BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

COUNTY OF KANKAKEE and EDWARD D. SMITH, STATE'S ATTORNEY OF KANKAKEE COUNTY, Petitioners, vs. THE CITY OF KANKAKEE, ILLINOIS, CITY COUNCIL, TOWN AND COUNTRY UTILITIES, INC. and KANKAKEE REGIONAL LANDFILL, L.L.C., Respondents,	No. PCB 03-31 (Third-Party Pollution Control Facility Siting Appeal)
BYRON SANDBERG Petitioner, vs. THE CITY OF KANKAKEE, ILLINOIS, CITY COUNCIL, TOWN AND COUNTRY UTILITIES, INC. and KANKAKEE REGIONAL LANDFILL, L.L.C., Respondents,	PCB 03-33 (Third-Party Pollution Control Facility Siting Appeal)
WASTE MANAGEMENT OF ILLINOIS, INC., Petitioner, vs. THE CITY OF KANKAKEE, ILLINOIS, CITY COUNCIL, TOWN AND COUNTRY UTILITIES, INC. and KANKAKEE REGIONAL LANDFILL, L.L.C. Respondents.	PCB 03-35 (Third-Party Pollution Control Facility Siting Appeal) (Consolidated)

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PETITIONERS' COUNTY OF KANKAKEE AND EDWARD D. SMITH POST-HEARING BRIEF

NOW COMES Petitioners COUNTY OF KANKAKEE and EDWARD D. SMITH, STATE'S ATTORNEY OF KANKAKEE COUNTY, by and through their attorneys, HINSHAW & CULBERSON, and as and for their Post-Hearing Brief, state as follows:

I. STATEMENT OF FACTS

The facts contained in this section are an attempt to summarize the most relevant evidence and testimony of the referenced issues. Attached hereto as Appendix A is an additional summary of certain testimony of many of the witnesses that testified at the IPCB hearings on this matter.

A. Facts Concerning the Failure of Applicant to Establish the Jurisdiction of the City of Kankakee to Hear Request for Landfill Siting Approval.

Section 39.2(b) requires that:

> No later than 14 days prior to a request for location approval the Applicant shall cause written notice of such request be served either in person or by registered mail, return receipt requested, on the owners of all property within the subject area not solely owned by the Applicant, and on the owners of all property within 250 feet in each direction of the lot line of the subject property, said owners being such persons or entities which appear from the authentic tax records of the County in which such facility is relocated; provided, that the number of all feet occupied by all public roads, streets, alleys and other public ways shall be excluded in computing the 250 feet requirement; provided further, that in no event shall this requirement exceed 400 feet, including public streets, alleys and public ways.

415 ILCS 5/39.2(b)(2000) (emphasis added).

In this case, the only evidence admitted at the local hearing by the Applicant, Town and Country Utilities, Inc. and Kankakee Regional Landfill, LLC, (hereinafter "Applicant"), of the notice to landowners was the affidavit of Mr. Tom Volini with Exhibits. (Applicant's Ex. 2)[1].

[1] The record of the City of Kankakee shall be cited as (C___). The exhibit to the City record shall be identified by the name of the person or entity offering the exhibit as follow (Applicant's Ex.__). The transcript of the IPCB Hearing of November 4, 2002 shall be cited (11/4 Tr.__). The second day of the IPCB hearing on 11/6/02 shall be cited (11/6 Tr.__). The exhibits to the IPCB hearing are identified as (Petitioners' Ex. ___).

Mr. Volini, President of the Applicant, determined that the individuals whose names were identified in Paragraph 5 of the affidavit were the "necessary" owners of all those parcels within 400 feet of the subject property, which were entitled to receive service of the "pre-filing" notice required by 415 ILCS 5/39.2(b). (Applicant's Ex. 2). The Affidavit further provides that the registered mail receipts attached to the Affidavit evidence the landowners that were served the required pre-filing notice. (Applicant's Ex. 2, Para. 5).

1. No Section 39.2 notices were sent before the City Council held the February 19, 2002 hearing wherein the request of the Applicant to site a landfill was considered.

On or about February 19, 2002, corporate representatives of the Applicant, their attorney, the project engineer and other Applicant witnesses met with the entire City Council of the City of Kankakee. (11/4 Tr. 229). The official minutes of that meeting,[2] reflect that the Mayor of the City of Kankakee told the City Council:

> OK, we've got a special presentation tonight but before I start with that presentation I'm going to ask the City Council for special indulgence on this particular issue. As you well know, people from the audience are not allowed to speak at a regular City Council meeting. But I believe this issue is of extreme importance to the City of Kankakee. We are talking about the siting of a landfill within our community . . . As we go through this presentation, we want you to ask questions, you members of the City Council, you the members of the Planning Commission, and there are three members of the press over here that we will open it up if the Council so gives them permission to do that. So, the members of the Council, our department heads, the planning commission and the press will have the opportunity to ask questions of Town and Country Utilities as we go through this process . . . We started this process well over two years ago . . . And, we're going to continue that process and we're going to have a presentation tonight by Town and Country Utilities . . . so, with that, I am going to ask Mr. Volini to come forward. He's got a presentation that they want to make, to talk about . . . where we are, and where we started, to where we are today and what direction we're going. And, at the proper time, giving the members of the City Council, department heads, Planning Commission members or the press are welcome to ask questions.
>
> (C 3143-3144)(emphasis added).

[2] The City and the Applicant have stipulated that the minutes to the meeting are fair and accurate and that every statement that is referenced in those meetings was indeed made on February 19, 2002. (11/6 Tr. 180).

Mr. Volini then stated that "with us tonight we have our team that is going to present our siting case to you…[and], the reason that we're going to make the presentation as George Mueller, our lawyer, will explain to you has to do with the law. And, the reason we want to be able to have this unfettered opportunity to talk to you without the filter of lawyers, without the rancor and the back and forth and that, unfortunately, the lawyers bring to the process is we want to be able to speak with you person to person about things that we believe in, concepts that we've proved and environmental protection that we've achieved." (C 3145)(emphasis added).

Mr. Volini indicated "at tonight's meeting we will have an opportunity to have our expert witnesses meet with you, talk to you about their fields of expertise briefly, talk to you about the process that's dictated by the statute that George Mueller will describe, talk to you about the proof. You are called upon to be judge and jury." (C 3145)(emphasis added). Mr. Volini also mentioned that "…I have some packages that will be referred to in this presentation for each of you". *Id.*

At the conclusion of the lengthy presentation, and before the Applicant took questions from the city council, Mr. Volini closed by stating, "you'll hear this without so much emotion and with a bunch of lawyers fighting with each other in about 120 days, but we wanted you to hear it from us first." (C 3155)(emphasis added). The applicant and its witnesses then fielded numerous City Council questions concerning the application and criteria for the majority of the remainder of the meeting. (C 3155-3165).

2. The owners of Parcel 13-16-23-400-001 were not sent notice.

The affidavit of Mr. Volini indicates that the following owners of Parcel 13-16-23-400-001: Gary L. Bradshaw, James R. Bradshaw, Jay D. Bradshaw, Ted a. Bradshaw, Denise Fogle, and Judith A. Skates were entitled to prefiling notice. (Applicant's Ex. 2). The affidavit indicates the address for these individuals was determined to be 22802 Prophet Road, Rock Falls,

IL. *Id.* However, there is no return receipt for Gary L. Bradshaw, James R. Bradshaw, Jay D. Bradshaw, Ted A. Bradshaw, Denise Fogle). (11/6 Tr. 297). There is a receipt for only Judith Skates, but it was sent to an Onarga, Illinois address, and was signed by one Richard Skates. *Id.*

Ms. VonPerbandt testified at the IPCB hearing that she is the secretary of the applicant's counsel and operated a process serving business and was the individual that coordinated the service of the Section 39.2 notices. (11/6 Tr. 282). She admitted that she has worked for the Applicant's attorney for 3 ½ years and that she is aware that the failure to provide notice is an important matter in landfill siting hearings and could cause problems for her boss's case. (11/6 Tr. 294-295). Despite her obvious biases she confirmed the receipts attached to Mr. Volini's affidavit, (Applicant's Ex. 2), "appear" to reflect all of the notices that were sent out. (11/6 Tr. 296). Ms. VonPerbandt also admitted that there was no return receipt for James Bradshaw. (11/6 Tr. 297). She also admitted that there are no receipts for J.D. Bradshaw or Ted Bradshaw. *Id.* Applicant's Ex. 2 also shows no such receipt for Gary Bradshaw nor Denis Vogel. (Applicants Ex. 2).

Ms. VonPerbandt then admitted that at least 14 days before the application was filed she attempted to personally serve Gary Bradshaw, James Bradshaw, J.D. Bradshaw, Ted Bradshaw, and Denise Vogel, but was unsuccessful. (11/6 Tr. 297-298). She also testified that during the week of February 18, 2002 she was told that the property near the landfill was held in trust but Ms. VonPerbandt never acquired service on the trust. *Id.* at 299. She never went to the clerk's office to acquire the trustee's deed (which would have indicated the trustee's identity). *Id.* Instead, all the server did was speak with an unnamed individual at the Prophet address who allegedly told Mr. VonPerbandt that she was the daughter of Judith Skates and provided the address of Ms. Skates, in Onarga, Illinois. This unnamed individual stated that Ms. Skates was

"handling the property" which was held in trust. *Id.* at 286. Ms. VonPerbandt did not ask this unnamed person if she knew the addresses of any of the other owners of the property such as Gary, James, or J.D. Bradshaw. *Id.* at 300. She also never asked this unnamed individual if she had the legal authority to appoint anyone as the agent for service of process for Gary Bradshaw, James Bradshaw, J.D. Bradshaw, Ted Bradshaw, Denise Vogel, or Judith Skates. *Id.* at 301. Ms. VonPerbandt admitted that she assumed the individual she spoke with did not have the legal authority to name an agent for the service of process of the owners of the parcel at issue. *Id.*

3. The notice to Illinois Central Railroad Company was not sent at least 14 days before application was filed.

Exhibit B to Mr. Volini's affidavit contains the only receipt for the owner "Illinois Central Railroad Company" as identified in Paragraph 5 of the affidavit. (App. Ex. 2, Para. 5, Ex. B). The return receipt for this owner is dated "3/6/02". *Id.* The Application was filed on March 13, 2002. (11/4 Tr. 209).

4. The return receipts of numerous parcel were not signed by the owners of the properties.

Service was not properly effectuated on the following properties as evidenced by Mr. Volini's affidavit:

1. Parcel 13-16-23-400-001. Mr. Volini indicates that the following individuals are identified as owners of the property by the Kankakee County Supervisor of Assessment: Gary L. Bradshaw, James R. Bradshaw, J.D. Bradshaw, Ted A. Bradshaw, Denise Fogel, and Judith A. Skates with an address of 22802 Prophet Road, Rock Falls, Illinois 61071. However, there is no registered mail receipt indicating that anyone at 22802 Prophet Road was served. The same parcel number is listed in the affidavit with an identification of Judith A. Skates, 203 South Locust, Onarga, Illinois 60955 as the owner of record. However, the registered receipt is not signed by Judith Skates instead is signed by a Richard Skates, and no verification is included that; 1) he is the authorized agent of Judith Skates, or 2) that Judith Skates actually was given a copy of the Applicant's pre-filing notice not less than 14 days prior to filing of the application in this matter. Accordingly, the record established in this matter only reflects at best that a non-owner of the property signed the registered receipt, and there is no evidence that any, (let alone all) of the actual owners as appear on the appropriate County tax records received the notice.

2. Parcel Number 13-16-24-300-017. The affidavit indicates that the owners of this property are Linda Skeen and Robert Skeen. However, the registered mail receipts are signed by one C. Skeen, and there is no indication that this individual is the authorized service agent of Linda or Robert Skeen.

3. Parcel Number 13-16-24-300-019. The owners are listed as Gerald M. Cann, Shirley A. Marion, Delmar L. Skeen, Robert S. Skeen, Norma J. Staukkenberg, Judith M. Trampanier and Skeen Farms. However, the registered mail receipts are all signed by one C. Skeen, and there is no indication that this individual is the authorized agent of any of the known owners of the property. None of the first names of the known owners of the property begin with the letter C.

4. Parcel Number 13-16-24-400-001. The owner is indicated as being Skeen Farms and the registered mail receipt is signed by C. Skeen; however, there is again no indication that this individual is the authorized service agent for service of process.

5. Parcel Number 13-16-24-400-003. The designated owner is listed as William Ohrt, however, the registered receipt is not signed by William Ohrt and is instead signed by one Marilyn Ohrt and there is no indication that she is the authorized service agent of William Ohrt.

6. Parcel Number 13-16-24-400-009. Robert S. Skeen is identified as the owner, however, once again the return receipt is signed by C. Skeen with no indication that he is the service agent of Robert S. Skeen.

7. Parcel Number 13-16-25-100-002. The property owner is identified as AT&T Property Tax, however, it is signed by one E. Myers. There is no indication that he is the service agent of the identified owner.

8. Parcel Number 13-16-25-100-003. The owner is identified as Benson M. Hansen, however, the receipt is signed by one Kevin Hansen with no indication that he is the authorized service agent of the owner for purposes of service of process.

9. Parcel Number 13-16-25-200-001. The affidavit indicates the owner is one Willie Walker, however, the receipt was signed by a Leslie Wilson, Jr. and there is no indication that individual was the authorized agent of the owner for service of process.

10. Parcel Number 13-16-25-400-001. The owner is identified as Frederick Forte and Mary Thompson, however, the receipt is signed by someone whose name appears to be Oscar Solvang and there is no declaration that Mr. Solvang was the service agent of the identified owners for purposes of service of process.

11. Parcel Number 13-16-26-200-012. The identified owners are Adrien Guiterrez and Louise Guiterrez, however, the receipt is signed by a Candie Martens with no declaration that individual was the authorized service agent of the identified owners.

12. Parcel Number 13-16-26-200-013. The identified owners are Adrien Guiterrez and Louise Guiterrez, however, the receipt is again signed by a Candie Martens with no declaration that individual was the authorized service agent of the identified owners.

13. Parcel Number 13-17-19-301-002. The affidavit indicates the owner of this parcel was Charles Burke, however, the mail receipt was signed by one Mary Grace with no indication that she was the authorized service agent of the owner.

14. Parcel Number 13-17-19-100-003. The owner is identified as William Ohrt, however, the mail receipt is signed by one Marilyn Ohrt with no indication that she is the agent of William Ohrt for service of process.

(Applicant's Ex. 2).

B. Facts Concerning Fundamental Fairness

1. The public was denied the opportunity to participate in the City hearing.

It is undisputed that conflicting notices of the Section 39.2 hearing were published to the public. (11/4 Tr. 306-307). Specifically, the siting ordinance (which was also published in the paper) required "any person or attorney representing such person, or entity wishing to testify, present witnesses and cross-examine witnesses must file a written appearance in the Office of the City Clerk not less than five (5) days prior the to [*sic*] first date set for public hearings pursuant to the Siting Ordinance. (C 3237). However, the applicant published a notice that provided that people could register up until the day of the hearing. (Applicant's Ex. 6).

On the first night of the hearing, the County of Kankakee motioned to quash the proceedings partly on the grounds that the notice of the proceeding was improper. (C 2191-2197). Oral argument was had on that motion wherein counsel for the County warned the hearing officer that the improper notice would create a chilling effect upon the public in participating in the hearing. (C 0036). The hearing officer inquired if counsel was aware of any specific individual that did not participate in the hearing because of the conflicting notices. (C 0036). At that time, counsel was unaware of any specific individual that was unable to

participate due to the conflicting notice but again warned that it was possible that such individuals existed. (C 0036).

Indeed, at the Illinois Pollution Control Board hearings, it became absolutely clear that people were denied an opportunity to participate in part because of the improper notices and in part because the City police barred people from entering the hearing room on the first night of the hearing and people could not hear an announcement made by the hearing officer that they could have registered at any time that evening. (11/4 Tr. 109, 306-307).

For example, Mr. Darrell William Bruck testified at the IPCB hearing that before the City hearings commenced, he saw a legal notice that stated one set of rules and a newspaper article that stated a different set of rules. (11/4 Tr. 100). He recalled that the notice in the newspaper indicated that people wishing to sign up to object had until the day of the hearing, however, he had seen an article in the same paper stating that the Kankakee City Council had set a rule that one had to sign up five days before the proceeding. (11/4 Tr. 100). The week before the hearing (between June 12 and June 17), Mr. Bruck telephoned the Kankakee City Clerk, Anjanita Dumas. (11/4 Tr. 113). Mr. Bruck explained that the reason he contacted the City Clerk was to "attempt to sign up as an objector" (11/4 Tr. 117). The City Clerk told Mr. Bruck that the advertisement that had been placed in the newspaper by the applicant was irrelevant and rather the City Council rules applied. (11/4 Tr. 117). He was told it was "too late" to register as an objector with the City Clerk. (C 1549-1550).

Mr. Bruck did attempt to go to the siting hearing on June 17, 2000, however, when he arrived at shortly after 8:00 p.m. (the time the hearing was scheduled to commence), he was unable to enter the hearing room due to the extreme crowd. (11/4 Tr. 109). He could not get into the Council Chamber until after 10:00 p.m. and at no time while he was in the hallway did

he ever hear any announcement that he could sign up and register that evening. (11/4 Tr. 109). While Mr. Bruck was in the hallway, he could not hear any of the witnesses nor the lawyers' arguments nor any announcements regarding the rules of the proceeding, nor any declarations regarding the rights of the citizens. (11/4 Tr. 105). At no time did he see anyone come into the hallway from the City Council chambers to make an announcement to the people in the hall about signing up to participate. (11/4 Tr. 106). As a matter of fact, at no time on June 17th did he ever hear an announcement that he could sign in and register that evening (11/4 Tr. 107).

The Kankakee City Clerk, Anjanita Dumas explicitly testified that she never read the siting ordinance before the siting hearing and at no time did anyone discuss or instruct her on that ordinance. (11/6 Tr. 231). Nonetheless, she was the individual at the City of Kankakee that, pursuant to the ordinance, was left with the responsibility of accepting the appearances of individuals who wished to participate in the hearing. (11/6 Tr. 239). Ms. Dumas testified that she "didn't know" if anyone in her office ever informed the members of the public that they had to use the word "participate" in their appearance forms in order to effectuate an appearance as an objector. (11/6 Tr. 248). The City Clerk maintains she never had any conversations with any member of the public explaining to them what needed to appear in their letter which they were required to file in order to show that they wanted to participate in the hearing. (11/6 Tr. 248). Her only excuse for not having those conversations was an assertion that "we don't give legal advice in the office and I can't write a letter for someone." (11/6 Tr. 248).

Hearing Officer Bohlen admitted that unless someone used the word participate in their appearance form, that the form was simply filed in the record as indicating someone who wished to give a public statement. (11/4 Tr. 332). What Mr. Bohlen failed to recognize is that the siting ordinance requiring five (5) days notice explicitly stated "this rule does not apply to a person or

entity who desires only to present an oral or written position statement to the City Council." (C 3237).

Ms. Patricia O'Dell testified that she was aware that the legal notice that was sent said anyone could sign up until the day of the hearing, Monday, June 17th, but she read, and heard, another statement that said that anybody who wanted to participate had to sign up five (5) days before the hearing. (11/6 Tr. 30-31). She, like Mr. Bruck, attempted to clarify the confusion by telephoning the City Clerk's office. Her confusion was not cleared up during the telephone call, so she went to the City Clerk's office on June 12, 2002. (11/6 Tr. 31). At that time, she asked the City Clerk if there was a form or document that she needed to sign in order to be able to ask questions and make comments at the public hearing. (11/6 Tr. 36-37). She was told "there was no document and no form and I was to write a letter saying I wish to speak." (11/6 Tr. 37). Ms. O'Dell then asked whether her time for submitting her appearance was the day of the hearing or five (5) days before and was told "if [she] wanted to go by the legal notice, [she] was welcome to." *Id.* She then asked Ms. Dumas who had the final authority on making the deadline decision and was told the City Clerk had such authority. (11/6 Tr. 37). She asked the City Clerk if they had the final authority "then what did they say was the final day that I could file a document to participate." (11/6 Tr. 37). She was finally told it was five days ahead and therefore she had to file it by June 12th. (11/6 Tr. 37). She then drafted a letter pursuant to the City Clerk's direction and gave it to the City Clerk on June 12, 2002. (C 2230).[3] This letter provided "I would like to

[3] Ms. O'Dell's appearance form is found at two places in the City of Kankakee record. First at Pg. 2230, which is not date stamped, an again at Pg. 2233, and at this time date stamped June 19, 2002 at 6:27 p.m. For some reason, a Ms. Olivia Wagner and Ms. Ruth Romer find themselves in a similar circumstance as Ms. O'Dell as to the appearance form which is found in two different locations within the record. The first location not dated stamped and the second location date stamped June 19 at 6:27 p.m. This is particularly troubling since Ms. O'Dell explicitly testified that she filed her appearance on June 12, 2002 at around noon.

speak at the landfill public hearing being held on June 17, 18, 19, 20, 21 of 2002 and it was signed and addressed by Ms. O'Dell with her telephone number. (C226).

Despite the fact that she was told by the City Clerk that she had to file a letter saying she wanted to "speak" in order to participate and that she indeed filed that letter, she was not recognized as an objector on June 17, 2002, and was not allowed into the public hearing room due to the overcrowding. (11/6 Tr. 49). It was not until the third or fourth day of the hearing that Ms. O'Dell was successful in convincing Hearing Officer Bohlen that she should have been recognized as a participant and at that point, she was then allowed to ask questions and fully participate. *Id.* However, by that time, one of the witnesses was no longer available for cross-examination, Dr. Schoenberger, the only witness called by the applicant as to Criterion viii. *Id.* He testified and was cross-examined on June 17, 2002 during which time Ms. O'Dell was forced to stand in the hallway where she could not hear or see the proceedings. *Id.* Hearing Officer Bohlen acknowledged that all of the forms that did not use the word "participate" were simply filed in the City record at Pgs. 2223-2235 and referenced in the table of contents as "written requests to make public comments." (11/4 Tr. 330).

2. The Public was also denied the opportunity to attend the first night of the hearing.

Hearing Officer Bohlen admitted that he was aware that the crowds would be substantial. (11/4 Tr. 320). As a matter of fact, the applicant's representative, Ms. Jaymie Simmon, informed the City Council at the February 19, 2002 meeting that the hearings would be crowded. (C 3154). Furthermore, the week before the hearings Ms. O'Dell explicitly inquired of both the City Clerk and Hearing Officer Bohlen whether there was going to be any backup plan if the hearings were overcrowded. (11/4 Tr. 336). Ms. O'Dell had viewed the room and knew that a citizen's group she was involved in alone would take up the vast majority of the seats available to the public. *Id.*

The City evidenced its expectation of substantial crowds by putting additional chairs in the City Council chambers. (11/4 Tr. 321). Explicit objections were even made before any opening statement or witness to the hearing proceeding on the grounds that the public was not being allowed into the hearing room and that of the public could not hear the announcement by the hearing officer that they could sign in to register to participate. (C 0039). That motion was joined by the Kankakee County state's attorney, Edward Smith (C 0039). Additionally, the evidence was that the annexation hearings for the landfill, which took place several months before the landfill siting hearings, were also overcrowded. (11/6 Tr. 110). At those hearings, people were allowed to stand in the back of the room, but for some reason the people that attempted to stand in the back of the room of the Section 39.2 hearing were told to leave. *Id.*

On June 17, 2002, the seats to the Council chamber room were completely occupied well before the meeting was scheduled to start at 8:00 p.m. (11/4 Tr. 63, 109, 123-124, 143). People were told they could not stand in the back of the hearing room. (11/4 Tr. 66, 143). People filled the foyer outside the chamber room and the two stairwells and landing leading from the first floor door. (11/4 Tr. 66). There were even people standing outside. (11/4 Tr. 78). From the hall no one could see, nor hear, the proceedings. (11/4 Tr. 67, 75-76, 105, 125). There were only six chairs in the hall and the majority of people were forced to stand. (11/4 Tr. 144). It was hot and uncomfortable to people including the many elderly who attempted to attend. (11/4 Tr. 67, 78, 79). Armed policemen kept people from entering the building and from entering the Council chambers. (11/4 Tr. 68-69, 130, 143). No one heard anyone from the City or make any announcement that people could sign up to participate that evening. (11/4 Tr. 80, 107). Many people were disappointed in the lack of accommodation and left after they realized they were not

going to be allowed to attend the hearing. (11/4 Tr. 66, 108). Many people never returned due to their experiences on the first night. *Id.*

On the first night, even elderly people that were able to find a seat such as Ms. Betty Elliott were told by armed City policemen that they could not sit in the seats that they were able to find. (11/4 Tr. 158). This happened to Ms. Elliott on four different occasions until she was finally banished to the hallway where she could neither hear nor see the proceedings. *Id.* The room was overcrowded on the second night as well, but by that night a speaker system was placed in the hallway. (11/4 Tr. 323).

3. The City failed to follow the notice that indicated the June 17, 2002 hearing would cease at 10:00 p.m.

The public notice published by the Applicant provided that the first night of the hearings would commence at 8:00 p.m. and conclude at 10:00 p.m. (Applicant's Ex. 6). Members of the public that were banished to the hallway left the hearing shortly before 10:00 p.m. because they understandably believed that the hearing was going to conclude at 10:00 p.m. and they had been unsuccessful in getting into the room by that time and therefore determined that there was no need to stay any later. (11/4 Tr. 133). Obviously, the people in the hallway could not hear the statements made by the hearing officer that the hearing would continue regardless of the hour until the completion of the Applicant's witness on Criterion 8, Dr. Schoenberger. (C 0013). Indeed, the County's cross-examination of Dr. Schoenberger did not even commence until around 11:00 p.m. and the hearing did not conclude until 12:30 a.m. June 18, 2002. (C 0013).

4. The City failed to provide copies of the application to the County of Kankakee.

The City of Kankakee ordinance number 01-65 was adopted October 15, 2001, and provides at Section 4(d)(1):

> Upon receipt of a proper and complete application and payment of the applicable filing fee deposit, the City Clerk shall date stamp all copies and immediately deliver one copy to the Chairman of the County Board and one copy to the Kankakee Solid Waste Director.

Kankakee County Siting Ordinance, 01-65, 4(d)(1) (October 15, 2001). The City has admitted that the ordinance was not followed and copies of the application were not provided to the County. (11/4 Tr. 305; 11/6 Tr. 237-238). The City has also admitted that the ordinance's requirement that the application be turned over immediately to provide the County with every possible opportunity to review, analyze, test and comment upon the application before the 39.2 proceeding began.. (11/4 Tr. 305).

The City Clerk Anjanita Dumas admitted that she never even read the siting ordinance before her deposition on October 25, 2002 in discovery of these proceedings. (11/6 Tr. 232). She further admitted that no one from the City, including Mayor Green and City Attorney Bohlen, ever informed her that she was supposed to send copies of the application to the Chairman of the County Board and the County Solid Waste Director. (11/6 Tr. 234-235). The Mayor and Mr. Bohlen both admitted that in their opinion the siting ordinance should have been followed but was not. (11/4 Tr. 305; 11/6, 237). Furthermore, the City admitted that the reason that the copies were supposed to be turned over immediately was to provide the County with every opportunity to review, analyze and test the application of a landfill that was proposed to be erected in Kankakee County. *Id.*

Not only did the City Clerk fail to provide copies of the application but she required the County's outside engineering expert to issue an FOIA request for the application and pay approximately $1,000.00 for the application. *Id.* It was not until over six weeks after the application was filed that an outside engineering consultant hired by the County was finally able

to acquire the application and it was sometime after that that it was able to acquire the drawings that came with the application. (11/6 Tr. 239).

Unlike the Rules and Procedures of Ordinance number 02-24, which provides that "in order to ensure fundamental fairness, compliance with the Act, and to protect the pubic interest, the hearing officer may waive any of these Rules and Regulations", (C 3239), Siting Ordinance number 01-65 does not contain any reference that any City official may waive any portion of the siting ordinance. *See* Kankakee City Siting Ordinance, 01-65. On the contrary, the Kankakee County siting ordinance 0-65 provides "it is apparent to the Kankakee City Council that due to the necessarily technical nature of the information provided to it relative to the above-mentioned criteria, a valuation of such information will require the analysis and opinions of qualified professionals, without which the Council will be unable to properly and effectively fulfill the mandate proposed upon it by the General Assembly." (C 3212). The ordinance further provides that "deciding approval procedures and criteria provided for in the Act and in this ordinance for the new [Pollution Control Facilities] shall be the exclusive siting procedures and rules and approval procedures." (C 3220). Finally, the Act provides at Section 10: "this ordinance and the attached rules and procedures (Ex. A) shall take effect immediately upon its passage and approval by the Kankakee City Council as provided by law." (C 3220).

5. Pre-filing contacts and evidence of bias.

The Mayor of Kankakee, Donald Green, testified that he realized at some point that funds could be generated for the City by negotiating a lucrative Host Agreement with a landfill operator. (11/6 Tr. 169). Mayor Green had numerous conversations with Tom Volini and other representatives of Town and Country, even before a request for proposal was made for the landfill to be constructed in the City of Kankakee. (11/6 Tr. 158-160). Eventually, Town and Country made a request for proposal which was accepted by the City of Kankakee. *Id.*

However, the land that Town and Country proposed to build a landfill upon was not within the City of Kankakee and instead was located in the unincorporated County lands over a mile from the city streets of the City of Kankakee. (11/4 Tr. 229). Therefore, the City, through Mayor Green and Christopher Bohlen, assisted Town and Country in seeking the annexation of the property which was not contiguous to the City of Kankakee except for a narrow railway strip that extended from the City out into County property. (11/4 Tr. 225). The Mayor and Mr. Bohlen both admitted that the proposed area of the landfill is actually surrounded by properties that are not annexed into the City. (11/4 Tr. 224-227; 11/6 Tr. 153).

The City Attorney Bohlen and Mayor Green both acknowledged that at the time the annexation process was going forward, they were aware that once the property was annexed into the City that the City would be the siting authority instead of the County. (11/6 Tr. 153; 11/4 Tr. 224). No other explanation for the annexation has been provided. The Applicant does not own the land at issue and as was evidenced by the testimony at the underlying hearing, the landfill will actually be placed into an aquifer which will require an unusual "over-engineering of the landfill". With the City's assistance, the Applicant was successful in annexing the property into the City thereby establishing the City as the siting authority. (11/4 Tr. 227).

At the time Mr. Bohlen was assisting the Applicant in the annexation process, Mr. Bohlen had reviewed the county solid management plan and "believed by then it did call for only one landfill". (11/4 Tr. 222). Mr. Bohlen knew that there already was a landfill operating within the County. (11/4 Tr. 222-223).

At the same time that the City was assisting and hearing the annexation petitions, Mayor Green and City Attorney Bohlen were also in the process of negotiating a lucrative Host Agreement with Town and Country. (11/4 Tr. 227-229). Mr. Bohlen admitted that under the

agreement the City would receive certain compensation for every ton of waste that was accepted by the landfill. (11/4 Tr. 232). This agreement, which is referenced in the table of contents by the City of Kankakee as an "Agreement for Siting" provided an estimate that in the first ten years of operation the landfill would generate approximately $42 million for the City of Kankakee. (11/4 Tr. 232). Mr. Bohlen was aware that the estimated compensation would be between $4 million and $5 million per year for the life of the facility which was estimated to be open for 25 to 30 years. (11/4 Tr. 236). Individual aldermen were aware that Mr. Bohlen was negotiating, drafting and communicating with Town and Country about the Agreement for Siting. (11/4 Tr. 237, 238). Mr. Bohlen admitted that he spoke with agents of the Applicant on numerous occasions regarding the Host Agreement and he personally performed rewrites on at least seven occasions. (11/4 Tr. 241).

As further evidence of the cooperative effort between the City of Kankakee and Town and Country in attempting to site this landfill, the Applicant even assisted the City in drafting its Solid Waste Management Plan. (11/4 Tr. 256). Mr. Bohlen admitted that he received examples of such plans from the Applicant. *Id.*

Not only did the Applicant assist in drafting the Solid Waste Management Plan, but it is also apparent from a correspondence dated March 12, 2002, that the Applicant's counsel drafted the Rules and Procedures for the very landfill siting hearing at issue. (Petitioner's Ex. 2 attached hereto as Petitioner's Appendix C). That letter explicitly provides that Mr. Mueller "previously drafted for Tom Volini a proposed Facility Siting Ordinance and Accompanying Rules and Regulations which I believe have been adopted." (11/4 Tr. 249). The letter is sent to Mr. Christopher Bohlen and says "if you want to defer cross-examination until after the close of the applicant's case, and then if cross-examination is conducted as a "round table" format where all

the witnesses are available at once, the City Council will need to amend Section 6(e)(14) of the existing Ordinance found on page 10 of my draft copy". *Id.*

Mr. Mueller then explained how the rules and procedures should be amended to read as follows:

> Cross-examination of any party's witnesses shall be deferred until completion of the direct testimony of all of that party's witnesses. Thereafter, all witnesses shall be simultaneously available for cross-examination so the questions are directed to the witness most qualified to answer. Any dispute between the parties as to which witness should answer a question of cross-examination shall be resolved by the Hearing Officer." (Petitioner's Ex. 2, attached hereto as Petitioner's Appendix C).

A review of Section 5(e) of the Rules and Procedures (C 3236) establishes that some of this language was adopted verbatim by the City Council. Specifically, the reference to "cross-examination of any party's witnesses shall be deferred until the completion of the direct testimony of all that party's witnesses" appears in the ordinance itself. *Id.* Likewise, the language that "all witnesses shall be simultaneously available for cross-examination [so that] questions [shall be] directed to the witness most qualified to answer..." appears in the city ordinance as well. *Id.* Finally, the discussion that the Hearing Officer shall resolve any dispute is also contained within the city ordinance. *Id.*

6. Improper and prejudicial visit to other landfill facilities.

Mr. Bohlen admitted that the Applicant took the City Council on a bus trip to an example landfill, before the application was filed. (11/4 Tr. 270). He did not recall any objectors being invited. *Id.*

7. The February 19, 2002 meeting was a pre-adjudication of facts and impeachment of the Section 39.2 Hearing.

At some point before the day of February 19, 2002, a meeting was held between Mayor Green, City Attorney Bohlen, Tom Volini, and other agents of Town and Country at which time

the idea was suggested of making a presentation to the City Council before the required 39.2 notices would be sent out on February 20, 2002. (11/4 Tr. 210). The Mayor and City Attorney Bohlen agreed that the presentation would be made. *Id.* Specifically, the Mayor agreed that he would provide a "special indulgence" to the applicant to speak on February 19, 2002, because he believed Town and Country could solve the financial dilemma of the City of Kankakee. (C3143). The City did not place any restrictions on the Applicant as to who could speak at the February 19 City Council meeting. (11/4 Tr. 184). During this initial meeting, the City never told the Applicant not to attempt to present its case to the City Council outside of the hearing process. (11/4 Tr. 277). No one at the City ever told Town and Country that they could not present expert opinion statements at the February 19, 2002 meeting. (11/6 Tr. 186).

Prior to February 19, 2002, the City was aware that the County of Kankakee was opposed to any new landfill being erected in the City of Kankakee. (11/6 Tr. 186). No notices were sent to potential objectors, nor individuals within 250 feet of the landfill, about the February 19, 2002 meeting as required by Section 39.2.[4] Though Mr. Bohlen would not admit that before 2/19/02 he was aware that Town and Country was going to give a presentation to discuss how the Section 39.2 criteria were met, he acknowledged that "I certainly heard it during the meeting." (11/4 Tr. 273).

A review of the City Council minutes indicates the Mayor described what he believed was the financial problems of the City of Kankakee and the benefits that he believed the application brought. (C 3143-3144). Indeed, the Mayor admitted that on that night he made public statements in favor of the landfill. (11/6 Tr. 175).[5] He informed the City Council that

[4] The Applicant stipulated that no 39.2 notices were sent with respect to the February 19, 2002 City Council meeting. (11/6 Tr. 188, 190).

[5] He also acknowledged making other biased statements to the media (11/6 Tr. 175).

"we started this process well over two years ago" (C 3143) and that "I think we're on the right track and going down the right path." (C 3144). He then introduced Mr. Volini of Town and Country as "having a presentation they want to make, to talk about theirs and where we are from where we started to where we are today and what direction we're going." (C 3144). He then invited that, at the proper time, the City Council and the City staff could ask questions of the Applicant (C 3144).

Mr. Volini then addressed the City Council and indicated that he had been working for the last 10 months with City Attorney Chris Bohlen negotiating an agreement. (C 3145). Mr. Volini also indicated his partner who was the operator of a landfill in Morris that some of the members of the City Council came to see. *Id.* Mr. Volini then made the earlier referenced statement about the "unfettered opportunity to talk to you without the filter of lawyers" and also stated, "we want to be able to speak with you person to person about things that we believe in, concepts that we've proved and environmental protection that we've achieved." (C 3145).

Immediately after stating that he intended to preserve the Council from the "rancor" and "back and forth" of lawyers, Mr. Volini then promptly introduced his own lawyer, George Mueller, to the City Council as "the dean of landfill siting in Illinois." *Id.* He also introduced individuals he described as "the best experts we can find", including, Devin Moose, P.E., Eric Dippon, Mike Donahue, Mike Gingrich, Ph.D., Jaymie Simmon and JoAnne Powers and these people spoke on (and apparently off) the record as to the merits of the application and in Ms. Simmon's case, about the untrustworthiness of the Section 39.2 hearing. *Id.* Mr. Volini indicated "at tonight's meeting we will have an opportunity to have our expert witnesses meet with you, to talk to you about their fields of expertise briefly, to talk to you about the process that's dictated by the statute that George Mueller will describe, to talk to you about the proof.

You are called upon to be judge and jury." (C 3146). Therefore, it is clear that the intention of the meeting was to present "expert witness" testimony to the City Council.[6]

Mr. Volini then indicated that "we want you to know the proofs you're called upon to make sure that we make. Or you're to vote no. That's what the statutes say and the cases say. So, if, if Envirogen can't convince you and Devin Moose can't convince you of the quality of his calculations, the integrity of his design and the compliance of that design the with Environmental Protection Act, you get to vote no". *Id.* He then indicated "I have some packages that will be referred to in this presentation for each of you. . ." *Id.* Volini also stated "So, that's the introduction to a process that is really ten months old. In a sense, Mayor and members of the counsel, and you who must vote on this, it's ten months and 23 or 25 years old because of our involvement in it. We expect your questions, we expect your scrutiny, we expect to be held to the highest standard. We're on trial. The trial started a long time ago. We're on trial with you. You're on trial." *Id.* Mr. Volini then indicated "after tonight, we can't talk to you." *Id.*

Then he introduced his attorney, George Mueller, who explained that in his opinion "once an application for local siting approval is filed, and that will be three weeks from tomorrow, I believe, there is, in effect, a ban on decision makers communicating on substantive issues within any of the parties in the proceeding." (C 3148).

Mr. Devin Moose, the project engineer for the Applicant, then addressed the City Council. (C 3149-3152). He described his company and the pride that they took in preparing applications based upon the facts and data and then he began to describe the siting criteria. (C 3149). Review of his testimony makes it clear that he not only described the criteria but also how the Applicant believed it met that criteria. For example, as to Criterion 1, Mr. Moose

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[6] Surprisingly, at the IPCB hearings, the applicant and the City objected to the term "witness" being used to describe the individuals that spoke on February 19, 2002.

explained the procedures that he uses including doing Freedom of Information requests of every landfill in Illinois and most landfills in Indiana, Michigan and Wisconsin in order to "prove to you how much garbage is generated, to prove to you how much is recycled and how much, yet needs to be disposed of." (C 3150). He then moved on to Criterion 2 and explained that as an engineer, it is his oath "not to return a profit to my client, not to return a profit to my business, my professional oath is to protect the public health, safety and welfare." (C 3150). He then explained his procedures for determining whether the protection of health, safety and welfare was met, including doing drillings, wells, lab tests, *in situ* field tests and then "marry the design into the hydro geological setting". (C 3150). He explained that it is his firm's policy to "respect nature and use nature for the design of the facility." *Id.* He then explained that his designs include a clay liner which the City Council could "rely that when you bury clay below grade, it's going to be there." *Id.* He explained that his systems include plastic liners and leachate collection systems. *Id.* He then explained how leachate is monitored in his designs and how the containment system is included to hold leachate into the system. (C 3151). He explained that his design involves keeping no more than one foot of leachate in the bottom of the landfill at any given time and that the rest is pumped out and taken to a waste water treatment plant. (C 3151) He continued to explain how they deal with surface water, storm water and air pollution. *Id.* He explained that there are 50 to 70 gas withdrawal points within their application that he puts under negative pressure and a vacuum will be applied to the landfill. *Id.* The gas would then be routed for positive energy use. *Id.*

Mr. Devin Moose told the City Council that "there are a group of people in this country that go around fighting landfills and put stuff on the internet with no basis in fact. And those people earn a living by going around fighting landfills". (C 3152). Even worse, the Applicant

introduced another "expert witness" by the name of Jaymie Simmon as someone who "will have some things to say tonight about the process and how the organized environmental community involves itself in the process." (C 3146). Mr. Volini said that Town and Country would have "Jaymie Simmon tell you some of the things she's learned about the community side and the organizing environmental community side of the these hearings." (C 3153).

Ms. Simmon then told the City Council "we've talked to some people who are experts and who've been through this process many times. And based on what they're telling us, the hearings can be expected to be crowded, lively, somewhat emotional." (C 3153). She explained that there would be people upset about the issue "some of them, many of them from Otto Township, from the vicinity near the landfill." *Id.* She also said that

> and then there will be those from outside the community, who don't live here, that Devin eluded to, who are simply landfill opponents. That's their passion. That's their job, is go around and oppose landfills wherever they are proposed. And, these people are likely to come in, not as fist waiving fanatics, but as people who are very calm, appear to be very professional, and appear to be very educated and very well informed on the issues. Ah, one of the things we need to watch out for, and I'll be the third to tell you tonight, to remember to make decisions based on science. This should not, and must not, be allowed to become an emotional issue. But, there are those who will want to make it that. And, they will tell stories, for example, they will quote an EPA report from 1988 that says that all landfill liners eventually will leak. What they won't tell you, is that that report was based upon research of landfills that were built before 1979. And, as you well know, the standards changed very dramatically from 1979 to the present day, and that report goes on to say that indeed, leachate collection systems and plastic liners and clay liners and treatment of leachate are, indeed the best way to protect the environment. They won't tell you that part. Um, partial quotes and out of context quotes are a pretty potent tool that we can expect to be used by the environmentalists. All of it geared to get all involved to doubt what they know. Um, It is a concerted effort, really, to create controversy and cause confusion. (C 3153).

Mr. Volini closed by stating "you'll hear this without so much emotion and with a bunch of lawyers fighting with each other in about 120 days, but we wanted you to hear it from us

first." (C 3156). The City Council then posed substantive questions to the Applicant's witnesses. (C3156-66).

Both the Mayor and Mr. Bohlen testified that during the February 19, 2002 meeting, they were not concerned about statements made by applicant and at no time voiced any objection to any of those statements nor did they at any time that evening direct the City Council to disregard any statements made by the applicant and its agents. (11/4 Tr. 310; 11/6 Tr. 184).

8. The City required FOIA requests for fundamental information concerning the landfill siting hearings.

The Kankakee City Clerk required the County of Kankakee and other objectors to file freedom of information requests to acquire basic information concerning the landfill siting hearings. (11/6 Tr. 239). For example, the City Clerk refused to inform the County the names of the people who had registered to participate absent submission of a Freedom of Information Act (FOIA) request and payment of certain costs. (C0031). The City Clerk also refused to provide the identities of the witnesses that had been disclosed by the Applicant and other parties, though the City Clerk was in possession of such information, unless and until a FOIA request was made. *Id.* Furthermore, the City Clerk refused to waive costs as to the request for the names of the witnesses and parties, even though the request was from another public body, the County of Kankakee. *Id.*

The result of the refusal to provide the information absent a FOIA request and payment of costs was that counsel for the County did know what witnesses had been disclosed until the very day the 39.2 hearings were scheduled to commence. *Id.*

9. Facts concerning hearing officer bias.

On the first night of the hearing, in response to a Motion to Disqualify filed by Waste Management, Mayor Green recused himself and at that time recommended that the City Council

appoint City Attorney Bohlen, as the Hearing Officer. (11/4 Tr. 308). The Motion immediately carried and the hearings commenced. *Id.*

During discovery in this IPCB case, it has become obvious that Hearing Officer Bohlen was also biased by not only his direct superior being the City Mayor, but also because he had extensive substantive contacts with the Applicant before and during the RFP process, the annexation process, drafting the County's Solid Waste Management Plan, drafting the Rules and Ordinances for the County, negotiating the Host Agreement, and attending other meetings with the Applicant. (11/4 Tr. 210, 212, 229, 255). The depth of his involvement with the Applicant and its attorneys was not completely discovered until October 31, 2002, when the March 12, 2002 correspondence from George Mueller to City Attorney Bohlen was found by the County. (11/4 Tr. 242). That correspondence makes it clear that George Mueller was not only actively communicating with Attorney Bohlen but actually directing the course of the Section 39.2 hearings by drafting the Rules and Procedures for those hearings for Mr. Bohlen and the City and suggestions that discussions could continue between the Applicant and the City after March 13, 2002. (11/4 Tr. 249).

10. Facts concerning post-filing ex *parte* communication.

The March 12, 2002, correspondence from the Applicant's attorney to City Attorney Bohlen indicated further communications could continue after the filing of the Application on March 13, 2002. (Petitioner's Ex. 2, Appendix C). The letter also attached Mr. Mueller's draft of the Proposed Rules for the hearing. *Id.* The letter was received by regular mail after the date of filing the application (though it had been received by fax the day before filing). The letter is described in more detail *infra* and is attached hereto as Appendix C. (11/4 Tr. 253).

C. Facts Concerning Criteria.

The facts concerning the failure to meet Criteria viii, ii, and v are contained in the body of the argument *infra.*

II. EVIDENTIARY RULINGS WHICH SHOULD BE RECONSIDERED BY THE ILLINOIS POLLUTION CONTROL BOARD

A. The Hearing Officer's Ruling that Evidence of Pre-Filing Contacts was Inadmissible was Erroneous

1. All of the evidence of prefiling contacts should have been allowed because the applicant admitted that the adjudication of the merits commenced with these contacts.

On the first day of the IPCB hearings testimony was offered concerning numerous contacts that City officials had with the Applicant before the filing of the application on March 13, 2002. The County described these prefiling contacts in detail in its opening statement. (11/4 Tr. 11-19). The Applicant in its opening also referenced numerous prefiling contacts including discussions concerning the annexation of the property, discussions with Applicant concerning financial benefits to the City, and discussions concerning the adoption of a City Solid Waste Management Plan. (11/4 Tr. 50). The City of Kankakee Corporate Counsel, Christopher Bohlen, (who was also the Hearing officer for the City Council Hearing) testified as to the nature and content of several pre-filing communications with the applicant before any objection was raised by Counsel. (11/4 Tr. 209-219). The Applicant eventually objected to one of the questions concerning pre-filing contacts on the grounds of relevancy which was sustained. (11/4 Tr. 213). (The city did not object to any such questions until after the Hearing Officer sustained the specific objection raised by the Applicant).

The hearing officer made it clear that the Applicant's objection would not be ongoing. (11/4 Tr. 240). There were numerous other questions about pre-filing contacts to which no

objections were raised. As to the questions that were objected to, the objections were sustained and the witness was allowed to answer as an offer of proof.

None of the objections should have been sustained because the Applicant "opened the door" to the evidence of prefiling contacts by referencing them in his opening. (11/4 Tr. 49). Furthermore, the questions were relevant because 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 elements in establishing and assessing fundamental fairness. See *Hediger v. D&L Landfill, Inc.* (December 20, 1990), PCB 90-163. Furthermore, evidence of bias on the part of the decision-maker or a landfill siting hearing officer is relevant. See *American Bottom Conservancy (ABC) v. Fairmont*, PCB 00-200 (October 19, 2000).

The sustaining of the relevancy objections by Hearing Officer Halloran was based on an interpretation of *Residents Against a Polluted Environment v. the Illinois Pollution Control Board*, 293 Ill.App.3d 219, 687 N.E.2d 552 (3d Dist. 1997), proffered by the Applicant's attorney. In *Residents*, the appellants argued that the applicant's involvement in the County's amendment of its solid waste management plan constituted an impermissible *ex parte* contact that resulted in pre-adjudication. The Third District held that such contact was not impermissible, and Section 40.1 only allowed review of the fairness of the "procedures employed by the County during the siting process". *Id.* Notwithstanding the foregoing, the *Residents* case does not contain a "bright-line" test that **any** contacts that occur before the filing of the application are allowable and not relevant. In this case, it is the Petitioner's assertion the "siting process" actually began before the Application was filed on March 13, 2002. This siting process culminated in a City Council hearing on 2/19/02 in which the City Council gave the

applicant an unfettered opportunity to present its expert witness testimony without any notice to landowners or objectors.

The Mayor of the City of Kankakee, explicitly informed the City Council that the siting "process" had actually begun two years before 2/19/02 meeting. (C 3144). The Applicant then provided substantive expert opinions on the criteria which was heard by the City Council and City Staff who then questioned these witnesses. No objector was provided a chance to cross-examine these witnesses on February 19, 2002.

The applicant then offered "expert witness" testimony that the section 39.2 hearing that would be forthcoming would be a crowded, confusing, emotional process where people who may not "appear" to be fist waiving fanatics but would offer testimony for environmental groups that was misleading and untrue. The relationship that developed between the applicant and the City Council that led up to the City holding the obvious "pre-hearing" of the application is not only relevant but important and crucial for the IPCB to review to determine whether the ultimate proceeding was tainted by the pre-filing biases, contacts and pre-adjudication.

In effect the Applicant made its first substantive presentation on the application before the decision-makers on February 19, 2002. The Applicant stated that the trial had actually begun when the Applicant and the City started this cooperative project. (C 3146). Moreover, the Applicant characterized potential objectors and the Section 39.2 hearing itself in a most inflammatory and derogatory manner, thereby conveying the clear and unequivocal message that the Section 39.2 hearing should be viewed with doubt, skepticism, and suspicion, and that the decision-makers should rely on what they heard from the Applicant on and before February 19, 2002. Therefore, not only is it clear that the siting process began before filing, but the 2/12/02 presentation by the Applicant caused a ripple effect which spread through to the legally

recognized hearing on June 17, 2002 and caused the decision-makers to ***pre-judge*** the Application at the statutory hearing.

This is not a situation, as was the case in *Residents Against a Polluted Environment*, in which the Applicant was merely a participant in the amendment of a solid waste management plan review process. Rather, in this case the Applicant made a substantive presentation on its completed Application before the City Council in a "dry run." Nor is this merely a situation in which Board members held or formed personal opinions prior to the Application date, see, e.g., *Waste Management of Illinois, Inc. v. Pollution Control Board*, 175 Ill.App.3d 1023, 530 N.E.2d 682 (2d Dist. 1988), but a situation in which the application process by admission of the Applicant and the City themselves itself actually began before February 19, 2002. *Residents Against a Polluted Environment* does not stand for the proposition that evidence of such prejudicial contact may not be admitted, and the holding in that case should be limited to its facts.

The most instructive precedent on this issue is *Land and Lakes Co. v. Illinois Pollution Control Board*, 319 Ill.App.3d 41, 743 N.E.2d 188 (3rd Dist. 2000), where the court clearly allowed evidence of and reviewed allegations of pre-judgment of a siting application, where it came to the conclusion that the contacts were not fatal because the communications by the applicant were not with the decision-makers. In that case, Will County staff members reviewed and commented upon the application prior to its filing. Following the grant of siting authority, challengers appealed the decision of the local board and the IPCB. The Third District found the proceedings fair because the special assistant state's attorney, Mr. Charles Helsten, established a procedure that *avoided any contact between* the *applicant and the decision-makers,* which was the County Board, not County staff. See *Land and Lakes Co.* at 47. The court stated as follows:

> Generally the PCB must confine itself to the record developed by the local siting authority. However, in some cases, such as the one at bar, it is proper for the PCB to hear new evidence relevant to the fundamental fairness of the proceedings where such evidence necessarily lies outside the record.

Id. at 48.

Given the foregoing, this Board should allow and closely examine the evidence relating to the pre-filing contacts in this siting proceeding. For the foregoing reasons the Petitioners, County of Kankakee and Edward D. Smith, State's Attorney of Kankakee County, pray that this Honorable Board allow and admit the evidence adduced by Petitioner relating to prejudgment of the Application and the prefiling contents.

2. Any and all evidence concerning the February 19, 2002 meeting should have been admitted because the meeting minutes were part of the underlying record and evidence prejudgment of adjudicative facts.

In addition to the reasons set forth in the preceding section concerning the admissibility of all the prefiling contacts offered in this case, the February 19, 2002 minutes and any questions concerning that specific meeting are obviously relevant because the minutes are part of the local siting record. The City of Kankakee admitted the City Council minutes from seven City Council meetings that occurred from October 15, 2002 through August 19, 2002, including the February 19, 2002 minutes. (C 2949-3209). The City even supplemented the record during the IPCB hearing with the minutes from June 3, 2002. (11/4 Tr. 281). Christopher Bohlen explained that the minutes of these various meetings were included in the section 39.2 record by the City because he understood that the inclusion of them was required as a matter of law. (11/4 Tr. 281). The minutes were also included in the City record as an exhibit to the Motion of Kankakee County to Quash Proceeding Because of the Improper Meeting Between the City Council and the Applicant on February 19, 2002. (C 2104-2190). Therefore, the minutes to the meeting were clearly made a part of the underlying record on two occasions. Furthermore, the Applicant and

the City stipulated that the minutes were part of the record. (11/6 Tr. 177). Since the minutes were admitted into the record by the City itself the questions by the Petitioners concerning the communications which led up to and included the 2/19/02 meeting, should have been admitted. Furthermore, the only objection raised to the testimony concerning the meeting (or the other pre-filing contacts) which was sustained was "relevancy".

Clearly pre-filing contacts of the nature of the 2/19/02 meeting are relevant to the question of whether there was a pre-adjudication, particularly when the applicant spoke directly to the decision maker and told the decision-maker that the purpose of the meeting was to have an "unfettered opportunity" to "speak directly" with the decision-makers about the "proofs" and the "environmental compliance... achieved" without the "filter of lawyers". The Applicant then indeed called its expert witness (Engineer Devin Moose) to present the Applicant's case that each of the Criteria were met and the City Council and its staff then questioned the expert witnesses for the Applicant. Again, the Applicant even explicitly acknowledged the same in its conclusory statement to the City Council as follows:

> that "[y]ou'll hear this without so much emotion and with a bunch of lawyers fighting in about 120 days, but we wanted you to hear it from us first" (C3156) (emphasis added).

Therefore, it is difficult to conceive of a more relevant piece of evidence and thus the Hearing Officer ruling of the inadmissibility of the questions concerning the 2/19/02 meeting was in error.

3. The Hearing Officer's ruling as to the inadmissibility of the March 12, 2002 letter from the Applicant's counsel to the City Attorney/Hearing Officer Bohlen was erroneous.

During the Illinois Pollution Control Board Hearing, Mr. Christopher Bohlen was shown a copy of the aforementioned correspondence dated March 12, 2002 which was marked as Petitioner's Ex. 2. This correspondence contained explicit, irrefutable evidence that the

Applicant and its attorney were intimately involved in establishing the Rules and Procedures for the City of Kankakee landfill siting hearing. The correspondence explicitly provides that Attorney Mueller drafted the Rules and Procedures for the City of Kankakee for the Applicant (Mr. Tom Volini) and that his Rules and Procedures were adopted. (See Petitioner's Ex. 2, attached hereto as Petitioner's Appendix C).

It is fundamentally unfair to objectors for the Applicant to be involved in the review and drafting of landfill siting procedures on behalf of the siting authority. *Concerned Citizens for a Better Environment vs. City of Havana*, page 10 (May 19, 1994). (The conduct of the Applicant and its counsel, George Mueller, is particularly troubling since Mr. Mueller was the objectors' counsel in the *City of Havana* case). Nonetheless, it is apparent that Mr. Mueller drafted the City of Kankakee's Rules and Procedures. Furthermore, Hearing Officer Bohlen admitted that the correspondence dated March 12, 2002 was received by regular mail on or after the application was file March 13, 2002. Therefore, even if an erroneous "bright-line" rule is applied, the letter should have been admitted as evidence of an improper post-filing *ex parte* communication.

B. The Applicant's Attempt to Supplement the Record with Testimony Concerning Jurisdiction at the Illinois Pollution Control Board Hearing Should not have been Allowed.

The Kankakee City Council lacked jurisdiction over the Application filed in this matter because Town and Country Utilities, Inc. and Kankakee Regional Landfill, L.L.C. (collectively the "Applicant") failed to affirmatively demonstrate and prove that it had satisfied the jurisdictional requirement that proper notice was given to all landowners located within a statutorily prescribed distance of the proposed pollution control facility pursuant to 415 ILCS § 5/39.2. In an eleventh hour, last ditch, attempt to cure that crucial failing, the Applicant sought to introduce new evidence at the IPCB review proceedings in an attempt to retroactively perfect

its failed efforts regarding notice by calling the Applicant's attorney's secretary and process server, Ms. Patricia VonPerbandt.[7]

Pursuant to 415 ILCS 5/40.1(b), the hearing on a petition for review appealing the grant of siting approval is to be based "exclusively on the record before the county board . . ." and no new evidence may be admitted except as it relates to issues of fundamental fairness. See *Land and Lakes Co. v. Illinois Pollution Control Board*, 252 Ill.Dec. 614, 319 Ill.App.3d 41, 743 N.E.2d 188 (3rd Dist. 2000). Establishing jurisdiction was the burden of the applicant and its failure to do so at the 39.2 hearing may not be cured in a subsequent appeal. The Applicant's attempt to bootstrap evidence clearly relating to jurisdiction into this proceeding impermissibly extends *ad infinitum* a process which is intended by Illinois law to begin and end at the local board siting hearing. The Applicant has a duty to present before the local board a complete application, either by the application itself or in conjunction with evidence adduced at the local hearing, and to comply with the notice requirements of the statute. See *Spill v. City of Madison* (March 21, 1996) PCB 96-91. An application that does not adequately present compliance with all jurisdictional pre-requisites, is obviously incomplete. Since the evidence of notice was not complete at the time of the hearing, the decision of the City counsel should be vacated.

In *Ogle County Board on behalf of the County of Ogle v. Pollution Control Board*, 272 Ill.App.3d 184, 649 N.E.2d 545, 208 Ill.Dec. 489 (2nd Dist. 1995), the court held that the failure by the applicant to comply with notice requirements could be raised at the IPCB hearing. *Id.* at 187-188. However, an applicant has never been allowed to prove-up jurisdiction at the IPCB as such would only provide the incentive to withhold any such information at the 39.2 hearing to avoid the scrutiny of objectors.

[7] Even though the testimony was erroneously allowed Ms. VonPerbandt actually confirmed that several landowners were never served. (11/6 Tr. 289, 298).

In this case, the Applicant had ample opportunity to introduce evidence regarding its alleged compliance with the notice requirements of Section 39.2. The Applicant failed to present this evidence. Attempts to cure at the appellate are in contravention of the statutory scope of review set forth in section 40.1 This Board should not allow such lackadaisical disregard for a jurisdictional pre-requisite to a Section 39.2 siting hearing, because then obviously it would no longer be a "pre-requisite" as intended by the legislature. Therefore, the plain language of Section 40.1 should be followed and the applicant barred from admitting evidence of compliance with the jurisdictional pre-requisite of notice for the first time on appeal.

III. THE DECISION OF THE CITY COUNCIL MUST BE OVERTURNED BECAUSE THE APPLICANT FAILED TO ESTABLISH JURISDICTION

Section 39.2(b) makes it absolutely clear that service must be obtained "on the owners of all property", (which appear from the authentic tax records of the County in which the facility is to be located") "either in person or by registered mail". 415 ILCS 5/39.2(b). Illinois case law clearly establishes that if an owner is listed on the authentic tax records that owner must be provided with the applicable notice. *Wabash and Lawrence County Taxpayers and Water Drinkers Association v. Pollution Control Board*, 198 Ill.App.3d 388, 555 N.E.2d 1081 (5th Dist. 1990). Furthermore, "the civil 'return receipt' provision of Section 39.2(b) of the Illinois Environmental Protection Act ("the Act") reflects the intent of the legislature to require actual receipt of the notice, as evidenced by the signing of the return receipt." *Ogle County Board v. Pollution Control Board*, 272 Ill.App.3d 184, 649 N.E.2d 545 (Ill.App.2d Dist. 1995). Finally, the return receipt must be signed by the actual owner, or it should be evidenced that the individual signing was the authorized agent of the owner for service process. *Illinois Environmental Protection Agency v. RCS, Inc. and Michael Duvall, AC* 96-12 (Dec. 7, 1995).

But see *Sam Dimaggio v. Solid Waste Agency of Northern Cook County,* PCB 89-138 (June 11, 1990 held that merely sending notice was sufficient).

The failure to acquire service results in the local siting authority failing to have jurisdiction. *Ogle County Board*, 272 Ill.App.3d at 193; *ESG Watts v. Sangamon County Board,* PCB 98-2, 1999 WL 43620 (June 17, 1999)("Notice Requirements contained in Section 39.2(b) are jurisdictional prerequisites which must be followed in order to vest the siting authority with the power to hear a landfill proposal."). In this case, jurisdiction was not acquired because notice was not sent before the February 19, 2002 hearing, five of the owners of a parcel were never sent notice, and the return receipts of numerous parcels were signed by non-owners.

A. The City Council does not have Jurisdiction Because the Applicant First made its Request for Site Location Approval to the City Council on February 19, 2002 Without any Notice as Required by Section 39.2.

Review of the February 19, 2002 City Council minutes reflect that an unabashed, unequivocal intent of the Applicant was to having a hearing in front of the decision makers (the City Council) in this matter on the merits of the application. It is impossible to review his testimony without coming to the conclusion that the Applicant was putting on its case before any notice was provided to the public or the landowners in the vicinity of the landfill. Section 39.2 provides that notice must be given prior to a request for location approval by an applicant. The Mayor acknowledged at the February 19, 2002 meeting that at a normal City Council meeting the public is not allowed to speak. Nonetheless, the applicant was allowed to speak and present evidence to the City Council on the Section 39.2 Criterion. (Just like a Section 39.2 hearing). It is, therefore, obvious that the February 19, 2002 meeting was not a normal City Council hearing, but rather it was a hearing on whether the Section 39.2 criteria were met. This was not a meeting to discuss the general logistics and procedures that would follow. To the contrary, the Applicant presented its expert witnesses, presented its evidence on the specific criteria, argued that

objectors should be ignored, and argued that it had proved compliance with the criteria. At the conclusion of the formal presentation, and before receiving and responding to the City Council's questions, the Applicant explicitly admitted that its purpose was to present its case to the City Council without the involvement of the emotional public or the argument of lawyers.

Section 39.2(b) requires 14 days notice to all landowners prior to a request for location approval. The evidence is clear, and stipulated to by the Applicant, that no section 39.2 notices to the landowners were issued before the February 19, 2002 hearing. Furthermore, 39.2(d) requires notice in a newspaper published to the public and notice by certified mail to all members of the general assembly before the hearing on the Section 39.2 criteria commences. 415 ILCS 5/39/2(b). No notices were issued before the siting hearing commenced on 2/19/02. Furthermore, the objectors were not given a chance to cross-examine the witnesses who spoke on 2/19/02 as required under Illinois law. Because notice was not adequately provided, the City Council lacked jurisdiction to consider this matter and the decision of the City Council should be vacated.

B. The Applicant Failed to Establish Jurisdiction Because it Presented No Evidence that it Served each of the Owners of Parcel 13-16-23-400-001.

It is also undeniable that jurisdiction was not established in this case because the Applicant failed to provide evidence that each of the owners of Parcel 13-16-23-400-001 were ever sent the 39.2(b) notice. Every owner listed in the authentic tax records must be served to establish jurisdiction. *Wabash and Lawrence Counties Taxpayers and Water Drinkers Association v. Pollution Control Board*, 198 Ill.App.3d 388, 555. N.E.2d 1081 (5th Dist. 1990). Five of the owners as identified by the tax records were never sent notice as there is no return receipt for the Prophet Road property contained in the Applicants' Ex. No. 7. This fact was even confirmed by a witness called by the Applicant, Patricia VonPerbandt who testified that the

receipts indicated to whom notices were sent and that she was unsuccessful in personally serving any owner of this property. (11/6 Tr. 297-298).

Therefore, it is absolutely clear from the record that there was no service upon five of the identified owners of Parcel 13-16-23-400-001. Furthermore, it is clear that the Applicant's agent had no reason to believe that Mr. Richard Skates (who signed the receipt for Judith Skates at the Onarga address) was the legally authorized agent for the purpose of serving Ms. Skates. Since there is no evidence that each of the owners of the property were sent a notice at the address of the authentic tax records of the County and the evidence is clear that personal service was not obtained, the City Council did not have jurisdiction to hear the request for siting approval. Therefore, the decision of the City should be reversed and the application denied.

C. There is No Jurisdiction Because Service Upon the Illinois Central Railroad Company was not Effectuated at least 14 days Before the Application was Filed.

The Kankakee City Council lacks jurisdiction as a matter of law because service was not effectuated at least 14 days before the filing of the application. The affidavit of Mr. Volini itself confirms there is no jurisdiction, as he determined that the Illinois Central Railroad Co, c/o CTS Corp., 208 LaSalle, Chicago, IL, was an owner of property entitled to notice as evidenced by the return receipt which is attached to the affidavit. The return receipt is dated "3/6/02", therefore service was not effectuated on this owner at least 14 days before the application was filed on March 13, 2002. (The return receipt also fails to indicate it was accepted by an agent for service of process). (See App. Ex. 2, Ex. B).

Once again, obtaining timely service of the 39.2 notices is a jurisdictional requirement. *Ogle County Board v. Pollution Control Board*, 272 Ill.App.3d 184, 649 N.E.2d 545 (Ill.App.2d Dist. 1995). Because service was not obtained 14 days before the filing of the Notice of Intent to

Request Site Location Approval, the City Council had no jurisdiction and therefore its decision should be vacated.

D. The Return Receipts of Numerous Parcels were Signed by Individuals other than the Owner of the Property and the Authority to Accept Service of Process on Behalf of the Owner(s) was not Established by the Applicant.

In the present case, the Kankakee City Council lacks jurisdiction in this matter because the Applicant has failed to provide sufficient evidence that those owners of record, as evidenced by the authentic tax records of the County, actually received the notice required by Section 39.2(b). Specifically, notice was improper as to the parcels identified in the Statement of Facts because on each of these parcels the box on the return receipt which indicates that the signer was the agent of the addressee was not marked. Therefore, each such receipt, on its face, indicates the signer was not the agent of the addressee. No further documentation was submitted by Applicant to confirm either: 1) that the individuals who did accept service were the authorized agents of the owners in question; or 2) that the owners that appear in the authentic tax records of the County actually received the pre-filing notice in timely fashion.

Merely signing the return receipt card is insufficient to establish agency. *IEPA v. RCS, Inc. and Michael Duvall*, AC 96-12, 1995 WL 747694 (Dec. 7, 1995); but see *Sam Dimaggio v. Solid Waste Agency of Northern Cook County*, PCB 89-138, (Jan. 11, 1990). In the *RCS, Inc.* the Pollution Control Board agreed that even if a signer marked "agent" on the return receipt card, this is insufficient to establish agency. Rather, there must be definitive evidence when the signer is not the addressee that the signer is the agent for service of process. (To the extent that the *Sam DiMaggio* case provides that merely placing the envelope in the mail is sufficient, it is the

Petitioners' position that case was wrongly decided). In this case, the agency box was not checked and, therefore, it is absolutely clear that there is insufficient evidence of agency.[8]

Pursuant to Section 39.2(b) the owner must receive notice and the actual owner identified on the tax record must be served either in person or by registered mail in order to establish jurisdiction. It is the burden of the Applicant to establish this jurisdiction by proper evidence. In this case, the evidence on its face indicates that each of the above-named owners did not receive notice that a request for a landfill location approval was going to be made by the Applicant because the signers refused to mark agent on the receipt. Therefore, the City Council of Kankakee did not have jurisdiction to hear this matter and its decision should be vacated.

IV. THE CITY COUNCIL PROCEEDINGS WERE NOT FUNDAMENTALLY FAIR

A. The Public was Denied the Opportunity to Participate in the City hearing.

The City of Kankakee instituted a procedure, either by negligence or malfeasance, which virtually assured that certain members of the public would not be able to participate in the hearing. Section 39.2(d) of the Act explicitly requires that "at least one public hearing is to be held by the County Board or governing body of the municipality . . ." 415 ILCS 5/39.2(d) (2001). A non-applicant who participates in a local pollution control facility siting hearing has a statutory right to "fundamental fairness" in the proceedings before the local siting authority. *Land and Lakes Company v. Illinois Pollution Control Board*, 319 Ill.App.3d 41, 47, 743 N.E.2d 188, 193 (3d Dist., 2000).

The local siting authority's role is quasi-adjudicative and thus at a minimum the procedural due process for Section 39.2 hearing requires that there be an opportunity to be heard,

[8] Pursuant to the *RCS, Inc.* case there is also insufficient evidence of service even if the signer indicated he or she was the agent. Therefore, service is also insufficient as to owners Lawrence C. Horrell, Yolanda M. Belluso, Kevin Hansen, Vincent Hansen, ICC Railroad, Jill Hansen, Katie Cooper, Donald Binoit, Barbara Benoit, Randy Tobenski, Willi Walker, Bret Perreault, and Donald Harenberg.

cross-examine adverse witnesses, and receive impartial rulings on evidence. *Id.* at 48 (citing *Daly v. Pollution Control Board*, 264 Ill.App.3d 968, 637 N.E.2d 1153 (1994)); *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76 (1992)). The *American Bottom Conservancy (ABC) vs. Village of Fairmont City*, PCB 00-200 (October 19, 2000); case acknowledged that the "public hearing before the local governing body is the most critical stage to the site approval process." *ABC* at page 5 (citing *Land of Lakes Company vs. Pollution Control Board*, 245 Ill.App.3d 631, 616 N.E.2d 349, 356 (3rd Dist. 1993)). The manner in which the hearing is conducted, the opportunity to be heard, existence of *ex parte* contacts, prejudgment of adjudicative facts, and the introduction of evidence are important, but not rigid, elements in assessing fundamental fairness. *Id.* The City of Kankakee failed to allow certain members of the public to enter their appearances as parties and failed to allow certain members of the public the opportunity to participate in the hearing or conduct cross-examination, and failed to provide a fair ruling on the motions to continue the hearing.

1. The conflicting notices on registration and the City Police barring people from entering the chamber resulted in the public not being allowed to participate.

Mr. Bruck, and any other member of the public that attempted to register during the week of June 12th to June 17th, was turned away by the City Clerk's office which was operating under the understanding that all participants had to register at least five (5) days before the hearing (despite the fact that the Clerk knew the legal notice said registration could occur until the time of the hearing). When the Hearing Officer announced on June 17, 2002 that they should be allowed to register at any time on June 17, 2002, due to the confusion created by the conflicting notices, the 75 to 100 people standing in the hallway could not hear such announcement. Furthermore, these people were barred from entering the hearing room anyway by armed

policemen. No member of the public testified that he heard anyone make an announcement in the hallway that people could come in and register as participants.[9]

The City Council was even made aware of this inequity before it rendered its decision because Mr. Bruck made a public comment wherein he informed the City Council that he "wished to be an objector but was not allowed to, because of misinformation by the City Clerk's office." (C 1549-1550). He was told by the City Clerk that "it was too late" for him to sign up *Id.* When he arrived at the first night of the meeting, he was not allowed into the hearing room and was never informed that he could have signed up assuming, he could even get into the hearing room to do so. (C 1549-1550).

It is fortunate that Mr. Bruck took the initiative to inform the City of Kankakee and the Illinois Pollution Control Board of the inequities of this situation because it can now be corrected. It is unclear how many people found themselves in the same situation as Mr. Bruck, but it is clear that the conflicting notices, the misinformation of the City Clerk, in conjunction with the armed guards at the City Council doors, resulted in members of the public not being able to participate. Therefore, the proceedings were fundamentally unfair because the City of Kankakee failed to provide a public hearing, failed to allow people wanting to participate the opportunity to cross examine witnesses, and conducted *ex parte* communications (since members of the public who wanted should have been recognized parties were not allowed to be present on June 17, 2002).

[9] Only Mr. Power testified he personally that he spoke to people in the hall about this but he could not identify any individual that we spoke to and he was vague in his description of his alleged conversations. (11/6 Tr. 388-390).

2. Members of the public that registered to participate were not allowed to do so by the City of Kankakee.

If Mr. Bruck's testimony alone was not enough. Ms. O'Dell testified that she followed the newspaper notice and went to the City Clerk to sign-up to participate. She was told she had to do so in writing by indicating she wanted to "speak". She drafted the memorandum requested and gave it to the Clerk before the end of the day June 12, 2002.

Despite Ms. O'Dell's efforts she was not recognized as an objector until the third or fourth night of the hearing, because she could not get into the hearing room the first night and could not hear any of the announcements made by the hearing officer. Furthermore, Assistant City Attorney, Mr. Power ignored her request to ask questions the first night.

A public hearing before the local unit of government charged with decision-making responsibilities is a critical component in the siting process. *Kane County Defenders v. Illinois Pollution Control Board*, 487 N.E.2d 743 (2d Dist. 1985). Obviously, no public hearing occurred here and the City Council decision should be vacated.

B. The Public was also Denied the Opportunity to Attend the First Night of the Hearing.

The IPCB has previously has ruled that a lack of adequate seating can lead to a finding of fundamental unfairness in a public hearing. *Daly v. Village of Robbins,* PCB 93-52, PCB 93-54 (July 1, 1993). In *Daly*, the Board held that taking public comment in a second room, separated from the main hearing room, would render a hearing fundamentally unfair if the public was compelled or coerced into public comment room (thereby requiring people to be outside of the hearing room while the hearing was going forward). *Id.*

In *City of Columbia v. County of St.* Clair, PCB 85-177 (April 3, 1986) the IPCB considered the lack of seating a "dampening prejudicial effect on the hearing attendees." *Id.* Also, the IPCB looked to the cumulative effect of the unfair procedures that occurred, including

improper notice and continuing the hearing until the early hours of the morning to find a fundamentally unfair proceeding. Coincidentally, those exact same unfair procedures occurred in this case. The facts in this case are absolutely clear that 75 to over 100 members of the public were denied access to the "public" hearing on the first night.

This case is even worse that *City of Columbia*, because the Kankakee City officials were aware before June 17, 2002 that the crowds would be substantial but still failed to schedule the hearing at an appropriate venue. Furthermore, the armed officials of the siting authority barred people from entering the room or expelled people that were able to find seats. As Ms. Barbara Miller indicated in her direct testimony, this is not what one would expect in a society which cherishes its freedoms and the ability of the public to participate in government.

Obviously, the constellation of facts at issue in this case far exceeds those referenced in the *City of Columbia*, in which the IPCB found a lack of fundamental fairness. Unfortunately the very conduct that *Daly* warned would be fundamentally unfair occurred here when the public was compelled and coerced out of the hearing room and into the crowded hallway and stairwell where they could not hear nor see the proceedings. This coercion and compulsion cannot be more obvious than the posting of armed City police at the bottom of the stairwell as one entered the building informing people that they could not enter and posting a second police officer at the door of the chamber room to inform people that they could not enter that room. Therefore, it is obvious that the public was indeed compelled to exit the hearing room, which pursuant to *Daly* is a violation of fundamental fairness.

It is particularly egregious in this case because the people that were banished to the hallway appeared to be almost entirely composed of people that would be neighbors to the proposed facility. It just so happens that these people are County residents rather than City

residents as the City of Kankakee annexed the proposed real estate into the City by following a narrow tentacle of annexed property out into the County land and at the end of that tentacle annexing this property to be surrounded by County residents rather than the City of Kankakee residents. Accordingly, the citizens that are actually impacted most were the very individuals that the City would not allow enter the hearing room on June 17, 2002.

This injury was compounded by the fact that the witness who testified on June 17, 2002 was the Applicant's only witness on consistency with the County's Solid Waste Management Plan (which called for only one existing landfill to be operated within the County). Furthermore, this one witness was the only witness that was allowed to be cross-examined immediately after providing direct testimony and was not required to be recalled at the time that the "round-table" cross-examination would occur by the objectors. Therefore, the people that were not allowed into the hearing room on the first night did not hear any testimony from the Applicant's witnesses as to how the proposed landfill could be consistent with the Waste Management Plan of the people of Kankakee County. Furthermore, if those individuals had been allowed to attend the public hearing the first night, they could have then heard the hearing officer's announcement that they were eligible to participate by signing up at any time that first night. Indeed, many of these individuals might have signed up to participate in order to pose questions to the sole witness who would testify that somehow it was appropriate to site a second landfill in the County despite the plain language of the County plan to the contrary.

Whether by design or mistake, it is obvious that the result was the residents of Otto Township in Kankakee County, who are most directly impacted by the landfill, were denied the chance to hear or question the one witness offered by the applicant to explain why the plain language of the people of Kankakee County's Solid Waste Management Plan did not need to be

followed in the opinion of the Applicant. In other words, the most crucial witness of the entire proceeding, as far as the people of the County of Kankakee were concerned, was allowed to testify on the very night that the Kankakee County public was barred from attending and participating in the proceeding. Therefore, the proceedings were fundamentally unfair.

C. The Public was Denied Access to the Hearing Because the Hearing Officer did not Follow the Notice that Indicated the Hearing Would Cease at 10:00 p.m.

The Applicant and the City published notice that the hearing on June 17, 2002 would conclude at 10:00 p.m. Once the Applicant and the City voluntarily undertook to publish the time that the hearing would conclude, the members of the public had the right to rely upon that information. We are aware that at least two members of the public left the building because they had not gotten into the chamber room and believed the hearing would conclude at 10:00 p.m. It is likely, that other members of the public who could have attended after 10:00 p.m. also did not because of the published notice. (For example, many people have second or third shift work schedules might have attended this public hearing that continued into the early morning hours of June 18, 2002). However, they were denied an opportunity to do so because a notice had been issued indicating that the hearing would conclude at 10:00 p.m.

The County acknowledges that there is no duty to publish the ending time of a public hearing, however, once it has been published, it is important that such ending time be honored to avoid the very situation that occurred here. A failure to honor that ending time results in a fundamentally unfair proceeding because the public was informed that the proceeding would not be taking place after 10:00 p.m. when in reality it was occurring. The public should not have been left in the position of having to guess whether a legal notice actually means what it says. In this case, the legal notice was erroneous in not only the ending time on the first night, but also

the procedures to be followed for registering as a participant. Therefore, the approval by the City of Kankakee should be vacated.

D. The City Failed to Follow its own Siting Ordinance by Failing to Provide Copies of the Application to the County of Kankakee.

The City of Kankakee has admitted that it failed to follow the siting ordinance requiring the City of Kankakee to immediately provide copies of the application to the County of Kankakee Solid Waste Director and the chairman of the Kankakee County Board. (11/4 Tr. 305; 11/6 Tr. 188, 237). A motion was filed by the County to quash the siting hearing for failing to provide the application which was denied by City Attorney/Hearing Officer Bohlen. His only explanation for that denial was his belief that it was "harmless error". (11/4 Tr. 305). However, he acknowledged that the ordinance required that the copies of the application be turned over immediately and acknowledged that the purpose was to provide the County with every opportunity to review, analyze, test and challenge the application before the 39.2 hearing. *Id.* Therefore, obviously the error was not harmless as the County had half as much time to review, analyze and test the application as it should have.

As *Waste Management of Illinois v. Pollution Control Board*, 175 Ill.App.3d 1023, 1036, 530 N.E.2d 682, 692-693 (2d Dist. 1988) established, Section 40.1 of the Illinois Environmental Protection Act "recognizes that the specific procedures as to the conduct of local hearings may be established by [a local siting authority] and also requires that those procedures be fundamentally fair." *Id.* Therefore, "the Act does not prohibit [a local siting authority] from establishing its own rules and procedures governing conduct of a local siting hearing." *Id.* Obviously, such ordinance is enforceable not only against the public, but especially the City. Unlike the City of Kankakee Rules and Procedures Ordinance 02-24, the Siting Ordinance 01-65 has no provision that any of its requirements may be waived. Therefore, the hearing officer had

no authority to waive the requirement that the City Clerk immediately provide a copy of any application to the County Board Chairman and another copy to the Kankakee Solid County Waste Director.

In *Waste Management*, the IPCB found that failure to provide access to the application was a fatal flaw from a statutory perspective and constituted fundamental unfairness. *Waste Management,* 530 N.E.2d at 693. Likewise, Attorney Mueller successfully argued in *Residents Against a Polluted Environment v. County of Lasalle*, PCB 96-243, that the failure to allow the public to see even an irrelevant portion of the Application was a violation of fundamental fairness. Id. at 7. Obviously, the County of Kankakee represents the people of Kankakee County who were not provided the application from the city as required.

In this case, undoubtedly the City and Applicant will argue that the County was not prejudiced because more than six weeks after the application was filed the County's expert was finally able to acquire a copy of the application by filing an FOIA request and paying a fee to the City, though he had a limited amount of time to review it before the siting hearing. Such an argument is disingenuous as the entire purpose of the City Ordinance was to give the County a copy of the application immediately without cost to the County. It seems apparent that when it became obvious to the City that the County wanted to limit the impacts from landfilling within its jurisdictions to only the existing Kankakee County landfill, the City was no longer concerned about sending a copy of the application to the County; which is why Anjanita Dumas was never directed to do so by the Mayor or the City Attorney and never took the initiate to do so herself.

American Bottom Conservancy (ABC) v. Fairmont, PCB 00-200 (October 19, 2000) establishes that even a delay in providing the application is fundamentally unfair. In *ABC*, an objector attempted to acquire an application from the City Clerk but was told that the cost would

be between $600 and $670, she then asked to simply view the application but it was not available on the date she requested it. The applicant itself made the application available to the objector two weeks before the hearing commenced and even allowed the objector to use its office and copy machine, apparently at no cost. *Id* at page 6. The objector argued that only having two weeks to review the application was insufficient and indeed the board found that even though the applicant allowed the objector to view the application in its own facility and use its copy machine two weeks before the hearing this "did prejudice petitioner as they were less able to prepare for the siting hearing" and rendered the proceedings fundamentally unfair. *Id.*

Obviously, the City's failure to ever provide the required copies of the application is much more egregious than the *ABC* case. Furthermore, the fact that the County's expert finally acquired a copy six to eight weeks after he was supposed to is prejudicial as a matter of law under *ABC* because the County had substantially less time to prepare than it was entitled. Therefore, the proceedings were fundamentally unfair.

E. The City Council had Improper Communications with the Applicant Including the Pre-Judgment of the Merits of the Application.

1. Pre-filing contacts and evidence of bias.

If a local siting authority is biased against, or for, an application, such can impact fundamental fairness. *E & E Hauling v. Pollution Control Board,* 115 Ill.App.3d 899, 451 N.E.2d 555, 565 (2nd Dist. 1983); *aff'd.* on other grounds, 107 Ill.2d 33, 481 N.E.2d 664 (1985). *E & E Hauling* established that the standard that would apply in landfill siting hearings would be whether a "disinterested observer might conclude that he, or it, had in some measure adjudged the facts as well as the law of the case in advance of hearing it." *Id.* (See also *Concerned Citizens for a Better Environment v. City of Havanna*, PCB 94-44, page 8 (May 19, 1994).

In this case, there is ample evidence of bias on behalf of the City of Kankakee in favor of the application. As more fully explained in the Statement of Facts, both the Mayor and Hearing Officer Bohlen had substantial prefiling contacts with the Applicant. The Mayor even advocated for the project. The City Council participated in a bus trip sponsored and hosted by the Applicant, participated in the annexation process, and was informed of the Host Agreement negotiations. The Applicant assisted the City in drafting a Siting Ordinance and the Rules and Procedures for the hearing. Finally, the extensive contacts culminated with the City Council inviting and allowing the Applicant to presents its evidence without notice to any interested party on February 19, 2002.

This case is unlike *Fairview Area Citizens Task Force v. Pollution Control Board*, 198 Ill.App.3d 541, 555 N.E.2d 1178 (3rd Dist. 1990) wherein petitioner's argument centered on a mere prior approval of an annexation agreement. In this case, the City Council through its agent, corporate City Attorney Christopher Bohlen actually assisted the applicant in acquiring annexation, was assisted by the applicant in drafting the siting ordinance, and had extensive discussions regarding the Host Agreement. (Furthermore, it should be noted the FACT case supports the petitioner's assertion that the evidence of pre-filing contacts of the IPCB should have been admitted into evidence as FACT acknowledges that if bias had been proved by evidence of pre-filing contacts then the proceedings would have been fundamentally unfair). *Id.*

This case is very similar to *Concerned Citizens for a Better Environment vs. City of Havana*, PCB 94-44, wherein there was evidence the City allowed the applicant to "review the siting ordinance, which set forth procedures to be followed throughout the process." *Id.* The Pollution Control Board explained that allowing the applicant to review the siting ordinance was one of the elements that showed that the City was allowing the applicant to have control over the

hearing process. *Id.* It is obvious from review of the record that the applicant at issue in this case had significant control over the hearing process as its attorney not only reviewed but actually drafted the Rules and Procedures for the hearing. (though this was denied by Hearing Officer Bohlen, the March 12, 2002 correspondence is a smoking gun to the fact that the applicant drafted the ordinance). Furthermore, the applicant was counseling the City on how to effectuate its "round-table" examination and it would be futile for the City to attempt to deny that the language suggested by the Applicant's counsel was indeed adopted by the City. These improper contacts were fundamentally unfair.

2. The Applicant hosted an improper and prejudicial visit to other landfill facilities.

The IPCB has held on numerous occasions that visits to "example landfills" by the decision-makers that are hosted by the applicant are improper. *Concerned Citizens vs. City of Havanna*, PCB 94-44, page 5 (May 19, 1994); *Spill vs. City of Madison*, PCB 96-61 *Southwest Energy vs. IPCB*, 655 N.E.2d 304 (4th Dist. 1995); (affirmed the IPCB decision because no opponents were invited to take the tour); *Beardstown Area Citizens vs. City of Beardstown,* PCB 94-98 (January 11, 1995). Though all of these cases involved trips that took place after the filing of the application, and before the hearing, none of the cases rested solely on that fact to find that the trips hosted by the applicant were fundamentally unfair. Rather, each case concerned the lack of opportunity for an objector to attend such viewings. Likewise, in this case, the Applicant and its counsel, crafted a very specific agenda for pre-filing adjudication of the merits of this application and the creation of pre-filing bias on behalf of the decision-makers. In accordance with this agenda, Mr. Volini and Town and Country hosted the City Council members on a bus trip to example landfills. (11/4 Tr, 270). The City Attorney, Mr. Bohlen was not aware of any opponents being invited on the bus trip. (11/6 Tr. 271).

Each of the aforementioned cases found improper conduct when the decision-maker attended a site viewing with an applicant that was not available to objectors. In this case, Mr. Bohlen and the Mayor were well aware that there were individuals strongly opposed to the landfill, at the time of the bus trip. It would be disingenuous to establish a procedure that encourages applicants to take the decision-makers on these trips, without inviting known objectors, and find that such is not fundamentally unfair, merely because the trip occurs before a filing date. If the only consideration was the date of the trip, then applicants (such as Town and Country did here) would be encouraged to develop biases and even seek pre-hearings of their evidence all before filing an application, in an effort to render the Section 39.2 process meaningless.

3. The February 19, 2002 meeting was a pre-adjudication of facts and an improper impeachment of the Section 39.2 Hearing.

As evidence that the Applicant embarked on a procedure designed to acquire a pre-adjudication of its application, the Applicant culminated its pre-filing contacts with the decision-maker by making a previously described formal presentation on February 19, 2002, to the City Council on the merits of the application. When one reads the minutes of that meeting *in toto* it is undeniable that it was the purpose of the meeting to provide an "unfettered opportunity" for the applicant and its "expert witnesses" to have a direct hearing with the decision-makers without the filter of any other participant or lawyer. It is further clear that the purpose of the Applicant was to present its case to the decision-maker as to the Section 39.2 criteria through its expert witness, Mr. Devon Moose. It is further clear that the purpose of the meeting was to inform the City Council members that the Section 39.2 proceeding could not be trusted because it would involve hired-gun environmental testifiers, rancorous lawyers, and objectors' witnesses who though they would not appear to be fist-waiving fanatics, would tell partial truths and could not be trusted.

At no time did the Mayor or City Attorney Bohlen voice any objection to the statements that were made at the February 19, 2002 meeting. At no time that evening did they direct the City Council to disregard any statements made by the applicant and its witnesses.

Town and Country obviously believed as their counsel put it at the IPCB hearing, that there was a "bright-line test" as to when the Applicant would have to be sure that it only had proper communications with the decision-makers. (11/4 Tr. 216). In other words, it was Applicant's position that "anything goes" until the filing of the application. However, no case decided by the IPCB, nor the Appellate Courts, establishes such an irresponsible procedure.

Third District precedence demonstrate that there is no bright line based upon the date of the filing of the application. As a matter of fact, the most recent Third District case to address the issue of pre-judgment was *Land of Lakes Company vs. IPCB*, 319 Ill.App.3d 41, 743 N.E.2d 188 (3rd Dist. 200). In that case, the court clearly reviewed the prefiling contacts to determine of the specific contacts were proper. (Will County staff members had reviewed and commented upon the application prior to its filing but the court found that there was no improper conduct because the Special Assistant State's Attorney for Will County, Charles Helsten, cautioned the County's staff members and other Will County departments that they "should not communicate with county board members concerning the...application".) 319 Ill.App.3d 42-43. After reviewing the prefiling contacts, the court ultimately found that those hearings were not "virtually meaningless" because there was an "absence of any pre-filing collusion between the applicant and the actual decision-maker." *Land of Lakes Company vs. Illinois Pollution Control Board*, 319 Ill.App.3d 41, 49, 743 N.E.2d 188, 194 (3rd Dist. 2000).

The court also noted that the County Board was undoubtedly aware that its staff might have potential bias due to the pre-filing contacts but the County Board was free to accept its

proposed Finding of Facts just like it would have been free to accept proposed finding of any other party, including the applicant itself. *Id* at 51, 743 N.E.2d at 195. Therefore, under *Land of Lakes* the important analysis is whether or not the pre-filing contact was with the decision-maker and likely to lead to bias. In this case, the communications were directly with the decision-makers and were highly likely to lead to bias.

It is blatantly obvious that the applicant presented expert testimony to the City Council regarding the criteria. It also provided them documentary evidence.[10] Therefore, it is undeniable that the applicant indeed used the February 19, 2002 meeting as an opportunity for the decision maker to have a pre-adjudication (i.e. pre-hearing) of the very opinion testimony that would be used at the siting hearing. Again, this was explicitly admitted by Mr. Tom Volini at the conclusion of the lengthy presentation and before questioning by the City Council, when Mr. Volini closed by stating "you'll hear this without so much emotion and with a bunch of lawyers fighting with each other in about 120 days, but we wanted you to hear it from us first." (C 3156).

Furthermore, not only did the Applicant seek to have a prejudgment of facts that were supposed to only be adjudicated at the Section 39.2 hearing, but it also tainted the very integrity of the hearing itself. The objector's witnesses did not walk into the hearing room on equal footing with the witnesses of the applicant because the City Council had already been informed that such witnesses could not be trusted. Likewise, since the applicant had already hired the "best experts" in the field and had the "dean of landfill" siting for its attorney, the attorneys and experts for any other participant in the hearing found themselves at an improper disadvantage.

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[10] These documents included the Property Value Guarantee Plan, a document concerning the needs assessment, and a diagram of the proposed landfill which is described in detail by Mr. Volini. (C 3153-3156). This handout was attempted to be admitted into the record by petitioner's counsel, but was not allowed by Hearing Officer Halloran on the grounds that it was an irrelevant pre-filing contact. For the reasons cited above, petitioners believe that decision was erroneous as the handout was part and parcel of the pre-filing of the facts by the City Council. Petitioner's Ex. 3 is contained in the record as an offer of proof.

Despite the applicant's protestations to the contrary, this was not a meeting to discuss the general logistics and procedures that would follow in a Section 39.2 hearing. To the contrary, the applicant presented its expert witnesses, presented its evidence on the specific criteria, argued its witnesses were highly credible, argued that objectors' witnesses were incredible and should be ignored, and argued that it proved compliance with the criteria. At the conclusion of the formal presentation, and before receiving and responding to the City Council's questions, the Applicant explicitly admitted that its purpose was to present its case to the City Council without the involvement of the emotional public or the argument of rancorous lawyers.

Therefore, the City Council of the City of Kankakee conducted an improper pre-hearing of the case that should have only been adjudicated at the Section 39.2 proceeding. Because this prejudice is irreparable, and caused by the actions of the Applicant, the decision of the City of Kankakee should be reversed with an order denying site location approval with prejudice.

F. The City Required FOIA Requests to Impede the Dissemination of Fundamental Information Concerning the Landfill Siting Hearings.

As further evidence of the City's fundamentally unfair procedures, confusion and lack of coordination in handling the Section 39.2 hearing process, the City Clerk, Anjanita Dumas, refused to provide the most basic information to the County of Kankakee and other participants in the hearing such as the names of the parties, witnesses and hearing dates, absent a Freedom of Information Act request and a payment of copying costs. (11/6 Tr. 249). Apparently, the City Clerk failed to understand that this was a quasi-adjudicative process and therefore the City Clerk was no longer just a keeper of records but was also acting as a Court Clerk in regard to this proceeding.

The result of the City Clerk requiring the FOIA request for the names of the parties and witnesses was that counsel for the County of Kankakee did not receive this information until

Monday, June 17, 2002, the very day of the commencement of the first night of hearings. (C 0031).[11] The City Clerk also refused to waive costs to the county even though the County was a public entity and one that had already been denied its right to two immediate copies of the application. (C 0031). Once again, this procedure was fundamentally unfair to the County of Kankakee and other participants who were subjected to it.

G. The Hearing Officer was Biased.

On the first night of the hearing, Mayor Green was originally scheduled to be the Hearing Officer. (11/4 Tr. 308). However, on Friday, June 14, 2002, objector, Waste Management, filed a Motion to Disqualify Mayor Donald Green from serving as the Hearing Officer based primarily upon the evidence of bias displayed at the February 19, 2002 hearing. (C2059-2067).. In addition to the 2/19/02 meeting, the Motion pointed out that a Kankakee Daily Journal article indicated that the Mayor had refused to appoint an individual to a vacant seat on the City Council because of his lack of support for bringing a landfill to the City. (There was evidence admitted at the hearing that the Mayor and several City Council members interviewed prospective Aldermen on whether they were in favor of siting a landfill in the City, before appointing him to the City Council). (11/6 Tr. 164; Petitioner's Ex. 6, attached hereto as Appendix F).. The objector argued that by Mayor Green's conduct a disinterested observer might conclude that he had prejudged the landfill siting application in violation of *Waste Management vs. Pollution Control Board*, 175 Ill.App.3d 1023, 530 N.E.2d 682, 696 (2nd Dist. 1988) and *EYE Hauling Incorporated vs. Pollution Control Board*, 116 Ill.App.3d 586, 451 N.E.2d 555, 566 (2nd Dist. 1983) *aff'd* 107 Ill.2d 33, 481 N.E.2d 664 (1985). The Mayor stepped down and Mr. Bohlen was immediately appointed as hearing officer.

[11] This was one of the grounds for the additional Motion to Quash filed by the County on June 17, 2002 and denied by Hearing Officer Bohlen (C2191-2197).

The biases and predisposition of Mr. Bohlen for the Applicant are evidenced not only by the extensive pre-filing contacts that were discovered during these IPCB proceedings, but also by his admission that he believed the application would be financially beneficial to the City, and by his rulings on the Motions to Quash of the County that were heard and immediately denied on June 17, 2002. Obviously, a disinterested observer might understandably conclude that Mr. Bohlen favored the Applicant. Furthermore, biases of a hearing officer which could not have been discovered at the 39.2 hearing are an appropriate basis for a finding of fundamental unfairness. *American Bottom Conservancy (ABC) v. Fairmont*, PCB 00-200 (October 19, 2000)

Mr. Bohlen admitted that before the hearing commenced he had discussions with the Mayor (and the Applicant) about hiring an individual unaffiliated with the City to act as the Hearing Officer. (11/4 Tr. 309). The City was aware that the cost of such a Hearing Officer would have been the responsibility of the Applicant. Regardless, the City council decided to appoint only hearing officer's that had substantial pre-filing contacts with the Applicant. In reviewing these facts, it is undeniable that the reason the City Council wanted either the Mayor, or Attorney Bohlen, as the Hearing Officer was because they both were intimately involved in facilitating this Applicant's request for siting approval. Therefore, the proceedings were fundamentally unfair and should be remanded to the City of Kankakee with direction that a fundamentally fair process be conducted.

H. The Applicant had an Improper Post-filing *Ex Parte* Contact with the City Attorney/Hearing Officer Bohlen who was Communicating with the Decision-Maker.

The correspondence from the Applicant's attorney, George Mueller, to Hearing Officer Bohlen dated March 12, 2002 is not only evidence of improper control by the Applicant over the hearing process, but it is also an improper post-filing *ex parte* communication and is evidence that those communications were going to continue. Mr. Bohlen acknowledged that the

correspondence was received by regular mail after the filing of the application (though it had been received previously by tealeaf)(11/4 Tr. 253).

When a member of a decision-maker's staff is acting on behalf of the City Council, communications of that staff member with the applicant are *ex parte*. *Residents Against a Polluted Environment v. County of LaSalle,* PCB 96-243 (Sept. 19, 1996). In the March 12, 2002 correspondence George Mueller informed Attorney Bohlen that the Applicant and the City could continue to converse concerning the terms of the host agreement even after the filing of the application. (11/4 Tr. 249-253). Furthermore, the correspondence directs the Hearing Officer how to amend the Rules and Procedures for the upcoming 39.2 hearing of the Applicant. Therefore, it was an improper *ex parte* communication and fundamentally unfair.

V. THE COMBINATION OF NUMEROUS UNFAIR PROCEDURES IN THIS CASE RESULTED IN A FUNDAMENTALLY UNFAIR LANDFILL SITING HEARING .

The IPCB has held that though a specific occurrence may not rise to the level of fundamental unfairness, when the various unfair practices are viewed in combination, the proceedings as a whole may be ruled fundamentally unfair. *American Bottom Conservancy (ABC) vs. Village of Fairmont City*, PCB 00-200 (October 19, 2000); *City of Columbia v. St. Clair,* PCB 85-177 (April 3, 1986)..

In this case, like *ABC* and *City of Columbia*, the combined unfair practices resulted in a fundamentally unfair proceeding. Numerous members of the public were not allowed to hear the first night of the testimony. Registered objectors such as Ms. O'Dell, were not recognized as participants and therefore could not conduct cross-examination or even hear the testimony of Dr. Schoenberg on the only night he was available, June 17. Individuals like Mr. Bruck were given misinformation by the City Clerk's Office that they could not sign up to participate after June 12, 2002, and then were barred from entering the chamber room on June 17, 2002, to hear the

announcement that they could have signed up that evening. Participants were restricted from receiving names of witnesses and participants and other fundamental information concerning the hearing by the City Clerk in a timely fashion. Kankakee City Police made people relinquish their seats in the hearing room so that individuals that came with the Applicant or other "preferred" persons would have a seat as happened to Ms. Barbara Miller, an elderly woman who found herself in the unenviable position of either having to disregard an armed City policeman or be banished to the hallway to attend this "public" hearing. (11/4 Tr. 107). Elderly people were forced to stand for hours in a crowded hallway and stairwell. 75-100 people were barred from entering the City Council Chambers at all. Dozens upon dozens of people were forced to stand shoulder to shoulder in a crowded, hot corridor and stairwell where they could neither see nor hear the proceedings. The first night of the hearing continued long past the posted cessation time resulting in members of the public not attending because they thought the City would abide by the notice. The first night of the hearing was allowed to proceed until 12:30 in the a.m. the next morning prejudicing the County of Kankakee and other objectors who were forced to attempt to conduct cross-examinations at such an unreasonable hour. The published notices of the hearings were conflicting, confusing and improper. The City even failed to follow its own siting ordinance regarding the procedures to register to participate, and failed to follow its own ordinance requiring copies of the application to be immediately delivered to the County Solid Waste Director and Chairman of Kankakee County Board. Furthermore the City allowed the applicant to take the City Council on a bus trip to an "example" landfill before the application was filed.

If that is not enough to establish fundamental unfairness, we also have the egregious meeting on February 19, 2002, where the applicant explicitly confessed that he wanted to have a

chance to talk directly with the City Council without the filter of lawyers to present his expert witnesses on how the criteria were met. The applicant, with the City's apparent endorsement and approval, even went on to inform the City Council that the Section 39.2 proceedings could not be trusted because objectors' witnesses were merely hired to go around and testify against landfills and tell half-truths. Finally, the refusal of the City Council to appoint an unbiased Hearing Officer was the culmination of the fundamentally unfair conduct in this case.

Obviously, when all these factors are viewed in combination, these proceedings were extremely tainted (much more so than even *ABC* or *City of Columbia*) and the decision of the City of Kankakee should obviously be vacated. When adding up these fundamentally unfair procedures, it is clear that a remand of this case to the same City Council would not correct the prejudice that occurred. Accordingly, the County of Kankakee prays that the Illinois Pollution Control Board issue an order disapproving the application with prejudice. In the alternative, the City of Kankakee decision should be vacated and the matter remanded with the mandate to hold a fundamentally fair hearing.

VI. THE DECISION OF THE CITY OF KANKAKEE SHOULD BE OVERTURNED BECAUSE THE APPLICANT FAILED TO MEET THE SECTION 39.2 STATUTORY CRITERIA

A. The Application was Inconsistent with the County's Solid Waste Management Plan in Violation of Criterion viii.

1. Standard of review.

Though generally the standard that the IPCB employees to review a decision of a local siting authority is whether the decision is against the manifest weight of the evidence; compliance with Criterion 8 is subject to *de novo* review because it involves a pure question of legal interpretation rather than weighing of factual evidence. (*See*, 415 ILCS 5/41(b)(1998); *Fairview Area Citizens Task Force v. Illinois Pollution Control Board*, 198 Ill.App.3d 541, 552,

555 N.E.2d 1178 (3d Dist. 1990); *Land and Lakes v. Illinois Pollution Control Board*, 319 Ill.App.3d 41, 48; 743 N.E.2d 188, 193 (3d Dist. 2000)). In *Land and Lakes*, the Third District Court determined that not every issue in regard to a siting appeal is decided by the manifest weight of the evidence standard. 319 Ill.App.3d at 48.

On the contrary, if an agency determination is a pure question of law, it will be subjected to *de novo* review. *Id.* (citing *Branson v. Department of Revenue*, 168 Ill.2d 247, 659 N.E.2d 961 (1995). Furthermore, where an agency determination presents a mixed question of law and fact, it will be set aside if it is clearly erroneous which is a middle ground between the deferential manifest weight of the evidence standard and the *de novo* standard. *Id.* (citing *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill.2d 191, 692 N.E.2d 295 (1998).

In this case, the language of the Solid Waste Management Plan and its amendments is undisputed and therefore the only issue is to interpret the meaning of that Plan as amended. Since this is a pure legal interpretation, it should be subjected to *de novo* review. Even if the Board employs the clearly erroneous, or the manifest weight of the evidence standard, the City Council decision should still be reversed because the language of the plan is clear.

2. The plain language of the Solid Waste Management Plan establishes that the County desired only one landfill and that landfill would be the existing landfill when expanded.

Section 39.2(a)(viii) provides that an applicant for local siting approval of a pollution control facility must demonstrate that:

> If the facility is to be located in the County where the County Board has adopted a Solid Waste Management Plan consistent with the planning requirements of the Local Solid Waste Disposal Act or the Solid Waste Planning and Recycling Act, the facility is consistent with that plan.

415 ILCS 39.2(a)(viii)(2001).

The Applicant has acknowledged in its application that "Kankakee County adopted its Solid Waste Management Plan on October 12, 1993 outlining the recommended Solid Waste Management System for the County. This plan was readopted August 18, 1995 and the five year update was approved on July 31, 2000. The Kankakee County Board approved an amendment to the plan on October 9, 2001." (Applicant's Ex. 1, 10464). The unsigned portion of the three pages of the application (which is the only portion that addresses Criterion viii) acknowledges that the following statement appeared in the Plan as amended on October 9, 2001:

> An expansion of the [existing Kankakee County] landfill, if approved, will satisfy the County's waste disposal needs for an additional twenty years. No new disposal facilities will be necessary or desired in Kankakee County for purposes of implementing the Plan.

(Applicant's Ex. 1, 10464).

The Applicant further noted that the 10/9/01 Plan Amendment provided:

> Kankakee County will not support and will contest the development of any other landfill in the County, unless the expansion of the existing landfill is not approved. *Id.*

Despite the fact that the operator of the Kankakee County Landfill is presently seeking an expansion, the Applicant nonetheless concluded that the new landfill it proposes is not inconsistent with the County Solid Waste Management Plan. (Applicant's Ex. 1, 10464).

At hearing, on this matter, a copy of the Solid Waste Management Plan was admitted into evidence by Kankakee County. In addition, the amendments to the plan of October 9, 2001 and March 12, 2002 were also admitted into evidence. Though the application makes no reference to the March 12, 2002 amendment; a resolution was passed by the County Board of Kankakee on that date which amended the first two paragraphs of Section 6: Available Landfill Capacity in Kankakee County of the Kankakee County Solid Waste Management Plan, to read as follows:

> Kankakee County has a single landfill owned and operated by Waste Management, Inc. This landfill has provided sufficient capacity to dispose of

> waste generated in Kankakee County and its owner has advised the County that it plans to apply for local siting approval to expand the facility to provide additional disposal capacity for the County. Operation of the landfill has been conducted pursuant to a Landfill Agreement signed by the County and Waste Management in 1974, and subsequently amended from time to time. In the event siting approval for expansion is obtained, the landfill would provide a minimum of twenty (20) years of long term disposal capacity through expansion of the existing landfill.
>
> An expansion of the existing landfill, if approved, would then satisfy the County's waste disposal needs for at least an additional twenty years and in accord with the Kankakee Solid Waste Management Plan (as amended) as well as relevant provisions of the Local Solid Waste Disposal Act and the Solid Waste Planning and Recycling Act, no new facility would be necessary.

Kankakee Solid Waste Management Plan as Amended March 12, 2002 (Kankakee County Ex. 2).

Additional text was included in the Solid Waste Management Plan as of March 12, 2002 that:

> [t]he owner/operator of any new or expanded regional and pollution control facility (as that term is defined by Section 3.32(a) of the Illinois Environmental Protection Act) in the County shall be required to post and maintain for the life of such regional pollution control facility either: (1) an environmental contingency escrow fund of a minimum of $1 million dollars based upon an annual payment not to exceed (five years), or (2) some other type of payment or performance bond or policy of on-site/off-site environmental impairment insurance in an amount acceptable to the County. This requirement shall be in addition to the satisfaction of any and all financial assurance requirements established by state or federal law and/or regulation.

Kankakee County Solid Waste Management Plan Amendment, March 12, 2002, Pg 3 (Kankakee County Ex. 2).

Furthermore, the March 12, 2002 Amendment explicitly required that:

> [T]he owner or operator of a proposed new landfill or landfill expansion in the County shall be required to establish a property value guarantee program for households within a site-specific distance from the proposed landfill site, such property value guarantee program to be prepared by an independent entity satisfactory to the County. *Id.*

The language of the October 9, 2001 Amendment was clarified by the March 12, 2002 Amendment, which explicitly provided that it was the County's plan that no new facilities would be needed within the County borders as long as the existing landfill's proposed expansion is approved. The resolution makes it clear that the owner of the existing Kankakee County Landfill has "advised the County that it plans to apply for local siting approval to expand the facility to provide additional disposal capacity for the County." *Id.*

In fact, an application for expansion was filed by the Kankakee County Landfill operator.[12] It is obvious from reading the Amended Plan that the County intends for only one landfill to be operating within its borders (as long as that landfill is sufficient to provide twenty years of long term disposal capacity), and that the County prefers that the present landfill simply be expanded rather than a new facility (and its resultant impacts) be erected within the County borders. Furthermore, it is clear from the Plan that the Kankakee County landfill operated by Waste Management shall be the sole facility unless its explanation is disapproved. The Waste Management application was filed, and at this point has not been disapproved. Therefore, the siting of another facility before the Kankakee County Extension Facility is disapproved is blatantly and plainly inconsistent with the County Plan.

The unsigned conclusions of the Applicant Town & Country of consistency are based solely upon the October 9, 2001 Amendment, and fails to even acknowledge by the March 12, 2002 amendment. At no time has the Applicant attempted to amend its application to explain how it could possibly be consistent with the Solid Waste Management Plan as amended on March 12, 2002.

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[12] The Section 39.2 hearing on the application for expansion of the Kankakee County Landfill is presently in front of the Kankakee County Board and began on November 18, 2002 and is continuing through the date of the filing of this brief.

Furthermore, even the anonymous conclusion in the application (which was adopted by the City Council) relating to the October 9, 2001 Plan Amendment is illogical and unsupportable. The October 9, 2001 Amendment made it clear that the County wanted one facility within its borders, and that facility should be at its present location, thereby minimizing the impacts to the County (so long as an expansion of that facility is approved). The Applicant and City Council's assertion that there must be final approval of an expansion of the existing facility in the County before a new siting application is inconsistent with the Solid Waste Management Plan, is simply disingenuous and illogical. There is nothing in the Solid Waste Management Plan that provides that the Kankakee County Landfill expansion must be finally approved to make the Plan restriction on the number of landfills located within the County effective. On the contrary, the County Solid Waste Management Plan is plain and unambiguous in that the County planned that the present Kankakee County Landfill would be the only landfill within the County borders, and the County instituted this restriction based upon the anticipated filing of an application for extension. As this extension application has now been filed, it is even more obvious that the Town & Country application is inconsistent with the County Solid Waste Management Plan

Therefore, the finding of the City Council as to Criterion 8 was erroneous as the plain language of the Plan establishes the application is inconsistent with the Plan. The obvious inconsistency with the County plan is a dispositive issue of this entire case. Though the fundamental fairness problems are substantial, the City Council decision should simply be reversed and the application denied with prejudice as the County is the primary planning body for Waste Management and the application is not and cannot be consistent with Criterion viii.

a. The County Solid Waste Management Plan as amended requires that a Property Value Guarantee Program be prepared by an independent entity satisfactory to the County; however, there is no evidence that an independent entity prepared the program contained within the application or that the County approved it.

As indicated above, the March 12, 2002 Amendment explicitly provided that any application for a proposed facility must include a Property Value Guarantee Program prepared by an independent entity satisfactory to the County. However, no evidence was contained in the application or presented by the Applicant in the hearing that such a program was established by an independent entity. Furthermore, no evidence was introduced by the Applicant that the County ever approved the independent entity that was to develop the program. No expert testimony was offered by the Applicant that these Plan requirements were met. To the contrary, Dr. Schoenberger (whose testimony mainly revolved around the legality of the amendments, and was, therefore, stricken) admitted that he did not know whether an independent entity being approved by the County had prepared the Property Value Guarantee Program proposed by Applicant. (6/17/02 Tr. 162). Because the Applicant failed to present expert testimony of consistency with this requirement, and because the application fails to even address the issue, the application on its face is inconsistent with the County Solid Waste Management Plan.

b. There was no evidence that any environmental damage fund or insurance was accepted, or even offered to the County, for approval.

The Solid Waste Management Plan explicitly required that any entity that intended to operate a landfill within its borders provide either an environmental contingency escrow fund with a minimum deposit of $1 million dollars or some other type of payment or a performance bond or policy approved by the County. The application entirely fails to address the requirement of County approval and the applicant offered no expert testimony on the issue. Dr. Schoenberger admitted that he did not know whether the County had approved any insurance policy offered by

the applicant. (6/17/02 Tr. 167). Therefore, the Application is inconsistent with the Plan as a matter of law.

3. The Applicant failed to present any testimony or evidence in regard to Criterion viii.

Though the Applicant attempted to present testimony of consistency with the Solid Waste Management Plan through Professor Alan Schoenberger (who attempted to attack the validity of the Amendments as opposed to testifying regarding consistency of the application with the Plan as amended), such testimony was correctly stricken by Hearing Officer Bohlen as legal conclusion and beyond the scope of inquiry in a Section 39.2 hearing. Stricken testimony cannot be considered by the City Council in reaching its decision.

Because Professor Shoe Berger's entire opinion was based upon an improper assumption (as a matter of law) that some of the text of the Plan could be ignored by the City Council, none of his opinions regarding consistency are persuasive. Indeed, the IPCB has already ruled that it is not within the scope of its review to consider how a Plan is adopted. *Residents Against a Polluted Environment v. County of LaSalle and Landcomp* Corp, PCB 97-139 (June 19, 1997)(citing *Residents Against a Polluted Environment v. County of LaSalle and Landcomp* Corp, PCB 96-243 (July 18, 1996). Therefore, Dr. Schoenbergers testimony that the amendments to the Plan were not properly adopted is not reviewable and rather the only issue is whether the Application is consistent with the Plan. Clearly, it is not consistent and the Applicant has failed to present any competent testimony concerning the basis for the Applicant's conclusion that its request is consistent with Criterion viii.

4. The County presented evidence as to the lack of consistency with the Solid Waste Management Plan.

Unlike the Applicant, the County did submit evidence that Criterion 8 was <u>not</u> met. Specifically, the Kankakee County Board Chairman Karl Kruse testified by sworn affidavit that

he had firsthand knowledge about the intent of the Kankakee County Solid Waste Management Plan and the amendments to the Plan. (C 2295- C 2305). Mr. Kruse testified by affidavit that the Kankakee County Board first adopted its Solid Waste Management Plan on October 12, 1993 and it was amended on August 8, 1995. (C 2295). Chairman Kruse explained that when the Plan was first adopted, a facility was identified to address the future disposal needs of the County and that facility was the Waste Management Landfill. (C 2296).

In the summer of 2001, Waste Management publicly announced its intention to expand its existing facility in Kankakee County. *Id.* At the same time, the County learned of possible efforts to develop a second landfill within the County which was the subject of the City of Kankakee proceeding. *Id.* Because the existing facility operated by Waste Management provided the residents of the County with safe, convenient, reliable disposal capacity, since the adoption of the County's Solid Waste Management Plan in 1993, a resolution was brought on October 9, 2001 to continue designation of this facility to meet the long-term needs of Kankakee County. *Id.* That resolution also identified the potential additional impacts that might occur if a second landfill was located within the County (C 2296) and as explained above, the plain language of that October 9, 2001 amendment made it clear that the County opposed opening its second landfill within its borders. *Id.* Mr. Kruse noted that the County Board voiced its overwhelming support for that October 9, 2001 resolution which received 26 affirmative votes and only one negative vote. *Id.*

In early 2002, the County Board became aware of the proposal for location of a third landfill within Kankakee was forthcoming. *Id.* On March 12, 2002, another resolution was passed before the County Board which, among other things, again reiterated that if Waste Management received siting and permitting approval for its proposed expansion, no further

disposal facilities would be necessary to meet the long term needs of the County. *Id.* Mr. Kruse further testified that the March 12, 2002 resolution reflected the County Board's concern over the additional impacts that might occur if a second (or even third) landfill were sited in the County. *Id.* Once again, the Board voiced its overwhelming support for the resolution with 21 affirmative votes (and the negative votes were from Board Members that did not want the restriction on acceptance of out of County waste removed and all were opposed to a second or third landfill in the County). *Id.* Mr. Kruse noted that he presided over and witnessed the deliberations that took place concerning both of the resolutions and based upon his role as Chief Executive of the County's government, he firmly believed that unless and until the proposed expansion of the Waste Management facility was disapproved, no further proposed facilities were needed to meet the long-term disposal needs of the County and that those facilities do not comport with the County's Solid Waste Management Plan. (C 2297).

Worthen vs. Village of Roxanna, 253 Ill.App.3d 378, 623 N.E.2d 1058, 1063-1064 (5th Dist. 1993) establishes that Mr. Karl Kruse's testimony should be given great weight. In *Worthen*, the local siting authority, employed an interpretation of a county plan which differed from a petitioner's witness. The court noted that the "petitioner's witness was not a person in authority in the county" whose opinion should be followed. *Id.* However, in this case, the County Board Chairman himself testified as to his understanding of the intent of the County Board in passing the Solid Waste Management Plan and its overwhelming support for the amendments passed by resolution. Therefore, Mr. Kruse's testimony should be given great weight particularly in light of the fact that there was no contrary testimony presented by the Applicant. Accordingly, the City Council decision as to criteria viii should be reversed as it is clear that the application is inconsistent with the County's Solid Waste Management Plan.

B. The Finding as to Criterion ii was Against the Manifest Weight of the Evidence.

The application provides that "bedrock five feet below the bedrock surface became competent and serves as an aquitard." (Applicant's Ex. 1, pg 10122). However, the evidence was clear at the hearing that the Niagaran dolomite immediately beneath the landfill was not an aquitard and, on the contrary, was actually an aquifer. It was explained at the hearing that an aquitard is an area that is retardant to water, in other words is impermeable to such a degree that water is precluded from entering or exiting an adjacent area at any significant velocity, whereas an aquifer is an area that contains water which may be used as a source for wells.

The evidence admitted at the hearing clearly showed that the fundamental assumption and the linchpin of the application was that the bedrock was an aquitard. The Applicant's conclusion that the unweathered portion of the Silurian dolomite was an aquitard was, at a minimum, conjectural, and not supported by appropriate study and clearly irrational under the evidence presented to the City Council at hearing. The diagram contained within the application establishes that the landfill liner will be located directly upon Niagaran dolomite. (Applicant's Ex. 1, 10237). For some unpersuasive reason the Applicant did only one "deep" soil boring within the landfill footprint. That one "deep" soil boring demonstrated that the upper five feet of the Niagaran dolomite bedrock was weathered, incompetent, and fractured to such an extent that water would pass readily through this portion of the bedrock. Nonetheless, the Applicant concluded from this one soil boring that after five feet the dolomite became sufficiently less permeable such that water would not pass through it.

Hydrogeologist Steven VanHook testified that he did not believe there was enough information provided by Applicant to reach the conclusion that dolomite is an aquaclude, as only one boring, was obtained to support this assumption, and a significant number of wells in the area located in this rock formation were producing water. (C1230). Stuart Cravens, also a

hydrogeologist with a Bachelor's Degree in Geology and Hydrogeology from the University of Toledo, and a Master's of Science Degree in Geology from the State University of New York at Albany with eight years of experience as a professional scientist with the Illinois State Water Survey (with a principal focus on characterizing the ground water resources in Northeastern Illinois including Kankakee County, within 500 feet of the subject's site), personally inspected three wells and reviewed well logs near and on the site and concluded that the proposed facility sat within a Silurian dolomite aquifer, and that the bedrock was not an aquitard. (C1309-1315, 1369, 1391, 1395-1397, 1406-1409). In turn, he testified that the location of the proposed facility would be detrimental to the public health, safety and welfare because the landfill was actually being carved into a regional aquifer with no retardant *in situ* geology between the landfill and the drinking water supplies of tens of thousands of people. (C1452).

The fact that the dolomite beneath the landfill was improperly characterized as an aquitard is emphasized by the evidence that within a two mile radius of the site the average well depth is 115 feet, with a minimum well depth of 30 feet and a maximum well depth of 411 feet. (C1406). Accordingly, the evidence strongly suggests that the wells in the area are certainly drawing water from depths deeper than five feet below the top of the Dolomite layer, and are indeed drawing water from the dolomite into which the Applicant proposes to build its landfill. In other words, the Applicant is proposing the building of a landfill within the very aquifer from which over 300 wells in the immediate area draw their water.

The written application itself contains numerous and explicit admissions that the unweathered lower dolomite is actually an aquifer rather than an aquitard. For example, the Applicant's project engineer, Devin Moose, conceded the application acknowledges such at Volume I Section 2.2-26 that "Chebanse is the closest community which uses the Silurian

dolomite aquifer [for well water]". (C681: Applicant's Ex. 1, 10112). Furthermore, well No.37 (which is immediately outside the proposed facility), the application obtained its water between 47 feet and 100 feet within the bedrock. (Applicant's Ex. 1, 30021; C672). Mr. Devin Moose also conceded that other than this application, he was unaware of the Silurian dolomite ever being described in any geological study as an aquitard. (C688-689). Therefore, the conclusion that the dolomite is an aquitard (which the design relies upon) is not supported by the evidence or even the application itself. This is a fundamental concern.

The hydrogeologist Mr. Cravens unequivocally testified that the Silurian dolomite bedrock is simply not an aquitard, and the application's assertion that it is an aquitard "is the first representation [of such] I've seen in 20 years". (C1446). Hydrogeologist Sondra Sixberry also unequivocally testified "The Silurian dolomite is a known aquifer in this area and should be recognized as such." (C1288-1289). Mr. Moose admitted that the application acknowledges "the groundwater for the wells is obtained from the Silurian dolomite aquifer". (C677). Hydrogeologist Steven Van Hook testified that the applicant used only one test boring to conclude that the Niagaran dolomite was an aquitard. (C1212). Professor Sondra Sixberry and Hydrogeologist Stuart Cravens both agreed that one soil boring over a 265 acre site is a woefully insufficient basis to reach a conclusion that a bedrock formation which is (well-recognized to be an aquifer in this area) will somehow act as an aquitard at this specific site. (C1298, C1442-1443).

The Applicant admitted that further borings will be necessary to confirm its "theory" that the Silurian Dolomite may act as an aquitard, this is evidence that the applicant has failed to meet its burden of proving that the site is an appropriate location for the landfill. Given the fact that it is undisputed that tens of thousands of people use the Silurian dolomite aquifer for their water

source, and further given that the Applicant proposes to actually carve its landfill into the aquifer, the lack of sufficient study of the characteristics of the dolomite surrounding the landfill requires the inescapable conclusion that the applicant has failed to show that the landfill will be designed, operated, and especially located so as to protect the public health and welfare.

Therefore, the Kankakee City Council's finding that criterion ii was met is against the manifest weight of the evidence.

C. The Finding as to Criterion v was Against the Manifest Weight of the Evidence.

Criterion v requires that there be a showing that "the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills or other operational accidents". 415 ILCS 5/39.2(a)(viii)(2001). The application contains a Health and Safety Plan to be used by the landfill which provides that the local City of Kankakee Fire Department shall respond to all fire, spill or operational accidents at the facility. (Applicant's Ex. 1, p. 10404; C516-517). However, at the hearing the Applicant admitted that it has never spoken with the City of Kankakee Fire Department personnel to determine if they are equipped, staffed, and trained to handle those fires, spills and operational accidents which might occur at a landfill site. (C517-518).

The opinion of the Applicant's project engineer that Criterion v is met was based squarely upon the capability of the Kankakee Fire Department to respond to accidents at the facility, but neither the project engineer nor the Applicant ever verified that this local department could respond in the manner outlined in the application. Therefore, Applicant's opinion that Criterion v was met is based upon pure guess and speculation. Accordingly, the Kankakee City Council's finding that Criterion v was met was against the manifest weight of the evidence and the decision of the City approving the siting application should be reversed.

VII. CONCLUSION

For the foregoing reasons the County of Kankakee prays that the Illinois Pollution Control Board order that the decision of the City of Kankakee reversed, thereby entering an order denying site location approval with prejudice. This is particularly appropriate as the application is not, and cannot be, consistent with Criterion viii. In the alternative, the County prays that the City of Kankakee decision be vacated and this matter remanded to the City Council of Kankakee with a mandate to hold a fundamentally fair proceeding.

Dated: September 18, 2002

Respectfully submitted,
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