BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

FOX MORAINE, LLC, Petitioner, v. UNITED CITY OF YORKVILLE, CITY COUNCIL, Respondent.	)	PCB No. PCB 07-146

NOTICE OF FILING

TO: All counsel of Record (see attached Service List)

Please take notice that on June 12, 2009, the undersigned filed with the Illinois Pollution Control Board, 100 West Randolph Street, Chicago, Illinois 60601, Petitioner's Post Hearing Brief..

Dated: June 12, 2009

Respectfully submitted,

On behalf of FOX MORAINE, LLC

/s/ Charles F. Helsten
One of Its Attorneys

Charles F. Helsten
Hinshaw & Culbertson LLP
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389
815-490-4900

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Fox Moraine, L.L.C.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB No. 07-146
	)	
United City of Yorkville, City Council,	)	
	)	
Respondents.	)	

POST-HEARING BRIEF OF THE PETITIONER, FOX MORAINE, LLC

Charles F. Helsten
Hinshaw & Culbertson LLP
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389
815-490-4900

George Mueller
Mueller Anderson, P.C.
609 Etna Road
Ottawa, Illinois 61350
815-431-1500

TABLE OF CONTENTS

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Fox Moraine, L.L.C.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB No. 07-146
	)	
United City of Yorkville, City Council,	)	
	)	
Respondents.	)	

PETITIONER'S POST-HEARING BRIEF

NOW COMES the Petitioner, FOX MORAINE, L.L.C., by and through its attorneys, Charles F. Helsten and George Mueller, and for its Post-Hearing Brief, states as follows:

INTRODUCTION AND OVERVIEW OF THE CASE

The Petitioner, Fox Moraine, seeks review of the May 24, 2007 decision by the City Council of Yorkville, denying Fox Moraine's application for local siting approval of a new pollution control facility, a solid municipal waste landfill.

On September 26, 2006, the subject property, which had been located in an unincorporated area of Kendall County, was annexed into the City and the City approved a Host Agreement with Fox Moraine. On December 1, 2006, pursuant to Section 39.2 of the Act, the Petitioner filed a 5,062 page application for siting approval for the development of a solid waste landfill with the City of Yorkville. The landfill was proposed to be located in a rural area adjacent to State Highway 71, near its interchange with the proposed Prairie Parkway interstate highway. A lengthy public hearing commenced on March 7, 2007, during which the Applicant established, through eight expert witnesses, that all of the Section 39.2 siting criteria were met.

There was, as is often the case, substantial opposition to the idea of a landfill among area residents, with the principal opposition coming from Friends of Greater Yorkville ("FOGY"), a citizens' group, and Kendall County, which was considering a siting application from a competitor. To complicate matters, April 17, 2007 would be election day, on which aldermen, as

well as a mayor, were due to be elected. The landfill hearings were near completion at the time of the election, and with anti-landfill sentiment running rampant in the community, the landfill took center-stage during the campaign. An anti-landfill slate of candidates was elected, including Valerie Burd, who became the new mayor.

The Applicant presented a host of highly experienced experts to testify concerning the proposed site's exceptionally favorable geology, and the Applicant's state of the art landfill design, while objectors presented testimony by those with marginal, if any, landfill, engineering, or geologic experience who relied on information they had found on the internet, and on what some simply called "common sense," to oppose the request for siting.

Both the Hearing Officer, who has worked on over 30 landfill siting hearings in the past, and the City's Special Environmental Counsel (also an individual with substantial siting experience), who was hired to coordinate with the City's technical consultants to evaluate the evidence, produced reports that found the Applicant met all of the statutory siting criteria, with certain minimal conditions. Nevertheless, on May 24, 2007, staying true to their campaign promises, the newly-seated City Council voted to deny siting. Realizing that reversal was likely because of the strong, unrebutted evidence presented by the Applicant, the Council focused most of its attention on coming up with conditions to be applied if its siting denial was later reversed. However, in its haste to come up with conditions to attach to the denial, the City Council neglected to come up with reasons to explain how it could deny approval for a site that landfill experts had described as the best they had ever seen, especially where both the Hearing Officer and the Special Counsel had recommended approval.

Because the City Council's decision was clearly against the manifest weight of the evidence, and because the process here was corrupted by local politics, and failed to comport with the requirements of fundamental fairness, the Board should reverse the City Council's

decision and, based on the strength of the Record, find that the Applicant has met all statutory criteria and that siting should be granted.

I. The Actions of the City Council and the Procedures Used in This Case Were No Fundamentally Fair.

A. Standard of Review

When a local siting decision is appealed to the Board, section 40.1 of the Act requires the Board to consider the fundamental fairness of the procedures used by the local governing body. 415 ILCS 5/40.1. Where fundamental unfairness occurs, tainting the outcome, the local siting decision must be reversed. *E&E Hauling*, 116 Ill.App. 3d 586, 451 N.E.2d 555 (2nd Dist. 1993), *aff'd* 107 Ill.2d 33 (1985). The standard of review for fundamental fairness is objective, and asks whether a disinterested observer might conclude that unfairness or the appearance of impropriety has tainted the decision-making process. *Id.* Unfairness will be found to occur if a disinterested observer might conclude that the local decisionmaker has in some measure made a decision based on matters outside the record. *See Concerned Adjoining Owners v. PCB*, 288 Ill.App.3d 565, 680 N.E.2d 810 (3rd Dist. 1997).

ARGUMENT

A. Statutory Framework

This appeal concerns review of the interim siting decision of the Yorkville City Council on May 24, 2007, which denied Fox Moraine's Application for siting approval. Pursuant to §40.1(a) of the Act, the Board is vested with the responsibility to review the fundamental fairness of a proceeding for local siting approval:

> In making its orders and determinations under this section, the Board shall include in its consideration...the fundamental fairness used by the County Board or the governing body of the municipality in reaching its decision... (415 ILCS 5/40.1(a))

In making a decision on an application for siting approval, a local siting authority is called upon to act in a quasi judicial rather than a legislative manner. *City of Rockford v. Winnebago County Bd.*, PCB 87-92 (November 19, 1987). Accordingly, City Council members must make their decisions regarding a siting application based solely on the evidence before them in the record, and may not be biased in favor of or against the application. While the law presumes that public officials act without bias, the presumption can be overcome when "a disinterested observer might conclude that the administrative body or its members had in some manner adjudged the facts as well as the law of the case in advance of hearing it." *Concerned Adjoining Owners v. PCB*, 288 Ill. App. 3d 565, 680 N.E. 2d 810 (5th Dist. 1997); *see also Waste Mgmt. of Illinois, Inc. v. PCB*, 175 Ill. App. 3d 1023, 520 N.E. 2d 682 (2nd Dist. 1988). Of equal importance is the principle that collusion between an applicant (or, presumably, an opponent) and the actual decisionmaker, resulting in the pre-judgment of adjudicative facts, is fundamentally unfair. *Land and Lakes Co. v. PCB*, 319 Ill. App. 3d 41, 743 N.E. 2d 188 (3rd Dist. 2000).

Unlike many past cases which focus primarily on ex parté contacts, this is a case of pre-judgment and collusion, in which an organized and bold opposition group, working in consort with a highly ambitious politician, hijacked the decision-making process.

B. Factual Overview

As will be demonstrated in the text which follows, using citations to the Record, the City of Yorkville had begun, as early as Spring 2006, to consider annexing property owned by Fox Moraine so as to acquire jurisdiction over the landfill siting application which Fox Moraine was expected to file. At approximately the same time, Kendall Land and Cattle Company, an affiliate of Waste Management of Illinois, Inc., was negotiating a landfill Host Agreement with Kendall

County, a competition that would eventually lead the County to actively campaign against the Fox Moraine Application.

In September 2006, the Yorkville City Council held a meeting which was attended by a substantial number of boisterous landfill opponents, at which the City annexed the Fox Moraine property (previously located in unincorporated Kendall County), approved an annexation agreement, and approved a Host Benefit Agreement with Fox Moraine. The meeting occurred more than two months before Fox Moraine filed its siting application, and in the two months that followed, the City Council would conduct a number of meetings to address preliminary matters relating to the anticipated landfill siting application, including the introduction of the City's technical experts to the public, as well as an explanation of the upcoming siting process. Those meetings would also address more controversial subjects, such as vacating a road that transected the proposed landfill site; the re-annexation of the subject property due to a previous notice defect; and, perhaps most controversial, the City's defense of its Host Agreement terms in the wake of opponents' criticism that the County had reached a more favorable Host Agreement with Kendall Land and Cattle Co.

Opposition attendance at these meetings was both loud and boisterous. Two Aldermen, Rose Spears and Valerie Burd, who had initially endorsed the concept of the City hosting a landfill, began presenting themselves as highly critical of Fox Moraine and the "process," and quickly emerged as "champions" of the opposition. Alderman Burd soon announced her candidacy for mayor of Yorkville. At the same time, the more strident and vocal opponents formed a citizen's group, Friends of Greater Yorkville, (hereinafter "FOGY") with intent to mobilize opposition to the landfill. Unbeknownst to Fox Moraine, Alderman Burd's mayoral campaign committee featured a number of FOGY founders and officers.

Thereafter, Fox Moraine filed its siting application on December 1, 2006, but by the time the statutory public siting hearing commenced on March 7, 2007, the opponents' crusade to defeat Fox Moraine's Application was well underway. Valerie Burd and her slate of three anti-landfill aldermanic candidates were elected on April 17, 2007, shortly before the end of the public hearings. By then, the campaign of intimidation by the landfill opposition had caused one alderman to resign, and several others to report threats made against them to law enforcement officials. Mayor-elect Burd would eventually crown her achievement by hiring a new law firm before she was even sworn in as mayor, and would direct the new lawyers, without any authorization from the City Council, to begin orchestrating a legal justification for the denial of the Fox Moraine siting Application, so that by the time the Council was ready to begin "deliberations" on the Application, its denial would be a *fait accompli*.

As will be demonstrated below, again utilizing detailed references to the Record, most of the foregoing is undisputed, and, in fact, much of it comes directly from the mouths of the participants themselves. The smoking gun in this case is an invoice from the Wildman law firm, which details dozens of hours spent on research to facilitate denial of the siting application, prior to Valerie Burd even being sworn in as mayor.[1] Ms. Burd's conduct in orchestrating the defeat of the Fox Moraine application to advance her own political career is rivaled only by the outrageousness of her testimony, which is so patently false that the Board should feel completely justified in resolving all credibility questions against Burd and her allies.

C. The Deliberative Process Privilege in Illinois

The Board has never reversed a local siting denial based on a finding that it was against the manifest weight of the evidence, although the Appellate Court reversed on that ground in

---

[1] As discussed in detail below, Burd located the Wildman firm and had them begin work on defeating Fox Moraine's Application at least 11 days before she was sworn in as Mayor.

Industrial Fuels and Resources v. PCB, 227 Ill. App. 3d 533, 592 N. E. 2d 148 (1st Dist. 1992). Moreover, the Board has not reversed a local denial based upon a finding that the proceedings were fundamentally unfair in almost 22 years, since *City of Rockford v. Winnebago County Bd.*, PCB 87-92 (November 19, 1987). In reversing the local siting denial in *City of Rockford* as fundamentally unfair, this Board held, *inter alia*, that the County Board members in that case made little real distinction between their quasi-judicial functions and their legislative functions. (Slip opinion at p. 19). In so holding, the Board noted that the testimony of County Board members indicated a lack of familiarity with the statutory criteria, and with the siting committee recommendations.

In the two decades since *City of Rockford*, the deliberative process privilege, as that concept is applied in Board decisions, has expanded considerably, to the point where there is now little doubt that questions regarding a decision-maker's familiarity with the statutory criteria, or familiarity with the contents of a committee recommendation, would be disallowed as invasive of the deliberative process privilege. This is a highly problematic trend, inasmuch as one cannot determine whether a decision-maker relied on information outside the record if one cannot even ask the question in the first place, and is inherently unfair, inasmuch as the deliberative process privilege has become a shield behind which decision makers hide to avoid disclosure of the fact that their decision was not based on the evidence presented.

Finally, while distinguishable on its facts, the principle announced by our Supreme Court in *People, ex rel Birkett v. City of Chicago*, 184 IL 2d 521 (1999), that the deliberative process privilege does not exist in Illinois, is completely applicable here, where bad faith and government misconduct pervade, and indeed lie at the very heart of the decision-making process.

At the public hearing conducted by the Board in this appeal, during April of this year, Fox Moraine filed a Hearing Brief and Offer of Proof regarding deliberative process privilege,

and the contents of said Brief and Offer are incorporated herein by reference, in their entirety. Because this is, at its core, a case that is suffused with bad faith, the Board is urged to revisit its previous holdings on deliberative process. Additionally, the Board is asked to consider some of the most damaging testimony and admissions by Mayor Burd and various Council Members at the recent Board hearing, which were elicited in the form of offers of proof. Fox Moraine urges the Board to find that this testimony should be properly admitted as evidence, and that it should be considered alongside all the other evidence of fundamental unfairness.

In recent landfill siting appeals, there appeared to be ample evidence presented by the petitioners that at least some local decision-makers based their denial on legislative rather than quasi-judicial considerations, and in each of those cases, the deliberative process privilege was allowed to remain intact: *Rochelle Waste Disposal v. City of Rochelle*, PCB 03-218 (Apr. 15, 2004); *Peoria Disposal Co. v. Peoria County Board*, PCB 06-184 (June 21, 2007). What distinguishes those cases from the instant case is that in each of them, the evidence could be construed to conclude that while the decision-makers may have been at times misguided and mistaken, they acted, by and large, with good intentions and in good faith. Where good faith has been in evidence, the Appellate Court has declined to hold local adjudicative decision makers to the same standards as a judicial body. *Southwest Energy v. PCB*, 275 Ill. App. 3d 84, 655 N.E. 2d 304 (4th Dist 1995).

What sets this case apart, however, is that the evidence here does not reflect good intentions. Rather, it show the very worst of intentions, including evidence of an organized intent to put personal, political aspirations ahead of official responsibilities.

D. The Prehearing Meetings

It is virtually axiomatic that pollution control facility proposals, especially landfills, generate loud, often virulent, public opposition. This is particularly true with green field

landfills, where nearby residents frequently coalesce into a natural opposition constituency. It is, therefore, not surprising that no new landfill has been built in Illinois since the Prairie View Landfill in Will County received siting approval more than a decade ago, and even Prairie View was exceptional in that its location within the old Joliet Arsenal complex meant there was no natural N.I.M.B.Y. constituency.

Compounding the problem, the internet has transformed retirees and homemakers into self styled anti-landfill experts, and has allowed landfill opponents to become better organized and more able to track and build upon each others' activities. Some have become semi-professional itinerants, traveling from hearing to hearing to share their anti-landfill gospel.[2]

In this case, the landfill siting saga effectively began in the spring of 2006, when City Attorney John Wyeth authored a series of confidential memos for the City Council, discussing the City's strategy for annexing a number of properties in order to facilitate the City's acquisition of jurisdiction over Fox Moraine's property, and, accordingly, the much-anticipated landfill siting application. (PCB 07-146 Transcript of 4-21-09 (hereinafter: "PCB Tr.") at p. 198). In late August 2006, Charlie Murphy, Fox Moraine's project manager, and James Burnham, another Fox Moraine representative, met with the City Council members to advise them of Fox Moraine's intention to be annexed into the City for the purpose of filing a landfill siting application. (PCB Tr. 4-22-09, pp. 177, 178, 206) Thus, Fox Moraine's intentions and subsequent actions were no surprise to any of the aldermen.

At the hearing in the instant appeal, Fox Moraine entered into evidence as FM Exhibits 1-9, the transcripts of nine City Planning Commission and City Council meetings that took place between September 25, 2006 and January 23, 2007. All but the January 23, 2007 meeting (which

---

[2] For example, Carolyn Gerwin from Pontiac and Keith Runyon of the many Kankakee landfill siting hearings both graced the Yorkville hearings with their participation. C7585-C7644, C11125-C11177.

dealt with re-annexation of the subject property) took place prior to Fox Moraine's filing of its siting application on December 1, 2006. It was during these meetings in the Fall of 2006 that Aldermen Burd and Spears became the champions of the objectors' cause, and it was at this time that the incessant and intimidating clamor of the objectors began to wear down the will of the other Aldermen to act fairly.

On September 25, 2006, the Yorkville Planning Commission conducted a public hearing on the proposed annexations. The transcript of that hearing is 200 pages, consisting almost entirely of public statements opposing annexation and the anticipated landfill it would make possible. (FM Ex. 1)[3]. One of the first to speak was Arden Plocher, then a County Board candidate and subsequently a member of Burd's anti-landfill slate, who was later elected as a Yorkville Alderman and ultimately voted no on the application. Plocher stated,

> Since we already bit the bullet and we opened up the landfill question, I just wanted to make a statement to everybody out there. You understand if this alleged proposal for a landfill goes through, the counsels on both sides which represent you, the tax payer, will be using your tax money with legal ways to fight your tax money. This is a way for Hamman[4] and anybody else to get what they want on your dime. (FM Exhibit 1 pp. 36, 37).

Later in the same meeting, Plocher spoke again, this time more directly stating his anti-landfill feelings, explaining that he does not want Yorkville to smell "worse than it already does." (FM Ex. 1 p. 109).

Another frequent anti-landfill speaker at the Planning Commission meeting was Todd Miliron, who would later emerge as the most strident landfill opponent. Miliron spoke seven times during the meeting. (FM Ex. 1 pp. 18, 37, 45, 73, 77, 105, 132) The meeting was interrupted by applause for anti-annexation, anti-landfill questions or statements 32 times. (FM

---

[3] Exhibits entered into evidence by Fox Moraine in the Board proceedings are referenced as "FM" followed by the exhibit number.

[4] The reference to Hamman is to Donald Hamman, majority owner of Fox Moraine.

Ex.1 pp. 19, 34, 34, 35, 35, 35, 36, 37, 43, 51, 66, 68, 70, 72, 73, 78, 85, 85, 107, 108, 110, 112, 115, 115, 147, 151, 154, 157, 157, 162, 168, 169).

The following night (September 26, 2006) the City Council met to consider the Fox Moraine and related annexations, an annexation agreement with Fox Moraine, approval of a Host Agreement, and an amendment to the pollution control facility siting ordinance. The transcript of this meeting is 267 pages, and this meeting was interrupted by applause for anti-landfill, anti-annexation sentiments 18 times. (FM Ex. 2 pp. 16, 22, 25, 26, 26, 26, 27, 28, 34, 34, 60, 95, 115, 150, 179, 206, 212, and 230). Again, a frequent speaker and recipient of applause was Todd Miliron, whose remarks included the declaration that, "[t]he only emergency is Mr. Hamman has lost out in the bidding competition to the current county landfill site process." (FM Ex. 2 pp. 24, 25) Additional excerpts from Miliron's comments on September 26, 2006 appear in the Amended Motion of Petitioner Fox Moraine, LLC for a Finding That Valerie Burd Was Not a Credible Witness, previously filed with the Board; to avoid repetition, the motion, with its quotations, is incorporated by reference herein and made a part hereof.

Also attending the September 26, 2006 City Council Meeting was Kendall County special environmental counsel, Michael Blazer, who opined at length concerning his opinion that the County Solid Waste Management Plan prohibited siting of a landfill in Yorkville, and that the proposed Host Agreement between Fox Moraine and Yorkville was inferior to the Host Agreement contemplated between Kendall County and Kendall Land and Cattle Co. (which he himself, of course, had negotiated). Blazer also announced that the County intended to work to oppose any attempt to develop a landfill in Yorkville. (FM Ex. 2 pp 174-179) Blazer concluded by telling the City Council to stop the landfill by voting against the annexation, urging the Aldermen to "stop this runaway train now." (FM Ex. 2, pp. 178, 179).

Alderman Rose Spears voted "no" on the annexation, "no" on the annexation agreement, "no" on the Host Agreement, and "present" on amending the City's pollution control facility siting ordinance. When she testified at the Board hearing, she claimed she did not remember the meeting, or whether the noisy crowd at the meeting was opposed to annexation and a landfill. (PCB Tr. 4-21-09, p. 45). Spears also claimed she could not remember voting on the annexation issue. (PCB Tr. 4-21-09, p. 44). Ms. Spears' testimony became even more incredible when she testified under oath that she did not know that the annexation of the Fox Moraine property was connected to a possible landfill. (PCB Tr. 4-21-09, p. 141). After extensive questioning, Spears finally admitted that she remembered the general subject matter of the annexation, but then stated that she thought the annexation agreement was illegal, and voted "no" on the Host Agreement because it would require that Sleepy Hollow Road be vacated. (PCB Tr. 4-21-09 pp. 71, 69). However, Ms. Spears' testimony is entirely at odds with the transcript of that meeting, which reveals that the main thrust of the public speakers at the meeting (including Todd Miliron and County attorney Mike Blazer) was that voting no on the annexation would stop the Fox Moraine landfill project in its tracks.

By the end of the September 26, 2006 meeting, the cards were on the table. The fact that the City would have to vacate a road to accommodate the landfill, as well as the fact that the County felt it had a favorable Host Agreement with its proposed developer and would fight any attempt by the City to develop a landfill, were obvious to all concerned, including the public.

Alderman Valerie Burd, who also voted "no" on annexing the Fox Moraine property, "no" on the annexation agreement, and "no" on the Host Agreement on September 26, like Rose Spears, testified under oath that she had no idea any of these items were related to a possible landfill (PCB 4-21-09 pp. 175, 178), although she, too (like Rose Spears), was able to remember

meeting with Fox Moraine representative, Charlie Murphy, a month before casting her September 26th votes.

Burd's failure to connect the annexation process with a possible landfill is not only contradicted by the written record itself, including the language in the annexation agreement, but is also contradicted by the testimony of another Alderman, Joe Besco, who testified that he first became aware of the possibility of annexation when Valerie Burd called him to advocate for the possibility of obtaining landfill revenue for the City. (PCB 4-22-09 p. 154) Besco recalled that Burd called him numerous times thereafter to talk about annexation, so that the City could realize tipping fee revenues from the landfill. (PCB 4-22-09, p. 156). However, Besco further testified that on the night of September 26, Alderman Burd was sitting next to him, and upon seeing the large public turnout turned to him and said, "Look at the large -- look at the crowd. What should I do?" (PCB 4-22-09 p. 158) He observed that from that moment forward, Valerie Burd did a 180 degree switch from her prior position. Her political aspirations had found a way to take flight.

What followed was a seemingly endless series of meetings to debate the merits of the City's Host Agreement vs. the County's Host Agreement, the vacating of Sleepy Hollow Road, and the ultimate re-annexation of the Fox Moraine property due to an apparent technical defect in notice. As evidenced by the transcripts, Mayor Prochaska allowed anyone to talk at virtually any time, which allowed the meetings to become a streaming, real-time forum for any and all landfill opponents to attack Fox Moraine.

Six such meetings occurred between October 10, 2006 and November 30, 2006, with the transcripts admitted at the hearing in this appeal as FM Exhibits 3-8, inclusive. The public comments at the meetings generally constituted a relentless and continuing *ad hominem* attack

on the Mayor and the Aldermen for having moved ahead with the annexation of the Fox Moraine property in the first place.

During the meetings, Rose Spears and Valerie Burd rapidly emerged as the darlings of the opposition speakers and crowd. As an anonymous audience member put it, during the October 30, 2006 meeting, "Let me tell you something, the mayor and this Council has done so many things deceitfully, how could we ever begin to trust this except for two of the Council members." (FM Ex. 5 p. 49). To appease their new adoring fans, Aldermen Spears and Burd embraced the idea that Fox Moraine had negotiated a Host Agreement that was unfavorable to the City. More significantly, because vacating a road requires a super majority and approving an annexation agreement only requires an ordinary majority, Spears and Burd suggested that Fox Moraine had surreptitiously included the requirement to vacate Sleepy Hollow Road in the annexation agreement, and that this rendered the annexation agreement void. Such talk quickly turned to threats of litigation. Despite her other numerous memory lapses, Alderman Spears was clear in her recollection at the hearing in this appeal that the City felt it was at risk for being sued because it allegedly did not follow state statute procedures in vacating Sleepy Hollow Road. (PCB Tr. 4-21-09 p. 90) On the subject of that threat, at the October 24, 2006 City Council Meeting, Spears stated,

> I just would like to add one thing. What I am hearing here is regardless we are going to have a lawsuit against us. The petitioner may sue us or other people may sue is. I, I would take the chance of having, if we were so threatened the petitioner sue us, because clearly, I don't think this would stand up in Court because again, it is against state statute. So if we have a choice of two lawsuits, why don't we take what the best alternative is? Vote no. Protect our City. (FM Ex. 4 pp. 185, 186)

At the previous meeting, Spears had stated, "I would just like to add that with our past votes and our special meetings and everything, that it is still questionable whether what we did

was legal, even though we were directed that it was correct and legal. I still have questions about that and I am still researching that."[5] (FM Ex. 3 p.).

Spears opined at the October 24, 2006 meeting that she had concerns about the Host Agreement, and further opined that, "I would like to add that I have found out that it is illegal to put that in an annexation agreement, vacation of a road." (FM Ex. 3 p. 67). She later added, "What is in the public interest? I really want to know. None of this." (FM Ex. 3 p 170)

After she voted no on vacating Sleepy Hollow Road, Alderman Spears' feelings about Fox Moraine were absolutely clear. At the October 30, 2006 meeting, she stated (referring to the annexation agreement), "We did have vacating Sleepy Hollow Road in there, and I believe that really should not have been in the annexation agreement and I have stated this several times..." (FM Ex. 5 p. 161).

Alderman Burd joined with Spears in opposing the vacation of Sleepy Hollow Road and in insinuating that the Council had been somehow tricked. At the October 24, 2006 meeting she stated, "And it's just logic to know that there is a problem here and some bells should have gone off. We shouldn't just listen to advice of the attorney and follow like sheep down the road. I mean we have brains and we should think about this, and that's why I have no problem voting against this." (FM Ex. 4 p. 155). Alderman Burd continued, "And I would like to point out, I voted against every single annexation that was leading up to this whole thing, all 6 of them and then the 4. I voted against every single one of them and I feel that I have a clear line too, of defense why I am doing what I am doing." (FM Ex. 4 p. 168-69). While former Alderman (now Mayor) Burd testified at the Board hearing that she never made an anti-landfill statement before the final vote on the siting application, she did admit that when she voted against the Sleepy

[5] Alderman Spears was an avid "independent researcher," as is discussed in the sections follow.

Hollow Road vacation, she knew that vacating the road was necessary to facilitate the landfill. (PCB Tr. 4-21-09 pp. 173, 175)

On January 23, 2007, at the City Council meeting to re-annex the Fox Moraine property, Alderman Burd passed out written information explaining how Fox Moraine allegedly breached the annexation agreement, and why it should be required to renegotiate. (FM Ex. 9 p. 120). Notably, when she testified at the Board hearing herein, Ms. Burd had absolutely no recollection of either passing out the information or of wanting to renegotiate any issue with Fox Moraine. (PCB Tr. 4-21-09 pp. 180, 181)

One of the most outspoken landfill opponents during this series of meetings prior to the commencement of the official siting hearing, was Ron Parrish, an officer of FOGY (PCB 4-21-09 p. 154). Nine of Mr. Parrish's more noteworthy anti-landfill statements, made between September 26, 2006 and November 30, 2006 are detailed in Fox Moraine's Amended Motion for A Finding that Valerie Burd was a Credible Witness, and need not be reiterated herein, except to note that at the very first meeting of the City Council on the annexation issue, Parrish decried the fact that nothing had been done "to help this or any of us out on that road to stop this landfill from going." (FM Ex. 2 p. 85).

It cannot be over-emphasized how loud, strident and disruptive the opposition speakers (particularly Miliron and Parrish) were during the nine meetings that preceded the start of public hearings on Fox Moraine's siting application. Devin Moose, the senior engineer for development of the Fox Moraine application and director of the St. Charles office of Shaw Environmental, testified that he has developed 60-70 siting applications and attended approximately 100 public hearings. (PCB Tr. 4-22-09 pp. 99-108). He described the opposition crowd he observed at the Council meetings and public hearings as the very worst he has ever seen. (PCB Tr. 4-22-09 pp. 111, 127). He observed, first-hand, the palpable effect that the disruptive behavior had on

Council members, which was reflected in both their body language and their demeanor. (PCB Tr. 4-22-09 p. 130) He noted that Todd Miliron and Ron Parrish were particularly ill-behaved. (PCB Tr. 4-22-09 p. 147). His observation was confirmed by Alderman Besco, who commented on the regular and forceful attacks leveled by Miliron and Parrish. (PCB Tr. 4-21-09 p. 162). Similarly, Fox Moraine project manager, Charlie Murphy, recalled that the annexation, Host Agreement and Sleepy Hollow Road meetings were constantly interrupted by anti-landfill diatribes. (PCB Tr.4-22-09 p. 179). He also recalled the taunting and cackling of audience members directed toward some of the elected officials, while objectors regularly cheered and lauded certain Council members, particularly Rose Spears and Valerie Burd. (PCB Tr. 4-22-09 pp. 181-184). Murphy recalled that police intervention was required during at least one Council meeting. (PCB 4-22-09 p. 194). Mr. Murphy concluded that Mayor Prochaska attempted to keep control of the meetings, but only suffered additional abuse for his efforts. (PCB 4-22-09 p. 186).

It is telling to note the reaction of various Council members to this sordid behavior. Alderman Spears (for reasons that have now become obvious) had no problem with the unruly opponents. (PCB 4-21-09 p. 106) Similarly, Wally Werderich, who admitted that he was one of the co-founders of FOGY, and who did the legal work to get FOGY incorporated, testified at the Board hearing that the public at the City Council meetings never acted inappropriately. (PCB 4-21-09 pp. 301, 303, 309) (Werderich was elected as an Alderman on April 17, 2007 and voted against the Application.)

Valerie Burd at least conceded in her testimony at the Board hearing that during the annexation and the landfill hearings, her friend, Todd Miliron was periodically threatened with eviction for his improper and unruly conduct. She acknowledged his disruptive conduct, but also, tellingly, noted it did not embarrass her. (PCB 4-21-09 pp. 187, 188)

While boisterous and disruptive conduct at public meetings is bad enough, the conduct of the opponents in this case went far beyond being simply disruptive. It also took the form of threats and personal intimidation. Aldermen Bock and James, who were subsequently defeated in their reelection bids, both received anonymous telephone threats. (PCB 4-21-09 pp. 82, 83) Alderman Munns, who ultimately voted against the application, and Alderman Besco, the only alderman who voted in favor, were also threatened via telephone. (PCB 4-22-09 p. 159) Aldermen Munns and Besco both testified they were subjected to name-calling during the meetings. (PCB 4-22-09 pp. 75, 163) Mr. Murphy recalled Alderman Leslie, who also ended up voting against the application, had to file a police report at one point. (PCB 4-22-09 p. 198) The tumultuous uproar culminated on March 9, 2007, the third night of the public hearing on the siting application, when City environmental attorney, Derke Price felt constrained to announce publicly that members of the City Council had received threatening phone calls at their homes the previous evening. (C0860) Clearly, the situation in Yorkville had spun out of control, and, to their ultimate detriment, virtually the only ones who remained restrained during all of this were the representatives of the Applicant, Fox Moraine Landfill.

E. The Election Campaign

As acknowledged by Yorkville City Administrator, Brendan McLaughlin, in a verified pleading filed with the Board in PCB 08-95, United City of Yorkville v. Illinois Environmental Protection Agency and Hamman Farms, the 2007 municipal elections in Yorkville focused almost exclusively on the landfill. McLaughlin verified that:

> The actions of Hamman relating to environmental concerns and its application for landfill permitting are the biggest issues in Yorkville in the past 20 years. Hamman has been the subject of numerous public meetings and was the primary issue in the City election and change in administration."

(FM Ex. pp. 29, 30, PCB 4-22-09 pp. 51, 52)[6] (emphasis added).

Despite the foregoing admission by the City in a verified pleading, Valerie Burd nevertheless testified that she was not an anti-landfill candidate for mayor. (PCB 4-21-09 p. 174) This assertion by Ms. Burd was initially corroborated by Alderman Munns, who originally denied Burd was associated with anti-landfill groups. (PCB 4-22-09 p. 77). Munns, however, later acknowledged that in his discovery deposition in this case he testified that Burd's open association with anti-landfill groups was "public knowledge." (PCB 4-22-09 p. 78).

The most compelling evidence, however, lies in Valerie Burd's personal and political associations, which are permeated with landfill opponents. Ms. Burd acknowledged that Todd Miliron, Ron Parrish, and Wally Werderich were members of her campaign committee. (PCB 4-21-09 p. 181). Alderman Plocher confirmed the involvement of these three individuals, and also added that he was a member of Burd's campaign committee, as was Ed Sleezer. (PCB 4-22-09 p. 18) It is not surprising Sleezer was never disclosed by Burd, because he testified as an "expert" for FOGY concerning Criterion (iii). (C13480).

FOGY, as mentioned above, was the lead opposition group. It appeared by counsel, cross-examined witnesses and presented self-styled "expert" witnesses. (C08095) As an example of the depth of FOGY's commitment to opposing the landfill, it filed over 1,100 pages of pre-hearing "evidence," mostly generic material off the internet. (C. 6473-C. 7584).

Mayor Burd's campaign committee is the heart of the organized effort to defeat Fox Moraine's Application. Ron Parrish's frequent and vocal opposition statements at the pre-public hearing meetings have already been detailed in Fox Moraine's separate motion regarding Burd's credibility. An original officer of FOGY, Parrish also donated thousands of dollars to Ms. Burd's

---

[6] This information was received by the hearing officer at the Board hearing as an offer of proof, but should be accepted as substantive evidence since it constitutes a damaging admission against interest by the City of Yorkville.

campaign in cash and kind, which she conveniently chose not to disclose in her campaign contribution reports. (PCB 4-21-09 pp. 159, 196)

Wally Werderich acknowledged that he spoke out in the meetings against annexation and that he knew the way to stop the landfill was to stop the annexation. (PCB 4-21-09 pp. 302, 304) He admitted mobilizing opposition through an email campaign, and acknowledged that with his help, FOGY was founded shortly after the annexation hearing. (PCB 4-21-09 pp. 301, 308, 313). Werderich also acknowledged there were many anti-landfill people at the annexation and related meetings, and that he decided to run for Alderman because he felt the Council was not listening to its constituents regarding their opposition to the idea of a landfill. (PCB 4-21-09 p. 316) He admitted that during his campaign, he handed out literature that informed would-be voters that he was the very first to question the City's annexation of the landfill property. (FM Ex. 28)

Alderman Plocher, as previously described, decried the smell of landfills at the original Planning Commission hearing on September 25, 2006. Like Werderich, his campaign was funded with the help of contributions from Todd Miliron and Ron Parrish. (PCB 4-21-09 p. 311, PCB 4-22-09 p. 18)

Todd Miliron's strident, anti-landfill vocalizing, both at the pre-hearing meetings and at the public hearing, have already been discussed, and are detailed at length in Fox Moraine's motion regarding Valerie Burd's credibility. Parrish identified Miliron as one of FOGY's three charter members. (PCB 4-21-09 p. 155) While he presented merely as an obstreperous and rude loudmouth at the meetings, Miliron was actually a political insider, sitting on Valerie Burd's mayoral campaign committee and assisting with the campaigns of anti-landfill candidates Plocher and Werderich. Some of Miliron's statements were truly beyond the pale, such as his statement that saying a landfill can be safe is akin to telling a Jew that Auschwitz is summer camp. (C13339). While Miliron relentlessly attacked Mayor Prochaska at the meetings, he took

special care, at the October 30, 2006 meeting, to pay homage and extend his thanks to "Rose and Ms. Burd." (FM Ex. 5 p. 146).

A tipoff that there was more to Todd Miliron than met the eye (or ear), was the fact that at the March 26, 2007 session of the public hearing on the landfill application, Miliron read into the record a previously confidential and undisclosed memo from City Attorney, John Wyeth, dated April 6, 2006, regarding the City's strategy for annexing the Fox Moraine property. (C13316) Alderman Burd acknowledged releasing these memos to the press a short time later, but denied giving them to Miliron. (PCB Tr. 4-21-09 pp. 196-198). Notably, these confidential memos were released approximately three (3) weeks before the mayoral election.

It is indisputable from the record that the most steadfast, vocal members of the landfill opposition joined forces in Valerie Burd's campaign committee. Ms. Burd's responses to questions on this subject during the hearing in this appeal defy comprehension. She testified under oath, and unequivocally, that she did not know that Todd Miliron and Ron Parrish were landfill opponents. (PCB Tr. 4-21-09 p. 182). She asserted that she could not recall whether she had ever heard Ron Parrish speak out against the landfill. (PCB Tr. 4-21-09 p. 183). She stated she was never aware that Miliron opposed the landfill. (PCB Tr. 4-21-09 p. 184). She further testified that she did not know Wally Werderich was a founding member of FOGY. (PCB Tr. 4-21-09 p. 185). Such testimony truly mocks the Oath.

The most that Ms. Burd would admit was that she was opposed to the way the landfill process was handled, and that she had campaign signs in close proximity to anti-landfill signs. (PCB 4-21-09 pp. 191, 197). Interestingly, as the reigning mayor, she acknowledged the presence of an anti-landfill sign on City property during the Board hearing in April 2009. (PCB 4-21-09 p. 239). One of Burd's committee members, Alderman Plocher, denied having his signs in close proximity to anti-landfill signs, but, on further examination, acknowledged he had

admitted it during his deposition. (PCB 4-22-09 pp. 19, 20) Plocher at least recalled the obvious: that his campaign contributors, Ron Parrish and Todd Miliron, publicly opposed the landfill at the pre-siting hearing meetings. (PCB 4-22-09 p. 21)

Another of Valerie Burd's connections to the opposition groups was her relationship with Dan Kramer, a local Yorkville attorney who appeared and participated actively throughout the siting hearing on behalf of Virginia Wells, a neighbor to the Fox Moraine property and opponent of the landfill. (C08096). Valerie Burd acknowledged Kramer was her family attorney, but testified she did not remember that he represented an opponent at the public hearing, despite the fact that he was present and cross-examining Fox Moraine witnesses almost every day. (PCB 4-21-09 p. 188). Arden Plocher acknowledged Kramer was also his personal attorney, based, interestingly enough, on a recommendation from Valerie Burd. (PCB 4-22-09 p. 19).

While not a member of Burd's campaign committee, Alderman Robyn Sutcliffe did, according to Rose Spears, run on a slate with Burd, Wally Werderich and Arden Plocher. (PCB 4-21-09 p. 84) Sutcliffe denied running on this slate, stating she did not know any of the other candidates. (PCB 4-21-09 p. 293). In her case, however, the evidence of pre-judgment comes from her own web site, the "Third Word Advisor," and published campaign materials for the purpose of facilitating her election as Alderman. (PCB 4-21-09 p. 259, 260) Ms. Sutcliffe produced four documents that she authored and published on her web site, which were admitted as FM Ex.s 20-23. These documents reveal her clear bias, pre-judgment, and political agenda:

> "Yorkville citizens have become aware of the proposed landfill that is to be situated close to our city. An organization. Friends of Greater Yorkville (F.O.G.Y.) was formed to, "fight City Hall" on this particular issue." (FM Ex. 20)
>
> "A standing room only crowd toted "no landfill" signs and applauded on cue when their hero, Rose Spears, poked holes into the Fox Moraine's threatening statements." (FM Ex. 21)

"It seems clear that Prochaska and several other Aldermen are bending to the will or hidden financial incentives offered by Fox Moraine." (FM Ex. 21).

"According to the Beacon News, both Aldermen from Ward 3 voted in favor of the first annexation after meeting privately with lawyers from the landfill owners. This, in my opinion, is unethical and is cause for new leadership." (FM Ex. 21).

"I am asking you to take action. If you want to stop the landfill you can do several simple things to make a difference. Vote for new leadership by voting for Robyn Sutcliffe on April 17, 2007! I will vote against the annexation of landfill property." (FM Ex. 21).

"This is the big one. The annexing of the property that, oh we can't talk about its end use, may house a landfill. Many residents shared their comments with the Council and the crowd." (FM Ex. 23).

"Alderman Burd said she had talked to a representative from the Library. They had met with the petitioner and they were now satisfied with the agreement they had come to with the petitioner. I think we all know what this means. Cha Ching, Cha Ching. Look for a new library in Newark?" (FM Ex. 23).

"A Record newspaper was given to all Aldermen and the mayor. It had a photo of the mayor with Don Hamman next to him. This is before the vote on the landfill. I have posted these photos and dates for your analysis." (FM Ex. 23)

"There is a huge cut in Yorkville. This cut is bleeding. Lies, deception and rumors. The Council has done wrong. You have been caught doing wrong. Do the right thing. This is your community talking to you. Please listen." (FM Ex. 23)

"We live in a republic. We elected you to represent us. We are telling you to vote no. It is the voice of the people. You have to abide by the voice of the people." (FM Ex. 23).

"This is regarding the vacationing (giving away) of Sleepy Hollow Road. Giving this road to the petitioner was part of the first annexation agreement. That's right. Giving them a road, no money to change hands. This allows for road access to the landfill." (FM Ex. 23)

"The vacationing of the road is for the eventual purpose of making money. What's a human's life worth?" (FM Ex. 23)

Based on the foregoing, Alderman Sutcliffe's agenda and pre-judgment are clearly established. Although §39.2(d) provides that "The fact that a member of the County Board or governing body of the municipality has publicly expressed an opinion on an issue related to a site review proceeding shall not preclude the member from taking part in the proceeding and voting on the issue," the statements of Alderman Sutcliffe while she was a candidate for office go far beyond a mere expression of opinion. Those statements are inflammatory, and more importantly, announce her explicit, unconditional promise to vote "no" on Fox Moraine's siting Application.

Sutcliffe further acknowledged in her testimony before the Board that her web site was linked to the FOGY website. (PCB 4-21-09 p. 264). Moreover, her reference to Rose Spears as the "hero" of the anti-landfill contingent is telling. As Sutcliffe acknowledged, opponents cheered when Spears spoke at meetings. (PCB 4-21-09 p. 273).

F. The Public Hearing

The public hearing on the siting application commenced on March, 7, 2007. While it is obvious from the foregoing that many of the candidates and aldermen had already decided how they would vote on the application, Valerie Burd and Wally Werderich did all they could to undermine the statutory public hearing before it even began. Wederich stated as early as the November 30, 2006 meeting of the City Council, that, "The hearing process presents only one side of the story. That's the side of the people who want to put in the landfill." (FM Ex. 9 p. 170). At the same meeting, Valerie Burd asked whether the City could pay for legal representation for the "citizens groups." When told this would not be possible, she remarked, "So it's kind of an unfair bias already against the anti people." (FM Ex. 9 pp. 27, 28).

The objectors' behavior at the public hearing continued to be disruptive. (PCB 4-22-09 p. 164). On the first day, the record reflects laughter by the crowd when counsel for Fox Moraine, in his opening statement, noted that an experienced appraiser would testify that the facility will

not negatively impact surrounding property values. (C08112-13). Subsequently, the hearing officer had to interrupt counsel's opening statement to admonish the audience to show some courtesy. C08116; C08118).

Shortly after the public hearings began, one of the aldermen, Dean Wolfer, resigned his position. Fox Moraine's project manager, Charlie Murphy was not allowed to testify as to why Wolfer resigned precipitously, but the totality of the circumstances clearly support the inference that he quit because of intimidation, the unruly behavior of the opponents, and threats received by Council members. (PCB 4-22-09 p. 195) Wolfer was replaced by acting Alderman Gary Golinski, who first appeared at the public hearings on March 14, 2007. (C09759)

Devin Moose, in his testimony before the Board, noted that in his professional and experienced opinion, the public hearings were being intentionally dragged out and prolonged by the opponents. (PCB 4-22-09 pp. 105-110) This tactic appeared to be designed to ensure that a final vote on the Application would not take place until after the opposition group's anti-landfill candidates could be seated as aldermen. The facts bear Mr. Moose out, and demonstrate that the opposition's tactics were effective. Although the hearing officer took frequent public comment by citizens throughout the hearing, including in the early stages, Fox Moraine was able to conclude its case early on March 24, 2007. (C12901) Thereafter, the public hearings continued almost four more weeks, through April 20th. Hearings were suspended from April 4 through April 19th, in clear violation of the City's own Pollution Control Facility Siting Ordinance, which requires that "No recess may extend past five (5) days except due to the unavailability of a suitable forum for the hearing" (C 00748). In total, there were 24 sessions of public hearings spread over a period of 45 days. As anyone experienced in pollution control facility siting hearings can recognize, this was an extraordinarily long, drawn-out schedule. The delay, occasioned by the opponents and by the City itself, resulted in the post hearing public comment

period not closing until after the spring elections, and approximately one week before the 180 day decision deadline.

As painstakingly detailed in the argument below concerning manifest weight, the evidence supporting the Application could not have been more powerful and compelling. FOGY and the other objectors continued to hammer home, mostly in lengthy, repetitive, unsworn public comment, the obvious: that there were some homes within a mile of the site, and that it would be visible from a state highway. They also hammered home outdated myths and clichés, *e.g.*, that all landfills leak, even though the unbrebutted expert testimony was that the proposed site offered a virtually perfect geologic setting. For example, Fox Moraine's hydrogeologist testified that the site passed the EPA's rigorous groundwater impact assessment without the liner system even being constructed. (C09893). Apparently, no one was listening except the Hearing Officer and the City's expert staff, all of whose findings were utterly disregarded by the City Council.

G. The Candidates' April 15, 2007 Statements To The Press

On Sunday, April 15, 2007, two days before the municipal election, the local newspaper, the Beacon News, ran a front page story entitled "The Landfill Lowdown - Yorkville Candidates Weigh In on Touchy Trash Issue" (FM Ex. 13, taken as offer of proof to assist witness testimony). According to the author of the article, each of the candidates was asked the same question, "Would a safe, state compliant landfill be a positive, negative or neutral addition to Yorkville?" The purported answer of Rose Spears was, "If it had nothing surrounding it for acres and if it was proven to be safe as far as leakage and if it would have no impact on traffic, that would be a perfect scenario." Spears denied making the statement, and said she was misquoted, although she never requested that the reporter made a correction or issue a retraction. (PCB 4-21-09 pp. 100, 101).

Valerie Burd was quoted as referring to the idea of a safe and compliant landfill as an oxymoron, and has since admitted she made the statement. (PCB 4-21-09 p. 200). Robyn Sutcliffe allegedly said, "It would be a negative addition to the city. I have no question about that." Sutcliffe claimed not to recall making the statement. (PCB 4-21-09 p. 294). Wally Werderich was quoted as saying that he didn't think the landfill was a good thing for Yorkville; he later acknowledged making the statement, but alleged it was taken out of context. (PCB 4-21-09 p.319) Arden Plocher was reported as saying that he didn't think there was any such thing as a safe and compliant landfill, but like Spears, also claimed he was misquoted. (PCB 4/22/09 p. 24).

H. The Wildman Law Firm's Involvement

On April 17, 2007, Valerie Burd was elected mayor. Her campaign committee members, Wally Werderich and Arden Plocher, were elected Aldermen, as was Robyn Sutcliffe. Rose Spears was also successful in her bid for re-election. On the day of the election, the City Attorney was John Wyeth, and the special independent counsel, who had represented and worked with the City's expert staff throughout the landfill siting process, was Derke Price. Price, who possessed extensive siting experience, had been specifically brought in to assist the City in the landfill project, and, according to Alderman Besco, Price was initially located and recommended by Valerie Burd. (PCB 4-22-09 p. 159) It is ironic that while Burd, in the face of overwhelming evidence to the contrary, maintained she had no bias against Fox Moraine, she testified that she felt prior to the start of the siting hearing that Price was biased in favor of Fox Moraine. (PCB 4-21-09 p. 192)

Because Mayor Burd was present at the siting hearings, heard the evidence, and could see that the evidence was overwhelmingly contrary to her predisposition, it was clear that to achieve her objective she would have to find a way to counter the unrebutted testimony of two experts

that this was the best geologic and hydrogeologic setting they had ever seen. (C09874; C11544). She had four committed "no" votes, no matter what the evidence showed, but she clearly needed someone who could appear credible, and perhaps even neutral, while recommending a "no" vote by the Council. For that she turned to the attorneys at Wildman.

Valerie Burd was sworn in as Mayor on May 8, 2006, three weeks after her election, but she has acknowledged that after her election and before being sworn in, she contacted the Wildman law firm about representing the City. Burd, however, has adamantly maintained, in sworn testimony, that the Wildman firm was not hired to do any work for the City prior to May 8, 2006. (PCB 4-21-09 p. 204) She insisted she never gave the Wildman firm any direction regarding the scope or direction of their work before May 8th, and that she never authorized any charges by the firm prior to May 8th. (PCB 4-21-09 pp. 205-209). In fact, Burd freely acknowledged she had no authority to engage the Wildman firm before she was sworn in on May 8, 2006.

The minutes of the City Council meeting of May 8, 2006 were admitted as FM Ex. 17. They succinctly tell the story of the City Council's appointment of a new city attorney:

> "Mayor Burd reported that she would like to appoint Mike Roth from Wildman, Harrold, Allen and Dixon to be the interim City Attorney. She entertained a motion to accept this firm. She indicated that the City Council had information before them and this will be the short term. She explained that she interviewed several firms and felt this one would best suit Yorkville's short term needs. She noted that Attorney Roth was the former city attorney for the City of Naperville, and she asked for the City Council's vote of confidence. So moved by Alderman Munns, seconded by Alderman Plocher.
>
> Alderman Munns questioned if Attorney Roth's fees would be comparable to the previous city attorney. Attorney Roth explained that the proposal is for a fixed number of hours starting at 50 hours per month for a fixed fee." (FM Ex. 17 p. 3)

The motion carried.

Subsequently, the City presented Fox Moraine with an invoice from Wildman, Harrold, Allen and Dixon, demanding payment of the invoice, but, interestingly enough, the invoice tells a contradictory story concerning the date and scope of the firm's engagement, and squarely refutes the testimony of Valerie Burd. The Wildman invoice was admitted as FM Ex. 16, and has been the subject of considerable controversy between the parties in pre-hearing motions before this Board.

As a threshold matter, the May 8th minutes reflect that the City Council's action was limited to the appointment of Michael Roth as interim City Attorney, for a fixed number of hours, starting at 50 hours per month for a fixed fee.[7] However, the invoice from Wildman in the amount of $96,119.73, for the period April 27, 2007 through May 29, 2007, is not limited to 50 hours. It is, in fact, for 251 hours of legal services, commencing 11 days before Burd was sworn in and Roth was even appointed as City Attorney. Mr. Roth stayed under his 50 hour allotment, with his component representing only 26.5 hours, but the three (3) other attorneys, who were never appointed, combined for the balance, with Leo Dombrowski and Anthony Hopp each billing for almost 100 hours of time. The inescapable inference is that the amount and scope of the work performed by lawyers at Wildman for the period in question is far beyond what was authorized by the City Council, and what was represented to the City Council by Mayor Burd.

The second, and equally troubling aspect of this invoice, is that it reflects several dozen hours of legal services performed by lawyers at the Wildman firm, primarily Anthony Hopp and Leo Dombrowski, prior even to the City Council's appointment of Michael Roth as interim City Attorney and prior to Burd's swearing-in. Notwithstanding Mayor Burd's protestation to the contrary, it seems incomprehensible that a law firm such as Wildman, Harrold, Allen & Dixon would dive headfirst into a project committing dozens of hours, reflecting thousands of dollars

[7] The amount of that fixed fee is unknown.

worth of attorney time and resources, before ever being retained by the client. It is equally incomprehensible that that law firm would know exactly the direction its efforts should take without receiving any prior guidance from the client. Moreover, although the City Council merely appointed Michael Roth to act as interim City Attorney, none of the work reflected on the $96,119.73 invoice represents the kind of work or tasks usually associated with the role of a City Attorney. Rather, the work listed on the invoice was directed solely toward the landfill proposal, with the majority of the work being directed toward preparation of a report analyzing the evidence. Most importantly, the work delineated on the invoice demonstrates that it is clearly directed toward denial of the application. For example:

- On April 28, one day after the work started and before any evidence had been reviewed, an attorney was reviewing and analyzing case law to determine the standard of review to be applied by the PCB, and to determine what may be considered improper contacts. This signals the beginning of the new administration's strategy for defending against an appeal from a siting denial.

- The next item on the invoice is a review of objections to the siting petitions and exhibits in support of objections, demonstrating that the attorneys were building a case for denial, rather than reviewing the evidence from a neutral perspective.

- The next item on the invoice includes work for a memorandum on the scope of improper contacts.

- The review of actual evidence began on April 30th, with attorney Dombrowski looking at evidence presented in opposition to landfill Application. At this point there is no indication the Application itself had ever been reviewed, or that evidence in support of the Application had been reviewed. Since §39.2 places the burden of proof on an Applicant, the logical first step in an impartial review begins with an examination of the Application, and moves onto a review of the Applicant's evidence in support of the application. In this case, the Wildman attorneys were doing just the opposite, focusing on objections, evidence in opposition, and Appellate issues that would likely be raised by the Applicant upon denial.

- The next invoice item deals with discussion and deliberations regarding recommended findings and a decision. The Yorkville siting ordinance in this case called for the preparation of recommended findings by both the hearing officer (Larry Clark) and the special environmental counsel (Derke Price). There was no legitimate reason to prepare an additional set of proposed

findings unless it was contemplated they would be needed to contradict the anticipated recommendations of approval from Clark and Price.. Notably, the report from Special Environmental Counsel Price would contain the input of the City's technical staff, who had been retained for their expertise in the substantive subject matter of the siting application. It is unclear what the Wildman attorneys could add to this analysis, inasmuch as they possessed no particular expertise in the area and did not participate in the siting hearings.

- On May 8th, Attorney Roth billed for work on strategies concerning finality of decision, disconnection of territory and development of the City's decision. Disconnection of territory, as a matter of law, would only become an issue if the Application was denied. Accordingly, the reference to finality of decision in this billing item is, in reality, a reference to finality of denial.

Shockingly, all of the foregoing described work was performed and itemized prior to Valerie Burd ever being sworn in as mayor, and prior to the City Council's limited appointment of anyone at Wildman to perform work for the City. The Wildman lawyers clearly knew exactly what they were supposed to accomplish before they were ever hired, and by the time Attorney Roth was formally appointed, albeit for a much more limited scope of work, the firm's efforts to orchestrate Burd's goal of a siting denial were well underway.

Because Ms. Burd denied giving the Wildman lawyers any direction on the scope of their work prior to their actual appointment by the City, it is hardly surprising that she has, conveniently, no recollection of her meeting with them on April 30, 2006, although Anthony Hopp billed five hours ($2,175.00) for preparation and conduct of a meeting with the Mayor and City Administrators that day, and also for post-meeting work based on results of the meeting. Mr. Hopp's description of the time clearly implies he received direction from the City, or from Ms. Burd, that day, more than a week before his partner was hired on an interim basis.

For the next several weeks, the Wildman lawyers, as evidenced by FM Ex. 16, worked on reviewing the evidence and preparing a report reviewing and analyzing the same. Again, it is curious that such a report was being prepared at a time when, pursuant to the ordinance, two others reports were being prepared – pursuant to the City ordinance - by individuals with 50

years of collective siting experience who actually attended the siting hearings, namely the Hearing Officer and Special Environmental Counsel. The invoice contains regular references to work related to appeals from siting decisions, and as early as May 14th, a full week before the record was even closed, and well before the Wildman lawyers had reviewed all the evidence, Attorney Roth was already preparing the Resolution on the siting decision.

The Wildman attorneys spent considerable time analyzing and reviewing the memorandum of Mr. Price and the City's expert staff. References to analysis of the staff report are contained in attorney Dombrowski's billing for 8.25 hours on May 21st, Mr. Roth's billing of 2.7 hours on the same date and Mr. Hopp's billing of 7.0 hours on May 22nd. Mr. Dombrowki then billed 10.50 hours for work on May 23rd, for review and analysis of the Hearing Officer's findings and recommendations. It is curious to see such extensive legal effort spent on review and analysis of the recommendations prepared by the City staff and the Hearing Officer. In light of the overwhelming evidence presented by the Applicant, including the massive clay layer present under the site, a proposed operator who had perhaps the best environmental compliance record in the state, and the state-of-the-art design components of the Applicant's proposal, Burd could clearly anticipate that the Hearing Officer, who had been through thirty siting hearings, and Special Counsel, who had an expert staff that would recognize the quality and thoroughness of the Application and evidence, would recommend approval. Such recommendations would have to be undermined to defeat the Application, and Burd almost certainly realized she would need a massive, impressive-sounding report (which ended up costing almost $100,000 to prepare) to counter the strong recommendations of the Hearing Officer and the City's technical experts to approve the Application.

Whether one looks to the individual billing items in the Wildman invoice, or the Wildman report as a whole, the conclusion is obvious: the Wildman attorneys were working

under clear direction as to the desired outcome, and the invoice documents the attorneys' step-by-step construction of a case for denial and defense of the inevitable subsequent appeal.

I. The Deliberations of May 23rd and May 24th, 2006

Eventually, it was time for the (new) City Council to meet and deliberate. The City Council met in open session on May 23, 2006, in sessions that were, fortunately, transcribed. Those transcripts reveal that it was Valerie Burd's show, and she was very obviously in charge. Neither the hearing officer, Larry Clark, nor special environmental counsel to the expert staff, Derke Price, were present for the deliberations, much to the consternation of some of the Aldermen. When pressed by several Aldermen to explain why Clark and Price were not there to assist the Council in deliberations, Burd snapped, "The hearing officer is no longer in charge. That is why he is not needed tonight. It is back under the Mayor and the Mayor is the one who is back and running the meeting." (C18541).

Burd would later testify that she couldn't remember whether Clark or Price had been invited to the deliberations. (PCB 4-21-09 pp. 227, 228). It is, however, naïve to believe Burd did not take steps to ensure that Clark and Price would not be present to assist. Once she was sworn in as Mayor, neither Clark nor Price was effectively ever heard from again, except for submittal of their reports and recommendations, which were mandated by the local ordinance.

With the two seasoned, knowledgeable experts out of the way, Burd no longer had to worry that someone with expertise might point out that what FOGY called "expert" evidence was actually nothing more than unqualified conjecture. What followed during the rest of the deliberations that night and during their conclusion on the following night, May 24, 2007, is so fraught with error that it is most easily broken down into individual categories.

a. The Council had insufficient time to review the evidence and information presented during the statutory public comment period.

The City Council received the Hearing Officer's Report, Price's Report, and Fox Moraine's post-hearing submittal, on the night of their deliberations. As noted above, the City Council had to begin deliberating just two days after the close of the public comment period because of the impending decision deadline, which was fast approaching due to the numerous delays occasioned by the opposition and the City, which were used to drag out the proceedings to ensure that the decision would be made by the incoming administration, elected on April 17.

Alderman Munns opined that the statutory siting process was unfair to municipalities, because average citizens must make decisions about technical subject matter in which they have no expertise, and he also complained about the unfortunate absence of the Hearing Officer, whose experience could have helped the Council in its deliberations, stating, that "[i]t seemed ludicrous that the person with the most experience in landfill hearings, over 30 sitings as testified, isn't here to give his opinion orally." (C12904). Mayor Burd chided him, suggesting, in response to his concern over the lack of time to review the newly-received reports and the absence of expert guidance in working through them, that he should just "have a little confidence in [his] own opinions." (C18560). He would soon decry the night's proceedings, which featured regular outbursts from the crowd that had gathered, describing the proceedings as "a circus" and bemoaning the fact that, "This is not deliberations." (C18560).

In all, five aldermen, Besco, Spears, Leslie, Golinski and Munns all expressed serious concern about their inability to review the recently-received material and to therefore make it a part of their deliberations, and all expressed a desire to continue the meeting. (C18538-40). As Munns put it, why had the City paid Derke Price and Larry Clark $50,000.00 each for their services, only to have their findings disregarded during deliberations? (C18538). When a motion was made and seconded to continue the deliberations, Mayor Burd refused to allow debate. The vote on the motion was 4 to 4, with Spears voting "no," notwithstanding her prior expressions of

concern over having insufficient time to review the recently-received material. Burd, of course, broke the tie by voting "no," so the deliberations would proceed. (C18541)

While it is clear that decision-makers may not consider matters outside the evidence in reaching their decision, logic suggests that the converse, namely, a failure (or in this case inability) to consider the evidence similarly renders proceedings fundamentally unfair. In this case, a majority of the City Council members indicated they needed time to read and consider all of the evidence. Failure to grant that time, which resulted from Mayor Burd's tie-breaking "no" vote, rendered the final decision fundamentally unfair.

b. The entire Council improperly relied on the secret Roth Report.

The Wildman invoice makes clear that Mayor Burd had directed the Wildman attorneys to prepare a report and a set of recommendations to counter the Hearing Officer and City staff technical reports, which Burd could clearly anticipate would recommend that siting be granted. (FM Ex. 16). Mr. Roth's billing on May 23, 2007, the night the deliberations began, referenced his preparation of the "final version of legal memorandum analyzing evidence and findings and recommendations." This has come to be known in pre-hearing motions as the "Roth Report," and the Hearing Officer previously ruled that the secret Roth Report is not subject to disclosure, due to attorney-client privilege.

The existence of the Roth Report was confirmed by the Aldermen on the night of May 23, 2006. In addressing Michael Roth, Alderman Munns referred to "Derke Price's and your stuff and Clark's." (C18538) The fact that Alderman Munns considered the Roth Report when making his decision is evidenced by his further statement to Mr. Roth, as follows: "Lets say my decision was to go one way, but then I read your comments, Derke Price's and Larry Clark's comments and it changes my criteria..." (C18540). Alderman Munns further stated, "To start with, just glancing at the memos we got today from Mr. Roth and Mr. Price and Mr. Clark, there

is highly conflicting opinions on a couple criteria, two attorneys say yes approve with conditions, and one says no." (C18550)(emphasis added). Munns' statement is critical. It shows that the Roth Report was clearly elevated above mere legal advice, and was viewed instead as substantive analysis of the evidence, being given the same weight and reviewed on the same basis as the Price and Clark Reports.

What Alderman Munns' statement confirms is consistent with what can be readily inferred from the Wildman invoice. The Board has long held that local decision-makers are entitled to rely on reports and proposed findings of fact prepared by their consultants. However, these reports and proposed findings have always been made available to the public and to all the parties. Here, the Wildman invoice makes clear that preparation of the Roth Report involved extensive effort by the Wildman attorneys in reviewing the evidence and drafting written findings regarding that evidence (*see, e.g.,* FX 16, entry of 5/14/07: "Continue review of materials related to analysis of "Need" criterion"; 5/14/07: "Review and analyze applicant's traffic studies"; 5/15/07: "Continue to review materials related to incompatability and property values..."; 5/18/07: "Continue to work on incompatability section of submission"; 5/20/07: "Continue work on incompatability section of written submission"). The Roth Report was researched and drafted as a substantive review and critique of the evidence, and was relied upon by the Alderman in much the same way they considered (or should have considered) the Clark and Price Reports. However, the Roth Report has been maintained as a closely-guarded secret, and no one will ever know whether it misstated facts, made references to matters outside the record, or included other prejudicial and unfair material. Notably, the resolution drafted after-the-fact by the Wildman lawyers is completely misleading here, in that it reflects that the Council received and considered the Clark and Price Reports, which were completely ignored, but makes

no mention of the secret Roth Report, which was Burd's counterpoint to the recommendations of Clark and Price.

The City has argued that the Roth Report is privileged attorney client communication, however this is true only in the most superficial sense, and it is functionally no different than the Price Report and the Clark Report, which might also be referred to as attorney client communications. As such, the Roth Report represents not legal advice, but rather, it represents, or purports to represent, a substantive review and critique of the evidence presented at the hearing, albeit with a hidden agenda. It should, therefore, have been disclosed, and the City Council's reliance on this secret document when making its siting decision renders the proceedings fundamentally unfair.

Not surprisingly, Mayor Burd, who commissioned the Roth Report, testified that she didn't recall that there was a third report (in addition to the Clark and Price Reports), but that she "hoped" there was. (PCB 4-21-09 p. 229) Likewise, Alderman Spears conveniently could not recall any reports other than the Clark and Price Reports. (PCB 4-21-09 p. 114)

c. Several Aldermen based their decision on information outside the Record and attempted to prejudice other Aldermen against the Application

A decision based on information outside the record and never received into evidence is a classic example of fundamental unfairness. Mayor Burd summed it up nicely at the end of the deliberations on May 23, 3007 when she said to the Aldermen, "Several of you haven't made a decision yet, several of the other Aldermen have already appeared to make a determination based on their own research and information they have gotten." (C18560)(emphasis added). Reliance on independent research, then, rather than on evidence in the record was, by Mayor Burd's own admission, a hallmark of the City Council's decision-making process.

The worst offender (in terms of relying on "independent research") was Rose Spears, who by her own admission during the prehearing meetings and public hearings was a diligent

"researcher" of the matters at issue. In expounding on her reasons for finding that none of the substantive siting criteria had been met, Spears made reference to a number of supposed facts that were never part of the evidence in the record. Spears stated that criterion (i) was not met because EPA records indicated adequate landfill availability for at least 9-15 years. (C18544). No such evidence is in the Record, and particularly not with regard to the service area proposed by the applicant. Spears also proposed detailed technical standards for leachate storage tanks, suggesting that they should be built to the AWWA D-100 or the API-650 standard. (C18546) There is nothing about alternative leachate storage tank design and material standards in the evidence, and the fact that Alderman Spears opined upon such arcane, technical information indicates conclusively that she had been doing more than a little of her own research. Alderman Spears also suggested that vinyl chloride, found in several landfills, has no known safe level for humans. (C18547) Again, there is no evidence in the record to this effect, and, rather, the unsworn statement offered by some objector public commentators, such as Keith Runyon, was that a closed landfill had vinyl chloride exceedances in some monitoring wells, thereby implying that there is a safe and acceptable level. (C10976).

Lastly, Spears opined that the landfill design was unsafe because it did not contain a double composite liner system with a leak detection component. (C18546). In fact, the only evidence at the public hearing was in direct opposition to what Alderman Spears asserted, that evidence being that double composite liner systems with a leak detection system are inferior to the proposed design. (C11346; C11512;13; C11520). Notably, Alderman Spears also misunderstood the burden of proof with respect to at least one substantive criterion, traffic. An applicant is only required to "minimize" the impact on existing traffic flows but Ms. Spears acknowledged in her testimony before the Board that she believed any impact on traffic is enough to defeat the criterion, and any additional traffic generated by a landfill is unacceptable.

(PCB 4-21-09 pp. 72, 75). Again, this "conclusion" was not based on evidence at the hearing, and would, of course, impose an impossible burden on an applicant. Clearly, then, no proposal could meet the Spears standard on the traffic criterion, which conflicts directly with the statutory requirement of minimization.

Alderman Werderich also relied on information outside the Record, alleging there had been citizen complaints regarding Don Hamman's "composting" operation. C18557). Such alleged complaints were not part of the Record. More importantly, Werderich, himself an attorney, tried to prejudice other members of the Council against Fox Moraine's application by misstating the law. Section 39.2(e) of the Act specifically provides that, "In granting approval for a site, the County Board or governing body of the municipality may impose such conditions as may be reasonable and necessary to accomplish the purposes of this section..." (415 ILCS 5/39.2(e)). Showing utter disdain for this legislative mandate, Werderich told his fellow council members on May 23rd, "What should be taken into consideration is the fact that the application must be judged on its face, not based upon the conditions which are suggested to be included by either Derke Price or the hearing officer. Accordingly, when reading through that, please take that into consideration." (C18557-58)

Since Fox Moraine was not entitled to inquire into what the City Council members took into consideration in making their decision, we will never know how many council members incorrectly followed Wederich's admonishment. We do, however, know that Alderman Munns knew that the Clark and Price Reports recommended approval with conditions, that these reports confirmed what he had heard in the evidence, and that they contained nothing he disagreed with. (PCB 4-22-09 p. 82, offer of proof during examination of Alderman Munns). Although he equivocated somewhat, and appeared to have joined the Burd team in his testimony at the Board hearing (initially attempting to deny his deposition testimony that Valerie Burd's association

with opposition groups was a matter of public knowledge), Alderman Munns' previous good faith and honesty have not been questioned by Fox Moraine. In his public statements during the deliberations on May 23, 2006, Munns never stated that any of the siting criteria had not been met, and affirmatively stated that a number of them were met with conditions. (C18550-51). On the following night, immediately before the final vote, Alderman Munn declined to add anything to his previous comments. C18607) In this context, the incorrect admonition of Alderman Werderich to vote 'no' if a siting criterion could only be met with conditions, combined with Alderman Munns' "no" vote despite his testimony that he disagreed with nothing contained in the Price and Clark Reports, is disturbing, and throws the entire decision making process into question.

Alderman Plocher also relied on information outside the Record. In his case, the outside information related to the unfortunate illness of his brother. In Plocher's comments during the deliberations on May 23rd, he incorrectly recalled that, "The applicant said that the landfill leaked," and then went on to say,

> "And, secondly, I could also never personally jeopardize my friends and the residents of this community on any health issues as someone has done to my family. As you all – as all probably know, I live with my brother, Jimmy Plocher, we call him Kiki. He is 21 years of age with cerebral palsy, and there is no way that I could sleep at night knowing that I voted yes and can do this to someone else." (C18549-50).

It goes without saying that there was no evidence in this record that modern Subtitle D landfills are linked with or the cause of any disease or birth defect. Alderman Plocher's statement of May 23rd, is, at best, uninformed, and likely much worse.

d. The Four Resolutions

On May 24, 2007, the City Council deliberations reconvened. Attorney Michael Roth indicated that he had prepared two different resolutions. In the denial resolution, he included the

conditions he had decided should be imposed upon reversal of the City's denial. C18612-13). While this Board has frequently held that conditions attached to a denial are a nullity, they are relevant here not only to help understand the tainted decision-making process, but more importantly, as guideposts that clearly signal the City's understanding, even then, that the manifest weight of the evidence showed approval was the only appropriate response to the exceptionally strong Application. The intense focus placed on the crafting of conditions "to be imposed in case of reversal" reveals an admission, by conduct, that such a reversal was inevitable.

Moreover, the clock was ticking, with the decision deadline just two days away, and as a result all attention turned to the question of which conditions should be imposed, sending the Council careening off on a sidetrack that left the formulation of a rationale to support denial to fall, forgotten, by the wayside. All eyes were focused on crafting the conditions the City planned, albeit erroneously, to impose when the inevitable occurred and their denial was later reversed.

Rose Spears proposed additional conditions, seeking to add to those already contained in the draft resolution. (C18613-19). Other Aldermen proposed their own additional conditions. In the wake of the additional conditions proposed by the Aldermen that night, Attorney Roth noted that he would have to revise the resolutions he had prepared for the meeting. Alderman Plocher then moved "To approve the denial resolution with restrictions, including all new restrictions." (R. 5-24-07 p. 33)(emphasis added). Attorney Roth confirmed to Alderman Munns that there were actually three draft resolutions. (C18624) Roth went on to caution the City Council about including conditions not permitted by law, and Mayor Burd asked for an amendment to Plocher's motion to allow the attorney to draft the final resolution to include only conditions that he believed were allowable under the law. (C18628-630). Mayor Burd explained to Alderman Besco, "The amendment is to allow our attorney to remove any illegal conditions, any of them

that pertain to the host agreement, the annexation agreement, anything that we can not legally ask for." (C18629-630). The motion as amended then passed by a vote of 7 to 1.

The City of Yorkville tendered to Fox Moraine a copy of Resolution No. 2007-36, which is dated May 24, 2007. This is a denial resolution with conditions to be imposed in the event of a reversal or remand. Some of the conditions proposed by Council members on the night of May 24, 2007 were included, while others were not. For example, Alderman Spears' technical specification for the above ground leachate storage tanks are included (Condition O). On the other hand, the proposed $10,000,000 annual flat fee proposed by Alderman Plocher is not included, and he testified that he was told by the lawyer that he decided not to include it because he thought it was unconstitutional. (PCB 4-22-09 p. 31) The record indicates and Mayor Burd acknowledged that her attorneys ultimately decided which conditions to include in the resolution and which conditions to leave out. (PCB 4-21-09 p. 239).

An unsigned and unnumbered copy of Resolution 2007-36 was admitted as FM Ex. 33. This Resolution was obviously not before the Council members at the time they voted on May 24, 2007, and the May 24, 2007 date affixed to it is obviously incorrect. Based upon the record and admissions of Mayor Burd and Alderman Plocher, this Resolution was prepared at some point after the May 24th meeting. This is confirmed by further review of the Wildman invoice (FM Ex. 16), which documents an attorney conference with assistant city administrator Bart Olson on May 29, 2007 regarding Resolution revision and work on legal requirements for service of the Resolution. Whether the actual Resolution tendered to Fox Moraine was actually finished by May 29, 2007 is, therefore, highly questionable. The May 29th time entry regarding resolution revisions is the last entry on the invoice, and Fox Moraine has not seen the Wildman firm's subsequent invoice. In any case, it is clear that the City improperly backdated, and Valerie Burd improperly signed, Resolution 2007-36. Presumably, this was intended to avoid approval of

the Application by operation of law pursuant to §39.2(e) of the Act. May 29, 2007 was the 179th day after filing of the application, and the written decision of the City was due no later than the following day. The point here is not that Fox Moraine's application was approved by operation of law (Fox Moraine is fully aware of the Board's holding in *Peoria Disposal Co. v. Peoria County Bd.*, PCB 2006-184), but rather to illustrate yet another example of Mayor Burd's extreme deception and bad faith.

Although a mayor is not necessarily a decision maker, this Board has, in the past, considered the misconduct of mayors in its fundamental fairness rulings. *See Concerned Citizens for a Better Env't v. City of Havana and Southwest Energy Corp.*, PCB 94-44 (May 19, 1994). In that case, the Board reversed local siting approval because the proceedings were fundamentally unfair. The Board noted that it was "dismayed at the actions of the mayor, when presiding over the actual council meeting where the actual vote occurred, the mayor clearly showed bias." (Slip Op. p. 8) The Board has therefore recognized the important role a mayor plays in the decision making process, even when that mayor doesn't necessarily vote.

It is indisputable that Resolution 2007-36, in the form presented to Fox Moraine, was never voted on by the City Council. The resolution, therefore, represents the final decision of Michael Roth and his team of lawyers at the Wildman law firm, rather than the final decision of the City Council. The City Council's improper delegation of authority to Roth to decide what conditions to impose makes the proceedings fundamentally unfair. Section 39.2(d) requires a written decision specifying the reasons for the decision, and to this date, Fox Moraine has not received the same. The Wildman attorneys' written decision is not an adequate substitute.

Moreover, at the hearing before the Board in this appeal, the City presented four draft resolutions, FM Ex. 33, 34, 35 and 36. Exhibit 33 is a copy of the Resolution ultimately presented as the purported decision of the City Council. Exhibit 34 is the draft of an approval

with conditions resolution. Exhibit 35 is actually 2 resolutions, the first being a denial with a single condition, and the second being an unconditional denial. Exhibit 36 is a multiple choice resolution called approval/denial. No one has identified which of these draft resolutions were actually before the City Council on the night of May 24, 2007, and it is therefore difficult, if not impossible, to determine exactly what the City decided. Moreover, what is known for certain is that the City Council did not determine the ultimate contents of Resolution 2007-36. Therefore, Sec. 39.2(e) has clearly been violated, and for this reason the application should be deemed approved by operation of law.

Additionally, there was apparently never a consensus of the City Council as to which siting criteria were met. The Resolution tendered to Fox Moraine indicates, in Paragraph 2, that criteria (i), (ii), (iii), (v), (vi), (viii), (ix) and "(x)" were not met (the reference to criterion x being shorthand for the previous operating experience and past record of the Applicant). This Resolution purports to be a consensus of the City Council reached during its public deliberations on May 23, 2006. However, a review of the transcript of those deliberations reveals there was no consensus with respect to these siting criteria. Not all of the aldermen expressed opinions on all criteria, and with respect to those that were discussed by individual aldermen, their statements were often equivocal and even contradictory. Thus, although the Resolution purports to represent a finding by the aldermen that the Applicant failed to meet certain criteria, the transcript reveals that a majority of the aldermen did not express negative views regarding each of those criteria

It is clear, in any event, that there was no consensus or will of the Council to find that all criteria except (iv) and (vii) were not met. Since we don't know (and the City has not explained) which draft resolution or resolutions the Council members had before them when they voted, there is no evidence that the majority of the City Council reached the findings reflected in the

ultimate Resolution, which was drafted almost a week after the vote, by an attorney who had been directed to include only those findings that would stand up on appeal.

If the City takes the position that the findings contained in Resolution 2007-36 actually represent the will of the majority as to their findings on individual criteria, then the Resolution offers clear proof of bias by all of the Aldermen who voted no, inasmuch as a "no" vote on criterion (ix) (regulated recharge), when that criterion is not even applicable and was not contested, is a conclusive indication of bias.

The final and perhaps most serious problem with Resolution 2007-36 is that it does not comply with the bedrock requirement of Section 39.2(e) of the Act that the written decision specify the reasons for the decision. Paragraph 2 of the resolution states, "The United City of Yorkville finds, for the reasons set out in the record of these proceedings, including but not limited to the reasons stated at the special meetings of the Yorkville City Council held on May 23 and May 24, 2007 that the following criteria, as set forth in Sec. 39.2 of the Act, were not met..." This is nothing more than lawyer-speak for "we're not going to tell you the reasons, because we don't know what they are." Certainly the record of the siting proceedings provided no reasons for denial; instead, it provided compelling reasons for approval, as reflected in the comprehensive review of the evidence contained in the Clark and Price Reports. That leaves only the statements of the Aldermen during the public deliberations. Aside from the obvious fact that no individual alderman's statement represented the consensus of the entire Council, the statements themselves are liberally peppered (as previously documented) with references to matters outside the record and to legal misstatements. There is an explanation for why the City did not provide the usual findings of fact or other concise statement of reasons for denial: those reasons did not exist. There are no findings to support denial that would withstand the scrutiny of a careful review of the Record. Accordingly, the City had to settle for a cursory conclusion that

the criteria were not met, which obviously does not satisfy the statutory requirement for "specifying the reasons."

Summary of the Evidence on Fundamental Fairness

Rose Spears, as evidenced by the transcripts of her statements at the time, was opposed to Fox Moraine from the outset. Although she claimed not to know that there was any landfill opposition, she became the hero of the anti-landfill crowd, according to Alderman Sutcliffe. She did her own independent research, on which she relied in reaching her decision. Moreover, she was patently untruthful in her testimony at the hearing on fundamental fairness in the Board proceedings.

Robyn Sutcliffe's campaign for alderman centered around her opposition to Fox Moraine and the proposed landfill. Her published promise to vote "no" offers conclusive proof of her pervasive bias and pre-judgment. She kept her promise.

Wally Werderich and Arden Plocher, were, together with other FOGY founders and officers, and "expert" witnesses, members of Valerie Burd's mayoral campaign committee. The committee members were friends, and helped each other. While Plocher benefited from his bias by getting elected Alderman, his bias was essentially personal and emotional, as indicated by his relating the landfill proposal to his brother's cerebral palsy. Werderich, on the other hand, freely admitted to organizing landfill opposition in the beginning, doing the legal work to incorporate FOGY and ultimately parleying those efforts into a seat on the City Council. His gross misstatements about the law concerning conditional approval on the night of deliberations very likely pushed an admittedly confused Marty Munns into a "no" vote.

Valerie Burd was initially enthusiastic about the idea of receiving host fees from a landfill. However, when she saw the large, hostile crowd at the initial annexation meeting, she suddenly realized she had an opportunity to use the landfill issue to become mayor. Her

insistence under oath that she never knew that any of the members of her campaign committee were landfill opponents is nothing short of disgraceful. Fox Moraine was as embarrassed to hear it as she should have been to offer it.

Marty Munns spoke like someone who voted "yes, with conditions." He also vocalized concerns about not having enough time to go through the material filed at the end of the public comment period. Munns observed that he felt technically unqualified to make the decision, and as a result, complained bitterly about not having the Hearing Officer present at deliberations to help him reach a decision. In the end, Munns testified that the Clark and Price reports confirmed what he himself had heard in the evidence, and he could not disagree with anything in those reports. That being the case, his "no" vote was obviously not based on the evidence, or even his perception of the evidence, but must instead have been based on other considerations.

II. ALDERMAN SPEARS WAS NOT A CREDIBLE WITNESS

Fox Moraine's Motion for a Finding that Valerie Burd Was Not a Credible Witness is extensively documented and supplemented in this Brief. Although no motion for a similar finding regarding Rose Spears was filed, the conflict between Ms. Spears' previous statements at Council meetings, as documented herein, and her testimony at the Board hearing on April 21, 2009, clearly warrant the same finding. In the City Council meetings where annexation, vacation of the road, and the Host Agreement were endlessly discussed, Spears was an even more vocal opponent than Valerie Burd. Her testimony that she did not know that the Fox Moraine annexation was related to a coming landfill proposal, that she did not know the loud crowds who cheered her at these meeting were opposed to a landfill, as well as her initial statement that she did not even remember the annexation meeting or voting on the annexation issue, are so unbelievable that her recent protestations of fairness should clearly be disregarded. Spears did acknowledge that she voted "no" on all the statutory siting criteria. This would include criteria

(iv) (flood plain), vii (hazardous waste preclusion), and ix (regulated recharge area), which were not even at issue.

Ms. Spears was also extremely evasive about the ex parté communications she received. She testified that she received *ex parté* emails, but said she could not remember whether she received one or one thousand. (PCB 4-21-09 p. 79). Similarly, with regard to the *ex parte* letters she received, she could not recall whether she received one or a thousand, and concerning the personal contacts she received, she again could not recall whether it was one or one thousand. (PCB 4-21-09 p. 80). However, on the other hand, her memory improved dramatically and remarkably when asked about pre-filing contacts by Fox Moraine general manager Charlie Murphy. She recalled that she got precisely three phone calls from him in August 2006, one of them being on a Sunday. (PCB 4-21-09 pp. 129, 130).

Alderman Spears denied doing outside research regarding the landfill proposal, but in light of her other unbelievable answers, and the absence in the record of evidence regarding several specific points she raised as alleged facts on May 23, 2007, her denial is not credible. Even Mayor Burd, at the conclusion of the May 23rd deliberations, singled out Alderman Spears for her "great" research. (C18563). Again, being a true team player, Spears swore at the Board hearing that she saw the final version of Resolution 2007-36 on the night of May 24th, although, again, that is clearly impossible. (PCB 4-21-09 p 110).

For someone who claims to have carefully and objectively weighed the evidence, it is disturbing that Spears now testifies she did not know what the Price and the Clark reports recommended, and that she did not even know there was a third report. (PCB 4-21-09 pp 112,113).

III. THE DECISION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE

A. Standard of Review

In addition to ensuring that the process was fundamentally fair, the Board's review must also assess whether the local siting decision was against the manifest weight of the evidence. *Land & Lakes Co. v. PCB*, 319 Ill.App.3d 41, 48 743 NE2d 188, 194 (3rd Dist. 2000). A decision is against the manifest weight of the evidence if an opposite conclusion is apparent or the decision-maker's findings "appear to be unreasonable, arbitrary, or not based upon the evidence." *Webb v. Mount Sinai Hosp.*, 347 Ill.App.3d 817, 807 NE.2d 1026 (1st Dist. 2004). Therefore, the decision-maker's findings must rest upon competent evidence and be supported by substantial proof. *Gumma v. White*, 345 Ill.App.3d 610, 803 N.E.2d 130 (1st Dist. 2003). Moreover, the mere existence of some evidence that conflicts with the Applicant's proof is not sufficient to support a denial of siting. *See A.R.F. Landfill v. Lake County*, PCB 87-051, slip op. at 21-24 (Oct. 1, 1987).

Where, as here, there is no competent or relevant evidence that fairly supports the decision-maker's denial of siting, the denial is against the manifest weight of the evidence and must be reversed. *See Gumma,* 345 Ill.App.3d at 614-615 (affirming reversal of administrative agency's suspension order based on a determination that there was insufficient evidence to support the order).

B. Introduction

The Applicant, Fox Moraine, presented *prima facie* proof for each of the statutory criteria, as is fully documented in the recitation of the evidence set forth below. Because the City Council's "findings" regarding an alleged failure to meet the statutory criteria were not supported by any competent or substantial evidence, and were in fact contrary to the competent and relevant evidence presented at the hearing, the City's denial was against the manifest weight of the evidence, and should accordingly be reversed, inasmuch as there is no evidence to substantiate risk or to contradict the Applicant's *prima facie* showing. *See Industr. Fuels &*

Resources/Illinois, Inc. v. PCB, 227 Ill.App.3d 533, 592 N.E.2d 148 (1st Dist. 1992) (reversing siting denial because there was no evidence to substantiate risk or contradict applicant's *prima facie* showing). The fact that the City found against Fox Moraine on two criteria where there was no sworn evidence in opposition, and one criterion which was not even applicable, should cause the Board to treat the City's decision and so-called findings with extreme skepticism.

In making a manifest weight determination, the Board must determine whether there is any technically sound basis for concluding that a particular criterion has not been met. The mandate of the Supreme Court in *Town & Country Utilities, Inc. v. PCB*, 225 Ill.2d 103, 866 N.E.2d 227 (2007) requires that the Board conduct a critical and technical review of the record developed during the local siting hearing "to determine whether the record supported the local authority's conclusions." (*Id.* at 123). The Supreme Court in *Town & Country* pointed out that the legislature intended to create a unified, statewide approach to pollution control facility approval, where the primary responsibility lies with the technically qualified PCB. Units of local government have "concurrent jurisdiction" in siting (*Id.*, 225 Ill.2d at 108), but they render only an "interim decision," (*Id.* at 116), which can then be contested before the PCB pursuant to Section 40.1 of the Act. Section 40.1 requires the PCB's technically qualified members to utilize their technical expertise in conducting a "hearing" to review the record developed below (*id.* at 120), places the burden of proof on the Petitioner (*Id.* at 123), and requires that the PCB "make factual and legal determinations on evidence" (*Id.* at 120, 237, 426)(emphasis added).

C. Facts Related to Criterion (i) ("the facility is necessary to accommodate the waste needs of the area it is intended to serve")

Need is established where the proposed facility is reasonably required by the waste needs of the service area identified by the applicant. *File v. D&L Landfill*, 219 Ill.App.3d 897, 597 N.E.2d 1228 (5th Dist. 1991). Opposition to the service area size, or to accepting out-of-county

waste, are not proper reasons to deny criterion (i). *See Metropolitan Waste Systems v. PCB*, 201 Ill.App.3d 51, 558 N.E.2d 785 (2nd Dist. 1990).

Mr. Philip Kowalski testified for Fox Moraine concerning Criterion (i). Mr. Kowalski, who has a Bachelor's degree in physics and a Master's of Finance degree from the University of Chicago, was well-qualified to undertake the "need" analysis, having worked as a solid waste consultant for 19 years, and having written (as principal author or contributor) 29 need assessments for solid waste facilities in Illinois. (C09382). He has also actively participated in the preparation of need assessments for solid waste management plans for 35 Illinois counties. (C09382).

Mr. Kowalski explained that in assessing the solid waste disposal needs of the service area relevant to this siting application, he examined demographics projections, various county solid waste management plans and need assessment studies, the current solid waste disposal capacity data, and the amount of waste presently being deposited in landfills based on data from the IEPA and its counterparts in Indiana, Michigan, and Wisconsin. (C09383-384).

Kowalski explained that the proposed service area for this project consists of Kendall County and seven neighboring counties in Northeastern Illinois, and that the proposed site is centrally located within that service area (C09385). The proposed facility will have a disposal capacity of 23.5 million tons, and with an average throughput of 3,500 tons per day, the facility would offer a life of 23 - 24 years. (C09386).

In the past, the proposed eight-county service area had 28 operating landfills, but by January 2006, only ten were still operating. (C09388-389). Even as the number of landfills in the area was diminishing, Kendall County experienced a growth rate of about 45 percent between 2000 and 2005, and during that same time period, the City of Yorkville ("City") had a growth rate of about 75 percent. (C09387). The estimated overall growth rate for the proposed service

area over the anticipated life of the landfill is 19 percent. (C09386-387). Moreover, per capita disposal rates are actually increasing with time. (C09387). It is anticipated that between 2006 and 2031, the service area will need to dispose of a total of approximately 325 million tons of waste, increasing from 11.5 million tons in 2006 to 13.6 million tons in 2031. (C09388).

Of the 28 landfills that once served the service area, only 10 remain, and of the three facilities that Kendall County has historically relied upon, two are now closed; the one remaining landfill that Kendall County has relied on in the past has very limited remaining capacity. (3/12 at 103-104). Two other open facilities within the greater service area restrict the areas from which they receive waste. C09389-90). Between 2031 (by which time the service area is projected to generate 325 million tons of waste), and 2006 (when total remaining waste capacity in the area was 29.5 million tons), a capacity shortfall of 296 million tons arises. (C09389-92). Once the landfills upon which Kendall County has historically relied are closed, the nearest landfill will be 37 miles away, and the next closest landfill will be 60 miles away. (C09398). The proposed facility would be centrally located, being about 40 miles from the "waste centroid" of the service area, and about 8 miles from the centroid within Kendall County. (C09397-98)

After having compared the cost to transport waste to the proposed, centrally-located landfill with the transportation costs associated with utilizing the 40 other regional landfills, Mr. Kowalski determined that the proposed landfill would result in a savings of over 800,000 gallons of fuel per year, thereby reducing waste transportation costs by millions of dollars. (C09399). As a result, the central location of the proposed facility will allow communities throughout the service area to better manage the cost of waste transportation, and will substantially decrease the amount of fossil fuels used to transport the waste. (C09399).

Based on the service area's insufficient waste disposal capacity, and the fact that it takes an average of nine (9) years to go from concept to actual operation of a landfill in Illinois, Mr.

Kowalski's report concluded that the proposed facility is necessary to accommodate the waste needs of the intended service area. (C09397; C09401-02).

Mr. Darryl Hyink, a retired industrial arts teacher, also testified on behalf of the objectors. C14321-22). Hyink opined that, based on his own research, including articles in the New York Times, that there is a "glut of landfill space," and construction of new landfills is "unnecessary." (C14325). Hyink opined that the citizens of Kendall County should not have to provide landfill space for waste generated in Cook County. (C14330). He further testified that in his opinion, companies attempting to site landfills are just in it for the money. (C14337). He opined that, rather than developing a new landfill, waste generated in the area of the proposed facility could be moved by rail to the Spoon Ridge landfill about 200 miles away, although he subsequently admitted he did not know whether rail lines ran in the vicinity of Spoon Ridge Landfill. (C14339-40; C14401-02).[8] Mr. Hyink's "testimony" is typical of what was apparently accepted by the City as evidence at this hearing. Mr. Hyink's remarks had no relation to the designated service area, and are "evidence" only to the extent that newspaper articles and the results of googling "landfill" on the internet constitute evidence.

Hearing Officer and Special Counsel Findings and Recommendations

Both the Hearing Officer and Special Counsel Derke Price concluded that, with the City Staff's proposed conditions, Criterion (i) was met. As the Hearing Officer, Mr. Larry Clark, observed in his "Findings and Recommendations," the evidence showed urgency with respect to

[8] Hyink also gave his opinions regarding Criterion (ii), although he acknowledged he has no expertise as an engineer, geologist, or hydrogeologist. (C14348-49). He testified that "pollution leaks will enter the aquifers from under the site" and will enter recharge areas along creek beds. (C14350-51) He acknowledged, however, that his opinions were personal, and that he did no scientific evaluation of the "research" that he did to educate himself about landfills. (C14389-90). He further testified that he had no reason to dispute the geologic and hydrogeologic evidence presented by the Applicant's witnesses. (C14407-08). His evidence that landfill liners leak is based on an incident he read about that occurred in Arkansas. (C14418-19).

need in the service area, and although objectors asserted that alternative methods to treating waste have advantages over landfills, "there are currently no proven alternative methods of treating waste so as to avoid landfilling" and therefore, such alternative technologies are purely speculative at this point. (C18522-23). Special Counsel, Derke Price, similarly concluded that Kowalski's testimony concerning need for the landfill was credible, and that with the City staff's proposed conditions, Criterion (i) was met. (C17192).

D. Criterion (ii): ("the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected")

Mr. Dan Drummerhausen testified for Fox Moraine concerning Criterion (ii). Drummerhausen is a senior hydrologist with Shaw Environmental, and has 11 years of experience in the solid waste field; he is licensed as a professional geologist in Illinois, Indiana, and Georgia. (C09873). He holds a Bachelor's degree in Geology and a Master's degree in Hydrogeology with a focus on groundwater modeling, and he has interpreted the geology and hydrogeology of more than 20 landfill projects. (C09873-74). He also has 14 years of groundwater modeling experience (most of which has involved landfills) and the development of one-dimensional, two-dimensional, and three-dimensional groundwater models. (C09874).

Drummerhausen designed, supervised, and implemented the geologic and hydrogeologic characterization of the proposed site. (C09872). He determined the relevant objectives, and conducted a regional and site-specific hydrogeologic investigation, which included a thorough examination of the proposed site's geology and hydrogeology. (C09874-75). He identified potential migration pathways in order to design the groundwater monitoring network and groundwater impact evaluation, and reviewed all water well logs within one mile of the site. (C09875-76).

Mr. Drummerhausen's analysis of the proposed site led him to conclude the site under consideration was the best landfill site he had ever worked on from a hydrogeological standpoint.

C09874; C10158-59). He observed that the site features a substantial amount of clay material below the site, and below that, sand, gravel and bedrock. (C09877-78). He explained that the presence of a high ridge of end moraine near the site will further decrease the already low potential for contamination of the shallow aquifers. (C09876-77).

Drummerhausen explained that the uppermost bedrock aquifer below the proposed site is the upper Galena-Platteville Dolomite and the Ancell group, which consists mainly of sandstone. (C09878). The City of Yorkville draws its water from the Ironton-Galesville sandstone unit, and there is 300 to 500 feet of confining material between the uppermost bedrock aquifer at the site and the aquifer from which the City draws its water. (C09878).

Borings and the geological study of the site reveal approximately 80 feet of low permeability clay beneath the location of the liner for the proposed landfill. At the projected vertical movement rate of two inches per year, it would take 480 years for groundwater to move from the base of the proposed landfill to the bottom of the clay unit. (C09879; C09888). Drummerhausen testified that his analysis revealed that the performance of the natural clay at the proposed site by itself exceeds IEPA permeability requirements for complete liner systems by 83 percent. (C09888).

Drummerhausen's investigation involved a drilling program that included 48 boring locations, with 46 continuous sampled borings and two continuous sampled angle borings being advanced to detect fractures; the borings being evenly spaced from north to south and east to west. (C09879-80) The borings were used to gather relevant geologic information and hydrogeologic information. (C09879-881). Forty-eight monitoring wells were drilled in all areas of geological interest, which were then used to collect groundwater elevation data and hydrologic conductivity data (i.e. slug testing). (C09879; C09882-85). Packer tests were also performed (C09884).

The geological study of the site revealed that the surface area contains Peoria silt, and beneath that the Lemont formation, which is predominantly clay. (C09885-86). Within and below that unit are discontinuous silt, sand, and gravel deposits, and then the Robein or Roxana silt, an ancient soil (C09885-86). Beneath that is an older drift of clay, silt, sand, and gravel, and beneath that is bedrock made up of Galena-Platteville Dolomite and the Ancell group, which is largely sandstone. (C09885-86). There is no hydraulic connection between the lower sand and the uppermost bedrock. (C10128). The Illinois State Geological Survey examined the report prepared by Drummerhausen's group and agreed that their investigation was thorough, and that the report accurately characterized the site's geology. (C09891).

Drummerhausen's group performed a groundwater impact evaluation or groundwater model of the type approved by the IEPA to evaluate the site. (C09893). Even without a liner system, the proposed facility easily passed the groundwater model, showing no measurable impact on groundwater. (C09893). Shaw submitted the groundwater impact evaluation to one of the world's top experts on liner design and contaminant transport, Dr. Kerry Rowe, who reviewed the materials and responded that the site appeared "well-suited for a landfill development" and that the hydrogeology had been "conservatively interpreted for the purposes of performing calculations to assess potential contaminant impact." (C09895). Dr. Rowe went on to observe that use of the minimum thickness of the Lemont Formation as a base was arguably "over-conservative." (C09895). Dr. Rowe concluded that based on his review of the groundwater impact evaluation, he believed "it adequately evaluates the potential impact of the site over the 130-year period examined." (C09895).

Drummerhausen concluded that based upon his investigation and his experience, the site is hydrogeologically located so as to protect the public health, safety, and welfare. (C09896).

Mr. Devin Moose also testified for Fox Moraine regarding Criterion (ii). He is the Director of Shaw Environmental's St. Charles, Illinois office, has a Civil Engineering degree, is a registered Professional Engineer in nine states, and is a Diplomat of the American Academy of Environmental Engineers. (C10636). Mr. Moose explained that as a professional engineer, he has taken an oath to protect the public health, safety and welfare. (C10812).

Mr. Moose has over twenty years of experience working on landfill projects, and regularly provides solid waste planning services, landfill design services, transfer station design services, and virtually all types of consulting services having to do with solid waste. (C10635-37). He has been involved in over 50 landfill siting, design, permitting, and due-diligence projects. (C10638). He works for government and state agencies, and has assisted approximately 50 counties in Illinois. (C10638). He also provides environmental engineering services to the private sector. (C10638). His testimony revealed that the proposed facility was designed to, in every way, utilize state of the art technology.

Mr. Moose participated in the selection of this site, and chose it because of its favorable geology. (C10650). He explained that the site is not located in a seismic impact area. (C10653-54). The nearest active fault zone is over 200 miles away, and there are no documented unstable areas beneath the site. (C10653, C10656). The Sandwich fault zone is between several hundred feet and one half mile from the site, but even the Sandwich fault zone has experienced no displacement since the Holocene period. (C10654). Because the area in which the proposed site is located has experienced no movement in the last 286 million years, it has experienced no displacement during a time period that well exceeds the regulatory standard. (C10654).

An archeological evaluation was performed, and there are no significant historical or archeological or architectural resources within the project area. (C10656). The Illinois State Historic Museum has signed off on the site. (C10656)(see also Application, Appendix F.6). Mr.

Moose also testified that the proposed landfill facility will have no impact on, or pose a potential threat to, any endangered species. (C10656).

The proposed facility is not governed by any state-wide water quality management plan, and it meets all required setbacks for water wells. (C10657). The nearest downgradient water well lies about 1,680 feet from the site. (C10657). The Application provides for a Water Well Protection Plan for people living within two miles, and all applicable regulations are met. (C10657). There are no sole source aquifers within the vicinity of the proposed site. (C10657) (see also Application, Appendix F.8).

The landfill meets all required setbacks from roads and highways (*see* Application, Drawing D-14), and also meets the required setbacks for schools, dwellings, retirement homes, hospitals, etc. (C10657). The nearest residential dwelling is about 1,500 feet from the site. (C10657). Mr. Moose explained that the Application provides a Property Value Protection Plan for all residences located within one mile of the proposed facility. (C10657).

There is an average of 78 feet of in situ clay beneath the proposed landfill site. (C10663). Because the clay has an extremely low permeability, a liner system isn't even technically necessary because the natural clay protects the aquifer. (C10663). The Application, however, calls for excavation of three feet of the in situ clay and recompacting it in place to ensure no cracks or fissures are present. (C10663). The clay will be compacted to one times ten to the minus seven centimeters per second or less. (C10664). On top of the clay, the design calls for a 60-mil, high density polyethelene (HDPE) liner. (C10664-65). A leachate collection system of 12 inches of granular material lies directly above the liner system. (C10664).

The design calls for the use of four individual liner systems in the critical areas around the leachate collection sumps and perimeter of the landfill facility. (C10668-70). The minimum

thickness of clay beneath the critical areas is 67 feet and the maximum thickness is 95 feet; there would be an average of 75 feet of clay beneath the critical areas. (C10670).

The design plan calls for the liner system beneath the critical areas, the sumps, and the V-notches, to consist of two layers of HDPE, with a geo-synthetic clay liner ("GCL") material sandwiched between the two layers, and a minimum of three feet of recompacted low permeability clay underneath that. (C10671). The GCL material will consist of bentonite, which, when hydrated, is equivalent to three feet of compacted clay. (C10671). If the GCL liner were to become perforated, the material in the liner would flow in and around the puncture and would therefore seal itself. (C10672-74). The Application calls for one hundred percent of every inch of every seam of the high density polyethelene liner to be tested. (C10680). Although the life of the liner is expected to be a thousand or more years, the Application nevertheless contains a design that assumes a seepage rate through the liner system as an ultra conservative measure. (C10782-83).

The Application calls for the use of fusion welding (the latest development in welding technology) to fuse all portions of both the HDPE cover and liner. (C11497-98). Fusion welding results in intermolecular linkage within the HDPE material, and within each of the welds; the welds are, in fact, actually stronger than the material itself. (C11499).

Because of the design grades in the liner system, leachate will only accumulate on 1% of the surface of the liner system. From there, it will be removed by the use of a system of leachate collection pipes to quickly convey leachate down to the sumps. (C10669; C10672). Mr. Moose explained that this pipe would be surrounded by a washed gravel envelope, with the envelope to be surrounded or encased in a layer of filter fabric which would provide additional protection in the unlikely event that there was ever a failure associated with the pipe. (C10672-73). Leachate would then be removed via a leachate collection riser system, using an air-driven pump.

(C10683-84). The pumps called for are specifically designed for this type of an environment, and are level-actuated, so that when one foot of leachate accumulates, they begin to pump. (C10684; C11496)). Leachate holding tanks will be equipped with an alarm system that will sound when a tank is 80% full, incorporating both visual and audio alarms. (C11538). If a tank reaches 85% of capacity, the pump will shut off and the alarm system will stay on so that the tank cannot overfill. (C11538-39).

An accumulation of storm water on the final cover is to be prevented by use of a geo-composite net, above which there would be three feet of protective soil, as well as a vegetative layer. (C10686-87). The final cover will have an average slope of 4 to 1, with a minimum of 5%. (C10687). The slope, working in combination with the synthetic cover and the drainage net, will cause 99% of all precipitation that falls on the facility to run off, thereby minimizing the likelihood that water could infiltrate and increase the potential for leachate. (C10687; C10816). Notably, in designing the landfill, it was decided not to make it as high as it could feasibly have been, but, rather, to mimic the area's topography so as to make it as aesthetically pleasing as possible. (C10814-15).

Gas removal is achieved by using suction, creating negative pressure within the landfill. (C10691). The design for the gas collection system calls for 208 wells, connected by piping to a central point, where the gas will be treated. (C10691). Mr. Moose explained that in the early stages of the landfill developrnent there might not be sufficient quantity or quality of gas to warrant a gas-to-energy system; therefore, in the early stages, gas will be burned using flares. (C10691-92). Incineration of this gas would take place in an enclosed flare, thereby eliminating the potential for odor problems. (C10692). Once the landfill generates a sufficient amount of gas, a waste-to-energy or gas-to-energy facility will be constructed for generating electricity. (C10692-93). Mr. Moose testified that the Application calls for continuous monitoring around

the facility for gas and leachate. (C10694). In addition, there is a system to monitor landfill gas within the waste footprint itself and around its perimeter to ensure that no gas is migrating through the vadose zone. (C10695). The Application also calls for monitoring the ambient air near the ground surface, since landfill gas is heavier than air. (C10695). Air in onsite buildings is to be continuously monitored to ensure no methane has migrated into any of the buildings. (C10695). The area around the perimeter of the facility will be monitored using 25 gas monitoring probes, thereby ensuring no gas is migrating into the surrounding ground. (C10698).

Mr. Moose described the facility's groundwater monitoring system. (C10698). He explained that the system calls for 36 groundwater monitoring wells, to be located all the way around the perimeter of the landfill, fifty feet from the edge of the waste. (C10698; C11271). The uppermost aquifer will be monitored completely around the landfill. (C10699). There will also be monitoring of the saturated zones of the Henry formation. (C10699).

Because groundwater flows to the South and Southeast of the landfill, wells are spaced closer together in that area, with the spacing having been determined by use of a computer program. (C10700). Mr. Moose explained that it will ultimately be up to the IEPA to determine the final spacing of such wells, but the groundwater monitoring system as designed will be over 99.5% efficient, far in excess of the EPA requirement of 95% efficiency. (C10701; C11531). Groundwater sampling and testing will be done by an outside independent consultant. (C11493).

The Application calls for a comprehensive construction quality assurance program that will oversee every aspect of construction to ensure that construction is in strict compliance with the design plan. (C10704). Every aspect of construction will be inspected by an independent, third party and certified by a professional engineer registered in the State of Illinois. (C10704; C11493). Construction oversight includes oversight of the recompacted low permeability clay liner system, and the testing of every inch of the seams of the high density polyethelene, as well

as the high-density polyethelene material itself. (C10704-05). In addition, every man-made component of the system will be tested. (C10705). The evidence in the record shows that the facility will not impact the aquifer within 100 feet of the facility boundary, 100 years after closure. (C11432). Mr. Moose also testified that the project is so designed as to avoid any flooding downstream as a result of construction activities. (C10707).

The storm water system is designed for a 100-year, 24-hour storm, which is nearly five times the state requirement for such facilities. (C10708). The stormwater system includes naturalized detention basins with emergent wetland shelves. (C10709). Prairie grasses on the banks of the basins are included to dampen or minimize the effect of erosion around the perimeter, and to serve as filtration or nutrient uptake, so that the plants themselves help clean the water. (C10710). The Application includes wet-bottom basins designed to be deeper than they need to be so that water is in them at all times, thereby causing water entering the basin to be slowed down. (C10709-10). Mr. Moose also explained that the longer water stays in such basins, the more sediment settles out. (C10709-10).

The Application also calls for the use of bio swales, and various wetland and prairie vegetation to minimize erosion, and for the rerouting of an existing farm ditch which transects a small portion of the site. (C10710; C10712). The landfill design also incorporates the creation of waterfalls to provide aeration and improve the quality of water prior to discharge. (C10713). Mr. Moose testified that the proposed design exceeds IEPA requirements by 50%, and will allow the facility to handle a flood of record (16.9 inches in a 24-hour period). (C10714).

With respect to operational controls, Mr. Moose testified that the proposed Site will take municipal solid waste, and will take no hazardous or radioactive waste. (C10717). Employees will be trained to identify acceptable and unacceptable materials, with unacceptable materials to be segregated and either recycled or disposed of properly. (C10720).

The gatehouse will have a radiation detection device, and vehicles will be videotaped as they enter. (C10721). In addition, at the active face of the landfill, operators, spotters, landfill compacters, and all other employees will be trained to look for unacceptable waste. (C10722). The Application calls for random inspections, both at the landfill and at transfer stations that will use the facility, to determine whether unacceptable waste is present. (C10722). Haulers who bring unacceptable materials to the landfill will be penalized, and chronic offenders will be barred from using the facility. (C11515-16).

The Application includes measures designed to control dust and mud. (C10725-28). On-site areas used by trucks will be paved, and Mr. Moose explained that the design provides adequate distance between the entrance and the scale house to queue incoming vehicles. (C10726). During periods of wet weather, landfilling would take place only in areas kept under intermediate cover. (C10726-27). This minimizes the distance a truck must travel from the paved road to the point of disposal. (C10727). Once weather improves, disposal will resume at the normal active face in the landfill. (C10727). Mr. Moose testified that the Application's best mud-control measure is use of good, all-weather access roads from the facility entrance gate to and from the active face area, so that most mud will have fallen off a vehicle before it even reaches the wheel wash area. (C11421). Dust is to be controlled by use of a water truck, and a street sweeper is used anywhere mud is created. (C10728; C11485-86).[9]

The Application calls for use of 10 to 15 foot high operational screening berms around the perimeter to shield daily operations from the view of passersby. (C10729). These operational berms also help suppress noise and control litter. (C10729).

---

[9] Mr. Edwards provided additional details concerning dust and mud control measures, at C10580-83).

The litter control measures include a requirement that waste be covered in a timely manner, and a process which ensures trucks are cleaned out before they leave the active face of the landfill. (C10729-30). Operations are to be altered during windy conditions. (C10730). Mr. Moose explained that there would, in addition, be primary, secondary and tertiary portable fencing, with 20 foot high primary fencing to be located next to the active face. (C10730). These fences are to be moved every day, or may be moved multiple times per day, as needed. (C10730).

The Site will be patrolled for litter pickup, and there are strict tarping procedures with meaningful penalties meant to increase incentive for compliance. (C10732). Odor control includes covering waste as soon as possible throughout the course of the day, and also use of the gas monitoring systems and flaring systems. (C10735-36). If a particularly odiferous load comes in to the facility, that load is to be handled immediately and buried immediately. (C11486). Additionally, a professional exterminator will regularly visit the Site to inspect for vermin and rats, and will use appropriate measures to control them. (C11598-99).

Noise is to be controlled in part by use of setbacks, as well as operational screening berms. (C10736). Mr. Moose confirmed that the facility will comply with the City's noise ordinance. (C10744).

Security will be present at the facility from the time it closes at night until the following morning to ensure that any trucks onsite are pre-approved and are part of the customer list, and that no one else gains access to the facility. (C10774-75).[10] The proposed facility incorporates a convenience center to allow homeowners to dispose of waste in a series of roll-offs near the scale

---

[10] The fact that security personnel would be onsite to ensure the safety and security of operations was confirmed by the testimony of Mr. Ron Edwards. (C10397-98).

house, and a recycling drop-off area where the public dispose of recyclable materials. (C10801; C11543).

Records concerning quality control and quality assurance are to be maintained onsite, along with records regarding operation, construction and self audits. (C10806).

Mr. Moose, like Mr. Drummerhausen, testified that from a geological and hydrogeological standpoint, this is among the best sites he has ever seen for a landfill. (C11544). Based on over 20 years of experience in the field as well as the design and operational aspects of the Application, Mr. Moose concluded that this facility is so designed and located, and is proposed to be operated so as to protect the public health, safety and welfare. (C10744-45).

The objector groups presented testimony by a Mr. William Schmanski, who claimed the Application does not meet Criterion ii with respect to stormwater management. Schmanski, however, admitted that he has never previously been involved in storm water management design for a landfill, and that he has never done a stormwater management review in connection with a landfill siting application. (C14111-14112). He admitted that the three drainage sections (A-1, B-1, and C-1) all drain to the Fox River, and that in the aggregate, they meet the 0.15 standard under the law. (C14114). Schmanski claimed, however, that each individual drainage way must individually meet the 0.15 standard, and that the standard was not based on the aggregate drainage into a single waterway. However, he could not provide any authority to back up this assertion. (C14114-17). Schmanski was aware that the EPA's stormwater management regulations for landfills are different than local regulations for other land uses, because the goal in stormwater management of a landfill includes minimizing infiltration into the landfill. (C14112-13).

The only other sworn opposition witness was the ubiquitous Mr. Hyink, whose expertise is based on his having located the web site and writings of G. Fred Lee. (C14376; C14432).

Hearing Officer and Special Counsel Findings and Recommendations

Once more, both the Hearing Officer and the Special Counsel found that, with conditions, Criterion (ii) was met. The Hearing Officer observed that Drommerhausen's testimony showed that the clay beneath the site "exceeds all IEPA requirements for liner soils in regard to acceptable permeability." (C18524). He further credited Drommerhausen's testimony that "this site is the best site from a geological/hydrogeological [basis] that he has ever worked on." (C18524). He did note that based on public input, Devin Moose had agreed to slightly modify the fill sequence to operate from east to west rather than west to east, allowing for earlier installation of downgradient wells, to provide earlier assurance that the liner system was not breached.[11] (C18525).

The Special Counsel and City staff also credited the testimony of Drommerhausen and Moose, and concluded that with the proposed conditions, Criterion (ii) was met. (C17192).

E. Criterion (iii): ("the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property")

Mr. Chris Lannert testified for Fox Moraine, concerning Criterion (iii). Mr. Lannert has substantial experience in Criterion (iii) planning and analysis, having provided testimony regarding approximately 29 solid waste landfill proposals and approximately 17 transfer station sites.(C08144) He personally viewed the area on multiple occasions, both on foot and by car, to confirm actual land uses in the area. (C08144; C08150-51) He then prepared a landscape plan, created 3-D images, and worked with a model maker to prepare a 3-D model of the landform.

---

[11] This was in response to the public comment of Stan Ludwikowski, a local resident with a lapsed engineering license, who admitted he had no expertise in geology or hydrology, but who questioned the sequencing of construction and the placement of groundwater monitoring wells. Mr. Moose strongly disagreed with the content of this unsworn, unqualified comment, but accommodating the concern was a minor point. (C10952-54; C11254-57.)

(C08145-46) His planning work for the facility incorporated a variety of design elements to minimize incompatibility with the surrounding area. (C08531).

Mr. Lannert determined that the holdings of one of Fox Moraine's principals (Mr. Don Hamman, who owns 2,000 acres in the area) represent 51% of the land area situated within a one-mile circumference of the site. (C08147). Hamman's land extends out in three directions from the proposed site. (C08541). Concluding that Hamman's substantial holdings in the area could skew the results if a 1-mile radius was used, Mr. Lannert utilized a 2-mile radius in his analysis (C08147; C08186-88; C08472). The 2 mile radius includes 13,083 acres, of which 84% are agricultural, 7% are open space, 6% are residential, and 2% comprise the ComEd right of way area. Fractional uses make up the remaining 1%. (C08149-50).

In choosing this site, the Applicant took into consideration its frontage on highway 71, its contiguity to the Com Ed corridor, and its proximity to the proposed Prairie Parkway. (C08533).

The landform for the facility was designed to have undulating contours, like the surrounding farmland, with drifts of wild flowers planted on top (C08159-60; C08167-68). Because there are substantial elevational variations in the area around the facility, the undulating landform will be minimally obtrusive. (C08524). The colors of the vegetation to be planted at the site coincide with the seasonal color change in the vegetation in the surrounding area (C08529). Ten to twelve foot tall berms feature vegetation that will, at the time of planting, add an additional twelve to fifteen feet as natural screening, which, when , coupled with the design of the entry drive, will shield the landfill operations from view. (C08162-63; C08214; C08522, C08551-52; C08554). The berming and screening also act to block noise from operations, and minimize impact on those near the landfill (C08517-18).

The landscape plan for the site features three layers of vegetation, an additional layer of a solid berm, plus the operational berm, along Highway 71.(C08551-52). All operational screening

berms are designed to be higher than the equipment working in that area. The plan incorporates a naturally planted wetland, to act as a stormwater pond for the site (C08163), as well as stormwater ponds at each corner, along with other features that address stormwater drainage requirements. (C08519). The design of these features was the result of a collaboration between the site engineer (Shaw) and ENCAP, an environmental firm that specializes in plant material. (C08546-47). The site is to be planted with natural, indigenous plant material, including native species of grasses and ornamental trees, as well as taller trees and evergreens (C08166).

The entrance to the facility is swept back, and an area is provided inside the entrance for queuing or stacking within the facility itself, so that truck traffic will not build up on the road. (C08520). In Mr. Lannert's professional opinion, the proposed facility is so designed as to minimize incompatibility with the surrounding area (C08168).

Mr. Frank Harrison also testified for the Applicant concerning criterion (iii), testifying with respect to impact on property values. He is an appraiser and land use consultant who has worked in this field for 36 years. (C08571). He holds the MAI and SRA designations from the Appraisal Institute, has taught appraisal for 29 years, and has written a book on the valuation of complex properties. (C08571-73). He is the past chairman of the Illinois Real Estate Appraisal Board, and was appointed by Governor Thompson to help create the criteria and standards that govern the licensure, certification, and accreditation of real estate appraisers in Illinois. (C08573-74).

Mr. Harrison evaluated and prepared a real estate impact study for the Applicant concerning the potential impact of the proposed site on property values in the area. (C08575-76). In so doing, he analyzed the market, looked at sales activity in that market, and analyzed the meaningful literature concerning other landfills throughout Northern Illinois, including historical case studies relating to those landfills. (C08575-78). He did not accept the findings of those

studies at face value, but, instead, reviewed the data and performed his own analysis, which included spot-checking to determine the accuracy of reported sales data. (C08579-80). Mr. Harrison pointed out that the construction standards for older landfills are unlike those that apply to modern landfills, and that older landfills are associated with a number of problems that limit the value of impact studies associated with them. (C08591-92).

Mr. Harrison identified two landfills with characteristics similar to the proposed site in this case, and conducted an in depth study of those landfills. (C08591-92). He also carefully reviewed the Applicant's proposed Residential Property Value Protection Plan. (C08582). He limited his examination of the data regarding other landfills to those built in accordance with the modern, updated (Subtitle D) design standards. (C08997-C0900). Harrison spent a substantial amount of time engaging in a first-hand examination of the area, including driving around the area on a number of occasions in order to familiarize himself with the actual land use, activity, and growth in the area. (C08576; C08583). He also examined soil and topography maps, and reviewed the municipal boundaries of properties in the area. (C08725). He examined sales data obtained from the Illinois Land Sale Bulletin (which collects farmland sales in every county in Illinois and is published every two months). (C08585) He also reviewed historical real estate impact studies identified with the Winnebago Landfill, Orchard Hills Landfill in Ogle County, Lee County Landfill, Livingston Landfill, Prairie View, Settler's Hill, and Countryside, as well as data related to several landfills in Kankakee County. (C08585; C08590). Harrison concluded that the characteristics of the area surrounding the proposed landfill support a finding it is a "transitional agricultural area" that is changing from one use to another. (C08588).

He found that the Countryside Landfill in Lake County bears a number of similarities to the proposed site in this case, including its proximity to a state highway, the presence of a ComEd corridor, and plans for a nearby interstate highway interchange. (C08595-97; C08602).

Harrison noted that in Lake County, the Prairie Crossing development, a highly successful community of national prominence featuring high-end homes, was built within a couple hundred feet of the north end of the Countryside landfill, which demonstrates that the Countryside Landfill has not impeded development in the area that surrounds it. (C08596-99; C08602).

With respect to the Settler's Hill landfill, Mr. Harrison explained that his research showed it has not hindered or impeded the growth of surrounding communities, and has not diminished the type or quality of development in those communities. (C08693-94).

In examining the Property Value Protection Plan associated with the Application in this case, Harrison observed that while most such plans extend out 1000 feet from a site (or sometimes up to a quarter mile), here, the Plan extends a full mile from the proposed site. (C08695). Additionally, instead of the property protection beginning at the time that the permit to accept waste is issued, here the property protection begins with the filing date of the application (i.e. December 1, 2006). (C08695-96).

Harrison noted that the specific location of the proposed facility on Mr. Hamman's acreage would have less impact on surrounding property than if the facility was sited elsewhere, because the proposed location is near a planned major intersection of a state highway and an interstate highway, making it unlikely that any adjacent property would be developed as single-family residential housing even if there was no landfill. (C08699-8701). Rather, this type of busy intersection is likely to be developed for commercial, industrial, and business park use. (C08700). Additionally, Mr. Hamman's ownership of much of the surrounding land acts as a buffer on the proposed facility's impact in the area. (C08709-10).

Like Lannert, Mr. Harrison concluded that the proposed facility is located so as to minimize the effect on the value of surrounding property (C08718).

Opposition groups attempted to show the Application does not meet Criterion (iii) by presenting witnesses who lacked appropriate relevant experience, failed to conduct legitimate, verifiable investigations and analysis, and largely misunderstood the standards under Criterion (iii). For example, Ed Sleezer, a self-described real estate broker and farmer, and former township assessor, as well as an undisclosed member of Alderman Burd's mayoral campaign committee, evaluated the Residential Property Value Protection Plan. (C13481-84; C 13487; 13, PCB 4-22-09 p. 18). Although he characterized himself as a real estate broker, he testified that in 2006 he brokered approximately four transactions, and in 2005, he brokered three or four transactions.(C13516-17). Of those transactions, 5-10% were actually his own transactions. (C13516-17). He is not now, and has never been a licensed appraiser. (C13517-18). Before looking at the Applicant's Property Value Protection Plan, he had never seen one before. (C13525-27). He testified that he concluded the proposed facility would have a negative impact on surrounding property based solely upon hearsay. (C13529-31).

Sleezer testified as to his pecuniary interest with respect to the Protection Plan, observing that it would not cover his own property, which is located north of the proposed facility. (C13514-15). Sleezer testified that when he first learned of the proposed use of the Hamman property, he approached Mr. Hamman to see if Hamman would sell his property to Sleezer for $15,000 an acre. (C13512-22). When Mr. Hamman declined, and offered to instead buy Sleezer's property for $15,000 an acre, it marked the end of the conversation. (C13522-23).

Sleezer testified that in his personal opinion, the Protection Plan was insufficient because it protected only residential property within a mile of the facility, and would not apply to agricultural property, business property, or commercial property. (C13489-90).

Opponents also presented Bud Wormley, an insurance and real estate broker. (C13564). Wormley is not a certified appraiser, but nevertheless undertook to create his own opinion of

surrounding property values, and projected future growth. (C13566-67; C13569-71). Like Sleezer, Wormley had a personal interest in the outcome of the siting hearing, inasmuch as he owns property about a mile from the proposed site. (C13585). Wormley opined that there would be depreciation of nearby land if the landfill was constructed, but offered no data to support his opinion. (C13593-96). He admitted that this constituted a "subjective" issue. (C13619).

Wormley testified that his "investigation" consisted solely of talking to certain property owners in the area, although he could only remember the names of two of the people he spoke to. (C13596-97). Wormley's conclusion that the Applicant failed to meet Criterion (iii) was based on the site's location, specifically, its location within what he believed was "a plan, committed, and invested growth corridor." (C13583; C13611-12). However, he also testified that any land use other than agriculture would have a negative impact on land values in the area. (C13618). He further opined that all landfills leak eventually, and that it is just a matter of when. (C13622).

When asked to suggest minimization techniques he thought should have been incorporated into the Application, he replied that "I think further studies need to be made by professionals in the field, traffic engineers, chemical engineers, geologists" but also stated he was not an expert in any of those fields, and gave no reason why these additional studies might be helpful. (C13620-21).

On cross-examination, Mr. Wormley's testimony was revealed to be laced with inconsistencies and arguably misleading statements. For example, when questioned about his initial testimony that he had testified in Federal Court regarding property valuation in a pipeline case, he admitted that his testimony in the pipeline case solely related to his family's attempts to recover compensation for pipelines that traveled through his mother's farm. (C13630-31). In addition, when asked during cross-examination to explain his initial testimony that there had been a decline in land prices in the previous six months related to the proposed landfill, he

admitted that there had been a nationwide decline in land prices during the same time period. (C13637-38). With respect to his claim of land depreciation, he admitted he conducted no investigation or analysis to determine what the percentage or rate of this alleged depreciation was, and knew of no information or sales data that would support his conclusion. (C13602-03).

When asked to explain his testimony that Section 1031 real estate exchanges had affected reported real estate values, he acknowledged that he did not know how many Section 1031 exchanges there had been within five miles of the proposed site in the prior year, and further admitted he did not look at such data, and did not even know whether such data was in fact even available. (C13591-93). He also revealed on cross-examination that the prior Criterion (iii) witness, Mr. Sleezer, was one of his former employees. (C13599).

Opponents also presented Mr. Ted Schneller as to Criterion (iii), another self-interested, self-proclaimed "expert" who lives near the proposed facility. (C13703). Schneller first testified that the facility would pose an environmental risk (C13652), would be a danger to the shallow aquifer from which residents draw their water, and would cause traffic problems (C13656-59). However, he thereafter admitted he had no expertise in any of these areas, and that his opinion was not based on scientific data or evidence. (C13683; C13685-89; C13700-01).

Schneller testified that his opinion that the application did not comply with Criterion (iii) was based on his "highest and best use analysis," and that the only way to "minimize" the landfill's incompatibility was to move it somewhere else. (C13646; C13683). He further opined that the "vast majority of residential developers would not seek to develop properties for residential purposes next to a landfill." (C13693). However, he later admitted he was not familiar with the Fox Run subdivision near Settlers Hill, where the average home price was over $750,000, and did not know there were million dollar homes within ready view of the Wheatland Prairie Landfill. (C13693-94). He acknowledged that he did not review any of this kind of

information in performing his so-called analysis, and admitted he did not do any match compared analysis, explaining that he did not know of "many other landfills that are in a location like this." (C13695). He conceded that if one excludes the opinions of local developers and other people he questioned concerning their personal opinions on the impact of a landfill, there was no empirical data to support his so-called analysis. (C13699). He noted that his opinion was based on the general "stigma" associated with a landfill, and claimed (again without support) that the proposed facility would create a stigma on the entire city of Yorkville. (C13687-13690; C13709-01).

Opponents also presented Doug Adams, an appraiser. Notably, Adams' report was not presented to the Applicant until after the Applicant had already rested its case, and was revealed only one day before the witness testified, and indeed, three and a half weeks into the hearing. (C13888-89; C13891). The Applicant accordingly objected to the testimony as unfair because of the untimely tendering of the report (which denied the Applicant an opportunity to review it and assess the validity of its contents). (C13888-89; C13891). The Hearing Officer agreed with the Applicant that if this hearing had progressed in the manner most siting hearings do, it would already have concluded, but he nevertheless denied the objection and allowed Adams to testify concerning his report (C13891).

Adams admitted this was his first impact study or analysis, and represented his first landfill study. (C13977-78). He acknowledged that he did no statistical analysis to verify his findings (C13978). He testified that he chose two landfills to study in order to determine impact on property values, and his choice of those two landfills arose from the fact that they were in different kinds of settings (one urban and one rural), and because he was already familiar with both of them. (C13980).

One of the "comparator" landfills Adams looked at (Hillside Landfill) is located in a highly urbanized area, close enough to Chicago that one can observe the Chicago skyline from the site. (C13990-91; C14002). With respect to the buffer around the Hillside Landfill, Adams acknowledged that residences are located extremely close to the landfill, with some residences located within a block of the landfill. (C13991). He acknowledged that the Hillside landfill is not a modern era landfill built under current standards, and that it has a long history of compliance problems, including uncontrolled releases of leachate and landfill gas. (C14008). He further testified that the Hillside Landfill exudes a very strong odor. (C13905). Nevertheless, he opined that data he obtained from the multiple listing service, which reportedly showed that one house within three blocks of the Hillside landfill sold for $12,000 less than a house that was a mile away, established that proximity to a landfill causes a decrease in property values. (C13910-11).

Adams further testified that he found another pair of listings in the multiple listing service that showed there was a $20,000 difference between the sale price of two houses, where one was located closer to the Hillside landfill than the other. (C13909-11) However, Adams admitted he wasn't sure whether the price difference was attributable to differences in the terms of the sale, the financing, or the interior condition of the two homes. (C14010-12). Adams testified that the price difference "suggests" that property closer to a landfill is worth less than property farther from a landfill, but acknowledged the price difference might be due to something else. (C14013-14). Notably, the Hearing Officer observed that the higher priced home sales included more personal property, including appliances, than the lower priced homes, and Adams admitted this was true. (C14040-41) The Hearing Officer further pointed out that the higher prices were obtained in spring and summer, and the lower prices were obtained in the winter, which is in keeping with typical sale trends. (C14042-43). The Hearing Officer also pointed out that the

lower priced properties were in the Hillside School District, whereas the higher priced properties were in School District 87; again, the witness admitted this was true. (C14043-44).

Adams also acknowledged that included in the data from which he selected the two paired sales that served as the sole basis for his opinion were two homes located on the same block, where one of the homes sold for $8,500 more than the other. (C14018-19). Adams didn't know what differences between the two homes might explain the price differential, because, again, he relied only on the two paired sales he selected from a total of 53 sales in the area reported in the multiple listing service. (C14019-21; C14023; C13906).

Adams testified that did not know how near to the landfill residences would be in the present case, and did not know how much buffer area Mr. Hamman owns in and around the proposed landfill site. (C13992-93). (He did, however, testify that he has no criticism of the buffers proposed for the proposed facility.) (C13993).

Adams testified that with respect to the other "comparator" landfill (near Clinton, Illinois) that landfill represents a "predevelopment" example of what is proposed for the Fox Moraine site. (C13900). The Clinton Landfill is rural, located outside the city limits of a small town in central Illinois. (C13895). Adams opined that the Clinton Landfill and the proposed facility in this case compare closely to the extent there is vacant, raw land around the site. (C13895). The owner/operator of the Clinton Landfill is also the same as the proposed operator in this case. (C13897). However, Adams found that with respect to the Clinton Landfill, there was no correlation between proximity to the landfill and sale prices. (C14027-28; C13904).

In formulating his Criterion (iii) opinion, Adams testified that he did not look at the Kendall County Land Resource Management Plan, and further admitted he is unfamiliar with Land Resource Management Plans. (C13994; C13996). He also acknowledged he did not know what percentage of the land in Fox Township, where the site is located, is agricultural. (C13997).

He nevertheless testified that the way to minimize the incompatibility of the proposed facility would be to make it smaller, because it is "too big," or to locate it "in a more rural setting than where it is." (C13912-13; C13920; C14025). However, he had no opinion as to how much smaller the landfill should be. (C14030).

Opponents further presented Joe Abel, a consultant on planning, zoning, and economic development. (C14562). Abel testified that Criterion (iii) had not been satisfied based largely on the Comprehensive Land Use Plan Update for Yorkville, because the Comprehensive Plan does not include landfills as a contemplated use. (C14575). He described landfills as a nuisance type land use, observing that in the past they have always been restricted to heavy industry zoning classifications. (C14580-81). The Applicant's objections to this witness's opinion being based on zoning principles was overruled by the Hearing Officer. (C14575-78)[12]. The witness opined that Criterion (iii) was not met because the proposed siting would be inconsistent with the Comprehensive Plan, because the proposed facility was in an area that is "part of what they call an estate neighborhood, which is intended to provide areas for low-density, detached single-family residences." (C14582-85).

Notably, he conceded, however, that the proposed area is actually outside of the boundary of the Comprehensive Plan's planning area. (C14584-85. He stated that when determining the compatibility of a proposed land use, "you must look at existing and proposed land uses to determine how an area is going to develop and, therefore, its total compatibility." (C14594). This is, he opined, because the subject property takes its character from the existing uses and the "proposed uses." (C14594). He stated that there is "no way from a planning standpoint" to characterize the area near the subject property as an agricultural area because when he refers to

---

[12] Section 39.2(g) states, in pertinent part, "Local zoning or other land use requirements shall not be applicable to such siting decisions."

an agricultural area, he means "an area where you have square mile upon square mile" of farmland, such that, for example, in a 36-square mile township, there might be only 36 homes. (C14598-99). Abel further testified to his belief that to be "truly agricultural," an area must have "very, very little residential intrusion." (C14599-600). In his opinion, looking at a three mile radius outside the property, he felt the area could not be classified as anything other than an "estate area." (C14603). He did admit, however, that section 7.6 of the Comprehensive Study states that "Fox and Kendall Townships are fairly similar in terms of their predominantly rural character" and testified that he had no reason to doubt the validity of Kendall County's Study. (C14649-50).

In Abel's opinion, when determining incompatibility, one should look at "general welfare from a planning standpoint" as "a sense of well being, a sense of feeling – feeling safe, healthy, and being in an environment that was part of your lifestyle." (C14609). His conclusion that Criterion (iii) was not met was based on the fact that a landfill would purportedly create traffic problems and would not be "an economic development tool to encourage or retain existing land uses," as well as his interpretation of the import of the Comprehensive Plan upon the siting proceedings. (C14611-12).

Notably, Abel has never assisted an applicant in filing an application for siting approval for a landfill or transfer station, and has never assisted in the submission of a landfill permit to IEPA. (C14614-15). He also acknowledged that the Comprehensive Land Use Plan provides for non-residential land use along the proposed Prairie Parkway, and admitted that Objective 2.1 of the 2004 Plan includes the goal of "explor[ing] economic development opportunities" which would include "industrial uses." (C14634-35).

Abel testified that in his opinion there is no incompatibility between the proposed landfill facility and the approximately 2000 acres owned by Mr. Hamman, of which it is a part. (C14652-

53; C14674). He went on to opine, however, that in his view, "[t]he total acreage in that two-mile area means nothing."(C14652-53).

Mr. Price, attorney for the City, returned to this point with Mr. Abel, asking him whether locating the subject facility inside land with which it is not incompatible constitutes a minimization of incompatibility; Abel denied that it would. (C14672-75). He went on to announce, summarily, that "you can't minimize it and, therefore, it shouldn't go in." (C14679.)

The evidence presented by Fox Moraine's witnesses clearly showed that the standards of Criterion (iii) were met, in that it demonstrated that the Applicant's proposal would minimize incompatibility with the character of the surrounding area, particularly given the fact that the subject property is buffered by the substantial land holdings of one of the principles of Fox Moraine at and around the site, and would minimize the effect on the value of the surrounding property. The non-scientific testimony presented by self-interested opponents failed to show that the Applicant did not minimize incompatibility or did not minimize the effect on nearby property. Rather, opponents merely demonstrated that their witnesses didn't like the idea of having a landfill facility in this particular location, whether because it would be located near their own property (Sleezer, Wormley, and Schneller), because they had objections based on their zoning and planning philosophies (Abel), or based on an entirely unscientific "study" that even the Hearing Officer easily debunked (Adams).

Hearing Officer and Special Counsel Findings and Recommendations

As with Criteria (i) and (ii), the Hearing Officer and Special Counsel both found that, with minimal conditions, Criterion (iii) was met. The Hearing Officer observed that the evidence showed "[a]lmost 85% of the land within the two mile study area is present used for agricultural purposes" and that "[m]ost of the residential uses located within the study area are greater than one mile from the proposed site." (C18526). He noted that the "character of the area surrounding

the site is predominantly agricultural in nature" and that there is no way to know when that use may change. (C18527). He noted that the property owned by Mr. Hamman will serve as a substantial buffer to the proposed site, and that any effect from the landfill would be felt first by Mr. Hamman. (C18527). The Hearing Officer observed that the objectors' witnesses misunderstood the standard under Criterion (iii), failing to recognize that the statute acknowledges there will always be some impact to the surrounding area, and that the duty is to minimize that impact. (C18527-28). He found the testimony of Adams to be suspect, and opined that Sleezer, Wormley, and Schneller had each provided self-serving, often contradictory testimony.(C18528).

Price, on behalf of the City's expert staff, concurred that the evidence showed Mr. Hamman's holdings serve as a buffer, and that this, along with the landscaping plan, minimizes incompatibility. (C17198). Price also noted the important role of the property protection plan in meeting the criterion. (C17198)

F. Criterion (iv): "((B)...the facility is located outside the boundary of the 100-year floodplain")

In addition to his testimony recited above regarding Criterion (ii), Mr. Moose also testified that the proposed site lies outside the 100 year flood plain as determined by the Federal Emergency Management Agency ("FEMA"). (C10745). Mr. Moose made this determination by looking at FEMA maps. (C10745-46). No evidence was presented that would show the area was located within the 100 year flood plain, therefore this criterion was clearly established.

Hearing Officer and Special Counsel Findings and Recommendations

Both the Hearing Officer and Special Counsel found that the evidence was uncontroverted that Criterion (iv) was met. (C17199; 18528).

G. Criterion (v) ("the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents")

Mr. Moose also testified concerning measures incorporated in the Application to prevent accidental spills, as well as leak detection methods including visual observation. (C11350-51). In addition, trucks into which leachate will be pumped will be at a higher elevation so that the hose either drains into the truck or drains back into the landfill; thus, when a hose is disconnected, gravity will cause leachate to drain from one receptacle to the other, thereby severely limiting the quantity of any possible spill. (C11350-51). Moose also testified concerning visual and audio alarms designed to immediately alert personnel if a spill were to develop (C11538-39), and testified that security personnel will be present onsite when the facility is closed(C10774-75).

Additional testimony by Mr. Moose regarding operational controls to avoid fire, spills, or other operational accidents is discussed in detail above in the section addressing Criterion (ii).

Mr. Moose testified that based on his experience, the Application, and the materials he referred to during his testimony, it was his professional opinion that the plan of operations for the proposed facility is designed to minimize the danger to the surrounding area from fires, spills, and other operational accidents. (C10746).

Mr. Ron Edwards testified as a representative of Fox Valley Landfill Services, which would be the operator of the proposed facility. (C10173-74). Edwards is also the vice-president of Peoria Disposal Company ("PDC"), which is an owner/member of Fox Valley Landfill Services ("FVLS"), and he has served as vice president of landfill operations for five landfills in Illinois. (C10173-74).

Edwards testified concerning the oversight that would be used to minimize the risk of accidents through vigilant monitoring and proactive inspections to detect potential problems before they ripen into accidents. He explained that PDC would provide FVLS with personnel who would be fully trained in the management of solid waste, and who would perform routine daily and weekly inspections; PDC's own environmental compliance department also routinely

audits personnel and operations. (C10188). PDC's compliance coordinator typically visits each facility every week, the health and safety coordinator visits each month, the compliance manager visits every three months, and Mr. Edwards, as vice-president of landfill operations for PDC, visits each facility every six months. (C10212).

Edwards testified that the operator will have the necessary heavy equipment and trained and experienced personnel onsite who can respond quickly to contain any fire that might occur. (C10488-490). Employees at PDC facilities receive annual training, as well as monthly "tool box" meetings that are conducted by the health and safety coordinator. (C10518). In addition, monthly training sessions would be conducted by the environmental coordinator at the landfill. (C10518).

Opponents presented no evidence to show that the Applicant failed to minimize danger to the surrounding area from fire, spills, or other operational accidents.

Hearing Officer and Special Counsel Findings and Recommendations

Once again, both the Hearing Officer and Special Counsel found that, with conditions, the Applicant met the criterion. The Hearing Officer treated Criteria (ii) and (v) together, and credited the testimony of Fox Moraine's witnesses Drommerhausen and Moose.

Special Counsel Price credited the testimony of Fox Moraine's witnesses as well, and concluded that with the proposed conditions, Criterion (v) was met. (C17199).

H. Criterion (vi) ("the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows")

Notably, the evidence presented by opponents focused solely on the notion that a landfill would generally increase traffic in and around Yorkville and surrounding communities, and thus failed to address the factors important in assessing this criterion (i.e., whether the designated patterns to and from the proposed facility were formulated in a way that will minimize the facility's impact on existing traffic). The gravamen of the opposition testimony was that any

increase in traffic, regardless of whether that increase is less than that from alternative uses for the property, would be unacceptable.

Michael Werthman, a traffic and transportation engineer with 17 years of experience who has worked on approximately 750 different projects, including residential, commercial, and retail, and involving distribution, manufacturing, and industrial facilities, testified for the Applicant.(C09038-39). Mr. Werthman is a registered professional engineer in Illinois, Pennsylvania and Wisconsin. (C09041). He holds a Bachelor's of Science degree in civil engineering from Michigan State University, as well as a Master's degree from Northwestern University (C09041). He has specific experience with solid waste projects, having worked on 30-35 such projects, and has testified in connection with 19 solid waste related projects (C09042).

Mr. Werthman works throughout the greater Chicago area, both on behalf of both private entities and units of local government (C09043). Mr. Werthman prepared a report as well as a Power Point presentation to summarize his findings. (C09040). He testified that due to its rapid growth rate and the limitations associated with having only one bridge across the Fox River, the City of Yorkville can expect to face significant traffic issues, with or without a landfill. (C09044-45). In the case of this project, he conducted a standard, three-phase traffic impact study using the accepted methodology within the industry and with transportation planning officials. (C09046). He explained that traffic delays are typically expressed on an "A to F" scale, with A representing the least amount of typical delay, and F representing the greatest delays. (C09049-50). Under existing conditions, the intersections that would be most impacted by the proposed landfill facility are currently operating at "B" and "C" levels (C09081). Even with the additional landfill-generated traffic, Mr. Werthman testified that they would continue to still operate at the same levels. (C09081).

The first phase of his traffic study looked at existing conditions, which was accomplished by doing field studies. (C09051-52). Next, he held discussions with various transportation officials including IDOT, the Kendall County Highway Department, the City of Yorkville, and other public agencies. (C09051). He then collected and reviewed transportation-related data, including existing traffic volumes, approved and proposed developments, planned and proposed roadway improvements, and existing accident data. (C09051-52).

Next, peak period and daily traffic counts were conducted at critical intersections near the site. (C09052). Finally, he and his group conducted a gap study along Route 71 at the location of the site access drive. (C09052). Route 71 is a northeast to southwest arterial roadway a two-lane, undivided cross-section, and is considered a Class 2 truck route. (C09052). At its intersection with Route 47, it has separate left turn lanes. (C09052). Routes 47 and 126 are also Class 2 truck routes, with two-lane undivided cross-sections. (C09053). All three of these roadways are under the jurisdiction of IDOT, all are designated arterial truck routes that connect important areas, and all carry both passenger and commercial truck traffic. (C09054-55).

Werthman explained that IDOT has already received funding to build the first section of the Prairie Parkway between Illinois 71 over the Fox River to Route 34, and construction is scheduled to begin in 2009. (C09064-65) In addition, he testified that IDOT proposes to widen Illinois 47 to a five-lane cross-section with additional intersection improvements between Kennedy Road and Illinois 71. (C09066) He also explained that the contract has been awarded for significant improvements to the intersection of Illinois 71 and Illinois 126, and that construction was scheduled to begin in the spring of 2007. (C09066-67).

The landfill traffic plan calls for use of the arterial roadways of Illinois Routes 71, 126, and 47. (C09069-70; C09085). In assessing the potential impact the landfill may have on traffic in the area, Werthman determined that the increase in traffic will be limited, as much of the same

volume of traffic that would travel to and from the landfill is already traveling to and from the landscape waste application facility that currently operates on the proposed site location. (C09073-74).

Werthman also explained that if, instead of a landfill, single family homes were built on the proposed site location, even if only one home were built per acre, the volume of traffic that would be generated would be in excess of 3,300 trips per day, rather than the 494 trips per day predicted for the landfill.C09075-76). In the alternative, if the property was developed as a warehouse facility, there would be an estimated 57 trips per acre, per day, rather than the 1 trip per acre, per day estimated for the proposed landfill facility. (C09077). An office development could be expected to generate 110 trips per acre per day. (09077). Moreover, traffic for a landfill would not be concentrated at a particular time of day, but would instead be expected to occur throughout the day. (C09077-080).

Under existing conditions, delay times at the intersections in the area are in the acceptable range. With the landfill-generated traffic, the volume during the peak afternoon travel period would increase at, for example, the intersection of Illinois 126 and Illinois 47 by approximately 1 percent, and would increase at the intersection of Illinois 47 and Illinois 71 by approximately 2 percent. (C09080-81).

The Application proposes significant improvements in the development of the site access drive and roadway improvements, including a three-lane access drive with two exit lanes. (C09296). The plan calls for wider radiuses to accommodate truck traffic safely and efficiently, and for a widening of Illinois 71 to provide separate right and left turn lanes, all at the expense of the landfill. (C09296; C09314).

Werthman explained that the Applicant's development team met with IDOT regarding the design and location of the site access drive on Illinois 71, and received conceptual approval

for both the design and location. (C09084). He concluded that the traffic generated by the proposed landfill will not have a significant impact on the existing roadway system, especially when compared with the traffic that would be generated by the alternative development possibilities for the tract of land in question. (C09084). Werthman also concluded that the existing roadway system is sufficient to accommodate the demands of the proposed facility. (C09085).

Finally, Werthman concluded that the proposed design of the access drive would be more than adequate to ensure that traffic demands can be accommodated efficiently. (C09085). In Werthman's opinion, based on his study of the proposed plan and the nature of existing traffic flow, the traffic patterns to and from the facility were so designed as to minimize the impact on the existing traffic flows. (C09085). His opinion did not rely upon the planned roadway improvements for the area. (C09086).

Opponents presented the testimony of Brent Coulter and Steve Corcoran. Coulter's testimony did not focus on whether the Applicant's traffic design would minimize adverse traffic impact, as set forth in the actual statutory criterion, but, instead, on the physical location of the landfill itself. (C13124-25). Notably, although Coulter's opinion focused on his belief as to the purported negative planning implications associated with the location of the proposed landfill, he acknowledged that he has no experience or expertise as a planner, and is not a member of the American Institute of Certified Planners or the American Planning Association. (C13157-59; C13121-22).

In attempting to show that a landfill at the proposed site was just generally a bad idea, Coulter initially testified that a landfill would increase area traffic by 20% to 25%, although he later acknowledged that his conclusion was not supported by the data gathered. (C13032-35). He further admitted that the 1,500 trucks per day he listed in his report was at odds with the traffic

study produced by the City of Plainfield, and he acknowledged that his claim that the proposed facility would add a total of 600 vehicles per day to the road system was incorrect, and overstated the actual increase in traffic by 20%. (C13035-37).

Coulter also admitted that although he initially claimed that the proposed routes would not meet minimum state truck standards, he never evaluated the routes proposed to be used by trucks going to and from the facility to identify the supposed portions of the routes that would allegedly not meet minimum state truck standards. (C13079). He further agreed that he had no data to support his conclusion that truck traffic from the landfill would pose an enhanced or increased danger to anyone along any portion of the access routes. (C13109-10).

Coulter agreed that if the subject property were developed into a regional distribution center, a manufacturing facility, or even a large residential subdivision it would create greater traffic problems than if developed as a landfill. (C13088). Again, Coulter's testimony did not identify a failure to design traffic patterns to minimize the impact on existing traffic flow, but, instead, simply took the form of a general attack on the physical location of the proposed facility.

Corcoran was retained by the Village of Plainfield to comment on Criterion (vi) and focused his attention almost exclusively on the impact of the proposed landfill on Plainfield, which is located 16 or 17 miles from the proposed site. (C13807, C13810, C13817). He acknowledged that according to Table 2-3 of the Transportation Impact Analysis for Site Development, the farthest distance impacts associated with a landfill are recognized was two miles away, whereas his study regarding the impact on an area 16 to 17 miles from the proposed site. (C13866-67).

Corcoran testified that the Village of Plainfield currently faces its own substantial transportation problems, and is trying to decrease the amount of non-local or through traffic penetration on a designated truck route in the downtown area. (C13817-19). Corcoran

acknowledged that in his assessment of Criterion (vi), he did not analyze the potential impacts of alternate routes. (C13837). He also testified that he did not study any alternative transport routes or traffic patterns. (C13838). He testified that he did not disagree with the conclusion in the Werthman Study that the transport routes proposed by the Applicant would have minimal impact on downtown Yorkville. (C13819-40). Corcoran also acknowledged that in terms of developed land use, landfills are one of the lowest per acre traffic-generating land uses. (C13856).

Fox Moraine's evidence showed that based on an in-depth, scientific study of the existing roads and proposed improvements, traffic patterns to or from the facility were designed to minimize the impact on existing traffic flows (the standard under Criterion (vi)). In contrast, the opponents' witnesses simply felt that the landfill should be built someplace else, and in the case of Corcoran, showed that a town located 16 to 17 miles away only wanted to ensure that trucks associated with the landfill would not pass through it, even on designated state truck routes running through it.

Hearing Officer and Special Counsel Findings and Recommendations

Once more, both the Hearing Officer and Special Counsel concluded that, with conditions, Criterion (vi) was met. The Hearing Officer remarked on the number of ways in which the Applicant's witnesses showed minimization of impact, including numerous safety improvements to Route 71, as well as design features that minimize the possibility for mud to be tracked onto the roadway, and the plan to allow semi-trailers to enter the facility outside normally operating hours for storage so as to minimize truck traffic on the roadway during peak traffic hours. (C18529-30). He concluded that the Applicant had done all it could to minimize traffic under the current system, but proposed additional conditions to come into play as roadway improvements are made in the future. (C18530).

Special Counsel Price observed that the County's expert had made assumptions "not recognized as valid for this or any other development." (C17199). He further rejected the objectors' assertion that state truck routes designed for 80,000-pound vehicles would be harmed if such vehicles actually traveled on them. (C17199). With conditions, he, as well as the Hearing Officer, concurred that Criterion (vi) was met.

I Criterion (vii) (requirements associated with facilities that will treat, store, or dispose of hazardous waste)

Mr. Moose testified that the proposed facility will not be treating, storing, or disposing of hazardous waste. (C10747). His opinion is based on the Plan of Operations, the Application, and his testimony. (C10747). There was no testimony that hazardous waste would be treated, stored, or disposed of at the proposed facility, therefore sufficient evidence to satisfy this criterion was presented.

Hearing Officer and Special Counsel Findings and Recommendations

The Hearing Officer and Special Counsel both found it was uncontroverted that the facility will not accept hazardous waste; therefore this criterion was met. (C17200; 18531).

J. Criterion (viii) ("if the facility is to be located in a 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.")

As a threshold matter, the County has insisted that the Applicant's Plan does not comport with Criterion (viii) because the County passed a Resolution on May 4, 2006 which the County interprets as depriving all municipalities of the right to act as local siting authorities. According to the County, therefore, any Application to site a landfill anywhere within Kendall County that is within the boundaries of a municipality is automatically inconsistent with the County's Plan and therefore fails under Criterion (viii).

The evidence at the hearing, however, showed that: (1) the County Board never formally adopted the May 2006 Amendment to the County Solid Waste Plan; (2) the Application is consistent with the formally adopted 1995 County Plan and its 2000 and 2005 updates; (3) even if validly adopted, the May 2006 resolution did not revoke or repeal the prior Plan and Updates, and (4) regardless of the County's after-the-fact expressions regarding the meaning of the May 2006 resolution, the Applicantion is still consistent with the Plan as amended.

The evidence demonstrated that at the time the subject property was initially located and identified as a suitable landfill site, it was in unincorporated Kendall County, and the County Plan provides for (and, in fact, expressly contemplates) annexation of unincorporated property into a municipality, as happened here. Further, the evidence showed that the Application is consistent with the County Plan because it includes a Host Agreement between the Applicant and the municipality, which governs the relationship between the two parties and provides compensation to the municipality, again, all as required under the County Plan.

Mr. Walter S. Willis, a Senior Planner with Shaw Environmental, testified for Fox Moraine concerning Criterion (viii). (C11715). Mr. Willis has twenty years of experience doing solid waste planning, both in Illinois and throughout the country. (C11716). He holds a Masters degree in Public Administration and a Bachelor's degree in Political Science, but more importantly, he has been a Project Manager responsible for developing Solid Waste Management Plans in 38 of Illinois' 102 counties. (C11745).

Mr. Willis began his career working for the Illinois EPA in the Solid Waste Management Section, and worked on the first available solid waste disposal capacity report. (C11744). In fact, he originated the database for the Senate Bill 172 sites. (C11744). He was involved when the Solid Waste Planning and Recycling Act was first being considered. (C11744). Mr. Willis was the Lee County Solid Waste Coordinator from 1997 to 2004, and, in that capacity, he helped Lee

County prepare its Plan. (C11802). In fact, he wrote the document (with input from the County Advisory Committee) that was subsequently adopted by the Board. (C11802-03).

Mr. Willis testified that in the Fall of 1990, the Kendall County Environmental Task Force established the Kendall County Solid Waste Management Plan. (C11748). In May of 1992, a Solid Waste Needs Assessment was conducted. (C11748). Mr. Willis explained that the County Board passed a resolution in 1992 that stated, "Whereas all governmental units have an interest in and will affect the operation of any waste management system, opportunities for all avenues and multi-jurisdictional cooperation should be explored and considered." (C11738). In May of 1995, the County Board adopted the Phase II Solid Waste Management Plan, at which time the County held extensive public hearings, and received extensive input and involvement from its Environmental Task Force. (C11748).

In July of 2000, the first Five Year Update was completed. (C11748-49). In February of 2005, the Ten Year Update to was completed. (C11749).

Mr. Willis explained that the County Plan consists of the 1995 Plan and the 2000 and 2005 updates. The earlier Plan has not been superseded by later amending documents. (C11750). Rather, the Five Year Update, Ten Year Update, and all later amendments supplemented the existing plan substance; they did not repeal previously-adopted portions of the Plan. (C11763-64). Notably, the 2005 Plan Update expressly provides for intergovernmental cooperation between the County and municipalities in addressing solid waste issues. (C11986)

Mr. Willis went on to explain that the County's Plan clearly contemplates municipal siting of landfills, inasmuch as it states: "If the County is not the appropriate siting authority, a Host Community Agreement must be made with the siting authority." (C11756; C12003). As Mr. Willis noted, the County has never removed this language from the Plan. (C11757). The Plan therefore requires that if an Applicant sites a landfill in an incorporated area of the County,

it must have a Host Agreement with the municipality wherein it is sited. (C11758). In this case, the Applicant did just that on September 26, 2006. (C11758-59). The Applicant and the City entered into a Host Agreement which provides that: "Fox Moraine LLC will offer its use of this facility as the host for those residential recycling, reclamation and/or reuse activities as defined by Section 3.380 of the Act which may from time to time be planned and conducted by the City." (C11759) Accordingly, Willis noted that such a Host Agreement is entirely consistent with the requirement of the County Plan. (C11759).

The County Plan further provides that a Host Agreement may be used as an incentive, compensating the host community and other affected communities for potential environmental, infrastructure, economic, aesthetic and other impacts within their jurisdiction. (C11760). In this case, the Host Agreement provides for the sharing of compensation, providing for the allocation of all or a portion of the Section 22.15(j) fees to other entities as deemed appropriate by the City. (C11760-61).

In March 2006, when Kendall County was negotiating with Fox Moraine concerning the potential siting of the landfill (at a site that was located in unincorporated Kendall County at the time), the County Board passed a resolution stating that it was appropriate to consider development of a solid waste disposal facility within the County. (C11749; C12971-72). At that time, the County's conduct shows it considered the subject property a feasible site for a landfill. Moreover, during the time period when Fox Moraine was actively engaged in ongoing negotiations with the County about the possible siting of a landfill on that property, the property was located in an unincorporated area. (C11755-56). The parcel was, however, subsequently annexed into Yorkville. Again, and notably, the County Plan does not prohibit a municipality from annexing land on which a landfill siting has been proposed. (C11743). Rather, it in fact

authorizes the annexation of unincorporated property into a municipality, as occurred in this case. (C11763).

In September 2006, the Applicant entered into a Host Agreement with the City of Yorkville, also as envisioned and required by the County Plan, and in December 2006, the Applicant filed an application for siting approval. (C11749; C11763). Thus, the evidence shows that the subject property on which a landfill facility was proposed to be sited was located in unincorporated Kendall County, was subsequently annexed into the City, and became the subject of a Host Agreement between the Applicant and the City. The evidence therefore showed that the proposed facility is consistent with the County Plan.

On May 4, 2006, however, the County Board passed Resolution No. 06-11, which the County interprets as denying municipalities the right to act as local siting authorities. Mr. Willis testified that if the Resolution actually had that effect, it would be in direct conflict with the planning principles that have guided the County since at least 1995. (C11737). He went on to note that although the County interprets the May 4th Resolution as effectively stripping municipalities of their right to act as local siting authorities, the legislature has clearly and expressly authorized both counties and municipalities to act as local siting authorities for solid waste facilities. (C11849)

While the County argues that the May 4, 2006 resolution was intended to prevent Kendall County's municipalities from exercising their statutory siting jurisdiction, Mr. Willis testified that the language of the resolution was not even effective at accomplishing that. Using an accepted dictionary definition of the word "located," Willis concluded that the proposed landfill was in an unincorporated area of the county at the time it was located and identified as a potential landfill site. (C11755-56; C11762-63). Willis opined that the application was therefore

consistent with the "plain and ordinary language of the plan." (C11755) It is a well-settled rule of statutory construction that one cannot look to intent in derogation of plain and ordinary language.

As our Supreme Court has explained, where a term is not defined within a statute, it must be assumed that the legislature intended the term to have its ordinary and popularly understood meaning. *Landis v. Marc Realty, L.L.C.*, 2009 WL 1416074, *3 (Ill. May 21, 2009). In such situations, "[i]t is appropriate to employ a dictionary to ascertain the meaning of an otherwise undefined word or phrase." *Id.* Moreover, where it is determined that there are alternative dictionary definitions of a word in a statute, each of which can make sense within the statute, the statute is deemed ambiguous. *Id.* at 5. In construing a statute (which the high court expressly observed to include municipal ordinances in *Landis*), an ambiguous term is to be given its broadest, not its narrowest, meaning. *Id.* Here, then, it was appropriate for Willis to utilize a dictionary to determine the meaning of the undefined term "locate," and to assign that term its broadest and most ordinary meaning, not its narrowest meaning. This is exactly what Willis did in his testimony, in construing the Application to be consistent with the County Plan.

It. is also well established (as observed by the Hearing Officer in his Findings and Recommendations) that ambiguities in language are to be resolved against the drafter. (C18532).

Finally, since the comments of a county attorney do not constitute evidence, Mr. Willis' conclusion regarding Fox Moraine's consistency with the plain and ordinary language of the Plan, including the May 4, 2006 Resolution, was unrebutted by any other witness. The testimony of Willis further showed that the May 2006 Update to the County Plan was never approved by the County Board. (C11770-72).

Kendall County Board Chairman, John Church, testified that since its inception, the County's Plan has been updated every five years, in accordance with State law, and that until the spring of 2006, when the County was engaged in negotiations regarding landfill siting, the

County had never amended its Plan other than on the five-year schedule. (C12967-68). Church admitted that in March 2006, the County was approached by Fox Moraine about siting the proposed facility, at a time when the subject property was located in unincorporated Kendall County, and that the County then passed an ordinance in order to allow it to consider siting a landfill. (C12971-72).

Church testified that at the March 2006 meeting concerning discussions about the potential siting of the Fox Moraine landfill, the City asked whether it could be part of the siting process if an application was filed, and the County's legal representative stated that the siting authority would whichever entity governed the property where it was located. (C12976-77). When asked by the City's Mayor to confirm that the County and City had in fact discussed, at the March 2006 meeting, the possibility that the City could enter into its own agreement with the owner of the subject property, Church claimed not to remember the discussion, but qualified his answer by saying, "now, I could be corrected..." (C12977-78). However, Church did expressly acknowledge that after the March 2006 meeting, the County and City "left the meeting in very general terms talking about the issue that we both knew was coming up, a potential landfill application...As we left the meeting, it is my recollection that as we laid those options out, if the City wanted to come back to us to work with us...they would contact us. They also, of course, had their options of working with the applicant directly." (C12981-82).

Church confirmed that a Host Agreement for a non-hazardous solid waste facility allows the siting authority garner revenue from a landfill. (C12924-25). He further acknowledged that the County had entered into such a Host Agreement with Waste Management, a competitor to Fox Moraine, and that the County was also involved in the process of negotiating a second such agreement with another waste disposal company. (C12925). Church acknowledged that if the

County could prevent the City of Yorkville from siting a landfill, the County could, in turn, effectively ensure that it, alone, could collect revenue for a landfill. (C12925-26).

With respect to the contents of the 2006 Amendment, Church testified that the full and complete text of the 2006 Amendment represents the controlling law regarding landfill siting in Kendall County. (C12929-30). He further acknowledged that the previously existing language of the Plan (which provides, for example, that if a landfill is to be sited in a municipality, the applicant should enter into a host agreement with that municipality) was never deleted from the 2006 Amendment. (C12930-31). He also testified that the May 2006 Resolution provides that "nothing herein shall be deemed by potential applicants, Kendall County, this Board or other agencies or the public to indicate that this...Board has adopted any position on the location of a non-hazardous waste landfill in Kendall County."(C12922-23). Notably, Church did not refute Willis's testimony that the May 2006 Amendment that purports to amend the County Plan was never formally adopted by the Board.

In summary, the proposed facility is consistent with the County Plan. Both the Plan and the purported May 2006 Amendment expressly provide that siting may be within a municipality: "If the County is not the appropriate siting authority, a Host Community Agreement must be made with the siting authority." (C11756). Moreover, the Plan does not prohibit the annexation of property, as occurred here, and, in fact, allows annexation. (C11743; C11823).

In summary, then, testimony by Mr. Willis that the May 2006 Amendment was never formally adopted by the County Board was never refuted by the County, although the Board's Chairman, Mr. Church, testified at the siting hearing, and had every opportunity to refute it. There is, therefore, a lack of evidence that the May 2006 Amendment was ever actually made a part of the Plan. In addition, the 2006 Amendment is internally inconsistent, inasmuch as it both provides for a municipality to enter into a Host Agreement when a landfill is located within an

incorporated area of the County, and simultaneously announces (under the interpretation propounded by the County) that no landfill may be located in an incorporated area of the County. Because the 2006 Amendment is ambiguous, it should be construed against the drafter, in this case the County.

Finally, if, in fact, as urged by the County, the County Plan strips all municipalities of the right to act as local siting authorities, then criterion (viii) does not even apply in these proceedings because the County's Plan is not "consistent with the planning requirements of the Local Solid Waste Disposal Act or the Solid Waste Planning and Recycling Act." 415 ILCS 5/39.2(a).

For the reasons set forth above, opponents failed to show that the Applicant did not meet any applicable requirements of Criterion (viii).

Hearing Officer and Special Counsel Findings and Recommendations

The Hearing Officer and Special Counsel both observed that Criterion (viii) presents a legal question. The Hearing Officer observed that the threshold question is whether "located" (in the context of the 2006 Resolution) means "located and sited" or whether it means "found".(C18532). Hearing Officer Clark opined that the County Board could have avoided the ambiguity of its resolution by simply drafting the resolution to state "located and sited," if that's what the County meant; he observed that courts generally interpret ambiguity against the drafter. (C18532). He accordingly recommended that the City Council find that the Applicant met its burden as to Criterion (viii), recognizing that it would likely be up to the Illinois Pollution Control Board or the courts to make the final legal determination on this question. (C18532).

Special Counsel Price opined that Willis's testimony set forth a *prima facie* interpretation of the Plan and also argument for consistency with the Plan as written. (C17200). He further observed that the Record contains evidence and testimony to indicate that the County may not

have adopted the revisions to its Solid Waste Management Plan in accordance with statutory requirements, which was never countered by opponents. (C17200). He went on to find that the Record "offers no support for the County's closing argument at the hearing: While the County may not agree with the petitioner's argument, the County did not come forward with facts or evidence to support the allegations made in its attorney's closing argument concerning Mr. Willis." (C17200). Ultimately, Special Counsel Price declined to state a recommendation and instead encouraged the members of the City Council to undertake their own legal analysis of whether the Application was consistent with the Plan's requirements. (C17200).

K. Criterion (ix) (all applicable requirements specified by the Board must have been met if the facility will be located within a regulated recharge area)

Mr. Moose testified that the proposed facility which is the subject of this application is not located within a regulated recharge area as defined by Criterion (ix). (C10747). There is only one regulated recharge area in Illinois, which is located near Peoria. (C10747). This facility lies physically outside the sole regulated recharge area. (C10747). Because no evidence was presented, or could be presented, that would show the subject property is located within the regulated recharge area, the evidence established that Criterion (ix) was met. The City Council's finding that criteria (ix) was not met offers a truly extraordinary illustration of the Council's willingness to utterly disregard the evidence.

Hearing Officer and Special Counsel Findings and Recommendations

Both the Hearing Officer and Special Counsel found it was uncontroverted that this criterion was met. (C17201; 18532)

L. So-called "Criterion 10"

Mr. Ron Edwards testified for the Applicant concerning the so-called "Criterion 10." Mr. Edwards is a certified landfill operator in Illinois with more than 23 years of experience in the management of solid waste, and as noted above, is a manager at Fox Valley Landfill Services

("FVLS"), which has contracted with the Applicant to operate the proposed facility. (C10174-75). Edwards is also the vice-president of Peoria Disposal Company ("PDC"), which is an owner/member of FVLS. Edwards has served as vice president of landfill operations for five landfills in Illinois. (C10174-75). Edwards is a past chairman of the National Solid Waste Management Association, Illinois Chapter, Landfill Technical Committee to assist the IEPA and the Illinois Pollution Control Board in the development of solid waste landfill regulations for Illinois. (C10175-76).

Mr. Edwards testified that PDC, an owner/member of Fox Valley Landfill Services, has a broad range of experience in the field of waste management operations, and has been in the waste disposal and management business for 90 years. (C10176-180). PDC operates six solid waste landfills, and its affiliates include a number of collection and transportation companies, as well as PDC Laboratories, Inc., in Peoria, which provides local drinking water and waste water testing services to many municipalities in the State of Illinois. (C10179-80; C10191). Another PDC affiliate (PDC Technical Services) also services numerous municipal clients. (C10180).

As noted above, PDC is an owner/member of FVLS, a newly formed company that has contracted to serve as the operator of the proposed facility. (C10190). Upon issuance of a permit by the State, FVLS would be responsible for compliance matters at the facility. (C10323-25). As a new entity, FVLS has no record to examine, however, its owner/member PDC has an excellent record of environmental compliance.

PDC's record for environmental compliance reveals that during its 90 year history of waste management, it has received only minor violation notices. (C10193-C10200). During that time, there have been only six violations that resulted in penalties, and one Supplemental Environmental Project that was agreed to without a stipulation of a violation. (C10200). Since 1990, PDC has had 350 inspections of its facilities without a violation. (C10457).

Accordingly, the evidence showed that the entity that would be operating the landfill facility, FVLS, is a new company with no existing operating record of its own, but which will draw upon the expertise of one of its owners, PDC, which has demonstrated an excellent, and, indeed, award-winning history of compliance in operating landfills, particularly during the last two decades. There was, therefore, no relevant and reliable evidence presented at the hearing that would justify denial based on "Criterion 10."

Hearing Officer and Special Counsel Findings and Recommendations

Both the Hearing Officer and Special Counsel addressed the "Criterion 10" question of operating history in their discussions of Criterion (ii). The Hearing Officer opined that Fox Moraine and the proposed operator, FVLS, have no operating histories, although the operating history of the related LLC's was discussed in depth. (C18524). Although he concluded that none had exemplary histories, he observed that there had been few violations in the last ten years. (C18524).

Special Counsel Price opined that Edwards' testimony "highlighted the paradox that the more experienced the operator is, the more of a history of regulation and enforcement there will be to judge that operator upon." (C17192). He included in his recommendations a number of conditions designed to ensure there would be appropriate oversight by qualified individuals, at Fox Moraine's expense. (C17192-97).

M. Summary of the Evidence on the Statutory Criteria

This case is controlled by *Industrial Fuels & Resources*, in that there was simply no competent evidence presented by the objectors on any criterion.

The City denied siting based on an alleged failure to meet Criteria (i), (ii), (iii), (v), (vi), (viii) and (ix). In the case of Criterion (i), objectors presented the testimony of a retired industrial arts teacher, who admitted that his opinions were based on his internet research and review of

newspaper articles, concerning which he performed no scientific evaluation. His opinions on Criterion (i) may be summarized as a wholesale fiat that new landfills aren't needed in Illinois, and that the proposed service area should consider shipping its waste by rail to a downstate landfill, although he was not sure that rail lines actually pass near enough to that facility to make it feasible. Clearly, such testimony does not establish that Criterion (i) was not met.

In the case of Criterion (iii), as discussed above, the objectors' so-called experts either misunderstood the criterion, lacked relevant expertise, or were motivated by personal pecuniary interest (or some sordid combination of the three). In the case of Criterion (vi), the objectors' witnesses were nominally experts, in that they were traffic engineers, but they uniformly misunderstood that the plain language of the criterion assumes that there will be some associated increase in traffic, and that this is therefore not inherently unacceptable. the opposition The Hearing Officer and Special Counsel for the City both recognized that the Applicant's evidence regarding Criterion (ix) was uncontested.

Public health, safety and welfare is considered by many to be the most important criterion. Here, on Criterion (ii) and related Criterion (v), only two people were willing to testify for the objectors under oath: one, Mr. Schmanski, was unqualified by virtue of his lack of experience with the subject matter, and the other, a retired teacher, readily admitted his lack of technical and scientific expertise.

With respect to Criterion (viii), Fox Moraine presented an eminently qualified witness with decades of experience developing Solid Waste Management Plans, who testified that, at best, the language of the County Plan was internally inconsistent and ambiguous. To counter this evidence, objectors presented the Chairman of the County Board, whose testimony was largely predicated on the County's aspirational goals, i.e., what it hoped to accomplish with the 2006

Resolution. Notably, the Chairman never attempted to counter the testimony by Fox Moraine's expert that the 2006 Amendment was never properly adopted by the County Board.

That leaves only voluminous public comment to rebut Fox Moraine's overwhelmingly strong evidence in support of its case. While some of the public comment was freely acknowledged to represent an expression of personal opinion, much of it purported to be scientific and authoritative.

Under 35 Il1.Adm.Code §101 .628(b), public comment must be received and considered at this type of hearing, but the rule cautions that, "Written statements submitted without the availability of cross-examination, will be treated as public comment in accordance with sub-section (c) of this section and will be afforded less weight than evidence subject to cross-examination." The principle that public comments are not entitled to the same weight as expert testimony submitted under oath and subject to cross-examination, and should accordingly receive a lesser weight, has been consistently endorsed by this Board . *See, e.g., City of Geneva v. Waste Mgmt. of Illinois,* PCB 94-058, 1994 WL 394691, *12 (July 21, 1994); *Donald McCarrell and Ann McCarrell v. Air Distribution Assoc., Inc* ., PCB 98-55, 2003 WL 1386319, *3 (March 6, 2003); *Landfill 33, Ltd . v . Effingham County Board and Sutter Sanitation Services, Stock & Co.*, PCB 03-043 & 03-052, 2003 WL 913440, *8 (Feb. 20, 2003).

The Board is not free to disregard an applicant's expert evidence or the absence of any credible opposition evidence in making its decision, and may not base its decision on speculation, or on unreliable or incompetent evidence. Rather, to rule against the applicant on any of the substantive siting criteria, the Board must find competent rebuttal or impeachment evidence in the record. *Indus. Fuels & Res. Illinois, Inc. v. PCB*, 227 Ill.App.3d 533, 592 N.E.2d 148 (1st Dist. 1992). Once an applicant makes a *prima facie* case on a criterion, the burden of proof shifts to the opponents to rebut the applicant's case. Claims by opponents that simply

counter the applicant's conclusions are insufficient and, in fact, prejudicial if not supported by competent evidence. *People v. Nuccio*, 43 Ill.2d 375, 253 N.E.2d 353 (1969).

In this case, the evidence was overwhelming: the Applicant established that it met all the siting criteria, but the City denied siting anyway. The Board is in a position to correct that erroneous decision, which was clearly against the manifest weight of the evidence.

CONCLUSION

Siting a landfill is difficult in the best of circumstances, and Fox Moraine encountered far worse than the best of circumstances. Not the least of these was the fact that a business competitor was seeking to site a landfill in a competing political jurisdiction. The County attorney (Mike Blazer) who made it his business to repeatedly appear to oppose the landfill at City Council meetings, legitimized and emboldened the opposition group, which originally, as is often true, consisted mostly of nearby residents who didn't want a landfill in the neighborhood.

This Board surely knows, from the experiences of Waste Management and Town & Country in Kankakee County, and the City of Kankakee respectively (well-documented in cases before this Board), that the existence of competing proposals seems to cause an exponential increase in the controversy surrounding a siting application. That increase due to a competitor is especially unfortunate here, where, unlike the applicants in Kankakee County, Fox Moraine was not seeking to build a landfill in or near a dolomite aquifer. Rather, as evidenced in the review of testimony related to the siting criteria, Fox Moraine's proposed location is among the most geologically sound and protective of the environment that most of the professionals associated with the project have ever seen. It is literally an unfortunate case of the perfect site in the worst possible political climate.

The mandate of our Supreme Court in *Town & Country Utilities v. PCB*, 225 Ill.2d 103 (2007), suggests that the Board take a more proactive and aggressive role in landfill siting decision process. The Supreme Court has made clear that the decision of the local siting authority is simply an interim decision, and that it is ultimately up to this Board to determine when an applicant has met the siting requirements set forth in the Illinois Environmental Protection Act.. *Id.*, 225 Ill.2d at 118-21. The Court in *Town & Country* sagely observed that the members of this Board possess the kind of technical qualifications City Councils and County Boards lack, and that it is the Board that has the knowledge and expertise to determine whether the interim decision of a City Council requires correction or, in some cases, reversal. As Section 39.2 of the Act makes clear, a siting decision must be predicated on more than the ambitions of local politicians and the unwarranted fears of nearby landowners, and as our Supreme Court made clear in *Town & Country*, the final responsibility for the decision on siting approval lies with this Board.

Alderman Munns' frustration over the heavy burden of having to make a decision he felt unqualified to make is well taken, particularly in light of the terrible, and in some cases terrifying, pressure placed upon aldermen in this case. The Board is urged to remember that kind of frustration when fashioning a remedy to the fundamental unfairness that occurred here. Unfortunately, a remand for new proceedings would serve no useful purpose. The City's action here "was so patently not quasi-judicial that the limited first aid available under remand is incapable of rehabilitating the record where the record can support a proper decision." *Concerned Citizens for a Better Environment v. City of Havana and Southwest Energy Corporation*, PCB 94-44 (July 21, 1994, order on motion for reconsideration).

Given the outstanding geology of this site and the state-of-the-art design presented in the Application (both factors being acknowledged in the reports of Mr. Clark and Mr. Price), the

Board can reverse outright with complete confidence that there is no danger of a threat to the environment. In fact, no other action is plausible, because the Record cannot support a denial.

While the City does not have the power to impose conditions on a denial, Fox Moraine is unaware of any prohibition on the Board's imposition of conditions if it reverses that denial. Since the conditions suggested by the Hearing Officer and Special Counsel represent a judgment based on over fifty years of collective siting experience by these two gentlemen, and since Fox Moraine admittedly would not have appealed from an approval subject to those conditions, Fox Moraine is willing to accept the conditions contained in the Clark and Price reports if the Board reverses the denial. These conditions are, quite frankly, not necessary, but they are not onerous and represent only minimal modifications and clarifications of Fox Moraine's Plan. Accordingly, Fox Moraine understands and appreciates the additional comfort level that its acceptance of these conditions may bring to all concerned.

All of the contributors to this brief have both won and lost cases before the Board in the past, and have even been fierce adversaries at times. Enough case law in siting has developed since the passage of Senate Bill 172 that almost any legal conclusion can be supported by a marginally relevant precedent. In the final analysis, however, this case isn't about legal research, selective excerpting of the record, or any of the other techniques of "good lawyering." This case is about right and wrong.

At that fundamental level, two things stand out: The first is that what happened to Fox Moraine here doesn't comport with basic American values of fairness, much less the fundamental fairness required by the Act. The second is that the Supreme Court's decision in *Town & Country* represents an invitation, if not a mandate, to the Board to take a more active role in ensuring the appropriateness of siting decisions than it has heretofore.

This is the case, and now is the time, for the Board to accept the Supreme Court's invitation and place technical expertise, not political ambitions and unbridled paranoia, at the helm.

Dated: 6/12/09

Respectfully submitted,

Fox Moraine LLC

/s/
One of its Attorneys

Charles F. Helsten
Hinshaw & Culbertson LLP
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389
815-490-4900

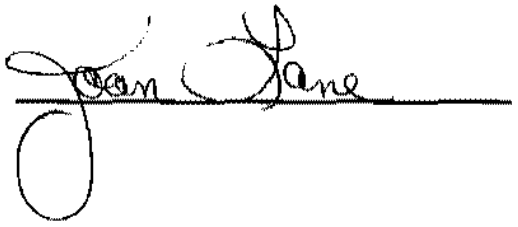
George Mueller
Mueller Anderson, P.C.
609 Etna Road
Ottawa, Illinois 61350
815-431-1500

AFFIDAVIT OF SERVICE

The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on June 12, 2009, she served a copy of the foregoing upon:

Via E-Mail – hallorab@ipcb.state.il.usl Bradley P. Halloran Hearing Officer Illinois Pollution Control Board James R. Thompson Center 1000 W. Randolph St., Ste. 11-500 Chicago, IL 60601	Via E-Mail – dombrowski@wildman.com Leo P. Dombrowski Wildman, Harrold, Allen & Dixon 225 West Wacker Dr. Suite 3000 Chicago, IL 60606-1229
Via E-Mail – jharkness@momlaw.com James S. Harkness Momkus McCluskey, LLC 1001 Warrenville Road, Suite 500 Lisle, IL 60532	Via E-Mail – eweis@co.kendall.il.us Eric C. Weiss Kendall County State's Attorney Kendall County Courthouse 807 John Street Yorkville, IL 60560

Via E-mail.



HINSHAW & CULBERTSON LLP
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389
(815) 490-4900