BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

FOX MORAINE, LLC	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB No. 07-146
	)	(Pollution Control Facility Siting Appeal)
	)	
UNITED CITY OF YORKVILLE, CITY COUNCIL	)	
	)	
	)	
Respondent.	)	

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on July 17, 2009, Leo P. Dombrowski, one of the attorneys for Respondent, United City of Yorkville, filed via electronic filing the attached **Post-Hearing Brief of Respondent The United City of Yorkville,** with the Clerk of the Illinois Pollution Control Board, a copy of which is herewith served upon you.

Respectfully submitted,

UNITED CITY OF YORKVILLE

By: /s/ Leo P. Dombrowski
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CERTIFICATE OF SERVICE

I, Susan Hardt, a non-attorney, certify that I caused a copy of the foregoing **Notice of Filing and Post-Hearing Brief of Respondent The United City of Yorkville**, to be served upon the Hearing Officer and all Counsel of Record listed on the attached Service list by sending it via Electronic Mail on July 17, 2009.

/s/ Susan Hardt

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

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

FOX MORAINE, LLC Petitioner, v. UNITED CITY OF YORKVILLE, CITY COUNCIL Respondent, KENDALL COUNTY, Intervenor.	)	PCB No. 07-146 (Pollution Control Facility Siting Appeal)

POST-HEARING BRIEF OF RESPONDENT,
THE UNITED CITY OF YORKVILLE

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I. INTRODUCTION

Fox Moraine and the City of Yorkville agree on one thing—that the decision of a local siting authority granting or denying approval of a proposed landfill is accorded substantial deference and, consequently, is rarely disturbed on appeal. The Illinois General Assembly greatly enhanced the role of local communities in landfill siting when it amended the Illinois Environmental Protection Act (the "Act") with Senate Bill 172 in 1981. S.B. 172 granted increased authority to municipalities and counties to site landfills and provided detailed criteria for the local communities to use when making siting decisions.

The burden placed on landfill applicants is a heavy one. The Act requires an applicant to meet **all** the statutory criteria, otherwise the local siting authority is **required** to deny the application. Additionally, the Illinois Supreme Court, Appellate Court, and Pollution Control Board ("PCB" or the "Board") have consistently held that the decision of the local authority will be vacated only if it is against the manifest weight of the evidence, a very deferential standard of review.

Recognizing the uphill battle it faces (Br. at 7-8), Fox Moraine strives to get the PCB's attention by submitting a brief packed with misrepresentations, half-truths, and outright falsehoods. Stripped of its hysterical claims, Fox Moraine's brief underscores why the PCB rarely overturns a local siting authority: the General Assembly has authorized the local siting body alone to weigh the evidence, assess the credibility of witnesses, and render a decision that receives great deference on review, while also recognizing that these local legislators—elected officials who deal daily with the myriad concerns of their constituents—are not to be held to the standards of judges or juries.

Fox Moraine appeals from a decision of the Yorkville City Council (the "City Council") denying Fox Moraine's application to site a landfill (the "Application"). The City Council found that Fox Moraine had failed to meet seven of the ten statutory siting criteria: need (i), health and safety (ii), compatibility (iii), operational accidents (v), traffic (vi), consistency with the Kendall County Solid Waste Plan (viii), and operating history/compliance record (the so-called "Tenth Criterion"). (C18641.)

The public hearings on the Application lasted 23 days and generated approximately 125 hours of testimony from numerous witnesses and public commenters. In addition to the landfill hearings, several hearings were held regarding the annexation of the proposed landfill site, which took place a few months before Fox Moraine filed its Application. The annexation matters, Application, exhibits, Power Point presentations, hearing transcripts, and post-hearing comments yielded an almost 20,000 page record.

Complicating matters was Fox Moraine's calculated decision to file its Application 4 ½ months before Yorkville held Mayoral and City Council elections on April 17, 2007. As Fox Moraine's principal, Don Hamman, testified, nothing prevented Fox Moraine from filing its Application either earlier or later than December 1, 2006, the day of filing, to avoid the elections, yet Fox Moraine chose to inject a very controversial issue right into the middle of the election campaigns, knowing full well that the proposed siting of a landfill in Yorkville would be a significant issue for the voters of Yorkville and would impose an additional challenge for the City Council candidates. Realizing that many of Yorkville's voters would oppose the landfill and express their opinions to their elected officials (as is typical when a landfill is proposed, especially in a small town), Fox Moraine now seeks to profit from filing the Application when it did, claiming this confluence of events resulted

in "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." (Br. at 5.)

Nothing so sinister happened. As one might expect, many Yorkville residents appeared at the annexation and landfill hearings, and some residents even raised their voices at a few of the hearings, but it was nothing out of the ordinary for an important issue facing the City Council, whether it be a proposed annexation, landfill, or dog-walking ordinance. Notwithstanding the heightened interest occasioned by the pending elections, the City Council and the Hearing Officer afforded Fox Moraine and the citizens of Yorkville an orderly and fair hearing.

Fox Moraine's chief argument seems to be that, while **it** deserved to be heard at length on its Application, the citizens of Yorkville should not have been allowed to exercise **their** First Amendment rights in speaking out against the proposed annexation and landfill. Perhaps Fox Moraine would have preferred no public opposition, yet Fox Moraine concedes, as it must, that it was provided a "full and complete opportunity" to present evidence in support of its Application (in fact, Fox Moraine monopolized over half of the hearing dates). And at the 23 landfill hearings, the Yorkville Mayor and Council Members listened intently to and questioned numerous witnesses and paid great attention to the details of the Application and the other evidence presented. Even those who were not incumbents and were running for office for the first time (and who would later vote on the Application) attended almost all of the hearings.

Fox Moraine realizes that it did not carry its burden regarding several of the siting criteria (and it also refused to disclose important information regarding the proposed

landfill owner and operator), so it tries to paint the siting proceedings as "strident," "boisterous," and generally "unfair." As the remainder of this brief will show, however, Fox Moraine has nothing to complain about. Fox Moraine does not like the final result, but it received much more than the basic fundamental fairness it was due.

II. THE ACTIONS OF THE CITY COUNCIL AND THE LANDFILL SITING HEARINGS WERE FUNDAMENTALLY FAIR.

A. Fox Moraine Waived Any Alleged Bias or Prejudgment of Mayor Burd and Six of the Eight City Council Members.

1. By not raising the issue prior to the City Council's vote on the Application, Fox Moraine waived any alleged bias or prejudgment of Council Members Leslie, Munns, Plocher, Sutcliff, and Werderich.

Seven Council Members—Golinski, Leslie, Munns, Plocher, Spears, Sutcliff, and Werderich—voted to deny the Application. Only Alderman Besco voted in favor. Mayor Burd did not vote, as the Mayor votes only to break a 4-4 deadlock. (C18640-43; a "yes" vote was in favor of the resolution denying the Application.)

At various points in its brief, Fox Moraine alleges that Aldermen Plocher, Spears, Sutcliff and Werderich, plus Mayor Burd, were biased and prejudged the Application.[1] Although Fox Moraine does not claim in its brief that Aldermen Leslie and Munns were also biased, Hamman testified that he believed they were. (PCB 4-23-09 pp. 17:23-18:16.) In all, Fox Moraine claims that the Mayor and six of the eight Council Members were biased against it. (The only Alderman voting to deny the Application who is not accused of bias is Golinski, and he was appointed in March 2007 to fill a vacant seat. Otherwise, only voting in favor of the Application saves one from a charge of bias by Fox Moraine.)

[1] As to Burd, *see* Br. at 6-7, 20; Plocher, Br. at 21, 47; Spears, Br. at 13, 47; Sutcliff, Br. at 23-25, 47; and Werderich, Br. at 21, 47.

Critically, Fox Moraine does not claim that it discovered the Council Members' alleged bias only after it was too late to raise an objection. The evidence is undisputed that Fox Moraine believed several Council Members were biased throughout the landfill siting hearings. Hamman testified that, approximately six weeks before the City Council's vote on the Application, he believed Council Members Leslie, Munns, Plocher, Sutcliff, and Werderich were biased against Fox Moraine and its Application. (PCB 4-23-09 pp. 15:5-18:16.) Hamman did not keep this to himself, but shared his concerns with Charlie Murphy and Jim Burnham, the leaders of Hamman's landfill team, who agreed with him. (PCB 4-22-09 pp. 168:15-24, 218:6-219:22, 234:19-235:14; 4-23-09 pp. 16:3-17:3.)[2]

As to Burd and Spears, Fox Moraine had claimed early during the landfill hearings that they were biased, and filed a motion (albeit unsupported by any evidence) seeking to disqualify Burd and Spears (but no others), alleging bias and prejudgment. (C8317-C8319.) Fox Moraine acknowledged that it would waive these issues if it did not raise them at the local siting stage:

> We are going to file at this time a motion to disqualify Aldermen Burd and Spears from participating in the decision-making process. . . . As you are well aware [Hearing Officer] Clark, the decisions of the Pollution Control Board indicate that in the absence of that type of motion, there is a – a danger of waiver should that issue be raised in the future. And so the purpose of that motion, really, at this point, is to protect the record in this matter. We want to bring of record our concerns regarding prejudgment and bias.

(C8104-C8105.) Although Fox Moraine had more than sufficient time, it made no objections regarding bias, prejudgment, or unfairness of any other Council Members

[2] Don Hamman is the main person behind Fox Moraine. He is Fox Moraine's sole managing member, and he and his family have a majority ownership stake in it. On behalf of Fox Moraine, Hamman signed the host agreement and Application. (PCB 4-23-09 pp. 4:18-10:24.) As Fox Moraine stipulated at the PCB Hearing, "the buck stops with Mr. Hamman. He's the person ultimately in charge." (*Id.* p. 8:17-24.)

during the landfill hearings, during the post-hearing comment period, or at any other time before the City Council voted on the Application. (PCB 4-22-09 p. 220:4-221:6.)

The law regarding waiver of unfairness and bias allegations in landfill siting proceedings is well-settled. If, during the hearings on a siting application, a party believes a decision-maker is biased, the party must raise the issue promptly during the hearings. Failure to raise a claim of bias, predisposition or unfairness in the original proceeding results in waiver of such claims. The Supreme Court has held that it would be unfair to allow a party to sit on its belief of bias without promptly asserting it during the siting hearing: "To allow a party to first seek a ruling in a matter and, upon obtaining an unfavorable one, permit him to assert a claim of bias would be improper." *E & E Hauling, Inc. v. Pollution Control Bd.*, 107 Ill. 2d 33, 38-39, 481 N.E.2d 664, 666-67 (1985); *see also Peoria Disposal Co. v. Pollution Control Bd.*, 385 Ill. App. 3d 781, 798, 896 N.E.2d 460, 474 (3rd Dist. 2008) ("issues of bias or prejudice on the part of the local siting authority are generally considered forfeited unless they are raised promptly in the original siting proceeding because it would be improper to allow the complainant to knowingly withhold such a claim and to raise it after obtaining an unfavorable ruling."); *Waste Mgmt. of Illinois, Inc. v. Pollution Control Bd.*, 175 Ill. App. 3d 1023, 1039-40, 530 N.E.2d 682, 695 (2nd Dist. 1988) ("claim of bias or prejudice on the part of a member of an administrative agency or the judiciary must be asserted promptly after knowledge of the alleged disqualification."); *A.R.F. Landfill, Inc. v. Pollution Control Bd.*, 174 Ill. App. 3d 82, 88-89, 528 N.E.2d 390, 394 (2nd Dist. 1988) (landfill applicant waived claims of bias or prejudice of county board members because it withheld those claims until its appeal of unfavorable decision); *Land and Lakes Co. v. Village of Romeoville*, PCB No. 92-25 (Jun

4, 1992), slip op. at 8 (where applicant claimed village trustees' campaign literature showed bias, PCB found that applicant failed "to explain why it was unable to ascertain information relating to the alleged bias which appears to have been available" prior to trustees' vote on application), *rev'd on other grounds*, 245 Ill. App. 3d 631, 616 N.E.2d 349 (3rd Dist. 1993).

Peoria Disposal is particularly applicable. There, the landfill applicant learned on the day the Peoria County Board voted on its application that two County Board members were also members of the Sierra Club, which was one of the groups opposing the application. On appeal, the applicant argued that the PCB erred in finding that the County Board's proceedings were fundamentally fair because the two County Board members were biased and should have been disqualified as a result of their Sierra Club memberships. 385 Ill. App. 3d at 790, 796, 896 N.E.2d at 469, 474. The Appellate Court disagreed, finding that even though the applicant did not learn of the alleged bias **until the day of the vote**:

> The company was aware of the grounds for making a claim of bias against the board members before the county board voted on the application at the May 3 meeting. The company learned at the meeting itself, before a vote was taken, that Mayer and Thomas were members of the national Sierra Club. The company's attorneys could have objected and raised a claim of bias at that point, before a vote was taken.

Id. at 799, 896 N.E.2d at 476. Therefore, the Appellate Court, affirming the Board, found that the applicant had sufficient opportunity to raise the alleged bias and waived it because it did not act.

Waste Management is also instructive. There, the landfill applicant contended that eight members of the county board were biased and should have been disqualified from voting on its application. However, the applicant's motion to disqualify at the local siting

stage alleged only four members were biased. By not alleging any bias or prejudice as to the remaining four members, the court held that the applicant had waived those claims and they would not be considered on appeal. 175 Ill. App. 3d at 1039-40, 530 N.E.2d at 695.

Here, Fox Moraine believed that Leslie, Munns, Plocher, Sutcliff and Werderich were biased against it **well before**—at least six weeks before—the City Council voted on its Application. As noted above, Fox Moraine acknowledged it would waive claims of bias if it did not assert them at the local siting stage. Fox Moraine was correct. It has waived these claims, and the PCB should not consider any claims of bias or prejudgment as to these five Council Members.

2. Even though Fox Moraine moved to disqualify Burd and Spears prior to the City Council's vote, it waived any alleged bias and prejudgment as to them as well by not supporting its bare allegations.

Fox Moraine did file a motion seeking to disqualify Burd and Spears, but the motion is unsupported by any evidence. (C8317-C8319.) It is based only on unidentified "statements to the press and members of the public evidencing bias and prejudgment" and a few other unsupported allegations. (C8318.) The Hearing Officer agreed, finding that: "I cannot make a recommendation on this Motion in that no evidence has been adduced regarding the allegations." (C18533.)

A litigant must support its contentions with reasons and evidence, otherwise it waives them. *See* Ill. Sup. Ct. R. 341(h)(7) ("Points not argued are waived."); *Waste Mgmt. of Illinois, Inc. v. Pollution Control Bd.*, 160 Ill. App. 3d 434, 443, 513 N.E.2d 592, 598 (2nd Dist. 1987) (holding that party "failed to cite any authority in support of [its] contention" of bias and "[t]herefore, the argument is waived"); *Wolfe v. Menard, Inc.*, 364 Ill. App. 3d 338, 348, 846 N.E.2d 605, 613 (2nd Dist. 2006) ("A conclusory assertion,

without supporting analysis, is not enough" to avoid waiver.); *People v. Rockey*, 322 Ill. App. 3d 832, 839, 752 N.E.2d 576, 583 (2nd Dist. 2001) ("Arguing an issue in a conclusory fashion or failing to adequately brief or argue an issue results in waiver of the issue."). This requirement of factual and legal support is especially critical in the area of claimed bias or partiality because if any claim of bias were enough to disqualify a decision-maker, all litigants would make bias claims whenever a ruling went against them. Hence, in ruling on a claim of bias:

> A court may only credit facts that are "sufficiently definite and particular to convince a reasonable person that bias exists; simple conclusions, opinions, or rumors are insufficient." The factual allegations must fairly support the charge of bias or impartiality and must be specific -- including definite times, places, persons, and circumstances.

Hoffman v. Caterpillar, Inc., 368 F.3d 709, 718 (7th Cir. 2004); *see also Williams v. Nagel*, 162 Ill. 2d 542, 556-57, 643 N.E.2d 816, 822-23 (1994) ("[P]laintiffs have failed to demonstrate any evidence of bias or prejudice whatsoever on the part of Justice Steigmann other than conclusory allegations that his participation in the instant civil case approximately 20 years after he prosecuted one of the plaintiffs in a criminal action was improper.")

While Fox Moraine did file a motion seeking to disqualify Mayor Burd and Alderman Spears, this motion did no more than raise conclusory allegations of bias without any factual support. As such, the motion was insufficient to preserve Fox Moraine's claims of bias, and the Board should not consider Fox Moraine's claims that Burd and Spears were biased against it.

B. By Filing Its Application 4 ½ Months Before the Yorkville Elections, Fox Moraine Knew that the Proposed Landfill Would Be a Significant Issue in the Election Campaigns.

Fox Moraine makes much of its scattershot allegations that "boisterous landfill opponents" appeared at the hearings, that "incessant and intimidating clamor of the objectors" influenced the City Council, and that the former Mayor "allowed anyone to talk at virtually any time," allowing meetings to become a forum for "landfill opponents to attack Fox Moraine." (Br. at 6, 11, 14.) It further laments that the Internet has allowed landfill opponents to become better organized and informed. (Br. at 10.) Yet it also concedes the obvious:

> 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.

(Br. at 9-10.)

Of course, allowing citizens to air their concerns is a hallmark of our American participatory democracy, and one of the "clear purposes" of the local hearing requirement:

> is to encourage public participation in siting decisions. Allowing public access to environmental proceedings and encouraging citizen participation are some of the fundamental policies of the Act.

Board of Trustees of Casner Township v. County of Jefferson, PCB 84-175 (Apr. 4, 1985), slip op. at 6. Throughout its brief, Fox Moraine disparages and disregards the public's right to be heard. It ignores well-settled doctrine that, "Public participation not only is encouraged, but is required by the statute." *Waste Mgmt., Inc. v. Pollution Control Bd.*, 123 Ill. App. 3d 1075, 1081, 463 N.E.2d 969, 974 (2nd Dist. 1984).

And not only would the proposed landfill have been a controversial issue on its own, but it generated significant additional interest because Fox Moraine filed its

Application four and a half months before Yorkville's municipal elections. When it filed its Application on December 1, 2006, Fox Moraine knew that Yorkville would be holding elections on April 17, 2007 for Mayor and four of the eight City Council seats and that the election campaigns would be happening at the same time as the hearings on the Application. (PCB 4-23-09 pp. 11:1-12:2.) Hamman also testified that nothing prevented Fox Moraine from filing its Application either earlier or later than December 1, 2006, yet Fox Moraine filed it knowing that the proposed landfill would be a controversial issue in the election campaigns. (*Id.* at pp. 12:3-15:4.) Fox Moraine acknowledges that the elections "complicate[d] matters" (Br. at 2-3), but it refuses to accept its role in bringing this about.

At the close of the siting hearings, Fox Moraine's attorney claimed that Fox Moraine had "taken the high road in terms of limiting ourselves to the evidence, being respectful during the presentation of others, and trying to play by the rules. Others might disagree." (C15646-47.) One person who might disagree is Ron Parish, whom Fox Moraine claims was one of the "most outspoken landfill opponents." (Br. at 17.) Fox Moraine is correct that Ron Parish was vocal, but he was mainly a vocal critic of the annexation process, and he did not attend any of the landfill siting hearings. Parish, like many Yorkville residents and officials, was concerned that the Mayor and some Aldermen were rushing the annexation of several parcels through the City Council without adequate public discussion. (PCB 5-21-09 pp. 156:4-12, 157:6-16, 159:22-160:13, 251:12-252:3.)

Parish did not attend any of the siting hearings because Devin Moose, Fox Moraine's chief landfill engineer, twice threatened Parish with physical harm if Parish continued to speak out. Moose called Parish a "radical" and threatened that Parish

"wouldn't live long" if he continued to voice his opinions. (PCB 5-21-09 pp. 161:22-163:20, 164:22-24, 166:6-18, 167:18-168:9.)

After Moose threatened Parish for the second time, which happened at the November 30, 2006 Special City Council Meeting (one day before Fox Moraine filed its landfill application), Parish became so appalled and disgusted by Moose's bullying tactics that Parish stopped attending public hearings. (*Id.* p. 170:15-18.)[3] If Fox Moraine intended to silence a vocal member of the public, it certainly succeeded.

It is ironic that Fox Moraine now complains of "intimidating clamor from some of the objectors" (Br. at 11) when it was Fox Moraine that attempted to intimidate the public, not by words, but rather by threats of physical harm. Fox Moraine's contempt for Yorkville residents who expressed opinions contrary to the proposed landfill—the persons who would be most affected by it—is evident in Moose's condescending depiction of them as "ignorant people who took over the town." (PCB 5-22-09 pp. 146:2-147:17.)

Just as Fox Moraine seeks to profit from withholding its claims of bias and prejudgment until it obtained an unfavorable ruling from the City Council, it now also seeks to profit from the "strident" and "boisterous" atmosphere that it intentionally provoked by injecting the proposed landfill into the election campaigns. Fox Moraine manufactured this issue for appeal by deciding to file its Application on December 1, 2006. Nonetheless, as Yorkville shows in this response, Fox Moraine received a fair hearing, even though the City Council was confronted with the added intensity of Yorkville residents demanding to know the candidates' position on the proposed landfill. The candidates acted appropriately, refusing to discuss the proposed landfill, whether in their

[3] Moose confirmed that Parish attended none of the landfill hearings. (PCB 5-22-09 pp. 147:18-148:2.)

internal campaign meetings, when campaigning door-to-door, at the landfill hearings, or anywhere else.

C. It Was Fox Moraine, Not the City Council or the Public, Whose Actions Guaranteed That the Vote on the Application Would Not Occur Until After the Newly-Elected Officials Had Been Sworn In.

Fox Moraine complains that landfill opponents prolonged the hearings "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 delay, occasioned by the opponents and 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." (Br. at 26-27.) But it was Fox Moraine who calculatedly filed its Application on December 1, 2006, so that the landfill hearings would take place at the very time Yorkville was voting for a mayor and aldermen. Moreover, Fox Moraine does not explain how the siting process could have ended before the newly-elected candidates were seated on May 8, 2007, nor does Fox Moraine explain how the length of the siting process caused it any prejudice.

The Act specifies that a local siting authority has only 180 days to review an application, hold hearings, receive post-hearing comment, and vote on the application. 415 ILCS 5/39.2(e). Because hearings cannot begin any sooner than 90 days after the filing of an application, Fox Moraine knew that the hearings could not begin until, at the earliest, March 1, 2007. 415 ILCS 5/39.2(d). The hearings began on March 7, 2007. (C8090, 8092.) With lengthy presentations from its eight witnesses, Fox Moraine monopolized the

first 13 ½ days of the hearings (out of 23) and did not rest its case until March 24, 2007. (Br. at 26, C12874, C12901.)[4]

Fox Moraine also knew there had to be a 30-day post-hearing comment period before the City Council could vote on the Application. 415 ILCS 5/39.2(c). So out of the 180 days provided for by the Act, 120 of those days could not accommodate hearings. Given Fox Moraine's lengthy presentation, the City Council should be commended for completing all of the statutorily required proceedings within the 180-day period. And it was only Fox Moraine who had something to gain from dragging out the hearings, because an application is deemed approved if the local siting authority does not vote on the application within 180 days after its filing. 415 ILCS 5/39.2(c).

Fox Moraine also claims that there was something nefarious about Mayor Burd presiding over the City Council meetings of May 23 and 24, 2007—when the City Council deliberated at length over the Application and then voted—without Hearing Officer Clark and Special Counsel Price in attendance. (Br. at 34.) But who could have presided over a **City Council** meeting, other than the Mayor? The landfill siting hearings had ended over a month earlier, and the Mayor, as Yorkville's chief elected official, presides over all City Council meetings, landfill-related or not.

Fox Moraine asserts it would be "naïve to believe Burd did not take steps to ensure that Clark and Price would not be present to assist." (Br. at 34.) But, as Fox Moraine must surely know, Price's involvement ended when he submitted his report on May 18, 2007, a week before the vote on the Application: "This Memorandum will conclude my work and those of the specially retained expert consultants hired in this matter and we thank you for

[4] The City Council also held landfill hearings on four Saturdays, March 10, 17, 24, and 31 (C8931-32, C10563-64, C12873-74, C14309-10), which shows that the Council was trying to complete the hearings as quickly as possible, hardly a delaying tactic.

the opportunity to be of assistance." (C17191.) Clark's report (C18521) is not dated, but it too was submitted to the City Council before their May 23 and 24 deliberations and no provisions were made to have Clark attend, nor does Fox Moraine identify any.

D. The City Council Members and Candidates Conducted Themselves Appropriately Throughout the Annexation Hearings, Election Campaigns and Landfill Hearings.

In conducting its review of the decision of the local siting authority, the Act allows the Board to consider "the fundamental fairness of the **procedures** used by . . . governing body of the municipality in making its decision." 415 ILCS 5/40.1(a) (emphasis added). In a local siting proceeding, "fundamental fairness incorporates only the minimal standards of procedural due process, such as the right to be heard, the right to cross examine adverse witnesses, and the right to have impartial rulings on the evidence." *Peoria Disposal*, 385 Ill. App. 3d at 797, 896 N.E.2d at 475; *see also Land & Lakes Co. v. Pollution Control Bd.*, 319 Ill. App. 3d 41, 48, 743 N.E.2d 188, 193 (3rd Dist. 1990) (fundamental fairness incorporates "minimal standards" of procedural due process). The members of a local siting authority are also presumed to have made their decision in a fair and objective manner. *E & E Hauling*, 107 Ill. 2d at 42, 481 N.E.2d at 667-68; *Waste Mgmt.*, 175 Ill. App. 3d at 1040, 530 N.E.2d at 695. That presumption is not overcome "merely because a member of the authority has previously taken a public position or expressed strong views on a related issue." 415 ILCS 5/39.2(d); *Waste Mgmt.*, 175 Ill. App. 3d at 1040, 530 N.E.2d at 695-96. To show bias, the applicant must show that a disinterested observer might conclude that the members of the local siting authority had prejudged the case. *Waste Mgmt.*, 175 Ill. App. 3d at 1040, 530 N.E.2d at 696.

Courts have recognized that a "local siting authority's role in the siting approval process is both quasi-legislative and quasi-adjudicative" and, in recognition of this dual

role, a "local siting authority is not to be held to the same standard of impartiality as a judge." *Land & Lakes*, 319 Ill. App. 3d at 47, 50, 743 N.E.2d at 193, 195. When the General Assembly amended the Act to provide that a member of a local siting authority who "has publicly expressed an opinion on an issue related to a site review proceeding" is not precluded from voting on the siting application, it confirmed that even though "a local siting proceeding more closely resembles an adjudicatory proceeding than a legislative one, the local governing body is not held to the same standards as a judicial body." *Southwest Energy Corp. v. Pollution Control Bd.*, 275 Ill. App. 3d 84, 91, 655 N.E.2d 304, 309 (4th Dist. 1995), *citing* 415 ILCS 5/39.2(d). The amendment demonstrated "the General Assembly's understanding that it has called upon locally elected officeholders on municipal or county boards—not judges—to adjudicate whether the siting criteria set forth in section 39.2(a) of the Act are present in a given case. In that amendment, the legislature recognized that standards governing judicial behavior cannot and do not apply to such local officeholders." *Id.* at 92, 655 N.E.2d at 309.

Fox Moraine would have the Board consider much more than just the procedures used by the City Council in evaluating the Application. Instead, Fox Moraine would like the Board to consider the possible effect of every alleged comment made by the public, even before the Application was filed, that Fox Moraine considers to be hostile, strident, or rude. Fox Moraine's invitation would have the Board adopt a role that is not authorized by the siting statute and that is beyond the review the Board has traditionally applied. In any event, as noted throughout this brief, the comments by the public did not amount to much, and did not result in any unfairness to Fox Moraine.

1. Mayor Burd

Fox Moraine theorizes that Mayor Burd was the linchpin of a plot of "prejudgment and collusion, in which an organized and bold opposition group, working in consort with a highly ambitious politician [Burd], hijacked the decision-making process." (Br. at 5.) Fox Moraine's theory is just that, a theory, one that withers and dies for lack of any supporting proof.

The silliness of Fox Moraine's speculations is apparent from its attempt to link a pleading filed by Yorkville in a different PCB matter with the supposed nefarious plot of collusion. In opposing Hamman's motion for attorney's fees in a matter involving his composting operation (in PCB 08-95, which motion the Board denied), Yorkville's City Administrator verified a pleading which noted that the proposed landfill was one of the "biggest issues" to face Yorkville in the last 20 years and was also a prominent issue in the elections. (Br. at 19-20.) At the PCB hearing, the Hearing Officer correctly refused to allow Fox Moraine to question the City Administrator regarding whether he had "certified" the statement. (PCB 4-22-09 pp. 42:3-55:2.)

Attempting to couple the prior verified pleading with the current action, Fox Moraine asserts: "Despite the foregoing admission by the City in a verified pleading [which the Hearing Officer ruled was inadmissible], Valerie Burd nevertheless testified that she was not an anti-landfill candidate." (Br. at 20.) One has nothing to do with the other, and this *non sequitur* is typical of Fox Moraine's arguments throughout its brief.

Without invoking it by name, Fox Moraine appears to be arguing the doctrine of judicial estoppel.[5] Under judicial estoppel, "a party who asserts a particular position in a legal proceeding is estopped from asserting a contrary position in a subsequent legal proceeding." *Wolfe v. Wolf*, 375 Ill. App. 3d 702, 705, 874 N.E.2d 582, 584 (1st Dist. 2007). Judicial estoppel has five elements: "(1) the party estopped must have taken two positions; (2) that are factually inconsistent; (3) in a separate judicial or quasi-judicial administrative proceeding; (4) intending the trier of fact to accept the truth of the facts alleged; and (5) have succeeded in the first proceeding and received a benefit thereby." *Id*. To estop a party, "the two positions must be '*totally* inconsistent.'" *Id*. (emphasis in original) (holding that party's positions were not totally inconsistent where she in one proceeding testified she understood a marital settlement agreement and in later proceeding said she did not due to her attorneys' misrepresentations and failures to tell her of her rights).

As noted above, Fox Moraine contends that in the verified response to a motion in another PCB case, Brendan McLaughlin verified that the "application for landfill permitting" was among "the biggest issues in Yorkville in the past 20 years" and the "primary issue in the City election and change in administration." (Br. at 19-20). Without an attempt to explain how any inconsistency results, Fox Moraine then suggests that this "admission" is inconsistent with Mayor Burd's testimony that "she was not an anti-landfill candidate for mayor." (Br. at 20). The two statements are not at all inconsistent (even if the landfill was a key issue to voters, it is not inconsistent with the Mayor's statement that she was not an anti-landfill candidate), much less *totally* inconsistent. Further, the

[5] Fox Moraine has not cited to any legal support for its argument and has therefore waived it. *See Waste Mgmt.*, 160 Ill. App. 3d at 443, 513 N.E.2d at 598 (party waived argument by failing to cite legal authority to support it).

statement is not attributed to any City Council member, much less the Mayor, and was made by an outside observer a year and a half after the City Council's decision on Fox Moraine's Application. It therefore has no bearing on any individual Council Member's state of mind at any time, much less at the time of the siting application hearings in 2007.

The record is clear that Burd was not an anti-landfill candidate. Fox Moraine's strident claims and wishful thinking are no substitutes for evidence. Burd did not discuss the proposed landfill at any of her campaign appearances, and she pointedly refused to discuss it with Yorkville voters even though some of them were angry with her for her silence on the issue. (PCB 4-21-09 pp. 174:4-21, 247:14-248:11 (referring to Respondent's PCB Hearing Exh. No. 1).) Nor did she discuss the landfill with members of her campaign committee. (PCB 4-21-09 pp. 182:3-17, 183:6-184:21, 188:17-189:11.)[6]

Fox Moraine's questioning of Mayor Burd regarding newspaper articles at the PCB hearing confirmed that Burd did not run on anti-landfill platform:

> Q: [Referring to newspaper article] Well, did you ever state that you were not opposed to the landfill, but you were opposed to the way it was handled?

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[6] Fox Moraine claims Burd failed to disclose contributions from Parish in her campaign disclosures. (Br. at 20-21.) In discovery, Fox Moraine asked for information regarding campaign contributions from members of FOGY. As Parish was a FOGY member for only two weeks or so (PCB 4-21-09 p. 161:3-17), it is no surprise that Burd did not know he was a member (*id.* pp. 184:22-185:1), so therefore she did not produce her campaign report for the second half of 2006, which is the one that details his contributions. She did produce her disclosure form for the first half of 2007. (*Id.* pp. 195:6-196:6.) And she did disclose Parish's contributions, as required, to the Illinois State Board of Elections, which can be found on-line at: http://www.elections.il.gov/campaigndisclosure/CommitteeDetail.aspx?id=20028 (7-1-06 to 12-31-06 semi-annual D2 report, which discloses that Parish contributed $1,310 to Burd's campaign--$100 in cash and $1,210 in in-kind contributions, hardly the "thousands of dollars" that Fox Moraine claims Parish contributed (Brief at 20-21).) For the PCB's convenience, a copy of Burd's disclosure report is attached as Exhibit A. The PCB may take judicial notice of Exhibit A as it is a state agency report. *See May Dep't Stores v. Teamsters Union*, 64 Ill. 2d 153, 159, 355 N.E.2d 7, 9 (1976) (public documents created by administrative agency are subject to judicial notice because they fall within category of readily verifiable facts); *State of Illinois v. Monroe*, 366 Ill. App. 3d 1080, 1097, 852 N.E.2d 888, 904 (2nd Dist. 2006) (where court took judicial notice of public records of Department of Corrections). If Fox Moraine had wanted all of Burd's campaign contribution disclosures, they should have asked for them in discovery.

A: That sounds like something I would say, yes.

(PCB 4-21-09 p. 197:4-13.)

Q: [Referring to another newspaper article] Ms. Gillers, in one paragraph, refers to you as, "Burd, who has long criticized the landfill plan." Is that an accurate characterization by her?

A: No, and I've been concerned about that kind of – as Alderman Spears said, the newspapers tend to lump things – they're looking for a quick description instead of really going into the issue.

(PCB 4-21-09 p. 223:11-18.)

Burd's statement to the Aurora Beacon two days before the elections also disproves Fox Moraine's theory. She was asked whether a safe, state-compliant landfill would be a "positive, negative, or neutral addition to Yorkville." She answered: "Is there such a thing as a safe state compliant landfill? I don't know if that's an oxymoron." (Br. at 28; PCB 4-21-09 pp. 199:22-200:11.) Mayor Burd avoided the question, rather than answering it.

Fox Moraine also misstates the record when it claims that Burd "conceded" that Todd Milliron, who was on her campaign committee, "was periodically threatened with eviction for his improper and unruly conduct" at some of the annexation and landfill hearings. (Br. at 18.) In fact, the testimony is clear that Burd acknowledged only that Milliron had been threatened with eviction "one time" **after** she had become Mayor, but she could not recall exactly when. (PCB 4-21-09 pp. 186:6-187:20, 309:15-19.)

Nor does the Hearing Officer agree with Fox Moraine. After the PCB hearing, Fox Moraine tendered a motion "for a finding that Valerie Burd was not a credible witness." The Hearing Officer denied the motion, finding Mayor Burd to have been a credible witness: "While observing Ms. Burd testify, I did not observe or perceive any body

language, difference in demeanor, vocal inflections or varied paralinguistic cues that would impeach her credibility." (Hearing Officer Order (June 26, 2009) at 6.)

Fox Moraine's other claims are also mere quibbles. For example, Fox Moraine breathlessly maintains that Burd testifying she did not know Werderich was a founding member of Friends of Greater Yorkville ("FOGY") "truly mocks the Oath." (Br. at 22.) Burd testified that she knew Werderich was involved with FOGY, but simply did not know he had helped found the organization, hardly the stuff of a dastardly plot to deceive. (PCB 4-21-09 p. 185:2-13.) Fox Moraine also finds it "interesting" that someone had placed an anti-landfill sign in the right-of-way outside the site of the PCB hearings in April 2009, and that Mayor Burd acknowledged having seen the sign. (Br. at 22.)[7] How the sign has anything to do with Burd's alleged bias of two years earlier is, of course, left unexplained.

2. Council Member Spears

Fox Moraine claims Spears should not be believed when she testified "that she did not know the annexation of the Fox Moraine property was connected to a possible landfill." (Br. at 13.) Again, Fox Moraine misrepresents the record, because Spears was asked whether, by September 26, 2006 (which was when the City Council voted on the annexation of the Fox Moraine property), she knew "that annexation was to start the process that would end in the landfill if everything went right for Fox Moraine, right?" She answered: "Not definitely, no." (PCB 4-21-09 p. 142:12-18.)

Spears did not definitely know because Fox Moraine did not yet definitely know either. Fox Moraine's annexation attorney told the City Council on September 26, 2006 (more than two months before Fox Moraine filed the Application): "We see a variety of

[7] Fox Moraine cited to the wrong page. The exchange is found at PCB 4-21-09 p. 191:5-21.

future uses for the land, but right now we don't have a particular use and so we want to continue the operation that Mr. Hamman has operated on this land for a number of years." (Petitioner's PCB Hearing Exh. 2, Tr. of 09-26-06 Council Meeting, at 156:9-157:20.) If Fox Moraine did not know at that point, how was Spears to know? And how can Fox Moraine claim that, "By the end of the September 26, 2006 meeting, the cards were on the table."? (Br. at 13.) If the "cards were on the table," why did Fox Moraine claim it could not see them?[8]

Fox Moraine further assails Spears' credibility by asserting that, "Spears also claimed she could not remember voting on the annexation issue." (Br. at 13.) Fox Moraine apparently did not bother to read the transcript. Spears was asked:

Q: Do you remember voting on the annexation resolution?

A: Yes, I did.

Q: And you voted no on that resolution, correct?

A: That's correct.

* * *

Q: And you do remember that you voted no on the annexation, correct?

A: Yes, I did.

(PCB 4-21-09 pp. 44:10-15, 45:19-21.) Fundamental fairness should include providing to the reviewing body an accurate representation of the record. Fox Moraine brazenly ignores that principle.

Fox Moraine also claims that an alleged statement by Spears to the Beacon News indicates bias. (Br. at 27.) First, Spears testified that she was misquoted by the Beacon News reporter, as she often had been: "that's why I believe we called it the Be Confused

[8] If Fox Moraine did know, it deliberately did not tell the City Council and the public. In retrospect, it now appears that Fox Moraine's attorney misrepresented his client's intentions.

News." (PCB 4-21-09 p. 100:13-24.) Even if the quote was at all close to what Spears said to the reporter, Spears was apparently commenting on a few of the criteria—safety, compatibility and traffic—and then said that compliance with the criteria would be a "perfect scenario." (Br. at 27.)

And contrary to Fox Moraine's portrayal of Spears as a "vocal opponent" of the landfill (Br. at 48), Spears, like the other Yorkville candidates running for office, was diligent in not talking about the landfill. The candidates were given a card to show Yorkville residents that explained why they would not talk about the proposed landfill. The card read:

> My assigned role as a judge in this matter prevents me from discussing it with you further. I offer this card to help explain why. . . . The state of Illinois has put me in the position of a judge, and the state commands me to base my findings on the evidence presented through that process. I am also commanded, like a jury, not to discuss the matter outside of the process in order to prevent any unfairness to anyone involved.

(PCB 4-21-09 pp. 132:18-21, 133:6-12, 136:15-21.) The card further explained the landfill siting process and how the public could obtain information regarding the process. (*Id.* pp. 130:22-134:4.); *see also* PCB 4-22-09 p. 89:4-13 (comments of Alderman Munns: "We were instructed not to discuss it [the landfill] outside the hearing process."); PCB 4-23-09 p. 37:9-14 (comments of Yorkville resident Dusell: "I on a number of occasions had talked to my Alderman Golinski as well as his predecessor Alderman Wolfer and on several occasions was told that they could not answer my questions or could not discuss this issue.")

The remainder of Fox Moraine's claims regarding Spears seem to indicate a belief that simply voting against the annexation, host agreement, road vacation or something else that Fox Moraine wanted must be an indication of bias. (Br. at 13-18, 48-49.) Fox

Moraine sees unfairness when an elected official merely examines an issue on its merits and then votes as she deems appropriate.

There was one incident of fundamental unfairness involving Alderman Spears, however. At one of the landfill hearings, Hamman approached Spears and offered to take her to a landfill in Will County that Hamman is involved in. He told her that there were several expensive homes around the landfill. Spears refused his offer. (4-21-09 pp. 125:10-126:18.) This was obviously an attempt by Hamman to influence Spears' decision on the compatibility criterion and is a blatant violation of the prohibition against *ex parte* contacts.

3. Council Member Werderich

Before Werderich decided to run for the City Council, he attended some Council meetings and criticized the timing of the annexation and certain of the Council's actions. (PCB 4-21-09 pp. 303:13-304:15.) He decided to run because, like many other Yorkville residents, he did not approve of the Council's handling of the annexation process. (*Id.* pp. 315:22-316:10.) And once he committed to run, he resigned from FOGY. (*Id.* p. 303:10-12.)[9]

Fox Moraine sees prejudgment in statements made by Werderich at one of the annexation hearings in September 2006, more than two months before Fox Moraine filed the Application, and more than six months before Werderich was elected. (Br. at 21.) Fox

[9] Mayor Burd also testified she would not allow any FOGY members to be a part of her campaign committee and therefore Werderich had to resign if he wanted to be a part of her campaign. (PBC 4-21-09 p. 185:2-13.)

Moraine also sees bias in Werderich's alerting "concerned citizens" regarding the annexation and helping form FOGY. (*Id.*)[10]

Local siting officials are presumed to be objective and capable of fairly judging a landfill application. That presumption is not overcome if an official "has taken a public position or expressed strong views" on the issue. *See*, *e.g.*, *A.R.F. Landfill*, 174 Ill. App. 3d at 89, 528 N.E.2d at 394. Here, other than Werderich's alleged statement to the Beacon News, the statements attributed to him concern the proposed annexation. They ceased around the time he decided to run for office and were made long before he was elected. (Br. at 21.) If strong statements by an elected official do not overcome the presumption, then certainly statements by a town resident well before he was elected do not overcome it.

As to his quote in the Beacon News (Br. at 28), Werderich testified that it was taken out of context because he spoke both "for and against the landfill" and said "a lot of things that were favorable to the landfill," which were not reported. (PCB 4-21-09 pp. 318:24-319:24.) Like the other Yorkville candidates, Werderich acted appropriately and Fox Moraine sees bias and unfairness where none exists.

4. Council Member Sutcliff

Sutcliff decided to run for office because she, too, believed that the City Council was trying to rush the approval of the annexation. (PCB 4-21-09 pp. 269:6-13, 291:14-22.) She was a political newcomer, ran on her own, and was not part of a slate of candidates.[11] As part of her campaign efforts, she established a web site.

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[10] As noted above, Fox Moraine claimed in the Fall of 2006 that it had not yet decided to file a landfill application. How could Werderich have prejudged the proposed landfill when Fox Moraine had not yet decided whether to seek approval of a landfill?

[11] Fox Moraine again misrepresents the record when it claims that Sutcliff "did, according to Spears, run on a slate" with other candidates. (Br. at 23.) In fact, Spears testified that she "**believe[d]** that was correct." (PCB 4-21-09 p. 84:7-13 (emphasis added).) Spears' belief was

Fox Moraine attributes almost all of the statements that appeared on her web site to Sutcliff (Br. at 23-24), but her testimony and hearing exhibits were clear that she was merely summarizing what other people had said at public meetings: "I was reporting on events that I was attending. So I don't want that to appear to be my opinion." (PCB 4-21-09 pp. 258:13-259:11, 261:4-262:13.) Even though the statements are not hers, which Fox Moraine did not contest at the PCB hearing, Fox Moraine now acts as if they were: "Based on the foregoing, Alderman Sutcliff's agenda and pre-judgment are clearly established." (Br. at 25.) Because Fox Moraine has no evidence of bias and pre-judgment, it has to attempt to manufacture some.

After she had been campaigning for a brief time, Spears, an incumbent, told Sutcliff, the newcomer, not to "make any comments whatsoever regarding the landfill, because if she were elected she would be a judge." (PCB 4-21-09 pp. 136:22-137:12.) Sutcliff heeded that advice and removed anything from her web site that referenced the annexation or proposed landfill. (*Id.* pp. 276:23-277:5, 278:2-9, 291:23-293:3.) And when campaigning, Sutcliff told Yorkville residents that she could not discuss the landfill. (*Id.* pp. 274:21-275:2, 276:20-277:5.)

Nonetheless, Fox Moraine claims certain statements that appeared for a brief time on Sutcliff's web page showed her to be biased against the landfill. (Br. at 23-25.) Her statements were not anti-landfill (*id.* p. 265:7-19), and she never, as Fox Moraine claims, "promised" to vote no on the Application. (Br. at 25.) She did say, because of her concerns about the haste of the process, that she would vote against the **annexation** (Petitioner's Exh. 20), but she never gave any indication as to how she would vote on the

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mistaken. Sutcliff testified that she did not run on a slate with Burd or others (*id.* p. 293:4-15), and there is no evidence she did.

Application. Moreover, because Sutcliffe was not sworn in as a Council Member until May 8, 2007, she never would have had an opportunity to vote on the annexation—the first annexation vote was taken on September 26, 2006 (C00625-29, C00714-22), which was well before she even decided to run, and the second vote was taken on February 13, 2007, almost three months before she was sworn in. (C06459-67.)

Fox Moraine further misrepresents the record when it claims Sutcliff testified that "her web site was linked to the FOGY web site." (Br. 25.) In fact, Sutcliff provided only FOGY's web address, not a link to the site. (PCB 4-21-09 264:2-7.)

Nor was there any bias or prejudgment in what Sutcliff said to the Beacon News. (Br. 28.) Sutcliff testified that she did not recall exactly what she had said to the reporter two years earlier, but that they had "an extensive conversation." (PCB 4-21-09 p. 294:18-21.) When asked whether she had talked about the landfill being a positive or negative addition, she testified that: "There's positives and negatives to anything. It needs to be weighed." (*Id.* p. 294:22-295:10.)[12]

5. Council Member Plocher

As with Werderich, Fox Moraine sees bias in statements made by Plocher at an annexation hearing in September 2006, more than two months before Fox Moraine filed the Application, and more than six months before Plocher was elected. (Br. at 11.) As

[12] Fox Moraine attempted to serve the Beacon News reporter with a subpoena on April 17, 2009, four days before the start of the hearing. Service was not obtained. (*See* Subpoena and the Beacon News' response, which noted that Gillers was no longer an employee of the Beacon News. These are found in the PCB 07-146 docket at 4/20/09 and 4/21/09, respectively.) Board rules require a subpoena to be served at least 10 days before the required appearance. 35 Ill. Admin. Code § 101.622(b). That Fox Moraine did not even attempt to find out whether Gillers was still an employee of the newspaper and its tardy attempt at service (of a non-employee) shows that it did not believe the reporter's appearance at the hearing was important.

noted above, local siting officials are presumed to be objective. Plocher's statements are innocuous and do not overcome the presumption.

Regarding his statement to the Beacon News (Br. 28), Plocher, like other Council Members, was misquoted. (PCB 4-22-09 p. 24:3-14.) He noted that the reporter had often misquoted him. (*Id.* p. 23:2-5.)

Plocher's statement regarding his brother's cerebral palsy also does not indicate bias or prejudgment. (Br. at 41.) In *Peoria Disposal*, a County Board member "commented on possible water and air emissions and discussed some of his personal experiences [regarding his father's health problems]." 385 Ill. App. 3d at 789, 896 N.E.2d at 468. The Appellate Court found that the Board Member's comments about his "personal experiences" did not show "that he had prejudged the issues before the county board in the local siting proceeding." *Id.* at 799, 896 N.E.2d at 476. Plocher's comment likewise shows no bias.

E. Fox Moraine Concedes It Had a Full and Complete Opportunity to Present Evidence in Support of Its Application.

As noted above, Fox Moraine acknowledges that "pollution control facility proposals, especially landfills, generate loud, often virulent, public opposition." (Br. at 9.) In its brief, Fox Moraine argues that the annexation and landfill hearings were tumultuous, chaotic and therefore, unfair, but the few examples given by Fox Moraine, from the approximately 200 hours of annexation and landfill hearings, amount to nothing more than a few, occasional shouts from the public, which happen from time to time at all kinds of City Council meetings. (PCB 4-21-09 pp. 248:18-250:13; PCB 4-22-09 pp. 90:23-94:3.)

Fox Moraine also misjudged or was simply unaware of the size of the "public opposition." It claims that the "principal opposition" came from FOGY and Kendall

County. (Br. at 2.) Yet FOGY was only five people. (Gilson Public Comment p. 1, submitted to the PCB on Apr. 28, 2009.) And Todd Milliron, whom Fox Moraine attempts to link to FOGY (Br. at 20), was never a member. (*Id.*)[13]

Fox Moraine also wildly exaggerates the tone of the landfill hearings. Several Yorkville residents commented that the numerous hearings were orderly, controlled, and well-run.

- "I attended almost all of [the landfill hearings]. . . . [A]s we sit here at this meeting together, the whole demeanor of it is rather quiet, it's not a chaotic meeting. It's a very controlled environment. People are listening, and this is the environment that I experienced while I was at all the meetings, and they were very structured." (PCB 4-21-09 pp. 144:15-145:8 (comments of Yorkville resident Hyink).)

- "No group disrupted the process, no council member violated rules of the process during testimony or deliberation." (Hyink Comment, submitted to the PCB on May 15, 2009.)

- "Fox Moraine complains that audience members disrupted the hearings. I attended most sessions and saw no such behavior. A quick review of the transcript shows that the hearing officer maintained control at all times." (Evans Comment, submitted on June 2, 2009.)

- "I wish to comment on the issue of fairness as it applies to the Landfill Hearings that took place in Yorkville in 2007. I attended all of the hearings and witnessed the proceedings which are now being called 'unfair' by Fox Moraine. Just the opposite is true! The hearings were conducted in a fair and orderly fashion and moderated in a professional way by Hearing Officer Larry Clark. Fox Moraine presented several witnesses, some taking several days to present all of their information. Much of their information was presented in the form of lengthy and elaborate power points while the speaker narrated and expounded on the topic. . . . As for the community members who sat in the audience during the hearings, they also listened to the information presented by Fox Moraine and were then allowed to submit questions for the witnesses. The questions from the audience were read by Mr. Clark and were answered by the witnesses. This also was done in a fair and orderly way." (Gilmour Comment p. 1, submitted on June 3, 2009.)

[13] Much of the alleged behavior of which Fox Moraine complains occurred at hearings regarding the proposed annexation, which occurred months before Fox Moraine filed its Application. Although Fox Moraine attempts to conflate the two (Br. at 9-19), the annexation hearings were not part of the landfill hearings. In any event, the City Council and the public acted appropriately throughout the two different proceedings.

- "I attended all the public landfill hearings and found them to be exhausting with detail and protocol, but never did I find them to be unfair towards Fox Moraine. In fact they consistently had a team of legal council [sic] and about a half dozen of support people present at all times. These individuals, along with Derke Price, and Michael Blazer were being consistent watchdogs and would make sure that the hearings and discussion did not leave the legal parameters." (Bond Comment, submitted on June 4, 2009.)

No one, other than Fox Moraine's paid witnesses, testified or submitted comment that the audience at the hearings was disorderly, unruly, or hostile.

Whether or not the Yorkville public opposition would qualify as "strong" is irrelevant (and while a number of people may have consistently attended the landfill hearings, they were orderly and respectful of the hearing process). The case law is clear that even the "existence of strong public opposition" does not render landfill siting proceedings fundamentally unfair "as long as the applicant is provided with a full and complete opportunity to present evidence in support of its application." *Peoria Disposal*, 385 Ill. App. 3d at 798, 896 N.E.2d at 476; *Waste Mgmt.*, 175 Ill. App. 3d at 1043, 530 N.E.2d at 697-98.

The 23 days of landfill hearings, resulting in approximately 125 hours of hearing testimony, in addition to the 20,000 page record, demonstrate that Fox Moraine was afforded more than ample opportunity to present its case. Fox Moraine conceded this at the PCB Hearing. Charlie Murphy, Fox Moraine's Project Manager, testified as follows:

Q: Would you agree with me that Fox Moraine had a full and complete opportunity to offer evidence in support of its application?

A: I believe we had a full opportunity.

(PCB 4-22-09 pp. 168:15-24, 217:8-11.) Jim Burnham, who managed the landfill project with Murphy, agreed:

Q: So how many people did Fox Moraine have testify, six, eight, ten?

A: Eight to ten.

Q: Would you agree with me that Fox Moraine had a full and complete opportunity to present evidence in support of its landfill application?

A: Yes.

(PCB 4-22-09 pp. 234:19-235:14, 241:4-8.) Fox Moraine had more than sufficient opportunity to present its case. This, alone, shows that the process was fundamentally fair.

Not only did Fox Moraine have a full and complete opportunity to present its case, but it also was accorded special meeting privileges with the Mayor and City Council before it filed the Application. In August 2006, Murphy and Burnham were allowed to meet with the Mayor and City Council on several occasions to discuss the proposed landfill. (PCB 4-21-09 pp. 126:19-130:14; PCB 4-22-09 pp. 205:8-21, 207:2-215:18, 236:3-240:8.) Murphy conceded that he and Burnham limited these meetings to a maximum of two Council Members at a time to get around the restrictions of the Open Meetings Act. (*Id.* pp. 205:22-207:1.)

In her 13 years as a Yorkville Alderman, other than with Fox Moraine, Alderman Spears has never participated in a private meeting with a developer. (PCB 4-21-09 pp. 42:13-19, 130:15-21.) And Murphy did not know of any similar meetings set up for the citizens of Yorkville to discuss the landfill with the City Council. (PCB 4-22-09 p. 215:14-18.) It is undisputed that Fox Moraine received meeting privileges not given to any other developer or to the citizens of Yorkville, yet Fox Moraine claims it was somehow mistreated, a claim that is not supported by the facts or the law.

F. The Council Members Based Their Decisions Solely on the Evidence of Record.

Fox Moraine attempts to make much out of its claim that "several" Council Members relied on information outside the record in reaching their decisions. "Several" is

apparently only two, as only Spears and Werderich are alleged to have relied on extra-record information. (Br. at 38-41.)

Fox Moraine suggests that Burd's reference to Council Members' doing "research" must necessarily mean research outside the record. (Br. at 38.) Fox Moraine, of course, has no support for this, and its allegation is nothing but unfounded speculation. Burd did not know of any Council Member relying on anything outside the record (PCB 4-21-09 p. 248:12-17), and she therefore could only have been referring to Council Members' "researching" the almost 20,000-page record. And when Spears used the word "research," she was referring only to the notes she had taken during the 23 lengthy landfill hearings. (PCB 4-21-09 pp. 105:1-10, 124:9-19, 137:13-140:19.[14]) Fox Moraine apparently believes that, instead of taking notes, the Council Members should have relied on their memories to recall all the testimony and evidence from the hearings. It is doubtful that Fox Moraine's attorneys, even as the experienced landfill counsel that they are, would place such a burden on themselves.

Fox Moraine claims there is no evidence in the record to support Spears' statement that EPA records showed adequate landfill availability for at least 9-15 years. (Br. at 39.) In fact, Fox Moraine's own Application shows that "currently permitted capacity will be exhausted in 2016 or 2017" (C1000), which is 10 or 11 years from when the Application was filed. The Application also references several Illinois EPA Annual Landfill Capacity Reports, which Fox Moraine relied on to support its landfill need analysis. (C1000, C1013-14.)

[14] The testimony at pp. 137-40 was taken under an offer of proof. It is offered only to show that Fox Moraine has no evidence to support its wild claims, even where it was allowed by the Hearing Officer to delve into matters under an offer of proof.

There was also sworn testimony that underutilized landfill capacity is available to meet waste disposal needs in Region 2 (which includes most of Fox Moraine's proposed service area) for 18.4 years. Like Fox Moraine, this witness also relied upon the IEPA Landfill Reports cited in the record. (C14321, C14324, C14344.) Additionally, there was public comment referencing the IEPA Landfill Reports, which demonstrated that, given the extent of landfill capacity in Region 2, the proposed Fox Moraine landfill was not needed. (C13278-80.) [15]

The record also supports Spears' references to technical standards for leachate storage tanks and a double liner with a leak detection system. (Br. at 39, C15919, C15920, C16819, 16824-25, C18546, C19555-57.)[16] Fox Moraine belittles Alderman Spears' painstaking efforts to examine the lengthy record, contending that it "indicates conclusively that she had been doing more than a little of her own research." (Br. at 39.) In fact, it is obvious that Alderman Spears was more familiar with the record than the Applicant.

Fox Moraine also claims there is no evidence in the record regarding a safe exposure level for vinyl chloride. (Br. at 39.) There are numerous references in the record to vinyl chloride being detected at landfills at unsafe levels, being detected in groundwater, and identifying it is a toxin and carcinogen. (C10972, C10976-78, C11049, C15781, C15785, C15787, C19542-45.)

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[15] *See* C00986 for a depiction of Fox Moraine's proposed service area, C7700 for a description of the counties in Region 2, and C7698 for a listing of landfills in DeKalb and LaSalle Counties, which are also part of the proposed service area.

[16] In its reply, Fox Moraine may protest that only sworn testimony should be considered, but these reports and comment are part of the record and are "entitled to the lesser weight given to all public comments." *City of Geneva v. Waste Mgmt. of Illinois, Inc.*, PCB 94-58 (July 21, 1994), slip op. at 17-18.

Fox Moraine finally claims that Spears misunderstood the traffic criterion, alleging that Spears believed any impact on traffic would be unacceptable. (Br. at 39-40.) In a limited offer of proof at the PCB hearing (because the Hearing Officer ruled that such questions violate the deliberative process privilege), Fox Moraine asked Spears: "However, it was your belief that any negative impact would be improper, and insufficient to defeat the criterion, right?" Spears answered: "Well, that would be your opinion. That wasn't mine." (PCB 4-21-09 pp. 65:20-66:14, 73:3-7.)[17] Not only did Spears testify contrary to what Fox Moraine suggests, but when she was prepared to vote, she cited the traffic criterion correctly: "Criterion 6. The traffic patterns to and from the facility are so designed to minimize the impact on existing traffic flows. My findings, applicant failed to meet Criterion 6." (C18548.)

As to Werderich, Fox Moraine asserts he incorrectly claimed there had been citizen complaints regarding Hamman's composting operation raised at the landfill hearings. (Br. at 40.) It is Fox Moraine who is wrong, however. Several Yorkville residents provided public comment that the litter, odor and "stench" from Hamman's composting facility were significant, continuing problems. There are also numerous complaints in the record regarding odor and litter registered with various governmental authorities. (C7822-49, C13305-06, C14461-62, C14496-97, C15100-02, C15107, C16408, C16441-84, C16517-40, C16658-63, C16669, C16886.)

[17] The issue of the scope of the deliberative process privilege was the subject of extensive briefing prior to the PCB hearing. Each side filed a pre-hearing motion and the issue was fully briefed and analyzed. Finding no bad faith by the City Council, the Hearing Officer correctly ruled, following a long line of precedent, that the integrity of the decision-making process requires that the mental processes of the members of the local siting authority be safeguarded. (Hearing Officer Order (Oct. 30, 2008) at 2-5.) Nor was evidence of any bad faith adduced at the PCB hearing. The PCB should reject Fox Moraine's suggestion to invalidate this long-standing privilege.

Moreover, even Fox Moraine's chief landfill engineer, Devin Moose agreed that Hamman's composting operation is a nuisance:

> I think the composting operation . . . is, from an odor standpoint and frankly from a litter standpoint, are both a bigger nuisance to the area than a landfill. . . . So from an odor standpoint, I have been driving by [Route] 71 for years. I have been working on this site since summer of '05, when I was out there witnessing some of the borings being installed, you know, there was an odor issue.

(C10772-73.) Moose was later asked:

> Q: Since you worked at this project since 2005 and have personally smelled the compost pile, why didn't you discuss this with the owner and ask him to address the issue?
>
> A: I think the compost pile smells worse than a good, well-run, operated landfill. That's my opinion. And we have problems state-wide with compost facilities.

(C11394.) That Moose dodged the question is further indication that he thought the odor from Hamman's composting operation was a big problem.

Werderich also noted that Kendall County had sued Hamman for odor and operational violations at his composting operation that resulted in a settlement agreement. (C18557.) The suit and settlement are documented at several places in the record. (C16434-40, C16523-26, C16658-63.) Again, the citizen commenters and the Council Members were more familiar with the record than the Applicant.

Fox Moraine further argues that some members of the City Council "expressed serious concern about their ability" to review Fox Moraine's lengthy post-hearing submittal, which was received one day before their vote on the Application. (Br. at 35-36.) Fox Moraine apparently dumped its 1,319-page post-hearing submittal (C17202-C18520) on the City Council on the last day of the 30-day comment period in an effort to postpone the proceedings and push the vote beyond the 180-day deadline, which would have

resulted in the Application being approved as a matter of law. *See* 415 ILCS 5/39.2(e). What the Council Members more likely were lamenting was Fox Moraine's shameless gamesmanship in withholding these materials until the last moment.[18]

Fox Moraine criticizes the City Council's decision not to postpone deliberations on the Application (Br. 35-36), but Fox Moraine could have submitted much, if not all, of its 1,319 pages well before the final day of the post-hearing comment period. For example, the 309-page "Environmental Compliance Manual" from a different landfill is dated October 2006 (C17204-512), and Fox Moraine obviously could have submitted it much earlier. The 64 pages of "letters of support" from 2002 and 2007 regarding other landfills (C17571-634) could also have been submitted earlier. So could have the 57-page January 2003 IEPA Liner Study (C17673-729), the 68 pages of 2004 traffic studies (C18284-352), the 62-page June 2000 risk assessment of another landfill (C18353-414), a 50-page October 2006 real estate study regarding a different landfill (C18467-517), and Fox Moraine's 51-page December 2006 Operating Agreement with the proposed landfill operator (C18467-517).

Again, Fox Moraine complains of a problem it deliberately created. Fox Moraine could have avoided the problem by providing at least some, if not all, of the materials earlier, but it instead chose to wait until the last possible day. In any event, the case law is clear that the members of the siting authority need not have reviewed every page of the record, as long as the record was made available for their review. *See*, *e.g.*, *Waste Mgmt.*, 123 Ill. App. 3d at 1080-81, 463 N.E.2d at 974 ("As long as the record was made available

[18] Fox Moraine criticizes FOGY for submitting 1,100 pages of **pre-hearing** evidence (Br. at 20), yet Fox Moraine sees nothing wrong with its eleventh-hour, much lengthier submittal.

for review by the full county board, all members heard the case irrespective of their attendance."); *see also* PCB 4-22-09 64:20-65:8. The City Council acted appropriately.

G. The City Council Generated the Required Written Decision.

Pursuant to 415 ILCS 5/39.2(e), the City Council's decision was required to be "in writing, specifying the reasons for the decision." Contrary to Fox Moraine's contention (Br. at 46), however, the writing "need only indicate which of the criteria, in [the City Council's] view, have or have not been met, and this will be sufficient if the record supports these conclusions so that an adequate review of the [City Council's] decision may be made." *E & E Hauling, Inc. v. Pollution Control Bd.*, 116 Ill. App. 3d 586, 616, 451 N.E.2d 555, 577-78 (2nd Dist. 1983), *aff'd on other grounds*, 107 Ill. 2d 33, 481 N.E.2d 664 (1984). Because the Board reviews only the local siting authority's ultimate decision on all of the criteria, the local authority need not vote on each individual criterion and instead may take a single vote that incorporates its decision on all of the statutory criteria. *City of Rockford v. Winnebago County Bd.*, PCB No. 88-107 (Nov. 17, 1988), slip op. at 6 (where applicant argued it was prejudiced because county board "did not vote separately on each individual criterion," PCB held that procedure of holding a single vote on all criteria was fundamentally fair because "[i]t is the totality of the Winnebago County decision on all six criteria that is under review, and not the votes of the individual county board members on individual criteria"), *aff'd*, 186 Ill. App. 3d 303, 313, 542 N.E.2d 423, 430 (2nd Dist. 1989) ("the only statutory requirement concerning the decision of the county board is that its decision be in writing and specify the reason for the decision.")

The decision also need not include specific findings of fact or explain how the City Council applied the law to the facts or reached its decision on each criterion. *Clutts v. Beasley*, 185 Ill. App. 3d 543, 544, 541 N.E.2d 844, 845-46 (5th Dist. 1989). Nor must the

City Council deliberate on each criterion or debate at all, as long as the members "have had an opportunity to review the record prior to voting." *Slates v. Illinois Landfills, Inc*., PCB No. 93-106 (Sept. 23, 1993), slip op. at 17-18; *see also Waste Mgmt.,* 123 Ill. App. 3d at 1080-81, 463 N.E.2d at 974 ("As long as the record was made available for review by the full county board, all members heard the case irrespective of their attendance.")

Therefore, a siting authority may meet the requirements of § 39.2(e) in several different ways, and there is no one prescribed method or approach, For example, a siting authority met the requirements when it adopted an unofficial transcript of its deliberations as its written decision. *Peoria Disposal*, 385 Ill. App. 3d at 796, 896 N.E.2d at 474 (noting that "the statute does not define the form that the local siting authority's written decision must take" and the court would not "read such a condition into the statute"). An authority also met the requirements when it adopted a hearing officer's written findings of fact, as reflected in the siting authority's meeting minutes, as its written decision. *American Bottom Conservancy v. City of Madison*, PCB No. 07-84 (Dec. 6, 2007), slip op. at 29-31.

Here, it is uncontested that the record was available to the City Council prior to the vote and that the City Council's written resolution indicates that Fox Moraine failed to meet seven of the ten statutory criteria. Fox Moraine complains, without citation to a single case supporting its position, only that it did not get specific "findings of fact" or "statement of reasons for denial." (Br. at 46.) As numerous courts have rejected similar arguments, *see E & E Hauling, Inc.*, 116 Ill. App. 3d at 616, 451 N.E.2d at 577-78; *Clutts*, 185 Ill. App. 3d at 544, 541 N.E.2d at 845-46; *Slates*, PCB No. 93-106 (Sept. 23, 1993), slip op. at 17-18; *City of Rockford*, PCB No. 88-107, (Nov. 17, 1988), slip op. at 6, Fox Moraine's lack of support is unsurprising.

The City Council's resolution clearly indicates that Fox Moraine's Application for siting approval for a landfill was denied and "that the following criteria, as set forth in Section 39.2 of the Act, were not met (i), (ii), (iii), (v), (vi), (viii) and [the Tenth Criterion]." (C18640-43.) The resolution also attached and referenced the City Council's two nights of deliberations as well as the Clark and Price reports. (C18640-C18763.) The City Council's written resolution therefore complies fully with the requirements of § 39.2(e), and Fox Moraine has no legal or factual basis for arguing that the written decision fails to comport with the requirements of § 39.2(e).

Fox Moraine also speciously suggests that because the City Council voted prior to seeing the exact final form of its resolution, the City Council's resolution is suspect. (Br. at 43-45.) Again, Fox Moraine is misinformed. After all, a city council may vote and later prepare a written memorial of that decision signed only by the mayor and city clerk, and it is beyond dispute that it need not have the final written product in-hand before it votes. *See*, *e.g.*, *Slates*, PCB No. 93-106, slip op. at 3, 17 (finding requirement of written decision was met where vote was taken and resolution was later signed by mayor and city clerk, even though council did not have final written resolution before them when vote was taken); *see also Peoria Disposal Co. v. Peoria County Bd.*, PCB No. 06-184 (June 21, 2007), slip op. at 13-14 (finding that county's procedure of orally voting on application and months later adopting the transcript of that vote as its "meeting minutes" complied with requirement for written decision), *aff'd*, 385 Ill. App. 3d at 796, 896 N.E.2d at 474 (noting that "the statute does not define the form that the local siting authority's written decision must take" and the court would not "read such a condition into the statute").

Fox Moraine also complains that, although there were several draft resolutions before the City Council on the night of the vote, some approving and some denying the Application, "No one has identified which of these draft resolutions were actually before the City Council on the night of May 24, 2007." (Br. at 45.) Yorkville produced these draft resolutions to Fox Moraine in discovery well before the PCB hearing. That Fox Moraine chose not to question the Mayor and Council Members at the hearing regarding the draft resolutions indicates that Fox Moraine did not consider this to be an important issue.

Here, the City Council had before it draft resolutions when it deliberated on May 24, 2007 (C18623:14-C18624:10), and the City Council voted to deny the Application. (C18630:16-C18632:1.) The resulting, final resolution was then prepared and signed by both the Mayor and Deputy City Clerk. (C18640-43.) Fox Moraine is incorrect that the later preparation of a revised resolution somehow took the decision away from the City Council (Br. at 44-45), and this procedure almost exactly mirrors that followed in *Slates*. The process therefore comported with the requirements of fundamental fairness and § 39.2(e). To see it otherwise would "elevate procedural form over the substance and intent of Section 39.2, which is to allow for local government to have meaningful say on issues of pollution control facility siting." *Peoria Disposal*, PCB No. 06-184 (June 21, 2007), slip op. at 13.

H. Fox Moraine Can Point to No Fundamental Unfairness in the City Council's Hiring of an Outside Law Firm.

Grasping at any straw to support its claim that the siting proceedings were fundamentally unfair, Fox Moraine next contends that the City Council improperly hired City Attorney, Michael Roth, and his law firm. (Br. at 28-34.) Not only does Fox Moraine

lack any conceivable standing to contest the City Council's hiring, but no fundamental unfairness resulted from the hiring or the work done by these attorneys.

First, Fox Moraine has no standing to challenge the City Council's hiring of a City Attorney and outside firm. To challenge a city's alleged failure to follow its own procedures, a party must allege a violation of an applicable statute or constitutional provision. *See*, *e.g.*, *City of Elgin v. County of Cook*, 169 Ill. 2d 53, 62-63, 660 N.E.2d 875, 880-81 (1995). Fox Moraine has alleged no statutory or constitutional infraction in how the City Council hired Attorney Roth or his firm and therefore fails even to raise a proper objection. Fox Moraine does not contend that the City lacks authority to hire attorneys, and the City's method for doing so is not Fox Moraine's concern.[19]

Second, Fox Moraine's contention that the Wildman Harrold invoice proves prejudgment is utterly unfounded. In contrast to Fox Moraine's self-serving assumptions and exaggerations of bias and treachery (Br. at 31-33), the invoice shows that the City's attorneys undertook a thorough review of the landfill siting criteria and fundamental fairness issues.[20] For instance, to name a few, on 4/27/07, an entry says that the attorney "determine[d] what may be considered improper contacts," and the next day, an attorney "determine[d] how to prepare the written decision." On 5/9/07, an entry indicates that the attorneys "review[ed] hearing transcripts and exhibits to determine scope of evidence

[19] Fox Moraine also appears to argue that Yorkville hired City Attorney Roth and his firm to do only 50 hours of work per month and that this is somehow relevant. (Br. at 30.) As Mayor Burd explained at the PCB hearing, Yorkville hired Roth to act as City Attorney and also hired his firm for the landfill matter, two separate engagements. (PCB 4-21-09 pp. 216:13-220:2.) Not only is Fox Moraine wrong, but the issue is also irrelevant to this appeal.

[20] The invoice was inadvertently disclosed and, because it is protected by the attorney-client and attorney work product privileges, Yorkville moved to have it returned. By Order dated March 27, 2008, the Hearing Officer denied the motion. While acknowledging but disagreeing with the Hearing Officer's decision, Yorkville does not intend to waive any privilege attaching to the invoice by discussing it herein.

offered for and against health, safety and welfare criterion." On 5/10/07, an attorney "research[ed] . . . standards for criteria to be applied in ruling on Section 39.2 siting applications," and the same attorney over the next few days, "summarize[d] research regarding PCB rulings upholding or overturning decisions of local boards relating to siting permits." On 5/20/07, an attorney "prepare[d] memoranda regarding issues to consider to determine whether applicant met traffic and health, safety and welfare criteria." Rather than show a single-minded approach toward denying a landfill application, these entries show that the City's attorneys were researching basic issues of statutory siting criteria and fundamental fairness.

And not only does the invoice not establish any prejudgment, but at its May 24, 2007 deliberations, the City Council had several draft resolutions before it, one of which denied the Application, and two of which approved, either with or without conditions. (PCB 4-21-09 pp. 109:23-110:15). This, too, shows that the City Council did not prejudge the Application.[21]

Finally, Fox Moraine claims that Burd hired the City Attorney and his law firm because she "could clearly anticipate that the Hearing Officer . . . and Special Counsel . . . would recommend approval" of the Application, and therefore Burd "almost certainly realized" she had to counter this recommendation. (Br. at 33.) Here, Fox Moraine's speculations are probably at their most absurd in light of the actual evidence. Again, Fox Moraine sees treachery and bias (and clairvoyance) where elected officials simply weighed

[21] Fox Moraine also contends that a memorandum written by City Attorney Roth should have been disclosed. (Br. at 36-38.) This issue was fully briefed and analyzed by the parties and, by Order dated Oct. 30, 2008, the Hearing Officer denied Fox Moraine's motion, finding that the memorandum was protected under the attorney-client privilege. (Order at pp. 7-9.) Fox Moraine's arguments here are simply a rehashing of those that were soundly rejected earlier.

the merits of an issue and then voted as they deemed appropriate—in other words, where the elected officials did their job.[22]

III. THE CITY'S COUNCIL'S DENIAL OF SITING APPROVAL SHOULD BE UPHELD BECAUSE IT WAS NOT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

Before 1981, a municipality like the City of Yorkville would have had no input on whether or not a landfill was to be sited within Yorkville. That authority rested solely with the Illinois Environmental Protection Agency. To address this unfairness, the General Assembly passed Public Act 82-62, commonly known as Senate Bill 172, which created Section 39.2 of the Act. The intent of S.B. 172 was to transfer to municipalities and counties much of the siting authority that had formerly rested only with Illinois EPA. *See*, *e.g.*, *CDT Landfill Corp. v. City of Joliet*, PCB 98-60 (Mar. 5, 1998), slip op. at 3-4.

To grant siting approval for a landfill, the local siting authority must find that the applicant has satisfied **all** the siting criteria set forth in 415 ILCS 5/39.2(a). If the applicant fails to meet only one of the criteria, the siting authority must deny the application. 415 ILCS 5/39.2(a); *Town & Country Utils., Inc. v. Pollution Control Bd.*, 225 Ill. 2d 103, 109 866 N.E.2d 227, 231 (2007) ("a negative decision as to one of the criteria is sufficient to defeat an application for site approval"); *Waste Mgmt*. 160 Ill. App. 3d at 443, 513 N.E.2d at 597.

The PCB will not overturn a local authority's determination unless it was against the manifest weight of the evidence. *See*, *e.g.*, *Land and Lakes Co. v. Pollution Control*

[22] Fox Moraine also claims that, well before the City Council voted on May 24, 2007, Burd "had four committed 'no' votes, no matter what the evidence showed." (Br. at 29.) This is another instance of Fox Moraine attributing special powers to Burd because, as the evidence shows, the Mayor and Council Members had no idea how each would vote given that they refused to discuss the issue before the deliberations and vote on May 23 and 24.

Bd., 319 Ill. App. 3d 41, 52, 743 N.E.2d 188, 197 (3rd Dist. 2000); *Peoria Disposal*, PCB 06-184 (June 21, 2007), slip op. at 25. "A decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident, plain, or indisputable," for instance, "when, after reviewing the evidence in the light most favorable to the local siting authority, the Board determines that no rational trier of fact could have agreed with the local siting authority's decision." *Id.*; *see also Worthen v. Roxana*, 253 Ill. App. 3d 378, 384, 623 N.E.2d 1058, 1063 (5th Dist. 1993) (same).

The manifest weight of the evidence standard is consistent with the General Assembly's intent to give local siting authorities the power to determine whether a particular proposed location and owner/operator are suitable, and the PCB may not reverse "[m]erely because the local government could have drawn different inferences and conclusions from conflicting testimony." *Land & Lakes Co. v. Village of Romeoville*, PCB 92-95 (June 4, 1992), slip op. at 3. Further, where there is conflicting evidence, the PCB may not reverse "merely because the lower tribunal credits one group of witnesses and not the other." *Id.* at 2; *see also Wabash & Lawrence Counties Taxpayers & Waterdrinkers Ass'n v. Pollution Control Bd.*, 198 Ill. App. 3d 388, 392, 555 N.E.2d 1081, 1085 (5th Dist. 1990) (Board may not reweigh evidence or reassess the credibility of the witnesses); *Tate v. Pollution Control Bd.*, 188 Ill. App. 3d 994, 1022, 544 N.E.2d 1176, 1195 (4th Dist. 1989) (local siting authority alone is to weigh the evidence, resolve conflicts in testimony and assess witness credibility).

Contrary to this well-established line of precedent, Fox Moraine somehow divines a "mandate" in *Town & Country* that would have the Board somehow modify the manifest weight of the evidence standard of review and "take a more proactive and aggressive role"

in the landfill siting process. (Br. at 51, 105-06.) Fox Moraine does not explain how the Board would fulfill this new role and, in any event, it misreads *Town & Country*. In that case, the Supreme Court did not alter the standard of review that the Board has traditionally applied to local siting decisions. Rather, the issue decided by the Supreme Court was whether the Appellate Court should review the Board's decision or that of the local siting authority. *Id.* at 106, 866 N.E.2d at 229. In fact, in *Town & Country*, the Supreme Court rejected the same argument Fox Moraine is making here: "[I]n siting approval appeals, the Board conducts its hearing upon a record prepared by the locality and applies the manifest weight of the evidence standard to the locality's findings." *Id.* at 120, 866 N.E.2d at 237.

After weighing the evidence, resolving conflicts in testimony, and assessing the credibility of the various witnesses, the City Council determined that Fox Moraine had failed to show it met Criteria (i), (ii), (iii), (v), (vi), (viii) and the Tenth Criterion. (C18640-43.) The Board should uphold the City Council's decision because not only is it not against the manifest weight of the evidence, but because it is also reasonable, logical, and supported by the evidence.

A. The City Council Properly Concluded That the Proposed Landfill Was Not Necessary to Accommodate the Needs of the Service Area.

The Act requires the Applicant to prove, by a preponderance of the evidence, that the proposed facility is "necessary to accommodate the waste needs of the area it is intended to serve." 415 ILCS 5/39.2(a)(i). The Applicant, rather than the siting authority, determines the intended service area of the proposed facility. It is the current needs of the service area, rather than future needs, that are relevant to this determination. *See Waste Mgmt.*, 123 Ill. App. 3d at 1084, 463 N.E.2d at 976 (noting PCB found that existing

available facilities could handle area's waste production for ten years, showing proposed landfill unnecessary); *Waste Mgmt. of Illinois, Inc. v. Lake County Bd.*, PCB 82-119 (Dec. 30, 1982), slip op. at 7-8 (holding that where remaining capacity of two other landfills was ten years, county board properly found that proposed facility was not necessary to accommodate waste needs of area).

To meet this Criterion, while an applicant need not show absolute necessity, the proposed landfill must be needed to serve the waste needs of the area, considering the waste production and waste disposal capabilities of the area. *Land & Lakes Co. v. Village of Romeoville*, PCB 92-25 (June 4, 1992), slip op. at 18-20; *Waste Mgmt.*, 123 Ill. App. 3d at 1084, 463 N.E.2d at 976. Relevant to this determination is the available landfill space whether inside or outside the service area if the service area currently sends waste outside and there are outside facilities capable of handling the waste disposal needs of the service area. *Waste Mgmt.*, 175 Ill. App. 3d at 1032, 530 N.E.2d at 690 ("It is not improper to consider facilities outside of the intended service area if those facilities are presently providing waste disposal to the county.")

In assessing this criterion, siting authorities may consider flaws in the applicant's expert's analysis, *see Peoria Disposal*, 385 Ill. App. 3d at 800-801, 896 N.E.2d at 477-78, including inconsistent and unsupported conclusions, *Waste Mgmt.*, 123 Ill. App. 3d at 1085-1087, 463 N.E.2d at 977-78 (noting that expert's testimony was substantially impeached where he testified that landfills should be located within a 15-mile radius of area served, but could not identify how much waste would be produced within radius of proposed site). Further, where the applicant shows only that the proposed landfill would be convenient, it does not meet Criterion (i). *Waste Mgmt.*, 123 Ill. App. 3d at 1084, 463

N.E.2d at 976. As with the other statutory criteria, as long as the City Council's decision is not against the manifest weight of the evidence, it must be affirmed.

Here, the City Council heard the following evidence. Fox Moraine proposed to serve the City of Yorkville and the Counties of Cook, DeKalb, DuPage, Grundy, Kane, Kendall, LaSalle and Will, though the "primary beneficiary" was to be the City of Yorkville and Kendall County communities, though they produce approximately only .7% of the waste in the service area. (C00984-86, C09783:8-14.) Fox Moraine estimated that the proposed facility would have a capacity of approximately 23,500,000 tons of disposal, with a projected life of 23.5-24 years. (C09386:3-8.) If the proposed landfill were to accept all waste from the service area, however, it would be full within two years. (C009388:9-13.)

In the proposed service area, there were ten landfills accepting waste, according to Phil Kowalski, Fox Moraine's need witness. (C00991, C09389-90.) However, two of the counties within the proposed service area, DeKalb and Will (along with municipalities lying partially within Will County), have exclusive use of two landfills located within the service area. (C00997, C09389-90.) The ten landfills in the service area handled approximately 2,376,000 tons of waste in 2005, compared to the 11,427,000 tons of waste generated by the area in that year, (C01000), meaning that 80% of the waste from the service area is currently exported outside the region.

Hence, Kowalski examined the 42 landfills in Illinois, Indiana, Wisconsin, and Michigan serving the proposed service area, which have an estimated aggregate remaining capacity of 243,923,000 tons. (C01000.) According to Fox Moraine, the 40 non-restricted facilities would meet the needs of the larger region for 8-9 more years, and another 1.1

years would be added to that estimate by the additional landfill capacity of the Streator Area Landfill #3, the Winnebago Landfill, and the Atkinson Landfill. (C01000, C01009.) Kowalski conceded, therefore, that the proposed facility would constitute a small fraction of the total yearly disposal capacity available to the service area. (C09392:18-24.) Finally, Fox Moraine projected that there would be savings associated with siting the landfill in Kendall County, including reduced fuel costs. (C101005-08.)

From Fox Moraine's Application and Kowalski's testimony alone, the City Council could have determined that the proposed landfill was unnecessary, and that Fox Moraine has merely shown that it would be convenient to certain of the counties in the service area. After all, 80% of the waste from the service area is already being sent outside the service area, and the landfills in the region Mr. Kowalski examined have approximately 10 years' life remaining, more than sufficient in and of itself to support the City Council's decision on this criterion. *See Waste Mgmt.*, 123 Ill. App. 3d at 1084, 463 N.E.2d at 976; *Waste Mgmt. of Ill., Inc. v. Lake County Bd.*, PCB 82-119 (Dec. 30, 1982), slip op. at 7-8. Moreover, the area closest to and surrounding the landfill, Kendall County, produces only .7% of the waste generated by the proposed service area, a factor weighing against necessity. And two of the counties in the proposed service area, DeKalb and Will, already have landfills available exclusively for their use, arguing against their need for additional landfill space in Kendall County.

That is not the only place in which Fox Moraine's analysis is inconsistent. Further undermining its expert's testimony, *see Waste Mgmt.*, 123 Ill. App. 3d at 1085-87, 463 N.E.2d at 977-78, Fox Moraine has projected that its landfill would remain open for over 23 years, yet estimates that all other available landfills in the service area will be

completely full in eight to nine years. (C01000; C09386:3-8.) By Fox Moraine's own estimates, if there were indeed no other facilities able to take the region's waste, its proposed landfill would be open less than two years. (C009388:9-13.) Therefore, in estimating more than 23 years' operating life for its proposed landfill, Fox Moraine must be estimating that another twelve to fourteen years' of landfill space will be available within the service area to pick up substantial portions of the area's waste. Finally, though savings are relevant to the question of whether the proposed landfill is needed in the service area, they are by no means determinative, *Waste Mgmt.*, 123 Ill. App. 3d at 1087, 463 N.E.2d at 978, particularly here, where that is the only portion of Fox Moraine's presentation that arguably supports the need for a landfill.

If this were not enough to show that the City Council's decision is not against the manifest weight of the evidence, Darryl Hyink also offered evidence on Criterion (i). He testified, under oath and subject to cross-examination, that "[u]nderutilized landfill capacity is available in the north one-third of Illinois to meet Region 2 landfill needs for 18.4 years." (C14344:4-6.) In yet another attempt to divert the Board's attention from the ultimate issues, Fox Moraine attempts to makes hay of the fact that Hyink is not an expert witness, but Hyink's non-expert status "does not discredit otherwise persuasive testimony." *Waste Mgmt.*, 123 Ill. App. 3d at 1086, 463 N.E.2d at 977.

And Hyink's testimony outlining available landfill space in the northern one-third of Illinois alone is persuasive indeed, especially when combined with Fox Moraine's capacity estimates for its proposed landfill, which suggest there will be enough additional landfill capacity available to the service area to allow the proposed landfill to continue to operate for 23-24 years despite taking only a relatively small portion of the service area's

waste. On these facts, the City Council's decision that Fox Moraine has not shown that the proposed landfill was necessary to the service area was certainly not against the manifest weight of the evidence.

B. The City Council Properly Found That Fox Moraine Failed to Establish That the Proposed Landfill Was So Designed, Located and Proposed to Be Operated to Protect the Public Health, Safety and Welfare.

Criterion (ii) requires that the applicant demonstrate the proposed facility is designed, located, and proposed to be operated in a manner in which the public health, safety, and welfare will be protected. "Determination of this question is purely a matter of assessing the credibility of expert witnesses." *Fairview Area Citizens Taskforce v. Pollution Control Bd.*, 198 Ill. App. 3d 541, 552, 555 N.E.2d 1178, 1185 (3rd Dist. 1990); *File v. D&L Landfill, Inc.*, 219 Ill. App. 3d 897, 907, 579 N.E.2d 1228, 1236 (5th Dist. 1991) (same).

Fox Moraine boasts that its experts termed the proposed site as "the best they had ever seen" (Br. at 3), but the evidence casts much doubt on that superlative. Price's report (on which Fox Moraine so heavily relies) calls for the imposition of 39 conditions before the "health, safety and welfare" criterion would be met. (C17191-97.) A sampling of the conditions highlights the deficiencies in the Application and the proposed design:

> Condition 2.1: The liner test pad should be constructed differently, and the field hydraulic conductivity of the pad should be confirmed using different methods. (C11360-61.)
>
> Condition 2.2: The Application does not provide for a leak location survey prior to the landfill accepting waste. Standard practice requires that one be conducted. (C11362-63.)
>
> Condition 2.3: The proposed design contains a "non-typical grade change" between certain landfill cells. A stress analysis study should be performed to demonstrate that the liner materials are adequate to withstand "down-drag stress" caused by this atypical grade change. (C11364-66.)

> Condition 2.4: To prevent clogging, the cover drainage layer and overlying cover soils should be constructed according to accepted practice, not as set out in the Application. (C11377-78.)
>
> Conditions 2.8-2.11: The Applicant should conduct certain tests to determine how to meet stability requirements. To ensure that the stability analyses are conservative, different parameters should be selected than those set out in the Application. (C11371-77.)

(C17193-94.)

Additionally, according to the Application, no groundwater monitoring wells would be installed on the southern border of the proposed landfill until 24 years after waste was first accepted. Stan Ludikowski, a Professional Engineer with a degree in civil engineering, testified that because complete groundwater monitoring would not occur until the landfill was almost at the end of its operating life, the design is unacceptable. (C10952-63.)

Ludikowski further testified that, according to the Illinois EPA, a landfill should be operated so that cell construction starts at the downgradient point and proceeds upgradient, which is not what the Application provides. Cell construction should therefore start at the south end of the proposed landfill and proceed north, and downgradient groundwater monitoring wells should be installed when landfill construction begins. (C10960-62.)

Fox Moraine disparages Ludwikowski's testimony as unfounded and claims that Moose "strongly disagreed" with it. (Br. at 67 fn. 11.) That is not true. Moose testified that Ludwikowski's testimony "was an intelligent, reasoned review of the application, and I think his concerns are valid." (C11250:2-6.) Moose added that, "Despite [IEPA's five-year review procedure], I still think that they are valid comments that Mr. Ludwikowski

brought up and I am proposing to revise the filling sequence [and monitoring well development]." (C11257:5-21.)

As part of its landfill design, Fox Moraine also proposed to reroute the unnamed tributary to Hollenback Creek. (C11287.) In response to the Applicant's application to the Army Corps of Engineers for a Clean Water Act permit to reroute or rechannel the tributary, the Army Corps stated:

> It appears that practicable alternatives may exist for the development of this facility that would have less adverse impact on the aquatic ecosystem, such as reconfiguration of the landfill to avoid or minimize stream and wetland impacts, or the acquisition of additional upland area to enlarge the upland component of the site, thereby avoiding impacts to aquatic areas. Generally, we are prohibited by law from permitting a discharge of dredged or fill material if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.

(C11287-90, C15372-74.) The U.S. Department of Interior recommended that the permit application "be held in abeyance pending the submittal and review of alternative site configurations that do not impact streams and/or wetlands." (C15373.) The Illinois Department of Natural Resources "expressed concerns for the project based on potential water quality, leakage, and flooding." (C11288-89, C15373.) In the face of these concerns, Fox Moraine withdrew its Army Corps permit application. (C11289.) Fox Moraine's failure to show how it would satisfy state and federal agency concerns regarding streams, wetlands, aquatic life, water quality, and flooding shows that it did not meet Criterion (ii).

Further, William Schmanski, a civil engineer, provided sworn testimony regarding drainage and stormwater issues. (C14099-101.) Schmanski testified that Fox Moraine failed to meet Criterion (ii) because the stormwater discharge from the proposed landfill to

the north drainageway exceeds the maximum release level of 0.15 cfs/acre of the City of Yorkville Specifications for Improvements. (C14101-10.) Fox Moraine further failed to meet Criterion (ii) because, although the proposed landfill was purportedly designed to withstand a 100-year 24-hour storm event, the northern section of the landfill does not meet that standard. (C14113.)

Moreover, Yorkville's former Mayor, Art Prochaska, who attended almost all of the landfill hearings, also found that Criterion (ii) had not been met. He had "several concerns that I don't believe have been addressed in the application and were not brought out completely in the public hearings":

> I believe this condition is not met because there is a major flaw in the design of the truck parking area. The lot is neither contained nor covered. There is no barrier against any liquid leaking from those trucks and running into the detention system, then further into the Hollenback Creek and ultimately into the Fox River. This obviously would pose potential risks to the public heath and safety of the landowners along the route to the Fox River as well as the environmental health of the waterways themselves.

(C16713.) He concluded that the truck parking area should be covered and include a system to pump accumulated liquid to leachate storage. (*Id.*)

Finally, as noted above, determination of Criterion (ii) often turns solely on the credibility of expert witnesses. Devin Moose was the chief landfill engineer for Fox Moraine, and the landfill siting hearings showed his credibility to be severely impaired.

On March 22, 2007, in the middle of the Yorkville landfill hearings, the Illinois Supreme Court issued its opinion in *Town & Country*, 225 Ill. 2d 103, 866 N.E.2d 227. That evening, Hearing Officer Clark asked Moose questions that had been submitted by the public. One question was asked of Moose regarding his work at the Town & Country landfill on behalf of the applicant:

> Q. Did you do only one boring to bedrock and did you rely on a 1966 study concerning hydrology?
>
> A. No, that's not, in fact, accurate. I did design the Kankakee landfill. I relied on my own experience at that—and in that particular material.

(C11524.) In fact, the Supreme Court had found otherwise:

> Devin Moose testified, as a professional engineer, on behalf of Town & Country. Moose prepared the application and testified regarding the design and proposed operation of the proposed landfill. . . . His company, Envirogen, Inc., conducted 19 soil borings on the site. One of the borings extended 50 feet into the bedrock. . . . Moose's study was also based on a 1966 geologic study which characterized the site as an aquitard.

225 Ill. 2d at 110-11, 866 N.E.2d at 231-32; *see also* C16404-06 (public comment detailing inconsistencies in Moose's testimony and problems with his credibility).

Moose also had difficulty recalling the facts of his landfill experience. He denied ever having worked at the Mallard Lake Landfill ("I have not worked at all on that facility." (C11391)), even though his resume lists Mallard Lake among his "Selected Project Experience." (C5903, C5905.) Perhaps Moose denied any involvement with Mallard Lake because he knew that the landfill has been the source of numerous complaints by neighboring property owners as well as the State of Illinois. *See Cannata v. Forest Preserve Dist.*, 2006 U.S. Dist. LEXIS 74267, at * 3 (N.D. Ill. Oct. 11, 2006) (property owners alleged that only limited portions of Mallard Lake Landfill contained a composite liner and that vinyl chloride and other hazardous substances had contaminated aquifer beneath landfill); *Enzenbacher v. Browning-Ferris Indus.*, 332 Ill. App. 3d 1079, 1081, 774 N.E.2d 858, 860 (2nd Dist. 2002) (property owners alleged nuisances to their property from "dirt, dust, debris, odors, and noise emanating from the [Mallard Lake] landfill."); *State of Illinois v. BFI Waste Sys.*, PCB 00-108 (Dec. 19, 2002), slip op. at 1-2

(landfill owner agreed to settle allegations of operating without permit and failing to initiate proper closure of Mallard Lake Landfill); (*see also* C15785-88, *Daily Herald* article about Mallard Lake).[23]

Given the testimony regarding the flaws in the proposed landfill design, coupled with the doubtful credibility of Fox Moraine's chief landfill engineer, the City Council properly concluded that Fox Moraine had failed to meet Criterion (ii).

C. The City Council Properly Concluded That Fox Moraine Failed to Show That the Proposed Landfill Is So Located as to Minimize Incompatibility with the Character of the Surrounding Area and to Minimize the Effect on the Value of the Surrounding Property.

The Act also requires a landfill applicant to minimize the incompatibility of the proposed facility with the surrounding area and minimize its effect on property values. 415 ILCS 5/39.2(a)(iii). An applicant "must demonstrate compliance with both portions of the criterion: minimizing incompatibility with the surrounding area, and minimizing the effect on property values." *Waste Hauling, Inc. v. Macon County*, PCB 91-223 (May 7, 1992), slip op. at 14.

As for the first portion, the applicant must show that it exerted "more than minimal efforts to reduce the landfill's incompatibility" with its surroundings but instead "has done or will do what is reasonably feasible to minimize incompatibility." *Waste Mgmt.*, 123 Ill. App. 3d at 1090, 463 N.E.2d at 980. Where an applicant fails to address the entire "surrounding area" and inadequacies in the applicant's minimization efforts are shown, it has not met this burden. *Id.*

[23] It was also Devin Moose who threatened Ron Parish, a resident who had spoken against the annexation and landfill, with physical harm if Parish continued to voice his opinions. Moose's tactics worked, and Parish stopped attending public meetings. (*See* above at pp. 11-12.)

Thus, for example, the decision-maker may properly consider the landfill's height and visibility from the surrounding area. *Waste Hauling*, PCB 91-223 (May 7, 1992), slip op. at 14 (noting that decision-maker could properly consider that landfill could be seen from over a mile away); *Waste Mgmt*., 123 Ill. App. 3d at 1090; 463 N.E.2d at 980 (upholding board's decision finding Criterion (iii) not met where 30-acre mound 70-90 feet above grade was incompatible with area because it could be seen from properties farther than 500 feet from site). The decision-maker may also weigh flaws in experts' analyses, including failure to consider viewpoints from multiple vantage-points or environmental and visual impact, such as unnatural-looking screening. *Id.* Further, the decision-maker may consider whether the proposed landfill is protected from view on all sides. *Waste Mgmt.*, PCB 03-104 (June 19, 2003), slip op. at 12 (upholding Board decision denying siting where Waste Management had proposed berming or fencing on only two of four sides of proposed landfill).

As for the second portion of the analysis, minimizing the proposed landfill's effect on property values, a siting authority may consider not only expert testimony regarding valuation, but also public statements regarding the difficulty of selling property or the decline of business nearby. *Waste Mgmt*., 123 Ill. App. 3d at 1090-92; 463 N.E.2d at 980-81. Further, the authority may also consider whether property values and residential sales near existing landfills have decreased, even when 80% of the land nearby is agricultural. *Rochelle Waste Disposal, L.L.C. v. City Council*, PCB 03-218 (Apr. 15, 2004), slip op. at 43-44.

The City Council's finding that Fox Moraine's proposed landfill does not minimize incompatibility with the surrounding area or minimize impact on the value of the

surrounding property is not against the manifest weight of the evidence, given the conflicting testimony of the witnesses and especially Price's recommendations for conditions related to this Criterion. (C17197-99.) Price also found that the testimony of Fox Moraine's Criterion (iii) witnesses was not credible: "[T]he first part of Mr. Harrison's report and his corresponding testimony, as well as that of Mr. Lannert that there was no incompatibility and that there would be no negative effect on surrounding property values (or indeed enhance them) is not credible." (C17197-98.)

Fox Moraine's witness, Chris Lannert, testified that Fox Moraine met the first portion of Criterion (iii). To do so, Lannert used a two-mile radius around Fox Moraine's proposed landfill site, (C08472:5-24), examined an aerial photo taken in September of 2004 and did some field observations. (C08473:16-C08474:3, C08188:17-C08189:10, C08512:10-19.) Lannert neither counted residents nor residential units in the area surrounding the landfill. (C08190:15-C08191:3, C08445:14-20, C8476:1-6.) Lannert agreed that Kendall County and Yorkville were "experiencing explosive growth" (C08446:16-23) and that the area was "obviously going through a transition" from agricultural to commercial or residential uses. (C08175:4-C08176:3.) He conceded that Fox Moraine had "a responsibility to consider future growth" and that the "trend of development in Yorkville is towards . . . residential" (C08448:17-C08449:6), but that development would occur unchanged "with or without the landfill" (C08176:9-17, C08177:9-15) because in areas around other landfills, "as time marches on, 20, 25, 30 years, you can start to see the development occurs through those market forces not impaired by the landfill." (C08177:12-C08178-7.)

As designed, Fox Moraine proposed landscaping on only three sides of the completed landfill. (C08456:7-C08458:12.) And Lannert could not even say whether the cells of the landfill would be shielded from view while being filled. (C08409:14-C08410:6, C08411:18-C08412:2.) Moreover, Lannert said that the completed landfill would be fit only for walking trials and activities like flying model airplanes, sledding, or observatories, rather than more active uses, (C08420:3-19, C08462:7-C08463:22), but conceded that the needs of the community surrounding the landfill "probably will evolve" over the almost-25-year projected life of the proposed landfill. (C08461:24-6.) When completed, "you are going to be able to see this landform on the horizon." (C08428:4-6; C08176:9-C08177:15.) He also testified that the elevation would be over 800 feet, compared to the highest nearby elevation of 720 feet, and that it would "be approximately 165 feet above grade," taller than the ComEd towers closest to the proposed site. (C08469:22-C08470:19; C08523:21-19.)

The Application thus failed to provide for the proper landscaping and screening. It also proposed a landfill that would become by far the highest point in the area. It further neither recognized that the recreational needs of the community could change over the years the landfill was in operation, nor did it provide a way for the City or community to have input into the use or appearance closer to its closing date. (C08420:3-19; C08462:7-C08463:22; C08465:1-20.)

Joseph Abel, a planning, zoning, and economic development consultant for approximately 45 years (C14562:2-24) testified on behalf of FOGY regarding the landfill's compatibility with the surrounding area. As a land use planner, he said, "eighty percent of [his] work" deals with compatibility or incompatibility determinations. (C14573:2-7.) He

opined that "the proposed landfill facility is not located so as to minimize incompatibility with the character of the surrounding area" (C14572:16-19), and would not stimulate economic or residential development in the area. (C14579:23-C14580:21, C14686:17-22.) Instead, "the problem with this [proposed landfill is that] it's right in the development corridor." (C14691:1-4.)

Abel disagreed with Lannert's methodology, saying "there is nothing magic from a planning standpoint about a one- or a two-mile radius around a particular facility. That is not the way I determine compatibility, just by putting a circle around it. I go out and do a very detailed land use and determine what uses are in the vicinity of it, how do those uses get to where they want to go, and that determines the area of influence in terms of compatibility, not some magic circle." (C14583:7-21; *see also* C14598:21-C14599:4, C14627:11-14, C14651:8-19.) He drove through the area surrounding the proposed landfill and examined maps. (C14598:6-16, C14601:10-14605:2.)

Abel also disagreed with the conclusions Lannert drew regarding the character of the surrounding area, saying "[t]here is no way from a planning standpoint that I would characterize the area north of Walker Road between 47 and all the way out to the Fox River as an agricultural area." (C14598:17-20.) He said that he characterizes agricultural as "an area where you have square mile upon square mile, in a 36-square-mile township, you might have 36 homes . . . almost totally agricultural with very, very little residential intrusion." (C14599:16-C14600:4.) He found that "there is the creeping of residential development" even south of Walker road, "the southern limit of the subject property." (C14599:1-10; *see also* C14665:7-C14666:6.) He, therefore, characterized the "entire area . . . as a low-density residential development, still has some agricultural or farmsteads

waiting to be developed, but they are not truly agricultural properties." (C14600:20-24.) He counted over 2,000 dwelling units in the area he reviewed. (C14608:9-12.) "The total acreage in the two-mile area means nothing. It's the watershed . . . the residential watershed that feeds into this area that is affected, and that's where the incompatibility comes from." (C14563:2-7.) Abel then fairly concluded that, as proposed, the landfill was not compatible with its surroundings. (C14608:16-C14609:20.)

As for the second component of the criterion, Frank Harrison, a real estate appraiser and land-use consultant, testified for Fox Moraine. (C08571:6-:11.) He noted that, given the rising sale prices in the area surrounding the proposed landfill, "[p]eople are not buying this acreage as family farms" but instead for development. (C085865:14-C08586:22.) Based on his studies, he "characterize[d] the neighborhood as a transitional agricultural area" (C08588:3-21; C08981:18-C08982:7), but believed development would be slow because the area did not have water and sewer. (C08970:9-C08971:13.) He was unaware, however, that Yorkville had entered into annexation agreements near the proposed landfill site, providing for utilities and other improvements. (C09034:15-C09035:2.)

Harrison read "historical case studies" of landfills, did a few "spot checks" on them (C8576:7-C08578:18, C08579:24-C085804, C08767:9-C08768:21, C08993:23-C08994:3), and chose two to evaluate. (C08580:9-11.) He initially gave reasons for choosing those two studies but later said "[t]here was no particular reason why I included or did not include any of the others." (C08757:5-7.) He found no study that tracked "pre-permit and post-permit" sales or rates of appreciation. (C08850:5-13.)

He first examined the "midlife" of the Countryside Landfill. (C08591:3-6; C08596:12-19; C08798:14-16.) He opined that "[t]he Countryside landfill did not prevent municipal growth" because, over twenty years, the land was developed, mostly industrially. (C08599:11-19, C08600:8-11, C08600:19-C08602:1, C08716:15-C08717:13, C08980:18-20, C09013:5-21.) As for the Settler's Hill Landfill (C08683:9-11), he explained that "the primary thing . . . is that much of the growth and development around Settler's Hill landfill is industrial in nature," but had proceeded less dramatically than that around Countryside. (C08685:9-13; C08692:9-19.) This was in complete indifference to Yorkville's residential growth.

Finally, Harrison examined Fox Moraine's proposed "Residential Property Value Protection Plan" ("PVPP"), which "are not uncommon with landfills," particularly "where there is relatively intense residential development" (C08786:22-C08787:4, C08694:2-9), because "[t]here is a perception among owners and among sellers that . . . the value of their property is going to be negatively influenced, by the landfill." (C08694:10-18.) He said that "when the [siting] application was filed, that's when the perception of the property owners began." (C08696:7-C08697:3.) If he were the appraiser involved in a sale made under the PVPP, he "would incorporate pre-application sales and appreciation rates as part of the analysis." (C08858:23-C08859:7.)

Harrison admitted that he had not studied whether property values near Fox Moraine's proposed landfill had actually increased or decreased since Fox Moraine's application was filed but had looked at local sales only "to define the character of the neighborhood in which this property was located." (C08885:16-C08886:23; C09007:5-23.) He suggested that any development near the landfill "would have to be compatible

with that . . . industrial use." (C08878:1-13.) Harrison conceded that "environmental situations where there is contamination" will "decrease[] values of surrounding properties" (C08948:18-C08949:2), as can proximity to power lines. (C08957:9-11.)

Doug Adams, a real estate appraiser, testified for FOGY regarding whether Fox Moraine had minimized the impact of the landfill on property values. (C013884:19-20.) He used a paired-sales approach, in which he examined sales of "two properties that are as identical to one another as possible, except for the variable you are trying to measure." (C13888:3-13.) Adams examined sales around two landfills, in Clinton and Hillside, and he drove to each area. (C13894:2-11; C13900:23-C13901:16.) Adams described the Clinton Landfill as rural and similar to the proposed landfill site "[t]o the extent there is vacant land" around it, but he said the Clinton Landfill differed from the proposed site in that Clinton is "a fraction of the size of the proposed landfill" (C13896:21-C13897:14), and that, unlike the land around Clinton, the proposed site "will not be long vacant land" because it is "a developing corridor." (C13894:21-C13896:6.) As for the Hillside Landfill, Adams testified that, similar to Fox Moraine's proposed landfill site, at Hillside there "is a mixture of residential, single-family residential properties, some commercial properties, some industrial properties." (C13898:5-22.) The Hillside Landfill differed from the proposed landfill in that Hillside is smaller with little traffic and has an "extraordinary odor." (C138998:23-C13899:11.) Thus, Adams opined that Clinton represented a smaller-scale "pre-development" example of what Fox Moraine proposed, while Hillside represented a smaller-scale post-residential and commercial development example. (C13900:10-22.)

Adams next collected land sales data near each landfill he studied. (C13903:6-21.) At Clinton, he began with 14 sales and winnowed it down to two pairs of sales, each including houses that were as closely matched as possible, other than their proximity to the subject landfill. (C13903:6-21; C13903:12-21.) For the purely agricultural-use property surrounding the Clinton landfill, Adams "found no noticeable difference [in price] between those properties that were close to and those that were more distant from the landfill." (C13903:22-C13904:5.) As for Hillside, which had more "single-family residences" (C13905:19-24), Adams again matched up two pairs of sales and drove out to look at them to make sure they compared. (C13905:19-C13906:23.)

In each pair, the house closest to the landfill sold for less than the one further away. (C13909:2-C13911:7.) He opined that, as proposed, Fox Moraine's landfill did not meet Criterion (iii). (C13913:7-C13914:24, C13915:20-C13916:24.) He noted that Hillside was relevant because the property surrounding Fox Moraine's proposed landfill "is priced to not continue to be farmland." (C14001:8-C14002:2.) He said that there is "a living stigma attached to" selling a home within two miles of a landfill, which would negatively affect the marketability. (C14034:2-C14035:7.)

Next, Ed Sleezer, a real estate broker and former Fox Township Assessor testified. (C13481:4-C13482:22.) He explained the limitations of Fox Moraine's PVPP and suggested improvements. He objected that it did "not cover agricultural," business or commercial properties nor provide what would happen to properties having both business and residential uses. (C13489:14-13490:10.) In fact, he noted that the PVPP "does absolutely nothing to protect" the many farmers in the area, at a time when prices were above farmland prices. (C13500:7-13501:24.) He calculated that potentially $115 million

worth of real estate was not covered by the PVPP. (C13509:21-C13510:7.) Moreover, unlike Harrison, he was aware that sanitary sewer and water were to be provided west along Fox Road, which would, in his opinion, increase the value of the property around the site. (C13540:18-C13541:21.)

Sleezer said that the PVPP should have an unlimited enrollment time, extending beyond a single sale and one year from the date of the application (C13490:11-19; C13496:12-C13497:3; C13497:17-21), and should cover more land, not just residential property, given Lannert's reliance on a two-mile radius in his study. (C13490:20-C13492:6, C13496:5-7, C13496:7-11.) Further, it should cover all losses, including the first five percent of loss and all business losses, and should not require marketing of the land for a year before the owners can be protected. (C13492:7-18, C13492:21-C13493:19, C13493:20-C13495:12, C13496:12-C13497:3.) It should also cover all appraisal costs and provide for Fox Moraine to guarantee escrow. (C13493:20-C13495:12, C13495:20-23, C13497:4-11, C13497:12-16.) Consequently, the PVPP had "substantive deficiencies," causing it to "fail[] to provide protection from impact to surrounding property values." (C13498:3-8.)

Next Bud Wormley, a real estate and insurance broker, testified for FOGY. (C13563:11-11.) He, too, personally investigated the impact of the proposed landfill on surrounding property values. (C13566:21-C13567:6.) He opined that 1031 exchanges were "likely to diminish exponentially as a result of loss of land value to the depreciation because of the siting of a landfill in this location." (C13575:11-C13576:4.) He opined that Fox Moraine had not minimized the impact on property values because "the location proposed is within a planned, committed, and invested growth corridor." (C13583:5-17.)

Finally, Ted Schneller, a real estate appraiser, testified. (C13641:15-C13642:5.) He testified regarding the highest and best use of the land surrounding the proposed landfill site. (C13646:8-9.) The highest and best use of land is the "use which is . . . legally permissible, physically possible, financially feasible, and maximally productive that will yield to the property the greatest net return in terms of dollars." (C13646:10-16.) Legally permissible uses would include residential uses, as well as some "industrial use, office use." (C13651:4-17.) He noted the land was "gently rolling," with good soil and "few physical limitations," except that some areas were "environmentally sensitive," including "creeks, tributaries." (C13652:1-C13653:10.) Investment capital would continue to be available, and interest rates were low, suggesting "a wide variety of uses to which properties in the area could be put." (C13653:11-17.)

Schneller opined that the landfill's impact on surrounding properties was not minimized. (C13654:3-7.) First, the proposed site is one of the highest points in Kendall County, and Fox Moraine would make it much higher. (C13654:8-19.) Next, there is a stigma, or "adverse public perception" of landfills, and the stigma is "amplified" due to the proposed site's height and the amount of truck traffic it would generate. (C13654:20-22, C13655:19-C13656:23.) The traffic, too, would impact property values. (C13660:16-C13661:13.) Schneller also opined that the highest and best use was not yet defined, but the "trend" in the area was residential. (C13668:17-C13669:18.)

After the close of the testimony and evidence, the Price and the City staff recommended that the City Council find that Fox Moraine had met this criterion only if nine conditions were imposed, and the Hearing Officer concurred. (C17197-98; C18756-58.) The conditions dealt with surrounding land use, landscaping (Fox Moraine should

provide "the same landscape buffering as the north side of the property" on "[t]he east side of the facility"), visual aesthetics (Fox Moraine should place "[g]as wells that are visible from public walking paths" in "underground vaults"), amendments to the PVPP, and stormwater runoff. (C17197-98.) Price and staff also recommended additional payments to cover the cost of final design, compliance with Yorkville's building ordinances for the on-site office building, re-design of detention ponds, and maintenance of a post-closure funding mechanism. (C17198-99.)

Given the hearing testimony and Price's and the Hearing Officer's recommendations, it was well within the manifest weight of the evidence for the City Council to determine that Fox Moraine had not met its burden on the first part of this Criterion. Not only do many of the recommendations, including requiring increased landscape buffering, land use buffering and other visual improvements, justify the City Council finding that Application did not "minimize the incompatibility of the proposed facility with the surrounding area," but the hearing testimony, including Fox Moraine's own testimony, provides additional and wide-ranging further support.

For example, Harrison and Lannert agreed that the area surrounding the proposed landfill has been developing as residential land, but Harrison testified that the growth around landfills generally tends to be industrial. This supports a finding by the City Council that Fox Moraine's proposed landfill is inconsistent with the character of the surrounding land.

Also, the City Council was well within the manifest weight of the evidence in finding that Fox Moraine had not minimized the landfill's "effect on property values," the second inquiry under Criterion (iii). After all, Harrison examined only the impact on

development surrounding landfills at those landfills' "midlife," rather than the beginning. The City Council could properly find that this was insufficient to show that the impact on property values surrounding the proposed landfill would be minimized, particularly where other witnesses testified that the impact would be particularly great on the developing area around the proposed site and suggested that it would take an industrial turn. (C08850:5-13, C08596:12-19, C08798:14-16.)

In addition, Harrison could not satisfactorily explain why he chose to study the two landfills he picked to evaluate (C08755:3-20, C08757:5-7), and unrealistically testified that the landfill would have no impact on property value, in contrast to Adams. (C08591:3-6; C08683:9-11, C13894:2-11, C13900:23-C13901:16.) Harrison, in fact, denied that any decreases in growth or value occurred, despite conceding that other similar factors, such as environmental issues or power lines could affect value. (C08688:13-15; C08599:11-19; C08948:18-C08949:2; C0857:9-11). Like Price and the City staff, the City Council could have viewed his testimony that absolutely no decrease in value would occur was not credible, affecting the credibility of the remainder of his testimony. In addition, multiple FOGY witnesses testified that Fox Moraine had not minimized the impact on the value of surrounding properties.

Similarly, the City Council could have found that Fox Moraine's PVPP was insufficient to protect the property owners near the landfill, another factor the City Council could properly consider in finding that Fox Moraine did not meet its burden. Even Harrison agreed that homeowners would perceive a reduction in value associated with a landfill beginning at the time of the Application. He said that a PVPP like Fox Moraine's would be consistent with protecting owners during "relatively intense residential

development" (C08786:22-C08787:4; C08694:2-18; C08696:7-C08697:3), and is meant to insure nearby property owners against loss of value. (C08786:22-C08787:4; C08694:2-9; C08694:10-14.)

However, as Sleezer testified, Fox Moraine's PVPP does not adequately prevent loss. The PVPP has onerous requirements for property owners to meet before they even will be covered, and it limits their protection substantially. (C13489:14-C13492:18, C13492:21-C13495:23, C13496:5-C13497:21, C13498:3-8.) More importantly, Fox Moraine's proposed PVPP protects only residential land value, not the value of the agricultural land that had been skyrocketing in value, potentially $115 million worth of property. (C13496:5-7, C13498:14-C13490:10, C13500:7-C13501:24, C13509:21-C13510:7, C13540:18-C13541:12.) The City Council properly considered the limitations and shortcomings of the PVPP in finding against Fox Moraine on the second part of Criterion (iii).

As to the credibility of Fox Moraine's witnesses, neither Harrison nor Lannert recognized that Yorkville had annexed additional land and was moving toward installing utilities on that land (C09034:15-C09035:2), which established that residential development was imminent, rather than distant. The City Council could have considered this to be a major factor overlooked by Fox Moraine's experts. Additionally, as noted above, Price found Harrison and Lannert to lack credibility: Harrison's and Lannert's testimony "that there was no incompatibility and that there would be no negative effect on surrounding property values (or indeed enhance them) is not credible." (C17197-98.) This lack of credibility gave the City Council additional reasons to find against Fox Moraine on Criterion (iii).

D. The City Council Correctly Concluded That the Plan of Operations for the Proposed Landfill Was Not Designed to Minimize the Danger to the Surrounding Area from Fire, Spills, or Other Operational Accidents.

Criterion (v) requires the Applicant to show that "the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents." Special Counsel Price found that Fox Moraine had not met this Criterion. Only after the imposition of certain conditions could he find that the proposed plan of operations would be sufficient. (C17199.)

In addition, the Application calls for the temporary storage of leachate. Fox Moraine suggested that it may use clay berms for secondary containment around the leachate storage tank. To minimize the danger to the surrounding area from spills, Fox Moraine should have committed to the installation and maintenance of concrete secondary containment enclosures. (C15920, C19552.) Fox Moraine also should have proposed the use of a different leachate storage tank as the tank type in the Application is inappropriate for leachate storage. (C15920.)

As noted above, the PCB may not reverse "[m]erely because the local government could have drawn different inferences and conclusions from conflicting testimony." *Land & Lakes Co.*, PCB 92-95 (June 4, 1992), slip op. at 3. The Board also may not reweigh evidence or reassess the credibility of the witnesses. *Tate*, 188 Ill. App. 3d at 1022, 544 N.E.2d at 1195. There was more than sufficient matter for the City Council to find that Fox Moraine had failed to meet Criterion (v). The Board should not disturb that finding.

E. The City Council Properly Concluded That Fox Moraine Failed to Establish That the Traffic Patterns to or from the Proposed Landfill Were Designed to Minimize the Impact on Traffic Flows.

Criterion (vi) requires the applicant to establish that "the traffic patterns to or from the facility are so designed as to minimize the impact on traffic flows." 415 ILCS

5/39.2(a)(vi). Traffic expert Michael Werthmann testified that Fox Moraine had met this criterion. Two other traffic experts, Brent Coulter and Stephen Corcoran, criticized Werthmann's findings and reasoning, and concluded that Fox Moraine had failed to meet Criterion (vi).

Specifically, Coulter (expert qualifications at C12984-89, C13751-52) and Corcoran (expert qualifications at C13806-09) testified as follows:

- Unlike traffic from other developments, traffic from the proposed landfill would not travel over several different roads, and therefore would not disperse within short distances once having left the landfill. Instead, as explained in the Application and criticized by Coulter and Corcoran, all or almost all (90%-99%) of the landfill's truck traffic will travel over only two routes: (1) from the east on IL 126 to IL 71 to the landfill and back; and (2) from the north on IL 47 to IL 71 to the landfill and back. (C1462-63, C13011-12, C13754-55, C13814-15.)

- The proposed landfill "is not well located with respect to proximity and accessibility" to the regional interstate system. The closest interstate interchanges are located 18-20.2 miles from the landfill. Consequently, access to the landfill would be on two-lane highways with no medians and restricted sight distance, making the landfill difficult to access. (C12997-13000, C13754.)

- The proposed landfill would generate 440-500 heavy truck trips per day. Landfill trucks have special needs in terms of their operating characteristics. They require longer breaking distances and require larger turning paths. The traffic from the proposed landfill would not be suited for the roads leading to the landfill. (C9271, C12996-97.)

- Fox Moraine's traffic study did not consider the impacts of the landfill traffic on downtown Yorkville and downtown Plainfield, which is contrary to accepted traffic analysis. (C13005-12.)

- The distances from the proposed landfill to the interstate system force the landfill traffic to use IL 47 and IL 126. Approximately 30% of the landfill truck traffic would pass through downtown Yorkville, which has significant pedestrian crossings, on-street parking, and side-street turning movements. Much of it would also pass through downtown Plainfield and a single-family residential neighborhood. Such heavy truck traffic is incompatible with areas of high pedestrian and passenger car traffic. (C13756-57.)

- The landfill truck traffic on IL 47 going through Yorkville would diminish the ability of the City to promote residential development and a pedestrian-friendly area. (C13157-59.)

- Traffic from the proposed landfill would significantly worsen the existing traffic levels on IL 47, IL 71, and IL 126 in Yorkville. (C13005.)

- Existing traffic plus landfill-generated traffic plus traffic from other developments would cause the service level at the intersection of IL 47 and IL 126 and the intersection of IL 47 and IL 71 (both in Yorkville) to be Level F, the worst possible level. (C13015-16, C13018.)

- Werthmann listed traffic delays at the intersections of IL 47 and IL 126 and IL 47 and IL 71 as "99.0+" seconds. Upon cross-examination, he had to concede that the delays were actually 300-400 seconds. (C9187-88, referring to C1472.)

- Having heavy truck traffic from the proposed landfill at these intersections is not appropriate. The impact of the truck trips is also disproportionate to their actual number based on their operating characteristics. (C13015-17.)

- The proposed landfill would require vacating Sleepy Hollow Road between Walker Road and IL 71. This road closure would result in an increased travel distance for local emergency vehicles and an increase in emergency vehicle response times. This issue was not addressed in the Application. (C13757.)

- Intersections in Plainfield are near, at, or over capacity. At least one intersection is already at service level F. The additional heavy landfill truck traffic could not be accommodated. (C13820-21, C13826-31.)

Significant public comment was also received:

- The impact of landfill traffic would adversely affect the development of downtown Yorkville. (C16714-15, post-hearing comment of former Mayor Art Prochhaska.)

- The proposed landfill truck traffic would lead to significant delays in transporting students to and from school. (C16638, post-hearing comment of Plainfield School District.)

- The Applicant's traffic report is flawed. It omits information regarding existing and proposed transfer station locations. The report also neglects to address how garbage from nearby communities will reach the landfill, i.e., via transfer station or trucks traveling directly to the landfill. Because the report lacks this information, the Village of Oswego cannot determine if the landfill truck traffic would impact the Village. (C17170-71, post-hearing comment of the Village of Oswego.)

- The proposed traffic pattern would result in a higher level of truck traffic through Plainfield than the already existing burdensome level. (C17120-21, post-hearing comment of Rep. Thomas Cross, Illinois House of Representatives.)

As the trier of fact, the City Council was able to hear and assess the testimony of the various witnesses and determine what witnesses and testimony it found to be more credible. *See Fairview,* 198 Ill. App. 3d at 550, 555 N.E.2d at 1184. Furthermore, Council Members were free to use their own knowledge and familiarity with local traffic conditions to determine if Criterion (vi) had been met. *See Hediger v. D&L Landfill,* PCB 90-163 (Dec. 20, 1990), slip op. at 16.

As noted above, the Board may not reweigh the evidence or reassess the witnesses' credibility. *See Wabash & Lawrence Counties*, 198 Ill. App. 3d at 392, 555 N.E.2d at 1085; *Tate*, 188 Ill. App. 3d at 1022, 544 N.E.2d at 1195. Further, if there is conflicting evidence, the Board is not free to reverse merely because the local siting authority credits some witnesses and not others. *See Waste Mgmt. of Illinois, Inc. v. Pollution Control Bd.*, 187 Ill. App. 3d 79, 82, 543 N.E.2d 505, 507 (2nd Dist. 1987). There was significant testimony showing that Fox Moraine had failed to establish the proposed landfill's traffic patterns would minimize the impact on traffic flows. Because the City Council was in the best position to weigh the evidence and testimony regarding Criterion (vi), the Board should uphold the City Council's decision.

F. The City Council Properly Concluded That Fox Moraine Had Failed to Establish That the Proposed Landfill Was Consistent with Kendall County's Solid Waste Management Plan.

Under 415 ILCS 5/39.2(a)(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 . . . the facility [must be] consistent with that plan." (emphasis added). For Criterion (viii), the plan at issue is the one "in effect as of the date the application for siting approval is filed." Thus, "the express language of the Act indicates that the purpose of the siting process is to determine whether

the proposed facility complies with the county's Plan." *See Residents Against Polluted Env't v. Pollution Control Bd.*, 293 Ill. App. 3d 219, 223, 687 N.E.2d 552, 555 (3rd Dist. 1997). In its Application, Fox Moraine correctly noted that Kendall County had adopted a solid waste management plan, and amended that plan on May 4, 2006, well in advance of Fox Moraine's Application, "to provide that landfills may only be located in unincorporated areas of the county." (C12143; *see also* C12069, C13764.)

The land on which Fox Moraine proposed to build the landfill has been annexed into the City of Yorkville, and is thus not in an unincorporated part of Kendall County. Because the landfill was proposed to be located in a municipality, the City Council properly found that Fox Moraine had not met Criterion (viii), which unambiguously allows landfills to be located "*only* . . . in unincorporated areas of the county." (emphasis added.) Fox Moraine was on notice and aware of this condition, yet Fox Moraine failed to comply with it, further complicating the negative impact on the surrounding area.

Now, in contrast to its admission in its Application that Kendall County had indeed amended its plan in May 2006 (C12143), Fox Moraine belatedly and desperately maintains that Kendall County did not **properly** amend its Plan to require landfills to be located only in unincorporated areas of the county. Not only is Fox Moraine's witness's testimony relating to Kendall County's passage of the amendment entirely speculative, unfounded and outside the witness's knowledge (C11770:7-9: "It was never formally adopted by the County Board *as far as I know*"), but it is also inconsistent with the facts in the record. After all, the Kendall County Meeting Minutes from May 4, 2006 (C13764), the signed resolution adopting the amendment (C12143), and the amended Kendall County plan,

(C12069), all show that the resolution was passed and that the Kendall County plan was amended to reflect the change.

John Church, who has been on the Kendall County Board since 1994 and Chairman of the Board since 1996, testified that he was authorized to speak on behalf of the County. (C12903:21-22, C12904:1-19.) In May 2006, the Kendall County Board passed a resolution "requiring that landfills only be located in the unincorporated area" of the County, and that the Kendall County plan had been revised to reflect that requirement. (C12906:15-C12907:6.) Again, notably, Fox Moraine was clearly unable to find any factual or legal support for its argument that the Kendall County resolution was not properly passed, just as it lacks support for its argument that Kendall County does not have the authority to require landfills to be sited only in unincorporated areas of the County. Here, Fox Moraine's unsupported allegations runs headlong into 415 ILCS 5/39.2(a)(viii), which itself unambiguously recognizes that a county may have its own requirements for waste disposal facilities. It requires that any proposed landfill be consistent with those requirements and, failing to offer any adequate support to contest this, it is unsurprising that Fox Moraine has provided nothing but rank speculation.

Fox Moraine's stretched interpretation of the meaning of Kendall County's May 4, 2006 plan amendment is equally unsupported. Fox Moraine twists the meaning of the word "located" in the Kendall County plan to mean "found" or "identified." (Br. 91, 95.)[24] The interpretation of a statute is a question of law, entitled to de novo review. *People v.*

[24] Because the determination is legal, rather than factual, *see, e.g., People v. Hunt*, 2009 Ill. LEXIS 634, at *12 (June 4, 2009), any testimony by Fox Moraine on the meaning of the word "locate" is irrelevant. And Fox Moraine's suggestion (Br. 95) that it was the only party to present testimony regarding the interpretation of the Kendall County plan is not only false, given the testimony of John Church, Kendall County Board Chairman, (C12903-07), but it is also baseless, particularly because Willis's testimony was unfounded and entirely lacking in personal knowledge.

Hunt, 2009 Ill. LEXIS 634, at *12 (June 4, 2009). A reviewing body interpreting a statute must examine the legislature's intent, which is "best determined by giving the statutory language its plain and ordinary meaning." *Id*. Any "statute should be construed in its entirety, with each section evaluated with the other provisions," and a reviewing body should not, as invited by Fox Moraine, "use other construction aids when the plain and ordinary meaning of the statutory language is clear and unambiguous." *Id*. at ** 12-13.

Here, the Kendall County plan is unambiguous, and the PCB need not resort to any construction aids to interpret it. It unambiguously provides that a landfill can be located only in unincorporated Kendall County, with "located" meaning a place somewhere within unincorporated Kendall County. According to Fox Moraine, however, the landfill, on which construction has not even begun, was "located" the moment Fox Moraine decided it wanted to construct a landfill at the location identified in its Application. Therefore, claims Fox Moraine, because it determined it **wanted** to place a landfill there prior to May 4, 2006, it had already "located" a landfill in unincorporated Kendall County and had done so prior to May 4, 2006. (Br. at 91.)

Kendall County, however, cannot have intended this bizarre interpretation, which would require it to determine the date on which a property owner subjectively decided to build a landfill in a particular place. *See Branson v. Department of Revenue*, 168 Ill. 2d 247, 259-60, 659 N.E.2d 961, 967-68 (Ill. 1995) ("reject[ing] plaintiff's proposed interpretation of" statute that would require inquiry into plaintiff's subjective reasoning). In *Branson*, the court noted that "[u]nder plaintiff's reasoning, the individual charged by law with remitting the corporation's collected retailers' occupation taxes would bear no obligation to justify his failure to comply with the law unless the Department could first

demonstrate the individual's subjective reasons for not filing returns and remitting taxes," which would require the Department to "undertake the burden of formal discovery in an attempt to ascertain the specific reasons" for nonpayment. *Id*. *Branson* thus held that a governmental agency is not required to be a mind reader, which would be an impossible task.

Similarly, in this case, under Fox Moraine's reasoning, Kendall County would have to "undertake the burden of formal discovery" to determine when anyone proposing to build a landfill had subjectively developed the intent to do so, an interpretation that would lead to an untenable result. In contrast, if the word "locate" is interpreted as it surely was meant—to specify the place on which the applicant proposes to build the landfill—no subjective intent need be determined. Instead, the landfill is "located" only when the landfill is actually proposed to be constructed, an objective determination.

Under this straight-forward interpretation, Fox Moraine's proposed landfill was located within the City of Yorkville and, therefore, Fox Moraine filed its Application with the City of Yorkville. If the proposed landfill had been located outside the city limits of Yorkville and in unincorporated Kendall County, Fox Moraine would have filed an application with Kendall County. The City Council therefore properly rejected Fox Moraine's improbable and tortured interpretation of the word "located" and found that Fox Moraine had not met Criterion (viii).

G. The City Council Properly Found That Fox Moraine Withheld Key Information Regarding the Operating Experience of the Proposed Landfill's Owner and Operator and Did Not Meet the Tenth Criterion.

The so-called "Tenth Criterion" allows the local siting authority to "consider as evidence the previous operating experience and past record of convictions or admissions of

violations of the applicant. . . ." 415 ILCS 5/39.2(a).[25] In the same vein, the Yorkville Siting Ordinance required Fox Moraine to submit information regarding the applicant and the proposed operator. If the entity was a limited liability company (which both Fox Moraine and the proposed operator are), the applicant was to submit the names and addresses of all members and managers of the LLCs and attach a certificate of good standing. (C00740-41.) The applicant was further required to submit information regarding its and the proposed landfill operator's previous operating experience and also information regarding their "past record of actual or alleged violations" of environmental laws. (C00741-42.)

Fox Moraine failed to meet this Criterion in several ways. First, and most significantly, Fox Moraine misrepresented the operating history of the proposed landfill operator, Fox Valley Landfill Services, LLC ("Fox Valley"). In the Application, Fox Moraine boasted that Fox Valley was "an experience [sic] landfill operator with an outstanding environmental compliance record." (C00995.) In its brief, Fox Moraine

[25] Fox Moraine hysterically claims that the City Council found that Criterion (ix) was not met, which "offers a truly extraordinary illustration of the Council's willingness to utterly disregard the evidence." (Br. at 99.) Fox Moraine is mistaken. The City Council found that Fox Moraine had failed to meet seven, not eight, of the ten criteria. No one disputed that Fox Moraine had met Criterion (ix), which is the regulated recharge criterion. Since the "Tenth Criterion" is not numbered in the statute and is listed in a paragraph following right after Criterion (ix), *see* 415 ILCS 5/39.2(a), the City Council's Resolution was worded as follows: "the following criteria . . . were not met (i), (ii), (iii), (v), (vi), (viii) and (ix)(previous operating experience of the Applicant, Fox Moraine LLC and its proposed operator, Fox Valley Landfill Services, LLC; this is also commonly referred to as the 'Tenth Criterion.')," totaling seven, not eight, criteria. (C18641.) If Fox Moraine were correct, the City Council would have found that Fox Moraine had failed to meet eight of the ten criteria and the Resolution would have been worded differently—namely, there would have been no "and" between (viii) and (ix), and it would have been worded as follows: "(viii), (ix) and the 'Tenth Criterion,'" etc. Fox Moraine gave up this charade when it acknowledged in a separate filing that: "The City purportedly found against Fox Moraine on seven of ten criteria." *See* Fox Moraine Motion to File Supplemental Brief Instanter at ¶ 3, submitted to the PCB on 6/12/09. This is simply another feeble attempt by Fox Moraine to distract the PCB from the evidence of record, which shows that Fox Moraine received a fair hearing and that it failed to meet several of the siting criteria.

describes Fox Valley as "a proposed operator who had perhaps the best environmental compliance record in the state." (Br. at 33.)

In reality, as found by Hearing Officer Clark, "the proposed operator Fox Valley Landfill Services, LLC has no operating history." (C18524.) Clark further found that, "The prior operating history of the Applicant Fox Moraine is non-existent as it relates to the operation of a landfill." (*Id.*) So the City Council was presented with an application filed by an entity with no landfill operating experience who proposed an operator that likewise had no landfill operating experience.

And not only did the Fox Valley have no experience, but Fox Moraine also refused to disclose Fox Valley's managers, members, and ownership. It also failed to attach a certificate of good standing. In the Application, Fox Moraine noted only that Fox Valley is an "affiliate" of Peoria Disposal Company (C00955), but nowhere did Fox Moraine reveal who is behind Fox Valley. (C05781-91.) At the siting hearings, Fox Moraine did divulge that Peoria Disposal had a 20% ownership stake in Fox Valley (C10493), but Fox Moraine left the City Council guessing as to who owned the remaining 80% and who Fox Valley's managers and members were.

In *Lowe Transfer, Inc. v. County Bd. of McHenry County*, PCB 03-221 (Oct. 2, 2003), slip op. at 27-28, the applicants for a waste transfer station argued that, "McHenry County inappropriately considered [applicants'] lack of experience when examining criteria ii and v." The PCB disagreed, finding that: "The evidence in this record indicates that not only is there no experience, but at this time an experienced operator has not been hired. Clearly this type of information is germane to a decision by McHenry County and McHenry County properly considered the information." Slip op. at 28. Because a local

siting authority is to approve not only the landfill's location and facility, but also the owner and operator, the "General Assembly recognized that it was important that . . . a municipality have the opportunity to investigate and examine the past operating history and violations of an applicant." *Medical Disposal Servs. v. Environmental Protection Agency*, 286 Ill. App. 3d 562, 568, 677 N.E.2d 428, 432 (1st Dist. 1996).

In its reply, Fox Moraine may argue that its lack of operating history is irrelevant because it is not the proposed landfill operator. However, at the local siting hearings, Ron Edwards, testifying for Fox Moraine regarding Criterion 10, admitted that responsibility for the "landfill proper" would be the responsibility of Fox Valley, and everything else would be the responsibility of Fox Moraine. (C10236.) For example, Fox Valley would have no responsibility for garbage trucks sitting overnight at the landfill because that would be Fox Moraine's responsibility. (C10236-37.)

Fox Moraine may also argue that Fox Valley's lack of operating history is irrelevant because Fox Valley will be able to draw upon Peoria Disposal Company's expertise. That argument is unconvincing because Fox Moraine disclosed (and disclosed at the siting hearing and not in the Application) only that Peoria Disposal has a 20% stake in Fox Valley, but refused to explain who was behind the remaining 80% stake and what that entity's landfill operating experience was, if any. A siting authority, faced with the important decision of whether to site a landfill in its community, should not be forced to guess as to the proposed operator's expertise and reliability.

Fox Moraine also violated the Yorkville Siting Ordinance because it did not provide information regarding alleged violations. Ron Edwards, testifying for Fox Moraine regarding Criterion 10, admitted that Fox Moraine did not provide information

regarding alleged violations. (C10328, C10371-73.) The City Council properly relied on the Fox Moraine's and the proposed operator's lack of experience, as well as Fox Moraine's failures to provide critical information, in finding against Fox Moraine on Criterion 10.

H. It Was the City Council's Obligation Alone to Decide Whether the Statutory Criteria Had Been Met.

Fox Moraine attempts to make much of Clark's and Price's reports, which recommended approval of the Application, but only with numerous conditions. (*See*, ***e.g.***, Br. at 3, 27, 54-55, 67, 80-81.) That Clark and Price recommended conditional approval is entirely irrelevant, however, because it was ultimately the duty of the City Council alone (not Clark, Price or anyone else), as charged by the Act, to determine if the statutory siting criteria had been met. 415 ILCS 5/39.2(a). The Board has made clear that "the decision-making authority rests solely with the local government. A local government's consultant report or a staff recommendation is not binding on the decisionmaker." *Rochelle Waste Disposal*, PCB 03-218 (Apr. 15, 2004), slip op. at 41 (rejecting applicant's argument that criteria had been established because hearing officer and city's environmental consultants found application met all criteria and recommended landfill be sited).

Moreover, despite Fox Moraine's endorsement of and reliance on Clark's and Price's reports, the reports actually support the City Council's decision to deny siting approval, and they prove that the Council's decision was not against the manifest weight of the evidence. For example, just as to Criterion (ii), Price's report calls for the imposition of **39** conditions before the "health, safety and welfare" criterion would be met. (C17191-97.) As noted above in the discussion regarding this Criterion, just a brief sampling of the conditions highlights numerous deficiencies:

> Condition 2.1: The liner test pad should be constructed differently, and the field hydraulic conductivity of the pad should be confirmed using different methods.
>
> Condition 2.2: The Application does not provide for a leak location survey prior to the landfill accepting waste. Standard practice requires that one be conducted.
>
> Condition 2.3: The proposed design contains a "non-typical grade change" between certain landfill cells. A stress analysis study should be performed to demonstrate that the liner materials are adequate to withstand "down-drag stress" caused by this atypical grade change.
>
> Condition 2.13: The Applicant should re-design the stormwater detention basin capacities to comply with the Yorkville stormwater ordinance.

(C17193-94.) The remaining Criterion (ii) conditions underscore further deficiencies with the Application. Price was clear that: "We cannot recommend approval of the application without conditions as we believe these are necessary for the application to meet the requirements of the Act." (C17191). Hearing Officer Clark also found that the Application was deficient as to Criterion (ii) without the addition of the 39 conditions: "I therefore fund [sic] that with the adoption of the conditions as proposed by City Staff, that Fox Moraine has met its burden in regard to this Criterion 2." (C18526.)[26]

Fox Moraine cannot dispute it is the applicant's obligation to establish that a proposed landfill meets all the statutory criteria. 415 ILCS 5/39.2(a); *Waste Management*, 160 Ill. App. 3d at 443, 513 N.E.2d at 597 ("We believe the mandatory and restrictive language [of § 39.2(a)] demonstrates a clear legislative intent that each and every one of the [statutory] criteria must be satisfied. Had the legislature desired [the siting authority] to base their decisions on a balancing of the [statutory] factors, corresponding language,

[26] Price and Clark recommended approving the Application on Criterion (i) with two conditions, Criterion (ii) with 39 conditions, Criterion (iii) with nine conditions, and Criterion (vi) with four conditions—54 conditions in total. The number of conditions alone suggests that the City Council's determination that Fox Moraine had not shown that the statutory criteria were met was not against the manifest weight of the evidence.

such as 'may' or 'include' would have been used.") (citing *E&E Hauling,* 107 Ill. 2d at 43, 481 N.E.2d at 668).) Thus, where all the criteria are not met, the local siting authority is required to deny the siting application.

It is also clear that it is not the obligation of the local siting authority to correct deficiencies in an application by imposing special conditions on the applicant. Instead, the local authority, if it so wishes, "**may** impose such conditions as may be reasonable and necessary to accomplish the purposes of this Section and as are not inconsistent with regulations promulgated by the Board." 415 ILCS 5/39.2(e) (emphasis added). Unlike the mandatory "shall" used in § 39.2(a), a local siting authority "may" impose conditions to accomplish the purposes of the Act, indicating a permissive, rather than mandatory, intent. *See*, *e.g.*, *Hill v. Galesburg Cmty. Unit Sch. Dist. 205*, 346 Ill. App. 3d 515, 519, 805 N.E.2d 299, 302 (3rd Dist. 2004) ("Legislative use of the word 'may' indicates a permissive or directory reading, while use of the word 'shall' indicates a mandatory meaning.")

Somehow, Fox Moraine turns this permissive language into a "legislative mandate," claiming that Alderman Werderich's statement to his fellow Council Members that the Application should be judged on its face shows "utter disdain" for the provisions of the Act. (Br. at 40.) But it is only Fox Moraine who disdains (and attempts to rewrite) the Act, asserting—of course, without citations to any authority—that the local siting body has the statutory obligation to fix an otherwise deficient application by adding as many conditions as are necessary until all the siting criteria have been met. (Br. at 40.)

IV. CONCLUSION

Fox Moraine bemoans that, "Siting a landfill is difficult in the best of circumstances, and Fox Moraine encountered far worse than the best of circumstances." (Br. at 104.) What Fox Moraine encountered was a full and complete opportunity to present its case; a citizenry that, understandably, involved itself in the hearing process, which is a hallmark of our participatory democracy; and a City Council that carefully considered the evidence and rendered a fair decision.

Whatever heightened interest the Yorkville elections brought to the proposed landfill was a result of Fox Moraine choosing to file its Application when it did. Fox Moraine could have avoided this, but it chose to unnecessarily complicate the matter. It should not be allowed to profit from its calculated decision.

The record is also clear that Fox Moraine was not able to carry its burden on several of the siting criteria. It now seeks to hide that failure by submitting a brief full of misrepresentations, half-truths, and outright falsehoods, hoping that its smoke screen will obscure the Section 39.2 mandate of the Illinois General Assembly: that it was the responsibility of the Yorkville City Council alone (and not the Hearing Officer, Special Counsel, or anyone else) to weigh the evidence, assess the credibility of witnesses, and render a decision.

The landfill siting system also provides that the City Council's decision is entitled to great deference on review. And, although Fox Moraine would like to hold the City Council to the standards applicable to judges and juries, the General Assembly and the courts have recognized that because the local siting authority is comprised of elected representatives, even though they are entrusted to make a quasi-judicial decision, the

standards applicable to judicial officials simply do not apply. Faced with protracted hearings and a difficult job of weighing all the evidence, the City Council is to be commended for its diligence, especially given the increased intensity occasioned by Fox Moraine's filing shortly before the Yorkville elections.

Fox Moraine does not like the final result, but it received much more than the basic fundamental fairness it was due. There is no basis to disturb the City Council's reasoned decision. The Board should affirm the denial of the Application.

Dated: July 17, 2009

Respectfully submitted,

UNITED CITY OF YORKVILLE, CITY COUNCIL

___/s/ Leo P. Dombrowski_____
By One of Its Attorneys

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EXHIBIT A

Return to Report

Voters for Val
D-2 Semiannual Report
7/1/2006 to 12/31/2006

This report has 6 itemized Individual Contributions totaling $960.00

Contributed By	Address	Amount	Received By	Description
Christensen, Judie	PO Box 4818 Scottsdale, AZ 85261	$250.00 11/27/2006	Individual Contribution Voters for Val	
Nicholson, Daniel	32 Gawne Lane Yorkville, IL 60560	$110.00 12/11/2006	Individual Contribution Voters for Val	
Parish, Ronald Occupation: retired Employer: self	11571 State Route 71 Yorkville, IL 60560	$100.00 10/15/2006	Individual Contribution Voters for Val	
Sleezer, Edward	14699 Meadow Lane Yorkville, IL 60560	$100.00 10/15/2006	Individual Contribution Voters for Val	
Sleezer, Edward	14699 Meadow Lane Yorkville, IL 60560	$200.00 12/6/2006	Individual Contribution Voters for Val	
York, Gary	56 Cotswold Drive Yorkville, IL 60560	$200.00 12/6/2006	Individual Contribution Voters for Val	

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Voters for Val
D-2 Semiannual Report
7/1/2006 to 12/31/2006

This report has 4 itemized In-Kind Contributions totaling $1,510.00

Contributed By	Address	Amount	Received By	Description	Vendor Name	Vendor Address
Burd, Paul	300 East Hydraulic Yorkville, IL 60560	$250.00 12/6/2006	In-Kind Contribution Voters for Val	11 x 14 framed river sunset photo door prize for fundraiser Dec.62006	Burd, Paul	300 East Hydraulic Yorkville, IL 60560
Nicholson, Daniel	32 Gawne Lane Yorkville, IL 60560	$50.00 12/6/2006	In-Kind Contribution Voters for Val	gift certificate for fundraiser door prize	Nicholson, Daniel	32 Gawne Lane Yorkville, IL 60560
Parish, Ronald Occupation: retired Employer: self	11571 State Route 71 Yorkville, IL 60560	$1,000.00 12/6/2006	In-Kind Contribution Voters for Val	2 airline tickets for raffle at fundraiser	United Airlines	8550 W Bryn Mawr Ave Chicago, IL 60631
Parish, Ronald Occupation: retired Employer: self	11571 State Route 71 Yorkville, IL 60560	$210.00 12/6/2006	In-Kind Contribution Voters for Val	hall rental for Dec 6 2006 fundraiser at Amer. Legion	American Legion	9054 State Route 34 Yorkville, IL 60560

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