ILLINOIS POLLUTION CONTROL BOARD
August 21, 2014

TIMBER CREEK HOMES, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 14-99
	)	(Pollution Control Facility
VILLAGE OF ROUND LAKE PARK,	)	Siting Appeal)
ROUND LAKE PARK VILLAGE BOARD	)	
and GROOT INDUSTRIES, INC.,	)	
	)	
Respondent.	)	

MICHAEL S. BLAZER OF JEEP & BLAZER APPEARED ON BEHALF OF TIMBER CREEK HOMES, INC.;

PETER S. KARLOVICS OF LAW OFFICES OF RUDOLPH F. MAGNA APPEARED ON BEHALF OF THE VILLAGE OF ROUND LAKE PARK VILLAGE BOARD;

GLEN SECHEN OF THE SECHEN LAW GROUP, PC APPEARED ON BEHALF OF THE VILLAGE OF ROUND LAKE PARK;

RICHARD S. PORTER OF HINSHAW & CULBERSTON, LLP APPEARED ON BEHALF OF GROOT INDUSTRIES, INC.

OPINION AND ORDER OF THE BOARD (by D. Glosser):

Timber Creek Homes, Inc. (TCH) filed a petition (Pet.) asking the Board to review a December 12, 2013 decision of the Village of Round Lake Park (Village) and the Round Lake Park Village Board (Village Board). That decision granted siting, with conditions, for a waste transfer station to Groot Industries, Inc. (Groot). *See* 415 ILCS 5/40.1(a) (2012); 35 Ill. Adm. Code 101.300(b), 107.204. The proposed transfer station will be located at 201 Porter Drive in Round Lake Park, Lake County.

The Board finds that the proceedings of the Village Board were fundamentally fair. The evidence does not indicate that the Village Board members had predetermined the outcome of the siting proceeding. Rather, the Village Board members made their decision based on the siting application, the hearing, and the record of the proceeding. The Village Board did not abdicate its responsibilities in adopting the hearing officer's findings of facts and conclusions of law.

Also, the Board finds that the Village Board's decision on each of the challenged criteria was not against the manifest weight of the evidence. Evidence in the record supports the Village

Board's conclusion on each of the criteria. Therefore, the Board affirms the Village Board's decision to approve siting of a transfer station by Groot.

PROCEDURAL BACKGROUND

On January 10, 2014, TCH filed its petition asking the Board to review the Village's December 12, 2013 decision. TCH appeals on the grounds that the Village's procedures used to reach its siting decision were fundamentally unfair, and the Village's decision on criteria I, II, III, VI, and VIII was against the manifest weight of the evidence.

On February 4, 2014, the Village filed a motion to strike and dismiss the petition for review. On February 6, 2014, the Village Board and Groot separately filed motions to dismiss the petition for review. On February 11, 2014, TCH filed a consolidated response to the motions. On February 18, 2014, all three respondents filed individual replies. On March 20, 2014, the Board denied the motions to strike and dismiss, however, the Board allowed the parties to raise the issue of waiver in their final briefs. *See* Timber Creek Homes, Inc. v. Village of Round Lake Park, *et al.*, PCB 14-99, slip op. at 13 (Mar. 20, 2014).

On May 29, 2014, TCH filed a motion for sanctions (Mot.), asking that the Board sanction the Village by granting TCH its requested relief. On June 2, 2014, the Village filed its response (Resp.) and on June 3, 2014, the Village Board filed a response (VBResp.). Also on June 3, 2014, TCH filed a consolidated reply (ReplyMot.)

A hearing was held before Hearing Officer Bradley Halloran on June 2, 2014, in Round Lake Park, Lake County (Tr.). On June 23, 2014, TCH filed its post-hearing brief (Br.) and on July 3, 2014, the Village and Village Board filed a joint response brief (VResp.). Groot also filed a brief on July 3, 2014 and on July 7, 2014, Groot filed a motion seeking leave to file a corrected brief (GResp.). The Board grants that motion. On July 10, 2014, TCH filed its reply (Reply).

PRELIMINARY MATTERS

Before proceeding to the substance of this appeal, there are two issues which must be addressed. The first is TCH's motion for sanctions and the second is the offers of proof from hearing.

Motion for Sanctions

The Board will first give a brief procedural history regarding discovery to aid in the consideration of the motion for sanctions. The Board will follow with a summary of TCH's motion and then the Village and Village Board's responses. The Board summarizes TCH's Reply. Finally the Board sets forth its reasoning for denying the motion for sanctions.

Procedural History of Discovery

On February 3, 2014, all parties submitted and agreed to a discovery schedule based on a June 2, 2014 hearing date. Hearing Officer Order at 1 (Feb. 3, 2014). The schedule required all written discovery be due on or before February 14, 2014, and all responses to written discovery due on or before March 15, 2014 with all discovery to be completed by May 9, 2014. *Id.* All prehearing motions, including motions *in limine*, were to be filed on or before May 12, 2014, and all responses to prehearing motions were to be filed on or before 12:00 p.m. May 15, 2014. *Id.* The parties also agreed on a post-hearing schedule. Assuming that the transcript would be filed on or before June 12, 2014, the petitioner's brief would be filed on or before June 23, 2014, and the respondents' response briefs would be due to be filed on or before July 3, 2014, with the petitioner's reply and the record closing on July 10, 2014. *Id.*

On March 20, 2014, the Hearing Officer ruled that TCH's request for discovery dating back to March 1, 2008 was not reasonable, because it appeared TCH was trying to gain information about Groot facilities other than the one in question. Hearing Officer Order at 5 (Mar. 20, 2014). The Hearing Officer then set the discovery time period from the date the Village Board's real estate expert was retained up until December 12, 2013, the date which Groot was granted siting. *Id.*

On March 24, 2014, during a telephonic status conference, the Hearing Officer revised the discovery schedule to show that all responses to written discovery must be provided on or before March 31, 2014. Hearing Officer Order at 1 (March 25, 2014).

During the April 3, 2014 telephonic status conference, the Hearing Officer orally ruled that TCH may pursue discovery regarding entries reflected in the Village Board's minutes that were subject to TCH's Request to Admit. Hearing Officer Order at 2 (Apr. 7, 2014). This expanded discovery, as long as said discovery is relevant and pertaining to the waste transfer station at issue here. *Id.*

During the April 28, 2014 telephonic status conference, the respondents stated that they would make the contents they claimed were subject to attorney-client privilege available to the Hearing Officer for review on or before May 5, 2014. Hearing Officer Order at 1 (Apr. 28, 2014). On May 12, 2014, the Hearing Officer found that the attorney-client privilege did not apply and required the documents to be produced. Hearing Officer Order at 4 (May 12, 2014). On May 20, 2014, the Hearing Officer denied a motion to reconsider the May 12, 2014 order. Hearing Officer Order (May 20, 2014).

The hearing was held on June 2, 2014, with representatives from all parties present. Hearing Officer Order at 1 (June 19, 2014).

TCH's Motion for Sanctions

TCH states that they served the respondents with interrogatories and requests for documents on January 31, 2014. Mot. at 1. On February 4, 2014 the Hearing Officer entered an order setting March 15 as the deadline for responses to written discovery, and May 9, 2014 as the

final deadline for all discovery. *Id*. On March 25, 2014 the Hearing Officer granted respondent's request to extend the deadline for written discovery responses to March 31, 2014. *Id*.

TCH argues that respondents provided their initial responses on March 31, 2014, and that because of the limitation on discovery implemented by the hearing officer's March 20 order, the respondents did not provide any discovery related to actions prior to June 20, 2013. Mot. at 1. June 20, 2013 was the day which respondents claimed Dale Kleszynski had been retained. *Id*.

TCH maintains that throughout the discovery process respondents have continuously tried to withhold information predating June 20, 2013. Mot. at 1. TCH acknowledges that June 20, 2013 was the discovery limitation within the hearing officer's March 20 order, but that discovery was expanded in the hearing officer's April 7 order. *Id*. TCH also states that they originally requested information through discovery dating back to early 2008, and that evidence crucial to the matter at hand predates June 20, 2013. *Id*. at 1-2.

TCH states that the Board affirmed the April 7, 2014 order on April 17, 2014, and the following day the Hearing Officer ordered the respondents to abide by the expanded scope of discovery by April 25, 2014. Mot. at 2. TCH argues that the information provided by the respondents was again limited. *Id*. TCH claims that the hearing officer's April 28, 2014 order decided that the respondents would submit discovery before May 5, 2014, in order for the Hearing Officer to rule on the respondent's claims of attorney-client privilege. *Id*.

TCH argues that in the face of the open discovery issue, the impending May 9, 2014, discovery cutoff, the June 2, 2014 hearing date, and Groot's refusal to waive the decision deadline, TCH was forced to continue with depositions of four Village Board members and the corporate representatives of Groot, without the material it sought. Mot. at 2.

The May 5, 2014, deadline for the respondents to submit their documents in question of the attorney-client privilege was also not met, given that the respondents submitted their documents on May 7, 2014. Mot. at 2. The May 12, 2014 Hearing Officer order rejected the respondent's claim of privilege. *Id*.

TCH also asserts that the Village and the Village Board filed a joint motion for reconsideration of the May 12, 2014 order, which was denied by the Hearing Officer on May 20, 2014. Mot. at 2. TCH argues that it was the next day, May 21, 2014, when the respondents provided the documents they claimed were subject to privilege. *Id*. TCH explains that this is less than two weeks before the scheduled hearing, almost two months after responses were due, and that it is this delay, combined with other conduct from respondents, that led to this motion. *Id*.

TCH argues that the Village withheld at least one document (an email string attached as exhibit A to this motion) between the counsels for the Village and Groot, on a claim of privilege. Mot. at 3. TCH claims the email string proves two things, first that the email string is not subject to any recognized privilege and should have been produced no later than April 25, 2014, and second, that the email reflects a direct link between the transfer station host agreement that was

negotiated between the Village and Groot, and the Village's award of its municipal waste hauling contract to Groot. *Id*. TCH continues, stating that this is consistent with their position that there is a connection between the subject transfer station and other businesses for which Groot received approval from the Village Board. *Id*.

Had the email been turned over by April 25, 2014, TCH argues they would have been able to inquire about the substance of the communication during the depositions. Mot. at 3.

TCH also asserts that respondents have continued to follow the scope of the hearing officer's March 20, 2014 order, even though the scope was expanded in the April 7, 2014 order. Mot. at 3. Further, TCH states that the Village Board's meeting minutes reflect discussions on the transfer station dating back to 2008. *Id*. at 4. TCH also notes that in the Village's supplemental responses to discovery the Village's attorney confirmed he was retained on or about April 20, 2010, and that the Village was unable to respond regarding dates prior to his retention. *Id*. This left TCH wondering why there were no documents presented between the date of the retention of the Village attorney and September 28, 2013. *Id*.

TCH also argues that the Village and the Village Board improperly determined the veracity of their claim of "relevance" or "scope" themselves, instead of submitting the documents to TCH or for an in camera review by the Hearing Officer. Mot. at 4.

TCH then cites to 35 Ill. Adm. Code 101.616(g) that gives the Board authority to impose sanctions on parties who abuse discovery. Mot. at 4.

TCH claims that one of the principal issues underlying the discovery in this case is the violation of fundamental fairness resulting from collusion between the Village and Groot. Mot. at 5. TCH argues that it is this collusion that resulted in the predetermination of the subject siting application by three members of the Village Board and the Village's Mayor. *Id*. TCH further states that the respondent's actions during the history of this case lead to two conclusions, 1) respondents clearly have something to hide on the issue of fundamental fairness, and 2) "the severest sanction is clearly warranted." *Id*.

As a result, TCH asks the Board to strike the defenses asserted by the Village Board and the Village on the issues of collusion with Groot, and the predetermination of Groot's siting application, and enter judgment on these issues in TCH's favor. Mot. at 5.

Village's Response to TCH's Motion for Sanctions

The Village argues that TCH's motion for sanctions is untimely, vague, and based upon mere conclusion that the Village and the Village Board have refused to abide by unspecified rules and Hearing Officer orders. Resp. at 1. The Village claims that all motions and responses must clearly state the grounds upon which the motion is made. *Id*.; *citing* 35 Ill. Code 101.504.

The Village asserts that the Board must exercise its discretion and consider factors like, "the relative severity of the refusal or failure to comply; the past history of the proceeding; the degree to which the proceeding has been delayed or prejudiced; and the existence or absence of

bad faith on the part of the offending party or person." Resp. at 1-2, citing 35 Ill. Adm. Code 101.800(c). The Village continues by stating that TCH fails to state any grounds upon which the Board could impose sanctions striking all of the Village or the Village Board's defenses. *Id*. at 2.

The Village emphasizes that TCH acknowledged in their motion that respondents tendered their initial discovery responses on March 31, 2014, and supplemental responses to discovery on April 25, 2014, both in compliance with the hearing officer's orders. Resp. at 1. The Village also emphasizes that they tendered discovery documents identified in privilege logs on May 21, 2014; just one day after the Hearing Officer denied respondents motions to reconsider. *Id*. The Village states that respondents did not appeal the hearing officer's decision. *Id*. at 2 n. 2. The Village then alleges that TCH incorrectly implied that the hearing officer's April 7, 2014 order expanded unlimited discovery to early 2008. *Id*. at 2. The Village also alleges that TCH inaccurately stated in their motion that respondents have not produced any documents dated prior to September 28, 2013; the Village in fact produced an email dated January 18, 2013. *Id*. at 3 n.3.

The Village argues that TCH has repeatedly ignored the hearing officer's order of April 7, 2014, by requesting information that does not pertain to entries reflected in the Village Board's minutes, and information concerning things other than the waste transfer station that is the subject of the appeal. Resp. at 3. In effort to provide an example of this, the Village points to paragraph 11 of TCH's motion for sanctions, where TCH seeks discovery pertaining to the Village's "award of its municipal waste hauling contract to Groot", and to "other businesses for which Groot received approval from the Village Board." *Id*.

The Village asserts that the Village raised these concerns in their April 25, 2012 response to TCH's discovery requests, and thus TCH has waived any right to file its motion, and is barred by laches, because they failed to timely raise their disagreement with the response and waited until just prior to the hearing. Resp. at 4. The Village argues that the Village did what was required of it, and that whatever vague claims TCH raises were brought upon itself. *Id*. at 4, n.4.

To counter TCH's claim that the emails found in exhibit B could not possibly have been subject to any known privilege, the Village cites Hertzog, Calamari & Gleason v. Prudential Insurance Company of America, 850 F. Supp. 255 (US Dist. Ct., S.D. New York, 1994) and Garvy v. Seyfarth Shaw, 2012 IL App(1st) 110115, 359 Ill. Dec. 202, 215, 966 N.E. 2d 523, 536 (1st Dist. 2012) to show the attorney-client privilege applies to corporation's in-house counsel and outside counsel. Resp. at 4, n.5.

According to the Village, one document TCH is claiming not to have received was an email that the Village Board's attorney replied , and copied the Mayor. The email was sent to the Mayor to provide the Mayor with Groot's attorney's email as the initial part of and foundation for the requested conversation. None of the rest of the email was sent back to Groot's attorney. Resp. at 5. The Village argues that this is the reason TCH claimed there was a direct link between the host agreement and the Village hauling contract, which is not discoverable under the hearing officer's order. *Id*. The Village also adds that contrary to what TCH describes as their consistent position, this is the first time TCH has complained that had the substance of

the email been revealed sooner they would have inquired into its substance during depositions. *Id*. at 4, n.6.

The Village admits that there is a specific host fee, but that TCH did not need the email to discover that there is a specific host fee, because the host fee was highlighted on page 1-27 of the application. Resp. at 5.

As a result, the Village argues that TCH could not have been deprived of anything, because they already held the information they now claim they did not. Resp. at 5. The Village also states that TCH pursues sanctions for compliance with the scope of discovery ordered by the Hearing Officer even though their own motion shows nothing but compliance. *Id*.

Village Board's Response to TCH Motion for Sanctions

The Village Board adopts the Village's response to TCH's motion for sanctions. ReplyMot. at 1. In addition, the Village Board states that TCH cannot claim that the Village Board or the Village withheld the email between Groot's attorney and the Village's attorney, because TCH received this email through a Freedom of Information Act (FOIA) request. *Id*. at 1-2.

TCH Reply in Support of its Motion for Sanctions

TCH argues that the Village is unwilling to directly respond to TCH's reasoning for imposing sanctions. ReplyMot. at 1. TCH then accuses the Village of repeating its conduct of avoidance. *Id*. TCH contends that contrary to the Village's assertions that TCH's motion is "vague" and based upon "mere conclusion", their motion identifies all relevant Hearing Officer Orders, the dates on which respondents responded, and the impact of respondent's withholding of information. *Id*.

TCH argues that although the Village concludes that TCH fails to state any grounds upon which the Board could impose sanctions, the Village fails to identify which additional grounds may be required other than those in TCH's motion for sanctions and in 35 Ill. Adm. Code 101.800. ReplyMot. at 1-2. TCH also adds that the Village consistently refused to comply with the Hearing Officer's discovery orders, and refused to produce documents predating June 20, 2013. *Id*. at 2.

TCH contends that the Village does not respond to these allegations and merely relies on the production of one email. ReplyMot. at 2. TCH asserts that the record shows consistent and extensive communications between the Village and Groot between September 2008 and the filing of Groot's siting application on June 21, 2013, and that the Village provided none of these communications. *Id*.

TCH explains that the only email between Groot and the Village that either the Village or the Village Board produced is one between Groot's counsel and the Village's counsel, which the Village insists is protected by attorney-client privilege. ReplyMot. at 2. TCH argues that there is no attorney-client or other privileges that apply to communication between the Village and Groot's counsel. *Id*.

TCH then argues that TCH received this email in May 2013, due to a FOIA request, before Groot filed its siting application. ReplyMot. at 2. TCH contends that the Village's assertion of privilege is disingenuous, because the Village did not claim privilege when TCH originally requested the information, and only requested it after the siting process began. *Id*. at 2-3. TCH claims this is the Village's attempt to mislead the Hearing Officer and the Board. *Id*. at 3.

TCH cites 35 Ill. Adm. Code 101.800(c), and argues that all of the factors in determining a sanction are present in this case. ReplyMot. at 3. For this reason, TCH argues for the Board to impose the most severe sanctions possible. *Id*. TCH quotes the Appellate Court in IEPA v. Celotex Corp., 168 Ill. App. 3d 592, 597-598 (3rd Dist.), stating that "dismissal of a party's claim is a drastic sanction and should only be used sparingly. *Id*. However, when a scheme of deliberate defiance of the rules of discovery and the court's authority or an attempt to stall a significant discovery has been shown, such a sanction is appropriate and should be unhesitatingly applied." *Id*.

TCH concludes that it has been prejudiced by the respondent's actions, and has been prevented from a full and fair adjudication of TCH's claims, and therefore the motion for sanctions should be granted. ReplyMot. at 4.

Board Analysis

The Board may sanction parties for unreasonably failing to comply with the Board's or hearing officer's orders, or the Board's procedural rules. *See* 35 Ill. Adm. Code 101.800(a). "The Board may order sanctions on its own motion, or in response to a motion by a party." *Id.* Potential sanctions include the Board entering default judgment on, or dismissing any portion of the offending party's claims or defenses asserted. *See* 35 Ill. Adm. Code 101.800(b).

The Board has broad discretion in determining the imposition of sanctions. *See* IEPA v. Celotex Corp., 168 Ill. App. 3d 592, 597, 522 N.E.2d 888, 891 (3d Dist. 1988); Modine Manufacturing Co. v. PCB, 192 Ill. App. 3d 511, 519, 548 N.E.2d 1145, 1150 (2d Dist. 1989). In exercising this discretion, the Board considers such factors as "the relative severity of the refusal or failure to comply; the past history of the proceeding; the degree to which the proceeding has been delayed or prejudiced; and the existence or absence of bad faith on the part of the offending party or person." 35 Ill. Adm. Code 101.800(c).

TCH argues that respondents have continuously tried to withhold information predating June 20, 2013. Mot. at 1. However, after reviewing the record, the Board finds that the respondents have followed the hearing officer's orders, and abided by the scope of discovery laid out by the hearing officer, in terms of subject matter and time.

TCH also argues that it was harmed by the late disclosure of an email string between counsel for the Village and counsel for the Village Board. Mot. at 3. However, the Board finds the requested information was outside the scope of discovery laid out by the hearing officer. As TCH phrased it in their motion, they are seeking information on the correlation between the

Village's award of its municipal waste hauling contract with Groot, as well as "other business for which Groot received approval from the Village Board." *See* Mot. at 3. The April 7, 2014 Hearing Officer order limited the scope of discovery to "entries reflected in the Village Board's minutes that was the subject of TCH's request to admit," and "must only pertain to the waste transfer station that is the subject of the above-captioned appeal." *See* Hearing Officer Order at 2 (Apr. 7, 2014).

The Board finds that sanctions are not warranted against respondents under the facts of this case. This is especially true given the drastic sanctions requested by TCH. TCH has not persuaded the Board that the Village and Village Board's actions have amounted to bad faith, deliberate non-compliance with rules or orders, or an effort to unreasonably delay the proceedings. Therefore, the Board denies TCH's motion for dismissal of the respondent's defenses and TCH's request for default judgment. *See* 35 Ill. Adm. Code 101.800(c).

Offer of Proof

During the Board's hearing on June 2, 2014, the Hearing Officer sustained objections to the admittance of several exhibits. After sustaining the objections, the Hearing Officer allowed many of the documents to be submitted as offers of proof. *See e.g.* Tr. at at 85, 88, 90, 91. Other than Exhibit 33, the parties offered no additional arguments regarding the materials the Hearing Officer allowed as offers of proof. The Board has reviewed the transcript and the arguments to the Hearing Officer regarding the materials. Also the Board reviewed the arguments presented in the briefs regarding Exhibit 33. The Board is unpersuaded by the arguments to admit these exhibits and therefore affirms the Hearing Officer's decision not to admit the exhibits. None of those exhibits will be considered in the Board's discussion below.

LEGAL BACKGROUND

The following section delineates the specific statutory provisions at issue in this proceeding and then discusses the legal standards to be applied by the Board when deciding the issues.

Statutory Provisions

Section 3.330(a) of the Act defines a pollution control facility as "any waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility, or waste incinerator." 415 ILCS 5/3.330(a) (2012). Section 3.330(b) defines a new pollution control facility to include "the area of expansion beyond the boundary of a currently permitted pollution control facility. 415 ILCS 5/330(b) (2012).

Section 39.2(a) of the Act requires that an applicant seeking approval for siting a pollution control facility must provide evidence demonstrating that the nine criteria listed in subsections (i) through (ix) are met. 415 ILCS 5/39.2(a) (2012). The specific criteria at issue in this proceeding are criteria (i), (ii), (iii), (v), (vi), (viii), (ix) and the provision regarding operator experience, which provide:

(i) the facility is necessary to accommodate the waste needs of the area it is intended to serve;

(ii) the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected;

(iii) the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property;

* * *

(vi) the traffic patterns to and from the facility are so designed to minimize the impacts on existing traffic flow;

* * *

(viii) if the facility is to be located in a county where the county board has adopted a solid waste management plan consistent with the planning requirements of the Local Solid Waste Disposal Act or the Solid Waste Planning and Recycling Act, the facility is consistent with that plan; for purposes of this criterion (viii), the "solid waste management plan" means the plan that is in effect as of the date the application for siting approval is filed;

The county board or the governing body of the municipality may also consider as evidence the previous operating experience and past record of convictions or admissions of violations of the applicant (and any subsidiary or parent corporation) in the field of solid waste management when considering criteria (ii) and (v) under this Section. 415 ILCS 5/39.2(a)(i), (ii), (iii), (vi), (viii), (2012).

Section 40.1(a) of the Act provides:

If the county board . . . refuses to grant or grants with conditions approval under section 39.2 of this Act, the applicant may, within 35 days after the date on which the local siting authority disapproved . . . siting, petition for a hearing before the Board to contest the decision of the county board or the governing body of the municipality *** In making its orders and determinations under this Section the Board shall include in its consideration the written decision and reasons for the decision of the county board or the governing body of the municipality, the transcribed record of the hearing held pursuant to subsection (d) of Section 39.2, and the fundamental fairness of the procedures used by the county board or the governing body of the municipality in reaching its decision. 415 ILCS 5/40.1(a) (2012).

Siting approval is to be granted only if a proposed facility meets all nine of the criteria set forth in Section 39.2(a) of the Act (415 ILCS 5/39.2(a) (2012)). *See* Town & Country Utilities, Inc. v. PCB, 225 Ill. 2d 103, 117, 866 N.E.2d 227, 235 (2007); *see also* Concerned Adjoining Owners v. PCB, 288 Ill. App. 3d 565, 576, 680 N.E.2d 810, 818 (5th Dist. 1997); Land and Lakes Co. v. PCB, 319 Ill. App. 3d 41, 48, 743 N.E.2d 188, 194 (3rd Dist. 2000).

Fundamental Fairness

The Board must review the proceedings before the local siting authority to determine if the proceedings were fundamentally fair. The Board may hear new evidence when considering fundamental fairness. Fox Moraine v. Yorkville, 2011 IL App (2d) 100017 ¶58, 960 N.E.2d 1144, citing Land & Lakes v. PCB, 319 Ill. App. 3d 41, 48, 743 N.E.2d 188 (3rd Dist. 2000).

The courts have given the Board some guidance on this issue. In E & E Hauling v. PCB, 116 Ill. App. 3d 586, 451 N.E.2d 555 (2nd Dist. 1983) *aff'd*, 107 Ill. 2d 33, 481 N.E.2d 664 (1985), the court indicated that fundamental fairness refers to the principles of adjudicative due process, and a conflict of interest itself could be a disqualifying factor in a local siting proceeding if the bias violates standards of adjudicative due process. E & E Hauling, 116 Ill. App. 3d at 596, 451 N.E.2d at 564. Further, in E & E Hauling, the appellate court found that although citizens before a local decisionmaker are not entitled to a fair hearing by constitutional guarantees of due process, procedures at the local level must comport with due process standards of fundamental fairness. The court held that standards of adjudicative due process must be applied. *See also* Industrial Fuels & Resources v. PCB, 227 Ill. App. 3d 533, 592 N.E.2d 148 (1st Dist. 1992); Tate v. Macon County Board, 188 Ill. App. 3d 994, 544 N.E.2d 1176 (4th Dist. 1989). Due process requirements are determined by balancing the weight of the individual's interest against society's interest in effective and efficient governmental operation. Waste Management of Illinois Inc. v. PCB, 175 Ill. App. 3d 1023, 530 N.E.2d 682 (2nd Dist. 1988).

The courts have indicated that the public hearing before the local governing body is the most critical stage of the site approval process. Land and Lakes Co. v. PCB, 245 Ill. App. 3d 631, 616 N.E.2d 349, 356 (3rd Dist. 1993). The manner in which the hearing is conducted, the opportunity to be heard, the existence of *ex parte* contacts, prejudgment of adjudicative facts, and the introduction of evidence are important, but not rigid, elements in assessing fundamental fairness. Hediger v. D & L Landfill, Inc., PCB 90-163 (Dec. 20, 1990). The courts have also indicated that fundamental fairness must include the opportunity to be heard and impartial rulings on evidence. Daly v. PCB, 264 Ill. App. 3d 968, 637 N.E.2d 1153, 1155 (1st Dist. 1994).

The members of a siting authority are presumed to have made their decisions in a fair and objective manner. Fox Moraine 2011 IL App (2d) 100017 ¶60, citing Peoria Disposal Co. v. PCB, 385 Ill. App. 3d at 797, 896 N.E.2d 460 (3rd Dist. 2008). This presumption is not overcome merely because a decision-maker has previously taken a public position or expressed strong views on a related issue. *Id*. To show bias or prejudice in a siting proceeding, the petitioner must show that a disinterested observer might conclude that the siting authority, or its members, had prejudged the facts or law of the case. *Id*. Additionally, issues of bias or prejudice on the part of the siting authority are generally considered forfeited unless they are raised promptly in the original siting proceeding, because it would be improper to allow the

petitioner to knowingly withhold such a claim and to raise it after obtaining an unfavorable ruling. *Id*.

Legal Standards for Board Review of Criteria

In reviewing the decision of a local government on siting a landfill or transfer station , the Board must apply the "manifest weight of the evidence" standard of review. Town & Country Utilities v. PCB, 225 Ill.2d 103, 866 N.E.2d 227 (2007); Land and Lakes Co. v. PCB, 319 Ill. App. 3d at 48, 743 N.E. 2d at 197; Waste Management of Illinois, Inc. v. PCB, 160 Ill. App. 3d 434, 513 N.E.2d 592 (2nd Dist. 1987); City of Rockford v. PCB, 125 Ill. App. 3d 384, 465 N.E.2d 996 (2nd Dist. 1984). A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain, or indisputable from a review of the evidence. Land and Lakes, 319 Ill. App. 3d at 53, 743 N.E.2d at 197; Harris v. Day, 115 Ill. App. 3d 762, 451 N.E.2d 262 (4th Dist. 1983). The province of the hearing body is to weigh the evidence, resolve conflicts in testimony, and assess the credibility of the witnesses. Merely because the Board could reach a different conclusion is not sufficient to warrant reversal. City of Rockford, 125 Ill. App. 3d 384, 465 N.E.2d 996; Waste Management of Illinois, Inc. v. PCB, 122 Ill. App. 3d 639, 461 N.E.2d 542 (3rd Dist. 1984); Steinberg v. Petta, 139 Ill. App. 3d 503, 487 N.E.2d 1064 (1st Dist. 1985); Willowbrook Motel Partnership v. PCB, 135 Ill. App. 3d 343, 481 N.E.2d 1032 (1st Dist. 1985).

The Board will not disturb a local siting authority's decision regarding the applicant's compliance with the statutory siting criteria unless the decision is contrary to the manifest weight of the evidence. *See* Concerned Adjoining Owners, 288 Ill. App. 3d at 576; 680 N.E.2d at 818; *see also* Land and Lakes, 319 Ill. App. 3d at 53, 743 N.E.2d at 197. "That a different conclusion may be reasonable is insufficient; the opposite conclusion must be clearly evident, plain or indisputable." Concerned Adjoining Owners, 288 Ill. App. 3d at 576, 680 N.E.2d at 818, quoting Turlek v. PCB, 274 Ill. App. 3rd 244, 249, 653 N.E.2d 1288, 1292 (1st Dist. 1995). The Board may not reweigh the evidence on the siting criteria to substitute its judgment for that of the local siting authority. *See* Fairview Area Citizens Taskforce v. PCB, 198 Ill. App. 3d 541, 550, 555 N.E.2d 1178, 1184 (3rd Dist. 1990); Waste Management of Illinois, Inc. v. PCB, 187 Ill. App. 3d 79, 81-82, 543 N.E.2d 505, 507 (2nd Dist. 1989); Tate v. PCB, 188 Ill. App. 3d 994, 1022, 544 N.E.2d 1176, 1195 (4th Dist. 1989). "[T]he manifest weight of the evidence standard is to be applied to each and every criteria on review." *See* Concerned Adjoining Owners, 288 Ill. App. 3d at 576, 680 N.E.2d at 818.

The local siting authority weighs the evidence, assesses witness credibility, and resolves conflicts in the evidence. *See* Concerned Adjoining Owners, 288 Ill. App. 3d at 576, 680 N.E.2d at 818; *see also* Land and Lakes, 319 Ill. App. 3d at 53, 743 N.E.2d at 197; Fairview, 198 Ill. App. 3d at 550, 555 N.E.2d at 1184; Tate, 188 Ill. App. 3d at 1022, 544 N.E.2d at 1195. Where there is conflicting evidence, the Board is not free to reverse merely because the local siting authority credits one group of witnesses and does not credit the other. *See* Waste Management, 187 Ill. App. 3d at 82, 543 N.E.2d at 507. "[M]erely because the [local siting authority] could have drawn different inferences and conclusions from conflicting testimony is not a basis for this Board to reverse the [local siting authority's] finding." File v. D & L Landfill, Inc., 219 Ill. App. 3d 897, 905-906, 579 N.E.2d 1228, 1235 (5th Dist. 1991).

FACTS

Application and Siting Hearing

On June 21, 2013, Groot filed a siting application with the Village's Clerk. C00003-1376. Public hearings on the application began September 23, 2013, and ended on October 2, 2013. C02946-3874.

The proposed transfer station is approximately 3.9 acres, located at 201 Porter Drive, in the Village. C00013. The proposed transfer station includes the construction of a 27,800 square foot transfer station building and a scale house of approximately 270 square feet. *Id*. Berms and landscape plantings will be placed along Porter Drive and Route 120 to screen the facility. *Id*.

Groot employs over 600 people and is the largest independent provider of solid waste management services in Illinois. C00016. In 2010, Groot opened the Groot North Facility at the abandoned Stock Lumber Supply Yard located at 40 South Porter Drive. *Id*. This facility serves as the headquarters for Groot's waste hauling operations in Lake County. *Id*. Groot is also seeking to develop the Groot Eco-Campus construction and demolition debris recycling facility on 14 acres south of the existing Groot North Facility. *Id*.

Shaw Environmental was contracted by Groot to develop the application and design the transfer station. C02612. Shaw Environmental's employees testified in support of the application including Devin Moose (C02612) and Christine Seibert (C03515). In addition, Groot also retained the Lannert Group and Poletti and Associates. J. Christopher Lannert provided testimony regarding the work of the Lannert Group (C02885) and Peter J. Poletti provided testimony regarding the work of Poletti and Associates. Michael Alan testified concerning the traffic impact study performed by Werthman, Kenig, Lindgren, O'Hara & Aboona. C0336.015.

TCH presented testimony by John W. Thorsen, Charles M. McGinley, Michael S. MaRous, and Brent Coulter.

Criterion I (Need)

The proposed service area is Lake County. Lake County has taken an active role over the last 20-plus years in assessing what facilities for disposal are available as well as the waste needs of the county. C00021; 3519-20. Lake County has taken the time to develop policies for the future handling of wastes. C03519-20.

Lake County generates significant quantities of waste, and that is projected to continue into the future. C00020. Lake County is highly developed and is projected to have modest growth between 2010 and 2040. C00023. Traditionally, Lake County has utilized two landfills within Lake County (Zion Landfill and Countryside Landfill) and a third in Wisconsin (Pheasant Run Landfill). C00025; C03521. There are currently no transfer stations in Lake County. *Id*.

Lake County has updated its solid waste management plan and reiterated a desire to maintain disposal agreements with the landfills; however, the disposal commitments from Zion and Countryside Landfills have expired. C00027. Zion Landfill has committed to providing a

guaranteed six years of disposal capacity to Lake County, which will expire in 2017. With no additional expansion, Lake County's existing landfills will reach capacity by 2027. *Id.*

As existing facilities in the region reach capacity, new disposal facilities are located further from the region. C00027. Counties are faced with deciding how to handle waste and in neighboring counties such as Cook and DuPage, the decision has been to develop transfer stations. C00027; 03523.

In 2004, Lake County recognized that more transfer stations are being developed in the Chicago region, and that existing landfills may not have sufficient capacity to meet the needs of the county. C00029. In 2009, no additional landfill capacity was developed, and transfer stations were identified as an option. C00030.

Projections to quantify the amount of waste generated in the service area were calculated based on service area population projections and the amount of waste generated for daily disposal. C00033. The population growth from 2010 through 2040 is projected to be plus 36% C00024. The per capita per day (pcd) developed for the period 1996 through 2010 averaged 7.2 pcd, and in 2011 the average was 6.1 pcd. C00033. Assuming the rate of 6.1 pcd, the average waste quantities in Lake County will increase from 2,899 tons per day (tpd) in 2015 to 3,550 tpd in 2035. *Id.*

Countryside Landfill has a remaining capacity of approximately nine years as of January 1, 2013, based on an annual average of waste received from 2008 through 2012. C00038. Zion Landfill has a remaining capacity of 20 years as of January 1, 2013. *Id.* Pheasant Run receives less waste from Illinois since the imposition of tipping fees in 2009, and it is not expected that Pheasant Run will provide significant disposal capacity for Illinois in the future. *Id.* The aggregate remaining capacity for the two Lake County landfills is 12 years. *Id.*; C03526. This is a combined capacity looking at total tonnage. *Id.*

Ms. Seibert explained that Lake County has consistently sought to have 20 years of capacity for disposal for its citizens and businesses. C03525. In Lake County, expansion of the Zion and Countryside Landfill took nine or more years. C03528. Ms. Seibert indicated that given the time necessary to develop new waste facilities, there is no indication that either facility will expand further in the future. *Id.*

Ms. Seibert testified that Lake County has identified the need to develop new facilities to serve the region's waste needs. C03529. Transfer stations are relied upon as a standard method for managing waste in other counties like Cook and DuPage. C03529-30. Ms. Seibert stated that development of transfer stations also takes a significant amount of time, and Groot has been working on this site since 2008. C03530-31.

Ms. Seibert opined that the transfer station is necessary to accommodate the waste needs of Lake County. C03548. She based her opinion on the projected increase in population, housing, and employment that will result in increased quantities of waste. *Id.* Further, her opinion is based on the fact that the in-county landfills do not provide for 20 years of capacity, and new landfills are not being planned for the area. *Id.*

When Ms. Seibert was asked to explain what she meant by "immediate" need to develop the transfer station, Ms. Seibert testified that she meant by 2015. C03613-14. Ms. Seibert was asked about the most recent capacity certifications at hearing, which demonstrate that Country side has ten years of capacity. C03654; C01873-78. Ms. Siebert noted that those certifications are based on the last year's tonnage only and do not account for fluctuations in tonnage. *Id*.

Ms. Seibert was cross-examined regarding another project (Zion Landfill) and an exhibit introduced. C03565-66; C02105. Ms. Seibert was asked about the need assessment in the Zion Landfill expansion, which Ms. Seibert and Shaw Environmental developed. C03565-72.

Mr. Thorsen testified on behalf of TCH and provided a report. C03146; C01383. Mr. Thorsen stated that if Groot "plans to begin operating the proposed transfer station in 2015 Groot Industries appears therefore to have a three year planning window form concept to operation." C01383. Mr. Thorsen concluded that if the need for the transfer station does not arise until 2027, Groot need not put forth this application until 2024 or 2025. *Id*.

Mr. Thorsen took the last three years of waste receipts from Zion Landfill and Countryside Landfill, and averaged those numbers. C03152. Based on this calculation, Mr. Thorsen testified that there "is plenty of landfill space until 2027". *Id*. Mr. Thorsen used the numbers in the application developed by Shaw Environmental, and did not attempt to develop his own numbers. *Id*.

Criterion II (Designed and Located to Protect Public Health, Safety and Welfare)

The facility will be located in an area currently undeveloped and zoned industrial. C00056. The nearest residential property is more than 1,500 feet away, and the nearest dwelling is located over 1,000 feet away. C00058. The proposed facility is not in a 100-year floodplain or a wetland. C00062. There are no archeologic or historic sites, no endangered species and no wild and scenic rivers. C00064.

The building will be a concrete and steel structure about 27,800 square feet. C00066-67; 2617. This design blends in with the surrounding area and also suppresses noise within the building. C02617. The tipping floor and pushwells will consist of cast-in-place reinforced concrete, and the tipping floor will be 12-inch thick slab-on-grade concrete with saw-cut joints. C00066-67. The tipping floor will gently slope toward floor drains and trench drains will be added along the interior walls. C00066-67.

The design also includes a transfer trailer station where the trucks leaving the facility with waste will be tarped. C00067; 02618. The facility is designed as a drive through, which will minimize the number of openings outside and the number of people that can see into the facility. *Id*. Landscaping will also be used to obstruct the view and no loading activities will be observable from outside. C02618-19.

The application requests the ability to operate 24 hours a day, seven days a week; however most of the time the operations will be from 4:00 a.m. to 8:00 p.m. Monday through Friday and 4:00 a.m. to 12:00 p.m. on Saturday. C00073; 02633. The facility will accept

municipal waste, landscape waste, and source separated recyclables. *Id*. The facility will not be treating, storing, or disposing of hazardous waste. C02633.

Mr. Moose testified that in his experience there are five areas that people are concerned about: litter, odor, pests, noise, and dust. C02635. The design of the facility and operational controls will minimize the potential impact in these five areas. C02636. The control of litter will be accomplished by requiring the vehicles arriving at the facility to be fully enclosed or covered. *Id*. The building and outside will be patrolled on a daily basis to pick up any litter that might be there. *Id*.

To help with odor, the facility is designed with negative air pressure within the building and an air exchange program. C02620. There are vents on the roof and sides of the building. *Id*. Also, the building will be cleaned daily, using a street sweeper and as necessary the walls will be power washed. C02637-38. The first waste in will be the first waste out and there will be a misting system with a non-toxic odor neutralizer. C02637.

For pests there will be an exterminator on a regular basis, but the quick removal of waste will also help keep pests down. C02637. As for noise, Mr. Moose opined that there will be no noticeable noise above background. With dust, the roads will be paved and misters will be used. C02638.

Mr. Moose opined that the facility was designed, located, and proposed to be operated to protect the public health, safety, and welfare. C02640.

During cross-examination, Mr. Moose was asked to clarify the intent of Groot regarding its operations of the transfer facility, including when the doors would be open or closed and the hours of operations. *See e.g.* C02721-25; 02739-42; C02745-46; C02822.

Mr. McGinley prepared a report and provided testimony on behalf of TCH. C03357.010; C01390-1492. Mr. McGinley is a licensed chemical engineer in Minnesota. C03357.011. Groot challenged Mr. McGinley's ability to testify as an engineer; however, the Hearing Officer allowed the testimony. C03357.011-15. Mr. McGinley provided training on how to develop odor management to several firms, including Shaw Environmental. C03357.020.

Mr. McGinley opined that the design and operations for the proposed transfer station will not prevent odors from infringing on, or passing into the community. C03357.039-40. Mr. McGinley based his opinion on the details in the application, specifically details on how the air will be exhausted from the facility and how the doors will be opened during business hours. C03357.40. Mr. McGinley recommends that the transfer station be completely enclosed and utilize automatic opening and closing doors along with air filtration. C01395.

Criterion III (Minimize Incompatibility and Impact on Property Values)

Minimize Incompatibility with Surrounding Area. The Lannert Group was retained by Groot to perform an analysis to determine if the proposed transfer station is designed to minimize incompatibility with the character of the surrounding area. C00091. Mr. Lannert

testified that the first step in the procedure his firm goes through in this analysis is to obtain an aerial photograph of the proposed site and then to gather regional documents such as zoning ordinances and plans. C02890-91. A drive through the area is taken and then a 3D model is developed. C02891.

The site will consist of the transfer building, scale house, parking, transfer trailer queuing area, and landscape features. C00092. The transfer station will generally operate Monday through Friday and on Saturday, and the capacity will be approximately 750 tons per day. *Id*. The transfer station will accept nonhazardous municipal waste. *Id*.

The transfer station will be located in I-1 Industrial District, which allows for several categories of land use, including "manufacturing, wholesaling, and warehousing activities". C00097. While the Village's Zoning Ordinance does not designate a transfer station as a "permitted or special use in any zoning district", "all manufacturing and industrial activities, including fabrication, processing, assembly, disassembly, repairing, recycling, cleaning, servicing, sorting, testing, packaging, and storage of materials, products and goods can be conducted wholly within enclosed buildings or structures, are allowed in the Village's I-1 District". *Id.* The transfer station is "similar in use, character, and intensity to the allowable uses" of the industrial district. *Id.*

The analysis included the evaluation of planning issues used to determine land use compatibility, with special attention to land use and zoning with a one-mile radius of the proposed site. C00092. The one mile radius includes parcels in Lake County, Grayslake, Hainesville, Round Lake, and the Village. C00094. A second one-half mile area was evaluated in order to focus within the corporate limits of the Village. C00092. A detailed site investigation was performed in the immediate neighborhood adjacent to the proposed site and the one-mile area. *Id*.

Criterion 3 requires an analysis of the "character of the surrounding area", meaning the "general nature and attributes of each type of land use". C00094. Each land use type has its own set of distinguishable characteristics. Land use types that are best suited as buffers or transitions between land use categories of different intensities include "open space, natural features, and man-made facilities, such as roads, railroads, and buildings of similar uses". *Id.*

Land use ratios were calculated to quantify land uses within the study area of a one-mile radius of the site. C00094. Each use was measured in acres and percentages of the entire study area. Four land use types were determined to exist within the study area, with open space comprising 55%, residential 37%, commercial/office 4%, and industrial/manufacturing 4%. Open space can include parks, vacant land, and agricultural land. *Id.*

The character within the vicinity of the proposed transfer station is "defined by industrial and open space consisting of approximately 59%" of the land area. C00095. The proposed transfer station will not impact these existing land use features. In addition to the 55% of open space that exists as a buffer or transitional area, there is a building to the north, a forested area to the east, and the Illinois Route 120 corridor, the Porter Road right-of-ways, and the landscaped plantings to serve as additional buffers or transition areas. *Id.* The transfer will be further

buffered by an additional piece of property located adjacent to the transfer station site that Mr. Groot purchased at auction, according to Mr. Lannert's testimony. C02862.

Residential uses comprise 37% of the one-mile study area and are located within "historically established neighborhood areas". C00095. These residential uses are "removed from any major impact of the proposed transfer station site". No residentially zoned property is located within the 1,000 foot set-back requirement. C00100.

The Site and Landscape Plan prepared by the Lannert Group has been designed to accommodate traffic flow and enhance streetscape elements along Illinois Route 120 and Porter Road. C00098. The placement of the natural plantings will minimize the impact of the transfer station. *Id.* Based on the Lannert Group report, the proposed transfer station "minimizes the impact on the character of the surrounding area and, therefore, satisfies the first part of Criterion 3". C00101.

In addition to the Lannert Group report, Mr. Lannert testified that the landscaping planned for the site improves the esthetic appearance and character of the area. C02917. The berms and plant materials will also filter the view of the site from the roadways. C02919. Mr. Lannert opines that based on the location of the site, the character of the area and defined use of the area, the proposed transfer station is located so as to minimize the impact on surrounding properties. C02924.

Minimize Impact on Property Values. Poletti and Associates were retained to perform a study of the proposed site to determine if the facility is so located to minimize the effect of the value of the surrounding property. C00113. In performing the study, a preliminary on-site inspection was performed; documents were reviewed and accumulated, including portions of the application. Poletti and Associates also held meetings with Groot and Shaw Environmental, and completed a review and analysis of property transactions in the areas surrounding the Glenview Transfer Station in Glenview, the Elburn Transfer Station in Elburn, and Bluff City Transfer Facility in Elgin. *Id*. The conclusion based on these studies is that the transfer station is located so as to minimize the effect on the value of the surrounding property. *Id*.

A target and a control area were established for the purpose of analysis. C00115. The target area is a zone in proximity to an operating transfer facility, and the control area is an area removed from the target area. C00115-16. A statistical evaluation can be made concerning sale prices between properties in the two areas to determine the effect of an operating transfer station. C00116.

The design of the facility, including buffering, and the orientation of the building will help to minimize the impact on surrounding property values. C00142. In addition to on-site measures, there are off-site measures that also affect the value of the surrounding properties, such as intervening land uses, vegetation, and distance to nearest residential units. *Id*. The evaluations of the existing transfer stations demonstrate that "there is no statistically significant difference in sales prices of the residential areas most proximate to these three operating transfer facilities from areas further removed." *Id*. Therefore, the proposed transfer station is located so as to minimize the value of surrounding property. *Id*.

Dr. Poletti has an MAI designation, which means he is a member of the Appraisal Institute. The MAI designation is considered the top designation that you can receive in the appraisal business. C03065. Dr. Poletti's scope of work was to examine the facility to determine if the facility minimized its impact on surrounding property. C03067. Dr. Poletti testified that the term in the statute is to "minimize" such impacts. The "state government basically at the time they wrote this made the assumption that there was an effect or potential effect on the value of surrounding property, and they deem it necessary to minimize that effect." *Id*.

Dr. Poletti used the map provided by Mr. Lannert and then looked at published literature concerning transfer stations. C03068. Dr. Poletti then performed a quantitative analysis looking at actual sales that have occurred around transfer stations to see if there is an impact on property values. *Id*. Dr. Poletti looked at previous work done by his company and the land use. C03069. Dr. Poletti looked at the design of the facility and the operations plan as well. C03069-73.

Dr. Poletti testified that at the three existing facilities, he saw no evidence that the transfer facility impaired development. Based on the proposed design of the facility and the examination of the existing transfer station, Dr. Poletti opined the facility is located to minimize the impact on surrounding property values. C03088.

Dale J. Kleszynski. Mr. Kleszynski is MAI-designated and senior residential appraisal (SRA) designated. C3742.009-10. Mr. Kleszynski reviewed Dr. Poletti's work to determine whether or not that work was done appropriately and completely so that the result is credible. C3742.012. Mr. Kleszynski testified that this review is similar to a peer review, but the amount of work done to check the work of the peer is more significant. C3742.013. For example, Mr. Kleszynski visited the properties and took photographs. C3742.016-21. He sought review from other MAI designated appraisers. C3742.022. Mr. Kleszynski concluded that Dr. Poletti's report was appropriate within the context of the assignment to reach a credible opinion. C02439, C3742.032.

Mr. Kleszynski also reviewed the work of Mr. MaRous, but not as extensively as that of Dr. Poletti. C3742.033. Mr. Kleszynksi opined the Mr. MaRous' report mischaracterized the work Mr. MaRous did in reviewing Dr. Poletti's work. C3742.033-34.

Michael S. MaRous. Mr. MaRous provided testimony for TCH concerning the proposed facility's design so as to minimize the impact on surrounding property and values. C03372. Mr. MaRous also prepared a report for TCH. C01507-24. Mr. MaRous found the land use analysis by the Lannert Group was unreliable for several reasons. C01508. Specifically, the Lannert Group report did not include an analysis of the comprehensive plans of adjoining communities, nor did the report discuss the impact of the significant increase of truck traffic on the roads surrounding the proposed facility. *Id*. The MaRous report took issue with the addition of industrial use (four percent) to the percentage of open space (55%) within a one mile radius of the proposed facility; as the addition of the numbers leads to a misrepresentation that industrial uses are well established in the area. *Id*. The MaRous report states that the report did not characterize the industrial use as "light" or "heavy" and did not address the fact that there are dwellings nearly within the 1,000 feet setback. *Id*. Finally, the Lannert Report acknowledges

that there are residential areas proximate to the proposed transfer station, however there is no analysis leading to the conclusion that the residential communities are "removed" from the proposed facility. *Id*.

Mr. MaRous also opined that the Dr. Poletti market impact study was unreliable. C01508. The literature cited is flawed; the study did not discuss the hours of operation and increased traffic, and the study misrepresents the zoning situation for Timber Creek. *Id*. The study does not discuss the impact on commercial properties. *Id*. In addition, the analyses on the existing facilities impact on property values are also flawed. *Id*.

Mr. MaRous is MAI-designated, and he was retained to review and analyze the application for siting on behalf of TCH. C03376, 03378. Mr. MaRous reviewed the plans, the professional reports, inspected the property in the area, took into consideration his experience in the area, and viewed the Timber Creek residential area. C03381. He looked into any trends in the development in the area and took into consider the traffic, transaction of commercial, industrial and residential lands. *Id*.

Mr. MaRous opined that Timber Creek provides affordable housing within a 30 to 40 minute drive of economic or job opportunities. C03382. Mr. MaRous stated that the zoning for Timber Creek residential area is industrial but residential use is permitted, and residential use is considered the "highest and best use", in his opinion. C03383.

Mr. MaRous stated that Mr. Lannert did not appear to consider that the proposed facility could operate 24 hours a day seven days a week and such operation would have a negative impact on the residential properties. C03386.

Criterion VI (Minimize Impact on Existing Traffic)

The application states that the transfer station will typically process on average 750 tons of waste per day and is anticipated to typically receive and transfer waste from 4:00 a.m. to 8:00 p.m. on weekdays and 4:00 a.m. to noon on Saturday. C00195. The waste will be transported via collection trucks to the proposed facility and from the facility via transfer trailers. *Id*. The proposed facility will result in an increase in traffic in the immediate vicinity of the site; however the amount of traffic generated at any one time is limited and distributed throughout the day. *Id*. The peak traffic periods of a transfer station typically occur during the late morning and early afternoon and do not coincide with the critical morning and evening commuter peak periods. *Id*. The proposed transfer station was chosen due to the proximity of Groot Industries North Facility, which is a storage and maintenance yard for Groot's waste trucks. *Id*. Many of the collection trucks that will deliver waste to the proposed transfer station will be maintained and stored at the existing facility and will only traverse Porter Drive to be parked at the North Facility. *Id*.

As a part of the development of the proposed site, Illinois Route 120 is proposed to be widened to provide a left-turn lane and a separate right-turn lane for Porter Drive. C00201. The Porter Drive approach to Illinois Route 120 will be widened to provide a three-lane cross section and the intersection radiuses are proposed to be increased. *Id*. It is recommended that all

transfer station truck traffic be prohibited from making a left turn between the hours of 7:00 a.m. to 9:00 a.m. and 3:00 p.m. to 5:00 p.m. from Porter Drive to Illinois Route 120. *Id.*

Illinois Route 120 is being considered for improvements by the Illinois Department of Transportation and the Lake County Department of Transportation. C00201. Mr. Werthmann testified that criterion VI "acknowledges, similar to any development, that these facilities generate traffic and, therefore, do have an impact on the roadway". C03116.018. Mr. Werthmann explained that the requirement is not to eliminate impacts, but rather to minimize the impact. Further, the analysis is on existing traffic not to mitigate against impacts associated with growth. *Id*.

Mr. Werthmann testified that the traffic study was based on accepted industry practice and was a three-phase study. C03116.018-19. First, the physical and operating characteristics of the roadway system are examined. C03116.019. Next the traffic characteristics are reviewed, including the type and volume of traffic that will be generated. *Id*. The third phase is to evaluate the impact of the facility and recommend ways to minimize the impact. *Id*.

Mr. Werthmann indicated that Groot will also place restrictions on truck traffic, using internal controls that will minimize the impact on existing traffic flow. C03116.032; C03116.034. Groot will direct truck traffic to use only the Illinois Route 120 Porter Drive intersection when accessing the arterial roadway system. *Id*. No truck traffic will travel North on Porter Drive beyond the Groot North Facility. *Id*. Groot will also restrict left turns from Porter Drive to Illinois Route 120. *Id.*

Mr. Werthmann explained that the peak hour volumes for traffic in the study are very conservative and represent worst case projections. C03116.37. Mr. Werthmann further explained his study stating that the assumption was made that the proposed facility would process 900 tons per day rather than the 750 tons per day expected. *Id*. Also there were no reductions in traffic volumes taken for the current traffic generated by the Groot North facility. *Id*. Finally, the study assumed that all traffic leaving the proposed transfer station would return to Illinois Route 120 even though a good portion of the traffic will travel up Porter Drive to the Groot North Facility. C03116.037-38.

The study also provide for some additional growth in the area of one percent per year. C03116.038-39.

Mr. Werthmann opined that the facility was designed to minimize the impact on existing traffic flow. C03116.047.

Mr. Coulter presented testimony (C03266) and provided a report on traffic (01495) for TCH. Mr. Coulter reviewed the Groot application for conformance with criterion VI. C01495. Mr. Coulter based his opinion on the application and the study prepared by Mr. Werthmann's firm. *Id*.

Mr. Coulter notes that the study argues that most of the trips to the site will occur outside the morning and afternoon peak hours. C01495. However, after examining the peak period

counts in the application, Mr. Coulter found that the hour before and after the morning and afternoon peak hours "are nearly as high as those single peak hours" and this means that for six hours a day Illinois Route 120 will experience peak or near peak traffic conditions. *Id*. Mr. Coulter opines that it will be difficult to schedule the larger waste transfer semi trucks to avoid the "peak period" traffic conditions. *Id*. Also, while trucks may end the day at the Groot North Facility, a truck may make several visits to the transfer station throughout the day; thus the benefit realized would only be for the last run of the day. C01496.

Mr. Coulter further opines that the intersection at Illinois Routes 120 and 134 and the intersection at Illinois Route 120 and Hainesville Road are already operating at a "poor level". C01496. Therefore, a small increase in traffic can have a disproportionate impact on delay and congestion. *Id*.

Mr. Coulter concurs with suggestions for roadway improvements. C01496. However, he disagrees that the study done by Mr. Werthmann demonstrates that the impact on traffic patterns has been minimized. C03274.

Criterion VIII (Consistent with the Solid Waste Management Plan)

In 1989, Lake County was the first county in Illinois to develop and adopt a solid waste management plan. C00669. In 1994, the Solid Waste Agency of Lake County (SWALCO) prepared a five-year update to the county plan, which noted that landfilling continued to be the predominant method of waste disposal in Lake County. C00670-71. The 1994 plan determined that Lake County would not develop a publicly owned landfill because such a facility was not economical. C00671. Rather, it was recommended that the county negotiate with the three landfills (Zion Landfill, Countryside Landfill and Pheasant Run) serving Lake county for landfill capacity. *Id*.

In 1999, when the plan was updated, the plan reflected the expansion of Zion and Countryside Landfills and the negotiated disposal agreements. C00671. In 2004, the plan identified goals for the disposal component of the plan:

1. landfill all waste which is not reduced at the source;

2. Recycling and composting services should take place in privately owned and operated facilities;

3. Utilize guaranteed disposal capacity agreements;

4. Acquire landfill capacity for future solid waste disposal needs. C00672.

The 2009 update to the plan identified the need to consider alternatives to in-county landfill disposal for the long-term management of the county's waste. C00673. Three options are identified for consideration including landfills, transfer stations, and alternative technologies. *Id*; C01923. The 2009 plan update does not include a definitive recommendation for the type of facility that should be developed. *Id*.

The 2009 plan update included requirements for any developer proposing a new facility. C01933. Those requirements are:

> 1. The proposed disposal facility must be one of the disposal options included in the 2009 plan update.
>
> 2. The proposed site must be demonstrated to meet all applicable Federal and State location standards.
>
> 3. The developer must enter into host agreements, prior to filing a siting application . . . with the following units of local government in chronological order: 1) the governing body with jurisdiction over the proposed facility (if not Lake County), 2) SWALCO, and 3) Lake County.
>
> * * *
>
> 4. Only if host agreements are entered into with all required parties may a developer proceed to the siting process. . .. C01924.

The 2009 plan update also included specific recommendations regarding size, enclosure, and that recyclables and landscape waste be a part of the facility. C01931-32.

Mr. Moose testified that the proposed transfer station is consistent with Lake County's solid waste management plan. C03116.125. As to the specific recommendations in the plan, Mr. Moose stated that the transfer station is large enough to manage the anticipated waste volume, while providing adequate screening, stormwater management, and safe traffic flow. C03116.126. The facility will accept recyclables and landscape waste, and the design of the facility uses proven technology, minimizes emissions, and has no economic risk to anyone other than Groot. C03116.128-29.

Mr. Moose on cross-examination indicated that the Winnebago landfill was used during the life cycle analysis for the proposed transfer station. C03130. Mr. Moose stated that "we had to select a landfill in order to perform" that analysis. *Id*. Mr. Moose continued, explaining that hauling or disposal agreements between transfer stations and landfills are relatively short term. C03131. "So although Groot may be bringing their waste now to Winnebago landfill" there is no guarantee that will continue over the life of the proposed facility. *Id*.

Post Siting Hearing Filings

Written public comments were received until November 1, 2013. C4379; 4372-81. In addition, parties were allowed to present briefs and proposed findings of facts and conclusions of law by October 21, 2013 (C4370) and to amend those filings by November 8, 2013 (C4371).

TCH provided proposed findings of facts and conclusions of law. C04135-96. In addition to findings on the criteria, TCH raised the issue of fundamental fairness. C04190-95. TCH noted that it raised the issue at hearing. C04190.

The Village of Round Lake presented findings of facts and conclusions of law. C04202-11. SWALCO also provided findings of facts and conclusions of law. C04212-20. The Village and Groot submitted findings of facts and conclusions of law. C0422-76; C04284-4332. The Hearing Officer also presented findings of facts and conclusions of law. C04355.032-.075.

Village Board Deliberations and Decision

The Village Board began deliberations on December 11, 2013, and continued on December 12, 2013. C3875-4047. The Village Board combined into one motion those criteria that were agreed upon by the Board. C03886. The Village Board voted that Groot had met its burden for criteria IV, V, VIII, and IX. C03890-91.

For Criterion I, Candace Kenyon indicated she would adopt the findings of TCH. C03894. Jean McCue disagreed, stating that the facility cannot be built the day the landfill closes, and planning ahead is necessary. C03895. Ms. McCue based her position on the testimony of Ms. Seibert, while Ms. Kenyon noted that the evidence by TCH indicated there would not be a need until 2027. C03897. Additional debate continued, and other members of the Village Board discussed the evidence. C03897-3915. Ms. McCue then made the motion that Groot had met its burden on criterion I, and the Village Board voted in favor of the motion four to three. C03915-17.

In discussing Criterion II, Ms. Kenyon again asked to adopt the findings of TCH, and Ms. McCue questioned the qualifications of TCH's expert. C03917-19. One member indicated he accepted the expertise of Mr. Moose on the issue. C03919. Ms. McCue indicated that she was not convinced and would like to add conditions to the decision. C03920. The Village Board voted that that Groot met its burden on criterion II, subject to conditions. C03923-73.

The Village Board also discussed the evidence on criterion III, including the witnesses, what each testified to, and whom the Village Board members thought was correct. C03975-79. Likewise on criterion VI, the Village Board discussed the evidence and suggested conditions for the siting. C03981-91.

On December 12, 2013, Resolution Number 13-09 was adopted by a majority of the Village Board. C4025-47; 4577-4623. This action approved Groot's application for the siting of the transfer station, with conditions. *Id.* Specifically, the Village Board noted that Groot met criteria II and III subject to the conditions imposed by the Village Board. C04580. The Village Board's conditions imposed included a limitation on the hours of operation, and requiring the doors of the facility to remain closed during specific hours of operation, except to let trucks in and out of the facility. C04580-81. The Village Board limited the throughput to an average of 750 tons per day on an annual basis and included requirements for cleaning the tipping floor, and required negative air pressure and limitations on noise. C04581-83. The conditions also included requirements limiting left turn from Porter Drive to Illinois Route 120. C04583.

Fundamental Fairness

Depositions

Lee Brandsma. Mr. Brandsma is the the chief executive officer for Groot, and provided deposition testimony. *See* TCH Exh. 73 Attach A. In 2008, Groot contacted Shaw Environmental to do a study in both Lake County and Eastern McHenry County looking for potential sites for a new truck and maintenance and office facility. *Id*. at 1. With respect to searching for a transfer facility site, Mr. Brandsma told the engineers to find a site that was "A, for sale, and B, meet the criteria, and then we will talk about it." *Id*. at 2. Mr. Brandsma found the first property in Lake County, by driving by and seeing a for sale sign outside a facility that appeared to be appropriate for the office and truck maintenance facility. *Id*. When the property (referred to as the Stock Lumber Property) was first located, it did not relate to the transfer station. *Id*. at 3.

In 2009, after making the effort to purchase the Stock Lumber Property, "all the variances, the hearings that all went on and the agreement that was reached. Then we looked around and said we were looking for other facilities within Lake County" in order to be competitive with larger waste haulers. TCH Exh. 73 Attach A at 3. Groot purchased the Stock Lumber Property, with conditions concerning zoning. *Id*. at 14. Two properties adjacent to the Stock Lumber Property were also for sale, and Groot moved forward with its plan to have larger, multiple facilities in one location. *Id*. On April 29, 2010, Groot closed on those two properties, but with no conditions on the purchase. *Id*. at 8 and 14.

The September 2, 2008, Village Board meeting minutes indicate that the then-mayor, Jean McCue, met with Groot, a company interested in putting a transfer station in the Village. TCH Exh. 19; C02086. Mr. Brandsma indicated that he would have been the Groot representative who contacted Ms. McCue. TCH Exh. 73 Attach A at 3-4. On September 16, 2008, Devin Moose, with Shaw Environmental, presented a power point presentation on siting a transfer station. TCH Exh. 20. Mr. Moose made the presentation on behalf of Groot and the presentation was approved by Groot. TCH Exh. 73 Attach A at 6.

Mr. Brandsma indicated that other than Ms. McCue, the only meeting with anyone acting on behalf of the Village was a meeting in the offices of the Village attorney, but only the Village attorney attended that meeting with someone from Shaw Environmental and Groot. TCH Exh. 73 Attach A at 11-12.

Mr. Brandsma stated that Groot hosted an open house in May 2010, after the opening of the truck terminal. TCH Exh. 73 Attach A at 15; C02087.

Jean McCue. Ms. McCue was active in Village government since 1989 and began serving as a trustee in 1991 until 1992 or 1993. TCH Exh. 73 Attach E at 1. Ms. McCue returned to the Village Board as a trustee in 1994 or 1995. *Id*. In 2006 or 2007, Ms. McCue became Mayor and served in that capacity until May 2013. *Id*. at 1-2. Linda Lucassen became Mayor in May 2013 and appointed Ms. McCue to be a trustee. *Id*. Ms. McCue wanted to see the completion of projects, like the downtown redevelopment. *Id*. at 2-3. She did not consider the siting of a transfer station as one of those projects. Groot Exh. 1 Attach E at 13:3 through 13:8.

Ms. McCue indicated that Groot contacted her in 2008 about attending a Village Board meeting. TCH Exh. 73 Attach E at 3. Ms. McCue did not remember whom she spoke to at Groot or the specifics of any meetings. *Id*. at 5. She acknowledged that the meeting minutes from September 2, 2008, indicate she reported a meeting with Groot, but she does not recall any details. *Id*. Ms. McCue remembers one meeting between April 2008 and June 2013, where she met Mr. Brandsma for breakfast where he explained what a transfer station was. *Id*. at 6.

Ms. McCue also answered questions about a presentation made on April 15, 2008, by Walter Willis, executive director of SWALCO. *Id*. at 4; 4/28/14 Request to Admit Exh. 1. At the time of the presentation in 2008, Ms. McCue did not know who Mr. Willis worked for, prior to joining SWALCO. TCH Exh. 73 Attach E at 4. Mr. Willis talked about proper recycling, oil and tire pickups for recycling, revenues from other facilities, and placing a transfer station in the Village. 4/28/14 Request to Admit Exh. 1. One trustee had a site in mind, but Ms. McCue did not know where that site might be. Groot Exh. 1 Attach E at 20:13.

Ms. McCue remembers the presentation by Mr. Moose on September 16, 2008 and agreed that the focus was the siting of a transfer station in the Village. TCH Exh. 73 Attach E at 8.

Ms. McCue stated that the Village, on the advice of counsel, adopted a solid waste management plan on November 6, 2012. TCH Exh. 73 Attach E at 23-24. The Village sought input from Shaw Environmental in preparing the solid waste management plan. *Id*. at 25. On August 6, 2013, the 2012 solid waste management plan was repealed, after the transfer station siting application was filed. *Id*. at 26-27.

Ms. McCue testified that she kept an open mind regarding the transfer station, and she attended many of the siting hearings. Groot Exh. 1 Attach E at 115:1-4. Ms. McCue stated she did not go into the hearing with any preconceived notions on how she would ultimately vote, and she made her decision on the record. *Id*. at 115:10-14.

Donna Wagner. Ms. Wagner has been a trustee on the Village Board since May 7, 2013. Ms. Wagner first heard about the transfer station at a "campaign meeting" in February 2013 held at a local restaurant. TCH Exh. 73 Attach B at 1. Ms. Wagner also heard about the transfer station through campaign literature from her opponents. *Id*. at 1-2. Ms. Wagner was on a slate of candidates that included Linda Lucassen, Raeanne McCarty, and Bob Cerretti. *Id*. She next heard about the transfer station when Ms. Lucassen announced that the application was being submitted and then on June 21, 2013, when Groot filed the application. *Id*. at 3-5.

Ms. Wagner recalled voting on the Village's solid waste management plant on August 6, 2013. TCH Exh. 73 Attach B at 11-13. She did not have any input in drafting the ordinance, but moved that the plan be adopted to replace the plan adopted on November 6, 2012. *Id*. at 13. Ms. Wagner believed that it was necessary to replace the prior plan to ensure agreement with SWALCO's solid waste management plan. *Id*. at 14; Groot Exh. 1 Attach B at 38:20-38:24. Ms. Wagner was not told that approval of the Village's solid waste management plan would assist Groot in siting the transfer station. Groot Exh. 1 Attach B at 39:12-29:20.

A campaign meeting in February 2013 was held but it was not a private meeting and several people were present. Groot Exh. 1 Attach B at 41:14-41:24. The candidates were warned not to discuss the transfer station "in any way shape or form" during the campaign. *Id*. at 41:24-42:2. Groot was not represented at the meeting. *Id*. at 43:3-43:5.

Ms. Wagner only discussed the transfer station with her fellow trustees and the Mayor during deliberations after the siting application had been filed, and hearings were held. Groot Exh. 1 Attach B at 47:1-48:2. Ms. Wagner attended some of the siting hearings and transcripts from the hearings were made available to the trustees. *Id*. at 51:9-51:20. Ms. Wagner made her decision based on the evidence in the record and only that evidence. *Id*. at 51:21-51:23. She remained unbiased and did not make up her mind until the evidence was heard. *Id*. at 52:3-52:9.

Linda Lucassen. Ms. Lucassen currently serves as Mayor for the Village and has been in Village government since 1997. TCH Exh. 73 Attach C at 1. Ms. Lucassen was Village Clerk for 14 years and then in 2011 became a trustee, until assuming the office of Mayor in 2013. *Id*. In her capacity as clerk, Ms. Lucassen took minutes of meetings of the Village Board and transcribed the audio recordings to written minutes. *Id*. at 1-2. Once the minutes were approved, generally the audio recording was destroyed or recorded over. *Id*.

Ms. Lucassen was Mayor during the siting process for Groot's transfer station and she knew there was opposition to the siting. TCH Exh. 73 Attach C at 3. Ms. Lucassen knew that TCH was an opponent, but did not think that "there was a side" for the Village to be on in the process. *Id*. at 4; Groot Exh. 1 Attach C at 13:13-14:4. Ms. Lucassen believed that the Village Board was there to hear the evidence presented and to listen at hearing. *Id*.

Ms. Lucassen indicated she first heard about the possibility of a transfer station coming to the Village six or eight years ago. TCH Exh. 73 Attach C at 5. Ms. Lucassen discussed the Village's repeal of the solid waste management plan on August 6, 2013, and stated that the action was adopted on advice from the counsel. *Id*. at 12.

Ms. Lucassen stated that as Mayor she votes in the event of a tie on a vote of the trustees. TCH Exh. 73 Attach C at 13. On December 12, 2013, Ms. Lucassen voted on the resolution to grant siting approval, because there was a tie. *Id*. at 13-14. Ms. Lucassen also voted on December 10, 2013, to approve siting for criteria IV, V and IX, even though there was not a tie. *Id*. at 14-15; C03890-91. While the minutes do not reflect that Ms. Lucassen voted, a transcript of the proceedings does. *Id*. at 16; *see also* C03890-91.

Ms. Lucassen attended the siting hearings and transcripts of the hearings were available to her before the vote. Groot Exh. 1 Attach C at 51:21-52:15. Ms. Lucassen stated that she waited until receiving all the evidence before making a decision and did not decide how she would vote before the siting application was filed. *Id*.

Candace Kenyon. Ms. Kenyon has been a Village trustee since 2007, and Ms. Kenyon voted against siting. TCH Exh. 73 Attach D at 1. Ms. Kenyon noted that Ms. Wagner, Mr. Cerretti, Ms. McCue and Ms. Lucassen voted to approve siting, and Ms. Kenyon was not

"surprised" that the four voted in favor. *Id*. Ms. Wagner did not "expect" the four to vote for siting as "anything could happen" during deliberations. *Id*. at 2. This group "usually" votes together, according to Ms. Kenyon. *Id*. Ms. Kenyon noted that Ms. McCue worked hard to bring revenues to the village, including the transfer station. *Id*. at 3. Ms. Kenyon had the sense that Ms. McCue would vote for the siting of the transfer station. *Id*.

Ms. Kenyon testified that neither before nor after the presentation by Groot in September 16, 2008, did she discuss the subject of a Groot transfer station with anyone. Groot Exh. 1 Attach D at 19:23-20:2; 31:3-31:9. She remembers the presentation but did not recall specifics, just that there was a possibility that they could pursue something like a transfer station. *Id*. at 21:15-21:22; TCH Exh. 73 Attach D at 5. Ms. Wagner attended the May 2010 open house; she remembered Ms. McCue making general statements to her at the open house about bringing a recycling center. TCH Exh. 73 Attach D at 12.

Ms. Kenyon remembered the host agreement discussions, but relied on the Village attorney to get the best deal. TCH Exh. 72 Attach D at 14; Groot Exh. 1 Attach D at 50:21-51:1. Ms. Kenyon was never told that by voting on a host agreement, she would be required to approve a siting application. Groot Exh. 1 Attach D at 74:20-75:6. Ms. Kenyon voted for the host agreement, but ultimately opposed siting. *Id*.

Ms. Kenyon limited her decision to the evidence and testimony at hearing. Groot Exh. 1 Attach D at 75:9-75:12. Ms. Kenyon limited her decision based on the advice of the Village attorney who provided the same advice to other members of the Village Board. *Id*. at 75:13-75:17. Ms. Kenyon attended the hearings and read the transcript from hearing on days she could not attend. *Id*. at 78:4-78:16. Ms. Kenyon indicated that objectors were given the opportunity to present witnesses, cross-examine witnesses and present their case. *Id*. at 78:23-79:6. Ms. Kenyon, to the best of her knowledge, indicated that the other Village Board members had not prejudged the application. *Id*. at 79:24-80:4.

Host Agreements

There are different host agreements discussed in the record. On December 13, 2011, the Village Board meeting minutes reflect discussions on a host agreement for a construction and demolition facility. C04383. The December 13, 2011, minutes state:

> Mayor asked board if they wanted to take a tough ground and try and get more money and take a chance on them not having a transfer station and not having a scale for the police department or do we want to take something which is better than nothing and have them in the town and deal with the next step. C4383.

On October 9, 2012, the Village attorney presented information regarding the host agreement for the transfer station. C4389. The minutes reflect the Village Board discussed what had been explained and they do not want to "push too far and end up losing everything." *Id*. The consensus of the Village Board was that the attorney's proposal was fair. *Id*. On October 16, 2012, the Village Board approved the host agreement. C4395. The agreement took two years to complete. C4394.

The host agreement includes provisions regarding what type of waste is authorized to be received at the facility as well as fees to be paid to the Village. C4630-31. The host agreement also includes record requirements, control measures, and a section called "application." C46335-40. The section entitled application includes the following:

> The Village has not, by entering into this Agreement with the Company [Groot] predetermined whether it will approve, approve with conditions, or disapprove any Application, and has not pre-judged whether Company [Groot] and the proposed Transfer Facility will meet the criteria for approval under Section 39.2 of the Act. C4640.

The provision goes on to require the Village to review the application pursuant to Section 39.2 of the Act (415 ILCS 5/39.2 (2012)). *Id*. The Village shall conduct a pre-review if requested by Groot and Groot will pay the costs for siting. *Id*.

On March 12, 2013, the Village Board counsel informed the Village Board that changes to the host agreement were needed for clarification. C4423. Specifically Lake County sought clarification of the host agreement. *Id*. On April 16, 2013, an addendum was approved to the host agreement. C4656. The addendum notes that a host agreement exists between Groot and Lake County, and the Village desires its host agreement be consistent with Lake County's agreement. C4656-59. The addendum also addressed the fees to be paid to the Village and noted that a host agreement was negotiated.

Village Solid Waste Management Plan and Landfill Siting Ordinance

On November 6, 2012, the Village Board adopted two ordinances relating to siting of the transfer facility. C04400-01. The first, ordinance 12-13 is a solid waste management plan. C02473-90. The solid waste management plan notes that on February 1, 2013, Groot will provide residential collection for waste in the Village. C02483. Along with other directives such as encouraging recycling, the solid waste management plan calls for the development of a transfer station. C02485-86. The solid waste management plan notes that Groot filed a development application with the Illinois Environmental Protection Agency requesting a permit to develop a construction and demolition debris processing facility. C2488. Groot also indicated that it may consider a transfer station. *Id*.

Also on November 6, 2012, the Village Board adopted ordinance 12-14. C04400; C02459-70. The ordinance included provisions for a filing fee, content and filing of the application and procedures subsequent to filing. C02459-65. The ordinance provides that the Hearing Officer will preside over the hearing and make rulings on evidence in a fundamentally fair manner. C02465. The Hearing Officer will also "prepare proposed findings of fact and conclusion of law" at the close of the public hearing. *Id*. The ordinance specifically allows the Village to, after deliberation, "adopt, in whole or in part, the findings of fact and conclusion of law of any Party or the Hearing Officer." C02468.

On August 6, 2013, the Village Board adopted an ordinance repealing the solid waste management plan approved in 2012, and replacing that plan with the 2009 solid waste management plan adopted by Lake County. C04471; C02491-94. The minutes indicate that the Village's solid waste management plan was repealed to bring the "Village back into alignment with the rest of the county." C04471.

Meeting Minutes

The meeting minutes from the Village Board include several other reports or discussion regarding Groot. *See generally* C04385, C04401, and C04410. For example, on February 5, 2013[1], the Village Board received a report from its attorney that Groot is required by SWALCO to give a presentation on transfer stations. C04419. The attorney expressed concern that the presentation could complicate the siting hearing. *Id*. In order to satisfy SWALCO and maintain neutrality, the meeting should be held, but trustees should not attend the meeting. *Id*. At that same Village Board meeting, the mayor "stated that Shaw is going to put on a presentation for Round Lake and Hainesville on the 16th of February. Attorney recommends that trustees not attend this meeting." *Id*.

Also on April 16, 2013, during public discussion, a trustee from Round Lake expressed opposition to Groot's transfer station. C04427. The trustee stated that Round Lake would like to talk to the Village Board, but understood that the Village Board would not. *Id*. The Village attorney explained that he advised the Village Board not to discuss the transfer station. *Id*.

On June 11, 2013, Ms. Lucassen mentioned that Groot would be filing the application and notifying residents. C4438. On June 18, 2013, the Village Board approved the hiring of experts for the Village in the siting process, specifically Dale J. Kleszynski and Kevin Finn. C4446.

Glenn Sechen and Dale J. Kleszynski

Mr. Sechen was the attorney representing the Village. C02497. Mr. Kleszynski was hired at Mr. Sechen's behest. C04446. Mr. Kleszynski was hired as an expert on the real estate impact of the proposed transfer station, and to provide a report and testimony. *Id*.; C02437.

Mr. Kleszynski testified that from the time he received the application until the completion of his assignment, Mr. Kleszynski had "probably" ten conversations with Mr. Sechen, including the directions regarding the assignment. C03742.062. After the completion of the draft report, Mr. Kleszynski received comments from Mr. Sechen related to the conclusions in the report; however, the draft report did include Mr. Kleszynski's independent conclusions. C03742.063. Mr. Kleszynski testified that the report was in compliance with the Uniform Standards of Professional Appraisal Practice and the Code of Ethics of the Appraisal Institute. C03742.064. Mr. Sechen did ask Mr. Kleszynski to expand his review to an additional report and offer an independent opinion. C03742.066-67. Mr. Sechen noted that Mr. Kleszynski had formulated his own opinion and asked if Mr. Kleszynski was okay with that. C03742.067-68.

[1] This is not the same meeting that Ms. Wagner testified to attending.

Mr. Kleszynski concedes that the Village is his client; however he stated:

> I am speak [sic] on behalf of Dale Kleszynski as a reviewer and appraiser who was given a professional assignment in order to determine whether or not the person whose work I reviewed met the standards of professional practice and formulated a credible opinion. I'm talking on this issue based on my work and not on behalf of anyone else. C03742.069.

Mr. Kleszynski took issue with questions that indicated he was "acting on behalf" of the Village; repeatedly stating he developed his opinion independently. C03742.069-74. When asked if Mr. Sechen had ever told Mr. Kleszynski that the draft reports Mr. Sechen reviewed "were not consistent" with the needs of the Village, Mr. Kleszynski indicated that such a conversation never occurred. C03742.87.

During the course of the hearing on siting the transfer station, Mr. Sechen asked a series of questions to John Thorsen, a witness on behalf of TCH. Mr. Sechen asked the following series of questions:

> By Mr. Sechen:
>
> Q. Let me just simply ask this, do you take issue with some portion of Lake County finding it necessary or prudent, if you will, to make a business decision to site a landfill? C03218
>
> Q. Do you take issue with any portion of Lake County making a business decision to site a transfer station? C03219
>
> Q. So then you would have no issue with Round Lake, the Village of Round Lake, my client, Round Lake Park, I'm sorry and its hauler finding it prudent, if they do to site a transfer station? *Id*.
>
> Q. Okay. Not the same question, Mr. Thorsen, do you take issue with the Village of Round Lake Park and its hauler finding it necessary, if they do, to site a transfer station whatever business reason they may have? C03220.

In response to these questions, particularly the last, the attorney for Lake County objected stating: "I didn't know that the Village was an applicant in this case." *Id*. Mr. Blazer, the attorney for TCH then indicated that if Mr. Sechen was saying that the Village and Groot had already decided to site the transfer station, "then he had raised a dramatically different issue in this case." C03221.

Hearing Officer Authority

On July 12, 2013, the Village Board voted to hire Phillip A. Leutkehans as Hearing Officer for the transfer station siting hearings. C04459. As required by the ordinance, Mr. Leutkehans provided the Village Board with findings and recommendations. C04355.032-.077.

Hearings commenced on September 23, 2013, and after the hearing ended, public comments were accepted. C04355.034; 4373-81. After the time for public comments the parties were allowed seven days to file responses. C04355.034; C04048-4355.31.

Mr. Leutkehans stated that in preparing the findings and recommendations, he reviewed applicable law, public comments on file, transcripts from the hearings, exhibits entered, the application, and briefs filed. C04355.036. Mr. Leutkehans noted that because there had been conflicting testimony in some cases, he was "required to make credibility determinations about various witnesses." *Id*. Mr. Leutkehans made numerous findings on credibility. *See e.g.* C04355.44, C04355.50, C04355.52. Mr. Leutkehans also commented that he did not find the actions of Mr. Sechen in the hearing to have tainted the process or created any unfairness. C04355.038.

Village Board Deliberations and Findings

The Village Board deliberated on each of the nine criteria, including discussing the testimony from competing witnesses. The Village Board then took votes on each criterion. *See e.g.* C3890-91, 3916-17,3923-24. After voting on each of the criteria and discussing conditions, the Village Board attorney indicated that the Village Board had not made "specific findings of fact". C04000. The Village Board attorney asked if the Village Board wanted him to draft findings or to use the "Hearing Officer's [Mr. Leutkehans] findings of fact or go specifically with any other," findings of facts prepared by participants including Mr. Sechen or Groot's . . .". *Id*. The Village Board adopted a motion directing the attorney to draft a resolution using Mr. Leutkehans' findings of fact and discussion of law. *Id*.; 4005-6.

Lawrence Joel Cohen

Mr. Cohen is a corporate officer for TCH, who lives a half an hour away from the proposed transfer station. He was not, however, testifying as a corporate officer for TCH. Groot Exh. 1 Attach A at 1; TCH Exh. 74 at 2. Groot Exh. 1 Attach A at 4, 6. There were no meetings with the residents of TCH about the application of Groot and only one person from TCH attended the hearings as far as Mr. Cohen knew. *Id*. at 5. Counsel was hired, and they were at the hearings. *Id*. at 6. TCH called witnesses, presented evidence and cross-examined witnesses. *Id*. at 6-7.

Mr. Cohen did not speak to any of the Village Board members; however he had "heard before the hearing that some people who knew other people said that" the siting of the transfer station was a done deal. Groot Exh. 1 Attach A at 9. Mr. Cohen's basis for believing a conspiracy existed was the culmination of separate actions leading to Groot "getting what they want". *Id*. Mr. Cohen had only heard "rumors". *Id*. at 12.

Mr. Cohen testified that the meeting minutes and conduct of the hearing, including Mr. Sechen's questioning of witnesses, convinced him that the decision was predetermined. Groot Exh. 1 Attach A at 12-13

Board Hearing

The Board's hearing consisted predominately of the admission of exhibits, described above. However, testimony was heard on one exhibit offered into the record. Mr. Kleszynski testified regarding an email from Mr. Sechen to the Village Board attorney. Tr. at 165-70. Mr. Kleszynski was the subject of the email that stated:

> I found the guy I was looking for. I have worked with him in the past but just couldn't find him. .... Dale is really good and he knows how to testify. .... Exh. 58.

Mr. Kleszynski indicated that he had worked on a case, earlier in his career that Mr. Sechen had also worked on. Tr. at 166-67.

TCH'S ARGUMENTS

Introduction

TCH notes that the Village Board consists of six members. Br. at 1. TCH alleges that three members (Jean McCue, Robert Cerretti, and Donna Wagner) vote together, forming a "voting bloc". *Id.* When there is a tie between the members, the Mayor, Linda Lucassen, will vote; TCH argues that she usually votes with the "voting bloc". *Id.* TCH offers that the "voting bloc" voted in favor of Groot's siting application and Groot's transfer station was approved. *Id.* at 2. According to another Village Board member, Candace Kenyon, Ms. McCue predetermined her decision since she wanted the transfer station in order to gain more revenue for the Village. *Id.* According to TCH, there are two main reasons the Village Board's determination to grant the transfer station was erroneous. *Id.* First, TCH alleges that before the hearing on the siting, the "voting bloc" predetermined to vote in favor of the transfer station. *Id.* Second, TCH argues that the Village Board's findings regarding certain siting criteria were contrary to the manifest weight of the evidence. *Id.* The first issue will be discussed below, followed by a summary of the second issue.

Predisposition in Favor of Siting Application

TCH first cites Section 40.1 of the Act (415 ILCS 5/40.1 (2012)), which requires siting proceedings to be conducted according to the requirements of fundamental fairness. *Id.* According to TCH, there was a breach of fundamental fairness when the "voting bloc" allegedly predetermined to vote in favor of Groot and its transfer station. *Id.* at 3. TCH also alleges that the Village Board failed to comply with an obligation requiring the Village Board to assess and determine the credibility of witnesses. *Id.*

The Decision Was Made Before the Application Was Filed

TCH recounts a series of events that it alleges prove that the "voting bloc" made a decision to vote for the transfer station before the hearing. First, TCH notes that Ms. McCue and Mr. Brandsma met in September 2008 regarding McCue's interest in putting a transfer station in

town. Br. at 3. Two weeks later, Shaw Environmental, on behalf of Groot, gave a presentation to the Village Board regarding the transfer station. *Id.* During that presentation, TCH claims Shaw Environmental indicated that a location for a transfer station had already been found. *Id.* Groot also held an open house in May 2010, presenting a "grand plan" for a transfer station in an industrial subdivision purchased in 2008. *Id.* at 4.

TCH claims that the transfer station was part of Groot's intertwined plans for its activities in the Village, along with a truck terminal and a construction and demolition debris recycling center. Br. at 4. TCH maintains that Groot decided to focus on the transfer station after securing property for the other two facilities in April 2009. *Id.* at 5. TCH notes that Mr. Brandsma discussed how the property purchased for the truck terminal was conditioned on obtaining appropriate zoning approvals from the Village. *Id.* Groot's purchase of the property for the transfer station was not conditioned and TCH asserts that this is evidence that the Village's acceptance of the transfer station was predetermined. *Id.*

TCH maintains that there are even more explicit examples of the Village Board's predetermination. Br. at 5. One such example involves comments by Ms. McCue at a December 13, 2011, Village Board meeting that include statements that referred to the siting of the transfer station. *Id*., citing 04383. TCH argues that another example is that in October 2012, the Village Board adopted a host agreement between the Village and Groot regarding the transfer station. *Id.* at 6. And then, TCH points out that a month later in November 2012, the Village adopted its own local solid waste plan despite never having one before. *Id.* at 7. Moreover, TCH claims that the plan was based on input from Groot's transfer station consultant, Shaw Environmental. *Id.* at 8.

TCH argues that Groot's influence did not end with the solid waste management plan. Br. at 8. TCH offers that in October 2012, the Village Board discussed its local pollution control facility siting ordinance that would govern Groot's siting application. TCH claims that Groot's attorneys were "consulted" on the siting ordinance and such a practice is uncommon. *Id.* TCH continues arguing that Ms. McCue had a "series of communications" with Shaw Environmental in order to correct a "misunderstanding" with the Village residents concerning a transfer station. *Id*.

TCH claims that the bias of the Village Board was evident at the siting hearing when the Village proceeded with Groot for approval of the transfer station as an undisclosed co-applicant. Br. at 9. TCH based this claim on statements made by Mr. Sechen at the siting hearing. As a reference to a case where the courts have discussed co-applicants, TCH quotes E & E Hauling:

> We note that the District and E & E became co-applicants for site location approval before the responsibility to decide on their application was transferred by statute to the County Board. We would be presented with a different case had the District entered into an agreement and application after the statutory change—i.e., after District commissioners were aware that they would later, as County Board members, decide on the application. To invoke the rule of necessity under such circumstances would create genuine injustice and would effectively foster, not merely tolerate, biased adjudication. In such a situation the applicants' right to a hearing and the County Board's obligation to decide would be wholly artificial

> and unworthy of respect. We would not be willing to allow the rule of necessity to facilitate deliberate manipulation of the permit procedure in a way that could empty that procedure of its intended meaning. E & E Hauling, 116 Ill. App. 3d at 603.

TCH argues that "confirming" the Village Board's bias is Mr. Kleszynski's testimony and report. Br. at 10. TCH asserts that Mr. Kleszynski admitted to being governed by the Uniform Standards of Professional Appraisal Practice and that it was a violation of those practices to advocate a particular position. *Id*. However, TCH asserts that Mr. Kleszynski had been directed by the Village's attorney to support Groot's application. *Id*. at 11.

The "Voting Bloc" Allowed the Hearing Officer to Usurp Its Authority

TCH argues that the law is well-settled in requiring the hearing body to assess the credibility of witnesses. Br. at 11, citing Tate, 188 Ill. App. 3d at 1022; Environmentally Concerned Citizens Organization v. Landfill, L.L. C., PCB 98-98, slip op. at 2 (May 7, 1998). TCH claims that the "voting bloc" failed to determine the credibility of the witnesses due to its predetermination. *Id.* at 12. TCH asserts that the "voting bloc" instead allowed the Hearing Officer to make determinations concerning the witnesses, despite the siting ordinance requiring the Village Board to determine credibility. *Id.* Furthermore, during deliberations, TCH claims that the Village Board was reminded that it needed to make a determination on the credibility of witnesses, but failed to do so. *Id*.

Village Board's Findings Contrary to the Manifest Weight of Evidence

TCH argues that siting approval may only be granted if the applicant proves that the proposed facility meets the nine statutory criteria in Section 39.2 of the Act (415 ILCS 5/39.2 (2012). Br. at 13, citing Town & Country, 225 Ill. 2d at 117. Further, TCH maintains that the siting authority may not disregard the unrebutted testimony on the substantive siting criteria. *Id*., citing Industrial Fuels & Resources/Illinois, Inc. v. Illinois Pollution Control Board, 227 Ill. App. 3d 533, 548 (1st Dist. 1992); CDT Landfill Corporation v. City of Joliet, PCB 98-60, slip op. at 12-13, 18-19, 21 (Mar. 5, 1998), *aff'd* CDT Landfill Corporation v. PCB, 305 Ill. App. 3d 1119 (3rd Dist.), *cert denied* 185 Ill. 2d 619 (1999). TCH asserts that the "voting bloc" adopted Mr. Leutkehan's recommendations and therefore an assessment of his review of the evidence must be analyzed in order to determine the proper outcome for each challenged criterion. Br. at 13. A summary of each criterion is described below.

Criterion I (Need)

TCH argues that a siting applicant need not demonstrate absolute necessity, but the siting applicant must "demonstrate an urgent need for the new facility as well as the reasonable convenience of establishing it." Br. at 13, citing Fox Moraine, 2011 IL App (2d) 100017 ¶110; Waste Management, 175 Ill. App. 3d at 1031. Further, TCH states the siting applicant must demonstrate that the facility is necessary based on the waste needs of the area, "including consideration of its waste production and disposal capabilities." *Id.*

Groot's witness, Ms. Seibert gave evidence supporting the necessity of the transfer station. Br. at 14. Ms. Seibert testified that the service area faced an immediate transfer capacity deficit; however, TCH claims she disregarded the disposal capacities of the two landfills in Lake County (Zion and Countryside landfills). *Id.* TCH asserts that the written report by Ms. Seibert confirmed that the remaining capacity of the two landfills did not pose an immediate disposal capacity deficit, with one having a remaining capacity of nine years and the other having a remaining capacity of twenty years. *Id.* at 15.

TCH opines that Ms. Seibert also acknowledged that both landfills were located at a convenient distance for the transport of waste. Br. at 17. She reported that hauling directly to a landfill becomes more expensive than to a transfer station, if the landfill is more than 18 miles away. *Id.* TCH contends that both landfills within Lake County are less than 18 miles away. *Id.* They also claim that the Winnebago landfill, where allegedly Groot would take waste from its transfer station, is over 60 miles away. *Id.*

TCH presented Mr. Thorsen as their witness. Br. at 18. TCH notes that Mr. Thorsen independently confirmed that there was plenty of landfill space until 2027, using the data in the siting application. *Id.* at 19. TCH reminds that Mr. Thorsen opined that there was no need for a siting a transfer station until 2025, given the capacity of the Lake County landfills. *Id.*

TCH claims that to demonstrate that there is an urgent need for landfill space, Groot relied on "planning" and specifically an assertion that Lake County desires to have "20 years of capacity available" at any given time. Br. at 19-20, citing C01337, 01344. However, TCH argues that this recommendation was required in a former Lake County solid waste management plan, not the current plan. *Id.* at 21.

Criterion II (Designed and Located to Protect Public Health, Safety and Welfare)

TCH gives two major reasons why the transfer station does not meet this criterion. First, TCH claims that Groot's witness, Mr. Moose, is not a credible witness. Br. at 24. Second, TCH argues that Groot ignores accepted principles of transfer design and operations and fails to protect the public welfare. *Id.* at 27. An analysis of each reason is detailed below.

Credibility

TCH maintains that the Village Board's failure to make a credibility determination "looms largest with respect to criterion II". Br. at 23, citing Fox Moraine, 2011 IL App (2d) 100017 ¶102; File, 219 Ill. App. 3d at 907. TCH opines that credibility of expert witnesses is a significant fact in assessing the siting applicant's compliance with criterion II. *Id.*

TCH asserts that Mr. Moose was not a credible witness and in at least two previous siting proceedings, Mr. Moose's testimony was the focus for denial of siting based on the failure to meet criterion II. Br. at 23-24. TCH further asserts that Mr. Moose provided "ample evidence" that he was dishonest. Br. at 24. Specifically, TCH maintains that Mr. Moose was dishonest in claiming to be unaware of where the waste from the transfer station would go. *Id.* TCH argues that Mr. Moose claimed in his testimony that the waste from the transfer station would go to an

unspecified landfill and stated that he was unaware of an agreement between Groot and the Winnebago landfill. *Id.* TCH claims that Mr. Werthmann, who testified regarding criterion VI for Groot, provided contradictory statements by Mr. Moose. TCH also claims that Mr. Moose participated in the Winnebago Landfill siting and is familiar with the host agreement for that landfill.

TCH asserts that Mr. Moose eventually admitted that Groot and the Winnebago landfill had an agreement. Br. at 25. TCH argues that Mr. Moose "told" Mr. Werthmann to use Winnebago Landfill as the destination for trucks leaving the proposed transfer facility. *Id*. TCH offers that at the end of Mr. Moose's testimony, he "confirmed that Groot" has an agreement with the Winnebago Landfill. *Id*.

TCH also claims that Mr. Moose misrepresented the nature of the waste accepted. Br. at 26. TCH asserts that Mr. Moose stated that the transfer station would not accept food waste although he noted it would accept municipal waste. *Id.* TCH notes that municipal waste encompasses food waste. *Id.* at 27.

Design

TCH argues that Groot ignored the accepted principles of transfer design and operations and fails to protect the public welfare. Br. at 27. Specifically, the issue of odor became the focus of the hearing and even Mr. Moose concedes that garbage generates an odor. *Id*. TCH argues that the unrebutted evidence is that the proposed transfer station is not designed to be state of the art. *Id*.

TCH notes that the design of the proposed facility will allow output air from the transfer station not to be filtered. Br. at 28. The air will be discharged from the roof with no treatment. *Id.* Mr. McGinley, TCH's odor expert, believes that the transfer station will not prevent garbage odors from passing into the community. *Id.* at 30. TCH argues that Mr. McGinley's opinion is based on current state of the art transfer station design. *Id*.

TCH maintains that there are ways to reduce odors both physically and operationally. Br. at 30, citing C01424-88. TCH asserts that Groot will only partially implement odor control measures and those partial controls are inadequate. Br. at 31. Specifically, TCH opines that without scrubbers the air and odor will be exhausted from the top of the transfer station into the community. *Id*.

Criterion III (Minimize Incompatibility and Impact on Property Values)

TCH argues that the standard applicable to criterion III is well settled, quoting File, 219 Ill. App. 3d at 907:

> This criterion requires an applicant to demonstrate more than minimal efforts to reduce the [facility's] incompatibility. An applicant must demonstrate that it has done or will do what is reasonably feasible to minimize incompatibility. Waste Management of Illinois, Inc. v. PCB, 123 Ill. App. 3d 1075, 1090, 426, 463

N.E.2d 969, 980 (2nd Dist. 1984). Furthermore, an applicant should not be able to establish compatibility based upon a preexisting facility. Waste Management of Illinois, 123 Ill. App. 3d at 1088; Br. at 32.

TCH claims that Groot's expert, Mr. Lannert, did not properly assess the character of the surrounding area. *Id.* at 33. TCH notes that Mr. Lannert studied over 2,200 acres of land within a one-mile radius of the transfer station to examine the impact on surrounding property. *Id.* Lannert stated that his analysis confirmed that 59% of the surrounding area was open space and industrial land. *Id.* at 34. TCH argues that Mr. Lannert failed to consider that residential use comprises 37% of the surrounding area. *Id.* TCH notes that Mr. Lannert even admitted that residential uses were integrated within the study area. Furthermore, TCH asserts that even Groot's appraiser, Dr. Poletti, confirmed the surrounding area was mostly for commercial and residential use. *Id.* at 35. TCH maintains that Mr. Lannert "fundamentally mischaracterized the character of the surrounding area in order to create a false 'basis' for his opinion." *Id*. TCH asserts that Mr. Lannert based his opinion on "impermissible speculation regarding trends of development" in the area. Br. at 35, referring to C02939 and citing Tate, 188 Ill. App. 3d 944.

TCH also claims that Dr. Poletti's opinion was flawed since he relied on Mr. Lannert's analysis. Br. at 36.

TCH's appraiser, Mr. MaRous, confirmed that Timber Creek is a well-developed residential community and is well established in the area. *Id*. Mr. MaRous stated that the transfer station classified as a heavy industrial use and that it is uncommon for heavy industrial uses to be integrated with residential uses. *Id.* at 37. Mr. MaRous characterized the area as having 92% open space and residential with only 4% being industrial. *Id*. TCH asserts that based on the "actual character of the surrounding community", Mr. MaRous opined that the impact on the surrounding property had not been minimized. *Id*. TCH asserts that the testimony of Mr. MaRous was unrebutted. Br. at 38.

Criterion VI (Minimize Impact on Existing Traffic)

TCH alleges that Section 39.2(a)(vi) of the Act (415 ILCS 5/39.2(a)(vi) (2012)) requires the siting applicant to analyze the traffic patterns "to or from the facility" to minimize the impact on the existing traffic flow. Br. at 38. However, TCH claims that Groot's attorneys characterized criterion VI as requiring only an analysis of routes going in and out of the facility. *Id*. TCH argues that Groot's interpretation limits the express language of Section 39.2(a)(vi) of the Act (415 ILCS 5/39.2(a)(vi) (2012)) and is contrary to case law. *Id*.

TCH argues that it is important to recognize that criterion VI does not limit the scope to the immediate area; but rather the traffic patterns to or from the facility. Br. at 39. Groot's witness, Mr. Werthman, conducted an analysis to determine the ability of intersections near the facility to accommodate the increased traffic flow. *Id.* He found that 100% of the 24-ton transfer trailers and 35% of the collection vehicles would use Illinois Route 120. *Id.* TCH asserts that Mr. Werthmann claimed to not know which routes would be used by transfer trailers going to and from the Winnebago landfill. *Id.*

TCH contends that Mr. Werthman's analysis was flawed since he only identified the potential routes in the immediate area of the facility and did not consider how the trucks would get to and from these routes. Br. at 40. Furthermore, TCH claimed that Mr. Werthmann provided no information regarding the "physical and operating characteristics" of that portion of the roadway. *Id*. at 41. TCH's expert, Mr. Coulter, claimed that Groot lacked a showing of compliance with criterion VI based on the absence of any routing information beyond the immediate vicinity of the proposed facility. *Id*.

Criterion VIII (Consistent with the Solid Waste Management Plan)

TCH notes that the Lake County solid waste management plan states an intention to manage as much of Lake County's waste as feasible in Lake County. Br. at 42. TCH claims that the operating plan for the proposed transfer station calls for waste to be disposed of at the Winnebago landfill. *Id*. Winnebago landfill did not enter into a host agreement with SWALCO. *Id*. Furthermore, it has not provided for a capacity guarantee nor have they agreed to a host fee. *Id.* Therefore, TCH claims that the Groot's proposed transfer station is not in compliance with the Lake County solid waste management plan. *Id.* Additionally, TCH argues that because the solid waste management plan requires the facilities to utilize proven technology and minimize emissions, and Groot is not implementing modern odor control measures, the proposed facility is contrary to the solid waste management plan. *Id.* at 43.

Conclusion

Due to the "voting bloc's" predetermination and its failure to make a credibility determination, coupled with the insufficient evidence concerning the criteria, TCH argues the "voting bloc's" decision should be reversed. Br. at 43.

GROOT'S ARGUMENTS

Introduction

Groot notes that TCH alleges that the siting approval violated principles of fundamental fairness, and that the Village Board's siting approval is supported by the evidence. GResp. at 1. Groot asserts that TCH failed to meet the burden of proof. Groot argues that the Village Board's decision was supported by the manifest weight of the evidence and the procedures used by the Village Board complied with the principles of fundamental fairness. *Id.* Groot asks the Board to uphold the Village Board's decision and deny TCH's petition for review. *Id.* at 2.

Standard of Review

Groot argues that in reviewing the siting authority's decision, the Board should consider the Village Board's written decision and reasons, the siting hearing transcript, and the fundamental fairness of the siting proceeding. GResp. at 2. Groot maintains that a siting authority's decision will be overturned only if it is against the manifest weight of the evidence. *Id.* It must be "clearly evident from the record that the siting authority should have denied the siting application." *Id.* Groot recognizes that the Board does not reweigh the evidence, and even

if there is evidence supporting a different conclusion, the Board can not substitute its judgment for the siting authority's judgment. *Id.* at 3.

Groot maintains that TCH must show that it preserved its claim regarding fundamental fairness by raising it during the siting proceeding. GResp. at 3. Groot notes that it is generally assumed that members of a siting authority have made fair and objective decisions unless TCH presents "clear and convincing evidence" of a violation of principles of fundamental fairness. *Id.* Furthermore, this evidence must be specific and show actual bias or pre-judgment. *Id.*

Groot cites to Stop the Mega-Dump, 2012 IL App (2d) 110579 (2012) to support its position. *Id.* at 4. In that case, the Board decided that sworn testimony that the decisionmakers "voted solely on the basis of the evidence" is more than enough to sustain the presumption that the decisionmaker acted in good faith. *Id.* Groot also notes that very few cases have actually overturned a siting authority's decision on the basis of fundamental fairness. *Id.* For example, in E & E Hauling, 116 Ill. App. 3d 586, the Board and reviewing courts found that the proceedings did not comply with fundamental fairness; however, the court upheld the siting approval because the adjudicative facts in the record showed that the applicant had met the statutory criteria. *Id.* Groot also mentions that the facts of E & E Hauling were sufficient to show a violation of fundamental fairness was egregious. *Id.* In contrast, in Fox Moraine, 2011 IL App (2d) 100017, several members of the siting authority were elected in the midst of siting proceedings and ran campaigns where they publicly opposed the landfill. *Id.* The Appellate Court found that there was insufficient evidence of prejudgment or bias and upheld the siting authority's decision. *Id.*

Proceedings Were Fundamental Fair

In arguing that the proceedings were fundamentally fair, Groot advances two arguments. First Groot argues that TCH waived its claim of fundamental unfairness. Next, Groot argues that TCH failed to establish that the Village Board had predetermined how it would rule on the siting application. The Board will discuss each in turn below.

TCH Waived Claim of Fundamental Unfairness

Groot argues that issues of bias or lack of fundamental fairness must be "raised promptly in the original siting proceeding" or they are forfeited. GResp. at 5. Groot claims that TCH did not introduce any facts into the record that made any specific claim regarding its allegations of fundamental fairness in the original siting proceeding. Further, Groot maintains that TCH did not do so in a timely or operative fashion. *Id.* Groot argues that TCH has not introduced any additional facts into the record showing that it preserved its fundamental fairness claim. *Id.* Therefore, Groot opines that TCH did not properly preserve its claim and, as a matter of law, Groot claims the Board should disregard TCH's arguments regarding fundamental fairness. *Id.*

Groot notes that TCH claims that it did not make a motion regarding fundamental fairness because "such a motion was not possible." GResp. at 6. However, Groot notes that even if TCH did not have the opportunity to make a formal motion regarding fundamental fairness, it still must have preserved its claim. *Id.* at 6-7. Groot cites to Fox Moraine where the court noted that even if the appellant lacked a formal mechanism for objection, it could have

written a motion during the public commentary period or at the deliberation meeting. *Id.* at 7; 2011 IL App (2d) 100017. Groot argues that since the TCH failed to do either, its claim was forfeited. *Id.*

Groot claims that neither the documents in the siting record nor those introduced by TCH on appeal show that it properly raised its claim regarding fundamental fairness during the siting hearing. GResp. at 7. Groot believes that a general statement by TCH's counsel that "there has been a predetermining of this application" and that "the rules of fundamental fairness have been violated" is not sufficient to have preserved the claim. *Id.* Groot cites to E & E Hauling where the Appellate Court noted that brief and generalized comments by citizens in that proceeding were insufficient to raise issues of bias and prejudice. *Id.*; 116 Ill. App. 3d 586. Groot argues that the comments made need to have been specific to TCH's actual allegations regarding fundamental fairness and not a broad and general reference. *Id.*

Groot alleges that since TCH made no such specific objection or allegation during the hearing and it has not presented any evidence, TCH's claim regarding fundamental fairness should be denied. GResp. at 8.

Village Board Did Not Predetermine the Sitting Application

Groot believes that even if the Board determines that TCH's generalized comments were sufficient to preserve its fundamental fairness claim, TCH has not met its burden to show that the proceedings before the Village Board were fundamentally unfair. *Id.* Groot notes that TCH argues that the Village Board was biased and prejudged Groot's application. GResp. at 9. Groot claims that TCH relies primarily on a series of meeting minutes, some of which do not pertain to the transfer station. *Id.* Groot argues that TCH is claiming that these meeting minutes prove that the Village Board decided to grant Groot's application years before it was actually filed. *Id.* However, Groot asserts that the documents at most show that Groot began to contemplate a transfer station in 2008. *Id.* Instead of showing bad intent by the Village Board, the documents show that Groot exercised forethought and good business judgment. *Id.* at 10. Groot notes that its business decisions have no bearing on whether the siting authority complied with the requirements of fundamental fairness. *Id.*

Groot also notes that contacts between the applicant and the siting authority before the application is filed are irrelevant to the question of whether the siting proceedings were conducted in an unfair manner. GResp. at 10. Thus, the meeting minutes cited by TCH, that are minutes to meetings that occurred before the siting application was filed, are irrelevant to whether the siting proceeding was fundamentally fair. *Id.*

Groot claims that because TCH lacks any actual proof of bias or predetermination, it turns to mischaracterizations of various hearing and deposition testimony to support its claims. GResp. at 10. Groot notes that board member Ms. Kenyon testified that she never heard any board member declare how he or she would vote prior to the actual vote. *Id.* at 11. Further, another member, Ms. McCue, testified that no Village Board member ever said anything to her that would suggest that they failed to keep an open mind. *Id.* Lastly, the mayor, Ms. Lucassen, had no idea she would be called to vote. Groot opines that this further shows that neither Ms.

Lucassen nor the Village Board had predetermined how they would vote on the siting application. *Id.* at 12. Groot claims that TCH's argument is based on rumors and is not the type of specific evidence that is required here. *Id.* at 13.

Next, Groot claims that TCH's entire evidence related to the negotiation of the host agreement between Groot and the Village Board also does not rise to the level required to show a violation of fundamental fairness. GResp. at 13. Groot notes that Section 39.2 of the Act (415 ILCS 5/39.2 (2012)) allows for a host agreement to be entered into before a siting proceeding as long as the terms and conditions of the agreements are disclosed and made a part of the hearing record. *Id.* at 14. Further, Groot observes that the agreement explicitly states that it does not obligate the Village to grant siting approval. *Id.* Lastly, the Board and the Appellate Court have both found that the negotiation of a host agreement prior to a siting proceeding does not violate fundamental fairness. *Id.*, citing Stop the Mega-Dump, 2012 IL App (2d) 110579 ¶56-64; City of Kankakee, PCB 04-33, slip op. at 12.

Also, TCH attempts to prove a violation of fundamental fairness by accusing Groot's counsel of providing comments on the solid waste plan and siting ordinance. *Id.* Groot notes that the Village repealed the solid waste plan. GResp. at 14. Further, in County of Kankakee v. PCB, 396 Ill. App. 3d 1000, 1024, 955 N.E.2d 1 (3rd Dist. 2010), the Board decided that this action did not violate fundamental fairness. *Id.* at 15.

Moreover, Groot claims that TCH relies on a series of misrepresentations of hearing testimony and documents not admitted into evidence to prove that the Village and Groot were somehow co-applicants for the transfer station. GResp. at 15. Groot alleges that the hearing transcripts contradict TCH's allegations. *Id.* at 17. Further, Groot claims that TCH's reliance on E & E Hauling is misplaced. *Id.* Groot observes that the siting authority in that case was actually a co-applicant for siting approval. *Id.* Furthermore, the Appellate Court upheld the siting authority's grant of siting approval based on the facts in the record that supported a finding that the criteria had been satisfied. *Id.*

Finally, Groot claims that TCH's attempt to undermine the credibility of Mr. Kleszynski did not meet the standard required for a showing that the proceeding violated fundamental fairness. GResp. at 17. Groot alleges that the transcripts from the hearing in fact show that Kleszynski's opinion was based on his professional judgment and not dictated by the needs of any party. *Id.* at 17-18. Further, even if TCH was correct that Mr. Kleszynski was biased in favor of Groot, he was not a decisionmaker and thus the proceedings were not unfair. *Id.* at 18.

Village Board's Decision Not Against the Manifest Weight of the Evidence

Groot argues that the Village Board's decision was not against the manifest weight of the evidence and TCH has "essentially re-hashed its closing brief from the siting hearing." GResp. at 20. Groot maintains that TCH is attempting to have the Board reweigh the evidence presented at the siting hearing. *Id*. Groot asserts that TCH misrepresented testimony by Groot's experts; however, rather than correct all of those misrepresentations, Groot will demonstrate that the Village Board's decision was supported by the evidence. *Id*.

Groot argues that the re-weighing of evidence is not the province of the Board. GResp. at 20. Groot notes that testimony by experts was provided by both Groot and the Village. *Id*. Groot states: "'The credibility to be accorded the testimony of these witnesses is a matter to be determined by the hearing tribunal,' not the Board". *Id*., citing Tate, 188 Ill. App. 3d at 1026. Groot asserts that the Village Board was presented with competing opinions and evidence on some criteria, the Village Board weighed this evidence, and then determined that Groot had met the criteria for siting of a transfer station. *Id*.

Groot's specific arguments on each of the contested criteria will be summarized below.

Criterion I (Need)

Groot argues that the Village Board's decision that the proposed transfer station was necessary to accommodate the waste needs of the intended service area was not against the manifest weight of the evidence. GResp. at 20. Groot opines that "need" for a facility as described in criterion I, is established when the evidence shows the facility is "reasonably required" by the waste needs of the service area. *Id*., citing File, 219 Ill. App. 3d 897. Groot continues, noting that the needs analysis has been interpreted by the courts to require a showing that the facility is "expedient, or reasonably convenient". *Id*. at 21, citing Clutts v. Beasley, 185 Ill. App. 3d 543 (5th Dist. 1989); Tate, 188 Ill. App. 3d at 1023. Groot quotes Tate:

> Neither the Act nor case law suggests that need be determined by application of an arbitrary standard of life expectancy of existing disposal capacities. The better approach is to provide for consideration of other relevant factors such as future development of other disposal sites, projected changes in amounts of refuse generation within the service area, and expansion of current facilities. Tate, 188 Ill. App. 3d at 1023; *Id*.

Groot argues that Ms. Seibert's qualifications were not questioned by TCH, but rather, TCH "attempts to split hairs and mischaracterize" Ms. Seibert's testimony. GResp. at 21. Groot argues that Ms. Seibert's definition of "need" is not relevant; instead, the inquiry is whether the evidence in the record demonstrates that the facility is reasonably required by the waste needs of the service area. *Id*. Groot asserts that the record is clear that the evidence supports the Village Board's finding. *Id*.

Groot points to Ms. Seibert's testimony that the facility is necessary for the applicant's designated service area, which consists of Lake County. GResp. at 21. Groot notes that Ms. Seibert performed a needs analysis, including evaluating trends in waste management in the service area and in the Chicago Metropolitan area. *Id*. Ms. Seibert compared available transfer and disposal capacity with those trends. *Id*. Groot recites Ms. Seibert's testimony regarding Lake County historically seeking and acquiring 20 years of guaranteed disposal capacity for waste generated within Lake County borders. GResp. at 22. Groot notes that Ms. Seibert identified that Countryside will have less than five years capacity when the transfer station is ready and Zion's commitment to Lake County ends in 2017. Zion is scheduled to close 12 years after the proposed transfer station is ready. *Id*.

Groot notes that Ms. Seibert looked at population growth and development in Lake County as well. She stated that no transfer station currently operates in Lake County and the Lake County solid waste management plan includes transfer stations. GResp. at 22.

Groot challenges the testimony presented by Mr. Thorsen as he admitted he did not perform a needs analysis, and Mr. Thorsen has no experience in performing a needs analysis for a transfer station. GResp. at 23. Groot asserts that Mr. Thorsen conceded that there was not sufficient capacity to meet the 20 year needs of the area, and Mr. Thorsen's "only criticism" was that the landfills could presently meet the requirements of the service area. *Id*. Groot claims that Mr. Thorsen acknowledged: 1) that meeting the daily tonnage requirements is not the standard in Illinois for assessing need and 2) Countryside would be at capacity in five to eight years and Zion only had six years of commitment to Lake County. *Id*. at 23-24.

Groot argues that Mr. Thorsen agreed that it takes on average nine or more years to site a landfill, and it can take as long to site a transfer station. GResp. at 24. Groot claims that the Lake County transfer station will take seven years from planning to commencement. *Id*. Groot asserts that Mr. Thorsen does not dispute the need for the facility; instead, Mr. Thorsen questions the timing of the facility. *Id*.

Criterion II (Designed and Located to Protect Public Health, Safety and Welfare)

Groot argues that "there is no evidence in the record that the proposed transfer station will have a deleterious effect on public health, safety welfare, or property values of surrounding properties." GResp. at 25, quoting Tate, 188 Ill. App. 3d at 1025. Thus, Groot maintains the evidence supports the Village Board's decision that the proposed facility meets criterion II. *Id*.

Groot notes that Mr. Moose was called to testify on this criterion, and the Village Board weighed his credibility. GResp. at 25. Groot claims that TCH challenges Mr. Moose's credibility and because Mr. Moose was found to be credible by the Village Board, TCH's arguments must be disregarded. *Id*.

Groot recounts Mr. Moose's findings regarding the consistency with the law regarding location standards, residential setbacks, wetlands, archaeological and historic sites, endangered and threatened species, wild and scenic rivers, and proximity to airports. GResp. at 25. More specifically, Groot points to Mr. Moose's testimony that the nearest dwelling is over 1,000 feet away from the proposed facility, and the nearest residential zoning is 1,500 feet away. *Id*. Groot also recites Mr. Moose's explanations regarding the design and operation of the facility. *Id*. at 26.

Groot claims that Mr. Moose's testimony was largely unrebutted except for Mr. McGinley's testimony, which Groot moved to strike. GResp. at 27. The Hearing Officer admitted Mr. McGinley's testimony as to odor, and odor alone. *Id*. Groot asserts that Mr. McGinley's testimony was given little weight as he did not perform any specific study, model or analysis on the proposed facility. *Id*. Furthermore, Groot takes issue with Mr. McGinley failing to visit the proposed site or the surrounding sites. *Id*.

Groot asserts that Mr. McGinley did not recommend any specific equipment for the facility to aid in odor control. GResp. at 28. Groot argues that Mr. McGinley's testimony was speculative and complete conjecture. *Id*. Thus, Groot opines the Village Board properly found Mr. Moose's testimony more thorough and credible. *Id*.

Criterion III (Minimize Incompatibility and Impact on Property Values)

Groot notes that criterion III has two parts. GResp. at 28. First, is to ascertain if the facility is compatible with the surrounding area, so as to minimize the impact on the character of the surrounding area. *Id*. The second part is to ascertain if the facility is so located as to minimize impacts on surrounding property values. *Id*. Groot argues that the statue recognizes and accepts that some impact will occur; so the question is not whether there is any impact but whether the impact has been minimized. *Id*. at 28-29, citing Fairview, 198 Ill. App. 3d 541.

Groot details Mr. Lannert's testimony including his statements that the site's boundaries are protected from others by property owned by Groot industries, and the immediate surrounding area is industrial. GResp. at 29. Groot notes that Mr. Lannert indicated that the predominant land use in the vicinity of the proposed site is open space.

Groot notes that TCH challenges Mr. Lannert's characterization of the land use in the "immediate surrounding area" and TCH made the same arguments to the Village Board. GResp. at 30. Groot points to the Village Board findings, which note that Mr. Lannert looked at three different radii, a 1,000 feet, one-half mile, and one mile. *Id*. The findings by the Village Board note that within one-half mile only 27% of the parcels are residential and no residential parcels are within 1,000 feet. *Id*.

Groot asserts that Mr. Lannert's testimony was substantively unrebutted and the only other witness to testify on this topic was Mr. MaRous. GResp. at 30. Groot claims that Mr. MaRous did not dispute the factual representations made by Mr. Lannert, nor did he contradict any of Mr. Lannert's conclusion. *Id*. Groot argues that Mr. MaRous "opined without scientific or empirical support" that Mr. Lannert's work was insufficient to support the conclusions. *Id*. at 30-31. Groot maintains that Mr. MaRous agreed with Mr. Lannert on design features proposed to minimize the impact, including the automatic doors, landscaping and facility orientation. GResp. at 31.

Groot claims that Mr. Lannert's testimony was supported by Dr. Poletti and Mr. Kleszynski. GResp. at 31. Dr. Poletti testified on behalf of Groot concerning the second aspect of criterion III. *Id*. Dr. Poletti's work included visiting the area, looking at local property transactions near existing transfer stations and evaluating the effect of existing transfer stations on surrounding property values. *Id*. Groot argues that after an extensive evaluation, Dr. Poletti found the proposal was designed to minimize the impacts on surrounding property values. GResp. at 32.

Groot also notes that Mr. Kleszynski inspected the property and reviewed Dr. Poletti's work. GResp. at 32. He agreed with Dr. Poletti's conclusion. *Id*. at 33.

Groot points out that Mr. MaRous also testified concerning Dr. Poletti's work. GResp. at 33. Groot notes that Mr. MaRous testified that in his opinion Dr. Poletti's work was unreliable, because it did not consider the hours of operation or increased traffic. *Id*. However, Groot argues Mr. MaRous did not perform his own appraisal, and his assumption that the facility would operate 24 hours a day seven days a week with the doors open 20 hours a day is unsupported. *Id*. Further, Groot argues Mr. MaRous assumes that the facility will generate significant truck traffic without any evidence to support that assumption. *Id*.

Groot argues that Mr. MaRous was not asked and did not offer an opinion regarding the potential negative impact of the facility on surrounding property values. GResp. at 33. Therefore, Groot maintains that as to the second portion of criterion III, Groot's expert witness is unrebutted. *Id*.

Criterion VI (Minimize Impact on Existing Traffic)

Groot summarizes the testimony of Mr. Werthmann including detailing his three-phase approach to the study. GResp. at 34. Groot notes that Mr. Werthmann made recommendations for roadway improvements and operating restrictions on trucks. *Id*. Groot offered that Mr. Werthmann opined that with the recommended design features, roadway improvements, and truck restrictions, the proposed facility would meet criterion VI. GResp. at 35.

Groot states that the only other testimony on criterion VI was by Mr. Coulter. GResp. at 35. Groot asserts that Mr. Coulter agreed with much of Mr. Werthmann's report, and the only criticism was that Mr. Werthmann did not consider an arterial route that might be used by transfer trucks traveling to their ultimate destinations. *Id*.

Groot asserts that there is no law or duty to study all potential impacts to remote or arterial roads. GResp. at 36, citing Fox Moraine, 2011 IL App (2d) 100017 ¶116. Groot further argues that a finding that the facility will have no impact is not required, nor does the applicant need to demonstrate that impacts will be mitigated entirely. *Id*. Groot opines that the Fox Moraine court explicitly rejected Mr. Coulter's testimony and stated that the Act did not require elimination of all traffic problems. *Id*. Further, Groot argues that as in E & E Hauling, there is nothing in the record to demonstrate how the impact on existing traffic patterns could have been controlled more than proposed. *Id*., citing E & E Hauling, 116 Ill. App. 3d at 616.

Groot argues that in this case it is "indisputable" that the applicant, with Mr. Werthmann, designed the facility to limit access only off Porter Drive, near the existing Groot facility. GResp. at 36. Thus, Groot maintains the amount of traffic is minimized on Porter Drive. *Id*. Furthermore, Groot argues that the operating restrictions and roadway improvement will also result in minimal impact on the nearby intersections and roadway traffic. *Id*. Groot asserts that TCH had offered no evidence on how the impact could have been further minimized. *Id*. Groot opines that therefore, the Village Board's decision is supported by the evidence in the record and is not against the manifest weight of the evidence. *Id*. at 37.

Criterion VIII (Consistent with the Solid Waste Management Plan)

Groot argues that its evidence on criterion VIII is unrebutted. GResp. at 37. Groot notes that Mr. Moose testified that the facility is consistent with the Lake County solid waste management plan. *Id*. Groot recites provisions of the plan including the desire to require waste disposal in Lake County, where feasible, and the need to look at landfilling, transfer stations and alternative technologies to meet that goal. *Id*.

Groot asserts that TCH's argument that the proposed facility does not comply with the plan because the facility does not have a host agreement is not supported by the language of the Lake County solid waste management plan. GResp. at 37. Groot argues that the requirement for a host agreement, relied upon by TCH, applies to landfills not transfer stations. *Id*.

Conclusion

Groot argues that TCH has provided only the barest of evidence based on "assumptions and speculation" in support of TCH's claim that the proceedings were fundamentally unfair. GResp. at 38. Groot further argues that the fundamental fairness claims have been waived, as TCH provided no evidence that it preserved the arguments. *Id*. Even if not waived, Groot asserts that TCH's claim to fundamental unfairness must be denied. *Id*.

Groot maintains that the substantive expert testimony regarding the Section 39.2 criteria was unrebutted. GResp. at 38. Groot argues that where conflicting testimony was offered, the Village Board weighed the evidence and determined that Groot satisfied the criteria. Therefore, Groot argues the Village Board's siting decision should be affirmed. *Id*.

THE VILLAGE'S ARGUMENTS

Fundamental Fairness of Proceeding

Introduction

The Village argues that TCH bears the burden of proof. VResp. at 1. The Village continues by claiming TCH has failed to meet this burden, and argues that instead TCH merely creates a convoluted conspiracy theory. *Id.* The Village contends that their evidence defeats TCH's conspiracy theories. *Id.*at 1-2.

The Village first addresses TCH's argument that "voting blocs" exist, by arguing that politically elected bodies often have individuals who disagree politically. VResp. at 2. The Village continues by stating that TCH is incorrect in trying to exploit these political disagreements by framing them as predispositions for Groot's application. *Id.*

The Village notes that in an attempt to further their notion of conspiracy, TCH uses Ms. Kenyon's deposition testimony that she and Village trustee Patricia Williams, are usually on the opposing side of Bob Cerretti, Jean McCue, and Donna Wagner. VResp. at 2. However, the Village argues that in Ms. Kenyon's deposition, she disagreed with TCH's conspiracy theory and

made it clear Ms. Kenyon saw no evidence that anyone prejudged the Groot application. *Id.* at 2-3. The Village further notes that TCH is trying to use Ms. Kenyon, who voted against the Groot application, as their only supposed witness in this matter. However, Ms. Kenyon clearly stated she does not believe in this conspiracy, and thus TCH has incorrectly raised this claim. *Id.* at 3.

The Village then argues that Larry Cohn, President of TCH, did not personally know of, or see any evidence of a predisposition in favor of the Groot application. VResp. at 3-4. In deposition, Cohn testified that he knew of no evidence outside of the scope of communications with his attorney. *Id.*

The Village argues that TCH has failed to show any evidence to support their accusation of predisposition towards the Groot application from any member of the Village Board. VResp. at 4.

The Village Board Was Unbiased and Fairly Considered the Evidence

The Village argues that TCH improperly cites a Board order in this case [Timber Creek Homes, Inc. v. Village of Round Lake Park, PCB 14-99, slip op. at 3 (Apr. 3, 2014)]. VResp. at 4. This Board order limited TCH's discovery requests, and the Village argues TCH tried to use it to persuade the Board that pre-filing contacts equate to predisposition. *Id.* TCH listed numerous contacts that Village Board members had with Groot before the filing; however, the Village maintains many of them had nothing to do with the proposed transfer station. VResp. at 4. The Village then states that the members of a siting authority are presumed to have made their decisions in a fair and objective matter. VResp. at 4-5, citing Peoria Disposal, 385 Ill. App. 3d at 797; Land and Lakes, 319 Ill. App. 3d at 50; Stop the Mega-Dump v. County Board of De Kalb County, 2012 IL App (2d) 110579, 365 Ill. Dec. 920, 932, 979 N.E.2d 524, 536 (2nd Dist. 2012).

Further, the Village argues that Illinois law shows that mere existence of pre-filing contacts does not establish bias or prejudgment, and that in this case, TCH must identify specific evidence showing that the Village Board was biased. VResp. at 5. The Village then quotes Stop the Mega-Dump:

> In Land & Lakes, the appellate court considered the impact of prefiling contacts on the fairness of a siting hearing. The court determined that certain prefiling contacts did not demonstrate that the siting authority had prejudged the application, and therefore, the court rejected the argument that the siting authority had "forfeited its neutrality." Land & Lakes, 319 Ill. App .3d at 50, 252 Ill. Dec. 614, 743 N.E.2d 188. While prefiling contacts are not ex parte communications, they might support a claim of fundamental unfairness if they are evidence of prejudgment. An objector demonstrates prejudice from an ex parte communication by establishing that the contact hindered the preparation of its case against the proposal. Southwest Energy Corp. v. Pollution Control Board, 275 Ill. App. 3d 84, 93, 211 Ill.Dec. 401, 655 N.E.2d 304 (1995). In contrast, an objector accusing the siting authority of prejudgment must identify specific evidence showing that members of the siting authority were actually biased. Residents Against A Polluted Environment v. Pollution Control Board, 293 Ill.

App. 3d 219, 225–26, 227 Ill. Dec. 302, 687 N.E.2d 552 (1997). *Id.* at 5, quoting 2012 IL App (2d) 110579 ¶56.

The Village opines that the Court reasoned in Stop the Mega-Dump that before an applicant files their application, the local siting authority are legislators, rather than adjudicators. VResp. at 5, *see* 2012 IL App (2d) 110579 ¶54. The Village contends that TCH shows no specific evidence, relies on the mere existence of pre-filing contacts, and exaggerates the number of contacts by mixing in contacts not related to the current transfer station at issue. VResp. at 6.

To refute TCH's argument that the Village prejudged Groot's application based on financial considerations in the host agreement, the Village argues that financial considerations are irrelevant to a prejudgment inquiry. The Village claims financial considerations are irrelevant because it is the community who sees the economic benefit, not the local siting authority or its members. VResp. at 6, Woodsmoke Resorts, Inc. v. City of Marseilles, 174 Ill. App. 3d 906, 909, 455, 529 N.E.2d 274, 275 (3rd Dist. 1988); Stop the Mega-Dump, 365 Ill.Dec. at 935, 979 N.E.2d at 539.

The Village refutes TCH's claim that a local siting authority that has approved a zoning request is predisposed, and therefore, should be disqualified from considering an application for local siting approval. VResp. at 7. The Village argues that in Woodsmoke Resorts, the Appellate Court held that despite a local board's action to annex property for two companies, the local board could still impartially review an application for local siting authority. VResp. at 7, citing Woodsmoke Resorts, 174 Ill. App. 3d at 910, 529 N.E.2d at 276. Thus, the Village argues that TCH's allegations of predetermination, based on approval of Groot's zoning requests or host agreements, are without merit. VResp. at 7.

Decision to Approve the Siting Application Was Made after Hearing the Evidence

Pre-application Contact About Non-Transfer Station Issues. The Village argues that TCH lacks direct evidence of any bias. Therefore, the Village claims TCH "throws out a large number of random allegations, hoping a few will stick;" even if the facts have nothing to do with the transfer station. VResp. at 7. The Village surmises that TCH is trying to bolster the number of contacts between the parties to draw the appearance of a red flag where no issue exists. *Id.*

The Village delineates TCH's "facts" and refutes six contacts that TCH raised in their brief. The Village claims that those six contacts have nothing to do with the transfer station at issue in the appeal. VResp. at 8-9. The Village argues that merely identifying contacts does not establish bias, especially when some of these contacts deal with proper legal requests for legislative action (like zoning requests). *Id*. at 9. The Village notes that the Village Board cannot deny a request for zoning unless it has proper legal reason. Therefore, the Village argues that the evidence cannot be used to show predetermination on the transfer station at issue. *Id.*

The Village contends that TCH provided no evidence that Groot benefitted from the host fee negotiations for Groot's construction and demolition debris recycling facility. VResp. at 9. To the contrary, the Village argues that the record shows the Village Board attempted to get the largest host fee possible. VResp. at 9-10.

The Village maintains that regardless of the determination on the above pre-filing discussions, the discussions had nothing to do with the proposed transfer station. Therefore should be excluded from consideration in this appeal. VResp. at 10.

Purchase of Property. Next the Village addresses TCH's argument that the contract to purchase the truck terminal property was conditioned on obtaining the appropriate zoning approvals from the Village Board. VResp. at 10. The Village argues that TCH relies solely on Mr. Brandsma's deposition testimony. However, the Village maintains that at best the record shows Mr. Brandsma was confused by TCH's questioning. *Id. T*he Village then recounts that when questioned on whether certain conditions were placed on the purchase of the truck terminal Mr. Brandsma replied "I don't recall." *Id.* at 10-11.

The Village contends that even if Groot contracted for the purchase of the trucking terminal property with conditions, and the purchase of the transfer station property without conditions, these facts would be irrelevant to the matter at hand. VResp. at 11. The Village argues it is irrelevant because the Village Board has no control over how Groot does business and enters contracts. *Id*. To bolster its argument, the Village lists other explanations as to why a company may contract with conditions for zoning approval. *Id. T*he Village continues by stating that TCH provided no evidence to prove its claim that one property was subject to a condition, while the other was not, and nor would the evidence constitute bias by the Village Board. *Id.*

Pre-application Contacts Related to Transfer Station. To combat TCH's argument that the pre-filing contacts constitute bias, the Village states that the act of pre-filing contacts alone does not constitute bias. VResp. at 11. The Village then addresses each of TCH's alleged facts in turn; starting with a meeting between Ms. McCue and Mr. Brandsma in September 2008 regarding Groot's interest in putting a Transfer Station in the town. *Id*. at 12. The Village argues that a mere meeting is not evidence of bias by the Village Board. *Id.* Next, the Village addresses a contact made two weeks later when Groot made their first formal presentation to the Village Board on the possible transfer station. Again the Village argues the evidence of a presentation is not evidence of bias. *Id*. Contacts with Shaw Environmental acting on Groot's behalf searching for a location within the the Village, and Shaw Environmental searching for a location to site a potential transfer station, also do not evidence bias, according to the Village. VResp. at 12.

Likewise, Groot's public informational meeting in February 2013 is not evidence of bias by the Village Board. VResp. at 12. At that meeting, Groot stated that after Groot's intentions on the possible transfer station received interest, Groot moved to purchase property. VResp. at 12-13. The Village contends that the word "interest" as defined in the dictionary denotes curiosity, not a positive feeling from the Village Board to Groot, and therefore, this does not show bias. *Id.* at 13.

TCH also took issue with Groot's May 2010 open house presentation. VResp. at 13. However, the Village argues that nothing about Groot hosting an open house or presenting plans on a possible transfer station demonstrates a bias from the Village Board. *Id*. Further, TCH's issue that Mr. Brandsma said he "got the ball rolling", or that Mr. Brandsma said he has a "grand plan" for the transfer station as part of "Groot's intertwined plans for all of its activities in the

Village" are not evidence of bias on the part of the Village Board. VResp. at 13. In fact, the Village argues Mr. Brandsma said that the initial search for a truck maintenance facility has nothing to do with finding a site for a transfer station. *Id.* at 13-14. And the Village asserts that Groot focusing on finding a transfer station property after acquiring the truck terminal, does not evidence bias by the Village Board. VResp. at 14.

To address Groot's April 29, 2010, purchase of property for the transfer station, as well as the construction and demolition debris recycling facility, the Village argues that the mere purchase of property does not evidence bias by the Village Board. VResp. at 14. On December 13, 2011, McCue discussed with the Village Board the possible positions to take on the construction and demolition debris recycling facility host agreement, and mentioned they would then "deal with the next step", which TCH assumed meant the transfer station. VResp. at 14-15. The Village argues that the meeting minutes show that the entire discussion pertained to the construction and demolition debris recycling facility and therefore, show no bias on the proposed transfer station. *Id.*

On October 9, 2012, Groot's attorney made a comment about needing to get approval for the transfer station to get things done in a timely fashion and be operable by the next operating season. VResp. at 15. The Village argues that comments by Groot's attorney cannot evidence bias by the Village Board. *Id.* To address the comments about the Village Board not wanting to push too far in fear of losing everything, the Village states that the discussion was in regard to economic benefit to the community and therefore, cannot be used to indicate prejudgment or predisposition. VResp. at 15.

Next, the Village refutes TCH's accusation that a bias was shown by the Village adopting a local solid waste management plan. VResp. at 16. The Village argues that the plan is similar to the SWALCO plan and that TCH fails to mention any differences, or how Groot might benefit from the Village plan. *Id.* The Village also states that the Village Board repealed its plan, and readopted the SWALCO plan prior to the hearing on Groot's application. *Id.* This repeal was due to a disagreement between Lake County and the Village over the host fees that would be paid; however, once the dispute was resolved the Village Board repealed the local plan and readopted the SWALCO plan. *Id.* The Village states that maintaining revenue or other financial considerations is irrelevant to a prejudgment inquiry. *Id.* at 16-17, citing Woodsmoke Resorts, 174 Ill. App. 3d at 909.

The Village also discounts the fact Groot provides collection services, contracted by the Village for residences in a portion of the Village, as irrelevant because it shows no illegal conduct by either party. VResp. at 17. Further, the awarding of a contract for residential collection services is a genuine function of the Village Board. *Id.* The Village also discounts TCH's accusation that an attorney for Groot made "substantial revisions to the Siting Ordinance". The Village notes that the accusation is irrelevant as TCH fails to state any revisions made, and shows no evidence of any suggestions actually being made. VResp. at 17.

TCH raises an issue with Ms. McCue exchanging emails with a Shaw employee to clear up confusion regarding transfer stations. VResp. at 17. The Village argues that the email (TCH Exhibit 31) shows the mayor of the Village and the mayor of Hainesville were interested in

presentations on transfer stations, and that Ms. McCue was interested in a presentation for the residents of the Village. *Id.* The Village argues answering concerns of the Village residents through a presentation on transfer stations does not show bias from the Village Board. *Id.*

Finally, the Village addresses TCH's allegation that the Village's counsel, Mr. Sechen, indicated that the Village had already determined that it was "prudent" to site a transfer station and was proceeding jointly with Groot for approval of that station. VResp. at 18. TCH essentially infers that the Village found siting a transfer station was necessary for their own business interests, and that the Village and Groot are co-applicants. *Id.* The Village maintains that this accusation is completely fabricated by TCH's attorney because Mr. Sechen never used the term "co-applicant". VResp. at 18-19. Continuing, the Village contends that any argument that Mr. Sechen's cross examination of Mr. Thorsen shows evidence of bias by the Village Board is ridiculous on its face because Mr. Sechen represents the Village, and it has been made known that the Village and the Village Board are two separate entities. VResp. at 19. The Village maintains that Sechen's questioning of Thorsen was based on hypotheticals, and that TCH is trying to twist his words from the hypotheticals. *Id.*

Mr. Kleszynski. The Village addresses TCH's allegation that the report and testimony of Mr. Kleszynski further evidence the Village's complicity with Groot. VResp. at 20. TCH argues that Mr. "Kleszynski admitted that it was a violation of the [Uniform Standards of Professional Appraisal Practice] USPAP code of ethics for him to advocate any particular position." *Id.* at 21. In fact, the Village argues, Mr. Kleszynski specifically denies violating any ethics rules. *Id.*, *see* Tr. 160-161. TCH's alleges that, Mr. "Kleszynski sought to misrepresent the fact that he had been directed by the Village, as Groot's undisclosed co-applicant, acting through [Mr.] Sechen, to generate an 'independent' statement supporting Groot's position"; however, the Village maintains this is an attempt by TCH to get the Board to reweigh the credibility of Kleszynski's testimony. *Id.* at 21-22.

The Village argues that Exhibit 58 was an email between Mr. Sechen and the Village Board's attorney, Peter Karlovics, stating that Mr. Sechen had, "found the guy [he] was looking for … Dale (Kleszynski) is really good and he knows how to testify." *Id.* The Village argues there is no evidence that Mr. Karlovics shared this information with his clients, and that the reference to Mr. Kleszynski being good at testifying is in reference to him authoring a book about being an expert witness. *Id.* at 23-24.

Village Board Decision Based on the Record. The Village asserts that Stop the Mega-Dump holds "[a]ny inferences that potentially could be drawn about possible bias or predisposition from various comments made at various time by [Village] Board members are more than negated by their sworn testimony." VResp. at 24, quoting Stop the Mega-Dump, 2012 IL App (2d) 110579. The Village also asserts that a local siting authority is not held to the same standard of impartiality as a judge. VResp. at 24, see Southwest Energy Corp., 275 Ill. App. 3d at 91, Land and Lakes, 319 Ill. App. 3d at 50. Further, the Village argues that questions of fundamental fairness is a mixed question of law and fact, and therefore, fall under the "clearly erroneous" standard. VResp. at 24, *see* Peoria Disposal, 385 Ill. App. 3d at 796.

The Village argues that due to the quasi-legislative and quasi-judicial nature of local siting authority, courts have interpreted the applicant's right to fundamental fairness as having minimal standards of procedural due process. VResp. at 24, see Land & Lakes, 319 Ill. App. 3d at 47-48. The minimal procedural due process includes the opportunity to be heard, the right to cross-examine an adverse witness, and impartial rulings on the evidence. *Id*. The Village maintains that members of a siting authority are presumed to have made their decision in a fair and objective manner. VResp. at 24, see Peoria Disposal, 385 Ill. App. 3d at 797. The Village adds that this presumption is not overcome because a decision-maker has previously taken a public position or expressed strong views on a related issue. VResp. at 24-25, see 415 ILCS 5/39.2(d); Peoria Disposal, 385 Ill. App. 3d at 797–98. The Village argues that in order to show prejudice in a siting proceeding, the petitioner would have to show a disinterested observer might conclude that the siting authority, or its members, had prejudged the facts or law of the case. VResp. at 24-25, see Peoria Disposal, 385 Ill. App. 3d at 798.

The Village contends that although TCH lacks evidence to prove any member of the Village Board supported Groot's application before hearing all the evidence at the local siting hearing, the Village has a wealth of evidence to show the members were unbiased. VResp. at 25. The Village lists the attendance records of all of the hearings, and follows it with a quote from the hearing officer, Mr. Luetkehans, about how the Village Board's attendance and attentiveness were exemplary. *Id.* at 25-26. The Village adds that the Village Board member who has been most criticized by TCH, Ms. McCue, had the best attendance record out of the members. *Id.* at 27.

Further, the Village adds the sworn testimony of members, Ms. Lucassen, Ms. Wagner, and Ms. McCue, stated that they waited to hear all of the evidence before making a decision, and had no predispositions. VResp. at 27. The Village again states that sworn testimony from the Village Board members negates any inferences that could be drawn about possible bias or predisposition from the accusations of TCH. *Id.*

Finally, the Village claims that the record shows that the Village Board members participated in a conscientious deliberation process, and made their decision based on the evidence provided at the hearings. VResp. at 27-28.

Village Board Findings on Credibility

The Village argues that a local siting authority is permitted to adopt a finding of fact that was prepared by another person, even an applicant or a siting approval opponent, without depriving any party of fundamental fairness. VResp. at 28, see Land and Lakes, 319 Ill. App. 3d at 50. In the current case, the Village Board adopted the findings of fact of the hearing officer, a neutral party. VResp. at 28. Although the Village Board adopted the hearing officer's finding of fact, the Village Board still made their own list of conditions. *Id.*

The Village asserts that although TCH claims the Village Board did not make a determination of credibility of the witnesses, this is false, because the Village Board adopted the hearing officer's determination of credibility. VResp. at 28. The Village also asserts that

although the Village Board accepted the hearing officer's determination of credibility, they still deliberated on the credibility of witnesses themselves. *Id.*

Village Board's Decision on Criteria Supported By Record

Standard of Review

The Village argues that the standard of review appropriate in this matter is the manifest weight of the evidence. VResp. at 29, *see* McLean County Disposal, Inc. v. County of McLean, 207 Ill. App. 3d 352, 566 N.E.2d 26 (4th Dist. 1991), Sierra Club v. City of Wood River, PCB 95-174 (October 5, 1995). The Village asserts that admission of the application into evidence is enough by itself for the Village Board to reasonably find as it did. VResp. at 29.

The Village explains the manifest weight of the evidence standard as the most common standard of review, and says that under the manifest weight standard the reviewing body "…must view evidence introduced at trial and inferences drawn therefrom in the aspect most favorable to the prevailing party below." VResp. at 29, see Sorenson v. Fio Rito, 90 Ill. App. 3d 368, 413 N.E.2d 47(1st Dist. 1980) citing Fetterman v. Production Steel Co., 4 Ill. App. 2d 403, 124 N.E.2d 637 (1954). Further, the Village states that the manifest weight standard is violated only when the decision is palpably erroneous, wholly unwarranted, clearly the result of passion or prejudice, or appears to be arbitrary, unreasonable, and not based on evidence. VResp. at 29-30, see Christian County Landfill, Inc., v. Christian County Board, PCB 89-92 (October 18, 1989).

The Village notes that the Board stated:

> The Board will not disturb a local siting authority's decision regarding the applicant's compliance with the statutory siting criteria unless the decision is contrary to the manifest weight of the evidence. [citations omitted]. That a different conclusion may be reasonable is insufficient; the opposite conclusion must be clearly evident, plain or indisputable. [citations omitted]. The Board may not reweigh the evidence on the siting criteria to substitute its judgment for that of the local siting authority. [citations omitted]. The manifest weight of the evidence standard is to be applied to each and every criteria on review." [citations omitted].
>
> It is for the local siting authority to weigh the evidence, assess witness credibility, and resolve conflicts in the evidence. [citations omitted]. Where there is conflicting evidence, the Board is not free to reverse merely because the local siting authority credits one group of witnesses and does not credit the other. [citations omitted]. Merely because the [local siting authority] could have drawn different inferences and conclusions from conflicting testimony is not a basis for this Board to reverse the [local siting authority's] finding." VResp. at 30-31, quoting Stop the Mega Dump v DeKalb County Board, PCB 10-103 (Mar. 17, 2011), aff'd 2012 IL App (2d) 110579 (2nd Dist. 2012)."

The Village then addresses each of the criteria. Those arguments are summarized below.

Criterion I (Need)

The Village states that the Board has addressed the issue of need numerous times. VResp. at 31. The Village cites Those Opposed to Area landfills (T.O.T.A.L.), v. City of Salem, PCB 96-79-82 consld (March 7, 1996), a case where the Board found it was "not clearly evident that the proposed expansions [of a facility] were not needed to accommodate the waste needs" in the designated area. *Id.* Within TOTAL, the Village contends, the Board summarized the law of "need". *Id.* The Board stated that an applicant does not need to show absolute necessity. *Id.* at 32. The Village argues that the evaluation does not involve an arbitrary standard, but a consideration of different relevant factors. *Id.*

To show criterion I has been met, the Village relies on the testimony of Ms. Seibert, who performed a needs analysis for this case. VResp. at 33.[2] The Village next turns to the testimony of Mr. Thorsen, who was the only witness who testified concerning this criterion on behalf of the objectors. VResp. at 35. The Village argues that Mr. Thorsen agrees that waste disposal need for the service area could be depleted before or after 2027, and he merely questions when exactly that need would exist. *Id.*at 35-36. Mr. Thorsen admitted that he did not complete a Section 39.2 needs analysis. *Id.* at 36. Mr. Thorsen also admitted that the date when a petition should be filed was not in his "wheelhouse." *Id.* The Village also states that Mr. Thorsen acknowledged he merely averaged the 2010, 2011, and 2012 waste receipts for the two landfills, instead of formulating a prediction accounting for the upturn in the economy. *Id.*

The Village maintains that Ms. Seibert's thorough analysis shows that the Village Board could have reasonably found that a transfer station was needed. VResp. at 36.

Criterion II (Designed and Located to Protect Public Health, Safety and Welfare)

The Village argues that TCH improperly uses an argument regarding manifest weight and Criterion II to challenge the credibility of Mr. Moose, Groot's engineer, regarding odor, attacking his veracity. VResp. at 37. However, the Village argues that manifest weight does not concern credibility issues. *Id.* Regarding the credibility of Mr. Moose, the Village states that he is a licensed professional engineer and the director of Shaw Environmental. VResp. at 37. The Village adds that Mr. Moose received his engineering degree from the University of Missouri – Rolla specializing in civil and geotechnical engineering, and has been practicing for 30 years in the solid waste field. *Id.* Mr. Moose also has won several awards, and the Lake Transfer Station incorporates all of the amenities, design features and safeguards of the rest of his recent designs. *Id*. The Village argues Mr. Moose is the only one in this case to prepare a full and complete opinion on the Criterion II issue, in which Mr. Moose offered that it was his professional opinion that the facility is designed, located, and proposed to be operated in such a way to fulfill the second criterion. *Id.* Along with fulfilling the requirement, Mr. Moose testified that there would be no noticeable odor at the facility boundary. *Id.*

[2] The Village relates the testimony of Ms. Seibert in its brief. The Board will not repeat the Village's summary, as the material appears in the Facts and other parties' summaries, which appear earlier in the opinion.

The Village argues that TCH's reliance on the testimony of Mr. McGinley, a chemical engineer who limits himself to odor, on the issue of criterion II is insufficient. VResp. at 37. The Village argues Mr. McGinley did not provide a complete opinion and analysis on criterion II, and did not even have an opinion on whether there would be an odor violation, or even any perceptible odor at TCH. *Id*. The Village argues Mr. McGinley's opinion is limited to his belief the transfer station will not "prevent" odor. *Id.*

Therefore, the Village argues the Village Board could have reasonably found that criterion II has been fulfilled. VResp. at 38.

Criterion III (Minimize Incompatibility and Impact on Property Values)

The Village states that criterion III deals with two separate issues. VResp. at 38. The first, the land planning issue of compatibility, is addressed by Mr. Lannert (Groot's land planner), and the second, minimizing the effect on property value, is addressed by Dr. Poletti (Groot's Appraiser). *Id.* The Village notes that two other appraisers testified, Dale Kleszynski for the Village, and Michael MaRous for TCH. *Id.*

Minimize Incompatibility with Surrounding Area. Mr. Lannert is an urban planner, landscape architect, and president of the Lannert Group, which provides planning services. VResp. at 38. Mr. Lannert and his firm have won the American Planning Association Award for work in New Lenox, and Mr. Lannert has professional affiliations with groups like the American Society of Landscape Architects, the American Planning Association, and is a past board member and president of the Landscape Architecture Foundation. *Id*. The Village adds that Mr. Lannert is also a past board member and chairman of the State of Illinois Department of Professional Regulation, and past president-elect of the Illinois Chapter of the American Society of Landscape Architects. *Id.* Mr. Lannert also has the experience of testifying in 60 solid waste related projects. *Id.*[3]

Mr. Lannert testified that it is his professional opinion "that the facility is located so as to minimize the incompatibility with the character of the surrounding area and, therefore satisfies the first part of criterion III, based on the character of the immediate area having been defined by industrial uses over the paste years." VResp. at 40.

Minimize Impact on Property Values. Dr. Poletti testified to the rest of Criterion III after being requested by the applicant to conduct a study on the proposed facility and its potential effect on neighboring properties' values. VResp. at 40-41. The Village notes that Dr. Poletti has been awarded Bachelor's, Master's and Doctorate degrees, taught at University of Missouri at St. Louis, teaches appraisal courses for the Appraisal Institute, and has been elected township appraiser in Collinsville Township, Madison County, Illinois since 1977. VResp. at 41. Dr. Poletti has also been a Real Estate Appraiser for over 34 years, has participated in 30 solid waste

[3] As with Ms.Seibert, the Village recounts Mr. Lannert's testimony. The Board will not repeat the Village's summary, as the material appears in the Facts and other parties' summaries, which appear earlier in the opinion.

related hearings, and has been awarded the MAI designation. *Id*. Dr. Poletti is a previous certified instructor of the Appraisal Institute and Certified Illinois Assessing Officer. *Id.*[4]

Dr. Poletti offered that it was his professional opinion, taking into consideration the design, features, and operating procedures of the new facility, as well as his study on the three other Transfer Stations, that the proposed facility is located as to minimize the effect on the value of the surrounding property. VResp. at 42.

Mr. MaRous TCH offered Mr. MaRous' testimony to try and prove the applicants had not fulfilled criterion III. VResp. at 42. Mr. MaRous, a full time appraiser since 1976, is the president and owner of MaRous and Company, a full service real estate appraisal firm for the past 33 years, and has a Bachelor's degree from the University of Illinois. *Id.*

The Village contends that Mr. MaRous, who is not a land planner, created a report that extensively criticized the work done by Mr. Lannert and Dr. Poletti. VResp. at 42. The Village also adds that Mr. MaRous merely testified that both Mr. Lannert and Dr. Poletti failed to demonstrate what they claim. *Id.* at 43. The Village explains that Mr. MaRous criticized Dr. Poletti's study claiming that the comparable sales utilized, and the size and location of the target and control areas utilized were incorrect. *Id.* Mr. MaRous also referred to Dr. Poletti's study being done by matched pair analysis, a term that no one, including Dr. Poletti used. *Id.*

The Village argues that Mr. MaRous never testified or noted visiting any of Dr. Poletti's case study transfer stations. Further the Village claims that Mr. MaRous "admits that he did essentially nothing but offer criticism". VResp. at 43.

Mr. Kleszynski. Mr. Kleszynski was called by the Village as an expert appraisal witness. VResp. at 43. Mr. Kleszynski received a Bachelor of Arts degree from Loyola University and has been awarded the MAI and SRA designations by the Appraisal institute. *Id.* Mr. Kleszynski is currently licensed to practice in Illinois, Michigan, and Indiana, as well as having taught almost every course offered by the Appraisal Institute. *Id.* He is also qualified to teach course work related to the Uniform Standards of Profession Appraisal Practice as well as professional ethics. *Id.*

The Village states that Mr. Kleszynski was brought in as a review appraiser to review the work performed by Poletti, and perform a Standard 3 review under the Uniform Standards of Profession Appraisal Practice. The Village explains that this review is similar to a peer review but more stringent. VResp. at 43.

During this review Mr. Kleszynski drove to the subject site, reviewed and spot checked Dr. Poletti's data, reviewed three reports that were referenced by Dr. Poletti, and contacted three other MAI appraisers to obtain their opinion on the options available to solve the valuation issues. VResp. at 44. Mr. Kleszynski verified the mathematical accuracy of Dr. Poletti's work, and whether the conclusions were supportable. *Id.* Mr. Kleszynski had a professor at Texas

[4] As with Ms.Seibert and Mr. Lannert, the Village recounts Dr. Poletti's testimony. The Board will not repeat the Village's summary, as the material appears in the Facts and other parties' summaries, which appear earlier in the opinion.

A&M University check Dr. Poletti's multiple regression analysis, which were verified and found to be appropriate. *Id.*

The Village also provides that Mr. Kleszynski concluded that Dr. Poletti applied the appropriate analytical techniques to determine that the proposed Lake County transfer station is located so as to minimize the effect on value of surrounding properties, and even concluded the subject transfer station is located as to have no effect on surrounding property values. VResp. at 44. The Village adds that Mr. Kleszynski concluded Mr. MaRous' report failed to meet relevant professional standards. *Id.*

Therefore, the Village states it is abundantly clear that the Village Board could have reasonably found criterion III to be fulfilled.

Criterion VI (Minimize Impact on Existing Traffic)

The Village argues that TCH does not actually pose a manifest weight challenge regarding criterion VI. VResp. at 45. The Village continues by stating TCH's caption only refers to Groot not meeting its burden regarding criterion VI, which is not a manifest weight of the evidence issue. *Id.*

The Village contends that courts in the past have construed criterion VI to mean the applicant must show that it has minimized traffic impact, not that it will eliminate any additional traffic impact. VResp. at 45, citing Tate, 188 Ill. App. 3d 994. The Village adds that the Board has also made it clear that Criterion VI does not require an applicant to present a specific traffic plan. *Id.*, citing CDT Landfill Corporation v. City of Joliet, PCB 98-60, slip op. at 50-52 (Mar. 5, 1998).

The Village argues that TCH's assertions are unrealistic because one unit of local government cannot approve or determine all routes from a transfer station. VResp. at 45. The routes of garbage trucks are subject to change as new developments occur and new hauling contracts are created. *Id.* The Village maintains that TCH's view would unduly complicate Section 39.2 facility sitings. *Id.*

The Village contends that Mr. Coulter would require that routes to each and every possible landfill that a transfer station could use should be included within the application. VResp. at 45. The Village states that when Mr. Coulter realized what an impossible task he was creating, he backed off and stated that only three or four landfills that could accept the waste had to be drawn out. *Id.* at 46. When asked about where the three to four landfill limitations came from, Mr. Coulter admitted that there was no such language in criterion VI. *Id.* The Village asserts that this means he just made up a limitation. *Id.*

The Village argues that Mr. Coulter's conclusion that Groot has not satisfied criterion VI is based on the absence of routing information beyond the immediate vicinity of the proposed facility, and that Mr. Coulter provided no evaluation of his own. VResp. at 46. The Village maintains that Mr. Coulter's report and testimony are not credible on their face. *Id.*

The Village explains that Mr. Werthmann, a certified professional traffic engineer, performed a three-phase traffic study. VResp. at 46. Mr. Werthmann began by evaluating the existing physical characteristics of the nearby road system, and then determined what type and volume of traffic would be generated by the facility. *Id.* Mr. Werthmann testified that he recommended several roadway improvements, including widening Illinois Route 120 to provide a separate left and right turn lanes serving Porter Drive, and the widening of Porter Drive to provide left and right turn lanes servicing Illinois Route 120. *Id.* The Village states that Porter Drive will be completely resurfaced, and the improved intersection radii will accommodate turning transfer trailers. *Id.*

The Village also adds that the proposed transfer station is located near Groot North where approximately 65 to 70 vehicles are stored. VResp. at 47. The Village argues that this allows trucks from the proposed facility to make a short trip at the end of the day to Groot North, minimizing traffic impacts on the area. *Id.*

Mr. Werthmann testified that it was his opinion that the traffic patterns to and from the facility were so designed as to minimize the impact on existing traffic flows thereby satisfying Criterion 6. VResp. at 47. Therefore, the Village argues that the Village Board could have reasonably found that Criterion 6 was satisfied. *Id.*

Criterion VIII (Consistent with the Solid Waste Management Plan)

The Village addresses TCH's argument that Winnebago Landfill, one of the landfills likely to receive waste from the Lake Transfer Station, does not have a host agreement with Lake County, by stating that the landfill is found in Winnebago County and may well pay host fees to Winnebago County. VResp. at 47-48.

The Village argues that a facility is consistent with a Solid Waste Management plan so long as it is not in opposition of the plan. VResp. at 48, see City of Geneva v. Waste Management, PCB No. 94-58 (July 21, 1994), reversed on other grounds in County of Kane v. PCB, 2-96-0652 and 2-96-0676 (consolidated) (2nd Dist., September 29, 1997). Further, the Village states that consistency does not require that a solid waste management plan be followed to the letter. VResp. at 48, see Cure v. BFI, PCB No. 96-238 (September 19, 1996).

The Village continues, stating that the Lake County Transfer Station does have a host agreement with Lake County requiring the payment of host fees to Lake County. VResp. at 48. The Village also finds it is important to note that the repealed Village solid waste management plan, in effect at the time the application was filed, had no requirement for a disposal facility to provide capacity, enter into a host agreement, or pay host fees to the Village, but the Lake County Transfer Station is consistent with that plan. *Id.*

The Village states that Mr. Moose, who again has 30 years of experience, stated that the proposed Lake County Transfer Station is consistent with both Solid Waste Management Plans. VResp. at 48. Therefore, the Village argues the Village Board could have reasonably concluded that Criterion 8 has been satisfied. *Id.*

Conclusion

The Village argues that despite TCH's conspiracy theories, the grant of local siting approval by the Village Board must be affirmed. VResp. at 49. The Village also maintains that no violations of the principles of fundamental fairness have occurred, and the decision of the Village Board is in accord with manifest weight of the evidence. *Id.*

The Village respectfully requests that TCH's petition for review be denied, and the Village Board's decision to grant siting approval be upheld. VResp. at 49.

TCH'S REPLY BRIEF

Clear Evidence of Predetermination by the "Voting Bloc"

TCH notes that respondents make two major arguments against TCH's fundamental fairness claims. Reply at 1. First, the respondents argue that TCH waived its fundamental fairness claim because it failed to raise the claim during the siting hearing. *Id.* Second, the respondents allege that TCH misstated the burden of proof applicable to fundamental fairness claims. *Id.* A summary of TCH's response to each argument will follow.

TCH Properly Raised the Issue of Fundamental Fairness During the Siting Hearing

The respondents claim that TCH waived its fundamental fairness claim since they failed to raise the issue at the siting hearing. Reply at 2. TCH states that it raised the issue when the Village's counsel revealed the Village "was proceeding jointly with Groot for approval of the transfer station". *Id.* When Mr. Sechen "acknowledged" that the Village and "Groot had found it necessary to site a transfer station for their own business reasons", TCH raised the issue of fundamental fairness at that time. *Id.* Furthermore, TCH notes that it raised the issue of fundamental fairness, including bias, pre-judgment, and the Village's status as "co-applicant" at the time the Village's status was "revealed". *Id.*

TCH asserts that Groot acknowledged that TCH raised the issue of fundamental fairness, but Groot claims that TCH's assertions were "brief and generalized." Reply at 3. Groot supported its contention by citing to E & E Hauling, 116 Ill. App. 3d 586. *Id.* TCH asserts that reliance on E & E Hauling is misplaced. *Id.* TCH claims that the fundamental fairness issue was waived in that case because the issue was not raised by the applicant in the siting proceeding but by citizens. *Id.* at 4. TCH also notes that although the fundamental fairness issue was waived, the Supreme Court still allowed consideration of the issue because of the seriousness of the charges. *Id.*

TCH argues that the evidence establishes that TCH timely raised the fundamental fairness issue. Reply at 4. And while Groot complains of the general nature of TCH's claim, Groot fails to acknowledge that the specific nature of the claims was delineated in TCH's findings of facts and conclusions of law. *Id.* TCH notes that Groot also alleges that the issue concerning the usurpation of the Village Board's role by the Hearing Officer was not raised during the siting

hearing and is therefore waived. *Id.* at 5. However, TCH argues that this issue could not have been properly raised until after the siting hearing ended. *Id.*

Respondents Misstated the Burden Applicable to a Fundamental Fairness Claim

TCH asserts that Groot advances that fundamental fairness claims are subject to the "clear and convincing evidence" standard, relying on Fox Moraine. Reply at 5. Meanwhile, the Village argues for the "clearly erroneous" standard to apply. *Id.* at 6. In contrast, TCH asserts that the proper standard of review for a fundamental fairness claim is the manifest weight of the evidence standard of review. *Id.*, citing Peoria Disposal, 385 Ill. App. 3d at 800. TCH quotes Peoria Disposal:

> The members of a local siting authority are presumed to have made their decision in a fair and objective manner. [Citations omitted] 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. [Citations] Rather, to show bias or prejudice in a siting proceeding, **the complainant must show that a disinterested observer might conclude that the local siting authority, or its members, had prejudged the facts or law of the case**. [Emphasis added in original]. *Id.*

TCH maintains that an objector must identify specific evidence of bias. *Id.*, citing Stop the Mega-Dump, 2012 IL App (2d) 110579 ¶56. TCH opines that it is this standard by which the evidence must be assessed.

The Evidence Confirms Bias and Predeterminations by Members of the "Voting Bloc"

TCH takes issue with respondents' reliance on testimony by members of the "voting bloc" that their decision was based on the record and not predetermined. Reply at 7. TCH points specifically to Groot's claims that Ms. Lucassen did not know she would be required to vote so there could not have been predeterminations by the Village Board. *Id.* TCH responds that the Village Board's conduct during the vote, and the Village's effort to cover up Ms. Lucassen's conduct is evidence of bias. *Id.* For example, TCH notes that Ms. Lucassen voted in favor of a unanimous decision when she should not have voted. *Id.* at 8. Ms. Lucassen claims that she has the option to vote; but TCH argues that this option is not allowed under the Illinois Municipal Code (65 ILCS 5/3-1-40-30 (2012)). *Id.* TCH alleges that the Village generated meeting minutes to prove that she did not vote when she previously admitted she did. *Id.*

Next, TCH challenges Groot's reliance on Stop the Mega Dump, 2012 IL App (2d) 110579, to support Groot's argument against predetermination. Reply at 8. TCH replies that there are significant factual differences between that case and the present one. *Id.* For example, in Stop the Mega Dump, TCH linked the funds for a jail expansion with the landfill expansion. *Id.* at 9. The court ultimately found that petitioner misrepresented the local siting authority's decision since there were alternate fund sources for the jail, and there was no connection with the landfill. *Id.* Also, TCH notes that testimony from Ms. Kenyon in this case confirms that Ms. McCue decided on the landfill's approval before the application was filed. *Id.* at 11.

In its opening brief, TCH raised issues regarding the host agreement and pre-application contacts. Reply at 11-12. TCH argues that respondents take two approaches to counter TCH's arguments. Reply at 12. First, TCH claims, respondents argue that the evidence of pre-filing contacts is irrelevant of a determination of predisposition. *Id*. TCH asserts that "this is a grossly incorrect statement of the law." *Id*. TCH claims the law is well-settled that pre-filing contacts can be probative of prejudgment of adjudicative facts, which are an element in considering fundamental fairness. *Id*., citing American Bottom Conservancy (ABC) v. Village of Fairmont City, PCB 00-200, slip op. at 6 (Oct. 19, 2000). Further, TCH quotes: "While prefiling contacts are not *ex parte* communications, they might support a claim of fundamental unfairness if they are evidence of prejudgment. Stop the Mega Dump, 2012 IL App (2d) 110579, ¶56." *Id*.

TCH notes that Groot relies on Sandberg v. City of Kankakee, PCB 04-33, 04-34, 04-35 (consld.) (Mar. 18, 2004) for the proposition that pre-filing contacts are irrelevant. Reply at 12. TCH argues that the Board did not state what Groot claims is stated in Sandberg and in fact the Board stated collusion between the applicant and the decisionmaker that result in prejudgment is fundamentally unfair. Reply at 13.

TCH argues that Groot claimed there is nothing wrong with negotiating a host agreement prior to a siting decision. Reply at 13. TCH notes that the Village echoes the claim that Ms. McCue's statements concerning the host agreement on December 13, 2011, reflect "negotiation strategy" and are irrelevant. *Id.* However, TCH asserts that the host agreement statements by Ms. McCue pertain to the construction and demolition debris recycling facility, not the transfer station. *Id.* TCH claims that the statements by Ms. McCue "confirmed that the approval of the two facilities is intertwined" and that the approval of the construction and demolition debris recycling facility was "a precursor to the transfer station". *Id*.

TCH notes that the Village alleges the statements made by Ms. McCue about "not having a transfer station" were in reference to the construction and demolition debris recycling facility being discussed; not the proposed transfer station. Reply at 13. However, TCH maintains that the respondents have consistently distinguished between the two facilities by calling one the transfer station and the other the construction and demolition debris recycling facility. *Id.* TCH maintains that "there is no doubt" that Ms. McCue was speaking about the proposed transfer station, 18 months before the application was filed, not the construction and demolition debris recycling facility. Reply at 14.

TCH notes that regarding the purchasing of the transfer station property without zoning conditions, the Village claims that Mr. Brandsma, in his deposition, stated that the initial search for the truck maintenance facility had nothing to do with the transfer station. Reply at 15. TCH disputes this claim, quoting the transcript of Mr. Brandsma's deposition. In that quote Mr. Brandsma responded to a question that Groot was looking for "bigger office and maintenance space and a transfer station at the same time" saying "That's what we do". *Id*.

TCH notes that the Village further claims that there is no evidence that the contract for one property was subject to zoning conditions and the other was not. *Id.* at 16. TCH responds

that Mr. Brandsma testified to the fact and Groot admitted in its brief to purchasing the transfer station property without conditions. *Id.* at 16-17.

TCH notes that the respondents do not address the issue of Groot's consultation with the local plan and siting ordinance. *Id.* at 19.

TCH argues that Ms. McCue also misrepresented the landfill capacity to the Village Board, in October 2009. Reply at 17. Ms. McCue was reporting on a SWALCO meeting she attended, yet TCH asserts neither SWALCO nor Groot ever claimed the two Lake County landfills were filled to capacity. Reply at 18. TCH claims that Ms. McCue admitted to suggesting that SWALCO and Groot work together, and she stated that SWALCO was looking at transfer stations. *Id.*

TCH asserts that Ms. McCue's efforts led to the Village's "unguarded disclosure" at the siting hearing that the Village and its hauler were finding it necessary to site a transfer station. Reply at 18. The Village attorney's "mission" was also evident in that an email concerning the hiring of Mr. Kleszynski indicated that he "knows how to testify." Reply at 22. Groot claims that even if Mr. Kleszynski was biased, he is not a decision-maker. *Id.* TCH replies that Mr. Kleszynski bias led to him pursuing a course of action in support of Groot at the Village's direction. *Id.* at 23. TCH expresses concerns that Mr. Kleszynski was provided an advance copy of the siting application before it was filed and publicly available. *Id.*

TCH maintains that all of these facts reflect more than "mere expressions of public sentiment" and do not reflect revenue-related considerations. Reply at 24, distinguishing Peoria Disposal, 385 Ill. App. 3d at 798 and Stop the Mega-Dump, 2012 IL App (2d) 110579 ¶61-62.

Hearing Officer's Usurpation of the Village Board's Obligation to Determine the Credibility of the Witnesses

TCH claims that the Hearing Officer made the determination of the credibility of witnesses, usurping the requirement that the siting authority do so. Reply at 25. TCH notes that respondents argue that the hearing officer's findings were recommended findings, and the Village Board was authorized to adopt those findings. *Id.* at 26. TCH asserts that the Hearing Officer exceeded his authority to only make proposed findings. *Id.* TCH notes that the Village claims that the Village Board did debate the credibility of witnesses during the deliberations. *Id.* However, TCH disagrees and asserts that the transcript shows only one instance where a member was asked if they were making a determination and she demurred. *Id.*

Village Board's Findings Regarding Siting Criteria

TCH does not believe that the respondents made proper arguments overcoming the Village Board's decisions concerning siting criteria I, II, III, VI, and VIII. Reply at 26-27. A summary of the TCH's argument for each criterion follows.

Criterion I (Need)

TCH reminds that in its opening brief, TCH pointed out that "need" for the purposes of criterion I, requires a showing of urgency. Reply at 27, citing Fox Moraine, 2011 IL App (2d) 100017 ¶109, 110. In contrast, TCH argues, respondents assert the "outmoded concept of 'expedience' or 'reasonable convenience'" as the criterion I standard. *Id*. TCH argues that Ms. Seibert attempted to connect "need" with the recommendation in the 2004 Lake County solid waste management plan that Lake County maintain 20 years of disposal capacity. *Id*. However, TCH asserts the 20-year disposal capacity requirement is non-existent, having been deleted in the 2009 plan. *Id.* at 27-28.

TCH argues that Ms. Seibert's opinion on "need" was based on her erroneous belief regarding remaining capacity of the two Lake County landfills. Reply at 28. TCH asserts that Countryside Landfill actually has more capacity than Ms. Seibert indicated and in fact Countryside has almost ten years of capacity. *Id*. TCH alleges that the remaining disposal capacity is sufficient until the year 2027, and thus, there is no present need for a transfer station. *Id.* at 29.

TCH argues that respondents also claim that the transfer station is needed now since it takes about seven years to develop. Reply at 29. However, TCH claims that this process only takes two to three years. *Id.*

Criterion II (Designed and Located to Protect Public Health, Safety and Welfare)

TCH argues that respondents correctly note TCH's argument focuses on two main points, Mr. Moose's lack of credibility and Groot's failure to proved adequate odor controls. Reply at 30. TCH pointed to two areas of misrepresentation by Mr. Moose: 1) where the waste would be transported to, and 2) that the transfer station would accept food waste. *Id*. TCH claims respondents ignore both points, and instead, Groot claims that the Village Board already assessed Moose's credibility. *Id.* However, TCH responds that the Village Board did not make proper assessments of the witness. *Id.*

The Village, according to TCH, argues that manifest weight is not the same as credibility issues. Reply at 30. TCH disagrees and argues that the credibility of the expert witnesses is a significant factor in assessing compliance with criterion II. *Id*., Fox Moraine, 2011 IL App (2d) 100017, ¶102, citing File, 219 Ill. App. 3d at 907.

TCH notes that respondents take issue with Mr. McGinley's testimony, arguing it was speculative and did not recommend any specific equipment to control odor. Reply at 30-31. TCH retorts that the respondents ignored the requirements of the United States Environmental Protection Agency manual that was attached to Mr. McGinley's report, and Mr. Moose's confirmation that odor controls will not be followed at the transfer station. *Id.* at 31.

Criterion III (Minimize Incompatibility and Impact on Property Values)

TCH argues that the respondents do not mention that Mr. Lannert's characterization of the surrounding area was based on "legally improper speculation". Reply at 31. TCH asserts

that Mr. Lannert's characterization was the fundamental basis for his opinion, and the speculative nature of that characterization renders Mr. Lannert's opinion unreliable. *Id.*

TCH asserts that the Village's argument regarding Timber Creek is unsupported and is speculative. Reply at 31. Further, the Hearing Officer findings also do not support the Village's position. *Id*. at 32.

Criterion VI (Minimize Impact on Existing Traffic)

TCH states that respondents criticize Mr. Coulter's claim that Groot failed to consider arterial routes that might be used by semi-trucks. Reply at 32. TCH notes that Groot claims that the law does not require an assessment of all potential impacts to remote arterial. *Id*. This argument, TCH claims is a "red herring" and ignores the principal concern of Mr. Coulter, which was Groot's failure to assess the impact of transfer station traffic at any point beyond one intersection, Illinois Route 120 and Cedar Lake Road. *Id.* at 32-33.

The respondents also claim that the scope of the assessment is limited to nearby intersections and roadway traffic. Reply at 33. TCH alleges that this is not accurate, and that the statute explicitly requires an analysis of traffic patterns to or from the facility, not only those into and out of the facility. *Id.* at 33. TCH argues that in Fox Moraine, 2011 IL App (2d) 100017 ¶113, the court recognized that the traffic assessment included multiple routes, unlike this instance. *Id*. The court in Fox Moraine, 2011 IL App (2d) 100017 ¶116, recognized that the Act does not require elimination of all traffic problems, but rather a minimization on impacts on traffic patterns to and from the facility. *Id*. at 33-34.

TCH maintains that the case law demonstrates that the analysis of criterion VI is fact specific. Reply at 35. TCH asserts that no case has held that criterion VI requires the "abandonment of the recognized methodology for conduction at traffic analysis." *Id*. TCH points to the Tate, 188 Ill. App. 3d 994 and Fairview Area Citizens Taskforce, 198 Ill. App. 3d 541 to support its arguments. *Id*.

Criterion VIII (Consistent with the Solid Waste Management Plan)

TCH notes that Groot claims that the section of the Lake County solid waste management plan relied upon with respect to criterion VIII concerns landfills, not transfer stations. Reply at 37. TCH replies that Groot misses the point, and the section applies to landfills serving Lake County. *Id.* TCH claims that since the Winnebago landfill will serve Lake County, this section applies to Winnebago County. *Id.* TCH alleges that the Winnebago landfill is not in compliance with the requirements of the solid waste management plan, and thus, the transfer station is not consistent with the solid waste management plan. *Id.*

TCH points out that the Village cites the City of Geneva v. Waste Management of Illinois, Inc., PCB 94-58, slip op. at 16 (July 21, 1994), to support its argument that a plan does not need to be strictly followed in order for the facility to be consistent. Reply at 38. TCH argues that the provision at issue here is not a technical timing provision as it was in City of

Geneva. *Id.* Instead, TCH claims that this case concerns a clear limitation on when a landfill can serve Lake County. *Id.*

Conclusion

Based on the foregoing arguments, TCH believes that the combination of the "voting bloc's" predetermination and its failure to make a credibility determination, coupled with the dramatic shortcomings in Groot's evidence with respect to criteria I, II, III, VI, and VIII mandates a reversal of the "voting bloc's" decision. Reply at 38-39.

DISCUSSION

The Board will first discuss the claims made by TCH that the proceedings before the Village Board were fundamentally unfair. Next, the Board will discuss each of the contested criteria.

Fundamental Fairness

Legal Authority

The law is well-settled that while the Board is generally confined to the siting authority's record when reviewing the appeal of a siting application, the Board may hear new evidence when considering whether the proceedings were fundamentally fair. Fox Moraine, 2011 IL App (2d) 100017 ¶58, citing Land & Lakes, 319 Ill. App. 3d at 48. As the Appellate Court stated in Fox Moraine:

> A siting authority's role in the siting-approval process is both quasi-legislative and quasi-adjudicative. Land & Lakes, 319 Ill. App. 3d at 47, 252 Ill. Dec. 614, 743 N.E.2d 188. Recognizing this dual role, courts have interpreted the applicant's right to fundamental fairness as incorporating minimal standards of procedural due process, including the opportunity to be heard, the right to cross-examine adverse witnesses, and impartial rulings on the evidence. *Id.* at 47–48, 252 Ill. Dec. 614, 743 N.E.2d 188. The members of a siting authority are presumed to have made their decisions in a fair and objective manner. Peoria Disposal, 385 Ill. App. 3d at 797, 324 Ill. Dec. 674, 896 N.E.2d 460. This presumption is not overcome merely because a decision-maker has previously taken a public position or expressed strong views on a related issue. 415 ILCS 5/39.2(d) (West 2006); Peoria Disposal, 385 Ill. App. 3d at 797–98, 324 Ill. Dec. 674, 896 N.E.2d 460. To show bias or prejudice in a siting proceeding, the petitioner must show that a disinterested observer might conclude that the siting authority, or its members, had prejudged the facts or law of the case. *Id.* at 798, 324 Ill. Dec. 674, 896 N.E.2d 460. Additionally, issues of bias or prejudice on the part of the siting authority are generally considered forfeited unless they are raised promptly in the original siting proceeding, because it would be improper to allow the petitioner to knowingly withhold such a claim and to raise it after obtaining an unfavorable ruling. *Id.* Fox Moraine, 2011 IL App (2d) 100017 ¶60.

The Board and the courts have reiterated these tenets of the law concerning fundamental fairness in the pollution control facility siting arena. Stop the Mega-Dump, 2012 IL App (2d) 110579 ¶27; Stop the Mega-Dump v. County Board of DeKalb County, Illinois, PCB 10-103, slip op. at 31, 52 (Mar. 17, 2011). The Board, therefore, must examine the actions of the decisionmaker and look to see if there is actual evidence to determine if prejudgment occurred in this case.

The parties argue what standard of review the Board should apply in determining whether or not the proceedings were fundamentally fair. In deciding whether or not the local siting authority's decision was fundamentally fair, the Board is reviewing the entire record to make its determination. The Board is not reviewing a decision by the local siting authority, but rather the Board is reviewing the actions of the siting authority. Therefore, the Board reviews the actions *de novo*.

While the Board reviews the record *de novo*, the courts have stated that "to show bias or prejudice in a siting proceeding, the petitioner must show that a disinterested observer might conclude that the siting authority, or its members, had prejudged the facts or law of the case. Fox Moraine, 2011 IL App (2d) 100017 ¶60. Further, the Board has stated that it is the petitioner's burden to demonstrate by "clear and convincing evidence" that the minds of the public officials were unalterably closed in critical matters of siting. *See* Stop the Mega Dump, PCB 10-103, slip op at 52 (Mar. 17, 2011), citing Fox Moraine, LLC v. City of Yorkville, PCB 07-146, slip op. at 60 (Oct. 1, 2009); *see also* A.R.F. Landfill, Inc. v. Lake County, PCB 87-51 (Oct. 1, 1987). Therefore, the Board must determine if TCH has demonstrated that the Village Board prejudged the siting application.

Waiver

It is well settled that failure to raise issues of bias and prejudice before the lower body will waive that argument on appeal. Fox Moraine, 2011 IL App (2d) 100017 ¶75. A review of the record establishes that TCH did raise issues of prejudgment at the siting hearing and again in TCH's findings of facts and conclusions of law. Therefore, the Board finds that the issues of fundamental fairness were not waived.

Prejudgment or Bias

TCH argues that a pattern of contacts and actions dating back to 2008 establish that the Village Board had determined, before the siting application was filed, that Groot would receive approval for the transfer station. These contacts include contacts with Ms. McCue, who was mayor prior to the siting application being filed. TCH has presented evidence that Ms. McCue had contact with Groot and Shaw Environmental. TCH also presented evidence that Groot made business decisions to locate in the Village, not only the truck terminal, but also a transfer station. However, much of TCH's "evidence" is speculation regarding the meaning of the contacts and business decisions that are evidenced. TCH makes much of business decisions by Groot, including the fact that Groot purchased the property for the transfer station without conditions on the contract, while the purchase for the truck terminal was conditioned on a zoning change.

Also, TCH raises statements made by Mr. Brandsma at an open house in 2010 as further evidence that the transfer station was going to be approved. However, neither, the Village, nor the Village Board had or have reason to be involved in Groot's business planning or decisions. Thus, while there is evidence of the fact that the two purchases of property were subject to different provisions and that an open house did occur, TCH relies on speculation to tie those business decisions by Groot to a predisposition allegation against the Village Board.

Likewise, TCH offers that Ms. McCue, as mayor, had contacts with Groot and Shaw Environmental. Ms. McCue attended an open house and attended SWALCO meetings. However, TCH cannot link these contacts to any action taken by Ms. McCue beyond her acting as mayor of her community. The presumption that a decisionmaker is making their decision in a fair and objective manner, is not overcome merely because the decisionmaker has taken a public positon or expressed strong views. Fox Moraine, LLC v. City of Yorkville, PCB 07-146, slip op. at 60; Fox Moraine, 2011 IL App (2d) 100017 ¶60. In this instance, while Ms. McCue had contact with Groot and Shaw Environmental, those contacts do not reveal that she took a position, much less that she prejudged the siting application. Ms. McCue attended the siting hearings, deliberated on the application and testimony, and stated she kept an open mind. *See* Groot Exh. 1 Attach E at 115:1-2.

The Board is also unpersuaded by TCH's arguments that the existence of both a host agreement and a solid waste management plan for the Village rendered the proceedings fundamentally unfair. The courts have held that amendment of a solid waste management plan, and participation by an eventual siting applicant in that process, were outside the scope of the siting hearing. *See* Residents Against Polluted Environment v. PCB, 293 Ill. App. 3d 219; 687 N.E.2d 552 (3rd 1997). In Residents, the court stated:

> In sum, the procedures employed by the county when amending its Plan were beyond the scope of the siting hearings as authorized by the Act. *See* 415 ILCS 5/39.2 (West 1994). Furthermore, LandComp's involvement in the amendment of the Plan did not create an inherent bias. Evidence regarding the amendment of the Plan was therefore properly excluded, and this proper exclusion did not render the siting process fundamentally unfair. Residents, 293 Ill. App. 3d at 224.

Further, the courts have found that the presence of a host agreement does not mean the application was prejudged. *See* Stop the Mega-Dump, Stop the Mega-Dump, 2012 IL App (2d) 110579 ¶62.

> In Stop the Mega-Dump, the court went on to state:
>
> Revenue or other financial considerations are irrelevant to a prejudgment inquiry because neither the local siting authority nor its members will realize and enjoy the additional potential revenue or pecuniary benefit. It is the community at large that stands to gain or lose from the local siting authority approving or disapproving the site. *Id*.

Likewise in Concerned Adjoining Owners *et al*. v. PCB, 288 Ill. App. 3d 572; 680 N.E.2d 815 (5th Dist. 1997), the court stated:

> The objectors make an extremely logical argument, that a hearing on the issue of whether to place a landfill in a certain area which is conducted by the same people who have already purchased land and spent large sums of public funds for that very purpose is fundamentally unfair because it is designed to insure that the site application will be granted. Despite the logic of the argument, our legislature and courts have already decided the issue against the objectors. Concerned Adjoining Owners *et al*. v. PCB, 288 Ill. App. 3d 565, 572; 680 N.E.2d 810, 815

Thus, even if the host agreement or other actions by a decisionmaker involve revenues either realized or spent, the proceedings would not be deemed fundamentally unfair.

The Board has reviewed the record in this proceeding. The Board notes that the testimony by Ms. McCue, Ms. Wagner, Ms. Lucassen, and Ms. Kenyon all indicated that the decision made by each of them was based on the siting application and proceedings. Furthermore, Ms. Kenyon did not agree that there was a conspiracy, even though she was pretty sure how the Village Board members would vote. While it is undisputed that there was contact prior to the siting application being filed, the evidence does not support a finding that the contacts rendered the proceedings fundamentally unfair.

In addition to the prefiling contacts, TCH points to comments by Mr. Sechen and argues that the Village was a "co-applicant", and that Mr. Sechen influenced Mr. Kleszynski to provide a pro-applicant opinion. The Board finds no support in the record for either of these contentions. First, the statements that TCH assert "reveal" the Village as a "co-applicant" when read in context, do not support the claim. Further, Mr. Kleszynski offered his professional opinion based on the reports and studies he reviewed. There is no evidence of collusion.

TCH finally argues that by adopting the Village's Hearing Officer's findings of facts and conclusion of law, the Village did not fulfill its duties. First, the Board notes that adopting the conclusions of staff is not in and of itself fundamentally unfair. *See* Land & Lakes, 319 Ill. App. 3d at 49-50. The court stated in Land & Lakes:

> Sierra Club contends that the extensive pre-application consultation between WM and Waste Services, when coupled with the County Board's adoption of the Olson Report, rendered the siting approval process fundamentally unfair. In particular, Sierra Club maintains that the County Board forfeited its neutrality by adopting the findings of its staff when that same staff aided WM in drafting its application. Sierra Club asserts that, just as it would be unacceptable for a clerk to provide legal assistance to a party and then assist a judge in ruling on a controversy involving that same party, it is fundamentally unfair for the County Board to rely on the ostensibly neutral Olson Report when that report was authored by persons who helped to draft the siting application.
>
> Sierra Club's attempt to analogize the relationship between the County Board and its staff to the relationship between a judge and his clerk is misconceived. A local siting authority is not held to the same standard of impartiality as a judge.

> [citations omitted]. Moreover, the decision of a local siting authority is not tainted merely because it adopts the findings and recommendations of persons who may have some bias concerning the merits of the siting application. So long as the local siting authority is aware of the possibility of bias, it is not improper for the authority to adopt findings and recommendations proffered by a person predisposed toward the siting application. Indeed, if it considers it proper, a local siting authority may adopt a set of findings proffered by an applicant or a siting approval opponent without depriving any party of fundamental fairness. Land & Lakes, 319 Ill. App. 3d at 49-50.

In this case, the Village Board was provided with findings of facts and conclusions of law from several parties, including the applicant and the objectors. A review of the Village Board's deliberations indicates that there was specific discussion about witnesses and which of the witnesses the Village Board agreed with. While the Village Board did not specifically find credibility on each witness, the Board finds that the debate of issues makes it clear that credibility was considered. Therefore, the Board finds that the Village Board did not abrogate its responsibility when adopting the hearing officer's findings of facts and conclusions of law, which included specific findings of credibility of witnesses.

Review of Contested Criteria

TCH argues that the Village Board's decision on five of the siting criteria is against the manifest weight of the evidence. The Board will discuss each of the criteria in turn.

Criterion I (Need)

In reviewing the Village Board's decision, the Board reviews the decision to determine if the decision is against the manifest weight of the evidence. Town & Country, 225 Ill. 2d 103. A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain, or indisputable from a review of the evidence. Land and Lakes, 319 Ill. App. 3d at 53, 743 N.E.2d at 197; Harris v. Day, 115 Ill. App. 3d 762, 451 N.E.2d 262 (4th Dist. 1983). The province of the hearing body is to weigh the evidence, resolve conflicts in testimony and assess the credibility of the witnesses. Merely because the Board could reach a different conclusion is not sufficient to warrant reversal. City of Rockford, 125 Ill. App. 3d 384; Waste Management of Illinois, Inc. v. PCB, 122 Ill. App. 3d 639, 461 N.E.2d 542 (3rd Dist. 1984); Steinberg v. Petta, 139 Ill. App. 3d 503, 487 N.E.2d 1064 (1st Dist. 1985); Willowbrook Motel Partnership v. PCB, 135 Ill. App. 3d 343, 481 N.E.2d 1032 (1st Dist. 1985).

In Fox Moraine, the court reiterated the standard that "an applicant need not show absolute necessity, it must demonstrate an urgent need for the new facility as well as the reasonable convenience of establishing it." Fox Moraine, 2011 IL App (2d) 100017 ¶110. The court continued: "The applicant must show that the landfill is reasonably required by the waste needs of the area, including consideration of its waste production and disposal capabilities." *Id*.

Ms. Seibert testified for Groot at the local siting hearing, and Mr. Thorsen testified on behalf of TCH. Ms. Seibert performed extensive review of the area in coming to her conclusion

that the facility was necessary to meet the waste needs of the service area. Mr. Thorsen disagreed with Ms. Seibert's interpretation of the data provided by Shaw Environmental.

The Board finds that Ms. Seibert's testimony regarding need for the facility supports the Village Board's finding that the facility is necessary. While Ms. Seibert and Mr. Thorsen disagreed on the immediacy of the need, certainly the Village Board could have relied on Ms. Seibert's testimony to decide that the transfer station was reasonably required to meet the needs of the service area. Therefore, the Board finds that the Village Board's decision on criterion I is not against the manifest weight of the evidence.

Criterion II (Designed and Located to Protect Public Health, Safety and Welfare)

As stated above the Board does not reweigh the evidence, and the Village Board's decision must be left undisturbed unless against the manifest weight of the evidence. *See* Town & Country, 225 Ill. 2d 103; Tate, 188 Ill. App. 3d at 1022. With this criterion, TCH offers two arguments. First TCH challenges the credibility of Groot's expert Mr. Moose, and second TCH offers that the facility is not designed to protect against odor.

A review of the Village Board's deliberations demonstrates that the Village Board considered the testimony by Mr. Moose and Mr. McGinley. The Village Board expressed concerns about the operations, but believed that conditions attached to siting approval would alleviate those concerns. As stated above, the Village Board adopted the hearing officer's findings, in which the Hearing Officer found Mr. Moose credible.

Based on a review of the record, the Board finds that the Village Board's reliance on Mr. Moose's testimony is appropriate. The Village Board did add conditions limiting hours of operation and amount of waste that could be received on average, and requiring negative air pressure be maintained. Therefore, the Board finds that the Village Board's decision is not against the manifest weight of the evidence.

Criterion III (Minimize Incompatibility and Impact on Property Values)

The Board does not reweigh the evidence and the Village Board's decision must be left undisturbed unless against the manifest weight of the evidence. *See* Town & Country, 225 Ill. 2d 103; Tate, 188 Ill. App. 3d at 1022. To satisfy this criterion the courts have held that an applicant must demonstrate that it has done or will do what is reasonably feasible to minimize incompatibility. File, 219 Ill. App. 3d at 907, citing Waste Management 123 Ill. App. 3d 1075. Neither can an applicant establish compatibility based upon a preexisting facility. *Id*. In File, the court stated: "it is important to note, however, that the statute does not speak in terms of guaranteeing no increase of risk concerning any of the criteria." File, 219 Ill. App. 3d at 907-908, citing City of Rockford v. Pollution Control Board, 125 Ill. App. 3d at 390.

The Village Board reviewed testimony from Mr. Lannert, Dr. Poletti, Mr. Kleszynski, and Mr. MaRous regarding the minimization of incompatibility and impact on surrounding property and property values. Mr. Lannert testified as to the character of the area, and TCH argues he was incorrect. However, a review of the record finds that there is evidence to support

Mr. Lannert's characterization. Mr. Lannert did note the residential areas, but there are no residences within 1,000 feet of the proposed transfer facility. The evidence in the record finds support for the Village Board's finding.

As to Dr. Poletti's appraisal, Mr. Kleszynski agreed with Dr. Poletti's findings. While Mr. MaRous questioned the results, the record shows he did not perform an independent study and based his findings on operational and traffic assumptions. Therefore, the Village Board had evidence to rely on in making its determination.

The Board finds that based on the evidence in the record, the Village Board's decision that Groot met criterion III is not against the manifest weight of the evidence.

Criterion VI (Minimize Impact on Existing Traffic)

The Board does not reweigh the evidence and the Village Board's decision must be left undisturbed unless against the manifest weight of the evidence. *See* Town & Country, 225 Ill. 2d 103; Tate, 188 Ill. App. 3d at 1022. To satisfy this criterion, the Act does not require elimination of all traffic problems. Fox Moraine, 2011 IL App 100017 ¶116, citing Tate, 188 Ill. App. 3d at 1024. Also, the applicant need not provide evidence of the exact routes, types of traffic or projections of volume and hours as the Act does not require a traffic plan to and from the designated facility, but rather a showing of patterns. *Id*.

Mr. Werthmann provided testimony as did Mr. Coulter. Mr. Coulter agreed with the conditions and limitation recommended in Mr. Werthmann's report but expressed concerns regarding the impact on traffic in non-peak periods. Mr. Coulter disagreed with Mr. Werthmann's conclusion that the facility was designed to minimize the impact on existing traffic patterns.

The Village Board added conditions to the siting approval to address some of the operational controls recommended by Mr. Werthmann. Mr. Werthmann offered a detailed analysis of traffic entering and exiting the facility. And while Mr. Coulter did not agree, the Village Board had evidence in the record to support the decision that criterion VI was met. Therefore, the Board finds that the Village Board's decision was not against the manifest weight of the evidence.

Criterion VIII (Consistent with the Solid Waste Management Plan)

The Board does not reweigh the evidence, and the Village Board's decision must be left undisturbed unless against the manifest weight of the evidence. *See* Town & Country, 225 Ill. 2d 103; Tate, 188 Ill. App. 3d at 1022. The solid waste management plan need not be followed "to the letter". City of Geneva v. Waste Management of Illinois, PCB 94-58 slip op. at 22 (July 21, 1994; *see also* Citizens United for a Responsible Environment v. Browning-Ferris Industries of Illinois *et al.*, PCB 96-238 slip op. at 7 (Sept. 19, 1996). It is within the decisionmakers' authority to determine consistency as long as the approval is "not inapposite" the solid waste management plan. *Id*.

Groot argues that the evidence is unrebutted. Mr. Moose testified that the facility was consistent with the Lake County solid waste management plan. TCH argues that the facility is not consistent because the operation plan is to take waste to Winnebago landfill, which does not have a host agreement with Lake County, according to TCH. TCH also argues inconsistency based on the failure of Groot to use state of the art odor control.

A review of the record finds that TCH has not substantiated its claims. The Board can find no evidence to support TCH. Therefore, the Board finds that the decision by the Village Board that Groot met criterion VIII is not against the manifest weight of the evidence.

CONCLUSION

The Board finds that the proceedings of the Village Board were fundamentally fair. The evidence does not indicate that the Village Board members had predetermined the outcome of the siting proceeding. Rather, the Village Board members made their decision based on the siting application, the hearing, and the record of the proceeding. The Village Board did not abdicate its responsibilities in adopting the hearing officer's findings of facts and conclusions of law.

Also, the Board finds that the Village Board's decision on each of the challenged criteria was not against the manifest weight of the evidence. Evidence in the record supports the Village Board's conclusion on each of the criteria. Therefore, the Board affirms the Village Board's decision to approve siting of a transfer station by Groot.

ORDER

The decision of the Village of Round Lake approving siting of a transfer station by Groot Industries, Inc. is affirmed.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on August 21, 2014 by a vote of 4-0.

John T. Therriault, Clerk
Illinois Pollution Control Board