

**BEFORE THE VILLAGE BOARD OF THE VILLAGE OF ROUND LAKE PARK  
SITTING AS POLLUTION CONTROL FACILITY SITING AUTHORITY**

IN RE: )  
 )  
APPLICATION FOR LOCAL SITING ) 03 -01  
APPROVAL FOR GROOT INDUSTRIES )  
LAKE TRANSFER STATION )

**TIMBER CREEK HOMES’ PROPOSED FINDINGS AND CONCLUSIONS**

Timber Creek Homes, Inc. (“TCH”), as a Participant in the hearing on the above siting request, hereby submits its Proposed Findings of Fact and Conclusions of Law with respect to the Application for Local Siting Approval for the Lake Transfer Station (the “Application”) submitted by Groot Industries, Inc. (“Groot”), with supporting references to the hearing record and case law, regarding the requirements of §39.2 of the Illinois Environmental Protection Act, 415 ILCS 5/39.2 (the “Siting Statute”).

**I. INTRODUCTION**

It is well-settled that siting approval can only be granted if the applicant proves that the proposed facility meets all nine of the criteria set forth in the Siting Statute. See *Town & Country Utilities, Inc. v. PCB*, 225 Ill. 2d 103, 117 (2007) This document will focus on the unrebutted evidence, primarily from Groot’s own witnesses and its own Application, supplemented by TCH’s witnesses, confirming that Groot has failed to meet its burden of proof with respect to Criteria 1, 2, 3, 6 and 8.

**II. CRITERION 1 – THE FACILITY IS NECESSARY TO ACCOMMODATE THE  
WASTE NEEDS OF THE AREA IT IS INTENDED TO SERVE**

During the siting hearing, the standard for establishing “need” received a tortured treatment at the hands of Groot’s counsel. Lest there be any doubt, this is the applicable standard, as most recently confirmed by the Second District Appellate Court (the Appellate District that encompasses Lake County):

Although 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. *Waste Management*, 175 Ill.App.3d at 1031, 125 Ill.Dec. 524, 530 N.E.2d 682. 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.* [Emphasis added]

*Fox Moraine, LLC v. United City of Yorkville*, 2011 IL App (2d) 100017, ¶110 (2<sup>nd</sup> Dist. 2011), appeal denied \_\_Ill.2d\_\_, 968 N.E.2d 81 (2012) See also *File v. D & L Landfill, Inc.*, 219 Ill.App.3d 897, 906-907 (5<sup>th</sup> Dist. 1991) As is evident from the *Fox Moraine* court's citation to its 1988 *Waste Management* decision, this standard is certainly nothing new. Nor is it anything new for Groot's consulting firm, Shaw Environmental, Inc. ("Shaw").

Phil Kowalski ("Kowalski") is a senior planner at Shaw. Christine Seibert ("Seibert"), Groot's Criterion 1 witness, has worked with Kowalski her entire career. (09/24/13 Hearing Transcript-3 at 44)<sup>1</sup> Seibert and Kowalski often work together on projects and review each other's work. She was the principal author of the needs assessment in this case, and Kowalski reviewed her work. (09/24/13 Hearing Transcript-3 at 45)

Why the discussion of a Shaw employee who did not testify in this proceeding? Because he testified in *Fox Moraine*:

Thus, in Kowalski's opinion, the intended service area was in need of a landfill because capacity of all landfills serving the area would be exhausted by 2016 or 2017. It would take eight to nine years from when a landfill is conceptualized until it could accept waste, so **Kowalski believed that siting a landfill now was urgent**. [Emphasis added]

*Fox Moraine* at ¶109

Seibert equates "urgent" with "immediate" or "imminent", and stated in the Application that, "[T]he service area faces an **immediate transfer capacity deficit**....[emphasis added]"

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<sup>1</sup> References to the transcript of the Hearing in this matter will be cited by the transcript date, session number for that day, and page number.

Seibert also said that by “immediate” she means as of 2015. (09/24/13 Hearing Transcript-3 at 107-108, 109; Application, p. 1-18; Groot Exhibit 7, Slide 23)

However, this discussion of “transfer capacity” ignores the present disposal capacity. Lake County currently has two operating landfills – Zion and Countryside – to which waste from Lake County is direct hauled. (09/24/13 Hearing Transcript-3 at 15) Seibert was asked to identify the portion of the Application that supports the existence of an "immediate landfill capacity deficit as of 2015". She pointed to the discussion at page 1-19 of the Application. This question and answer followed:

Q. So it's your position that as of 2015 there will not be sufficient capacity in the two Lake County landfills to accept Lake County waste?

A. No, I did not say that at all.

(09/24/13 Hearing Transcript-3 at 108-109)

Based on the information on page 1-19 of the Application, that is in fact the only answer Seibert could give to that question. Seibert’s report confirmed that, based on the remaining capacity at the two Lake County landfills, there is no “immediate” or “imminent” disposal capacity deficit:

- Countryside Landfill (Lake County): The Countryside Landfill has a remaining capacity of approximately **9 years** as of January 1, 2013, based on remaining capacity as of December 31, 2012 and average annual waste received from 2008 through 2012. This landfill will have approximately **6 years** of remaining capacity when the proposed Groot Industries Lake Transfer Station begins operating.<sup>2</sup>
- ADS Zion Landfill (Lake County): The ADS Zion Landfill has a remaining capacity of approximately **20 years** as of January 1,

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<sup>2</sup> Seibert was wrong about the remaining capacity at the Countryside Landfill. Counsel for the Solid Waste Agency of Lake County (“SWALCO”) pointed out that Seibert understated the remaining capacity at Countryside Landfill by two to three years. The capacity certifications for the Countryside Landfill dated as of January 1<sup>st</sup> of this year said they had ten years of capacity. (09/24/13 Hearing Transcript-3 at 148-150; TCH Exhibit 22)

2013, based on remaining capacity as of December 31, 2012 (including pending expansion capacity) and average annual waste received from 2008 through 2012. This landfill will have approximately **17 years** of remaining capacity when the proposed Groot Industries Lake Transfer Station begins operating. [Emphasis added]<sup>3</sup>

(Application, p. 1-19)

This is what Shaw says today about disposal capacity in Lake County:

Historically, communities in the service area have relied primarily on in-county landfills to dispose of their waste. The two in-county landfills are nearing capacity, however, and replacement capacity is being developed further from the service area. As a result, waste will be transported to more distant landfills for disposal.

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Existing landfills within the service area are nearing capacity and will not provide long-term disposal capacity.

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The convenient location of the proposed transfer station to waste generators within the service area is particularly important given the high price for diesel fuel and declining landfill capacity near the service area.

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[N]ew disposal capacity is increasingly being located further from the service area, and existing landfills with appreciable remaining capacity are located further from the service area than the facilities that the service area has historically relied upon. As existing landfills reach capacity and close, waste will be increasingly exported from the service area for disposal. Increased haul distances and high fuel prices add to the cost of managing waste, and transfer stations are needed to mitigate these impacts.

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The primary reason for using a transfer station is to reduce the cost of transporting waste to disposal facilities.

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The transfer station is located near waste generators.

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<sup>3</sup> Seibert expects that, after the Countryside Landfill closes, whenever that may be, the waste that went there will be absorbed by the Zion Landfill. (09/24/13 Hearing Transcript-3 at 112)

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The proposed transfer station will be located close to the centroid of waste generation for the service area.<sup>4</sup>

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[T]he majority of landfills with appreciable remaining capacity are located more than 50 miles from the centroid of the service area.

(Application, pp. 1-1, 1-6, 1-8, 1-20, 1-21, 1-28)

Shaw prepared the application for the recent expansion of the Zion Landfill. Kowalski was the principal author of the needs assessment in that matter, but Seibert worked on it as well, is familiar with it, and reviewed it in the context of preparing her needs assessment for this project because she needed to know everything about the disposal capacity that is available for this service area. (09/24/13 Hearing Transcript-3 at 59-60) This is what Shaw said just three years ago regarding the impact of that expansion on Lake County's waste needs (page references are to TCH Exhibit 34A, the excerpts from the Zion Landfill Expansion Siting Application):

The expanded landfill will provide solid waste disposal capacity to the City, Lake County ("County") and other communities in the service area for years to come. (p. 1.0-1)

The expanded landfill will provide numerous benefits to the City of Zion and other communities in Lake County and the service area. These benefits include the following:

Reduced waste transportation costs, and therefore reduced tax burdens and costs to residents and local businesses.... (p. 1.0-4)

A landfill that will compete with other landfills and assure that local communities will have the continued availability of a cost-competitive, safe and convenient disposal option.... (p. 1.0-4)

The convenient location of the proposed expansion will save on fuel consumption and also help communities to contend with waste disposal cost increases stemming from higher fuel costs. (p. 1.0-18)

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<sup>4</sup> The waste centroid is the average point in the service area where waste is being generated. (09/24/13 Hearing Transcript-3 at 16)

The proposed expansion will provide needed additional disposal capacity to communities in the service area, in accordance with sound solid waste management planning principles adopted by jurisdictions in Illinois and throughout the U.S. (p. 1.0-23)

The expanded Veolia ES Zion Landfill will provide a conveniently-located source of disposal capacity to the service area. The proposed Facility will be located approximately 16 miles from the centroid of Lake County and 46 miles from the centroid of the service area. Approximately 93 percent of the capacity at the 35 non-restricted landfills considered in the regional analysis is located greater than 50 miles from the Lake County centroid (refer to Figure 1-7). Approximately 96 percent of the capacity is located more than 50 miles from the service area centroid (refer to Figure 1-8). The average distance to the 35 facilities (weighted by capacity) is 113 miles from the Lake County centroid, and 98 miles from the service area centroid, or 2-7 times further than the Veolia ES Zion Landfill (refer to Appendix E.5). (p. 1.0-24)

Rising fuel costs as well as labor costs in the solid waste industry have added to the overall cost of managing waste. Figure 1-9 shows that the price of diesel fuel has increased significantly since the late 1990s and early 2000s. Although fuel prices declined in late 2008 and early 2009 from the very high levels observed in the summer of 2008, as of December, 2009, fuel prices still remain significantly higher than the 1995-2004 period. Many waste services companies have responded by adding fuel surcharges to customer bills. The siting of the proposed expansion may help to alleviate these cost increases and will save on fuel consumption by providing landfill capacity that is located nearer to waste generators within the service area. (p. 1.0-24)

The expanded landfill will provide additional disposal capacity to the City of Zion and Lake County. This will enable the City and other communities in the County to focus future solid waste efforts on increasing recycling and waste diversion. (p. 1.0-30)

The continued availability of the landfill will assist the City and County in attracting and/or retaining industry, since many industrial facilities consider the availability of safe, competitively-priced disposal capacity in determining where to locate. (p. 1.0-30)

The expanded Facility will be conveniently located to Lake County and the service area. Existing landfills are located, on average, more than twice as far away from the service area as the Veolia ES Zion Landfill. The landfills are located approximately seven times further than the proposed expansion from Lake County. As a

result, the proposed expansion will conserve significant quantities of fuel and enable communities in the service area to better contend with the rising cost of transporting waste farther distances. (p. 1.0-31)<sup>5</sup>

Seibert admitted that closer distances are important because the need to provide cost effective waste services is an element of waste need. She spoke at length about roadway miles, fuel costs, the higher costs associated with greater distances, etc. (09/24/13 Hearing Transcript-3 at 38-40) Seibert claimed that, particularly after the Countryside Landfill closes, siting the transfer station, which is also close to the waste centroid, would minimize the cost increases that may be experienced by trucking waste "many additional miles" to Zion. (09/24/13 Hearing Transcript-3 at 21-22) Seibert nevertheless acknowledged that both in-county landfills are at a convenient distance to transport waste. (09/24/13 Hearing Transcript-3 at 25)

Approximately 80% of Lake County's waste is currently direct hauled to the two in-county landfills. (09/24/13 Hearing Transcript-3 at 48) Seibert admitted that direct haul landfills are closer to the waste generation source, and therefore are serviced by the local haul vehicles rather than transfer vehicles. That is because the local haul vehicles are coming from a shorter distance, and can economically serve their area by going to those direct haul landfills. (09/24/13 Hearing Transcript-3 at 50)

In fact, Seibert admitted that the break-even distance, in relation to the waste centroid, means that hauling direct to a landfill becomes more expensive than a transfer haul if the landfill is more than 18 miles away. (09/24/13 Hearing Transcript-3 at 68; Application, p. 1-25) For purposes of this Application and this waste centroid, the Zion landfill is only 16 miles away, the

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<sup>5</sup> Seibert confirmed that the waste centroid is the average point in the service area where waste requiring disposal is being generated. As reflected on Figure 1-7 in the Application, the Countryside landfill is 5 miles from the centroid, and the Zion landfill is 16 miles from the centroid. Eighteen miles is the break-even distance as between direct haul and transfer haul. Because both landfills are less than 18 miles from the centroid, they are both accessible by direct haul to the service area. (09/24/13 Hearing Transcript-3 at 65-67)

Countryside landfill is only 5 miles away, and the Winnebago Landfill is over 60 miles away. (09/24/13 Hearing Transcript-3 at 68-69, 87-88)

Seibert also said that the presence of facilities that are reasonably available to address the needs of the service area, and convenience of location, are also aspects of the needs assessment. (09/24/13 Hearing Transcript-3 at 127-128) Seibert then had to admit two critical facts:

1. Landfills like the two in Lake County that are located much closer to the waste centroid of the service area than other more distant landfills provide benefits to the people near them who generate the waste; and
2. Closer landfills also provide an important economic or environmental benefit by preserving the fuel that would otherwise be spent by going to more distant landfills.

(09/24/13 Hearing Transcript-3 at 128)

Seibert nevertheless tried to compare Lake County to Kane and DuPage Counties. She stated that the landfills in those latter counties had closed, and this reflected a trend that she is expecting to see in Lake County. (09/24/13 Hearing Transcript-3 at 17; Application p. 1-11) As noted, however, unlike Lake County, the landfills in those “comparable” counties have already closed. Moreover, no new landfills are allowed in those counties. Lake County has no such prohibition. (09/24/13 Hearing Transcript-3 at 94-96, 101-102)

There have been cases where facilities have been approved in the face of evidence of remaining disposal capacity in the service area. But in every one of those cases, the determining factor was the absence of any contrary evidence or witnesses on the issue of need. See, *e.g.*, *Fox Moraine, supra*, ¶110 (“No reliable evidence was presented refuting the need for the landfill.”); *Industrial Fuels & Resources/Illinois, Inc. v. Illinois Pollution Control Board*, 227 Ill.App.3d 533, 544-545 (1<sup>st</sup> Dist. 1992) (“No contrary evidence was admitted or even offered at the

hearing.’); *E&E Hauling v. Pollution Control Board*, 116 Ill.App.3d 586, 609 (2<sup>nd</sup> Dist. 1983), (Testimony on need was neither rebutted nor impeached.)

TCH called John Thorsen to testify regarding Criterion 1. Thorsen is a professional engineer registered in four states, including Illinois. He has decades of experience in solid waste issues and also holds a masters degree in regional planning. (09/25/13 Hearing Transcript-2 at 30-31) Thorsen also has experience in Lake County with what is now the Countryside Landfill, dating back to the 1980s. (09/25/13 Hearing Transcript-2 at 31-33) Thorsen performed the needs analysis for proposed expansion of the former ARF Landfill, and testified as an expert witness in that matter. Through his over 40-year career, approximately 20 to 25% of Thorsen's work has involved waste issues in Lake County. (09/25/13 Hearing Transcript-2 at 33-34, 35, 44) Thorsen was also a member of the Lake County Solid Waste Advisory Committee, a planning group that dealt with County planning for solid waste management. (09/25/13 Hearing Transcript-2 at 34-35)

Thorsen independently verified the data for the amount of waste received at the two Lake County landfills for the last three years. This was from the capacity reports publish by the Illinois Environmental Protection Agency (“IEPA”), including the data for 2012. That report has not yet been formally published, but Thorsen obtained the data directly from the IEPA. (09/25/13 Hearing Transcript-2 at 37-38; TCH Exhibit 22) Thorsen also reviewed the need section of the Zion Landfill expansion application. (09/25/13 Hearing Transcript-2 at 48)

Thorsen confirmed that the determination of whether there is a need for the proposed transfer station was a simple matter that did not require a great deal of analysis. He accepted at face value the waste generation and disposal capacity figures for the two Lake County landfills

in Groot's Application<sup>6</sup>, and easily concluded that there is plenty of landfill space in Lake County until 2027. (09/25/13 Hearing Transcript-2 at 36-37, 49-51)

Thorsen concluded that there is no need, urgent or otherwise, for this transfer station in Lake County at this time. This conclusion is based on the confirmation in Groot's Application that the Lake County landfills have capacity through 2027, based on Shaw's own figures reflecting waste generated in the service area, average disposal rates, and remaining capacity. These figures in fact reflect that there is an overage of capacity. (09/25/13 Hearing Transcript-2 at 38-39)

Seibert admitted that a need for new capacity is demonstrated when the demand or the amount of waste that is requiring disposal exceeds the available capacity. (09/24/13 Hearing Transcript-3 at 126-127) She could do little else but admit that fact, since it is the standard identified in *Fox Moraine*. By Groot's own admissions, that is a situation that does not exist in Lake County, and will not for many years to come.

Thorsen also separately assessed the need for a transfer station in Lake County that would transport waste over 60 miles away, to the Winnebago Landfill. He performed a simple mileage analysis, summarized on page 3 of his report (TCH Exhibit 2). Based on an average of 750 tons per day, Thorsen concluded that hauling to the Winnebago Landfill would entail more than twice as many road miles per day than required for direct haul to the Lake County landfills. Thorsen concluded that there is no need for such a facility, and it would result in a waste of fuel and carbon into the air. (09/25/13 Hearing Transcript-2 at 39-40)

Apart from his independent conclusion that there is no need for this transfer station, Thorsen also concluded that Groot failed to demonstrate that the proposed transfer station is

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<sup>6</sup> Thorsen did confirm that, based on the latest capacity information obtained from the IEPA, the Countryside Landfill has 10 years of capacity remaining. (09/25/13 Hearing Transcript-2 at 67-68)

necessary to accommodate the waste needs of Lake County. This conclusion is likewise based on Groot's own figures, which demonstrate sufficient in-county landfill capacity through 2027. (09/25/13 Hearing Transcript-2 at 40-41)

Based on the amount of work already done, Thorsen also concluded that, assuming no new landfill capacity before 2027, there will be no need for a transfer station until 2025. (09/25/13 Hearing Transcript-2 at 64-65) In response to a barrage of questioning from Groot's counsel, including the suggestion that he in fact did not have the opinion that he did have, and that was set forth in his report, Thorsen repeatedly reiterated that Groot failed to meet Criterion 1 because there is capacity through 2027, and there is no current need for the transfer station. (09/25/13 Hearing Transcript-2 at 80, 84-85, 89-90) Thorsen confirmed that the issue under Criterion 1 is whether there is a need in the service area for a transfer station and his opinion, again, is that there is no need at this time for a transfer station to serve the service area. (09/25/13 Hearing Transcript-2 at 100, 106)

Groot tried to circumvent its own evidence regarding the substantial amount of remaining disposal capacity in Lake County by shifting the focus from need, to "planning". Seibert asserted that, "In-county landfills will not provide needed 20 years of capacity for Lake County waste." (Groot Exhibit 7, Slides 7, 22) Seibert attempted to connect need for purposes of Criterion 1 with what SWALCO had identified in the 2004 version of the Lake County Solid Waste Management Plan ("SWMP") as a recommendation to maintain 20 years of available disposal capacity. (09/24/13 Hearing Transcript-3 at 19) Seibert's ultimate opinion was in fact based on what she described as "the necessary 20 years of capacity to meet the county's needs". (09/24/13 Hearing Transcript-3 at 42) Seibert in fact claimed that the "urgent need" for the transfer station is set

forth throughout the Application, in terms of the purportedly limited remaining landfill life and the County's desire to have 20 years of capacity available. (09/24/13 Hearing Transcript-3 at 74)<sup>7</sup>

Groot's counsel, in closing, confirmed Groot's position. Groot's effort to establish need in the face of overwhelming and uncontroverted evidence of adequate disposal capacity in Lake County through at least 2027 (even if the error about the remaining capacity at Countryside Landfill is ignored) is based exclusively on the county's "planning" in a 20-year time frame – what counsel claimed to be the "the 20-year need of Lake County." (10/02/13 Hearing Transcript-2 at 15-16)

It is important in the first instance to recognize the law in this area. As noted above, the *Fox Moraine* court confirmed that the focus is on “waste production and disposal capabilities”. See also *Waste Management of Illinois, Inc. v. Pollution Control Board*, 234 Ill.App.3d 65, 69-70 (1<sup>st</sup> Dist. 1992) (Evidence presented by applicant for transfer station “was insufficient to show that the waste transfer station was reasonably required by the waste needs of the area and did not adequately address the waste production and disposal capabilities in the service area.”) Seibert defined remaining "capacity" as "the physical space that is available to place waste into". (09/24/13 Hearing Transcript-3 at 47) This is consistent with the accepted definition of how need is determined. It takes into account actual disposal capacity, not what might be considered under Criterion 8.

Even if the case law did not exist and what Shaw claims to be the County's plan was a relevant factor, the evidence is un rebutted that Groot misrepresented any such present expression

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<sup>7</sup> Thorsen disregarded Seibert's suggestion that, for "planning purposes", need has to be assessed over a 20-year period – a concept not supported by the case law. Rather, Thorsen conducted his analysis through 2027, at which point there would be no more landfill capacity in the county. The point is that there is adequate capacity until 2027. (09/25/13 Hearing Transcript-2 at 55) Notably, even SWALCO's counsel objected to Groot's counsel's effort to commingle the concept of need in Criterion 1 with the "needs" of the Lake County SWMP for purposes of Criterion 8. (09/25/13 Hearing Transcript-2 at 74) Ultimately, the Hearing Officer agreed, and noted that the Lake County SWMP indicates that transfer stations are consistent with that plan, but that is not relevant to need. (09/25/13 Hearing Transcript-2 at 75-76)

by Lake County. As noted above, Groot claims that Lake County's SWMP expresses a "requirement" for "20 years of disposal capacity". It is noteworthy that, unlike other siting applications, Groot's Application did not include a copy of the current SWMP, adopted by the Lake County Board on April 13, 2010. It was instead submitted into evidence by TCH. (TCH Exhibit 27)

The Siting Statute provides direction on which SWMP is to be considered. Criterion 8 specifically provides that, "[F]or 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** [Emphasis added]". The current SWMP emphasizes this point: "Any disposal facility proposed to be developed within Lake County must be consistent with the recommendations **in this 2009 Plan Update**. [Emphasis added]" (TCH Exhibit 27, p. 4-3)

The current SWMP notes that the prior 2004 version included a "recommendation", L6, to, "Acquire additional landfill capacity for Lake County to meet waste disposal needs for a twenty (20) year period." The current SWMP also notes that this recommendation was "Not implemented". (TCH Exhibit 27, p. 3-10)

Groot's notion that "need" is controlled by what the SWMP "plans" is expressly based on the 2004 version of the Lake County SWMP. (Application, p. 1-10) But that recommendation from the 2004 SWMP, albeit not a statement of "need", is not repeated or included in the 2009 SWMP. The only such forward looking statement in the current SWMP is that, "One of the primary purposes of the planning process is to make sure new facilities and/or programs are in place **prior to existing facilities closing**. [Emphasis added]" (TCH Exhibit 27, p. 4-1) Indeed, the current SWMP specifically addresses any recommendations in prior versions, and provides that, "Recommendations and requirements applicable to pollution control facilities that may have existed in the 1989 Plan or the subsequent Plan Updates **are superseded** by this 2009 Plan

Update. [Emphasis added]" (TCH Exhibit 27, p. 1-2) There is absolutely no legal or factual basis for Groot's assertion of "need" based on "planning".

There was also some debate during the hearing regarding how long it takes to site a transfer station. Seibert had confirmed in another transfer station proceeding several years ago, based on a study by Kane County, that "two to three years should be allowed for proposals, siting, permitting and construction of the transfer stations prior to the landfill closures." Groot's counsel objected to the relevance of this admission, given its age. The Hearing Officer also questioned its weight, again because of its age. (09/24/13 Hearing Transcript-3 at 114-116) So which is it – 2 to 3 years or 5 or more years? How long does it take? How long did it take here? What was the evidence on this issue?

Groot's counsel claimed that the Application had been "painstakingly planned and considered for an extended period of time". (09/23/13 Hearing Transcript-1 at 14) Shaw's lead engineer, Devin Moose ("Moose") and Seibert said it has already taken five years. Moose also claimed that the process can take four to seven years. (09/23/13 Hearing Transcript-1 at 42, 91-92; 09/24/13 Hearing Transcript-3 at 25) Is there evidence in the record to substantiate these assertions, or to contradict them?

Moose stated that he was involved in assisting Groot in finding the subject location. Doubtless to remain consistent with his claim that it takes four to seven years to develop a transfer station, Moose asserted that Groot purchased the property "four or five years ago". (09/23/13 Hearing Transcript-3 at 39) But it was established during the hearing that Groot purchased the subject property, along with the property across Porter Drive where it plans to operate its so-called "Eco Park", on May 4, 2010, for a total price of \$2,750,000 (Application, Appendix D) Several witnesses confirmed that Groot acquired the property in May 2010, not "five years ago". (10/01/13 Hearing Transcript-1 at 21-22; 10/02/13 Hearing Transcript-1 at 76)

Moose repeatedly stated that the Application is the primary source for the evidence in this case. (09/23/13 Hearing Transcript-2 at 14, 16, 28-29) Focusing on that primary source, all of the drawings in the Application are dated May 2013. That in and of itself likely means nothing, since the drawings are dated as of when the siting application was about to be filed. However, the age of the data in the drawings presents a different picture. Rather than “years” ago, the drawings confirm that the information was obtained as of October and November, 2012. (Application, Drawings D3, D4, D5, D6) The “footers” in Sections 2, 4, 5, 7 and 9 of the Application further confirm that the work for the subject transfer station was done in 2012. All of those sections, about which Moose testified, reflect that the work was done in 2012, not years before that. All of the pages of that section contain the same footer – “T:\Projects\2012\147312 [Emphasis added]”.

All of the backup data for the text of the Application was also prepared in 2012, including the following:

1. The backup data for Section 1 of the Application, in Appendix G, is dated September 20, 2012.
2. The correspondence with the Illinois Historic Preservation Agency, Appendix I, is dated September and October 2012.
3. The information in Appendix L, Stormwater Management, is dated October 2012.
4. The information in Appendix M.2, Tipping Floor Waste Storage Capacity, is dated October 2012.
5. The information in Appendix N, Wastewater Generation, is dated November 2012.
6. The Fire Protection Correspondence, Appendix P.2, is dated November 2012.

7. The Illinois Environmental Protection Agency Regulated Recharge Area and USEPA Sole Source Aquifer Correspondence, Appendix R, is dated September 2012

Indeed, the earliest material in the Application, and the only item dated before the May 2010 purchase date, is a April 22, 2010 report from the Illinois Department of Natural Resources (“IDNR”) in Appendix J. The balance of the material in that Appendix is dated September and October 2012.<sup>8</sup>

The fact that there is substantial disposal capacity remaining in Lake County is un rebutted. That capacity exists, by Groot’s own admission, through at least 2027, and most likely beyond that given Groot’s misstatement of the actual remaining capacity at the Countryside Landfill. There is no need, urgent, immediate, or otherwise, for this transfer station at this time, or for years to come.

There is yet one more shortcoming with Groot’s needs analysis. Seibert claimed that the “service area”, for which the need must be assessed and confirmed, is Lake County. (09/24/13 Hearing Transcript-3 at 15) Contrary to Seibert's testimony, however, and to Groot's purported definition of the service area proposed to be served by the transfer station, Michael Werthmann (“Werthmann”), Groot’s traffic consultant, admitted that the service area will in fact fluctuate and include areas outside of Lake County. Seibert gave Werthmann that information. (09/25/13 Hearing Transcript-1 at 63-64) When asked if Groot would accept a condition limiting the service area to Lake County, Seibert dismissed the notion, and stated that she did not think such a condition was needed. (09/24/13 Hearing Transcript-3 at 147-148)

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<sup>8</sup> The witnesses who do not work for Shaw evidently did not get the message about “five years”. Chris Lannert (“Lannert”), one of Groot’s Criterion 3 witnesses, admitted he had been working on the project for only three years – since Groot purchased the property. (130924 Hearing Transcript-1 at 55)

Seibert spoke at great length about information regarding Lake County – population projections, waste generation projections, quantities of waste requiring disposal, etc. (09/24/13 Hearing Transcript-3 at 26-30) Yet she said nothing, and in fact there is nothing in the Application or anywhere else in the hearing record, about the area outside of Lake County that this facility is intended to serve. This is despite Werthmann's admission that it was Seibert who told him that this facility will in fact serve an unspecified area outside of Lake County. Groot provided no information of any kind, either in the Application or during the hearing, regarding what that area is, what its waste needs are, what the disposal capacity for the area is, or any of the information necessary to determine whether Criterion 1 has been met.

**III. CRITERION 2 – THE FACILITY IS SO DESIGNED, LOCATED AND PROPOSED TO BE OPERATED THAT THE PUBLIC HEALTH, SAFETY AND WELFARE WILL BE PROTECTED**

The credibility of the expert witnesses is a significant factor in assessing compliance with Criterion 2. See *Fox Moraine, supra*, 2011 IL App (2d) 100017, ¶102, citing *File v. D & L Landfill, Inc.*, 219 Ill.App.3d 897, 907 (1991) In *Fox Moraine*, the credibility issue focused specifically on the testimony of the applicant's principal Criterion 2 witness – Moose. *Id.* Nor was *Fox Moraine* the first time that a denial of siting based on Criterion 2 focused on testimony from Moose. See *Town & Country Utilities, Inc. v. Illinois Pollution Control Board*, 225 Ill.2d 103, 111-114, 124-125 (2007)

But we need not resort to prior assessments of Moose's credibility. Moose provided ample evidence in this proceeding that, to coin a phrase, his testimony demonstrates unequivocally that he is not a truthful individual, and that very little, if anything, he says ought to be believed.

### **A. Moose Is Not A Credible Witness**

Moose is the engineer of record for this project. The portions of the Application prepared by Shaw were done so under his direction. Moose also placed his professional engineer's stamp on the Application, by which he represented that the Application was prepared under his personal supervision or developed in accordance with the use of accepted engineering standards. (09/23/13 Hearing Transcript-1 at 41, 73)

There are multiple examples of Moose's deceptive testimony during the hearing, highlighted by two particular ones that loom large in the context of several siting criteria. This discussion must begin with one of those – a subject that took on increasing proportions as the hearing wore on – the Winnebago Landfill.

Very early in his presentation regarding multiple siting criteria, including Criterion 2, Moose claimed that the transfer trailers from this transfer station would go to an unspecified landfill 100 to 120 miles away. (09/23/13 Hearing Transcript-1 at 61) Moose claimed not to know what landfill would be used in decades to come, or even in 2015 when this transfer station is proposed to start operating. Moose also claimed that there has been no contractual agreement with anyone to take waste from this transfer station in 2015. (09/23/13 Hearing Transcript-2 at 18-20) Moose also claimed that he was not aware of Groot's agreement with the Winnebago Landfill, even though he admitted that he participated in the Winnebago Landfill siting proceeding and is familiar with the host agreement between Winnebago County and the operator of that landfill. (09/23/13 Hearing Transcript-2 at 20-21)

Evidently trying to support Moose, Seibert claimed that Groot has not definitively determined what landfill the waste from this transfer station would go to, and it could go to the

Zion Landfill. (09/24/13 Hearing Transcript-3 at 117)<sup>9</sup> Yet Seibert admitted that all of the waste from Groot's Glenview transfer station already goes to the Winnebago Landfill. (09/24/13 Hearing Transcript-3 at 57, 81) Seibert's statement was also inconsistent with Werthmann's Criterion 6 traffic report. Werthmann confirmed, as set forth in his report, that, "The outbound waste is anticipated to be transported from the transfer station to the Winnebago Landfill located in Winnebago County, Illinois." Werthmann's "directional distribution" further confirms that all of the outbound waste from this facility will go west to the Winnebago Landfill, and not back into Lake County. (09/25/13 Hearing Transcript-1 at 31-32, 33, 35, 65-67; 68-69; Application, p. 6-10; Groot Exhibit 8, Slide 21, 23) Werthmann confirmed that he was provided that information by "the development team". (09/25/13 Hearing Transcript-1 at 67, 68-69)

Seibert's assertion was also inconsistent with her own prior representations. Seibert participated in the preparation of Groot's *Lake Transfer Station Energy and Emissions Life Cycle Assessment*, TCH Exhibit 10. The Assessment was prepared in part to comply with the 2009 Lake County SWMP. (09/24/13 Hearing Transcript-3 at 118) The Assessment identified two landfills as "intended to receive waste from the Lake Transfer Station" – Rochelle Municipal Landfill and Winnebago Landfill. (09/24/13 Hearing Transcript-3 at 119; TCH Exhibit 10, p. 4)

Despite the unequivocal evidence that the waste from the transfer station would be transported to the Winnebago Landfill, Moose continued to assert during his Criterion 8 testimony that "we're not going through Winnebago Landfill." (09/25/13 Hearing Transcript-2 at 7-8) Little by little, however, Moose's story finally began to break down. First, he admitted that Shaw had prepared the *Life Cycle Assessment*, TCH Exhibit 10. (09/25/13 Hearing Transcript-2 at 11-12) After Werthmann had testified, Moose admitted that he told Werthmann to use the

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<sup>9</sup> Not even Moose supported this notion, having already testified that all of the waste would go to a landfill outside of Lake County. (130925 Hearing Transcript-1 at 64-65)

Winnebago Landfill as the destination because it "is required in order to create the traffic showing going to the west". He also claimed that he provided the same information to Seibert for the *Life Cycle Assessment*. However, Moose claimed that these were just to "put a dot on a map". (09/25/13 Hearing Transcript-2 at 14-15) But neither Werthmann's traffic report nor the *Life Cycle Assessment* speak in such "dot on the map" terms. They are, rather, specific and definitive about where the waste is going.

Under what can only euphemistically be termed "cross-examination" by counsel for the Village of Round Lake Park (the "Village"), Glenn Sechen ("Sechen"), Moose's effort to equivocate fell short. Rather than say the waste from the transfer station will not go to the Winnebago Landfill, Moose acknowledged that, "Groot may be bringing their waste now to Winnebago landfill". He then tried to soften the blow by saying that "there is no guarantee that they're going to bring it to that landfill over the course of the life of this facility for the next 20 or 30 years." When asked by Sechen if Groot could send the waste to some other landfill "pretty much any time they want", Moose did not say "yes", he said, "At some point, yes." (09/25/13 Hearing Transcript-2 at 15)

Finally, at the very end of his testimony, we learned why Moose was so equivocal about the Winnebago Landfill – because he knows that Groot does in fact have an agreement with that landfill to accept all waste generated through transfer stations owned and/or operated by Groot and disposed of at that landfill. That, Moose finally admitted, was why he instructed Werthmann to use Winnebago Landfill in his traffic analysis. (09/25/13 Hearing Transcript-2 at 24-25)

Even Groot's attorney finally conceded that the "present intent" is for the waste to go to the Winnebago Landfill. (09/30/13 Hearing Transcript-2 at 53) Groot's counsel repeated this admission in its Renewed Motion to Strike the testimony Brent Coulter, which confirmed, contrary to Moose's repeated false denials, that "it was explained several times at the hearing"

that “it is the immediate intention to travel to the Winnebago Landfill”. (Groot Motion at 6) No such “explanation” appears anywhere in the record. These admissions do confirm what one of Groot’s attorneys said about Moose many years ago – that “he is not a truthful individual, and that very little, if anything, he says ought to be believed.” *Residents Against a Polluted Environment v. County of LaSalle and Landcomp Corporation*, PCB No. 97-139, 1997 WL 355836, Slip Op. Cite at 24 (IPCB June 19, 1997)

Moose’s prevarication was not just limited to the Winnebago Landfill. It extended directly to a subject critical to the issues encompassed by Criterion 2. Moose’s evasion in this regard was more subtle – less obvious than denying where the waste is going, but no less indicative of his proclivity for falsehoods.

Moose stated that approximately 90% of the waste handled by the facility would be municipal solid waste. Moose admitted that food waste is wetter and "more odiferous", and needs special handling. But when asked if the facility would accept food waste, Moose demurred, and said, "It's not part of this siting application." (09/23/13 Hearing Transcript-3 at 12-13)

The Illinois Environmental Protection Act (the “Act”) confirms that food waste is very much “part of this siting application”. Section 3.290 of the Act, 415 ICS 5/3.290, defines “municipal waste” as, “garbage, general household and commercial waste, industrial lunchroom or office waste, landscape waste, and construction or demolition debris.”<sup>10</sup> Indeed, responding to a verbatim recitation of that definition, Moose admitted that this is exactly the type of waste that the facility will accept. (09/23/13 Hearing Transcript-3 at 43-44) But in claiming that food waste is “not part of the siting application”, Moose neglected to mention §3.200 of the Act, 415 ILCS 5/3.200, which further defines “garbage” as "**waste resulting from the handling, processing,**

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<sup>10</sup> This definition is also incorporated in the Village of Round Lake Park Siting Ordinance, §160.02

**preparation, cooking, and consumption of food**, and wastes from the handling, processing, storage, and sale of produce.” [Emphasis added]

**B. Groot’s Design And Operating Procedures Ignore Accepted Principles Of Transfer Station Design And Operations, And Fail To Protect The Public Welfare**

Moose’s reason for misrepresenting the nature of the waste that this facility can and will accept became evident as the hearing focused on the issue of odor. That issue became a central one in the context of Groot’s effort to prove compliance with Criterion 2. Moose acknowledged that garbage does in fact generate odor. (09/23/13 Hearing Transcript-1 at 66; 09/23/13 Hearing Transcript-2 at 4)

Groot’s counsel represented, from the earliest moment of the siting hearing, that Moose would demonstrate that no shortcuts were taken on this facility, and it "incorporates all the most current state of the art amenities that need to be included to provide these types of protections". (09/23/13 Hearing Transcript-1 at 16) The un rebutted evidence in fact demonstrates exactly the opposite – that this facility, based exclusively on what Moose “likes”, is contrary to the state of the art. Groot intends to ignore accepted processes and mechanisms that have in fact been the “state of the art” for years, solely because Moose does not want to implement them. Indeed, Moose's conception of "state of the art" is two decades old. (130923 Hearing Transcript-1 at 48)

Shaw conducted a public presentation on Groot’s behalf in February 2013. This was the first public presentation of information regarding the proposed transfer station. (09/23/13 Hearing Transcript-2 at 13-14) In that presentation, Shaw represented that, “No waste will be stored on the tipping floor overnight....” (TCH Exhibit 28, p. 3) But Moose admitted that Groot is seeking approval to operate 24 hours a day and 7 days a week, including Sundays and holidays – a fact Shaw did not disclose in the February presentation. (09/23/13 Hearing Transcript-2 at 14, 37) The facility could in fact operate 365 days a year. (09/23/13 Hearing Transcript-2 at 37)

Moose said that the facility will be open 24/7 because it will be accepting overnight deliveries of commercial waste to accommodate Groot's customers. (09/23/13 Hearing Transcript-2 at 10, 36, 37; 09/23/13 Hearing Transcript-3 at 41) Waste from Groot's commercial accounts is picked up during all times of the day, and Groot therefore wants the flexibility to service those accounts at all times of the day. (09/23/13 Hearing Transcript-3 at 7)

Moose was unwilling to agree to a condition that would limit operating hours but allow for the flexibility of overnight operation with prior notice to the Village, even though he is aware of other facilities that operate that way. (09/23/13 Hearing Transcript-3 at 20-21) There are transfer stations where the hours are limited and the operator has to provide notice and obtain permission to operate outside of the normal operating hours. But Moose does not agree with that concept. (09/23/13 Hearing Transcript-3 at 47)

According to the Application (p. 2.4-13), all waste will be removed from the facility on a daily basis if the facility is not operating 24/7. (09/23/13 Hearing Transcript-1 at 113) The Application (page 2.4-13) also states that no waste will typically remain on the facility floor overnight. According to Moose, "typically" was a poor choice of words – a mistake – because it is not Groot's intent to keep garbage on the floor overnight. (09/23/13 Hearing Transcript-1 at 119) In fact, with the exception of a few minutes a day, if the transfer station is operating 24 hours per day, there could be waste on the tipping floor for the entire time. (09/23/13 Hearing Transcript-2 at 69-71)

In addition, the facility's bay doors will be open 20 hours per day. (09/23/13 Hearing Transcript-2 at 4, 6, 8-9, 12; 09/24/13 Hearing Transcript-2 at 64-65) The bay doors could be kept closed, and are in fact designed to be, but Moose does not believe it is necessary for the doors to be closed. That is why the Application does not provide for keeping the doors closed. (09/23/13 Hearing Transcript-2 at 64-65, 65-67; Hearing Transcript-3 at 5-7, 41-43)

According to Moose, it would be feasible to keep the doors closed. He also admitted that noise from the facility would be more noticeable at night, and that keeping the doors closed and only opening them when vehicles entered and exited would reduce the potential for noise to carry. But he nevertheless claimed that the doors are not necessary for noise control – despite the fact that the Application (p. 2.4-12) specifically states that the doors are intended to be used for noise control. (09/23/13 Hearing Transcript-3 at 8-9)

Moose also claimed that there will never be transfer trailers filled with garbage parked at the facility – except for a potentially short period of time, possibly 2 hours, while awaiting processing. (09/23/13 Hearing Transcript-3 at 14-15) Moose was definitive that loaded transfer trailers would not be parked outside overnight or over the course of a day. (09/23/13 Hearing Transcript-3 at 16) But the site design allows for overnight parking of transfer trailers. (09/23/13 Hearing Transcript-1 at 56)

According to Moose, there will not be a filter of any kind on the output air from the facility. (09/23/13 Hearing Transcript-3 at 28) The air from inside the transfer station will be discharged outside through the roof with no treatment. (09/23/13 Hearing Transcript-3 at 48) Moose has designed transfer stations with filters on the output, such as the Glenview transfer station operated by Groot, but that system was disabled ten years ago. (09/23/13 Hearing Transcript-3 at 29) Yet Moose admitted that he has seen filtration devices used for transfer stations. (130923 Hearing Transcript-3 at 20)

TCH called Charles McGinley (“McGinley”), a licensed chemical engineer in the state of Minnesota, and renowned expert in the fields of air quality, air toxics and odor. (09/30/13 Hearing Transcript-1 at 10, 11) McGinley has testified as an expert on these subjects, odors, odor control measures, and management options to deal with odors, multiple times in multiple states. (09/30/13 Hearing Transcript-2 at 31)

McGinley has 40 years of experience in his field. He works extensively for the waste industry, and has worked for some of the largest waste companies in the world. He has provided training services relating to odor management development, odor management auditing, odor sampling and investigation. (09/30/13 Hearing Transcript-1 at 17-19) That training applies to both landfills and transfer stations. McGinley has provided training to every major waste company in the United States. He has also provided services to various government environmental agencies. He has also authored or contributed to a number of scholarly reference materials on odor issues in the waste industry. McGinley holds three patents for devices and processes in the fields of odor measurement and analysis. He has also provided training to companies that themselves provide services to the waste industry, such as Shaw. McGinley has provided training to over ten Shaw employees, including employees in Illinois. (09/30/13 Hearing Transcript-1 at 20-23)<sup>11</sup> McGinley has spent 30 years training dozens of transfer station personnel on odor management systems and odor control procedures. (09/30/13 Hearing Transcript-1 at 36-37, 38-39) McGinley teaches people how to design transfer stations and manage odor from waste facilities, including transfer stations. (09/30/13 Hearing Transcript-1 at 43)

Based on his review of the Application and Moose's testimony, it is McGinley's opinion that the facility will not prevent air laden with garbage odors from passing into the community,

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<sup>11</sup> This may explain Moose's preemptive effort to undermine McGinley's testimony. Moose had claimed that the people who work at the transfer station can identify odor, and, "You don't have to be an expert in odor." (09/23/13 Hearing Transcript-3 at 30) Groot's counsel also tried, desperately and repeatedly, to prevent McGinley from testifying, even resorting to citation of a case, *Van Breemen v. Department of Professional Regulation*, 296 Ill.App.3d 363 (2<sup>nd</sup> Dist. 1998), for the proposition that an engineer who is not licensed in Illinois cannot testify as an expert. Groot's counsel admitted that there is no authority in Illinois to support such a proposition in the context of a siting hearing. (130930 Hearing Transcript-1 at 11-17; 09/30/13 Hearing Transcript-2 at 37-39) But he also failed to acknowledge, as pointed out by TCH's counsel, that the proposition for which counsel cited to *Van Breemen* had been rejected by the Illinois Supreme Court in 2006 in *Thompson v. Gordon*, 221 Ill.2d 414, 434 (2006), where the Court held that not having an Illinois license is not a bar to testifying as an expert in Illinois. The Hearing Officer ultimately rejected counsel's attempt, and ruled on the basis of the existing law that McGinley's testimony with respect to odor was proper and admissible. (09/30/13 Hearing Transcript-2 at 39-42)

and that would infringe on the public welfare, in contravention of Criterion 3. (09/30/13 Hearing Transcript-1 at 32, 34, 39) The opinion is based on the details in the Application, and related information that describes how air will be exhausted from the facility and how the doors will be opened during business hours, allowing odorous air to leave the facility. (09/30/13 Hearing Transcript-1 at 40)

There are ways to reduce garbage odors, both physically and operationally, which are emitted by a waste transfer station. Those methods are published in USEPA guidance documents specifically for urban transfer stations. (09/30/13 Hearing Transcript-1 at 40) The guidance documents are attached to McGinley's report, TCH Exhibit 4.

Groot will only partially implement those odor control measures. Those partial measures will not be adequate to keep odors from traveling beyond the boundary of the facility. (09/30/13 Hearing Transcript-1 at 42) Without scrubbers, as required by the USEPA, the air that is laden with garbage odor will be exhausted from the elevation on the building and will go into the community untreated. (09/30/13 Hearing Transcript-1 at 55-56, 94-96) McGinley also stated that the facility doors need to be closed all the time, except for truck passage, in order to minimize the passage of odors beyond the facility's property boundary. (09/30/13 Hearing Transcript-1 at 59) The issue with the doors is that they will be open 20 hours a day. The air exchange system is inadequate to address odors because it is not sufficient to address the air volume with the doors open. The open doors will result in a wind tunnel effect. (09/30/13 Hearing Transcript-1 at 99-100, 101) McGinley's opinion regarding the high speed doors is that, contrary to Moose's "preference", they are designed to be, and need to be, closed at all times. (09/30/13 Hearing Transcript-1 at 58) The fast acting doors are an effective means of odor control, if they are closed but not if they are kept open. (09/30/13 Hearing Transcript-1 at 66)

McGinley has personally been to waste transfer stations that have open doors and ventilation without filtration. He observed odor downwind in the community from the air being pulled out or blown through the open doors. (09/30/13 Hearing Transcript-1 at 49-50) There is, in fact, nothing about garbage odor that prevents it from traveling more than 1000 feet. Charles McGinley has personally observed garbage odor that has traveled more than 1000 feet. (09/30/13 Hearing Transcript-2 at 30)

Groot's counsel, of course joined by Sechen on behalf of the Village, continued at almost every step to try to prevent McGinley from testifying – even to the extent of repeatedly renewing his legally baseless assertion regarding McGinley's qualification to testify. (09/30/13 Hearing Transcript-1 at 34-36)<sup>12</sup> If anything, all of these efforts, coupled with the fact that McGinley is the pre-eminent expert in his field, having trained not just waste company employees, but even Shaw employees, only served to enhance his credibility. Most notably, McGinley's testimony was completely un rebutted. Neither Groot nor the Village called a single witness to contest McGinley's testimony. Indeed, his testimony was supported by no less an authority than the U.S. Environmental Protection Agency (“USEPA”).

One of the attachments to McGinley's report is a USEPA publication entitled *Waste Transfer Stations: A Manual for Decision Making*, published in 2002 (the “USEPA Manual”)

The USEPA Manual includes a discussion on Urban Transfer Station Design and Operations:

Urban transfer stations must employ a combination of planning, design, and operating practices to help minimize impacts upon the surrounding community. Listed below are several engineering designs, technologies, and operating practices that an urban transfer station should consider employing to mitigate facility impacts upon the neighboring community.

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<sup>12</sup> The Hearing Officer had already ruled that McGinley has the expertise to testify about odor. (09/30/13 Hearing Transcript-1 at 31)

(USEPA Manual, attached to TCH Exhibit 4, at 36) The USEPA then lists a number of design and operational features that must be implemented in order to achieve the foregoing goals. With respect to odors, the USEPA Manual lists the following requirements in order to minimize odors:

- Remove all waste at the end of each operating day. Do not allow any waste to remain on site overnight.
- Frequently clean/wash down the tipping floor or surge pit.
- Install misting systems with deodorants to mask or neutralize odors. Be prepared to make seasonal adjustments as needed to control odors.
- Install ventilation systems with air filters or scrubbers.
- Plant vegetative barriers, such as trees, to absorb and disperse odors.
- Use odor vestibules on truck entrances and exits. Odor vestibules are 2-door systems in which the outer door closes before inner door opens to prevent odors from escaping.
- Install plastic curtains on entrances and exits to contain odors when doors are opened to allow vehicles to enter or exit.
- Use biofilters – which pass malodorous air through organic matter, such as wood chips, mulch, or soil – to capture odor molecules. Bacteria in biofilters consume and neutralize odor molecules.
- Set up a community “odor complaint” phone line, and respond to community complaints.

Notably, the USEPA Manual is repeatedly cited as an authoritative reference in the Application – just not by Moose. (Application, pp. 1-15, 1-20, 1-33)<sup>13</sup> Moose will not implement the majority of the controls required by the USEPA Manual, nor will he even do what he claimed would be done for the minimal odor control measures identified in the Application. This is what

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<sup>13</sup> Groot's counsel did refer to the USEPA Manual, but only for the purpose of misrepresenting what it said regarding waste regulations in New Hampshire. (09/30/13 Hearing Transcript-1 at 78, 116-119) McGinley was also asked about the HERC facility in Minneapolis. He pointed out that odors are not detectable from that facility because it follows the USEPA guidelines, including an air vestibule with fast acting doors that are kept closed. (09/30/13 Hearing Transcript-1 at 86-87)

Moose had to say about the odor mitigation measures mandated by the USEPA, and his view of the “state of the art”:

Q. All right. Then just finally on this issue of the odor controls that everybody's been asking you about. Is the plan to remove all waste at the end of each operating day every day?

A. Yes, off the tipping floor.

**Q. And is the plan to not allow any waste to remain on site overnight at any point in time?**

**A. No.**

Q. All right. Is the plan to install misting systems with deodorants to mask or neutralize odors?

A. Yes.

Q. Is the plan to install ventilation systems with air filters or scrubbers?

A. No.

Q. Is the plan to use odor vestibules on truck entrances and exits?

A. No.

Q. Could you explain what odor vestibules are?

A. It's an air lock where a truck enters -- opens a door -- a door opens, truck enters an air lock, door closes behind it, and another door opens to allow the truck to enter.

Q. Is the plan to install plastic curtains on entrances and exits to contain odors when doors are opened to allow vehicles to enter or exit?

A. No.

Q. Is the plan to use biofilters which pass malodorous air through organic matter such as wood chips, mulch or soil to capture odor molecules?

A. No. [Emphasis added]

(130923 Hearing Transcript-3 at 44-46) It is clear, under these circumstances, that Groot has failed to meet its burden with respect to Criterion 2.

**IV. CRITERION 3 – 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**

The standard applicable to Criterion 3 is well-settled:

This criterion requires an applicant to demonstrate more than minimal efforts to reduce the landfill'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. Illinois Pollution Control Board (1984), 123 Ill.App.3d 1075, 1090, 79 Ill.Dec. 415, 426, 463 N.E.2d 969, 980.) 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, 79 Ill.Dec. at 425, 463 N.E.2d at 979.)

*File v. D & L Landfill, Inc., supra*, 219 Ill.App.3d at 907 See also *Fox Moraine, supra*, 2011 IL App (2d) 100017, ¶112

**A. Lannert Failed To Ascertain The Character Of The Surrounding Area**

It is readily apparent that, before the issue of minimization of impacts can be addressed, an applicant must first determine the character of the surrounding area that will be impacted. Groot's witness with respect to the first part of Criterion 3 completely failed in this regard.

Lannert stated that a very significant portion of his work, in determining minimization of impacts on the character of the surrounding area, is to determine the context in which the facility is proposed to be located in relation to the other elements around the proposed site. (09/24/13 Hearing Transcript-1 at 14-15; Groot Exhibit 4, Slide 4) Another aspect of the required methodology is to gather regional information. This includes plans, zoning areas and physical field inspections. This is all done in order to verify the regional context. (09/24/13 Hearing Transcript-1 at 15; Groot Exhibit 5, Slide 4) Lannert's study includes an examination of land

uses within one mile of the proposed site to determine compatibility from both a land use and zoning perspective. (09/24/13 Hearing Transcript-1 at 17-18; Groot Exhibit 5, Slides 6 – 10) Lannert studied over 2200 acres of land within a one-mile radius of the facility in order to examine surrounding impact. (09/24/13 Hearing Transcript-1 at 25) This is all done in order to determine the character of the surrounding area. (09/24/13 Hearing Transcript-1 at 30)

It is only upon determining the character of the surrounding area, and evaluating the compatibility of those existing uses with the proposed transfer station, that Lannert could proceed to determine how to minimize the incompatibility. (09/24/13 Hearing Transcript-1 at 38) Lannert's opinion regarding the character of the surrounding area was in turn a principle basis for his opinion that 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 3. (09/24/13 Hearing Transcript-1 at 47-48)

One of the principal purposes of Lannert's study, and a principal linchpin of his opinion, as set forth at p. 3.1-6 of the Application, was to analyze and evaluate the compatibility of the existing land uses within a one mile radius of the subject site. (09/24/13 Hearing Transcript-1 at 75-76) Lannert acknowledged that his methodology, including his determination of the appropriate study area, including specific attention to land use and zoning within a one-mile radius of the proposed site, was of the type commonly utilized to make determinations of land use compatibility. (09/24/13 Hearing Transcript-1 at 69-70) Lannert's study area for purposes of determining the character of the surrounding area, and therefore compliance with Criterion 3, was therefore the area within a one-mile radius of the proposed site. (09/24/13 Hearing Transcript-1 at 68; Application p. 3.1-6) The one-mile radius is part of the surrounding area for purposes of the Criterion 3 analysis. (09/24/13 Hearing Transcript-1 at 128) The specific purpose of the one-mile study area was to determine the character of the surrounding area. (09/24/13

Hearing Transcript-1 at 74) Lannert admitted that the appropriate study area for determining the character of the surrounding area is not limited to the properties immediately adjacent to the proposed site. (09/24/13 Hearing Transcript-1 at 71) Lannert therefore focused specific attention on the land uses and zoning within the one-mile radius of the proposed transfer station. (09/24/13 Hearing Transcript-1 at 79-80)<sup>14</sup>

Lannert confirmed, as stated at page 3.1-9 of the Application, that, "An analysis of the existing zoning and the permitted uses within a one mile study radius of the subject site indicate that the existing uses have been established for many years and continued growth is anticipated as planned." (09/24/13 Hearing Transcript-1 at 81) Lannert stated that open space and industrial land uses account for 59% of the area within a one-mile radius of the proposed site. (09/24/13 Hearing Transcript-1 at 67-68; Application, p. 3.1-12 and Table on p. 3.1-6) Lannert in his conclusion focused on the fact that 55% open space plus 4% industrial within one mile adds up to his 59%. But he did not address the fact that, after open space, residential uses, at 37%, are the second most predominant uses in the study area – far ahead of industrial uses. (09/24/13 Hearing Transcript-1 at 81-82) Lannert's Criterion 3 opinion was instead based on his statement that "the immediate area surrounding the site has been defined by industrial uses that have been established over the past years". (09/24/13 Hearing Transcript-1 at 60-62) Lannert admitted that the sole purpose in linking the 55% open space to the 4% industrial was to be able to say that those are compatible land uses to the proposed transfer station. (09/24/13 Hearing Transcript-1 at 84)

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<sup>14</sup> Lannert confirmed that the analysis is not limited to the 1000-foot setback required by section 22.14 of the Act, 415 ILCS 5/22.14. The 1000-foot setback does not define the limit of the analysis for determining the character of the surrounding area, or minimization of impacts on that area. (09/24/13 Hearing Transcript-1 at 73-74) That is why Lannert evaluated the area within a one-mile radius of the proposed site. (09/24/13 Hearing Transcript-1 at 71-72)

Lannert had limited, if any knowledge, regarding what the 4% industrial actually comprises. Other than Groot's truck terminal, Lannert did not know what any of the purported industrial uses near the proposed facility actually are, other than they are classified as "light industrial". (09/24/13 Hearing Transcript-1 at 102-103, 104, 105-106, 107, 109-110, 114, 115-116)

In contrast, Lannert admitted that residential uses have been successfully integrated within the study area. Indeed, he acknowledged that the residential areas appear "to have been carefully designed with open space parks, trails, buffers and setbacks within those communities. So intermixed within their zoning is a lot of open space as required by the community's specific relations. So that is what I'm trying to get at in terms of that statement." (09/24/13 Hearing Transcript-1 at 82-83) Lannert conceded that the substantial area of residential uses in the study area are "well done residential areas". This included the Timber Creek community, which has been in existence for over 40 years. Lannert also conceded that "residential uses account for 37 percent of the one mile study area and occur within historically established neighborhood areas and recent master plan communities." (09/24/13 Hearing Transcript-1 at 86-88)

Ultimately, Lannert would not acknowledge simple math. When asked whether, instead of "concluding" that open space and industrial land uses account for 59 percent of the area within a one mile radius of the proposed site, he could instead have acknowledged that open space and residential land uses account for 92 percent of the area within a one mile radius of the proposed site, his answer was a bald-faced, "No." (09/24/13 Hearing Transcript-1 at 89-90)

Lannert fundamentally and dramatically mischaracterized the character of the surrounding area. Even Peter Poletti ("Poletti"), Groot's appraiser, did not agree with Lannert. Poletti confirmed the real character of the surrounding area. "The Village of Round Lake Park is

a multi-faceted **commercial and residential community**. [Emphasis added]" (Application, Poletti Report, p. 13)

Moreover, Lannert's "characterization" was based on an impermissible foundation.

During the hearing, Groot's counsel pointed out that:

Trends of development are just that, trends. They are speculative. This line of questioning is speculative. We don't know what is going to happen in the future. We only know the current state of those lands adjacent to the proposed facility, Mr. Hearing Officer. In that regard, I would cite generally *Tate vs. Illinois Pollution Control Board*, 188 Ill. App. 3d, 994, Fourth District case in 1989 that specifically says that, that you have to look at the current state of the land because that's all we know.

(09/24/13 Hearing Transcript-1 at 62-63) Yet that is exactly what Lannert did.

Lannert tried to defend his refusal to acknowledge simple math, and that residential uses far outweigh industrial ones, by claiming that "by lumping open space and agricultural uses in with my industrial, I will probably be more correct than incorrect **over the next decade** and that is my opinion [emphasis added]". (09/24/13 Hearing Transcript-1 at 130-131) This was the only justification Lannert offered for ignoring the current character of the surrounding area. Lannert's "justification" ignores the simple fact that potential future land uses are completely irrelevant to the Criterion 3 analysis.

Lannert also failed to consider actual operating conditions in determining whether the facility's impacts have been minimized. Lannert's report does not take into account the fact that the subject facility will operate 24 hours a day and 7 days a week. (09/24/13 Hearing Transcript-1 at 93) Nor does Lannert's report address the fact that the facility's bay doors will be open 20 hours per day. Lannert was not aware of those facts when he prepared his report. (09/24/13 Hearing Transcript-1 at 94) Lannert tried to compare the subject facility to the area surrounding the Glenview and Elburn transfer stations. But no one advised him that the operating hours for

those facilities are dramatically shorter than those proposed for the subject facility – nowhere near 24/7. (09/24/13 Hearing Transcript-1 at 95-96; TCH Exhibit 19)

Lannert said that his opinion was based on the average of 750 tons of waste per day represented in the Application. He did not know as of the time of his testimony, when it had already been confirmed that there was in fact no limit on the amount of waste proposed to be handled by this facility, if an increase in tonnage would have an impact on his opinions. He could only admit that he had not studied that because it was not part of his assignment, but he would "like to have an opportunity again to determine whether it would impact" on his opinion. (09/24/13 Hearing Transcript-1 at 122-123)

### **B. Poletti's Opinion Was Equally Flawed**

Poletti acknowledged that he worked with Lannert to present a "unified approach" to the two aspects of Criterion 3, and that he relied on Lannert's work in the context of his property value assessment. (09/24/13 Hearing Transcript-2 at 37-38, 63) This reliance included Lannert's "determination" of the character of the surrounding land uses. (09/24/13 Hearing Transcript-2 at 39, 44) Poletti and Lannert never discussed the advisability of representing the combined percentages of open space and commercial property, or of open space and residential. (09/24/13 Hearing Transcript-2 at 63-64)

Poletti also relied on his understanding of certain design and operating features of the proposed transfer station as part of the minimization of the impact on property values. These included the use of automatic doors to minimize noise, and that the facility will be well-run and well-operated. (09/24/13 Hearing Transcript-2 at 42-43; Groot Exhibit 6, Slide 7) These are factors that Poletti routinely evaluates as things that will tend to minimize potential impacts on surrounding property values. (09/24/13 Hearing Transcript-2 at 44-45) Those operational and design features that Poletti understands Groot intends to implement are the basis for Poletti's

opinion that the impact on surrounding property values has been minimized. (09/24/13 Hearing Transcript-2 at 45, 59)

TCH called Michael MaRous (“MaRous”) as a witness with respect to Criterion 3. MaRous is a highly qualified real estate appraiser with almost 40 years of experience. He is highly regarded in his field, and has received a number of honors and advanced designations. MaRous has vast experience, including over 1000 projects in Lake County with a combined value of over \$1 billion. He has also worked for well over 40 units of government, including a number in Lake County. MaRous has been qualified as an expert witness over 300 times in various settings and forums. (10/01/13 Hearing Transcript-1 at 14-19)

MaRous has also done numerous market impact studies, including several involving waste facilities. This includes work for owners and operators of waste facilities. (10/01/13 Hearing Transcript-1 at 19-20)

Regarding the character of the surrounding area, MaRous confirmed that the Timber Creek community is well established in the area. It is a well-developed residential community with approximately 240 residential units and over 700 residents. Timber Creek has been in existence for over 40 years. It is attractive, has mature landscaping and it is well maintained. (10/01/13 Hearing Transcript-1 at 20, 26-27)

In contrast, MaRous described a transfer station as a “very heavy industrial use”. (10/01/13 Hearing Transcript-1 at 19-20) It is not common for heavy industrial uses to be co-located with residential uses. They are normally one half mile or more apart from each other. Instead, heavy industrial uses are generally concentrated with other heavy industrial uses. (10/01/13 Hearing Transcript-1 at 27-28)

A light industrial use generally includes office, light distribution, warehouse and light assembly. Heavy industrial uses, like a waste transfer station, are much more intensive uses, such

as heavy manufacturing, cranes, forges, etc. (10/01/13 Hearing Transcript-1 at 79) A garbage transfer station is a heavy industrial use because of its characteristics – it generates heavy truck traffic, with vehicles weighing over 40,000 pounds, with doors open potentially 20 hours per day. It is a very intensive, heavy industrial use. (10/01/13 Hearing Transcript-1 at 79)

MaRous confirmed the information regarding prevailing land uses within one mile of the proposed facility – 92% open space and residential and only 4% industrial. (10/01/13 Hearing Transcript-1 at 32-33) He also pointed out that Lannert did not identify the 4% industrial as either light or heavy industrial uses. (10/01/13 Hearing Transcript-1 at 33) As noted above, Lannert admitted that, except for Groot's existing truck storage facility (a light industrial use)<sup>15</sup>, he had no idea what the nature of the industrial uses was. MaRous agreed that Criterion 3 requires minimization of the impacts on the character of the surrounding area as it exists. (10/01/13 Hearing Transcript-1 at 102-103) The problem here, as discussed above, is that Lannert did not do that. He instead based his mischaracterization of the character of the surrounding area on what he speculates it will be in the next decade.

MaRous concluded that, given the actual character of the surrounding community (which Lannert mischaracterized), and the transfer station's actual operating conditions (which Lannert did not take into account), minimization of the impact on the character of the surrounding area, including the Timber Creek community which is just over 1000 feet away, has not been adequately addressed. (10/01/13 Hearing Transcript-1 at 29-30) MaRous confirmed that the use of fast acting automatic doors would be a benefit, if used as designed. The absence of minimization in this instance, and in fact the increase in impact, results from Groot's (or

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<sup>15</sup> The Groot truck terminal is a light industrial use. What differentiates that from the transfer station, a heavy industrial use, is the transfer of garbage. (10/01/13 Hearing Transcript-1 at 107-108)

Moose's) intent to keep the doors open 20 hours per day and the absence of any limitation on the transfer station's operating hours. (10/01/13 Hearing Transcript-1 at 87-88, 99)

With respect to Poletti, MaRous pointed out that the character of the surrounding area must be taken into account in the context of a Criterion 3 analysis. (10/01/13 Hearing Transcript-1 at 38) As discussed above, however, Poletti relied on Lannert's mischaracterization for that information.

MaRous concluded that Poletti had not demonstrated compliance with Criterion 3, particularly as to minimization of impacts on the very close Timber Creek community. Ultimately, given the defects in both reports, MaRous concluded that neither Lannert nor Poletti had demonstrated compliance with Criterion 3. (10/01/13 Hearing Transcript-1 at 48-49)

MaRous' testimony regarding the character of the surrounding area, including the nature of the uses, was unrebutted. Lannert mischaracterized it based on improper speculation, and Poletti relied on Lannert.

Apart from having MaRous reconfirm his opinions and the bases for them, the cross-examination by Groot's counsel was therefore highlighted by counsel's effort to undermine MaRous' credibility by using false or fabricated "facts". For example, MaRous had testified that he had done work in connection with the McCook Landfill. Groot's counsel falsely asserted that there is no McCook Landfill, in an unseemly effort to suggest that MaRous was fabricating testimony. (10/01/13 Hearing Transcript-1 at 72-74) Groot's counsel did the same thing with respect to the quarry operation in the area of the Bluff City transfer station, claiming that the quarries are "played out and no longer being mined". (10/01/13 Hearing Transcript-1 at 121-122)

The McCook Landfill does in fact exist. (10/01/13 Hearing Transcript-2 at 27-28) The same is true for the quarry operation near Bluff City. (10/01/13 Hearing Transcript-2 at 28-29)

The discussion of the property value portion of Criterion 3 concluded with the testimony of Dale Kleszynski (“Kleszynski”), an appraiser called by the Village in its role as the undisclosed co-applicant. Kleszynski opined about Poletti’s opinion, and also offered his own “independent” opinion about property value. The deficiencies in Kleszynski’s “analysis” are innumerable.

Kleszynski said that he conducted a Standard 3 review of Poletti’s report, as defined by the Uniform Standards of Professional Appraisal Practice (“USPAP”). A Standard 3 review requires the reviewer to examine the data in the report under review. (10/02/13 Hearing Transcript-1 at 19-20) A Standard 3 review is more extensive than a peer review, and involves a series of defined steps the reviewing appraiser must take in order to formulate his opinion, and how the results are to be communicated. (10/02/13 Hearing Transcript-1 at 13) The Standard 3 review also required Kleszynski to determine if Poletti's opinion was credible. This entailed a determination of whether Poletti's methods were consistent with the standards in the industry. (10/02/13 Hearing Transcript-1 at 20-21, 65)

Kleszynski’s opinions fail for the same reasons Lannert’s do. Kleszynski did not opine on or even analyze the mischaracterization of the surrounding area by Lannert. (10/02/13 Hearing Transcript-1 at 50) Kleszynski did visit the area around the proposed site, including the residential subdivisions in the area, in order to familiarize himself with the uses that exist in the area that might be influenced by the establishment of the transfer station. He did go over 1000 feet, because he wanted to familiarize himself with the uses that are located surrounding the subject property. He in fact went even farther than Lannert - " I went in every direction at least a couple of miles". (10/02/13 Hearing Transcript-1 at 17, 78-80)

However, Kleszynski’s assignment was limited by the Village to a review of what Poletti did. (10/02/13 Hearing Transcript-1 at 12) Kleszynski also sent Poletti's report to an appraiser at

Texas A&M University, for a "second opinion". Again, however, this "second opinion" did not include a review of Lannert's report, upon which Poletti's report was based. (10/02/13 Hearing Transcript-1 at 28-29) Kleszynski "independently" came to the opinion that the proposed facility comports with the property value element of Criterion 3. But he likewise provided no opinion regarding the character of the surrounding area. (10/02/13 Hearing Transcript-1 at 32) Finally, Kleszynski also conducted a "peer review" of MaRous' report, but did not conduct a Standard 3 review. (10/02/13 Hearing Transcript-1 at 33)<sup>16</sup> Kleszynski limited his criticism to MaRous' review of Poletti's work, and said nothing about the review of Lannert's work. (10/02/13 Hearing Transcript-1 at 33-34)

Kleszynski ultimately admitted why the "scope" of his review had been limited by the Village – because he in fact contradicted Lannert. Kleszynski agreed with Lannert's statement that the existing zoning and the permitted uses within a one-mile study radius of the subject site indicates that the existing uses have been established for many years and continued growth is anticipated as planned. (10/02/13 Hearing Transcript-1 at 102-103) Kleszynski also agreed that open space represents 55% of the area within one mile of the proposed site. He also agreed that residential uses, at 37%, are the second most predominant uses within the one-mile study area. Kleszynski also agreed that residential uses have been successfully integrated within the study area. (10/02/13 Hearing Transcript-1 at 104)

Kleszynski likewise agreed with the statement from Poletti's report (which Poletti had evidently ignored in relying on Lannert) that, "The Village of Round lake Park is a multi-faceted commercial and residential community". Indeed, Kleszynski admitted that this is not an area that is defined by industrial uses. (10/02/13 Hearing Transcript-1 at 105) Kleszynski then admitted,

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<sup>16</sup> Kleszynski's assignment expanded to include a review of MaRous' report after that report was issued. But he was neither asked nor did he offer to conduct a Standard 3 review of that report, as he claimed to have done with Poletti's report – although missing the critical review of Lannert's work. (10/02/13 Hearing Transcript-1 at 65)

contrary to Lannert's opinion (Application, p. 3.1-12) that, "the area within 1 mile of the site has been defined **by open space and residential uses** that have been established over the past years. [Emphasis added]" (10/02/13 Hearing Transcript-1 at 105) <sup>17</sup>

Kleszynski's opinions about Poletti's report suffer from similar defects of omission. Kleszynski became aware during the course of the hearing that this facility is proposed to operate 24 hours a day and 7 days a week, and the facility doors will be open 20 hours a day. He did not consider those facts in his report, because Poletti did not consider them. (10/02/13 Hearing Transcript-1 at 46, 83-84) Kleszynski is aware that the three transfer stations reviewed in Poletti's report do not operate 24/7. (10/02/13 Hearing Transcript-1 at 49-50) Kleszynski nevertheless claimed that the hours of operation would have no impact on his ultimate conclusions, but had to arrive at that assertion by circular reasoning. Having admitted that Poletti did not consider the hours of operation, he nevertheless said that he based his opinion on what Poletti did. He was able to "ignore" the absence of any consideration of operating hours by stating that he "didn't make any determinations about what factors were important". In other words, he ignored operating hours because Poletti did, regardless of whether they were relevant. Kleszynski also admitted that he did not consider any of that information in coming to his "independent" conclusion, again because Poletti did not consider it. (10/02/13 Hearing Transcript-1 at 47-48, 85-86) In fact, Kleszynski admitted that he did not review any other reports, involving transfer stations or otherwise, in coming to any of his opinions, other than what Poletti looked at. (10/02/13 Hearing Transcript-1 at 47-48, 86-87)

Kleszynski was reminded of the various operative provisions of the Uniform Standards of Professional Appraisal Practice, which he agreed governed his activities in this case. (10/02/13

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<sup>17</sup> Kleszynski never spoke to either Lannert or Poletti about his fundamental disagreement regarding the character of the surrounding area. (10/02/13 Hearing Transcript-1 at 107)

Hearing Transcript-1 at 64-65) His actions were in direct contravention of several of those standards. First, he completely ignored the fact that a fundamental underpinning for Poletti's report, Lannert's opinion regarding the character of the surrounding area, was incorrect, and based on a future speculation that is irrelevant in the context of Criterion 3. Second, having learned what the actual operating conditions of the proposed facility will be, and having acknowledged that Poletti did not take that information into account, Kleszynski also chose to ignore it.

Kleszynski's "independent opinion" was completely lacking in even the type of analysis that Poletti conducted. Despite having confirmed the propriety of both a target and control area analysis and a multiple regression analysis in the context of Poletti's report (10/02/13 Hearing Transcript-1 at 24-28), Kleszynski did neither to support his "independent" opinion – a failure that he had discussed with Sechen. (10/02/13 Hearing Transcript-1 at 80-82)

Nor was Kleszynski's "independent opinion" consistent with the standards that he admitted apply to such an analysis. For purposes of analysis, the proposed transfer station is considered a potential “detrimental condition”. This is the condition that has a potential impact on the value of surrounding properties. (10/02/13 Hearing Transcript-1 at 89-90) In arriving at his "independent" opinion, Kleszynski admitted that he failed to determine a baseline value, or compare data where a similar condition or situation is known to exist. Yet his own report confirmed that such an analysis is required in order to assess the potential impact of a detrimental condition. (10/02/13 Hearing Transcript-1 at 88-90)

Indeed, in coming to his "independent" opinion, Kleszynski did not conduct any of the analysis that he had conducted in a prior matter when assessing the impact of a detrimental condition. (10/02/13 Hearing Transcript-1 at 92-94; TCH Exhibits 45, 46) TCH Exhibits 45 and 46 are the methodology and backup for an opinion Kleszynski rendered in another matter where

he was assessing the impact of a detrimental condition. He did none of those things in coming to his "independent" opinion in this matter. (10/02/13 Hearing Transcript-1 at 97) Kleszynski performed no independent analysis of the values of properties before and after the imposition of the detrimental condition, that being the transfer station. (10/02/13 Hearing Transcript-1 at 112) Kleszynski could have done his own independent target and control analysis to support his "independent" opinion. However, based on conversations with Sechen, on behalf of the Village, that analysis was not in the scope of his assignment. (10/02/13 Hearing Transcript-1 at 112)

In the same prior case, Kleszynski had also conducted a Standard 3 review of another report, like he claimed to have done in this case with Poletti's report. (10/02/13 Hearing Transcript-1 at 97-98; TCH Exhibit 47) The report he was rebutting was from Integra Realty ("Integra"), the same company that wrote three of the four reports relied on by Poletti. (10/02/13 Hearing Transcript-1 at 98) Kleszynski had noted in his prior assignment, TCH Exhibit 47, that much of the information relied on by Integra had not been disclosed. According to Kleszynski, without disclosure of such information in the context of a Standard 3 review, nothing could be verified, including whether or not there was information contrary to the expressed opinions. Yet Kleszynski admitted that he did exactly the same thing in this case that Integra had done in his prior case – failed to disclose information. (10/02/13 Hearing Transcript-1 at 99-102)

**V. CRITERION 6 – THE TRAFFIC PATTERNS TO OR FROM THE FACILITY ARE SO DESIGNED AS TO MINIMIZE THE IMPACT ON EXISTING TRAFFIC FLOWS<sup>18</sup>**

Criterion 6 of the Siting Statute expressly provides that the applicant for siting approval has the burden of proving that “the traffic patterns **to or from the facility** are so designed as to minimize the impact on existing traffic flows. [Emphasis added]” During the siting hearing,

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<sup>18</sup> This section of TCH’s submittal is similar to TCH’s Memorandum Regarding Criterion 6 submitted on October 9, 2013, but also includes certain modifications and a new subsection C.

Groot's counsel claimed that the scope of Criterion 6 is limited to "traffic patterns at the facility". (09/25/13, Session 1, Tr. 65) This assertion is purportedly based on *Fox Moraine, supra*. According to Groot's counsel, "the *Fox Moraine* court seems to emphasize the area around the immediate vicinity of the proposed facility." (09/26/13, Session 1, Tr. 18-19) Indeed, from the very beginning of the siting hearing, Groot's counsel asserted that the Criterion 6 obligation is limited to minimizing "impacts on traffic patterns going in and out of the facility". (09/23/13, Session 1, Tr. 23) Ultimately, in its Renewed Motion to Strike submitted on October 9, 2013, Groot confirmed its effort to re-write Criterion 6 by claiming that "an Applicant need only submit evidence that it designed **the entrance** to minimize the impact on the roadways. [Emphasis added]" (Groot Motion at 2) Groot's assertions of a court-created limitation on the express language of Criterion 6 are contrary to both the requirements of Criterion 6 and the case law construing those requirements.

**A. Groot's Traffic Engineer Acknowledged That The Scope Of Criterion 6 Is Not Limited To The Facility Entrance**

It is important to recognize the obvious – Criterion 6 does not limit its scope to "the immediate area into or out of" the facility. The operative language is "traffic patterns to or from" the facility. Nor does Criterion 6, or the cases that have construed it, require an abandonment of accepted traffic engineering principles. Werthmann prepared the Criterion 6 portion of the Application. (09/25/13 Hearing Transcript-1 at 16) Werthmann acknowledged that Criterion 6 requires an analysis of the routes serving the facility, and a demonstration that the impact on those routes has been minimized. (09/25/13 Hearing Transcript-1 at 18)

According to Werthmann, the Criterion 6 traffic analysis is based on a methodology accepted in the transportation industry. (09/25/13 Hearing Transcript-1 at 50-51, 52) It includes an examination of the physical and operating characteristics of the roadway system – that is the

“base condition” upon which the balance of the analysis is premised. (09/25/13 Hearing Transcript-1 at 18-19, 51-52)

Werthmann’s examination of the existing roadway system involved a field investigation aimed at defining and quantifying that system’s physical and operating characteristics. (09/25/13 Hearing Transcript-1 at 19-20) The analysis also included a determination of the facility's characteristics. Werthmann acknowledged that this is important in order to determine “the type and volume of traffic that will be generated and **the routes that they will be using to get to the facility.** [Emphasis added]” That data is analyzed in order to determine “what the impact is on the roadway system”. (09/25/13 Hearing Transcript-1 at 28-29) Werthmann also conducted a capacity analysis to determine the ability of the intersections that will be used by the transfer station traffic to accommodate the traffic flow. (09/25/13 Hearing Transcript-1 at 40-42, 53; Groot Exhibit 8, Slide 31)

Werthmann admitted that 100% of the 24-ton transfer trailers and 35% of the collection vehicles would travel to and from the proposed facility via Illinois Route 120, west of Cedar Lake Road – the transfer trailers to and from the Winnebago landfill and the collection vehicles from parts unknown. (09/25/13 Hearing Transcript-1 at 31-32, 33, 35, 65-67; 68-69; Application, p. 6-10; Groot Exhibit 8, Slide 21, 23) Based on the number of truck trips identified by Werthmann (Groot Exhibit 8, Slide 25), those percentages reflect a total of 64 to 76 round trips by transfer trailers, and 78 to 94 round trips by collection vehicles.

Werthmann also admitted that the specific routes being used are themselves one of the ways in which impacts to existing traffic flows are intended to be minimized. (09/25/13 Hearing Transcript-1 at 32) Nevertheless, despite the critical importance of the specific roadways to be used in the context of a Criterion 6 study, Werthmann's analysis to the west of the proposed facility stopped at the intersection of Cedar Lake Road and Route 120. (09/25/13 Hearing

Transcript-1 at 21-22, 35, 55; Application, p. 6-16 to 6-22; Groot Exhibit 8, Slides 13, 26, 29) Indeed, Werthmann does not know what routes will be used by the transfer trailers to go to and come from the Winnebago Landfill. (09/25/13 Hearing Transcript-1 at 70-72) Nor, for that matter, did Werthmann provide any information of any kind regarding what routes any of the transfer station traffic would use west of Cedar Lake Road.

Werthmann candidly acknowledged the essential requirements of a proper Criterion 6 analysis discussed above – they are the same requirements for a proper traffic analysis for any type of development, and a matter of sound traffic engineering practice. (09/25/13 Hearing Transcript-1 at 50-51; 52) Yet Werthmann never explained why he stopped at Cedar Lake Road. He did, however, identify a number of potential routes that transfer trailers could utilize to get to and come from the Winnebago Landfill. (09/25/13 Hearing Transcript-1 at 71-72) But he provided no information of any kind, either in the Application or in his testimony, regarding how any of the trucks might get to and come from those routes. More important for the purpose of the type of analysis that Werthmann admitted is required under Criterion 6, Werthmann provided no information regarding the “physical and operating characteristics” of that portion of “the roadway system”.

This is the principal point made by TCH’s traffic expert, Brent Coulter (“Coulter”). Coulter is an experienced and highly qualified traffic engineer. (09/26/13 Hearing Transcript-1 at 5-9; TCH Exhibit 5) Groot and its legal team clearly recognize Coulter's expertise and qualifications in the field of traffic engineering. Indeed, Groot's lead counsel had sought to retain Coulter to conduct an independent review of Werthmann's traffic analysis in this matter. (09/26/13 Hearing Transcript-1 at 9-11)<sup>19</sup>

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<sup>19</sup> Groot’s counsel sought to diminish this acknowledgment of Coulter’s expertise by pointing out that Coulter works out of a home office. (09/26/13 Hearing Transcript-1 at 25) Evidently, at least according to Groot and its

Coulter's conclusion that Groot has not satisfied Criterion 6 is based on the absence of any routing information beyond the immediate vicinity of the proposed transfer station. No information of any kind was provided for the area west of Cedar Lake Road. Coulter agreed with Werthmann that sound traffic engineering involves two principal factors: the traffic component (roadway analysis) and the location specific component (the directional distribution). Coulter concluded that the complete absence of any information beyond the immediate vicinity of the proposed facility, where so much of the heavy truck traffic would go, and how the impact from that traffic had been considered and minimized, did not meet either sound traffic engineering principles or the requirements of Criterion 6. (09/26/13 Hearing Transcript-1 at 21-22, 24-25, 34-35, 48, 68; TCH Exhibit 6, p. 4)

In this regard, Sechen, as he did so often during the hearing in his ongoing effort to support Groot on the Village's behalf, mischaracterized the facts in his Memorandum on Criterion 6. First, counsel did not cite to a single case in support of his concerns about "practical considerations". More to the point, Sechen asserted that:

Here the Applicant noted that the facility will utilize the Winnebago Landfill. While there is nothing to suggest that the Applicant could not or does not intend to use other disposal facilities, Timber Creek Homes ("TCH") claims that the Applicant must disclose the entire route to the Winnebago Landfill and other disposal facilities it intends to utilize. Apparently it is TCH's position that such routes must be developed and set forth in the application complete with the type of analysis impact minimization historically applied to the area more proximate to the facility entrance/exit.

(Village Memorandum at 1)

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lawyers, an experienced and highly qualified traffic engineer who works out of a home office is somehow, by that virtue, less credible than one who works exclusively for garbage companies. Coulter's "incapacity" was obviously not relevant when Groot's lawyer tried to hire him. That tactic speaks volumes about the approach Groot and its lawyers took in this matter. Groot's counsel also sought to make headway by asserting that Coulter had not memorized the exact language of Criterion 6 for his testimony, despite Coulter's confirmation that he understood the statutory requirement and had taken its language into account in rendering his opinion. (09/26/13 Hearing Transcript-1 at 31-32, 34)

As noted above, Werthmann acknowledged that there are a number of ways for trucks to come and go once they pass Cedar Lake Road on their way to the Winnebago Landfill. Although Groot's counsel tried to inject doubt into the issue of where the waste transfer trailers would go,<sup>20</sup> Coulter confirmed that his conclusion that the trucks will go to the Winnebago Landfill is based on the confirmation of that fact in the Application. (09/26/13 Hearing Transcript-1 at 36, 63)<sup>21</sup>

During Coulter's cross-examination, Groot's counsel speculated about potential routes from the transfer station to the Winnebago Landfill – as had Werthmann. (09/26/13 Hearing Transcript-1 at 54)<sup>22</sup> Any number of combinations of roads and intersections might be utilized, depending on roadway configurations, intersection capacity, and a multiplicity of other facts that Werthmann did not even mention, much less analyze. That is Coulter's ultimate point – absent any information regarding any roads or intersections beyond the immediate vicinity of the transfer station, or the impact on any such routing, or how that impact has been minimized, Groot cannot demonstrate that it has complied with Criterion 6. (09/26/13 Hearing Transcript-1 at 55-56)

**B. The Cases Construing Criterion 6 Focus On The Particular Traffic Issues Before Them, And Have Not Imposed A Blanket Limitation On The Scope Of The Requisite Traffic Analysis**

In the first instance, unlike the situation here, the *Fox Moraine* court recognized that Werthmann in that case had in fact identified multiple routes that would be used to access the proposed landfill. 2011 IL App (2d) 100017, ¶113 Further, Werthmann acknowledged in this case that the intersection at Cedar Lake Road and Route 120 is a short distance from the proposed facility. (09/25/13 Hearing Transcript-1 at 11) This is in stark contrast to the area under

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<sup>20</sup> A “doubt” not supported by Groot's own witnesses.

<sup>21</sup> Even Devin Moose, certainly no paragon of credibility, ultimately admitted that he advised Werthmann that the transfer trailers will go to the Winnebago Landfill. (09/25/13 Hearing Transcript-2 at 24-25)

<sup>22</sup> That speculation left even the Hearing Officer wondering about where the transfer trailers would go. (09/26/13 Hearing Transcript-1 at 71-72)

review in *Fox Moraine*, in Plainfield, which was 15 miles from the facility at issue in that case, as Groot's counsel acknowledged. (09/26/13, Session 1, Tr. 15-16, 18) 2011 IL App (2d) 100017, ¶116

Moreover, the *Fox Moraine* court's review of Coulter's testimony, and that of another traffic engineer, focused on their criticism of the applicant's failure to demonstrate elimination of all traffic impacts in the subject area, rather than minimization of those impacts. *Id.* at ¶116 Rejecting that concept, and the Illinois Pollution Control Board's apparent acceptance of it, the court noted that, "The Act does not require elimination of all traffic problems...." *Id.*, citing *Tate v. Pollution Control Board*, 188 Ill.App.3d 994, 1024 (4<sup>th</sup> Dist. 1989)

This limitation on the scope of the Criterion 6 issue in *Fox Moraine* had also been discussed, and confirmed, by the applicant in the case before the Illinois Pollution Control Board:

Fox Moraine agreed that Mr. Coulter and Mr. Corcoran may be experts, but argued that they misunderstood the criterion and testified on location of the facilities and the impact on the Village of Plainfield. Fox Moraine asserts that the criterion contemplates that there will be traffic impacts, and the applicant must demonstrate that those impacts are minimized.

*Fox Moraine, LLC v. United City of Yorkville*, PCB 07-146, 2009 WL 6506730, Slip Op. Cite at 75 (IPCB October 1, 2009)

Following the above statement, the *Fox Moraine* court then stated that:

[N]or is the applicant required to provide evidence of exact routes, types of traffic, noise, dust, or projections of volume and hours of traffic, because the Act does not require a traffic plan **but rather a showing that the traffic patterns to and from the facility are designed to minimize impact on existing traffic flows** (*Tate*, 188 Ill.App.3d at 1024, 136 Ill.Dec. 401, 544 N.E.2d 1176). See also *McHenry County Landfill, Inc. v. Environmental Protection Agency*, 154 Ill.App.3d 89, 102, 106 Ill.Dec. 665, 506 N.E.2d 372 (1987) (traffic criterion was not established where the landfill's entrance design did not have a deceleration lane for trucks to make

right turns into facility, where road's speed limit of 55 miles per hour was considered hazardous). Here, the entrance was designed to have right and left turn lanes for trucks to use and would also allow trucks to enter the facility at off-hours so that trucks could come after rush-hour times. Fox Moraine did not have to establish that every arterial road would not be affected, just that it designed the entrance to and from the facility to minimize the impact on the roadways. **Downtown Plainfield is quite a distance from the planned landfill site (approximately 15 miles), and since Fox Moraine was not even required to submit planned traffic routes, we question the Board's analysis that Fox Moraine failed to demonstrate that the traffic patterns to and from the facility were designed to minimize the impact on the traffic flow around it.** [Emphasis added]

*Id.* at ¶116

The foregoing language is the asserted basis for Groot's argument that the ambit of Criterion 6 is limited to the immediate vicinity of the proposed facility. Most notably, not even Werthmann himself limited his analysis to the "immediate vicinity" – he merely artificially, and without explanation, stopped where a significant portion of the collection trucks, and all of the transfer trailers, would go to and come from. From that perspective, Groot's position appears to be that the geographic scope of the Criterion 6 traffic analysis is whatever the applicant says it is. It is certainly true that an applicant defines the geographic scope of the proposed facility's service area, in connection with Criterion 1. But no case has ever provided an applicant with such unilateral control over the scope of its minimization obligation under Criterion 6.

Sechen also misperceived the language and purpose of Criterion 6 in his Memorandum on Criterion 6. According to him, the issue of the scope of the Criterion 6 analysis is one of municipal authority – "what authority one Illinois municipality has to direct and/or approve any type of traffic through any Illinois township, municipality or county other than the siting unit of government itself?" (Village Memorandum at 2) That, of course, is not the meaning of Criterion 6, which doubtless explains why Sechen cited no authority to support this assertion. Criterion 6

does not speak of “control” over routes. Rather, it requires the applicant to demonstrate that impacts on the chosen routes have been minimized, regardless of their jurisdictional location. Indeed, counsel’s “concern” is belied by Werthmann’s own analysis, which includes streets and intersections in Round Lake and Hainesville.

The case law in fact demonstrates that the Criterion 6 analysis is fact specific, and is not subject to a blanket limitation regarding its geographic scope. It is important in this regard to recognize that the sole traffic issue in *McHenry County Landfill*, the “entrance design” case cited by the *Fox Moraine* court, was in fact limited to the entrance design. No other issues at any other roads to and from the facility were raised or addressed. 154 Ill.App.3d at 101-102 That limitation to the facts before the *McHenry County Landfill* court explains why Groot’s attorneys are incorrect about their interpretation of *Fox Moraine*. No case has ever held that Criterion 6 is limited in the way Groot’s counsel suggest, or that Criterion 6 requires the abandonment of the recognized methodology for conducting a traffic analysis that Werthmann admitted applies to this process.

For example, in *Tate, supra*, also cited by the *Fox Moraine* court, the court noted that, “The IPCB found ample evidence that traffic patterns are designed to minimize impact on traffic flow, citing evidence of **truck routes, road condition, and usage**, location of the access gate and the MCL plan to extend the on-site exit roadway to minimize road mud. [Emphasis added]” 188 Ill.App.3d at 1024

In another example, the court in *Fairview Area Citizens Taskforce v. Illinois Pollution Control Board*, 198 Ill.App.3d 541, 554 (3<sup>rd</sup> Dist.), appeal denied 133 Ill.2d 554 (1990), abrogated on other grounds by *Town & Country Utilities, Inc. v. Illinois Pollution Control Board*, 225 Ill.2d 103 (2007), likewise addressed the scope of the review before it beyond merely the entrance gate of the proposed facility:

As Gallatin points out, the question is not whether there will be no adverse impact, but whether the impact on traffic flow has been minimized. Should a new access road be built? **Should landfill traffic be routed to Routes 9 or 116? Should traffic signals or signs be installed at any intersections where they are not presently located?** Petitioners presented no evidence to indicate that the proposed traffic patterns did not already minimize the impact on the existing traffic flow. No State, county, township, or village official concerned with roadways or traffic testified that the traffic patterns in Gallatin's proposal did not minimize the impact on existing traffic flows. [Emphasis added]

The scope of the traffic evidence was also reviewed by the Second District (well before *Fox Moraine*) in *A.R.F. Landfill, Inc. v. Pollution Control Board*, 174 Ill.App.3d 82, 93-94 (2<sup>nd</sup> Dist.), appeal denied 123 Ill.2d 555 (1988) In affirming the denial of a siting application, the Second District noted that:

According to Box, the increased volume of trucks entering and leaving the facility would create additional traffic problems in the roads surrounding the landfill. Additionally, he testified that one of the access roads (Harris Road) is currently too narrow to safely accommodate two garbage trucks passing each other from opposite directions, and that in his opinion the proposed expansion would have an **adverse effect on traffic conditions in the area**. Moreover, he opined that the proposed traffic patterns for the landfill facility would not minimize the impact on existing traffic flows. [Emphasis added]

The Illinois Pollution Control Board has likewise confirmed that the site access is merely one of the many issues addressed in the context of Criterion 6, including the routes leading to and from the proposed facility. See, e.g., *Waste Management of Illinois, Inc. v. County Board of Kane County*, PCB 03-104, 2003 WL 21512770, Slip Op. Cite at 11-12 (IPCB June 19, 2003) (Transfer station proceeding, in which Coulter testified for Kane County. IPCB affirmed denial of siting because the applicant failed to provide traffic volume information on a critical intersection, and the record either lacked information on traffic patterns or showed the traffic patterns were not designed to minimize impacts on current traffic flows.); *Industrial Fuels &*

*Resources/Illinois, Inc. v. City Council of the City of Harvey*, PCB 90–53, 1990 WL 171483, Slip Op. Cite at 15-18 (IPCB September 27, 1990) (Routing to and from the proposed facility reviewed)

The requirement of minimization of impacts, and not their elimination, is certainly a requirement of Criterion 6. But beyond that concept that is clearly supported by the language of the statute, the case law demonstrates that the issue of the minimization of impacts to or from the facility is considered on a case by case basis, depending on those factors which Werthmann himself admitted are critical to a Criterion 6 analysis. It is a well-settled principle of statutory construction that the best indication of legislative intent is the language of the statute, which must be given its plain and ordinary meaning. *Metropolitan Life Insurance Co. v. Hamer*, 2013 IL 114234, ¶18 (2013) The statute at issue here explicitly requires an analysis of the traffic patterns to or from the facility, and not merely those into and out of the facility. Groot’s effort to artificially limit the scope of its evidentiary burden under Criterion 6 is not supported by either the clear language of the statute or by the case law construing the statute’s requirements.

**C. The Traffic Analysis Failed To Consider The Amounts Of Waste That Will Be Handled By The Facility, Or The Traffic Impact Resulting From The Trucks Handling Those Amounts**

The traffic analysis is based on the assumption that this facility will handle an average of 750 tons per day of waste, with a potential maximum of 900 tons per day. The number of truck trips per day, including during peak travel times, is based on those quantities (Application, p. 6-12) However, Moose admitted that there is in fact no limit on the amount of waste this facility will handle, either daily or annually. (130923 Hearing Transcript-2 at 38-39; 09/23/13 Hearing Transcript-3 at 34, 48-49) Moose would in fact not recommend a limitation on the number of tons per day because, according to him, such a limitation is not supported by the evidence. (09/23/13 Hearing Transcript-2 at 41-42) When pressed on the issue, Moose would not commit

to an upper limit of even 900 tons per day, because “the facility based on previous testimony can handle well in excess of 900”, and the host agreement with the Village allows for the possibility of over 1000 tons per day. (09/23/13 Hearing Transcript-3 at 11-12) Later expounding on the point, Moose stated that the proposed transfer station can easily handle 900 tons per day, but that 900 tons does not even come close to transfer station's capacity, and it could "comfortably handle many more times that". (130925 Hearing Transcript-1 at 127)

Werthmann himself acknowledged that there is no upper limit on the amount of waste this facility will handle. (09/25/13 Hearing Transcript-1 at 100) Yet there is no analysis of any kind – number of trucks, number of trips, directional distribution, impact on roadways – for any amount of waste over 900 tons. Shaw provided Werthmann with the information on the number of truck trips. (09/25/13 Hearing Transcript-1 at 36, 49) But they clearly did not provide him with any information for any amount of waste over 900 tons per day – and certainly not for “many more times than that”. Any such amount, its potential impact, or how that impact has been minimized, is not even discussed in Werthmann’s report. Absent such information, Groot has failed to meet its burden under Criterion 6.

**VI. CRITERION 8 – 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 1 OR THE SOLID WASTE PLANNING AND RECYCLING ACT, 2 THE FACILITY IS CONSISTENT WITH THAT PLAN**

The Lake County SWMP specifically provides that, “[T]he recommendations regarding final disposal facilities requiring siting per Section 39.2 of the Illinois Environmental Protection Act (415 ILCS 5/39.2) are the recommendations that a proposed pollution control facility applicant must demonstrate consistency with in order to be granted approval under siting criterion 8 of Section 39.2.” (TCH Exhibit 27, p. 4-4)

It must be noted in the first instance that Moose falsely claimed that the Lake County SWMP "does not contain a definitive type of facility that it's counting on". (09/25/13 Hearing Transcript-1 at 124) That representation might have gone unchallenged, since Shaw failed to include a copy of the SWMP in the Application. In any event, contrary to Moose's representation, the SWMP confirms Lake County's intent "to continue to manage as much Lake County waste requiring disposal as feasible within the borders of Lake County because this is the most responsible and sustainable approach to waste management." (TCH Exhibit 27, p. 4-1) The SWMP even acknowledges the possibility of expansions of two in-county landfills. (09/24/13 Hearing Transcript-2 at 101-102)

More to the present point, it is now beyond question, despite Moose's repeated misrepresentations to the contrary, that the waste from the proposed transfer station would be taken to the Winnebago Landfill for the foreseeable future. In this regard, the SWMP expressly requires that:

SWALCO will consider expanding the list of landfills (located outside of Lake County) deemed to be serving Lake County if the owner of the landfill proposed for inclusion first negotiates a host agreement with SWALCO. The host agreement must provide for a capacity guarantee and payment of a host fee for each ton of Lake County waste taken to the landfill.

(TCH Exhibit 27, p. 4-9)

When questioned with respect to these express requirements of the SWMP, Moose admitted that none have been met – the Winnebago Landfill has not entered into a host agreement with SWALCO; it has not provided for a capacity guarantee; and it has not agreed to pay a host fee. (09/25/13 Hearing Transcript-2 at 6-9) This constitutes a fundamental failure to comply with the requirements of the Lake County SWMP.<sup>23</sup>

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<sup>23</sup> This also explains why Moose was so reluctant to admit where the waste from this facility is going.

Further, Groot has failed to meet the express technical requirements of the SWMP. The SWMP does not require transfer station doors to remain closed at all times except under circumstances not applicable here. (TCH Exhibit 27, p. 4-11) Beyond that exception, however, the SWMP identifies certain guidelines that must be implemented by the proponent of a waste transfer station in order to satisfy Criterion 8. These guidelines include “utilize proven technology” and “minimize emissions”. (TCH Exhibit 27, p. 4-11) As set forth in the discussion regarding Groot’s failure to meet its burden with respect to Criterion 2, and specifically its failure to comply with the requirements of the USEPA Manual, Groot will not “utilize proven technology” or “minimize emissions”.

For the foregoing reasons, Groot has also failed to meet its burden with respect to Criterion 8.

## **VI. FUNDAMENTAL FAIRNESS**

Section 40.1 of the Illinois Environmental Protection Act, 415 ILCS 5/40.1, and the relevant case law require that siting proceedings be conducted in accordance with the requirements of fundamental fairness. Fundamental fairness includes an element of procedural due process, “and the parties are guaranteed the right to a fair and impartial tribunal”. *Girot v. Keith*, 212 Ill.2d 372, 380 (2004) “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.” *Stop the Mega-Dump v. County Board of De Kalb County*, 2012 IL App (2d) 110579, ¶27 (2<sup>nd</sup> Dist. 2012) With that said, however, objections based upon alleged bias and pre-judgment are deemed waived if not timely made. *Id.*

In this proceeding, the issue of fundamental fairness, including bias, pre-judgment, and the Village’s status as a co-applicant, was raised by counsel for TCH during Sechen’s cross-examination of Thorsen, and repeated numerous times thereafter. (09/25/13 Hearing Transcript-2

at 118) SWALCO's counsel also raised the evident fact that the Village was revealed to be a co-applicant with Groot. (09/25/13 Hearing Transcript-2 at 104-105)

This discussion begins with a highly unusual step taken by the Village before the hearing began. Criterion 8 of the Siting Statute specifically references a solid waste plan adopted by the relevant county. Yet in 2012, the Village "identified its preferred disposal option, adopting a solid waste management plan recommending the development of a transfer station within its borders". (Application, pp. 1-11, 8-13) On August 6, 2013, just weeks before the hearing in this matter began, the Village repealed its 2012 solid waste plan, and instead adopted the Lake County SWMP. (Village of Round Lake Park Ordinance No. 13-15, attached hereto as Exhibit A) Whatever may be said about the irrelevance of a local solid waste plan in the context of Criterion 8, the Village's pre-hearing actions do evidence an element pre-disposition. That pre-disposition was amplified by Sechen's actions during the hearing.

During his cross-examination of Thorsen, Sechen appeared to suggest that it was "prudent" for a municipality and "its hauler" to develop transportation within its boundaries to serve its waste needs. (09/25/13 Hearing Transcript-2 at 98) "Prudence" is completely irrelevant to the issue of the needs of the service area, but it does reflect that a decision has already been made by the Village and its hauler, Groot, to site a transfer station within the Village's boundaries. The Hearing Officer ultimately confirmed that "need" for purposes of Criterion 1 and "prudence" are two different concepts, and the latter is not relevant to the former. Nevertheless, Sechen revealed that the Village is effectively a co-applicant for this transfer station, indicating that the Village and its hauler found it prudent to site a transfer station. (09/25/13 Hearing Transcript-2 at 103-104)

Going even farther, Sechen then acknowledged that the Village and its hauler had found it necessary to site a transfer station for their own business reasons. It was at this point that

SWALCO's attorney noted that the Village had failed to disclose that it is a co-applicant with Groot. (09/25/13 Hearing Transcript-2 at 104-105)

Sechen's conduct was not limited to Criterion 1. With respect to Criterion 6, Sechen repeatedly sought to cast doubt on the fact that the waste is going to Winnebago Landfill, despite the admissions of Groot's own witnesses. (09/26/13 Hearing Transcript at 62-66) Sechen's assault on the Winnebago Landfill issue continued unabated. (09/26/13 Hearing Transcript at 68-69)

Sechen continued his actions on behalf of Groot during his closing argument. Attempting to cast doubt about the accepted definition of "need", as recently explained by the Second District in *Fox Moraine, supra*, Sechen cited to a First District case from 1992, almost 20 years before *Fox Moraine*, and misrepresented the law regarding Criterion 1. (10/02/13 Hearing Transcript-2 at 82-84)

Sechen then sought to minimize the impact of the admissions by Groot's witnesses that there is no limit on the amount of waste that this facility will take. Sechen misrepresented the law, and asserted that an entirely new siting process will be required if Groot exceeds 750 tons per day. (10/02/13 Hearing Transcript-2 at 84-85)

The Village's complicity with Groot reached its zenith with Kleszynski's report and testimony. Many of the failings in Kleszynski's opinion, including his failure to abide by the standards that he admitted apply to his work, are addressed above in the discussion on Criterion 3. As noted, Kleszynski admitted that the various operative provisions of USPAP governed his activities in this case:

Q. And you're aware that under that Code of Ethics, an appraiser must not advocate the cause or interest of any party or issue, correct?

A. I am absolutely aware of that part of the Code of Ethics, as well as the Uniform Standards.

Q. You're also aware then that an appraiser must not accept an assignment that includes the reporting of predetermined opinions and conclusions, correct?

A. That is absolutely correct. But that is part of both of the Code of Ethics as well as USPAP.

Q. A couple of more that I think we're going to agree on. You're also aware that an appraiser must not misrepresent his or her role when providing valuation services that are outside of appraisal practice, correct?

A. We would agree on that also.

Q. Here's another one, an appraiser must not communicate assignment results with the intent to mislead or to defraud, correct?

A. That would also be true.

Q. And then finally, an appraiser must not use or communicate a report that is known by the appraiser to be misleading or fraudulent, correct?

A. That is also true.

(10/02/13 Hearing Transcript-1 at 64-65)

Kleszynski agreed that it was a violation of the USPAP code of ethics for him to advocate any particular position. Fundamentally, however, Kleszynski in his testimony sought to misrepresent the fact that he had been directed by the undisclosed co-applicant, the Village, acting through Sechen, to generate an "independent" statement supporting Groot's position. Despite his claim that he "volunteered" an opinion (10/02/13 Hearing Transcript-1 at 67), Kleszynski's report in fact confirmed that he was asked to render a separate opinion by his client, and that his report is "specific to the needs of the client", the Village. (10/02/13 Hearing Transcript-1 at 70-74)<sup>24</sup> Kleszynski's assignment in this case was communicated to him by Sechen on behalf of the Village. (10/02/13 Hearing Transcript-1 at 108) Indeed, Sechen never told Kleszynski that the contents of his report were not consistent with the Village's needs.

(10/02/13 Hearing Transcript-1 at 87)

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<sup>24</sup> Kleszynski then equivocated and claimed, despite the express language of his report, that his report was not in fact "specific to the needs" of the Village. (10/02/13 Hearing Transcript-1 at 74-75)

The existence of an undisclosed co-applicant was discussed long ago in *E & E Hauling, Inc. v. Pollution Control Board*, 116 Ill.App.3d 586, 603 (2<sup>nd</sup> Dist. 1983), affirmed 107 Ill.2d 33 (1985), where the court stated:

We note that the District and E & E became coapplicants 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.

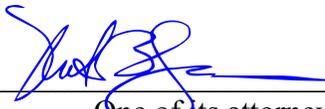
*Id.* at 603 No case has ever addressed a situation like this, doubtless because no attorney acting at the behest of a siting authority has gone so far, not just advocating for the applicant, but actively reflecting his marching orders to ensure that the hearing record supports a pre-determined approval.

Nor can it be said that Sechen was acting alone, independent of the Village's interests and directives. Rule 1.2 of the Illinois Rules of Professional Conduct ("RPC"), provides that, "[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation." Just like Kleszynski, Sechen had an assignment in this case, and he was far too obvious in carrying it out.

## VII. CONCLUSION

Based on all of the foregoing, Groot has failed to meet its burden of proving compliance with requirements of Criteria 1, 2, 3, 6 and 8 of the Siting Statute. Irrespective of pre-determination, there is no basis in the record to support an approval of this Siting Application, and it must be denied.

Timber Creek Homes, Inc.

By:  \_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

In Re: Application For Local Siting Approval  
For Groot Industries Lake Transfer Station  
03-01

The undersigned hereby certifies that he caused a copy of the above and foregoing TIMBER CREEK HOMES' PROPOSED FINDINGS AND CONCLUSIONS to be served on the following, via electronic mail, on this 21<sup>st</sup> day of October, 2013:

*Hearing Officer*

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\_\_\_\_\_  
Michael S. Blazer

## **EXHIBIT A**

**VILLAGE OF ROUND LAKE PARK**

**ORDINANCE NO. 13-15**

***AN ORDINANCE REPEALING ORDINANCE 12-13 ADOPTING A "SOLID WASTE MANAGEMENT PLAN" FOR THE VILLAGE OF ROUND LAKE PARK, AND IN ITS PLACE, ADOPTING THE "2009 SOLID WASTE MANAGEMENT PLAN UPDATE FOR LAKE COUNTY ILLINOIS" ADOPTED BY THE BOARD OF DIRECTORS OF THE SOLID WASTE AGENCY OF LAKE COUNTY ON OCTOBER 22, 2009 AND ADOPTED BY THE LAKE COUNTY BOARD ON APRIL 13, 2010***

**ADOPTED BY THE PRESIDENT AND BOARD OF TRUSTEES**

**OF THE**

**VILLAGE OF ROUND LAKE PARK, ILLINOIS**

**ON**

**August 6, 2013**

**Published in pamphlet form by authority of the Village Board  
of the Village of Round Lake Park, Lake County, Illinois,  
this 6<sup>th</sup> day of August, 2013.**

LINDA LUCASSEN	<b>President</b>	CANDACE KENYON	<b>Trustee</b>
		PATRICIA WILLIAMS	<b>Trustee</b>
KAREN M EGGERT	<b>Clerk</b>	BOB CERRETTI	<b>Trustee</b>
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PETER S. KARLOVICS	<b>Attorney</b>	RAEANNE MCCARTY	<b>Trustee</b>
		JEAN MCCUE	<b>Trustee</b>

ORDINANCE NO. 13- 15

***AN ORDINANCE REPEALING ORDINANCE 12-13 ADOPTING A "SOLID WASTE MANAGEMENT PLAN" FOR THE VILLAGE OF ROUND LAKE PARK, AND IN ITS PLACE, ADOPTING BY REFERENCE THE "2009 SOLID WASTE MANAGEMENT PLAN UPDATE FOR LAKE COUNTY ILLINOIS" ADOPTED BY THE BOARD OF DIRECTORS OF THE SOLID WASTE AGENCY OF LAKE COUNTY ON OCTOBER 22, 2009 AND ADOPTED BY THE LAKE COUNTY BOARD ON APRIL 13, 2010***

***WHEREAS***, the Corporate Authorities of the Village of Round Lake Park, Lake County, Illinois, have previously adopted Ordinance 12-13, approving and adopting a solid waste management plan for the Village of Round Lake Park; and

***WHEREAS***, the Corporate Authorities of the Village desire to repeal Ordinance 12-13 and the above previously adopted solid waste management plan for the Village, and replace it by adopting by reference the "2009 Solid Waste Management Plan Update for Lake County, Illinois;" and

***WHEREAS***, 50 ILCS 220/1 et seq. authorizes municipalities in Illinois to adopt any public record, provided three (3) copies of the public record has been kept on file with the office of the clerk of the municipality; and

***WHEREAS***, at least three (3) copies of the "2009 Solid Waste Management Plan Update for Lake County, Illinois" have been on file in the office of the Village Clerk of the Village of Round Lake Park, Illinois, for public use, inspection and examination, continuously for more than fifteen (15) days prior to the date hereof, and copies thereof will hereafter be kept on file in said office for such public use, inspection and examination; and

***WHEREAS***, prior to the aforesaid fifteen (15) day period, notice was posted at the Village Hall, which notice stated that at least three (3) copies of said "2009 Solid Waste Management Plan Update for Lake County, Illinois" would be on file during said fifteen (15) day period, as well as subsequent thereto, and that the Corporate Authorities of the municipality would give consideration to and might adopt all or part or parts of said "2009 Solid Waste Management Plan Update for Lake County, Illinois," by reference thereto without further printing, at any time after the lapse of fifteen (15) days or more subsequent to the aforesaid posting of notice; and

***WHEREAS***, the Corporate Authorities of the Village have determined that it is in the best interest of the Village of Round Lake Park to adopt the "2009 Solid Waste Management Plan Update for Lake County, Illinois" adopted by the Board of Directors of the Solid Waste Agency of Lake County on October 22, 2009 and adopted by the Lake County Board on April 13, 2010.

***NOW, THEREFORE, BE IT ORDAINED***, by the President and Board of Trustees of the Village of Round Lake Park, Illinois, as follows:

**SECTION I:** That the preceding "Whereas" clauses are hereby incorporated into this Ordinance as if it were fully set forth herein.

**SECTION II:** That "AN ORDINANCE APPROVING AND ADOPTING A "SOLID WASTE MANAGEMENT PLAN" FOR THE VILLAGE OF ROUND LAKE PARK" adopted by the Corporate Authorities of the Village of Round Lake Park, Lake County, Illinois on November 6, 2012 as Ordinance No. 12-13 is hereby repealed in its entirety.

**SECTION III:** That the "2009 Solid Waste Management Plan Update for Lake County, Illinois," adopted by the Board of Directors of the Solid Waste Agency of Lake County on October 22, 2009 and adopted by the Lake County Board on April 13, 2010, is hereby adopted by reference as the solid waste management plan for the Village of Round Lake Park, Lake County, Illinois.

**SECTION IV:** Nothing in this Ordinance shall be construed to affect any suit or proceeding pending in any court, or any rights acquired, or liability incurred, or any cause or causes of action arising, acquired or existing under any act or ordinance or portion thereof hereby repealed or amended by this ordinance; nor shall any just or legal right, claim, penalty or remedy of any character of the corporate authority existing on the effective date hereof be lost, impaired or affected by this Ordinance.

**SECTION V:** All ordinances or parts of ordinances in conflict herewith are, to the extent of such conflict, hereby repealed.

**SECTION VI:** If any provision, clause, sentence, paragraph, section, or part of this ordinance or application thereof to any person, firm, corporation, public agency or circumstance, shall, for any reason, be adjudged by a court of competent jurisdiction to be unconstitutional or invalid, said judgment shall not affect, impair or invalidate the remainder of this ordinance and the application of such provision to other persons, firms, corporation, or circumstances, but shall be confined in its operation to the provision, clause, sentence, paragraph, section, or part thereof directly involved in the controversy in which such judgment shall have been rendered and to the person, firm, corporation, or circumstances involved. It is hereby declared to be the legislative intent of the corporate authorities that this ordinance would have been adopted had such unconstitutional or invalid provision, clause, sentence, paragraph, section, or part thereof not been included.

**SECTION VII:** This ordinance shall be in full force and effect from and after its passage, approval and publication in pamphlet form as required by law.

Passed this 10<sup>th</sup> day of August, 2013.

TRUSTEES

CANDACE KENYON  
PATRICIA WILLIAMS  
BOB CERRETTI  
DONNA G. WAGNER  
RAEANNE MCCARTY  
JEAN MCCUE

Ayes:

Nays:

Absent/Abstain

✓  
✓  
✓  
✓  
✓  
✓

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**APPROVED:**

By: Linda L. Loomis Date: 8/6/2013  
Village President

**ATTEST:**

By: Karen M. Eggert  
Village Clerk

Presented and read, or reading having been waived, at a duly convened meeting of the Corporate Authorities on August 6, 2013.

I hereby certify that the above ordinance was published in pamphlet form on August 6, 2013, as provided by law.

By: Karen M. Eggert  
Village Clerk

