BEFORE THE CITY OF WEST CHICAGO CITY COUNCIL

In Re: THE APPLICATION OF	)
LAKESHORE RECYCLING SYSTEMS,	)
LLC, FOR SITING APPROVAL OF A	)
TRANSFER STATION AT	)
1655 POWIS ROAD,	)
WEST CHICAGO, ILLINOIS 62418	)

PROTECT WEST CHICAGO'S PROPOSED COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

NOW COMES, Objector, Protect West Chicago, ("PWC") in the above-mentioned matter, by and through its attorney, Meza Law, and submits its Combined Proposed Findings of Fact and Conclusions of Law related to the Application of Lakeshore Recycling Systems, LLC (the "Applicant") for Siting Approval of a new proposed Pollution Control Facility.

I. EXECUTIVE SUMMARY

On September 16, 2022,[1] Lakeshore Recycling Systems ("LRS") submitted their Pre-Filing Notice informing West Chicago and its residents that it intended to submit a proposal to site a pollution control facility in West Chicago, namely a waste transfer station. After multiple so-called "public hearings," it is now clear that West Chicago's City Council has multiple grounds and basis to reject LRS's proposed waste transfer station.

First, LRS's Pre-Filing Notice did not comply with 415 ILCS §5/39.2(b). Specifically, LRS's expert, John Hock failed to provide the required statutory notice to owners of all property within 250 feet. Mr. Hock's failure to provide proper notice, and the manner in which he provided

[1] Coincidentally, or perhaps not, September 16 is Mexican Independence Day and is often referred to as "El Grito" or "El Grito de Independencia," a tribute to the battle cry that launched a rebellion in 1810 and is celebrated in Mexico and in many majority-minority Latino communities including West Chicago, in the same manner as the 4th of July.

notice, dooms LRS's Application and strips the City Council of any jurisdiction to even consider the Application.

Second, because LRS's proposed facility would, by their own admission, be located within 1,000-feet of property zoned residential, it does not comply with 415 ILCS §5/22.14(a). Despite LRS's multiple attempts to salvage its Application and argue that it is "exempt" from this requirement, none of their efforts can or do circumvent the 1,000-foot setback requirement.

Third, the Siting Hearing did not comport with the dictates of Fundamental Fairness in a multitude of ways. For example, despite West Chicago 21% limited English Proficiency resident population, neither the City of West Chicago nor its Hearing Officer took any steps to ensure the hearing was available in Spanish. This, even though both West Chicago and the Hearing Officer were informed that certain residents' primary language was Spanish. In addition, the Hearing Officer failed to render impartial rulings on the evidence and specifically prevented PWC from cross-examining Applicant's expert on environmental justice related issues and even went so far as to prevent PWC from asking its own expert about environmental justice related issues, all under the guise that issues relating to minority or disadvantaged communities were not "relevant."

Fourth, LRS failed to meet 39.2 Criterion 1, 2, 3 and 8. Specifically, LRS failed to establish that there was a "need" for an additional waste transfer station and instead focused on its "need for vertical integration," which, of course, is not a part of Criterion 1. The testimony was clear—there is more than enough waste transfer station capacity to properly handle the current and future waste needs of the proposed LRS Service Area. LRS also failed to establish that its proposed facility would be operated in a safe manner, especially considering its proximity to the DuPage Airport Authority and its admission that its operations were within the runway protection zone; thus, it did not satisfy Criterion 2. In regard to Criterion 3, LRS's decision to hinge it expert's opinion on the

"highest and best use" analysis failed to sufficiently establish that the proposed facility was to be located so as to minimize incompatibility with the character of the surrounding areas and to minimize the effect on the value of the surrounding property. Finally, in regard to Criterion 8, LRS failed to overcome the DuPage County's Solid Waste Management Plan's clear language that the siting for any additional waste transfer stations should be located "throughout the County" and in the southern portion of DuPage County, not next door to the other waste transfer station in the northwest corner of DuPage County. In fact, any ambiguity in that regard was decide when DuPage County confirmed in its prior denial of on an earlier waste transfer station siting proposal that "throughout the County" in its Solid Waste Management Plan did not mean allowing a second transfer station to be located in close proximity to an existing one.

Finally, LRS's last ditch effort to salvage its application by submitting, on the eve of the deadline for the filing of Proposed Findings of Fact and Conclusions of Law, two documents as "public comment" actually represent the final dagger in the heart of LRS's Application; that is because one of the submitted letters, from Canadian National, actually confirms that the owner on the authentic tax records is still in existence and that the pre-Filing Notice was deficient. The other letter was simply improper rebuttal testimony submitted after the close of evidence and must not be considered.

For all of the above reasons, PWC respectfully requests that the Hearing Officer recommend to the City of West Chicago's City Council that the proposed Application be denied. In the alternative, PWC further requests that even if the Hearing Officer does recommend that the City of West Chicago City Council approve LRS's Application to site a second waste transfer station in the City of West Chicago, that the City Council nonetheless deny LRS's Application.

II. APPLICANT HAS FAILED TO MEET THE JURISDICTIONAL NOTICE REQUIREMENTS

In order to proceed with a siting hearing and prior to even determining whether the criterion in 415 ILCS §5/39.2(b) (the "Siting Statute") have been met, an Application must comply with all statutory provisions, including the notice requirement. However, as set forth below, Applicant failed to meet the jurisdictional notice requirements.

The Siting Statute required the Applicant to serve written notice of intent (the "Pre-Filing Notice") on all owners of property within 250 feet in each direction of the lot line of the Subject Property (the "Subject Area Radius"). This notice is required to be made no later than 14 days before the date on which the City of West Chicago (the "City") receives the request for siting approval. 415 ILCS §5/39.2(b). Moreover, under the statute, notice can only be satisfied in one of two ways: (1) Personal Service; or (2) Registered Mail, Return Receipt Requested.

The Siting Statute explicitly and specifically provides that the Applicant shall:

> … cause written notice of such request to be served either ***in person*** or ***by registered mail, return receipt requested***, on the owners of all property within the subject area not solely owned by the applicant, and on the ***owners of all property within 250 feet in each direction of the lot line of the subject property***, said owners being such persons or entities ***which appear from the authentic tax records of the County*** in which such facility is to be located; …

415 ILCS §5/39.2(b) (emphasis added). This requirement is jurisdictional, and the burden of proof rests with the Applicant to show that all procedural requirements relating to issuance and service of the Pre-Filing Notice have been met. *Id*; *see also* 415 ILCS 39.2(b); *Cnty. of Kankakee v. Illinois Pollution Control Bd.,* 396 Ill. App. 3d 1000, 1008, 955 N.E.2d 1, 9 (3rd Dist. 2009) (citing *Waste Mgmt. of Illinois v. Illinois Pollution Control Bd.,* 356 Ill. App. 3d 229, 234, 826 N.E.2d 586 (3d Dist. 2005). Applicant failed to meet the notice requirement.

The Pre-Filing Notice is jurisdictional because it is not just a perfunctory act or perfunctory exercise. The Pre-Filing Notice is the critical document that provides all statutory stakeholders

with adequate notice of what is being proposed in their community. *Kane Cnty. Defs., Inc. v. Pollution Control Bd.*, 139 Ill. App. 3d 588, 593, 487 N.E.2d 743, 746 (2d Dist. 1985). In this matter, the City also failed to post the actual Pre-Filing Notice on its website in Spanish and thus failed to take necessary steps to ensure that this critical document was also available to West Chicago residents whose primary language was Spanish.[2] The City's failure to make the Pre-Filing Notice available in Spanish denied Spanish-speaking residents their rights to meaningful access, as more fully described in the "Fundamental Fairness" section of this filing.

In any event, railroads own two parcels of land within the Subject Area Radius (the "Railroad Parcels"), and those parcels are located directly east of (and directly adjacent to) the Subject Property. Tr. 454. Thus, Applicant was required to serve the two railroads with the perquisite Pre-Filing Notice. The two Railroad Parcels are identified by Parcel Identification Numbers (PINs) 01-32-505-011 and 01-32-506-001. *See* Application at Appendix 2-J (Exhibit C)**.**

On May 5, 2003, the City via Ordinance 03-O-0033 annexed the rights-of-ways of property belonging to Elgin, Joliet and Eastern Railway Company (the "EJ&E") within the City. *See* Exhibit 1 to PWC's Motion to Dismiss. The EJ&E parcels that were annexed into the City included the parcel with PIN 01-32-506-001, which, as noted above, is within the Subject Area Radius. *Id.*

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[2] Although the Pre-Filing Notice was attached as an exhibit to Applicant's Application, it was not easily accessible to Spanish-speaking residents of West Chicago. The only reference to the Pre-Filing Notice of the City of West Chicago's website states as follows:

Notice of Intent (NOI) Sent to Neighboring Properties

Property owners near the area of 1655 Powis Road received an official mailed Notice of Intent (NOI) stating that Lakeshore Recycling Systems, LLC (LRS) would be filing a formal application and proposal on Friday, September 16, 2022 with the City that would request approval to construct and operate a solid waste transfer station facility at the site of 1655 Powis Road. See https://westchicago.org/transfer-station/#process (last visited Feb. 16, 2023).

The Act requires that applications for siting approval of pollution control facilities use "authentic tax records" to determine to whom and where the Pre-Filing Notice must be sent. 415 ILCS §39.2(b). In Illinois, the County Treasurer, the County Clerk and the Assessor each have a role in the keeping of the authentic tax records. *Bishop v. Pollution Control Bd.*, 235 Ill. App. 3d 925, 932, 601 N.E.2d 310, 315 (5th Dist. 1992); *Scott v. City of Chicago*, 2015 IL App (1st) 140570, ¶ 6, 29 N.E.3d 592, 594-595. In *Scott,* the court held that *Bishop* requires that one look to all three of these offices when determining the proper entities and locations to send notice based on the authentic tax records. *Scott v. City of Chicago*, ¶ 12, 29 N.E.3d at 596.

In Illinois, the Department of Revenue sets the tax assessments for all properties owned by the railroad companies that are used in the operation of the railroad [35 ILCS §200/8-5; 35 ILCS §200/11-70(b) and (d); 35 ILCS §20/11-80]; accordingly, local assessors have no role in determining real estate taxes or property values for the Railroad Parcels. Thus, an Applicant must look specifically at the authentic tax records contained in the offices of the DuPage County Treasurer and the DuPage County Clerk to determine to whom and where Pre-Filing Notices must be served for the Railroad Parcels. The Applicant in this case did not do that.

As set forth in the sworn declarations from DuPage County Treasurer Gwen Henry, the authentic DuPage County tax records clearly show that there are only six railroads, identified by name, address, city, state, and zip code included in the authentic DuPage County tax records, and that these are the *only railroads* that are assessed and pay real estate taxes within DuPage County. *See* Exhibit 2 of PWC's Motion to Dismiss.

Below are the six railroads:

	Railroad	Address	City	State and Zip Code
1	Chicago Central & Pacific Railroad	Bus Dev N Real Estate 1 Administration Road	Concord	Ontario L4K1B9
2	Burlington Northern & Santa Fe Railway Company	Property Tax Department PO Box 961089	Fort Worth	Texas 76161
3	CSX Transportation Railroad	Tax Department J-910 500 Water Street	Jacksonville	Florida 32202
4	Soo Line Railroad Company	7th Floor Tax Department 120 S. 6th Street	Minneapolis	Minnesota 55402
5	Elgin, Joliet & Eastern Railway Company	17641 S. Ashland Avenue	Homewood	Illinois 60430
6	Union Pacific Railroad Company	Property Tax Department Stop 1640 1400 Douglas Street	Omaha	Nebraska 68179

Id.

In addition, as set forth in the sworn declaration from DuPage County Clerk Jean Kaczmarek, Railroad Assessment Certifications for DuPage County also confirmed that these same six railroads are the *only railroads* assessed real estate taxes within DuPage County. *See* Exhibit 3 of PWC's Motion to Dismiss.

The six railroads and the locations (addresses) for the sending of real estate tax notices identified by Ms. Kaczmarek are identical to those in the County Treasurer's authentic tax records and are as follows:

	Railroad	Address	City	State and Zip Code
1	Chicago Central & Pacific Railroad	Bus Dev N Real Estate 1 Administration Road	Concord	Ontario L4K1B9
2	Burlington Northern & Santa Fe Railway Company	Property Tax Department PO Box 961089	Fort Worth	Texas 76161
3	CSX Transportation Railroad	Tax Department J-910 500 Water Street	Jacksonville	Florida 32202
4	Soo Line Railroad Company	7th Floor Tax department 120 S. 6th Street	Minneapolis	Minnesota 55402
5	Wisconsin Central, Ltd. (EJ&E Line) Company	17641 S. Ashland Avenue	Homewood	Illinois 60430
6	Union Pacific Railroad Company	Property Tax Department Stop 1640 1400 Douglas Street	Omaha	Nebraska 68179

Id.

In its Siting Application, the Applicant included Appendix 2-J which contains a document titled "Applicant's Affidavit of Compliance With 415 ILCS §5/39.2(b)," ("Applicant's Affidavit of Compliance") as well as the related exhibits which depict copies of notices and receipts of such service, in which Applicant purports to have complied with the requirement of 45 ILCS §39.2(b). *See* Exhibit 4 of PWC's Motion to Dismiss. In fact, the Applicant also included a chart reflecting the identity of the entities Applicant served, including their respective addresses. The following is the relevant portion of Applicant's chart reflecting purported service on three railroads:

Property Owner	Address	City	State	Zip Code	PIN or General Assembly
Union Pacific Railroad Company	Property Tax Department Stop 1640 1400 Douglas Street MS910	Omaha	Nebraska	68179-0910	01-32-505-011
Canadian National Railway	935 de La Gauchetiere Street Ouest	Montreal	Quebec, Canada	H3B 2M9	01-32-506-001
Chicago Central & Pacific Railroad	Bus Dev Real Estate 1 Administration Road	Concord	Ontario Canada	L4K 1B9	01-32-506-001

See Exhibit 4 of PWC's Motion to Dismiss.

Moreover, in its Application, the Applicant declared under oath and via the affidavit of its engineer John Hock, that it attempted service of its Pre-Filing Notice upon Canadian National Railway for PIN 01-32-506-001; however, there is no indication in the authentic tax records of DuPage County that Canadian National Railway is the property owner identified by PIN 01-32-506-001 or, for that matter, owns any property within the Subject Area Radius. *See* Exhibits 3 and 4 of PWC's Motion to Dismiss. In fact, there is no evidence in the authentic tax records that Canadian National Railway is assessed real estate taxes or receives real estate tax bills for any property in DuPage County, let alone in West Chicago. *Id.*

At the Siting Hearing and only after being informed of the notice deficiencies in its Application, Applicant attempted to salvage it fatal error by solely relying on a label included in a

DuPage County map that stated, "Canadian National (EJ&E RR)." Tr. 218. And, although Mr. Hock testified that the map was an "authentic tax record map" or "authentic tax records" of DuPage County; other than his bald assertion, he provided no support for that statement. Tr. 215-46. In fact, Mr. Hock admitted that he never even took the simple step, either before or after PWC filed its Motion to Dismiss, of calling or contacting anyone at DuPage County to ask them whether this map which he had alleged was an "authentic tax record map," was in fact an "authentic tax record" of DuPage County or even whether it had any relevance to the real estate taxes DuPage County issued. Tr. 231-34. Even after PWC specifically pointed out to Mr. Hock that he had served the wrong entity and even after providing Mr. Hock with documentary proof of his error, he still refused to call the DuPage County Clerk's Office or the DuPage County Treasurer's Office to determine, or even try to determine, what their records did show. *Id.*

In summary, other than looking at this one map and conducting a so-called "Google search," (Tr. 245) Mr. Hock took no steps to:

- confirm with the DuPage County Treasurer;
- confirm with the DuPage County Clerk; or
- confirm with any assessor's office at the township or county level;

that the map he claimed was an authentic tax record was an actual authentic tax record of DuPage County. Tr. 108-10. Moreover, and of dispositive significance here, nor did Mr. Hock take any steps whatsoever to determine where or to whom the tax bills were sent or whom the authentic tax records listed as the owner of PIN 01-32-506-001. Tr. 105-06, 108-10 and 231-34.

On the other hand, PWC entered into the hearing record certified copies of actual DuPage County real estate tax records and bills for the Railroad Parcel at issue. *See* Exhibits 2 and 3 of PWC's Motion to Dismiss. In regard to the PWC records, and of further dispositive significance,

Mr. Hock admitted on cross-examination that the certified authentic tax records provided by PWC did not show any DuPage County real estate tax bills ever being sent to Canadian National Railway. Tr. 244-45.

Here, rather than determine who received the authentic tax bills and at what address, Applicant did nothing more than look online for an address for the Canadian National Railway and happened to find an address in Canada. Tr. 245. Applicant then simply attempted to serve the Pre-Filing Notice on Canadian National Railway via overnight express mail at the Canada address (Tr. 102-04), which as noted below was also improper under the Siting Statute.

In its Siting Application, the Applicant also attempted service on Chicago Central & Pacific Railroad (the "Chicago Central") for PIN 01-32-506-001; however, there is no indication in *any* authentic tax record of DuPage County that the Chicago Central owns *any* property identified by PIN 01-32-506-001 or owns *any* property within the Subject Area Radius.[3] This, again, reinforces the fact that Applicant paid no heed whatsoever as to what the authentic tax records of DuPage County actually provided or revealed.

In its Application, despite the Siting Statute's requirement that an Applicant provide all property owners within the 250-foot Subject Area Radius with the required notice as set forth at Section 39.2 (b), the Applicant failed to effectuate any service on EJ&E for PIN 01-32-506-001 even though:

1) West Chicago Ordinance 03-O-0033, which annexed the rights-of-ways of property belonging to EJ&E, clearly revealed that PIN 01-32-506-001 belonged to EJ&E. *See* Exhibit 1 of PWC's Motion to Dismiss.

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[3] A review of the authentic tax bill sent to Chicago Central & Pacific Railroad by the DuPage County Treasurer (Exhibit 2 to PWC's Motion to Dismiss) and a review of the Illinois Department of Revenue PTAX-105-A form provided by the DuPage County Clerk (Exhibit 3 to PWC's Motion to Dismiss), shows that there is no indication that the Chicago Central & Pacific Railroad receives tax bills for any property located in the City of West Chicago.

2) The DuPage County Treasurer certified records unambiguously confirm that EJ&E, *not* Canadian National Railway, is the entity appearing as the "owner" on the ***authentic tax records of the County*** for PIN 01-32-506-001. *See* Exhibit 2 of PWC's Motion to Dismiss.

3) The DuPage County Clerk certified records also confirm that EJ&E, and *not* Canadian National Railway, is the entity assessed real estate taxes in DuPage County generally and in particular for PIN 01-32-506-001. *See* Exhibit 3 of PWC's Motion to Dismiss.

In fact, none of the tax records, let alone the ***authentic tax records of the County***, reveal that Canadian National Railway received any tax bills or paid any taxes thus entitling or requiring that they receive notice for PIN 01-32-506-001 or any other PIN in DuPage County. Further, Mr. Hock's failure to even call the DuPage County Clerk or Treasurer is also telling because it reveals *sub silentio,* that he was likely fully aware of his fatal error. PWC's Motion to Dismiss Exhibits conclusively showed that a review of the records at the DuPage County Treasurer's or Clerk's Offices would only serve to prove PWC's point: the only proper party and location to serve for PIN 01-32-506-001 was EJ&E at 17641 S. Ashland Avenue, Homewood, Illinois, 60430, as that is the address where the authentic tax bills are sent. *See* Exhibit 2 to PWC's Motion to Dismiss. Hence, one can easily assume that Mr. Hock knew that the response from the DuPage County Clerk's Office or the DuPage County Treasurer's Office was going to be unfavorable and decided ignorance was (somehow) bliss.

At the Siting Hearing, Mr. Hock nevertheless attempted to justify Applicant's failure to serve EJ&E by stating that he read internet articles stating that EJ&E was dissolved but offered no competent documentation in this regard. Tr. 245. Going further, Mr. Hock conceded he did not research this issue on the Illinois Secretary of State's website that lists all corporate entities registered to do business in Illinois. Tr. 245-46. In fact, a review of the Illinois Secretary of State's website would have shown that the EJ&E merged with another railway and was not dissolved as

Mr. Hock would like everyone to believe, and that the EJ&E simply merged with the Wisconsin Central Ltd. in 2012. *See* certified copy of Illinois Secretary of State records of the Department of Business Services dated January 17, 2023 attached hereto as Exhibit A. Although not relevant, interestingly enough, Applicant did not serve the Wisconsin Central Ltd either. *See* Application at Appendix 2-J (Exhibits C and D).

Even if Canadian National Railway does own the EJ&E and/or Wisconsin Central Ltd., it would still not save the Applicant's failure to notify the proper entity listed on the authentic tax records. Illinois courts have taken a very strict view on the entities that must be served the Pre-Filing Notice; those being the "Owners" set out in the authentic tax records of a county. *Waste Mgmt. of Illinois, Inc. v. Illinois Pollutions Control Bd.,* 356 Ill. App. 3d 229, 234, 826 N.E.2d 586, 591-92 (3rd Dist. 2005). Actual notice is insufficient to cure notices not served by the statutory method or to the correct person or entity. *Id.* at 592. Moreover, each corporation is its own legal entity under Illinois law, and one cannot consider service on a parent company as service on its subsidiary. *See Wissmiller v. Lincoln Trail Motorsports, Inc.*, 195 Ill. App. 3d 399, 403, 552 N.E.2d 295, 298 (4th Dist. 1990) ("mere existence of a parent-subsidiary relationship is insufficient to establish close ties necessary" for proper service of process). As such, what Mr. Hock thought or what Mr. Hock says he relied upon and the reason(s) he did so is totally irrelevant; what controls is what the Siting Statute requires, not Mr. Hock's "whole cloth" arguments and posits as to what might possibly suffice.

In addition, there was no evidence that the authentic railroad tax records or railroad tax bills were being returned to sender or, for that matter, were not being paid. In other words, the authentic railroad tax records reviewed showed that the railroad addresses, the railroad owner designations, and the railroad bills were all current and were all still functioning addresses.

In this case, even if the Canadian National Railway would somehow be deemed an entity entitled to Pre-Filing Notice, overnight express service through a private company as utilized by the Applicant does not meet the Pre-Filing Notice requirements of the Siting Statute. There are only two methods prescribed by statute (personal service or registered mail, return receipt requested) which satisfy the Pre-Filing Notice service requirement set forth in Section 39.2(b). Overnight express is not one of the two methods, and no decisions have been found or cited by anyone in these proceedings that have ever allowed this type of service for Pre-Filing Notice. Accordingly, service of the Pre-Filing Notice via overnight express service through a private company was void. In other words, in addition to serving the wrong entity, at the wrong location, Applicant's form of service was also improper under the Siting Statute.

With respect to the Siting Statute, the Illinois Appellate Court has adopted the "Plain Language Doctrine" and, in doing so, has adopted a very strict interpretation as to how and whom must be served the Pre-filing Notice, as set forth in Section 39.2(b). *Waste Mgmt. of Illinois v. Illinois Pollution Control Board*, 356 Ill. App. 3d 229, 234, 826 N.E. 2d 586, 591-92 (3d Dist. 2005). The Court in *Waste Management* determined that the General Assembly had provided only two methods by which an applicant could satisfy the Pre-Filing Notice service requirements set forth within the Siting Statute, personal service or registered mail, return receipt requested, to the address appearing on the authentic tax records of the county. *Id.* at 591.

Here, for the reasons set forth above, service of the Pre-Filing Notice is fatally flawed and insufficient as a matter of law because the Applicant has failed to establish that notice was properly served upon all owners within the Subject Area Radius entitled to notice as required by the Siting Statute, namely the Elgin, Joliet and Eastern Railway Company. Further, the method of service

of Applicant's Pre-Filing Notice to Canadian National fails to comply with the notice requirements of the Siting Statute and is, thus, insufficient as a matter of law.

Accordingly, the City of West Chicago has no jurisdiction to approve or deny Applicant's proposed waste transfer station, and this matter must be dismissed for lack of jurisdiction.

III. THE APPLICANT HAS FAILED TO COMPLY WITH 415 ILCS §5/22.14(a)

To obtain local siting approval of a new pollution control facility in Illinois, the Application (the "Application") submitted to the City of West Chicago (the "City") by the Applicant must also comply with 415 ILCS §5/22.14(a) (the "Set-Back Provision"):

> *No person may establish any pollution control facility for use as a garbage transfer station, which is located less than 1000 feet from the nearest property zoned for primarily residential uses or within 1000 feet of any dwelling, except in counties of at least 3,000,000 inhabitants.*

In its Application, the Applicant confirmed its obligation to comply with the 1,000-foot Set-Back Provision by stating that:

> "DuPage County has less than 3,000,000 inhabitants, so West DuPage RTS may not be established within 1,000 feet of the nearest property zoned for primarily residential uses or within 1,000 feet of any dwelling." *See* Applicant's Exhibit 1, p. 2-10.

The Applicant also confirmed and conceded that two residentially zoned properties (ER-1) are located within 1,000 feet of the proposed waste transfer station. Tr. 454. Specifically, Section 2.1.4.1 of the Application states:

> That "Figure 2-2 indicates that all of the surrounding properties within 1,000 feet of the West DuPage RTS are zoned [non-residential], *except for railroad properties directly to the east of the site*." (emphasis added). Applicant's Exhibit 1.

However, despite conceding that the proposed facility is located within 1,000 feet of West Chicago properties zoned residential, Applicant seeks to circumvent the statutory requirement by advancing two arguments:

> *First*, Applicant argues that "the physical features of the property, the lack of access, and the above lot requirements make it physically impossible to construct a residence on the railroad property." *Id.*
>
> *Second*, Applicant states that the setback criteria is not applicable as evidenced by a letter from a West Chicago city official in which the official states that the "ER-1 zoning classification is a remnant from when it was annexed into West Chicago, residential development on this property is physically impossible, and West Chicago concludes the setback criteria is not applicable to this property." *See* Applicant's Exhibit 2 (Appendix 2-D2).

Applicant's arguments that it complies with the Set-Back Provision are faulty because they are based on an inapplicable exception articulated in an *unpublished* Rule 23 decision which does not apply to this Application. *See Roxana Landfill, Inc. v. Illinois Pollution Control Bd., 2016 IL App (5th) 150096-U.* Moreover, even if the *Roxana* decision did apply, the facts in that case are distinguishable from the facts in the Application and, thus, Applicant's arguments fails for a number of reasons.

A. <u>The Rules of Statutory Construction Do Not Support Applicant's Position</u>

First, pursuant to the rules of statutory construction, the statute must be read to comply with its plain language. The plain language of the statute at issue shows that no waste transfer station can legally be sited at the proposed location because there are two properties zoned primarily for residential use within 1,000 feet of the proposed facility. "No" means exactly that, and the Applicant is not authorized to declare that the legislature did not mean what it clearly wrote in order to obtain the outcome it seeks. *See Zahn v. N. Am. Power & Gas, LLC*, 2016 IL 120526, ¶ 15, 410 Ill. Dec. 947, 72 N.E.3d 333, 337 ("No rule of construction authorizes us to declare that the legislature did not mean what the plain language of the statute imports, nor may we rewrite a statute to add provisions *** the legislature did not include.").

When presented with an issue of statutory construction, a court's primary objective is to ascertain and give effect to the intent of the legislature. *Murphy-Hylton v. Lieberman Mgmt.*

Services, Inc., 2016 IL 120394, ¶ 25, 72 N.E.3d 323, 329. Hence, the most reliable indicator of legislative intent is the language of Section 22.14(a), which must be given its plain and ordinary meaning. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 479, 639 N.E.2d 1282, 1287 (1994). Courts should not depart from the plain language of the Act by reading into the Act exceptions, limitations, or conditions that conflict with the express legislative intent. *Alternate Fuels, Inc. v. Dir. of Illinois E.P.A*., 215 Ill. 2d 219, 238, 830 N.E.2d 444, 455 (2004). In performing this task, courts will consider the statute's language as well as the reason for the law, the evils to be remedied, and the purposes to be obtained. *M.I.G. Investments, Inc. v. E.P.A.*, 122 Ill. 2d 392, 397-398, 523 N.E.2d 1, 3 (1988); *Murphy-Hylton*, 2016 IL 120394, ¶ 25; *J&J Ventures Gaming LLC, v. Wild, Inc.*, 2016 IL 119870, ¶ 25, 67 N.E3d 243, 251.

Here, the statute is clear and states that no facility may be constructed within 1,000 feet of residentially zoned property. The current zoning classification of the two parcels is, then, dispositive. In turn, there is no factual dispute that within 1,000 feet of the LRS transfer station there are two properties that are zoned residential. Applicant's Exhibit 1, Section 2.1.4.1; Tr. 454 and 1104. Since LRS concedes that the proposed facility is within 1,000 feet of property zoned residential, the inquiry should stop there.[4]

By including residentially zoned properties in the 1,000-foot Set-Back Provision and not just prohibiting residential dwellings, the legislature made a clear choice to include parcels that had the ability to be utilized in the future as residential, even if currently vacant or used in a different manner. To read exceptions into the plain language, as Applicant suggests, would be to change the clear intent of the General Assembly, which in this case was designed to protect the

[4] Although there are statutory exceptions to the 1,000-foot Set-Back Provision, those exceptions are inapplicable to this Application.

quality of areas that are zoned or used for residential purposes. Accordingly, the plain language of Section 22.14(a) that prohibits this type of facility within 1,000 feet of residentially zoned property requires that siting for the project be denied.

B. <u>The Adjacent Rail Lines Could Be Used in A Residential Manner</u>

In an attempt to avoid the plain language of the statute, Applicant argues that the rail lines could never be developed in a residential manner. This argument is legally and factually false.

PWC's expert Joe Abel, a certified land planner who has been involved in the development of hundreds of projects in Illinois, primarily in DuPage County, including residential developments throughout his fifty plus year career on both the developer and regulatory sides of projects (Tr. 1073-77) testified unequivocally that:

(1) the Railroad Parcels are within 1,000 feet of the proposed Pollution Control Facility (Tr. 1105);

(2) the Railroad Parcels are zoned residential (Tr. 1073 and 1097);

(3) adjacent to the Railroad Parcels is vacant property currently used for farming purposes (Tr. 1077);

(4) properties are consolidated and re-zoned on a regular basis (Tr. 1078-79);

(5) numerous rail lines in DuPage County have been vacated during his career and utilized in other ways, including as parts of other developments (Tr. 1071-72, 1087 and 1101-02; and

(6) the adjacent vacant property currently being farmed could be legally re-zoned and consolidated with the Railroad Parcels and the adjacent farmland to develop and use in a residential manner. Tr. 1080-1082 and 1089-91.

None of Mr. Abel's testimony in this regard was ever contradicted or disputed.

C. The Roxana Decision Does Not Help Applicant

Applicant relies upon an unpublished Rule 23 Opinion entitled *Roxana Landfill, Inc. v. Illinois Pollution Control Bd.,* 2016 IL App (5th) 150096-U, to attempt to establish an exception to the 1,000-foot Set-Back Provision set forth in Section 22.14(a). However, *Roxana* is inapplicable and is entirely distinguishable from this case because the property in question in *Roxana* was foreclosed in perpetuity by a deed restriction from ever being utilized for residential purposes.

The same is not true for the Railroad Parcels in this matter. As evidenced via Mr. Abel's testimony, nothing legally or factually prohibits the residentially zoned Railroad Parcels from ever being combined with the farm parcels to the east and being redeveloped as part of a larger residential development.

In *Roxana,* the Fifth District Appellate Court issued a Rule 23 Opinion that examined whether the applicant's non-conformity with Section 22.14(a) was fatal to the application. *Id.* First, and perhaps most importantly, while a Supreme Court Rule 23 ruling may be cited as persuasive, it ***may not*** be cited as binding precedent by any party except in the limited circumstances allowed under Rule 23(e)(1). This case is not one of those limited circumstances; therefore, neither the Hearing Officer nor the City Council can or should rely on this decision. Assuming, *arguendo*, that the case was not a Rule 23 Opinion, it would still hold no weight in this circumstance.

The *Roxana* applicant asserted in its waste transfer station application that there were no residential land uses within 1,000 feet of the site. The applicant therein noted, however, that property approximately 1,000 feet to the southeast of the site previously contained residential dwellings but that St. Clair County had acquired these properties under a Federal Emergency

Management Agency (FEMA) buy-out program, which included permanent deed restrictions prohibiting any future residential use of the parcels. The deed provided that the grantee (the City):

> "agree[d] to conditions which [were] intended to restrict the use of the land to open space in perpetuity" and that the grantee "agree[d] that no new structures or improvements shall be erected on the premises other than a restroom or a public facility that [was] open on all sides and functionally related to the open space use."

In other words, residential buildings were forever banned from being located on the land. The *Roxana* court relying on the perpetual requirement of the deed restriction reasoned that notwithstanding the lack of compliance with Section 22.14(a), the property would not be considered residential under this very limited circumstance.

In this case, however, the Railroad Parcels contain no such prohibition related to use of the properties as residential uses, nor have the owners of the Railroad Parcels agreed that they would never utilize the Railroad Parcels in a residential manner. Further, as shown by Mr. Abel's testimony, there is nothing legally or factually that would prohibit the Railroad Parcels from being utilized as residential in the future. Tr. 1080-1082 and 1089-91. In short, the *Roxana* decision does not allow Applicant to circumvent the clear language set forth in Section 22.14(a).

Further, the Illinois Pollution Control Board has previously held in favor of strict compliance with Section 22.14(a). *C&S Recycling, Inc. v. Illinois Environmental Protection Agency*, 1996 WL 419477, at *3 (PCB 95-100, July 18, 1996). C&S Recycling filed an application for a permit to develop and operate a municipal waste transfer station. *Id*. at *1. The Agency denied the application because it failed to demonstrate that the proposed facility was located at least 800 feet from the nearest residence or property zoned for primarily residential uses as required by Section 22.14 of the Act, and Section 39(1) of the Act prohibits the issuance of a permit for a facility located within the boundaries of any setback zone established by the Act. *Id*. at *2. The Board agreed and concluded its decision with the following language "Further, even if the Board

found in favor of C&S Recycling on these arguments, without a legislative change in the Act, issuance of the permit would still result in a violation of the Act." *Id.* at *3. (Emphasis Added).

Like in *C&S Recycling*, the Applicant has conceded that the facility is within 1,000 feet of a property zoned for residential use. Thus, without a legislative change in the Act, West Chicago cannot read exceptions into the statute in favor of the Applicant, because the issuance of the permit would still result in a violation of the Act.

D. The Dabareiner Letter Does Not Modify the Requirements of Section 22.14(a)

Applicant also attempts to circumvent the clear language of the Act by relying on an August 24, 2022 letter issued by a City of West Chicago staff member named Tom Dabareiner (the "Dabareiner Letter"). *See* Exhibit 1 Application at Appendix 2-D2. According to the Applicant's engineer, Mr. Hock, West Chicago provided a letter "with their determination that the 1,000-foot set-back does not apply to those railroad properties." Tr. 455. Specifically, in the Dabareiner Letter, Mr. Dabareiner wrote, among other things, that "[r]esidential development on this property is physically impossible," and that "[a]s such, the City concludes that the 1,000-foot setback requirement in 415 ILCS 5/22.14(a) is not applicable." *Id.* As shown above, Mr. Abel's testimony destroys the argument that "residential development on this property is physically impossible." Tr. 1073-1105.

Further, at the siting hearing, it became clear that although Mr. Dabareiner eventually signed the version of the Dabareiner Letter included in the Application, the language in the August 24, 2022 letter (Exhibit 1, Application at Appendix 2-D2) was not the same language that had been included in the initial version of the letter Mr. Dabareiner authored and executed on October 15, 2019. *See* Exhibit PWC-200. Rather, at the siting hearing, it was discovered that significant revisions to the initial letter were made at the request of the Applicant's engineer, Mr. Hock. Tr.

539-43. As noted, the revisions made to the initial letter by Mr. Hock were not insignificant or minor. Tr. 542-44. For example, in the initial October 15, 2019 letter, Mr. Dabareiner never included language stating that "residential development on this property is physically impossible." *Compare* Exhibit 1 Application at Appendix 2-D2 *with* Exhibit PWC-200; Tr. 540. In addition, in the initial letter, Mr. Dabareiner did not state that the City "concluded" that the 1,000-foot setback did not apply; rather, in the initial letter, Dabareiner stated, "as such, the City believes Section 22.14(a) 1,000 foot setback requirement is not applicable." *Compare* Exhibit 1 Application at Appendix 2-D2 *with* Exhibit PWC-200; Tr. 540. The ultimate production, then, was much more a work of Mr. Hock's penmanship than that of Mr. Dabareiner. Regardless, Applicant's reliance on a West Chicago staff member's letter to support its position that it has met all location criteria is inapposite.

First, in West Chicago, pursuant to Article VVII - Pollution Control Facility Site Approval Procedures, and in particular Section 14-93, it is clear that: "The applicant remains ***solely responsible*** to demonstrate that the location approval criteria are ***all*** met." (Emphasis Added). Thus, the Applicant's efforts to use the revised/reconstituted version of the Dabareiner Letter to argue that it has met the Set-Back Provision should be rejected because neither Mr. Dabareiner nor the City are the Applicants.

Second, a West Chicago staff member's conjecture or speculation regarding the availability of property for a particular future use is not the standard created by 415 ILCS §5/22.4(a); the current zoning of the property is the issue under the statute. This standard is confirmed and reinforced by the last paragraph of Section 39.2(a), which provides: "If the facility is subject to the location restrictions in Section 22.14 of this Act, ***compliance with that section shall be determined as of the date of filing of the application for siting approval***". (Emphasis added). In this case, as of the date that the siting application was filed, (as well as to the present date), the parcel in question is zoned

"Residential." Accordingly, the parcel in question was zoned Residential as of the time the siting application was filed, and this is dispositive of the issue.

Moreover, as a City of West Chicago staff member, Mr. Dabareiner has no authority to determine whether the Application complies with the Set-Back Provisions of an Illinois statute and the Applicant cannot rely upon representations made by a municipal official to argue that it has satisfied the provisions of the Act, because the controlling law is the Act, ***not*** what a local municipal official may state in a letter provided to the Applicant. Accordingly, neither a West Chicago staff member nor its corporate authorities have the authority to create "whole cloth" exceptions in or to the clear and unequivocal mandate included in both Section 22.14(a) and the last paragraph of Section 39.52(a). That is not within the purview of the City or any city official.

Thus, since the Application fails to comply with the 1,000-foot set-back requirement of 415 ILCS §5/22.14(a), siting approval for this proposed pollution control facility must be denied.

IV. FUNDAMENTAL FAIRNESS RELATED ISSUES

In a local siting proceeding under the Illinois Environmental Protection Act, a nonapplicant who participates in the siting process [] has a statutory right to fundamental fairness in proceedings before the local siting authority. *Land & Lakes Co. v. Illinois Pollution Control Bd.,* 319 Ill. App. 3d 41, 47, 252 Ill. Dec. 614, 743 N.E.2d 188, 193 (3d Dist. 2000), rev'd on other grounds, *Peoria Disposal Co. v. Illinois Pollution Control Bd.,* 385 Ill. App. 3d 781, 796–97, 324 Ill. Dec. 674, 896 N.E.2d 460 (3d Dist. 2008). However, fundamental fairness in this context incorporates only the minimal standards of procedural due process, such as the right to be heard, the right to cross-examine adverse witnesses, and the right to have impartial rulings on the evidence. *Peoria Disposal Co.,* 385 Ill. App. 3d at 797. *See Cnty. of Kankakee v. Illinois Pollution Control Bd.*, 396 Ill. App. 3d 1000, 1014, 955 N.E.2d 1, 14 (3d Dist. 2009), *as corrected* (Jan. 26, 2010).

To show bias or prejudice in a siting proceeding under the Environmental Protection Act, the participant must show that a disinterested observer might conclude that the siting authority, or its members, had prejudged the facts or law of the case. *Fox Moraine, LLC v. United City of Yorkville*, 2011 IL (2d) 100017, ¶ 60, 960 N.E.2d 1144, 1163, appeal denied 360 Ill. Dec. 2, 968 N.E.2d 81 (2012). Although citizens before a municipal board in proceedings regarding site approval for pollution control facilities are not entitled to a fair hearing by reason of constitutional guarantees of due process, they may nevertheless insist that procedures comport with standards of fundamental fairness. *Fairview Area Citizens Taskforce v. Illinois Pollution Control Bd*., 198 Ill. App.3d 541, 555 N.E.2d 1178, 1180, (3d Dist. 1990) appeal denied 149 Ill. Dec. 319, 133 Ill.2d 554, 561 N.E.2d 689 (1990).

Moreover, the Siting Statute requires that a "public" hearing be held (415 ILCS 5/39.2(d)). In turn, Black's Law Dictionary defines the terms "public" as "Pertaining to a … ***whole community***; proceeding from, relating to ***or affecting the whole body of people or an entire community***." (Emphasis added). For the reasons set forth below, the hearing held by the City of West Chicago did not meet the legal definition of a "public" hearing and thus the hearings were fatally infirmed (from a fundamental fairness/procedural point of view). As James Madison wrote: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both." 9 Writings of James Madison 103 (G. Hunt ed. 1910). *Branzburg v. Hayes*, 408 U.S. 665, 728 (1972).

In this case, the proceedings regarding site approval, starting with the Pre-Filing Notice and the right to have impartial rulings on evidence did not comport with either standards of fundamental fairness or the procedural requirement that a "public" hearing be held in one or more of the following ways:

First, the statutory Pre-Filing Notice was not made available on the City's website in Spanish, in a community where more than 52% of residents over the age of five speak a language other than English, and nearly 21% have limited English Proficiency ("LEP").[5] In fact, West Chicago's 21% LEP population is four times the 5% threshold set by the Federal Government for requiring language access measures for LEP residents.

Second, no City official or even the Hearing Officer took any steps to determine whether there was a need for a Spanish language interpreter for any citizen or participant. And, even after being informed that certain participants' primary language was Spanish, no City official or the Hearing Officer took any steps to locate a Spanish language interpreter.

Third, despite the fact that the United States Environmental Protection Agency has recommended that environmental justice considerations be taken into account in waste transfer station sitings, the Hearing Officer did not make impartial rulings on the evidence and specifically prevented PWC from cross-examining Applicant's expert on environmental justice related issues and further prevented PWC from asking its environmental expert questions regarding emissions and environmental justice related issues relating to West Chicago's minority community or for that matter the surrounding minority communities.

Individually, any of the above three deficiencies confirm that the Siting Hearing, including the Pre-Filing Notice, did not comport with standards of fundamental fairness; however, combined, the three deficiencies reveal a clear bias that none of those in control of how the Siting Hearing was to be conducted were concerned with the rights of the Latino community, which comprise the majority of West Chicago residents. This, despite the fact that West Chicago is considered a "majority-minority" community because Latinos as an ethnic group represent the largest population, namely 52% of city residents. Each deficiency is described in greater detail below.

A. The Pre-Filing Notice Related Issues and Language Access

As noted above, the Pre-Filing Notice was not available in Spanish. In that regard, the last paragraph of 39.2(b), states, in pertinent part that: "Such notice shall ***state*** the name and address of the applicant, the location of the proposed site, the nature and size of the development, the nature of the

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[5] *See* American Community Survey 2021 5-Year Estimates: Language Spoken at Home Tables at https://data.census.gov/table?q=West+Chicago+&t=Language+Spoken+at+Home&tid=ACSST5Y2021.S1601.

activity proposed, the probable life of the proposed activity, the date when the request for site approval will be submitted, and a description of the right of persons to comment and a description of the right of persons to comment on such request as herein provided." (Emphasis added). Black's Law Dictionary defines the verb "state" as: "***To express*** the ***particulars*** of a thing in writing or in word; to set down or set forth ***in detail***." (Emphasis added). The requirement set forth in the Siting Statute to state certain matters in the Pre-Filing Notice requires that they be done with particularity and in detail. The requirement that these matters be stated in the Pre-Filing Notice with particularity and in detail are not afforded to the majority-minority Latino community in West Chicago when the Prefiling Notice was only available in English and only within an exhibit of the Applicant's Criterion 2. *See* Applicant's Criterion-2, Appendix-2-J at Exhibit A. The touchtone purpose of a "notice" is to "notify"—in turn, a notice that does not notify serves no purpose, and is a nullity.

This critical omission of statutory notice in Spanish denied LEP West Chicago residents with their fundamental right to receive notice and meaningful access to critical information. The standard of meaningful participation was established by the landmark *Lau v. Nichols*, where the U.S. Supreme Court found that by receiving no instruction or English only language instruction, "Chinese speaking children" were denied the opportunity for meaningful participation in the same education available to English speaking children. Lau v. Nichols, 414 U.S. 563, 568, 94, S. Ct. 786, 789, 39 L. Ed. 2d 1 (1974). Thus, the Supreme Court ruled that the school district had discriminated against these Chinese students, as a result of their national origin, a protected category under Title VI of the Civil Rights Act of 1964. *Id*. The exact same thing occurred in West Chicago; however, in the context of the Siting Hearing "public" hearings.

Any local government entity receiving federal funds is required to provide meaningful access to information and services to residents with LEP[6] under Title VI of the Civil Rights Act of 1964, Executive Order 13166 (2000). *See* https://www.lep.gov/executive-order-13166; Executive Order 13985 (2021; 2023); and Strengthen Racial Equity and Support for Underserved Communities Through the Federal Government at https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/16/ executive-order-on-further-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/.

Moreover, the U.S. Department of Justice's (DOJ) safe harbor provision recommends oral language assistance from a qualified interpreter and written translations of any vital documents for LEP groups. In this case, the Pre-Filing Notice is clearly a vital document. An LEP group is defined as one that constitutes 5% of the population, or 1,000 people, whichever is less. In the City of West Chicago, the overall LEP population is 21% and the vast majority of LEP, or 88%, are Spanish speakers. *See* American Community Survey 2021 5-Year Estimates "Language Spoken at Home Tables at https://data.census.gov/table?q=West+Chicago+&t=Language+Spoken+at+Home&tid=ACSST5Y2021.S1601.

In other words, despite having a Latino population that is 52% Latino of which about 38% of Spanish-speakers 18 years and over are LEP, the City of West Chicago failed to take appropriate steps to provide meaningful access to LEP West Chicago residents vis-à-vis the proposed waste

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[6] The City of West Chicago is the recipient of federal funding and in fact recently received funding through the assistance of United States Congressman Sean Casten relating to the environmental damage done to the community. As noted in the appropriation request of Congressmen Casten, he sought federal funding to be "used for remediation of the Kerr-McGee Superfund. The Kerr-McGee site is one of four Superfund National Priorities List sites in the West Chicago area that had been contaminated with radioactive thorium wastes." *See* https://casten.house.gov/services/appropriations-and-community-funding.

transfer station Pre-Filing Notice or Hearings. Moreover, although the City of West Chicago relied on the Google translation feature on their website to provide access to Spanish language information on the siting process, this free Google feature is deemed unreliable and has been rejected by the courts "as simply not reliable enough where rights are on the line." *See*, *United States v. Ramirez-Mendoza*, 2021 WL 4502266, at *6 (M.D. Pa. Oct. 1, 2021) (court not convinced that Google Translate accurately translated [the] request for consent into Spanish. . . .. Precision is important, particularly in this context, and the Court believes that more was needed to establish the accuracy of Google Translate).

In any event, even if the general West Chicago website was translated by Google, no effort was made to provide translation of the application components. In other words, none of the actual application materials LRS submitted were available in Spanish for review by residents. Similarly, the transcripts posted at the end of the hearings were available only in English and, therefore, not accessible to LEP residents of West Chicago. And, as noted above, the entirety of the Siting Hearings were conducted solely in English, with two notable exceptions during the public comment section.

First, one LRS employees whose primary language was Spanish was provided with a Spanish language interpreter, but of both ironic and profoundly revealing and significant note was that the interpreter was provided by LRS itself, not any West Chicago official or the Hearing Officer. In the second case, an LRS employee summarized some of her English language comments in Spanish. So, then even the Applicant itself understood the crucial importance of providing a Spanish language interpreter. Without qualified interpretation during the hearings, many if not all LEP residents were denied meaningful participation in the hearing process. The Siting Hearing is the most critical stage of the site approval process, as it presents the ***only***

opportunity for public comment and participation. *Kane Cnty. Defs., Inc. v. Pollution Control Bd.*, 139 Ill. App. 3d 588, 593, 487 N.E.2d 743, 746 (2d Dist. 1985). (Emphasis Added). Thus, without qualified interpretation during the hearings, West Chicago LEP residents were denied meaningful participation in the hearing process.

B. Siting Hearing Language Access Related Issues

First, although West Chicago is a majority-minority community, no West Chicago official nor the Hearing Officer took any steps to determine whether there was a need for a Spanish language interpreter for any citizen or participant prior to or during the Siting Hearing. In fact, PODER, which is coincidentally an acronym for "People Opposing DuPage Environmental Racism"), a local Latino-based organization that was also a Siting Hearing participant, specifically informed the Hearing Officer that there was no Spanish language interpretation at the Hearing "for people from the community in a minority-majority community that have an interest in this along with the rest of the people of West Chicago." Tr. 939. This information, however, fell completely on deaf ears.

Second, even after being informed that certain participants' primary language was Spanish, no West Chicago official (nor did the Hearing Officer) take any steps to locate a Spanish language interpreter in order to provide meaningful access to the Spanish-speaking members of the West Chicago community. Specifically, the Hearing Officer was informed that participant Julieta Garcia's primary language was not English and had been forced to participate in this hearing without the aid of Spanish interpretation at any point in the process. Tr. 1231. In fact, Applicant

Itself recognized the need for a Spanish language interpreter for a public participant and provided one itself, yet no City official or the Hearing Officer took any similar steps.[7]

The right to understand what is being said is essential to ensuring meaningful participation in a truly "public" hearing. Otherwise, the hearing fails its essential "public" purpose as set forth in Section 39.2(d). In this Siting Hearing, the rights of numerous members of the community were denied and thus they were clearly denied the right to meaningful participation under state and federal law.

C. The Hearing Officer Improperly Denied Evidence Relating to Environmental Justice Issues

At the Siting Hearing, the Hearing Officer did not make impartial rulings on the evidence and specifically prevented PWC from cross-examining Applicant's expert on environmental justice-related issues. The Hearing Officer also prevented PWC from asking its own environmental expert questions regarding emissions and environmental justice issues relating to West Chicago's minority community or for that matter the surrounding minority communities. Specifically, the Hearing Officer prevented PWC from asking Applicant's expert Mr. Hock whether the Applicant took any steps to ensure that the siting decision did not impose a disproportionate impact or burden upon the largely low-income or minority community in West Chicago. Tr. 705. This, despite the fact that the United States Environmental Protection Agency's 2002 Manual titled "Waste Transfer Stations: A Manual for Decision-Making (Tr. 703-04) states that "Environmental Justice Considerations" should be taken into consideration during "the site selection process, [and] steps should be taken to ensure that siting decisions are not imposing a disproportionate burden upon low-income or minority communities." *See* Exhibit PWC-49. In rejecting PWC's ability to use this document to question Applicant's expert on whether they took any steps to ensure that the

[7] During the hearing Jonathan Luna, a manager at West Chicago's LRS facility attended the hearing in order to translate for a witness named Jose, who provided public comments. Tr. 1387.

siting decision did not impose a disproportionate burden on West Chicago's minority community, the Hearing Officer not only failed to make impartial rulings on the evidence, he inexplicably even questioned whether a 20-year-old document was still relevant—which of course is still relevant. In denying the questioning of Applicant's expert in relations to environmental impacts on minority communities, the Hearing Officer specifically stated, "The manual is not the criteria. The criteria are set forth in the statute. We're not here to see if we comply with a 20-year-old U.S. EPA document. It's 39.2. Let's stay focused." Tr. 706. In fact, however, environmental justice-related issues go to protection of public health, safety, welfare and the environment, and are then directly relevant in siting proceedings and continue to be relevant today and may be even more relevant than they were 20 years ago, in both the West Chicago context and the overall federal EPA enforcement framework. As noted below, West Chicago's minority community is no stranger to environmental justice issues.

Specifically, there are four Superfund sites in the West Chicago area that were contaminated by radioactive thorium waste and, despite decades of cumulative damage and negative health impact for residents, clean-up has yet to be completed. *See* https://www2.illinois.gov/dnr/programs/NRDA/Pages/KressCreek.aspx. West Chicago Spanish speaking LEP residents in particular, claim they were not provided with accurate and comprehensive information about the environmental risks of moving into West Chicago, which came to be known as the "radioactive capital of the Midwest." *See* https://borderlessmag.org/2022/07/12/west-chicago-is-cleaning-up-the-last-of-its-nuclear-contamination-residents-exposed-to-radiation-say-its-not-over/.

In addition, on the federal level, as recently as January 13, 2023, the United States EPA Cumulative Impacts Addendum to EJ Legal Tools, noted that:

> Addressing cumulative impacts is also an inextricable component of federal environmental justice and equity policy, and integral to protecting civil rights. Executive Order 12898, which lays the foundation for federal environmental justice policy, directs federal agencies to identify "multiple and cumulative exposures" in environmental human health analyses, whenever practicable and appropriate.13 Executive Order 14008 further directs agencies to "make achieving environmental justice part of their missions by . . . address[ing] the disproportionately high and adverse . . . climate-related and ***other cumulative impacts on disadvantaged communities***." *See* https://www.epa.gov/system/files/documents/2022-12/bh508-Cumulative%20Impacts%20Addendum%20Final%202022-11-28.pdf. (Emphasis Added).

In the same January 13, 2023, United States EPA document, it further notes the following with regarding to environmental justice:

> As discussed in the RCRA section of EJ Legal Tools, the landmark decision that set out EPA's and the Environmental Appeals Board's (EAB's) position on the consideration of cumulative impacts in RCRA permitting is *In re Chemical Waste Management of Indiana*. []. As stated by the EAB, RCRA's omnibus clause authorizes EPA to impose permit conditions as follows: Under the omnibus clause, if the operation of a facility would have an adverse impact on the health or environment of the surrounding community, the Agency would be required to include permit terms or conditions that would ensure that such impacts do not occur. . . . Thus, under the omnibus clause, if the operation of a facility truly poses a threat to the health or environment of a low-income community or community of color, the omnibus clause would require the Region to include in the permit whatever terms and conditions are necessary to prevent such impacts. []. As such, in carrying out EPA's hazardous waste permitting program [] and in EPA's oversight of authorized state hazardous waste permitting programs, [] EPA can take into account cumulative impacts to "justify permit conditions or denials based on disproportionately high and adverse human health or environmental effects."[]. Specifically, EPA can "tak[e] a more refined look at its health and environmental impacts assessment, in light of allegations that operation of the facility would have a ***disproportionately adverse effect on the health or environment of low income or minority populations***." []. *Id.* (Emphasis Added).

Thus, the Hearing Officer did not make impartial rulings on the evidence as reflected by his decision to deny PWC the ability to cross-examine Applicant's expert and clearly violated the right to fundamental fairness. In the process of doing so, the Hearing Officer's rulings created a profoundly damaging disregard for the rights of West Chicago's minority (Latino) community.

At the Siting Hearing, the Hearing Officer also failed to make impartial rulings by preventing PWC from asking its own environmental expert questions regarding emissions and environmental justice related issues. This required PWC to submit an offer of proof which denied

members of the community from hearing relevant testimony, which among other things, revealed that if called to testify, PWC's environmental expert, Mr. James Powell, would have testified that:

- according to the Environmental Justice Act and as set forth in **Exhibit PWC-405**, the Illinois General Assembly found that environmental justice requires that no segment of the population, regardless of race, national origin, age or income, should bear disproportionately high or adverse effects of environmental pollution and that certain communities in the state may suffer disproportionately from environmental hazards related to facilities with permits approved by the state.

- as set forth in **Exhibit PWC-406**, the Illinois EPA Environmental Justice Public Participation Policy explains the methods by which the Illinois Environmental Protection Agency will engage with the public in communities located in identified areas of Environmental Justice (EJ) concern.

- the Illinois EPA defines "area of EJ concern" as a census block group or areas within one mile of a census block group with income below poverty and/or minority population greater than twice the statewide average.

- the Illinois EPA has developed a Geographic Information System (GIS) mapping tool call EJ START to identify census block groups and areas within one mile of census block groups meeting the EJ demographic screening criteria.

- EJ START is publicly available and can be found on the Illinois EPA's EJ webpage at the following location: http://epagisportal.illinois.gov/portal/apps/webappviewer/index.html?id=414d804241e94c51809f08f3644c37d9.

- he (PWC's expert) used EJ START to determine whether the proposed LRS waste transfer station facility is in or impacting an "area of EJ concern," and that based on his review of the EJ START, the proposed facility is approximately 1,300 feet from an area determined by the IEPA to have minority population greater than twice the statewide average, and therefore within an "area of EJ Concern."

- he (PWC's expert) also used EJ START to determine whether the proposed LRS waste transfer station's proposed trash transfer-trailer route travels through an "area of EJ concern," and that based on his review of the EJ START, he found that if LRS transfer-trailers leaving the LRS facility on Powis Road travel North on Powis Road and then proceed West on North Avenue and then South on Kirk Road (as depicted by the yellow line on slide 31), all LRS transfer-trailers leaving the LRS facility would travel through numerous "areas of EJ concern," that are located along Kirk Road South from Batavia to I-88 and would include the area of West I-88 at Aurora and North Aurora communities, as depicted by the blue and red portions along the proposed route.

- environmental hazards can result in adverse health effects for the general population in West Chicago, a majority of which (namely 51.85%) is Latino based on United States census information and as set forth below:

LRS Service Area
Burden on Latino Community
2.3 x's Greater on Latinos vs. Non-Latinos

	A	B	C	D	E	F	G	H
1	DuPage County Townships	#	%	#	%	#	%	#
2		Latino	Latino	African American	African American	White	White	Total
3	Bloomingdale	23,786	21.26%	5,736	5.13%	60,875	54.41%	111,875
4	Lisle	11,141	9.36%	6,582	5.53%	80,630	67.73%	119,040
5	Milton	10,993	9.14%	5,604	4.66%	87,153	72.48%	120,237
6	Naperville	12,098	11.55%	9,167	8.75%	54,932	52.43%	104,765
7	Wayne	9,506	14.75%	1,890	2.93%	39,097	60.68%	64,427
8	Winfield	17,502	38.18%	1,137	2.48%	23,936	52.22%	45,836
9	**Kane County**							
10	Aurora	74,474	58.67%	12,102	9.53%	34,152	26.91%	126,929
11	St. Charles	5,846	11.26%	975	1.88%	40,296	77.64%	51,902
12	Elgin	45,542	43.58%	6,296	6.03%	43,530	41.66%	104,493
13	Geneva	1,924	7.29%	189	0.72%	22,704	86.01%	26,396
14	Batavia	4,113	11.63%	1,285	3.63%	27,401	77.48%	35,363
15	**Will County**							
16	Du Page Township	24,011	27.49%	14,279	16.35%	36,414	41.69%	87,348
17	Wheatland	7,428	8.36%	5,798	6.52%	50,092	56.35%	88,894
18								
19	Total Service Area	**248,364**	**22.8%**	71,040	6.53%	601,212	55.28%	1,087,505
20								
21	West Chicago	**13,282**	**51.85%**	701	2.74%	8,906	34.77%	25,614
22								

- as set forth in **Exhibit PWC-48**, the National Environmental Justice Advisory Council – Waste and Facility Siting Subcommittee Waste Transfer Station Working Group found that the clustering and disproportionate siting of noxious facilities in low-income communities and communities of color led to the creation of the environmental justice movement and that the "siting and operation of waste transfer stations is such an example."

- the National Environmental Justice Advisory Council – Waste and Facility Siting Subcommittee Waste Transfer Station Working Group also found that waste transfer stations "can cause environmental concerns associated with poor air quality (from idling diesel-fueled trucks and from particulate matter such as dust and glass) and disease-carrying vectors such as rodents and roaches."

- based on his review of the EJ START map, as well as the information from the EPA and Illinois Environmental Protect Act, the proposed facility route for departing trash

transfer-trailers does impose an adverse impact on various areas of EJ concern as depicted in slide 31 and the image above.

See Exhibit PWC-702 (James Powell Offer of Proof).

All of the above-factors strike at the heart of the concerns the General Assembly has determined need to be addressed via the public health, safety and environment criteria as set out in Criterion 2 of the Siting Statute. They further reveal that West Chicago's Siting Hearing did not comport with the dictates of fundamental fairness.

V. STATUTORY CRITERIA – THE APPLICANT HAS FAILED TO COMPLY WITH STATUTORY CRITERION 1, 2, 3 AND 8

A. Criterion 1: The facility is necessary to accommodate the waste needs of the area it is intended to serve

Applicant has failed to meet Criterion 1 because the proposed facility is not necessary to accommodate the waste needs of the area it is intended to serve. The Application, as well as the the Siting Hearing testimony is undisputed—there is more than enough waste transfer station capacity to handle the current and future waste needs of the proposed LRS Service Area. Tr. 112 and 816-17. In fact, the waste transfer stations currently serving the proposed LRS Service Area have capacity that is almost double the amount of waste being generated by the Service Area. Tr. 816-17. In addition, the existing transfer station in the Service Area (the "Groot Facility") is operating at less than fifty percent (50%) of capacity. Tr. 114.

In light of the fact that LRS's proposed facility is *not* necessary to accommodate the waste needs of the area it is intended to serve, Applicant pivots and argues that the proposed facility is necessary from a competition standpoint because according to Applicant, "if you're going to be able to effectively compete in the market, you need to be fully integrated in that market." Tr. 69. Applicant continues and argues that it needs vertical integration in both trucking and transfer

stations (Tr. 60-64) in order to have the "ability to compete on a level playing field." Tr. 85. However, while making this assertion, Applicant concedes:

- that it is currently the third largest waste provider in Illinois (Tr. 54);
- that it has admittedly been able to obtain over 100 franchise agreements with municipalities (Tr. 32); and
- that it is currently operating a landfill in Atkinson, Illinois (Tr. 58).

In other words, Applicant does have vertical integration and in fact did have vertical integration in portions of its initially proposed service area (Tr. 133 and Exhibit PWC-151-A) before Applicant altered its service area.

In any event, when one looks at the actual facts, it is clear that while Applicant may not have a waste transfer station within the proposed Service Area, there are clearly numerous waste transfer stations surrounding the proposed Service Area and of those, Applicant owns five waste transfer stations in the Chicagoland area. Tr. 137-38. In his testimony, Applicant's engineer confirmed that fifteen miles around the proposed Service Area was a reasonable distance to the Service Area for analysis purpose. Tr. 126-27. And, within the fifteen miles of the Service Area, Applicant has three waste transfer stations, at least two of which receive waste from the Service Area. Tr. 126-27, 133-34 and 140. In other words, Applicant is already vertically integrated in the Chicagoland area and parts of the Service Area despite its assertions to the contrary. Further, the Applicant is not the only large waste hauler that does not have vertical integration in the Service Area. Tr. 134.

Perhaps most importantly is the fact that Criterion 1's analysis hinges on accommodating the waste needs of the area it is intended to serve – not accommodating the needs of a specific waste company such as Applicant. Applicant's alleged need for vertical integration are irrelevant to the plain language in Criterion 1, and no case has been cited or found that holds otherwise. In

fact, if "competition" (rather than actual "need") is to take precedence, then what if two, three, four, five (or more) waste companies decide they too need a facility in West Chicago to achieve their "vertical integration"—where does it end, if ever?

In further arguing that Criterion 1 has been satisfied, Applicant states that this criterion is satisfied because there is a general need for more competition in the Service Area. This statement should be disregarded as Applicant provided no documentation, no data, no reports and no studies to support its otherwise wholly self-serving conclusion that another waste transfer station would benefit anyone, other than itself. Tr. 142-45. On the other hand, the evidence revealed that nowhere in the proposed Service Area is there an actual lack of competition. In fact, the uncontradicted evidence provided by John Lardner, a professional engineer with over 35 years of experience in the waste industry, was that every portion of the Service Area was currently served by at least two, and sometimes up to six different waste transfer stations and companies. Tr. 814 and 819-20. These facts, in and of themselves, belie Applicant's conclusion of a lack of competition, unless of course there was evidence of collusion between waste haulers in the Service Area. However, as Applicant's engineer confirmed, there is no evidence or knowledge of collusion in the waste industry, and both he and Mr. Lardner stated that they were not aware of any collusion to keep Applicant out of the industry. Tr. 129-30 and 903-04.

In reality, Applicant is already successfully competing on a daily basis with the remainder of the hauling industry in the Chicagoland area, including the Counties in the Service Area where it currently holds eight municipal waste contracts. *See* Application at pp. 1-17 and 1-18; Tr. 135-36**.** To say otherwise is disingenuous, as Applicant is clearly competitive in obtaining municipal waste contracts within DuPage and Kane Counties. *See* Application at pp. 1-17 and 1-18.

In making its competition argument, Applicant appears to be relying almost entirely upon the *Will Cty. v. Vill. of Rockdale,* 2018 Il App (3d) 160463, 121 N.E.2d 468. Applicant's argument appears to hinge on their belief that all they have to do to satisfy Criterion 1 is argue that an additional pollution control facility will add competition to the market.

However, Applicant's reliance on the *Rockdale* decision is misplaced, and a review of that decision does not support their argument. The *Rockdale* ruling does not hold that anytime you add competition you satisfy Criterion 1. If that were the case, then every additional pollution control facility would automatically satisfy Criterion 1 because it would add competition. In other words, Applicant's proposed standard would effectively void and make Criterion 1 superfluous from the Section 39.2 criteria analysis as there would never be a scenario where Criterion 1 was not met because, as noted above, every new facility would necessarily add competition. Statutes should not and cannot be read to make all or parts of a statute superfluous and finding for the Applicant on these grounds would, in essence, remove Criterion 1 from the language of the statute and from any future siting hearing. *Sylvester v. Indus. Comm'n,* 197 Ill.2d 225, 232, 756 N.E.2d 822, 827 (2001) (statutes must be read such that each portion not be rendered superfluous, meaningless or void).

In any event, despite Applicant's attempt to remove Criterion 1 from the Section 39.2 analysis, a review of the *Rockdale* decision reveals that it was decided on a very specific set of factual circumstances that do not exist in this Application. Of note, in *Rockdale*, the court found that the only waste station in the service area that accepted solid waste was beyond capacity. *Rockdale,* ¶ 63, 121 N.E.3d at 485. Here, the evidence is very clear that the other transfer stations receiving waste from the Service Area, including the Groot Facility down the street, have more

than enough capacity to service the proposed Service Area. In fact, Mr. Hock admitted the Groot Facility is only utilizing approximately 1,000 tons of its 3,000 tons per day capacity. Tr. 114-15.

In *Rockdale,* because the only other waste transfer station in the service area was beyond capacity, the court found the need for more competition to accommodate the needs of the Service Area in that specific instance; as noted in the decision, the other waste transfer stations in the Service Area were:

- "cutting off trucks waiting in line" at the end of the service day and not allowing those trucks to dump their waste;
- allowing up to "30 loads of waste" to remain overnight and on the tipping floor until the beginning of the facility's operational day;
- allowing "discharged loads of waste [to remain][] partially outside the building;" and;
- one of the waste transfer stations in the Service Area was receiving double the amount of its average volume of waste and "had been observed operating beyond its capacity."

Id. ¶ 58-63**.** In the current Application, there is no evidence that any of the above *Rockdale* conditions or factors, or anything similar, exist or are occurring at the waste transfer stations currently in the Service Area or receiving waste from the Service Area. Moreover, and also of significant note, Applicant's own engineer admitted that he was not aware of any of those conditions occurring at any transfer station serving the proposed Service Area. Tr. 114-16.

The *Rockdale* court, relying on *Fox Moraine, LLC v. United City of Yorkville,* 2011 IL App (2d) 100017, 960 N.E.2d 1144, also specifically stated that to meet Criterion 1, an applicant needs to show an "urgent need" for the facility. Thus, in *Rockdale*, only because the four conditions shown above existed, did the court find an urgent need for further competition in that particular service area. The *Rockdale* court never went as far as Applicant would have one believe—that by

simply adding more facilities "…whenever, wherever . . ." despite not needing more capacity is sufficient to satisfy Criterion 1's "urgent need" for the facility.

In sum, no case has ever found that adding competition to a service area without anything more, is sufficient to satisfy Criterion 1. In fact, as noted above, the only decision that relied on a the theory of competition to satisfy need, actually relied on the fact that the current facilities were not able to properly handle the waste in the service area (which went directly to public health and safety issues) – not that evidence of additional competition in an already properly served area was sufficient to meet the urgent need finding required. Here, the Applicant has failed to introduce evidence of lack of waste transfer service capacity because, as Applicant has confirmed, the other facility located within the Service Area, and down the street, is operating well under capacity. Moreover, the facilities receiving waste from the Service Area are properly handling the waste needs for the area, including Applicant's proposed service area.

Therefore, *Rockdale* actually supports PWC's position that Applicant has woefully failed to meet Criterion 1. *Rockdale* requires a showing of urgent need – not just the fact that another transfer station would add competition. Here, no urgent need, or need of any kind, has been shown. As admitted by John Hock, there is more than enough capacity in the Service Area to meet the waste needs of the Service Area. As Mr. Hock also admitted there is no evidence that the current transfer stations receiving waste from the Service Area are not properly handling the waste. Tr. 114-16. Accordingly, the urgent need required by the court in *Rockdale* has not been shown, and Applicant has failed to meet its burden of proof as to Criterion 1. To hold otherwise, would effectively and improperly remove Criterion 1 from future Section 39.2 analysis.

B. Criterion 2: The facility is so designed, located, and proposed to be operated that the public health, safety, and welfare will be protected"

Applicant has failed to meet Criterion 2 because the proposed facility is not so designed to be operated that the public health, safety, and welfare will be protected. The determination of whether Criterion 2 is met "is purely a matter of assessing the credibility of expert witnesses." *File v. D & L Landfill, Inc.*, 219 Ill. App. 3d 879, 907 579 N.E.2d, 1228, 1236 (5th Dist. 1991), *citing Fairview*, 198 Ill. App. 3d at 552. In this case, Applicant's expert has not shown that the operations of the proposed facility can be operated in a safe manner because Applicant does not rely on proper data and because the City of West Chicago's expert questioned whether the proposed facility's proximity to the DuPage Airport Authority was properly addressed.

First, there is no dispute that it is important to know whether or not this facility can accept all of the waste that it's going to be sited for in order to make sure there's going to be enough room in the facility to unload, leave and then load the transfer trailer. Tr. 556. In its Application, Applicant relied on data to arrive at peak hours (Tr. 557), yet Applicant's peak hours changed and its expert Mr. Hock was unable to remember or provide a reason for the change in peak hours. Tr. 559-60. In fact, when asked who changed the peak hour truck data in the various draft excels obtained via a Freedom of Information Act request (Tr. 562-64), Mr. Hock was unable to explain why peak hour truck numbers were changed.

In addition, to operational issues relating to peak truck traffic hours, Applicant's proposed waste transfer station "Tipping Floor Stockpiling Capacity" inexplicably changed from one draft to another and was ultimately deleted from the body of the final Application. Tr. 566-78.

West Chicago's expert, Aptim, also raised a number of questions regarding the facility and its proximity to the DuPage Airport Authority. Tr. 668. Hazards relating to the DuPage Airport Authority are predominately related to birds. Tr. 670. In its Application, Applicant confirmed that

the FAA Advisory Circular indicates that waste handling facilities should not be located within the Runway Protection Zone commonly referred to as an RPZ. Exhibit 1 Application at 1-13 and 2-14. In fact, Applicant recognized this and specifically cited to FAA Advisory Circular 150/5300-13A, Section 310, which indicates the following regarding the RPZ: "The RPZ's function is to enhance the protection of people and property on the ground through the airport ownership over RPZs." *Id.* Nevertheless, at the Siting Hearing, Exhibit PWC-43 was shown which depicted the Runway Protection Zone. After being shown the depiction of the Runway Protection Zone, Mr. Hock was shown PWC-38, namely a diagram depicting a portion of the proposed facility's operation which clearly revealed that those operations were occurring and were located within the Runway Protection zone. Tr. 686-87. After reviewing PWC-38, Mr. Hock did confirm that a portion of their operations would be located within the Runway Protection Zone and specifically identified spotters as being in that zone. Tr. 689. Specifically, after being shown PWC-38, Mr. Hock went further and stated, "[y]eah, that portion of our facility is within the runway protection sone. Absolutely." Tr. 689.

In addition to the above, and despite recognizing that DOT/FAA/AR-09/62 titled "Evaluation of Trash Transfer Facilities as Bird Attractants," was the "best reference" when experts from Aptim raised questions about the proximity of the airport to the proposed waste transfer facility, Applicant opted to remove any referenced of this FAA document from its Application in its entirety. Exhibit 1 Application; Tr. 703. In other words, the Applicant has failed to meet Criterion 2 because the proposed facility has not been shown to be so designed to be operated that the public health, safety, and welfare will be protected, especially as it relates to the RPZ operations.

C. Criterion 3: The facility is located so as to minimize incompatibility with the character of the surrounding areas and to minimize the effect on the value of the surrounding property.

1. Minimizing incompatibility with character of the surrounding area.

The Applicant has the burden of showing that it meets both prongs of Criterion 3. *Peoria Disposal Company v Peoria Cnty. Bd.,* 2007 WL 1816891, at *24. The first prong requires the Applicant show that the "facility is located so as to minimize incompatibility with the character of the surrounding area." Sec. 39.2. Here, Applicant relies on the testimony and report of an appraiser, Dale Kleszynski, to attempt to show its proposed facility meets the first prong of Criterion 3.

However, Mr. Kleszynski has not provided any of the information necessary to meet this prong nor is he qualified to do so. Demonstrating that the incompatibility of the proposed facility with the surrounding area is not what Mr. Kleszynski did in his testimony related to the first prong of Criterion 3. Rather, Mr. Kleszynski chose instead to testify only to the highest and best use of the subject property, which is in an appraisal practice that allows one to determine what use of the property brings the highest sale price. TR. 342-43. Underlying that analysis was simply Mr. Kleszynski's review of the zoning statute of the subject property and the surrounding area, nothing more. However, nothing Mr. Kleszynski did established that the facility is located so as to minimize incompatibility with the surrounding area, which is the required standard. There was little or no testimony in Mr. Kleszynski's presentation related to how this use was located as to minimize the effect on surrounding properties, other than that the zoning in the area was generally consistent with the proposed use in that both were industrial type uses.

The problem with this analysis, however, is that Mr. Kleszynski is not qualified to discuss proper zoning and compatible uses. As he admitted, he has no experience in zoning or land

planning. Tr. 278-82. He is not, nor has he ever been, a land planner, and he is not a member of the AICP, which is the national organization responsible for certifying land planners' credentials. Tr. 278-79. He has never drafted a zoning ordinance nor land use plan and admitted he has not previously testified in any land planning capacity. Tr. 279-81.[8]

Probably because of this lack of experience, Mr. Kleszynski failed to take into account that the City had already legislatively determined that all land owned by the DuPage Airport in this area, which owns land contiguous to this proposed facility on two sides, was not an appropriate use for any pollution control facility. Tr. 326-30. PWC Ex. 1. This determination is a strong indication of what the City has historically believed is an appropriate use for this portion of its City. That legislative finding was totally ignored by Mr. Kleszynski.

While Mr. Kleszynski is apparently of the opinion that zoning determines incompatibility in and of itself, he also admitted on cross-examination that he had not done any analysis on mitigation or minimizing the effect of the proposed waste transfer station on any of the surrounding properties because that was not "within his area of expertise." Tr. 353. One can assume that this lack of expertise also led him to testify that he never looked at ways to minimize the effect the proposed facility would have on surrounding property or whether proper screening could be used to protect nearby properties, even though he did acknowledge that zoning ordinances often use screening techniques to minimize effect of uses on surrounding properties. Tr. 291-94 and 298-99. His total failure to consider any mitigation measures further shows analyzing the first prong of

[8] It is interesting to note that PWC's appraiser, Kurt Kielisch, admitted that he did not perform an analysis of the first prong of Criterion 3 because as a licensed appraiser practicing in over 21 states, even with 39 years of experience, he was not qualified to give an opinion on compatibility. Tr. 920-21 and 931-32.

Criterion 3 was clearly not within his expertise. This first prong is a land use issue – not an issue for an appraiser of land values.

Accordingly, the Applicant has wholly failed to meet its burden of proof as to the first prong of Criterion 3.

2. Minimizing effect on the value of surrounding property.

The Applicant also relied on Mr. Kleszynski's testimony as its evidence that the proposed waste transfer station meets the second prong of Criterion 3. Unlike the first prong, Mr. Kleszynski as an appraiser is qualified to testify on this portion of Criterion 3. However, Mr. Kleszynski failed to do any substantive analysis to support his conclusion and, accordingly, provides no actual analysis or evidence that can be relied upon.

Mr. Kleszynski's opinion basically was that the highest and best use of the subject property was as a waste transfer station; hence, by definition, that use standing alone minimized effect on surrounding property values. Tr. 337 and 350. While no one disputes Mr. Kleszynski's ability to opine about highest and best use, his very novel theory went something like this:

- If the property is used at its highest and best use, then it avoids obsolescence. Tr. 337.
- If the property does not become obsolete, then it will not negatively affect surrounding property values. Tr. 337.

Importantly, while Mr. Kleszynski consistently discussed obsolescence is his sworn testimony, his report, which was filed as part of the Application never, even mentions the word "obsolescence." Applicant Ex. 1, pp. 3-1 to 3-63; Tr. 347. Going further, neither in his report nor in his testimony does Mr. Kleszynski ever cite to any particular source for his theory that lack of obsolescence somehow equals minimization of the effect on surrounding property values.

However, as PWC's appraisal expert, Kurt Kielisch, pointed out, highest and best use and minimizing effect on property values are not at all related. Tr. 926-27. In fact, it is nonsensical to say that a property utilized to its highest and best use automatically minimizes the effect on surrounding property values. The driving reason to determine the highest and best of a property is to in turn determine the highest value one can obtain for the property. Tr. 342-43. Every definition of highest and best use posed to Mr. Kleszynski on cross-examination was based on obtaining the highest value for the property. Tr. 341-49. None of the definitions mention or even relate to the effect of the use on surrounding property values. *Id.* In fact, when asked to provide authority for his statement that there was a correlation between minimizing effect on property values and the highest and best use, Mr. Kleszynski was unable to cite any authority. Tr. 350-351. Although Applicant's attorney claimed during his cross-examination of Mr. Kielisch that authority existed where the IPCB approved highest and best use as a factor in Criterion 3 (Tr. 959-960), and while the IPCB has been asked to consider highest and best use analyses in relation to Criterion 3, an exhaustive search of IPCB decisions by PWC counsel found no IPCB decisions where an expert based his entire Criterion 3 opinion on the mere fact that a pollution control facility was the highest and best use – however, that is exactly (and only) what Mr. Kleszynski did in this matter.

Despite Mr. Kleszynski's conclusory opinion, a property being utilized at its highest and best use and not becoming obsolete does not in any way assure that it will not negatively affect surrounding property values. Tr. 926-29. As Mr. Kielisch testified, a hog farm may be the highest and best use in rural areas and may not face obsolescence because it brings in the highest return on value, but it is an enormous leap to say that the hog farm will not affect property values of neighboring farms or other uses. Tr. 929.

Mr. Kielisch went even further and noted that without further studies and sales analysis, Mr. Kleszynski's opinion could not be used to determine whether the subject property was located so as to minimize the effect on surrounding property values. Tr. 932. In order to properly determine whether a facility or use would negatively affect surrounding property values, an appraiser would have to go much deeper, and do a very different analysis than what Mr. Kleszynski performed. Tr. 933-38. One of those possible analyses would have been to perform a "Matched Pair" analysis. Tr. 934-35. Another one would have been to do a "Before and After" study. Tr. 935. Mr. Kleszynski admitted he did neither. Tr. 335 and 352.

Further, Mr. Kleszynski admitted that his report does not look at possible impacts on any specific property in the area – he just looked "globally." Tr. 317. This admission alone shows that his opinion did not look at any of the factors necessary issues to determine effect on property values or minimization thereof. The question is not whether property values are "globally" affected. The issue that must be looked at is the effect of this waste transfer station on the "surrounding" property. That analysis was not done in any way, shape or form here. Therefore, Applicant has failed to meet the second prong of Criterion 3 as well.

D. Criterion 8: The Facility is Inconsistent with the Solid Waste Management Plan Enacted by the County of DuPage

The DuPage County Board is the legislative body that enacted and approved the Solid Waste Management Plan (the "SWMP") at issue in this matter. Tr. 788. In 1996, the SWMP was updated (the "1996 Update") to state that there should be three to five waste transfer stations "***throughout*** the County." Tr. 996. (Emphasis Added). As the court in *Cnty. of Kankakee v. Illinois Pollution Control Bd*, 396 Ill. App. 3d 1000, 1020-23, 955 N.E.2d 1, 19-21 (3d Dist. 2009) held, the cardinal rule of statutory construction when looking at a SWMP is to give effect to the

intent of the County that drafted it. Here the County gave a clear indication of what the intent of the words "throughout the County" was in the early 2000's.

In 2003, a second DuPage County transfer station was proposed (the "2003 Facility") just blocks from the existing Groot Facility. Tr. 998. After a siting hearing, the County of DuPage specifically relied upon its own 1996 Update language finding that transfer stations should be located "throughout the County" to deny siting the 2003 Facility within blocks of the Groot Facility because it failed to comply with the SWMP. Exhibit PWC 3; Tr. 998. The County Board of DuPage made it crystal clear that "throughout the County' did not mean two transfer stations within blocks of each other when it specifically found that the 2003 Facility did not meet Criterion 8 "in that the proposed facility was inconsistent with the solid waste disposal plan of DuPage County because the proposed location is within ¼ mile of another transfer station; and fails to reduce wear on roads, reduces overall truck miles traveled and decrease truck air emissions." PWC Ex. 3.[9] This requirement that two transfer stations not be in close proximity still exists today in the SWMP.

This "throughout the County" language in the 1996 Update has never been repealed by any of the later updates that occurred in 2007, 2012 or 2017. If the County later disagreed with its construction of this SWMP related to the 2003 Facility, its failure to amend or supersede that language denotes its express embracing of that prior interpretation. *See Village of Vernon Hills v. Heelan,* 2015 IL 118170, ¶ 19, 39 N.E.3d, 937, 941 (statutes that have been interpreted but not amended create a presumption that the legislature has acquiesced in the interpretation).

[9] Interestingly, the City of West Chicago agreed with this interpretation in 2003 as it adopted its own Resolution opposing the siting of the 2003 Facility. PWC Ex. 2.

Accordingly, this language requires that the proposed facility be denied for the exact same reason that 2003 facility was denied – its close proximity to the still existing Groot Facility.

The later SWMP updates only serve to further solidify the requirement that new waste transfer stations should not be sited near existing ones.[10] The 2012 update to the SWMP followed that reasoning when it articulated that "future conditions may necessitate a new facility ***in the southern portion*** of the County." Tr. 1002; Applicant's Ex. 1, Appendix 8-G, p. 5. (Emphasis Added). Of significant note, that same 2012 update did not mention or seek the establishment of a new facility in the northwest portion of DuPage County. Applicant's Ex. 1, Appendix 8-G. Going further, and bringing us to the present, nothing in the 2017 SWMP update superseded or repealed this language. Tr. 793; Applicant's Ex. 1, Appendix 8-H.

In fact, Applicant's own Criterion 8 expert, Mr. Hock, never disputed that any of this language was in the SWMP or its updates, nor did Mr. Hock cite any language in the SWMP (before or after the County's denial of the 2003 Facility), that stated or even implied two waste transfer stations within blocks of each other would comply with the SWMP. Given the fact that the language in the SWMP and its updates never changed the requirements that future waste transfer stations be spread "throughout the County" and only added language seeking a transfer station in the southern portion of the County; the 2003 County Board's reliance on this language in the 1996 Update in denying a second a second waste transfer station within blocks of an existing transfer station clearly shows that the County never intended for there to be two waste transfer stations in close proximity. *Cnty. of Kankakee v. Illinois Pollution Control Bd*, 396 Ill. App. 3d at 1020-23, 955 N.E.2d at 19-21. The fact that the language has never been modified or been

[10] Both the proposed facility and the Groot Facility are in the northwest corner of DuPage County. Tr. 785.

removed points to the still-existing requirement that waste transfer stations be built throughout the County, not next to each other, to satisfy the needs of DuPage County residents and comply with the SWMP. If the County Board had the desire to remove or modify the requirement that waste transfer stations be "throughout the County," there have been numerous opportunities to change that language. PWC Ex. 801, p. 3. However, the County's consistent refusal to modify this language or its position in this regard shows a form of acquiescence in that prior interpretation. *Village of Vernon Hills,* 2015 IL 118170, ¶ 19. Accordingly, the intent of the SWMP is clear – two transfer stations in such a small area violate the SWMP (put a different way, the County does not believe the words "throughout" means "next to" or "next door").

Applicant's engineer, John Hock, relied heavily in his testimony regarding Criterion 8 upon a letter provided by Joy Hinz, an Environmental Specialist with the County of DuPage, stating that the "facility ***appears*** to be consistent with the … DuPage Solid Waste Management Plan Five Year Update (2017)." Applicant Ex. 1, Appendix 8-1 (the "Hinz Letter") (Emphasis Added). However, the Hinz Letter opinion is of little value to the Applicant. First of all, the Hinz letter is not under oath and was not subject to further examination by the participants in the proceeding. Further, the letter is ambiguous in that it only states that the facility proposed here "appears" to be consistent with SWMP. *Id.* Tr. 788. Ms. Hinz never saw the application for the proposed facility before issuing her letter, and her letter was issued over two years before the Application was completed. Applicant Ex. 1, Appendix 8-1; Tr. 785. More importantly, it is the intent of the legislative body that enacted the SWMP (not a staff member with unknown authority) that is most important in determining the actual meaning of the SWMP. *Cnty. of Kankakee v. Illinois Pollution Control Bd*, 396 Ill. App. 3d at 1020-23, 955 N.E.2d at 19-21; *Murphy-Hylton v. Lieberman Mgmt. Services, Inc*., 2016 IL 120394, ¶ 25, 72 N.E.3d 323, 329 (primary objective is to ascertain and give effect

to the intent of the enacting body). In this case, the County Board made its intent crystal clear in when it previously found that the proposed 2003 Facility violated the SWMP because of its proximity to the Groot Facility.

Hence, the proposed facility is not consistent with the requirements of the Solid Waste Management Plan Enacted by the County of DuPage and thus fails to meet Criterion 8.

E. PWC Does not Challenge Applicant's Remaining Criterion

PWC does not challenge Applicant's ability to satisfy the remaining criterion. Thus, PWC does not dispute that Applicant is able to and has satisfied Criterion 4, 5, 6 or 9.

VI. APPLICANT'S POST HEARING SUBMISSIONS

On February 18, 2023, at 9:48 a.m., and in a desperate last-ditch, Reargued Action to salvage its clearly deficient Application, counsel for Applicant, Mr. George Mueller, sent the Hearing Officer an email in which he wrote: "Attached hereto are a letter from Canadian National and a supplemental report from Dale Kleszynski. These are filed by LRS as post hearing public comment." Attached to the email were in fact the following two documents:

1) A letter dated February 2, 2023 from K.T. Donahue, State and Local Affairs Manager of the Canadian National Rail directed to John Hock; and,

2) A letter dated February 16, 2023 from Dale J. Kleszynski, President of Associated Property Counselors, Ltd. Directed to John Hock.

Neither of the two Hail Mary letters help Applicant because as set forth above, Applicant has already failed to meet the statutory notice requirements, has failed to meet the 1,000-foot set back requirement, the Siting Hearings were riddled with Fundamental Fairness related issues and numerous statutory criterion under 39.2 were not met. And, if this was not enough, the two letters themselves do not help Applicant, and, in fact, one of the letters, the Canadian National Letter, actually supports PWC arguments that the Pre-Filing Notice was statutorily deficient.

A. The February 2, 2023 Canadian National Letter

First, counsel for Applicant is fully aware that the manner to submit post hearing comments is clearly set forth on the City of West Chicago's website and can be submitted in only one of two ways, either via email or by writing to the City of West Chicago at 475 Main Street. The website specifically states the following regarding the submission of Public Comments:

> ***Public Comment***
>
> *Members of the public seeking to submit a public comment for the City Council to consider in making its decision must have already done so as part of the public hearing, or must have submitted a written comment received by the City, or postmarked on or before, Saturday, February 18, 2023.*
>
> *Any comments made at the Special City Council meeting would be outside of the siting record and thus not lawfully considered by the City Council in making its decision.*
>
> *Public comments may be submitted in writing by delivering to the West Chicago City Hall at 475 Main Street, or by email at aadm@westchicago.org.*

Thus, the manner in which counsel for Applicant submitted a proposed "public comment," is inconsistent and inappropriate and, thus, this so-called "public comment" should be rejected.

Second, the February 2, 2023 letter from Canadian National to John Hock is not a public comment and it specifically states so in the body of the letter. In his letter to Mr. Hock, Mr. Donahue wrote that Canadian National does "***not have any comments*** regarding the proposed West DuPage Recycling and Transfer Station." (Emphasis Added). The Canadian National letter, thus, speaks for itself and any effort by counsel to convert a letter written to Mr. Hock specifically stating that Canadian National does not have any comment into a "post hearing comment" is disingenuous and should be summarily rejected.

Third, although the February 2, 2023 letter that has been in the possession of Applicant for weeks now is Applicant's not so veiled attempt to support their argument that their non-compliance with the 1,000-foot set back requirement set forth in 415 ILCS §5/22.14(a) fits within the so-called

Roxana decision exception, the letter actually confirms that PWC is correct—namely, that the Pre-Filing Notice is statutorily deficient. This is because the Canadian National letter makes clear that the EJ&E Railroad Line is a viable railroad line and that the "Leighton sub is part of the old Elgin Joliet & Eastern Railway (EJ&E) which was purchased by CN in 2009 ***and it is doing business as the Wisconsin Central LTD which is a wholly owned subsidiary*** of Canadian National Railway." (Emphasis Added). The reference in the February 2, 2023 letter to the EJ&E "… doing business as the Wisconsin Central LTD …" is consistent with the Secretary of State records showing that these two companies merged in 2012, and that the EJ&E is still alive and well, and a fully-functioning business entity. In addition, as Canadian National wrote regarding the EJ&E:

- CN has spent hundreds of millions of dollars in capital improvements since a***cquiring the EJ&E***.
- The ***EJ&E connects*** the entire network together in the Chicago area. It ties together CN's southern region and its western and eastern regions.
- The ***EJ&E not only connects*** the CN network together, but it also connects with all the major railroads in the Chicago area. It is also home to CN's largest rail yard in the U.S.
- The ***EJ&E serves*** steel mills, petrochemical customers, and a diverse group of distribution centers. (Emphasis Added).

In other words, the February 2, 2023 CN letter confirms in definitive fashion that PWC is and was correct in its Motion to Dismiss—the EJ&E is an active fully-functioning entity that should have received Pre-Filing Notice pursuant to 415 ILCS §5/39.2(b). A simple search of the Secretary of State website would have confirmed that the EJ&E is an active Illinois business in good standing. And, since the evidence showed that the EJ&E was not served with the Pre-Filing Notice, the City lacks jurisdiction to even consider Applicant's proposed siting of a second waste transfer station in West Chicago.

Therefore, despite Applicant's representation to the Hearing Officer that its "research disclosed that EJ&E was wholly acquired by Canadian National on December 31, 2012, and that ***it ceased to operate as an independent entity after that date***"[11] (*see* Applicant's Response to Motion to Dismiss – Notice) no such ceasing of operations of the EJ&E existed according to Canadian National's own correspondence. Interestingly, the Canadian National correspondence submitted by the Applicant as public comment shows the letter came from 17641 S. Ashland Avenue, Homewood, IL 60430, which is the same address in Homewood, Illinois where the authentic tax records are sent for the Subject Property and where PWC's Motion to Dismiss stated was the proper location for the Pre-Filing Notice to be sent.

In any event, the Canadian National letter conclusively dooms Applicant's Pre-Fling Notice violation and thus denies the City of West Chicago with jurisdiction to even consider the proposed Application. This dagger ends the inquiry once and for all.

B. <u>The Dale Kleszynski Letter</u>

In addition, Applicant also included a letter from Mr. Kleszynski to John Hock in which Mr. Kleszynski wrote that the letter was his "response to the testimony of Mr. Kielisch as found on pages 919 thru 940 of the record of the January 12, 2023 hearing." As with the Canadian National letter, this letter was also being submitted "by LRS as post hearing public comment." For the reasons set forth below, this letter should also be rejected.

First, the letter titled "Rebuttal 2-16-23 - Powis Rd," is not a public comment. Rather, it is, as it is called, a Rebuttal to the testimony of Mr. Kielisch. Perhaps recognizing that all evidence is closed and realizing that it was too late to rebut Siting Hearing testimony, counsel for Applicant

[11] PWC assumes that Applicant's representation that EJ&E "ceased to operate as an independent entity" was inadvertent and not meant to intentionally mislead.

seeks to introduce through the back-door what he knows he should have introduced during rebuttal at the hearing. Counsel's efforts should be rejected.

Second, as with the Canadian National letter, this so-called public comment, which it is not, should have been submitted to the City of West Chicago in one of the two manners mentioned above, either via email or in letter form to the address on Main Street. That was not done and thus this letter should be rejected by the Hearing Officer as public comment.

Third, after noting that the letter was in response to the testimony of Mr. Kielisch and in particular testimony found at pages 919 thru 940 of the record, Mr. Kleszynski goes on *ad nausea* about a series of matters that are clearly rebuttal as he continually refers to Mr. Kielisch's testimony throughout. In any event, while Applicant and Mr. Kleszynski may believe they raise good rebuttal points, which they do not, the time to have raised these would have been at the Siting Hearing, not weeks after the close of the evidence.

Unlike the numerous LRS employees who provided public comment in support of their employer (LRS), at the Siting Hearing, Mr. Kleszynski, on the other hand, was identified as an expert who provided specific expert testimony regarding Criterion 3. He was then subject to cross-examination and if he really did have issues with the testimony of PWC's expert (Mr. Kurt Kielisch), the time to have challenged that testimony would have been at the Siting Hearing when the Hearing Officer offered the Applicant an opportunity to present rebuttal testimony (Tr. 1315), not weeks later after he has had time to review and digest the Hearing transcript. Providing what is clearly rebuttal evidence and testimony days before Findings of Fact and Conclusions of Law are due smack of nothing other than additional Fundamental Fairness irregularities. These sort of tactics by counsel for Applicant are unbecoming, inappropriate and should be rejected.

VII. CONCLUSION

In conclusion, PWC respectfully avers that Applicant's proposal to site a second waste transfer station in a majority-minority community be denied for the following reasons:

1) The Pre-Filing Notice was deficient and thus does not comply with 415 ILCS §5/39.2(b);

2) The proposed facility would be located within 1,000-feet of property zoned residential and thus does not comply with 415 ILCS §5/22.14(a);

3) The Siting hearing violated the principals of Fundamental Fairness because:

    a. the Pre-Filing Notice was not in Spanish even though West Chicago receives federal funds and more than 5% of its residents are LEP;
    b. West Chicago failed to provide Spanish-language interpreters for the public even though West Chicago receives federal funds and more than 5% of its residents are LEP;
    c. The Hearing Officer denied PWC the ability to question Applicant's expert on whether he considered the impact of the proposed facility on West Chicago's minority community;

4) The Applicant failed to establish that the proposed "facility is necessary to accommodate the waste needs of the area it is intended to serve;" thus, Criterion 1 was not satisfied;

5) The Applicant failed to establish that the proposed "facility is so designed, located, and proposed to be operated that the public health, safety, and welfare will be protected;" thus, Criterion 2 was not satisfied;

6) The Applicant failed to establish that the proposed "facility is located so as to minimize incompatibility with the character of the surrounding areas and to minimize the effect on the value of the surrounding property;" thus, Criterion 3 was not satisfied;

7) The Applicant failed to establish that "if the facility is to be located in a county where a county board has adopted a solid waste management plan consistent with the planning requirements of the Local Solid Waste Disposal Act or the Solid Waste Planning and Recycling Act, the facility is consistent with that plan;" thus, Criterion 8 was not satisfied.

For all of the above reasons, PWC respectfully requests that the Hearing Officer recommend to the City of West Chicago's City Council that the proposed Application be denied.

In the alternative, PWC further requests that even if the Hearing Officer recommends that the City of West Chicago City Council approve Lake Shore Recycling's Application to site a second waste transfer station in the City of West Chicago, that the City Council nonetheless deny the Application for the reasons set forth herein.

Date: February 21, 2023

Respectfully Submitted,

Ricardo Meza
Attorney for Protect West Chicago

Ricardo Meza
Meza Law
542 S. Dearborn, 10th Floor
Chicago, IL 60605
(312) 802-0336
rmeza@meza.law

Exhibit A

File Number 5458-646-9

STATE OF ILLINOIS

OFFICE OF THE SECRETARY OF STATE

To all to whom these Presents Shall Come, Greeting:

I, Alexi Giannoulias, Secretary of State of the State of Illinois, do hereby certify that I am the keeper of the records of the Department of Business Services. I certify that

ATTACHED HERETO IS A TRUE AND CORRECT COPY, CONSISTING OF 7 PAGE(S), AS TAKEN FROM THE ORIGINAL ON FILE IN THIS OFFICE FOR WISCONSIN CENTRAL LTD..

In Testimony Whereof, *I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois, this* 17TH *day of* JANUARY *A.D.* 2023 .

Authentication #: 2301700741 verifiable until 01/17/2024.
Authenticate at: https://www.ilsos.gov

SECRETARY OF STATE

FORM **BCA 11.25** (rev. Dec. 2003)
ARTICLES OF MERGER, CONSOLIDATION OR EXCHANGE
Business Corporation Act

Secretary of State
Department of Business Services
501 S. Second St., Rm. 350
Springfield, IL 62756
217-782-6961
www.cyberdriveillinois.com

Remit payment in the form of a check or money order payable to Secretary of State.

Filing fee is $100, but if merger or consolidation involves more than two corporations, submit $50 for each *additional corporation.*

FILED
DEC 2 1 2012
JESSE WHITE
SECRETARY OF STATE

PAID
DEC 2 6 2012
EXPEDITED
SECRETARY OF STATE

File # 5458-6469 Filing Fee: $ 100.00 Approved: lt

----- Submit in duplicate ----- Type or Print clearly in black ink ----- Do not write above this line -----

NOTE: Strike inapplicable words in Items 1, 3, 4 and 5.

CP0903840

1. Names of Corporations proposing to ~~merge~~ consolidate ~~exchange shares~~ and State or Country of incorporation.

Name of Corporation	State or Country of Incorporation	Corporation File Number
WISCONSIN CENTRAL LTD.	ILLINOIS	54586469
ELGIN, JOLIET AND EASTERN RAILWAY COMPANY	ILLINOIS	65674963

2. The laws of the state or country under which each Corporation is incorporated permits such merger, consolidation or exchange.

3. a. Name of the ~~new~~ surviving ~~acquiring~~ corporation: WISCONSIN CENTRAL LTD.

b. Corporation shall be governed by the laws of: ILLINOIS

For more space, attach additional sheets of this size.

4. Plan of ~~consolidation~~ merger ~~exchange~~ is as follows:

PLEASE SEE AGREEMENT AND PLAN OF MERGER ATTACHED HERETO AND MADE A PART HEREOF AS EXHIBIT A.

Printed by authority of the State of Illinois. March 2007 — 500 — C 195.12

5. The ~~consolidation~~ merger ~~exchange~~ was approved, as to each Corporation not organized in Illinois, in compliance with the laws of the state under which it is organized, and (b) as to each Illinois Corporation, as follows:

The following items are not applicable to mergers under §11.30 — 90 percent-owned subsidiary provisions. (See Article 7 on page 3.)

Mark an "X" in one box only for each Illinois Corporation.

Name of Corporation:	By the shareholders, a resolution of the board of directors having been duly adopted and submitted to a vote at a meeting of shareholders. Not less than the minimum number of votes required by statute and by the Articles of Incorporation voted in favor of the action taken. (§11.20)	By written consent of the shareholders having not less than the minimum number of votes required by statute and by the Articles of Incorporation. Shareholders who have not consented in writing have been given notice in accordance with §7.10 and §11.20.	By written consent of ALL shareholders entitled to vote on the action, in accordance with §7.10 and §11.20.
WISCONSIN CENTRAL LTD.	☑	☐	☐
ELGIN, JOLIET AND EASTERN	☐	☐	☐
RAILWAY COMPANY	☑	☐	☐
	☐	☐	☐
	☐	☐	☐

6. **Not applicable if surviving, new or acquiring Corporation is an Illinois Corporation.**

It is agreed that, upon and after the filing of the Articles of Merger, Consolidation or Exchange by the Secretary of State of the State of Illinois:

a. The surviving, new or acquiring Corporation may be served with process in the State of Illinois in any proceeding for the enforcement of any obligation of any Corporation organized under the laws of the State of Illinois which is a party to the merger, consolidation or exchange and in any proceeding for the enforcement of the rights of a dissenting shareholder of any such Corporation organized under the laws of the State of Illinois against the surviving, new or acquiring Corporation.

b. The Secretary of State of the State of Illinois shall be and hereby is irrevocably appointed as the agent of the surviving, new or acquiring Corporation to accept service of process in any such proceedings, and

c. The surviving, new or acquiring Corporation will promptly pay to the dissenting shareholders of any Corporation organized under the laws of the State of Illinois which is a party to the merger, consolidation or exchange the amount, if any, to which they shall be entitled under the provisions of The Business Corporation Act of 1983 of the State of Illinois with respect to the rights of dissenting shareholders.

Printed by authority of the State of Illinois. March 2007 — 500 — C 195.12

7. **Complete if reporting a merger under §11.30 – 90 percent-owned subsidiary provisions.**

a. The number of outstanding shares of each class of each merging subsidiary Corporation and the number of such shares of each class owned immediately prior to the adoption of the plan of merger by the parent Corporation:

Name of Corporation	Total Number of Shares Outstanding of Each Class	Number of Shares of Each Class Owned Immediately Prior to Merger by the Parent Corporation

b. **Not applicable to 100 percent-owned subsidiaries.**

The date of mailing a copy of the plan of merger and notice of the right to dissent to the shareholders of each merging subsidiary Corporation was _____, _____.
Month & Day Year

Was written consent for the merger or written waiver of the 30-day period by the holders of all the outstanding shares of all subsidiary Corporations received? ☐ Yes ☐ No

(If "No," duplicate copies of the Articles of Merger may not be delivered to the Secretary of State until after 30 days following the mailing of a copy of the plan of merger and the notice of the right to dissent to the shareholders of each merging subsidiary Corporation.)

8. The undersigned Corporation has caused this statement to be signed by a duly authorized officer who affirms, under penalties of perjury, that the facts stated herein are true and correct. **All signatures must be in BLACK INK.**

Dated DECEMBER 20, 2012 WISCONSIN CENTRAL LTD.
Month & Day Year Exact Name of Corporation

Any Authorized Officer's Signature

SEAN FINN, EXECUTIVE VICE PRESIDENT
Name and Title (type or print)
CORPORATE SERVICES,
CHIEF LEGAL OFFICER AND CORPORATE SECRETARY

Dated DECEMBER 20, 2012 ELGIN, JOLIET AND EASTERN RAILWAY COMPANY
Month & Day Year Exact Name of Corporation

Any Authorized Officer's Signature

SEAN FINN, EXECUTIVE VICE PRESIDENT
Name and Title (type or print)
CORPORATE SERVICES,
CHIEF LEGAL OFFICER AND CORPORATE SECRETARY

Dated _____, _____ _____
Month & Day Year Exact Name of Corporation

Any Authorized Officer's Signature

Name and Title (type or print)

Printed by authority of the State of Illinois. March 2007 – 500 – C 195.12

AGREEMENT AND PLAN OF MERGER

This AGREEMENT AND PLAN OF MERGER (this "Agreement") is made as of December 20, 2012, by and between Elgin, Joliet and Eastern Railway Company, an Illinois corporation (the "Merging Entity"), and Wisconsin Central Ltd., an Illinois corporation (the "Surviving Entity"). This Agreement has been approved, adopted, certified, executed and acknowledged by each of the undersigned in accordance with the requirements of the Illinois Business Corporation Act of 1983.

WHEREAS, the Merging Entity is a wholly owned subsidiary of Grand Trunk Corporation, a Delaware corporation ("Merger Parent");

WHEREAS, the Surviving Entity is a wholly owned subsidiary of Wisconsin Central Transportation Corporation, a Delaware Corporation ("Survivor Parent"); and

WHEREAS, Merger Parent and Survivor Parent desire that the Merging Entity be merged with and into the Surviving Entity pursuant to the terms of this Agreement.

NOW THEREFORE, in consideration of the promises and mutual covenants and agreements contained herein, and other good and valuable consideration, and further in accordance with the Illinois Business Corporation Act of 1983, it is agreed by and between the parties hereto that the Merging Entity shall be merged into the Surviving Entity upon the terms and conditions set forth herein.

1. Merger. On the Effective Date (as hereinafter defined), the Merging Entity shall be merged with and into the Surviving Entity pursuant to the Illinois Business Corporation Act of 1983, with the Surviving Entity continuing as the surviving entity (the "Merger"). At the time of the Merger, Survivor Parent shall issue 8 shares of its common stock with $0.01 par value to Merger Parent in exchange for the cancellation of the Merging Entity's stock.

2. Effective Date. Upon the execution of this Agreement, the Merging Entity and the Surviving Entity shall be and hereby are directed to file Articles of Merger in the office of the Secretary of State of the State of Illinois. The Merger shall become effective on January 1, 2013 (the "Effective Date").

3. Surviving Entity. On the Effective Date, the Merging Entity shall be merged with and into the Surviving Entity, and the separate corporate existence of the Merging Entity shall thereupon cease. The Surviving Entity shall (a) be the surviving corporation in the Merger and shall possess all the rights, privileges, claims, demands, property, powers, franchises and authority, both public and private, and all debts due to the Merging Entity and the Surviving Entity, (b) be subject to all the restrictions, disabilities and duties of both the Merging Entity and the Surviving Entity, (c) be vested with all assets and property, real, personal and mixed, and every interest therein, wherever located, belonging to the Merging Entity and the Surviving Entity, and (d) be liable for all of the obligations and liabilities of the Merging Entity and the Surviving Entity. On and after the Effective Date, the title to any real estate vested by deed or otherwise in the Merging Entity shall be vested in the Surviving Entity, all rights of creditors and all liens upon property of the Merging Entity shall be preserved unimpaired, and all debts, liabilities and duties of the Merging Entity shall thenceforth attach to the Surviving Entity and

may be enforced against it to the same extent as if such debts, liabilities and duties had been incurred or contracted by it. The title to any such real estate, or any interest therein, vested in the Merging Entity or Surviving Entity shall not revert or be in any way impaired by reason of the Merger. This Agreement is on file at the principal place of business of the Surviving Entity, the address of which is 17641 South Ashland Avenue, Homewood, Illinois 60430. A copy of this Agreement will be furnished to any shareholder of the Merging Entity or Surviving Entity upon request and without cost.

4. Additional Actions. If, at any time after the Effective Date, the Surviving Entity shall consider or be advised that any deeds, bills of sale, assignment, assurance or any other actions or things are necessary or desirable (a) to vest, perfect or confirm, of record or otherwise, in the Surviving Entity its right, title or interest in, to or under any of the rights, properties or assets of the Merging Entity or the Surviving Entity acquired or to be acquired by the Surviving Entity as a result of, or in connection with, the Merger, or (b) or otherwise carry out the purposes of this Agreement, the Merging Entity and its officers and directors shall be deemed to have granted to the Surviving Entity an irrevocable power of attorney to execute and deliver all such deeds, bills of sale, assignments and assurances and to take and do all such other actions and things as may be necessary or desirable to vest, perfect or confirm any and all right, title and interest in, to and under such rights, properties or assets in the Surviving Entity and otherwise to carry out the purposes of this Agreement; and the officers and directors of the Surviving Entity are fully authorized in the name of the Merging Entity or the Surviving Entity, or otherwise to take any and all such actions.

5. Cancellation of Stock of Merging Entity. On the Effective Date, and without any further action on the part of the Merging Entity or the Surviving Entity, (a) each of the shares of common stock of the Surviving Entity issued and outstanding immediately prior to the Effective Date shall remain issued and outstanding immediately subsequent to the Effective Date as shares of common stock of the Surviving Entity, (b) each of the shares of the common stock of the Merging Entity issued and outstanding immediately prior to the Effective Date shall be cancelled and cease to exist and be outstanding.

6. Service of Process. The Surviving Entity hereby agrees that it may be served with process in the State of Illinois in any proceeding for the enforcement of any obligation of the Merging Entity and in any proceeding for the enforcement of the rights of a dissenting shareholder of the Merging Entity against the Surviving Entity.

7. Name. The name of the Surviving Entity immediately prior to the Effective Date shall be the name of the Surviving Entity following the Effective Date.

8. Articles of Incorporation. The Articles of Incorporation of the Surviving Entity immediately prior to the Effective Date shall be the Articles of Incorporation of the Surviving Entity following the Effective Date, unless and until the same shall be amended or repealed in accordance with the provisions thereof.

9. By-laws. The by-laws of Surviving Entity immediately prior to the Effective Date shall be the by-laws of Surviving Entity following the Effective Date, unless and until the same shall be amended or repealed in accordance with the provisions thereof.

10. Board of Directors and Officers. The members of the board of directors and the officers of Surviving Entity immediately prior to the Effective Date shall be the members of the board of directors and the officers of Surviving Entity following the Effective Date, unless and until the same shall be terminated or replaced in such positions as provided in the by-laws.

11. Plan of Reorganization. This Agreement constitutes a plan of reorganization pursuant to Internal Revenue Code §368(a) to be carried out in the manner, on the terms, and subject to the conditions set forth herein, it being the intent of the parties that the merger of the Merging Entity, which is a wholly owned subsidiary of Merger Parent, into Surviving Entity, which is a wholly owned subsidiary of Survivor Parent, qualify as a forward tri-angular "A Reorganization" described in Internal Revenue Code §368(a)(2)(D).

12. Termination/Abandonment. This Agreement may be abandoned by the mutual consent of the Merging Entity and the Surviving Entity, each acting by its board of directors at any time prior to the filing of the Articles of Merger in the State of Illinois. In the event of any termination of this Agreement, this Agreement shall become wholly void and of no effect and there shall be no further liability or obligation hereunder on the part of (a) the Merging Entity, its board of directors or shareholder or (b) the Surviving Entity, its board of directors or shareholder.

13. Counterparts. This Agreement may be executed in multiple counterparts.

[Signature page follows]

IN WITNESS WHEREOF, each of the Surviving Entity and the Merging Entity, pursuant to authority duly granted by its shareholder and its board of directors, has caused this Agreement to be executed by its duly authorized officers.

Surviving Entity:

WISCONSIN CENTRAL LTD.,
an Illinois corporation

By: _____
Sean Finn
Its: Executive Vice President,
Corporate Services,
Chief Legal Officer and
Corporate Secretary

Merging Entity:

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, an Illinois corporation

By: _____
Sean Finn
Its: Executive Vice President,
Corporate Services,
Chief Legal Officer and
Corporate Secretary

Survivor Parent:

WISCONSIN CENTRAL TRANSPORTATION CORPORATION,
a Delaware corporation

Acknowledging its consent as the sole shareholder of the Surviving Entity

By: _____
Sean Finn
Its: Executive Vice President,
Corporate Services,
Chief Legal Officer and
Corporate Secretary

Merger Parent:

GRAND TRUNK CORPORATION,
a Delaware corporation

Acknowledging its consent as the sole shareholder of the Surviving Entity

By: _____
Sean Finn
Its: Executive Vice President,
Corporate Services,
Chief Legal Officer and
Corporate Secretary