



**FINAL ADMINISTRATIVE DECISION  
ILLINOIS PROPERTY TAX APPEAL BOARD**

APPELLANT: Onyx Orchard Hills Landfill, Inc.  
DOCKET NO.: 03-00470.001-I-3  
PARCEL NO.: 11-02-400-001

The parties of record before the Property Tax Appeal Board are Onyx Orchard Hills Landfill, Inc., the appellant, by attorneys Robert M. Sarnoff, Michael F. Baccash and Alan Skidelsky of Sarnoff & Baccash in Chicago; the Ogle County Board of Review by Assistant State's Attorney Emily S. Siefert; and the Board of Education, Meridian Community Unit School District No. 223, the intervenor, by attorneys Stuart L. Whitt, Joshua S. Whitt and Catherine M. Hough of Whitt Law LLC in Aurora.<sup>1</sup>

Based on the facts and exhibits presented, the Property Tax Appeal Board hereby finds a reduction in the assessment of the property as established by the **Ogle** County Board of Review is warranted. The correct assessed valuation of the property is:

**LAND:** \$3,221,000  
**IMPR.:** \$100,000  
**TOTAL:** \$3,321,000

Subject only to the State multiplier as applicable.

**ANALYSIS**

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<sup>1</sup> The New Milford Fire Protection District filed a Request to Intervene on October 21, 2005. In order to intervene, a taxing body must file within 60 days after the postmark date of the notice or within 30 days after the postmark of the board of review service as required in Section 16-180 of the Property Tax Code. (86 Ill. Admin. Code Sec. 1910.60(d) and 35 ILCS 200/16-180). By letter dated August 11, 2005, the Property Tax Appeal Board notified the Ogle County State's Attorney of the pending appeal petition. As set forth on the Certificate filed in this matter, on August 15, 2005 the Ogle County Board of Review notified the taxing districts of this pending appeal. Based on the foregoing facts, by letter dated November 18, 2005 the Property Tax Appeal Board advised the New Milford Fire Protection District that its request to intervene was not timely filed and a copy of its request to intervene was returned to it.

The property at issue consists of a sanitary landfill of 333.78 total acres located in Davis Junction, Scott Township commonly known as the Onyx Orchard Hills Landfill. The landfill is actually composed of three rectangular-shaped parcels of which 175 acres were permitted for landfill development as of the date of valuation. As of January 1, 2003, according to engineering reports, approximately 76.59 acres spread across the three parcels were developed with clay liners and cell improvements installed and accepting waste. Only parcel number (PIN) 11-02-400-001, consisting of 159.54 acres, was on appeal in this proceeding; this parcel includes the main office building of the business. The other two parcels comprising the landfill are identified by PINs 11-02-100-002 and 11-02-300-003. The majority of the site value had been placed by the assessor on parcel number 11-02-400-001.

The site also includes auxiliary improvements including farm houses and support buildings. The office building (a converted residence) built in May 1998 consists of 1,548 square feet of building area; a maintenance building constructed in March 1998 consists of 5,298 square feet; a wash building built in January 1998 consists of 1,164 square feet; a scale building (weigh station) built in January 1998 consists of 288 square feet; a guard shack built in January 1998 consists of 100 square feet; and pole buildings constructed in about 1968 consist of 7,673 square feet. Site improvements include pavement/roadways, fencing, a leachate tank, and two scales. There is also a gas flare on the property.

Unless otherwise specifically noted in the text or the context of this decision, "subject" will refer to the entire landfill and, where necessary, specific reference may be made by parcel identification number. For ease of reference, the three parcels with their respective land area sizes and 2003 assessment values (III, 766-67)<sup>2</sup> is set forth below:

PIN	Land (acres)	Land/Farmland AV	Impr AV	Total AV
11-02-100-002	88.14	17,856(farmland) 3,500(homesite)	48,113	69,469
11-02-300-003	86.10	12,645(farmland)	0	12,645
11-02-400-001	159.54	8,533,000(land)	100,000	8,633,000
<b>Totals</b>	<b>333.78</b>	<b>8,567,001</b>	<b>148,113</b>	<b>8,715,114</b>

<sup>2</sup> References to the transcript of the proceedings will be made to the transcript volume (i.e., I for volume I) followed by page number reference(s).

Based upon the 2003 three-year median level of assessments of 33.21% for Ogle County as determined by the Illinois Department of Revenue the assessment reflects an estimated market value of the parcel on appeal of \$25,995,182.

The appellant appeared before the Property Tax Appeal Board arguing that the fair market value of the subject was not accurately reflected in its assessed valuation. In support of the overvaluation argument, the appellant submitted two narrative appraisals estimating the property's market value as of January 1, 2003 along with supporting testimony from the respective appraisers. Although only the one parcel was appealed, both appraisals encompassed all three parcels in their respective reports and in arriving at an estimate of market value of the entire landfill. Through differing analyses, the appellant's appraisers concluded market values of \$10,660,000 and \$9,600,000, respectively.

The board of review presented minimal data in support of the current assessment.

The intervening taxing district presented an appraisal for the subject property as of January 1, 2003 with an estimated market value of \$25,900,000 and also presented the testimony of a review appraiser who verbally critiqued the appraisals submitted by the appellant.

Lastly, the appellant presented rebuttal evidence including a review appraiser before the parties presented oral closing arguments in this matter.

**APPELLANT'S CASE-IN-CHIEF**

Appellant called as its first witness, Michael J. Kelly, a real estate appraiser with 32 years of employment experience in the appraisal field. At the time of this assignment, Kelly worked for Real Estate Analysis Corporation (REAC). (Appellant's Ex. 2, p. 83) His experience includes appraisals of all types of commercial and industrial properties, including in excess of thirty landfill facilities since the 1980's. Kelly has a Member of the Appraisal Institute (MAI) designation and an SRPA designation. In addition, Kelly is a Certified General Real Estate Appraiser in the State of Illinois, along with being likewise certified in the states of Michigan, Iowa and Indiana.

Prior to being qualified as an expert witness, Kelly provided a general description of a landfill as a piece of property which has been approved by local and state authorities to accept waste subject to all of the requirements of the license and permit; he noted that it is generally operated on a for-profit basis to accept certain approved types of waste.

On *voir dire*, Kelly acknowledged that landfills go through a two-part process to receive local and state approvals to operate. Kelly had previously testified before the Property Tax Appeal Board as to a landfill located in Tazewell County. Kelly's other Illinois landfill appraisal experience for property tax purposes involved facilities in Cook and St. Clair counties. After *voir dire* and without objection, Kelly was accepted as an expert witness in real estate appraisals and landfill appraisals.

Kelly was one of four appraisers to execute the appraisal report prepared by REAC for the client Onyx Waste Services, Inc. (Appellant's Ex. 2); Kelly takes responsibility for the entire report. The purpose of the appraisal was to determine the unencumbered fee simple value of the property known as Onyx Orchard Hills Landfill, consisting of three parcel identification numbers, as of January 1, 2003. The appraisal includes both an identification of market value of the property in the aggregate of \$10,660,000, rounded, and individually for the three parcel identification numbers. (See Appellant's Ex. 2, p. 5 of the Transmittal Letter and body of the Report, p. 2) Additionally, the appraisal report specifies that farm houses and auxiliary improvements which exist on parcel 11-02-100-002 have not been included in the appraisal as they were not deemed to be part of the operating landfill.

Kelly inspected the subject property twice, once in May 1999, prior to receiving this appraisal assignment, and again in April 2004. This latter inspection was performed by Kelly in the company of the landfill's general manager, Christopher Peters, and another appraiser from REAC, Alan Geerdes. In addition, Kelly returned to the property in August 2007. Through his conversations with Peters, Kelly learned of the physical layout of the property as of the date of value in terms of building sizes, cell site sizes, and other pertinent data.

As of the valuation date, only 175 acres of the entire 333.78 acres had been permitted to accept waste; moreover, cell liners and cell site improvements were installed on 76.6 acres, rounded, so as to accommodate about 9,699,200 cubic yards of

waste. Thus, as of the valuation date and in reliance upon the engineer's report by Randy Nolden from RMT, Inc., Kelly determined the landfill area (cells) were at approximately 63% of aggregate capacity (Appellant's Ex. 2, p. 24). Kelly testified that for a landfill most of the value is in the cell site improvements which are then depreciated based on how much was filled as compared to how much capacity was actually built as of the valuation date. "Additional phases and cells can be opened after the currently developed and accepting portion is filled. However, those cells and the land improvements (clay liners, etc) required to operate them are not physically in place as of the date of value." (Appellant's Ex. 2, p. 24)

Kelly testified that as an operating landfill, the subject is comprised of a going concern value consisting of real estate, personal property and business value; this value must be adjusted by the appraiser to arrive at a final value of the real estate portion only. "Only those items which are assessable for assessment purposes, such as land, site improvements and buildings will be included. The improvements will be depreciated based on their contribution to the going concern value of the landfill and their remaining economic life according to the remaining unfilled capacity of the landfill as of the date of value." (Appellant's Ex. 2, p. 5)

Kelly testified that he examined the three traditional approaches to value and had to ascertain which would be the most reliable and applicable given the appraisal assignment to value the real estate only. Because the subject is a going concern and the assignment was to value the real estate only, Kelly determined that the cost approach was the best method to identify the tangible elements on the property with minimal, if any, adjustments necessary and depreciation could reliably be calculated based on the fill rate of the subject with a land value quantified from analysis of sales in the area with the same broad zoning classification as the subject. (Appellant's Ex. 2, p. 48) Kelly specifically noted that use of the income capitalization approach, assuming one could even obtain valid arm's-length royalty agreements for reliable market data, would necessitate too many adjustments to the income stream to provide a reliable value indication for the real estate only. (Appellant's Ex. 2, p. 46) Likewise, the sales comparison approach suffers from the inherent problem that sales of operating landfills involve the going concern and necessitate significant adjustments along with the question of overall comparability of sales data. (I, 52; Appellant's Ex. 2, p. 47)

Kelly found the highest and best use of the property to be continued use as a landfill. He described the landfill as divided into eight contiguous phases or units which are further divided into separate cells. By definition, a cell is an area 30 to 40 feet below grade which is lined with a geotextile or filter layer, a one-foot sand layer which includes leachate pipes, a geotextile cushion layer, a 60 millimeter plastic liner, and a four-foot layer of clay. (Appellant's Ex. 2, p. 24) In addition, a gas collection system and groundwater monitoring system are in place along the perimeter of the landfill. Additional phases and cells can be opened after the currently developed and accepting portion is filled. The REAC report summarized the landfill improvements as consisting of four items: excavation cost, clay or synthetic liners, leachate collection systems, and gas collection system.

Under the cost approach, Kelly estimated the subject's value as \$10,660,000, rounded. First, to develop the land value, seven vacant land sales in Scott, Monroe, and Dement Townships in Ogle County were used; the most distant sale property was located approximately 14.9 miles from the subject. Each comparable was zoned agricultural whereas the subject was zoned agricultural with local siting approval for development and operation as a landfill. In both the report and in testimony, Kelly noted that these prevailing local land values would indicate what an operator would pay for the land portion, recognizing that conditional use zoning and required permits would still need to be obtained. (Appellant's Ex. 2, p. 49)

These vacant land sales ranged in size from 63 to 274.23 acres and sold between March 1999 and March 2004 for prices ranging from \$3,081 to \$4,550 per acre. Kelly made qualitative adjustments to the comparables for date of sale and location (Appellant's Ex. 2, p. 64). Kelly also noted that agricultural land sale prices are generally dependent on soil type and potential yield rather than on location or size. Based on these adjusted sale prices, Kelly concluded a market value of \$4,000 per acre for the subject land (Appellant's Ex. 2, p. 65).

Since the subject site has been partially developed, Kelly analyzed both the developed and undeveloped portions of the landfill. Kelly valued the undeveloped site area of 257.18 acres of the subject property at its full value of \$4,000 per acre with no discounting<sup>3</sup>; as to the 76.6, rounded, developed acres which were operating as a landfill and accepting waste, the land value had to be discounted for consumed capacity. As

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<sup>3</sup> Undeveloped land value of \$1,028,720 (257.18 acres x \$4,000 per acre).

to the developed portion and based on the engineer's report, Kelly found that as of the valuation date the landfill had a remaining capacity of 37% of its total developed capacity.<sup>4</sup> In order to discount this portion of the land, the appraiser multiplied the 76.6, rounded, developed acres by \$4,000 per acre and further multiplied by the remaining capacity of 37% to arrive at a land value for this portion of the subject of \$113,368. Based on this analysis, Kelly found the developed and undeveloped land of the subject property had a total land value of \$1,150,000, rounded.

Step two was to estimate a replacement cost new of all the site improvements such as the liners, ground water monitoring system, perimeter leachate collection system, the gas flaring system, and minor auxiliary improvements. For purposes of compiling a cost estimate for cell construction, Kelly relied on actual historical costs and recent cost estimates to construct new improvements as provided by the operator/appellant along with data REAC gathered from past landfill appraisal work. (Appellant's Ex. 2, p. 66) Kelly concluded a replacement cost new of \$250,000 per developed acre or \$19,150,000 for the 76.6-acre developed portion of the subject site's cells as of January 1, 2003.

For the industrial/garage type buildings on the property, Kelly utilized the Means Cost Manual, the Marshall Valuation Service and the actual costs as provided by the property owner/appellant to calculate the replacement cost new of these auxiliary and other site improvements. (Appellant's Ex. 2, p. 67) Specifically, Kelly provided value estimates for five buildings, a guard shack, a leachate tank, paved areas, fencing, landscaping and two 60-ton scales. These items were found to have a total replacement cost new estimate of \$2,618,000. Thus, adding in the value of the cell liner systems, Kelly arrived at a total estimated replacement cost new of \$21,768,000.

Step three in the cost approach requires the calculation of depreciation, if any. As set forth in his report, Kelly found no depreciation attributable to either functional or economic obsolescence. As to physical depreciation, Kelly opined that site improvements at a landfill are installed for use with the landfill; as it fills, the improvements lose value accordingly and when the landfill reaches its approved capacity, the site

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<sup>4</sup> Kelly considered the engineering report that approximately 6,111,200 cubic yards of waste were in place out of a total developed capacity of 9,699,200 cubic yards; in other words, the landfill was at approximately 63% of its developed capacity. (Appellant's Ex. 2, p. 65)

improvements are at the end of their useful life and would be 100% depreciated (Appellant's Ex. 2, p. 49). As of January 1, 2003 the subject had reached 63% of its currently developed capacity according to the engineering report<sup>5</sup>; thus, Kelly based his physical depreciation calculation upon the percentage of fill in place relative to the developed capacity at that point in time; in other words, Kelly found the value of the site improvements was tied to the unfilled capacity of the landfill (Appellant's Ex. 2, p. 70).

In this appraisal, Kelly arrived at the total expected life calculation for the cell improvements by dividing the projected stabilized annual amount of cubic yards of waste to be placed into the total developed capacity of the landfill. (Appellant's Ex. 2, p. 31) Based on the engineering report, as of January 1, 2003 Kelly calculated the developed landfill site had a remaining economic life expressed as a percentage of 37% (Appellant's Ex. 2, p. 32). On page 71 of the report, Kelly broke down the cell site depreciated value by individual parcel identification number and also supplied a total depreciated value based on 63% depreciation of the cell sites (total depreciation of \$11,675,210) to arrive at an estimated value of \$7,472,290 for the cell site improvements.

Kelly used the age/life method of depreciation for the auxiliary improvements which depreciate on a different pattern than the cell site liners. (Appellant's Ex. 2, p. 72) But for one pole building, most auxiliary improvements had an effective age of 5 or 6 years; but for pavement with a life of 30 years and the leachate tank with a life of 60 years, the auxiliary improvements were said to have an economic life of 40 years. (Appellant's Ex. 2, p. 72) Kelly calculated the auxiliary improvements had an estimated depreciated total value of \$2,036,500 after total depreciation of \$581,500.

Adding back the land value, Kelly arrived at an estimated value of the subject property of \$10,658,790 or \$10,660,000, rounded. In addition, Kelly provided allocations for the individual parcels as reflected in his transmittal letter discussed previously.

Lastly, the appraiser testified regarding the sale history of the subject property. BFI Waste Systems sold the subject along with other assets in July 1999 to Allied Waste. (Appellant's

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<sup>5</sup> In the certification of the appraisal report, Kelly indicated reliance upon the remaining airspace calculations of engineer Nolden. (Appellant Ex. 2, p. 79)

Ex. 2, p. 7) Then there was a purchase by Onyx of the subject property along with numerous other assets in March 2000 for \$250,000,000. This sale was pursuant to a divestiture order of the Department of Justice in order to avoid a monopolistic position by Allied Waste. In appraising the subject, Kelly gave no weight to this sale price because of the multiple types of assets involved in the transaction and multiple locations. (Appellant's Ex. 2, p. 7) Additionally, Kelly testified that the acquisition of the subject property by Onyx was not an arm's-length sale representative of market value because the seller was under a compulsion, namely the divestiture order, to sell and therefore the transaction did not meet the test of a normal market value transaction where neither a buyer nor seller were under any compulsion to buy or sell. Kelly's understanding was that Onyx had a short period of time in which to decide on the purchase. Moreover, the purchase of the subject property included business assets, such as the licenses to operate, the hauling routes, and trained work force of employees. The first recorded transfer declaration regarding the subject set forth an allocation based on the existing assessment of \$7.6 million; Kelly placed no weight on that allocated value as no determination could be made as to the basis of the consideration set forth. (Appellant's Ex. 2, p. 7) There was also a second recorded transfer declaration which again, Kelly placed no weight upon.

Upon cross-examination by the intervenor's counsel with regard to the sale transaction, while Allied Waste was under a consent decree in federal court to sell, Kelly acknowledged that the buyer Onyx was not ordered to do anything. In terms of determining fair market value, Kelly acknowledged that he determined the value of the whole property (all three parcels) and then he allocated that value to the three parcel identification numbers. The allocation was based upon the engineer's report in terms of how much space had been developed in the landfill and how much space had been consumed in the landfill by parcel number.

Kelly acknowledged that each of the comparable land sales was zoned as agricultural land which was being farmed to his knowledge and none of the properties had been through the rigorous approval process for siting as a landfill. For landfill siting approval, an operator or developer presents himself or herself to the local authorities demonstrating experience, ability and wherewithal to operate a landfill; if approved, Kelly testified the enhancement to value of the land accrues to the applicant as an intangible generated by the

applicant/developer; the value does not accrue to the vacant land itself without an applicant being attached to it. Despite those differences, Kelly testified he made no positive adjustment to these comparable sales prices for purposes of a landfill as Kelly contends the value of the siting approval accrues to the going concern (business value), not to the land because it is the company that is approved for a landfill permit. On the other hand, however, Kelly testified that former farmland which obtains siting approval for a commercial development would cause a small value enhancement in the value of the land.

In terms of the \$250,000 in costs quoted by the operator for construction of a cell site in the landfill, Kelly did not believe those costs included expenses outlined in his appraisal associated with the original licensing (development permit) such as topographic maps, detailed survey maps, land use and population density data, and other requirements including soil borings and groundwater conditions. (Appellant's Ex. 2, p. 37-38) Kelly was also unaware whether the cost in building a berm for a cell site was included in the cost estimate which was given. An individual cell averages 6 to 10 acres. Upon further questioning about a developer recouping investment costs, Kelly testified that only upon collecting tipping fees in the operation of the landfill would the costs be recouped. In arriving at the cost to build a single cell, Kelly considered data provided by Onyx and compared it to the cost per acre REAC has found in other landfills; upon finding the figure reasonable in light of that data, Kelly adopted the \$250,000 cost per acre to build a cell.

Kelly was also asked about his understanding of the royalty method in the income capitalization approach to valuation based on a percentage of market tip fees. (Appellant's Ex. 2, p. 46) In his experience, this royalty method has been tied to a sale of a landfill to a large operator; the operator makes an upfront cash payment followed by payments of a percentage of the collected tipping fees for a term of 20 or 25 years. Kelly equated the development of a landfill to development of a casino or a nursing home where extensive licensing processes are involved which is unlike the development of a typical shopping center or other rental space.

Kelly reiterated that the highest and best use of the subject property, both the developed and the undeveloped acres and both the permitted and unpermitted acres, was for continued use as a landfill.

Kelly testified that his calculation of replacement cost did not account for any entrepreneurial profit as it was Kelly's opinion that such profit would accrue to the business value portion of the going concern (the holder of the licenses to operate and run the landfill) and would not accrue to the real estate. Kelly acknowledged that an entrepreneur expects to obtain a return of capital and a return on capital which then is their entrepreneurial profit. However, Kelly acknowledged that while there may be an expectation of a return on investment, there certainly is no assurance or guarantee of such return.

As its next witness, appellant called Douglas Main. Main testified he has provided economic and appraisal services since 1986 and has been employed with Deloitte, Deloitte & Touche since March 2006 where he is the director in the financial advisory services division specializing in waste and the waste industry. In his previous employment, Main was the director of the Waste Group of PricewaterhouseCoopers for five years which involved a national practice dedicated to providing advisory valuation consulting services to the waste management industry.

With regard to his educational background for appraisal practice, Main testified that he has taken well over a hundred courses. Main also holds appraisal licenses in ten states, including through reciprocity a license as a Certified General Real Estate Appraiser in Illinois. In 1990, Main obtained an MAI designation from the Appraisal Institute; he is also a member of the International Association of Assessing Officials (IAAO).

In his testimony, Main made special note of his prior work experience from 1990 to 1993 with Robert L. Foreman, whom he described as being the godfather of landfill valuation because he wrote a chapter around 1970 on going concern valuation of a landfill which he contends is still used in the appraisal field today. After Foreman passed away, Main developed his own company called Landfill Valuation of America and utilized the work documents and papers Foreman had accumulated back to 1967. Main's company was purchased by PricewaterhouseCoopers and led to the development of the Waste Group within the company where Main then worked.

Main described a landfill as a very sophisticated operation as a result of federal regulation imposed in 1993 known as Subtitle D requiring considerable design and operational expertise in the development, maintenance, closure and thirty years worth of

postclosure care of the facility. In this controlled environment, the waste which has been disposed of must be maintained to prevent any migration or contamination of adjacent property. Also, while there can be variations, in the Midwest, Main estimated the cost of construction of a cell could range from \$100,000 to \$300,000 per acre of permitted space. He estimated the cost to go from raw space of 500 to 2,000 acres or more to permitted space would range from several million to ten million dollars including litigation, with no guarantee of actually obtaining the permit.

With regard to this appraisal assignment, during *voir dire* Main also testified that he reviewed a number of Illinois Environmental Protection Agency (IEPA) documents for the period 1995 through 2005, documents related to the existing permit, he read the existing permit, reviewed financial statements, documents related to tonnages (both historical according to State records and those supplied by the operator), data specific to the industry in the region, data from the operator regarding the amount of host fees and surcharges paid, documents from the Department of Justice relating to the subject property, data from the operator on actual compaction received at the facility, and balance sheets.

Without objection, Main was accepted as an expert in the field of appraising real estate and in the field of appraisal of landfills.

Main was the sole signatory to a complete and summary appraisal report prepared for Onyx Orchard Hills Landfill, Inc. with a valuation date of January 1, 2003 estimating a fair market value for all three parcels comprising the landfill of \$9,600,000. (Appellant's Ex. 1A) As compared to a self-contained report which would include all referenced documents as attachments to the report, a summary report may merely reference underlying documentation. In the report, Main made an allocation of the real property (land and improvements) value based on the remaining footprint acreage of the landfill that will accommodate the 19,629,545 cubic yards of remaining permitted airspace. (Appellant's Ex. 1A, Pages I-II)

Main testified that with regard to an appraisal, the first step is to define the purpose of the assignment. In this matter, the appraiser was required to value only one component, namely, the real estate only and thus exclude the going concern or whole business value with all the assets combined. This means the exclusion of any intangible value, assemblage value, portfolio

value, and waste integration value. (Appellant's Ex. 1A, Page IV) In his report on page 12, Main itemized the types of typical intangible items that should be excluded in a valuation of the real estate only. For instance, a permit for a landfill creates a certain amount of airspace; for the subject, the permit allowed for approximately 25 million cubic yards of volume to be consumed. Main also made a determination as to the highest and best use of the subject site; as if vacant, its highest and best use was to be held for future development and its current use as improved represents its highest and best use. (Appellant's Ex. 1A, p. 15-17)

Main analyzed and determined if any sale of the subject property within three years of the valuation date at issue was a market indicator and/or reconcilable with any value conclusion. With regard to the subject property, Main considered the definitions of market value as developed by appraisers and "fair cash value" as set forth in the Illinois Property Tax Code (35 ILCS 220/1-50); Main recognized that the purchase of the subject property was part of a portfolio of assets which the Department of Justice ordered be divested. (Appellant's Ex. 1A, p. 6) From the documentation Main reviewed, the subject property was included in a portfolio of various assets of landfills and transfer stations purchased for about \$205 million located in the Chicago and Detroit areas.

An arm's-length transaction would be one between unrelated parties and one that was sufficiently exposed to the market without force or a specific reason to buy or sell. (Appellant's Ex. 1A, p. 10) Under these circumstances, Main classified the transfer of the subject as one under duress by the Department of Justice. He testified in this transaction the buyer and seller were not typically motivated in that the seller was being forced to get rid of this portfolio of assets. The transaction also did not meet the criteria of having a reasonable time allowed for exposure in the open market being typically from one to two years as opposed to the 120 days outlined in the Department of Justice order. Main testified that it would be very rare circumstances where a transaction under duress would qualify as an arm's-length transaction. Moreover, while Main discovered an allocation of prices for some of the assets included in this portfolio sale, he found those allocations to have no relevance to market value because they were made for accounting purposes. Finally, for the subject property, the sale price failed to meet the definition of market value because it was not of just the real property.

Main testified that not all three approaches to value would be applicable or relevant to an "as is" real property valuation. (Appellant's Ex. 1A, p. 18) For instance, the cost approach was not applicable here for reasons including the difficulty in estimating land value for such a large parcel, defining accrued depreciation (physical, functional and economic), and because this is a depleting or wasting asset impacting depreciation; the fact the landfill has been open for a number of years precludes reliance upon the cost approach. In addition according to Main, given the amount of adjustments, the amount of judgment, and the age of the facility for a wasting asset, the cost approach may not be the best indicator of value. (Appellant's Ex. 1A, p. 1 & 18) As to the sales comparison approach, because most of the sales data of comparable landfills would involve a going-concern with personal property and intangibles and, many are part of a portfolio acquisition or even an integrated company, this approach would require numerous problematic adjustments. (II, p. 288; Appellant's Ex. 1A, p. 1 & 18) Main found the income approach to be relevant in that the whole purpose of a landfill is to produce revenue by the sale or use of airspace. (Appellant's Ex. 1A, p. 18-19)

In applying the income approach, Main chose to rely on the market rent/royalty method in order to reflect the value of the real estate component only. (Appellant's Ex. 1A, p. 12 & 19) Main also noted that the International Association of Assessing Officials (IAAO) has approved the royalty (market rent) method for appraisals of landfills as a depleting asset similar to mineral properties. The market rent/royalty method is based upon the theory that the value of the property tends to be set by the market land rent attributable to the real property which is essentially capitalization of future income attributable to the real estate into an estimate of the net present worth of the real estate. (Appellant's Ex. 1A, p. 20)

As part of the appraisal process, Main had to define the economic unit in the assignment which consists of three parcel numbers for the economic unit of this operating landfill. In order to ascertain the property's characteristics as of January 1, 2003, Main toured the property, conferred with the manager of the facility, Christopher Peters, and examined aerial photographs. The landfill consists of 333.78 acres of which about 175 acres were permitted for the landfill footprint as of January 1, 2003 with approximately 76.6 acres which had been developed, filled or consumed as of the valuation date.

(Appellant's Ex. 1A, p. 4)<sup>6</sup> For valuation purposes, Main testified that he was not allowed to speculate on whether or not unpermitted area(s) would be permitted; instead, only currently permitted airspace is valued.

In the royalty method, the appraiser first derives a net market rent for the use of that real estate, indifferent to ownership, business acumen, any integration of businesses, assemblage of various parcels, or trade name. For this landfill, Main examined the amount of tons of waste coming in annually, based on market, multiplied by the actual effective tipping fee to arrive at an estimate of the revenue (to be confirmed with historical data). (Appellant's Ex. 1A, p. 2 & 20) The appraiser seeks to apply the effective tip fee which essentially is the actual revenue collected less surcharges and host fees multiplied by the annual volume of waste received to arrive at an actual operating revenue which can be generated.

To arrive at a market-based effective tip fee, Main used two methods. (Appellant's Ex. 1A, p. 22) The first consideration was the subject's historical average effective rate per ton and gate rate; the second consideration was the actual market as shown by the competition's gate rates with consideration for the cost of transportation and transfer station. (Appellant's Ex. 1A, p. 57-58) After analyzing all of the data gathered, Main estimated a net disposal fee of \$18.50 per ton and then deducted \$5 per ton for surcharges and host fees which are collected and simply passed on to appropriate agencies; Main therefore concluded an effective tipping rate of \$13.50 per ton.<sup>7</sup> (Appellant's Ex. 1A, p. 24-29) Main then assumed an increase of 3% per year in the effective tip fee based on the Consumer Price Index. (Appellant's Ex. 1A, p. 29)

The next calculation involved waste intake. Main found that historically about a million tons of waste came to the facility annually at the price of \$13 to \$14 per ton and given the facility's location, the waste was being brought in from considerably outside the natural market area of the subject

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<sup>6</sup> Landfill design capacity refers to how much airspace could actually fit on a given piece of land whereas permitted airspace is that which has been authorized by regulatory authorities. Remaining capacity of a landfill refers to the airspace remaining of a current permit less the amount already consumed. Unpermitted capacity is the potential airspace from adjacent parcel(s) not yet permitted.

<sup>7</sup> Only a municipality or government agency can pass a host fee onto a landfill. In the case of the subject, there is a village agreement that establishes a host fee for having that facility within the jurisdictional boundaries of the village.

facility and thus was charged at a lower price. (Appellant's Ex. 1A, p. 26 & 40) For purposes of this appraisal, Main assumed an annual growth in waste flow of 1.5% per year.

Remaining capacity at the subject landfill was next relevant to Main's calculations because airspace is what the landfill sells, namely, the amount of volume the landfill is able to bring in over time. (Appellant's Ex. 1A, p. 24) As set forth in Main's report and in reliance upon the engineer's report of volume filled thus far, the subject landfill as of January 1, 2003 had total remaining permitted airspace of 19,629,545 cubic yards. (See charts in report, p. 4 & 24) For purposes of calculating future intake, Main utilized a compaction rate<sup>8</sup> of 1,400 pounds per cubic yard of in-place density. The manager of the subject landfill confirmed to Main that assuming a compaction rate of 1,400 pounds per cubic yard was reasonable for this facility.

The second step in the market rent/royalty method involved multiplying the effective tipping fee revenue by the royalty rate to arrive at the market rent/royalty income. For this calculation, Main summarized lease information or royalty/market rent data gathered from other landfills in a chart on page 31 of his report, Appellant's Ex. 1A, for nine comparables with some detail about each lease agreement. Main found an unadjusted range of from 5% to 15% of effective gross income excluding surcharges, host fees and related taxes. Given this data with locational and physical characteristics of the subject, Main selected a market rent/royalty rate of 12%, which is applied to the tip fee revenue net surcharges, taxes and host fees. (Appellant's Ex. 1A, p.32)

The third step in the market rent/royalty method involved adding any miscellaneous income derived, for instance, from the sale of methane gas captured from the landfill, to arrive at the effective gross income to the real property; there was no such income for the subject property.

In step four, the appraiser must deduct nominal costs, typically 1% to 2%, for operating expenses such as miscellaneous administrative expenses, accounting, legal fees and the like associated with the lease. In his report, Main asserted that market rent leases for landfills are typically referred to as "triple net" or a net, net, net (NNN) expense basis which involves minimal lessor related expenses. Main estimated expenses at 2% of effective gross income per year to cover

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<sup>8</sup> Waste brought to the landfill is compacted by machinery and over the life of the landfill, the rate of compaction increases for the layers below.

administration (such as legal, accounting, management) associated with the lease. (Appellant's Ex. 1A, p. 32-33)

In step five of the market rent/royalty method, the appraiser must discount the annual net market rent/royalty income for the remaining estimated life of the landfill to a present value indication. (Appellant's Ex. 1A, p. 2) Since investors anticipate both return of capital and return on capital, with a depleting or wasting asset like a landfill (a capital loss is forecast), a portion of the current income must be considered a recovery of the investment with the balance of current income being a return on investment. With these principals in mind, the appraiser selects a rate which allows for a return both on and of the capital invested. In this appraisal, the selection of a discount rate was based on the current permitted capacity of about 19.6 million cubic yards which was projected to be depleted in about 13 years given the assumed intake, compaction rate and growth rate.<sup>9</sup> (Appellant's Ex. 1A, p. 33-34) Deriving a discount rate from sales data would include the going concern and/or may involve a portfolio sale meaning the data would not be indicative of just the real property component of a single asset. (Appellant's Ex. 1A, p. 34)

Throughout his report, Main theorized that there is a higher level of real estate investment risk associated with a landfill because it is a wasting asset, it has no reversion since under Subtitle D regulations<sup>10</sup> a closed landfill cannot be used for 30 years; it is a highly regulated industry with potential regulatory changes during its life; and it has significant closure and post-closure liabilities. (Appellant's Ex. 1A, p. 34-37) These issues make a landfill a much higher risk investment than, for instance, a hotel property or petroleum extraction.

Another method utilized by appraisers to derive a discount rate is through survey or market information from brokers and

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<sup>9</sup> Thirteen years is the mathematical remaining life of the landfill based on the current permitted capacity, compaction rate of 1,400 pounds per cubic yard and an intake of one million tons per year with a growth factor of about 1 1/2% per year. (Appellant's Ex. 1A, p. 40)

<sup>10</sup> Subtitle D Regulations refers to federal legislation effective in 1993 mandating that landfills, at a minimum, had to follow certain operational and closure standards. As a consequence, operation and expenses in royalty or market rent changed at that time making a pre-Subtitle D and post-Subtitle D distinction in royalty/market rent rates which went down; while costs of compliance increased substantially, tip fees only nominally or gradually increased on average.

secondary sources or published studies such as Korpacz or Cushman & Wakefield concerning similar high-risk investment types. (Appellant's Ex. 1A, p. 36-38) Main's appraisal reports discount rates for commercial-industrial properties ranging from 11% to 15% with higher risk investments ranging from 12% to 18%. Meanwhile, wasting asset discount rates ranged from 15% to 35%. All other things being equal, Main asserted that as a wasting asset the subject requires a higher discount rate.

An alternative method to derive a discount rate is to utilize the band-of-investment technique which Main found to be 17%. (Appellant's Ex. 1A, p. 36 & Addendum E) With corroboration from the survey method, Main found the applicable discount rate of 17% was reconciled from the band-of-investment technique. (Appellant's Ex. 1A, p. 39) Main further noted in his report that this discount rate would severely under estimate the risk if it were to include the unpermitted, speculative potential expansion airspace.<sup>11</sup>

On page 41 of the appraisal report, Main summarizes the market rent/royalty method utilizing the aforesaid figures and assumptions for the subject property. In summary, the analysis assumes a remaining life of 13 years, effective tip fee of \$13.50 with increases over time, annual intake of 1 million tons with increases over time, the market rent/royalty rate of 12%, less 2% for expenses, and application of a discount rate factor annually to arrive at a present worth of the rent for each year resulting in a value finding for the subject property under this method of \$9.6 million, rounded.

In light of this value conclusion for the whole, Main was requested to consider an allocation process given that the landfill (the economic unit) consists of three parcels of land; Main considered methods for this allocation. One allocation method for the waste industry would be to consider the total permitted remaining airspace contained on the three parcels as a percentage of the total. (Appellant's Ex. 1A, p. 42) Main specifically testified this allocation was just an exercise and was not indicative of an independent market valuation of each of the parcels based on the percentage of remaining airspace within the parcels from the total economic unit which he had appraised. In summary, Main's market value opinion of the entire real estate as of January 1, 2003 based on the permitted airspace only was \$9.6 million.

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<sup>11</sup> The appraisal report notes that, "The discount rate would be much higher if unpermitted airspace was included." (Appellant's Ex. 1A, p. 36)

In addition, Main's assignment included a request to consider the additional acreage that is not permitted but, hypothetically, if it was permitted what impact would it have on value? (Appellant's Ex. 1A, p. 43-47) Based on this request in his report, Main presented an alternative discounted cash flow analysis applying the extraordinary assumption of unpermitted airspace being added to the total permitted airspace estimate and thereby concluded remaining airspace volume increased to about 39.3 million cubic yards and utilized a weighted average discount rate which was increased to 20%. Due to the time value of money and the fact the unpermitted airspace would not be used for nearly 14 years, Main's conclusion of value under this analysis was only slightly higher at \$9.9 million (Appellant's Ex. 1A, p. 46).

On cross-examination, Main clarified that the allocation was done as an exercise at the request of counsel for the appellant and was a calculation based on permitted airspace as recorded by the engineering firm divided by the permitted airspace over the footprint acreage of each of the three parcels. Main reiterated that this allocation is not an independent opinion of market value of the individual parcels and/or improvements located thereon, but the allocation was merely an exercise based on permitted acreage.

Intervenor's counsel showed Main reports prepared by the Illinois Environmental Protection Agency (IEPA) reflecting tonnage of waste received for years 2002, 2001 and 2000 at the subject landfill which differ from the figures utilized by Main as drawn from engineering reports provided to him. Main explained that the compaction rate (conversion factor from cubic yards to tonnage - 3.3 gate cubic yards = 1 ton) utilized by the IEPA is 30% higher than actual tonnage. (Intervenor's Ex. 5) For purposes of market area comparables stated on page 57 of Main's report, however, intervenor's counsel established that Main relied upon gate rate charges and disposal volume per calendar year as reported by the IEPA.

Main was cross-examined extensively on his data gathered on competitive gate rates for long-haul and direct haul waste. (Appellant's Ex. 1A, p. 57-58) Main further explained the subject receives only about 10% of its annual volume or 105,000 tons of local market (direct haul) waste which, with discounts, results in an average price of \$34 per ton with surcharges. The balance of the subject's waste volume comes from outside the local market or what is referred to as long-haul waste which is processed through outlying transfer stations miles from the

subject landfill; the stations charge their own fees and have the expense of transportation to the landfill, but the landfill receives an effective tipping fee at the landfill ranging from \$16 to \$20 per ton including surcharges. With removal of the surcharges, Main testified that the actual tip fee generated at the landfill for long-haul waste is \$13 to \$14 per ton based upon financial statements of the facility and underlying contracts.

As set forth in his report, Main testified that as an appraiser it was his understanding that real property and tangible personal property was generally subject to taxation in Illinois. (Appellant's Ex. 1A, p. II) His report further indicated that for purposes of this appraisal project, he appraised the fee simple estate of the real property, land and improvements only, excluding personal property and/or intangible personal property. Main further indicated that the scales at the landfill are personal property since they can be removed, although Main was not familiar with how the assessor treated the scales for assessment purposes. In defining the components of the real property during cross-examination, Main indicated the footprint of the landfill, clay or other liners comprising the cells of the landfill, fencing, gatehouse, maintenance facility, a single-family residence used as offices, a parking lot, and private paved road were all such components; a modular office, wells for methane gas, and groundwater recovery wells, however, were personal property. The five or six inch dirt layer or tire chippings placed as cover on waste for compliance with regulations is not part of the real property component as it does not have utility or value according to Main.

Main reiterated the premise of a triple net lease to be the rent payment which accounts only for the use of the real estate because the tenant has the responsibility for all the expenses. Construction of future cells under the market rent/royalty approach is paid for by the operator as a cost of doing business. The market rent/royalty method assumes the renting of the land and improvements on the given property "as is" at the time of renting. Intervenor's counsel established through Main that the operator of the landfill, not the lessee, would pay the costs of seeking any approvals for expansion, construction of new cells for waste disposal, and any new maintenance buildings found to be necessary in association with the expansion given the selection of a 12% market rent/royalty rate for the subject property and in light of a range shown by the comparables of 5% to 15%.

On re-direct examination, Main reiterated that he considered and analyzed the reports published by the IEPA with regard to the subject property noting design capacity and remaining life were consistent with Main's findings, but the IEPA's method of converting intake - cubic yards to tonnage - does not accurately reflect filled airspace at any facility reported by the IEPA.

Appellant next called Christopher Peters, general manager of the subject landfill facility. He has held that position since October 2004 and was also employed at the facility from April 2000 through December 2001 as general manager; from January 2002 until October 2004, he held the position of regional manager over ten landfill facilities and eighteen transfer stations in the Midwest region.

Peters testified that as of January 1, 2003, the landfill was receiving approximately 85% to 90% of its waste from transfer stations (long-haul) and the remainder from short-haul routes. The subject landfill was collecting from \$16 to \$20 per ton for this long-haul waste. Based upon a compilation of actual records for 2002 and 2003, Peters indicated the average third-party tip fee was about \$17 or \$18 per ton including host fees and surcharges. Peters testified the landfill spends between \$200,000 and \$220,000 per acre in actual costs to develop a cell site.

Peters also testified that an industry standard for density of in-place waste (refuse placed in the prepared cell with some level of compaction effort applied) is about 1,400 pounds per cubic yard or more; operators try to maximize density achieved in the landfill; he further noted this compaction rate is being achieved at the subject landfill. The IEPA's 2002 annual report regarding the subject facility reports remaining airspace of 56,197,000 gate cubic yards or calculated as 17,029,000 tons; Peters testified the landfill reported the gate cubic yard figure, but did not report the tonnage figure. (Intervenor's Ex. 5) As explained by Peters, the landfill reports to the IEPA cubic gate yard intake. Then, the IEPA's report utilizes a standard conversion rate of 3.3 gate cubic yards to one ton. (Intervenor's Ex. 5, p. 4) In 19 years of examining the records, Peters has never seen a different conversion ratio utilized by the IEPA. Based on the historic records of the facility, Peters testified the subject achieves a ratio of 4.27 gate yards of waste to one ton; on average, a cubic gate yard is 468 pounds at the facility. In Peters' experience in different states, landfills achieve varying compaction rates.

The subject landfill pays host fees and surcharges quarterly based on tons received to the Village of Davis Junction, Ogle County, and the IEPA; for 2002, annual fees paid to the village were nearly \$2 million, the payment was between \$1.6 and \$1.7 million to the county, and the payment was about \$1 million to the IEPA. As of January 1, 2003, the subject landfill paid a host fee to the village of \$2.26 per ton, a fee to the county of \$1.69 per ton with a tiered rate, and fees to the IEPA of \$1.07 per ton for a total of \$5.02 per ton of waste accepted.

Peters also testified that the subject property provides bulk discounts in order to increase the number of tons coming in to the landfill for disposal; the bulk discount rates at the facility as of January 1, 2003 ranged from \$16 to \$20 per ton.

The landfill has maintained records since 1997 of airspace surveys done by contracted firms such as Willett & Hofmann and RMT, Inc.; the surveys were performed most often on a quarterly basis, but occasionally on an annual or as needed basis. Peters confirmed that, for use by the appraisers, Peters requested the engineering firm perform an allocation of airspace over the three parcel identification numbers comprising the landfill property as of January 1, 2003 which is not a typical part of the airspace measurements performed regularly for the landfill.

On cross-examination, intervenor's counsel established that it took approximately 36-months for the entire application and approval process for the siting of the subject landfill until the first waste was received in January 1998. The application process included a detailed filing with the village. Peters reiterated that labor and material costs to construct a cell range from \$200,000 to \$220,000 per acre for a cell ranging from approximately 8 to 10 acres in size without any of the costs associated with the permitting process.

While Peters referenced a conversion rate of 468 pounds per cubic gate yard, on cross-examination he acknowledged that the conversion rate varies from year-to-year with the potential to be as high as 540 pounds per cubic gate yard of waste resulting in a reduction in the conversion ratio.

No airspace had been consumed as of January 1, 2003 for parcel 100 consisting of 16.43 developed acres, and only portions of cells within the parcel had been constructed with available volume of 1,777,300 cubic yards of airspace. (Appellant's Exs. 3 & 4) Peters assumes 1,400 pounds of waste fits into a cubic yard of airspace.

Peters acknowledged that in 2002, the landfill's revenues exceeded its expenses. When establishing the subject landfill, a need for landfill space beyond merely Ogle County was established to the satisfaction of the IEPA.

On re-direct examination, Peters testified the pounds per cubic gate yard achieved at a landfill can vary greatly depending upon the facility, waste streams, compaction rates and other factors; the range can be from 200 pounds per cubic gate yard up to 800 or 900 pounds per cubic gate yard.

Appellant next called James Harrison, Supervisor of Assessments in Ogle County since 1988 as an adverse witness. Harrison agreed the assessment for the parcel on appeal in this matter was \$8,533,000 for land and \$100,000 for improvements or a total assessment of \$8,633,000 as of January 1, 2003. The target level of assessment for 2003 was 33 1/3%. Harrison acknowledged that attached to the board of review notes on appeal filed in this matter was a copy of a complete, restricted use appraisal prepared by Michael McCann with an estimated fair market value of the subject landfill of \$25,900,000. Prior to the board of review's action, the 2003 assessment on the subject parcel had been \$2,501,240. Harrison acknowledged that documentation filed with the Property Tax Appeal Board by the board of review does not include data on how the assessment was prepared or the property record cards for the subject property; Harrison testified that he does not believe property record cards exist for the subject parcel. Harrison further testified that historically there has been a practice of assessing the entire value of the subject landfill on one single parcel identification number.

Harrison acknowledged that the 2006 assessments for the three individual parcels comprising the landfill differed significantly from the 2003 parcel assessments. Harrison indicated the 2006 assessments were made by the office of the supervisor of assessments; this change more accurately allocated the value of an entire landfill over the three parcels, however, in prior years, the bulk of value of the landfill was assigned to one parcel. The basis of this previous allocation arose from when the landfill began operation and the bulk of its operations were on the subject parcel with the other two parcels still farmland. Harrison believes the previous allocation was based on acreage devoted to landfill use gleaned from aerial photography from the 1990's when the landfill project began. Although over the years the landfill expanded into the other

parcels, finally in 2006 Harrison decided to try to allocate the value more fairly onto the other two parcels. The 2006 assessment values were as follows (IV, 836-38):

PIN	Land AV	Impr AV	TOTAL '06
11-02-100-002	2,253,898	51,101	2,304,999
11-02-300-003	2,201,731	0	2,201,731
11-02-400-001	4,077,423	100,000	4,177,423
	<b>8,533,052</b>	<b>151,101</b>	<b>8,684,153</b>

Harrison was not sure during testimony whether there were other parcels like the subject upon which the policy had changed in terms of allocating value across all the parcels comprising a given property, but there could be some others.

On cross-examination by intervenor's counsel, Harrison testified that as Supervisor of Assessments, he generally does the assessments for large industrial properties in Ogle County. He further testified that it is not uncommon for improvements to creep over from one parcel to another in large industrial properties like occurred with the subject landfill and the Byron nuclear power station. With the power station located in Ogle County, while the plant expands over several parcels, for assessment purposes the property is split into two both for allocation of value and because a taxing district boundary runs through the property necessitating allocations for two different school districts. Harrison testified that neither a court of law, nor the Illinois Department of Revenue, nor other chief county assessing officials have informed Harrison that for a property which spreads across more than one parcel that he cannot allocate a property's value to one parcel identification number.

Harrison further testified the subject property's 2006 changed assessments were strictly the result of a reallocation; Harrison testified the total 2006 assessment reflects the appraised value previously placed on the subject parcel for 2003. As clerk of the board of review, Harrison acknowledged that he received three assessment complaints for 2003 with regard to the landfill.

When asked by the Hearing Officer to give a citation or provision to the Property Tax Code for his authority to allocate the entire value of multiple parcels to one parcel, Harrison testified that he was not aware of any provision allowing for

that other than the definition of real property at Section 1-130 of the Code. 35 ILCS 200/1-130. Harrison also acknowledged that no board of review final decision(s) were issued with regard to the 2003 assessment complaints filed with regard to the other two parcels which comprise the landfill and he had no explanation why no final decisions were rendered on them; the board of review took no action. Likewise, the board of review never issued any hearing notices for those two other parcels in response to these assessment complaints filed before the board of review. Harrison testified that the 2003 assessment of \$8,633,000 on the subject parcel includes the value of the landfill, but does not include the other two parcels comprising the landfill as those parcels still have individual assessments placed on them.

On re-direct examination, Harrison indicated that if a property owner requested division of an individual parcel, even if the division ran down the center of a dwelling, Harrison's office would honor that request and adjust the assessment accordingly to the two parcels comprising the dwelling. Alternatively, if a multi-parcel property owner petitioned to consolidate the parcels to one parcel identification number, Harrison's office would likewise honor that request and place the entire assessment on the one parcel. In the absence of a consolidation request, Harrison would continue to assess each portion of an improvement on its respective parcel.

#### **BOARD OF REVIEW'S RESPONSE**

The board of review presented its "Board of Review Notes on Appeal" wherein the final assessment for PIN 11-02-400-001 of \$8,633,000 was disclosed. Based upon the 2003 three-year median level of assessments of 33.21% for Ogle County, the assessment reflects an estimated market value of \$25,995,182. In support of the assessment, the board of review submitted a copy of a restricted use appraisal report (Intervenor's Ex. 3) with an attached one-page chart as the last page entitled "landfill sales summary" also identified as "Exhibit B"; two court decisions from Wisconsin; a 2005 tipping fee survey; four articles on assessment and appraisal of landfills; and two IEPA publications on landfills. The restricted use report was prepared by Michael S. McCann and sets forth an estimated market value as of January 1, 2003 of \$25,900,000. The board of review presented no witnesses of its own and requested confirmation of the subject's assessment.

#### **INTERVENOR'S RESPONSE**

Intervenor called its first witness, Michael McCann, a licensed certified general real estate appraiser in Illinois and president and general manager of the firm of William A. McCann & Associates, Inc. in Chicago. McCann is also a semi-active licensed real estate agent, a certified review appraiser by the National Association of Review Appraisers and Mortgage Underwriters, past member of the Appraisers Council of the Chicago Real Estate Board, and a member of Lambda Alpha International which is a land economics society to which membership is by invitation only.

McCann testified that he has about 23 years of experience appraising all types of waste disposal facilities including sanitary landfills, hazardous waste landfills, composting facilities, transfer stations and other properties used in the waste disposal industry. His appraisal experience around the United States includes slightly more than 100 different properties with, in some cases, multiple appraisals of the same property. Purposes of these other appraisals varied from property tax matters, condemnation matters for both owners and condemning agencies, divorces, bank financing and other types of financing, for tax return depreciation schedules, and for zoning and siting. McCann has been a lecturer for the Appraisal Institute, the Illinois State Bar Association and for Landmark Education Services.

McCann is an associate member of the Appraisal Institute. McCann is not currently working toward the MAI designation. McCann has the CRA designation which, when he obtained it, required at least five years of verifiable review appraisal experience and completion of a number of appraisal courses.

For different appraisal projects, McCann has identified market value and also going concern value. For going concern, the appraiser examines the property as an enterprise (net income from the whole operation) and what cash flow can be generated from that enterprise such as might occur when one landfill company acquires another landfill company. This is in contrast to a market value of the real property which only examines the net income that the property itself can generate as a rental property. McCann acknowledged that for a given property, either a market value or a going concern value could be made and those two values might be different. Similarly, market value and investment value for a landfill may also be different as could market value and value in use for a landfill differ from one another.

Without objection, McCann was accepted as an expert in appraisal of real estate associated with solid waste landfills.

McCann appraised the subject landfill at the request of counsel for intervenor and the Supervisor of Assessments for Ogle County. McCann prepared two different documents concerning the subject property; one was done at the request of Harrison in 2004 (restricted use report) and one was done at the request of intervenor's counsel and, he guessed, for Harrison more recently (summary appraisal report).

Intervenor's Ex. 1 is the more recently prepared summary appraisal report with an effective date of January 1, 2003 setting forth an estimated fair market value conclusion of \$25,900,000. This assignment was to appraise the fair market value of the subject property, namely, the real property exclusive of any business or enterprise value as of January 1, 2003. Paraphrasing the definition of real property in Illinois, according to McCann, it is not just the physical land and buildings, but also all rights, benefits and privileges appurtenant to the property.

While the subject property consists of three distinct parcel identification numbers, McCann did not express an opinion as to the fair market value of any individual parcel, but rather appraised the landfill as one whole property or economic unit. McCann testified that he typically does not make allocations of value for assessment purposes, but has done so, for instance, in partial taking condemnation cases such as for a road widening to determine the contributory value to the whole. Within the 333.78 acres of the subject property, there is a 175-acre footprint or land area which defines the limits of waste within the larger property. McCann utilized a disposal capacity figure for the remaining airspace directly from reports published by the IEPA of 17,029,000 tons of remaining disposal capacity with a remaining useful life of approximately 17 years for the facility. Given the discount rate of 22 ½% utilized by McCann, he testified that shortening his remaining life estimate by just one year would reduce the last year's income stream to about \$300,000, thus making a minor change in estimated remaining life would result in a *de minimus* change in the value estimate of the property.

McCann expressed that the highest and best use, if vacant, for the subject property was development and operation of a sanitary landfill assuming local siting was still in hand or appended to

the property. (Intervenor's Ex. 1, p. 25) McCann testified that any other type of development "would be throwing away an entitlement that is incredibly valuable." Highest and best use as improved was as continued use as a sanitary landfill. In Illinois, local siting approval for a landfill is specific to a certain piece of property and in McCann's opinion siting approval enhances the market value of the real property.

Among the documents McCann reviewed for preparation of this appraisal was Criterion 1, Need for expansion of the subject landfill dated in October 1998. (Intervenor's Ex. 4, p. 00778) McCann had been involved professionally with the expansion of the subject landfill at both the county level and the village level. In addition, McCann relied upon data contained in Intervenor's Ex. 5, the IEPA "Nonhazardous Solid Waste Management and Landfill Capacity in Illinois," 2002 annual report. While not an exhaustive listing, on page 7 of his appraisal report, McCann outlined generally other documents he relied upon in preparing this appraisal.

Under guidelines of the Uniform Standards of Professional Appraisal Practice (USPAP), the appraiser must denote if he or she uses "extraordinary assumptions" in an appraisal and in this instance, McCann assumed there was no environmental enforcement or adverse environmental factors affecting the property beyond the requirements for closure and post-closure and he also considered the closure/post-closure costs. (Intervenor's Ex. 1, p. 8) The premise is that a landfill subject to Subtitle D must have closure funds which can be guaranteed through letters of credit satisfactory to the IEPA for larger operators (with smaller operators having to actually establish an interest-bearing fund, in essence an escrow) to guarantee closure/post-closure care of the landfill.

McCann testified that the definition of market value contained on page 9 of his report is synonymous with the Illinois statute defining fair cash value. (Intervenor's Ex. 1) For purposes of estimating market value, McCann assumed an exposure time of 6 to 12 months and a similar marketing time. It was McCann's opinion that the subject landfill was very well positioned to service the Chicago market area and it was very well-positioned in the national market for purchasers of landfills.

In reporting on the history of sale(s) of the subject, McCann testified that sale of the subject was initiated in 1999 and was purchased in March 2000 for \$22,812,000. (Intervenor's Ex. 1, p. 11) As of the sale date, McCann calculated remaining

disposal capacity of approximately 18,555,000 tons. In examining the sale price, McCann utilized 10% of the sale price for a personal property allocation which is dependent upon the age of the equipment and the typical range is 5% to 10%. In addition, because an additional 182 acres of farmland was also part of the purchase, McCann excluded a value of \$72,244 or \$396.95 per acre for those additional lands based on the transfer declaration price per acre that was applied to the entire property. At this point, in testimony McCann revealed that there is an old original landfill which is closed and that the subject landfill is being developed around it. Utilizing the IEPA capacity figures, McCann's final conclusion as to an adjusted sale price of the subject property as of March 2000 was \$1.10 per ton of remaining capacity or \$20,458,556. (Intervenor's Ex. 1, p. 11-13)

While for other assignments McCann has inspected this property, for this particular appraisal assignment McCann did not inspect the subject property. As McCann recalls, his report of 25,740,745 cubic yards, net for refuse, for the subject came from the IEPA landfill capacity report as did the remaining disposal capacity figure of 17,029,000 tons as of January 1, 2003. (Intervenor's Ex. 1, p. 19) McCann acknowledged that the IEPA uses a gate yard conversion of 3.3 gate yards per ton which is a conversion factor he finds to be widely used. Moisture content in refuse also makes it denser and similarly an arid climate experiences more moisture evaporation from the refuse; therefore, "rules of thumb" used in the industry can vary region by region and even site by site or day by day. Additionally, the type of debris makes a difference as construction debris with a lot of concrete will be heavier than typical household waste. Long-haul waste is typically transported in open-topped trailers with a tarp across the top to keep the debris from blowing out. Therefore, while there is never an exact conversion factor, as a rule of thumb and industry standard the 3.3 cubic gate yards per ton is widely accepted and used according to McCann.

The subject landfill is designed and intended to serve not only Ogle County, but the surrounding counties of Boone, Cook DeKalb, DuPage, Kane, Lake, Lee, McHenry, Stephenson and Winnebago. (Intervenor's Ex. 1, p. 19) While McCann views a 20 to 30-mile market area as an antiquated way of defining a service area for a landfill, he acknowledged that for direct haul a 20 to 30-mile market area is still typical. McCann noted that direct haul is where the operator makes their money keeping the trucks busy on the streets collecting trash instead of hauling long distances;

the market instead has been building transfer stations, a concrete pad with a metal-panel building, closer to population centers where about three loads from collection trucks fit into one long-haul trailer which is then tarped and trucked to a landfill. Many of the transfer stations are part of vertically integrated companies which seek to control the waste stream from the curb to the landfill. Valuation of any landfill based on how the operator works within the market would be a value in use or an investment value conclusion rather than a market value of the property on the open market.

In this appraisal report, McCann considered all three approaches to value, but did not utilize the cost approach because he found it not to be relevant since no one in the market buys or sells landfills on the basis of "anything that resembles a cost approach"; rather, McCann utilized both the sales comparison and income approaches which drive the decisions of buyers and sellers in the market.

Under the sales comparison approach, McCann estimated a fair market value of \$25,500,000 for the subject. In preparing this approach, McCann testified that he reviewed many, many sales of landfill properties and presented a few of them in his report.

Sale #1 located in northern Lake County services portions of the northern Chicago metropolitan area containing 191.7 acres of which 131.2 acres were approved for waste disposal. This property sold in March 2000 for \$26,808,000 or \$3.26 per ton of remaining disposal capacity of approximately 8,230,000 tons at the time of sale prior to making adjustments for personal property and enterprise value. To adjust the sale price, McCann estimated 10% for personal property and a 60% EBINTDA<sup>12</sup> margin resulting in \$9,650,000 or \$1.17 per ton of capacity as the real property contribution to the sale price. (Intervenor's Ex. 1, p. 32)<sup>13</sup> With an upward adjustment of 7.5% per year for time to the unit price, McCann concluded an adjusted unit sale price of \$1.43 per ton. (Intervenor's Ex. 1, p. 32)

Sale #2 located in California contained 652 acres with 246 acres permitted and 145 acres actually approved for disposal area

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<sup>12</sup> EBINTDA means "earnings before interest, national overhead, taxes, depreciation, and amortization."

<sup>13</sup> Specifically, McCann wrote: With the realty and the remaining non-realty combined yielding a 50% EBINTDA margin, and given the high, urban disposal volume, a royalty rent of 20% of the gross revenue, or an equivalent allocation of 40% of EBINTDA can be made to reflect the contribution of real property with the remaining 60% of EBINTDA attributed to the remaining non-realty.

footprint. This property sold in January 2000 for \$40 million with a remaining capacity of 9,840,000 tons. With an overall capitalization rate of 16.7%, McCann found this sale had an unadjusted sale price of \$4.07 per ton of remaining disposal capacity. To adjust the sale price, McCann deducted 10% for personal property and a 60% EBINTDA for a high volume facility resulted in \$14,400,000 or \$1.46 per ton of remaining disposal capacity.<sup>14</sup> With an upward adjustment for date of sale of 7.5% per year, McCann concluded an adjusted sale price of \$1.82 per ton of remaining disposal capacity. (Intervenor's Ex. 1, p. 34)

Sale #3 located in Michigan contained 337 acres of which 294 acres were approved for disposal of waste. This property sold in April 2000 for \$73,842,000 and had a remaining capacity of approximately 20,500,000 tons. With an overall capitalization rate of 16.7%, an unadjusted sale price of \$3.60 per ton of remaining disposal capacity was calculated by McCann. After adjusting for a 10% deduction for personal property and a 67% EBINTDA resulted in an adjusted price for the real property only of \$21,931,000 or \$1.07 per ton of remaining capacity.<sup>15</sup> With a time adjustment of 7.5% per year for date of sale, McCann concluded an adjusted sale price of \$1.31 per ton. (Intervenor's Ex. 1, p. 36)

McCann testified that there are two main elements determining the value of a landfill on the open market: the volume which can be achieved at the facility (an available market) and the total remaining disposal capacity; if the property will close in the near-term and there is no prospect for near-term expansion, the property has limited value.

In the sales comparison approach, McCann reconciled his adjusted sales values on page 38 of his report and determined that the subject property would have a unit value of \$1.50 per ton based on remaining capacity of 17,029,000 tons. As a result of this reconciliation, McCann found an estimated fair market value of

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<sup>14</sup> McCann wrote: With the realty and the non-realty combined yielding a 50% EBINTDA margin, and given the high, urban disposal volume, a royalty rent of 20% of the gross revenue, or an equivalent allocation of 40% of EBINTDA can be made to reflect the contribution of real property, with the remaining 60% of EBINTDA attributed to the enterprise. (Intervenor's Ex. 1, p. 34)

<sup>15</sup> As to this sale, McCann wrote: With the real property and remaining non-realty combined yielding a ± 75% EBINTDA margin, and given the high, urban disposal volume, a market royalty of 25% would be warranted, indicating an allocation of 33% of EBINTDA is associated with the real property, with the remaining 66% of EBINTDA being associated with the remaining non-realty. (Intervenor's Ex. 1, p. 36)

the subject property under the sales comparison approach of \$25,500,000, rounded. (Intervenor's Ex. 1, p. 38)

Under the income approach, McCann estimated a fair market value of \$25,900,000 for the subject property utilizing a market rent/royalty method. The purpose of the market rent/royalty method is to reflect the market for landfill properties as it relates to rentals since there is a fairly wide and demonstrable market for rentals of landfills owned by one entity and operated by another entity which pays the owner typically a percentage of the gross revenue. Rent is viewed as the measure of income generated by a property whereas the EBINTDA margin is really the commingled contribution of both business and real property elements to the creation of income. By utilizing market rent, the appraiser isolates the income attributable to the real property from the income attributable to the going concern.

McCann examined and collected data from the 2002 annual IEPA report regarding tip fees charged at ten northern Illinois landfills along with the subject all of which serve Region 1 and 2 in Illinois as set forth in his report. (Intervenor's Ex. 1, p. 43 & Intervenor's Ex. 5) Given the data, McCann selected a mid-range estimated market tipping fee of \$33.00 per ton with an increase of 2.3% per year for the life of the landfill. (Intervenor's Ex. 1, p. 45)

McCann next assumed a starting remaining capacity of 17,029,000 tons of airspace and further assumed it would be steadily reduced by 1 million tons per year (a stabilized annual volume) with a market tip fee per ton, net of all taxes, commencing with \$33.00 per ton tip fee through the life of the landfill's remaining capacity with an increasing rate of 2.3% annually compounded based on the prior ten years such that the final tip fee of \$48.57 per ton by the year 2020 was achieved when the airspace would be filled. (Intervenor's Ex. 1, p. 47) McCann testified that utilizing a stabilized volume intake of 1 million tons annually through the life of the subject landfill was the safest way to approach the analysis without making assumptions regarding how much of the market share from displaced waste the subject would be able to capture; McCann acknowledged that there was some upside potential to the volume figure.<sup>16</sup>

After McCann estimated the gross revenues over 18 years as set forth on page 47 of his report, he then determined a

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<sup>16</sup> McCann acknowledged that remaining capacity calculations for a landfill is not an exact science; compacting of waste changes with changes in large equipment used in compaction.

rent/royalty rate (amount charged by the property owner to the landfill operator) by examining landfill lease transactions; in doing so, McCann paid particular attention to the market area serviced by the landfill and volume. (Intervenor's Ex. 1, p. 48-50) For the subject property, McCann deemed both Regions 1 and 2 to be the market area. Next, to gather the rent/royalty data, McCann analyzed several landfill leases from his files as set forth below. (Intervenor's Ex. 1, p. 48-49)

Lease #1 was for a landfill in Bakersfield, California consisting of 80 acres which began in 1983 with an initial 5 year term and had a rent based on 16 2/3% of gross revenue. Lease #2 in Tennessee consisting of a 407 acre landfill with a lease commencing in 1988 with a 20 year term with annual extensions which had an escalating rent based on volume increases at a low of 10% up to a high of 15% of gross revenue. Lease #3 also in California consisting of a 509 acre site with a 100 year lease term that commenced in 1988; it had a sliding scale from 10% to 18.5% in the final years of operation. Lease #4 in DuPage County consisted of a 530 acre landfill. With its last amendment, Lease #4 presented a rate of 18% of gross revenue going to the owner the Forest Preserve District of DuPage County. (Intervenor's Ex. 1, p. 48-49)

McCann further testified that besides being complex transactions with many different factors impacting the terms, there can also be fairly significant upfront payments as part of the lease agreement and requirements for the lessee to handle closure and post-closure costs and liabilities. Where the landfill had been owned by a municipality and is now being leased, terms of the lease may also account for airspace available to the municipality and its residents for its waste for up to the life of the landfill at favorable disposal rates. In some instances, royalty rates also vary between in-county and out-of-county waste. A fully operational landfill with improvements would be expected to command a higher percentage rental than a "green field site" which requires further expenditures before becoming operational.

In summary, McCann noted that rental/royalty agreements of comparable properties range from 10% to 16.33% of gross revenue with higher volume urban market facilities commanding sometimes more than 20% of gross revenue. (Intervenor's Ex. 1, p. 50) Based on examination of this data, McCann determined a royalty rate between 15% and 20% as of January 1, 2003 given the distance to the market area; his final conclusion was a rate of 17.5% for the subject property. On page 51 of his report,

McCann applied the chosen market rent/royalty rate of 17.5% to the previous calculation of gross revenue over the life of the subject property to project the annual rent for the subject property. Next, in his appraisal report McCann assumed a 5% deduction for expenses in managing the lease agreement; the lease transactions considered were based on a net lease where the tenant or operator was responsible for all of the costs of operating the landfill including cell construction. (Intervenor's Ex. 1, p. 52) The 5% reflects the landlord's expenses for accounting, legal and related costs.

The next step in applying the market rent/royalty method was for the appraiser to determine an appropriate discount rate. (Intervenor's Ex. 1, p. 52-53) For this report, McCann identified a discount rate range of 20% to 25%, concluding that 22.5% was the appropriate discount rate to utilize. To arrive at this conclusion, McCann examined the transaction of the subject property which reflected a reported 16.7% or rounded 17% capitalization rate; although the transaction included other assets, McCann testified that the higher chosen percentage more accurately reflects the risks to the operator and recapture of the investment over the life of the landfill along with the lack of usefulness of the land after closure. On page 54 of his report, McCann applied his chosen discount rate to his previous revenue calculations for the subject property. (Intervenor's Ex. 1, p. 54) Under the income approach utilizing the market rent/royalty method, McCann estimated a fair market value of the subject property of \$25,900,000. (Intervenor's Ex. 1, p. 55) In year 2021, McCann assumed reversion with no reversionary value of the property.

In reconciling his findings based on the two approaches to value utilized with the sales comparison approach as a cross-check on the income approach, McCann concluded an estimated fair market value for the subject property of \$25,900,000 as the income approach best reflects how a typical investor would analyze the potential rental income stream from a landfill royalty lease arrangement. (Intervenor's Ex. 1, p. 56-57)

McCann was extensively cross-examined about his investigation of the 2000 sale price of the subject property. In the course of his investigation, McCann obtained an eight-page document from an appraiser with the accounting firm of Arthur Andersen summarizing the transaction details with an allocation<sup>17</sup> of the multi-asset Department of Justice ordered disposition of assets.

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<sup>17</sup> McCann thinks the prices were allocated because each related exactly to a 16.7% overall capitalization rate on the income from the facilities listed.

McCann relied upon the prices reported in the document, which reflected acquisition by a company named Republic, rather than the appellant Onyx. There was also no value data in the document for personal property. McCann further explained assumptions he made regarding the 2000 purchase of 515.84 acres, including the land currently comprising the subject, without access to documentation.

McCann acknowledged that the purchase prices reflected in his report regarding the subject and Sales #1, #2 and #3 all came from documentation he received from Arthur Andersen. McCann also examined a real estate transfer declaration concerning the subject recording full actual consideration of \$204,755. (Intervenor's Ex. 1, p. 12) McCann viewed this latter figure as an allocation because it clearly was not the price of the landfill. (Intervenor's Ex. 1, p. 12-13) Based upon the material from Arthur Andersen and the transfer declaration, McCann set forth an adjusted price for the landfill site and airspace of \$20,458,556 in his report; this figure, however, was merely an analysis of what McCann knew of the sales transaction from available records. (Intervenor's Ex. 1, p. 13)

McCann revealed his restricted use report filed at the board of review hearing included consideration of a listing of landfill sales transactions throughout the United States; the three sales set forth in his report are a "representative sample of activity from that point in time." (V, 1135-38, 1139-40, 1142) McCann reviewed that listing of other landfill sales again prior to preparing this summary appraisal report.

Despite the court's compulsory order, McCann testified that these sales were not under duress; while the owner was ordered to sell, the transactions were individually negotiated. Contrary to this testimony, McCann wrote on page 11 of the appraisal report that since the sale of the subject property was a compulsory sale "there is some element of question as to whether the asset sold under typical motivation, or for less than market value." (Intervenor's Ex. 1, p. 11) Also, when given a definition of an arm's-length transaction as one between unrelated parties under no duress, McCann testified that the three sales set forth in his report incorporate the greatest majority of the elements of an arm's-length transaction; the sales represent market transactions under the terms of the Department of Justice order to divest of the assets. McCann was unable to confirm whether any of the sales in his report were 100% arm's-length transactions. According to McCann, the only condition not met was the voluntary decision to sell the

property. Furthermore, according to McCann, an antitrust order was not an extraordinary motivation (i.e., duress or distress) as it is pretty typical in the waste industry. No adjustments to the sales prices were warranted.<sup>18</sup> McCann noted the divestiture order provided for fairly substantial time limits: six months to market the property, about 120 days for review of the terms and for approval by the Department of Justice. McCann contended the three sales had more than adequate marketing time, were exposed to the market, it was well-known in the industry that sale was required, the order did not specify a price nor a sell-by date, and any effect on price by these considerations was not reflected in comparison to other sales in the market.

McCann confirmed that he deducted the non-realty elements including any portion of the permit value that does not append to the real estate, which is the most significant component. McCann had already deducted an estimate of the rolling stock, the equipment (10% deduction), and any goodwill associated with the landfill. Additional possible non-realty elements may include all the records, the value of arrangements with other companies, and the value of contracts with municipalities or haulers; existing workforce is another non-realty item. To the best of McCann's knowledge, the purchase of the subject property included all of these types of non-realty elements. This would also be true of the sales used in his appraisal report. In analyzing McCann's reported sales, the adjustments result in a range of deductions of from 30% to 36% of the sale price to account for his estimate of non-realty items. McCann had no documentation as to the non-realty items comprised within any of his sales comparables; McCann made the adjustment for each comparable by imputing a royalty rate against the EBINTDA margin with the difference being the income that is attributable to everything but the realty.

When cross-examined about his income approach analysis, McCann agreed important elements of the calculation include stabilized tonnage, the tipping fee and total disposal capacity as a mathematical function reflecting the remaining economic life. McCann conceded that if the waste intake was increased in the first years of the analysis, it would impact the entire analysis. McCann further testified that landfills with less than 10 or 12 years' remaining economic life tend to be less valuable on the open market than one with over 10 or 12 years of

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<sup>18</sup> Later McCann testified that he made an adjustment for personal property of 10% for each sale transaction because in Illinois it is not subject to assessment, although for none of the three sales did he have an actual list of personal property which was included in the sale transaction.

remaining economic life; once the remaining life exceeds about 17 or 18 years, the value line when charted flattens out, everything else being equal. Regarding the tip fee data which was gathered, McCann was unsure what the NSWMA survey actually requests that landfills report.

Next McCann was thoroughly cross-examined regarding disposal capacity calculations he used in his income analysis. He does not specifically recall requesting a survey of the subject property's remaining capacity, but McCann had the IEPA reports "which are derived from those surveys." (V, 1198-99) McCann also acknowledged seeing the engineering reports which were made part of the REAC appraisal report filed as Appellant's Ex. 2. McCann also reviewed host fees and volume history of the subject; the host fee data may have been obtained from the supervisor of assessments or from the intervenor's law firm, but admittedly McCann's report makes no reference to any host fee data for the subject. Based on what McCann has heard according to many operators and an industry rule of thumb, northern Illinois landfills tend to average 1,300 to 1,400 pounds per cubic yard of in-place airspace. For remaining airspace capacity, however, McCann utilized the IEPA reported figure which was based on the landfill owner's report to the IEPA, which McCann presumed was based upon the engineering report prepared for the appellant. While McCann did some calculations for consistency, for purposes of his appraisal McCann adopted the IEPA reported capacity figure in whole for the subject. McCann believed the capacity figure in the IEPA report was derived from information the owner provided to the IEPA. McCann acknowledged that the remaining airspace capacity set forth by the IEPA is calculated on a conversion ratio of 3.3 cubic gate yards per ton to one in-place cubic yard which McCann believes has been in use by the IEPA since around 1990. McCann admitted that as a general rule of thumb, landfill operators are more efficient in compacting waste as of 2003 than they were in 1990. In McCann's remaining life calculation for the subject property, he estimated a remaining life of 17 years based on a stabilized volume of one million tons per year rather than a volume of 1.3 million tons per year estimate which resulted in a remaining life of 13 years as reported by the IEPA.

In terms of the reported tip fees on page 43 of McCann's report, host fees were included in the figures given, but surcharges would still have to be added on. Although McCann presented the chart on page 44 of his report as the national average reported tipping fees from operators, upon being shown Appellant's Impeachment Ex. 5, McCann acknowledged the chart actually

reflects the "spot market" price for municipal solid waste disposal as reported from some 630 privately owned or operated facilities when surveyed on the given date. McCann's report did not note the NSWMA data reflected the "spot market" price.

McCann was also asked about the leases he examined for this appraisal which were from 1983 through 1988. When asked whether the property referenced in McCann's report as Lease #2 ever opened, McCann was not aware of its status as to whether it ever opened or not. (Intervenor's Ex. 1, p. 48) As to his Lease #3, McCann was aware of a long permit battle concerning the facility, but was not aware whether the facility ever opened or not. (Intervenor's Ex. 1, p. 49) To McCann's knowledge, the facility referenced in his Lease #4 was closed in 2003.

On re-direct examination, McCann reiterated that his primary basis for his opinion of value was based upon the market rent/royalty approach. Individual disposal contracts at a given facility may be higher or lower than the reported national averages; facilities make contractual arrangements for a variety of reasons, some of which may be loss leaders and some of which may be non-loss leaders. He also noted that host fees are structured in varying ways such as volume, consumption of airspace, or possibly a flat rate based on weight of intake. The host fees are typically negotiated with the siting authority during the siting process and then collected from the users of the landfill and passed through by the landfill to the municipality or governing entity. In addition, landfills may have to collect surcharges and/or taxes payable to state and/or county entities.

McCann reiterated that as to his estimate of remaining life for the subject landfill, if the stabilized annual volume were increased, it would shorten the lifespan of the landfill and would ultimately increase McCann's ultimate conclusion of value.

On re-cross, McCann testified that his estimated tipping fee of \$33 for year one in the income analysis was "net of all State and County surcharges and host fees" (excluded the same). In this appraisal, McCann believes that his income approach better and more accurately separates the real property from the whole enterprise and, therefore, is better than his sales comparison approach.

Intervenor's next witness was Mark Pomykacz, a real estate and business appraiser based in New Jersey with over 20 years of experience. He founded Federal Appraisal & Consulting in

January 2001 which performs "normal" real estate appraisals such as office buildings, malls, and apartment buildings, but also appraises special-purpose properties. Prior to beginning this firm, Pomykacz was a senior manager and chief appraiser for the property tax group of Deloitte & Touche in New York City; he was with the firm for five years. Prior to that employment for five years Pomykacz did commercial appraisals of investment grade properties.

Over the past five or six years, Pomykacz' work has involved a national practice covering about twenty-four states for real estate and business appraisal services. Pomykacz has a temporary practice license in Illinois as an appraiser and an application pending for a permanent license.<sup>19</sup> Pomykacz has a certified real estate/general appraiser license in about six states, primarily on the East Coast. He is a Member of the Appraisal Institute (MAI) which is a designation for commercial appraisers. He has taught appraisal courses. Pomykacz has lectured at seminars on various appraisal topics for the Appraisal Institute, the International Association of Assessing Officers (IAAO), and others.

In terms of landfill appraisal experience, Pomykacz appraised landfills in Florida, North Carolina and New Jersey. In the Florida project, the purpose was a feasibility study to perform an income analysis to determine the value and the cash flow generated by the proposed development of a landfill and incineration facility. In North Carolina, there was a proposed landfill expansion and Pomykacz assisted in determining the value of adjacent land to be acquired for expansion. The New Jersey assignment involved a closed landfill which was collecting methane to generate electricity via a turbine; Pomykacz had to determine the value of the remaining landfill assets, namely, the methane collection and electricity production assets.

Pomykacz believed he may have testified before the Property Tax Appeal Board previously concerning a nuclear power plant, but upon further questioning was unsure if it was perhaps a local board hearing on the property. Pomykacz stated he was not sure what the Property Tax Appeal Board was and while he was at a hearing today, "I don't know what you call this." (VI, 1348-49) He further acknowledged that he has never testified in court in Illinois previously.

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<sup>19</sup> Temporary licenses are issued for a period of time or a specific project; a permanent license is obtained with the intention to work long term and costs more. (VI, 1302-03)

For purposes of an appraisal, depending upon the scope of service and the planned usage of the report/analysis, Pomykacz testified that verification of market derived data, such as sales, is done by verifying the parties involved in the transaction including potentially checking public record filings such as the deed. An allocated sale price derived, for instance, as part of a portfolio sale, may be considered verified for purposes of use as a comparable sale depending upon the quality of the source of the data from the buyer or seller; the purpose or use of the data may dictate whether further verification is necessary. Pomykacz testified that he would probably check further if the transaction involved litigation.

Pomykacz performed an appraisal review for the intervenor for this matter in which appraisal(s) are examined to determine their reliability and credibility. For appraisal purposes, Pomykacz testified that commercial properties are all similar in that the goal is to generate revenue, income or cash flow to the property owner. Valuation techniques are universal in that revenue is estimated, expenses are estimated, net income is calculated, cash flow, and capitalization. Also, sales techniques are similar regardless of the type of property. For complex properties, however, one special problem is remaining economic life.

Intervenor tendered Pomykacz as an expert witness in appraisal of real property for property tax purposes; for appraisal and valuation theory; for concepts, methods and procedures in appraisal work; the reconciliation of appraisal valuations; and valuation of complex properties. Appellant objected on grounds of competency for this witness to critique the appellant's tendered appraisals as the witness did not possess expertise in evaluating operating landfills. The objection was noted, but overruled in that the objection goes to the weight and credibility to be given to the witness' testimony. Pomykacz was accepted as an expert in real estate appraisal valuation matters and valuation work in complex properties. (VI, 1374)

Pomykacz' assignment for intervenor was to examine certain documents filed in the case including the Kelly appraisal, the Main appraisal, several of the leases referred to in the Main report, along with some independent research into the landfill/solid waste market in Illinois; there was no request for a review appraisal or any type of written report. Pomykacz made notes on his copies of the appraisals. In addition, Pomykacz had various documents referenced in the appraisals

which had been presented by intervenor as potential impeachment exhibits and upon which documents either Pomykacz or his staff had made notes.

Of the nine leases presented in Main's appraisal report in the chart on page 31, Pomykacz did not have access to the underlying leases referenced as Leases #3, #5 and #7.

In comparing the lease data in Main's report to the actual lease agreement for Lease #2, Pomykacz noted the lessee was responsible for seeking any expansion approval, was responsible for closure and post-closure of the facility and was responsible for payment of 50% of all reasonable and necessary legal and engineering fees incurred by the County of Whiteside as lessor; Main did not disclose this expense data in his chart. (Intervenor's Impeachment Ex. 2 and Appellant's Ex. 1A, p. 31) This lease also provided for set rates for disposal of county supplied waste for a minimum of 20 years and an up-front payment to the county of \$2 million, but this payment was not reflected in Main's report. Likewise, the lessor was responsible for all future construction of improvements.

As to Lease #4 in Main's report, Pomykacz found that this landfill was closed, having stopped accepting waste in 1990; there was a new lease on an adjacent property serving the area. (Intervenor's Impeachment Ex. 3) In Main's data, Lease #4 was said to be from a 1980 lease which was restarted in 1982 and renewed in 1990. (Appellant's Ex. 1A, p. 31) In his research, Pomykacz found a newer lease for the landfill located on the adjacent property known as Denver Arapahoe Disposal Site (DADS). (Intervenor's Impeachment Ex. 4) Pursuant to this latter lease, the lessee was responsible for securing permits, construction of improvements, and post-closure requirements. Pomykacz opined that the royalty rate of 12% reflected in Main's report regarding Lease #4 was not accurate as this current lease calls for a rate beginning at 15% and escalating every few years to 18%, 21% and then 24%. (Intervenor's Impeachment Ex. 4) As of January 1, 2003, this lease called for an 18% royalty rate; Main's data did not reflect those minimum guarantees. Likewise, Main did not reflect the preferred pricing of waste disposal provided to the county and the City of Denver, even though the lease agreement provided for preferred pricing. (Intervenor's Impeachment Ex. 4)

Main's referenced Lease #6 was an existing landfill which was being expanded. Also, the underlying lease called for premium volume royalty rents for exceeding 200,000 tons of waste

annually by .25% for each additional 50,000 tons which was not reflected in Main's data. Also, the lease provided for preferred pricing for the lessor, but this was not reflected in Main's report. The lessee was also responsible for construction of all improvements at the facility.

As to Main's Lease #8, the lessee was responsible for securing approvals for any expansion, design of any improvements, and construction of any improvements. (Intervenor's Impeachment Ex. 6) While Main's data did not reflect it, the lease called for three lump-sum payments to the lessor totaling \$1.8 million. Pomykacz opined that from a lessor's perspective, such a lump-sum payment added substantial value to the lease.

Main's referenced Lease #9 called for renewal and extension as recently as November 2002. (Intervenor's Impeachment Ex. 7) The terms provided the lessee was responsible for obtaining any expansion permit and construction of improvements. While Main's data reflected certain percentage rents to be paid, the lease provided for other types of consideration including that the lessee would build, design and construct the landfill, and residents of the local community had preferred disposal pricing of \$10 for each delivery; moreover, public bonds were to be issued to finance the construction of the landfill with the lessee paying the cost of amortizing the bond repayment; none of these additional terms was reflected in Main's report.

Pomykacz examined the lease for Main's Lease #1 and found the lessee was to secure permits for the landfill and construction of the improvements. (Intervenor's Impeachment Ex. 8) While Main reflected certain annual payments as a consequence of this lease, Pomykacz found that other payments were also part of the lease including two up-front payments of \$200,000 which he opined added substantial value to the lease. In addition, the city lessor was able to dispose of its waste free of charge as part of the lease, but this is not reflected in Main's data.

In summary, Pomykacz testified that the leases considered by Main involved land or landfills which were substantially less improved than the subject property. While Main found only the income approach appropriate and Kelly found only the cost approach appropriate for the subject property, Pomykacz testified that it is unusual in appraisals to have such divergent appraisal approaches.

In examining the Kelly appraisal with regard to parcel 100-002 where no airspace had yet been consumed on a footprint of 16.43

acres, Pomykacz opined that a reasonably prudent owner who bought that parcel and built the cell(s) for disposal of waste would expect to both receive a return of the investment and a return on the investment. While Pomykacz had not done the research as to what percentage return would be expected, investment trends in the broader real estate activities which developers expect are in the range from 10% to 30% above and beyond the cost to construct the asset. Kelly's report indicated 1,777,300 cubic yards of airspace remaining or remaining economic life of this parcel.

During his testimony, Pomykacz was then asked to apply Main's conversion calculation of cubic yards of airspace (70%) to tons of waste (from p. 40 of the Main report) to Kelly's remaining airspace figure for parcel 100-002. He determined that 1,777,300 cubic yards of airspace is the equivalent of 1,244,110 tons of in-place waste based on Main's conversion factor for this particular parcel meaning at that time, after that amount of waste, the parcel would have no remaining economic life.

Again applying the average effective tipping fee and market rent/royalty rate from Main's appraisal to the 16.43 acre footprint of parcel 100-002, Pomykacz calculated gross revenue of \$2,015,458 (1,244,110 tons of waste x \$13.50 tip fee x 12% market rent/royalty rate). Less Main's assumed expense of 2%, the net revenue on this parcel over its lifetime would be \$1,975,149. Pomykacz testified that this net revenue would be insufficient to return all of the owner's investment in the real property; where net revenue is \$1,975,149 and investment is \$4,460,000, roughly 44% of the initial investment is coming back to the developer. Pomykacz opined that no prudent owner of real property would invest \$4,460,060 in anticipation of returning back \$1,975,000; under these combined approaches, the owner of the property would lose money on every single acre. These same principles would apply to the other two parcels making up the subject landfill and, while the percentage return may change from parcel to parcel, overall Pomykacz contended that the result would reflect the property as underperforming income-wise and it would not be feasible to build another acre.

Upon questioning by the Hearing Officer, Pomykacz testified that an appraiser must assign some probability to the potential for upward expansion of a landfill; if it's not probable, the appraiser assigns zero. For Kelly's appraisal, he assumed complete depreciation once the current permitted airspace was consumed whereas Main considered potential expansion to be

speculative so no value for vertical expansion of the landfill was attributed to the parcel.

Pomykacz found the Kelly and Main appraisals to be materially inconsistent as the data from the two appraisals when bridged together are incompatible, inconsistent. Pomykacz did not feel that these two appraisals could be reconciled to arrive at a fair market conclusion of value for the subject property.

Pomykacz was then cross-examined by appellant's counsel and testified the assignment in this matter was "to determine the credibility and the reliability" of the appellant's appraisal reports. Pomykacz prepared no written analysis with regard to this assignment; he was presenting an oral report. Pomykacz testified that oral reports are covered by USPAP standards; the oral appraisal review report must address the substantive matters set forth in one of the USPAP standards. His work file for this project consists of the documents used in the review which includes the exhibits previously referenced and other materials involving Pomykacz' market research.

Pomykacz did not inspect the subject property. While he has done hundreds of review appraisals in his career, this was the first time he testified with regard to a review.

Pomykacz had no opinion whether vertical expansion of the landfill was legal or not; however, Pomykacz contended that if there is a potential for vertical expansion of the landfill, he felt that it should be reflected in the value calculations. To determine if expansion is reasonably probable, the appraiser would perform research into the legal process, examine the market to determine the track record for similar facilities and compare those to the subject's characteristics. He did perform research to determine if vertical expansion was reasonably probable as of January 1, 2003; the local approvals had been obtained and filings were either planned or already submitted to the State for expansion, thus Pomykacz concluded there was a reasonable probability of expansion, not a speculative probability as of the valuation date.

Pomykacz testified that if he were performing an appraisal of the subject, he would have ascribed some value to the preliminary approvals obtained at the local level. The methodology to assign a value would be to assume approval as of the valuation date and then apply a discount for the fact that it was not an actuality; the discount would represent the probability of success or failure of obtaining the approval. In

addition, the appraiser would have to talk with developers and owners of landfills to see how they were valuing the potential of obtaining permits at sites, not only locally but nationally. While Main reflected the research, Main ultimately arrived at a fundamentally different conclusion than Pomykacz with regard to the potential for expansion. (Appellant's Ex. 1A, p. 46)

When determining market value, Pomykacz testified that appraisers work from the assumption that a hypothetical buyer and a hypothetical seller are working under conditions of being typically informed, ready, willing, and able, and without duress or some unusual compulsion or need to buy.

Upon examining the appellant's two appraisals, Pomykacz did make notes of occasions where the reports had erroneous figures which were drawn from documentation Pomykacz had reviewed. In examining Main's report, Pomykacz checked some of the math and analyses; he also recalculated some of the figures in Kelly's appraisal.

Since one appraisal reflected a cost approach and one appraisal reflected an income approach, Pomykacz said he tried to bridge the two reports by finding common ground based upon the assumptions and figures that are contained in the reports and thus he found an income approach in the one that did not have such an approach and vice versa. Pomykacz also reviewed published data as of 2003 regarding the number of landfills in Region 2 as defined by the IEPA and the number of active transfer stations; this data impacted his opinion of the two appraisals concerning the quality of the analysis of the solid waste disposal market.

Pomykacz testified that he has never used the market rent/royalty approach in an appraisal, but finds it fairly easy to critique as the concept behind the method is not particularly complicated; it boils down to the data used to extract the rent/royalty rates and the quality of the data used to forecast future performance for the subject property. Pomykacz found the market rent/royalty approach was one of the most commonly used for valuing the land under a landfill, but he found that "to value a landfill is a different question than what we're dealing with here today. We're looking for just the real property." While the method was commonly used, it was fraught with problems; while it may be the least problematic of the available approaches, it had issues with the application in that the supply of data was very poor. (VI, 1486-87)

Pomykacz noted that Main's data comparables were Subtitle D compliant properties; however, based on the terms of the leases, it was not clear whether that was being supplied by the landlord. In circumstances where Subtitle D compliance was being supplied by the tenant, the comparable was inappropriate for consideration since the subject property was a Subtitle D property. Pomykacz testified that seven of Main's suggested comparables had this leasehold issue. The royalty rates reflected that the lessee paid for the improvements.

According to Pomykacz, the fact that a landfill could be classified as a "rare" type of property did not dictate which of the three basic approaches to value would be applicable. The purpose in the appraisal was an important determinant in selecting which approaches to value apply; also, the supply of market data on the property was a consideration.

Pomykacz testified that if he were to appraise the subject property, he would commence by considering the three approaches to value, but as of the time he was testifying, he had not conducted sufficient independent research to decide which of the approaches would be best; based upon the two reports filed by appellant, Pomykacz was not terribly confident that those stated values were reliable because the appraisals themselves did not supply Pomykacz with adequate data to make him confident. In particular, the quality of the leases and the lack of adjustment for them indicated to Pomykacz that either there was not proper data and/or there was not proper analysis of that data.

In the course of re-direct examination, Pomykacz testified that if the landlord made the property improvements, he would expect the landlord would command a certain level of rent to pay for those improvements and if the lessee made the improvements to the real property, Pomykacz would expect the lessee to pay less rent.

To determine the value of the real property improvements at the subject property, in using the market rent/royalty approach, Pomykacz noted that the appraiser would want market rent/royalty comparables of facilities where the landlord was providing all the same assets and expecting a return on all the same assets which exist at the subject property; the appraiser would not want comparables of an old facility or of vacant land where the tenant was required to build the Subtitle D assets. Of the leases in the Main report which he examined, Pomykacz noted that each one indicated the tenant was responsible for major real

property improvements and the landlord's rent did not reflect the value created there.

Pomykacz' opinion was that the income derived from the Main report was not sufficient to support the cost that Kelly ascribed to the subject property. He further opined that a prudent owner would not construct the improvements described in the Kelly report if the owner knew they would receive the income as ascribed in the Main report.

#### **APPELLANT'S REBUTTAL**

For rebuttal, appellant recalled appraiser Main who testified that he has reviewed more than 200 leases related to landfills. He further testified that unless the landfill lease is for a specific timeframe which covers closure, the goal is to continue the landfill and both parties assume or try to assume expansion.

Main also set forth what he deemed to be the salient facts regarding the nine lease comparables chosen to arrive at a market rent/royalty rate of 12% for the subject property in his appraisal. (Appellant's Ex. 1A, p. 31) In examining these leases, since both parties contemplated keeping the landfill open as long as possible, there was no adjustment necessary.

While his Lease #2 provided for the operator to pay legal fees incurred by the county related to submission of a siting application and having read the entire terms of the lease, Main found this provision had nominal impact at best and therefore did not make an adjustment in identifying market rent.<sup>20</sup> Main further testified that for a summary appraisal, USPAP required him to present some of the key salient facts which he presented in the table on page 31; Main read each lease in total and considered the provisions in total context; provisions such as this one had no affect on Main's selection of the 12% royalty rate. Lease #2 also provided for a \$2 million up-front payment for the 20-year guaranteed life of the landfill. He took this provision into account; in total context of the lease, this landfill and its amendments illustrated that the landfill was not generating enough revenue to cover these expenses and was barely achieving a 10% royalty requirement.

All of the leases utilized by Main were triple net leases where the tenant pays for future improvements with respect to the

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<sup>20</sup> Main noted the provision allows the county to bill the operator 50% of its legal costs incurred in a review of the siting proposal submitted by the operator.

property. Since the landfill sells airspace, Main took this provision into consideration in examining the income approach; the property can only be sold if it is Subtitle D compliant; by taking a percentage of the gross revenue, he testified that he captured the contributory value of the sold airspace relative to the real property component.

For Lease #4, Main testified the property of 2,600 acres is a multi-phased property, however, the lease referenced in his report related to the municipal solid waste portion of the facilities; admittedly a portion of the multi-phased landfill closed in 1990, however the portion referenced in his chart was still operating, even as of the date of hearing. Main testified the increases in royalty rate to 15% along with other concessions in Lease #4 were directly related to funding of a Superfund site clean-up. Main testified there were several leases involving a municipal solid waste landfill, a hazardous waste landfill and a Superfund clean-up site; the later agreements reached covered rents, non-compete clauses and other matters. Main testified the 1998 agreement concerning the landfill in Lease #4 of his report, which was pointed out by Pomykacz, was not a market-based royalty agreement between lessor and lessee because of the rationale for its creation including funding of a Superfund site, non-compete provisions, and others.

Regarding Lease #6, Main was familiar with a 2003 amendment to the lease and asserted the amendment was not materially different than what Main reported on page 31 of his report; the reported data is sufficient to provide the salient facts according to Main.

For Lease #8 in Main's report, there was an upfront payment of about \$1.8 million for the use of the landfill, four transfer stations, and the right to build an additional transfer station. He took this payment into consideration along with the 7% royalty rate and transfer stations; in giving it the weight it deserves, Main found these facts warranted a higher adjustment and thus Main selected a rate of 12%.

When examining Lease #9, Main acknowledged there have been subsequent amendments to the original lease dated in 1994; the original agreement provided a small discount for the tip fee charged to the town of Buckeye. This discount was not referenced in his table in the report due to space considerations; moreover, the town had a population of about 6,000 and therefore the volume generated was not material to

Main's analysis. The original lease also provided for potential public financing; while it was considered, since Main found that no bond financing occurred and financing was not even relevant to his analysis since it did not occur, no adjustment was made for this non-occurrence.

For his Lease #1, Main was considering the City of Rochelle Landfill where the lease provided for a nominal or relatively small up-front payment at the beginning of the lease of three payments of \$200,000. In considering this lease term, Main examined the base royalty rate of 6.1% and knew it warranted an upward adjustment to account for the upfront payments, so for the subject he selected a 12% rate. Additionally, the city had a preferential tip fee structure due to the lease, but with a population of about 10,000, Main opined this had a nominal impact on the overall volume of the landfill. These details were not set forth on page 31 of his report due to its summary nature where the critical items were listed.

Each of Main's lease comparables was Subtitle D compliant according to the terms of the leases. For purposes of this proceeding, the parties stipulated at hearing that the subject landfill was Subtitle D compliant.

On cross-examination, Main was questioned about what items would be paid by the tenant in the landfill lease comparables, including utilities, taxes, insurance, maintenance, construction of cells; depending on the terms of the lease, the tenant may not pay for construction of buildings and/or fencing. Main reiterated that his chart of the leases considered reveals some of the salient facts and, while Main considered other facts of the leases, not every fact considered was set forth in his chart contained within a summary appraisal report.

As to his Lease #9, Main acknowledged on cross-examination that when the agreement was executed, the lessee had purchased vacant land and agreed to diligently pursue acquiring additional land with the Town of Buckeye potentially issuing bonds for that acquisition and the lessee paying off those bonds; the operator would construct and operate the landfill and the town was paid an escalating percentage of gate revenues over time regardless of waste volume.

As to Lease #8, the terms provided for the operator/lessee to have the exclusive right and responsibility to operate the landfill, use existing improvements, and develop any new airspace either laterally or vertically along with bearing the

costs for such expansion as is standard for a triple net lease. This lease further called for an up-front payment of \$200,000 upon execution of the lease and payment to the county of \$1.5 million when an upgraded permit was obtained. Main testified it was not necessary to itemize these payments on page 31 of his report.

For Lease #6, there was an escalating percentage of gate revenue paid to the county based on increasing waste volume. While the landfill property in Lease #6 collected 160,000 tons a year on average, it was pointed out on cross examination that the subject property collects over 1 million tons of waste annually.

As to Lease #4, Main was questioned about his use of the term "Lowry Landfill" for this property when in fact "Lowry" was closed and another parcel known as DADS was actually the open property which was accepting waste; Main reiterated DADS was a phase of the Lowry complex. While Main acknowledged that the lease provided for increasing royalty rates over time for this property, Main noted those rate increases were not reflected in his report because this was not a market-based lease.

On re-direct examination, in reiterating his use of the term "triple net lease," Main testified that he used the term as it related to the leases typical for the landfill industry; the Appraisal Institute uses the phrase "absolute net lease" to refer to the same concept as referenced by Main.

Main testified that reporting the up-front payments in the leases was not a salient fact to be reported on page 31 of his report because this was a summary appraisal report. Likewise, the potential for issuance of bonds as to Lease #9 was considered by Main in preparing the appraisal, but as a summary report he did not feel that fact needed to be reported in the report on page 31. As to Lease #8, Main did not report the \$1.8 million up-front payment in his appraisal report because he "ran out of space on page 31." (VII, 1627-28) Lease #6 never met its lease threshold to pay more than 7 ½% so Main did not feel further explanation in his report was necessary. Main testified that his Lease #4 properly referenced an original 1980 agreement covering just the operations of a solid waste landfill as opposed to other leases referenced by intervenor involving a Superfund site and a hazardous waste cleanup.

As to Lease #2, Main considered the up-front payment set forth in this lease (\$2 million) and assumed a 20-year life for about \$100,000 per year along with this facility's annual volume of

waste resulting in a royalty of about 10%; in light of the low volume and discount to the county for disposal, Main concluded the subject's royalty rate should be higher than Lease #2. Again, the data in the report was merely a summary and salient facts such as this up-front payment were considered as part of the appraisal process.

Appellant next called Jerry Jones for testimony who indicated he was a real estate appraiser with 34 years of experience and has had an MAI designation since 1979. Initially, Jones worked as an appraiser for a savings and loan institution performing commercial appraisals and "upper-end" residential properties. His next position for three years was with an independent fee appraiser performing appraisals of income-producing properties. For about two or three years, Jones then operated his own appraisal business and performed some appraisals of income-producing properties. For about ten years, he was part of a partnership appraisal business where he continued to perform appraisals of income producing properties. Since then, Jones has been a self-employed independent fee appraiser; types of properties appraised include office buildings, apartment buildings, automobile dealerships, full-service car washes, ranches, and subdivisions. Jones has appraised landfills, performing his first such appraisal in 1991; since then he has performed 18 landfill appraisals in 17 different states and eight landfill reviews primarily in California.

During *voir dire*, Jones testified that he is a state-certified real estate appraiser only in the state of Texas; however, Jones does obtain temporary appraisal licenses in other states when performing an appraisal in that state. Jones also noted that landfill appraisal work performed in New York was actually only a consultation as opposed to an actual appraisal. Jones had no experience appraising landfills in Illinois and the instant testimony was his first review appraisal work in Illinois on a landfill.

Appellant tendered Jones as an expert in appraising real estate, in preparing review appraisals, and in the field of appraising landfills. No objection was made and the witness was qualified as an expert.

Jones prepared a review of the McCann appraisal of the subject property. (Appellant's Rebuttal Ex. 1) A review appraisal forms an opinion as to the adequacy and completeness of an appraisal report to determine the relevance of the data and the adjustments made to the data and forms an opinion as to whether

the analysis, opinions, methodology, and conclusions in the report were appropriate, reasonable, and well-supported. (Appellant's Rebuttal Ex. 1, cover letter) Jones' review began with USPAP Standard 3 to ensure compliance, preparation of an outline, review of McCann's appraisal several times, and then the process began. One aspect was to investigate the accuracy of McCann's report. For instance, Jones investigated the sales history of the subject property and learned that it was part of a compulsory sale of property including many landfill assets, hauling companies, transfer stations and other landfills across the United States.

In addition to McCann's appraisal, Jones examined a divestiture order, information provided by the property owner, income data on the subject, a host fee schedule, a client listing and volume of waste per client and by tip classification, engineering studies for remaining capacity, and internet data from the IEPA for years 1998 through 2004. Jones defined an arm's-length sale as one between unrelated parties and neither party being under duress; Jones concluded the purchase of the subject property was not an arm's-length sale in that there was duress present through the compulsory sale of assets owned by BFI. Specifically, the acquisition of the subject property did not meet the definition of market value under Illinois law in that the transaction was not in the due course of business in that it was a compulsory sale, there was duress present, and it was not between a willing buyer and seller in that Jones does not believe BFI would sell but for the court order. Similarly, the transaction did not meet the test of a market value transaction under the USPAP definition.

Jones noted that McCann's information from an accounting firm of an allocated sale price would not be a good source and, furthermore, to lend more credence to the opinion, McCann should have disclosed the name of the source. In any event, an "allocated purchase price" merely is an assigned number according to Jones with no particular criteria upon which to base it.

Jones further noted that the three sales McCann used in his sales comparison approach were all from the same divestiture order which resulted in the purchase of the subject property and the same compulsory sale. Thus, these sales likewise were not arm's-length transactions according to Jones due to the duress present. In his appraisal, McCann adjusted these three comparable sales for personal property, but made no adjustment for intangible assets.

Under McCann's income approach, McCann had reported a remaining waste capacity for the subject of 17,029,000 tons and Jones investigated that figure to find that it was not accurate in that it was based on a conversion factor for un-compacted gate yardage to in-place compacted garbage (an industry standard conversion of 3.3) whereas the subject experiences a conversion of 4.27. Jones based his conclusion on data received from the property owner such that Jones found the remaining capacity to be closer to 19 million tons than 17 million tons as used by McCann. Upon further examination, it was noted that Jones' report indicated the subject's remaining capacity as of January 1, 2003 was approximately 13.5 million tons, based upon a compaction rate of 1,400 pounds per cubic yard of airspace and applied to the remaining 19-plus million cubic yards. While McCann found the remaining economic life of the subject to be 17 years, Jones did not agree with that estimate because the remaining capacity figure was in error according to Jones.

Also, Jones found the NSWMA's tip fee study reported tipping fees in various parts of the country at the posted gate rate, also known as the spot rate (typically the highest rate charged at a landfill for a one-time user), but it did not take into account any kind of discounts that may be given; Jones testified that spot market is not the same as a market tipping fee. Jones' third-hand understanding is that this survey was done by telephone and did not include any deductions. In Jones' opinion, there was no relationship between the posted gate rate and the market rate because the market rate is the effective rate at the landfill and the survey figure is an un-compacted rate at the gate.

McCann had four comparable leases in his appraisal which Jones examined. None of the leases considered were signed prior to Subtitle D. Royalty rates dropped after its enactment; prior to Subtitle D, operators had very little costs at a landfill with little regulation upon closure. McCann's Lease #1 involved a property in California which was not operating as a landfill as of January 1, 2003. McCann's Lease #2 involved a property in Tennessee which Jones understood never opened as an operating landfill. Likewise, Lease #3 was not operating as of the valuation date at issue and Lease #4 closed in 1996.

Intervenor's counsel next cross-examined Jones. At the time he wrote his review report, Jones had not inspected the subject property; he inspected it during the week before he testified in this proceeding. Jones admitted that the certification attached

to his report indicating that he inspected the subject premises was an error. (Appellant's Rebuttal Ex. 1, certification) However, page 4 of the Jones report indicated he did not make an on-site inspection.

Jones understood McCann's assignment to be to value the underlying real property of the subject, which is the land and all the improvements thereon. Jones clarified in cross-examination that the taxable portion of the landfill is the underlying land. Jones acknowledged that he took two sentences from McCann's report regarding the Illinois definition of real property and placed those sentences in his report concerning market value. Jones has information files on leases and has several Illinois landfill leases in those files. Jones also acknowledged that the NSWMA survey does not address host fees.

Next, appellant recalled Christopher Peters for rebuttal testimony for topics not disclosed prior to hearing. Intervenor objected that the witness had not been disclosed for the purposes he would now be called for. The Hearing Officer reserved ruling on the objection pursuant to Section 1910.90(f)(2) of the Official Rules of the Property Tax Appeal Board. (VII, 1788 & 1796-97)

With the first question asked of the witness, intervenor objected that the testimony would not be appropriate rebuttal to intervenor's case-in-chief. The objection was sustained. Appellant's counsel then presented the testimony as an offer of proof. The Board finds upon reviewing the transcript that certain aspects of the offer of proof were admissible and proper rebuttal to the intervenor's case-in-chief as follows: with regard to how the NSWMA surveys are completed, Peters testified it is a verbal telephone survey inquiring as to the tipping fee at the landfill; Peters further testified he provided the posted gate rate of \$45 which includes all taxes, surcharges and host fees. (VII, 1803-04)

#### **BOARD'S DETERMINATION**

After hearing the testimony and reviewing the record, the Property Tax Appeal Board finds that it has jurisdiction over the parties and the subject matter of this appeal. The Board further finds that in accordance with recent case law, the appellant as a matter of law met the burden of going forward in this matter with evidence sufficient to challenge the assessment and the Board further finds that a reduction in the subject's assessment is warranted.

The appellant contends the assessment of the subject property is excessive and not reflective of its market value. When market value is the basis of the appeal the value of the property must be proved by a preponderance of the evidence. National City Bank of Michigan/Illinois v. Illinois Property Tax Appeal Board, 331 Ill. App. 3d 1038 (3<sup>rd</sup> Dist. 2002). The appellant submitted two separate appraisals estimating, under differing analyses, that the subject property consisting of three individual parcel numbers had a market value of \$10,660,000 and \$9,600,000, respectively, as of January 1, 2003. One appraisal consisted solely of the cost approach to value and one appraisal consisted solely of the income approach to value. The Ogle County Board of Review submitted a Restricted Use Report prepared by McCann estimating the subject property had a market value of \$25,900,000 as of January 1, 2003 along with additional documents. The intervenor submitted a Summary Appraisal Report prepared by McCann estimating that the subject property consisting of three individual parcel numbers had a market value of \$25,900,000 as of January 1, 2003.

a. Applicability of Omni decision

Following the hearing and while this matter was under advisement, the intervenor filed a motion for the Board to consider additional legal authority which arose in the interim from the Appellate Court of Illinois, First District. (See Cook County Board of Review v. Illinois Property Tax Appeal Board, 384 Ill. App. 3d 472, 894 N.E.2d 400 (1<sup>st</sup> Dist. 2008), *opinion supplemented on denial of reh'g* (9-8-08)) [hereinafter referred to as "Omni"]. From the court's opinion, the intervenor argues that neither of the appellant's appraisers contended that the subject property was "so unique as to not be salable." Moreover, since there presumably is a market for the subject property and since neither of the appellant's appraisers included the sales comparison approach, intervenor argues pursuant to the court's opinion appellant's evidence in this matter challenging market value without a sales comparison approach was insufficient as a matter of law.

Appellant objected to consideration of the court's opinion contending that neither the intervenor nor the board of review had argued inadequacy of the appellant's evidence as a matter of law during the previous proceedings, thus the argument was waived and the parties were now barred from making the argument or, alternatively, the instant case is distinguishable factually from the court's holding in various respects. As to waiver,

counsel reports closing argument remarks by both counsel for the intervenor and counsel for the board of review arguing the weight of the evidence presented, not that either appraiser presented by appellant used an improper methodology. Appellant further points out that at the conclusion of testimony of appellant's appraiser in the Omni case, the board of review moved for a directed finding arguing that the limited scope of the appraisal and reliance upon the income approach was "insufficient to establish market value." Omni, 384 Ill. App. 3d at 476. Appellant noted that intervenor never moved for a directed verdict in this matter. From this, appellant concludes that intervenor (and/or the board of review) waived the right to present such an argument citing Towne v. Town of Libertyville, 190 Ill. App. 3d 563, 568 (2<sup>nd</sup> Dist. 1989). Appellant contends intervenor had ample time and opportunity prior to hearing, during the hearing and in closing argument to challenge the taxpayer's appraisals as being prepared based on an alleged improper methodology. In further support of the proposition of waiver of the argument, appellant cites the cases of McLean v. Department of Revenue, 326 Ill. App. 3d 667, 670 (3<sup>rd</sup> Dist. 2001), People v. A Parcel of Property Commonly Known as 1945 North 31<sup>st</sup> Street, Decatur, Macon County, Illinois, 217 Ill. 2d 481, 503 (2005), and Thornton v. Garcini, 382 Ill. App. 3d 813, 888 (3<sup>rd</sup> Dist. 2008).

In the alternative, appellant contended the facts in the record distinguish this matter from Omni since all of the landfill sales in the record, including that of the subject, were under duress, involuntary, and non-arm's length. The sale of the subject and the sales used by McCann in his sales comparison approach were each the result of a divestiture order. Therefore, appellant contends there were no valid sales in the record to support a sales comparison approach and thus no sales comparison approach is required in the appellant's appraisals. Moreover, unlike the facts set forth in Omni, the appellant's appraisers did not assert there were no sales of landfills and then, in an income approach, developed a capitalization rate from sales of landfills; in Omni there was an obvious internal contradiction which was not true in this matter. Appellant argues that any sale in a sales comparison approach must involve a seller and a buyer desirous of selling and buying (respectively) and not compelled to sell and buy (respectively). If duress is involved, such a sale is not, by definition, a "market" sale according to appellant. Factually the instant case is also distinguishable because no appraiser contended that exclusion of the sales comparison approach was a critical problem in the valuation of the landfill. Lastly and in

accordance with the court's discussion in Omni, the appellant's appraisers justified in their respective appraisals and testimony why they considered the sales comparison approach and excluded it because they did not consider it reliable.

In reply, intervenors contended that there was nothing barring the Board from considering new case law and that intervenor cannot waive the issue of whether appellant met its burden of going forward pursuant to Sec. 1910.63(b) of the Official Rules of the Property Tax Appeal Board (86 Ill. Admin. Code Sec. 1910.63(b)). Intervenor argues that under this Rule, the Board must make a determination whether the contesting party has met its burden of going forward by providing substantive, documentary evidence or legal argument sufficient to challenge the correctness of the assessment of the subject property; if the Board determines the contesting party has not met its burden of going forward the appeal is to be dismissed. As argued in reply, the intervenor and the board of review cannot waive the contesting party's burden. As to the effort to distinguish the instant case from the court's decision in Omni, the intervenor argues that appellant never addressed the relevant legal question of whether the subject property was so unique as to not be salable or whether there was no actual or potential market for the subject property. According to intervenor, based on the record evidence that there is a market for the subject property and that it was in fact sold, under the Omni decision the appellant herein as a matter of law failed to meet its burden of going forward under Section 1910.63(b) of the Board's Rules and accordingly the Property Tax Appeal Board is duty-bound to dismiss the appeal.

The Board agrees with intervenor that a party cannot waive the issue of whether the burden of going forward has been met. As such, the Board grants in the intervenor's motion to consider the court's opinion in Omni. The court's original opinion broadly declared that "[w]here the correctness of the assessment turns on market value and there is evidence of a market for the subject property, a taxpayer's submission that excludes the sales comparison approach in assessing market value is insufficient as a matter of law." Omni, 384 Ill. App. 3d at 487. It is primarily this statement of the court by which intervenor seeks to have the Property Tax Appeal Board make a finding that appellant herein failed to meet the burden of going forward since neither of its appraisals included a sales comparison approach.

The Property Tax Appeal Board agrees that it is a rare instance where a property is not "salable." In seeking to distinguish the instant case from the facts in Omni, appellant argued essentially the merits of the appraisers' consideration of the sales comparison approach both in that no appraiser testified the lack of a sales comparison approach was a critical problem and in that the appellant's appraisers explained their reasons for not including the sales comparison approach due to the lack of reliability of available sales data. In contrast, the rebuttal record in Omni included testimony by the taxpayer's own review appraiser during cross-examination that it would be "a 'critical problem' to even venture a thought of wanting to omit the sales comparison approach [for the subject property]." Id. at 484. [Emphasis in opinion.]

As stated in the original opinion in Omni, the sales comparison approach "must be presented in a taxpayer appraisal to satisfy Illinois case law that market value be established to properly decide property tax assessment except where no market exists for the sale of the property." Id. at 486. In its supplemental opinion, the court wrote, "Our opinion simply holds that a *single* approach appraisal is inadequate as a matter of law to warrant a 'best approach' decision except when there is 'no evidence of an actual or potential market for the subject property.' [Citation omitted]." Id. at 487. [Emphasis in opinion.] On rehearing before the court, the Property Tax Appeal Board expressed a concern that "appraisers [must] now fully develop a sales comparison analysis regardless of its probative value." Id. at 487. The court firmly disagreed with the Board's concerns contending that typical practice is the inclusion of the sales comparison approach and exclusion of the approach is the exception. In the original opinion, the court stated:

It is also no answer to call the sales approach "problematical" in light of the "unique character" of the Omni building. Being problematical says nothing more than it might be difficult to do.

Id. at 485. To the foregoing statement, the court added this footnote:

It was not demonstrated that employing the sales comparison approach would have resulted in *unreliable* estimates of the fair market value of the Omni property. [Emphasis in opinion.]

Id. at 485. Appellant herein contends that the evidence in this record does establish that employing the sales comparison approach would have resulted in an unreliable estimate of the fair market value of the landfill. As argued by appellant even McCann, who presented a sales comparison approach, in reconciliation chose to rely upon his income approach when opining an estimate of the landfill's fair market value.

Upon rehearing and in its supplemental opinion, the First District Appellate Court in Omni declared that an appraisal excluding the sales comparison approach had to be justified with more than unsupported conclusions that adjustments would be too subjective and that the sales comparison approach could not be employed because there were no sales of properties similar to the subject. Id. at 488. The court further noted in Omni that of the three appraisers who presented testimony, two agreed the sales comparison approach was appropriate for the subject property; only the taxpayer's principal appraiser relied solely on the income approach and did so "without any showing that either of the other two approaches would provide results that were not 'meaningful.'" Id. The First District Appellate Court concluded that in reliance upon case law and the Administrative Code, matters before the Property Tax Appeal Board "require a showing be made before a single approach appraisal, which excludes the sales comparison approach, can be relied upon as the 'best evidence of market value.'" Id. Thus, based upon this decision, the Property Tax Appeal Board will examine the instant record to ascertain whether a showing has been made to justify a single approach appraisal which excludes the sales comparison approach.

There is no doubt on this record that landfills are sold from time to time, however, the question becomes whether the data reflects comparable sales. McCann examined not only the sale of the subject, but also three additional sales that were part of the same divestiture order in his sales comparison approach to value; McCann's sale price data was obtained from accountants where prices were allocated for individual properties. The sales that were presented by McCann on behalf of the intervenor reflected complex transactions in most instances and McCann found in reconciling his sales comparison and income approaches to value that it was more appropriate in his learned opinion to rely upon the income approach to value in this matter. Thus, McCann's sales comparison approach became at most a check on his income approach to value, but was not otherwise utilized in arriving at a final opinion of value. Pomykacz noted that sales involving litigation need further investigation. Jones noted an

allocated sale price presented by accountants was not a good source for sale data without further investigation. See Board of Review of the County of Alexander v. Property Tax Appeal Board, 304 Ill. App. 3d 535, 540 (5<sup>th</sup> Dist. 1999).

As outlined by the court in the Omni decision, the Property Tax Appeal Board finds that this record justifies the exclusion of the sales comparison approach in that the appraisers found that reliable data could not be derived from the sale of the subject or from the sales of reasonably comparable property. As Kelly noted, sales of landfills include going concern value which requires adjustment and there is also the question of the comparability of sales. Main similarly noted that sales of comparable properties include going concern value which requires questionable adjustments. In summary, two appraisal experts concluded that the market approach was not useful with regard to the subject landfill primarily because of the numerous adjustments necessary to sales data. While McCann did a sales comparison approach, all three sales considered were as a result of the same divestiture order that lead to the sale of the subject. To perform the sales comparison approach, McCann applied a number of adjustments to arrive at an adjusted per ton sale price. As was asserted by the intervenor's review appraiser Pomykacz, the purpose specified in an appraisal is an important determinant in selecting which approaches to value apply and also the available supply of market data is a consideration for the appraiser. As to use of the sales comparison approach for a landfill property, the review appraisal report prepared by Jones outlined the numerous items for which adjustments in sales prices should be made and also stated "there is a great deal of business enterprise value and intangible asset value in a landfill operation which are part of the sale price and are very difficult, if not impossible, to isolate and value individually." (Appellant's Rebuttal Ex. 1, p. 12-13)

The Fourth District Appellate Court has previously found it appropriate for the Property Tax Appeal Board to determine which expert appraiser's approach to value was most persuasive and to rely on that. Board of Review of Macon County v. Property Tax Appeal Board, 295 Ill. App. 3d 242 (4<sup>th</sup> Dist. 1998). The Property Tax Appeal Board acknowledges that the sales comparison approach is a preferred valuation method in many instances,<sup>21</sup> however, as established on this record there are circumstances where a property is so unique and/or where the sales data that

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<sup>21</sup> Where there is evidence of *comparable* sales, the market approach should be used. Chrysler, supra; Willow Hill Grain, supra; County of Alexander, supra.

are available involve highly complex transactions of multiple properties, business value and/or intangible assets that it is nearly impossible to decipher the purchase price of a single property with any level of certainty. See Chrysler Corp. v. State Property Tax Appeal Board, 69 Ill. App. 3d 207 (2<sup>nd</sup> Dist. 1979).

The Property Tax Appeal Board finds on this record that a showing has been made which justifies a single approach appraisal excluding the sales comparison approach can be relied upon as the 'best evidence of market value' in accordance with the opinion of the First District Appellate Court in Omni. Thus, the Property Tax Appeal Board finds that the appellant's submission of appraisals relying upon the cost and income approaches to value, respectively, sufficiently challenged the correctness of the assessment of the subject property (86 Ill. Admin. Code Sec. 1910.63(b)) and the underlying assessment without the inclusion of a sales comparison approach given the available sales data with regard to the valuation of a landfill where the sales transactions were typically comprised of a portfolio of assets including the landfill itself.

b. "Correct assessment of property ... subject of an appeal"

The Property Tax Code authorizes the Property Tax Appeal Board to determine the correct assessment of "property which is the subject of an appeal." (35 ILCS 200/16-180) Furthermore, a taxpayer dissatisfied with the decision of a board of review as it pertains to the assessment of property may within 30 days after the date of written notice of the decision of the board of review file an appeal with the Property Tax Appeal Board. (35 ILCS 200/16-160; see also 86 Ill. Admin. Code Sec. 1910.30(a)) As set forth in the Official Rules of the Property Tax Appeal Board, two copies of the written notice of the decision of the board of review must be filed with the appeal petition. (86 Ill. Admin. Code Sec. 1910.30(e)) Furthermore, the appeal shall describe the particular property including the PIN or plate number, if any, assigned to the subject parcel by the county. (86 Ill. Admin. Code Sec. 1910.30(c))

There is no dispute on the record that there is only one parcel under appeal in this matter and that, although appeals were filed on the other two parcels comprising the landfill before the Ogle County Board of Review, no final decisions were issued by the Ogle County Board of Review on the appeals of those other two parcels. (See 35 ILCS 200/16-55 - "Complaints shall be

considered by townships or taxing districts until all complaints have been heard and passed upon by the board." [Emphasis added.]) The parcel under appeal has an assessment of \$8,633,000 reflecting a market value of \$25,995,182 using the 2003 three-year median level of assessments for Ogle County of 33.21%.

Illinois' system of taxing real property is founded on the Property Tax Code. (35 ILCS 200/1-1 et seq.) Section 1-130 of the Property Tax Code (hereinafter the Code) defines "real property" in pertinent part as:

The land itself, with all things contained therein, and also all buildings, structures and improvements, and other permanent fixtures thereon. . . and all rights and privileges belonging or pertaining thereto, except where otherwise specified by this Code. (35 ILCS 200/1-130).

The Ogle County Board of Review through the testimony of the Supervisor of Assessments acknowledged that its practice with regard to the subject property was to place the value "of the landfill" on merely one parcel number (which is the subject of this appeal), rather than to assess the property in accordance with Sections 9-155, 9-160 and 9-180 as may be appropriate from time to time to reflect the value of each parcel and its respective improvements.<sup>22</sup> Despite the provisions of the

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<sup>22</sup> As a general proposition, except in counties with more than 200,000 inhabitants that classify property for taxation purposes, each tract or lot of property is to be valued at 33 1/3% of its fair cash value. 35 ILCS 200/9-145. As stated by the Illinois Supreme Court in Springfield Marine Bank v. Property Tax Appeal Board, 44 Ill. 2d 428, 430 (1970), "[e]ach tract or lot of real property shall be valued at its fair cash value, estimated at the price it would bring at a fair, voluntary sale." Furthermore, the Property Tax Code specifies valuation is to be "the value of each property listed for taxation as of January 1 of that year, or as provided in Section 9-180, and assess the property at 33 1/3% of its fair cash value" (35 ILCS 200/9-155). Moreover, Section 9-160 of the Property Tax Code (35 ILCS 200/9-160) provides in pertinent part:

Valuation in years other than general assessment years. On or before June 1 in each year other than the general assessment year, in all counties with less than 3,000,000 inhabitants, . . . , the assessor shall list and assess all property which becomes taxable and which is not upon the general assessment, and also make and return a list of all new or added buildings, structures or other improvements of any kind, the value of which had not been previously added to or included in the valuation of the property on which such improvements have been made, specifying the property on which each of the improvements has been made, the

Property Tax Code, the Property Tax Appeal Board using its equitable jurisdiction will recognize the past practice of the Ogle County Board of review in assessing primarily the subject parcel with the "value of the landfill" despite the fact that the landfill was actually spread over three separate parcel numbers. The Property Tax Appeal Board further recognizes that this practice of the Ogle County Board of Review was not in conformance with the terms of the Property Tax Code<sup>23</sup>, however, equity and the weight of the evidence mandate accepting this practice lest there be an unsubstantiated windfall reduction in the assessment to reflect the proportionate value of the only parcel on appeal while the Board simultaneously does not have jurisdiction to make upward adjustments to the assessments of the other two parcels comprising the landfill.

c. The appraisal evidence

To reiterate, the appellant and intervenor submitted narrative appraisals to support their respective positions. Appellant's appraiser Main estimated the subject property had a market value of \$9,600,000 as of January 1, 2003 and appellant's appraiser Kelly estimated the subject property had a market value of \$10,660,000 as of January 1, 2003. The intervenor submitted an appraisal estimating the subject property had a market value of \$25,900,000 as of January 1, 2003. Additionally, each appraisal identified the property being appraised as being composed of three parcels with the parcel identification numbers (PINs) of 11-02-100-002, 11-02-300-003 and 11-02-400-001. However, only

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kind of improvement and the value which, in his or her opinion, has been added to the property by the improvements. [Emphasis added.] (35 ILCS 200/9-160)

Section 9-180 provides further support for the proposition that valuation of property is specific to the tract or lot identified for assessment purposes (35 ILCS 200/9-180):

The owner of property on January 1 also shall be liable, on a proportionate basis, for the increased taxes occasioned by the construction of new or added buildings, structures or other improvements on the property from the date when the occupancy permit was issued or from the date the new or added improvement was inhabitable and fit for occupancy or for intended customary use to December 31 of that year. (35 ILCS 200/9-180)

<sup>23</sup> The Ogle County Board of Review essentially admitted the practice was not in compliance with the Code and reversed their erroneous practice when in 2006 it revised the assessments of the three parcels comprising the landfill and accorded each one a valuation believed to be reflective of the valuation of the individual parcels.

PIN 11-02-400-001 was properly appealed to the Property Tax Appeal Board from a decision of the Ogle County Board of Review.

While none of the appraisers relied upon the sale price of the subject property in determining its estimated market value, each appraiser examined the data they could gather based on USPAP standards since the sale of the subject occurred in March 2000 and the valuation date was within three years of that sale date. Based on the evidence presented, the Property Tax Appeal Board questions whether or not the March 2000 sale price of the subject landfill or any other such similar sale associated with a court's divestiture order was a true arm's-length transaction. The appraisers had divergent views as to whether the sale of the subject was made in a commercially reasonable manner with advertising over a reasonable period of time so that the sale price could be said to reflect fair market value. Kelly characterized the divestiture order as compulsion upon the seller. Main called the order duress in that the owner was forced to sell and there was limited exposure time. The compulsion created by the Department of Justice order which resulted in these sales also leads the Property Tax Appeal Board to find that such divestiture sales without other supporting evidence do not meet the definition of an arm's-length transaction. Furthermore, given the lack of substantiated data regarding the allocated sale price, the Board finds that it cannot rely upon the purported sale price to ascertain the fair market value of the subject property despite the fact that it occurred within three years of the date of valuation and could otherwise presumably be practically conclusive of the subject's fair cash value.

The Board also finds the sales comparison approach performed by McCann lacks reliability because the adjustments made by McCann were vague at best. Moreover, the sales considered by McCann suffer from the same compulsion as the sale of the subject, namely, the divestiture order. As such, the Property Tax Appeal Board finds the entire sales comparison analysis performed by McCann is questionable and unreliable. Thus, in conclusion, the Property Tax Appeal Board finds that it has sufficient reason to doubt the reliability of the market approach to value in this matter. Although McCann did not ultimately rely upon his sales comparison approach in his final reconciliation of the subject's fair market value estimate, the Board finds the data considered by McCann lacks credibility or reliability and therefore the Board finds McCann's sales comparison approach does not support the subject property's 2003 assessed value.

Given the foregoing, the Board concludes that it should look to other elements, including the cost approach and the income approach to value based on the market rent/royalty approach, in determining the correct assessment of the subject property.

Neither party disputes that the highest and best use of the subject property is as a landfill site. A purchaser of the property would be unlikely to use the land as anything other than a site for dumping waste. As a result, the value of the land appears to lie in its ability to receive waste over the remaining life of the landfill.

As a landfill, the nature of the property is such that the income approach utilizing a market rent/royalty analysis reflects the property's chief source of value; the net income from receiving waste reflects the property's chief source of value. Through the market rent/royalty method of analysis, the appraiser factors out the net income attributable to the labor and skill of the owner. The record before the Board suggests that a landfill is a unique type of property in this respect. See also Waste Management of Wisconsin, Inc. v. Kenosha County Board of Review, 184 Wis. 2d 541, 516 N.W.2d 695 (1994).

Of the two appraisals using the income approach, the Board finds the appraisal and testimony provided by Main is better supported and more credible than McCann's appraisal and testimony. With respect to the income approach to value, the appraisers were in complete agreement in the use of the market rent/royalty method. Moreover, within that method, the appraisers were virtually in agreement on the annual waste volume for the subject, although one used a stable figure and the other provided for a small rate of annual growth, and the appraisers both agreed there was no miscellaneous income to be accounted for. Within the application of the market rent/royalty method and based purely on their respective data, the appraisers differed substantially in their effective tipping fees, remaining capacity and remaining economic life of the subject, and also in their market rent/royalty rates, miscellaneous administrative expenses, and discount rates.

The effective tipping fees ascertained by Main at \$13.50 per ton and by McCann at \$33.00 per ton were dramatically different which in great part explains their highly varying value conclusions although the increases over time in the tipping fees were not substantially different between the appraisers. Main reported historical tip fees ranging from \$35 to \$40 per ton for nearby long-haul disposal facilities, but then adjusted this

amount to account for transfer station operating costs and transportation costs in order to arrive at a net tip fee including surcharges, taxes and host fees of about \$17 to \$20 per ton. This tipping fee conclusion is further supported by the testimony of Peters regarding the typical range of tipping fees for the facility of \$16 to \$20 per ton. In contrast, McCann derived his tip fee from the 2002 IEPA annual landfill report (Intervenor's Ex. 5) by utilizing both Region 1 and Region 2 landfill tipping fees finding an average fee collected of \$44.95 per ton (Intervenor's Ex. 1, p. 43) and McCann further compared this data with data from a survey of Midwest area landfills reflecting a fee of \$34.14 per ton (Id., p. 44). Peters testified that the amount reported to the IEPA is the "gate rate" or the highest rate paid by users who pull up to the landfill. In addition, the evidence indicated that the survey data again reflected the spot market rate, one of the highest rates charged to users.

The Board finds the data considered and adjusted by Main to be more reliable than the data gathered and considered by McCann. First, McCann used data published by the IEPA in its annual solid waste landfill capacity report for 2002. The Illinois Solid Waste Management Act (415 ILCS 20/4) mandates that IEPA produce this document annually "regarding the projected disposal capacity available for solid waste in sanitary landfills subject to the fee requirements in Section 22.15 of the Environmental Protection Act. Such reports shall present the data on an appropriate regional basis. With respect to such sanitary landfill facilities, the report shall include an assessment of the life expectancy of each site." Based upon the statutory mandate, the IEPA report is focused primarily on capacity issues and secondarily on fees mandated by a provision of the Environmental Protection Act (415 ILCS 5). (See also 35 Ill. Admin. Code Sec. 858.207(a)(5)). Thus, while the IEPA report includes "tipping fee" data, there was nothing presented on this record to reflect the accuracy of that information and/or whether the fee was gross or net of surcharges, taxes and other pass-through amounts that a landfill may collect under various regulations and/or what the amount truly represented. The regulation calls for reporting "the fee rate applicable under Section 22.15 and Section 22.44 of the [Environmental Protection] Act [415 ILCS 5]." Likewise, McCann's cross-check on the IEPA data with Midwest survey data does not bolster the reliability of the data. The Midwest survey reflected a spot market price which would be the higher or highest amount paid by a given customer. This was further confirmed by Peters in rebuttal that he reports the posted gate rate of \$45 per ton in

response to the survey. Based on the entirety of the evidence and testimony presented, the Board finds that Main's selection of an appropriate tip fee was better researched, supported and explained on the record than that of McCann.

While the differences in annual waste volume utilized by Main and McCann were fairly similar, a stable versus a slightly growing annual volume, the somewhat more substantial difference between the appraisers concerned remaining capacity and therefore also remaining economic life of the facility. Both appraisers agreed on the starting point: the subject as of the date of valuation had been permitted for 175 acres and a total capacity of 25,740,745 cubic yards of airspace.

Main determined based on an engineering report (copy of which was included in the Kelly appraisal) that the subject, having filled thus far 6,111,200 cubic yards, had a remaining capacity of 19,629,545 cubic yards of remaining airspace as of January 1, 2003. Main then converted the airspace into remaining capacity in tons based on the experience of the subject property to compact about 1,400 pounds of waste into one cubic yard resulting in a remaining capacity for the subject of 13,740,000 tons as of January 1, 2003. These figures resulted in a conclusion that the landfill had a remaining economic life of 13 years as of the date of valuation (see Appellant Ex. 1A, p. 41).

In contrast, although McCann had access to the engineering report from the Kelly appraisal, McCann again utilized the IEPA annual report previously referenced. For the subject the IEPA reported 17,029,000 tons of remaining capacity as of January 1, 2003. Evidence established that the IEPA calculation of remaining tonnage capacity assumes 3.3 cubic gate yards convert to one ton of in-place waste. The evidence revealed that the IEPA conversion ratio was an industry standard that had not been amended since the 1990's, but that individual properties have varying rates of compaction which would impact the conversion ratio. The IEPA report at page 4 (Intervenor's Ex. 5) specified that Illinois landfills report the quantities of waste received each year in "gate cubic yards"; to aid the reader, the IEPA has "divided gate cubic yards by an industry standard of 3.3 to achieve approximate tons." Id. Based upon his calculations of this IEPA data, McCann assumed a remaining economic life of the subject property of 17 years.

Based on the foregoing, the Property Tax Appeal Board finds that the best evidence in the record as to the remaining capacity and therefore the remaining life of the subject landfill as of

January 1, 2003 was the data gathered and presented by Main. The IEPA report states at page 4 that the conversion utilized is as a visual aid and an effort to provide an approximate ton calculation. The witnesses agreed the IEPA conversion rate has not changed since the 1990's, even though operators of landfills have continually become more adept at compacting waste. Therefore, the best evidence in the record is the data derived from engineering reports performed of the subject landfill along with compaction ratios achieved at the subject landfill which testimony indicated were not out of the ordinary.

Next, each appraiser derived a market rent/royalty rate from data gathered from leases. Each appraiser was variously criticized by review appraisers for the leases chosen and/or the data included or excluded in the respective appraisal reports. Main considered nine lease comparables which he summarized on page 31 of his report and found a range of royalty rates ranging from 5% to 15%; from this data he concluded a royalty rate of 12% for the subject. McCann reported four leases in his appraisal report with royalty rates ranging from 10% to 18%; from this data he concluded a royalty rate of 17.5% for the subject. While Main was sharply criticized for the summary data presented on page 31 of his report, McCann was criticized for using leases of properties that were pre-Subtitle D regulated and all of which were from landfills that were closed by 2003. In weighing the data presented by the two appraisers, the Board finds the data presented by Main to be more credible and reliable with regard to this post-Subtitle D landfill at issue in this matter.

Next, each appraiser considered the miscellaneous administrative expenses that the owner would incur in managing the lease. Main found the expenses to be a nominal 2% of effective gross income per year. McCann reported at page 52 of his appraisal that "a minimum of 1% of royalty income would reflect the cost to the owner for periodic monthly auditing, as well as legal work, management and miscellaneous expense." However, McCann went on to say "if an owner/lessor was capable of performing these tasks unassisted, a 5% deduction would be viewed as management expense and deductible from gross royalty income." Without further explanation, McCann chose to apply the higher deduction of 5%. The Board finds that McCann failed to substantiate the selected expense figure after initially reporting a more nominal amount of 1% as being appropriate. Based on this record, the Board finds that Main's selection of a 2% expense ratio was more credible and conforms more to McCann's initial conclusion of an appropriate expense ratio.

Lastly, in the income approach each appraiser selected an applicable discount rate. On behalf of appellant, appraiser Main noted a landfill to be a high risk project and considered survey data from publications and the band of investment technique in finding a range of discount rates from 11% to 35%; Main concluded a rate of 17% for the subject. On behalf of the intervenor, appraiser McCann reported data ranging from 20% to 25% and for the subject chose a discount rate of 22.5%. While the rates are not dramatically different, the Board finds that Main has better discussed and supported the chosen rate than did McCann in his report and testimony.

Considering just the two appraisals presenting an income approach to value, the Property Tax Appeal Board finds for the reasons outlined above that Main presented the more competent, professional and logical testimony in support of his appraisal methodology, data used, and final value conclusion over the presentation of McCann. Although there were concerns raised about the terms of several of the leases chosen by Main involving upfront payments, the Board finds that in light of entire report and data gathered, such matters raised do not overcome or void his final value conclusion. The Board finds Main's appraisal to be more credible and a better indicator of the subject's fair market value using the income approach than the appraisal report prepared by McCann. Therefore, the Board has given McCann's final value conclusion little weight in the Board's analysis.

In further support of the value conclusion made by Main, the Board has before it the cost approach value conclusion prepared by Kelly finding an estimated fair market value for the subject as of January 1, 2003 of \$10,660,000. The Board finds that in this matter the cost approach provides an interesting contrast for determining the value of the site improvements on the subject property as of the date of value. In other words, in the income approach both appraisers were extracting the value the property provides in generating revenue in order to arrive at a value of the property. In the income approach, the appraisers considered the entire permitted 175 acres and the entire permitted airspace capacity, less the amount already filled in their respective analyses. In the cost approach, Kelly examined only the area developed with cells prepared to accept waste consisting of 76.59 acres of the total 175 permitted acres and the remaining airspace capacity of that developed portion of the permitted 175 acres. In other words, Kelly engaged in a different approach to value reflecting what

was present at the landfill site as of January 1, 2003. While the courts prefer other valuation methods over the cost approach in most instances, in this matter the Property Tax Appeal Board finds that Kelly's cost approach lends support and credence to the income approach value finding made by Main of \$9,600,000.

In light of the credible and well-explained value conclusions made by Kelly of \$10,660,000 and by Main of \$9,600,000, the Property Tax Appeal Board finds the subject property to have an estimated fair market value as of January 1, 2003 of \$10,000,000.

Having concluded the subject parcel's assessment as established by the board of review is incorrect and since fair market value has been determined, the 2003 three-year median level of assessments for Ogle County of 33.21% shall apply.

This is a final administrative decision of the Property Tax Appeal Board which is subject to review in the Circuit Court or Appellate Court under the provisions of the Administrative Review Law (735 ILCS 5/3-101 et seq.) and section 16-195 of the Property Tax Code.

*Ronald R. Crit*

Chairman

*K. L. Fan*

Member

*Richard A. Huff*

Member

*Harold H. Lewis*

Member

Member

DISSENTING:

C E R T I F I C A T I O N

As Clerk of the Illinois Property Tax Appeal Board and the keeper of the Records thereof, I do hereby certify that the foregoing is a true, full and complete Final Administrative Decision of the Illinois Property Tax Appeal Board issued this date in the above entitled appeal, now of record in this said office.

Date: December 23, 2009

*Allen Castrovillari*

Clerk of the Property Tax Appeal Board

**IMPORTANT NOTICE**

Section 16-185 of the Property Tax Code provides in part:

"If the Property Tax Appeal Board renders a decision lowering the assessment of a particular parcel after the deadline for filing complaints with the Board of Review or after adjournment of the session of the Board of Review at which assessments for the subsequent year are being considered, the taxpayer may, within 30 days after the date of written notice of the Property Tax Appeal Board's decision, appeal the assessment for the subsequent year directly to the Property Tax Appeal Board."

In order to comply with the above provision, YOU MUST FILE A PETITION AND EVIDENCE WITH THE PROPERTY TAX APPEAL BOARD WITHIN 30 DAYS OF THE DATE OF THE ENCLOSED DECISION IN ORDER TO APPEAL THE ASSESSMENT OF THE PROPERTY FOR THE SUBSEQUENT YEAR.

Based upon the issuance of a lowered assessment by the Property Tax Appeal Board, the refund of paid property taxes is the responsibility of your County Treasurer. Please contact that office with any questions you may have regarding the refund of paid property taxes.