

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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FOX MORAIN, LLC)
)
Petitioner,)
)
v.)
)
UNITED CITY OF YORKVILLE, CITY)
COUNCIL)
)
Respondent.)

STATE OF ILLINOIS
Pollution Control Board

PCB No. 07-146
(Pollution Control Facility Siting
Appeal)

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on this 23rd day of August, 2007, Leo P. Dombrowski, one of the attorneys for Respondent, United City of Yorkville, filed the original and nine (9) copies of the attached **United City of Yorkville's Motion for a Protective Order Limiting Discovery; United City of Yorkville's Memorandum in Support of Its Motion for a Protective Order Limiting Discovery; and United City of Yorkville's Motion for Stay**, with the Clerk of the Illinois Pollution Control Board, a copy of which is herewith served upon you.

Respectfully submitted,

UNITED CITY OF YORKVILLE

By: Leo P. Dombrowski

One of their Attorneys

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Fox Moraine, LLC v. United City of Yorkville
PCB No. 07-146

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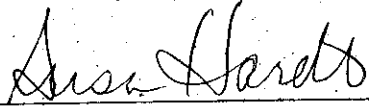
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CERTIFICATE OF SERVICE

I, Susan Hardt, a non-attorney, certify that I served a copy of the foregoing **Notice of Filing and United City of Yorkville's Motion for a Protective Order Limiting Discovery; United City of Yorkville's Memorandum in Support of Its Motion for a Protective Order Limiting Discovery; and United City of Yorkville's Motion for Stay** to the Hearing Officer and all Counsel of Record listed on the attached Service list, by sending it via Electronic Mail and First Class Mail on August 23, 2007, before 5:00 p.m.



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

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COUNCIL)

Respondent.)

PCB No. 07-146
(Pollution Control Facility Siting
Appeal)

MOTION FOR PROTECTIVE ORDER LIMITING DISCOVERY

Respondent, UNITED CITY OF YORKVILLE, CITY COUNCIL ("Yorkville"), by and through its attorneys and pursuant to 35 Ill. Admin. Code § 101.616(d), moves the Hearing Officer for a protective order limiting the discovery sought by FOX MORaine, LLC ("Petitioner") from members of the Yorkville City Council. In support of its motion, Yorkville states as follows:

1. In this landfill siting appeal, and as more fully explained in Yorkville's accompanying Memorandum in Support of Yorkville's Motion for a Protective Order, Petitioner generally alleges that Yorkville conducted an unfair hearing on Petitioner's landfill application and that the members of the Yorkville City Council were biased against Petitioner and prejudged its landfill application.

2. Although Petitioner had ample opportunity to ascertain whether members of the City Council indicated any bias or prejudice against it, and to raise those issues at the local siting stage, Petitioner sought to disqualify only two Yorkville Council members, Aldermen Burd and Spears.

3. Because it raised allegations of bias and unfairness against only two Council members at the local siting stage, Petitioner has waived any such allegations against the remaining seven Council members.

4. Despite waiving all bias claims not previously raised, Petitioner now seeks extensive discovery from all nine Yorkville City Council members regarding the bias and unfairness allegations raised in its Petition for Review.

5. Because Petitioner has waived the issues on which it seeks discovery other than those raised in its Motion to Disqualify, Yorkville should not have to respond to Petitioner's wide-ranging interrogatories and document requests.

WHEREFORE, Respondent, UNITED CITY OF YORKVILLE, CITY COUNCIL prays for a protective order limiting Petitioner's discovery to those issues raised in Petitioner's Motion to Disqualify.

UNITED CITY OF YORKVILLE, CITY COUNCIL

By: Leo P. Dombrowski
One of Its Attorneys

Dated: August 23, 2007

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**MEMORANDUM OF LAW IN SUPPORT OF YORKVILLE'S MOTION
FOR A PROTECTIVE ORDER LIMITING DISCOVERY**

I. INTRODUCTION

A landfill applicant waives allegations of unfairness, bias, or predisposition if it does not raise them at the local siting stage. In this appeal, without alleging a single fact, Fox Moraine ("Petitioner") alleges that the United City of Yorkville ("Yorkville") conducted an unfair hearing on Petitioner's landfill application, that "various members" of the Yorkville City Council were biased against Petitioner and prejudged its application, and that Yorkville's denial of the application was based on matters outside the record. (Petition for Review ¶ 5.A-N, attached as Exh. A.)

The public hearing process on Petitioner's application was lengthy and involved. Yorkville held public hearings on 23 days regarding Petitioner's application to site a landfill, which resulted in over 100 hours of testimony and thousands of pages of related exhibits from a wide variety of witnesses, including witnesses for the applicant, opposition groups, and members of the public. Additionally, thousands of pages of post-hearing comments were submitted, including more than 1,300 pages of post-hearing comments filed by Petitioner alone.

The public hearing process also fell in the middle of campaigns for the Yorkville City Council, which elections were held on April 17, 2007. A new mayor and three new City Council members were elected. In short, Petitioner and the public both provided and received a torrent of information regarding the proposed landfill siting. If City Council members displayed any indication of bias or predisposition, Petitioner had ample opportunity to ascertain this and raise it during the local siting process.

During the public hearing, Petitioner did move to disqualify two Yorkville Council members (but no others), alleging bias, predisposition and unfairness. (*See* Motion to Disqualify at pp. 2-3, attached as Exh. B.) Petitioner acknowledged that it would waive these issues if it did not raise them at the local siting stage:

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

(Transcript of 3/7/07 Hearing at 15:12-16:1, attached as Exh. C.) Petitioner made no other objections regarding unfairness, bias or prejudice of any other Council members at the public hearing, during the post-hearing period, or anywhere else in the record.

Despite admitting that it has waived all bias claims not previously raised, Petitioner now seeks extensive discovery from all nine members of the City Council in an obvious attempt to fish for information to prop up its unsupported allegations. (*See* Petitioner's Interrogatories and Document Requests, attached as Exhs. D and E, respectively.) Because Petitioner has waived the issues on which it seeks discovery other

than those raised in its Motion to Disqualify, Yorkville should not have to respond to Petitioner's wide-ranging interrogatories and document requests.

II. BY FAILING TO OBJECT BELOW, PETITIONER HAS WAIVED ANY RIGHT TO CONDUCT DISCOVERY.

The law regarding waiver of unfairness and bias allegations in landfill siting proceedings is well-settled. Failure to raise a claim of disqualifying bias or partiality in the original proceeding results in waiver of such claims. "To allow a party to first seek a ruling in a matter and, upon obtaining an unfavorable one, permit him to assert a claim of bias would be improper." *E & E Hauling, Inc. v. Pollution Control Bd.*, 107 Ill. 2d 33, 38-9 (1985); *see also Waste Management of Illinois, Inc. v. Pollution Control Bd.*, 175 Ill. App. 3d 1023, 1039 (2nd Dist. 1988) ("claim of bias or prejudice on the part of a member of an administrative agency or the judiciary must be asserted promptly after knowledge of the alleged disqualification."); *A.R.F. Landfill, Inc. v. Pollution Control Bd.*, 174 Ill. App. 3d 82, 88-89 (2nd Dist. 1988) (landfill applicant waived claims of bias or prejudice of county board members when it withheld claims of bias until its appeal of unfavorable decision to PCB); *Land and Lakes Co. v. Village of Romeoville*, PCB No. 92-25 at *16, 1992 Ill. ENV LEXIS 424 (Jun 4, 1992) (where applicant claimed trustees' campaign literature showed bias against landfill siting, Board found that applicant failed "to explain why it was unable to ascertain information relating to the alleged bias which appears to have been available" prior to Village's vote on application).

Waste Management is particularly applicable. There, the landfill applicant contended that eight members of the county board were biased and should have been *disqualified from voting on its application*. However, the applicant's motion to disqualify at the local siting stage alleged only four members were biased. The court held that the

applicant had waived any claims of bias or prejudice as to the remaining four members and those claims would not be considered. 175 Ill. App. 3d at 1039-40.

Nor does Illinois law or the Administrative Code permit the use of discovery to fish for information to support waived claims. The Petition for Review and the record are devoid of factual allegations of any bias or prejudice by the seven Council members. Petitioner did not seek to disqualify. Petitioner fails to provide any justification to permit the use of its onerous discovery requests with respect to those seven Council members.¹ In essence, Petitioner has filed a bare-bones appeal and now wishes to use the discovery process in an attempt to put some meat on those bones.

In other cases involving unsubstantiated requests for discovery, the Illinois Appellate Court has upheld the decision of the Pollution Control Board limiting discovery. *See, e.g., Joliet Sand & Gravel Co. v. Pollution Control Bd.*, 163 Ill. App. 3d 830, 835 (3rd Dist. 1987) (Hearing Officer and Board properly determined numerous discovery requests and attempts to depose witnesses were excessive); *see also Snoddy v. Teepak, Inc.*, 198 Ill. App. 3d 966, 969 (1st Dist. 1990) (trial court properly denied motion to compel requested discovery because requests were “merely a ‘fishing expedition,’ which would have been conducted with the hope of finding something relevant.”)

Petitioner’s discovery requests to the unchallenged seven Council members are an unreasonably burdensome and unduly onerous attempt to uncover some evidence perhaps relevant to its unsupported claims of unfairness, bias and prejudice. Allowing such

¹ By filing this Motion, Yorkville does not waive any objections as to any discovery sought by Petitioner of Council members Burd and Spears. Petitioner’s Motion to Disqualify alleges few facts and is almost as unsupported as its Petition for Review. Petitioner’s discovery directed to Burd and Spears should be limited to those issues raised in its Motion to Disqualify.

requests would contravene the purpose of discovery under Illinois law. Rather, it would act to harass and impose unreasonable demands upon Yorkville.

As noted above, Petitioner acknowledged it risked waiver if it did not raise unfairness allegations at the local siting stage. It should now be forced to live with its decision to seek the disqualification of only two members and not challenge the other seven. The Hearing Officer should use the authority granted him by 35 Ill. Admin. Code § 101.616(d) and enter a protective order limiting Petitioner's discovery to those issues raised in Petitioner's Motion to Disqualify.

Respectfully submitted,

UNITED CITY OF YORKVILLE, CITY COUNCIL

By: Leo P. Dombrowski
One of Its Attorneys

Dated: August 23, 2007

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**RESPONDENT'S MOTION SEEKING STAY OF PETITIONER'S DISCOVERY
UNTIL HEARING OFFICER HAS RULED ON RESPONDENT'S MOTION
FOR A PROTECTIVE ORDER**

Respondent, UNITED CITY OF YORKVILLE, CITY COUNCIL ("Yorkville"),
by and through its attorneys and pursuant to 35 Ill. Admin. Code § 101.514, moves the
Board for an Order Staying Petitioner's Discovery until seven days after the Hearing
Officer has ruled on Respondent's Motion for a Protective Order. In support of its
motion, Yorkville states as follows:

1. As explained in Yorkville's Motion for a Protective Order Limiting
Petitioner's Discovery and accompanying Memorandum in Support, Petitioner seeks
extensive discovery from all nine members of the Yorkville City Council regarding
Petitioner's allegations of bias, prejudice, and lack of fundamental fairness.¹

2. Yorkville has moved for a protective order limiting Petitioner's discovery
because Petitioner raised allegations of bias and unfairness against only two Council

¹ Instead of attaching its Motion for a Protective Order and Memorandum in Support to this
Motion, Yorkville has filed an original and nine copies of those two documents, instead of the
required original and four, so that the Board has enough copies to distribute to the Board
members and staff.

members at the local siting stage. Consequently, Petitioner has waived any such allegations against the remaining seven Council members.

3. Yorkville should not be forced to expend the time and resources in preparing responses to wide-ranging discovery requests on issues that Petitioner has waived. If the Hearing Officer grants Yorkville's Motion for a Protective Order, Yorkville will have to answer discovery as to only two City Council members, instead of all nine. Time and effort spent in preparing responses to discovery directed to the remaining seven Council members would have been wasted.

4. Given that the Hearing Officer's decision regarding Respondent's Motion for a Protective Order may substantially limit the scope of discovery in this matter, a stay of Petitioner's discovery best serves the efficiency and economy interests of the parties, the Hearing Officer, and the Board.

5. Yorkville is therefore requesting that the Board grant this Motion to Stay and enter an order requiring Yorkville to respond to Petitioner's discovery seven calendar days after the Hearing Officer rules on Yorkville's Motion for a Protective Order.

6. Pursuant to 35 Ill. Admin. Code § 101.514(a), Yorkville provides the following status report regarding the progress of this proceeding: On June 27, 2007, Petitioner filed its Petition for Review appealing Yorkville's denial of its application for a proposed landfill. On July 12, 2007, the Board accepted the Petition for hearing. This action is a decision deadline proceeding, and at the first telephonic status conference, held on July 18, 2007, Petitioner agreed to waive the decision deadline until January 24, 2007. (A copy of Petitioner's waiver is attached as Exh. A.) By order dated August 9, 2007, the Board extended the record filing date until August 30, 2007. At the second

telephonic status conference, held on August 20, 2007, Yorkville raised the issue of Petitioner's waiver of certain bias claims and agreed to file a Motion for a Protective Order by August 23, 2007. Petitioner's response is due August 30, 2007. By order dated August 20, 2007, the Hearing Officer noted that the discovery schedule would be revisited at the next status conference on September 20, 2007. (A copy of the order is attached as Exh. B.)

7. As noted, Yorkville should not have to extend the time and resources necessary in preparing discovery responses until it knows the scope of that discovery. Petitioner will not be prejudiced by the granting of this motion as it will not delay this proceeding.

WHEREFORE, Respondent, UNITED CITY OF YORKVILLE, CITY COUNCIL, prays for an order directing Yorkville to respond to Respondent's discovery seven calendar days after the Hearing Officer has ruled on Respondent's Motion for a Protective Order.

UNITED CITY OF YORKVILLE, CITY COUNCIL

By: Leo P. Dombrowski
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Dated: August 23, 2007

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