BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

FOX MORAINE, LLC, Petitioner, v. UNITED CITY OF YORKVILLE, CITY COUNCIL, Respondent.	)	PCB No. PCB 07-146

NOTICE OF FILING

TO: All counsel of Record (see attached Service List)

Please take notice that on August 30, 2007, the undersigned filed with the Illinois Pollution Control Board, 100 West Randolph Street, Chicago, Illinois 60601, the Petitioner's Response to the Motion for Protective Order Limiting Discovery.

Dated: August 30, 2007

Respectfully submitted,

On behalf of FOX MORAINE, LLC

/s/
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Fox Moraine, L.L.C.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB No. PCB No. 07-146
	)	
United city of Yorkville, City Council,	)	
	)	
Respondents.	)	

PETITIONER'S RESPONSE TO THE MOTION FOR PROTECTIVE ORDER LIMITING DISCOVERY

NOW COMES the Petitioner, FOX MORAINE, L.L.C., by and through its attorneys, Charles F. Helsten and George Mueller, and in response to the Motion for a Protective Order Limiting Discovery, states as follows:

INTRODUCTION

The gist of the City's Motion for Protective Order Limiting Discovery is that the Petitioner did not preserve its right to challenge the fundamental fairness violations in the proceedings below, and is therefore barred from discovering evidence of those violations and revealing that evidence in this appeal before the Board. The City's assertion is not only patently false, it ignores this Board's Rules concerning discovery and is an affront to the very principles of fundamental fairness.

The Petitioner, Fox Moraine, raised fundamental fairness concerns from the onset of the public hearing for siting approval, on March 7, 2007. (Petition for Review, Exhibits B and C). At the commencement of the hearing, the Petitioner filed a Motion to Disqualify in which it delineated the bias demonstrated by two members of the Council based on their pre-hearing expressions of public opposition to the Application, their solicitation of legal advice for purposes of opposing the Application, and a variety of other disqualifying conflicts of interest. *Id.* After the close of the siting hearing, when the rules prevented Fox Moraine from making any further

comments or presentations, three newly elected Council members were seated; the timing of their arrival then leaving the Petitioner unable to take any action to disqualify them.

Despite the recommendation of its own independent review staff and the Hearing Officer, the City Council denied the siting Application, and, in the aftermath of that decision, the Petitioner appealed to this Board on the basis of multiple fundamental fairness violations and on the basis that the decision was against the manifest weight of the evidence at the hearing.

In conjunction with its appeal to this Board, the Petitioner propounded discovery consistent with 35 Ill.Adm.Code 101.616. That section provides that "[a]ll relevant information and information calculated to lead to relevant information is discoverable, excluding those materials that would be protected from disclosure in the courts of this State pursuant to statute, Supreme Court Rules or common law, and materials protected from disclosure under 35 Ill. Adm. Code 130." 35 Ill.Adm.Code 101.616(a).

The Petitioner's Interrogatories seek disclosure of evidence that establishes bias, *ex parte* contacts, prejudgment and a decision based on matters outside the public record, all legitimate areas of inquiry as established by the case law in this area. The City has been asked to disclose the *ex parte* communications; the gifts and/or transfers between Council members and the Participant/Objectors; the Council members' affiliations with the Objector organizations; and the materials and information outside the record of proceedings which were considered by the Council in reaching its decision. The Petitioner's Requests for Production simply seek production of the documentary evidence of these violations. The discovery propounded in this case is narrowly tailored to result in disclosure of the evidence establishing violations of fundamental fairness which lie at the heart of the instant Appeal.

Upon receiving the Petitioner's requests for disclosures of evidence, the City responded with a Motion for Protective Order in which it asserted that it did not need to produce the

evidence because the Petitioner purportedly "waived the issues on which it seeks discovery." In support of this assertion, the City pointed to the fact that Motions to Disqualify were only filed against two members of the siting authority. (Motion for Protective Order at p. 2). However, and again, the City's motion completely ignores the fact that the Petitioner also seeks evidence of *ex parte* contacts, as well as evidence of the Council's consideration of materials outside the record in reaching its decision, and similarly ignores the timing of the post-hearing seating of three members of the Council.

The City's assertion that the Petitioner "waived its right" to discover evidence of the fundamental fairness violations is not only in contravention with the Board's rules providing for discovery, it also seeks to deny the Board access to vital evidence. This attempt to withhold evidence suggests the City may be well aware of the fundamental fairness violations which occurred in the proceedings below, and is doing everything possible to prevent such conduct from seeing the light of objective scrutiny.

ARGUMENT

1. The Board's Procedural Rules Concerning Discovery

Under the Board's Procedural Rules, "[a]ll relevant information and information calculated to lead to relevant information is discoverable, excluding those materials that would be protected from disclosure in the courts of this State pursuant to statute, Supreme Court Rules or common law, and materials protected from disclosure under 35 Ill. Adm. Code 130." Sec. 101.616(a).

The Rules provide that a protective order is available solely "to prevent unreasonable expense, or harassment, to expedite resolution of the proceeding, or to protect non-disclosable materials from disclosure consistent with Sections 7 and 7.1 of the Act and 35 Ill.Adm.Code 130." Sec. 101.616(d). No such basis for a Protective Order has been raised by the City, and

indeed, the discovery requested by the Petitioner falls into none of the above-referenced categories. Rather, the discovery here seeks only production of evidence showing fundamental fairness violations, including a request for disclosure of *ex parte* contacts, any inappropriate relationships between the Council members and Objector Participants, and materials or information outside the record which were considered by the Council in reaching its decision.

For purposes of Discovery, "the Board may look to the Code of Civil Procedure and the Supreme Court Rules for guidance where the Board's procedural rules are silent." Sec. 101.616. In describing the scope of discovery, Supreme Court Rule 201(b)(1) states that "full disclosure regarding any matter relevant to the subject matter involved in the pending action" can be had.

Although the City points to *Joliet Sand and Gravel v. PCB*, 163 Ill.App.3d 830, 516 N.E.2d 955 (3rd Dist. 1987) as authority for the Board to deny discovery, in that case the petitioner sought to "depose, subpoena or both no less than 19 people. Many of these persons had no direct bearing on the denial of the operating permit." *Id.* at 835. The Appellate Court accordingly upheld the hearing officer's decision to limit the number of testifying witnesses to five, and declined to require production of memoranda which had been created by IEPA personnel and attorneys with respect to a decision on whether to bring an action against an alleged polluter. *Id.* The discovery limitations imposed in *Joliet Sand and Gravel* clearly have no relevance to the instant case, where the Petitioner has submitted narrowly tailored requests which go directly to the issues raised in this appeal.

The other case relied upon by the City in its argument for limiting discovery, *Snoddy v. Teepak*, 198 Ill.App.3d 966, 556 N.E.2d 682 (1st Dist. 1990), is a battery case far afield from the matters before this Board, in which a worker sued his employer and the manufacturer of chemicals used at his employer's facility. The case is so dissimilar, and so utterly bereft of factual detail, that its applicability to the instant case is nearly impossible to discern. Its only

relevance derives from the fact that the Appellate Court held the trial court properly declined to compel discovery which was "not calculated to develop specific probative evidence regarding the issue of fraud, collusion, or tortious conduct." *Id.* at 969. Unfortunately, the opinion offers no indication as to what kind of evidence the plaintiff did seek, or on what subjects. In any event, the Appellate Court found that the trial court correctly held that the requested discovery was unnecessary since the case could be decided without an evidentiary hearing. Moreover, the fact that there exists a case in which the Appellate Court once found that it was appropriate to limit discovery hardly supports the City's motion here. Finally, in contrast with *Snoddy*, the discovery in this case is focused directly at the issues on appeal.

2. **Discovery in the Context of Fundamental Fairness**

In the instant appeal, the Petitioner clearly raised fundamental fairness as an issue during the proceedings below, and raised the issue again in its Petition for Review. Indeed, fundamental fairness is the very core of this appeal. Thus it is clear that discovery intended to reveal information and documents evidencing the fundamental fairness violations that occurred below is tailored to matters entirely relevant to the instant appeal.

Because a Section 39.2 hearing must be fundamentally fair to all participants, and must be heard by a siting authority which is objective and unbiased, the Board has a *statutory duty* to consider the fundamental fairness of the siting process. 415 ILCS 5/40.1 (2002); *E & E Hauling, Inc. v. Pollution Control Bd.*, 116 Ill.App.3d 586, 596, 451 N.E.2d 555, 564 (2d Dist. 1983); *aff'd*, 107 Ill.2d 33, 481 N.E.2d 664 (1985). "The Act provides that, in reviewing a section 39.2 decision on site approval, the Board *must* consider the fundamental fairness of the procedures used by the local governing body in reaching its decision." *Land and Lakes v. PCB*, 245 Ill.App.3d 631, 616 N.E.2d 349 (3rd Dist. 1993) (emphasis added) (reversing the Pollution Control Board's decision, based on a lack of fundamental fairness in proceedings below).

It is well-settled that although the Act requires that Board hearings on siting decisions be based exclusively on the record before the siting authority, the Board may consider new evidence relevant to the fundamental fairness of those proceedings "where such evidence necessarily lies outside of the record." *Land and Lakes Co. v. PCB,* 319 Ill.App. 3d 41, 743 N.E.2d 188, 194 (3rd Dist. 2000) (emphasis added). Such a situation is present in this case, and is often true when it comes to fundamental fairness violations.

Fundamental fairness involves considerations of bias, prejudgment, decisions based on matters outside the record, and *ex parte* contacts. The discovery requests to which the City has so strenuously objected merely ask that the City provide any evidence in its possession which establishes such bias, prejudgment, consideration of matters outside the record, and *ex parte* contacts (again, all well-established areas of fundamental fairness inquiry).

It is axiomatic that no person may play a decision-making role in a judicial or administrative proceeding in which he or she has any personal or pecuniary interest in the outcome which might influence his or her decision. *See e.g., Board of Educ. of Niles Tp. High School Dist. 219, Cook Co. v. Regional Bd. of School Trustees of Cook Co.*, 127 Ill.App.3d 210, 213 (1st Dist.1984). Participation by such interested parties in the decision making process is said to "infect the whole" and render the decision voidable. *Id.*

Here, multiple members of the Council had a personal interest in the outcome, and engaged in a variety of improper acts and conduct with respect to the Application, yet the City asserts it should be completely insulated from disclosing the evidence related to that conduct and establishing those conflicts because the Petitioner didn't discover much of it until the hearings were over. That assertion is at total odds with the law.

3. Waiver

The City asserts that the Petitioner "waived" its right to seek disclosure of the evidence of fundamental fairness violations because it only filed a motion to disqualify two of the siting authority members.[1] In support of its argument, the City cites to *E & E Hauling v. PCB* for the proposition that it is improper for a party to raise a claim of bias for the first time on appeal. (City's Motion at p.3). In the instant case, of course, bias was, in fact, raised as an issue in the proceedings below, therefore bias is not being raised as an issue for the first time on appeal. Moreover, the City's argument and citation to *E & E Hauling* fails to acknowledge that in that case the Illinois Supreme Court observed the exceptions to the waiver rule, and went on to address the petitioner's claims of bias in great depth, despite the fact that they were apparently not raised in the proceedings below. *E & E Hauling v. PCB*, 107 Ill.2d 33, 38-9 (1985). It is also worth noting that in *E & E Hauling*, the Supreme Court affirmed the Appellate Court, which had explained that the waiver rule is "not inflexible and may encompass challenges to the composition of administrative bodies made for the first time on administrative review wherein injustice might otherwise result." *E & E Hauling v. PCB*, 116 Ill.App.3d 586, 593, 451 NE2d 555 (2nd Dist. 1993), *aff'd* 107 Ill.2d 33, 481 N.E.2d 664 (1985). The City points to *Waste Management v. PCB*, 175 Ill.Appp.3d 1023, 530 N.E.2d 682 (2nd Dist. 1988) as allegedly providing additional support for its waiver theory, yet the petitioner in that case failed to seek disqualification of siting authority members despite the fact that it knew they had publicly voiced opposition to the landfill, and instead urged disqualification of them only on appeal. The instant case is easily distinguishable, since the Petitioner here promptly moved to disqualify those members who publicly opposed the Application, and now appeals concerning additional bias which was unknown at the time of the hearing.

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[1] Notably, the City relies exclusively on cases that are in excess of fifteen years old to support its waiver theory, thereby ignoring the Board's clear duty to consider fundamental fairness issues, as is clearly reflected in more recent cases addressing the subject.

The City's reliance on *A.R.F. Landfill v. PCB*, 174 Ill.App.3d 82, 528 N.E.2d. 390 (2nd Dist. 1988), is similarly misplaced. The City asserts that in *A.R.F.* the Appellate Court found a landfill waived claims of bias when it withheld those claims until its appeal of an unfavorable decision. (City's Memorandum of Law at p. 3). In *A.R.F.*, however, the petitioner had been allowed to submit written questions to the members of the siting authority prior to the hearing, in which the members were asked to – and did – disclose their public statements critical of the landfill. Nevertheless, the petitioner failed to seek disqualification based on the statements received from members until after the siting decision was announced, raising its claims of bias for the first time on appeal. The Appellate Court held in *A.R.F.* that the petitioner in that case had a duty to raise the claim promptly after it obtained knowledge of the alleged disqualification. *Id.* at 88. This is clearly distinguishable from the facts present in the instant appeal.

Here, waiver is inapplicable because the information was unknown at the time of the hearing. A waiver is the voluntary relinquishment of a known right, and the Petitioner cannot be deemed to have waived its objection to individuals who were not even seated as members of the Council until after the hearing, when it was too late for the Petitioner to move for their disqualification to disqualify them. Even the City acknowledges that a "claim of bias or prejudice on the part of a member of an administrative agency...must be asserted promptly after knowledge of the alleged disqualification." (City's Memorandum of Law at p. 3, citing *Waste Management v. PCB*, 175 Ill.App.3d 1023 (2nd Dist. 1988)(emphasis added). Here, knowledge of the additional disqualifications did not occur until after the hearing had concluded.

Similarly, the Petitioner could not possibly "waive" its right to discover materials outside the record which were considered by the Council in reaching its decision by failing to raise an objection during the hearing to something which had not yet occurred or which was not yet known.

Fox Moraine had reason to believe at the outset of the hearings that two Council members were tainted, and properly moved to disqualify them. Fox Moraine did not and could not know at the time that the entire process was tainted, however, a decision which shockingly ignored the strong recommendations for approval by both the Hearing Officer and the City's own independent review staff makes no other conclusion possible. It is the very nature of *ex parte* contracts that they are furtive, and it is the essence of bias that it is hidden from those against whom it will be directed. That is why the Board has a statutory obligation to examine the fundamental fairness of a proceeding. No action on the part of Fox Moraine was required during the hearing to preserve this issue beyond what was done.

The fact that Council members participated in heretofore undisclosed *ex parte* contacts, based their final decision on previously undisclosed materials, communications, and other information outside the record, and in other ways prejudged the Application and disregarded the evidence at the hearing, does not justify a determination that the hearing was fundamentally fair, and the Board has a statutory responsibility to determine whether, in fact, the hearing process in this case met the standards of fundamental fairness.

If the City has no information or materials that would substantiate the violations, it has nothing to fear in answering the Petitioner's discovery requests. It is the alternative to that proposition which should raise concern for this Board, and most likely explains why the City has so strenuously objected to an otherwise routine discovery request in fundamental fairness cases.

CONCLUSION

It has been said that the very essence of constitutional due process is based on the concept of fundamental fairness, and Illinois courts have consistently held that at a minimum, fundamental fairness requires a fair hearing before a fair tribunal. *See e.g. Van Harken v. City of Chicago*, 305 Ill.App.3d 972 (1st Dist. 1999).

As the Appellate court has observed, shielding off-record considerations from judicial review not only frustrates the purpose of review by preventing consideration of fundamental fairness issues, it also visits unjust results on parties who have been "actually victimized by unfair or improper procedures not of record." *E & E Hauling, Inc. v. PCB*, 116 Ill.App.3d 586, 593, 451 N.E.2d 555, 562 (2nd Dist. 1983), *aff'd.*, 107 Ill.2d 33, 481 N.E.2d 664 (1985). That type of victimization occurred in this case, and the Petitioner should be afforded access to the evidence which reveals the extent of the violations that occurred in the proceedings below.

The City's Motion for Protective Order seeks to obfuscate this Board's inquiry into the fundamental fairness of the proceedings below, and to prevent consideration of relevant evidence. The Petitioner accordingly requests that it be denied.

Dated: August 30, 2007

Respectfully submitted,

On behalf of Fox Moraine, LLC

/s/
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and

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AFFIDAVIT OF SERVICE

The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on August 30, 2007, she served a copy of the foregoing upon:

Via E-Mail Bradley P. Halloran Hearing Officer Illinois Pollution Control Board James R. Thompson Center 1000 W. Randolph St., Ste. 11-500 Chicago, IL 60601	Via E-Maill Leo P. Dombrowski Anthony G. Hopp Wildman, Harrold, Allen & Dixon 225 West Wacker Dr. Suite 3000 Chicago, IL 60606-1229
Via E-Mail Michael Blazer Jeep & Blazer 24 N. Hillside Avenue, Suite A Hillside, IL 60162	Via U.S. Regular Mail Michael Roth Interim City Attorney 800 Game Farm Road Yorkville, Illinois 60560
Via E-Mail George Mueller Mueller Anderson , P.C. 609 Etna Road Ottawa, IL 61350	

By depositing a copy thereof, enclosed in an envelope in the United States Mail at Rockford, Illinois, proper postage prepaid, before the hour of 5:00 p.m., addressed as above.

/s/_____
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