

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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SEP 13 2007

STATE OF ILLINOIS  
Pollution Control Board

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

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

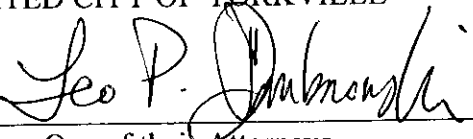
**NOTICE OF FILING**

To: See Attached Service List

PLEASE TAKE NOTICE that on this 13<sup>th</sup> day of September, 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 Leave to file *Instant* a Reply Brief in Support of Its Motion for a Protective Order Limiting Discovery and Reply Brief in Support of Yorkville's Motion for a Protective Order Limiting Discovery**, 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:   
One of their Attorneys

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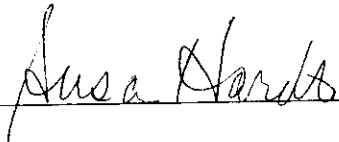
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Pollution Control Board

**CERTIFICATE OF SERVICE**

I, Susan Hardt, a non-attorney, certify that I served a copy of the foregoing **Notice of Filing; United City of Yorkville's Motion for Leave to file *Instante* a Reply Brief in Support of Its Motion for a Protective Order Limiting Discovery; and Reply Brief in Support of Yorkville's Motion for a Protective Order Limiting Discovery** 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.

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

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**YORKVILLE'S MOTION FOR LEAVE TO FILE *INSTANTER*  
A REPLY BRIEF IN SUPPORT OF ITS MOTION  
FOR A PROTECTIVE ORDER LIMITING DISCOVERY**

Respondent, UNITED CITY OF YORKVILLE, CITY COUNCIL ("Yorkville"), by and through its attorneys and pursuant to 35 Ill. Admin. Code § 101.500(e), moves the Pollution Control Board and Hearing Officer for leave to file *instanter* a Reply Brief in Support of Its Motion for a Protective Order Limiting Discovery. In support of its motion, Yorkville states as follows:

1. Because Fox Moraine ("Petitioner") served extensive discovery on Yorkville seeking information on issues that Petitioner did not raise at the local siting stage and therefore waived, Yorkville filed a Motion for a Protective Order Limiting Discovery.
2. Petitioner filed a response to the Motion that misstates the record and, in several respects, asserts things that are simply untrue.
3. Under the Board's rules, a movant is not entitled to file a reply, except as permitted by the Board or Hearing Officer to prevent material prejudice. 35 Ill. Admin. Code § 101.500(e).

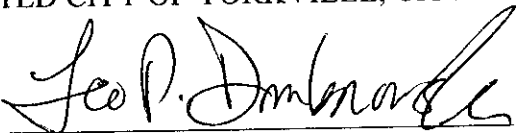
4. Yorkville will be materially prejudiced unless it is allowed an opportunity to address the misstatements set forth in Petitioner's response to the Motion.

5. Yorkville is submitting its Reply with this Motion for Leave.

WHEREFORE, for the foregoing reasons, Yorkville respectfully requests that the Board or Hearing Officer grant it leave to file *instanter* a Reply Brief in Support of Its Motion for a Protective Order Limiting Discovery.

Respectfully submitted,

UNITED CITY OF YORKVILLE, CITY COUNCIL

By:   
One of Its Attorneys

Dated: September 13, 2007

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**REPLY BRIEF IN SUPPORT OF YORKVILLE'S MOTION  
FOR A PROTECTIVE ORDER LIMITING DISCOVERY**

Yorkville's Motion for a Protective Order (the "Motion") shows that Fox Moraine ("Petitioner") served extensive discovery on Yorkville seeking information from all nine members of the Yorkville City Council on issues that Petitioner did not raise at the local siting stage. As Petitioner acknowledged at the public hearing, it has waived all claims of bias it did not raise below. (Motion, p. 2.) Consequently, the Board will not consider issues Petitioner has waived, *see, e.g., Peoria Disposal Co. v. Peoria County Bd.*, PCB 06-184, slip op. at p. 23 (June 21, 2007), and Yorkville should not be put to the time and expense in responding to pointless discovery.

The gist of Petitioner's response to the Motion is essentially twofold. One, Petitioner claims that, while it sought disqualification of only two Council members:

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.

(Response at pp. 1-2.) Nothing prevented Petitioner from seeking to disqualify any of the other seven members of the Council, only three of whom were newly elected on April 17, 2007

(Council Members Plocher, Sutcliffe, and Weyderich), nor does Petitioner cite any "rules" to explain just how it was "prevented" from seeking additional disqualifications.

The public hearing did not close until April 20, 2007 (C15629, C15704)<sup>1</sup>, and Petitioner could have moved for disqualification of any additional Council member while the public hearing was still on-going. It did not.

Petitioner also could have moved for disqualification at any time during the post-hearing comment period. The "rules" did not prevent Petitioner from making any further comments or presentations after the close of the siting hearing, because it submitted over 1,300 pages of post-hearing comments on May 21, 2007 (C17202-C18520), a full month after the hearing had closed. However, not a single page of its submittal raised any issue of bias, predisposition, or unfairness, even though Petitioner claims that "knowledge of additional disqualifications did not occur until after the hearing had concluded." (Response at p. 8.) It is telling that Petitioner alleges it later received "knowledge of additional disqualifications," but submits nothing with its Response to support this claim or states when or how it received such knowledge.

Petitioner also could have moved for disqualification at any time up to May 23, 2007, when the Yorkville City Council, ruled on Petitioner's Motion to Disqualify Council Members Burd and Spears. (C18537, C18539.) Again, it did not. If Petitioner had had any information to support a motion to disqualify any of the other seven Council Members, it certainly would have filed one by this time. That it did not shows that its discovery requests are simply a fishing expedition.

Second, Petitioner generally alleges various nefarious acts of the Yorkville City Council, including that "multiple members of the Council had a personal interest in the outcome and

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<sup>1</sup> Citations are to the Landfill Siting Record, which was filed with the Board on August 30, 2007.

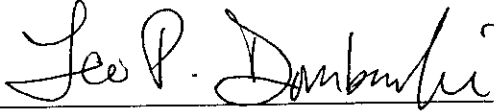
engaged in a variety of improper acts and conduct with respect to the Application. . . ."

(Response at p. 6.) It asserts that its discovery requests "simply seek documentary evidence of these violations." (Response at p. 2.) Petitioner's claims ring hollow. Had it anything to back up such serious charges, it would have alleged it in its Petition for Review or certainly in its Response to the Motion. Petitioner's discovery is an obvious attempt to fish for information to support allegations that Petitioner had no basis making in either its Petition for Review or its Response to the Motion.

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. Its claim that the rules prevented it from doing so is simply wrong. 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:   
One of Its Attorneys

Dated: September 13, 2007

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