

ILLINOIS POLLUTION CONTROL BOARD
September 20, 2007

FOX MORaine, LLC,)	
)	
Petitioner,)	
)	
v.)	
)	PCB 07-146
UNITED CITY OF YORKVILLE, CITY)	(Pollution Control Facility
COUNCIL,)	Siting Appeal)
)	
Respondent.)	
)	
KENDALL COUNTY,)	
)	
Intervenor.)	

HEARING OFFICER ORDER

On August 2, 2007, petitioner Fox Moraine, LLC, (Fox Moraine) served respondent United City of Yorkville, City Council (Yorkville) with a first set of interrogatories and first set of requests to admit. On August 23, 2007, Yorkville filed a motion for a protective order limiting discovery (Mot.), accompanied by a memorandum of law (Memo.) in support, attaching among other things the discovery requests that are the subject of this motion. (Memo, Ex. C & D). In its argument for the protective order, Yorkville argues that petitioner has waived its discovery requests regarding possible bias or prejudice against petitioner by seven of the nine members of the City Council because it did not object to these members' participation as decision makers at the local siting hearing. Yorkville also filed a motion for stay of discovery pending the hearing officer's ruling on the motion for protective order, noting that otherwise Yorkville's responses would be due today, September 20, 2007. To date, Fox Moraine has not filed a response.

On August 30, 2007, Fox Moraine filed its response, asserting that discovery was necessary and that it had not waived issues of bias or prejudice (Resp.). On September 13, 2007, Yorkville filed a motion for leave to file a reply and its reply in favor of issuance of a protective order. (Reply).

Yorkville's motion for leave to file a reply is granted. For the reasons set forth below, Yorkville's motion for a protective order is denied. As a practical matter, Yorkville's motion for a discovery stay has in essence been granted. Yorkville's responses are now due to be filed on or before September 28, 2007.

Procedural Status of the Case

On June 27, 2007, Fox Moraine filed a petition for review asking the Board to review the May 24, 2007, decision of Yorkville's decision on petitioner's proposed siting of a pollution control facility in Yorkville, Kendall County. Petitioner appealed to the Board on the grounds that 1) Yorkville's decision was fundamentally unfair, alleging bias and prejudice on the part of various and unnamed council members, and 2) Yorkville's findings regarding certain criteria were against the manifest weight of the evidence.

Kendall County was granted intervenor's status by the Board on August 23, 2007. The County has not participated in the briefing of this discovery issue.

Pursuant to Fox Moraine's waiver, the statutory decision deadline in this case is now due January 24, 2008. Hearing has yet to be scheduled. In the hearing officer order entered August 20, 2007 after the telephonic status conference entered that day, Yorkville's time to respond to outstanding discovery requests was extended to September 20, 2007.

Yorkville's Motion For A Protective Order

In its memorandum supporting its motion for a protective order, Yorkville relates that it held 23 days of public hearings concerning Fox Moraine's application for siting. Yorkville also noted that the hearing process fell in the middle of the campaign process for the City Council, with a new mayor and three new council members being elected on April 17, 2007. Yorkville acknowledges Fox Moraine objected to two of the nine council members at the local siting hearing alleging bias, predisposition and unfairness in its motion to disqualify at the March 7, 2007 hearing. Memo. at 2. Yorkville argues that because Fox Moraine failed to object at the local siting hearing concerning the other seven members of the City Council on those grounds, Fox Moraine waived its right to raise these issues in the proceedings before the Board. Yorkville accordingly objects to providing discovery concerning the remaining seven council members Memo. at 2. In support of its waiver argument, Yorkville cites various siting cases, finding especially relevant Waste Management of Illinois v. Pollution Control Board, 175 Ill. App. 3d 1023 (2d Dist. 1988). See Memo. at 3-4, and cases cited therein. Yorkville argues that Fox Moraine's "discovery requests to the unchallenged seven Council members are unreasonably burdensome and unduly onerous attempt to uncover some evidence perhaps relevant to its unsupported claims of unfairness, bias and prejudice". Memo. at 4.

Petitioner's Response

On August 30, 2007, Fox Moraine filed a response in opposition (Resp.) to Yorkville's motion for a protective order. Fox Moraine argues, in summary, that Yorkville's motion "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 time of the post-hearing seating of three members of the Council." (Resp. at 3). The petitioner agrees that at the local

siting hearing, it only moved to disqualify two of the council members alleged to be biased, but argues that it has not waived its right to discovery requests concerning the other council members, including the three newly elected Council members.. Resp. at 1-2. Fox Moraine states that it asked the City 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”. Resp. at 2. Fox Moraine characterizes its discovery requests as “narrowly tailored to result in disclosure of the evidence establishing violations of fundamental fairness which lie at the heart of the instant appeal. Id. Petitioner argues that case law and the Board’s procedural rules require disclosure, and that the Waste Management case cited by respondent is distinguishable on its facts. Resp. at 3-6.

Finally, Fox Moraine argues that the respondent does not allege that the issuance of a protective order motion would prevent unreasonable expense, or harassment, or to expedite resolution of the proceeding pursuant to Section 101.616 (d) of the Board’s procedural rules.

Respondent’s Reply

On September 13, 2007, Yorkville filed a motion for leave to file a reply and its reply. Yorkville takes issue with Fox Moraine’s allegation that due to the timing of the newly elected Council members, it could not timely object or move to disqualify the new members. Yorkville argues that Fox Moraine could have objected below because the three new Council members were elected on April 17, 2007, and the public hearing did not close until April 20, 2007. Additionally, Yorkville argues that petitioner could have moved for disqualification at any time during the post-hearing comment period. Reply at 2.

Finally, Yorkville argues that it “should not be put to the time and expense in responding to pointless discovery”. Reply at 1.

Discussion

On appeal of a municipality’s decision to grant or deny a siting application, the Board generally confines itself to the record developed by the municipality. 415 ILCS 5/40.1 (b) (2006). However, the Board will hear new evidence relevant to the fundamental fairness of the proceedings where such evidence lies outside the record. Land and Lakes Co. v. PCB , 319 Ill. App. 3d 41, 48, 743 N.E. 2d 188, 194 (3d Dist. 2000). Public hearing before a local governing body is the most critical stage of the site approval process. Land and Lakes Co. v. PCB, 245 Ill. App. 3d 631, 616 N.E.2d 349, 356 (1993). The manner in which the hearing is conducted, the opportunity to be heard, whether *ex parte* contacts existed, prejudgment of adjudicative facts, and the introduction of evidence are important, but not rigid, elements in assessing fundamental fairness. American Bottom Conservancy v. Village of Fairmont City, PCB 00-200 (Oct. 19, 2000). The Board must consider the fundamental fairness of the procedures used by the

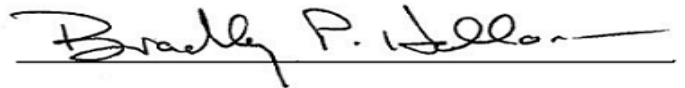
respondent in reaching its decision. 415 ILCS 5/40.1 (a) (2006). Additional evidence outside the record that may be considered include pre-filing contacts. See County of Kankakee v. City of Kankakee, Town and County Utilities, Inc., and Kankakee Regional Landfill, LLC., PCB 03-31, 03-33, 03-35 (cons.) (Jan. 23, 2003).

The purpose of discovery is to uncover all relevant information and information calculated to lead to relevant information. 35 Ill. Adm. Code 101.616(a). The Board's rules also allow issuance of a protective order that deny, limit, condition or regulate discovery to prevent unreasonable expense, or harassment, or to expedite resolution of the proceeding. 35 Ill. Adm. Code 101.616(d).

Yorkville's motion for a protective order is denied. When a fundamental fairness issue is raised before the Board, the whole purpose of discovery is to attempt to uncover relevant evidence or evidence calculated to lead to relevant evidence that is outside the record, evidence that is presumably unknown to the party propounding the discovery. Fox Moraine has persuasively argued that it seeks discovery of information concerning fundamental unfairness that extends beyond issues of alleged bias and prejudice of Council Members. Fox Moraine has cited case law and distinguished that cited by Yorkville sufficient for the hearing officer to conclude that discovery may proceed under the circumstances of this case. This is particularly so since, as Fox Moraine alleges, Yorkville does not allege that the requested discovery creates an unreasonable expense or engenders harassment as set forth in 35 Ill. Adm. Code 616(d). Yorkville states only that it "should not be put to the time and expense in responding to pointless discovery. Reply at 1. For all of these reasons, Yorkville's motion for a protective order is denied. Yorkville must file its responses to the requested discovery on or before September 28, 2007.

Finally, the procedural rules provide that parties may seek Board review of discovery rulings pursuant to 35 Ill. Adm. Code 101.616(e). The hearing officer reminds the parties that the filing of any such appeal of a hearing officer ruling does not stay the proceeding. In a deadline date case, the hearing officer must manage the case to insure that discovery, hearing, and briefing schedules allow for timely Board deliberation and decision of the case as a whole.

IT IS SO ORDERED



Bradley P. Halloran
Hearing Officer

¹ The ultimate determination as to whether the petitioner has waived any issues as to one or more Council Members is a decision for the Board, and not the hearing officer, to make.

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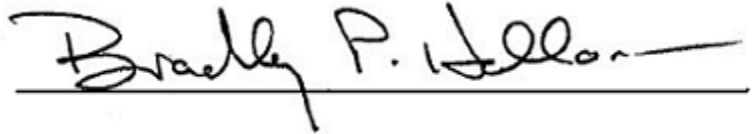
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CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order was mailed, first class, and faxed on September 20, 2007, to each of the persons on the attached service list.

It is hereby certified that a true copy of the foregoing order was hand delivered to the following on September 20, 2007:

John T. Therriault
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A handwritten signature in black ink that reads "Bradley P. Halloran". The signature is written in a cursive style and is positioned above a solid horizontal line.

Bradley P. Halloran
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