

ILLINOIS POLLUTION CONTROL BOARD
 October 30, 2008

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 September 24, 2008, the petitioner, Fox Moraine, LLC, (Fox Moraine) filed the following motions: 1) Motion to Compel Answers to Deposition Questions, 2) Motion to Compel Production of Transcripts and Videos and 3) Motion to Compel Disclosure of Roth Report. Also on September 24, 2008, the respondent, United City of Yorkville, City Council (Yorkville) filed four Motions *in limine*. On September 29, 2008, the respondent filed its responses to the petitioner’s motions. Also on September 29, 2008, the petitioner filed its responses to respondent’s motions *in limine*. On October 1, 2008, the parties were directed to file their respective replies, if any, on or before October 7, 2008. On October 7, 2008, the parties filed their respective replies.

The hearing in the above-captioned matter was scheduled for October 6, 7 and 8, 2008. However, those hearing dates were cancelled on October 1, 2008, because the parties requested an opportunity to reply to the various motions that were filed and review the rulings rendered. The petitioner has filed an additional waiver of the statutory decision date to and including April 16, 2009. By agreement, the hearing dates were rescheduled to December 16, 17 and 18, 2008. Due to the time constraints and the number of pleadings, this order will briefly summarize the respective motions and rule accordingly.

This order first sets out the procedural status of the case. The parties’ arguments on each motion or issue are summarized and followed by the ruling on each. In summary, Fox Moraine’s motions to compel answers to discovery questions, production of transcripts and video tapes, and to compel disclosure of the Roth report are each denied. Yorkville’s motion *in limine* #2 is granted, but motions *in limine* #1, #3, and #4 are denied.

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. On September 23, 2008, Fox Moraine filed its First Amended Petition for Review. On September 26, 2008, Fox Moraine filed its Second Amended Petition for review. To date, the Board has not addressed these filings.

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

Fox Moraine's Motion To Compel Answers To Deposition Questions

On September 24, 2008, Fox Moraine filed a Motion to Compel Answers to Depositions Questions (Mot. re Dep. Ques.) regarding deponents Jason Leslie and Wally Werderich. Attached to the motion are deposition excerpts from Leslie and Werderich labeled as Exhibit A. It appears the catalyst for Fox Moraine's questions at the depositions of Leslie and Werderich and the premise for its motion to compel is Fox Moraine's claim that some or all of the aldermen did not know what they were voting on regarding the individual siting criteria. Mot. re Dep. Ques. at 3. Fox Moraine claims that:

During the deliberations on May 23 and May 24, 2007, there was never a vote on whether any individual statutory siting criteria had been proven, nor were there any written prepared finding of facts adopted. The individual aldermen did not universally express opinions with regard to each siting criterion. Additionally, there was never any vote to adopt, endorse, or incorporate any particular expression of personal opinion on the evidence from any particular alderman. Mot. re Dep. Ques. at 2.

Yorkville suggests a review of the questions asked of Fox Moraine's attorney of deponents Leslie and Werdrich reflects an attempt by Fox Moraine to flesh out feelings, intentions, and beliefs of the deponents regarding siting criteria. Mot. re Dep. Ques. at Exhibit A. Yorkville objected and directed the respective deponents not to answer stating the questions invaded the deliberative process privilege. *Id.* at 3.

Fox Moraine cites to People of the State of Illinois ex rel. Joseph Birkett v. City of Chicago, 184 Ill. 2d 521, 705 N.E.2d 48 (1998), for its proposition that there is no deliberative process privilege which protects public officials from disclosures. Mot. re Dep. Ques. at 3. In the alternative, Fox Moraine argues that the questions posed did not

invade the privilege. Fox Moraine states that “the questions merely asked the aldermen what they believed to be the facts and more relevantly what they believed that they were voting on.” *Id.* at 4. Fox Moraine continues and states that “[p]etitioner has the right to know how the aldermen intended to vote and whether the record, which purports to be a denial on all but two criteria, is an accurate reflection of their intentions.” *Id.*

Yorkville’s Response

On September 29, 2008, Yorkville filed its response to Fox Moraine’s motion to compel answers to deposition questions (Resp. re Dep. Ques.). Yorkville states that its City Council heard over 125 hours of evidence relating to Fox Moraine’s application. On May 23, 2007, the City Council met to deliberate on whether to grant or deny the application and when deliberations ended, the City Council voted to have a resolution consistent with its deliberations drafted for its vote the next day. On May 24, 2007, the City Council adopted the resolution denying the application. Resp. re Dep. Ques. at 2. Yorkville argues that the objected to questions propounded by petitioner seek information irrelevant to the issues before the Board and that the questions improperly sought to invade the mind of the decision-makers. *Id.* at 1.

In particular, Yorkville alleges that:

As its first basis for suggesting that questioning the Council members is proper, Fox Moraine implies that there is a possibility that the Council’s decision may not have complied with statutory requirements, but its suggestions are both legally and factually unfounded. Fox Moraine suggests that the Council did not-but was required to-deliberate on each criterion set forth in 415 ILCS 5/39.2(a) prior to voting. Moreover, Fox Moraine suggests that the Council should have had the final written decision in front of it before voting on the application. Resp. re Dep. Ques. at 2.

Citing case law, Yorkville argues that a Council need not discuss each criterion separately or have the final written product in-hand before it votes. Resp. re Dep. Ques. at 2-3.

Yorkville also states that a plethora of case law supports its additional argument that the courts and the Board “ have consistently refused to allow questioning into the thought process of either the decision-making body as a whole or individual decision-makers. Resp. re Dep. Ques. at 4.

Finally, Yorkville distinguishes Birkett and opines that Birkett does not address adjudicatory roles of a county board or municipality deciding a landfill application. Instead, Yorkville argues that:

the discovery request in Birkett asked for documents and communications relating to applications for airport modifications and plans or discussions regarding future airport plans. Here, Fox Moraine has pointedly asked not for

documents or communications but to examine individual Council members about their processes and beliefs relating to the Council's vote. Resp. re Dep. Ques. at 7.

Fox Moraine's Reply

On October 7, 2008, Fox Moraine filed its reply (Reply re Dep. Ques.). In essence, Fox Moraine continues its argument that the questions that were asked at the depositions was an attempt to confirm whether or not the Council members knew what they were voting for on May 24, 2007, and that without answers, Fox Moraine cannot determine whether the resolution that was later executed was consistent with the findings expressed and the votes cast by the Council members on May 24, 2007.

Fox Moraine states that:

as a threshold matter, many of the questions at issue in this motion do not seek to elicit information about the deliberative process at all. Other questions could be read as seeking information about the deliberative process, however, such questions should be allowed because this is a case in which the very process itself

is at issue. Finally, and perhaps more importantly, the deliberative process itself was conducted in an open public forum, before an audience, and was transcribed in its entirety by a court reporter. By conducting the deliberative process in full public view, the City Council waived any privilege as to that process that might otherwise be argued to exist in Illinois. Reply re Dep. Ques. at 1.

Fox Moraine culls many of the deposition questions at issue from its motion to compel and incorporates them in the body of the reply in its attempt to better illustrate that the questions were posed simply to ask for clarification of the votes cast for the statutory criteria and what it was the members believed they were voting on May 24, 2007, not to ask why a particular deponent decided to vote a particular way. Reply re Dep. Ques. at 2. Fox Moraine also represents that some of the questions arguably do seek information as to why the Council members voted as they did, but since there is no deliberative process privilege that applies here, the questions were improperly objected to. *Id.* at 4.

Discussion And Ruling

For the reasons stated below, Fox Moraine's motion to compel answers to deposition questions is denied.

The courts have been clear that nothing in Section 39.2 requires "a detailed examination of each bit of evidence or a thorough going exposition of the County Board's mental processes". E & E Hauling, Inc. v. Pollution Control Board, 116 Ill. App.3d 586, 451 N.E.2d 555, 609 (1983) "Rather, the County Board need only indicate which of the criteria, in its view, have or have not been met, and this will be sufficient if the record supports these conclusions so that an adequate review...may be made." *Id.*

Moreover, it is the totality of the County's decision on all of the criteria that is at issue on review, "and not the votes of individual county board members on individual criteria." City of Rockford v. Winnebago County Board, PCB 88-107, slip op. at 6, (November 17, 1988). Further, there is no requirement that the local decision-maker conduct any debate as long as they have had the opportunity to review the record prior to voting. Slates v. Illinois Landfills, Inc., PCB 93-106, slip op. at 18 (September 23, 1993) (citations omitted). Finally, the Board has held that the integrity of the decision making process requires that the mental processes of the decision-makers be safeguarded, and that a strong showing of bad faith or improper behavior is required before any inquiry into the decision making process can be made. Waste Management of Illinois, v. County Board of Kankakee County, PCB 04-186, slip op. at 27 (January 24, 2008) (citations omitted).

It is undisputed that Yorkville's City Council heard over 24 days of evidence relating to Fox Moraine's landfill application. A review of the May 23 and May 24, 2007, transcripts attached to the respective pleadings reveals that the Council members, including Leslie and Werderich, undertook deliberations and voted on a draft resolution. Case law requires nothing more. In any event, Fox Moraine has failed to make the case that Leslie, Werdich, or any City Council member acted in bad faith or improperly behaved as to allow inquiry into the mental processes of the decision-makers.

Fox Moraine argues that the holding in Birkett, that there is no deliberative process privilege which protects public officials from disclosures, overrules prior precedent. Fox Moraine's reliance on Birkett is misplaced. Birkett simply does not apply to the case at bar, as it does not involve quasi-judicial actions of the sort here.

Yorkville correctly distinguishes Birkett by stating that the discovery requests in Birkett "asked for documents or communications relating to applications for airport modifications and plans or discussions regarding future airport plans, [not examinations regarding Council members] thought processes and beliefs relating to the Council's vote." Resp. re Dep. Ques. at 7. Yorkville correctly notes that in 2005, the appellate court found that the 1998 Birkett decision did not apply to judicial officers. Thomas v. Page, 361 Ill. App. 3d 484, 491, 837 N.E.2d 483, 407) (2005)(judicial officers are entitled to a deliberative process privilege, because "[I]t is well-settled that a judge may not be asked to testify as to his or mental impressions or processes in reaching a judicial decision". 837 N.E. 2d at 405.) In E & E Hauling, the court held that "a County Board's decision to grant or deny permit application was an adjudication, rather than rule making, which leads to our conclusion that the requirement of 'fundamental fairness' in the statute incorporates standards of adjudicative, rather than legislative, due process." 451 N.E.2d at 564, n.1. Accordingly, the judicial deliberative process privilege applies to the quasi-judicial siting decision reached here by Yorkville.

Again, Fox Moraine's motion to compel answers to deposition questions is denied.

Fox Moraine's Motion To Compel Production of Transcripts and Videos and For Sanctions

In its motion to compel production of transcripts and videotapes (Mot. re Tr.), Fox Moraine states that subsequent May 29, 2008, Yorkville produced some of the requested items that were requested by Fox Moraine in its second request to produce, “in which it asked for copies of all videotapes and/or transcripts of City Council, Committee, Board or Agency meetings between September 1, 2006 and June 1, 2007”. Mot. re Tr. at 2. In particular, Fox Moraine asserts:

That on August 27, 2008, counsel for Fox Moraine contacted counsel for the City, advising them of missing transcripts and videos and the incomplete nature of the production. The missing items include videos for four meetings and transcripts for nine meetings. On September 8, 2008, one of the attorneys for the City replied to Fox Moraine advising that transcripts and videos, as the case may be, did not exist for any of the meetings referenced in the August 27th request. Said letter specifically represented that there were no transcripts for city council meetings at which there were no public hearings. Said letter also indicated that videos were missing or not available for certain meetings with no explanation as to why. Said letter lastly alleged that Fox Moraine had the transcripts of the city council meetings of October 24th, October 30th and February 13, 2007. Mot.re Tr. at 3.

In a nutshell, Fox Moraine states that the transcripts for the City Council meetings of October 24, 2006, October 30, 2006 and February 13, 2007 remain missing and that Fox Moraine believes that all of City Council meetings are transcribed and all were videotaped. Fox Moraine alleges that it “does not know what the City is attempting to hide, but the missing videos and transcripts would contain evidence of prejudicial conduct and prejudice by city council members”. Mot.re Tr. at 4. Fox Moraine requests sanctions be imposed on Yorkville “for its wrongful and ingenuous [sic] representations that these materials do not exist.” *Id.*

Yorkville’s Response

In its response (Resp. re Tr.), Yorkville asserts that it “has produced all of the existing transcripts. Nothing has been withheld.” Resp. re Tr. at 3. Yorkville further alleges that although it videotapes many meetings, not all of the meetings are video taped. *Id.* Yorkville confesses that it is not clear why the September 25, 2006 and the February 13, 2007 videos were not made. An affidavit attached to Yorkville’s response from Bartholomew Olson, the Assistant City Administrator, supports Yorkville’s representation as to the missing videotapes for the September 25, 2006 Plan Commission meeting and the February 13, 2007 City Council meeting.

Yorkville requests that Fox Moraine’s motion to compel and for sanctions be denied and that Fox Moraine be admonished to refrain from making further, baseless sanctions motions. Resp. re Tr. at 4.

Fox Moraine’s Reply

In its reply (Reply re Tr.), Fox Moraine argues that Yorkville' affidavit only addresses the missing videotapes from the September 25, 2006, meeting and the February 13, 2007, meeting. Fox Moraine believes transcripts from the meetings held on September 25, 2006, October 17, 2006, February 6, 2007 and February 13, 2007 still remain missing or unaccounted for. Further, Fox Moraine suggests, the videotapes from the meetings held on October 17, 2006, and February 6, 2007 remain missing or unaccounted for. Reply re Tr. at 3.

Fox Moraine alleges that the missing and unaccounted for media material will support its allegations of predisposition and bias that caused City Council members to make a political rather than an adjudicatory decision on its application. Reply at 4. For instance, Fox Moraine alleges that the minutes of the February 6, 2007 meeting indicate that the Mayor reported on annexation and zoning of the Fox Moraine parcel. Reply re Tr. at 3.

Discussion And Ruling

In summary, Fox Moraine's motion to compel production of transcripts and videos is denied.

In some circumstances, 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 349, 356 (1993). 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).

Yorkville states that it has produced all meeting transcripts, and that there were no videotapes to produce. Based on the record presented here, there is simply no additional responsive material this hearing officer can order Yorkville to produce. The motion for sanctions for failure to produce additional material is accordingly moot. *See also* 35 Ill. Adm. Code 101.800, providing that the Board itself rules on sanctions. The hearing officer trusts that Fox Moraine will take care that any future motions for sanctions are well founded.

Fox Moraine's Motion To Compel Disclosure Of Roth Report

In its motion to compel disclosure of the Roth Report (Mot. re Roth Rep.), Fox Moraine seeks disclosure of a report regarding its landfill application authored by Michael Roth, Yorkville's new city attorney, that was submitted to the City Council members on May 23, 2007.

Petitioner states that on May 23, 2007, the hearing officer, Larry Clark filed a report containing his findings and recommendations, and the City's expert technical staff filed a report authored by attorney Derke Price with its findings and recommendations. Both reports are referenced in the City's final resolution and part of the record. Mot. re Roth Rep. at 1. Fox Moraine states that the transcript attached to its motion indicates that Roth filed a report with his findings and recommendations on May 23, 2007. Fox Moraine states that the Roth report was not included in the record. *Id. at 2.*

The petitioner asserts that three new City Council members "were sworn in on May 8, 2006 [sic], at which time a new city attorney, Michael Roth was hired by the city council." Mot. re Roth Rept. at 1. "An invoice from Michael Roth's law firm at that time, Wildman, Harrold, Allen and Dixon, attached hereto as Exhibit A, indicates however that various members of that firm were performing legal services for the City related to the landfill siting application as early as April 27, 2007." *Id.*

Fox Moraine argues that there is no privilege applicable to the Roth report, and that as a matter of fundamental fairness is entitled to know all of the materials considered by the city council in making its decision." Mot. re Roth Rep. at 2.

Yorkville's Response

In its response (Resp. re Roth Rep), Yorkville first argues that since Fox Moraine has known about the Roth report for over a year, its belated attempt to secure the Roth report should be denied on that basis alone. Resp. re Roth Rep at 2. Further, Yorkville cites case law and states that said report is privileged:

Unlike Roth, both Clark and Price were assigned, by ordinance, a role in the application hearing proceedings. Clark, the Hearing Officer, was required to submit a written report of his findings to the Council prior to its deliberations. He did so, and his report became part of the record. Price, too, as the City's Special Counsel, was required to submit any report he produced through public hearing process. Because he prepared a report, that report also became part of the record.

The City Attorney, on the other hand, is not assigned any role in the landfill proceeding by the ordinance and had no obligation to write or file any report as part of the proceeding. Roth's memorandum therefore was not a third landfill 'report' under the ordinance or otherwise. It is solely a lawyer's confidential response to his client's request for legal advice-a privileged attorney-client communication. Resp.re Roth Rep. at 3.

Fox Moraine's Reply

In its reply (Reply re Roth Rep.), Fox Moraine states that the minutes of the May

8, 2007 city council meeting “indicate that Michael Roth and his firm (the Wildman firm) were retained as interim City attorney pursuant to a proposal (a copy of which also has never been made available to Fox Moraine) for a maximum of 50 hours per month of legal services at a fixed fee.” Reply re Roth Rep. at 1. Fox Moraine also alleges that “the minutes do not reflect any request for specific services” or advice from Roth, nor is there evidence that any “advice” was requested by the City Council. *Id.* at 2.

Fox Moraine also takes issue with Yorkville’s assertion that Fox Moraine should have known of the existence of the Roth report for some period of time, and its belated request should be denied. Fox Moraine states that “[t]he importance of the document has emerged as it became clear that the city council members were considering recommendations and materials which were not part of the public record in making their decision on Fox Moraines siting application”. Reply re Roth Rep. at 2. Further, Fox Moraine states that it:

is entitled to know as a matter of law what materials were relied upon by city council members in reaching their decision. This is not probing the minds of the decision-makers, but, rather merely determining whether or not the council’s decision was based upon the record made in this proceeding as required by law. *Id.*

Discussion And Ruling

In summary, Fox Moraine’s motion to compel production of the Roth report is denied. Fox Moraine should have filed this motion to compel earlier. But, the timing of this motion, is of no matter because the Roth report submitted to the City Council on May 23, 2007, is protected under the attorney-client privilege.

“The purpose of the attorney-client privilege is to encourage and promote full and frank consultation between a client and legal advisor by removing the fear of compelled disclosure of information”. Consolidation Coal Co. v. Bucyrus-Erie, 89 Ill.2d 103, 117-18, 432 N.E.2d 250, 256 (1991); Waste Management, Inc., v. International Surplus Lines Insurance Company, 144 Ill.2d 178, 196, 579 N.E.2d 322, 329-330 (1991). “Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party’s attorney”. Waste Management, 579 N.E.2d at 781, citing 134 Ill.2d R. 201(b)(2).

Fox Moraine concedes that Michael Roth and his firm were hired to assist Yorkville in petitioner’s landfill application and proceedings. To that end and, as Yorkville asserts, the Roth report is privileged communication because it was Michael Roth’s confidential response to Yorkville’s request for legal advice regarding Fox Moraine’s landfill application.

Again, Fox Moraine’s motion to compel the Roth report is denied.

Yorkville Motion In Limine #1: Alleged Bias of Council Members

In its first motion *in limine* (Mot. Lim. #1), Yorkville asserts that the petitioner has waived any and all allegations of bias and prejudice on the part of seven Council members because of petitioner's failure to object at the local siting hearing. Yorkville appears to agree that questioning the Council members regarding *ex parte* contacts is proper Mot. Lim. #1 at 3. but that Fox Moraine has preserved the ability to raise fairness issues only as to Mayor Burd and Member Spears. Specifically, the motion seeks to:

Exclude from hearing on this matter the following information: any and all arguments or statements, questions, testimony, or evidence of any kind from petitioner Fox Moraine and its counsel and from any other party, that refer to, directly or indirectly, the alleged bias, predisposition, or unfairness of any City Council Member other than Mayor Burd and Member Spears. Mot. Lim. #1 at 1.

Yorkville contends that ample precedent supports its contentions that Fox Moraine has waived any ability to raise issues about the balance of the city council members. Mot. Lim. #1 at 4-5.

Fox Moraine's Response

In its response to the first motion *in limine* (Resp. Mot. Lim. #1) Fox Moraine correctly states that this issue has been fully briefed and ruled upon in a September 20, 2007, hearing officer order. Fox Moraine states that it "reiterates, repeats and reincorporates its response filed August 30, 2007, to Yorkville's motion for protective order." Resp. Mot. Lim. #1 at 1. Fox Moraine also addresses Yorkville's waiver arguments, maintaining that caselaw supports its right to raise fairness issues concerning persons other than Mayor Burd and Member Spears. *Id.* at 2-3.

Yorkville's Reply

Yorkville, in its reply (Reply Mot. Lim. #1) continues with its waiver argument and Fox Moraine's failure to timely move to disqualify certain Council members. In support thereof, Yorkville points to deposition testimony in support of its contention that Fox Moraine failed to timely act on its early knowledge or suspicions of fairness concerns regarding various council members. Reply Mot. Lim. #1 at 4-5.

Discussion And Ruling

In summary, Yorkville's motion *in limine* #1 is denied.

This issue of inquiry by Fox Moraine into the alleged bias of various council members was previously raised by Yorkville in a motion for protective order concerning discovery; the hearing officer addressed the issue in a September 20, 2007 order finding in favor of Fox Moraine. Basically, Yorkville argued in its motion for a protective order, as it does here, that Fox Moraine has waived any issues regarding possible bias or prejudice against petitioner by seven of the nine member of the City council because it did not object to the member's participation as decision-makers at the local siting hearing. Yorkville's motion for a protective order was denied.

The earlier order found that information regarding possible bias and prejudice is “fair game” for discovery when the issue of fundamental fairness is raised, as Yorkville apparently now agrees. Mot. Lim. #1 at 3. Further, the order noted that the ultimate determination as to whether the petitioner has waived any issues as to one or more of the council members is a decision for the Board, and not the hearing officer, to make. Yorkville as not appealed the September 20, 2007, hearing officer order.

Based on the materials obtained in discovery as appended to the parties’ filings and cited in the pleadings on this motion, it is clear that potential evidence concerning fundamental fairness issues involving various city council members exists. Yorkville’s arguments are not persuasive that Fox Moraine should be prevented from presenting relevant information at hearing.

For the reasons set forth herein and in the September 20, 2007, hearing officer order, Yorkville’s motion *in limine* #1 is denied.

Yorkville Motion In Limine #2: City Council Member’s Decisionmaking Processes

In its second motion *in limine* (Mot. Lim. #2), Yorkville raises a “decisionmaking process” issue not unlike one raised in one of Fox Moraine’s motions to compel. Yorkville moves the hearing officer to exclude, at hearing, the following information:

Any and all arguments, statements, questions, testimony, or evidence of any kind from Petitioner Fox Moraine and its counsel and from any other party, that refer to, directly or indirectly, the decision making process of the Members of the Yorkville City Council, including the reasons why they voted the way they did regarding the Fox Moraine landfill application. Mot. Lim. #2 at 1.

Yorkville contends that any such inquiry would run afoul of the requirement that the mental processes of the decision-makers be safeguarded. Mot. Lim. #2 at 2-4.

Fox Moraine’s Response

In its response to the second motion *in limine* (Resp. Mot. Lim. #2), Fox Moraine first claims, as it did in its motion to compel answers to deposition questions, that there is no deliberative process privilege in Illinois applying to municipalities, citing the 1998 Illinois Supreme Court Birkett decision. Resp. Mot. Lim. #2 at 2. Fox Moraine contends that the 2005 *Thomas* decision applies only to the judicial branch. *Id.* at 3.

Secondly, Fox Moraine argues that, even assuming a deliberative process exists for judicial decisionmakers, “any protection enjoyed by decision-makers must yield where the evidence reveals ‘bad faith or improper behavior.’” Resp. Mot. Lim. #2 at 5. In support, Fox Moraine points to a front page newspaper article attached to Yorkville’s Motion In *Limine* #3 where campaigning Council members, “during the pendency of the siting proceedings, [and] while evidence was still being presented, that, *inter alia*, ‘I

don't think there is any such thing as a safe, state-compliant landfill'; 'a landfill would be a negative'; and 'it would be a negative addition to the city. I have no question about that.'" *Id.* In sum, Fox Moraine argues there has been a strong showing of bad faith or improper behavior as to allow further inquiry. *Id.* at 6.

Further, Fox Moraine argues that "even if a deliberative process existed, the Council members waived that privilege by deciding to conduct their deliberations publicly, on the record, with a court reporter present to transcribe." Resp. Mot. Lim. #2 at 6-7.

Fox Moraine contends that council members own admissions open the door for an inquiry into the bases for their decisions: in the transcript of their May 23, 2007 meeting, Council members admitted that they had not actually reviewed the record. Resp. Mot. Lim. #2 at 7.

Yorkville's Reply

In its reply (Reply Mot. Lim. #2), Yorkville continues with its argument that the decision in Birkett does not apply to this matter, and that any statements made by City council members do not amount to a strong showing of prejudgment or bias. Reply Mot. Lim. #2 at 1-5. Yorkville also dismisses as "inane" Fox Moraine's allegation that the City Council members waived their deliberative process privilege by conducting deliberations on the record. *Id.* at 5.

Finally, Yorkville argues that Fox Moraine misconstrues the City Council members statements that they did not review the record. Reply Mot. Lim. #2 at 5. Yorkville reminds that the City Council members "sat through approximately 140 hours of testimony and reviewed a mountain of exhibits", and states that since "the City Council members participated in creating the record, they did not have to re-review it in order to render an impartial decision, nor were they required to." *Id.* at 5-6.

Discussion And Ruling

In summary, Yorkville's motion *in limine* #2 is granted.

As stated above in the ruling herein regarding Fox Moraine's motion to compel answers to depositions, the Board has held that the integrity of the decision making process requires that the mental processes of the decision-makers be safeguarded, and that a strong showing of bad faith or improper behavior is required before any inquiry into the decision making process can be made. Waste Management of Illinois v. County Board of Kankakee County, PCB 04-186, slip op. at 27 (January 24, 2008). A Council member's mere expression of opinion regarding the landfill does not overcome the presumption of impartiality of the decision-maker. See A.R.F. Landfill, Inc., v. Lake County, PCB 87-51 (October 1, 1987). Here, petitioner has failed to make the necessary showing of bad faith so as to overcome the prohibition of inquiring into the mental processes of the Council members.

Petitioner's reliance on Birkett for its proposition that the deliberative process does not exist in Illinois has been addressed above and rejected.

Fox Moraine's argument, without supporting authority, that any deliberative process privilege that may exist has been waived because the open meeting at which deliberations were made was transcribed is likewise rejected. The Board has held that the decision-maker cannot waive the mental process and/or deliberative process privilege. Land and Lakes Company, v. Village of Romeoville, PCB 92-25, slip op. at 6 (June 4, 1992).

Finally, petitioner's allegation that the decisionmaking process need not be protected because certain Council members indicated that they have not reviewed the record is rejected. Yorkville points out that City Council members heard 140 hours of testimony and reviewed a plethora of exhibits. There is no requirement that the decision-makers re-review the record. City of Rockford v. Winnebago County Board, PCB 88-107, slip at 6 (November 17, 1988).

Again, Yorkville's motion *in limine* #2 is granted.

Yorkville Motion In Limine #3: Election Campaign Statements Re Fox Moraine's Siting Application

In its third motion *in limine* (Mot. Lim. #3), Yorkville moves the hearing officer to exclude, at hearing, the following information:

Any and all arguments, statements, questions, testimony, or evidence of any kind from Petitioner Fox Moraine and its counsel and from any other party, that refer to, directly or indirectly, any statements, whether oral or written, made by Yorkville City Council Members during their election campaigns leading up to the April 17, 2007 elections regarding the proposed Fox Moraine landfill. Mot. Lim. #3 at 1.

Yorkville argues that any statements made by City Council members leading up to the election as reported in various newspaper articles is not relevant and "cannot be used to establish that the proceeding was fundamentally unfair because the fact that Council Members made statements regarding the landfill during their election campaigns does not overcome the presumption that, as administrative officials, they were objective in judging the siting application." Mot. Lim. #3 at 3. (citing Waste Management of Illinois v. Pollution Control Board, 175 Ill. App.3d 1023, 1040 (1988) "the fact that an administrative official has taken a public position or expressed strong views on an issue before the administrative agency does not overcome the presumption".)

Finally, Yorkville citing the First Amendment to the United States Constitution, U.S. Const. Amend. 1, argues "that the Council Members, as candidates for political office, had a right to express their political views without fear of formal interrogation." Mot. Lim. #3 at 3.

Fox Moraine's Response

In its response (Resp. Mot. Lim. #3), Fox Moraine opposes Yorkville's motion. Citing the Illinois Environmental Protection Act and case law, Fox Moraine insists that it has a right to be judged by an unbiased decision-maker and, although it is presumed that decision-makers act objectively in arriving at its decision, the applicant may nevertheless show bias or prejudice if the evidence "might lead a disinterested observer to conclude that the administrative body, or its members, had in some measure adjudged the facts as well as the law of the case in advance of hearing it." Danko v. Board of Trustees of City of Harvey Pension Bd., 240 Ill. App. 3d 633, 642, 608 N.E.2d 333, 339 (1992). Resp. Mot. Lim. #3 at 2.

Fox Moraine states that:

Here, by its motion, Yorkville attempts to prevent the Board from hearing the evidence necessary to determine whether Council Member's statements opposing the landfill were such that they would lead a disinterested person to conclude that the decision-makers adjudged the matter in advance of the hearing. Without presentment of that evidence, there is no way to answer this pivotal question. Resp. Mot. Lim. #3 at 3.

Finally, Fox Moraine argues that the First Amendment does not give decisionmakers a "right to avoid being asked about their public statements". Resp. Mot. Lim. #3 at 3.

Yorkville's Reply

In its reply (Reply Mot. Lim. #3), Yorkville points to the holding in Waste Management that even though an "administrative official has taken a public position or expressed strong views on an issue before an administrative agency does not overcome the presumption" that the decision-makers were objective. Resp. Mot. Lim. #3 at 1-2. Yorkville contends that Fox Moraine has failed to make a showing of strong evidence of bias sufficient to overcome the presumption. *Id.* at 2.

Finally, Yorkville states that in fact the First Amendment does apply to the case at bar to protect inquiry into the decisionmakers election campaign statements. Yorkville discusses certain arguments made to this effect by Fox Moraine's attorney on the issue in another case. Resp. Mot. Lim. #3 at 2-3.

Discussion And Ruling

In summary, Yorkville's motion *in limine* #3 is denied.

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 may be considered in an attempt to demonstrate impartiality. *See County of Kankakee v. City of Kankakee, Town and Country Utilities, Inc., and Kankakee Regional Landfill, LLC.*, PCB 03-31, 03-33, 03-35 (cons.) (Jan. 23, 2003). The Board has also held that “an applicant can probe facts relevant to fundamental fairness.” *Land and Lakes Company et al. v. Village of Romeoville*, PCB 92-25, slip at 6 (June 4, 1992).

Fox Moraine has persuasively demonstrated that it must be allowed to inquire at hearing as to the statements made, in the words of Yorkville’s motion “by Yorkville City Council Members during their election campaigns leading up to the April 17, 2007 elections regarding the proposed Fox Moraine landfill”. Fox Moraine may not ultimately present enough evidence to overcome the presumption in favor of any decisionmaker’s impartiality. But under the circumstances of here, Fox Moraine cannot be precluded from attempting to make any case it may have.

Again, Yorkville’s motion *in limine* #3 is denied.

Yorkville Motion In Limine #4: Law Firm Invoice

In its fourth motion (Mot. Lim. #4), Yorkville moves the hearing officer to exclude, at hearing, the following information:

any and all arguments, statements, questions, testimony, or evidence of any kind from Petitioner Fox Moraine and its counsel and from any other party, that refer to, directly or indirectly the invoice of Wildman Harrold that was inadvertently produced in this appeal.

Yorkville had previously sought the return of this inadvertently produced invoice, but in a March 27, 2008 order the hearing officer denied a motion to compel the return of the invoice.

Yorkville represents that it “incorporates by reference the arguments made in support of its Motion to Compel Return of Document Inadvertently Disclosed, which was filed with the Board on or around November 8, 2007.” Mot.Lim. #4 at 1. Yorkville additionally appears to question whether the invoice amounts to “relevant evidence”. *Id.* at 1-2.

Fox Moraine’s Response

In its response (Resp. Mot. Lim. #4), Fox Moraine too notes that this invoice was previously the subject an earlier motion by respondent and that it was addressed and denied by a March 27, 2008 hearing officer order.. Fox Moraine represents that it realleges all of the arguments made in its response brief to that motion. Resp. Mot. Lim. #4 at 1. Fox Moraine then devotes 6 pages arguing additional relevance of the invoice, suggesting that it is “relevant as circumstantial, if not direct, evidence of predisposition and bias” for various reasons. *Id.* at 1-2.

Yorkville's Reply

In its reply (Reply Mot. Lim. #4), Yorkville attempts to refute Fox Moraine's allegations and reiterates that the invoice "is not relevant to any issue in this appeal, and should not be part of the evidence at hearing or the record going forward." Reply at 1. Yorkville concedes that its privilege claims regarding the invoice has been rejected pursuant to the hearing officer order dated March 27, 2008, and that it "intends to appeal it, if necessary." Reply Mot. Lim. #4 at 1, n.1.

Discussion And Ruling

In summary, Yorkville's motion *in limine* #4 is denied.

The March 27, 2008, hearing officer order did not reach the relevance issues presented in the motion in limine. In summary, that order provided:

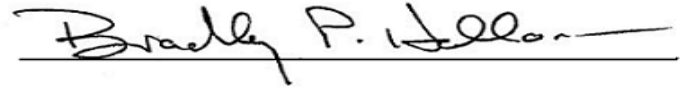
The invoice at issue here was originally provided by Yorkville to Fox Moraine outside the Board's discovery process, in pursuit of monies due Yorkville under its Landfill Siting Ordinance. Had this document not been included in response to discovery requests in the Board's action, the hearing officer would agree with Fox Moraine that the Board has no jurisdiction to entertain the motion at all. But, as Yorkville's motion is in the nature of a motion for protective order as part of the Board's discovery process, the hearing officer reluctantly concludes that the motion is properly before him and the Board. *See, e.g. Saline County Landfill, Inc. v. IEPA*, PCB 04-117 (May 6, 2004) (ruling on protective order concerning attorney-client privilege issues).

For the reasons expressed . . . , the hearing officer finds that the invoice is not properly within the scope of either the attorney-client or work product privileges. And, even if the privileges applied to the invoice, any such privilege would be considered waived under Illinois case law. Fox Moraine, LLC v. United City of Yorkville, City Council: Kendall County, Intervenor. PCB 07-146, slip op. at 8 (hearing officer order March 27, 2008).

This order does not revisit the issues of privileges ruled on in the March 27, 2008 order. As to the relevance issues, this order finds that Fox Moraine has made a sufficient showing in its filing that the invoice may be relevant to issues of fundamental fairness, including predisposition and bias of decisionmakers. Under the circumstances of here, Fox Moraine cannot be precluded from attempting to make any case it may have.

Again, Yorkville's motion *in limine* #4 is denied for the reasons set forth above and for the reasons set forth in the March 27, 2008, hearing officer order.

IT IS SO ORDERED

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.

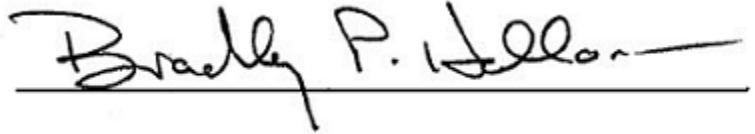
Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, Illinois 60601
312.814.8917

CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order was mailed, first class, on October 30, 2008 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 October 30, 2008:

John T. Therriault
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph St., Ste. 11-500
Chicago, Illinois 60601

A handwritten signature in black ink that reads "Bradley P. Halloran" with a horizontal line underneath it.

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