BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

TIMBER CREEK HOMES, INC.,	)	
	)	
Petitioner	)	
	)	
v.	)	No. PCB 2014-099
	)	
VILLAGE OF ROUND LAKE PARK, ROUND LAKE PARK VILLAGE BOARD and GROOT INDUSTRIES, INC.,	)	(Pollution Control Facility Siting Appeal)
	)	
Respondents	)	

PETITIONER'S CONSOLIDATED RESPONSE TO RESPONDENTS' MOTIONS TO DISMISS

Now comes Petitioner, Timber Creek Homes, Inc. ("TCH"), by its attorneys, Jeep & Blazer, LLC, and hereby submits its Consolidated Response to the Motions to Dismiss filed by Respondents Village of Round Lake Park ("VRLP"), Round Lake Park Village Board (the "RLP Board") and Groot Industries, Inc. ("Groot").

I. INTRODUCTION

All three Respondents have filed similar Motions, asserting the same two grounds for dismissal – that TCH's Petition for Review (the "TCH Petition") is factually inadequate, and that TCH has failed to allege that it preserved its fundamental fairness claim by first raising it in the underlying hearing. Respondents Motions reflect an effort to circumvent the appeal process before the siting hearing record has even been filed. As will be demonstrated below, in pursuit of that effort, Respondents ask this Board to ignore its consistent prior pronouncements on the adequacy of a Petition for Review.

II. THIS BOARD'S ORDER ACCEPTING THE PETITION FOR HEARING, AND ITS PRIOR RULINGS ON THE ADEQUACY OF PETITIONS FOR REVIEW OF SITING DECISIONS, CONFIRM THAT TCH HAS PROPERLY STATED ITS CLAIMS

Respondents collectively cite to numerous cases in support of their assertions of the TCH Petition's purported factual inadequacy. The subjects of those citations cover a

broad range of claims – everything from fraud in supplying roofing materials, *Knox College v. Celotex Corporation*, 88 Ill.2d 407 (1981), to negligence against a hospital, *Estate of Johnson v. Condell Memorial Hospital*, 119 Ill.2d 496 (1988). Conspicuously absent from all three Motions, however, is a citation to any case addressing the subject of those Motions – the pleading standard under 35 Ill.Adm.Code 107.208.[1] That absence looms large, particularly in the face of an attorney's ethical obligation to disclose contrary authority. Illinois Rules of Professional Conduct, Rule 3.3(a)(2) In this case that conscious and inexcusable failure involves a recent decision from this Board that completely disposes of Respondents' arguments.

It is important in the first instance to reiterate what the regulations applicable to siting appeals require.[2] Section 107.208 provides that:

> In addition to the requirements of 35 Ill. Adm. Code 101.Subpart C the petition must also include:
>
> a) A copy of the local siting authority's written decision or ordinance;
>
> b) A statement as to how the filing party is a proper petitioner under Section 107.200 of this Part; and
>
> c) In accordance with Section 39.2 of the Act, a specification of the grounds for the appeal, including any allegations for fundamental unfairness or any manner in which the decision as to particular criteria is against the manifest weight of the evidence.

---

[1] Groot does site to one Board decision, *Winnetkans Interested in Protecting the Environment (WIPE) v. EPA*, 1976 WL 8302, PCB 76-215 (September 15, 1976), in discussing what may constitute a "frivolous" pleading. (Groot Motion at 3) That case, however, did not address the pleading requirements for a petition for review of a siting decision, nor could it have since it predates both the adoption of §39.2 of the Illinois Environmental Protection Act and Part 107 of the Board's regulations.

[2] VRLP points to the pleading requirements in Board enforcement actions, governed by 35 Ill.Adm.Code 103.204. VRLP's "reliance" on those requirements is plainly misplaced. This Board's regulations explicitly provide that "adjudicatory proceedings before the Board concerning petitions to review a pollution control facility siting decision made by local government pursuant to Sections 39.2 and 40.1 of the Act" are those found in Part 107. 35 Ill.Adm.Code 107.100 VRLP itself acknowledges that the pleading requirements for a siting appeal are different than for an enforcement action, and are governed by Section 107.208. (VRLP Motion at 2-3)

Section 107.208 does not establish some heightened fact pleading standard. The standard, rather, is one of frivolousness. Unless the Board determines that a petition is "duplicative or frivolous," the Board will hear the petition. 415 ILCS 5/40.1(b); 35 Ill.Adm.Code 107.200(b) See also *Sierra Club and JIm Bensman v. City of Wood River and Norton,* 1997 WL 728170, PCB 98-43, Slip Op. Cite at 1 (November 6, 1997) An action is duplicative if it is "identical or substantially similar to one brought before the Board or another forum." 35 Ill.Adm.Code 101.202 An action is frivolous if it is "a request for relief that the Board does not have the authority to grant, or a complaint that fails to state a cause of action upon which the Board can grant relief." *Id*.

In assessing the sufficiency of pleadings, this Board has previously recognized that, "[P]leading requirements for administrative review are less exacting than for other causes of action." *Bernice Loschen v. Grist Mlll Confections, Inc*., 1997 WL 593982, PCB 97-174, Slip Op. Cite at 4 (September 18, 1997), citing *Mueller v. Board of Fire and Police Commissioners of the Village of Lake Zurich*, 267 Ill.App.3d 726, 733-734 (2nd Dist. 1994)[3] A petitioner is not required "to plead all facts specifically in the petition, but to set out ultimate facts which support his cause of action." *City of Wood River, supra,* Slip Op. Cite at 2

Most recently, in *American Disposal Services of Illinois, Inc. v. County Board of McLean County, et al.,* 2012 WL 586817, PCB 11-60 (February 16, 2012), this Board rejected the identical arguments raised by Respondents here. Unlike all of the cases cited by Respondents, *American Disposal* did involve a siting appeal and the requirements of Section 107.208. Like the Respondents do here, the Respondents in

[3] The RLP Board cites to both *Mueller* and *People of the State of Illinois v. Michel Grain Company Inc*., 1996 WL 742730, PCB 96-143 (December 5, 1996) in support of the proposition that the allegations in the TCH Petition are inadequate. (RLP Board Motion at 2) But the RLP Board fails to mention that both cases (neither of which involved a siting appeal) acknowledged the lessened pleading standard in administrative review proceedings. *Mueller*, 267 Ill.App.3d at 733-734; *Michel Grain*, Slip Op. Cite at 1 Indeed, this Board in *Michel Grain* denied a motion to dismiss and subsequent motion to reconsider that denial, finding that "though more facts probably would have been more helpful in this case, the amended complaint may proceed to hearing". *Id.*

American Disposal moved to strike and dismiss the petition for review because, among other things, the allegations in the petition for review that the findings on siting criteria were against the manifest weight of the evidence and that the proceeding was fundamentally unfair were "conclusory" and "failed to include any specific basis for [the petitioner's] challenge to the local siting authority's decision". 2012 WL 586817, Slip Op. Cite at 24, 32

It is instructive to compare the petitioner's allegations in *American Disposal* and what TCH alleges in this case. This is what the petitioner in *American Disposal* alleged regarding the siting criteria:[4]

> Additionally, Criteria I, 2, 3, 4, 5, 6, 7, 8, and 9 were not met by Henson, and McLean's approval of Henson's siting Application on those Criteria is not supported by the record and against the manifest weight of the evidence

(*American Disposal* Petition for Review at 3, ¶10) This is the allegation in the TCH Petition:

> In addition, the Village Board majority's finding that Groot met its burden of proving the nine statutory siting criteria, subject to certain conditions, was against the manifest weight of the evidence, and contrary to existing law, with respect to criteria I (need), ii (public health, safety and welfare), iii (character of the surrounding area and property values), vi (traffic) and viii (consistency with county solid waste plan).

(TCH Petition, at 2-3, ¶8) This is what the petitioner in *American Disposal* alleged regarding fundamental fairness:

> Finally, the local siting review procedures, hearings, decision, and process, individually and collectively, were fundamentally unfair due to, at a minimum, the unavailability of the public record. ADS reserves its rights to incorporate additional fundamental fairness issues during the course of this proceeding.

[4] A copy of the Petition for Review in *American Disposal* is attached hereto as Exhibit A.

(*American Disposal* Petition for Review at 3, ¶12) This is the allegation in the TCH Petition:

> The local siting review procedures, hearings, decision, and process, individually and collectively, were fundamentally unfair in at least two respects. First, members of the Village Board prejudged the Application and were biased in favor of Groot. Second, the Hearing Officer, appointed to oversee the hearing process and render proposed findings and conclusions, usurped the authority of the Village Board by making determinations that were beyond the scope of his authority and that were solely the province of the Village Board. The Village Board in turn failed in its statutory duty to make those determinations.

(TCH Petition, at 2, ¶7)

This Board denied the motion to dismiss in *American Disposal*, holding that:

> In assessing the adequacy of pleadings in a complaint, the Board has stated that "Illinois is a fact-pleading state which requires the pleader to set out the ultimate facts which support his cause of action." *Loschen v. Grist Mill Confections*, PCB 97-174, slip op. at 4 (June 5, 1997), citing *LaSalle National Trust, N.A. v. Village of Mettawa*, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297, 1303 (1993). Fact-pleading does not require a complainant to set out its evidence: "[t]o the contrary, only the ultimate facts to be proved should be alleged and not the evidentiary facts tending to prove such ultimate facts." *People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill. 2d 300, 308, 430 N.E.2d 1005, 1008-09 (1981) (citations omitted). A complaint's allegations are "sufficiently specific if they reasonably inform the defendants by factually setting forth the elements necessary to state a cause of action." *People ex rel. Scott v. College Hills Corp.*, 91 Ill. 2d 138, 145, 435 N.E.2d 463, 467 (1982).
>
> In ruling on the motion to dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of ADS. In light of these authorities, and based on its review of the pleadings, the Board finds that ADS sufficiently pleads these allegations against the respondents. The Board denies the motion to dismiss on this basis.

2012 WL 586817, Slip Op. Cite at 32-33

The TCH Petition is clearly consistent with what this Board has previously found to be sufficient pleading. Beyond that, this Board has already addressed the sufficiency of the Petition. On January 23, 2014, this Board issued an Order finding that the Petition conforms to the requirements of Section 107.208 and accepted it for hearing. *Timber Creek Homes, Inc. v, Village of Round Lake Park, et al*, 2014 WL 297955, PCB 14-99 (January 23, 2014) VRLP and the RLP Board do not even mention this Board's Order. Groot at least acknowledges it, but tries to avoid its impact by arguing that it is "a procedural, rather than a substantive, determination that TCH's Petition should be accepted for further consideration". (Groot Motion at 6) Groot appears to be of the view that such orders by this Board are mere "rubber stamps", to be accorded no weight. Groot again ignores prior precedent.

This Board has rejected such a myopic view of its role in determining the adequacy of a Petition for Review. See *City of Wood River, supra,* Slip Op. Cite at 1 Indeed, contrary to Groot's "rubber stamp" concept, this Board has in the past struck inadequate petitions on its own motion. For example, in *Batavia, Illinois Residents Opposed to Siting of Waste Transfer Station v. Onyx Waste Services Midwest, Inc*., 2004 WL 1707735, PCB 05-1, Slip Op. Cite at 1-2 (July 22, 2004), this Board refused to accept a petition for hearing until an amended petition was filed, because the petitioner failed to identify any of the siting criteria that were claimed to have been decided contrary to the manifest weight of the evidence. See also *John F. Nocita v. Application of Greenwood Transfer, L.L.C. for Transfer Station Local Siting Approval in Village of Maywood, Illinois*, 2004 WL 2578741, PCB 05-67, Slip Op. Cite at 3 (November 4, 2004) ("[A]t no point in his petition does Mr. Nocita state that the Village's siting approval was against the manifest weight of the evidence on any of the nine Section 39.2(a) criteria. See Pet. at 1-2. In addition, he states that 'when this appeal is granted, I will be

in position to further address my objections....' Pet. at 2. This failure to state any grounds under Sections 39.2(a) and 40.1(b) for an appeal violates the Act's and the Board's petition content requirements.")

III. THE ISSUE OF TCH'S PRESERVATION OF ITS FUNDAMENTAL FAIRNESS CLAIM IS NOT RIPE FOR ADJUDICATION

Respondents' assertions regarding TCH's "waiver" of its fundamental fairness claim, or, more specifically, that TCH has not alleged that it did not waive the claim, suffer from similar defects. Respondents rely on *Stop the Mega-Dump v. County Board of DeKalb County*, 2012 IL App (2d) 110579 (2nd Dist. 2012), *Fox Moraine LLC v. United City of Yorkville*, 2011 IL App (2d) 100017 (2nd Dist. 2011), appeal denied __ Ill.2nd __, 968 N.E.2d 81 (Table) (2012), and *Peoria Disposal Company v. IPCB*, 385 Ill.App.3d 781 (3rd Dist. 2008), appeal denied 231 Ill.2d 654 (2009). But all of those cases address what a petitioner must prove to substantiate a fundamental fairness claim, not what it must plead to conform to the requirements of Section 107.208 and establish its right to proceed with the claim. All three cases make the same statement: the petitioner "**must show** that a disinterested observer might conclude that the local siting authority, or its members, had prejudged the facts or law of the case. [Emphasis added]" *Stop the Mega-Dump*, 2012 IL App (2d) 110579, ¶27; *Fox Moraine,* 2011 IL App (2d) 100017, ¶ 60; *Peoria Disposal,* 385 Ill.App.3d at 798 None of the cases even mentions the pleading requirements for a fundamental fairness claim.

Moreover, waiver (or lack thereof) is not a pleading requirement – it is an assertion that may, if appropriate, be addressed after the siting authority files the hearing record. In this regard, Respondents ignore a fundamental legal principle. Waiver is a matter of affirmative defense that must be determined on the basis of the record, and absence of waiver is not an element of the underlying claim. See *People of the State of Illinois v. QC Finishers, Inc.*, 2004 WL 1615869, PCB 01-7, Slip Op. Cite at

12 (July 8, 2004); *People of the State of Illinois v. Peabody Coal Company*, 2003 WL 21405850, PCB 99-134, Slip Op. Cite at 8 (June 5, 2003)

It is important to keep in mind that VRLP is required to submit the entire record on appeal, 35 Ill.Adm.Code 107.304, something that has not yet occurred. Respondents nevertheless ask this Board to blindly accept their assertion that TCH did not preserve the issue of fundamental fairness for appeal, without the benefit of the hearing record. [5]Should this Board accept Respondents' assertions at face value? Or should this Board instead do what it has always done, and consider what actually occurred during the siting hearing at the appropriate stage in this proceeding? Respondents would clearly prefer the former, since they very obviously do not want this Board to base its decision on the actual facts.

IV. CONCLUSION

As historically defined by this Board, most recently in *American Disposal Systems*, the allegations of the TCH Petition satisfy the requirements of 35 Ill.Adm.Code 107.208. The Motions to Dismiss should therefore be denied. In the event that this Board nevertheless elects to strike the Petition, TCH requests leave to file an amended Petition in due course.

Respectfully submitted,
Timber Creek Homes, Inc.

By: _____
One of its attorneys

Michael S. Blazer (ARDC No. 6183002)
Jeffery D. Jeep (ARDC No. 6182830)
Jeep & Blazer, LLC
24 N. Hillside Avenue, Suite A
Hillside, IL 60162
(708) 236-0830
Fax: (708) 236-0828
mblazer@enviroatty.com
jdjeep@enviroatty.com

[5] 35 Ill.Adm.Code 101.504 provides that, "Facts asserted that are not of record in the proceeding must be supported by oath, affidavit, or certification in accordance with Section 1-109 of the Code of Civil Procedure…." None of the Respondents have complied with this requirement.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a copy of PETITIONER'S CONSOLIDATED RESPONSE TO RESPONDENTS' MOTIONS TO DISMISS to be served on the following, via electronic mail transmission, on this 11th day of February, 2014:

Hearing Officer

Bradley P. Halloran
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, Illinois 60601
Brad.Halloran@illinois.gov

For Groot Industries, Inc.

Charles F. Helsten
Richard S. Porter
Hinshaw and Culbertson
100 Park Avenue
Rockford, IL 61101-1099
chelsten@hinshawlaw.com
rporter@hinshawlaw.com

For the Village of Round Lake Park

Peter S. Karlovics
Law Offices of Rudolph F. Magna
495 N Riverside Drive, Suite 201
Gurnee, IL 60031-5920
PKarlovics@aol.com

For the Round Lake Park Village Board

Glenn Sechen
The Sechen Law Group
13909 Laque Drive
Cedar Lake, IN 46303-9658
glenn@sechenlawgroup.com

Michael S. Blazer
One of the attorneys for
Petitioner

EXHIBIT A

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

AMERICAN DISPOSAL SERVICES OF ILLINOIS, INC., Petitioner, v. COUNTY BOARD OF MCLEAN COUNTY, ILLINOIS, HENSON DISPOSAL, INC., and TKNTK, LLC, Respondents.	No. PCB 11- 60 (Pollution Control Facility Siting Application)

PETITION FOR REVIEW OF DECISION CONCERNING SITING OF A NEW POLLUTION CONTROL FACILITY, PURSUANT TO SECTIONS 39.2 AND 40.1 OF THE ILLINOIS ENVIRONMENTAL PROTECTION ACT

Petitioner American Disposal Services of Illinois, Inc. ("ADS"), by and through its attorneys at Querrey & Harrow, Ltd., respectfully requests a review of the decision of the County Board of McLean County, Illinois ("McLean") approving the siting application ("Application") filed by Henson Disposal, Inc. ("Henson") to operate a construction debris, recycling, and landscape waste treatment and transfer facility on property owned by TKNTK, LLC in McLean County. In further support of this Petition, Petitioner states as follows:

1. This Petition is filed pursuant to Section 40.1(b) of the Illinois Environmental Protection Act ("Act") and Sections 107.200-107.208 of the applicable Illinois Pollution Control Board Regulations. (415 ILCS 5/40.1(b) (2003) and 35 IAC 107.200-208).

2. Pursuant to Section 107.208(a), a copy of McLean's written decision is attached to this Petition as **Exhibit A**. The attached copy is from McLean County's website.

3. Henson proposed to treat and transfer construction debris, single-stream recycling, and landscape waste at various locations on property owned by a different entity. The name of the facility, as stated by McLean in the LPC-PA8, is the "Henson Disposal Recycling Center." Henson's siting proposal was approved, with a few conditions, by McLean.

4. Pursuant to Section 107.208(b), the following Paragraphs, 5-7, provide a statement as to how ADS, the filing party, is a proper Petitioner under Section 107.200 of the Pollution Control Board Regulations, because, among other things, ADS participated in and attended the local site location review public hearing and submitted written comment on the Application.

5. ADS is a company that does business in McLean.

6. On December 9, 2010, ADS entered its appearance at the siting hearing on the subject Application. Additionally, ADS attended the public hearing and decision in the subject local siting review.

7. Further, ADS, through its attorneys, timely filed written comments concerning or relating to the subject application with McLean.

8. Pursuant to Section 107.208(c), the following Paragraphs 9-11, set forth the grounds for this appeal.

9. As an initial matter, McLean did not have proper jurisdiction to conduct the local public hearings or make a decision on Henson's siting Application. The pre-filing notice was not accurate, was misleading, and was insufficient under the requirements of Section 39.2(b) of the Act. (415 ILCS 5/39.2(b) (2003)). The Illinois Pollution Control Board and Illinois Courts have consistently held that Section 39.2(b) pre-filing notice requirements are a jurisdictional prerequisite to the local new pollution control facility site location process. *See, Ogle County Bd. ex rel. County of Ogle v. Pollution Control Bd.*, 272 Ill. App. 3d 184, 208 Ill. Dec. 489, 649 N.E.2d 545 (1995); *Kane County Defenders, Inc. v. Pollution Control Bd.*, 139 Ill. App. 3d 588, 93 Ill. Dec. 918, 487 N.E.2d 743 (2nd Dist. 1985).

10. Additionally, Criteria 1, 2, 3, 4, 5, 6, 7, 8, and 9 were not met by Henson, and McLean's approval of Henson's siting Application on those Criteria is not supported by the record and against the manifest weight of the evidence

11. Further, McLean did not make a finding as to Criterion 4, and incorrectly determined that Criterion 4 was not applicable.

12. Finally, the local siting review procedures, hearings, decision, and process, individually and collectively, were fundamentally unfair due to, at a minimum, the unavailability of the public record. ADS reserves its rights to incorporate additional fundamental fairness issues during the course of this proceeding.

WHEREFORE, Petitioner ADS respectfully requests the Board enter an order **(a)** finding that no jurisdiction existed on Henson's siting Application; **(b)** alternatively and notwithstanding or waiving the jurisdictional issues, setting for hearing this contest of the County Board siting approval decision; **(c)** alternatively and notwithstanding or waiving the jurisdictional issues, reversing the County Board's approval and denying Henson's siting application; **(d)** alternatively and notwithstanding or waiving the jurisdictional issues or item **(c)**, above, remanding this matter for further local public hearings to address the fundamentally unfair local proceeding; and **(e)** providing such other and further relief as the Illinois Pollution Control Board deems appropriate.

Dated: March 22, 2011

Respectfully submitted,

AMERICAN DISPOSAL SERVICES, INC.

By: _____
One of its attorneys

Jennifer J. Sackett Pohlenz
Querrey & Harrow, LTD.
175 W. Jackson Blvd., Suite 1600
Chicago, Illinois 60604
Direct Dial: (312) 540-7540
Fax: (312) 540-0578