

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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

**NOTICE OF FILING**

**To:** see service list

**PLEASE TAKE NOTICE** that prior to 4:30 p.m. on February 18, 2014, I filed the attached Village of Round Lake Park's Reply to TCH's Response to Motion to Dismiss and Motion to Quash Subpoena with the Clerk of the Illinois Pollution Control Board, copies of which are hereby served upon you by email.

By: *Glenn C. Sechen*  
The Sechen Law Group, PC  
Attorney for the  
Village of Round Lake Park

**Certificate of Service**

The undersigned hereby attorney certifies prior to 4:30 p.m. on February 18, 2014, 2014, a copy of the above was filed and served by email, as agreed by counsel, upon the persons shown in the Service List:

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**VILLAGE OF ROUND LAKE PARK's REPLY  
TO TCH's RESPONSE TO  
MOTION TO STRIKE AND DISMISS**

The Village of Round Lake Park ("RLP") hereby replies to the response of Timber Creek Homes, Inc. ("TCH") to RLP's Motion to Strike and Dismiss as follows:

1. TCH claims that, this Board has already addressed the sufficiency of the Petition by the Board 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).

2. In the very next paragraph of TCH's response TCH cites Sierra Club and Jim Bensman v. City of Wood River and Norton Environmental, 1997 WL 728170, PCB 98-43, Slip Op. at 1 (November 6, 1997).

3. In Sierra Club, the Board entertained Norton's motion to strike and ultimately struck portions of the petition despite its prior acceptance of that petition and its prior finding that it was not duplicative or frivolous. It would not have been fundamentally fair to proceed without giving due consideration to Norton's arguments.

The same is true here, as the Board has not yet considered the arguments of the Respondents.

4. TCH chides RLP and the other Respondents for citing pleading rules applicable to more than just siting appeals. However, all of these pleading rules are substantially similar and provide a good guidance regarding the issues at bar.

5. While the Board pointed out in the Sierra Club case that the rules are less exacting in administrative proceedings, Illinois remains a fact pleading state and the rules applicable to other actions provide aid in interpreting the rules that are applicable here.

6. TCH relies on American Disposal Services of Illinois, Inc. v. County Board of McLean County, et al., 2012 WL 586817, PCB 11-60 (February 16, 2012), but that reliance is misplaced as American Disposal was focused on the lack of availability of the record and the petition so pled.

7. It is unclear exactly what other allegations were contained in the American Disposal petition limiting the usefulness of that case.

8. However, the American Disposal order in question did expressly rely on a case which was not a siting appeal, People ex rel. Scott v. College Hills Corp., 91 Ill. 2d 138, 145, 435 N.E.2d 463, 467 (1982), and it set forth the proposition that “[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”.

9. Section 107.208 states that a Section 40.1 siting appeal petition must, in accordance with Section 39.2 of the Act include, “a specification of the grounds for

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”.

10. Siting Sierra Club, TCH states in its response it is not required to plead all facts specifically but just set out ultimate facts in support of its petition and then attempts to convince the Board that it has properly pled the necessary ultimate facts.

11. Ultimate facts are those necessary to determine issues in the case, as distinguished from the evidentiary facts supporting the ultimate facts. State Farm Mutual Auto Ins. Co. v. Woods, 2013 IL App (2<sup>nd</sup>) 120556 (2013).

12. In the court system the rule is the same as that before the Board. “Although a party may plead only ultimate facts rather than evidence upon which he relies, the words used must give the opponent sufficient information as to the character of the evidence to be introduced or the issues to be tried and if the words do not provide that information, the allegations may be deemed conclusory and stricken. J. Eck & Sons, Inc. v. Reuben H. Donnelly Corp., 213 Ill.App. 3d 510 (1991)”. as cited in American Disposal, *supra*, *Slip Op* at 16.

13. The Illinois Supreme Court has noted that the line between ultimate facts and conclusions is not easily drawn, adding that in one context a set of ultimate facts will suffice while in another, from a pragmatic viewpoint, those same ultimate facts do not give sufficient information to an opponent of the character of the evidence to be introduced or the issues to be tried that they are held to be legal conclusions. Van Dekerkhov v. City of Herrin, 51 Ill.2d 374, 282 N.E.2d 723 (1972).

14. Paragraph 7 of the TCH Petition states:

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. *Emphasis added*

15. As pointed out in more detail in RLP's Motion to Strike and Dismiss it is total and complete guesswork to determine what is meant by "procedures", which "hearings" [hearings on the Application? Which hearing date?] and what "process" [Another vague and open ended term. Perhaps everything that happened from the filing of the Application is the "process"?]

16. Unnamed "members" of the Village Board. Which Board members? What "determinations"?

17. It would be helpful to know what RLP should be prepared to introduce in the way of evidence on at the Board's hearing, what documents to have available, if any, and what witnesses to have present, including which of the unnamed "members" of the Village Board.

18. In Van Dekerkhov the Illinois Supreme Court noted that a complaint which attempted to assert common-law negligence, but alleged only that the defendant 'negligently' performed the act in question, has been held to be subject to dismissal.

19. In that context a normal manner of pleading would be to plead that the defendant was negligent in one or more of the following ways, thereafter listing the ways.

20. TCH's petition fails to even rise to the level of the bare assertion performing an act 'negligently'.

21. Here we are dealing with unnamed Board "members", unidentified "determinations", unidentified "procedures, hearings, decision, and process" and the respondents are supposed to guess which are to be taken "individually" and which "collectively".

22. It is clear that the TCH fishing expedition has boarded its ships, left the harbor under full sail and is deploying its fishing nets to see what it might catch in the hope claiming that whatever it catches is within the scope of its purposely vague, unclear and subjective Petition deliberately void of facts. TCH hopes that the meaningless allegations in its Petition can be later twisted in a manner that meets its whatever objectives it develops in the future through its fishing expedition or simply stored to be utilized later in wholly unrelated matters.<sup>1</sup>

23. INEXCUSABLY, Larry Cohn, of TCH addressed the Village Board in public comment at the end of the hearings. Mr. Cohn EXPRESSLY THREATENED the Village Board stating that if the Village Board grants siting, TCH will appeal and will take

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<sup>1</sup> See, e.g., Record C2132 to C2400, C2655, C3582, C3636, C3708, C3710, C3792 wherein TCH utilized transcripts other documents from unrelated matters as fadder on cross examination including to improperly and inaccurately assert that many of those involved in this siting, including the Executive Director of the Solid Waste Agency of Lake County, are liars. C2677-78, C2711-12. TCH hopes to obtain more documents that can be twisted to intimidate Mr. Kleszynski and APC in other subsequent and unrelated cases. The unrelated documents used by TCH on cross examination were part of those produced electronically by TCH prior to the hearings initially without disclosing which of the thousands of pages of documents would be used.

the depositions of each member of the Village Board. At that point, the Hearing Officer put an end TCH's threats. Record, C03849-50

24. TCH has the nerve to seek to continue its tactic before this Board.

25. Apparently, TCHs' intimidation includes retribution directed at witnesses testifying for the Respondents such as Mr. Kleszynski and his firm, APC .

**WHEREFORE**, Respondent, the Village of Round Lake Park, respectfully requests that the Pollution Control Board enter an quashing *duces tecum* and attached notice of deposition for documents of the Village of Round Lake Park's expert real estate appraiser and his firm, Dale Kleszynski and Associated Property Counselors, Ltd.

Respectfully submitted,  
Village of Round Lake Park

By Glenn C. Sechen  
One of Its Attorneys

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**MOTION TO QUASH SUBPOENA**

The Village of Round Lake Park ("RLP") moves to strike the recent subpoena issued by TCH for essentially all of the records and documents in the custody of RLP's expert real estate appraiser, Dale Kleszynski ("Kleszynski") and his firm, Associated Property Counselors, Ltd. ("APC"), and in support thereof, states as follows.

1. Petitioner Timber Creek Homes ("TCH") filed its petition pursuant to Section 40.1 of the Act.
2. Section 40.1(b) governs third party appeals such as this. That section provides, among other things, "such hearing to be based exclusively on the record



before county board or the governing body of the municipality. The burden of proof shall be on the petitioner.”

3. The Respondents, including RLP, have filed motions to strike and dismiss raising issues related to the lack of facts pled in TCH’s petition as well as the vague, unclear and subjective nature of the TCH Petition, which arguments have not yet been addressed by the Board.

4. In the various motions the Respondents in general, and RLP in particular, have charged that TCH is engaged in a fishing expedition by virtue of the vague, unclear and subjective pleading void of facts. Further, we have pointed out the lack of proper pleading allows TCH to attempt to later claim that allegations in its Petition mean something that is not pled or even intended to be pled at this time and to claim the right to overbroad discovery and to later raise yet to be discovered issues by simply interpreting its vague allegations in a manner that meets newly identified objectives *in futuro*.

5. Accordingly, TCH hopes to exceed the scope of issues properly allowed in appeals of local siting approvals under Section 40.1 of the Act and obtain discovery otherwise unavailable to TCH in the hope of finding something that could benefit TCH in the future in this or in other forums. *See also*, footnote 5 below.

6. Dale Kleszynski ("Kleszynski") is a principal of Associated Property Counselors, Ltd. ("APC") and is expert in the field of real estate appraisal. Mr. Kleszynski was called to testify by RLP in the siting hearing at issue.

7. TCH has recently filed a subpoena *duces tecum* and attached notice of deposition for documents covering essentially all of the files of Mr Kleszynski and APC in any way related to the Village of Round Lake Park or the subject transfer station.

8. The documents sought by TCH exceed the scope of these proceedings and, accordingly, the scope of permissible discovery as well.

9. TCH subpoenaed, "All documents relating to or reflecting":

- a. the retention of Mr. Kleszynski and APC, and
- b. the services performed from retention to the present [not to the decision date], and
- c. all meetings and communications between anyone acting or purporting to act on behalf of RLP, including all of RLP's present and former agents, employees, appointed officials, elected officials and attorneys on one hand, and all present and former shareholders, directors, agents, employees of APC and Mr. Kleszynski on the other hand from the date of retention to the present [not to the decision date], and
- d. all meetings and communications between anyone acting or purporting to act on behalf of Groot Industries ("Groot"), including all of Groot's present and former shareholders, directors, officers, agents, employees, attorneys, and consultants on one hand, and all present and former shareholders, directors, agents, employees and attorneys

of APC and Mr. Kleszynski on the other hand from the date of retention to the present [not to the decision date],<sup>1</sup> and

- e. all meetings and communications between anyone acting or purporting to act on behalf of Chicago Bridge and Iron Company (“CBI”), including all of CBI’s present and former shareholders, directors, officers, agents, employees, attorneys, and consultants on one hand, and all present and former shareholders, directors, agents, employees and attorneys of APC and Mr. Kleszynski on the other hand from the date of retention to the present [not to the decision date],<sup>2</sup> and
- f. all meetings and communications between anyone acting or purporting to act on behalf of Poletti and Associates, Inc. (“Poletti”) [Groot’s expert real estate appraiser], including all of Poletti’s present and former shareholders, directors, officers, agents, employees, attorneys, and consultants on one hand, and all present and former shareholders, directors, agents, employees and attorneys of APC and Mr. Kleszynski on the other hand from the date of retention to the present [not to the decision date],<sup>3</sup> and
- g. all meetings and communications between anyone acting or purporting to act on behalf of The Lannert Group (“Lannert”) [Groot’s expert land

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<sup>1</sup> Note that CBI is a publically traded company with an extremely large number of shareholders.

<sup>2</sup> Note that, prior to its merger or acquisition by CBI, Shaw was a publically traded company with an extremely large number of shareholders.

<sup>3</sup> Mr. Poletti is the expert real estate appraiser who wrote the relevant portion of the application for local siting and who was called to testify by Groot.

planner and landscape architect], including all of Lannert's present and former shareholders, directors, officers, agents, employees, attorneys, and consultants on one hand, and all present and former shareholders, directors, agents, employees and attorneys of APC and Mr. Kleszynski on the other hand from the date of retention to the present [not to the decision date],<sup>4</sup>

10. TCH also includes a lengthy list of definitions to be utilized in interpreting its subpoena expanding yet further the breath of the documents it seeks.

11. The scope of discovery sought by TCH in this subpoena and deposition for documents goes well beyond the scope of these proceedings as contemplated by Section 40.1 of the Act and all without pleading ANY facts that could be construed as misconduct of any kind by Kleeszynski, APC, Poletti or Lannert and without any showing that a disinterested observer might conclude that the siting authority, or its members, had prejudged the facts or law of the case as required by Fox Moraine LLC v. United City of Yorkville, 2011 Ill.App.2<sup>nd</sup> 100017, 40-41, 960 N.E.2d 1144, 1163-1164 (2<sup>nd</sup> Dist 2011) *cert denied* \_\_ Ill.2<sup>nd</sup> \_\_ (2012), *citations omitted*.

12. Significantly, no facts are pled linking either Mr. Kleszynski, APC or ANY respondent herein to any portion of the predicate required by Fox Moraine LLC, *Id.* In fact TCH's Petition is void of ANY fact showing the required predicate and that Petition is further void of ANY fact or even ANY claim that it properly raised these issues promptly below before the Village Board. Accordingly, it would be improper to allow the

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<sup>4</sup> Mr. Lannert is the expert land planner and landscape architect who wrote the relevant portion of the application for local siting and who was called to testify by Groot.

TCH to knowingly withhold such a claim and to raise it only after obtaining an unfavorable ruling from the Village Board. Fox Moraine, *Id.*

13. Mr. Kleszynski, APC and the documents sought from them are all many steps removed from any such possible claim and NO such claim has been properly alleged by TCH in its Petition thus making it obvious that TCH is merely engaged in an expensive and what it hopes to be a long fishing expedition.

14. It is clear that the TCH fishing expedition has boarded its ships, left the harbor under full sail and is deploying its fishing nets to see what it might catch in the hope claiming that whatever it catches is within the scope of its purposely vague, unclear and subjective Petition deliberately void of facts. TCH hopes that the meaningless allegations in its Petition can be later twisted in a manner that meets its whatever objectives it develops in the future through its fishing expedition or simply stored to be utilized later in wholly unrelated matters.<sup>5</sup>

15. INEXCUSABLY, Larry Cohn, of TCH addressed the Village Board in public comment at the end of the hearings. Mr. Cohn EXPRESSLY THREATENED the Village Board stating that if the Village Board grants siting, TCH will appeal and will take the depositions of each member of the Village Board. At that point, the Hearing Officer put an end TCH's threats. Record, C03849-50

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<sup>5</sup> See, e.g., Record C2132 to C2400, C2655, C3582, C3636, C3708, C3710, C3792 wherein TCH utilized transcripts other documents from unrelated matters as fadder on cross examination including to improperly and inaccurately assert that many of those involved in this siting, including the Executive Director of the Solid Waste Agency of Lake County, are liars. C2677-78, C2711-12. TCH hopes to obtain more documents that can be twisted to intimidate Mr. Kleszynski and APC in other subsequent and unrelated cases. The unrelated documents used by TCH on cross examination were part of those produced electronically by TCH prior to the hearings initially without disclosing which of the thousands of pages of documents would be used.

16. TCH has the nerve to seek to continue its tactic before this Board.

17. Apparently, TCHs' intimidation includes retribution directed at witnesses testifying for the Respondents such as Mr. Kleszynski and his firm, APC .

18. For all of these reasons, the TCH subpoena *duces tecum* and attached notice of deposition for documents should be quashed.

**WHEREFORE**, Respondent, the Village of Round Lake Park, respectfully requests that the Pollution Control Board enter an order quashing the subpoena *duces tecum* and attached notice of deposition for documents belonging the Village of Round Lake Park's expert real estate appraiser and his firm, Dale Kleszynski and Associated Property Counselors, Ltd.

Respectfully submitted,

Village of Round Lake Park

By *Glenn C. Sechen*

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