

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

TIMBER CREEK HOMES, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB No. 14-99
	)	(Pollution Control Facility
	)	Siting Appeal)
VILLAGE OF ROUND LAKE PARK, ROUND	)	
LAKE PARK VILLAGE BOARD and GROOT	)	
INDUSTRIES, INC.,	)	
	)	
Respondents.	)	

**NOTICE OF FILING**

PLEASE TAKE NOTICE that on February 18, 2014, there was filed electronically Respondent's REPLY IN SUPPORT OF MOTION TO STRIKE AND DISMISS, a copy of which is hereby attached and served upon you.

Dated: February 18, 2014

Respectfully submitted,

On behalf of GROOT INDUSTRIES, INC.

/s/ Charles F. Helsten

Charles F. Helsten  
One of Its Attorneys

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

TIMBER CREEK HOMES, INC.,

Petitioner,

v.

VILLAGE OF ROUND LAKE PARK, ROUND LAKE PARK VILLAGE BOARD and GROOT INDUSTRIES, INC.,

Respondents.

PCB No. 14-99  
(Pollution Control Facility  
Siting Appeal)

**REPLY IN SUPPORT OF MOTION TO STRIKE AND DISMISS**

NOW COMES Respondent, GROOT INDUSTRIES, INC., by and through its attorneys, HINSHAW & CULBERTSON LLP, and hereby submits its Reply in Support of Motion to Strike and Dismiss and in support thereof states as follows:

**I. ARGUMENT**

Petitioner Timber Creek Homes, Inc. ("TCH") has failed to "set out ultimate facts which support [its] cause of action," as is required by the Pollution Control Board ("PCB") regulations and Illinois pleading rules. *Sierra Club v. City of Wood River*, PCB 98-43, 1997 WL 728170 (Nov. 6, 1997). Even under the "less exacting" standards for pleading in an administrative review, TCH's petition fails to set forth facts sufficient to state a claim. Therefore, it should be dismissed as a frivolous pleading under Section 107.500 of the Illinois Administrative Code.

Groot Industries, Inc. ("Groot") is not arguing for a "heightened pleading standard," as is implied by TCH. Resp. Mot. Dism. at 3. Instead, it is Groot's contention that even under the more relaxed pleading standards applicable in administrative proceedings, TCH's Petition is insufficient. TCH's Petition is so vague and conclusory that it fails to meet the pleading standard set forth in the PCB's regulations: "a *specification* of the grounds for appeal," and "the *manner in which* the decision as to the particular criteria is against the manifest weight of the evidence."

35 Ill. Admin. Code § 107.208 (emphasis added). The words of the regulation cannot be rendered meaningless by a "relaxed pleading standard." Instead, even under a less rigorous standard, there must be *some* specificity to the Petition. Wholly conclusory allegations that the process was fundamentally unfair and that the Village Board's finding was against the manifest weight of the evidence, which are the sum total of Petitioner's "substantive" allegations, do not meet the requirements of specificity set forth in the PCB's regulations.

Petitioner attempts to discount relevant case law by stating that it was decided under a previous version of the PCB's rules (while notably relying on several decisions also decided under those earlier rules). However, the standard discussed in *City of Des Plaines v. Metropolitan Sanitary District*, 60 Ill. App. 3d 995, 377 N.E.2d 114 (1978) is substantively similar to the standard applicable in the present matter and is therefore relevant. The rule discussed in *City of Des Plaines* also requires a petitioner to set forth "the manner in which" the respondent is alleged to have violated the law. The PCB's rules state that this requires sufficient allegations "to reasonably allow the preparation of a defense." *Id.* at 1001 (citing prior PCB Procedural Rule 304(c)).<sup>1</sup>

While Section 107.208 does not set forth identical pleading requirements to former Procedural Rule 304(c), it nonetheless by its plain terms requires Petitioner to set forth "the manner in which" the Village Board's decision was against the manifest weight of the evidence. The Petitioner should be required to plead sufficient factual allegations to reasonably allow Respondents to prepare a defense. Respondents simply should not be required to guess the manner in which Petitioner alleges the Village Board's decision was against the manifest weight

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<sup>1</sup> The prior version of the rule cited in *City of Des Plaines* corresponds to the current PCB rule set forth in 35 Ill. Admin. Code 103.204(c).

of the evidence or the procedure was fundamentally unfair. The Petition should be dismissed for failure to state a claim.

Further, Petitioner attempts to rewrite the PCB's rules by arguing that the PCB's decision that accepts the Petition for review foreclosed an opportunity for Respondents to move to dismiss the Petition. The PCB's decision that purports to accept the Petition for review cannot have the effect of rendering one of its rules meaningless. The regulations specifically allow for motions to dismiss, strike or challenge the sufficiency of any pleading. 35 Ill. Admin. Code § 101.506. Groot timely filed its Motion to Dismiss prior to the regulatory 30-day deadline for such filing. As such, its Motion must be fairly heard. Indeed, in the case cited by Petitioner in support of its apparent contention that the PCB's order has already decided the sufficiency of Petitioner's pleading, the PCB *did* hear the motion to dismiss, although it had already issued an order similar to the one issued here regarding TCH's Petition. *See City of Wood River, supra*, at \*1-\*2 (noting that the petitioner argued that because the PCB had already accepted its petition, it could not grant the motion to strike, and nonetheless substantively reviewing the motion to strike).

Further, with respect to Petitioner's allegations regarding fundamental fairness, it is true that Petitioner is not required to plead evidence that would prove its claims of fundamental fairness. *See* Resp. Mot. Dism. at 7-8. However, Petitioner *is* required to plead "ultimate facts" that establish a claim on which relief can be granted. Illinois law is clear that one of those ultimate facts is that Petitioner preserved its claim of fundamental fairness in the proceeding before the Village Board. The requirement that Petitioner preserve its claim of fundamental fairness in the underlying proceeding, prior to a decision by the decision maker, is a prerequisite to a challenge of a siting decision. *See, e.g., Stop the Mega-Dump v. DeKalb County*, 2012 IL

App. 110579, 99 N.E.2d 524 (2d Dist. 2012). This requirement, well established in Illinois, cannot be rendered meaningless by a relaxed pleading standard.

Petitioner does not plead the ultimate fact that it properly preserved its claim of fundamental fairness in the underlying proceeding – nor, as is discussed in Groot's Motion to Dismiss, can it do so. Its fundamental fairness claim should therefore be dismissed for failure to state an essential element of its claim, which amounts to failure to state a claim on which relief can be granted.

## II. CONCLUSION

For the reasons set forth herein, Petitioner's Petition for Review should be dismissed for failure to state a claim on which relief can be granted.

Dated: February 18, 2014 Respectfully submitted,

On behalf of GROOT INDUSTRIES, INC.

/s/ Charles Helsten

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One of Its Attorneys

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**AFFIDAVIT OF SERVICE**

STATE OF ILLINOIS            )  
  ) SS  
COUNTY OF WINNEBAGO    )

The undersigned certifies that on **February 18, 2014**, a copy of the foregoing **Notice of Filing and Respondent's Reply in Support of Motion to Strike and Dismiss** was served upon the following:

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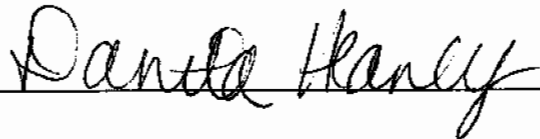
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