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' DISCOVERY OBJECTIONS

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

I. INTRODUCTION

The Petition for Review in this matter raises issues regarding both individual siting criteria and the fundamental fairness of the siting proceeding. It is well-settled that, "Hearings before the PCB are based exclusively on the record before the [siting authority], **except that evidence may be introduced on the fundamental fairness of the [siting authority's] siting procedures where the evidence necessarily is outside the record.** [Emphasis added]" *Stop the Mega-Dump v. County Board of De Kalb County*, 2012 IL App (2d) 110579, ¶11 (2012), citing *Land & Lakes Co. v. Pollution Control Board*, 319 Ill.App.3d 41, 48 (3rd Dist. 2000) Respondents all ignore the "except" part of the foregoing statement in their effort to avoid disclosure of information directly related to TCH's fundamental fairness claim.

Further, as they have done since the beginning of this proceeding, Respondents persist in their assertions that TCH's Petition for Review does not plead sufficient facts to warrant consideration or form a basis for discovery on the issue of fundamental fairness. (Groot Objections at 2, n. 2, 3, n. 3, 4; VRLP Motion at 4, 5) TCH has repeatedly pointed out that this assertion flows from Respondents' repeated refusal to acknowledge the Board's decision in *American Disposal Services of Illinois, Inc. v. County Board of McLean County, et al.,* 2012 WL 586817, PCB 11-60 (February 16, 2012), in which the Board rejected the identical pleading arguments raised by Respondents here.

More to the present point, the discovery sought by TCH is clearly related to its fundamental fairness claim. It is important in this regard, as noted in previous filings, to recognize the substantial basis for the fundamental fairness claim that already exists in the siting hearing record. The fundamental fairness issue arose during the course of the siting hearing. VRLP's counsel, Glenn Sechen ("Sechen"), indicated that VRLP had already determined that it was "prudent" to site a transfer station, and was proceeding jointly with Groot for approval of that transfer station. (C03214, C03219-03220; 9/25/2013 Hearing Transcript-2 at 98, 103-104) Sechen further acknowledged that VRLP and Groot had found it necessary to site a transfer station for their own business reasons. At that point, counsel for the Solid Waste Agency of Lake County ("SWALCO"), another participant in the siting hearing, noted that VRLP had failed to disclose that it was a co-applicant with Groot. (C03220-03221; 09/25/13 Hearing Transcript-2 at 104-105) None of the Respondents had disclosed prior to that time that VRLP was proceeding jointly with Groot – in effect as an undisclosed co-applicant for siting of the transfer station. [1]

[1] VRLP admits, as it must, that the RLP Board serves as its "corporate authority". (VRLP Motion at

VRLP's complicity with Groot reached its zenith with the report and testimony of Dale Kleszynski ("Kleszynski"), who was hired by and testified for VRLP. Kleszynski's report (C02437-C02456) and testimony were in lockstep support of Groot's siting applications. Kleszynski admitted that the various operative provisions of the Uniform Standards of Professional Appraisal Practice ("USPAP") governed his activities in this case:

> Q. And you're aware that under that Code of Ethics, an appraiser must not advocate the cause or interest of any party or issue, correct?
> A. I am absolutely aware of that part of the Code of Ethics, as well as the Uniform Standards.
> Q. You're also aware then that an appraiser must not accept an assignment that includes the reporting of predetermined opinions and conclusions, correct?
> A. That is absolutely correct. But that is part of both of the Code of Ethics as well as USPAP.
> Q. A couple of more that I think we're going to agree on. You're also aware that an appraiser must not misrepresent his or her role when providing valuation services that are outside of appraisal practice, correct?
> A. We would agree on that also.
> Q. Here's another one, an appraiser must not communicate assignment results with the intent to mislead or to defraud, correct?
> A. That would also be true.
> Q. And then finally, an appraiser must not use or communicate a report that is known by the appraiser to be misleading or fraudulent, correct?
> A. That is also true.

(C 3742.064-3742.065; 10/02/13 Hearing Transcript-1 at 64-65)

Kleszynski agreed that it was a violation of the USPAP code of ethics for him to advocate any particular position. Kleszynski nevertheless sought to misrepresent the fact that he had been directed by VRLP, as the undisclosed co-applicant acting through Sechen, to generate an "independent" statement supporting Groot's position. Despite

10. See 65 ILCS 5/3.1-45-5, 5/3.1-45-15

his claim that he "volunteered" an opinion (C 3742.067; 10/02/13 Hearing Transcript-1 at 67), Kleszynski's report in fact confirmed that he was asked to render a separate opinion by his client, and that his report is "specific to the needs of the client", VRLP. (C 3742.070-C 3742.074; 10/02/13 Hearing Transcript-1 at 70-74) Sechen never told Kleszynski that the contents of his report were inconsistent with VRLP's needs. (C 3742.087; 10/02/13 Hearing Transcript-1 at 87) On the contrary, Kleszynski was given an assignment in this case, and Sechen, on behalf of VRLP, communicated that assignment to Kleszynski. (C 3742.108; 10/02/13 Hearing Transcript-1 at 108)

Respondents re-raise the assertion that TCH "waived" or "forfeited" or "failed to properly preserve" the fundamental fairness claim. (Groot Objections at 3; RLP Board Objections at 2; VRLP Motion at 2-3) In fact, counsel for TCH raised the issue of fundamental fairness, including bias, pre-judgment, and VRLP's previously undisclosed status as a co-applicant, during Sechen's cross-examination of one of TCH's witnesses. Counsel specifically confirmed that the issue was being raised so that it would not be waived. The Hearing Officer acknowledged that he had no authority to address the issue. (C03234, C03236-03237; 09/25/13 Hearing Transcript-2 at 118, 120-121) The fundamental fairness issue was also a significant subject of TCH's post-hearing proposed Findings and Conclusions, (C04190-04194), and TCH's assertion of the issue was discussed by the Hearing Officer in his proposed findings and conclusions. (C04355.037)

Further, the cases confirm that the party claiming a fundamental fairness violation must only have "raised" or "asserted" the issue during the siting proceeding in order to preserve it for appeal. Nothing more formal is required. *E & E Hauling, Inc. v. Pollution Control Board*, 107 Ill.2d 33, 38 (1985) *Peoria Disposal Co. v. Illinois Pollution Control Board*, 385 Ill.App.3d 781, 798 (3rd Dist.), appeal denied 231 Ill.2d 654 (2008)

The foregoing facts amply demonstrate why Respondents are so anxious to avoid discovery relating to the fundamental fairness claim. In that light, Respondents' objections ring quite hollow.

II. RESPONDENTS PROVIDE NO COGNIZABLE BASIS FOR THEIR OBJECTIONS

It is important in the first instance to recognize the broad scope of discovery allowed in Board proceedings. The general scope of discovery is found in 35 Ill.Adm.Code 101.616(a), which provides, in relevant part:

> (a) All relevant information and information calculated to lead to relevant information is discoverable, excluding those materials that would be protected from disclosure in the courts of this State pursuant to statute, Supreme Court Rules or common law, and materials protected from disclosure under 35 Ill. Adm. Code 130.
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> ***
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> (e) Unless a claim of privilege is asserted, it is not a ground for objection that the testimony of a deponent or person interrogated will be inadmissible at hearing, if the information sought is reasonably calculated to lead to relevant information.[2]

Respondents all make the blanket objection, too often found in discovery "responses", that the information sought is "neither relevant nor calculated to lead to relevant information". (Groot Objections at 1; RLP Board Objections at 2, 3; VRLP Motion at 7-8) That conclusion, without substantially more, is not a basis for a failure to respond to discovery.

Groot and the RLP Board then take a different approach, and try to limit the scope of discovery to just one of their many relationships. According to Groot, it "owns, operates, or has permits for several other facilities in the area of" VRLP. Groot

[2]

acknowledges that there were communications between Groot and VRLP or the RLP Board regarding those other facilities. But Groot then argues that documents related to those facilities "are not in any way relevant to TCH's appeal". (Groot Objections at 2) The RLP Board mimics Groot's argument. (RLP Board Objections at 3)

This argument ignores the "calculated to lead to relevant information" standard in §101.616 (and in the discovery rules applicable to all proceedings in this State). Particularly in the context of a claim of collusion between the Respondents, any and all communications between them, and particularly communications in the context of Groot's present and future operations in VRLP, clearly may lead to relevant information – disclosure of the scope and ambit of Respondents' scheme.

Respondents then try to recast TCH's discovery requests so that they can create an argument out of whole cloth. According to Respondents, TCH's discovery requests are directed to *ex parte* communications. Based on that characterization of the requests, Groot argues that the requests are "significantly overbroad with respect to the time frame for which they seek information" because communications predating the filing of a siting application are not "improper *ex parte* contacts". Therefore, Groot argues, "Information related to the time frame prior to the filing of the application…is simply not relevant to the present proceeding." (Groot Objections at 3-4, 5)

The RLP Board, in similar fashion, asserts that discovery "should be restricted to information related to the proposed waste transfer station, and should be further restricted to the time period between the filing of the application for local siting approval and the final decision". (RLP Board Objections at 3)

VRLP takes a slightly different approach to arrive at the same conclusion. According to VRLP, ""The motives of the members of a municipal authority are not the proper subjects of judicial inquiry." (VRLP Motion at 4) VRLP therefore asserts that "there can be no *ex parte* contacts prior to the filing of the application, and logically, subsequent to the decision as well." (VRLP Motion at 5)

Respondents' scheme appears to predate the filing of the application, and may have even been hatched years before, in the context of VRLP's agreement to approve all of Groot's facilities. But Respondents' convenient recasting of TCH's requests would preclude an inquiry into what the RLP Board admits are "thousands of conversations". (RLP Board Objections at 3) More to the point, evidence of pre-filing collusion is directly relevant to a fundamental fairness claim. *Land & Lakes, supra,* 319 Ill.App.3d at 49 [3]

III. RESPONDENTS FAIL TO ESTABLISH THE APPLICABILITY OF ANY PRIVILEGE THAT PRECLUDES DISCLOSURE OF THE INFORMATION SOUGHT BY TCH

The RLP Board concludes that, "TCH should not be entitled to any discovery regarding information protected by attorney-client privilege." (RLP Board Objections at 3) In similarly generalized fashion, VRLP asserts that the information sought "includes attorney-client matter and work product material. (VRLP Motion at 10) VRLP also assails TCH's requests regarding Kleszynski, again solely based on the scope of the inquiry. (VRLP Motion at 7-8, 10)

VRLP does specify one inquiry. TCH's Interrogatory No. 11 asks VRLP to, "Identify all meetings, conversations, communications and contacts between any member of the RLP Board and Glenn Sechen from the date of his retention by VRLP to the present." Given Sechen's disclosures during the siting hearing, discussed above,

[3] Groot and VRLP admit that this is the law, but ignore it throughout their submittals. (Groot Objections at 4; VRLP Motion at 5)

the basis for this Interrogatory is obvious. But VRLP argues that such information "would fall squarely within the attorney-client privilege and/or the attorney work-product privilege as TCH seeks information regarding mental impressions and strategy." (VRLP Motion at 10)

Illinois Supreme Court Rule 201(n) specifically provides that:

> Claims of Privilege. When information or documents are withheld from disclosure or discovery on a claim that they are privileged pursuant to a common law or statutory privilege, any such claim shall be made expressly and shall be supported by **a description of the nature of the documents, communications or things not produced or disclosed and the exact privilege which is being claimed**. [Emphasis added]

See also *Consolidation Coal Co. v. Bucyrus-Erie Co*., 89 Ill.2d 103, 119 (1982) (The burden is on the proponent of the privilege to show that the privilege applies to the specific communication at issue, and the privilege only applies if the communication was with a member of the organization's control group.); *Midwesco-Paschen Joint Venture For Viking Projects v Imo Industries, Inc*., 265 Ill.App.3d 654, 669 (1st Dist.), appeal denied 157 Ill.2d 505 (1994); *Profit Management Development, Inc. v. Jacobson, Brandvik and Anderson, Ltd*, 309 Ill.App.3d 289, 299 (2nd Dist. 1999) Neither the RLP Board nor VRLP have even attempted to meet their burden.

Further, communications are not automatically privileged simply because they were made to or from an attorney. First, the proponent of the privilege must establish that the communication entailed "confidential legal advice". Any other communications are not subject to the privilege. *People v. Radojcic*, 2013 IL 114197, ¶40 (2013) Again, neither VRLP nor the RLP Board make any effort to meet their burden of proof.

The RLP Board also ignores settled principles in its effort to preclude disclosure of information pertaining to Kleszynski. There is no privilege, work product or otherwise, with respect to a testifying expert. Illinois Supreme Court Rule 201(b)(3) specifically

limits disclosure only with respect to a consulting expert who is not to be called at trial. This is simply a confirmation of the historically accepted rule that communications with a testifying expert, who was not hired by the attorney, are not covered by any privilege. See, *e.g.*, *People v. Wagener*, 196 Ill.2d 269, 275-277 (2001); *Midwesco-Paschen Joint Venture, supra*, 265 Ill.App.3d at 668

IV. CONCLUSION

The only "bases" asserted by any of the Respondents in support of their efforts to avoid discovery are wholly improper under the controlling case law and the rules governing discovery in Board proceedings. The information sought relates directly to TCH's fundamental fairness claim. TCH therefore requests that Respondents' Objections and Motions be overruled.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a copy of PETITIONER'S CONSOLIDATED RESPONSE TO RESPONDENTS' DISCOVERY OBJECTIONS to be served on the following, via electronic mail transmission, on this 26th day of February, 2014:

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