

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 March 19, 2014, there was filed electronically Respondent, GROOT INDUSTRIES, INC.'S RESPONSE TO MOTION TO MAKE SPECIFIC, a copy of which is hereby attached and served upon you.

Dated: March 19, 2014 Respectfully submitted,

On behalf of GROOT INDUSTRIES, INC.

/s/ Richard S. Porter
Richard S. Porter
One of Its Attorneys

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GROOT INDUSTRIES, INC.'S RESPONSE TO MOTION TO MAKE SPECIFIC

NOW COMES the Respondent, Groot Industries, Inc. ("Groot"), and sets forth the following response to the Motion to Make Specific filed by Respondent the Village of Round Lake Park ("Village"):

Groot respectfully joins the Village's request for a specific ruling on what discovery must be provided. As set forth in Groot's Objections to Discovery, Petitioner has propounded broad and extensive discovery requests on the Respondents, to which Respondents have objected.¹ Notably, Petitioner has requested no documents or information after the date of filing of the application in this matter. Instead, it has requested documents and information from Groot from 2008 to the date of filing and seeks information related to facilities other than the transfer station at issue in the present matter. Allowing Petitioner discovery on other facilities, which were the subject of their own application process, would open the floodgates and set a precedent of extremely and unduly burdensome discovery for applicants and siting authorities.

¹ Petitioner states that the Village has issued "blanket objections" to its discovery requests. Groot has set forth specific objections, with specific reasons therefor, so to the extent that Petitioner's opposition to the Motion is based on such "blanket objections," that argument is not applicable to Groot.

In its response to the Village's Motion, Petitioner for the first time has claimed that it needs this pre-filing information because there was a "collusive scheme" between the Village and Groot involving prior applications and separate facilities which have already been through the complete application and hearing process (although it did not raise this allegation either at the underlying siting hearing or in its Petition for Review). Petr's Resp. at 2. Petitioner now claims that it should be granted discovery related to those facilities and dating back as early as 2008.

Petitioner now argues that this scheme was revealed by the Village's meeting minutes as early as 2008 regarding the earlier application processes. Pet'r's Resp. at 2. These documents, however, were and have been publicly available, and nothing precluded Petitioners from raising its concerns regarding this so-called scheme *in the hearings related to those facilities* or in the underlying siting hearing for the proposed transfer station. Petitioner's belated attempts to challenge properly issued permits for other facilities by way of a later claim of "collusion" should not define the scope of discovery. Instead, principles of well-settled law regarding fundamental fairness should govern this proceeding.

The law simply does not support Petitioner's broad discovery requests, particularly since it has not pled any facts related to its apparently new theory that there was a "collusive scheme" between Groot and the Village. Just as *Mega-Dump* limited the scope of the fundamental fairness inquiry to post-filing contacts *related to the application at issue*, here Petitioner should be limited to discovery related only to the transfer station that was the subject of the underlying proceeding. *See Stop the Mega-Dump*, 2011 WL 986687, at *38, 40. Groot respectfully requests that the order regarding the proper scope of discovery be detailed and specific as to the time frame and subject matter of discoverable material, consistent with its Objections to Discovery filed on February 26, 2014.

It is a well-established principle that "members of a siting authority are presumed to have made their decisions in a fair and objective manner." *Stop the Mega-Dump v. County Bd.*, 2012 IL App. (2d) 110579, 979 N.E.2d 524 (2012); *Fox Moraine, LLC v. United City of Yorkville*, 2011 IL App. (2d) 100017, ¶ 60 (2011). A petitioner faces a very heavy burden to overcome that presumption. 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." *Peoria Disposal Co. v. IPCB*, 385 Ill. App. 3d 781, 798, 896 N.E.2d 460 (3d Dist. 2008) (citing *Waste Management of Ill., Inc. v. IPCB*, 175 Ill. App. 3d 1023, 1040, 530 N.E.2d 682 (1988)). Petitioner must also show that, as a result of *ex parte* contacts, "the agency's decision was *irrevocably tainted* so as to make the ultimate judgment of the agency unfair." *E & E Hauling v. PCB*, 116 Ill. App. 3d 586, 606-07, 451 N.E.2d 555 (2d Dist. 1983) (emphasis added).

As a matter of law, contacts between the Village and Groot or its representatives prior to the filing of the siting application are not improper *ex parte* contacts. See *Land & Lakes Co. v. IPCB*, 319 Ill. App. 3d 41, 47-49, 743 N.E.2d 188 (3d Dist. 2000). In that case, the applicant and the County had pre-filing contacts related to the application, in the form of pre-filing review of the application by the County staff and experts. However, as in the present proceeding, the County Board and the County staff had separate counsel. Further, the applicant had no contact with the decisionmaker – the County Board – once the application was filed. Therefore, "[i]n the absence of any pre-filing collusion between the applicant and the actual decisionmaker . . . the pre-filing contact between [the applicant and County] *could not have deprived* [the petitioner], or any other siting approval opponent, of fundamental fairness." *Id.* (emphasis added); see also *Stop the Mega-Dump v. County Board*, 2011 WL 986687, PCB 10-103 (Mar. 17, 2011) (stating that contacts that occurred prior to the filing of the application related to negotiation of a host

agreement and review of the application "were permissible under prior Board precedent" and "were not, by definition, *ex parte* contacts").

Petitioner now claims, based on documents that have long been publicly available, that an alleged "collusive scheme" was in existence as early as 2008, thereby attempting to broaden the subject of its appeal to facilities that were not the subject of the underlying proceeding. It is inarguable that under Illinois law, a claim of fundamental fairness must be promptly raised in the underlying hearing, "because *it would be improper to allow the complainant to knowingly withhold such a claim and to raise it after obtaining an unfavorable ruling.*" *Peoria Disposal Co.*, 385 Ill. App. 3d at 798 (emphasis added) (citing *E & E Hauling*, 116 Ill. App. 3d at 606-07). It would be equally improper to allow a petitioner to withhold its claim related to these other facilities until now and gain essentially unfettered discovery going back years prior to the present decision and related to facilities whose application process has long since been completed. Because it was not properly (or ever) raised, the pre-filing discovery sought by Petitioner related to contacts between the Village and Groot regarding separate facilities and the host agreement *cannot* be a basis for a fundamental fairness claim; this information is therefore not relevant or discoverable.

Because of the broad scope of Petitioner's discovery request, an order detailing exactly what is and is not relevant and discoverable in this matter is of critical importance.

WHEREFORE, Respondent Groot Industries Inc. respectfully requests that the Pollution Control Board make its rulings on the scope of discovery as specific as possible, in order to aid the parties with timely and efficient discovery.

Dated: March 19, 2014

Respectfully submitted,

On behalf of GROOT INDUSTRIES, INC.

/s/ Richard S. Porter

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AFFIDAVIT OF SERVICE

STATE OF ILLINOIS)
) SS
COUNTY OF WINNEBAGO)

The undersigned certifies that on **March 19, 2014**, a copy of the foregoing **Groot**

Industries, Inc.'s Response to Motion to Make Specific was served upon the following:

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