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 REPLY IN SUPPORT OF ITS MOTION FOR SANCTIONS

Now comes Petitioner, Timber Creek Homes, Inc. ("TCH"), by its attorneys, Jeep & Blazer, LLC, and hereby submits its Reply in Support of its Motion for Sanctions against Respondents Village of Round Lake Park ("VRLP") and Round Lake Park Village Board (the "Village Board"). [1]

I. RESPONDENTS ARE CONSCIOUSLY MISLEADING THIS BOARD

VRLP is unwilling to directly respond to TCH's delineation of the bases for imposing sanctions. VRLP therefore falls back on the conduct it has repeated throughout this case – avoidance. TCH's Motion sets forth, in detail, the tortured history of Respondents' efforts to avoid and evade discovery in this case. The Motion identifies all the relevant Hearing Officer Orders, the dates on which Respondents "responded", and the impacts of Respondents' withholding of information. (Motion for Sanctions, ¶¶1-9, 12-15) VRLP nevertheless asserts that TCH's Motion is "vague" and based upon a "mere conclusion".

VRLP then concludes that, "TCH's Motion fails to state any grounds upon which the Board could impose the drastic sanction of striking all of RLP's or RLPVB's defenses." (VRLP Response at ¶4) VRLP does not identify what additional "grounds" may be required other than

[1] VRLP filed a Response to TCH's Motion. The Village Board filed a "Motion Adopting" VRLP's Response, which nevertheless added a separate response. All responses will be addressed in this Reply.

those set forth in the Motion for Sanctions and in 35 Ill.Adm.Code 101.800. Notably, TCH specifically points out in the Motion for Sanctions that VRLP repeatedly refused to comply with the Hearing Officer's discovery orders and, with a flippant "Me too", refused to produce documents predating June 20, 2013.

VRLP does not respond to these facts, and instead relies on the production of one email between its counsel and its expert dated January 18, 2013. (VRLP Response at ¶8, n. 3) That limited disclosure serves no purpose other than to highlight the mass of information that VRLP has withheld. As noted in the Motion for Sanctions, VRLP's counsel was retained on April 20, 2010. The record of this case confirms consistent and extensive communications between VRLP and Groot Industries, Inc. ("Groot") between September 2008 and the filing of Groot's siting application on June 21, 2013. Yet VRLP produced nothing regarding those communications, or any others, other than the one innocuous email to which it now points.

Indeed, the only email between Groot and VRLP that either VRLP or the Village Board address is the one from Groot's counsel dated September 27, 2012. (Motion for Sanctions, Exhibit A) VRLP persists in its assertion that this email is somehow subject to the "attorney-client privilege". (VRLP Response at ¶14, n. 5) Another copy of the subject email is attached hereto as Exhibit A. There is no privilege, attorney-client or otherwise, that applies to a communication between VRLP's counsel and Groot's counsel.

The Village Board goes a step further in its Response, and points out that the subject email was provided to TCH in May 2013, in response to a Freedom of Information Act request. (Village Board Response at ¶¶2-3) This was before Groot filed its siting application, before the instant review proceeding was initiated, and, most important, before Respondents became obligated to produce all documents in response to TCH's discovery requests and the Hearing Officer's Orders.

Far beyond all of the foregoing, however, VRLP's pre-litigation production of this document confirms a much more insidious fact – that the assertion of a privilege in this

proceeding is a complete fabrication. VRLP asserted no "privilege" when it produced the subject document before the siting process began. The persistent assertion of a fabricated claim of privilege through the course of this proceeding confirms these Respondents' conscious effort to mislead both the Hearing Officer and this Board.

35 Ill.Adm.Code 101.800(c) provides that:

> In deciding what sanction to impose the Board will consider factors including: the relative severity of the refusal or failure to comply; the past history of the proceeding; the degree to which the proceeding has been delayed or prejudiced; and the existence or absence of bad faith on the part of the offending party or person.

All of these factors are present here, and warrant the imposition of the severest sanction. In this context, the words of the Appellate Court in *IEPA v. Celotex Corp*., 168 Ill.App.3d 592, 597-598 (3rd Dist.), appeal denied 122 Ill.2d 575 (1988), the case inexplicably cited by VRLP (VRLP Response at ¶3), are most apt:

> This court is mindful that the dismissal of a party's claim is a drastic sanction and should be employed sparingly. However, when a scheme of deliberate defiance of the rules of discovery and the court's authority or an attempt to stall significant discovery has been shown, such a sanction is appropriate and should be unhesitatingly applied. *Cedric Spring and Associates, Inc. v. N.E.I. Corp*. (1980), 81 Ill.App.3d 1031, 37 Ill.Dec. 462, 402 N.E.2d 352; *Jones v. Healy* (1981), 97 Ill.App.3d 255, 52 Ill.Dec. 695, 422 N.E.2d 904.
>
> Our review of the record confirms the Board's finding that the Agency engaged in a pattern of dilatory response to hearing officer orders, unjustifiable cancellation of depositions, and engaged in an intentional pattern of refusal to meet deadlines; further, that the explanations tendered for these activities were not reasonable. We find that the Board's finding that the Agency was guilty of abuse of discovery was amply justified and concur that lesser sanctions would be of little avail in advancing timely closure of the pretrial proceedings.

IV. CONCLUSION

The Hearing Officer most recently highlighted Respondents' "belated discovery responses" in denying Respondents' Motions in Limine. (May 21, 2014 Hearing Officer Order at

5. Apart from their dilatory conduct, it is now beyond question that these Respondents were and are willing to assert baseless reasons for their failure to disclose relevant information regarding their collusive scheme with Groot, and to mislead this Board about that subject. Those belated responses, coupled with Respondents' conscious refusal to provide several years' worth of communications, have prejudiced TCH and prevented it from a full and fair adjudication of its claims. For all of the foregoing reasons, TCH requests that its Motion for Sanctions be granted.

Respectfully submitted,
Timber Creek Homes, Inc.

By: _____
One of its attorneys

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a copy of PETITIONER'S CONSOLIDATED REPLY IN SUPPORT OF ITS MOTION FOR SANCTIONS to be served on the following, via electronic mail transmission, on this 3rd day of June, 2014:

Hearing Officer

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EXHIBIT A

transmission in error, please immediately contact the sender and destroy the material in its entirety, whether in electronic or hard copy format.

To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this document (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

-------- Original Message --------
Subject: Fw: Further Discussion of Host Agreement Terms
From: chelsten@hinshawlaw.com
Date: Thu, September 27, 2012 2:12 pm
To: sechlaw@yahoo.com

CONFIDENTIAL AND PRIVILEGED

Wasn't sure if you received this e-mail so I am resending it.

Charles F. Helsten
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----- Forwarded by Joan Lane/HC07 on 09/27/2012 02:11 PM -----

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Glenn: This time with the correct email address.

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----- Forwarded by Charles F. Helsten/HC07 on 09/17/2012 06:13 PM -----

Charles F. Helsten/HC07
09/17/2012 06:14 PM

To glenn@sechenlawgroup.com
cc
Subject Fw: Further Discussion of Host Agreement Terms

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Glenn: This follows our most recent conversation of earlier today concerning HA terms. As I indicated earlier this afternoon, Groot will pay $.10/ton as an additional Host fee for tonnage that comes from the Village to the Transfer Station where the Village is under direct contract with Groot. Groot will not offer any additional/supplemental Host Fee for the Village simply directing its waste to this Transfer Station where Groot does not have the hauling contract with the Village.

In addition, Groot needs a 3 (three) year hiatus before the first Annual Host Fee Adjustment takes place (not the 1 (one) year hiatus currently proposed by the Village. Moreover, the Annual Adjustment cannot exceed 3% (three per cent), with no recapture/"claw back" provision.

As previously indicated, Groot is in agreement with all other terms of the Village's proposed Host Agreement, but those discussed above are of critical importance to Groot.

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09/17/2012 05:00 PM

To glenn@sechenlawgoup.com
cc
Subject Further Discussion of Host Agreement Terms