

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ROXANA LANDFILL, INC.

Petitioner,

vs.

VILLAGE BOARD OF THE VILLAGE OF
CASEYVILLE, ILLINOIS;
VILLAGE OF CASEVILLE, ILLINOIS; and
CASEYVILLE TRANSFER STATION, L.L.C.

No. PCB 15-65

(Pollution Control Facility Siting Application)

Respondents.

VILLAGE OF FAIRMONT CITY, ILLINOIS,

No. PCB 15-69

Petitioner,

vs.

VILLAGE OF CASEYVILLE, ILLINOIS BOARD
OF TRUSTEES and CASEYVILLE TRASFER
STATION, L.L.C.

(Pollution Control Facility Siting Application)

Respondents.

**ROXANA LANDFILL, INC'S RESPONSE IN OPPOSITION TO
RESPONDENTS CASEYVILLE TRANSFER STATION'S AND
VILLAGE OF CASEYVILLE'S JOINT MOTION FOR PROTECTIVE ORDER**

TO:

J. Brian Manion Weilmuenster Law Group, P.C. 3201 West Main Street Belleville IL 62226 (jbm@weilmuensterlaw.com)	Donald J. Moran Pedersen & Houpt 161 N. Clark Street, Ste 2700 Chicago, Illinois 60601 (dmoran@pedersenhaupt.com)	Robert J. Sprague Sprague & Urbana 26 E. Washington Street Belleville, Illinois 62220
Hearing Officer Carol Webb (Carol.Webb@illinois.gov)	Penni S. Livingston 5701 Perrin Rd. Fairview Heights, IL 62208 (penni@livingstonlaw.biz)	

PLEASE TAKE NOTICE that on October 20, 2014, we filed with the Illinois Pollution Control Board, (1) this Notice of Filing and (2), the attached Petitioner Roxana Landfill, Inc.'s Response In Opposition To Respondents Caseyville Transfer Station's and Village of Caseyville's Joint Motion for Protective Order, a copy of each is attached and served upon you.

Dated: October 20, 2014

Clark Hill PLC

150 N. Michigan Ave., Suite 2700

Chicago, Illinois 60601

Phone: 312-985-5912

PETITIONER ROXANA LANDFILL, INC.

BY: /s/ Jennifer J. Sackett Pohlenz

One of its attorneys

PROOF OF SERVICE

I, Jennifer J. Sackett Pohlenz an attorney, certify¹ that I served the above referenced documents on the persons identified above by e-mail, at the email addresses listed, before 5:00 p.m. on this 20th day of October 2014.

 /s/ Jennifer J. Sackett Pohlenz

¹ Under penalties as provided by law pursuant to Illinois Rev. Stat. Chap. 110-, Sec. 1-109, I do certify that

Now comes Petitioner Roaxana Landfill, Inc. (“Petitioner”), by and through its attorney Jennifer J. Sackett Pohlenz of CLARK HILL PLC and in opposition to Respondents Caseyville Transfer Station, L.L.C. and Village of Caseyville, Illinois (“Movants”) Joint Motion for Protective Order, states as follows:

INTRODUCTION

On October 14, 2014, Petitioner issued subpoenas for the depositions of Village Board Members Walter Abernathy and Kerry Davis, as well as others that have no potential to be subject to the deliberative process privilege.

On October 17, 2014, Caseyville and the Village filed a Joint Motion for Protective Order (the “Motion”) requesting Petitioner not be allowed to question or otherwise inquire into the mental processes of or bases for the decisions of Village Board Members Abernathy and Davis with respect of the approval of the Caseyville Transfer Station, L.L.C.’s Application for Local Siting Approval.

The Motion should be denied because it seeks to restrict more testimony than is protected under the deliberative process privilege, and Village Board Members Abernathy and Davis waived the privilege by discussing their reasons for approving the Caseyville Transfer Station Application for Local Siting Application at the August 6, 2014 Special Meeting.

RESPONSE

The deliberative process privilege protects from disclosure communications that are a part of the decision-making process of a governmental agency. *People ex rel. Birkett v. City of Chicago*, 292 Ill. App. 3d 745, 749-750 (2d Dist. 1997). The primary rationale for the privilege is the belief that the free flow of ideas among governmental officials will be reduced if officials know that their communications may be revealed to outsiders. *Id.* at 750. Supporters rely on the

the statements set forth herein are true and correct.

possible chilling effect on intergovernmental communications resulting from the failure to recognize such a privilege. They claim this will prove detrimental to the policy-making process and, ultimately, to the public interests. *People ex rel. Birkett*, 292 Ill. App. 3d at 750.

The deliberative process privilege does not prevent Petitioner from inquiring about the bases for Village Board Member's decisions, in the circumstance where they revealed the basis for the decision and prejudged the siting application. Privileges are strongly disfavored because they operate to exclude relevant evidence and work against the truth seeking function of legal proceedings. *Id.* at 749.

A. Neither Respondent Who Filed the Motion Has Standing To Raise The Privilege

Only Respondents Village of Caseyville and Caseyville Transfer Station, L.L.C. filed the Motion. Neither have standing to raise the issue of privileged, as neither party is the Village Board or the particular Board Members whose testimony is sought to be limited by use of the privilege.

A privilege should be invoked only by a party with a direct legitimate and personal interest in preserving the confidentiality of the requested information. *Craig L. Unrath, Privileges, in Civil Trial Evidence (Illinois) 2009 Edition & 2012 Supplement* §7.1 (Ill. Inst. for Cont. Legal Educ. 2009). The right to object lies with the person vested with the interested protected by the particular privilege, a person who may or may not be a party to the litigation. *Id.* A privilege should be invoked only by a party with a direct, legitimate, and personal interest in preserving the confidentiality of the requested information." *Howard v. Forbes*, 185 Ill.App.3d 148, 541 N.E.2d 685, 688, 133 Ill.Dec. 474 (4th Dist. 1989). This limitation points toward a key difference between rules of evidence and privileges. When a rule of evidence is violated, only the adverse party may object. If the evidence is privileged, the right to object lies not in the adverse party, but to the person vested with the interest protected by the particular

privilege, a person who may or may not be a party to the litigation.

B. Village Board Members Davis and Abernathy Waived Any Privilege By Discussing The Basis For Their Votes to Approve The Caseyville Transfer Station, L.L.C. Application for Site Location Approval

Village Board Members Abernathy and Davis' waived the privilege by discussing the reasons they approved the Caseyville Transfer Station, L.L.C. Application for Local Siting Approval at the Village Board's August 6, 2014 Special Meeting. Illinois Courts have held that the deliberative process privilege can be waived. *Dumke v. City of Chicago*, 373 Ill. Dec. 804, 810 (1st Dist. 2013). Anything that was discussed at a public meeting should be considered waived – or, alternatively, not subject to the privilege – and should not be subject to any protective order.

For example, at the August 6, 2014 Special Meeting to Approve Application, Village Attorney Grass asked, “are there any reasons that we’re going to give for the granting of the application?” Village Board Member Abernathy eventually responded:

“I think it would be a good thing for Caseyville. I mean, we got all kinds of traffic down there. We had the trucking company, Henderson, Corman, and there was never any questions on them being there or nobody asked us about whether they could be there or not, or they were going to be there. We just heard about it after they moved in down there. Of course, they’re in the county, the two businesses. But there was no discussion over the road or anything that time that I know of. I don’t know.”

Village Board Member Davis also discussed the reasons for approving the Caseyville Transfer Station at the August 6, 2014 Special Meeting to Approve Application. Village Board Member Davis responded to Attorney Grass:

“I’ll be honest. My reasons is that right now the Village is in financial dire straits, and this is a revenue source for the Village we can certainly use. And we don’t think – it’s going to be a good thing for neighbors of Canteen and Washington Park and everybody else involved, but we have to do what needs to be done to protect the interest of the village residents. . . . So my reason for

voting for it is the revenue source that we certainly need badly . . .”

Questioning concerning Village Board Members Abernathy and Davis’ reasons for voting to approve the Caseyville Transfer Station, L.L.C. proposed facility were publicly cited and identified at the August 6, 2014, public meeting. Thus, even if deliberative process applied prevent disclosure of Board Member’s reasons for their decision (which arguably it does not, since the bases for a decision should be included with that decision), since Board Members Davis and Abernathy disclosed their reasons, the privilege is waived.

Movants rely on *Fox Moraine, LLC v. United City of Yorkville*, 960 N.E.2d 1144, 1168 (Ill. App. 2011) to support their Motion. However, in *Fox Moraine, LLC*, the court did not apply the deliberative process privilege to bar the questioning of council members regarding the process in reaching their decisions. *Id.* Instead, the Appellate Court found that the Pollution Control Board incorrectly denied Fox Moraine, L.L.C.’s motion to compel the disclosure of the “Roth Report,” a document the United City of Yorkville claimed was confidential, because the City Council waived the privileged when they openly discussed the report during the public meeting during which a decision was made. *Fox Moraine, LLC*, 960 N.E.2d at 1166. Similarly to this case, Board Members Abernathy and Kerry disclosed their thought process in their statements made at the August 6, 2014, public meeting and waived the privilege, if any.

Movants also rely on *Land and Lakes Co. v. Village of Romeoville*, PCB 92-25 (June 4, 1992) to support their argument. Yet in that case, the court determined that if a party can present adequate facts warranting an inference that fundamental unfairness may have occurred in the hearing process, then Village Board Members may be required to reveal their internal thought processes. *Id.* Here, based off the above cited testimony of Village Board Members Abernathy and Davis, Petitioner presented adequate facts warranting an inference that fundamental unfairness may have occurred. Accordingly, Village Board Members Abernathy and Davis

should be required to testify concerning their thought processes, in addition to their statements at the public hearing.

B. Pre-Judgment Requires Review Of Why Village Board Members Made A Decision

Whether the Village's board prejudged adjudicative facts before approving the siting proposal is one of the issues before the Illinois Pollution Control Board. Pre-judgment of a siting decision is fundamentally unfair. *See, Stop the Mega-Dump v. County Board of Dekalb County*, PCB 10-103 (March 17, 2011). Petitioner has a right to inquire as to the statements made at the August 6, 2014, meeting and to have discovery on this issue. This is not an issue that Petitioner "pulled from thin air," but that is raised by the statements made by the Village Board Members at the August 6, 2014, public meeting where the decision was made to approve the siting application. In other words, there is a factual basis for Petitioner's argument based on the Village Board Members' own statements, and the Petitioner has a right to explore those statements further during Board Members Abernathy's and Davis's depositions.

WHEREFORE, Roxana Landfill, Inc. respectfully requests that Respondent Caseyville Transfer Station, LLC ("Caseville") and Respondent Village of Caseyville, Illinois (the "Village") Joint Motion for Protective Order be denied.

Dated: October 20, 2014

Respectfully submitted,

ROXANA LANDFILL, INC.

By: /s/ Jennifer J. Sackett Pohlenz

One of Its Attorneys

Jennifer J. Sackett Pohlenz
CLARK HILL PLC
150 N Michigan Ave | Suite 2700 | Chicago,
Illinois 60601
312.985.5912 (direct) | 312.985.5971 (fax) |
312.802.7810 (cell)
jpohlenz@clarkhill.com | www.clarkhill.com