

ILLINOIS POLLUTION CONTROL BOARD  
March 27, 2008

FOX MORaine, LLC,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	PCB 07-146
UNITED CITY OF YORKVILLE, CITY	)	(Pollution Control Facility
COUNCIL,	)	Siting Appeal)
	)	
Respondent.	)	
	)	
KENDALL COUNTY,	)	
	)	
Intervenor.	)	

**HEARING OFFICER ORDER**

On December 20, 2007, petitioner Fox Moraine, LLC, (Fox Moraine) filed an amended motion to compel certain discovery and for sanctions (Amend Mot.). On January 8, 2008, respondent United City of Yorkville, City Council (Yorkville) filed its response (Resp.). On January 31, 2008, Fox Moraine filed its reply (Reply).

**Procedural Status of the Case**

On June 27, 2007, Fox Moraine filed a petition for review asking the Board to review the May 24, 2007, decision of Yorkville's decision on petitioner's proposed siting of a pollution control facility in Yorkville, Kendall County. Petitioner appealed to the Board on the grounds that 1) Yorkville's decision was fundamentally unfair, alleging bias and prejudice on the part of various and unnamed council members, and 2) Yorkville's findings regarding certain criteria were against the manifest weight of the evidence.

Kendall County was granted intervenor's status by the Board on August 23, 2007. The County has not participated in the briefing of this discovery issue.

Pursuant to Fox Moraine's most recent waiver, the statutory decision deadline in this case is now August 21, 2008. Hearing has yet to be scheduled.

**Preliminary Matter**

On September 20, 2007, a hearing officer order (Hearing Order) was issued responding to Yorkville's motion and memorandum (Memo.) for a protective order limiting discovery sought by Fox Moraine. Yorkville's motion was denied. In essence, Yorkville argued that Fox Moraine was not entitled to discovery requests concerning

seven members of the City Council because it failed to object at the local siting hearing and has waived any right to conduct discovery concerning those seven City Council Members. Yorkville further alleged in the motion that the “discovery requests are unreasonably burdensome and unduly onerous attempt to uncover some evidence perhaps relevant to its unsupported claims of unfairness, bias and prejudice”. Memo. at 4. I noted that the ultimate determination as to whether the petitioner has waived any issues as to one or more Council Members is a decision for the Board, and not the hearing officer, to make. Hearing Order at 4, n.1. In denying Yorkville’s motion, I stated that when a fundamental fairness issue is raised before the Board, the whole purpose of discovery is to attempt to uncover relevant evidence or evidence calculated to lead to relevant evidence that is outside the record, evidence that is presumably unknown to the party propounding the discovery. Hearing Order at 4. I directed the parties to proceed with discovery. Neither party appealed to the Board.

### **Amended Motion to Compel and For Sanctions**

In its four page motion, the prevailing theme appears to be that Yorkville waived all of its objections to Fox Moraine’s First Request to Produce and Fox Moraine’s First Set of Interrogatories, for its failure to raise them in Yorkville’s previously filed motion for a protective order. Fox Moraine briefly argues that the responses to its First Request to Produce are deficient and incomplete. Finally, Fox Moraine states that the “response to the Request to Produce is signed by one of the Respondent’s attorneys, is unverified and is not accompanied by an affidavit of accurateness or completeness as required by Supreme Court Rule.” Amend. Mot. at 3.

Fox Moraine next argues that responses and objections to its First Set of Interrogatories are insufficient and defective as well. Fox Moraine argues that Yorkville in some instances failed to answer some of the interrogatories and some answers so incomplete an unspecific that as to be no responses at all. Finally, Fox Moraine alleges that Yorkville’s “responses and answers were clearly propounded in bad faith and that the Hearing Officer ought to sanction” Yorkville. Amend. Mot. at 3.

### **Yorkville’s Response To Fox Moraine’s Amended Motion**

Yorkville’s prevailing theme also appears to be a waiver argument. Yorkville argues that by failing to support its waiver argument with case law, Fox Moraine has waived its waiver argument. Yorkville argues at length that it did not and has not waived any objections in its responses by its failure to include all discovery objections in its motion for a protective order. It argues that neither the Board rules “nor any other authority (including all other Board Rules and Supreme Court Rules) require a party seeking a protective order to include all discovery objections in its motion for a protective order or risk waiving them”. Resp. at 3. Yorkville states that “[s]uch requirement would be absurd”. *Id.*

Yorkville further argues that it is not required to furnish an affidavit of completeness. It further states that Fox Moraine did not furnish an affidavit with its

responses to Yorkville's requests. Yorkville argues that since Fox Moraine failed to support its objection on specificity grounds, Fox Moraine has waived its objections. Yorkville represents that some of its responses to Fox Moraine's First Set of Request to Produce included relevance and scope objections. Resp. at 6.

Addressing Fox Moraine's objections to Yorkville's answers to interrogatories, Yorkville argues that Fox Moraine's objection stating the interrogatories are either incomplete or unresponsive is not supported with explanation or authority and are thereby waived. Yorkville further alleges that it objected to some of Fox Moraine's interrogatories on relevance and deliberative process grounds.

### **Fox Moraine's Reply**

Fox Moraine initially states that it withdraws its request for sanctions in an effort to expedite the resolution of its amended motion to compel. Reply at 1. Next, Fox Moraine cites to Supreme Court Rule 214 to support its claim that an affidavit of completeness is required. Next, Fox Moraine represents that:

[a]dmittedly, Fox Moraine, in its initial motion did not state with specificity in what way the objections of Yorkville were insufficient, improper or otherwise not well taken. However, the nature of Yorkville's objections to production and refusals to answer interrogatories did not require such specificity or detailed explanation in a motion to compel, as Yorkville's objections themselves lacked any specificity. In fact Yorkville's objections and refusals were so vague and generic that Yorkville's [presumably Fox Moraine] motion to compel could not contain a specific explanation of how they were inadequate and insufficient. Reply at 3.

Specifically, Fox Moraine argues that Yorkville does not specify why some of Fox Moraine's interrogatories are vague overly broad or beyond the scope of the appeal. Fox Moraine also points out, supported by case law, that pre-filing contacts may be relevant evidence of fundamental fairness violations. Reply at 3.

### **Discussion**

Revisiting the language in the September 20, 2007, order, on appeal of a municipality's decision to grant or deny a siting application, the Board generally confines itself to the record developed by the municipality. 415 ILCS 5/40.1 (b) (2006). However, the Board will hear new evidence relevant to the fundamental fairness of the proceedings where such evidence lies outside the record. Land and Lakes Co. v. PCB, 319 Ill. App. 3d 41, 48, 743 N.E. 2d 188, 194 (3d Dist. 2000). Public hearing before a local governing body is the most critical stage of the site approval process. Land and Lakes Co. v. PCB, 245 Ill. App. 3d 631, 616 N.E.2d 349, 356 (1993). The manner in which the hearing is conducted, the opportunity to be heard, whether *ex parte* contacts existed, prejudgment of

adjudicative facts, and the introduction of evidence are important, but not rigid, elements in assessing fundamental fairness. American Bottom Conservancy v. Village of Fairmont City, PCB 00-200 (Oct. 19, 2000). The Board must consider the fundamental fairness of the procedures used by the respondent in reaching its decision. 415 ILCS 5/40.1 (a) (2006). Additional evidence outside the record that may be considered include pre-filing contacts. *See* County of Kankakee v. City of Kankakee, Town and County Utilities, Inc., and Kankakee Regional Landfill, LLC., PCB 03-31, 03-33, 03-35 (cons.) (Jan. 23, 2003).

The purpose of discovery is to uncover all relevant information and information calculated to lead to relevant information. 35 Ill. Adm. Code 101.616(a). The Board's rules also state that where the Board's rules are silent, the Board may look to the Code of Civil Procedure and the Supreme Court Rules for guidance. 35 Ill. Adm. Code 101.100.

### **Ruling**

At this time, Fox Moraine's amended motion to compel is denied.

After an exhaustive review of the pleadings, including Yorkville's responses to Fox Moraine's First Request To Produce, Yorkville's answers to Fox Moraine's First Set of Interrogatories, Fox Moraine's amended motion to compel, Yorkville's response and Fox Moraine's reply, I cannot discern with any specificity what the respective parties are alleging or the bases for the respective objections. For instance, some of Yorkville's answers to Fox Moraine's discovery requests object on grounds of relevance or beyond the scope. If I were to assume that Yorkville's objections are based on pre-filing contacts, without more, I would overrule Yorkville's objection and direct it to respond or answer. But that assumption will not be made at this time. Fox Moraine's amended motion to compel is likewise replete with objections that lack specificity. Given the totality of the circumstances, I cannot grant Fox Moraine's amended motion to compel at this time.

I further note that Yorkville's argument that to include all discovery objections in a motion for a protective order is "absurd" is less persuasive in a time sensitive matter such as this. In the September 20, 2007, order, I stated that in a deadline date case, the hearing officer must manage the case to insure that discovery, hearing and briefing schedule allow for timely Board deliberation and decision of the case as a whole. It is difficult to manage the case when piecemeal discovery motions are filed.

I direct that Yorkville re-serve its responses to Fox Moraine's First Request To Produce. In its amended responses, Yorkville must include specific grounds for any objections. Yorkville must furnish an affidavit of completeness pursuant to Supreme Court Rule 214. Fox Moraine must also furnish an affidavit of completeness regarding its responses to Yorkville's Request to Produce. I further direct that Yorkville re-serve its answers to Fox Moraine's First Set of Interrogatories. In its amended answers, Yorkville must include specific grounds for any objections. The parties are reminded that when a fundamental fairness violation is alleged, additional evidence outside the record that may be considered by the Board include pre-filing contacts. Due to the

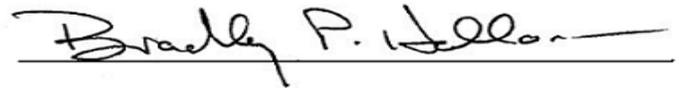
statutory decision deadline of August 21, 2008, an abbreviated discovery schedule is required. Yorkville's amended responses and answers to Fox Moraine's propounded discovery is due to be served on or before April 8, 2008. Fox Moraine's affidavit of completeness is due to be served on or before April 4, 2008. Given this time frame, I suspect a hearing could still be held in mid June 2008.

If another motion to compel is to be filed, that motion is due to be filed on or before April 18, 2008. The motion must set forth specific objections to each and every response or answer, and not just a general summary. Any response is due to be filed on or before April 28, 2008.

It is again noted that Fox Moraine has withdrawn its request for sanctions.

Finally, I again remind the parties that the procedural rules provide that parties may seek Board review of discovery rulings pursuant to 35 Ill. Adm. Code 101.616(e). The hearing officer reminds the parties that the filing of any such appeal of a hearing officer ruling does not stay the proceeding.

IT IS SO ORDERED

A handwritten signature in black ink, reading "Bradley P. Halloran", is written over a horizontal line.

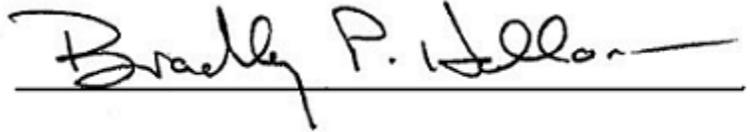
Bradley P. Halloran  
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CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order was mailed, first class, on March 27, 2008 to each of the persons on the attached service list.

It is hereby certified that a true copy of the foregoing order was hand delivered to the following on March 27, 2008:

John T. Therriault  
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James R. Thompson Center  
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A handwritten signature in black ink that reads "Bradley P. Halloran" with a horizontal line underneath it.

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