

ILLINOIS POLLUTION CONTROL BOARD  
April 17, 2014

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STATE OF ILLINOIS  
Pollution Control Board

TIMBER CREEK HOMES, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	PCB 14-99
VILLAGE OF ROUND LAKE PARK,	)	(Pollution Control Facility
ROUND LAKE PARK VILLAGE BOARD	)	Siting Appeal)
and GROOT INDUSTRIES, INC.,	)	
	)	
Respondents.	)	
	)	

**HEARING OFFICER ORDER**

On April 9, 2014, the Round Lake Village Board (Village Board) filed a motion to quash subpoena for deposition of Derke J. Price. (Mot.) On April 11, 2014, Groot Industries, Inc. (Groot) filed its motion to quash subpoena for deposition of Derke J. Price. (Groot's Mot.). On April 14, 2014, the Village of Round Lake Park (Village) filed its adoption of Groot's motion to quash. (Village Mot.) On April 14, 2014, Timber Creek Homes, Inc. (TCH) filed its consolidated response to respondents' motions to quash subpoena. (TCH Resp.). On April 15, 2014, the Village Board and Groot filed their respective motions for leave to reply and their replies to TCH's consolidated response. (Reply). Also on April 15, 2014, TCH filed its consolidated response to respondents' motions for leave to file replies. (TCH Resp. to Reply).

The respondents' motions for leave to file their replies are granted and for the reasons stated below, the respondents' motions to quash are granted.

**Village Board's Motion To Quash Subpoena For Deposition of Derke J. Price**

The Village Board states that on April 8, 2014, TCH issued a subpoena for Derke J. Price to appear on April 21, 2014 for a deposition. (Mot. at 1)<sup>1</sup> By way of background, the Village Board states that Groot filed its application for local siting approval with the Village of Round Lake Park on June 21, 2013. The Village Board considered appointing Mr. Price as hearing officer at a Village Board meeting to be held on July 2, 2013. Mot. at 1. Mr. Price, however, withdrew his name from consideration on June 27, 2013, because he learned that his client, the Village of Hainesville, intended to object to the Groot application. Mot. at 2. The Village Board further states that Mr. Price was never appointed hearing officer for the local siting hearing. *Id.*

<sup>1</sup> The Village Board neglected to paginate its motion.

Citing 35 Ill. Adm. Code 101.622 (d) and 35 Ill. Adm. Code 101.614 of the Board's procedural rules, the Village Board prays that the subpoena for deposition of Derke J. Price be quashed because to depose Mr. Price "is unreasonable and irrelevant to the facts of the case, and only causes undue delay, undue expense and the harassment of Derke J. Price." Mot. at 3.

### **Groot Industries Motion to Quash Subpoena for Deposition of Derke J. Price**

Groot states that it adopts the motion to quash filed by the Village Board. Groot's Mot. at 1. Groot additionally argues that the subpoena violates the Board Order of April 3, 2014 regarding the limitations on the scope of discovery. *Id.* Groot further argues that the subpoena violates the Hearing Officer Order of April 7, 2014 where "[t]he Subpoena for Deposition of Derke Price does not in any way reference any document referred to in the meeting minutes which were involved in the Request to Admit issued by Timber Creek Homes, Inc." *Id.* at 2-3.

### **Village's Motion to Quash Subpoena of Derke J. Price**

The Village states that it adopts the motion to quash subpoena of Derke J. Price filed by Groot and "incorporates by reference herein both the argument of Groot Industries, Inc. and the Village Board of Round Lake Park." Village Mot. at 1.

### **TCH's Consolidated Response to Respondents' Motions to Quash Subpoena**

The first two pages of TCH's response rehash its arguments made in its previous filings with the Board regarding the scope of discovery in landfill siting cases when fundamental unfairness is alleged. TCH Resp. at 1-2. Next, TCH attacks the Village Board's motion stating that it does not "cite any specific reasons for its desire to prevent Price's deposition." TCH Resp. at 3. Next, TCH argues that the Village Board's motion to quash would, if granted, improperly limit discovery contrary to the Board's Order of April 3, 2014 and the Hearing Officer Order of April 7, 2014. *Id.*

Next, TCH cites to the Village Board's Exhibit C that is attached to the Village Board's motion to quash. *Id.* at 4. Exhibit C is a copy of an e-mail, dated June 27, 2013, in which Mr. Price informs Peter Karlovics, attorney for the Village Board in this appeal, that he is unable to serve as hearing officer and is withdrawing his consideration for appointment as such in the local siting hearings. The e-mail reads as follows:

I have now been informed by the firm's client, the Village of Hainesville, that it intends to appear and object. Accordingly, since I have not been officially appointed by the Board at this time, the firm has concluded that I must withdraw from service as the Hearing Officer and erect a "chinese wall" with the attorneys in our office that work with Hainesville



due to my discussions with Peter. Words cannot express my disappointment and frustration from not being able to work with you all on this matter. Although the conflict was initially cleared back in October, Hainesville—as is its right—has now changed its corporate mind. I would say that the July 9 meeting is probably unlikely but I leave that to Peter. Village Board Mot., Exhibit C.

Citing the e-mail, TCH launches into its argument that that “[w]e do not know (yet) what Price’s ‘discussions’ with Karlovics specifically entailed,” but that they must have involved information that created a “direct conflict” with an opponent of the transfer station. TCH Resp. at 4. As such, TCH argues that these discussions are relevant information or information calculated to lead to relevant information. *Id.*

Finally, TCH takes issue with Groot’s argument that discovery is limited as delineated by the Hearing Officer’s Order of April 7, 2014 that limited the scope of discovery to the Village Board’s minutes that was the subject of TCH’s Request to Admit.<sup>2</sup> *Id.* at 5. Instead, TCH argues that the Board’s Order of April 3, 2014 allows TCH to continue with discovery concerning documents provided during discovery. *Id.*

#### **Village Board’s Reply to TCH’s Consolidated Response**

The Village Board states that it did cite specific reasons to quash, and opines that “a deposition of Mr. Price [is] about as relevant as TCH deposing any random person off the street.” Village Board Reply at 1. The Village Board argues that TCH has not explained the relevancy of a deposition of Mr. Price and only “invites speculation.” *Id.* at 2.

The Village Board also takes issue with TCH’s insinuation that the e-mail of June 27, 2013, reveals that Mr. Price has some type of relevant confidential information. *Id.* The Village Board states that the e-mail reflects nothing of the sort. *Id.* In the alternative, the Village Board cites to Rule 1.6(a) of the Illinois Rules of Professional Conduct and argues that “even if Mr. Price possessed confidential information from the Village of Round Lake Park, Mr. Price remains irrelevant to this case because he could not ethically disclose any such information.” *Id.*

#### **Groot’s Reply to TCH’s Consolidated Response**

Groot primarily argues that TCH “is again attempting to move the target of discovery and broaden the scope of discovery.” Groot’s Reply at 2. In support, Groot argues that the Hearing Officer Order issued April 7, 2014 limits the scope of discovery to relevant information as reflected in the Village Board’s minutes, and the June 27, 2013 e-mail from Derke Price is not mentioned or found in the minutes. *Id.* at 2-3.

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<sup>2</sup> The respondents have filed an expedited appeal of the Hearing Officer Order issued April 7, 2014.

Groot argues that TCH “ignores” the discovery limitations in place and states as follows:

Petitioner instead relies on a tortured reading of the state’s Rules of Professional Conduct to manufacture an argument that Mr. Price, the proposed deponent, must somehow be in possession of confidential information. Petitioner notably omits any argument that *even if* Mr. Price had such confidential information (a leap of logic not supported by any facts set forth by petitioner), that information is in any way relevant to Petitioner’s claim of fundamental fairness in this matter or allowed by the hearing officer’s orders on discovery in this matter. Petitioner’s argument fails based on the plain language of the Rules of Professional Conduct, as set forth in the Village Board’s Reply, and its Subpoena is outside the scope of the existing discovery limitations. Groot’s Reply at 3. (emphasis in original).

### **TCH’s Consolidated Response to Respondents’ Motions for Leave to File Replies**

TCH argues that the Village Board’s interpretation of the Rules of Professional Conduct Rule 1.12 is in error because the rule “only applies to situations where “the lawyer **participated personally and substantially** as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral.” TCH Resp. to Reply at 1. (emphasis in original). As such, TCH argues that the rule does not apply to this situation because Mr. Price was not appointed the hearing officer for the siting hearing. *Id.* at 1-2.

TCH next turns to Groot’s reply and states that Groot’s argument that discovery is limited to the meeting minutes that were the subject of TCH’s Request to Admit and that Groot’s position that any information would not be relevant is in error and has already been addressed by TCH. *Id.* at 2. For these reasons, TCH argues that the respondents’ motions for leave to reply should be denied. *Id.*

### **Discussion And Ruling**

The purpose of discovery is to uncover all relevant information and information calculated to lead to relevant information. *See* 35 Ill. Adm. Code 101.616(a). 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) (2012). However, the Board will hear new evidence relevant to the fundamental fairness of the proceedings where such evidence lies outside the record, including pre-filing contacts. *See Land and Lakes Co. v. PCB*, 319 Ill.



App. 3d 41, 48, 743 N.E.2d 188, 194 (3d Dist. 2000). Pre-filing contacts may be probative of prejudgment of adjudicative facts, which is an element to be considered in assessing a fundamental fairness allegation. American Bottom Conservancy (ABC) v. Village of Fairmont City, PCB 00-200, slip op. at 6 (Oct. 19, 2000).

TCH's vague claim that Derke Price's deposition will produce relevant information or will lead to relevant information because the June 27, 2013 e-mail reflected some prior discussion between Mr. Price and the Village Board's attorney is unpersuasive. Mr. Price was not the hearing officer and there no evidence, as opposed to supposition, that his testimony would provide any relevant information or lead to any relevant information. TCH offers only speculation in support of its claim that Mr. Price must necessarily possess such information because he withdrew from consideration for appointment as a hearing officer and was "walled off" from other attorneys at his firm representing the Village of Hainesville. That is not a reasonable inference from the relevant facts concerning Mr. Price's prospective role as hearing officer—a role that he never assumed. Moreover, missing from TCH's attempt to obtain Mr. Price's testimony is any explanation why any information Mr. Price could conceivably possess would be relevant or likely to lead to the discovery of relevant evidence relating to TCH's fundamental fairness claim.

Furthermore, TCH's subpoena is outside the discovery limitations that I have put in place. TCH seems to interpret the Hearing Officer Order issued on April 7, 2014 allows discovery as long as it relates in any way to a documents provided during discovery. TCH Resp. at 5. That understanding is erroneous. In pertinent part, the Order states that "**TCH may pursue discovery regarding entries in the Village Board's minutes that [were] the subject of TCH's Request to Admit** as those documents were provided or gained during the course of discovery." Hearing Officer Order at 2. (emphasis added). Further, the Order stated that discovery is limited to the waste transfer station that is the subject of this appeal and must be relevant or calculated to lead to relevant information. *Id.* These limitations on the scope of discovery in this appeal remain in force. TCH has not shown that any information in Mr. Price's possession is related in any way to entries in the Village Board's minutes that were the subject of TCH's Request to Admit. The subpoena directed to him is quashed on this ground as well as that discussed above.

The Village Board minutes dating back to 2008 referenced in the Board's Order issued April 3, 2014 and the Hearing Officer Order issued April 7, 2014 provide ample discovery possibilities without opening the discovery door further.

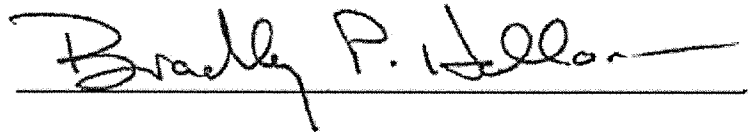
### Conclusion

Based on the aforesaid reasons, the respondents' motions to quash Derke Price's deposition subpoena are granted.

Procedural rules provide that parties may seek Board review of discovery rulings pursuant to 35 Ill. Adm. Code 101.616 (e). The parties are reminded that the filing of any such appeal of a hearing officer order does not stay the proceeding. In statutory decision deadline cases, such as

at bar, the hearing officer must manage the case to insure that discovery, hearing and briefing schedules allow for Board deliberation and a timely decision of the case as a whole.

IT IS SO ORDERED.

A handwritten signature in black ink that reads "Bradley P. Halloran". The signature is written in a cursive style and is positioned above a solid horizontal line.

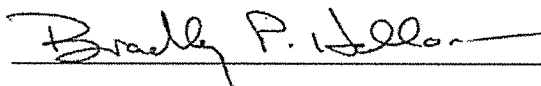
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## CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were mailed, first class, on April 17, 2014, to each of the persons on the service list below.

It is hereby certified that a true copy of the foregoing order was hand delivered to the following on April 17, 2014:

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

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