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MAR 20 2014

STATE OF ILLINOIS
Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD

March 20, 2014

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

HEARING OFFICER ORDER

On February 26, 2014, respondent Groot Industries, Inc. (Groot) filed its objections to Timber Creek Homes, Inc.'s (TCH) discovery requests (Groot Obj.). Also on February 26, 2014, respondent Village of Round Lake Park (Village) filed a motion to strike (Village Mot.) TCH's discovery requests. Likewise, on February 26, 2014, Round Lake Village Board (Village Board) filed objections and a motion to strike (VB Obj.) TCH's and Groot's discovery requests. Finally, on February 26, 2014, TCH filed its consolidated response to respondents' discovery objections (TCH Resp.).

On March 3, 2014, the Village filed "Village of Round Lake Park's Reply Re its Motion to Strike TCH's Discovery Requests." After further reading, the Village is replying to TCH's consolidated response to respondents' discovery objections (V. Reply). Also on March 3, 2014, the Village Board filed its reply to TCH's response to respondent's discovery objections (V.B. Reply).

On March 20, 2014, the Board denied the respective motions to dismiss and held that TCH has not waived its fundamental unfairness claim and that TCH has sufficiently pled its fundamental unfairness claim in its petition. Timber Creek Homes, Inc. v. Village of Round Lake Park, Round Lake Park Village Board and Groot Industries, Inc., PCB 14-99, slip op. at 14 (Mar. 20, 2014).

Due to time constraints that are inherent in statutory decision deadline appeals and the plethora of motions, objections and responses that have been filed regarding discovery in this matter, I will summarize the various objections and motions and responses and then proceed to discussion and decision.

Groot's Objections to TCH's Discovery Requests

It is clear throughout Groot's Objections that Groot is basing its general discovery objections on its argument that TCH either has waived its fundamental unfairness claim or has not sufficiently pled fundamental unfairness claim in its appeal before the Board.

Groot eventually hones in on its objections to TCH's Interrogatories No. 1 through 3, stating that "even if the PCB does permit discovery regarding Petitioner's fundamental fairness claim, pre-filing contacts are not relevant to such claim." Groot Obj. at 5. Groot further objects that except for TCH's Request for Production of Documents No. 15, the production requests are not limited to "the proposed transfer station that is the subject of the proceeding." *Id.* at 2. Groot further objects because the "requests purport to seek information for the time period between March 1, 2008 and June 21, 2013." *Id.*

Finally, Groot argues that TCH's Interrogatories No. 4 through 9 are not "limited to the subject of the transfer station at issue in petitioner's appeal . . . and to the extent that these Interrogatories seek information regarding facilities other than the proposed transfer station at issue in this matter, Groot objects to such Interrogatories." *Id.* at 5.

Village Motion to Strike TCH's Discovery Requests

Like Groot, the Village maintains that discovery and hearing must be based exclusively on the record. Village Mot. at 1. The Village continues with circuitous arguments and finally honing on TCH's Production Requests No. 1 through 22. *Id.* It appears the Village's specific objection is that the Production Requests seek documents, which includes pre-filing documents, from the Village from March 1, 2008 through June 21, 2013. *Id.* The Village also argues generally and as an aside, without specifics, that the requests seek "ethical issues as well as attorney-client and work product privilege issues." *Id.* at 9. Citing TCH's Production Requests No. 23 and 24, the Village objects to documents regarding contacts between Mr. Kleszynski and the Village that include the date Mr. Kleszynski was retained to present, or post-decision contacts. *Id.*

The Village moves on to its objections to TCH's Interrogatories. Although confusing, the Village appears to object to TCH's Interrogatories No. 1 through 10, and argues that the Interrogatories cover a time period between March 1, 2008 through June 21, 2013. *Id.* As with its other objections, including objections to TCH's Request for Production, the Village argues that the Interrogatories are vague, overly broad, unduly burdensome and not relevant. *Id.*

The Village cites Interrogatories No. 2 and 11 that seek information that involve post decisional information and that "would fall squarely within the attorney-client privilege and/or the attorney work-product privilege as TCH seeks information regarding mental impressions and strategy." *Id.* at 10. The Village also cites to TCH Interrogatory No. 13 and states that post-decisional information is not relevant and any information that is relevant Mr. Kleszynski testified to at the hearing and was cross-examined. *Id.* at 10.

Finally, the Village revisits its argument that appeals under Section 40.1 of the Environmental Protection Act (Act) (415 ILCS 5/40.1 (2012)) are based on the record below and does not include “fishing expeditions.” *Id.* at 10-11.

Village Board’s Objections to TCH’s and Groot’s Discovery Requests

The Village Board first lodges its objections at TCH’s Interrogatories and TCH’s Request for Production. The Village Board argues that TCH waived its fundamental unfairness claim and that Section 40.1 of the Act requires the hearing to be based exclusively on the record below. V.B. Obj..¹

The Village Board states that should the Board find that the fundamental unfairness issue is properly before the Board, any discovery seeking attorney-client privilege is improper and that discovery should only involve the transfer station that is the subject of this appeal. *Id.* The Village Board also argues that any discovery should be restricted to the time of filing the application and the final decision of the Village Board. *Id.* Finally, the Village Board argues that the discovery sought is overbroad, unduly burdensome and likely not relevant. *Id.*

The Village Board “adopts its arguments regarding TCH’s Interrogatories and TCH’s Request for Production for its objection and motion to strike Groot’s Interrogatories and Groot’s Request for Production.” *Id.*

TCH’s Consolidated Response to Respondents’ Discovery Objections

TCH argues that its fundamental unfairness claim is properly before the Board. TCH Resp. at 4. TCH next states that Groot and the Village Board are trying to improperly limit discovery to the transfer station that is the subject of this appeal. *Id.* at 5. TCH recounts Groot’s and the Village Board’s arguments that Groot owns and operates other facilities in the area but that documents related to those facilities are not relevant to this appeal. *Id.* at 5-6. TCH argues that this pre-filing information is calculated to lead to relevant information, “[p]articularly in the context of a claim of collusion between respondents . . . and clearly may lead to relevant information-disclosure of the scope and ambit of Respondents scheme.” *Id.* at 6. In further support of its discovery requests, TCH argues that Mr. Kleszynski “sought to misrepresent the fact that he had been directed by VRLP, as the undisclosed co-applicant act through Sechen, to generate an ‘independent’ statement supporting Groot’s position.” *Id.* at 3. This, TCH contends, is a violation of the Uniform Standards of Professional Appraisal Practice. *Id.*

TCH then takes issue with Groot’s and the Village Board’s objection that the time frame for information sought is overly broad and should not include pre-filing contacts and should be restricted to the time period between the filing of the application and the final decision of the Village Board. *Id.* TCH claims generally the its theory of collusion demands the requested discovery. *Id.* at 2-6.

¹ The Village Board neglected to paginate its objections.

TCH then responds to the Village's argument that "[t]he motives of the members of a municipal authority are not the proper subjects of judicial inquiry," and therefore there can be no *ex parte* contacts. *Id.* at 7. In rebuttal, TCH argues that the discovery requests are reasonable where "[r]espondents' scheme appears to predate the filing of the application, and may have even been hatched years before, in the context of VRLP's agreement to approve all of Groot's facilities." *Id.*

Finally, TCH states that the Village Board's blanket argument that TCH should not be entitled to discovery regarding information protected by attorney-client privilege and the Village's blanket argument regarding attorney-client privilege and/or work product lacks needed specific objections, reminding the Village that not all communications between Mr. Sechen and the Village Board or Mr. Kleszynski is privileged or involves protected work product. *Id.* at 7-8.

Village's Reply

In its reply, the Village adds no new arguments and simply attacks THC's collusion theory. V. Reply at 1-3.

Village Board's Reply

The Village Board continues its argument that THC's discovery requests are vague and overly broad and "has the potential to devolve to a Spanish Inquisition of sorts, punishing underpaid part time Village Board members for their good attendance at the hearings with baseless accusations of bias" V.B. Reply.²

Discussion and Ruling

On March 20, 2014, the Board found that TCH has not waived its fundamental unfairness claim and that THC has sufficiently pled the fundamental unfairness claim in its petition. Timber Creek Homes, PCB 14-99, slip op. at 14.

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

² The Village Board neglected to paginate its reply.

City, PCB 00-200, slip op. at 6 (Oct. 19, 2000). Further, the courts have indicated that fundamental fairness refers to the principles of adjudicative due process and a conflict of interest itself could be a disqualifying factor in a local siting proceeding if the bias violates standards of adjudicative due process. E & E Hauling v. PCB, 116 Ill. App. 3d 586, 596, 451 N.E.2d 555, 564 (2d Dist. 1983), *aff'd* 107 Ill. 2d 33, 481 N.E.2d 664 (1985). 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. Hediger v. D & L Landfill, Inc., PCB 90-163, slip op. at 5 (Dec. 20, 1990).

Decision

On December 12, 2013, the Village and the Village Board granted siting, with conditions, for a waste transfer station located at 201 Porter Drive in Round Lake Park, Lake County, to Groot. The above siting decision is the issue on appeal, not other transfer stations or facilities owned or operated by Groot. Furthermore, TCH's seemingly arbitrary date of March 1, 2008 to which pre-filing information is sought is not reasonable. It appears that TCH has chosen this date to retrieve information regarding Groot facilities other than the transfer station at issue on appeal.

Respondents' objections to TCH's discovery requests that seek information pertaining to Groot's other transfer stations or facilities are sustained.

It appears that TCH first became aware of its theory of collusion during the siting hearing, when Mr. Kleszynski was being cross-examined. TCH Resp. at 3. To that end, I find that a reasonable time period to seek pre-filing contacts is the day that Mr. Kleszynski was retained by the Village to assist with the transfer station that is the subject of this appeal, to June 21, 2013, the date the siting application was filed. The date of Mr. Kleszynski's retention is not readily apparent from the record or the pleadings.

Respondents' objections to TCH's pre-filing discovery requests from March 1, 2008 are sustained.

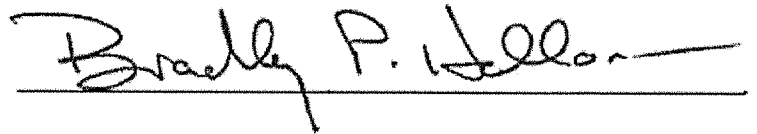
For the reasons above, I find that the time frame for all discovery requests, including pre-filing, is from the date Mr. Kleszynski was retained by the Village to December 12, 2013, the date Groot was granted siting.

Next, it is impossible to discern with any specificity what the respondents allege is attorney-client privilege, protected work product, or what discovery would invade the minds of the decision makers. If the respondents re-allege such objections, a privilege log identifying the document and contended privilege is required, not broad brush objections.

Finally, I direct the parties to partake in an Illinois Supreme Court Rule 201(k) conference on or before March 28, 2014.

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, reading "Bradley P. Halloran", is written over a horizontal line.

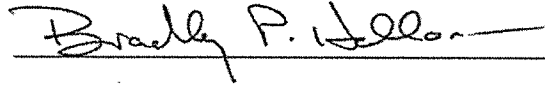
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CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were mailed, first class, on March 20, 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 March 20, 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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