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.,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by D. Glosser):

Timber Creek Homes, Inc. (TCH) filed a petition (Pet.) asking the Board to review a December 12, 2013 decision of the Village of Round Lake Park (Village) and the Round Lake Park Village Board (Village Board). That decision granted siting, with conditions, for a waste transfer station to Groot Industries, Inc. (Groot). *See* 415 ILCS 5/40.1(a) (2012); 35 Ill. Adm. Code 101.300(b), 107.204. The transfer station is located at 201 Porter Drive in Round Lake Park, Lake County.

Respondents all filed separate motions to dismiss and replies. TCH filed a consolidated response to the motions. For the reasons set forth below, the Board denies the motions to dismiss.

The Board begins by setting forth background information and then summarizes each motion to dismiss. The Board then summarizes the response and the replies. The Board then discusses its reasons for denying the motions.

BACKGROUND

On June 21, 2013, Groot filed a siting application with the Village's Clerk. Pet. at 1. A public hearing was held beginning September 23, 2013, and ending on October 2, 2013. *Id.* Written public comment was also received until 30 days after the application was received, at which time the record of the Village Board's decision was closed. *Id.*

TCH owns and operates a residential community on property within the Village. *Id.* at 2. TCH's property is in close proximity to the proposed transfer station, and TCH argues it is situated as to be directly affected by the proposed facility. *Id.* TCH appeared and participated in the hearings held before the Village Board opposing the proposed siting. *Id.* TCH's involvement in the hearings included the filing of motions and responses to motions, cross examination of witnesses, presentation of evidence and witnesses, and submission of written arguments. *Id.*

On December 12, 2013, Resolution Number 13-09 was adopted by a majority of the Village Board. Pet. 2. This action approved with conditions Groot's application for the siting of the transfer station. *Id.*

On January 10, 2014, TCH filed its petition asking the Board to review the Village's December 12, 2013 decision. TCH appeals on the grounds that the Village's procedures used to reach its siting decision were fundamentally unfair and the Village's decision was against the manifest weight of the evidence. More specifically paragraph 7 of the petition states:

> The local siting review procedures, hearings, decision, and process, individually and collectively, were fundamentally unfair in at least two respects. First, members of the Village Board prejudged the Application and were biased in favor of Groot. Second, the Hearing Officer, appointed to oversee the hearing process and render proposed findings and conclusions, usurped the authority of the Village Board by making determinations that were beyond the scope of his authority and that were solely the province of the Village Board. The Village Board in turn failed in its statutory duty to make those determinations. Pet. at 2.

In paragraph 8, the petition states:

> In addition, the Village Board majority's finding that Groot met its burden of proving the nine statutory siting criteria, subject to certain conditions, was against the manifest weight of the evidence, and contrary to existing law, with respect to criteria i (need), ii (public health, safety and welfare), iii (character of the surrounding area and property values), vi (traffic) and viii (consistency with county solid waste plan). *Id.*

On February 4, 2014, the Village filed a motion to strike and dismiss the petition for review (V. Mot.). On February 6, 2014, the Village Board (VB Mot.) and Groot (Groot Mot.) separately filed motions to dismiss the petition for review. On February 11, 2014, TCH filed a consolidated response to the motions. By hearing officer order respondents were allowed an opportunity to file replies. On February 18, 2014, all three respondents filed a reply (the Village's reply (V. Reply), Village Board's reply (V.B. Reply) and Groot's reply (G. Reply)).

MOTIONS TO STRIKE AND DISMISS

The Board will first summarize the Village's motion and then the Village Board's motion. The Board concludes this section with a summary of Groot's motion.

Village Of Round Lake Park

The Village requests that the Board strike and dismiss the petition, because of a lack of facts, overall vagueness, and the forfeiture of petitioner's right to appeal. V. Mot. at 1. The Village argues that TCH is purposefully casting vague accusations in paragraphs 7 and 8 of TCH's petition, in an effort to create a broad and extensive discovery. The Village claims that TCH hopes to uncover something that fits one of TCH's accusations. *Id.* at 3.

The Village states that in paragraph 7 of the petition, TCH points to unnamed and unspecified "procedures, hearings, decisions and process". V. Mot. at 3. The Village argues that respondents are not required to guess the meaning of these accusations. *Id*. To do so, the Village opines, would require respondents to participate in a guessing game which would be an unduly expensive, and needlessly time consuming appeals process. *Id*. at 4.

The Village also argues that TCH asserts that the Village Board was biased without identifying a specific Village Board member. V. Mot. at 5. The Village states that, in order to show bias TCH must raise the issue promptly in the original siting proceeding. *Id*; citing Fox Moraine, LLC v. United City of Yorkville, 2011 Il App (2d) 100017, ¶60; 960 N.E.2d 1144, 1163-64 (2nd Dist. 2011). Further, the Village argues that the members of a siting authority are presumed to have made their decisions in a fair manner, and therefore, TCH must show that a disinterested party might conclude that one or more of the voting members prejudged the facts or law of the case. *Id*., citing Fox Moraine, 960 N.E.2d at 1163-64. The Village argues that on this issue TCH does not overcome the presumption of fair decisionmaking, fails to charge a specific Village Board member of prejudice, and failed to raise the claim of bias at the original siting proceeding. V. Mot. at 5.

Also responding to paragraph 7, the Village argues that TCH's accusation that the hearing officer usurped the decision maker's authority by making "unidentified and unspecified determinations" lacks the required facts for a proper petition. V. Mot. at 6. Again, the Village argues that TCH is making vague accusations in an effort to maximize TCH's potential to find something in discovery. *Id*. The Village asks the Board to strike this language because it is conclusory and lacks clarity. *Id*.

The Village also requests that the Board strike paragraph 8 from the petition because the Village believes TCH failed to specify what provisions of existing law relate to the allegations in paragraph 8. V. Mot. at 7. The Village argues that TCH failed to allege any facts to support the allegations within the paragraph. *Id*.

The Village does not believe the Board needs to reconsider its January 23, 2014 order, because of the ability of any party to move to dismiss a petition and the requirement to plead "a specification of the grounds for the appeal, including any allegations for fundamental unfairness". V. Mot. at 7, citing 35 Ill. Adm. Code 107.208(c) and 107.502. However, if the Board does not agree to grant its motion to dismiss, the Village asks the Board to consider this a request to reconsider. *Id*.

Round Lake Park Village Board

The Village Board lists two reasons in support of its motion to strike and dismiss TCH's petition. VB Mot. at 1-3. First, the Village Board claims that TCH has failed to allege sufficient facts to state a cause of action, and second alleges that TCH forfeited its claim of bias by failing to raise the issue during the original siting hearing. *Id.*

Failure to Allege Sufficient Facts to State a Cause of Action

The Village Board states that paragraphs 7 and 8 of the petition form the basis for TCH's appeal. VB Mot. at 2. The Village Board argues that paragraph 7 fails to allege a specific incident or fact showing bias on the part of any Village Board member, fails to identify any specific Village Board member that was biased, and also fails to allege what determinations by the hearing officer were beyond the scope of their duty. *Id.* The Village Board asserts that paragraph 8 of the petition for review also fails to allege specific facts that show the decision that the majority of the Village Board made was against the manifest weight of the evidence. *Id.*

The Village Board claims that TCH's allegations in paragraphs 7 and 8 are so "conclusory and devoid of fact" that a claim is not stated. The Village Board further claims that the paragraphs are merely a step above alleging that "the Village Board did it wrong." VB Mot. at 2. The Village Board then states that Illinois is a fact pleading state, and because of that, TCH must set forth the facts that support its cause of action. *Id.* The Village Board opines that even when examined liberally, TCH has not stated the necessary facts sufficient enough for the Village Board to provide a defense, let alone for the Board to grant the relief requested. *Id.* at 3.

Forfeited the Claim of Bias

The Village Board asserts that TCH waived a claim of bias, because TCH failed to raise the issue of bias at the original siting hearing. VB Mot. at 3, citing Fox Moraine, 960 N.E.2d at 1168. In Fox Moraine, the court affirmed a finding by the Board that Fox Moraine forfeited its argument of bias and prejudgment because it failed to raise the issue promptly at the initial siting hearing. 960 N.E.2d at 1168. The Village Board claims that TCH failed to allege that any specific board member was biased in its petition for review. VB Mot. at 3. The Village Board alleges that TCH both failed to allege it raised the claim of bias against a specific Village Board member at the original siting hearing, and failed in fact to raise the claim of bias against a Village Board member at the original siting hearing. *Id.* Therefore, the Village Board opines that TCH forfeited its claim of bias. *Id.*

Groot Industries, Inc.

Groot claims that the Act and Board regulations require specificity in the pleadings and the petition fails to provide that specificity. Because the petition lacks specificity, the petition should be dismissed according to Groot. Groot next argues that the claim that the proceedings were fundamentally unfair should be dismissed as the claim was not raised by TCH in the proceedings before the Village Board.

Act and Board Regulations Require Specificity

Groot argues that the Act requires that a petition for review must include specific grounds for the appeal. Groot Mot. at 2. Groot also cites to Section 107.208 of the Board's procedural rules (35 Ill. Adm. Code 107.208), claiming the section requires TCH to include the manner in which the decision was against the manifest weight of the evidence. *Id.* at 3.

More specifically, Groot cites Section 40.1(b) of the Act (415 ILCS 5/40.1(b) (2012)), stating that if a petition does not include the specificity required by regulations than the Board may dismiss the claim as frivolous. Groot Mot. at 3. Groot then notes that the Board has interpreted "frivolous" to mean a pleading that "is either legally or factually deficient." *Id.* citing Winnetkans Interested in Protecting the Env't (WIPE) v. IPCB, 55 Ill. App. 3d 475, 480; 370 N.E.2d 1176, 1180 (1st 1977). The WIPE case, an enforcement action before the Board, was the first time a court addressed the Board's interpretation of the statutory term "frivolous". The court accepted the Board's interpretation of "frivolous". *Id*. Groot also cites the WIPE case in support of Groot's claim that a pleading is frivolous when it contains only a bare conclusion of law, and the pleading is in effect a mere suspicion. Groot Mot. at 3.

Groot claims that TCH sets out the basis of its appeal in paragraphs 7 and 8. Groot Mot. at 3. In paragraph 7, Groot argues, that TCH merely concludes that the proceedings were unfair because the Village Board members were biased, without providing facts to support the conclusion. *Id.* Similarly, Groot argues that paragraph 8 of the petition claims the decision was against manifest weight of the evidence and states no details to support the conclusion. *Id.* at 3, 4.

Groot then alleges that TCH's petition is more conclusory than the petitions dismissed in WIPE and City of Des Plaines v. Metro. Sanitary Dist., 60 Ill. App. 3d 995; 377 N.E.2d 114 (1st Dist. 1978). Groot Mot. at 3. Groot specifically points to the City of Des Plaines, where the plaintiff's argument that the permit at issue "was obtained by misrepresentation and failure to disclose all relevant facts" was found by the Board to be frivolous. *Id.*; City of Des Plaines, 77 N.E.2d at 119. The Board found, and the appellate court affirmed, that the allegation pled only "conclusions of law[, and did] not set forth with sufficient particularity the nature and extent of the alleged misrepresentations and failure to disclose." *Id.* Groot analogizes the current case to City of Des Plaines, asserting that TCH did not set forth any specific facts to support its claims. Therefore, Groot opines that the Board should dismiss the petition as frivolous. Groot Mot. at 4.

Fundamental Fairness Claim

Groot claims it is well established that issues of bias or fundamental fairness must be raised at the original siting proceeding, or the claims are forfeited. Groot Mot. at 4, citing Fox Moraine, 960 N.E.2d at 1168. Groot then states that TCH did not allege that it raised fundamental fairness issues at the original proceeding, nor did TCH actually raise the question of fairness at the original proceeding. Groot Mot. at 4. Because of this, Groot argues TCH's claim of fundamental unfairness should be dismissed by the Board. *Id.*

Groot also argues that "members of a siting authority are presumed to have made their decisions in an objective matter." Groot Mot. at 5, citing Stop the Mega-Dump v. County Bd. Of DeKalb County, 2012 IL App (2d) 110579, ¶27; 979 N.E.2d 524, 531-32. Groot further argues that to show fundamental unfairness, TCH is required to "show that a disinterested observer might conclude that the siting authority, or its members, had prejudged the facts or law of the case." Groot Mot. at 5, quoting Fox Moraine, 960 N.E.2d at 1163. Groot claims that the presumption of fairness, along with the requirement to raise objections in regards to fundamental

fairness, demonstrate a public policy of reluctance to disturb a siting authority's decision. Groot Mot. at 5.

Therefore, Groot claims that because TCH did not supply any facts to support the conclusion of fundamental unfairness by the Village Board, its petition for review should be dismissed by the Board. Groot Mot. at 5.

January 23, 2014 Board Order

Groot states that although the Board's order of January 23, 2014 signifies the position that TCH's petition is sufficient and not frivolous, that order cannot bar an opportunity for respondents to challenge the substantive sufficiency of the petition. Groot Mot. at 5. Groot claims that respondents are in compliance with the Board's procedural requirement that "any motion to strike, dismiss, or challenge the sufficiency of any pleading filed with the Board must be filed within 30 days after the service of the challenged document, unless the Board determines that material prejudice would result." *Id.*, citing 35 Ill. Adm. Code 101.506. Therefore, Groot argues that the Board's order of January 23, 2014 is presumably procedural, rather than substantive, and does not block respondents' motion to dismiss TCH's claim. Groot Mot. at 5.

TCH'S RESPONSE

TCH begins by noting that all three respondents submitted similar motions, asserting the same two grounds for dismissal. Resp. at 1. The first grounds for dismissal is that TCH's petition for review is factually inadequate, and the second is that TCH has failed to allege that it preserved its fundamental fairness claim by raising it in the initial hearing. *Id.* TCH characterizes respondents' motion to dismiss as, "an effort to circumvent the appeal process before the siting hearing record has even been filed." *Id.*

TCH Has Properly Stated Its Claims

TCH argues that respondents cite numerous cases, but fail to cite one that addresses the subject of the respondents' motions. Resp. at 1-2. TCH states that the pleading standard under Section 107.208 of the Board's rules (35 Ill. Adm. Code 107.208) is the subject of respondents' motions. Resp. at 2. In a footnote, TCH notes that Groot cites the WIPE case in an effort to address the issue of whether the case is frivolous, but points out that WIPE does not address the pleading requirements for the review of a siting decision. Resp. at 2, citing WIPE, 370 N.E.2d 1176. TCH additionally points out that WIPE could not address the pleading requirements because it predates the adoption of Section 39.2 of the Act and Part 107 of the Board's regulations. *Id.*

TCH claims that Section 107.208 sets forth the requirements for siting appeals, and Section 107.208 does not establish a heightened fact pleading standard. Resp. at 2-3. TCH notes that the Board will hear a case, unless it is duplicative or frivolous. Resp. at 2, citing 35 Ill. Adm. Code 107.200(b) and Sierra Club and Jim Bensman v. City of Wood River and Norton, PCB 98-43, slip op. at 1 (Nov. 6, 1997). TCH recites the definition of both duplicative and frivolous. *Id.*, citing 35 Ill. Adm. Code 101.202. Section 101.202 defines frivolous as "a request

for relief that the Board does not have the authority to grant, or a complaint that fails to state a cause of action upon which the Board can grant relief." *Id.*, 35 Ill. Adm. Code 101.202.

TCH argues that previously when the Board addressed the sufficiency of pleadings, the Board recognized that, "pleading requirements for administrative review are less exacting that for other causes of action". Resp. at 3, quoting Bernice Loschen v. Grist Mill Confections, Inc., PCB 97-174 (Sept. 18, 1997), citing Mueller v. Board of Fire and Police Commissioners of the Village of Lake Zurich, 643 N.E.2d 255, 262 (1994). TCH adds that TCH is not required to plead all facts specifically in the petition, but to set out ultimate facts that support its cause of action. Resp. at 3.

TCH then analogizes American Disposal Services of Illinois, Inc. v. County Board of McLean County, *et al.*, PCB 11-60 (Feb. 16, 2012), to the current case. Resp. at 3. In American Disposal, the Board rejected the respondent's argument for dismissal of the petition for review. TCH argues the arguments the respondents put forth for dismissal of TCH's petition are identical. *Id.* TCH also notes that American Disposal involves a siting appeal pursuant to Section 107.208, and argues that cases relied upon by respondents for the proposition that the petition is frivolous do not relate to siting appeals. *Id.* TCH then directly compares several of its own allegations to those of American Disposal, arguing that the cases are so similar that the Board has already decided this issue, and the Board should rule that TCH's petition is sufficient. Resp. at 4-6.

TCH then argues that the Board already addressed the sufficiency of the petition when, on January 23, 2014, the Board issued an order finding the petition conforms to the requirements of Section 107.208, and accepted it for hearing. Resp. at 6. TCH notes that neither the Village nor Village Board acknowledged the acceptance for hearing in the motions. *Id.* TCH recognizes that Groot acknowledged the acceptance for hearing, but characterizes Groot's acknowledgement as claiming the acceptance is procedural, rather than substantive. *Id.* TCH then characterizes the acknowledgement as referring to the Boards decision as a mere "rubber stamp". *Id.*

In effort to show that Groot's "rubber stamp" understanding of the Boards acceptance is incorrect, TCH points to cases where the Board in the past has struck down inadequate petitions on the Board's own accord. Resp. at 6. TCH cites to Batavia, Illinois Residents Opposed to Siting of Waste Transfer Station v. Onyx Waste Services Midwest, Inc., PCB 05-1 (July 22, 2004), where the Board refused to accept a petition until an amended petition was filed because petitioner failed to address any of the siting criteria that were claimed to have been decided contrary to the manifest weight of the evidence. *Id.* TCH also cites to John F. Nocita v. Application of Greenwood Transfer, L.L.C. for Transfer Station Local Siting Approval in Village of Maywood, Illinois, PCB 05-67 (Nov. 4, 2004), where similarly the Board held that Mr. Nocita never stated that the Village's siting approval was against the manifest weight of the evidence on any of the nine Section 39.2(a) requirements. *Id.* Mr. Nocita also stated in his petition that he would be in position to further address his objections after the petition was accepted. *Id.* at 7, citing Nocita, PCB 05-67 (Nov. 4, 2004). In Nocita, the Board held that the failure to state any grounds under Sections 39.2(a) and 40.1(b) of the Act (415 ILCS 5/39.2(a) and 40.1(b) (2012)) for an appeal violates the Act's and the Board's petition content requirements. Resp. at 7.

Fundamental Fairness Claim

TCH also addresses respondents' argument that TCH has waived its fundamental fairness argument. Resp. at 7. TCH takes issue with respondents' reliance on Stop the Mega-Dump and Fox Moraine LLC, and contends that these cases address what TCH must "prove" to substantiate a fundamental fairness claim, not what it must "plead" to conform to the requirements of Section 107.208 and establish TCH's right to proceed with a claim. *Id.*; 2012 IL App (2d) 110579; 960 N.E.2d 1144. TCH states that neither of these cases even mention the pleading requirements for a fundamental fairness claim. Resp. at 7.

TCH opines that waiver is not a pleading requirement, and that waiver is an assertion that must be raised, if appropriate, after the siting authority files the hearing record. Resp. at 7. TCH then cites People of the State of Illinois v. QC Finishers, Inc., PCB 01-7 (July 8, 2004), in which TCH argues the Board ruled that waiver is a matter of affirmative defense that must be determined on the basis of the record, and that absence of waiver is not an element of the underlying claim. *Id.* at 7-8.

TCH then mentions that it is important that the Village is required to submit the entire record on appeal, which TCH claims has not happened yet[1]. Resp. at 8. TCH then alludes to respondents asking the Board to make a decision without the benefit of the hearing record. *Id.* TCH argues that this is against the Board's typical procedures, and the Board should in fact make a decision after reviewing the hearing record. *Id.*

TCH concludes that the petition satisfied the requirements of 35 Ill. Adm. Code 107.208, and therefore, the respondents' motions should be denied. Resp. at 8. TCH also asks that in the event the Board elects to strike TCH's petition, TCH be given leave to file an amended petition in due course. *Id.*

REPLIES

The Board will summarize the Village's reply and then the Village Board's reply. The Board will conclude this section by summarizing Groot's reply.

Village Reply

The Village argues that Sierra Club, PCB 98-43, cited by TCH, actually supports an argument that the Board will hear a motion that a petition is frivolous, even after the Board accepts the petition. V. Reply at 1. The Village states that in Sierra Club, the Board heard a motion to dismiss the case as frivolous, even though the Board had previously ruled that the compliant was not frivolous. *Id.*, citing Sierra Club, PCB 98-43.

The Village takes issue with TCH's reliance on American Disposal, PCB 11-60, arguing that the American Disposal case hinged on the lack of availability of the siting record prior to the decision by the local authority. V. Reply at 2. The Village notes that the American Disposal

[1] The Board notes that the Village timely filed its record on February 13, 2014.

case also relied on People ex rel. Scott v. College Hills Corp., 91 Ill. 2d 138; 435 N.E.2d 463 (1982), which is not a siting case. *Id*. Scott sets forth the proposition that "[a] complaint's allegations are sufficiently specific if they reasonably inform the defendants by factually setting forth the elements necessary to state a cause of action". Scott, 91 Ill. 2d at 145, 435 N.E.2d at 467 (1982).

The Village asserts that TCH must plead the ultimate facts to inform the respondents. Ultimate facts "are those necessary to determine issues in the case as distinguished from the evidential fact supporting the ultimate facts." V. Reply at 2-3, quoting State Farm Mutual Auto Ins. Co. v. Woods, 2013 IL App (2nd) 120556. The Village opines that the rules are the same before the Board as the court system, and the petition must be pled to give the respondents sufficient information as to the character of the evidence to be introduced, and the failure to do so means the petition should be dismissed. V. Reply at 3.

The Village argues that the petition is insufficient and a "fishing expedition". V. Reply at 3-4. The Village opines that the petition should be dismissed.

Village Board Reply

The Village Board disagrees with TCH's position that the Board's January 23, 2014 order constitutes a ruling on the sufficiency of the TCH petition. V.B. Reply at 1. The Village Board states that pursuant to Section 101.506 of the Board's rules (35 Ill. Adm. Code 101.506), a respondent has 30 days after service of the petition to file a motion to dismiss. The Village Board asserts nothing in the Board's January 23, 2014 order "infringes on that right". *Id*.

The Village Board also disagrees with TCH's reliance on American Disposal, PCB 11-60. V.B. Reply at 2. The Village Board argues that nothing in American Disposal conflicts with the cases cited by respondents, and in fact, American Disposal restates the requirement of fact pleading. *Id*. The Village Board reiterates that Illinois is a fact-pleading state and notice pleading is not sufficient in Illinois. *Id*. The Village Board continues with this argument noting that nothing in paragraph 7 constitutes an actual or alleged event and is silent on what actions or inactions occurred. V.B. Reply at 3-4. The Village Board claims that TCH's allegation in paragraph 7 is distinguishable from American Disposal, because in that case a specific occurrence was alleged as being fundamentally unfair. *Id*. at 4.

The Village Board notes that the courts are to construe pleadings liberally, and no pleading is defective if it contains facts that reasonably inform the opposite parties of the nature of the charge to be answered. V.B. Reply at 5, citing Keller v. State Farm Insurance Company, 180 Ill. App. 3d 539, 546; 536 N.E.2d 194, 198 (5th Dist. 1989); Disc Jockey Referral Network, Ltd v. Ameritech Pub. of Illinois, 230 Ill. App. 3d 908, 912; 596 N.E.2d 4,7 (1st Dist. 1992). The Village Board asserts that in this case, TCH's petition is broad, vague, and conclusory and leaves respondents guessing as to the nature of the claims. V.B. Reply at 5.

The Village Board reiterates its argument that TCH waived its claim of bias and prejudice by not raising the claim during the decision making process. V.B. Reply at 6.

Groot Reply

Groot reiterates its argument that TCH failed to set forth facts that support TCH's claims that the proceedings were fundamentally unfair and that the decision was against the manifest weight of the evidence. G. Reply at 1. Groot asserts that it is not arguing for a "heightened pleading standard", and that even under the "less exacting" pleading requirements of an administrative review, the petition should be dismissed. *Id*. Groot again argues that TCH's petition is vague and conclusory, and the petition fails to meet the standards enunciated in the Board's rules. *Id*.

More specifically, Groot agrees that TCH need not plead evidence sufficient to prove the proceedings were fundamentally unfair; however, Groot maintains that TCH must plead facts to establish a claim upon which relief can be granted. G. Reply at 3. Groot asserts that the requirement that the claim of fundamental fairness be preserved before the local siting authority is a prerequisite to a challenge in a siting appeal. *Id*., citing Stop the Mega-Dump, 979 N.E.2d 524.

Groot takes issue with TCH's arguments, which "attempt to discount relevant case law". G. Reply at 2. Groot argues that the standard discussed in City of Des Plaines (60 Ill. App. 3d 995; 377 N.E.2d 114), is "substantively similar to the standard" applicable in the context of a siting appeal and is relevant. Reply at 2. Groot concedes that Section 107.208 of the Board's rules does not include identical language to the rule discussed in City of Des Plaines; however, Section 107.208 does require that TCH set forth the manner in which the decision was against the manifest weight of the evidence. *Id*. Groot opines that TCH should be required to plead its case in a manner that will allow respondents to prepare a defense. *Id*.

Groot also reiterates its argument that the Board's January 23, 2014 order accepting the petition does not preclude respondents from filing a motion to dismiss. G. Reply at 3. Groot argues that the motion to dismiss is proper under the Board's rules at Section 101.506 (35 Ill. Adm. Code 101.506), and the motion should be heard. G. Reply at 3.

DISCUSSION

In the motions to dismiss, respondents have set forth two main arguments in support of the motions to dismiss. First, respondents all argue that the petition is vague and conclusory. Second, respondents argue that the claim of fundamental unfairness was waived because TCH failed to raise issues before the local decisionmaker. The Board will first address the legal framework for the motions and then each issue in turn.

Legal Framework

In deciding a motion to dismiss, the Board considers all well-pled facts contained in the pleading as true, and draws all inferences from the facts in favor of the non-movant. American Disposal, PCB 11-60 slip op. at 33, citing Veolia ES Zion Landfill, Inc. v. City Council of the City of Zion, PCB 11-10, slip op. at 2 (Nov. 4, 2010) (citations omitted). "[I]t is well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts

could be proved which would entitle the plaintiff to relief." Smith v. Central Illinois Regional Airport, 207 Ill. 2d 578, 584-85, 802 N.E.2d 250, 254 (2003). Dismissal of the petition is proper only if it is clear that no set of facts could be proven that would entitle complainant to relief. *See* People v. Stein Steel Mills Services, Inc., PCB 02-1 (Nov. 15, 2001); Shelton v. Crown, PCB 96-53 (May 2, 1996); Krautsak v. Patel, PCB 95-143 (June 15, 1995).

Section 107.208 of the Board's rules sets forth petition requirements for appeals of a local authority's decision to site a pollution control facility. Section 107.208 provides:

> In addition to the requirements of 35 Ill. Adm. Code 101.Subpart C the petition must also include:
>
> a) A copy of the local siting authority's written decision or ordinance;
>
> b) A statement as to how the filing party is a proper petitioner under Section 107.200 of this Part; and
>
> c) In accordance with Section 39.2 of the Act, a specification of the grounds for the appeal, including any allegations for fundamental unfairness or any manner in which the decision as to particular criteria is against the manifest weight of the evidence. 35 Ill. Adm. Code 107.208.

Petition Is Not Vague and Conclusory

Generally respondents argue that the petition is vague and fails to argue ultimate facts necessary to inform respondents of the issues in the case. The Village asserts the petition is a "fishing expedition", and the Village Board argues that the petition leaves respondents guessing as to the nature of the claims. Groot argues that the Act and Board regulations require more specificity in the pleadings. The respondents all take issue with TCH's reliance on American Disposal, PCB 11-60 and attempt to distinguish that case from the facts of this proceeding.

TCH argues the cases relied upon by the respondents are not siting cases and that TCH has complied with Section 107.208 (35 Ill. Adm. Code 107.208). TCH compares the petition in this proceeding with the petition in American Disposal, PCB 11-60. TCH asserts that because the Board accepted the petition in American Disposal, the Board has effectively determined that TCH's petition is sufficient.

The Board disagrees with respondents that the petition is vague and conclusory. TCH is not required to plead all the facts in the petition, but must provide sufficient notice of its claims to respondents. *See* Sierra Club, PCB 98-43. Consistent with Section 107.208 (35 Ill. Adm. Code 107.208), the Board finds that the petition does provide sufficient facts to allow respondent to prepare a defense. The petition specifically lists two areas under which TCH claims the proceedings were fundamentally unfair. The petition also lists the specific criteria where TCH believes the decision was against the manifest weight of the evidence. A review of prior cases, where motions to dismiss pollution control facility siting petitions for review were filed, supports

this outcome. Most recently in American Disposal, the petition included little more than TCH's petition for review, and the Board found the petition in American Disposal sufficient.

The Board also notes that the petition for review included a copy of the decision to grant siting. The petition included assertions that TCH participated in the siting proceedings and is so situated as to be adversely affected by the siting. Thus, the requirements of Section 107.208 (35 Ill. Adm. Code 107.208) were met, and the Board finds that the petition is sufficient. As the Board stated in Sierra Club,

> In ruling on the instant motion to strike the entire petition, or motion to dismiss, the Board must take all well-pleaded allegations as true and may not dismiss the petition unless it clearly appears that no set of facts could be proven which would entitle petitioner to relief. Illinois is a fact-pleading state and, as such, does not require petitioner to plead all facts specifically in the petition, but to set out ultimate facts which support his cause of action. LaSalle National Trust N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297 (2nd Dist. 1993); People ex. Rel. Fahner v. Carriage Way West, Inc., 88 Ill. 2d 300, 430 N.E.2d 1005 (1981); Bernice Loschen v. Grist Mill Confections, Inc. (Sept. 18, 1997), PCB 97-174. Despite the requirement of fact pleading, courts are to construe pleadings liberally to do substantial justice between the parties. Classic Hotels, Ltd. v. Lewis, 259 Ill. App. 3d 55, 60, 630 N.E.2d 1167 (1st Dist.1994). However, case law is consistent in finding that pleading requirements for administrative review are less exacting than for other causes of action. Mueller v. Board of Fire and Police Commissioners of the Village of Lake Zurich, 267 Ill.App.3d 726, 643 N.E.2d 255 (2d Dist.1994). Sierra Club, PCB 98-43 slip op. at 2 (Nov. 6, 1997).

The Board has carefully reviewed the petition filed and the arguments raised by the parties. The Board finds that the petition sets forth sufficient facts and allegations to allow respondents to prepare a defense. While the petition does not set forth all facts necessary to prove the allegations, the Board finds that the petition contains the specificity necessary to proceed.

January 23, 2014 Order

The issue of the effect of the Board's January 23, 2014 order accepting the petition for hearing was also raised by the parties. The Village and Groot maintained that the January 23, 2014 order does not preclude the Board from making a finding that the petition should be dismissed. TCH argues that the Board has already determined that the petition is sufficient, and the Board should affirm that decision.

The Board's January 23, 2014 order in no way precludes the Board from ruling on the pending motions to dismiss. The Board's decision that the petition was sufficient and not frivolous was made based on the petition and no other evidence in the record. As pointed out by respondents, the Board's procedural rules allow for motions to dismiss a petition that may be

filed 30 days after the service of the petition. *See* 35 Ill. Adm. Code 101.506. Therefore, the Board will address the arguments made by respondents in the motion to dismiss.

Frivolous

An additional argument raised by Groot was that if a petition does not include the specificity required by regulations than the Board may dismiss the claim as frivolous; Groot relies on WIPE, 370 N.E.2d 1176 in support of the argument. The Board is unconvinced by Groot's argument. The Board's rules define "frivolous" as a complaint that requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." 35 Ill. Adm. Code 101.202. Clearly the Board has the authority to grant the relief requested by TCH, and the Board finds that the petition states a cause of action upon which the Board may grant relief.

Fundamental Unfairness Is Not Waived

Respondents argue that TCH waived the claim that the proceedings were fundamentally unfair because TCH did not raise the issue before the Village Board. Respondents rely on Fox Moraine, 960 N.E.2d 1144 and cite Stop the Mega-Dump, 979 N.E.2d 524, to support respondents' arguments. TCH contends that these cases address what TCH must "prove" to substantiate a fundamental fairness claim, not what it must "plead" to conform to the requirements of Section 107.208.

The Board agrees that in order to prevail before the Board, TCH must establish that any claim of bias or prejudice was raised at hearing. However, in the petition, TCH need not set forth all the facts TCH will need to prove to prevail in the petition. TCH's petition alleges bias and prejudice; but also the petition alleges that the hearing officer "usurped the authority of the Village Board". *See* Pet. at 2.

As stated above, in ruling on a motion to dismiss, the Board must take all well-pled allegations as true and may not dismiss the petition unless it clearly appears that no set of facts could be proven which would entitle petitioner to relief. Taking all facts as true, the Board cannot find that TCH waived its argument that the proceedings were fundamentally unfair. However, this argument may be raised by respondents after additional evidence is included in the record, and the Board will re-examine the argument at that time.

Village Board Record

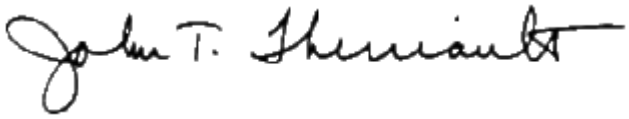
On February 11, 2014, the hearing officer granted an unopposed motion to allow the Village Board to file an original, bate stamped record, one hard copy and one electronic version. On February 13, 2014, the Village Board filed only the original and an electronic copy. The Board directs the Village Board to file two additional hard copies of the record by April 21, 2014.

CONCLUSION

After examining the arguments by the parties and reviewing the cases relied upon by the parties, the Board denies the motions to dismiss. The Board must take all well-pled allegations as true and may not dismiss the petition unless it clearly appears that no set of facts could be proven that would entitle TCH to relief. Based on the arguments provided, the Board finds that TCH has sufficiently pled its case to potentially prevail. Therefore, the Board denies the respondents' motions to dismiss.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 20, 2014 by a vote of 4-0.



John T. Therriault, Clerk
Illinois Pollution Control Board