BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

TIMBER CREEK HOMES, INC.,	)	
	)	
Petitioner	)	
	)	**No. PCB 2014-099**
v.	)	**(Pollution Control Facility Siting Appeal)**
	)	
VILLAGE OF ROUND LAKE PARK, ROUND LAKE PARK VILLAGE BOARD and GROOT INDUSTRIES, INC.,	)	
	)	
Respondents	)	

NOTICE OF FILING

To: see service list

PLEASE TAKE NOTICE that on February 4, 2014, I filed the attached Appearance and Motion to Strike and Dismiss with the Clerk of the Illinois Pollution Control Board, copies of which are hereby served upon you by email.

By: *Glenn C. Sechen*
The Sechen Law Group, PC
Attorney for the
Village of Round Lake Park

Certificate of Service

The undersigned hereby attorney certifies that on the 3rd day of February, 2014, a copy of the above was filed and served by email, as agreed by counsel, upon the persons shown in the Service List:

Glenn C. Sechen
The Sechen Law Group, PC
Attorney for the
Village of Round Lake Park

Glenn C. Sechen
The Sechen Law Group, PC
13909 Laque Drive
Cedar Lake, IN 46303
312-550-9220
glenn@sechenlawgroup.com

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MOTION TO STRIKE AND DISMISS

The Village of Round Lake Park hereby requests the Board the strike and dismiss the Petition of Timber Creek Homes, Inc. ("TCH"). TCH seeks a Section 40.1 review of the grant of local siting approval for a transfer station based on an application filed by respondent, Groot Industries, Inc. [“Groot”]. The TCH Petition is completely insufficient as it is wholly conclusory, void of facts and vague. Accordingly, paragraphs 7 and 8 must be stricken, causing the Petition to fail and requiring dismissal. In addition, TCH has forfeited and waived its right to appeal by not properly and promptly raising this issue below.

PLEADING REQUIRMENTS:

Illinois is a fact pleading jurisdiction, Knox College v. Celotex Corp., 88 Ill.2d 407, 430 N.E.2d 976 (1981); Richco Plastic Co. v. IMS Co., 288 Ill. App. 3d 782, 681 N.E.2d 56 (1st Dist. 1997). In order to set forth a good and sufficient claim or defense, a

pleading must allege ultimate facts sufficient to satisfy each element of the cause of action or affirmative defense pled. *Id.*

In determining the sufficiency of any claim or defense, conclusions of fact or law that are not supported by allegations of specific fact will be ignored. Richo Plastic Co, *supra.,* Knox College, *supra*; Curtis v. Birch, 114 Ill. App. 3d 127, 448 N.E.2d 591 (1983) Ford v. University of Illinois Board of Trustees, 55 Ill. App. 3d 744, 371 N.E.2d 173, 15 Ill. Dec. 478 (1st Dist. 1977).[1] While permitting broad and potentially extensive discovery, it has long been held that an actionable wrong cannot be made out by the pleading of conclusions alone and such will not suffice for the factual allegations upon which a cause of action must be based. Salaymeh v. Interqual, Inc., 155 Ill. App. 3d 1040, 508 N.E.2d 1155, 108 Ill. Dec. 578 (5th Dist. 1987), Schroeder v. Busenhart, 80 Ill. App. 2d 431, 225 N.E.2d 702 (1st Dist. 1967) *cert. den*. 390 U.S. 947 (1968).

Pleading requirements before the Board are consistent with those in civil actions in Circuit Court. For example, in enforcement actions before the Board under Part 103 it is required that the complaint to be sufficient to advise respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense as well as contain a concise statement of the relief the complaint seeks. 35 Ill. Admin. Code 103.204(c)(2) and (3).[2]

Procedural rules regarding Pollution Control Facility Siting Appeals are found in Part 107, 35 Ill. Adm. Code 107. Pursuant to Section 107.208, a siting appeal petition must, in accordance with Section 39.2 of the Act include, "a specification of the grounds

[1] These rules of pleading even apply to affirmative defenses which must be pled with the same degree of specificity as required of a petitioner to establish a cause of action. International Insurance Co. v. Sargent and Lundy, 242 Ill. App. 3d 614, 630, 609 N.E.2d 842, 853 (1st Dist. 1993), citing Kermeen v. City of Peoria, 65 Ill. App. 3d 969, 973, 382 N.E.2d 1374 (3rd Dist. 1978).

[2] Likewise, the Board's procedural rules regarding enforcement actions provide that "any facts constituting an affirmative defense must be plainly set forth before the hearing in the answer or in a supplemental

for 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".

Here, TCH has completely failed to adequately specify the grounds for appeal or set forth any specific allegations regarding fundamental unfairness. TCH's petition is completely vague and conslusory, potentially resulting in a lengthy appeals process because this type of pleading is an attempt to yield an unlimited scope of discovery. TCH hopes that broad and extensive discovery will uncover something that TCH will be later be able to claim fits into one of its vague overbroad allegations. Simply put, TCH seeks to embark on little more than a classic fishing expedition.

ARGUMENT:

PARAGRAPH 7:

In paragraph 7 TCH points to unnamed and unspecified "procedures, hearings, decision and process". Neither the Board nor Respondents are required to guess what this vague, meaningless and undefined phrase is intended to mean. Considering these terms one at a time doesn't assist in ascertaining the meaning of this vague phrase.

Whatever is meant by "procedures", the "procedures" at issue are never specified. It is unspecified what is meant by "hearings" and whatever TCH means by "hearings" the "hearings" at issue are never identified. Does TCH mean the hearing on the application? One hearing date or time on a particular date perhaps?

It is total and complete guesswork to determine what is meant by "decision". TCH fails to specify what it means by "decision". Does TCH mean a decision on an

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answer, unless the affirmative defense could not have been known before hearing." 35 Ill. Adm. Code 103.204(d).

unnamed criterion? Perhaps TCH means the criterion it names, without further explanation, in the next paragraph, paragraph 8 of the Petition? Neither the Board nor the Respondents are required to guess. It is unspecified what is meant by "procedures" and whatever TCH means by "procedures" the "procedures" at issue are never identified. From TCH's perspective, the beauty of this type of impermissible pleading is that these terms can, if need be, be claimed to mean whatever TCH wants at some point in the future, while unduly inflating the present scope of discovery in the meantime. A case can become near perpetual if this scheme is allowed. Fortunately, it is not.

TCH pleads that "the local siting review procedures, hearings, decision, and process, individually and collectively, were fundamentally unfair. That at least doubles the nearly infinite possibilities above. By so pleading, TCH expressly refuses to narrow the possibilities. In fact, TCH's intent to do just the opposite is clear. Which of these meaningless undefined terms "taken together" were fundamentally unfair? Again, this is completely vague and requires total and complete guesswork to interpret. Worse, like the rest of the Petition, the "taken together" claim is subject to a potentially changing interpretation by TCH to justify where it seeks to go in discovery and otherwise over time. Again, as written, the Petition is intended to justify a fishing expedition resulting in an unduly expensive, and needlessly time consuming appeal process. The allegation "at least two respects" is vague, overbroad and open ended. TCH is required to plead all of the "respects" it seeks to put at issue and not just two of some unknown number.

Whatever follows "at least two" cannot narrow the possibilities. Apparently to be sure the breath of its Petition is maximized, TCH adds "individually and collectively".

That is like saying two times infinity! Significantly, this is by itself sufficient to strike paragraph 7 and dismiss the petition.

TCH does plead, by mere conclusion and without any facts, that "members of the Village Board prejudged the Application and were biased in favor of Groot" TCH completely fails to identify any Village Board member that it claims to have done so. The Appellate Court has recently addressed this issue. Relying on Peoria Disposal v. IPCB, 385 Ill.App.3d 781, 896 N.E.2d 460 (3nd Dist. 2008), the Second District Appellate Court recently stated that.

> The members of a siting authority are presumed to have made their decisions in a fair and objective manner. This presumption is not overcome merely because a decision-maker has previously taken a public position or expressed strong views on a related issue. To show bias or prejudice in a siting proceeding, the petitioner must show that a disinterested observer might conclude that the siting authority, or its members, had prejudged the facts or law of the case. Additionally, issues of bias or prejudice on the part of the siting authority are generally considered forfeited unless they are raised promptly in the original siting proceeding, because it would be improper to allow the petitioner to knowingly withhold such a claim and to raise it after obtaining an unfavorable ruling. Fox Moraine LLC v. United City of Yorkville, 2011 Ill.App.2nd 100017, 40-41, 960 N.E.2d 1144, 1163-1164 (2nd Dist 2011) *cert denied* __ Ill.2nd __ (2012), *citations omitted.*

TCH has not pled any fact overcoming the presumption. Of even greater significance, TCH neither pled that it properly objected below on the basis of bias or prejudice nor did TCH in fact make properly make such an objection. TCH never asked that any Village Board Member be recused because of specific grounds of bias or prejudice or for any other tangible reason. Nor does TCH lay that charge at the feet of any Village Board member even now. During the hearings, TCH never properly objected based on any fact indicative of a breach of fundamental fairness. Significantly, TCH has not pled to

the contrary in this appeal. Accordingly, TCH clearly and further, as a matter of law, waived and forfeited its right to appeal on such grounds.

The second of the infinite possibilities inherent "in at least two aspects" pled by TCH is the claim that the Hearing Officer, "usurped the authority of the Village Board by making unidentified and unspecified determinations that were beyond the scope of his authority and that were solely the province of the Village Board" and that [t]he Village Board in turn failed in its statutory duty to make those unidentified and unspecified determinations. Again, neither the Board nor the Respondents are required to guess what "determinations" TCH is referring to.

In reality, TCH hopes to extend is fishing expedition to the point that it can depose every member of the Village Board and, it hopes, find something or twist something it finds into fitting within the vague and unclear allegations of its Petition. Like the other allegations complained of, the allegation regarding unidentified and unspecified determinations is void of the required facts, conclusory and, largely as a result, vague. Accordingly this language must be stricken resulting in a Petition that must be dismissed.

NO CAUSAL CONNECTION:

Nowhere does TCH so much as attempt to plead that any of its vague conclusory allegations contained in paragraph 7 led to a finding by the Village Board that any single Section 39.2 siting criteria was met or even led the grant of siting in general.

PARAGRAPH 8:

In paragraph 8 TCH 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).

TCH has completely failed to specify what provisions of existing law relate in any way to the allegations in paragraph 8, nor any fact showing that the finding is against the manifest weight of the evidence. Therefore, paragraph 8 must be stricken.[3]

WHEREFORE, Complainant, the Village of Round Lake Park, respectfully requests that the Pollution Control Board enter an order striking paragraphs 7 and 8 and dismissing TCH's Petition and other relief as this Board deems just and proper. The Village of Round Lake Park does not believe that it is necessary for the Board to reconsider its Order of January 23, 2014, particularly in light of the ability of "any party" to move to dismiss found in 35 Ill. Admin. Code 107.502 and the requirement to plead "a specification of the grounds for the appeal, including any allegations for fundamental unfairness" found in 35 Ill. Admin. Code 107.208(c). However, should the Board disagree, please consider a request to reconsider to be included herein.

[3] The way paragraph 8 is written, whether TCH limits the application of all these allegations to certain siting criteria or whether they apply to all "nine statutory siting criteria" is debatable and vague. Initially TCH references all "nine statutory siting criteria" and near the end of the paragraph adds, 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). One potential reading is that only the allegation regarding "contrary to existing law" is limited to the enumerated siting criteria. Accordingly, the Board should strike paragraph 8 for this reason alone.

Respectfully submitted,

Village of Round Lake Park

By Glenn C. Sechen
One of Its Attorneys

Glenn C. Sechen
The Sechen Law Group, PC
13909 Laque Drive
Cedar Lake, IN 46303
312-550-9220

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APPEARANCE

Glenn C. Sechen hereby enters the appearance of the Sechen Law Group, PC on behalf of the Village of Round Lake Park.

By: *Glenn C. Sechen*
The Sechen Law Group, PC
Attorney for the
Village of Round Lake Park

Glenn C. Sechen
The Sechen Law Group, PC
13909 Laque Drive
Cedar Lake, IN 46303
312-550-9220
glenn@sechenlawgroup.com
ARDC 2538377

SERVICE LIST

CLERK AND DEPUTY CLERK, VILLAGE OF ROUND LAKE PARK
Karen Eggert, Clerk
Cindy Fazekas, Deputy Clerk
Village of Round Lake Park
203 E. Lake Shore Drive
Round Lake Park, IL. 60073
keggert@villageofroundlakepark.com
Cfazekas@RoundLakePark.us

COUNSEL FOR THE VILLAGE BOARD
VILLAGE OF ROUND LAKE PARK
Peter Karlovics
Magna & Johnson
495 N. Riverside Drive
Suite 201
P.O. Box 705
Gurnee, Illinois 60031
pkarlovics@aol.com

COUNSEL FOR TIMBER CREEK HOMES
Michael S. Blazer
Jeffery D. Jeep
Jeep & Blazer, LLC
24 N. Hillside Avenue
Suite A
mblazer@enviroatty.com
jdjeep@enviroatty.com

COUNSEL FOR GROOT INDUSTRIES
Charles F. Helsten
Richard S. Porter
Hinshaw Culbertson
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389
chelsten@hinshawlaw.com
rporter@hinshawlaw.com

George Mueller
Mueller Anderson & Associates
609 Etna Road
Ottawa, IL 61350
george@muelleranderson.com