

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

TIMBER CREEK HOMES, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB No. 14-99
	)	(Pollution Control Facility
	)	Siting Appeal)
VILLAGE OF ROUND LAKE PARK, ROUND	)	
LAKE PARK VILLAGE BOARD and GROOT	)	
INDUSTRIES, INC.,	)	
	)	
Respondents.	)	

**NOTICE OF FILING**

PLEASE TAKE NOTICE that on February 6, 2014, there was filed electronically Respondent's MOTION TO STRIKE AND DISMISS PETITION FOR REVIEW, a copy of which is hereby attached and served upon you.

Dated: February 6, 2014

Respectfully submitted,

On behalf of GROOT INDUSTRIES, INC.

/s/ Charles F. Helsten  
Charles F. Helsten  
One of Its Attorneys

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**MOTION TO STRIKE AND DISMISS PETITION FOR REVIEW**

NOW COMES the Respondent, Groot Industries, Inc. ("Groot"), and hereby moves the Illinois Pollution Control Board ("Board" or "PCB") for an order to strike and dismiss the Petition for Review of Decision Concerning Siting of a New Pollution Control Facility (the "Petition") of Timber Creek Homes, Inc. ("TCH"). In support of this Motion, Groot states as follows:

**I. BACKGROUND**

After a thorough hearing regarding Groot's application to site a new pollution control facility, the Round Lake Park Village Board approved Groot's application on December 12, 2013. On January 10, 2014, TCH filed its Petition with the Board. The Petition contains exactly two paragraphs setting forth the basis for TCH's Petition. The Petition states summarily:

7. 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 this 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.

8. In addition, the Village Board majority's finding that Groot mets 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).

Pet. Rev. ¶¶ 7, 8.

From these two wholly vague and conclusory allegations, Respondents are apparently supposed to glean the basis for TCH's claims that the Village Board's siting decision was against the manifest weight of the evidence and that the proceeding did not satisfy the requirements of fundamental fairness. However, Illinois law is clear that Respondents are not required to engage in such a guessing game. TCH's Petition should be dismissed because it does not meet the requirements of the governing state statute or regulations.

## II. ARGUMENT

### A. **The governing statute and regulations require specificity in a petition for review of a siting decision.**

The Illinois Environmental Protection Act (the "Act") sets forth the requirements for an appeal from local siting approval for a pollution control facility. The statute states:

Unless the Board determines that such petition is duplicative or frivolous . . . the Board shall hear the petition in accordance with the terms of subsection (a) of this Section and its procedural rules governing denial appeals.

415 ILCS 5/40.1(b). The Board, in turn, requires that a petition for review of approval of a siting application must include "a *specification* of the grounds for the appeal, including any allegations for fundamental fairness or *any manner in which* the decision as to the particular criteria is against the manifest weight of the evidence." 35 Ill. Admin. Code § 107.208 (emphases added).

The regulation explicitly requires *specifics* regarding the grounds for appeal, and does not contemplate merely a list of conclusory allegations. *Id.*; *see also* 35 Ill. Admin. Code § 105.210

(governing denial appeals and made applicable to siting appeals by virtue of Section 40.1(b) of the Act; stating that a petition for review of denial of a permit must include "a statement *specifying* the grounds of appeal"). Section 107.208 also requires a petitioner to include the *manner in which* the decision was against the manifest weight of the evidence, and not merely a bald allegation that the decision was against the manifest weight of the evidence.

**B. A petition that fails to allege specific facts, such as TCH's Petition, should be dismissed as frivolous.**

If the petition does not include the specificity required by the regulations, then it may be dismissed as a frivolous pleading under Section 40.1(b) of the Act. 415 ILCS 5/40.1(b) (stating that the Board need not hear a petition if it is "duplicative or frivolous"). The Board has interpreted "frivolous" to mean a pleading "that is either legally or factually deficient." *See Winnetkans Interested in Protecting the Env't (WIPE) v. IPCB*, 55 Ill. App. 3d 475, 370 N.E.2d 1176 (1977) (citing *WIPE v. IPCB*, PCB No. 76-215 (Nov. 10, 1976)). The Board has explicitly found that broadly generalized allegations may be so factually deficient as to be frivolous. *WIPE v. IPCB*, PCB No. 76-215 (Nov. 10, 1976). A pleading is frivolous when it states "only a 'bare conclusion' of law, in effect a mere suspicion." *WIPE*, 55 Ill. App. 3d at 479 (citing PCB No. 76-215); *City of Des Plaines v. Metro. Sanitary Dist.*, 60 Ill. App. 3d 995, 1000, 377 N.E.2d 114 (1978) ("[T]his allegation pleads only pure conclusions which, even in administrative proceedings, are insufficient to state a cause of action.").

TCH's Petition has only two paragraphs that purport to set forth the basis of its complaint regarding the Village Board's siting approval. It summarily claims in Paragraph 7 that the proceedings were fundamentally unfair because the Village Board members were biased and prejudged the application. This allegation is a "pure conclusion[]," and contains no facts to support the conclusion. The Petition then alleges in Paragraph 8 that the Village Board's

decision was against the manifest weight of the evidence as to several of the siting criteria. However, it gives not even the barest details regarding the *manner in which* TCH alleges that the Village Board's decision was against the manifest weight of the evidence.

TCH's Petition is even more conclusory than those dismissed in the cases cited above. For example, in *City of Des Plaines*, the petitioner alleged that the permit at issue "was obtained by misrepresentation and failure to disclose all relevant facts." The Board found, and the Court of Appeals affirmed, that this 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.* at 1001. TCH's two very general paragraphs that purport to set out the basis for its challenge to the Village Board's siting approval do not set forth with *any* particularity the manner in which the siting process was fundamentally unfair or in which the siting decision was against the manifest weight of the evidence. With this glaring defect in the pleadings, the Board should dismiss the Petition as frivolous due to its factual deficiency.

**C. TCH's fundamental fairness claim should be dismissed because it was not preserved in the proceeding before the Village Board.**

It is well established that issues of bias or fundamental fairness must be "raised promptly in the original siting proceeding," or they are forfeited. *Fox Moraine, LLC v. United City of Yorkville*, 960 N.E.2d 1144, 1168 (2nd Dist. 2011). TCH has not alleged that it raised fundamental fairness in the original siting proceeding in a timely or operative fashion, nor did it actually do so. At no time during the siting hearing did TCH raise an issue of alleged bias of the Village Board nor any allegation of lack of fundamental fairness in the conduct of the hearing officer. Therefore, TCH's claim of fundamental unfairness or bias must be dismissed on that basis as well.

Further, as a matter of law, "members of a siting authority are presumed to have made their decisions in a fair and objective manner." *Stop the Mega-Dump v. County Bd. of DeKalb County*, 979 N.E.2d 524, 531-32 (Ill. App. Ct. (2d Dist.) 2012). In order to show that the principles of fundamental fairness were violated, TCH "must show that a disinterested observer might conclude that the siting authority, or its members, had prejudged the facts or law of the case." *Id.* (quoting *Fox Moraine*, at ¶ 60). The presumption of fairness and high evidentiary bar to overcome such presumption, coupled with the requirement that an objector raise issues of fundamental fairness in the original proceeding, evince a public policy of reluctance to disturb a siting authority's decision. This public policy lends further support to the principle that a petitioner must set forth specific grounds and facts in support of its allegations of bias, in addition to facts that show that it properly preserved the claim.

Because TCH did not allege *any* facts or particulars in support of its bare conclusion that the proceeding before the Village Board did not comply with fundamental fairness, its petition for review should be dismissed as to its fundamental fairness claim.

**D. This Motion is not barred by the Board's Order accepting TCH's Petition.**

Although the Board's Order of January 23, 2014 in this matter purports to determine that TCH's Petition is sufficient and not frivolous, that Order cannot foreclose an opportunity for Respondents to challenge the substantive sufficiency of the Petition. The IPCB's procedural rules state 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." 35 Ill. Admin. Code § 101.506. The 30-day deadline for such filing has not elapsed, as TCH's Petition was filed on January 10, 2014. The deadline for filing a motion is February 10, 2014. Groot and the other Respondents would be prejudiced if they were foreclosed from an opportunity to bring such a motion. Therefore, the

Board's order of January 23, 2014 is presumably simply a procedural, rather than a substantive, determination that TCH's Petition should be accepted for further consideration.

**III. CONCLUSION**

For the reasons set forth herein, TCH's Petition should be dismissed as insufficient to state a claim on which relief can be granted.

Dated: February 6, 2014

Respectfully submitted,

On behalf of GROOT INDUSTRIES, INC.

/s/ Charles F. Helsten

Charles F. Helsten

One of Its Attorneys

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**AFFIDAVIT OF SERVICE**

STATE OF ILLINOIS                    )  
  ) SS  
COUNTY OF WINNEBAGO            )

The undersigned certifies that on **February 6, 2014**, a copy of the foregoing **Motion to Strike and Dismiss Petition for Review** was served upon the following:

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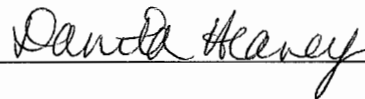
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by depositing a copy thereof, enclosed in an envelope, in the United States Mail at Rockford, Illinois, proper postage prepaid, at or about the hour of 5:00 o'clock p.m., addressed as above.

  
\_\_\_\_\_

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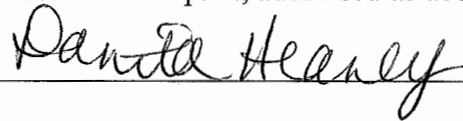
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