BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

RESPONDENT ROUND LAKE PARK VILLAGE BOARD'S RESPONSE TO PETITIONER'S MOTION FOR EXPEDITED REVIEW OF HEARING OFFICER ORDER

Now comes the Respondent, Round Lake Park Village Board ("RLPVB"), by its attorneys, the Law Offices of Rudolph F. Magna, and hereby submits its RESPONDENT ROUND LAKE PARK VILLAGE BOARD'S RESPONSE TO PETITIONER'S MOTION FOR EXPEDITED REVIEW OF HEARING OFFICER ORDER.

At the local siting hearing in this case on October 3, 2013, in its final comments to Respondent Round Lake Park Village Board ("RLPVB"), Petitioner Timber Creek Home, Inc. ("TCH") directly transmitted its intent to abuse the discovery process of the Pollution Control Board ("PCB"). In a public statement at the close of the hearing, Larry Cohn, owner of TCH, made the following threat and revealed the true intent of TCH to make oppressive discovery requests during its appeal to the PCB:

"…if the Village Board votes yes and approves the petition, that decision will be appealed and it will be appropriate and necessary as part of the appeal process for every member of the present

board of trustees to be required to appear and testify in a deposition to ascertain the facts of what has been taking place in your village with regard to this matter…"

(See Statement of Larry Cohn, 10/3/2013 Hearing Transcript 107:22-24 and 108:1-5, Record of Proceedings C03849-C03850)

On January 31, 2014, TCH served interrogatories and requests for production of documents, making very broad requests for information and documents covering an extensive time span between March 1, 2008 and June 21, 2013. The documents and information sought potentially covers thousands of communications over a six (6) year period. TCH makes light of the weeks of work that would be required to fulfill the above discovery requests by comparing to the ease by which RLPVB was able to authenticate thirty (30) sets of RLPVB minutes of meetings, which took about thirty (30) minutes to accomplish.

TCH's extensive discovery requests for volumes of documents and information over a six (6) year period were a partial fulfillment of the threat that Mr. Cohn made that TCH would abuse the discovery process and place RLPVB members on trial.

On March 20, 2014, Hearing Officer Bradley P. Halloran issued an order limiting all discovery requests to a more reasonable time frame from the date that Mr. Dale Kleszynski and Associated Property Counselors were hired by the Village of Round Lake Park ("VRLP") to testify at the siting hearing to December 12, 2013, which was the date that RLPVB made its decision granting local siting approval to Respondent Groot Industries, Inc. ("Groot").

In its Motion for Expedited Review TCH claims that Hearing Officer Halloran "dramatically limited" the scope of TCH's discovery. It is only because TCH's discovery requests were so broad, overbearing, and of questionable relevance, that Mr. Halloran's limitation order could be considered "dramatic."

35 Ill.Adm.Code 101.616(a) provides:

"a) All **relevant** information and information calculated to lead to **relevant** information is discoverable, excluding those materials that would be protected from disclosure in the courts of this State pursuant to statute, Supreme Court Rules or common law, and materials protected from disclosure under 35 Ill. Adm. Code 130." (**emphasis supplied**)

35 Ill.Adm.Code 101.616(b) provides:

"b) If the parties cannot agree on the scope of discovery or the time or location of any deposition, the **hearing officer has the authority** to order discovery or **to deny requests** for discovery." (**emphasis supplied**)

35 Ill.Adm.Code 101.616(d) provides:

"d) The **hearing officer may**, on his or her own motion or **on the motion of any party** or witness, issue protective orders that **deny, limit, condition or regulate discovery to prevent unreasonable expense, or harassment**, to expedite resolution of the proceeding, or to protect non-disclosable materials from disclosure consistent with Sections 7 and 7.1 of the Act and 35 Ill. Adm. Code 130." (**emphasis supplied**)

TCH claims that it requires six (6) years of information and documents to find evidence of "pre-filing collusion." In justification of its claims, TCH spins a web of nefarious collusive schemes between Groot, VRLP and RLPVB using a string of events that are irrelevant to one another, often misrepresenting those innocent events as part of some type of secret evil plan to grant local siting approval for the Groot Lake Waste Transfer Station – in public.

TCH lists a string of unrelated events in its motion in an attempt to infer that members of RLPVB expressed a public opinion in favor of Groot's application prior to the siting hearing. The events consisted of such actions such as meeting with Groot officials prior to the filing of

the siting application, negotiating a Host Agreement providing for a host fee for the Village, approving a zoning request of an office building and a parking lot for Groot trucks, and approving a zoning request for a Construction and Demolition materials recycling facility.

The last sentence of 415 ILCS 5/39.2(d) provides:

"…The fact that a member of the county board or governing body of the municipality has publicly **expressed an opinion** on an issue related to a site review proceeding **shall not preclude the member from taking part in the proceeding** and voting on the issue." (**emphasis supplied**)

The Appellate Court in *Southwest Energy Corp. v. Illinois Pollution Control Bd* explained the purpose of the above portion of 415 ILCS 5/39.2d):

"The timing of this amendment and **the fact that the legislature thought it necessary to amend this comprehensive section by adding just one sentence** suggest that the General Assembly was concerned about arguments that had been recently made to the appellate court asserting claims of procedural unfairness. **One such argument was that a village board was prejudiced because of a "predisposition" to rule against the appellants because the village board members believed the landfill in question would provide an economic benefit to the community** (see *Fairview Area,* 198 Ill.App.3d at 546, 144 Ill.Dec. at 662, 555 N.E.2d at 1181); another was that a county board was prejudiced against appellants because of *ex parte* contacts county board members had with opponents of a proposed landfill. See *City of Rockford v. County of Winnebago* (1989), 186 Ill.App.3d 303, 313-14, 134 Ill.Dec. 244, 251-52, 542 N.E.2d 423, 430-31.

We construe the sentence added by Public Act 87-1152 as demonstrating the General Assembly's understanding that it has called upon locally elected officeholders on municipal or county boards-not judges-to adjudicate whether the siting criteria set forth in section 39.2(a) of the Act (415 ILCS 5/39.2(a) (West 1992)) are present in a given case. In that amendment, the legislature recognized that **standards governing judicial behavior cannot and do not apply to such local officeholders.**" (**emphasis supplied**)

Southwest Energy Corp. v. Illinois Pollution Control Bd., 275 Ill.App.3d 84, 91 and 92, 211 Ill.Dec. 401, 406, 655 N.E.2d 304, 309 (4th Dist. 1995)

TCH offered eleven (11) "highlights" of supposed suspicious conduct by RLPVB that TCH claims demonstrates a "collusive scheme," and none of these "highlights" were committed in secret and all of which were reported in public RLPVB meeting minutes. Of those eleven (11) "highlights," seven (7) had nothing to do with Groot's proposed waste transfer station, one "highlight" involved an introductory meeting between RLPVB member Jean McCue ("McCue") while she was serving as Mayor, one "highlight" involved an informal presentation by Groot before the RLPVB, one "highlight" involved McCue requesting an update on the transfer station, and one "highlight" involved a negotiation decision on the host agreement.

More disturbing is TCH's outright "misrepresentation scheme" regarding the nature of some of the contacts with Groot:

Paragraph 17(d) of TCH's motion alleges that "On August 11, 2009, Groot made another presentation to the Village Board (August 11, 2009 Village Board Meeting Minutes, Request to Admit Paragraph 6)." This misrepresented "highlight" makes it appear as if Groot made another presentation about the Waste Transfer Station before RLPVB. However, TCH conveniently fails to specify that the presentation involved Groot "…looking to maintain approximately 50 trucks to begin with and have an office building with dispatchers handling the Lake and McHenry County customer base…" in a facility formerly occupied by "Stock Lumber" (see "Special Presentation: Groot Industries," August 11, 2009 Village Board Meeting Minutes, Request to Admit Paragraph 6). The "highlight" actually refers to a separate office use on different property, unrelated to the proposed subject waste transfer station.

Paragraph 17(e) of TCH's motion alleges that "On November 3, 2009, the Village Board approved a request by Groot for a special use permit to establish a truck terminal and maintenance facility in VRLP. (November 3, 2009 Village Board Meeting Minutes, Request to

Admit Paragraph 8). This misrepresented "highlight" makes it appear as if the approval were completed in some type of summary process, and ignores the fact that the Village's Plan Commission did "…conduct a hearing, take testimony, and make a recommendation and finding of fact…" (see Page 1 of November 3, 2009 Village Board Meeting Minutes, Request to Admit Paragraph 8) and that "There were some objections and concerns between the two parties, but they met and were able to work out their issues." (TCH was the party opposing party to Groot) (see Page 2 of November 3, 2009 Village Board Meeting Minutes, Request to Admit Paragraph 8). Requiring Groot to satisfy the objections of another party (TCH) can hardly be considered to be part of a "collusive scheme."

Paragraph 17(f) of TCH's motion alleges that "McCue thereafter continued to have private, personal contacts with Groot regarding its activities in VRLP. (December 8, 2009, January 19, 2010 and February 16, 2010 Village Board Meeting Minutes, Request to Admit Paragraphs 9, 10, 11)". This misrepresented "highlight" makes it appear as if McCue were having secret meetings with Groot to plot the approval of the subject waste transfer station. However, according to the above Village Board meeting minutes, McCue was reporting on conversations she had regarding Groot's progress in the above approved Office and Truck maintenance facility and when Groot would be occupying that facility.

Paragraph 17(g) of TCH's motion alleges that "An June 7, 2011, the Village Board approved Groot's request for an amendment to the VRLP Zoning Ordinance allowing the Village Board, without a hearing, to extend the existing special use permit to a contiguous parcel of property owned by the same owner. (April 5, 2011 Village Board Meeting Minutes, Request to Admit Paragraph 13)". This misrepresented "highlight" makes it appear as if RLPVB avoided the hearing process to allow Groot to extend a special use permit to a contiguous parcel owned

by the same owner. However, according to the June 7, 2011 Village Board Meeting Minutes (Request to Admit Paragraph 13), the Round Lake Park Plan Commission conducted a public hearing on May 25, 2011 on Groot's request for the above special use extension ordinance, and the reference in the April 5, 2011 minutes allowing the Village Board to extend a special use permit is not without any hearing, but rather, without further hearing. The Village's Plan Commission did conduct a public hearing to give Groot the zoning relief it requested.

Paragraph 17(h) of TCH's motion alleges that "On December 13, 2011, during discussions about the host agreement being negotiated with Groot, McCue asked the Village Board "if they wanted to take a tough ground and try to get more money **and take a chance on them not having a transfer station** and not having a scale for the police department, or do we want to take something which is better than nothing **and have them in the town** and deal with the next step. [Emphasis added]" (December 13, 2011 Village Board Board Meeting Minutes, Request to Admit paragraph 14).

This misrepresented "highlight" makes it appear that the Village was giving some type of pre-approval for the subject waste transfer station. However, the waste transfer station referred to in 17(h) of TCH's motion is not the subject waste transfer facility, but rather, the construction and demolition recycling facility. Under Paragraph E of the "Mayor's Report" of the December 13, 2011 Village Board Board Meeting Minutes (Request to Admit paragraph 14), it states in pertinent part: "Our attorneys and the special counsel, who Groot pays for, have been negotiating. Right at the moment we are at a standstill. They are offering us **75 cents per ton on 75% of the tonnage** that comes through the facility. The reason for that is, not 100% of all loads are recyclable. Would like to try and negotiate CPI increases for the transfer station. At

this moment they are willing to give us $20,000 up front. Mayor asked board if they wanted to take a tough ground and try to get more money and take a chance…" (**Emphasis supplied**).

Under the First Amendment to Host Community Agreement between VRLP and Groot for the subject waste transfer station, the host fee is $1.60 per 100% of the tonnage that comes through the facility. The above figure of 75 cents per ton on 75% of the tonnage is not even closely related to the $1.60 per 100% of the tonnage that comes through the facility. (See C04658 of the Hearing Record)

Under Paragraph 17(i), TCH exaggerates the significance of McCue reporting that she "struck a verbal deal with Groot" regarding the host agreement for the C&D Facility. (March 13, 2012 Village Board Meeting Minutes, Request to Admit paragraph 21). Negotiation on any agreement involves an eventual verbal agreement before a written agreement is signed. There is nothing relevant or significant about McCue's report.

Paragraph 17(i) of TCH's motion alleges that "On May 15, 2012, the Village Board amended its zoning ordinance in order to allow Groot's C&D Facility operations to commence without any further hearing (May 15, 2012 Village Board Meeting Minutes, Request to Admit paragraph 21)." This misrepresented "highlight" makes it appear as if RLPVB avoided the hearing process for Groot's benefit. However, the above minutes refer to the approval of a zoning ordinance that "adds "recycling" and "sorting" to the list of permitted uses allowed in the L-1 zone." (May 15, 2012 Village Board Meeting Minutes, Request to Admit paragraph 21). 65 ILCS 5/11-13-14 provides that **no amendment of the zoning ordinance** "…**shall be made without a hearing before some commission** or committee designated by the corporate authorities. Notice shall be given of the time and place of the hearing, not more than 30 nor less than 15 days before the hearing, by publishing a notice thereof at least once in one or more

newspapers published in the municipality, or, if no newspaper is published therein, then in one or more newspapers with a general circulation within the municipality…" (**emphasis supplied**) According to 65 ILCS 5/11-13-14, RLPVB was required to have a hearing before its plan commission, and therefore, could not legally amend the zoning ordinance as Groot requested without providing notice and a hearing. The reference to allowing operations to commence without any further hearing refers to the fact that the necessary zoning hearing was already completed prior to the passage of the ordinance. The ordinance was being held up for approval until such time as Groot approved the Host Agreement for the C&D facility. (See attorney's report under Paragraph 2 of "Village Attorney" in the May 15, 2012 Village Board Meeting Minutes, Request to Admit paragraph 21).

Paragraph 17(k) of TCH's motion alleges that "On October 9, 2012, during a discussion about negotiations for the transfer station host agreement, the Village Board acknowledged that "In order to get things done in a timely fashion and **make this a reality by next operating season**... they don't want to push too far and end up losing everything. [Emphasis added]" (October 9, 2012 Village Board Meeting Minutes, Request to Admit paragraph 24)"

The above editing makes it appear that the RLPVB stated that it wanted to make the waste transfer station a reality by the next operating season, a total misrepresentation of the above minutes by TCH. The quote is actually attributable to Groot's Attorney.

Here is the unedited version of the relevant portion of the minutes in question (see the emphasized language in **bold**):

"Special Presentation-Mayor McCue informed the board that the village attorney requested to attend tonight's meeting. He wants to present information regarding the negotiation process with Groot for the Host Agreement.

Attorney Karlovics explained that the negotiation for the Host Agreement is now down to a remaining issue where Groot wants the cost of living adjustment on the host fee to be capped at

3%. A compromise proposal was a 5% cap with a 5% claw-back. Would have up to five years to re-coup that inflation. Groot will not agree to an open-ended rate of inflation cost of living adjustment. **After meeting with Groot's attorney, they stated that In order to get things done in a timely fashion and make this a reality by next operating season**, they did to get approval of the host agreement. Groot feels they need approximately 10 years to get established. Would be approximately 3 years to get started where there's no cost of living adjustment. Between year 4 and year 10 perhaps suggested going with the 3% cap for a 10 year period. Thought that at year 10 could begin the claw-back. So at year ten, we begin 5% for 5 years and if the inflation rate is over 5%, we can use succeeding years to get the money back. That would allow us to at least keep it more in line with going market rate. Their attorney thought this was a good suggestion.

Board discussed what had been explained so far and **they don't want to push too far and end up losing everything**. Polled board and consensus was that Attorney's proposal was fair. Would like to have agreement ready for approval at the October 16th board meeting."
(October 9, 2012 Village Board Meeting Minutes, Request to Admit paragraph 24) (**emphasis supplied**)

Paragraph 18 of TCH's motion alleges that "VRLP's Counsel, Glenn Sechen ("Sechen"), indicated that VRLP had already determined that it was "prudent" to site a transfer station, and was proceeding jointly with Groot for approval of that transfer station…Sechen further acknowledged that VRLP and Groot had found it necessary to site a transfer station for their own business reasons." Thereafter, TCH accuses VRLP of "proceeding jointly with Groot – in effect as an undisclosed co-applicant for siting of the transfer station.

Paragraph 18 is a complete fabrication. C03214, and C03219-C03220 contain no statements by Sechen. They contain cross-examination of TCH witness John W. Thorsen, featuring hypothetical questions regarding the need for waste transfer station. At no time during the questioning did Sechen blurt out that Groot was a co-applicant with VRLP. In fact, at no time during the questioning does Sechen use the term "co-applicant". The term was used by TCH's attorney, Michael Blazer, and not Sechen.

The following exchange occurred at the subject waste transfer station hearing on September 25, 2013:

"MR. BLAZER: If Mr. Sechen is now saying that the Village and Groot have already decided to site this transfer station, then he had raised a dramatically different issue in this case.

MR. SECHEN: That is not what I said.

THE HEARING OFFICER: Let me respond, especially, because I heard - - I did not hear that they had decided. I heard that "if they decide," that was the statement, that was the question I'm ruling on. And if they decide that it's necessary, the questions is, if they decide it's necessary, do you disagree with them? That's what I heard, and that's the question that I think is prudent - - proper. Now you almost got me saying prudent. That's the proper question."

(See C03220, 9/25/2013 Hearing Transcript - Lines 9 through23)

Paragraph 19 and 20 of TCH's motion continues the co-applicant nonsense with an allegation, without basis, that Dale Kleszynski, expert witness for VRLP, "sought to misrepresent the fact that he had been directed by VRLP, as the undisclosed co-applicant acting through Sechen, to generate an "independent" statement supporting Groot's position." TCH does not allege any facts to support this outlandish accusation.

TCH's conduct and baseless accusations against RLPVB ignores the fact that Members of the Village Board demonstrated their intent to base their decision on the evidence provided at the siting hearing through their continuous attendance at the hearings. (See 9*/20/2013 Hearing Transcript 3:3-8, Record of Proceedings C02533;* 9*/23/2013 Hearing Transcript 4:21-24, Record of Proceedings C02575;* 9*/23/2013 Hearing Transcript 28:14-15, Record of Proceedings C02599;* 9*/24/2013 Hearing Transcript 6:6-7, Record of Proceedings C02882;* 9*/24/2013 Hearing Transcript 2:2-6, Record of Proceedings C03508;* 9*/25/2013 Hearing Transcript 2:22-24, Record of Proceedings C03118;* 9*/25/2013 Hearing Transcript 3:9-11, Record of Proceedings C03258;* 9*/26/2013 Hearing Transcript 2:20-14, Record of Proceedings*

C03263; 9/26/2013 Hearing Transcript 3:8-11, Record of Proceedings C03354; 10/1/2013 Hearing Transcript 2:20-24, Record of Proceedings C03359; 10/1/2013 Hearing Transcript 3:15-19, Record of Proceedings C03742.003; 10/2/2013 Hearing Transcript 58:5-7, Record of Proceedings C03800.

As the Hearing Officer Luetkehans noted at the end of the hearing:

"…And finally, I do wish to really thank the Village Board. We have had a large number of the Village Board members here on a daily basis. I don't think we have ever had less than two or three at some very - - not the easiest times for everyone to show up. You have been very attentive and I think all parties I think mentioned it in their closings and they are all very true, the attentiveness of this Village Board has been exemplary and you should be proud of yourselves and the people who you represent should be proud of yourselves as well…" *(See Statement of Hearing Officer Philip Luetkehans, 10/3/2013 Hearing Transcript 115:21-24 and 116:1-8, Record of Proceedings C03857-C03858)*

The law, as cited above, and TCH's actions, exaggerations and misrepresentations above provide a solid basis for Mr. Halloran's Hearing Officer Order dated March 20, 2014, which limits the opportunity for TCH to abuse the discovery process. TCH seeks material that is not relevant to its claim, and the scope of its discovery should be limited.

WHEREFORE, Respondent, Round Lake Park Village Board, respectfully requests that the Pollution Control Board affirm the HEARING OFFICER ORDER of Bradley P. Halloran dated March 20, 2014, and grant Respondent, Round Lake Park Village Board, such further and other relief as this Board deems just and proper.

Respectfully Submitted,
Village Board of Round Lake Park,
Respondent

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