

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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

**PETITIONER’S CONSOLIDATED RESPONSE  
TO RESPONDENTS’ MOTIONS TO QUASH SUBPOENA**

Now comes Petitioner, Timber Creek Homes, Inc. (“TCH”), by its attorneys, Jeep & Blazer, LLC, and hereby submits its Response to the Motions to Quash the Subpoena served on Derke J. Price (“Price”) filed by Respondents Round Lake Park Village Board (the “Village Board”), Groot Industries, Inc. (“Groot”) and Village of Round Lake Park (“VRLP”).

**I. INTRODUCTION**

It is also well-settled that, “Hearings before the PCB are based exclusively on the record before the [siting authority], **except that evidence may be introduced on the fundamental fairness of the [siting authority’s] siting procedures where the evidence necessarily is outside the record.** [Emphasis added]” *Stop the Mega-Dump v. County Board of De Kalb County*, 2012 IL App (2d) 110579, ¶11 (2012), citing *Land & Lakes Co. v. Pollution Control Board*, 319 Ill.App.3d 41, 48 (3<sup>rd</sup> Dist. 2000)

The Board acknowledged this settled principle in its April 3 Order in this matter:

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 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 (2nd 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). [Emphasis added]

*Timber Creek Homes, Inc. v. Village of Round Lake Park, et al*, 2014 WL 1350986, PCB 2014-099, Slip Op. Cite at 3 (April 3, 2014)

Someone reading the file in this matter for the first time would have to seriously wonder what is going on. The above settled legal principles clearly allow for discovery into pre-filing activities to determine the nature and extent of “prejudgment of adjudicative facts”. Yet in this case, as if these settled principles do not exist, the Respondents have filed a myriad of objections and motions in repeated efforts to prevent exactly the type of discovery that is allowed by the rules applicable to these proceedings. That begs the question: what are Respondents trying so hard to hide?

## **II. THE SUBPOENA SERVED ON PRICE SEEKS INFORMATION DIRECTLY RELATED TO TCH's FUNDAMENTAL FAIRNESS CLAIM**

The general scope of discovery in Board proceedings is found in 35 Ill. Adm. Code 101.616(a), which provides, in relevant part:

(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.

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(e) Unless a claim of privilege is asserted, **it is not a ground for objection that the testimony of a deponent or person interrogated will be inadmissible at hearing, if the information sought is reasonably calculated to lead to relevant information.** [Emphasis added]

The Village Board filed the instant Motion to Quash, with which Groot and VRLP have now joined. The Village Board's Motion does not cite any specific reasons for its desire to prevent Price's deposition. No claims of privilege are asserted. Nor does the Village Board claim that Price's deposition might be the subject of "other siting proceedings" – the limitation on discovery in the Board's April 3 Order. *Id.* at 3-4

Rather, the Village Board states that, "Price was never appointed hearing officer for the above local siting hearing" and "played no role in the above local siting hearing". (Village Board Motion at ¶¶6, 7) On that basis, and with no further explanation or support, the Village Board concludes that the subpoena served on Price "is unreasonable and irrelevant to the facts of this case, and only causes undue delay, undue expense and the harassment of Derke J. Price". (Village Board Motion at ¶10)<sup>1</sup>

In the first instance, these blanket, non-specific assertions are contrary to the Hearing Officer's repeated directive in this case that broad brush objections to discovery will not be considered, and a party objecting to discovery must do so with specificity. (See Hearing Officer Orders dated February 11, 2014 and March 20, 2014)

More important, however, the Village Board's reference to the fact that Price was not involved in the siting hearing seeks to limit the potential scope of inquiry regarding the time when Price was involved – before the siting hearing. In this regard, it is important to keep in mind the statement in the Board's April 3 Order that in turn formed the basis for the Hearing Officer's April 7 Order: "The Board notes that TCH may continue discovery, as allowed by the hearing officer, **concerning documents provided during discovery**. [Emphasis added]" 2014 WL 1350986, Slip Op. Cite at 4

The attachments to the Village Board's Motion confirm that conversations between Price and the attorney for the Village Board, Peter Karlovics ("Karlovics"), were ongoing for a substantial amount of time (at least as early as October 2012) before Groot Industries, Inc.

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<sup>1</sup> The Village Board does not explain how it has standing to assert a "harassment" claim on behalf of Price.

("Groot") filed its siting application on June 21, 2013. One of the documents produced by the Village Board in the course of discovery is a June 27, 2013 email from Price to Karlovics and the attorneys for Groot and VRLP. A copy of that email is attached hereto as Exhibit A (and is also attached to the Village Board's Motion).

The Village Board notes in its Motion that Price announced in the June 27 email that he was withdrawing from consideration as the hearing officer. But it is what else Price said in that email that leads to the conclusion that he possesses "relevant information and information calculated to lead to relevant information". Price stated that:

I have now been informed by the firm's client, the Village of Hainesville, that it intends to appear and object. Accordingly, since I have not been officially appointed by the Board at this time, the firm has concluded that I must withdraw from service as the Hearing Officer **and erect a "chinese wall"** with the attorneys in our office that work with Hainesville **due to my discussions with Peter** [Karlovics].... Although the conflict was initially cleared **back in October**, Hainesville—as is it's right—has now changed its corporate mind. [Emphasis added]

We of course do not know (yet) what Price's "discussions" with Karlovics specifically entailed. But they clearly entailed information that created a direct conflict with the Village of Hainesville in its capacity as an opponent of the transfer station. Screening mechanisms, colloquially known as "Chinese walls", are used to avoid the consequences of conflicts that otherwise warrant attorney disqualification due to knowledge of confidential information. See Illinois Rules of Professional Conduct ("RPC"), Rule 1.0(k) ("Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.") See also RPC 1.7(a) ("A concurrent conflict of interest exists if...the representation of one client will be directly adverse to another client..."); RPC 1.10(e); *In re Marriage of Stephenson*, 2011 IL App (2d) 101214, ¶42 (2<sup>nd</sup> Dist. 2011)

Groot ignores all of the above in joining the Village Board's Motion (its Motion does not even mention the June 27 email), and adds one additional argument. Groot relies on the Hearing Officer's March 20 Order limiting discovery. The March 20 Order limited discovery to the period following VRLP's retention of its testifying witness, Dale Kleszynski. According to Groot, the subpoena served on Price "does not limit the discovery in any way to communications which occurred after Mr. Kleszynski was hired on June 20, 2013 by [VRLP] and therefore violates the Hearing Officer Order." (Groot Motion to Quash at 2) Resurrecting that limitation would certainly be a convenient outcome for Groot, who has already tried to take advantage of that original limitation.

Groot's initial responses to TCH's Interrogatories and Request for Production are attached hereto as Exhibits B and C. Based on its assertion that VRLP retained Kleszynski on June 20, 2013, Groot limited its responses to one day, "from June 20, 2013, to June 21, 2013". Groot has used this convenient limitation as an excuse to withhold disclosure of any information regarding its pre-filing contacts with VRLP and the Village Board.

Groot's argument, of course, does not take into account the Hearing Officer's subsequent April 7 Order, which expanded the scope of allowed discovery regarding pre-filing contacts based on the Board's statement in its April 3 Order that TCH "may continue discovery, as allowed by the Hearing Officer, concerning documents provided during discovery." Groot therefore tries to limit the scope of the Hearing Officer's April 7 Order by arguing that the scope of discovery allowed by that Order is limited to "the meeting minutes which were involved in the Request to Admit issued by" TCH. (Groot Motion to Quash at 2)

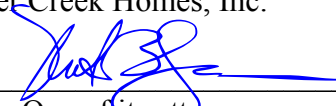
First, the Board's directive regarding "documents provided during discovery" is not limited to TCH's Request to Admit. Further, the April 7 Order resulted in large part from the language in the Board's April 3 Order, and the fact that, "TCH did not reference the Village Board's meeting minutes in its consolidated response to respondents' discovery objections and only first referenced them in its expedited appeal to the Board." (April 7 Order at 1)

As with those meeting minutes, this is the first time that the Hearing Officer (and TCH) have been privy to the June 27 email between Price and the parties trying so hard to prevent Price from testifying. The Village Board did not produce that email (or any other documents) until March 31, 2014. TCH issued the subject subpoena after the email was produced. The email reveals that Price obtained “confidential” (but not privileged) information from the attorney for the Village Board before the subject siting hearing. This information created an insurmountable conflict with an opponent of the transfer station. The subpoena served on Price is clearly discovery based on “documents provided during discovery”, and seeks “relevant information and information calculated to lead to relevant information” regarding the Village Board’s “prejudgment of adjudicative facts”.

### III. CONCLUSION

For all of the foregoing reasons, TCH requests that the Village Board’s Motion be denied.

Respectfully submitted,  
Timber Creek Homes, Inc.

By:   
One of its attorneys

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**EXHIBIT A**

**From:** Price, Derke <DPrice@ancelglink.com>

**To:** pkarlovics <pkarlovics@aol.com>; Glenn Sechen <glenn@sechenlawgroup.com>; Larry Clark <larrymclark55@sbcglobal.net>; Charles F. Helsten <chelsten@hinshawlaw.com>

**Subject:** RE: July 9th

**Date:** Thu, Jun 27, 2013 11:30 am

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thank you for being so understanding.

**Derke J. Price, Partner**

**Ancel  
Glink** ILLINOIS BAR  
LICENSED  
SINCE 1978

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[DPrice@ancelglink.com](mailto:DPrice@ancelglink.com)

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**From:** Peter S. Karlovics [mailto:[pkarlovics@aol.com](mailto:pkarlovics@aol.com)]

**Sent:** Thursday, June 27, 2013 11:30 AM

**To:** Price, Derke; Glenn Sechen; Larry Clark; Charles F. Helsten

**Subject:** Re: July 9th

Dear Derke:

I have every confidence that you would have conducted a model hearing.

I have another hearing officer in mind. Best wishes.

Peter S. Karlovics

LAW OFFICES OF RUDOLPH F. MAGNA

Sent from my Verizon Wireless BlackBerry

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**From:** "Price, Derke" <DPrice@ancelglink.com>

**Date:** Thu, 27 Jun 2013 11:14:17 -0500

**To:** [glenn@sechenlawgroup.com](mailto:glenn@sechenlawgroup.com)<[glenn@sechenlawgroup.com](mailto:glenn@sechenlawgroup.com)>; Larry Clark<[larrymclark55@sbcglobal.net](mailto:larrymclark55@sbcglobal.net)>; [chelsten@hinshawlaw.com](mailto:chelsten@hinshawlaw.com)<[chelsten@hinshawlaw.com](mailto:chelsten@hinshawlaw.com)>; 'Peter Karlovics'<[pkarlovics@aol.com](mailto:pkarlovics@aol.com)>

**Subject:** RE: July 9th

Gentlemen:

With my sincerest apologies to all of you--and especially Peter who is out of the office on vacation; I have now been informed by the firm's client, the Village of Hainesville, that it intends to appear and object. Accordingly, since I have not been officially appointed by the Board at this time, the firm has concluded that I must withdraw from service as the Hearing Officer and erect a "chinese wall" with the attorneys in our office that work with Hainesville due to my discussions with Peter. Words cannot express my disappointment and frustration from not being able to work with you all on this matter. Although the conflict was initially cleared back in October, Hainesville--as is it's right--has now changed its corporate mind. I would say that the July 9 meeting is probably unlikely but I leave that to Peter.



**EXHIBIT B**

**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	)	
and GROOT INDUSTRIES, INC.,	)	(Pollution Control Facility Siting Appeal)
	)	
Respondents	)	

**ANSWERS TO PETITIONER'S FIRST SET OF INTERROGATORIES TO  
GROOT INDUSTRIES, INC.**

Now comes Respondent, Groot Industries, Inc. ("Groot"), by and through its attorneys, HINSHAW & CULBERTSON LLP, and in answer to Petitioner, Timber Creek Homes, Inc.'s First Set of Interrogatories states as follows:

GENERAL OBJECTIONS: Groot objects to the Interrogatories, as set forth in its Objections to Petitioner's Discovery Requests, dated February 26, 2014. Groot specifically objects to these Interrogatories to the extent that they are overbroad and seek documents unrelated to the transfer station that is the subject of this proceeding. That objection was ruled upon and sustained in the Discovery Order of Hearing Officer Halloran ("Discovery Order") dated March 20, 2014. Pursuant to the Discovery Order, the time frame for which discovery could be requested by Petitioner commences on the date that Mr. Kleszynski was retained by the Village. **The Village has indicated he was retained on June 20, 2013.** Petitioner has limited its Interrogatories to the period ending June 21, 2013. Therefore, Groot's Answers are limited to the period from June 20, 2013, to June 21, 2013.

1. Identify all communications in verbal, written or electronic form made by Groot to any member of the Round Lake Park Village Board (the "RLP Board") relating to the subject of a waste transfer station in the Village of Round Lake Park.

ANSWER: Subject to and without waiving the objections set forth above, see attached e-mail from Peter Karlovics, attorney of RLP Board and Douglas Allen of CB&I, consultant of Groot dated June 20, 2013 and attachment thereto (Groot 000001 to 000003). See also e-mail from attorney for Groot, Charles F. Helsten, to Mr. Karlovics of the same date, attached hereto (Groot 000004 to 000005).

2. Identify all communications in verbal, written or electronic form made by or to the Village of Round Lake Park ("VRLP") relating to the subject of a waste transfer station in the Village of Round Lake Park.

ANSWER: Subject to and without waiving the objections set forth above, this interrogatory is vague and unanswerable as it fails to identify a declarant; subject to this objection and without waiving same, none for the time frame of June 20, 2013 to June 21, 2013 other than the communications identified in Answer to Interrogatory Number 1.

3. Identify all meetings, conversations, communications and contacts between Groot and any member of the RLP Board where the subject of a waste transfer station in the Village of Round Lake Park was discussed.

ANSWER: Subject to and without waiving the objections set forth above, none for the time frame of June 20, 2013 to June 21, 2013.

4. Identify all meetings, conversations, communications and contacts between any member of the RLP Board and any officer, agent, employee or representative of Groot Industries, Inc.

ANSWER: Subject to and without waiving the objections set forth above, none for the time frame of June 20, 2013 to June 21, 2013.

5. Identify all meetings, conversations, communications and contacts between any member of the RLP Board and Lee Brandsma.

ANSWER: Subject to and without waiving the objections set forth above, none for the time frame of June 20, 2013 to June 21, 2013.

6. Identify all meetings, conversations, communications and contacts between any member of the RLP Board and Larry Groot.

ANSWER: Subject to and without waiving the objections set forth above, none for the time frame of June 20, 2013 to June 21, 2013.

7. Identify all meetings, conversations, communications and contacts between any member of the RLP Board and Devin Moose.

ANSWER: Subject to and without waiving the objections set forth above, none for the time frame of June 20, 2013 to June 21, 2013.

8. Identify all meetings, conversations, communications and contacts between any member of the RLP Board and Chicago Bridge & Iron Company.

ANSWER: Subject to and without waiving the objections set forth above, see Groot 000001 to 000003 attached hereto.

9. Identify all meetings, conversations, communications and contacts between any member of the RLP Board and Shaw Environmental, Inc.

ANSWER: Subject to and without waiving the objections set forth above, see Groot 000001 to 000003 attached hereto.

Dated: March 31, 2014

Respectfully submitted,

On behalf of GROOT INDUSTRIES, INC.

/s/ Richard S. Porter

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Richard S. Porter  
One of Its Attorneys

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**EXHIBIT C**

**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 )  
 and GROOT INDUSTRIES, INC., ) (Pollution Control Facility Siting Appeal)  
 )  
 Respondents )

**RESPONSE TO PETITIONER'S FIRST REQUEST FOR PRODUCTION OF  
DOCUMENTS FROM  
GROOT INDUSTRIES, INC.**

Now comes Respondent, Groot Industries, Inc. ("Groot"), by and through its attorneys, HINSHAW & CULBERTSON LLP, and in response to Petitioner, Timber Creek Homes, Inc.'s First Request for Production of Documents states as follows:

GENERAL OBJECTIONS: Groot objects to the Requests for Production, as set forth in its Objections to Petitioner's Discovery Requests, dated February 26, 2014. Groot specifically objects to these Requests to the extent that they are overbroad and seek documents unrelated to the transfer station that is the subject of this proceeding. That objection was ruled upon and sustained in the Discovery Order of Hearing Officer Halloran ("Discovery Order") dated March 20, 2014. Pursuant to the Discovery Order, the time frame for which discovery could be requested by Petitioner commences on the date that Mr. Kleszynski was retained by the Village. The Village has indicated he was retained on June 20, 2013. Petitioner has limited its Requests for Production to the period ending June 21, 2013. Therefore, Groot's Responses **are limited to the period from June 20, 2013, to June 21, 2013.**

1. All documents relating to or reflecting all meetings, conversations, communications and contacts between Groot and the Village of Round Lake Park (“VRLP”).

RESPONSE: Subject to and without waiving the Objections set forth above, see documents attached to the Answers to Interrogatories Bate Stamped 000001 to 000005.

2. All documents relating to or reflecting all meetings, conversations, communications and contacts between Groot and any member of the Round Lake Park Village Board (the “RLP Board”).

RESPONSE: Subject to and without waiving the Objections set forth above, see documents attached to the Answers to Interrogatories Bate Stamped 000001 to 000005.

3. All documents relating to or reflecting all meetings, conversations, communications and contacts between VRLP and Lee Brandsma.

RESPONSE: Subject to and without waiving the Objections set forth above, there are no documents responsive to this request.

4. All documents relating to or reflecting all meetings, conversations, communications and contacts between any member of the RLP Board and Lee Brandsma.

RESPONSE: Subject to and without waiving the Objections set forth above, there are no documents responsive to this request.

5. All documents relating to or reflecting all meetings, conversations, communications and contacts between VRLP and Larry Groot.

RESPONSE: Subject to and without waiving the Objections set forth above, there are no documents responsive to this request.

6. All documents relating to or reflecting all meetings, conversations, communications and contacts between any member of the RLP Board and Larry Groot.

RESPONSE: Subject to and without waiving the Objections set forth above, there are no documents responsive to this request.

7. All documents relating to or reflecting all meetings, conversations, communications and contacts between VRLP and Chicago Bridge & Iron Company.



RESPONSE: Subject to and without waiving the Objections set forth above, see documents attached to the Answers to Interrogatories Bate Stamped 000004 to 000005.

8. All documents relating to or reflecting all meetings, conversations, communications and contacts between any member of the RLP Board and Chicago Bridge & Iron Company.

RESPONSE: Subject to and without waiving the Objections set forth above, see documents attached to the Answers to Interrogatories Bate Stamped 000004 to 000005.

9. All documents relating to or reflecting all meetings, conversations, communications and contacts between VRLP and The Shaw Group and/or Shaw Environmental, Inc.

RESPONSE: Subject to and without waiving the Objections set forth above, see documents attached to the Answers to Interrogatories Bate Stamped 000004 to 000005.

10. All documents relating to or reflecting all meetings, conversations, communications and contacts between any member of the RLP Board and The Shaw Group and/or Shaw Environmental, Inc.

RESPONSE: Subject to and without waiving the Objections set forth above, see documents attached to the Answers to Interrogatories Bate Stamped 000004 to 000005.

Dated: March 31, 2014

Respectfully submitted,

On behalf of GROOT INDUSTRIES, INC.

/s/ Richard S. Porter

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that he caused a copy of PETITIONER'S RESPONSE TO RESPONDENT'S MOTION TO QUASH SUBPOENA to be served on the following, via electronic mail transmission, on this 14<sup>th</sup> day of April, 2014:

*Hearing Officer*

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*For Groot Industries, Inc.*

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One of the attorneys for  
Petitioner