

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 MOTION FOR EXPEDITED REVIEW OF HEARING OFFICER ORDER

Now comes Petitioner, Timber Creek Homes, Inc. (“TCH”), by its attorneys, Jeep & Blazer, LLC, and pursuant to 35 Ill.Adm.Code 101.512 and 101.616(e) moves this Board for an Expedited Review of Hearing Officer Halloran’s April 17, 2014 Order granting the Motions to Quash the Subpoena for Deposition 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”), and in support thereof states:

1. The Board’s April 3, 2014 Order provides that, “TCH may continue discovery, as allowed by the hearing officer, concerning documents provided during discovery.” *Timber Creek Homes, Inc. v. Village of Round Lake Park, et al*, 2014 WL 1350986, Slip Op. Cite at 4

2. On March 31, 2014, in response to a request for production of documents, the Village Board provided TCH with a June 27, 2013 email from Price to Peter Karlovics (“Karlovics”), the Village Board’s attorney, and the attorneys for Groot and VRLP. A copy of that email is attached hereto as Exhibit A.

3. The email reflects that Price had been selected to serve as the hearing officer for the underlying siting proceeding, although he had not yet been formally retained. Conversations between Price and Karlovics had been ongoing for a substantial amount of time (at least as early

as October 2012) before Groot Industries, Inc. (“Groot”) filed its siting application on June 21, 2013.

4. 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]

5. Price did not specify what his “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 (2nd Dist. 2011)

6. It is clear that Karlovics, the attorney for the Village Board, conveyed confidential information to Price – information so sensitive and of such a nature, that Price not only had to

withdraw from consideration as the hearing officer, but had to insulate himself from any contact with attorneys representing an opponent to the proposed transfer station. What confidential information could Karlovics have revealed to Price? It was clearly beyond the scope of innocuous scheduling and procedural issues. The information conveyed by the attorney for the persons who were to rule on Groot's siting application must have been far more substantive and sensitive, and may well have included the Village Board's views on Groot's proposed transfer station. No other possibility exists that could have resulted in Price's drastic action.

7. Because of the clear import of the information revealed by Price's email, TCH thereafter served Price with a subpoena for his deposition on April 8, 2014. A copy of the subpoena is attached hereto as Exhibit B.

8. The Village Board filed a Motion to Quash, with which Groot and VRLP later joined. The Village Board's Motion did not cite any specific reasons for its desire to prevent Price's deposition. No claims of privilege were asserted. Nor did 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. 2014 WL 1350986, Slip Op. Cite at 3-4

9. In its Reply in support of its Motion, however, the Village Board claimed that Rule 1.12 of the Illinois Rules of Professional Conduct ("RPC") was the basis for Price's decision to withdraw from consideration and screen himself from the attorneys representing the Village of Hainesville.

10. A copy of RPC 1.12 is attached hereto as Exhibit C. By its terms, RPC 1.12 only applies to situations where "the lawyer **participated personally and substantially** as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral [Emphasis added]".

11. RPC 1.12 clearly would apply if Price had actually been retained and served as the hearing officer in the subject siting proceeding. But the Village Board has confirmed that Price "was never appointed hearing officer" and that "he played no role in the local siting

hearing other than to be considered for the position of hearing officer. [Emphasis added]" (Village Board Motion to Quash at ¶¶6, 7; Reply at 1)

12. Further contrary to the Village Board's Reply, Price was not "screening himself to comply with the provisions of Rule 1.12". (Village Board Reply at 2) Price did not even mention RPC 1.12 in his withdrawal. Rather, Price confirmed in his June 27, 2013 email that he was required to screen himself "due to my discussions with Peter [Karlovics]".

13. In his ruling on the Motions to Quash, the Hearing Officer acknowledged that, "The purpose of discovery is to uncover all relevant information and information calculated to lead to relevant information." (April 17 Order at 4)

14. The Hearing Officer also acknowledged that, in the context of a siting appeal:

[T]he Board will hear new evidence relevant to the fundamental fairness of the proceedings where such evidence lies outside the record, including pre-filing contacts. See *Land and Lakes Co. v. PCB*, 319 Ill.App.3d 41, 48, 743 N.E.2d 188, 194 (3d Dist. 2000). 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).

(*Id.*)

15. The Hearing Officer nevertheless granted the Motions to Quash, describing the basis for Price's deposition as "vague" and "speculation", and stated that "there no evidence, as opposed to supposition, that [Price's] testimony would provide any relevant information or lead to any relevant information." The Hearing Officer further stated that, "Moreover, missing from TCH's attempt to obtain Mr. Price's testimony is any explanation why any information Mr. Price could conceivably possess would be relevant or likely to lead to the discovery of relevant evidence relating to TCH's fundamental fairness claim." (April 17 Order at 5)

16. This process, and indeed all litigation, would certainly be easier and faster, and require no discovery at all, if confidential information was not confidential – if it was openly

available for all the world to see. The Hearing Officer's comments presuppose a situation where parties who have predetermined the result of a siting application openly reveal the evidence of that predetermination. But that is not reality, and that is why parties are allowed to engage in discovery – to find out what people revealed to each other behind a curtain of secrecy. A curtain that the Hearing Officer has allowed to remain closed.

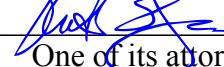
17. The Hearing Officer also gave a second reason for his ruling. According to him, discovery regarding TCH's fundamental fairness claim is limited to "entries in the Village Board's minutes that [were] the subject of TCH's Request to Admit as those documents were provided or gained during the course of discovery." The Hearing Officer therefore stated that, "TCH has not shown that any information in Mr. Price's possession is related in any way to entries in the Village Board's minutes that were the subject of TCH's Request to Admit." (April 17 Order at 5)

18. As noted above, the Board's April 3 Order allowed TCH to pursue discovery "concerning documents provided during discovery". Price's email is just such a document. TCH did not know that document existed, and could not have known about it, until the Village Board produced it on March 31. Yet the Hearing Officer has decided to limit the scope of TCH's inquiry into Respondents' secret plans solely to documents that were publicly available. That ruling does a disservice to the rules of discovery and the principle of full disclosure, to the principle that siting hearings must be conducted in a fundamentally fair manner, and to TCH's right to a full and fair hearing before the Board.

19. Given the current expedited schedule and limited time before the decision deadline, an expedited decision is necessary in order to allow adequate time to assess the information that should be produced.

20. For all of the foregoing reasons, TCH requests that the order quashing the subpoena served on Price be reversed.

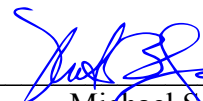
Respectfully submitted,
Timber Creek Homes, Inc.

By: 
One of its attorneys

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Jeffery D. Jeep (ARDC No. 6182830)
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jdjeep@enviroatty.com

CERTIFICATION

Under penalties as provided by §1-109 of the Illinois Code of Civil Procedure, the undersigned hereby certifies that he is one of the attorneys for Timber Creek Homes, Inc., the Petitioner herein, and that he has read the above and foregoing PETITIONER'S MOTION FOR EXPEDITED REVIEW OF HEARING OFFICER ORDER and knows the contents thereof, and the same are true to the best of his knowledge, information and belief.



Michael S. Blazer

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

thank you for being so understanding.

Derke J. Price, Partner

**Ancel
Glink** ILLINOIS BAR
MEMBER
NOVEMBER 2011

1979 N. Mill St., Suite 207

Naperville, IL 60563

Direct Dial: 630.596.4612

Telephone: 630.596.4610

Fax: 630.596.4611

DPrice@ancelglink.com

www.ancelglink.com



From: Peter S. Karlovics [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

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

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

To: glenn@sechenlawgroup.com<glenn@sechenlawgroup.com>; Larry Clark<larrymclark55@sbcglobal.net>; chelsten@hinshawlaw.com<chelsten@hinshawlaw.com>; 'Peter Karlovics'<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)	(Pollution Control Facility Siting Appeal)
LAKE PARK VILLAGE BOARD and GROOT)	
INDUSTRIES, INC.,)	
)	
Respondents)	

SUBPOENA FOR DEPOSITION

TO: Derke J. Price
 Ancel, Glink, Diamond, Bush, Dicianni & Krafthefer, P.C.
 1979 N. Mill St., Suite 207
 Naperville, IL 60563
 dprice@ancelglink.com

Pursuant to Section 5(e) of the Environmental Protection Act (415 ILCS 5/5(e) (2002)) and 35 Ill. Adm. Code 101, Subpart F, you are ordered to attend and give testimony at the deposition in the above-captioned matter at 10:00 a.m. on April 21, 2014 at Ancel, Glink, Diamond, Bush, Dicianni & Krafthefer, P.C., 1979 N. Mill St., Suite 207, Naperville, IL 60563.

You are also ordered to bring with you documents relevant to the matter under consideration and designated herein:

1. All documents relating to or reflecting all meetings and communications between Derke J. Price and anyone acting or purporting to act on behalf of the Village of Round Lake Park, Illinois (“VRLP”), including all of VRLP’s present and former agents, employees, appointed officials, elected officials and attorneys, and relating to the proposed Groot Industries, Inc. (“Groot”) Lake Transfer Station (the “Transfer Station”).

2. All documents relating to or reflecting all meetings and communications between Derke J. Price and anyone acting or purporting to act on behalf of Groot, including all of Groot’s

present and former shareholders, directors, officers, agents, employees, attorneys, and consultants, and relating to the Transfer Station.

3. All documents relating to or reflecting all meetings and communications between Derke J. Price and anyone acting or purporting to act on behalf of Chicago Bridge & Iron Company ("CBI"), including all of CBI's present and former shareholders, directors, officers, agents, employees, attorneys, and consultants, and relating to the Transfer Station.

4. All documents relating to or reflecting all meetings and communications between Derke J. Price and anyone acting or purporting to act on behalf of The Shaw Group and/or Shaw Environmental, Inc. ("Shaw"), including all of Shaw's present and former shareholders, directors, officers, agents, employees, attorneys, and consultants, and relating to the Transfer Station.

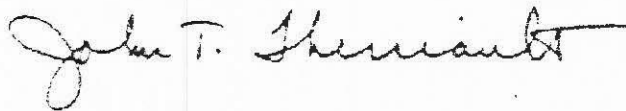
For purposes of this Subpoena, "documents" shall include all written material or other tangible medium of reproduction of every kind or description, however produced or reproduced, including, without limitation, correspondence, notes, memoranda, recordings, photographs, letters, financial statements, tax returns, bank account statements, specifications, inspection reports, blueprints, drawings, diagrams, charts, summaries, computer printouts, computer or other digital data, microfilm, microfiche, records of oral conversations, diaries, calendars, field reports, logs, minutes, meetings, analyses, projections, work papers, tape recordings, films, video tapes, models, statistical statements, graphs, laboratory and engineering reports and notebooks, plans, minutes or records of meetings, minutes or records of conferences, lists of persons attending meetings or conferences, reports and/or summaries of investigations, opinions, or reports of consultants, appraisals, evaluations, records, contracts, agreements, leases, invoices, receipts, preliminary drafts, however denominated, by whomever prepared, to whomever addressed, which are in possession of the respondent as defined herein. Further, "documents" includes any copies of documents which are not identical duplicates of originals, including, but not limited to, all drafts of whatever date and copies with typed or handwritten notations, and any other form of reporting, storing, maintaining or

indexing such information, including, without limitation, electronic storage, computer storage, shorthand notes, diagrams, magnetic cards and other forms of storage.

Failure to comply with this subpoena will subject you to sanctions under 35 Ill. Adm. Code 101.622(g) and 101.802.

Failure to comply with this subpoena will subject you to sanctions under 35 Ill. Adm. Code 101.622(g) and 101.802.

ENTER:

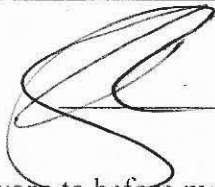


John T. Therriault, Assistant Clerk
Pollution Control Board

Date: February 11, 2014

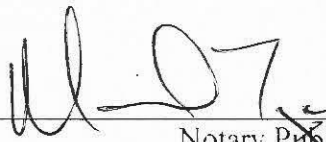
I served this subpoena duces tecum by handing a copy to Derke J. Price

on April 8, 2014.



Subscribed and sworn to before me this 8th day of April

2014.



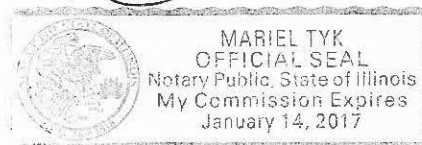
Notary Public

EXHIBIT C

West's Smith-Hurd Illinois Compiled Statutes Annotated

Court Rules

Illinois Supreme Court Rules (Refs & Annos)

Article VIII. Illinois Rules of Professional Conduct of 2010 (Refs & Annos)

ILCS S Ct Rules of Prof.Conduct Rule 1.12

Formerly cited as IL ST CH Rule 1.12;IL ST S CT RPC Rule 1.12

Rule 1.12. Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

Currentness

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this Rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Credits

Adopted July 1, 2009, eff. Jan. 1, 2010.

COMMENT

[1] This Rule generally parallels Rule 1.11. The term “personally and substantially” signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that

did not affect the merits. Compare the Comment to Rule 1.11. The term “adjudicative officer” includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges.

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent. See Rule 1.0(e) and (b). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[Notes of Decisions \(1\)](#)

I.L.C.S. S Ct Rules of Prof.Conduct Rule 1.12, IL R S CT RPC Rule 1.12

Current with amendments received through 2/1/2014

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a copy of PETITIONER'S MOTION FOR EXPEDITED REVIEW OF HEARING OFFICER ORDER to be served on the following, via electronic mail transmission, on this 18th day of April, 2014:

Hearing Officer

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For the Village of Round Lake Park

Glenn Sechen
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glenn@sechenlawgroup.com



Michael S. Blazer
One of the attorneys for
Petitioner