

**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 RESPONSE TO  
RESPONDENTS’ MOTION TO RECONSIDER HEARING OFFICER ORDER**

Now comes Petitioner, Timber Creek Homes, Inc. (“TCH”), by its attorneys, Jeep & Blazer, LLC, and for its Response to the Motion by Respondents Round Lake Park Village Board (the “Village Board”) and Village of Round Lake Park (“VRLP”) to Reconsider the Hearing Officer’s Order dated May 12, 2014, states:

1. According to the May 12 Order, these two Respondents have supplied the Hearing Officer with a total of 75 emails (60 from the Village Board and 15 from VRLP) to which some privilege is claimed to attach. TCH has had no opportunity to assess the applicability of any claim of privilege to any withheld document. Nor have either the Village Board or VRLP previously specified what privilege is claimed to apply to what document.

2. The Hearing Officer pointed out in the May 12 Order that, “Here, neither the Village Board nor the Village attempted to show why the privilege attaches to the withheld documents. Neither makes any argument nor sets forth any facts that would prove the existence of an attorney-client privilege, despite settled authority requiring the party claiming privilege to meet the burden of establishing that privilege applies.” (May 12 Order at 3)

3. Illinois Supreme Court Rule 201(n) specifically provides that:

Claims of Privilege. When information or documents are withheld from disclosure or discovery on a claim that they are privileged pursuant to a common law or statutory privilege, any such claim

shall be made expressly and shall be supported by a **description of the nature of the documents, communications or things not produced or disclosed and the exact privilege which is being claimed.** [Emphasis added]

See also *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill.2d 103, 119 (1982) (The burden is on the proponent of the privilege to show that the privilege applies to the specific communication at issue, and the privilege only applies if the communication was with a member of the organization's control group.); *Midwesco-Paschen Joint Venture For Viking Projects v Imo Industries, Inc.*, 265 Ill.App.3d 654, 669 (1<sup>st</sup> Dist.), appeal denied 157 Ill.2d 505 (1994); *Profit Management Development, Inc. v. Jacobson, Brandvik and Anderson, Ltd*, 309 Ill.App.3d 289, 299 (2<sup>nd</sup> Dist. 1999) Neither the RLP Board nor VRLP have even attempted to meet their burden.

4. The Village Board belatedly asserts in the present Motion that the emails are between counsel and VRLP's control group, and are subject to the attorney/client privilege. (Motion to Reconsider at ¶¶1, 15) Although the Motion is purportedly filed jointly, it only addresses the 60 emails from the Village Board and says nothing about the emails from VRLP. (Motion to Reconsider, ¶1) VRLP does not in any way attempt to meet its burden with respect to the 15 emails that it has produced.

5. Moreover, communications are not automatically privileged simply because they were made to or from an attorney. The proponent of the privilege must establish that the communication entailed "confidential legal advice". Any other communications are not subject to the privilege. *People v. Radojcic*, 2013 IL 114197, ¶40 (2013) Neither VRLP nor the Village Board make any effort to meet their burden of proof with respect to any specific communication.

6. Respondents also cite to the "rule of confidentiality" in RPC 1.6. But as the Hearing Officer noted in the May 12 Order, "Invoking the rule of confidentiality and characterizing withheld information as "secrets and confidences" does nothing to support a claim of privilege". (May 12 Order at 3) Moreover, RPC 1.6(b)(6) requires disclosure "to comply with other law or a court order". This Rule is mandatory, not discretionary. An attorney must disclose

“secrets and confidences” when directed by a final order if the burden of establishing an applicable privilege has not been met. *In re Marriage of Decker*, 153 Ill.2d 298, 316-317 (1992)

7. VRLP has in the past also sought to withhold communications between its counsel and its retained experts. While TCH does not know whether any of VRLP’s 15 emails fall into that category, discovery in this case confirms that VRLP’s counsel did not retain any experts – they were all retained directly by VRLP. To the extent any of the subject emails are communications between counsel and VRLP’s retained experts, they are not covered by any privilege. See, e.g., *People v. Wagener*, 196 Ill.2d 269, 275-277 (2001); *Midwesco-Paschen Joint Venture, supra*, 265 Ill.App.3d at 668

8. The issues of Respondents’ disclosure, a proper privilege log, and Respondents’ burden to establish some applicable privilege to any communication, have now dragged on since at least April 25 – the deadline by which Respondents were to have served “all responses to petitioner’s written discovery”. (Hearing Officer Order dated April 18, 2014) That Order followed the IPCB’s April 17 affirmance of the Hearing Officer’s April 7 Order that expanded the scope of allowed discovery in this case beyond what had been allowed pursuant to the Hearing Officer’s March 20 Order.

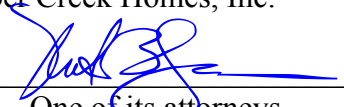
9. In his Order of April 28, the Hearing Officer also confirmed that, “The respondents stated that they will make the contents available to me for a ruling regarding attorney-client privilege on or before May 5, 2014.” According to the May 12 Order, the Village Board did not provide its 60 emails to the Hearing Officer until May 7. Even that disclosure is incomplete.

10. According to the privilege logs provided by the Village Board (VRLP has not provided any log to TCH), the communications only date back to September 2012. But the communications regarding the subject transfer station, the subject of the Hearing Officer’s April 7 Order, began in 2008. VRLP’s counsel was retained with respect to transfer station issues in

2011. It appears that Respondents have made no effort to comply with the proper scope of discovery ordered by the Hearing Officer.

11. Throughout all the Motions and Orders, the Village Board and VRLP have never once complied with their burden of establishing the applicability of a specific privilege to a specific communication, or with their obligation of full compliance. Under the circumstances, TCH requests that Respondents' Motion to Reconsider be denied, and that they be ordered to immediately produce all communications, consistent with the scope of discovery previously ordered by the Hearing Officer.

Respectfully submitted,  
Timber Creek Homes, Inc.

By:   
One of its attorneys

Michael S. Blazer (ARDC No. 6183002)  
Jeffery D. Jeep (ARDC No. 6182830)  
Jeep & Blazer, LLC  
24 N. Hillside Avenue, Suite A  
Hillside, IL 60162  
(708) 236-0830  
Fax: (708) 236-0828  
[mblazer@enviroatty.com](mailto:mblazer@enviroatty.com)  
[jdjeep@enviroatty.com](mailto:jdjeep@enviroatty.com)

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that he caused a copy of PETITIONER'S RESPONSE TO RESPONDENTS' MOTION TO RECONSIDER HEARING OFFICER'S ORDER to be served on the following, via electronic mail transmission, on this 14<sup>th</sup> day of May, 2014:

*Hearing Officer*

Bradley P. Halloran  
Illinois Pollution Control Board  
James R. Thompson Center, Suite 11-500  
100 W. Randolph Street  
Chicago, Illinois 60601  
[Brad.Halloran@illinois.gov](mailto:Brad.Halloran@illinois.gov)

*For Groot Industries, Inc.*

Charles F. Helsten  
Richard S. Porter  
Hinshaw and Culbertson  
100 Park Avenue  
Rockford, IL 61101-1099  
[chelsten@hinshawlaw.com](mailto:chelsten@hinshawlaw.com)  
[rporter@hinshawlaw.com](mailto:rporter@hinshawlaw.com)

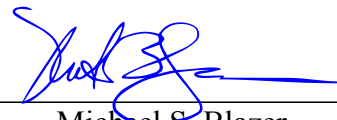
Peggy L. Crane  
Hinshaw and Culbertson  
416 Main Street, 6th Floor  
Peoria, IL 61602  
[pcrane@hinshawlaw.com](mailto:pcrane@hinshawlaw.com)

*For the Round Lake Park Village Board*

Peter S. Karlovics  
Law Offices of Rudolph F. Magna  
495 N Riverside Drive, Suite 201  
Gurnee, IL 60031-5920  
[PKarlovics@aol.com](mailto:PKarlovics@aol.com)

*For the Village of Round Lake Park*

Glenn Sechen  
The Sechen Law Group  
13909 Laque Drive  
Cedar Lake, IN 46303-9658  
[glenn@sechenlawgroup.com](mailto:glenn@sechenlawgroup.com)



---

Michael S. Blazer  
One of the attorneys for  
Petitioner