



**BEFORE THE  
ILLINOIS POLLUTION CONTROL BOARD**

FOX MORaine, LLC )  
 )  
 Petitioner, )  
 )  
 v. ) PCB 07- 146  
 )  
 UNITED CITY OF YORKVILLE, )  
 CITY COUNCIL )  
 )  
 Respondent. )

**FOX MORaine'S REPLY TO YORKVILLE'S RESPONSE  
TO MOTION TO COMPEL DISCLOSURE OF THE ROTH MEMORANDUM**

**NOW COMES** Fox Moraine, LLC ("Fox Moraine") by its attorneys, Charles Helsten and George Mueller, and for its reply to Yorkville's Response to its Motion Compel Production of the Roth Memorandum states as follows:

1. Yorkville's response incorrectly characterizes the Roth Memorandum ("Roth memorandum" is actually a misnomer, since other attorney's in Roth's' firm were the principal contributors to the document) as privileged "legal advice" tendered in response to the city council's request for the same. This contention is both factually and legally incorrect.

2. The minutes of the Yorkville city council meeting of May 8, 2007, the night the new mayor (landfill opponent Valerie Burd) and new city council were first sworn in, indicate that Michael Roth and his firm (the Wildman firm) were retained as interim City attorney pursuant to a proposal (a copy of which also has never been made available to Fox Moraine) for a maximum of 50 hours per month of legal services at a fixed fee. The minutes do not reflect any request for specific services, or any direction to perform specific services. Certainly no advice was requested regarding the pending landfill

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application, which would be expected, since the city council had another attorney, Derke Price, who had attended the public hearings and was at that time preparing a report summarizing the evidence and containing his recommendations. Interestingly, although the May 8, 2007 minutes reference Mayor Burd's representation that the city council had information in front of them regarding the proposed appointment of an interim city attorney, the packet of information for that meeting as published on the City's website shows no such information. Accordingly, there is no evidence that the "advice" allegedly provided in the Roth Memorandum or any specific other "advice" related to the merits of the landfill application was ever requested by the city council.

3. The fact that Fox Moraine may have or should have known of the existence of the Roth Memorandum for some period of time (a fact not established, but merely now asserted by Yorkville) is of no relevance to whether this memorandum ought to be produced. The importance of the document has emerged as it became clear that city council members were considering recommendations and materials which were not part of the public record in making their decision on Fox Moraine's siting application. Fox Moraine is entitled to know as a matter of law what materials were relied upon by city council members in reaching their decision. This is not probing into the minds of the decision makers, but, rather merely determining whether or not the council's decision was based upon the record made in this proceeding (as is required by law). Yorkville's attorneys' (the Wildman firm) direction to its Aldermen not to answer questions as to what they considered in reaching their decision only compounds the problem.

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4. Yorkville also incorrectly claims that the Roth Memorandum consisted merely of legal advice. A careful review of the Wildman, Harrold, Allen & Dixon invoice of June 15, 2007, in the amount of \$96,119.73 demonstrates that this claim is untrue, and that the Roth memorandum, prepared after dozens, if not hundreds of hours of review of the hearing evidence by the Wildman attorneys, in fact contained a lengthy analysis of the evidence presented at the sitting hearing. In other words, the Memorandum essentially dealt with the hearing evidence rather than with law. This is made clear by the fact that on April 29, 2007, more than a week before he was even retained or authorized to perform any work, Leo Dombrowski of the Wildman firm, billed 3.50 hours for, among other tasks: "Prepare memorandum regarding review of evidence..." On May 11, 2007, Anthony Hopp billed 6.0 hours for: "Continue to review testimony and to work on "need" section." On May 14, 2007, Leo Dombrowski billed 5.25 hours for: "Review and analyze Applicant's traffic studies; review and analyze case law to determine whether Applicant met traffic criterion; begin to prepare report regarding same." On May 18, 2007, Leo Dombrowski of the Wildman firm billed 6.75 hours for, among other things: "Review and analyze post hearing comments; review city council memorandum regarding traffic criterion..." On May 21, 2007, Leo Dombrowski of the Wildman firm billed 8.25 hours for, among other things: "Prepare memoranda regarding issues to consider to determine whether Applicant met traffic and health, safety and welfare criteria; continued to review and analyze hearing testimony and exhibits regarding same; review and analyze memorandum of Mr. Price and city staff addressing siting criteria." On the same day, Michael Roth of the Wildman firm also billed 2.70 hours for: "Work on proposed advice memos regarding landfill siting criteria

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and review staff report regarding same.” On May 22, 2007, Anthony Hopp also billed 7.0 hours for: “Continue to revise, edit and finalize legal memoranda to mayor and city council...” On the same date, Leo Dombrowski also billed 7.0 hours for, among other tasks: “Revise memorandum regarding Applicant’s and operator’s environmental history.” On May 23, 2007, Anthony Hopp billed 6.0 hours for, among other tasks for: “Complete memorandum and executive summary for city council.” On the same day, Leo Dombrowski billed 10.50 hours for among other tasks: “Review and analyze hearing officer’s findings and recommendations; prepare draft city council resolution; revise memoranda regarding evaluation of siting criteria evidence...” On the same day, Michael Roth also billed 8.80 hours for, among other things: “...work on introductory statement for meeting executive summary and final version of legal memorandum analyzing evidence and findings and recommendations...” (emphasis added)

5. From the foregoing it is clear that the Roth Memorandum contained a complete and exhaustive review of the evidence, recommendations to the city council regarding the same and, very likely also, comment and rebuttal with respect to the expert city staff’s factual findings and recommendations and the hearing officer’s factual findings and recommendations, both of which recommended approval of the siting application with conditions.

6. Since the evidence in this case was overwhelmingly in favor of Fox Moraine and little, if any, credible evidence was presented by the opponents on any of the siting criteria, with absolutely no evidence whatsoever presented in opposition to criteria i, v and ix (all of which were found not to have been met in the resolution prepared by the Wildman attorneys some time after the May 24, 2007 city council vote),

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and, since the city council apparently completely disregarded this absence of opposition evidence, and since the city council also completely disregarded the recommendations of its own expert staff and the hearing officer for approval of the application, it is arguable that the city council may have improperly proxied Mayor Burd and her unauthorized agents, the Wildman firm, to make the final decision for them.

7. Work on the Roth Memorandum, based upon the June 15, 2007 Wildman invoice, apparently began on April 29, 2007. Michael Roth and his firm were not even retained until May 8, 2007 and then only for the limited purpose of providing 50 hours per month of work at a fixed fee. Instead, the Wildman firm did 257.45 hours of work for the month in which they were appointed, with a significant portion performed before the appointment even became effective. Valerie Burd has testified at her discovery deposition that she did not authorize the Wildman firm to begin work prior to its appointment, and that she was unaware that they were performing such work (despite the fact that the Wildman invoice references a meeting between Anthony Hopp and "mayor" on April 30, 2007). On that date, Art Prochaska was still mayor and he was not the individual that met with Mr. Hopp. All of this makes it clear that Yorkville's assertion now that the Roth Memorandum was prepared in response to the city council's request for legal advice is not supported anywhere in the record. The document was either prepared at the direction of Valerie Burd before she had any authority to give such direction, or the document was prepared by the Wildman firm without any proper direction, in the apparent hope that someone would later politically appreciate its content and, in turn, then agree to pay for it. Under either scenario, the document does not constitute privileged legal advice. Work performed prior to establishment of an

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attorney client relationship is obviously not subject to any attorney client privilege. Fox Moraine hereby repeats, realleges and incorporates as if fully set forth herein its previous response to Yorkville's motion in limine seeking to bar evidence and questions regarding the Wildman invoice in the amount of \$96,119.73

8. Yorkville's assertion that Fox Moraine is not entitled to know what the city council considered in reaching its decision is patently incorrect, and Yorkville's reliance for that assertion on City of Rockford vs. County of Winnebago is also grossly misplaced. Yorkville is apparently correct that city council members do not need to demonstrate that they have reviewed all the evidence (which is the proposition that its cited cases stand for), but this does not bear on the fact that an Applicant is entitled to a decision based on the evidence, and when a decision is based on something other than the evidence, it becomes a legislative-type decision, rather than an adjudicatory decision. Rockford v. Winnebago County Board, PCB 88-107 (Nov. 1988), cited by Yorkville in its response, is particularly instructive, in that this case was a second appeal after an earlier remand, based upon the Board's finding that the original siting proceedings were fundamentally unfair, in that Winnebago County had made a legislative-type decision. In that earlier case, PCB 87-092 (Nov. 19, 1987), the Board had found that the unfamiliarity of Winnebago County Board members with the siting criteria was highly probative of the issue of whether they made a legislative rather than an adjudicatory decision. The Board also agreed with the City of Rockford's contention that County Board members lack of familiarity with its committee's recommendations and their apparent reliance on information not in the public record rendered the hearings fundamentally unfair, (slip opinion at page 19).

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9. Lastly, Yorkville filed suit on Oct. 3, 2008 in the Circuit Court of Kendall County against Fox Moraine, seeking to recover among other things the full amount of the Wildman invoice of June 15, 2007. (Case 08-L-68) The basis is alleged violation of the city pollution control facility siting ordinance, which requires a siting applicant to reimburse "expenses incurred by the City in conducting the review of the request for siting approval." Ord. 2006-117, Sec. 3(C)(13). (Emphasis added). Obviously then, the question of whether the work was ever authorized or not aside, Yorkville admits judicially that the Wildman firms work during April and May of 2006 was "review" of the request for siting approval. As such, Fox Moraine is entitled to discover the report prepared as a result of that "review". (It is also noteworthy that in previously attempting to have the \$96,119.73 invoice returned, Yorkville alleged that the same was sent to Fox Moraine in error, yet now Yorkville has filed suit to collect the same from Fox Moraine).

**WHEREFORE**, Fox Moraine prays that the Board order a disclosure of the Roth/Wildman memorandum/report and all other documents submitted to the city council as a result of the Wildman firm's unauthorized review of the site location request.

Dated: October 7, 2008

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Respectfully submitted,

On behalf of FOX MORaine, LLC

/s/ George Mueller  
George Mueller  
One of Its Attorneys




**AFFIDAVIT OF SERVICE**

The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on October 7, 2008, she served a copy of the foregoing upon:

Via E-Mail – hallorab@ipcb.state.il.us Bradley P. Halloran Hearing Officer Illinois Pollution Control Board James R. Thompson Center 1000 W. Randolph St., Ste. 11-500 Chicago, IL 60601	Via E-Mail – dombrowski@wildman.com Leo P. Dombrowski Wildman, Harrold, Allen & Dixon 225 West Wacker Dr. Suite 3000 Chicago, IL 60606-1229
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Via E-mail.

  
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