BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

FOX MORAINE, LLC, Petitioner, v. UNITED CITY OF YORKVILLE, CITY COUNCIL, Respondent.	)	PCB No. PCB 07-146

NOTICE OF FILING

TO: All counsel of Record (see attached Service List)

Please take notice that on October 7, 2008, the undersigned filed with the Illinois Pollution Control Board, 100 West Randolph Street, Chicago, Illinois 60601, Petitioner's Reply in Support of Motion to Compel Answers to Deposition Questions.

Dated: October 7, 2008

Respectfully submitted,

On behalf of FOX MORAINE, LLC

/s/
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One of Its Attorneys

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PETITIONER'S REPLY IN SUPPORT OF ITS MOTION TO COMPEL ANSWERS TO DEPOSITION QUESTIONS

NOW COMES Fox Moraine Landfill, LLC hereinafter ("Fox Moraine" or "Petitioner"), by one of its attorneys, George Mueller, and for its Reply in support of its Motion to Compel Answers to Deposition Questions, states as follows:

Introduction

Yorkville erroneously asserts that the information sought in the Petitioner's Motion to Compel Answers to Deposition Questions is "irrelevant to the issues before the Board" and contrary to Illinois law because of an alleged "deliberative process privilege" as to the siting proceedings. (Yorkville's brief at 1).

As a threshold matter, many of the questions at issue in this motion do not seek to elicit information about the deliberative process at all. Other questions could be read as seeking information about the deliberative process, however, such questions should be allowed because this is a case in which the very process itself is at issue. Finally, and perhaps most importantly, the deliberative process itself was conducted in an open public forum, before an audience, and was transcribed in its entirety by a court reporter. By conducting the deliberative process in full public view, the City Council waived any privilege as to that process that might otherwise be argued to exist in Illinois.

This appeal is predicated on the lack of fundamental fairness in the proceedings below, which is illustrated, in part, by the "after-the-fact" resolution crafted by the City Attorney which was never voted upon by the City Council, and which appears to conflict with the findings of the City Council as expressed in the vote taken on May 24, 2007. Moreover, this appeal challenges the City Council's failure to apply the criteria set forth at 415 ILCS 39.2(a), and the apparent confusion as to what Council members believed they were voting on when the vote was taken on May 24, 2007.

In summary, because the questions at issue are tailored to elicit information that would clarify whether the City Council's siting decision complied with certain fundamental mandates of the Environmental Protection Act, including the requirements of fundamental fairness, the questions are entirely relevant and the information they seek is discoverable under controlling Illinois precedent.

I. Many of the Questions at Issue in This Motion Seek to Discover What Votes Were Cast by the City Council Members, Not Why Particular Votes Were Cast

The City Council conducted its siting deliberations in a completely open public forum, before a public audience. Its deliberations were transcribed in their entirety by a court reporter. However, due to the format of the proceedings on May 23, 2007 and May 24, 2007, there is some question as to how the City Council Members actually voted on May 24, 2007. During the depositions of City officials, questions were posed seeking clarification of the votes cast that night. The questions objected to by Yorkville's attorney, which are the subject of the instant motion, include questions that simply ask for clarification of whether, on May 24, 207, the City Council voted on the statutory criteria, and what it was the members believed they were voting on that night, *not* why a particular deponent decided to vote a particular way. Those questions,

which do not intrude upon any alleged deliberative process privilege, even if such a privilege existed as to the public proceedings, are as follows:

Taken from the Certified Questions from the Discovery Deposition of Leslie

4. Q: Which City Council members voted no as to Criterion 1?

MR. DOMBROWSKI: Object to the form of the question. Instruct the witness not to answer. (p. 61)

5. Q: Was any specific vote taken as to Criterion 1?

MR. DOMBROWSKI: Same objections. Instructing the witness not to answer. (p. 62)

7. Q: Your statement, your comments on May 23, 24 2007, which are contained in the transcript, indicate that you chose Criterion Nos. 3, 6 and 8. What did you mean by you chose Criterion 3, 6 and 8?

MR. DOMBROWSKI: Again, I am going to instruct the witness not to answer on the same basis. (Pp. 65-66).

9. Q: Do you know whether any other of the aldermen voted to find the Criterion 3 had not been met?

MR. DOMBROWSKI: Same objections. I am instructing the witness not to answer. (Pp. 67, 68)

10. Q: You never intended to vote that Criterion 1 had not been met, correct?

MR. DOMBROWSKI: Same objections and I am instructing the witness not to answer.

Q: And did you intend to vote no as to Criterion 2?

MR. DOMBROWSKI: Same objections. (Pp. 68, 71)

11. Q: As to Criterion 4, did you intend to vote no to Criterion 4?

MR. DOMBROWSKI: Same objections and I am instructing the witness not to answer.

Q: As to Criterions 5 through 8, did you intend to vote no as to any one of those specific criteria?

MR. DOMBROWSKI: Same objections, and I am instructing the witness not to answer. (P. 72).

12. Q: As you sit here today, you do not know if the majority of the City Council members believed the Criterion 1 had not been met, correct?

MR. DOMBROWSKI: I will object and instruct the witness not to answer. It's also been asked and answered.

Q: I am going to ask the same question as to Criterion 2 through 9. As you sit here today, you do not know if a majority of the City Council members believed that any of the specific Criteria 2 through 9 had not been met?

MR. DOMBROWSKI: Same objections and I am instructing the witness not to answer. (Pp. 87, 88)

Inasmuch as the questions set forth above do not attempt to elicit information concerning why a deponent voted a particular way, or how he or she reached his or her conclusion, the questions do not in any way intrude upon the deliberative process, and so were improperly objected to by the attorney for the City. Deponents Leslie and Werderich should therefore be compelled to answers those questions.

As to the remaining questions objected to by the City's attorney, this second category of questions do, arguably, seek information as to why the Council members voted as they did. However, as discussed below at Sections III , V, and VII, because no "deliberative process privilege" applies to the Council's public deliberations, such questions were improperly objected to and answers to the questions should accordingly be compelled.

II. The Requested Information is Necessary to Determine Issues of Fundamental Fairness

The Council's deliberations on May 23, 2007 and May 24, 2007 were transcribed; complete copies of the transcripts for both nights were attached to Fox Moraine's Petition to the Board as Exhibits A-1 and A-2.

Prior to the May 24, 2007 deliberations, the City Attorney had already drafted a resolution denying siting. (Tr. 5/24/07 at 21). Despite the fact that a resolution to deny siting was drafted prior to the May 24, 2007 proceedings, the Mayor nevertheless opened that second night of deliberations by explaining that the City Council was meeting that night to "continue with our deliberations on whether or not we should site the proposed landfill for Fox Moraine, LLC." (Tr. 5/24/07 at 4, 21) (emphasis added). During both nights of deliberations, Council members were allotted up to twenty minutes in which to offer their thoughts regarding the proposed siting; over the course of the two nights, various Council members offered widely diverse opinions about the application for siting. (*See generally*, Tr. 5/23/07 and 5/24/07). Neither night of deliberations featured any focused discussion by the Council as to the siting criteria set forth in Section 39.2(a), although many Council Members shared their random thoughts about different criteria during their allotted time.

As Council members continued presenting their opinions about the proposed siting, some of them proposed new conditions they would like to see imposed on any siting approval that might be granted. (Tr. 5/24/08 at 20-29). At no time did the Council members appear to vote on the individual siting criteria, or on the proposed conditions offered by various members. Rather, random ideas and observations were tossed out by individual members during their allotted time. (See generally, Tr. of 5/23/07 and 5/24/07).

On May 24, 2007, the Mayor eventually called for a vote by the Council to "amend the conditions or – to this resolution to allow the attorney to make sure that they are in compliance

with what conditions should be so that we don't add anything that's not allowable...that should not be in this resolution." (Tr. 5/24/07 at 37). When a roll call vote was taken, Alderman Besco asked for an explanation as to what he was being asked to vote on. (Tr. 5/24/07 at 38). He was told that the vote was "to allow our attorney to remove any illegal conditions." (Tr. 5/24/07 at 38-39). After passing the motion to allow the City attorney to re-write the resolution later, the Mayor then immediately called for a roll call vote on "the resolution." (which the Council had just authorized the attorney to change after-the-fact).

In describing the subject which the Council was asked to vote upon, Mayor Burd explained, "What we are voting on is denial – where is it – denial of siting application from Fox Moraine, LLC." (Tr. 5/24/07 at 39). In other words, when it came time to vote on the Petitioner's siting application, the Council was asked to vote on the "denial" of the application by approving a resolution which was to be re-written later. The Council then voted to adopt the as-yet incomplete resolution.

The actual resolution on which the Council members cast their votes on May 24, 2007 has never been produced, and the resolution that appears in the record (which purports to provide the Council's "findings of fact") was never voted upon by the Council. Moreover, the resolution eventually signed by the Mayor asserts that the applicant failed to prove various statutory criteria, some of which were not event discussed during the Council's deliberations.

The circumstances under which the Council voted ad hoc to deny siting and, at the same time, to impose conditions upon any approval demonstrate a complete disregard of certain essential mandates of the Environmental Protection Act, which require that the decision-maker evaluate the statutory siting criteria at Section 39.2(a) and issue a written determination that must include the decision-maker's findings of fact. These mandates are necessary for a proceeding to

be fundamentally fair. In this case, unless members confirm what they were voting for on May 24, 2007, there is no way to determine whether the resolution that was later executed by the Mayor, never having been subjected to a vote, was consistent with the findings expressed and votes cast by Council members, in public proceedings, on May 24, 2007. Moreover, because the resolution eventually crafted by Yorkville's attorney incorporated portions of the hearing officer's report and the expert staff's report, it is appropriate to ask those who voted in favor of the as-yet undrafted resolution on May 24, 2007, whether their votes cast that night were intended to adopt the portions of the reports by the hearing officer and the expert staff.

Yorkville argues that it is enough that the Council voted on whether the criteria have, or have not, been met, and that the resolution's specific findings are irrelevant to this appeal. However, Section 39.2(e) requires that:

> Decisions of the county board or governing body of the municipality are to be in writing, specifying the reasons for the decision, such reasons to be in conformance with subsection (a) of this Section.

415 ILCS 5/39.2(e)(emphasis added).

The statute's express requirement that a decision-maker provide a written decision which specifies the reasons for its decision, with those reasons to be based on the criteria in Section 39.2(a), completely belies Yorkville's argument that the only thing relevant to this appeal is that the Council voted that the statutory criteria were not met. Contrary to Yorkville's assertion, it matters whether the resolution purporting to express the reasons for the Council's decision accurately depicts the Council's reasons for its decision.

Yorkville's brief focuses attention on cases that discuss the degree of specificity required in a siting decision. However, the problem here is not a lack of specificity in the so-called resolution denying siting. The problem in this case is that the City Council, which was supposed

to be the decision-maker, cast its vote on a resolution that was intended to be re-written later, whereupon the City attorney would add some material and delete other material, selectively, based upon his judgment. The Council never voted upon the re-written, back-dated resolution, which purports to represent the Council's findings and reasons for its findings as of May 24, 2007 (when the vote was taken).

Unless the Council Members answer the questions at issue in this motion, there is no way to know whether the final resolution (purportedly passed by the City Council on May 24, 2007) accurately depicts Council members' findings and conclusions on May 24, 2007, or whether it instead represents the conclusions of others, which were not contemplated by the Council members when they cast their votes on May 24, 2007.

III. The Cases Relied Upon by Yorkville are Inapposite

Yorkville's reliance on cases such as *Peoria Disposal Co. v. Peoria County Bd.,* PCB 06-184 (June 21, 2007) is misplaced. In *Peoria Disposal*, the Board was presented, *inter alia*, with the question of whether a county board was timely in its denial of a siting application. The relevant portion of the Peoria Disposal opinion considers whether the county board's oral vote not to approve siting and not to adopt a written "Recommended Findings of Fact," constituted a final decision within the 180 day statutory requirement, despite the fact that the it did not formally adopt the transcription of the meeting as its "written decision" until several months later. *Id.* at 14. In that case, the Board concluded that the vote did constitute final action, and that the fact that the transcripts were not officially adopted until some time later did not negate the fact that a decision on the application had been timely. Therefore, *Peoria Disposal* did not involve the subsequent adoption of a resolution different from the one voted upon. Rather, the

decision-maker in Peoria Disposal eventually adopted the transcript of its own meeting. That is far different from the facts present in this case.

Similarly, in *Slates v. Illinois Landfills, Inc.*, PCB 93-106, the Board was again asked to pass on the sufficiency of the written decision, based on an assertion that each criterion was not discussed separately. The Board in *Slates* found no error or denial of fundamental fairness in the city council's failure to discuss each criterion separately. Again, the facts here are different, and the need for answers to the deposition questions at issue arises from the fact that the resolution voted on by the City Council was different from the resolution that was ultimately drafted by the City's attorney's and signed by the Mayor, and based upon a lack of clarity as to the votes cast by the Council members. The problem here, therefore, is not with a lack of specificity. For the same reason, the holding in *Rockford v. Winnebago County Bd*, PCB 88-107 is irrelevant to this appeal.

IV. Yorkville's Characterization of the Information Sought by Fox Moraine is both Erroneous and Misleading

Yorkville asserts that "Fox Moraine seeks to invade the Council members' heads to find out what facts they thought were established and whether the written decision is exactly what they expected." (Yorkville's brief at 7).

As to the question of whether the written decision is "what [the Council members] expected," this question holds enormous significance where, as here, that "written decision" is supposed to reflect the members' decision on siting and their reasons for the decision, as reflected by their votes "adopting" it on May 24, 2007. At the very least, if it is considered permissible for Council members to adopt a document that has not yet been drafted, one would hope that once it has been drafted, the document would at least reflect what the Council members

intended to adopt with their votes. Further discovery is necessary to determine if, in fact, this is the case.

With respect to the claim that Fox Moraine wants to "invade" Council members' heads, the City resorts to hyperbole in a desperate attempt to grossly distort and exaggerate what is actually being sought. For example, Attorney Dombrowski refused to allow Council member Leslie state how he voted as to various criteria, or to express his opinion of Larry Clark and the Clark Report's recommendations (Leslie Dep. Tr. 9/19/08 at 44, 45, 65-68, 71). Dombrowski also forbade any inquiry into whether the resolution ultimately drafted by the City attorney correctly reflected the votes cast by Council members on May 24, 2007. (Leslie Dep. Tr. 9/19/08 at 61, 67, 68, 71, 72). With respect to the deposition of Werderich, Dombrowski again refused to allow the deponent to express an opinion about the Clark Report or the Price Report. (Werderich Dep. Tr. 9/19/2009 at 64). Asking Council members whether they have an opinion about something, or what vote they cast, is hardly an "invasion of their heads." Moreover, inasmuch as the after-the-fact resolution drafted by the City attorney adopted portions of the Clark and Price Reports, it is clearly appropriate to determine whether the votes cast by Council members were votes in support of adopting those portions of the Reports.

V. Yorkville's Characterization of *People ex rel. Birkett*, 184 Ill.2d 521, 705 N.E.2d 48 (1998), and the Status of the So-Called "Deliberative Process Privilege" is Erroneous

Yorkville argues in favor of the "sanctity of the deliberative process" on the basis of what it terms "long-settled rulings against inquiring into a governing body's deliberative process." (Yorkville's brief at 4). Yorkville begins by asserting that the local siting authority's role is "both quasi-legislative and quasi-adjudicative" (Yorkville's brief at p. 4 citing *Waste Mgmt. v. Kankakee County Bd.*, PCB 04-186 (Jan. 24, 2008). Then, Yorkville categorically declares, as though with authority, that the courts and the Board have "refused to allow questioning into the

thought process of either the decisionmaking body as a whole or individual decisionmakers." (Yorkville's brief at 4). However, despite this proclamation, Yorkville then concedes that just such an inquiry is permissible in cases of bad faith or improper behavior, or under "very special circumstances."

Notably, of the Board decisions cited by Yorkville in support of its argument, most are fifteen to twenty years old, and only two have been issued subsequent to *Birkett*, which was decided in 1998. Of the two cited cases that were decided since *Birkett*, both acknowledge the appropriateness of an inquiry into the decisionmaking process under certain circumstances, especially where there is a showing of government misconduct. The appropriateness of an inquiry into the decision-making process where there is a showing of misconduct is consistent with *Birkett*, in which the Supreme Court opined that an inquiry into the decisionmaking process is particularly important where, as here, government is accused of misconduct. 184 Ill.2d at 530.

Yorkville goes on to cite several cases that discuss whether it is necessary to show that the decisionmakers looked at the record. Once again, the cases cited by Yorkville are inapposite inasmuch as this motion does not seek to prove that the Council Members failed to review the record. Rather, the motion seeks information relating to the impropriety of the City's creation of an after-the-fact resolution that purports to reflect the May 24, 2007 vote of the City Council members. It is information pertaining to this procedural impropriety that is being withheld by Attorney Dombrowski, and that is the subject of this motion.

Yorkville tries to distinguish *Birkett* by relying on *Thomas v. Page*, 361 Ill.App.3d 484, 837 N.E.2d 483 (2nd Dist. 2005), a case discussed at length by Fox Moraine in its Response in Opposition to Yorkville's Motion in Limine #2, at pp. 3-4. As discussed in Fox Moraine's Brief in Response to Motion in Limine #2, the Appellate Court in *Thomas* took great pains to

circumscribe its holding, declaring that its holding that a deliberative process privilege exists with respect to the court system applies solely and exclusively to the judicial branch of government, and to no other branch of government. *Id.* at 494. In fact, the Appellate Court noted that *Birkett* remains controlling with respect to the lack of any deliberative process privilege for municipalities. *Id.* Thus, it is irrelevant that certain aspects of the siting decision process may be deemed quasi-adjudicatory. *Thomas* is clear in its holding that the privilege applies to the judicial branch of government, not to adjudicatory activities. *See id.*

Yorkville goes on to argue, by footnote, that the inquiry of the Council Members should also be barred because the Board cannot consider "new or additional evidence." (Yorkville's brief at FN 2.). Contrary to this assertion, the Board and the courts have long held that additional information outside the record can be crucial in a fundamental fairness challenge. *See, e.g. E & E Hauling, Inc. v. Pollution Control Bd.*, 116 Ill.App.3d 586, 593, 451 N.E.2d 555, 562, 71 Ill.Dec. 587, 594 (2nd Dist.1983) (declaring that the exclusion of information outside the record "could visit unjust results on parties actually victimized by unfair or improper procedures not of record. To shield off-record considerations from judicial review would frustrate the purposes of review since the statute directs the PCB to consider the fundamental fairness of the procedures at the County Board level"). Thus, Yorkville's footnote argument is unsupported by law.

VI. Whether the Resolution that the Council Members Believed They Were Passing is the Same as the Resolution Used to Purportedly Deny Siting is Relevant to These Proceedings

Yorkville concludes its brief by asserting that "whether the final written decision was what [the Board] expected" is irrelevant to these proceedings. (Yorkville's brief at 9). This declaration ignores the requirements of the Environmental Protection Act, which assigns to the local siting authority the responsibility for hearing evidence and voting on whether to allow

siting. 415 ILCS 5/39.2(a). Here, however, the Council Members voted on one resolution, only to have a different resolution used to purportedly authorize a denial of siting. An inquiry into whether the resolution used to deny siting was consistent with the votes cast by the Council Members' on May 24, 2007 is absolutely germane to the determination of fundamental fairness of the proceedings below. Therefore, Yorkville's attempt to deny any inquiry into the difference between the votes cast by Council Members and the resolution that was ultimately claimed to represent those votes is improper, inasmuch as the Board's rules provide for the discovery of "[a]ll relevant information and information calculated to lead to relevant information... 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. 35 Ill.Adm.Code 101.616(a). The Board's rules further provide that non-disclosable information is limited to:

> information which constitutes a trade secret; information privileged against introduction in judicial proceedings; internal communications of the several agencies; information concerning secret manufacturing processes or confidential data submitted by any person under the Act [415 ILCS 5/7(a)].

35 Ill.Adm.Code 101.202.

The highest court in this State has spoken on the subject of deliberative process privilege, and it has expressly refused to acknowledge the privilege. *See Birkett*, 184 Ill.2d at 530. Thereafter, in *Thomas v. Page*, the Appellate Court declared that *Birkett* remains the law, and that the only exception to the rule in *Birkett* applies solely and exclusively to the judiciary branch of government, and expressly does not apply in the context of municipal decision-making.

VII. The City Council Waived Any Deliberative Process Privilege

Even if a deliberative process privilege existed in Illinois, the City Council knowingly waived any such privilege by conducting its deliberations not in a private and/or confidential setting, but rather, in an open, public forum, before a live audience, with a court reporter transcribing the entire deliberative process. In light of its full and knowing disclosure of the deliberative process, the City should not now be heard to complain that those very public deliberations should now be viewed as confidential and "privileged."

Conclusion

Even if the Supreme Court's holding in *Birkett* case could be ignored, many of the questions at issue in the Petitioner's motion did not inquire why Council Members voted a particular way, how they arrived at their decisions, or why they credited some evidence and discredited other evidence.

Furthermore, as a whole, the inquiry objected to by Attorney Dombrowski turned squarely on whether the after-the-fact resolution created by the City attorney, based upon the attorney's own discretionary additions and deletions, which was never submitted to a vote, accurately reflects the May 24, 2007 votes cast by Council members on the statutory siting criteria of Section 39.2(a) of the Environmental Protection Act, and their findings as expressed publicly in a forum before a live audience. Such questions represent a fair inquiry into whether Council Members Leslie and Werderich knew what was occurring, procedurally, on May 23 and May 24, 2007, what these members found (as evidenced by their respective comments and observations in an open meeting) and what they believed they were voting on.

In this appeal, which challenges the fundamental fairness of the siting proceedings and decision, the Petitioner has the right to know whether the resolution (which appears to indicate a denial as to all criteria) is an accurate depiction of the Council members' findings. This inquiry

into whether the after-the-fact resolution accurately depicts the findings and votes cast by the local siting authority on May 24, 2007 is therefore clearly appropriate. Moreover, questions regarding the Council Members' opinions concerning the hearing officer's report and the expert staff's report are appropriate in light of the fact that the recommended conditions of approval from those reports were incorporated in the purported resolution of the City Council.

With respect to the questions delving into the "why" and "how" of the Council members' votes, the improprieties and misconduct of the governmental body which are at issue in this appeal make this a case where it is appropriate to examine the deliberative process to determine whether the proceedings were, in fact, fundamentally fair.

WHEREFORE, Fox Moraine prays for an order directing Aldermen Leslie and Werderich to answer the questions set forth in Exhibit A to the Motion to Compel, and similar questions related to the answers provided.

Respectfully submitted,
FOX MORAINE, LLC

Date: _____ By: _____
One of its attorneys

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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:

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