

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

FOX MORaine’S RESPONSE TO YORKVILLE’S MOTION IN LIMINE #6

NOW COMES Fox Moraine Landfill, LLC hereinafter (“Fox Moraine”), by its attorneys, George Mueller and Charles Helsten, and in opposition to Yorkville’s Motion in Limine #6, states as follows:

Introduction

Yorkville’s Motion #6 seeks to bar the introduction of any evidence of the City Council’s meetings, including minutes, transcripts, or video recordings. Presumably realizing that it has no basis for excluding the records of public meetings, and, indeed, offering no basis whatsoever for the requested exclusion, Yorkville demands that in the alternative, Fox Moraine be required to disclose to Yorkville in advance the exact portions of the evidence Fox Moraine will rely upon in making its case. (Motion at ¶¶ 2, 3). Yorkville asserts this is necessary so that Yorkville will be able to formulate all of its objections in advance. (Motion at ¶¶2, 3).

Although it would unquestionably be convenient for Yorkville if Fox Moraine were to be prevented from introducing any evidence of fundamental fairness violations by excluding all evidence of the City Council’s conduct or statements, there is no authority for such a ruling, particularly where, as here, the materials Yorkville seeks to exclude are public records.

Moreover, Fox Moraine is not required to reveal its trial strategy in detail in advance of

the hearing to facilitate Yorkville's preparation of objections. Fox Moraine accordingly responds that it declines to pinpoint the minutiae of its strategy and its case in advance of the hearing.

Argument

The Act mandates that the Board consider the fundamental fairness of the procedures used by the respondent in reaching its decision. 415 ILCS 5/40.1(a) (2006). In that regard, it is axiomatic that a party appearing before an administrative tribunal has the right to be judged by an unbiased decision maker. *See, e.g., Ferguson v. Ryan*, 251 Ill.App.3d 1042, 1049, 623 N.E.2d 1004, 1009, 191 Ill.Dec. 414, 419 (3rd Dist.1993). Here, Fox Moraine was denied that right, and the denial of fundamental fairness is the crux of the appeal. Therefore, the crucial evidence in the case will be the evidence of the absence of fundamental fairness in the proceedings.

Although there is a presumption that administrative decision makers are persons of "conscience and intellectual discipline" who are able to fairly and objectively judge a matter based on its own facts, and may be presumed to set aside their own personal views, a claimant may nevertheless show bias or prejudice if the evidence might lead a disinterested observer to conclude that the administrative body, or its members, had in some measure adjudged the facts as well as the law of the case in advance of hearing it. *Rochelle Waste Disposal L.L.C. v. City Council of the City of Rochelle, Illinois*, PCB 03-218 (Apr. 15, 2004); *Danko v. Board of Trustees of City of Harvey Pension Bd.*, 240 Ill.App.3d 633, 642, 608 N.E.2d 333, 339, 181 Ill.Dec. 260, 266 (1st Dist. 1992); *see also Waste Management of Illinois, Inc. v. Pollution Control Bd.*, 175 Ill.App.3d 1023, 1040, 530 N.E.2d 682, 696, 125 Ill.Dec. 524, 538 (2 Dist. 1988)(citing *E & E Hauling, Inc. v. Pollution Control Bd.*, 116 Ill.App.3d 586, 598, , 451 N.E.2d 555, 71 Ill.Dec. 587 (2nd Dist. 1983), *aff'd* 107 Ill.2d 33, 481 N.E.2d 664, 89 Ill.Dec. 821 (1985)).

Here, to prove its case, Fox Moraine must present evidence that would lead a reasonable

person to conclude it was denied fundamental fairness by the conduct of the proceedings and the decision-makers. The rules provide that evidence is admissible if it is “material, relevant, and would be relied upon by prudent persons in the conduct of serious affairs, unless the evidence is privileged.” 35 Ill.Adm.Code 101.626(a).

Under the circumstances of this appeal, evidence of the proceedings themselves is material and relevant, and is the kind of evidence that would be relied upon by prudent persons in evaluating whether there has been a denial of fundamental fairness. Evidence of the meetings themselves, therefore, offers the best possible evidence of the fundamental fairness violations.

Because the City Council meetings are the events that clearly illustrate the presence, or absence, of fundamental fairness, and because the best evidence of those events are the records that were contemporaneously created to memorialize them, the records are material and relevant to this appeal. Moreover, the rules provide that business records, “whether in the form of any entry in a book or otherwise made as a memorandum or record of any act, transaction, occurrence, or event, may be admissible as evidence of the act, transaction, occurrence, or event.” 35 Ill.Adm.Code 101.626(e). Here, the records at issue include the contemporaneously created minutes of meetings, transcripts, and/or video recordings of the meetings, which were created to record the events depicted therein, and therefore constitute admissible business records.

Yorkville’s argument that if the public records of the meetings are to be used at the hearing, it must be informed of the precise portions and passages to be relied upon (*e.g.*, “date and line” for transcripts, and “date and time” for video excerpts)(Motion at p. 1) is no more availing here than it would be if Yorkville demanded that, with respect to planned use of deposition transcripts for impeachment, its opponent be required to provide citations to page and

line numbers for each statement about which each witness might be examined, and potentially impeached at the hearing. Ultimately, in demanding disclosure of the precise “date and line number” of materials Fox Moraine will rely upon when presenting its case, Yorkville is demanding the disclosure of attorney work product and strategy. Yorkville’s explanation for this demand is that it will allow Yorkville to formulate its objections in advance.

As the Illinois Supreme Court has explained, however, an attorney’s work product that reveals trial strategy is privileged from disclosure in order to “protect the right of an attorney to thoroughly prepare his case and to preclude a less diligent adversary attorney from taking undue advantage of the former’s efforts.” *Waste Management, Inc. v. Int’l Surplus Lines Ins. Co.*, 144 Ill.2d 178, 196, 579 N.E.2d 322, 329, 161 Ill.Dec. 774, 781 (Ill. 1991). Thus, materials prepared in anticipation of litigation that reveal the attorneys’ trial strategy are not subject to disclosure. *See id.*

Here, Yorkville has access to the full minutes, transcripts, and tapes of proceedings, and in any event, the City Council itself is already intimately familiar with what occurred in the proceedings below. There is, therefore, no risk of “surprise,” since the proceedings were experienced first-hand by the Council Members, who have had possession and/or access to all minutes, transcripts, and tapes. The fact that having a roadmap of Fox Moraine’s case would make preparation less taxing for Yorkville’s attorney is no excuse for demanding that Fox Moraine do Yorkville’s work.

Conclusion

Under the Act, the Board has a duty to assess the fundamental fairness of the proceedings, and evidence of the proceedings themselves are the best evidence thereof. Although Yorkville is entitled to know what evidence will be presented at the hearing, it is not entitled to

demand that Fox Moraine disclose its trial strategy, or the minutiae of its case. Just as it would be improper to require a party to disclose in advance exactly which questions a party will ask of a witness, for the purpose of facilitating the preparation of objections in advance, so too, it is improper to demand that Fox Moraine disclose the precise statements or precise moments in the hearing upon which it will rely in presenting its case.

Motion in Limine #6 should accordingly be denied.

WHEREFORE, Fox Moraine respectfully requests that the Hearing Officer deny Yorkville's Motion in Limine #6.

Dated: _____

Respectfully submitted,
On behalf of FOX MORaine, LLC

One of Its Attorneys

<p>Charles F. Helsten Hinshaw & Culbertson LLP 100 Park Avenue P.O. Box 1389 Rockford, IL 61105-1389 815-490-4900 Facsimile (815) 490-4901 chelston@hinshawlaw.com</p>	<p>George Mueller MUELLER ANDERSON, P.C. 609 East Etna Road Ottawa, IL 61350 Telephone (815) 431-1500 Facsimile (815) 815-1501 Gmueller21@sbcglobal.net</p>
--	---