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 April 10, 2009, the undersigned filed with the Illinois Pollution Control Board, 100 West Randolph Street, Chicago, Illinois 60601, Fox Moraine's Response to Yorkville's Motion in Limine #5

Dated: April 10, 2009

Respectfully submitted,

On behalf of FOX MORAINE, LLC

/s/ Charles F. Helsten

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FOX MORAINE'S RESPONSE TO YORKVILLE'S MOTION IN LIMINE #5

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 #5, states as follows:

Introduction

Yorkville's Motion #5 seeks, in essence, to exclude any argument concerning or evidence of the "bias of Council Members" or other evidence establishing the absence of fundamental fairness in the proceedings, and includes a request to exclude argument concerning, or evidence of, the atmosphere at the landfill and pre-landfill hearings and/or the effect that the hearings' atmosphere had on Council members. (Motion at p. 1). Yorkville's Motion accordingly seeks to conveniently exclude any and all evidence that would tend to prove Fox Moraine's claim that the proceedings did not comport with the requirements of fundamental fairness. While it would undoubtedly be helpful to Yorkville if it could exclude all evidence that would tend to prove Fox Moraine's case, and all argument concerning the theories of the case, the exclusion of such argument and evidence would effectively moot this, and indeed any, appeal based on lack of fundamental fairness.

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, a lack of fundamental fairness is at the heart of the appeal, therefore the crucial evidence will be that which establishes that the proceedings did not comport with fundamental fairness, including evidence of bias by the decision-makers.

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)).

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). Here, whether the decision-makers meet the standard articulated above is in doubt, and the evidence showing that they did not meet that standard is

therefore probative of a crucial issue in the case. This makes such evidence material, relevant, and such that it would be relied upon by prudent persons.

a. Yorkville relies upon questions asked by its own attorney to "predict" what Fox Moraine will ask witnesses at the hearing

Yorkville's motion claims that it is "clear from the depositions" that Fox Moraine intends to show that the atmosphere at the pre-landfill and landfill hearings was hostile and threatening, and that this atmosphere intimidated City Council Members. (Motion at pp. 1-2). Interestingly enough, to support this assertion, Yorkville cites a series of colloquies at the depositions of Devin Moose, Jesse Varsho, James Burnham, and Charlie Murphy, which allegedly reveal Fox Moraine's aims in the litigation. (Motion at pp. 2-5).

Remarkably, every one of the colloquies cited involves an exchange between Yorkville's own attorney and the witness, and in each quote the witness is simply answering a question proffered by Yorkville's own attorney, Mr. Dombrowski. The only involvement by Fox Moraine's attorneys in the quoted exchanges is the objections they raise to Mr. Dombrowski's questions, including objections to his repeated attempts to get the witnesses to engage in conjecture or speculation. Therefore, the quoted deposition testimony reveals nothing about what Fox Moraine intends to accomplish with its witnesses.

b. Yorkville mischaracterizes the law in its Motion

In its Motion, Yorkville mischaracterizes the law, stating that the opinions of lay witnesses are *per se* inadmissible (Motion at ¶2). In support of this assertion, Yorkville cites *Freeding-Skokie Roll-Off Svc., Inc. v. Hamilton*, 108 Ill.2d 217 (1985). However, Yorkville conveniently fails to provide the full context of the Supreme Court's comments in *Freeding* regarding the opinions of lay witnesses, thereby both mischaracterizing and misrepresenting the court's statements. What the high court actually said in *Freeding* was that "to be admissible

opinion testimony must be of assistance to the trier of fact," and that opinion testimony of a lay witnesses should be excluded "wherever inferences and conclusions can be drawn by the jury as well as by the witness." *Id.*, 108 Ill.2d at 221-222 (emphasis added). In other words, where the witness is in a unique position to draw inferences and conclusions based on his/her observations, such inferences are not inadmissible. The court went on to explain that to be admissible, opinions or inferences of a lay witness must be "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." *Id., quoting* Fed.R.Evid. 701. This is a far cry from Yorkville's pronouncement that lay witness inferences and opinions are simply barred.

Yorkville further misrepresents the law by asserting that "A witness's speculation as to the thought processes of a decision-maker should also be excluded" (Motion at ¶3). This statement is allegedly supported by *O'Regan v. Arbitration Forums, Inc.*, 246 F.3d 975 (7th Cir. 2001). However, in *O'Regan*, an employment discrimination case, the Seventh Circuit stated that, with respect to a challenged Affidavit in which an employee attested that a supervisor's hiring, employment and termination practices were discriminatory, "[a]ffidavits must be based on personal knowledge...[and] "[s]tatements by a non-decision-maker that amount to mere speculation as to the thoughts of the decision-maker are irrelevant to an inquiry of discrimination." *Id.* at 986. The Seventh Circuit upheld the trial court's ruling striking the Affidavit's conclusory statements which asserted that the employment decisions were discriminatory, because the plaintiff had not "presented any facts in the affidavits that would have supported her claim that AF used the employment agreement as a pretext for discrimination." *Id.* at 987. Thus, the context is that of an Affidavit in a federal discrimination suit, and the statement was stricken because it was unsupported by facts.

In the same vein, Yorkville purports to provide a second authority in support of its assertion, citing *Chiaramonte v. Fashion Bed Group*, 129 F.3d 391 (7th Cir. 1997). Again, however, Yorkville offers only illusory support for its position. In *Chiaramonte*, another employment discrimination case, the Seventh Circuit rejected the plaintiff's alleged "smoking gun" evidence that a firing was related to age, finding that the plaintiff's recollection was unclear and unaccompanied by any facts in support:

> Additionally, Chiaramonte's own recollection was unclear; during his deposition testimony Chiaramonte stated that Singer said, "Age had to be a factor ... but I don't know." Chiaramonte submitted no evidence suggesting that Singer would have knowledge of Elting's motivations for the terminations, and Singer's admission that he "didn't know" demonstrates that he was simply speculating as to Elting's motivations. Singer was not the decision-maker, and his speculations do not provide a basis for charging Elting with discrimination.[citation omitted] Statements by a non-decision-maker that amount to mere speculation as to the thoughts of the decision-maker are irrelevant to our inquiry. Therefore, Singer's alleged statement does not provide the kind of "smoking gun" evidence required for a direct inference of discriminatory intent.

Chiaramonte, 129 F.3d at 397.

Clearly, then, *Chiaramonte* offers no support for Yorkville's assertion.

As the Illinois Supreme Court pointed out in *Freeding*, to be admissible, opinion testimony or inference testimony by a lay witness must be "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." 108 Ill.2d at 221-222; *see also* Fed.R.Evid. 701. Thus, to the extent that witnesses called by Fox Moraine provide testimony which is rationally based upon their perceptions, and is helpful in providing a clear understanding of testimony or the determination of a fact in issue (*e.g.*, whether Council Members were unbiased and able to fairly and objectively judge the application based on its own facts), such testimony is admissible and should therefore not be excluded. There is no authority anywhere for the proposition that lay witnesses are not entitled

to draw conclusions based upon their experiences in life when those conclusions follow their actual observations. That, for example, is why it is proper for a witness to testify that another person appeared to be afraid or angry or happy or any other emotion known to all of us in our everyday experiences. Such ordinary conclusions are not matters for experts only.

It is worth noting, moreover, that under Board precedent, the mental processes of the decision makers in a siting appeal are not protected from inquiry where, as here, and as will be demonstrated at the hearing, there is a strong showing of bad faith or improper behavior. *See, e.g., Waste Management of Illinois, Inc. v. County Bd. of Kankakee County*, PCB 04-186 (Jan. 24, 2008); *Rochelle Waste Disposal L.L.C. v. City Council of the City of Rochelle, Illinois*, PCB 03-218 (Apr. 15, 2004).

Yorkville's argument is styled as a motion in limine, but it is really an advance attack on the weight to be given to certain anticipated evidence, rather than an attack on the admissibility of that evidence. Evidence of a hostile and oppressive atmosphere at pre hearing city council meetings at which matters related to Fox Moraine and to the landfill application were discussed is clearly relevant to support an inference that city council members, who are not judges, but instead ordinary citizens of the community, could have had their independence overwhelmed. More troubling is another inference, clearly supported by the proposed evidence, that council members demonstrated their actual bias by their actions in encouraging or not taking action to stop the hostile atmosphere. It is up to the Board and not to the City to determine the weight that should be given to the evidence.

Conclusion

The Board has a duty to assess the fundamental fairness of the proceeding and, where a fundamental fairness challenged is raised, to ensure that the application was judged by an

impartial and unbiased decision-maker, in reliance on the evidence presented in the proceedings.

Yorkville's motion improperly seeks to bar the testimony of lay witnesses concerning what they observed at the hearings, as well as their opinions and inferences that are rationally based on their perceptions. As explained by the Illinois Supreme Court in *Freeding*, a case cited and relied upon by Yorkville, such testimony is proper where it will be helpful in providing a clear understanding or determination of a matter at issue in the case, which is, here, the fundamental fairness of the proceedings.

WHEREFORE, Fox Moraine respectfully requests that the Hearing Officer deny Yorkville's Motion in Limine #5.

Dated: April 10, 2009

Respectfully submitted,
On behalf of FOX MORAINE, LLC

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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 April 10, 2009, she served a copy of the foregoing upon:

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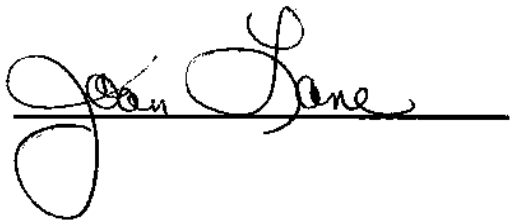

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