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MAR 04 2014

STATE OF ILLINOIS  
Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD

March 4, 2014

TIMBER CREEK HOMES, INC., )  
 )  
Petitioner, )  
 )  
v. )  
 )  
VILLAGE OF ROUND LAKE PARK, ) PCB 14-99  
 ) (Pollution Control Facility  
ROUND LAKE PARK VILLAGE BOARD ) Siting Appeal)  
and GROOT INDUSTRIES, INC., )  
 )  
Respondents. )  
 )



ORIGINAL

**HEARING OFFICER ORDER**

On February 18, 2014, respondent Village of Round Lake Park (Village) filed a motion to quash Timber Creek Homes, Inc. (TCH) subpoena *duces tecum*. (Mot.) On February 19, 2014, TCH filed its response (Resp.). On February 24, 2014, the Village filed its reply.

In summary, the subpoena requests documents related to Dale Kleszynski, an expert in the field of real estate appraisal retained by the Village for the siting hearing. Mr. Kleszynski is a principal and employee of Associated Property Counselors, Inc. (APC). The subpoena also seeks any communications with the Village and Groot Industries, Inc. (Groot), and several of Groot's retained siting witnesses. Mot. at para. 6<sup>1</sup>; Resp. at 2.

**Village's Motion To Quash Supoena**

In a nutshell, the Village makes a blanket objection and argues that the subpoena is overly broad and "outside the scope of these proceedings". Mot. at para. 2, 5, 11. In support, the Village cites to Section 40.1(b) of the Environmental Protection Act (Act) and states that this appeal hearing must "be based exclusively on the record before the county board or the governing body of the municipality". *Id.* The Village also argues that this appeal is void of any facts that would support TCH's fundamental fairness allegation and therefore the subpoena goes beyond the scope of these proceedings as contemplated by Section 40.1 of the Act. *Id.* at para. 11.

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<sup>1</sup> The Village neglected to paginate its motion. Citation to paragraph is required.

Finally, the Village argues that because TCH did not properly raise the fundamental fairness issue at the local siting hearing it would be improper to raise it in this proceeding. *Id.* at para. 12.

### **TCH's Response**

Citing case law, TCH argues that when an issue of fundamental fairness is alleged, as is here, evidence may be introduced where the evidence necessarily lies outside the record. Resp. at 1.

In support of its argument that the information sought may lead to relevant information, TCH alleges that the Village failed to disclose that it was a co-applicant with Groot. TCH further alleges that appraiser Dale Kleszynski, an employee of APC, violated provisions of the Uniform Standards of Professional Appraisal Practice (USPAP) by failing to generate an independent statement and instead generated a report that was “in lockstep support of Groot’s siting application”. Resp. at 3. TCH argues “[t]hat the information sought in the subpoena at issue relates directly to the scope, nature and extent of Kleszynski’s role in, and knowledge of, that effort”. *Id.*

Finally, TCH states that the fundamental fairness issue was indeed raised at the local siting hearing and therefore not waived. Resp. at 4, 5.

### **Village's Reply**

The Village again, citing to Section 40.1 of the Act, argues, *inter alia*, that “the Legislature did not intend to allow time consuming fishing expeditions”. Reply at 5. The Village states that “TCH is not entitled to any of what it seeks in its subpoena *duces tecum*”. Reply at 1. The Village further argues that some of the documents TCH seeks would include attorney-client material or involve work product. Reply at 2.

### **Discussion And Ruling**

On January 23, 2014, the Board accepted TCH’s petition for review that alleged the Village’s procedures were fundamentally unfair and the decision was against the manifest weight of the evidence. Timber Creek Homes, Inc. v. Village of Round Lake Park, Round Lake Park Village Board and Groot Industries, Inc., PCB 14-99 (Jan. 23, 2014).<sup>2</sup>

The purpose of discovery is to uncover all relevant information and information calculated to lead to relevant information. See 35 Ill. Adm. Code 101.616(a). On appeal of a municipality’s decision to grant or deny a siting application, the Board generally confines itself to the record developed by the municipality. 415 ILCS 5/40.1 (b) (2012). However, the Board will hear new evidence relevant to the fundamental fairness of the proceedings where such evidence lies outside the record, including pre-filing contacts. See Land and Lakes Co. v. PCB, 319 Ill. App. 3d 41, 48, 743 N.E.2d 188, 194 (3d Dist. 2000). Pre-filing contacts may be probative of

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<sup>2</sup> The respondents’ respective motions to strike and dismiss are pending before the Board.

prejudgment of adjudicative facts, which is an element to be considered in assessing a fundamental fairness allegation. American Bottom Conservancy (ABC) v. Village of Fairmont City, PCB 00-200, slip op. at 6 (Oct. 19, 2000). Further, the courts have indicated that fundamental fairness refers to the principles of adjudicative due process and a conflict of interest itself could be a disqualifying factor in a local siting proceeding if the bias violates standards of adjudicative due process. E & E Hauling v. PCB, 116 Ill. App. 3d 586, 596, 451 N.E.2d 555, 564 (2d Dist. 1983), *aff'd* 107 Ill. 2d 33, 481 N.E.2d 664 (1985). The manner in which the hearing is conducted, the opportunity to be heard, whether ex parte contacts existed, prejudgment of adjudicative facts, and the introduction of evidence are important, but not rigid, elements in assessing fundamental fairness. Hediger v. D & L Landfill, Inc., PCB 90-163, slip op. at 5 (Dec. 20, 1990).

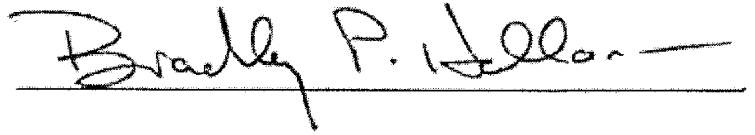
### **Conclusion**

TCH has alleged that the local siting proceedings were fundamentally unfair when the Village failed to disclose that it was a co-applicant with Groot and that the retained appraiser failed to generate an independent review as required by the USPAP. At this time, I find that TCH's subpoena seeking information that lies outside the record might be relevant information or information calculated to lead to relevant information. The Village's motion to quash, with its blanket objection, is denied.

Procedural rules provide that parties may seek Board review of discovery rulings pursuant to 35 Ill. Adm. Code 101.616 (e). The parties are reminded that the filing of any such appeal of a hearing officer order does not stay the proceeding. In statutory decision deadline cases, such as at bar, the hearing officer must manage the case to insure that discovery, hearing and briefing schedules allow for Board deliberation and a timely decision of the case as a whole.

For all of these reasons, the Village's motion to quash is denied in its entirety.

IT IS SO ORDERED.

A handwritten signature in black ink that reads "Bradley P. Halloran" with a horizontal line extending to the right from the end of the name.

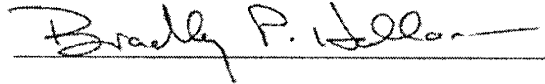
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CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were mailed, first class, on March 4, 2014, to each of the persons on the service list below.

It is hereby certified that a true copy of the foregoing order was hand delivered to the following on March 4, 2014:

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A handwritten signature in black ink, reading "Bradley P. Halloran", is written over a horizontal line.

Bradley P. Halloran  
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