BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

TIMBER CREEK HOMES, INC., Petitioner, v. VILLAGE OF ROUND LAKE PARK, ROUND LAKE PARK VILLAGE BOARD and GROOT INDUSTRIES, INC., Respondents.	)	PCB No. 14-99 (Pollution Control Facility Siting Appeal)

NOTICE OF FILING

PLEASE TAKE NOTICE that on March 28, 2014, there was filed electronically Respondent, GROOT INDUSTRIES, INC.'S RESPONSE TO MOTION FOR EXPEDITED REVIEW OF HEARING OFFICER ORDER, a copy of which is hereby attached and served upon you.

Dated: March 28, 2014

Respectfully submitted,

On behalf of GROOT INDUSTRIES, INC.

/s/ Richard S. Porter
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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GROOT INDUSTRIES, INC.'S RESPONSE TO MOTION FOR EXPEDITED REVIEW OF HEARING OFFICER ORDER

NOW COMES the Respondent, Groot Industries, Inc. ("Groot"), and respectfully requests that the Petitioner's Motion for Expedited Review of Hearing Officer Order ("Motion") be denied and respectfully requests that the Hearing Officer's Order on discovery be affirmed. In support thereof, Groot states as follows:

I. BACKGROUND

This proceeding is an appeal from a grant of siting approval by the Round Lake Park Village Board ("Village Board") for a pollution control facility to be located in the Village of Round Lake Park ("Village"). Groot's Siting Application was filed on June 21, 2013, and, after an extensive and thorough siting process, including lengthy public hearings, the Village Board granted the Application on December 12, 2013.

On January 31, 2014, Petitioner served upon Groot and the other Respondents a set of document requests and interrogatories that requested information dating from 2008 until the date Groot's Application for Siting was filed.[1] These requests were broad and burdensome in scope and encompassed documents related to two other facilities owned by Groot, which were

[1] Petitioner also served Requests to Admit upon the Village and the Village Board; it did not serve Groot with Requests to Admit, so Groot's objections were limited to the interrogatories and document requests served upon it.

approved by the Village Board in 2009 and 2012. The Petitioner's requests were also not limited to fundamental fairness issues, but instead sought all documents related in any way to contacts between the Respondents. Groot and the other Respondents timely objected to these requests as overbroad and not calculated to lead to relevant information.[2]

On March 20, 2014, Hearing Officer Halloran issued an Order sustaining Respondents' objections to Petitioner's discovery requests related to other facilities owned by Groot. The Order stated that the "siting decision [for the transfer station] is the issue on appeal, not other transfer stations or facilities owned or operated by Groot." Discover Order at 5. Therefore, documents regarding earlier decisions by the Village Board related to other Groot facilities are not relevant in the present proceeding, according to the Hearing Officer Order. Despite the fact that Groot and the other Respondents contend that Petitioner did not preserve its claim of fundamental fairness in the underlying proceeding and is therefore not entitled to *any* discovery, Hearing Officer Halloran did allow Petitioner discovery from the date Petitioner claims it became aware of an alleged "collusive scheme" between the Respondents to the date the Village Board granted Groot's siting application.

Although, as a matter of law, Petitioner should not be allowed any discovery because it did not properly preserve its claim of fundamental fairness in the underlying proceeding, Groot does not challenge the Hearing Officer Order allowing Petitioner discovery for the time frame specified by the Order. Groot respectfully requests that the Hearing Officer Order be affirmed.

II. DISCUSSION

Petitioner, in its Motion for Expedited Review, quotes publicly available meeting minutes from Village Board meetings related to two other facilities owned by Groot, facilities whose

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[2] Respondent the Village of Round Lake Park ("Village") also has objected because Petitioner is requesting information protected by the deliberative process and attorney client privileges.

approval by the Village Board was final between two and five years prior to the current siting matter. Pet'r's Motion ¶ 17. It also quotes an excerpt of testimony by the Village Board's expert appraiser, in which the appraiser openly admitted that he agreed with and was bound by the standard of ethics for his profession. *Id.* ¶ 19. Petitioner ineffectively attempts to use these excerpts to weave a conspiracy theory, the basis of which is not at all clear, but which is apparently based in large part on the fact that the Village Board's witness was a paid expert witness. Petitioner is attempting, by way of this convoluted *post hoc* conspiracy theory, to open the door to challenge decisions by the Village Board that have long since been final and are not appealable.

Despite its claim of a "collusive scheme" among the Respondents that "reached its zenith" during the siting hearing, Petitioner has requested no documents or information after the date of filing of the application in this matter. *See* Pet'r's Mot. Exped. Rev. ¶ 19 & Exh. B, C. Instead, it has requested documents and information from Groot from 2008 to the date of filing and seeks information related to facilities other than the transfer station at issue in the present matter.

The Hearing Officer has discretion under PCB rules to control discovery in this proceeding and limit it to relevant subjects as he did in this case. PCB rules make it clear that discovery in a proceeding such as this is not carte blanche to a petitioner and must be limited to relevant information:

> All relevant information and information calculated to lead to relevant information is discoverable, 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. Admin. Code 101.616(a).

> If the parties cannot agree on the scope of discovery or the time or location of any deposition, the hearing officer has the authority to order discovery or to deny requests for discovery.

35 Ill. Admin. Code 101.616(b).

> The hearing officer may, on his or her own motion or on the motion of any party or witness, issue protective orders that deny, limit, condition or regulate discovery to prevent unreasonable expense, or harassment, to expedite resolution of the proceeding, or to protect non-disclosable materials from disclosure consistent with Sections 7 and 7.1 of the Act and 35 Ill. Adm. Code 130.

35 Ill. Admin. Code 101.616(d).

The discovery standard under Section 101.616 is not an unlimited license to seek such a broad swath of documents. Instead, Petitioner's discovery requests must be narrowed to require the production only of *relevant* information. *See Atkinson Landfill Co. v. IEPA*, 2013 WL 633913, PCB No. 13-8, at *2 (Feb. 14, 2013) ("The scope of discovery in a permit appeal is in part 'controlled by the general issue presented'"). Petitioner has notably not pled collusion, even though it now argues that this scheme was revealed by the Village's meeting minutes as early as 2008. Pet'r's Motion ¶ 16. Petitioner is apparently attempting to revisit decisions by the Village Board that have been long since final and are not appealable. Further, the documents cited by Petitioner as evidence of its alleged "collusive scheme" were publicly available at the time of the earlier decisions, and nothing precluded Petitioners from reviewing them and making such allegations properly at an appropriate time.

The law simply does not support Petitioner's broad discovery requests. It is a well-established principle that "members of a siting authority are presumed to have made their decisions in a fair and objective manner." *Stop the Mega-Dump v. County Bd.*, 2012 IL App. (2d) 110579, 979 N.E.2d 524 (2012); *Fox Moraine, LLC v. United City of Yorkville*, 2011 IL App. (2d) 100017, ¶ 60 (2011). A petitioner faces a very heavy burden to overcome that presumption. Petitioner must show "that a disinterested observer might conclude that the local

siting authority, or its members, had prejudged the facts or law of the case." *Peoria Disposal Co. v. IPCB*, 385 Ill. App. 3d 781, 798, 896 N.E.2d 460 (3d Dist. 2008) (citing *Waste Management of Ill., Inc. v. IPCB*, 175 Ill. App. 3d 1023, 1040, 530 N.E.2d 682 (1988)).

The burden on Petitioner to show this alleged "collusion" is even higher. Petitioner must show that, as a result of *ex parte* contacts, "the agency's decision was *irrevocably tainted* so as to make the ultimate judgment of the agency unfair." *E & E Hauling v. PCB*, 116 Ill. App. 3d 586, 606-07, 451 N.E.2d 555 (2d Dist. 1983) (emphasis added). As a matter of law, contacts between the Village and Groot or its representatives prior to the filing of the siting application are not considered *ex parte* contacts at all, much less contacts that could have "irrevocably tainted" the Village Board's decision. *See Land & Lakes Co. v. IPCB*, 319 Ill. App. 3d 41, 47-49, 743 N.E.2d 188 (3d Dist. 2000). In *Land & Lakes*, the applicant and the County had pre-filing contacts related to the application, in the form of pre-filing review of the application by the County staff and experts. The PCB held that, "[i]n the absence of any pre-filing collusion between the applicant and the actual decisionmaker . . . the pre-filing contact between [the applicant and County] *could not have deprived* [the petitioner], or any other siting approval opponent, of fundamental fairness." *Id.* (emphasis added); *see also Stop the Mega-Dump v. County Board*, 2011 WL 986687, PCB 10-103 (Mar. 17, 2011) (stating that contacts that occurred prior to the filing of the application related to negotiation of a host agreement and review of the application "were permissible under prior Board precedent" and "were not, by definition, *ex parte* contacts").

Pre-filing contacts with the Village, if such occurred, are generally allowable under Board precedent and are not an appropriate basis for finding that a proceeding was fundamentally unfair, much less for allowing discovery regarding decisions made years prior to the presently challenged decision. *Id.* at *38, 40 (noting that, in the absence of evidence of pre-

filing collusion between the applicant and the decision maker, pre-filing contacts are not relevant to the fundamental fairness inquiry). Pre-filing contacts related to completely different facilities are even less relevant. In this matter, over Respondents' objections, the Hearing Officer is nonetheless allowing limited discovery into pre-filing contacts as of the date of hiring of the expert whose opinion Petitioner now claims may have been unfair. The hiring of that expert is the lynch-pin of Petitioner's new collusion argument. Thus, the Hearing Officer properly employed his discretion by using the retention date of that witness to allow for discovery by an objector while avoiding subjecting the applicant and the Village to over-burdensome, harassing, and irrelevant discovery.

Petitioner never raised the issue of an alleged "collusive scheme" it now claims was in existence as early as 2008. It is inarguable that under Illinois law, a claim of fundamental fairness must be promptly raised in the underlying hearing, "because *it would be improper to allow the complainant to knowingly withhold such a claim and to raise it after obtaining an unfavorable ruling.*" *Peoria Disposal Co.*, 385 Ill. App. 3d at 798 (emphasis added) (citing *E & E Hauling*, 116 Ill. App. 3d at 606-07). It would be equally improper to allow a petitioner essentially unfettered discovery going back years prior to the present decision to fish for evidence of this "collusive scheme" Petitioner only now raises.

This is particularly underscored by the fact that Petitioner seeks discovery regarding the host agreement negotiations for the proposed transfer station and regarding other facilities owned and operated by Groot, whose approval is long past and not appealable. Appeal of a siting decision is, by statute, an expedited process limited to 120 days. Discovery in such a proceeding is limited to documents related to properly raised fundamental fairness issues. *See, e.g., E&E Hauling, Inc. v. PCB*, 116 Ill. App. 3d 586, 451 N.E.2d 555 (2d Dist. 1983). "Due process

requirements are determined by balancing the weight of the individual's interest against society's interest in effective and efficient governmental operation." *Waste Management of Ill. v. PCB*, 175 Ill. App. 3d 1023, 1037, 530 N.E.2d 682, 693 (2d Dist. 1988). It would certainly not be either effective or efficient governmental operation, or result in the statutorily mandated expedited process, to allow a petitioner to re-visit a local government's earlier decisions simply because they involved the same applicant. The pre-filing discovery sought by Petitioner related to contacts between the Village and Groot regarding separate facilities and the host agreement was not raised and *cannot* be a basis for a fundamental fairness claim, nor would it lead to effective or efficient governmental operation. The information sought by Petitioner is not relevant or discoverable.

WHEREFORE, Respondent Groot Industries Inc. respectfully requests that the Pollution Control Board affirm the Hearing Officer Order on Discovery.

Dated: March 28, 2014

Respectfully submitted,

On behalf of GROOT INDUSTRIES, INC.

/s/ Richard S. Porter
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STATE OF ILLINOIS)
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COUNTY OF WINNEBAGO)

The undersigned certifies that on **March 28, 2014**, a copy of the foregoing **Groot Industries, Inc.'s Response to Motion For Expedited Review of Hearing Officer Order** was served upon the following:

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