

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

TIMBER CREEK HOMES, INC.,	)	
	)	
Petitioner	)	
	)	
v.	)	No. PCB 2014-099
	)	(Pollution Control Facility Siting Appeal)
	)	
VILLAGE OF ROUND LAKE PARK,	)	
ROUND LAKE PARK VILLAGE BOARD)	)	
and GROOT INDUSTRIES, INC.,	)	
	)	
Respondents	)	

**NOTICE OF FILING**

To: see service list

**PLEASE TAKE NOTICE** that on February 24, 2014 before 4:30 p.m., I filed the attached reply regarding RLP's Motion to Quash Subpoena with the Clerk of the Illinois Pollution Control Board, copies of which are hereby served upon you by email.

By: *Glenn C. Sechen*  
The Sechen Law Group, PC  
Attorney for the  
Village of Round Lake Park

**Certificate of Service**

The undersigned hereby attorney certifies that on the 24th day of February, 2014, a copy of the above was filed and served by email, as agreed by counsel, upon the persons shown in the Service List:

*Glenn C. Sechen*  
The Sechen Law Group, PC  
Attorney for the  
Village of Round Lake Park

Glenn C. Sechen  
The Sechen Law Group, PC  
13909 Laque Drive  
Cedar Lake, IN 46303  
312-550-9220  
[glenn@sechenlawgroup.com](mailto:glenn@sechenlawgroup.com)

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	)	
<b>Respondents</b>	)	

**VILLAGE OF ROUND LAKE PARK's REPLY  
TO TCH's RESPONSE RE  
MOTION TO QUASH SUBPOENA**

The Village of Round Lake Park ("RLP") hereby replies to the response of Timber Creek Homes, Inc. ("TCH") to RLP's Motion to Quash Subpoena as follows:

1. Fundamentally, TCH misses the mark.<sup>1</sup>
2. TCH is not entitled to any of what it seeks in its subpoena *duces tecum* served on Village of Round Lake Park's ("RLP's"), sole witness, Dale Kleszynski ("Kleszynski") and his firm, Associated Property Counselors, Ltd. ("APC").<sup>2</sup>

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<sup>1</sup> In light of TCH's references to counsel personally and the Hearing Officers admonishment to act civilly, RLP will refer to both TCH and its counsel as TCH. TCH ascribes something sinister to RLP's questions on cross examination of its Needs expert failing to recognize that questions were a direct result of the direct examination of that witness wherein he testified to "business decisions". RLP is entitled to probe the witness utilizing questions in the nature of hypothetical questions in an attempt to determine the interplay between "business decisions" in that witnesses mind, what differentiates business decisions from Need and how all of these things relate to his opinion. *Eg.* Record C03216 – 17. *See also*, Record C03236 – 39.

<sup>2</sup> TCH refers to RLP as VRLP. RLP is not the Village Board which is referred to as and to the Village Board or as the "RLP Board".

**TCH SEEKS MORE THAN ALLOWED  
IN A SECTION 40.1 APPEAL:**

3. Section 40.1(b) provides, among other things, “such hearing to be based exclusively on the record before county board or the governing body of the municipality. The burden of proof shall be on the petitioner.”

4. TCH seeks documents related to events subsequent to the Village Board’s grant of siting (“to the present”).

5. By definition material related to anything that post dates the decision which is being appealed are neither relevant nor material to any issue in this appeal and are not likely to lead to any admissible evidence.

6. However, TCH seeks more, much more.

7. TCH seeks all documents relating to or reflecting the retention of Mr. Kleszynski and APC, the services rendered to RLP as well as documents relating to or reflecting all meetings and communications between anyone acting or purporting to act on behalf of RLP and its attorney.

8. These documents would include the communications with RLP counsel and material that went into Mr. Kleszynski report and testimony.<sup>3</sup> This material is calculated to obtain information related to the mental impressions of counsel, hearing strategy and all of that falls into the attorney work product privilege. Significantly, the

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<sup>3</sup> The subpoena includes all communications with elected officials and rest of what is sometimes referred to as Village staff. Note, however, that elected officials does not include the Village Board as the Village Board is a separate party to this appeal and is referred to by TCH as the RLP Village Board. In general, if there is anything that could be relevant a Section 40.1 appeal it, under normal circumstances, would relate to contacts with the decision maker, the Village Board. However, such is not sought by TCH here.

material sought may have been, at least, relevant to the hearing below but not to this appeal.

9. The documents sought include those that relate to what Mr. Kleszynski testified to at the hearings which testimony was on the record and subjected to extensive cross examination by TCH. In other words, TCH now seeks, *ex post facto* discovery regarding testimony that is included in the record before the Board. Record C03742 – 164, C02401 – 21.

10. The documents subject to the subpoena at issue include all meetings and communications between anyone acting or purporting to act on behalf of Groot Industries (“Groot”) and those who were called to testify by Groot and their respective firms and, as with all of the materials subpoenaed, TCH seeks documents which post date the decision by the Village Board.<sup>4</sup>

11. Contact with the applicant and those called to testify by an applicant and their respective firms could constitute *ex parte* contacts or be in the nature of *ex parte* contacts and could be discoverable if within the scope of a properly pled petition.

12. However, nothing regarding *ex parte* contacts or collusion was pled in the TCH Petition nor did TCH allege that the Village Board had any knowledge of

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<sup>4</sup> TCH relies on Stop the Mega-Dump v. County Board of De Kalb County, 2012 IL App (2d) 110579, ¶11 (2012), citing Land & Lakes Co. v. Pollution Control Board, 319 Ill.App.3d 41, 48 (3rd Dist. 2000). In Stop the Mega-Dump the third party objectors attempted to show predetermination by *ex parte* contacts prior to the filing of the application. There, the Appellate Court held that the County Board acts in a quasi-legislative capacity prior to the filing of the application and once filed, the County Board acts in a quasi-judicial capacity. The Stop the Mega-Dump court further held that, by definition, there can be no pre filing *ex parte* contacts prior to the filing of the application. By the same logic, the same is true post decision contacts.

anything outside of the record and such requests are, hence, neither relevant nor material to these proceedings.<sup>5</sup>

**TCH SEEKS MORE THAN ALLOWED BASED ON ITS WHAT TCH PLED IN ITS PETITION:**

13. Based on what TCH pled in its petition it is not entitled to any of what it seeks in its subpoena of the Village of Round Lake Park's ("RLP"), sole witness, Mr. Kleszynski or his firm, APC.

14. Paragraph 7 of TCH's Petition states in relevant part that, "The local siting review procedures, hearings, decision, and process, individually and collectively, were fundamentally unfair ..."

15. No matter how that vague and conclusory language is interpreted it cannot be broadened to the point that covers pre-filing and post decision occurrences as the allegations are limited to those related to the siting review which commenced no earlier than the filing of the application and ended with the grant of local siting approval.

16. Nor can language in the TCH petition be interpreted as alleging any misconduct on the part of Mr. Kleszynski, APC or RLP which could have led to any alleged predetermination.

17. No matter how the vague and conclusory allegations of the TCH petition are interpreted, they cannot be interpreted to include anything that did not come to the

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<sup>5</sup> See Generally, Land and Lakes, Co. v. IPCB, 319 Ill.App.3d 41, 48, 743 N.E.2d 188 (3<sup>rd</sup> Dist. 2000), Fairview Area Citizens Taskforce v. PCB, 198 Ill. App. 3d 541, 555 N.E.2d 1178 (3<sup>rd</sup> Dist.1990). Predetermination is a conclusion which must be pled by pleading facts which support that conclusion. The term *ex parte* does not even appear in the TCH Petition nor does any similar term. The TCH Petition is void of any allegation of misconduct or allegation of misdeeds by RLP, its sole witness, Mr. Kleszynski or his firm, APC.

Village Board's attention. If it didn't come to the Village Board's attention it could not have caused predetermination and that includes anything contained in Mr. Kleszynski's documents regarding his preparation to testify and the preparation of his report. Absent some sort of *ex parte* communication, all of what the Village Board knows about Mr. Kleszynski has to be contained in the record and there is absolutely nothing in the TCH petition even tends to support going beyond the record.

18. Section 40.1 appeals are based on the record and that section of the Act contains a 120 day time limitation because the Legislature did not intend to allow time consuming fishing expeditions.

**WHEREFORE**, Respondent, the Village of Round Lake Park, respectfully requests that the Pollution Control Board enter an order quashing the subpoena *duces tecum* for documents of the Village of Round Lake Park's expert real estate appraiser and his firm, Dale Kleszynski and Associated Property Counselors, Ltd and indicated herein.

Respectfully submitted,  
Village of Round Lake Park

By Glenn C. Sechen  
One of Its Attorneys

Glenn C. Sechen  
The Sechen Law Group, PC  
13909 Laque Drive  
Cedar Lake, IN 46303  
312-550-9220

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**SERVICE LIST**

**CLERK AND DEPUTY CLERK, VILLAGE OF ROUND LAKE PARK**

Karen Eggert, Clerk  
Cindy Fazekas, Deputy Clerk  
Village of Round Lake Park  
203 E. Lake Shore Drive  
Round Lake Park, IL. 60073  
keggert@villageofroundlakepark.com  
Cfazekas@RoundLakePark.us

**COUNSEL FOR THE VILLAGE BOARD  
VILLAGE OF ROUND LAKE PARK**

Peter Karlovics  
Magna & Johnson  
495 N. Riverside Drive  
Suite 201  
P.O. Box 705  
Gurnee, Illinois 60031  
pkarlovics@aol.com

**COUNSEL FOR TIMBER CREEK HOMES**

Michael S. Blazer  
Jeffery D. Jeep  
Jeep & Blazer, LLC  
24 N. Hillside Avenue  
Suite A  
mblazer@enviroatty.com  
jdjeep@enviroatty.com

**COUNSEL FOR GROOT INDUSTRIES**

Charles F. Helsten  
Richard S. Porter  
Hinshaw Culbertson  
100 Park Avenue  
P.O. Box 1389  
Rockford, IL 61105-1389  
chelsten@hinshawlaw.com  
rporter@hinshawlaw.com

George Mueller  
Mueller Anderson & Associates  
609 Etna Road  
Ottawa, IL 61350  
george@muelleranderson.com

Peggy L. Crane  
Hinshaw & Culbertson LLP  
416 Main Street, 6<sup>th</sup> Floor  
Peoria, IL 61602  
pcrane@hinshawlaw.com