

**BEFORE THE VILLAGE BOARD OF THE VILLAGE OF ROUND LAKE PARK
SITTING AS POLLUTION CONTROL FACILITY SITING AUTHORITY**

IN RE:)
)
APPLICATION FOR LOCAL SITING) 03 -01
APPROVAL FOR GROOT INDUSTRIES)
LAKE TRANSFER STATION)

TIMBER CREEK HOMES’ MEMORANDUM REGARDING CRITERION 6

Timber Creek Homes, Inc. (“TCH”), as a Participant in the hearing on the above siting request, and pursuant to the Hearing Officer’s directive, hereby submits its Memorandum regarding the requirements of Criterion 6 of the Pollution Control Facility Siting Statute (the “Siting Statute”).

I. THE SCOPE OF CRITERION 6 OF THE SITING STATUTE IS NOT LIMITED TO THE IMMEDIATE AREA AROUND THE PROPOSED FACILITY

Criterion 6 of the Siting Statute expressly provides that the applicant for siting approval has the burden of proving that “the traffic patterns **to or from the facility** are so designed as to minimize the impact on existing traffic flows [emphasis added]”. 415 ILCS 5/39.2(a)(vi) During the siting hearing, counsel for Groot Industries, Inc. (“Groot”) asserted that the scope of Criterion 6 is limited to "traffic patterns at the facility". (09/25/13, Session 1, Tr. 65)¹ This assertion is purportedly based on *Fox Moraine, LLC v. United City of Yorkville*, 2011 IL App (2d) 100017 (2nd Dist. 2011), appeal denied __Ill.2d __, 968 N.E.2d 81 (2012). According to Groot’s counsel, “the *Fox Moraine* court seems to emphasize the area around the immediate vicinity of the proposed facility.” (09/26/13, Session 1, Tr. 18-19) Indeed, from the very beginning of the siting hearing, Groot’s counsel asserted that the Criterion 6 obligation is limited to minimizing “impacts on traffic patterns going in and out of the facility”. (09/23/13, Session 1,

¹ References to the transcript of the Hearing in this matter will be cited by the transcript date, session number for that day, and page number.

Tr. 23) Groot's assertions of a court-created limitation on the express language of Criterion 6 are contrary to both the requirements of Criterion 6 and the case law construing those requirements.

A. Groot's Traffic Engineer Acknowledged That The Scope Of Criterion 6 Is Not Limited To The Facility Entrance

It is important to recognize the obvious – Criterion 6 does not limit its scope to “the immediate area into or out of” the facility. The operative language is “traffic patterns to or from” the facility. Nor does Criterion 6, or the cases that have construed it, require an abandonment of accepted traffic engineering principles. Michael Werthmann (“Werthmann”), the traffic engineer retained by Groot, prepared the Criterion 6 portion of the subject Siting Application (the “Application”). (09/25/13, Session 1, Tr. 16) Werthmann acknowledged that Criterion 6 requires an analysis of the routes serving the facility, and a demonstration that the impact on those routes has been minimized. (09/25/13, Session 1, Tr. 18)

According to Werthmann, the Criterion 6 traffic analysis is based on a methodology accepted in the transportation industry. (09/25/13, Session 1, Tr. 50-51; 52) It includes an examination of the physical and operating characteristics of the roadway system – that is the “base condition” upon which the balance of the analysis is premised. (09/25/13, Session 1, Tr. 18-19, 51-52)

Werthmann's examination of the existing roadway system involved a field investigation aimed at defining and quantifying that system's physical and operating characteristics. (09/25/13, Session 1, Tr. 19-20) The analysis also included a determination of the facility's characteristics. Werthmann acknowledged that this is important in order to determine “the type and volume of traffic that will be generated and **the routes that they will be using to get to the facility** [emphasis added]”. That data is analyzed in order to determine “what the impact is on the roadway system”. (09/25/13, Session 1, Tr. 28-29) Werthmann also conducted a capacity

analysis to determine the ability of the intersections that will be used by the transfer station traffic to accommodate the traffic flow. (09/25/13, Session 1, Tr. 40-42, 53; Groot Exhibit 8, Slide 31)

Werthmann admitted that 100% of the 24-ton transfer trailers and 35% of the collection vehicles would travel to and from the proposed facility via Illinois Route 120, west of Cedar Lake Road – the transfer trailers to and from the Winnebago landfill and the collection vehicles from parts unknown. (09/25/13, Session 1, Tr. 31-32, 33, 35, 65-67; 68-69; Application, p. 6-10; Groot Exhibit 8, Slide 21, 23) Based on the number of truck trips identified by Werthmann (Groot Exhibit 8, Slide 25),² those percentages reflect a total of 64 to 76 round trips by transfer trailers, and 78 to 94 round trips by collection vehicles.

Werthmann also admitted that the specific routes being used are themselves one of the ways in which impacts to existing traffic flows are intended to be minimized. (09/25/13, Session 1, Tr. 32) Nevertheless, despite the critical importance of the specific roadways to be used in the context of a Criterion 6 study, Werthmann's analysis to the west of the proposed facility stopped at the intersection of Cedar Lake Road and Route 120. (09/25/13, Session 1, Tr. 21-22, 35, 55; Application, p. 6-16 to 6-22; Groot Exhibit 8, Slides 13, 26, 29) Indeed, Werthmann does not know what routes will be used by the transfer trailers to go to and come from the Winnebago Landfill. (09/25/13, Session 1, Tr. 70-72) Nor, for that matter, did Werthmann provide any information of any kind regarding what routes any of the transfer station traffic would use west of Cedar Lake Road.

Werthmann candidly acknowledged the essential requirements of a proper Criterion 6 analysis discussed above – they are the same requirements for a proper traffic analysis for any

² Shaw Environmental provided Werthmann with the information on the number of truck trips. (09/25/13, Session 1, Tr. 36, 49) The facility will handle as much as 900 tons or more per day of waste. (09/25/13, Session 1, Tr. 86, 100; Application p. 2.4-1)

type of development, and a matter of sound traffic engineering practice. (09/25/13, Session 1, Tr. 50-51; 52) Yet Werthmann never explained why he stopped at Cedar Lake Road. He did, however, identify a number of potential routes that transfer trailers could utilize to get to and come from the Winnebago Landfill. (09/25/13, Session 1, Tr. 71-72) But he provided no information of any kind, either in the Application or in his testimony, regarding how any of the trucks might get to and come from those routes. More important for the purpose of the type of analysis that Werthmann admitted is required under Criterion 6, Werthmann provided no information regarding the “physical and operating characteristics” of that portion of “the roadway system”.

This is the principal point made by TCH’s traffic expert, Brent Coulter (“Coulter”). Coulter is an experienced and highly qualified traffic engineer. (09/26/13, Session 1, Tr. 5-9; TCH Exhibit 5) Groot and its legal team clearly recognize Coulter's expertise and qualifications in the field of traffic engineering. Indeed, Groot's lead counsel had sought to retain Coulter to conduct an independent review of Werthmann's traffic analysis in this matter. (09/26/13, Session 1, Tr. 9-11)³

Coulter's conclusion that Groot has not satisfied Criterion 6 is based on the absence of any routing information beyond the immediate vicinity of the proposed transfer station. No information of any kind was provided for the area west of Cedar Lake Road. Coulter agreed with Werthmann that sound traffic engineering involves two principal factors: the traffic component (roadway analysis) and the location specific component (the directional distribution). Coulter

³ Groot’s counsel sought to diminish this acknowledgment of Coulter’s expertise by pointing out that Coulter works out of a home office. (09/26/13, Session 1, Tr. 25) Evidently, at least according to Groot and its lawyers, an experienced and highly qualified traffic engineer who works out of a home office is somehow, by that virtue, less credible than one who works exclusively for garbage companies. Coulter’s “incapacity” was obviously not relevant when Groot’s lawyer tried to hire him. That tactic speaks volumes about the approach Groot and its lawyers took in this matter. Groot’s counsel also sought to make headway by asserting that Coulter had not memorized the exact language of Criterion 6 for his testimony, despite Coulter’s confirmation that he understood the statutory requirement and had taken its language into account in rendering his opinion. (09/26/13, Session 1, Tr. 31-32, 34)

concluded that the complete absence of any information beyond the immediate vicinity of the proposed facility, where so much of the heavy truck traffic would go, and how the impact from that traffic had been considered and minimized, did not meet either sound traffic engineering principles or the requirements of Criterion 6. (09/26/13, Session 1, Tr. 21-22, 24-25, 34-35, 48, 68; TCH Exhibit 6, p. 4)

In this regard, Round Lake Park's attorney, as he did so often during the hearing in his ongoing effort to support Groot on the Village's behalf, mischaracterizes the facts in his Memorandum on Criterion 6. First, counsel does not cite to a single case in support of his concerns about "practical considerations". More to the point, counsel asserts that:

Here the Applicant noted that the facility will utilize the Winnebago Landfill. While there is nothing to suggest that the Applicant could not or does not intend to use other disposal facilities, Timber Creek Homes ("TCH") claims that the Applicant must disclose the entire route to the Winnebago Landfill and other disposal facilities it intends to utilize. Apparently it is TCH's position that such routes must be developed and set forth in the application complete with the type of analysis impact minimization historically applied to the area more proximate to the facility entrance/exit.

(Village Memorandum at 1)

As noted above, Werthmann acknowledged that there are a number of ways for trucks to come and go once they pass Cedar Lake Road on their way to the Winnebago Landfill. Although Groot's counsel tried to inject doubt into the issue of where the waste transfer trailers would go,⁴ Coulter confirmed that his conclusion that the trucks will go to the Winnebago Landfill is based on the confirmation of that fact in the Application. (09/26/13, Session 1, Tr. 36, 63)⁵

⁴ A "doubt" not supported by Groot's own witnesses.

⁵ Even Devin Moose, certainly no paragon of credibility, ultimately admitted that he advised Werthmann that the transfer trailers will go to the Winnebago Landfill. (09/25/13, Session 2, Tr. 24-25)

During Coulter's cross-examination, Groot's counsel speculated about potential routes from the transfer station to the Winnebago Landfill – as had Werthmann. (09/26/13, Session 1, Tr. 54)⁶ Any number of combinations of roads and intersections might be utilized, depending on roadway configurations, intersection capacity, and a multiplicity of other facts that Werthmann did not even mention, much less analyze. That is Coulter's ultimate point – absent any information regarding any roads or intersections beyond the immediate vicinity of the transfer station, or the impact on any such routing, or how that impact has been minimized, Groot cannot demonstrate that it has complied with Criterion 6. (09/26/13, Session 1, Tr. 55-56)

B. The Cases Construing Criterion 6 Focus On The Particular Traffic Issues Before Them, And Have Not Imposed A Blanket Limitation On The Scope Of The Requisite Traffic Analysis

In the first instance, unlike the situation here, the *Fox Moraine* court recognized that Werthmann in that case had in fact identified multiple routes that would be used to access the proposed landfill. 2011 IL App (2d) 100017, ¶113 Further, Werthmann acknowledged in this case that the intersection at Cedar Lake Road and Route 120 is a short distance from the proposed facility. (09/25/13, Session 1, Tr. 11) This is in stark contrast to the area under review in *Fox Moraine*, in Plainfield, which was 15 miles from the facility at issue in that case, as Groot's counsel acknowledged. (09/26/13, Session 1, Tr. 15-16, 18) 2011 IL App (2d) 100017, ¶116

Moreover, the *Fox Moraine* court's review of Coulter's testimony, and that of another traffic engineer, focused on their criticism of the applicant's failure to demonstrate elimination of all traffic impacts in the subject area, rather than minimization of those impacts. *Id.* at ¶116 Rejecting that concept, and the Illinois Pollution Control Board's apparent acceptance of it, the

⁶ That speculation left even the Hearing Officer wondering about where the transfer trailers would go. (09/26/13, Session 1, Tr. 71-72)

court noted that, “The Act does not require elimination of all traffic problems....” *Id.*, citing *Tate v. Pollution Control Board*, 188 Ill.App.3d 994, 1024 (4th Dist. 1989)

This limitation on the scope of the Criterion 6 issue in *Fox Moraine* had also been discussed, and confirmed, by the applicant in the case before the Illinois Pollution Control Board:

Fox Moraine agreed that Mr. Coulter and Mr. Corcoran may be experts, but argued that they misunderstood the criterion and testified on location of the facilities and the impact on the Village of Plainfield. Fox Moraine asserts that the criterion contemplates that there will be traffic impacts, and the applicant must demonstrate that those impacts are minimized.

Fox Moraine, LLC v. United City of Yorkville, PCB 07-146, 2009 WL 6506730, Slip Op. Cite at 75 (IPCB October 1, 2009)

Following the above statement, the *Fox Moraine* court then stated that:

[N]or is the applicant required to provide evidence of exact routes, types of traffic, noise, dust, or projections of volume and hours of traffic, because the Act does not require a traffic plan **but rather a showing that the traffic patterns to and from the facility are designed to minimize impact on existing traffic flows** (*Tate*, 188 Ill.App.3d at 1024, 136 Ill.Dec. 401, 544 N.E.2d 1176). See also *McHenry County Landfill, Inc. v. Environmental Protection Agency*, 154 Ill.App.3d 89, 102, 106 Ill.Dec. 665, 506 N.E.2d 372 (1987) (traffic criterion was not established where the landfill's entrance design did not have a deceleration lane for trucks to make right turns into facility, where road's speed limit of 55 miles per hour was considered hazardous). Here, the entrance was designed to have right and left turn lanes for trucks to use and would also allow trucks to enter the facility at off-hours so that trucks could come after rush-hour times. Fox Moraine did not have to establish that every arterial road would not be affected, just that it designed the entrance to and from the facility to minimize the impact on the roadways. **Downtown Plainfield is quite a distance from the planned landfill site (approximately 15 miles), and since Fox Moraine was not even required to submit planned traffic routes, we question the Board's analysis that Fox Moraine failed to demonstrate that the traffic patterns to and from the facility were designed to minimize the impact on the traffic flow around it.** [Emphasis added]

Id. at ¶116

The foregoing language is the asserted basis for Groot’s argument that the ambit of Criterion 6 is limited to the immediate vicinity of the proposed facility. Most notably, not even Werthmann himself limited his analysis to the “immediate vicinity” – he merely artificially, and without explanation, stopped where a significant portion of the collection trucks, and all of the transfer trailers, would go to and come from. From that perspective, Groot’s position appears to be that the geographic scope of the Criterion 6 traffic analysis is whatever the applicant says it is. It is certainly true that an applicant defines the geographic scope of the proposed facility’s service area, in connection with Criterion 1. But no case has ever provided an applicant with such unilateral control over the scope of its minimization obligation under Criterion 6.

The Village’s attorney also misperceives the language and purpose of Criterion 6 in his Memorandum. According to him, the issue of the scope of the Criterion 6 analysis is one of municipal authority – “what authority one Illinois municipality has to direct and/or approve any type of traffic through any Illinois township, municipality or county other than the siting unit of government itself?” (Village Memorandum at 2) That, of course, is not the meaning of Criterion 6, which doubtless explains why counsel cites no authority to support this assertion. Criterion 6 does not speak of “control” over routes. Rather, it requires the applicant to demonstrate that impacts on the chosen routes have been minimized, regardless of their jurisdictional location. Indeed, counsel’s “concern” is belied by Werthmann’s own analysis, which includes streets and intersections in Round Lake and Hainesville.

The case law in fact demonstrates that the Criterion 6 analysis is fact specific, and is not subject to a blanket limitation regarding its geographic scope. It is important in this regard to recognize that the sole traffic issue in *McHenry County Landfill*, the “entrance design” case cited

by the *Fox Moraine* court, was in fact limited to the entrance design. No other issues at any other roads to and from the facility were raised or addressed. 154 Ill.App.3d at 101-102 That limitation to the facts before the *McHenry County Landfill* court explains why Groot's attorneys are incorrect about their interpretation of *Fox Moraine*. No case has ever held that Criterion 6 is limited in the way Groot's counsel suggest, or that Criterion 6 requires the abandonment of the recognized methodology for conducting a traffic analysis that Werthmann admitted applies to this process.

For example, in *Tate, supra*, also cited by the *Fox Moraine* court, the court noted that, "The IPCB found ample evidence that traffic patterns are designed to minimize impact on traffic flow, citing evidence of **truck routes, road condition, and usage**, location of the access gate and the MCL plan to extend the on-site exit roadway to minimize road mud. [Emphasis added]" 188 Ill.App.3d at 1024

In another example, the court in *Fairview Area Citizens Taskforce v. Illinois Pollution Control Board*, 198 Ill.App.3d 541, 554 (3rd Dist.), appeal denied 133 Ill.2d 554 (1990), abrogated on other grounds by *Town & Country Utilities, Inc. v. Illinois Pollution Control Board*, 225 Ill.2d 103 (2007), likewise addressed the scope of the review before it beyond merely the entrance gate of the proposed facility:

As Gallatin points out, the question is not whether there will be no adverse impact, but whether the impact on traffic flow has been minimized. Should a new access road be built? **Should landfill traffic be routed to Routes 9 or 116? Should traffic signals or signs be installed at any intersections where they are not presently located?** Petitioners presented no evidence to indicate that the proposed traffic patterns did not already minimize the impact on the existing traffic flow. No State, county, township, or village official concerned with roadways or traffic testified that the traffic patterns in Gallatin's proposal did not minimize the impact on existing traffic flows. [Emphasis added]

The scope of the traffic evidence was also reviewed by the Second District (well before *Fox Moraine*) in *A.R.F. Landfill, Inc. v. Pollution Control Board*, 174 Ill.App.3d 82, 93-94 (2nd Dist.), appeal denied 123 Ill.2d 555 (1988) In affirming the denial of a siting application, the Second District noted that:

According to Box, the increased volume of trucks entering and leaving the facility would create additional traffic problems in the roads surrounding the landfill. Additionally, he testified that one of the access roads (Harris Road) is currently too narrow to safely accommodate two garbage trucks passing each other from opposite directions, and that in his opinion the proposed expansion would have an **adverse effect on traffic conditions in the area**. Moreover, he opined that the proposed traffic patterns for the landfill facility would not minimize the impact on existing traffic flows. [Emphasis added]

The Illinois Pollution Control Board has likewise confirmed that the site access is merely one of the many issues addressed in the context of Criterion 6, including the routes leading to and from the proposed facility. See, e.g., *Waste Management of Illinois, Inc. v. County Board of Kane County*, PCB 03-104, 2003 WL 21512770, Slip Op. Cite at 11-12 (IPCB June 19, 2003) (Transfer station proceeding, in which Coulter testified for Kane County. IPCB affirmed denial of siting because the applicant failed to provide traffic volume information on a critical intersection, and the record either lacked information on traffic patterns or showed the traffic patterns were not designed to minimize impacts on current traffic flows.); *Industrial Fuels & Resources/Illinois, Inc. v. City Council of the City of Harvey*, PCB 90-53, 1990 WL 171483, Slip Op. Cite at 15-18 (IPCB September 27, 1990) (Routing to and from the proposed facility reviewed)

II. CONCLUSION

There certainly are some blanket statements that apply to Criterion 6 across all fact patterns. The requirement of minimization of impacts, and not their elimination, is certainly such

a statement. But beyond a concept that is clearly supported by the language of the statute, the case law demonstrates that the issue of the minimization of impacts to or from the facility is considered on a case by case basis, depending on those factors which Werthmann himself admitted are critical to a Criterion 6 analysis. It is a well-settled principle of statutory construction that the best indication of legislative intent is the language of the statute, which must be given its plain and ordinary meaning. *Metropolitan Life Insurance Co. v. Hamer*, 2013 IL 114234, ¶18 (2013) The statute at issue here explicitly requires an analysis of the traffic patterns to or from the facility, and not merely those into and out of the facility. Groot's effort to artificially limit the scope of its evidentiary burden under Criterion 6 is not supported by either the clear language of the statute or by the case law construing the statute's requirements.

Timber Creek Homes, Inc.

By:  _____
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CERTIFICATE OF SERVICE

In Re: Application For Local Siting Approval
For Groot Industries Lake Transfer Station
03-01

The undersigned hereby certifies that he caused a copy of the above and foregoing TIMBER CREEK HOMES' MEMORANDUM REGARDING CRITERION 6 to be served on the following, via electronic mail, on this 9th day of October, 2013:

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