ILLINOIS POLLUTION CONTROL BOARD
November 17, 2011

ANIELLE LIPE and NYKOLE GILLETTE,	)	
	)	
Complainants,	)	
	)	
v.	)	PCB 12-44
	)	(Citizens Enforcement - Air)
VILLAGE OF RICHTON PARK,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by T.E. Johnson):

Anielle Lipe and Nykole Gillette (complainants) filed a *pro se* complaint against the Village of Richton Park (Village), a municipality located in south suburban Cook County. The complaint concerns a Village ordinance approving a special use permit for a proposed concrete crushing operation. The operation is to be located on an 80-acre parcel of land in the Village of Richton Park, near the intersection of Saulk Trail and Central Avenue (Site). The Site is the former location of the Sexton Landfill.

Complainants allege that proper notice was not given for the public hearing held by the Richton Park Planning and Zoning Commission on the proposed concrete crushing operation. The Village moved to dismiss the complaint as "frivolous." A citizen complaint is "frivolous" if it "fails to state a cause of action upon which the Board can grant relief" or asks for "relief that the Board does not have the authority to grant." 35 Ill. Adm. Code 101.202 (definition of "frivolous").

For the reasons below, the Board finds that the complaint is, by definition, frivolous. The Board therefore grants the Village's motion. In this order, the Board first addresses procedural matters. The Board then summarizes the following: the complaint; the Village's motion to dismiss; complainants' response to the motion; the Village's reply to the response; and complainants' surreply to the reply, as well as complainants' addendum to their surreply. Finally, the Board discusses its reasoning for granting the motion to dismiss.

PROCEDURAL MATTERS

On September 1, 2011, complainants filed a complaint. Later that day, complainants filed an amended complaint, correcting a representation in the original complaint concerning a hearing date (Am. Comp.). On September 8, 2011, complainants filed the original complaint again, but this time complainants attached a May 29, 2011 newspaper notice for a public hearing to be held by the Richton Park Planning and Zoning Commission on June 14, 2011, to "consider a special use petition concerning the allowance of a concrete crushing operation" at the Site (Public Hearing Notice).

On September 27, 2011, the Village timely filed a motion to dismiss this enforcement action (Mot.), attaching, among other things, (1) Special Use Petition of Sexton Properties R.P., LLC (Sexton), dated May 20, 2011 (Special Use Petition); (2) June 14, 2011 Minutes of the Richton Park Planning and Zoning Commission (Commission Minutes); (3) July 25, 2011 Regular Meeting Minutes of the Village (Regular Meeting Minutes); and (4) the Village's Ordinance No. 1497, approving a special use permit on July 25, 2011, to allow a concrete crushing operation on the Site (Special Use Ordinance).

On October 12, 2011, complainants filed a response to the motion (Resp.). On October 25, 2011, the Village filed a motion for leave to file a reply, attaching the reply. Complainants have not responded to the motion for leave to file. The Board grants the motion for leave and accepts the Village's reply (Reply). On November 10, 2011, complainants filed a "Reply in Support of Motion to Hear Our Case." The Board construes this *pro se* filing as a motion for leave to file a surreply and the surreply. So construed, the Board grants the motion for leave and accepts complainants' surreply (Surr.) to avoid undue delay and any potential material prejudice. *See* 35 Ill. Adm. Code 101.500(d), (e). On November 16, 2011, complainants filed an "addendum" to their surreply, which the Board accepts for the reasons the Board accepted complainants' surreply (Add.).

COMPLAINANTS' COMPLAINT

Complainants claim that the notice of May 29, 2011, in the *Southtown Star* newspaper for the public hearing to be held by the Richton Park Planning and Zoning Commission on June 14, 2011, failed to properly notify citizens regarding the requested special use permit for crushing. Am. Comp. at 1. Specifically, complainants allege that contrary to the notice required by the Environmental Protection Act (Act) (415 ILCS 5 (2010)) for a proposed "Control Pollution Facility," the newspaper notice failed to do the following:

- Give the complete address of the applicant, John Sexton Sand And Gravel Corporation omitting the name of the suburb, Richton Park, IL.

- Give the complete nature and size of the development. Failing to mention other materials such as: asphalt, aggregate or other materials and their quantities proposed to be crushed on the John Sexton Sand And Gravel Corporation's site.

- Give the probable life of the proposed crushing operation.

- Give the date when the request for site approval or the Special Use application will be submitted to the Village Of Richton Park Board Of Trustees and Village President for approval.

- Give a description of the right of citizens to comment on the request for the Special Use Permit or site approval. *Id*., citing 415 ILCS 5/3.330, 39, 39.2, 40.1 (2010).

Because of these alleged deficiencies in the notice, complainants continue, interested citizens "were not fully informed" and were unable to comment at the June 14, 2011 public hearing "regarding our concerns" over the effects of potential air emissions from the operation in "very close proximity to residential areas, schools, businesses and the general public that travel the Interstate 57 and well travelled thoroughfares in Richton Park." Am. Comp. at 1-3. "As a result of these concerns and others that may have not been raised at the public hearing," complainants allege that "the Richton Park Village Board may have not objectively considered the citizen's concerns of how the pollutants from the crushing operation can negatively affect human health, cost to property, productivity, quality of life and the environment." *Id*. at 3. Complainants ask that the Board "appeal" the Special Use Ordinance "as a result of improper public notification." *Id*.

THE VILLAGE'S MOTION TO DISMISS

The Village moves to dismiss the complaint as "frivolous" because the Board "has no jurisdiction to review an ordinance adopted by the corporate authorities of a municipality granting a special use permit." Mot. at 4. According to the Village, the complaint appears to request that the Board "void or overturn" the Village's decision to approve the Special Use Ordinance. *Id*. The Illinois Municipal Code, the Village continues, provides the "sole remedy regarding a decision of the Village Board granting or denying a special use," and that is to file a complaint in Cook County Circuit Court:

> Any decision by the corporate authorities of any municipality, home rule or non-home rule, in regard to any petition or application for a special use . . . shall be subject to de novo judicial review as a legislative decision[,] regardless of whether the process in relation thereto is considered administrative for other purposes . . . . *Id*., quoting 65 ILCS 5/11-13-25(a) (2010).

The Village adds that complainants had "full and fair notice of the proceedings before the Village because (among other things) they were present at all of the proceedings before the Village Board." *Id*.

COMPLAINANTS' RESPONSE

Complainants argue that the "local siting decision" of the Village "approving Ordinance # 1497 . . . can be appealed" under the Act. Resp. at 1, citing 415 ILCS 5/3.330, 39, 39.2, 40.1 (2010). "[I]f the local government grants siting approval," complainants continue, "a citizen opposed to the development may appeal the decision to the Board." *Id*. The Board is therefore "acting within its legal authority of granting an appeal to revoke the Ordinance # 1497," according to complainants. *Id*. Complainants articulate the "basis of the appeal" as follows:

> John Sexton Sand and Gravel Corporation failed to properly notify citizens of the Public Hearing held on June 14, 2011, and the Village of Richton Park neglected to follow all the processes that local officials must follow to approve a local siting for crushing concrete and other materials at a Pollution Control Facility. *Id*.

Complainants add that the Village (1) failed to provide "proof to the public that our quality of life, human health, safety and welfare would not be negatively impacted," (2) failed to have a court reporter transcribe the public hearing, (3) granted the special use permit "without the applicant applying for the Modified CCDD [clean construction and demolition debris] permit with the [Illinois Environmental Protection Agency (Agency)] to use its own crushed material to develop the site for future commercial use," and (4) failed to investigate the "previous operating experience and past record of convictions and violations of Sexton Properties R.P., LLC's and any subsidiary or parent corporation." Resp. at 3-4. Complainants ask the Board to "accept their complaint and revoke the Special Use Permit, Ordinance #1497." *Id*. at 7.

THE VILLAGE'S REPLY

The Village argues that a facility "such as the one approved by Richton Park, that processes concrete for return to the economic mainstream, is not a 'pollution control facility' subject to the local siting procedures." Reply at 1, citing 415 ILCS 5/3.330(a)(14) (2010). According to the Village, it is "plain error" to suggest that the facility "amounts to a 'pollution control facility' so as to give individuals [the] right to appeal a local zoning decision to PCB." *Id*. at 2.

By definition, the Village continues, a "pollution control facility" does not include:

> the portion of a site or facility located within a unit of local government that has enacted local zoning requirements, used to accept, separate, and process uncontaminated broken concrete with or without protruding metal bars, provided that the uncontaminated broken concrete and metal bars are not speculatively accumulated, are at the site no longer than one year after their acceptance, and are returned to the economic mainstream in the form of raw materials or product. Reply at 1-2, quoting 415 ILCS 5/3.330(a)(14) (2010).

The Village maintains that the facility approved by the Village is a "manufacturing operation, not a waste treatment system," and that the facility is "going to recycle uncontaminated broken concrete for return to the economic mainstream." *Id*. at 2. The Village further represents its understanding that "[the Agency] has reviewed Sexton's proposed operation, and agrees that no solid waste permit is required because the facility is not going to process solid waste." *Id*.

COMPLAINANTS' SURREPLY AND ADDENDUM

Complainants maintain that the Sexton operation is a "pollution control facility," which the Act defines as "'any waste storage site, sanitary landfill, *waste disposal site*, waste transfer station, waste treatment facility[,] or waste incinerator . . . .'" Surr. at 1, quoting 415 ILCS 5/3.330 (2010) (emphasis by complainants). According to complainants, the crushing operation is:

> a waste storage facility and would also be considered a waste disposal site because some of the proposed crushed material/solid waste would be emitted in the air and escape into the environment instead of being used for recycling or developing the site. *Id*.

This "solid waste that escapes into the air and environment during a crushing operation," complainants continue, would be considered "air pollution" under the Act and "qualifies Sexton Properties R.P., LLC as a Pollution Control Facility." Surr. at 5, citing 415 ILCS 5/3.115 (2010) (definition of "air pollution"). Complainants argue that Sexton therefore "should have complied with all the local siting processes" in the Act before the Village granted the special use permit. *Id*. at 1; *see also id*. at 5.

Complainants further argue that the crushing operation "would also be considered a waste treatment facility and sanitary landfill." Add. at 1. According to complainants, "[i]t is highly suspicious that the Village of Richton Park refuses to classify Sexton Properties as a Pollution Control Facility when the Illinois Environmental Protection Act defines it as one." *Id*. Complainants conclude that the Village's approval process lacked "fundamental fairness." *Id*.

DISCUSSION

Under the Act (415 ILCS 5 (2010)), any person may bring an action before the Board to enforce Illinois' environmental requirements. *See* 415 ILCS 5/3.315, 31(d)(1) (2008); 35 Ill. Adm. Code 103. Section 31(d)(1) of the Act provides that "[u]nless the Board determines that [the] complaint is duplicative or frivolous, it shall schedule a hearing." 415 ILCS 5/31(d)(1) (2008); *see also* 35 Ill. Adm. Code 103.212(a). A citizen complaint is "duplicative" if it is "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202 (definition of "duplicative"). A citizen complaint is "frivolous" if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." *Id.* (definition of "frivolous").

Within 30 days after being served with a complaint, a respondent may file a motion alleging that the complaint is duplicative or frivolous. *See* 35 Ill. Adm. Code 103.212(b). The Village did so here, alleging that the complaint is frivolous. In ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See*, *e.g*., Beers v. Calhoun, PCB 04-204, slip op. at 2 (July 22, 2004).

For the reasons set forth below, the Board finds that the complaint is "frivolous" by definition. The complaint both "fails to state a cause of action upon which the Board can grant relief" and asks for "relief that the Board does not have the authority to grant." 35 Ill. Adm. Code 101.202 (definition of "frivolous"). The complaint cites four sections of the Act: Sections 3.330, 39, 39.2, and 40.1 (415 ILCS 5/3.330, 39, 39.2, 40.1 (2010)). None of these provisions is capable of being violated within the meaning of the Act's enforcement provisions.

Section 3.330 of the Act (415 ILCS 5/3.330 (2010)) provides the definition of "pollution control facility." The definition cannot be violated. *See* Gregory v. Regional Ready Mix, LLC, PCB 10-106, slip op. at 2 (Aug. 19, 2010); Patterman v. Boughton Trucking and Materials, Inc., PCB 99-187, slip op. at 2 (Sept. 23, 1999). Section 39 of the Act (415 ILCS 5/39 (2010))

addresses Agency determinations on permit applications.[1] Complainants do not allege any permitting violation by the Agency, nor could the Board entertain any such allegation. *See* Landfill, Inc. v. PCB, 74 Ill. 2d 541, 556, 559-60 (1978); Citizens Utilities Co. of Illinois v. PCB, 265 Ill. App. 3d 773, 781-82 (3rd Dist. 1994). Section 39.2 of the Act (415 ILCS 5/39.2 (2010)) sets forth the local siting review procedures and criteria for proposed pollution control facilities. Section 39.2 is not "properly the subject of an enforcement action." Nelson v. Kane County Board, PCB 95-56, slip op. at 2 (May 18, 1995); *see also* Gregory, PCB 10-106, slip op. at 2. Likewise for Section 40.1 of the Act (415 ILCS 5/40.1 (2010)), which simply authorizes appeals of local siting decisions to the Board and requires a filing fee for such petitions.

Complainants express concerns about potential air emissions from the crushing operation but do not allege any violation of the air pollution provisions of the Act. Am. Comp. at 1-3. Moreover, the "mere presence of the ordinance" permitting concrete crushing at the Site is not a violation of the Act's air pollution provisions. City of Lake Forest v. PCB, 146 Ill. App. 3d 848, 854-56 (2nd Dist 1986) (Board exceeded its statutory authority by ordering city to cease and desist from allowing leaf burning, in essence repealing municipal ordinance regulating leaf disposal); *see also* Graham v. City of Paris, PCB 97-79, slip op. at 2 (Dec. 19, 1996) (granting motion to dismiss complaint as frivolous where issuing the requested cease and desist order would essentially "be directing Paris to repeal its ordinance, a power clearly outside the Board's statutory authority.").

The complaint also asks the Board to "appeal" the Special Use Ordinance. Am. Comp. at 3. In their response to the motion for dismissal, complainants request that the Board both "accept their complaint" and grant "an appeal" to "revoke" the Special Use Ordinance. Resp. at 1, 7. Even if this "Formal Complaint" (Am. Comp. at 1) were construed as a petition for review, neither Sexton's Special Use Petition nor the Village's decision thereon refers to the Act's procedures or criteria for siting a pollution control facility (415 ILCS 5/3.330, 39.2, 40.1 (2010)). Indeed, nothing in this record indicates that the Special Use Ordinance is a grant of local siting approval under Section 39.2 of the Act (415 ILCS 5/39.2 (2010)). *See* Public Hearing Notice at 1 ("special use petition"); Special Use Petition at 1 ("Proposed Zoning" and "Special-Use Permit"); Commission Minutes at 1 ("village zoning ordinance" and "special use permit"); Regular Meeting Minutes at 5-7 ("Ordinance Approving a Special Use Permit"); Special Use Ordinance at 2-3 ("Ordinance No. 1497" and "special use permit").

The Board finds that the Village's Special Use Ordinance is a zoning decision. Because "'an administrative agency is a creature of statute, any power or authority claimed by it must find its source within the provisions of the statute by which it is created.'" Granite City Div. of Nat'l Steel Co., 155 Ill. 2d 149, 171 (1993), quoting Bio-Medical Laboratories, Inc. v. Trainor, 68 Ill. 2d 540, 551 (1977). It is well settled that "the Act does not give the Board the authority to review zoning decisions." Village of Lynwood v. Cook County Board of Commissioners, PCB 97-28, slip op. at 2 (Sept. 19, 1996) (ordinance granting special use permit for recycling operation is a zoning decision, not a Section 39.2 local siting approval; Board granted motion to

[1] For example, Section 39(c) generally provides that no permit to develop or construct a new pollution control facility may be granted by the Agency unless the applicant submits proof of local siting approval pursuant to Section 39.2 of the Act. *See* 415 ILCS 5/39(c), 39.2 (2010).

dismiss petition for lack of jurisdiction); *see also* 415 ILCS 5/39.2(g) (2010) (Act's siting procedures and criteria for new pollution control facilities are "exclusive"; "Local zoning or other local land use requirements shall not be applicable to such siting decisions.").

Taking all well-pled allegations as true and drawing all reasonable inferences from them in favor of complainants, the Board finds that the complaint is frivolous and accordingly grants the Village's motion to dismiss this enforcement action. In doing so, the Board need not render a legal opinion on whether Sexton's proposed crushing operation is a "pollution control facility" or requires permitting under the Act.

CONCLUSION

The Board finds that the complaint both "fails to state a cause of action upon which the Board can grant relief" and asks for "relief that the Board does not have the authority to grant." 35 Ill. Adm. Code 101.202 (definition of "frivolous"). Accordingly, the complaint is, by definition, "frivolous." *Id*. The Board therefore grants the Village's motion for dismissal, dismisses the complaint, and closes the docket.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2010); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 17, 2011, by a vote of 5-0.

John Therriault, Assistant Clerk
Illinois Pollution Control Board