BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

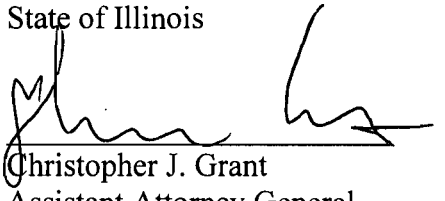
VAN ZELST LANDSCAPE COMPOST FACILITY	)	
	)	
	)	
Petitioner,	)	
	)	PCB No. 11-7
	)	
v.	)	(Permit Appeal-Land)
	)	
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY	)	
	)	
	)	
Respondent.	)	

NOTICE OF ELECTRONIC FILING

PLEASE TAKE NOTICE that on May 2, 2011, Respondent filed its Motion for Summary Judgment, by electronic filing. A true and accurate copy of the document so filed is attached hereto, and herewith served upon you.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By LISA MADIGAN
Attorney General of the
State of Illinois



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VAN ZELST LANDCAPE COMPOST FACILITY,	)	
Petitioner,	)	
v.	)	PCB No. 11-7 (Permit Appeal-Land)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY	)	
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RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

NOW COMES Respondent, the ILLINOIS ENVIORNMENTAL PROTECTION AGENCY ("Illinois EPA" or "Agency"), by LISA MADIGAN, Attorney General of the State of Illinois, and moves the Illinois Pollution Control Board ("Board") to grant summary judgment in its favor and against Petitioner, VAN ZELST LANDSCAPE COMPOST FACILITY ("Van Zelst"). In support thereof, Respondent states as follows:

I. INTRODUCTION

On March 2, 2010 Van Zelst filed its application for a permit to develop and operate a landscape waste compost facility. On July 22, 2010, Illinois EPA denied the application because, based on the Agency's interpretation, the proposed facility did not satisfy the minimum setback requirements contained in 35 Ill. Adm. Code 830.203(a)(3). Pursuant to this regulation, a $1/8^{th}$ mile setback is required between the composting area and the "nearest residence".

The Agency has consistently applied the term "nearest residence" as the property line of the residential property. Illinois EPA believes that this interpretation reflects the purpose of the setback requirements, and is in accordance with the Board's intent, as expressed in two related rulemakings. Also, Illinois EPA believes that application of a "property line" standard in the

permitting of composting facilities is reasonable and unambiguous, and will result in more consistent application of the setback regulations.

Petitioner Van Zelst notes that when the Board added setback requirements for schools and other protected land uses, it expressly designated the "property line" as the appropriate setback point. Petitioner asserts that this difference indicates that the Board intended to distinguish these uses from residential uses, and, therefore, the setback for residential uses should be measured to the actual residential building.

Illinois EPA disagrees with Petitioner's conclusion. The Agency believes that the record from the rulemakings clearly indicates that the Board accepted Illinois EPA's consistent application of the "property line" standard for residences, and intended an identical standard to apply to the additional protected uses added in the 1998 amendments. Illinois EPA correctly denied Petitioner's permit application for lack of the required setback, and its Motion for Summary Judgment should be granted.

II. STIPULATION OF FACTS

Petitioner and Respondent stipulate that in this case, the proposed compost facility is located less than 1/8th of a mile from the property boundary line of the nearest residential property, but more than 1/8th of a mile from the house located on the adjacent property.

III. QUESTION PRSENTED

The correct application of the 1/8th mile setback requirement, and the appropriate definition of 'residence', are the sole issues in this case.

IV. SUMMARY JUDGMENT IS APPROPRIATE

Summary judgment is appropriate when the pleadings, depositions, admissions, affidavits, and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *City of Quincy v. Illinois EPA*, PCB 08-86, March 4,

2010, slip op. at 1. (Citing *Adames v. Sheahan*, 233 Ill. 2d 276, 295 (2009)). Summary judgment is an efficient method of disposing of contested issues. *Carroll v. Curry* 392 Ill. App. 3d 51 (2d Dist., 2009) .

Summary judgment is particularly appropriate in this case, where the facts are agreed, and the sole issue is the correct interpretation of the Board's Compost Facility regulations.

V. THE REGULATORY HISTORY SUPPORTS THE AGENCY'S INTERPRETATION OF THE SETBACK REQUIREMENT

Illinois EPA's denial is based on its finding that Petitioner's facility does not meet the setback requirements of Section 830.203 of the Board regulations, 35 Ill Adm. Code 830.203. Illinois EPA interprets this regulation to require a setback of 1/8 mile from the property line of a residence. The Agency believes that this interpretation is correct based on the history of the regulation, and also believes that its interpretation has been accepted by the Board.

a. The 1994 Rulemaking

The Board initiated a rulemaking on standards for siting landscape waste composting facilities in response to the newly added Section 22.33 of the Act, 415 ILCS 5/22.33 (1992). The original regulations were developed in Rulemaking case No. R93-29. On November 3, 1994, the Board issued its Final Order adopting the proposed regulations. As promulgated, the regulations provided, in pertinent part, as follows:

Section 830.203 Location Standards for Landscape Waste Compost Facilities

* * *

c) The composting areas of the facility must be located so as to minimize incompatibility with the character of the surrounding area, including at least a 200 foot setback from any residence, and in the case of a facility that is developed or the permitted composting area of which is expanded after November 17, 1991, the composting area must be located at least 1/8 mile from the nearest residence (other than a residence located on the same property as the facility). (Section 39(m) of the Act).

* * *

Section 830.102 Definitions

* * *

"Nearest residence" means an occupied dwelling and adjacent property commonly used by inhabitants of the dwelling.

Apart from including the definition of 'nearest residence' contained in Section 830.102, the 1994 rulemaking did not provide guidance on the exact point to which a residence setback should be measured. However the Board did note that the purpose of the location requirements in Section 830.203 (c) was to "...protect surrounding *properties* from off-site impacts[1]" (emphasis added).

b. The 1997 Amendments

In 1997, the Board revisited the setback requirements contained in Section 820.203 in R97-29. This rulemaking was originated by proponents requesting *(inter alia)* that, in addition to residences, setbacks should also apply to schools, parks, and certain medical facilities[2]. After consideration, the Board designated several additional land uses to the requirement for setbacks, and Section 830.203 was revised, as follows:

Section 830.203 Location Standards for Landscape Waste Compost Facilities

* * *

3e) The composting area of the facility must be located so as to minimize incompatibility with the character of the surrounding area, including at least a 200 foot setback from any residence, and in the case of a facility that is developed or the permitted composting area of which is expanded after November 17, 1991, the composting area shall be located at least 1/8 mile from the nearest residence (other than a residence located on the same property as the facility). (Section 39(m) of the Act.) In addition, in the case of a facility that is developed or the permitted composting area of which is expanded after January 1, 1999, the composting area shall be located at least 1/8 mile from the property line of each of the

[1] R93-29, November 3, 1994 Final Order, p.13

[2] During consideration of the amendments, various Proponents requested setbacks ranging from ½ mile to 2 miles.

following:

A) Facilities that primarily serve to house or treat people that are immunocompromised or immunosuppressed, such as cancer or AIDS patients; people with asthma, cystic fibrosis, or bioaerosol allergies; or children under the age of one year;

B) Primary and secondary schools and adjacent areas that the school uses for recreation; and

C) Any facility for child care licensed under Section 3 of the Child Care Act of 1969 [225 ILCS 10/3]; preschools; and adjacent areas that the facility or preschool uses for recreation.[3]

As shown, the 1/8 mile setback from the newly added land uses is expressly measured from the 'property line'. Petitioner asserts that inclusion of the 'property line' language distinguishes these uses from the 'residential' setback. However, the record of proceedings in the rulemaking supports the opposite conclusion. The record demonstrates that the Board was actually applying the same 'residential' setback to these new land uses. Thus, Illinois EPA believes that, rather than creating a new setback for additional land uses, use of the term 'property line' merely clarified that the residential setback should be measured at the residential property line.

In its Opinion and Order on the proposed amended rule (Second Notice), the Board addressed questions and comments regarding the setback for schools. Board Member Hennessey noted, without criticism, comments submitted by Illinois EPA during the rulemaking:

> The setback from a school would be from the school property boundary rather than from the school building. This recommendation is consistent with the Agency's current practice regarding the existing setback from residence; generally the Agency measures the distance between the edge of the composting area and the residential property line to determine compliance with the setback[4] (emphasis added).

[3] Strikeouts indicate deletions, underlined language is added. This section has not been revised since the Board's November 19, 2008 final order adopting the amendment.
[4] R97-29, October 1, 1998, pp. 17-18

Illinois EPA believes that, by incorporating these comments in its response on the school setback issue, the Board was impliedly recognizing that the residential setback was also measured to the property line.

Board Member Hennessey also responded to issues regarding the effect of the regulation on 'home schooled' children, as follows:

> At hearing, the Agency stated that it assumed that "primary and secondary schools" encompassed kindergarten through 12th grade and could include public and private schools. Tr.3 at 26. Although at hearing the Agency asked the Board to clarify whether the term included homes where children are home-schooled (Tr.3 at 26), the Agency did not request any further clarification of this term in its final public comment. See PC 32 at 2 ("The Agency agrees with the Board's assertion at the August 7, 1998, hearing that the term 'primary and secondary schools' is easily understood and therefore need not be defined.") The NSWMA, however, requested further clarification of this term in its public comment. See PC 34 at 6.
>
> The Board agrees with the Agency that this term has a commonly understood meaning and, as used in the proposed regulation, should be understood to have its ordinary meaning. As the Agency suggested, "primary and secondary schools" are those schools that include any grade from kindergarten through 12th grade, and include both private and public schools. That term, as it is ordinarily understood, would not include homes at which children are homeschooled. <u>However, those homes obviously are residences that, like primary and secondary schools, are protected by the 1/8 mile setback</u> (emphasis added)[5].

Again, it is clear that the Board impliedly recognizes that, rather than creating a new setback, the amendments refer to the existing residential setback. Further, the Board clearly sees no difference between primary schools, secondary schools, and residences, as all are "protected by the 1/8 mile setback".

Finally, in adopting the final amended rule, Board Member Hennessey summarizes the Board's Actions during the rulemaking:

> Therefore, as a precaution, and consistent with the recommendations of public health experts, the Board at first notice proposed to extend the 1/8 mile setback from residences that currently applies to composting areas to health care facilities,

[5] R97-29, October 1, 1998, p.19

> preschool and child care facilities, and primary and secondary school facilities. The Board proposed that this modified proposal apply only to facilities developed or expanded after January 1, 1999. The Board also proposed corresponding changes to requirements for permit applications[6].

Nowhere in the Final Opinion and Order does the Board contrast the setbacks of residences from those of schools, health care facilities, or the other land use applications added by the Amendments. Rather, throughout the 1997-1998 Rulemaking, all are treated equally. Moreover, the Board recognizes, without disagreement, Illinois EPA's position on the matter, i.e. that the residential setback is measured to the residential property line. The Agency believes that the Amended Rule incorporated this interpretation, and that the setback for each use listed in 830.203(3) is the same: a minimum 1/8 mile from the property line of all of the protected uses, including residential property.

VI. MEASURING THE SETBACK AT THE PROPERTY LINE IS CLEAR AND REASONABLE

Even if the Board does not interpret the prior rulemakings as clearly establishing the property line of a residence as the appropriate setback line, it should still affirm the Agency's position in this case. Illinois EPA believes that using the residential property line results in a consistent and easily understandable standard for siting new composting facilities. By contrast, mere application of the regulatory definition of "nearest residence" would cause confusion.

Section 830.102 of the Board's Compost Facility Regulations, 35 Ill. Adm. Code 830.102, provides the following definition:

> "Nearest residence" means an occupied dwelling and adjacent property commonly used by inhabitants of the dwelling.

As the Board will recognize, the regulation is somewhat ambiguous. For example, how should the term "commonly used by inhabitants" be applied? If a residence is located on

[6] R97-29, November 18, 1998, p. 1

agricultural property, does farming constitute "common use"? Would a child's swing set indicate "common use"? Who has the burden of proving or disproving "common use" of adjacent property?

By comparison, Illinois EPA's use of a residential property line for calculating setback is clear and predictable. All that would be required of a prospective applicant would be reference to an accurate survey. Moreover, it is inherently reasonable to presume that a residential property owner will, at some time during a calendar year, use all adjacent property for some purpose. Since the regulations are intended to minimize the impact of a composting facility on the surrounding area, all of the property adjacent to a residence should be protected.

VII. CONCLUSION

No material facts are at issue in this matter, and summary judgment is appropriate. The regulatory history of the composting regulations indicates that the Board has accepted Illinois EPA's use of the property line of a residence as the appropriate measure for determining setback requirements. Also, Illinois EPA's interpretation is practical and reasonable, and in accord with the purpose of the applicable regulations

Based on the stipulated facts, Petitioner's facility does not meet the applicable setback requirements, as the border of the composting area is less than 1/8 mile from the adjacent residential boundary. Illinois EPA correctly denied the permit at issue in this case, and is entitled to summary judgment in its favor.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

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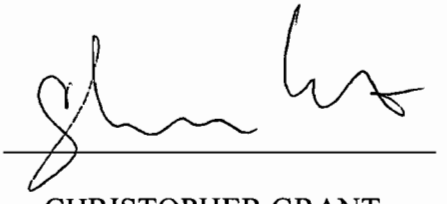
CERTIFICATE OF SERVICE

I, CHRISTOPHER GRANT, an attorney, do certify that I caused to be served this 2d day of May, 2011, the foregoing Respondent's Motion for Summary Judgment and Notice of Filing upon the persons listed below by placing same in an envelope bearing sufficient postage with the United States Postal Service located at 100 W. Randolph, Chicago, Illinois.



CHRISTOPHER GRANT

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