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JUN 19 2003

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ROCHELLE WASTE DISPOSAL, L.L.C.,
Petitioner,

vs.

CITY COUNCIL OF THE CITY OF
ROCHELLE, ILLINOIS,
Respondent.

ORIGINAL

) No.: PCB 03-218

)

) (Pollution Control Facility Siting
) Appeal)

)

)

STATE OF ILLINOIS
Pollution Control Board

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on June 16, 2003 there has caused to be filed with the Clerk of the Illinois Pollution Control Board located at the James R. Thompson Center, Suite 11-500, 100 W. Randolph St., Chicago, Illinois, 60601-3218 via U.S. Mail an original and 9 copies of the following document, a copy of which is attached hereto:

PETITION TO INTERVENE

George Mueller

GEORGE MUELLER, Attorney at Law

PROOF OF SERVICE

I, Pat Wheeler, a non-attorney, on oath state that I served a copy of the above listed document by sending the same to each of the parties listed on the attached Service List via U.S. Mail from Ottawa, Illinois, at 5:00 P.M. on June 16, 2003, with proper postage pre-paid.

Pat Wheeler

Pat Wheeler

SUBSCRIBED AND SWORN TO before me this 16th day of June, 2003.

Karen K. Donnelly

NOTARY PUBLIC

GEORGE MUELLER, P.C.
Attorney at Law
501 State Street
Ottawa, IL 61350
Phone: (815) 433-4705

"OFFICIAL SEAL"
KAREN K. DONNELLY
NOTARY PUBLIC, STATE OF ILLINOIS
My Commission Expires 09-20-2005

SERVICE LIST

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STATE OF ILLINOIS
Pollution Control Board

PETITION TO INTERVENE

Now comes the Concerned Citizens Of Ogle County, a voluntary association, and pursuant to 35 Illinois Administrative Code 101.402 Petition To Intervene as an Additional Party Respondent herein, and in support thereof state as follows:

1. Concerned Citizens Of Ogle County participated actively as a Party Objector in the local regional pollution control facility siting hearings which are the subject of the Petition To Review filed by Rochelle Waste Disposal, L.L.C. In fact, Concerned Citizens Of Ogle County was the only Objector at said proceedings represented by counsel, Concerned Citizens Of Ogle County cross-examined witnesses, and Concerned Citizens Of Ogle County presented affirmative evidence in opposition to the application for siting approval.

2. Concerned Citizens Of Ogle County is a voluntary association of citizens in the community of Rochelle, and they would be adversely affected by a decision reversing the correct finding of the Rochelle City Council.

3. That participation of Concerned Citizens Of Ogle County as an additional Party Respondent would not materially delay these proceedings, and that this Petition is expeditiously brought.

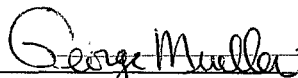
4. That the Board's Rules provide that intervention may be permitted when the person seeking to intervene, "may be materially prejudiced absent intervention." Attached hereto and made a part hereof is a letter dated May 16, 2003 from Michael F. O'Brien, one of the attorneys for Rochelle Waste Disposal, L.L.C. to the Rochelle City Council, which letter in essence states that the Rochelle City Council's denial of the application for siting approval is a breach of the

City's Host Agreement with the Applicant, and that said breach excuses the Applicant's performance obligations regarding closure and post-closure of an existing facility. Rochelle Waste Disposal, L.L.C.'s application for site location approval was an application for vertical and horizontal expansion of an existing facility. During the siting hearings, Concerned Citizens Of Ogle County presented evidence that leachate escapes from the existing facility are contaminating groundwater, and that Rochelle Waste Disposal, L.L.C. is aware of those leachate escapes. If the evidence of Concerned Citizens Of Ogle County is correct, the closure and post-closure responsibilities of Rochelle Waste Disposal, L.L.C with respect to the existing facility pursuant to its Host Agreement with the City of Rochelle would include significant and presumably very expensive remediation of the existing site. A threat by Rochelle Waste Disposal, L.L.C. to walk away from those remediation obligations, and its letter of May 16, 2003 is clearly such a threat, may have a chilling and intimidating impact on the Rochelle City Council. To the extent that the Rochelle City Council is concerned that denial of Rochelle Waste Disposal, L.L.C.'s application for siting approval may result in the City of Rochelle being solely responsible for remediation of the existing facility, Concerned Citizens Of Ogle County feel that they and the other citizens of Rochelle, Illinois may be materially prejudiced by not being allowed to participate in vigorously, and without reservation, defending the correctness of the City Council's decision to deny siting approval.

WHEREFORE, Concerned Citizens Of Ogle County respectfully pray that this Court grant them leave to intervene as additional Parties Respondent herein.

Respectfully Submitted,
Concerned Citizens Of Ogle County

BY:



Their Attorney

GEORGE MUELLER, P.C.
Attorney at Law
501 State Street
Ottawa, IL 61350
Phone: (815) 433-4705

May 16, 2003

SENT VIA FAX, ORIGINAL MAIL

Rochelle City Council
Office of the City Clerk
Rochelle City Hall
Sixth Street & Fifth Avenue
Rochelle, IL 61068-0601

Re: Notice of Default

Dear Council Members:

Rochelle Waste Disposal, L.L.C. ("RWD"), intends to appeal the recent decision of the City of Rochelle ("the City") in RWD's local siting proceeding. While the PCB may grant RWD's local siting application, as a protective measure, RWD hereby notifies the City that the City Council's course of conduct in connection with RWD's application for siting approval of the proposed landfill expansion ("the expansion") constitutes a default under the Agreement for Operation/Development of City of Rochelle Landfill No. 2 entered into on April 26, 1995, and amended January 21, 1999 ("the Host Agreement"). Thus, pursuant to Section 12.3 of the Host Agreement, RWD hereby demands that the City cure that default.

The Host Agreement requires RWD to seek the expansion, obligating RWD to "use its continuing best efforts to obtain siting approval for an expansion" (Section 7.1) and obligating the City to "cooperate with OPERATOR in its efforts to obtain siting approval for an expansion of the existing landfill facility" (Sections 5.2 and 5.3). The \$200,000 Initiation Fee payable under the Host Agreement was, in part, in consideration of the City granting RWD the exclusive right to expand the facility.

The Host Agreement also imposes a duty on the City, "its officers, board members and employees [to] not take any action which has the intended or probable effect of interfering unreasonably with the operation *or expansion* of the facility" (Section 5.2) (emphasis added). Additionally, the City is required to make every reasonable effort to insure that factual and technically accurate information concerning the landfill facility is made available to the public.

In reliance on the terms of the Host Agreement, RWD has acquired the property known as the Babson Farm as well as the property known as the Creston Parcel. At the request of the City, RWD has annexed both of these parcels to the City, in each case under an Annexation Agreement, which specifically provides for the use of the property as a landfill. Despite its obligations under the terms of the Host Agreement, the City did not cooperate with RWD in the planning, development or consideration of the expansion and has completely failed to make accurate information concerning the landfill available to the public. Moreover, we believe that the City has, indirectly and without informing RWD or the public, taken action which has the intended or probable effect of interfering unreasonably with the operation or expansion of the facility by adopting requirements or conditions that have not been disclosed.

If the City's breach of the Host Agreement is not cured by the action of the PCB or otherwise, the City's course of conduct violates the City's obligations under the Host Agreement as well as the implied obligation of "good faith" which is imposed on the City under Illinois law, thereby relieving RWD from further monetary and other obligations under the Host Agreement. We note that the City's course of conduct also constitutes "Uncontrollable Circumstances" under Section 13.4 of the Host Agreement in that denial of the expansion constitutes an "act, event or condition . . . that has had . . . a material adverse effect on" RWD's rights under the Host Agreement and was "beyond the reasonable control of" RWD. Those circumstances, if not cured, thus further excuse RWD's obligation to perform various non-monetary obligations under the Host Agreement, including providing the City with disposal capacity for 20 years under Section 2.2, providing free waste disposal under Section 3.1, reserving such capacity under Section 3.9 and assuming the closure and post-closure costs for the existing facility, including Unit I (Section 3.12).

Because these issues are quite serious and involve substantial damages, we want to make sure that the City is on notice at the earliest opportunity and will summarize the legal bases for our claim in order that the City Council may carefully consider its obligations.

When the Host Agreement was executed, the City was not the siting authority in that the land had not yet been annexed to the City. The City was the lessor of the existing facility and assumed its duty to cooperate with RWD "in its efforts to obtain siting approval for an expansion of the existing landfill facility" in its *proprietary* capacity as lessor. Thus, if RWD had applied for an expansion with Ogle County as the siting authority, the City clearly could not have voted to object to the expansion consistent with its "Cooperative Guarantee." Although the City subsequently became the siting authority for the expansion, its duties under the landfill lease remained unchanged, and it was obligated to communicate effectively with RWD and the public before, during and after the proceeding regarding the City's requirements, standards and conditions associated with the landfill and to approve a reasonable expansion recommended by the City staff's independent consultants and attorneys as well as by the Hearing Officer.

In the event of litigation, the question will be whether the City's action in rejecting such a reasonable proposal had "the intended or probable effect of interfering unreasonably with the operation or expansion of the facility" (Section 5.2). Thus, although RWD's difficult burden in an Illinois Pollution Control Board appeal may be to show that the City's *legislative* decision was "contrary to the manifest weight of the evidence," which could be established "only if the opposite result is clearly evident, plain, or indisputable from a review of the evidence" (File v. D & L Landfill, Inc., 219 Ill.App.3d 897, 901, 579 N.E.2d 1228, 1232, 162 Ill.Dec. 414, 418 (5th Dist. 1991)), the standard for reviewing the City's *proprietary* obligation under the "Cooperative Guarantee" of the landfill lease is quite different. RWD can establish that the City has violated its *proprietary* duty to cooperate merely by showing that the application proposed a reasonable expansion, that it was recommended by the City's independent consultants and attorneys as well as by the Hearing Officer and that the City Council's denial of siting was an unreasonable interference with the expansion that is at the heart of the Host Agreement landfill lease arrangement.

The City Council's decision to deny siting was quite obviously based on public clamor rather than the evidence adduced at the hearing. The City Council made no inquiries of its independent consultants and attorneys during the hearing and did not communicate with RWD or the public with respect to any standards, requirements or conditions that it would apply to the facility. RWD believes that the evidence will ultimately establish that the City Council completely failed to consult with its independent consultants and attorneys retained by the City to advise it and also failed to advise RWD regarding the City's requirements prior to the filing. RWD further believes a lack of cooperation will be shown in that the City gave no consideration to what special conditions might have been imposed in order to approve the expansion. See, e.g., County of Lake v. Illinois Pollution Control Board, 120 Ill.App.3d 89, 457 N.E.2d 1309, 79 Ill.Dec. 750 (2d Dist. 1983) (siting authority has authority to impose conditions on site approval). Clearly, the evidence will show that the City Council did not discuss the evidence, the proposed conditions or any other conditions or requirements during the public meeting at which the vote was taken. This complete failure to inform RWD of the City's position is a failure to act in good faith and a failure to cooperate.

The City Council's vote on Criterion 9 particularly manifests an utter disregard of the evidence, which clearly showed that there is only one regulated recharge area in the state of Illinois and that it is located near Peoria and is nowhere near the existing facility. Similarly, the City Council's failure to discuss or even consider special conditions until that was virtually insisted upon by the City's siting counsel in the subsequent meeting evinces further disregard for the City's duty to cooperate with RWD "in its efforts to obtain siting approval for an expansion on the existing landfill facility" (Section 5.3).

Thus, although the City Council may have broad *legislative* authority in siting matters, the City also has *proprietary* duties under the Host Agreement to cooperate with RWD and to not interfere unreasonably with such an expansion. A municipality may

have the *legislative* authority to enact an ordinance or resolution that breaches its contractual obligations under a lease of municipal property, but that does not preclude an action for breach of contract in connection with a lease entered into in its *proprietary* capacity. See In re Wa-Wa-Yanda, Inc. v. Dickerson, 18 A.D.2d 251, 254, 239 N.Y.S.2d 473, 477 (1963). Under such circumstances “[u]se of the ordinance was merely the City’s way of breaching the contract.” E & E Hauling, Inc. v. Forest Preserve District of DuPage County, 613 F.2d 675, 680 (7th Cir. 1980).

In E & E Hauling a landfill operator leased the Mallard Lake Recreational Preserve from the DuPage County Forest Preserve District with the exclusive right to operate and maintain a sanitary landfill. When the Forest Preserve District subsequently adopted new ordinances prohibiting certain waste from being deposited at the landfill site, the Seventh Circuit found there was a claim against the Forest Preserve District for violating the Contract Clause of the United States Constitution, which provides “No State shall . . . pass any . . . law impairing the Obligation of Contracts.” That is somewhat similar to what had happened in the Wa-Wa-Yanda case where the town had leased land for a marina and the sale of gasoline but subsequently enacted an ordinance barring the sale of gasoline. Such an abrogation of contract rights is not permissible, and someone contracting with a municipality, such as RWD, has a right to either enforce its contract against the City or obtain damages for the contract’s unconstitutional impairment. One way or the other, RWD is entitled to enforce the City’s contractual duties under the lease made in the City’s *proprietary* capacity. That right to enforce the contract is not the same as a right to challenge the City’s *legislative* authority, and the City’s exercise of legislative authority in violation of such a contract entitles RWD to contract remedies. See also Mid-American Waste Systems, Inc. v. City of Gary, 49 F.3d 286 (7th Cir. 1995) (lessee of the Gary landfill could claim damages against the City under its lease for interfering with the operation of the landfill).

Rochelle City Council Members

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May 16, 2003

Host Agreement are to be considered made "Under Protest." RWD has expended millions of dollars in good faith in reliance on the City's assurances and on the City's express obligation to comply with its cooperation obligations under the Host Agreement. Thus, RWD expects that the City will either cure its default or answer in damages or such other remedies as may be appropriate.

Very truly yours,

ROCHELLE WASTE DISPOSAL, L.L.C.

By McGreevy, Johnson & Williams, P.C.
Its Attorneys

By _____

Michael F. O'Brien
One of its Attorneys

cc: Dennis Hewitt, Esq.
Charles Helsten, Esq.

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