

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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JUN 15 2004

STATE OF ILLINOIS
Pollution Control Board

VILLAGE OF SOUTH ELGIN,)
)
Complainant,)
)
vs.)
)
WASTE MANAGEMENT OF ILLINOIS, INC.,)
)
Respondent.)

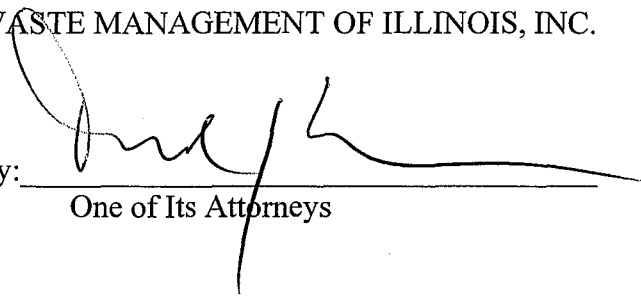
No. PCB 03-106
(Enforcement)

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on June 15, 2004, we filed with the Illinois Pollution Control Board, the attached **WASTE MANAGEMENT OF ILLINOIS, INC.'S REPLY TO VILLAGE RESPONSE TO MOTION FOR SUMMARY JUDGMENT** in the above entitled matter.

WASTE MANAGEMENT OF ILLINOIS, INC.

By: 
One of Its Attorneys

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**WASTE MANAGEMENT OF ILLINOIS, INC.'S
REPLY TO VILLAGE RESPONSE TO MOTION FOR SUMMARY JUDGMENT**

Waste Management of Illinois, Inc. ("WMII"), by its attorneys, Pedersen & Houpt, submits this reply to the Village of South Elgin's Response to WMII's Motion for Summary Judgment.

I. Condition 2 of the Kane County Woodland III Siting Approval Does Not Require the Implementation of a Conceptual End Use Plan.

The Village contends that Condition 2 of the Kane County Woodland III Siting Approval requires that the entire Woodland landfill property be developed as a passive recreation park upon closure of the landfill. (Village Response at 5.) The plain language of Condition 2 does not even suggest, much less establish, that WMII must develop a passive recreation park on the entire Woodland property upon closure of the landfill.

Siting conditions should be construed using the same standards that guide statutory interpretation. See Radaszewski ex rel. Radaszewski v. Garner, ___Ill.App.3d___, 805 N.E.2d 620, 623 (2d Dist. 2003) (administrative regulations are construed by same standards that guide statutory interpretation). The primary goal is to determine the intent of the drafter, and the

best indicator of that intent is the language of the condition itself. People v. Bonutti, 338 Ill.App.3d 333, 341, 788 N.E.2d 331 (5th Dist. 2003). A court may not read into the condition any provisions or exceptions that the drafter did not express. Garner, 805 N.E.2d at 623.

Condition 2 states that "the site will be developed and operated in a manner consistent with the representations made at the public hearing in this matter held on July 26, 1988 and to all applicable laws, statutes, rules and regulations of the Illinois Environmental Protection Agency, and the Illinois Pollution Control Board, or their successors, as may now or hereafter in effect and which are applicable to this site." The "representations made at the public hearing" were the statements contained in the July 8, 1988 letter from Donald Price to Mayor Thomas Rolando that were read into the record of the July 26, 1988 public hearing by WMII's attorney. These statements did not refer to any proposed end use for the property, much less require any specific end use to be implemented. These statements did not indicate that any proposed end use had been approved by Kane County and other interested governmental units, which approvals were prerequisite to any implementation of such end use. Thus, the plain language of Condition 2 does not require the implementation of any proposed end use.

The Village argues that the "representations made at the public hearing" include the contents of the siting application and the testimony describing those contents. (Village Response at 3.) However, the Kane County Board gave no indication that it intended that the siting application and hearing testimony be considered the representations referred to in Condition 2. The Kane County Board did not expressly state this intent, as it could have done by providing that the site be developed and operated "in a manner consistent with the statements contained in the siting application and the hearing testimony." Rather, the Kane County Board referred to the representations made in the July 8 letter and read by WMII's counsel at hearing, and made those statements conditions of siting approval. There was no intent to include a proposed end use,

described conceptually in the siting application but not approved by Kane County, as a condition of siting approval that must be implemented upon landfill closure.

Condition 2 referred to the representations read into the record from the July 8 letter. Those representations neither refer nor relate to any end use of the property. Hence, Condition 2 requires no implementation of an end use as a condition of siting approval.¹

II. The Plain Language of Condition 4 Prohibits Only the Further Expansion of the Woodland Landfill, Not the Development of a Waste Transfer Facility.

As with Condition 2, the meaning of Condition 4 must be determined by construing its language. Garner, 805 N.E.2d at 623. This language is the best indicator of the intent of the drafter, Kane County. Bonutti, 338 Ill.App.3d at 341.

Kane County drafted Condition 4 on the basis of the statement contained in the July 8 letter that WMII would agree, upon final siting approval and permitting, to no further expansions of the Woodland landfill. Thus, Condition 4 plainly provides that the Woodland landfill "shall not be expanded further." Condition 4 does not provide that any other development at the property is prohibited, or that WMII is prohibited from any other use at the property.

The Village argues that Condition 4 prohibits development of a waste transfer station because an "expansion" includes an extension of a nonconforming use or an increase in intensity. (Village Response at 5-6.) An expansion may involve an increase in intensity (i.e. traffic), but it does not include a fundamental change in the use or thing expanded. As the Village's argument

¹ The fact that Condition 2 does not mandate the development of a passive recreation park for the entire Woodland property does not mean that WMII will not implement an end use for the closed landfill in accordance with the siting application and applicable Illinois regulations. As stated previously, WMII will take those steps necessary to obtain Kane County approval and then to implement an end use for the closed landfill. (WMII's Response in Opposition to Village of South Elgin's Motion for Summary Judgment at 8-9.) This end use does not preclude the development of a waste transfer facility on the 8.9 acre parcel on the southern portion of the property.

is predicated on such a change, it distorts the plain meaning of the term "expansion." To "expand" means to "make greater in size, bulk, scope, etc." or to "enlarge upon." Webster's New World Dictionary (Third College Edition, 1991). It presumes a use or "thing" to be expanded, and does not include a change in the nature or type of the subject use. Thus, to expand a use is not to change its nature or essence, but to increase or enlarge it. If the nature of the use is changed, the use has not been expanded, but transformed or metamorphosed.

Condition 4 prohibits only further expansions of the landfill. It does not prohibit other uses or new development on the property. The cases cited by the Village construed "expansion" to include an increase in the intensity of use, but the nature of that use remained the same. In Triem Steel & Processing and Continental Waste Industries, the increase in intensity of use for a waste transfer facility was deemed to be an expansion. This conclusion was reasonable because the nature of the use - a waste transfer facility - remained the same. In each instance, it was the waste transfer activity that experienced the increase in intensity, and thus it was the waste transfer activity that was expanded. But the introduction of a new use or development at those sites would not have constituted an "expansion" of the waste transfer facility. By definition, a new use is not the expansion of an existing, different use.

There is no question that an increase in the intensity of use of a waste transfer facility may constitute an "expansion" of that facility. There is also no question that an increase in the size of a waste footprint constitutes an expansion of a landfill. But it cannot be said that the development of a waste transfer station constitutes an expansion of a landfill. It is the increase or enlargement of the existing landfill use, not the development of an entirely different use, that constitutes an expansion of the landfill.

To claim otherwise would subvert the ordinary meaning of an "expansion" and make it synonymous with "development." If "increase in intensity of use" is the standard, then any new

development that would continue or enhance the amount of traffic or use at the site would constitute an "expansion" of the Woodland landfill. To give just two examples, a proposal to develop a multi-family residential unit or a hospital would be an "expansion" of the Woodland landfill, because there would be continued use and increased traffic at the property. Of course, such a result is absurd and was not intended by the drafters of Condition 4.² The expansion prohibited by the plain language of Condition 4 is the expansion of the Woodland landfill, not the development of a waste transfer station.

In its July 8 letter, WMII agreed that, in the event siting approval and an IEPA permit were issued for the expansion of the Woodland landfill, it would not further expand the landfill. The willingness to agree to this condition was predicated on final regulatory approval for the expansion of the Woodland landfill. There was no intent or agreement that the condition would prohibit the development of a waste transfer facility. Neither WMII nor the Village had any such understanding. (Price Tr. at 19-24; Rolando Tr. at 38-41, 59-60.) The July 8 letter was the basis for Condition 4. Had Kane County so intended, it could have included a condition stating that no waste transfer stations could be developed on the property or that no new development would be allowed. The Kane County Board did not do so, and this Board may not include such a proscription when there is no basis for it in the legislative intent or the plain language of Condition 4.

² This is a principal reason the discussion of the term "expansion" in Village of South Elgin v. Waste Management of Illinois, Inc., No. 2-03-0174, slip op. at 17-18 (2d Dist. May 28, 2004) is incomplete and should not be followed here. In that opinion, the Appellate Court stated that since the transfer facility would service over twice the number of trucks using the landfill, this would fall within the common meaning of "expansion." Slip op. at 17. However, the increased traffic of a new use does not constitute an expansion of a prior distinct use. The new use may create an increased intensity over and above the prior use, but such increased intensity may not properly or accurately be characterized as an "expansion" of the prior use. The common meaning of the language of Condition 4 is that no further expansions of the Woodland landfill are allowed. Nothing in Condition 4 even suggests that any increased traffic as a result of a new use was intended to be considered an "expansion" of the old use.

III. Conclusion.

For all of the foregoing reasons, Waste Management Of Illinois, Inc. respectfully requests that this Board grant Waste Management Of Illinois, Inc.'s Motion for Summary Judgment, deny the Village of South Elgin's Motion for Summary Judgment, and award such other and further relief as it deems appropriate.

Respectfully Submitted,

WASTE MANAGEMENT OF ILLINOIS, INC.

By: 

One of Its Attorneys

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PROOF OF SERVICE

Victoria L. Kennedy, a non-attorney, on oath states that she served the foregoing **WASTE MANAGEMENT OF ILLINOIS, INC.'S REPLY TO VILLAGE RESPONSE TO MOTION FOR SUMMARY JUDGMENT** on the following party by depositing same in the U.S. mail at 161 N. Clark St., Chicago, Illinois 60601, at 5:00 p.m. on this 15 day of June, 2004:

Mr. Derke J. Price
ANCEL, GLINK, DIAMOND, BUSH, DICANNI & ROLEK, P.C.
140 South Dearborn Street, Sixth Floor
Chicago, Illinois 60603



Victoria L. Kennedy