ILLINOIS POLLUTION CONTROL BOARD
May 20, 1993

CITY OF DES PLAINES, GAIL PAPASTERIADIS, and GABRIEL AND LINDA GULO,	)	
Complainants,	)	
v.	)	PCB 92-127 (Enforcement)
SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,	)	
Respondent.	)	

SANFORD M. STEIN AND GEORGIA VLAMIS APPEARED ON BEHALF OF COMPLAINANTS;

THOMAS R. BURNEY AND GLENN C. SECHEN APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by R.C. Flemal):

On September 1, 1992, City of Des Plaines, Gail Papasteriadis, Gabriel and Linda Gulo (Des Plaines or complainants) filed a complaint alleging violation by (Solid Waste Agency of Northern Cook County (SWANCC or respondent) of the setback provisions contained in Section 22.14 of the Illinois Environmental Protection Act (415 ILCS 5/22.14 (1993)[1])(Act), pertaining to the siting of a solid waste transfer station.

The complaint is brought pursuant to Sections 5(d) and 31(b) of the Act and contains four "alternative" counts, as discussed below. Hearing was held on December 21 and 23, 1992, and January 11, 12, 19, and 28, 1993 in Chicago. Members of the public attended.

The parties have provided a stipulated agreement addressing some of the issues initially presented to the Board. (Joint Exh. 2.) Remaining is whether SWANCC's Wheeling Township facility is located within an "industrial area" (as that term is used within Section 22.14 of the Act), whether the applicable setback limitation is thereby 800 or 1000 feet, and, in either case, how is the 800 or 1000 foot setback to be measured.

Based on the record before it, the Board finds that complainants have failed to prove that respondent's siting of the proposed transfer station violates Section 22.14 of the Act. This action accordingly will be dismissed.

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[1] The Act was formerly codified at Ill.Rev.Stat. 1991, ch. 111½, par. 1001 et seq.

BACKGROUND

SWANCC is a Municipal Joint Action Agency organized and existing by authority of the Intergovernmental Cooperation Act, (5 ILCS 220/3.2, 3.2(a))[2] SWANCC was established May 2, 1988 pursuant to an "Agreement Establishing the Solid Waste Agency of Northern Cook County as a Municipal Joint Action Agency" for the purpose of collecting, transporting, treating, storing, processing, and disposing of municipal solid waste. (Complaint at 2; answer at 3)

SWANCC owns 50 acres bounded by the Cook County Forest Preserve on the north, Des Plaines River Road on the west, the Carmelite Monastery and Central Road on the south, and the Des Plaines River and the closed Sexton landfill on the east (the "SWANCC property"). (Tr. at 1055-56; 1205-06; 660-61; Resp. Exh. 5.) On November 19, 1990 in accordance with "An Ordinance Amending the Cook County Zoning Ordinance Rezoning Certain Property and Providing for A Special Use in Wheeling Township" (hereinafter, Rezoning and Special Use Ordinance), 43 acres within the 50 acres owned by SWANCC were rezoned by the Cook County Board of Commissioners (Cook County Board) from previous residential zoning (R-5, single family residence district) to an industrial zoning classification (I-1, restricted industrial district). (Exh. B. to the Complaint.) The entire area subject to the Rezoning and Special Use Ordinance is located east of Des Plaines River Road, west of the Des Plaines River and Wheeling/Northfield Township line, south of the Cook County Forest Preserve District boundary, and north of Central Road, all in Wheeling Township, Cook County. (Complaint at 3; Answer at 5.)

Des Plaines subsequently challenged the Cook County Board's rezoning determination in City of Des Plaines v. County of Cook (June 12, 1991), 90 CH 12163. That action was dismissed.

The following improvements are planned for the SWANCC property: an administration building, a transfer station, a stormwater flood control project, and a potential industrial use under consideration for an industrial outlot located west of the transfer station and north of the administration building. (Tr. at 1207.)

SWANCC plans to have its staff, clerical employees, Board of Directors, and committees meet and work in the administration building. (Tr. at 1041-1042.) SWANCC further states that people working in the administration building will not operate the transfer station. (Tr. at 1051-1052.) An independent contractor

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[2] Formerly codified at Ill. Rev. Stat. (1991) ch. 127, Sec. 741-749.

will operate the transfer station and have offices and conference rooms in the transfer station, not in the administration building. (Tr. at 1052; see, also Resp. Exh. 18, drawings 13 & 14.)

The proposed flood control projects are to be located in the northeast and southeast portions of the SWANCC property, east of the transfer station and west of the township line. These projects will divert approximately 53 acre feet of water during flood stage from the Des Plaines River into storage basins where the water will be held until flood waters recede. At that time, water will be metered back into the river over a four-day period. These flood control projects are not necessary for the transfer station, and are different from the stormwater detention areas designed to accommodate the transfer station, administration building, and industrial outlot. (Tr. at 1208-1209.)

On February 7, 1992 the Illinois Environmental Protection Agency (Agency) issued permit No. 1992-002-DE to SWANCC for the development of a 7.1-acre solid waste management site to bale and transfer municipal waste (transfer station or transfer station site)[3]. (Exh. A. to Complaint) The transfer station building and parking are located within that 7.1-acre parcel. (Tr. at 710.)

AFFIRMATIVE DEFENSES

As a preliminary matter, the Board addresses the following affirmative defenses asserted by SWANCC[4]:

1. This Complaint is barred by laches.

2. This Complaint is barred by *Res Judicata* as a direct result of the lawsuit, City of Des Plaines v. County of Cook, 90 CH 12163.

* * *

[3] This site is also referred to in the record as the "Wheeling Transfer Station".

[4] SWANCC filed the document containing its affirmative defenses on December 18, 1992 and later presented it at hearing. (See also Board order issued January 7, 1993 in this matter.) Nevertheless, in each of its post-trial briefs, affirmative defenses different than those contained in the original defenses document were presented. The Board here addresses only the affirmative defenses as originally filed, because SWANCC has never made formal request to have these amended and because affirmative defenses first raised in post-hearing briefs are untimely pursuant to 35 Ill. Adm. Code 103.210(b).

3. Section 22.14 of the Act is an unconstitutional intrusion into the home rule zoning authority of the County of Cook.

4. This Board does not have jurisdiction as this case constitutes:

   a. an impermissible third party challenge to the grant of a development permit by the Agency;

   b. an attempt to reverse the zoning decision of the County of Cook.

5. Des Plaines lacks sufficient standing to bring this action.

Regarding defense #1, the Board finds that SWANCC has not shown where laches applies to enforcement actions brought before the Board under the Illinois Environmental Protection Act. Also, SWANCC has not shown where Des Plaines has unreasonably delayed bringing this action to the prejudice of SWANCC. As Des Plaines correctly observes:

> In assessing the period in which claims will be barred by laches, equity follows the law, and generally courts of equity will adopt the period of limitations established by statute. Beynon Building Corp. v. National Guardian Life Insurance Co. (2d Dist. 1983), 118 Ill. App. 3d 754, 455 N.E.2d 246,253. Thus, where parties' rights are not barred by the statute of limitations, unless their conduct or special circumstances make it inequitable to grant them relief, they are not barred by laches either. Id.
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> Complainants' claim is brought pursuant to Sections 5(d) and 31(b) of the Act. Neither provision contains an express limitations period, nor does the Act provide for a specific limitations period within which citizens' complaints must be filed. (Compl. Brief at 38.)

Also, the Board notes that the permit was granted in February 1992 and the instant action was not filed until September 1992. Even if the laches defense were applicable, delay is not evident under these circumstances, especially since Des Plaines did not know where within the 43-acre holdings the transfer station site would be located.

Therefore, the Board finds that SWANCC has failed to show that laches applies to its circumstance in this matter.

Defense #2 has already been ruled on by the Board in this proceeding by Board order of October 1, 1992. The Board found and continues to find that this matter is not barred by City of Des Plaines v. County of Cook (June 12, 1991), 90 CH 12163, for the reasons stated in the October 1, 1992 order.

Defense #3 was not argued as an unconstitutionality claim against the statute, but rather was presented by SWANCC in its brief as a constitutional challenge to Des Plaines' interpretation of the statute. The Board construes this as argument on the merits.

Pertaining to defenses #4 and #5, the Board has already found that it has jurisdiction in that it is empowered under the Act to adjudicate enforcement actions and can issue cease and desist orders (See Section 33 of the Act). The instant action is an enforcement action brought under Section 22.14 of the Act; it is not a permit appeal, and does not constitute an impermissible third party challenge of the grant of the development permit. For the same reasons, the action here is an enforcement action and not an appeal of a zoning decision of Cook County. It is not unusual for the Board to face issues relating to zoning in enforcement actions. (See Section 33(c)(3) of the Act.) Des Plaines has standing, as has any person, to bring an enforcement action under the Act. (See, Section 31(b) of the Act.)

DISCUSSION

Essential to this action is interpretation of a portion of Section 22.14(a) of the Act. That portion reads as follows:

> No person may establish any regional pollution control facility for use as a garbage transfer station, which is located less than 1000 feet from the nearest property zoned for primarily residential uses or within 1000 feet of any dwelling, except in counties of at least 3,000,000 inhabitants. In counties of at least 3,000,000 inhabitants, no person may establish any regional pollution control facility for use as a garbage transfer station which is located less than 1000 feet from the nearest property zoned for primarily residential uses, provided, however, a station which is located in an industrial area of 10 or more contiguous acres may be located within 1000 feet but no closer than 800 feet from the nearest property zoned for primarily residential uses. However, in a county with over 300,000 and less than 350,000 inhabitants, a station used for the transfer or separation of waste for recycling or disposal in a sanitary landfill that is located in an industrial area of 10 or more acres may be located within 1000 feet but no closer than 800

feet from the nearest property zoned for primarily residential uses.

The central issue is whether the transfer station is sited in violation of the setback provisions of Section 22.14 above.

Complaint

For all counts, complainants allege that respondent has sited the transfer station in violation of the setback requirements contained in Section 22.14 of the Act. Essentially, complainants allege that the proposed transfer station property is not located in an industrial area of 10 or more contiguous acres; therefore, the siting of the station less than 1000 feet from the nearest residentially zoned property violates Section 22.14 of the Act. (count I.) The controversy as presented here by complainants surrounds the interpretation of the term "industrial area" used in Section 22.14(a). When referring to this "industrial area" designation, the legislature did not add additional descriptive terminology as it did when referring to residential property. In the case of residential property, the legislature used the phrase "nearest property zoned for primarily residential uses".

In the alternative, complainants argue that even if the transfer station is located in an industrial area, the siting violates Section 22.14 because an administration building to be located on SWANCC's holdings is part of the transfer station, and will be within 800 feet of the nearest property zoned for primarily residential uses. (count II.) Complainants also argue in the alternative that the entire 43 acres as rezoned by the County Board comprises the transfer station site, and that the site thus defined violates the Act's setback requirements. (count III.) Lastly, complainants argue in the alternative that since the permitted site consists of 7.1 acres (an area less than 10 acres), the transfer station is not proposed to be located in an industrial area of 10 or more contiguous acres. Therefore, the siting would not qualify for the 800-foot setback contained in the Act. The complainants conclude that without so qualifying, the siting violates the then applicable 1000-foot setback contained in the Act. (Count IV.)

Industrial Area

Complainants present their case based on exhibits and on the testimony of expert witnesses that the character of the area where the transfer station is to be built is not industrial since industrial uses are not exhibited, irrespective of the zoning. Therefore, they argue, the transfer station is not in an industrial area.

Allen L. Kracower, a planning and zoning consultant, testified on behalf of complainants that prior to November 1990

when the land was rezoned by the Cook County Board for I-1 special use as a garbage transfer station, it had been zoned R-5 single family. He described the current surrounding uses as institutional, consisting of a Carmelite Monastery, a cemetery, a group home for youth), P-1 public use (forest preserve), P-2 open space, and P-2 (former Sexton landfill). Oakton Community College, in an R-2 zoned area, is also nearby on property south of the former landfill property. (Tr. at 137-140.) Mr. Kracower opined that the area is not an industrial area because no industrial activity surrounds the property, and since the land is currently vacant there is no industrial activity on the site. (Compl. Exh. 1.) Mr. Kracower gave his definition of "industrial area" as "an area that has the physical attributes and characteristics of industrial land use * * *" (Tr. at 101.)

Jeanne F. Becker, president of Becker Associates, a consulting firm specializing in solid waste planning, testified on behalf of complainants. She maintained that the activities that occur on a single property do not characterize the area; rather, an industrial area is comprised of multiple industrial uses in one location or a preponderance of industrial activity and uses in a larger area. (Tr. at 457.) Therefore, she reasoned that the presence of a closed landfill alone, such as the Sexton landfill, is not sufficient to characterize the area as industrial. (Tr. at 457; 395-400.) She further maintained that this area is an institutional area since it is the influence of the surrounding properties that characterizes the area, and that the predominant uses in this area are institutional. (Tr. at 398.)

Respondent asserts that the transfer station is located in an industrial area of 10 or more contiguous acres, by virtue of the fact that the Cook County Zoning Board of Appeals' (ZBA) and the Cook County Board proceedings resulted in the rezoning of 43 acres, including the 7.1-acre transfer station site owned by SWANCC, to an industrial classification. SWANCC maintains that the transfer station site thereby qualifies for the 800 foot setback exception of Section 22.14(a) of the Act. Since the transfer station, as defined by SWANCC, is not sited within 800 feet of any residentially zoned property, SWANCC maintains that the station is not proposed to be built in violation of Section 22.14 of the Act.

Respondent presented exhibits and testimony, including that of Devin Moose, Vice-President, Environmental Permitting and Planning, Patrick Engineering, and Steven Lenet, principal planner and owner of Lenet Design Group, and William Abolt, Executive Director of SWANCC.

Mr. Moose testified that, in his opinion, an industrial area includes those areas that are zoned for industrial uses or those areas that have industrial activities on them. (Tr. at 1267.)

Mr. Lenet opined that the SWANCC property is an industrial area of 10 or more contiguous acres. He based his opinion on the fact that the zoning process in Cook County is a legislative process, and that the ZBA "made specific findings that the 43 acres should be appropriately zoned I-1". (Tr. at 682.) He also stated that the ZBA amended the comprehensive plan for Cook County for the 43 acres to reflect industrial uses for the subject property. (Tr at 683.) In making its findings regarding the subject property, the ZBA specifically considered the "[e]xisting uses of property within the general area in question" (Resp. Exh. 12 at 17), and found:

> The zoning of nearly all the surrounding territory in open space, institutional or industrial (the landfill) categories results in a long term commitment of the surrounding property to uses with which the proposed publicly operated waste management facility and public office building would be compatible.
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> * * *
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> In all, the property is unsuitable for the zoned residential use yet very suitable for the proposed zoning and special use. (Resp. Exh. 12 at 19.)

SWANCC therefore submits that both the ZBA and respondent's witnesses examined the existing uses of the property and concluded that the area is compatible with the existing neighboring uses and is best utilized as an industrial area, not a residential area.

SWANCC also observes that its property was zoned as I-1 under the Cook County Zoning Ordinance. That ordinance specifically provides that lands zoned in an industrial district are also to be considered in an "industrial area":

> The industrial district regulations are intended to govern the location, intensity, and method of development of the industrial areas of Cook County. The regulations are designed to provide for the grouping together of industries that are compatible to one another and that are not objectional to the community as a whole. The regulations preserve lands for industrial and allied uses and prohibit the intrusion of residential and other noncompatible uses into the industrial area. (Section 6.0, Purpose, Cook County Zoning Ordinance, 1976, as amended, Resp. Exh. 1.)

The Board observes that testimony and exhibits indicate a clear intent by the ZBA and the Cook County Board not only to give the 43 acres in question an industrial zoning classification, but also to give it characterization as an

industrial area. While the ZBA's and the Cook County Board's industrial area characterization is not controlling, such characterization certainly deserves considerable weight in an interpretative context. Moreover, we see no reason to believe that the legislature had anything different in mind in its use of the term "industrial area" than does the ZBA and Cook County Board. Therefore, the Board finds that the 43- acre area is an industrial area within the meaning of Section 22.14 of the Act. Consequently, the 800-foot setback is the appropriate setback for the transfer station at issue. We now turn to the issue of whether the transfer station is in compliance with the 800-foot setback.

Setback Violation Allegations (Counts II, III, and IV)

In addressing this issue it is necessary to first define the transfer station site. The definitions of "site" in the Act and applicable Board regulations are as follows:

> "SITE" means any location, place, tract of land, and facilities, including but not limited to buildings, and improvements used for purposed subject to regulation or control by this Act or regulations thereunder. (Section 3.43 of the Act.)
>
> "SITE" means any location, place or tract of land used for waste management. A site may include one or more units. (35 Ill. Adm. Code 807.104.)

In addition, the definition of transfer station includes "site":

> "TRANSFER STATION" means a site or facility that accepts waste for temporary storage or consolidation and further transfer to a waste disposal, treatment or storage facility. * * * (Section 3.83 of the Act.)

Des Plaines is correct in observing that the Rezoning and Special Use Ordinance indicates that the whole 43 acres were reclassified "for a waste transfer station for the packaging and processing of solid waste within a wholly enclosed building". (Exh. B to the Complaint.) Des Plaines is further correct in observing that parts of the full 43 acres are located less than 800 feet from residential property. From these two observations, Des Plaines would have us conclude that development of a transfer station anywhere within the full 43 acres is prohibited.

The Board cannot accept this argument. The transfer station as proposed by SWANCC and permitted by the Agency is limited to 7.1 acres of the larger 43 acres; all of the 7.1 acres are

located beyond the 800-foot setback distance (Joint Exh. 2)[5]. It is this 7.1 acres that is clearly the transfer station site as referenced in the Act. The ZBA's and Cook County Board's zoning authority notwithstanding, those bodies do not define what constitutes a site; that is determined pursuant to the Act and Board regulations. The ordinance indicates that the Cook County Board understood that the transfer station would be built somewhere on the 43 acres. However, the entire 43 acres were not permitted for the development of a transfer station. It makes no difference that SWANCC sought and achieved rezoning of 43 acres of its holdings related to its purpose of establishing a waste transfer station on the 7.1 acres. It has not been shown that SWANCC intends to use the entire 43 acre site for the transfer station; rather SWANCC intends to use the 7.1 acres permitted by the Agency for development of a transfer station. In fact, SWANCC would be prevented here from using areas in addition to those permitted by the Agency for development of a transfer station.

On the related issue of the proper measuring points for the setback and whether or not the administration building is included in the transfer station site, the Board finds that the setback should be measured from the boundary of the 7.1-acre transfer station site permitted by the Agency. Since the administration building is not included in that 7.1-acre site, (See, Abolt testimony, 1041-1042; 1051-1052) and may not be used as part of the transfer station operations pursuant to the developmental permit, it not relevant that the administration building is closer than 800 feet from residentially zoned property[6].

The Board disagrees with respondent's witnesses that propose measuring solely from the transfer station building or nearest structure within the 7.1 acres (Tr. at 1064; 714-716), finding that improvements outside of the transfer station building, but still located in the permitted area around the building, are included in the transfer station site. This is consistent with the definitions of "site" and "transfer station" quoted above. Therefore, the correct measuring points are from the property

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[5] "The approximately 7.1 acre site referenced in the Development Permit Application is located less than 1000 feet, but in excess of 800 feet from the nearest property zoned for primarily residential uses." (Joint Exh. 2 at 3.)

[6] We are not here deciding that a facility needs to be permitted in order to qualify for the setback. See, Dimaggio v. SWANCC (January 11, 1990), PCB 89-138, 107 PCB 49. The facts of this case indicate that the transfer station is permitted and that all "operating facilities" are included in that permitted area.

line of the residential area to the boundary of the permitted area.

The Board accordingly finds that complainants have failed to prove that the transfer station site is located closer than 800 feet from the nearest property zoned for primarily residential uses.

The last issue we determine is whether the transfer station, consisting of only 7.1 acres, is not proposed to be located in an industrial area of 10 or more contiguous acres, and thereby does not qualify for the 800-foot setback contained in the Act. The Board finds that a plain reading of Section 22.14 indicates that the entire industrial area must consist of 10 or more contiguous acres, not that the size of the transfer station site alone must be 10 or more contiguous acres. The Board does not find complainants arguments persuasive here.

Based on the above, the Board finds that complainants have failed to prove that respondent's siting of the proposed transfer station violates Section 22.14 of the Act. This action is accordingly dismissed.

This opinion constitutes the Board findings of fact and conclusions of law in this matter.

ORDER

The enforcement action filed by City of Des Plaines, Gail Papasteriadis, and Gabriel and Linda Gulo is hereby dismissed.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act, 415 ILCS 5/41 (1992), provides for appeal of final orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 20th day of May, 1993, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board