ILLINOIS POLLUTION CONTROL BOARD
August 4, 2011

VAN ZELST LANDSCAPE COMPOST FACILITY,	)	
Petitioner,	)	
v.	)	PCB 11-7
	)	(Permit Appeal-Land)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

OPINION AND ORDER OF THE BOARD (by G.T. Girard):

On October 4, 2010, Van Zelst Landscape Compost Facility (Van Zelst) filed a petition to contest the Illinois Environmental Protection Agency's (Agency) denial of a permit for Van Zelst's proposed landscape waste compost facility. The proposed facility would be located at 39400 North Highway 41, City of Wadsworth, Lake County. Today the Board grants Van Zelst's motion for summary judgment and denies the Agency's motion for summary judgment. The Board finds that Van Zelst has constructed a landscape compost facility a permissible distance from the appropriate entities, and the Board directs that the Agency grant Van Zelst's application for permit to develop and operate a landscape waste compost facility. The Board specifically finds that the facility is setback from the nearest residence by at least 1/8 of a mile as required by 35 Ill. Adm. Code 830.203(a)(3).

Below, the Board provides the procedural history, the factual history, summaries of the parties' cross-motions and responses, and the legal background before turning to its analysis. The Board's analysis contains the Board's findings and interpretation in this issue of statutory construction. Finally, the Board renders its legal conclusion and sets out the order.

PROCEDURAL HISTORY

On August 20, 2010, Van Zelst filed a request for a 90-day extension for the deadline for filing an appeal to the Board from the Agency's July 22, 2010 denial. On September 2, 2010, the Board declined to accept the request for an extension, but accepted Van Zelst's request as a timely filed petition to contest the permit denial. However, the Board found that the petition was deficient and directed Van Zelst to file the amended petition by October 4, 2010. On October 4, 2010, Van Zelst filed an amended petition to contest permit denial by the Agency. (Pet.) On October 7, 2010, the Board accepted the petition for review.

On November 30, 2010, the Agency filed the record accompanied by a motion for leave to file a reduced number of copies of the record (AR). The hearing officer granted the unopposed motion. *See* hearing officer order Dec. 14, 2011.

On May 2, 2011, the parties filed cross-motions for summary judgment. (Van Zelst Mot.; Agency Mot.) On May 16, 2011, both parties filed responses to one another's motion for summary judgment. (Van Zelst Resp.; Agency Resp.)

FACTUAL HISTORY

Van Zelst was operating a landscape waste compost facility without a permit from the Agency at 39400 North Highway 41, Wadsworth, Lake County. AR at 7. Lake County inspected the site and informed Van Zelst of the failure to have a permit. *Id.* In response, Van Zelst filed an application for permit with the Agency, which was received on March 24, 2010. The proposed facility would be new, and would be located at 39400 North Highway 41, Wadsworth, Lake County. AR at 12. The facility has been assigned Site Number 0978105010. *Id.* at 14.

The proposed facility would compost landscape waste through windrow composting methods, the area of which would be approximately 3.38 acres. *Id.* at 25, 33, 47. The proposed facility would process material generated from Van Zelst's own operations and also that of third parties. *Id.* at 33. The permit application contains letters from various state agencies confirming that the proposed facility is not within specified distances of endangered species, historic areas, residences, potable water supplies, or schools. *Id.* at 36-37. The permit application also states that the proposed facility is located outside the boundary of the 10-year floodplain and does not restrict the 100-year floodplain. *Id.* at 37. The administrative record also contains Van Zelst's permission from the Illinois Department of Natural Resources and Illinois Historic Preservation Agency to proceed with the proposed facility. *Id.* at 78, 81; 415 ILCS 5/39(c).

The permit application ultimately set out Van Zelst's procedures comprehensively for all of the statutory requirements at Sections 39(b) and (m) of the Illinois Environmental Protection Act (Act) (415 ILCS 5/39(b) and (m) 2010). Those requirements include a site location map, (AR 36), recording-keeping procedures, (AR 59-60; 415 ILCS 5/39(m)(5)), and a closure plan, (AR 61-63; 415 ILCS 5/39(m)(5)).

On July 22, 2010, the Agency denied the application on the grounds that the proposed facility did not "meet the required setback of an 1/8 mile[1] from the nearest residence as required, pursuant to 35 Ill. Adm. Code 830.203(a)(3)." AR at 1. The proposed facility would exist approximately 700 feet from a house to the east-northeast and approximately 800 feet from a house to the northwest. *Id.* at 8. The proposed facility would exist approximately 50 feet and approximately 400 feet from those houses' property lines, respectively. *Id.* The Agency states that in

> evaluating the setback distance for compost facilities, Illinois EPA measures the setback distance from the property line of a private residence. During the

[1] 1/8 of a mile is equivalent to 660 feet.

> rulemaking process for rule R97-29; (sic) Illinois EPA commented that the Agency established procedure was to measure the distance between the edge of the composting area and the residential property line to determine compliance with the setback. No one objected to [the Agency's] procedure during the rulemaking, so [the Agency] continued in that manner. *Id.* at 9.

There are no issues related to the potable water supply in the region or the setback from the boundary of the 10-year floodplain. *Id.* at 8. The water runoff/storm water plan is acceptable and there are no issues with historic preservation or endangered or threatened wildlife. *Id.* Further, the compost volume contingency plans, operating plans, recordkeeping plans, and closure plans are acceptable. *Id.* In fact, the only issue that the Agency found was that the proposed facility would reside less than 1/8 mile from a residence's property line. *Id.* at 9.

On August 20, 2010, wishing to contest the Agency's denial of Van Zelst's permit application, Van Zelst filed a request for a 90-day extension from the July 22, 2010 Agency decision. In response, the Board directed Van Zelst to file an amended petition by October 4, 2010. On October 4, 2010, Van Zelst complied with the Board order and filed an amended petition to contest the Agency's permit denial.

On May 2, 2011, the parties filed their respective motions for summary judgment. Both motions for summary judgment state that:

> [p]etitioner and [r]espondent 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. The correct application of the 1/8th mile setback requirement, and the appropriate definition of 'residence', (*sic*) are the sole issues in this case. Van Zelst Mot. at 1-2; Agency Mot. at 2.

Both parties also agree that the interpretation of the Illinois Administrative Code is a question of law, not fact, and is appropriate for a motion for summary judgment. Van Zelst Mot. at 2; Agency Mot. at 2-3.

SUMMARY OF AMENDED PETITION TO CONTEST PERMIT DENIAL

On October 4, 2010, Van Zelst filed an amended petition to contest the permit denial by the Agency pursuant to Section 40 (a) (1) of the Act (415 ILCS 5/40(a)(1)) and the Board's order of September 2, 2010. Pet. at 1. Van Zelst states that an application for permit to develop and operate a landscape waste compost facility was filed on March 10, 2010, and that the Agency received the application on March 24, 2010. *Id.* On August 20, 2010, the Agency denied the landscape waste compost facility permit and provided the specific reason for denial. *Id.*

Van Zelst reports that the Agency denied the application for permit because the proposed facility did not meet the required setback of an 1/8 mile from the nearest residence, which is

required by 35 Ill. Adm. Code 830.203(a)(3).[2] *Id.* at 2. However, Van Zelst asserts that the proposed facility does meet the required setback of 1/8 mile from the nearest residence, but does not meet the setback of 1/8 mile from the property line of the parcel that contains that residence. *Id.* Van Zelst concludes that the Agency has misapplied the standard of 1/8 mile setback requirement in 35 Ill. Adm. Code 803.203(a)(3). *Id.*

VAN ZELST MOTION FOR SUMMARY JUDGMENT

The Board will begin by summarizing Van Zelst's two main arguments and then will summarize Van Zelst's request for relief.

Plain Meaning of Statute's Language

In Van Zelst's motion for summary judgment, Van Zelst argues that the correct application of the 1/8 mile setback requirement is to be found in the plain meaning of the language of the Illinois Administrative Code. *Id.* at 3. Van Zelst cites People ex rel. Skonberg v. Paxton and a number of other cases in Van Zelst's argument for examination of the statute's plain meaning, stating "[w]here language . . . is specific and unambiguous, there is no need for interpretation or construction." Van Zelst Mot. at 3, *citing* People ex rel. Skonberg v. Paxton, 211 N.E.2d 591, 594, 64 Ill. App. 2d 294, 301 (3rd Dist. 1965)

Statutes Must be Interpreted as a Whole

Next, Van Zelst argues that when interpreting a statute, the statute's sections must be construed together in light of the general purpose. Van Zelst Mot. at 4, *citing* Scofield v. Board of Ed. of Community Consol. School. Dist. No. 181, 103 N.E.2d 640, 643, 411 Ill. 11, 15 (Ill. 1952). Specifically, Van Zelst argues that only the second half of Section 830.203(a)(3) requires a 1/8 mile setback from the property line, and only from schools, certain health facilities, or certain child-care facilities. *Id.* at 4. Therefore, Van Zelst claims that interpreting the word "residence," which appears in the first half of the paragraph, cannot have the same meaning as "property line" because such a construction would be contradictory. *Id.* Van Zelst points out that there would be no need to specify what types of facilities needed a setback if the requirement were uniform for all structures; under the Agency's definition, the additional language is entirely unnecessary. *Id.* Van Zelst asserts that the language of the Section 830.203(a)(3) was written to add to the underlying rule and add additional protections for "children and people with certain breathing problems." *Id.* Van Zelst concludes the argument by stating that "the setback from a residence must be measured from the structure of the residence itself as opposed to the property line of the parcel upon which the structure was located," and reasoning that "an interpretation that the set back (sic) requirement from a 'residence' is the same as the set back (sic) from the property line upon which the structure exists is an absurd result." *Id.* at 4-5.

[2] The Agency's denial letter incorrectly sited the rule as "39 Ill. Adm. Code 820.203(a)(3)".

Therefore, Van Zelst requests that the Board enter an order finding that the correct setback of a landscape compost facility from a residence is 1/8 of a mile from that residence. Second, Van Zelst requests that the Board enter an order finding that the word "residence" in 35 Ill. Adm. Code 830.203(a)(3) is the actual house or structure used for living purposes.

AGENCY MOTION FOR SUMMARY JUDGMENT

First, the Board will summarize the Agency's three main arguments in the Agency's motion for summary judgment. Finally, the Board will state the Agency's conclusion.

Property Line Requirement

The Agency argues that "[p]ursuant to this regulation [35 Ill. Adm. Code 830.203(a)(3)], a 1/8 mile setback is required between the composting area and the 'nearest residence.'" Agency Mot. at 2. However, the Agency states that the Agency has consistently applied the term "nearest residence" to mean the property line of that residential property. *Id.* The Agency states that this interpretation reflects the Board's intent, which was manifested in two separate rulemakings. *Id.* The Agency asserts that the "property line" standard is clear and unambiguous, given the rule's provision, and achieves the desirable effect of generating consistent application of the setback regulations. *Id.* at 2-3.

Regulatory History

The Agency argues that the Board's 1997 rulemaking expressly designated the "property line" as the appropriate setback point. Agency Mot. at 3, referring to Amendments to Requirements for Landscape Waste Compost Facilities, 35 Ill. Adm. Code 830.203, 831.107, and 831.109(b)(3), R97-29 . The Agency disagrees with Van Zelst's argument that the "property line" language is meant to be distinct from the "residence" language based on the rulemaking proceedings. *Id.* The Agency reports in the Agency's motion for summary judgment that the 1994 rulemakings did not contain any language about "property lines." *Id.* at 4, referring to Regulation of Landscape Waste Compost Facilities 35 Ill. Adm. Code 830-832, R93-29 (Nov. 3, 1994). The Agency states that the 1994 rulemakings resulted in a definition of "nearest residence" that was unclear because the 1994 version of Section 830 "did not provide guidance on the exact point to which a residence setback should be measured." *Id.* at 5.

Regarding the 1997 rulemaking when new language was added to the rule's provision, the Agency asserts that the "record demonstrates that the Board was actually applying the same 'residential' setback to these new land uses." Agency Mot. at 6, referring to R97-29. The Agency argues that the language regarding additional facilities and the "property line" standard does not create a new setback for additional land uses but clarifies the setback point. *Id.* The Agency points to comments made by then Board Member Hennessey during the proceedings which acknowledged the Agency's practice of measuring from the residential property, and the Agency argues that this means the Board implicitly acknowledged and condoned the Agency's practice as legitimate. *Id.* The Agency also claims that Board Member Hennessey's comments regarding homeschooled children to support the Agency's argument because Board Member

Hennessey said that schools "would not include homes at which children are homeschooled. However, those homes obviously are residences that, like primary and secondary schools, are protected by the 1/8 mile setback." *Id.* at 7, *citing* R97-29, slip op. at 19 (Oct. 1, 1998). The Agency uses a third example of Board Member Hennessey's speech to demonstrate the fact that "[n]owhere in the Final Opinion and Order does the Board contrast the setback of the residences from those of schools, health care facilities, or the other land use applications added by the Amendments (Emphasis in the original.)" *Id.* at 8. From these instances, the Agency draws the conclusion that "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." *Id.*

Clear and Reasonable

The Agency reasons that measuring the setback from the property line is clear and reasonable. Agency Mot. at 8. The Agency asserts that this method would result in a "consistent and easily understandable standard for siting new composting facilities." ." Agency Mot. at 8. The Agency argues, again, that the definition of "nearest residence" in Section 830.102 is too ambiguous to be clear and reasserts the superiority of its property line setback requirement. *Id.* Specifically, the Agency takes issue with the "adjacent property" that receives "common use," reasoning that a homeowner would likely use all of his or her property at some point. *Id.* at 9.

The Agency concludes by stating that a motion for summary judgment is appropriate because this is an issue of law, and that the Agency correctly denied Van Zelst's application. Agency Mot. at 9.

VAN ZELST RESPONSE TO AGENCY'S SUMMARY JUDGMENT MOTION

First, the Board will summarize Van Zelst's three main arguments in response to the Agency's motion for summary judgment. Then, the Board will summarize Van Zelst's request for relief.

Regulatory History

In Van Zelst's response to the Agency's motion for summary judgment, Van Zelst argues that the Agency accords the regulatory history too great a weight in the consideration of statutory interpretation. Van Zelst Resp. at 1. Van Zelst points out that the Agency relies "entirely" on the regulatory history to support the Agency's interpretation of Section 830.203(a)(3). Van Zelst argues that the Agency's interpretation is: 1) not supported by case law and 2) ignores the clear language of the regulation in question. *Id.* Van Zelst asserts that the "best determination of the legislative intent is the clear language of the statute." *Id.* Therefore, Van Zelst concludes that the Agency's reliance on the regulatory history is not the appropriate standard with which to interpret the regulation's meaning. *Id.*

Nearest Residence Requirement

Van Zelst challenges the Agency's assertion that the "nearest residence" definition is confusing because one can never measure "adjacent property commonly used by the inhabitants," and claims that the Agency did not even use that standard when considering Van Zelst's application. Van Zelst Resp. at 2. Van Zelst contends that if the Agency used this definition in considering Van Zelst's application, the Agency would have found that the proposed facility was approximately 700 feet from the nearest residence, and that this would have left another 40 feet to be used by the residence's inhabitants, which would have been a reasonable amount of space for the residents. *Id.* Van Zelst argues that the Agency just used the property line as a "bright line" determination of setback requirements because the true interpretation requires a case-by-case analysis. *Id.* Van Zelst concedes that measuring the "adjacent property commonly used by the inhabitants" is a case-by-case issue that requires examination by the Agency. *Id.*

Statutes Must be Interpreted as a Whole

Van Zelst also argues that different sections of a statute must be read together. Van Zelst Resp. at 2. Van Zelst does acknowledge that the 1997 amendments added to the original rule. *Id.* However, Van Zelst contends that the 1997 amendments would be unnecessary if the setbacks for both a residence and the other facilities were actually the same. *Id.* Van Zelst goes on to criticize the clarity of the Agency's property line standard, claiming that the Agency's supposedly clear standard could still result in conflicting measurements. *Id.* at 2-3. Van Zelst calculated that:

> [i]f a health facility or child related facility as defined at Section 820.203(a)(3)(A), (B), and (C) were located within 10 feet of a lot line of a parcel that was located some 665 feet away (a total of 675 feet from the proposed facility), it would be permitted, but yet a residential structure that is 700 feet away, as in this case, could not be permitted. *Id.* at 3.

Van Zelst argues that this standard would be unfair because of inconsistent and illogical results. *Id.* At any rate, Van Zelst asserts again, the Agency cannot bootstrap the argument that the regulatory history of the 1997 amendment is controlling when the statute has clear and unambiguous language. *Id.*

For the above reasons, Van Zelst urges the Board to find that the correct setback of a landscape compost facility from a residence shall be 1/8 of a mile from that residence. Further, Van Zelst asks that the Board find that the word "residence" in 35 Ill. Adm. Code 830.203(a)(3) be means the actual house or structure used for living purposes.

AGENCY RESPONSE TO VAN ZELST'S SUMMARY JUDGMENT MOTION

In response to Van Zelst's motion for summary judgment, the Agency argues that the Board should consider the regulatory history of 35 Ill. Adm. Code 830.203(a)(3). Agency Resp.

at 1. Specifically, the Agency contends that Van Zelst's assertion that Section 830.203(a)(3) is clear and unambiguous is incorrect because the definition of "nearest residence" is ambiguous. *Id.* The statute is ambiguous, according to the Agency, because "nearest residence" has more than one reasonable interpretation. *Id.* at 2. The Agency points to case law that states that "[i]n the case of an ambiguous statute, a reviewing body may consider extrinsic aids, such as legislative history." *Id., citing* County of Du Page v. Illinois Labor Relations Bd., 231 Ill. 2d 593, 604 (2010). Therefore, the Agency states that the Board should examine both the original rule and the amended rule. *Id.* at 1.

The Agency reiterates that a motion for summary judgment is appropriate because this is an issue of law, and that the Agency correctly denied Van Zelst's application. Agency Resp. at 2-3.

LEGAL BACKGROUND

This section contains all of the law that controls and is relevant to the case. First, the Board will set out the appropriate standard for granting summary judgment. Second, the Board will set out the standard of review and burden of proof. Next, the Board will set out all of the relevant provisions of the Illinois Environmental Protection Act (Act) and the Board's own regulations that pertain to this case.

Summary Judgment

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." *Id*. Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief "is clear and free from doubt." *Id., citing* Purtill v. Hess, 111 Ill. 2d 299, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994).

Standard of Review and Burden of Proof

The standard of review on a permit appeal is preponderance of the evidence, specifically, whether the application, as submitted to the Agency, would not violate the Act and Board regulations. 415 ILCS 5/40 (2010). The Board will not consider new information that was not before the Agency prior to its final determination regarding the issues on appeal. Kathe's Auto Service Center v. IEPA, PCB 95-43, slip op. at 14 (May 18, 1995). The Agency's denial letter frames the issues on appeal. Pulitzer Community Newspapers, Inc. v. IEPA, PCB 90-142 (Dec. 20, 1990).

The Board's procedural rules provide that, in appeals of final Agency determinations, "[t]he burden of proof shall be on the petitioner. . . ." 35 Ill. Adm. Code 105.112(a), citing 415 ILCS 5/40(a)(1), 40(b), 40(e)(3), 40.2(a).

Statutory and Regulatory Authorities

Section 39(m)(4)(1)-(6) of the Act contains the pertinent statute and the various setback requirements for a landscape waste compost facility in Illinois. The provision at issue in this proceeding is Section 39(m)(4)(3), which states that:

> the facility is 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 is located at least 1/8 mile from the nearest residence (other than a residence located on the same property as the facility). 415 ILCS 5/39(m)(4)(3) (2010).

The Board rules at Section 830.102 provide definitions to be used with the composting rules. *See* 35 Ill. Adm. Code 830.102. The definition relating to the issue in this proceeding is the definition of "Nearest Residence" that states: "'Nearest residence'" means an occupied dwelling and adjacent property commonly used by inhabitants of the dwelling." 35 Ill. Adm. Code 830.102.

Section 830.201 applies to the scope and applicability of permits to landscape waste composting. Section 830.201(e) provides in pertinent part:

> Permitted landscape waste compost facilities are subject to the minimum performance standards in Section 830.202, the location standards in Section 830.203, the additional operating standards and requirements in Sections 830.204 through 830.213, the end-product quality standards of Subpart E of this Part and the financial assurance requirements of Subpart F of this Part. 35 Ill. Adm. Code 830.201(e).

Section 830.203(a)(3) provides:

> 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 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. 35 Ill. Adm. Code 830.203(a)(3).

In 1997, the Board amended Section 830.203(a)(3) by adding subsections (A), (B), and (C) , which designates setback areas for various types of facilities. *See* Amendments to Requirements for Landscape Waste Compost Facilities, 35 Ill. Adm. Code 830.203, 831.107, and 831.109(b)(3), R97-29.

BOARD ANALYSIS

First, the Board examines both parties' arguments for summary judgment. The Board then analyzes the relevant issues before rendering a decision. The relevant issues include the Agency's historical practice, the statutory requirement for setback from a residence and the regulatory requirements for setback from a residence.

Summary Judgment

Van Zelst argues that this case concerns the interpretation of 35 Ill. Adm. Code 830.203(a)(3), and is a matter of law not fact. Van Zelst Mot. at 2. Therefore, this case is ripe for a summary judgment motion. *Id.* Van Zelst also argues that the language of the statute in question is specific and unambiguous, which means that there is no need for statutory interpretation or construction analysis. *Id.* at 3. Based on the plain language of Section 830.203(a)(3), Van Zelst argues that the rule means that a compost facility must be setback at least 1/8 of a mile from the nearest "residence," and that "residence" means a dwelling. *Id.* Therefore, Van Zelst argues that the proposed facility is the appropriate distance from the nearest residence. *Id.* at 5.

The Agency concurs that summary judgment is appropriate here because there is no genuine issue of material fact. Agency Mot. at 4. The Agency argues that the property line is the setback point from all facilities and that measuring from the property line is the Agency's historic practice. *Id.* at 1. The Agency asserts that the regulatory history supports the Agency's interpretation of the setback requirement. *Id.* at 4.

Upon reviewing the arguments of both parties and the facts of the record, the Board finds that summary judgment is appropriate. There are no issues of material fact in this case, only a matter of law relating to the meaning of the Board's rules at Section 830.203(a)(3). In determining which motion for summary judgment to grant, the Board must look to the burden of proof in a permit appeal and examine the arguments presented by the parties.

The Board is not Bound by Agency Practice in Interpreting Laws

The Agency relies on the Agency's historical use of the property line to measure setbacks from residences. Agency Mot. at 1. However, the Board has the final authority to interpret the Board's rules and regulations. While the Agency makes initial determinations implementing Board rules, these interpretations are not binding on the Board.. *See* 415 ILCS 5/3.04, 5, 13 (2010).

In Village of Fox River Grove v. IPCB, 299 Ill. App. 3d 869, 702 N.E.2d 656 (2nd Dist. 1998) the Agency in the context of issuance of a National Pollutant Discharge Elimination System (NPDES) permit interpreted the Board's rules at 34 Ill. Adm. Code 304.120(b). . In a 1986 letter to the petitioner, the Agency stated that the Agency "does not agree" with the "literal interpretation of 304.120(b)". *Id*. at 872-73. The Board did not rule on the letter because the petitioner withdrew the petitioner's appeal when the Agency settled with the petitioner. *Id*. In 1996, the petitioner tried to renew the permit, and the Agency tried to impose more stringent effluent standards than exist in Section 304.120(b). *Id*. at 873. The petitioner appealed the NPDES permit conditions to the Board. *Id.* The Board found that the Agency properly imposed the effluent limitations in 304.120(b), reasoning that the rule's plain language prohibited discharges greater than a certain amount, that petitioner's discharges exceeds that amount, and that the permit could not be lawfully issued. *Id*. at 876-77. The petitioner appealed the Board's finding to the Illinois Appellate Court, and the Court found that the Agency's interpretation of the regulations is not entitled to deference but that the Board has the power to construe the Board's own rules and regulations to avoid unfairness or absurd results. *Id*. at 877-78, 880. Therefore, the Agency's own interpretation of the Board's regulations is not binding on the Board.

The decision in Fox River Grove is controlling and the Board need not rely on the Agency's historic practice as establishing the bright line rule for setback requirements. In Fox River Grove, the Agency attempted to impose the Agency's own interpretation of imposing population equivalents to determine effluent limitations on the Village of Fox River, and in the case at hand, the Agency is attempting to impose the Agency's own definition of a setback requirement from a residence. Fox River Grove, 299 Ill. App. 3d at 873; Agency Mot. at 1. Therefore, the Board will not give deference to the Agency's historic practice in measuring setback requirements from a proposed compost facility.

Statutory Requirement for Setback from Residence

In a permit appeal, the Agency's denial letter frames the issue on appeal. Here, the Agency denied Van Zelst permit application because:

> The proposed facility does not meet he [sic] required setback of an 1/8 of a mile from the nearest residence as required, pursuant to 35 Ill. Adm. Code 830.203(a)(3). AR at 1.

Van Zelst argues that the facility meets the required setback because the facility is located more than 1/8 of a mile from the nearest residence, reasoning that the plain language of the rule supports Van Zelst's application of the rule. The Agency argues that the 1/8 of mile setback is from the property line, asserting that the definition of "Nearest Residence" is ambiguous and legislative history supports the Agency's interpretation of the rule.

The Board is a creature of statute, and as such, has only specific areas of authority. The Board has the authority to adopt such procedural and substantive rules as may be necessary to accomplish the purposes of the Illinois Environmental Protection Act. 415 ILCS 5/26-26(a) (2010). The only time the Board may make different provisions than what appears in the Act or what appears in federal law is when circumstances require something different because of different contaminant sources, different geographical areas, sources outside the State of Illinois, and emergencies. 415 ILCS 5/26(a) (2010). Therefore, the Board first examines the Act's plain language and the statute's legislative history.

Section 39(m)(4)(3) of the Act creates the statute on which the Board's Section 830.203 is based. The statute states in pertinent part that the Agency shall issue permits when proposed facilities meet the following criterion:

> the facility is 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 is located at least **1/8 mile from the nearest residence** (other than a residence located on the same property as the facility). 415 ILCS 5/39(m)(4)(1)-(6) (2010) (Emphasis added).

"The best evidence of legislative intent is the statutory language itself, which must be given its plain and ordinary meaning." Ultsch v. Ill. Mun. Retirement Fund, 226 Ill. 2d 169, 181, 314 Ill. Dec. 91, 99 (Ill. 2007); Allstate Inc. Co. v. Menards, Inc., 202 Ill. 2d 586, 591, 270 Ill. Dec. 64, 67 (Ill. 2002) ("The statute's plain language is the best indicator of the legislature's intent."), citing Lulay v. Lulay, 193 Ill. 2d 455, 466, 250 Ill. Dec. 758 (2000). Likewise, the Supreme Court also held in Ultsch that "[w]here the language of a statute is plain and unambiguous, a court need no consider other interpretive aids," dictating that a court can never declare that the legislature intended an interpretation other than the plain language of the statute and that when the language of a statute is plain and unambiguous, a court does not need to use other interpretive analyses. *Id.* at 184-85, 101-02.

Section 39 was promulgated by the Illinois General Assembly. The Statute on Statutes: states that "[a]ll general provisions, terms, phrases and expressions shall be liberally construed in order that the true intent and meaning of the General Assembly may be fully carried out." 5

ILCS 70/1.01 (2010). The Board examined the legislative history of Section 39 of the Act to ensure that the General Assembly intended to use the term "residence" as generally understood. That review revealed that none of the drafts of the statute ever contained a reference to the property line but only the residence. P.A. 90-655 § 133, eff. July 30, 1998; P.A. 92-574 § 5, eff. June 26, 2002; P.A. 93-575 § 10, eff. Jan 1, 2004; P.A. 94-272 § 10, eff. July 19, 2005; P.A. 94-725 § 5, eff. June 1, 2006. Obviously, the General Assembly never contemplated using "residence" to mean "property line." The Board can find no suggestion that the General Assembly intended to include the location of the property line in the analysis of a setback from a residence.

Regulatory Requirement for Setback from Residence

The Board finds that the Board's own rulemaking did not change the statutory requirement that a setback should be measured from a residence rather than the property line of a residential property in either the definition of "Nearest Residence" or amendments to Section 830.203(a)(3). The Board specifically provided for measurement from an occupied dwelling and property adjacent to the dwelling "commonly used by inhabitants". However, the Board did not require measurement from the property line. Thus, the Agency's liberal reading of the definition of "Nearest Residence" is unsupported by the plain language of the rule.

In R97-29, the Board took into account the fact that the fungus *A. fumigatus*, which composting areas generate, has an adverse effect on "very young children and persons with asthma, cystic fibrosis, immunocompromised or immunosuppressed conditions, or bioaerosol allergies." R97-29 slip op. at 1 (Nov. 19, 1998). The Board found that the fungus can cause "allergic asthma, allergic bronchopulmonary aspergillosis, extrinsic allergic alveolitis, and invasive aspergillosis." *Id.* For that reason, extra precautions were constructed, based on the recommendations of public health officials, to protect this subset of the population. *Id*; 415 ILCS 5/26(a) (2010).

At first notice, the Board proposed to extend the 1/8 mile setback requirement from residences to health care facilities, preschool and child care facilities, and primary and secondary school facilities. R97-29 slip op. at 1 (Nov. 19, 1998). The second notice changed the proposed amendments further. The second notice clarified "(1) the facilities that would be protected by setbacks; (2) when the setbacks would be determined; and (3) how setbacks would be measured." *Id.* The third category is pertinent to this inquiry.

The measurement of the setbacks was clarified in the following way. The paragraph regarding setback requirements is made up of two sentences. The first sentence maintains the original rule and the setback requirement for residences surrounding a proposed compost facility. R97-29 slip op. at 5 (Nov. 19, 1998). The second sentence creates greater protections for facilities in which people with the aforementioned ailments exist; this second sentence requires that a proposed facility be set back from three particular types of building, and it is followed by very precise parameters for those protected buildings. *Id.* Specifically, the 1997 amendments changed Section 830.203(a)(3) to add protection to facilities serving a population with very

specific physical ailments and small children. *Id.* The 1997 amendments did not change the original rule in any way but expanded on it.

In essence, there are now two standards for setback requirements, and which setback is applied depends on the facility itself. A residence still requires 1/8 mile setback. Facilities serving a population with very specific physical ailments and small children require a 1/8 mile setback from the property line of the parcel on which the facility sits. Those facilities require greater protection because there is scientific evidence that people within those facilities are more adversely affected by the fungus that composting generates. The Board's findings at first notice demonstrate that "*A. fumigatus* spores pose little, if any, health threat to healthy individuals in the general public," and so average residences do not require such additional protection. R97-29 slip op. at 6 (Nov. 19, 1998).

Now that the Board has analyzed the regulatory history of the rule, the Board turns to basic statutory interpretation. As stated above, when reviewing the language of a rule or statute, the law is clear that "[t]he best evidence of legislative intent is the statutory language itself, which must be given its plain and ordinary meaning." Ultsch v. Ill. Mun. Retirement Fund, 226 Ill. 2d 169, 181, 314 Ill. Dec. 91, 99 (Ill. 2007); Allstate Inc. Co. v. Menards, Inc., 202 Ill. 2d 586, 591, 270 Ill. Dec. 64, 67 (Ill. 2002) ("The statute's plain language is the best indicator of the legislature's intent."), citing Lulay v. Lulay, 193 Ill. 2d 455, 466, 250 Ill. Dec. 758 (2000). Likewise, the Supreme Court also held in Ultsch that "[w]here the language of a statute is plain and unambiguous, a court need no consider other interpretive aids," dictating that a court can never declare that the legislature intended an interpretation other than the plain language of the statute and that when the language of a statute is plain and unambiguous, a court does not need to use other interpretive analyses. *Id.* at 184-85, 101-02.

First, the phrase "in addition," which comes after the first sentence regarding residences and leads into the sentence regarding certain healthcare and child care facilities, demonstrates that there are additional standards for certain facilities. Second, as Van Zelst notes, statutes are meant to be read as whole entities. Therefore, the Agency's reasoning that the Board would have written a two sentence paragraph which included two different terms "residence" and "property line" and intended those two terms to carry the same meaning is illogical. A plain language interpretation of the rule is clear.

Finally, the Board finds that the Agency's denial letter supports Van Zelst's and the Board's interpretation. As noted above, the Agency's denial letter states "[t]he proposed facility does not meet he [sic] required setback of an 1/8 of a mile from the nearest residence as required, pursuant to 35 Ill. Adm. Code 830.203(a)(3). AR at 1." The Agency's denial letter does not reference the property line at all but only the "residence" as the setback point.

Based on the fact that the plain language of the rule states that residences are protected by a 1/8 mile setback and that the rules of statutory construction require the Board to find that "residence" and "property line" do not carry the same meaning, the Board finds that there are two different setback requirements contained in 830.203(a)(3). According to the plain language of the statute and Board rule, the setback requirement for Van Zelst's proposed facility from

residences is 1/8 mile. The record shows that the nearest residence to the facility is a house to the east-northeast that is approximately 700 feet from the proposed facility. Since 1/8 mile is 660 feet, the residence is located more than 1/8 mile from the facility. Therefore, the Board finds that Van Zelst's proposed facility satisfies the setback requirement of 830.203(a)(3).

Therefore, the Board finds that there are two different setback requirements contained in 830.203(a)(3). The nearest residence to Van Zelst's proposed facility only requires that the setback be 1/8 mile from the residence itself, which the records demonstrates is the case; thus, the Board finds the proposed facility satisfies setback requirements.

CONCLUSION

For the reasons described above, the Board finds that there is no genuine issue of material fact posed in this case, and that Van Zelst is entitled to summary judgment as a matter of law. Further, the Board finds that based on provisions of Section 39(m) of the Act (415 ILCS 5/39(m)(4)(3) 2010)), and Board rules implementing that statute, a landscape waste compost facility requires a setback of 1/8 mile from a residence to the composting operation. The record shows that the nearest residence to the facility is a house to the east-northeast that is approximately 700 feet from the proposed facility. Since 1/8 mile is 660 feet, the residence is located more than 1/8 mile from the facility. The Board accordingly grants Van Zelst's motion for summary judgment, denies the Agency's motion for summary judgment and directs the Agency to grant Van Zelst a permit to develop and operate a landscape waste compost facility at 39400 North Highway 41, City of Wadsworth, Lake County.

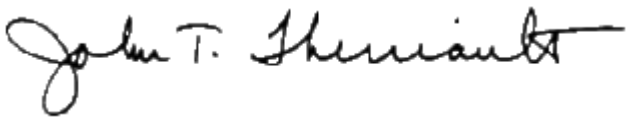
ORDER

The Board directs the Illinois Environmental Protection Agency to issue a permit to Van Zelst Landscape Compost Facility consistent with this opinion and order.

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 T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 4, 2011, by a vote of 5-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board