

STATE OF MICHIGAN
IN THE COURT OF APPEALS

PITSCH RECYCLING & DISPOSAL, INC.
and PITSCH SANITARY LANDFILL, INC.,
Michigan Corporations,

Circuit Court No:06-M-24599-CZ

Plaintiffs,

Hon. Suzanne Kreeger

v

IONIA COUNTY, a Michigan
Municipal Corporation

Defendant.

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**DEFENDANT IONIA COUNTY'S PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

September 28, 2010

Ionia County, by and through its counsel, Silver and Van Essen, P.C., submit the following Proposed Findings of Fact and Conclusions of Law:

At a session of said Court held in the Ionia Circuit Court, State of Michigan, on the ____ day of October, 2010.

PRESENT: HONORABLE SUZANNE KREEGER
Circuit Court Judge

The Court having received an Amended Complaint from the Plaintiffs, Pitsch Recycling and Disposal, Inc, and Pitsch Sanitary Landfill, Inc. (collectively, "Pitsch") against Defendant Ionia County ("County"), which in Count I, seeks a declaration that the 100,000 ton annual aggregate solid waste disposal cap in the County Solid Waste Management Plan of 2000 is unauthorized and having received testimony and other evidence at a trial held on August 19, 2010 and otherwise being advised in the premises:

NOW, THEREFORE, the Court adjudges and decides as follows:

Conclusions of Law

1. Michigan's Solid Waste Management Act, MCL §324.11501 *et seq* ("Part 115") authorizes and directs Michigan counties to adopt a Solid Waste Management Plan ("County Plan"), the purpose of which is to ensure that there is sufficient disposal capacity for at least ten years for all solid waste generated within the County. MCL §324.11533(1).

2. Part 115's Section 11538 and the Rules promulgated by the Michigan Department of Natural Resources and Environment ("MDNRE") require

the County Plan to develop specific siting criteria for landfills and to evaluate, among other things, the “goals and objectives” for the “prevention of adverse effects” on the environment resulting from solid waste disposal and to inventory and describe the characteristics, including deficiencies, of all disposal facilities serving the County. See MCL §324.11538(1)(a) and (d) and R 299.4711.

3. Part 115 obligated the Michigan Department of Environmental Quality to develop for a legislative committee, a standardized plan format. MCL §324.11539a. The format developed by the MDEQ expressly authorizes a county to place **daily** and **annual** waste quantity limits on waste deposited. See Exhibit 1, which is the County’s 2000 Solid Waste Management Plan.

4. Part 115 also requires the County Board of Commissioners to each year certify landfill capacity available to the County and if it cannot certify at least 5 and ½ years capacity, it is obligated to site any newly proposed landfill or landfill expansion that otherwise meets the objective siting criteria of the Plan. See MCL §324.11537a and MCL §324.11538(4).

5. To develop and approve a County Plan, a county board of commissioners must create a solid waste management committee (“SWMC”) composed of various interested parties, including a representative from any local landfill. MCL §324.11534(2). After the SWMC develops and recommends a County Plan, the local county board of commissioners must approve the County Plan. MCL §324.11536(2). After board approval, the County Plan must be submitted to the local units of government. If 2/3rds of the local units approve

the County Plan, it is then submitted to the Michigan Department of Environmental Quality ("MDEQ" and now called the "MDNRE"), which may modify it and approve it as modified. Only then does the County Plan become enforceable as law. MCL §324.11536(4). Collectively, all individually approved County Plans make up the State's Solid Waste Management Plan. MCL §324.11541.

6. The Court of Appeals has recognized that Part 115 is general mandate to counties develop enforceable solid waste management program and that it implies authorization for a county to enact specific provisions to advance the objectives and goals of the plan. Thus, although Part 115 does not expressly confer authority in counties to impose an operational surcharge, such authority is consistent with having an enforceable solid waste program and is duly drawn from the statute's general grant of power:

Furthermore, we believe plaintiff possessed authority to pass the surcharge ordinance under the solid waste management act. As we previously mentioned, subsection 11538(8) of the act, M.C.L. § 324.11538(8); MSA 13A.11538(8), declares that, after approval of a countywide solid waste management plan by the Department of Environmental Quality, only a county ordinance that affects landfill location or development and is not part of or is inconsistent with the county's approved plan is prohibited. Because the surcharge does not fall into the category of ordinances explicitly prohibited by subsection 11538(8), it is valid. The surcharge also comports with the most recent, state-approved update to plaintiff's solid waste management plan. The update requires that the county board of commissioners establish an enforcement agency to carry out the plan and provides for *222 enforcement agency funding "by surcharges, tipping fees and/or other appropriate means of financing."

County of Saginaw v. John Sexton Corp. of Michigan, 232 Mich App 202, 221-222, 591 N.W.2d 52, 61 (Mich.App.,1998).

7. The MDNRE interprets Part 115 and its regulations as generally authorizing a County to impose an annual, aggregate disposal cap of all waste disposed of at a landfill as part of the Part 115's obligation on the counties to develop enforceable provisions in its Plan to ensure that it has adequate landfill disposal capacity for 10 or more years, to enforce landfill siting criteria, and to address goals and objectives for avoiding adverse consequences and deficiencies of a landfill located within the planning area.

Findings of Fact

1. Pitsch owns and operates the small Pitsch Sanitary Landfill ("Landfill"), which is located at 7905 Johnson Road, Belding, Michigan in Orleans Township in Ionia County, Michigan. (CC ¶2; Pitsch Answer ¶2). The Landfill is the location of Pitsch's principal place of business. (CC ¶2; Pitsch Answer ¶2).

2. Pitsch has operated the Landfill since 1973. The Landfill is accessed only through Johnson Road, which has a limited capacity for disposal truck traffic since it only has two lanes, is narrow and hilly, and is not an all season road; meaning truck traffic is subject to seasonal load restrictions. (TR 237).¹

3. Ionia County has had a County Plan since the 1980's, first under Act 641 and then later, its successor, Part 115. Since at least the 1990's Ionia

County has had an overall maximum disposal cap in its Plan governing the total amount of solid waste from all sources that Pitsch can accept in the Landfill. Until the 1999, that cap was 54,240 tons per year, when it was increased to 100,000 annual tons. (TR 233).

4. In 1999, the Landfill was nearing capacity and Pitsch sought the County's approval for a 41.28 acre expansion and a total tonnage capacity of approximately 2.3 million tons. Pitsch proposed to landfill 100,000 tons per year and to increase that figure by three quarters of one percent. Based on that rate of annual use, Pitsch estimated that the capacity or useful life of the Landfill would be 20.82 years, using the Plan's conversion rate of 2 yards per ton. (Plan p. 88). Pitsch expressly marketed the expansion on the premise that this would enable the County to certify 20 year capacity and avoid a mandate that have siting criteria for another landfill in its 1999 Plan Update that the County had to adopt to meet the requirements of the State's Solid Waste Management Act, known as "Part 115." See p. 86 of County Plan.

5. Pitsch concluded its pitch seeking the County's approval of its expansion plans by stating that "Pitsch Companies is dedicated to providing a safe and economical means of disposal waste for Ionia County, and to conforming to the Ionia County Solid Waste Management Plan in addition to the Act 451 rules. As the disposal capacity is needed and the siting criteria met, we

¹ Parenthetical expressions preceded by the letters "TR" refer to the page number of the transcript of the Trial on Thursday, August 19, 2010.

request that this proposal be found consistent with the Ionia County Solid Waste Management Plan.” Plan p. 90.

6. Based on these representations, the County worked the proposal into its 1999/2000 Solid Waste Management Plan, making it consistent therewith and enabling Pitsch to obtain State Approval. It modified its Solid Waste Management Plan to increase the aggregate landfill disposal cap, which had been 54,240 for over ten years, to 100,000 tons.

7. The County’s Plan identifies specific counties from which waste may be imported, limits volume that may be accepted in the Landfill and contained a 100,000 ton cap that ensured that the County of Ionia would have 20 years capacity. See Page III-2 of the County Plan, excerpts of which are attached as Exhibit 1. The 2000 County Plan Update contained an explanatory “note” that indicated that the 100,000 cap was designed to ensure that the County had 20 years of capacity for its own waste:

NOTE: The 100,000 tons per year cap is for the Pitsch Sanitary Landfill. This cap is to ensure the County of Ionia of 20 + years of capacity. This cap is negotiable with Ionia County and Pitsch Sanitary Landfill. This Cap is in no way to limit the business of Pitsch Sanitary Landfill and any revenue due to the Landfill.

Plan, p. 67.

8. On Page 271 of the County Plan, the County made clear that the 100,000 tons was an overall disposal cap, consistent with its earlier Plan provisions, when it noted:

The plan establishes limits on the amounts and origins of waste authorized for disposal in Ionia County, including a controlling overall maximum amount of 100,000 tons annually.

9. Gary Pitsch testified that he was a member of the SWMC and that he understood the 100,000 ton annual cap to be a disposal cap on all solid waste deposited in the family landfill, including waste generated from within Ionia County, rather than as a cap only regulating the amount of waste that could be brought into the County from other counties in Michigan, other states in the United States or foreign locations. (TR 219). Pitsch further testified that while he voted against the 100,000 ton annual cap, he proposed 150,000 tons and that Pitsch would have been satisfied if such a cap were installed. (TR 219).

10. After local governmental approval, however, the MDEQ on August 23, 2000 asked the County to modify the County Plan to establish a fixed cap of 100,000 tons per year:

On page III-2, the Note attached to this page states the cap for Pitsch Sanitary Landfill is negotiable between Ionia County (County) and Pitsch Sanitary Landfill. **Annual caps must be established in the Plan and may not be changed except by a Plan amendment.** This note should be deleted from the Plan and the annual cap of 100,000 tons per year shall be the only annual cap authorized in the Plan unless amended.

See MDEQ's August 3, 2000 letter attached to Plan, 314.

11. The County agreed to the modification through a Board of Commissioners' resolution, communicated on September 1, 2000. Plan, p. 322. On January 19, 2001, the MDEQ officially modified the Plan, codifying the language above, and then finally and formally approved the Plan. Plan, p. 326.

12. Pitsch has never exceeded 100,000 tons of disposal in a particular year and averages approximately 65,000 tons deposited each year. (TR 240; Exhibit I).

13. Pitsch didn't complain about the cap until 2004 when it wanted to sell the landfill to Transload, which only wanted the landfill if it could "train" 600,000 tons of waste per year apparently from the Eastern seaboard. (TR. 221).

14 Ionia County refused to amend its cap at that time, because it would have consumed Pitsch's licensed capacity in 2 or 3 years, as well as put a burden on the infrastructure of the landfill and surrounding areas.

15. Many other Michigan Counties impose annual, aggregate disposal caps on the landfills located therein through their Solid Waste Management Plans, including Ottawa, Clinton, St. Joseph and Washtenaw Counties. (TR 103; Exhibits D-G). While some of those Counties may have entered into host agreements with their local landfills addressing the disposal cap, such an agreements only involve the County and do not commit the local units of government or State of Michigan, which must also approve those solid waste management plans. (TR 186-187). Moreover, as the MDNRE's 2001 correspondence regarding the 2000 Ionia County Plan Update demonstrates, the MNDRE requires that all landfill disposal caps be established in and through the county solid waste management planning process and that they may not be imposed or modified through a contract with the host landfill.

15. The County amended its Solid Waste Plan in 2003 to impose a solid waste tipping fee surcharge to fund the implementation of Ionia County's Solid Waste Plan, including recycling. In 2005, Pitsch sued Ionia County in federal court and stopped paying the surcharge. However, Pitsch did not challenge the disposal cap.

17. In September of 2005, the Federal Suit was dismissed, as the Court found there was no impairment of contract related to the Surcharge, deferring the issue of whether there was a breach of contract regarding the Surcharge to the state courts.²

18. On February 13, 2006, the County filed a two-count Complaint—the present case—in Ionia Circuit Court, seeking to compel in Count I, the payment of the Surcharge pursuant to the County Plan, and in Count II, to compel compliance with the provisions of the County Plan requiring Pitsch to submit monthly waste deposit information.

19. On March 28, 2006, Pitsch responded with an answer and counterclaim. Counts I, II and VII of the Counterclaim, challenge the authority of the County to enforce the Surcharge. Count III (Equal Protection), Count IV (Due Process), Count V (Takings) and Count VI (Part 115 Authorization) and Count VII (Commerce Clause) of the Counterclaim all pertain to the County Plan's 100,000 ton annual limit on total waste that may be deposited in the Landfill.

² *Pitsch Recycling & Disposal, Inc. v. County of Ionia*, 386 F.Supp.2d 938 (W.D.Mich., 2005).

20. On December 10, 2006, the Ionia County Circuit Court granted the Plaintiff's First Motion for Partial Summary Disposition regarding the two counts in its Complaint. On February 22, 2007, the Court granted the Plaintiff's Second Summary Disposition against all but Counts I, II and VII of the Counterclaim, finding that the County Plan's Surcharge and 100,000 ton annual waste limit did not violate the Commerce Clause of the United States Constitution and were authorized under state law. On May 29, 2007, the Circuit Court granted Judgment on Counts I, II, and VII of the Counterclaim.

21. Pitsch filed a Delayed Application for Leave to Appeal on March 3, 2008, seeking review of **only** of the questions of whether the 100,000 ton annual cap on waste deposited at the Pitsch landfill is authorized by Michigan law discriminates against out of state waste or violates Pitsch's substantive due process rights. On August 8, 2008, the Court granted delayed application for leave to appeal, limited to those issues. On August 6, 2009, the Court of Appeals, the COA reversed and remanded this Court's ruling on the Counterclaim, directing that the Court receive the input of the State of Michigan on the statutory interpretation question.

22. On September 25, 2009, Pitsch filed an Amended Counterclaim, asserting that the due process and commerce clause claims in addition to the statutory authority count. On October 9, 2009, the County moved to dismiss the Commerce Clause claim in the Amended Counterclaim. At a hearing on November 11, 2009, this Court granted the County's motion.

23. The State of Michigan was added as a party and the Court issued a scheduling order on or about November 10, 2009 that reorganized the caption, and authorized Pitsch to file an Amended Complaint, asserting its three Amended Counterclaim counts in a Complaint form, recognizing that Count III on the Counterclaim was being dismissed. An order dismissing Count III was entered by the Court on December 23, 2009.

24. On March 23, 2010, the State moved for summary disposition on jurisdictional grounds. The County joined in that motion and moved for summary disposition on Count II. The Court granted those motions at the hearing on April 27, 2010 and entered an order to that effect on May 10, 2010, leaving only the statutory interpretation count, Count I of the Amended Complaint in question against Ionia County.

25. The Court heard testimony from the MNDRE, the successor to the MDEQ. The MDNRE believes the 100,000 ton annual disposal cap in the Ionia County Plan, which it approved, is authorized under Part 115, as an available provision in an enforceable solid waste Plan. (TR 61-63; 94-96; Exhibit H).

26. The County finds that disposal cap serves several important purposes, including:

A. Assures that Ionia County can meet the Part 115 mandate of certifying at least 10 years of capacity and in the process insuring that Ionia County has a local landfill that can admit all of the solid waste that the County generates for at least its 20 years, since the landfill after the

1999 expansion had capacity for 2.3 million tons, roughly 23 years at 100,000 tons per year. (TR. 99; 163-167; 235).

B. Enables the County to avoid an obligation to site additional landfills, which if it could not certify at least 10 years of capacity, it would have to site, permanently consuming additional tracks of Ionia County, undeveloped land. (TR 164).

C. Assures that the infrastructure surrounding the landfill, including Johnson Road, will not be overwhelmed by exponentially increasing truck traffic, noise, odors, and litter. (TR 167-168; 237). This is particularly important to the Pitsch Landfill since Johnson Road is not all season, and is otherwise narrow, hilly and dangerous. (TR 102-103; 237).

27. Page 10 of the County Plan clearly indicates that the County is relying on the Pitsch Sanitary Landfill for its 5, 10 and 20 year planning capacity. While the County Plan may have attempted to relying on capacity available in other Michigan Counties, statements by such landfills that they may accept Ionia County generated waste do not commit them to actually taking such waste and Pitsch would be the only landfill over which Ionia County might have legal jurisdiction in the event that it had to compel the landfill to accept Ionia County waste. (TR 165).

28. State witnesses acknowledged that the State of Michigan—outside of its approval of county solid waste management plans--does not regulate or impose neither annual landfill disposal caps nor siting or operational concerns

affecting the landfill outside of the actual cell construction which would be impaired by the County's Disposal Cap. (TR 103).

Application of Law to Fact

1. The Court concludes that just as the operational surcharge was found in *John Sexton, supra*, to be authorized under Part 115's general mandate that counties develop a enforceable program to manage the County's solid waste disposal needs even though it wasn't expressly authorized in Part 115, so also an aggregate, annual disposal cap is an available tool, authorized under Part 115 to the County in developing the required, enforceable County Plan to ensure that the County's solid waste disposal needs are met, that infrastructure limitations associated with the landfill are addressed and any adverse effects on the environment are mitigated, and to ensure that the siting and operational concerns regarding the landfill of the local community are addressed and enforced.

2. The Court's conclusion is bolstered by the fact that the MDNRE has the same interpretation of Part 115 and the enforceability of the disposal cap in the County Plan, since a state administrative agency's interpretation of a statute is to be given respectful consideration and only reversed if there are cogent reasons to do so. *In re Complaint of Rovas Against SBC Michigan* 482 Mich. 90, 108(2008). Deference is particularly appropriate where the interpretation is doubtful. *Id.* Moreover, when the agency's interpretation also includes an interpretation of its own promulgations, as is the case with the County's

implementation of the State's standardized disposal authorization format in its County Plan and its regulations regarding landfill siting and operations, the state Agency's interpretation should be given deference unless it is obviously wrong, which is certainly not the case given the Court's own interpretation of Part 115 as noted above. *City of Romulus v. Michigan Dept. of Environmental Quality*, 260 Mich App 54 (2003)..

3. Michigan statutes are to be interpreted in order to give meaning and effect to the intent behind the Statute and to avoid absurd consequences. See *Luttrell v. Department of Corrections*, 421 Mich 93 (1984). If Ionia County and the State of Michigan through the Part 115 planning process lacked the authority to impose an annual aggregate cap, the County's 20 year certification of landfill capacity in its 2000 County Plan could have been completely disrupted in less than 4 years by Transload's proposed purchase of the landfill and the 600,000 ton annual deposit that Transload proposed. The County would then have had to site any additional proposed landfill that objectively met its siting criteria, meaning more undeveloped land would be permanently consumed in Ionia County for landfill purposes. Moreover, the County's legitimate infrastructure concerns about the Pitsch landfill; namely, the limits of Johnson Road and its concerns over an exponential increase in truck traffic, odors, noise and litter from the Landfill could be disregarded. Such results are contrary to the legislative intent behind Part 115 to promote stable, solid waste planning. Thus, an interpretation that such caps are unauthorized leads to

absurd results that are contrary to the intention of the statute, thereby militating against that interpretation and in favor of the County's and State's interpretation that such caps are indeed, authorized.

4. The Court finds that the 100,000 ton annual cap is reasonable given the historical waste disposal activities of the Pitsch Landfill, the Counties reliance on the landfill for its 5, 10 and 20 year capacity, and legitimate concerns of the community regarding truck traffic on the hilly, narrow and dangerous Johnson Road and their concerns regarding noise, litter, and odors emanating from the landfill—all of which could be compromised if the landfill took in as much as 6 times its historical waste level if the cap had not been in place and Transload had fully implemented its plans for the Landfill.

5. Since the State does not regulate annual disposal nor address site and infrastructure concerns except those associated with the actual cell construction, the Court concludes that the County Plan's 100,000 disposal cap does not interfere with state regulations and is in now way pre-empted thereby. Indeed, the regulations involved here were modified and expressly approved by the State of Michigan through the County Plan approval process.

6. While the County might have decided to rely on out of county landfills for its capacity, it chose to rely on Pitsch's capacity for its disposal certification and given that this is the only landfill over which the County would have jurisdiction, such a reliance and the exercise of such discretion is not unreasonable.

7. For the above reasons, the Court declares that the County's 100,000 ton annual aggregate disposal cap in its 2000 County Plan is authorized under Part 115, is enforceable and Count I of Pitsch's Amended Complaint is hereby be dismissed with prejudice.

IT IS SO ORDERED.

Suzanne Kreeger
Circuit Court Judge

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF IONIA

PITSCH RECYCLING & DISPOSAL,
INC., and PITSCH SANITARY
LANDFILL, INC., Michigan corporations,

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Hon. Suzanne H. Kreeger

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STATE OF MICHIGAN)
) ss
COUNTY OF KENT)

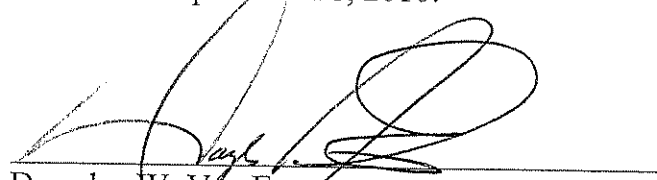
Douglas W. Van Essen, being first duly sworn, deposes and says that he is the attorney for Defendant in the above captioned matter and that on the 28th day of September, 2010, he served a copy of Defendant Ionia County's Proposed Findings of Fact and Conclusions of Law on:

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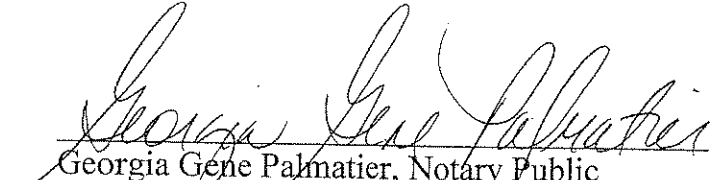
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Service was made via United States Mail on September 28, 2010.



Douglas W. Van Essen

Subscribed and sworn to before me, a Notary Public, in and for said County, this
28th day of September, 2010.



Georgia Gene Palmatier, Notary Public
Kent County, acting in Kent County, Michigan
My commission expires: 09/26/12

