IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GENERAL III, LLC d/b/a SOUTHSIDE RECYCLING, and RMG INVESTMENT GROUP, LLC,	)	Case No. 21-cv-02667
Plaintiffs,	)	Judge Robert M. Dow, Jr. Magistrate Judge Young B. Kim
v.	)	
CITY OF CHICAGO and DR. ALLISON ARWADY, in her Official Capacity as the Commissioner of the Chicago Department of Public Health,	)	
Defendants.	)	

PLAINTIFFS' RESPONSE TO
BRIEF OF *AMICUS CURIAE*

It is understandable that the Southeast Side community would question why a metal recycling facility, pressured to stop operating on the North Side, should be permitted to move to the environmentally burdened South Side. When RMG purchased the assets of General Iron, with an eye towards moving the business to its 175-acre South Side property, RMG knew it would have to demonstrate a much greater degree of environmental consciousness than the other industrial facilities that operate nearby.[1] The City, too, knew that the move would face great public scrutiny. Thus, after the City signed the transition agreement with RMG, the City created an entirely new LRF permitting process, specifically designed to make sure that any LRF facility would protect

[1] The City played no role whatsoever in RMG's decision to purchase the assets of General Iron or to use those assets to operate a metal recycling business at the Southeast Side property, which it has owned for decades. Once the location was chosen, General Iron and RMG entered negotiations, and ultimately executed the transition agreement with the City.

human health and the environment. The new LRF Rules, effective June 2020, were the result of extensive public input, including from a host of community and environmental advocacy groups, and contain 60 pages worth of requirements. They are among the most stringent LRF rules in the country. *See* Expanded Declaration of Steve Joseph, ECF No. 32-1, p. 10, ¶ 5.

The application of the new LRF Rules comes on top of a nine-month air pollution control construction permit process of unprecedented rigor by IEPA, for a minor source of air emissions, with review, comment, and commendation by USEPA, focusing on the potential impact of the proposed facility on the surrounding community. All of these permitting and rulemaking processes have allowed and accounted for substantial public comments, both in writing and at public hearings.

As explained at length in both the case filed by the *Amicus Curiaes* ("*Amicus*") and in this one, SR could not have taken the community's concerns more seriously, in the permitting and construction of its facility and in the testing and modeling of its air dispersion, in order to ensure there would be no adverse air impact to the community from this facility. The facility is not only a state-of-the-art facility, which utilizes processing equipment and pollution controls that should serve as a model for the metal shredding industry throughout the country, it is also one proven to be protective of human health in the burdened community where it will operate. SR has the right to rely on the rules and standards that were placed upon it, which it diligently met, and the City has the obligation to enforce those rules. It has failed to do so. Thus, SR requests the Court order the recycling permit be issued.

I. RMG's Property on the Southeast Side Provides a Superior Location to Minimize Environmental Impacts.

The question of why the facility is appropriate on the Southeast Side but not the North Side is a fair one, particularly given the racial and economic disparities between the two

neighborhoods. But the reasons for the move make sense from an environmental perspective, having nothing to do with race or wealth. The following characteristics of Southside Recycling's new facility explain why the new location is far superior to the North Side location from an environmental perspective and will make it the leader among the country's 300+ large shredder operations:

- 175+ acres of buffering for dust and noise—approximately 15x more buffering acreage than existed on the 10-acre North Side location, with the distance to the nearest public right of way over 50x the distance than the North Side location
- An enclosed shredder and emissions capture and control system
- Interior private roads for the queuing of delivery trucks to avoid traffic on public ways—not possible at the North Side location
- A 24-foot high newly constructed barrier along the eastern edge of the new facility to buffer noise and dust
- An unprecedented number of water cannons for dust control
- Access to rail transport in addition to the river for more efficient transportation options, also not available at the North Side location
- Access to the necessary utilities, including electrical power

This new location was not influenced by the race or other demographics of the neighborhood. The Southeast Side location is ideally situated for a metal recycling facility from both an environmental and business perspective.

In an effort to contest that conclusion, the *Amicus* have attached a study which critiques SR and the City for failing to analyze the presence of a certain type of fine particulate

matter, commonly called PM2.5—particles that measure 2.5 microns or less. This critique is not relevant. First, PM2.5 measurements are made throughout the City. The measurements relevant to the Southeast Side, taken at Washington Park High School, demonstrate that the presence of PM2.5 is well within safe levels. (IEPA Responsiveness Summary at 58) ("The Illinois EPA monitoring data at monitors nearest to the current site do not show unhealthy levels of fine particulates and, in fact, that area, along with the entire State of Illinois, is in attainment with the PM2.5 National Ambient Air Quality Standard.")[2] In fact, the Washington Park monitors show a presence of PM2.5 at the same level as in Naperville, Des Plaines, and other non-Environmental Justice communities. (Illinois Air Quality Report 2019 at 60-61, Table B7.)[3] Second, the PM10 measurements and related air dispersion modeling reported by SR include particles of 10 microns or less, which includes PM2.5. It is true that there are more stringent standards for PM2.5, as those particles are considered to be more dangerous. However, the most significant source of PM2.5 emissions are sulfur dioxide, nitrous oxide and other emissions related to fuel combustion.[4] Emissions of PM2.5 from the SR facility will be minimal and, thus, not of significant concern to the LRF permit or even addressed in the LRF Rules. Finally, because of the very small size of these particles, they remain in the atmosphere for long distances, making it virtually impossible to link them to any particular emissions source. Their alleged presence near General Iron's facility on the North Side says nothing about from where they emanated.

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[2] IEPA Responsiveness Summary, available at https://external.epa.illinois.gov/WebSiteApi/api/PublicNotices/GetAirPermitDocument/6381.

[3] Illinois Air Quality Report 2019, available at https://www2.illinois.gov/epa/topics/air-quality/air-quality-reports/Documents/2019AnnualAirQualityReportFinal.pdf.

[4] "The Particulars of PM 2.5," available at https://www.nrdc.org/onearth/particulars-pm-25 ("Road dust and tiny bits of, well, stuff sent into the air by stone processing and other crushing operations are common PM 10 pollutants. PM2.5 comes primarily from combustion.").

The *Amicus* also accuse SR of exaggerating how it addressed the community's environmental justice concerns to IEPA's satisfaction. Although IEPA noted its authority over those issues was limited by law, *Amicus* ignored the parts of the IEPA Responsiveness Summary where it stated the agency went beyond what was required for a minor source of air emissions and addressed the environmental justice issues substantively. *See, e.g.*, IEPA Responsiveness Summary at 18, ¶ 41 & at 59, ¶ 181. Other *Amicus* critiques are equally invalid, not only because they seek to rewrite the LRF Rules, but also because they are substantively flawed. *See* Exhibit 1, attached hereto, for an analysis of some examples.

II. The Community's Objection is About the Assertion of Political Power—Not Environmental Justice.

The community's remaining objections do not point to any meaningful flaws in the process, nor do they meaningfully dispute the air emissions data or conclusions of the agency review. Rather, what is left is a raw exercise of political power because the community is unhappy with the result of the rigorous permitting process. As evidence that this community dispute is about exercising political muscle rather than substance, consider the response from community representatives to SR's attempts to reach out to the community for input and to cooperate. For the past two years, Southside Recycling has made efforts to engage the Southeast Side community in this process. In the fall of 2018, representatives of General Iron and RMG met with multiple Southeast Side stakeholders, facilitated by Ald. Susan Sadlowski Garza. RMG expressed a willingness to satisfy the "Green Economic Industrial Corridor" platform created by the neighborhood groups. After reaching out to Keith Harley—counsel to the Southeast Environmental Task Force (SETF)—in a further attempt to express the sincerity of RMG's willingness to work with the neighborhood, the response was as follows:

> On Tues, Nov 27, 2018 at 2:42 PM Keith Harley wrote:
>
> Hi David -
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> This is the response I was asked to send to you:
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> > SETF and the local, regional and national organizations aligned with SETF uniformly and unconditionally oppose the proposal for General Iron to operate on Chicago's southeast side. These groups have decided that General Iron's communications to one organization regarding this matter must be directed to all. These organizations are determined to oppose General Iron at every point in the approval process and, if necessary, every day thereafter.
>
> - Keith Harley, Attorney for Southeast Environmental Task Force

Exhibit 2, attached hereto. Since receiving this email, and despite other additional outreach, the SETF has refused even to meet with any representatives of Southside Recycling or General Iron. The frustration evident in SETF's email response is understandable; and the overall environmental conditions imposed on that community must be addressed. Yet, neither the frustration nor persistent condition justify a permit refusal. Rather, the way to address those concerns is to impose on all companies the type of major investment that SR has made, the thorough review that SR has undergone, and the continuous air emissions monitoring to which SR will be performing as required by the LRF.

It is natural that this community wants a say in what happens in its neighborhood. And the voices of the community have been heard and honored in this process, as reflected both by the massive investment to make sure the facility is protective of human health, and by the continuous monitoring it will endure. RMG also has an interest in how it may use property that it has owned for decades. At the end of the day, the City must follow its laws and honor its contracts. That is what this lawsuit is about.

III. This Court Should Exercise the Jurisdiction it has Over Plaintiffs' Request for Mandamus and/or Injunctive Relief.

As SR stated in its reply brief, this Court has jurisdiction to hear SR's state law claims under supplemental jurisdiction. *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 165 (1997) (citing 28 U.S.C. § 1367(a)). Moreover, this Court should exercise that jurisdiction because, per the City, the only reason for the City's suspension of the permitting process outlined in its Code, Rules, and Guidelines, all of which SR complied with, is a request from USEPA, a federal agency, for further analyses. The City posits that if it does not heed the request, it opens the door to suit from the federal agency. While that may not rise to the level of a federal question (though it might under *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1477 (2018)), those issues of federal law certainly call for an exercise of supplemental jurisdiction. *Hagans v. Lavine*, 415 U.S. 528, 548 (1974) ("[T]the federal court's rendition of federal law will be at least as sure-footed and lasting as any judgment from the state courts.").

Furthermore, a writ of mandamus or an injunction are appropriate relief that this Court can issue under these circumstances. *See* SR Reply at 5-8; *see also Dadian v. Vill. of Wilmette*, No. 98 C 3731, 1999 WL 299887, at *7 (N.D. Ill. May 4, 1999) (exercising supplemental jurisdiction over Illinois state law mandamus claim). By failing to address that assertion from SR's reply brief, *Amicus* appear to concede that much. Instead, in response to SR's preliminary injunction request, *Amicus* jump the gun and move to dismiss SR's Takings Clause claim in order to obviate supplemental jurisdiction. That is premature. *Hagans*, 415 U.S. at 542 ("Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy."). It is also ill-fated because the Takings Clause claim is well-pled.

First, *Amicus* obfuscate the claims and relief sought in the complaint. SR is not seeking injunctive relief under the Takings Clause. Amicus Brief at 2-3. Rather, SR seeks mandamus and injunctive relief to operate its facility because it is entitled to the operating permit under the City's Rules and Guidelines. In the alternative, SR seeks just compensation under the Takings Clause because, in denying its operating permit, the City has deprived SR to the use of its property. The Federal Rules allow for such alternative pleading. *Brown v. United States*, 976 F.2d 1104, 1108 (7th Cir. 1992) ("Rules 8(e)(2) and 20(a) of the Federal Rules of Civil Procedure specifically allow parties to pursue such alternative and inconsistent claims. 2A & 3A *Moore's Federal Practice* §§ 8.32, 20.06 (2d ed. 1992)"). *Amicus*' citations on this issue are inapposite. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 164 (2010) (reversing decision enjoining any deregulation as premature absent initial agency action in considering viability and scope of partial deregulation); *Daugherty Speedway, Inc. v. Freeland*, No. 4:20-CV-36-PPS, 2021 WL 633106, at *3 (N.D. Ind. Feb. 17, 2021) (dismissing injunctive remedy requested in Takings Clause claim).

Moreover, contrary to *Amicus*' implication, the Takings Clause claim is real and substantial. *See* Amicus Brief at 3. If the quantity of allegations measures sufficiency, the claim itself incorporates all allegations in the complaint, Complaint at ¶ 64, and is not a mere "three paragraphs," Amicus Brief at 2. In addition, as further addressed below, the Takings Clause claim is not "so insubstantial, implausible, foreclosed by prior decisions of this Court or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court . . . ." *Hagans*, 415 U.S. at 543.

Next, *Amicus* improperly minimize SR's harm as a mere delay in actualizing profits. Amicus Brief at 4.[5] However, the ability of an owner to profit from her land is a mainstay of Takings Clause jurisprudence. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017 (1992) ("[F]or what is the land but the profits thereof[?]"). Furthermore, *Amicus* cite factually distinct cases that miss the mark. SR is not postulating speculative harm from potential construction on adjoining land. *Muscarello v. Ogle Cnty Bd. of Comm'rs*, 610 F.3d 416, 421-22 (7th Cir. 2010) (Court found no taking where property owner sued because county issued special use permit to company to build windmills on adjacent property). Nor does SR complain of a couple days lost profits. *Daugherty Speedway*, 2021 WL 633106, at *3. Here, until the City issues the operating permit, SR cannot use its property at all. Pursuant to an Agreement with the City and subject to newly mandated regulations and Guidelines, SR invested $80 million to construct an environmentally-conscious metal recycling facility. There is nothing else it can do with the property on which it has operated a recycling facility for decades and whose structure and processing it has revamped per the City's requirements. *See Lucas*, 505 U.S. at 1019 ("[T]here are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle,

[5] *Amicus* appear to be arguing the *Penn Central* factors for a non-categorical regulatory taking. Amicus Brief at 4. Under the Supreme Court's decision in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978), "when a regulation impedes the use of property without depriving the owner of all economically beneficial use, a taking still may be found based on a complex of factors, including: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Image Media Advert., Inc. v. City of Chicago*, No. 17 C 4513, 2017 WL 6059921, at *6 (N.D. Ill. Dec. 7, 2017) (internal brackets omitted). That is not the only applicable Takings analysis. In any event, like the economic impact factor, whether the "nature of the governmental action" serves the "common good" is but one factor in the non-categorical regulatory takings analysis. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986) (finding no taking of property where statute required withdrawal liability where employer withdrew from multi-employer pension). And, here, there is no evidence that the City's as-yet-undefined environmental analysis would serve any "common good" beyond what SR has already conducted.

he has suffered a taking."). Moreover, SR has alleged a loss in excess of $80 million and the very viability of its business—such facts surely "give rise to a permissible inference that [SR] suffered some form of economic harm, up to and including the deprivation of all beneficial uses of the propert[y]." *Image Media*, 2017 WL 6059921, at *2, *6 (denying motion to dismiss Takings Clause claim where City denied permit and plaintiff expended more than $2 million on agreements in anticipation of permit).

Then, *Amicus* incorrectly argue that because the City is simply conducting a "continued evaluation", there is not finality that has caused a taking. Amicus Brief at 5 (citing *Barber v. Charter Twp. of Springfield*, No. 19-13519, 2020 WL 7122073, at *4 (E.D. Mich. Dec. 3, 2020) (finding takings claim was not ripe because "the only concrete step taken towards removal of the dam is the allegation that Springfield Township, an entity that has no ownership interest in the dam and no control over it, passed a motion to recommend to the OCPRC that the dam be removed")). This argument fails for multiple reasons. As an initial matter, Illinois courts have viewed the refusal to process an application as "tantamount to a denial of said permits." *Willie Pearl Burrell Tr. v. City of Kankakee*, 56 N.E.3d 1067, 1073 (Ill. App. Ct. 2016). Moreover, the argument is circular. *Amicus* argues that the as-yet-undefined analysis suggested by USEPA is a "continued evaluation" that renders SR's claim unripe. Amicus Brief at 5. However, that indefinite, undefined "continued evaluation" provides the exact basis for the Takings Clause violation because the indefinite delay renders SR's property utterly useless until the City issues the permit pursuant to its Rules and Guidelines that SR has followed. It would "not accord with sound process to insist that [SR] pursue the late-created [and, in this case, yet to be created] procedure before his takings claim can be considered ripe." *See Lucas*, 505 U.S. at 1012. In addition, that SR has met every procedural requirement surely proves the futility of awaiting the Commissioner's

"final decision"—whenever she deems fit in her unfettered discretion to issue it. *Cf. Unity Ventures v. Cnty. of Lake*, 841 F.2d 770, 776 (7th Cir. 1988) (holding that "the law requires a greater legitimate effort to follow administrative procedures than plaintiffs have made," where plaintiffs failed to seek "formal approval of his request for a sewer connection").

Finally, *Amicus*' other arguments are just wrong. First, if SR's Takings Clause claim arose from its Agreement with the City, contracts can form property rights that fall within the Takings Clause. *Connolly*, 475 U.S. at 224 ("This is not to say that contractual rights are never property rights or that the Government may always take them for its own benefit without compensation."). Second, *Amicus* cite cases that deferred to state courts; however, the precedent when those cases were decided required exhaustion of state remedies for a Takings Clause case to ripen. *Covington Ct., Ltd. v. Vill. of Oak Brook*, 77 F.3d 177, 179 (7th Cir. 1996) ("To succeed on its takings and due process claims, [plaintiff] first must show that it has availed itself of state court remedies."); *San Remo Hotel, L.P. v. City & Cnty. of San Francisco*, 545 U.S. 323, 346 (2005) ("The requirement that aggrieved property owners must seek 'compensation through the procedures the State has provided for doing so' . . . "). The Supreme Court expressly overruled that requirement. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2179 (2019) ("The state-litigation requirement of *Williamson County* is overruled.").

Amicus have not cited any authority that would demonstrate the frivolity of the Takings Clause claim, or—in prematurely attacking the merits—demonstrated that it is insufficiently pled. This Court has and should exercise its jurisdiction and adjudicate the pending motion.

Dated: June 23, 2021

Respectfully submitted,

GENERAL III, LLC d/b/a
SOUTHSIDE RECYCLING

and RMG INVESTMENT GROUP, LLC

By /s/ David J. Chizewer
One of Their Attorneys

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that on June 23, 2021, he caused a copy of the foregoing **PLAINTIFFS' RESPONSE TO BRIEF OF *AMICUS CURIAE*** to be filed via the Court's ECF/electronic mailing system upon all counsel of record.

/s/ David J. Chizewer