



City of Springfield

Special Meeting

~ Agenda ~

36 Court Street
Springfield, MA 01103
<http://www.springfieldcityhall.com>

Linda Fitzpatrick
413-787-6559

Wednesday, September 10, 2014

5:00 PM

Springfield City Hall -- Council Chambers

I. Call to Order

5:00 PM Meeting called to order on September 10, 2014 at Springfield City Hall -- Council Chambers, 36 Court Street, Springfield, MA.

II. Orders

1. Order (ID # 2751)

An Order to File Notice of Appeal of the Land Court Decision Dated August 14, 2014 (12-PS-468569)

ATTACHMENTS:

- Palmer Renewable Energy Decision (PDF)
- Notice of Appeal 9-10-2014 (DOCX)



City of Springfield

SCHEDULED

Meeting: 09/10/14 05:00 PM
Initiator: Wayman Lee
Sponsors: President - Ward 2 Councilor Michael A. Fenton
DOC ID: 2751

2.1

An Order to File Notice of Appeal of the Land Court Decision Dated August 14, 2014 (12-PS-468569) (President - Ward 2 Councilor Fenton)

Order to File a Notice of Appeal

**AN ORDER OF THE CITY COUNCIL IN THE CITY OF SPRINGFIELD,
MASSACHUSETTS AUTHORIZING THE FILING OF A NOTICE OF APPEAL IN
THE CASE OF PALMER RENEWABLE ENERGY, LLC v. SPRINGFIELD ZONING
BOARD OF APPEALS**

BE IT ORDERED THAT the Springfield City Council hereby authorizing the filing of the attached Notice of Appeal from the Judgment of the Land Court dated August 14, 2014 in the matter of Palmer Renewable Energy, LLC v. Zoning Board of Appeals for the City of Springfield, Brenda Doherty, Daniel Morrissey, Henry Nowick, Maria Perez, Jose Gonzalez, and Walter Gould (Docket No. 12 PS 461494 and Docket No. 12 PS 468569).

SEAL

COMMONWEALTH OF MASSACHUSETTS

Land Court

Department of the Trial Court

12 PS 461494 (AHS)

PALMER RENEWABLE ENERGY, LLC,

Plaintiff,

vs.

ZONING BOARD OF APPEALS OF THE CITY OF SPRINGFIELD, BRENDA DOHERTY,
 DANIEL MORRISSEY, HENRY NOWICK, MARIA PEREZ, JOSE GONZALEZ, and
 WALTER GOULD,

Defendants.

12 PS 468569 (AHS)

PALMER RENEWABLE ENERGY, LLC,

Plaintiff,

vs.

ZONING BOARD OF APPEALS OF THE CITY OF SPRINGFIELD, BRENDA DOHERTY,
 DANIEL MORRISSEY, HENRY NOWICK, MARIA PEREZ, JOSE GONZALEZ, and
 WALTER GOULD,

Defendants.

JUDGMENT

Plaintiff Palmer Renewable Energy, LLC, filed its unverified Complaint (12 PS 449538) (the "Special Permit Case") on June 23, 2011, pursuant to G. L. c. 40A, § 17 and G. L. c. 231A, § 1, appealing a decision of Defendant City Council of the City of Springfield ("City Council") which revoked a special permit (the "Special Permit") which the City Council had issued to Plaintiff on September 25, 2008, to construct a biomass energy plant (the "Project").¹ The City Council filed its Answer on August 3, 2011. On August 12, 2011, the Conservation Law Foundation filed a Motion to Intervene. A case management conference was held on August 17, 2011. On September 14, 2011, the court denied the Motion to Intervene. On December 5, 2011, the parties filed a Joint Request for a Stay pending Plaintiff's pursuing an as-of-right building permit for the Project. At a status conference on May 28, 2013, all parties agreed to a stay in the

¹ The Special Permit was a special permit for use as a "recycle center," due to the fact that the Project involved the use of recycled wood derived from construction and demolition waste as fuel.

Special Permit Case.

Plaintiff filed its unverified Complaint (12 PS 461494) on March 26, 2012, pursuant to G. L. c. 40A, § 17 and G. L. c. 231A, § 1, appealing a decision ("ZBA Decision 1") of Defendant City of Springfield Zoning Board of Appeals (the "ZBA") dated February 27, 2012, which revoked two building permits (the "Building Permits") that the Springfield Building Commissioner (the "Building Commissioner") had issued to Plaintiff for the Project because Plaintiff had not received the Special Permit. ZBA Decision 1 resulted from an appeal to the ZBA by the petitioners, Michaelann Bewsee and William and Toni Keefe, (the "ZBA Decision 1 Petitioners"). Plaintiff also sought a declaratory judgment pursuant to G. L. c. 231A that the Project does not require a special permit, the Project may be built as-of-right in the Industrial A District, ZBA Decision 1 exceeded the authority of the ZBA, and that the ZBA lacked jurisdiction because the ZBA Decision 1 Petitioners lacked standing to bring the appeal.² The ZBA filed its Answer on April 12, 2012.³ A case management conference was held on May 1, 2012. On July 30, 2012, the ZBA filed a Request for Transfer to the Hampden County Housing Court Pursuant to G. L. c. 185C, § 20, to which Plaintiff filed an Opposition on August 20, 2012. On August 29, 2012, the ZBA Decision 1 Petitioners (hereinafter the "Intervenors") filed a Motion to Intervene along with a supporting memorandum.⁴

Plaintiff filed its unverified Complaint (12 PS 468569) (together with 12 PS 461494, the "Building Permit Cases") on August 6, 2012, also pursuant to G. L. c. 40A, § 17, appealing a decision ("ZBA Decision 2," together with ZBA Decision 1, the "ZBA Decisions") of the ZBA dated July 23, 2012, which revoked the same Building Permits that were revoked in ZBA Decision 1, and G. L. c. 231A, seeking declaratory judgment that the Project does not require a special permit. ZBA Decision 2 resulted from an appeal to the ZBA by petitioner City Council.^{5,6}

² Plaintiff argued in the Complaint that the ZBA exceeded its authority in allowing the appeal because the ZBA Decision 1 Petitioners did not have standing to bring the appeal. Plaintiff argued that the ZBA Decision 1 Petitioners would not suffer any injury that was special or different from the impacts to the general public. Because this argument is not made on summary judgment and this court has received no support for this argument, the ZBA will be considered to have acted within its authority in ZBA Decision 1.

³ In the ZBA's Answer, they raise the following affirmative defenses: 1. Failure to state a claim upon which relief may be granted. 2. Failure to comply with the notice requirements of G. L. c. 40A. 3. Claims barred by the applicable statute of limitations. 4. Claim under G. L. c. 40 barred because of insufficiency of service of process. 5. Claims barred by laches. Because no argument is presented for any of these affirmative defenses, this court treats these defenses as waived.

⁴ No opposition was filed.

⁵ Plaintiff again challenged the ZBA's authority in its Complaint. Plaintiff alleged that the City Council did not have standing to bring the appeal to the ZBA because the Building Permits had already been revoked by ZBA Decision 1. This argument is also not made on summary judgment and this court has received no support for this argument; therefore, this court will deem the ZBA to have acted within its authority in ZBA Decision 2.

⁶ The City Council was not an original party to this case: on May 29, 2013, Plaintiff filed its Second Amended Complaint, adding the City Council (together with the ZBA, the "Municipal Defendants") as a Defendant. On June 21, 2013, the Municipal Defendants filed their Answer to the Second Amended Complaint.

Plaintiff sought the same relief as listed in the March 26, 2012 Complaint. The ZBA filed its Answer on August 30, 2012, together with a Request for Transfer to the Hampden County Housing Court Pursuant to G. L. c. 185C, § 20.

On September 6, 2012, this court allowed the two Requests for Transfer of the Building Permit Cases, and the cases were transferred to the Housing Court on September 17, 2012. On September 25, 2012, Plaintiff requested a transfer of the Building Permit Cases back to the Permit Session of the Land Court. The ZBA filed a Memorandum in Opposition to Plaintiff's Motion to Retransfer to the Land Court on October 4, 2012. The Building Permit Cases were transferred back to the Land Court in May of 2013.

Plaintiff filed its Motion for Summary Judgment in the Building Permit Cases on November 27, 2013, together with supporting memorandum, Statement of Undisputed Material Facts, and Appendix containing the Affidavits of Victor E. Gatto, Dale T. Raczyński, Douglas J. Kelleher (the "Kelleher Affidavit"), and Peter F. Durning, Esq. On January 13, 2014, the Municipal Defendants filed their Opposition and Cross-Motion for Summary Judgment, together with supporting memorandum, Statement of Undisputed Material Facts, Appendix containing the Affidavit of James T. Donahue, Response to Plaintiff's Statement of Undisputed Facts and Motion to Strike references to the Special Permit Case. The Intervenor filed their Opposition and Cross-Motion on January 14, 2014, together with supporting memorandum, Response to Plaintiff's Statement of Undisputed Facts and Statement of Additional Undisputed Material Facts. On January 31, 2014, Plaintiff filed its Reply in Opposition to the Municipal Defendants' Opposition to Summary Judgment Motion and Motion to Strike. On February 3, 2014, Plaintiff filed its Reply in Opposition to the Intervenor's Summary Judgment Motion, Affidavits of James N. DiMaio ("DiMaio Affidavit") and Dale T. Raczyński (Supplemental) (the "Raczyński Affidavit"), and Motion to Strike Portions of the Intervenor's Exhibits and Statement of Undisputed Facts. Plaintiff filed its Opposition to the Intervenor's Cross-Motion, the Intervenor's Statement of Undisputed Material Facts, and the Municipal Defendants' Cross-Motion on February 12, 2014. The Intervenor filed their Opposition to Plaintiff's Motion to Strike on February 18, 2014. On March 17, 2014, Plaintiff filed a Supplemental Affidavit of Peter Durning (the "Durning Affidavit") and a hearing was held on all motions; at that time the matter was taken under advisement. A Decision of today's date (the "Decision") has been rendered. In accordance with the Decision it is:

ORDERED and ADJUDGED that the Municipal Defendants' Motion to Strike is DENIED.

ORDERED and ADJUDGED that Plaintiff's Motion to Strike is ALLOWED IN PART and DENIED IN PART as follows: Exhibit A and the cover page of Exhibit B are stricken; ¶¶ 34-38, 42, and 43 of the Intervenor's Additional Statement of Material Facts, the remainder of Exhibit B, Exhibit C, and the Intervenor's arguments regarding green woods chips and poisonous gas are not stricken.

ORDERED and ADJUDGED that there is an association with waste in the common definition of incineration.

ORDERED and ADJUDGED that the term "incineration" in Section 1401.3(n) of the Springfield Zoning Ordinance (the "Ordinance") is modified by the phrase "offal, garbage or refuse."

ORDERED and ADJUDGED that the Municipal Defendants' interpretation of the Ordinance, that Section 1401.3(n) prohibits the burning of any product, does not correspond with the statutory purpose of Section 1401.

ORDERED and ADJUDGED that green wood chips are not refuse.

ORDERED and ADJUDGED that the Project will not emit poisonous gases as contemplated by Section 1401.3(x) of the Ordinance.

ORDERED and ADJUDGED that although some deference should be given to the ZBA's interpretation of the Ordinance, in the case at bar such deference is outweighed by other factors.

ORDERED and ADJUDGED that the Project does not require a special permit, and the Building Permits should not have been revoked; as a result, the Building Permits are hereby reinstated.

ORDERED and ADJUDGED that the Plaintiff's Motion for Summary Judgment is ALLOWED and the Municipal Defendants' Cross Motion for Summary Judgment and the Intervenor's Cross Motion for Summary Judgment are DENIED.⁷

AHS
By the court. (Sands, J.)

Attest:

Deborah J. Patterson
Recorder

Dated: August 14, 2014

A TRUE COPY
ATTEST:

Deborah J. Patterson
RECORDER

⁷ As a result of the foregoing, the parties shall notify this court as to the status of the Special Permit Case and whether it should be dismissed. The parties shall so reply on or before September 2, 2014.

SEAL

COMMONWEALTH OF MASSACHUSETTS
Land Court
Department of the Trial Court
12 PS 461494 (AHS)

PALMER RENEWABLE ENERGY, LLC,
Plaintiff,

vs.

ZONING BOARD OF APPEALS OF THE CITY OF SPRINGFIELD, BRENDA DOHERTY,
DANIEL MORRISSEY, HENRY NOWICK, MARIA PEREZ, JOSE GONZALEZ, and
WALTER GOULD,
Defendants.

12 PS 468569 (AHS)

PALMER RENEWABLE ENERGY, LLC,
Plaintiff,

vs.

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DANIEL MORRISSEY, HENRY NOWICK, MARIA PEREZ, JOSE GONZALEZ, and
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DECISION

Plaintiff Palmer Renewable Energy, LLC, filed its unverified Complaint (12 PS 449538) (the "Special Permit Case") on June 23, 2011, pursuant to G. L. c. 40A, § 17 and G. L. c. 231A, § 1, appealing a decision of Defendant City Council of the City of Springfield ("City Council") which revoked a special permit (the "Special Permit") which the City Council had issued to

Plaintiff on September 25, 2008, to construct a biomass energy plant (the "Project").¹ The City Council filed its Answer on August 3, 2011. On August 12, 2011, the Conservation Law Foundation filed a Motion to Intervene. A case management conference was held on August 17, 2011. On September 14, 2011, the court denied the Motion to Intervene. On December 5, 2011, the parties filed a Joint Request for a Stay pending Plaintiff's pursuing an as-of-right building permit for the Project. At a status conference on May 28, 2013, all parties agreed to a stay in the Special Permit Case.

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¹ The Special Permit was a special permit for use as a "recycle center," due to the fact that the Project involved the use of recycled wood derived from construction and demolition waste as fuel.

² Plaintiff argued in the Complaint that the ZBA exceeded its authority in allowing the appeal because the ZBA Decision 1 Petitioners did not have standing to bring the appeal. Plaintiff argued that the ZBA Decision 1 Petitioners would not suffer any injury that was special or different from the impacts to the general public. Because this argument is not made on summary judgment and this court has received no support for this argument, the ZBA will be considered to have acted within its authority in ZBA Decision 1.

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³ In the ZBA's Answer, they raise the following affirmative defenses: 1. Failure to state a claim upon which relief may be granted. 2. Failure to comply with the notice requirements of G. L. c. 40A. 3. Claims barred by the applicable statute of limitations. 4. Claim under G. L. c. 40 barred because of insufficiency of service of process. 5. Claims barred by laches. Because no argument is presented for any of these affirmative defenses, this court treats these defenses as waived.

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Intervenors' Statement of Undisputed Material Facts, and the Municipal Defendants' Cross-Motion on February 12, 2014. The Intervenors filed their Opposition to Plaintiff's Motion to Strike on February 18, 2014. On March 17, 2014, Plaintiff filed a Supplemental Affidavit of Peter Durning (the "Durning Affidavit") and a hearing was held on all motions; at that time the matter was taken under advisement.

Summary judgment is appropriate where there are no genuine issues of material fact and where the summary judgment record entitles the moving party to judgment as a matter of law. See Cassesso v. Comm'r of Corr., 390 Mass. 419, 422 (1983); Cnty. Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976); Mass. R. Civ. P. 56(c).

I find that the following material facts are not in dispute:

1. In 2008, the City Council issued the Special Permit to Plaintiff for the Project to use recycled wood derived from construction and demolition waste as fuel. The Project will be located on approximately seven acres ("Locus") of an existing thirteen acre asphalt plant located at 1000 Page Boulevard in Springfield, MA. The proposed use of the Project is an electric generating facility that will use a steam driven turbine to generate 38 megawatts of electricity.
2. Because of hearings before the MassDEP and concerns over potentially toxic air emissions, Plaintiff determined to change its source of fuel from recycled wood to green wood chips.
3. Because of the change in the Project, the City Council revoked the Special Permit in May 2011.
4. Plaintiff appealed the revocation of the Special Permit in the Special Permit Case.
5. On June 30, 2011, the MassDEP issued an Approval to Construct the Plant to Plaintiff,

based on the use of green wood chips for fuel.

6. On October 4, 2011, Plaintiff applied to the Building Commissioner for the Building Permits as-of-right.

7. On November 15, 2011, the Building Commissioner issued the Building Permits to Plaintiff for 1) site grading and storm drainage control in preparation for construction and 2) to installing a reinforced concrete foundation for a future 275' tall steel power plant stack, both relative to the Project. Locus is located in an Industrial A Zoning District under the Springfield Zoning Ordinance (the "Ordinance").

8. On December 15, 2011, the Intervenor and the City Council each separately appealed the Building Permits to the ZBA.

9. On January 25, 2012, a public hearing was held before the ZBA to address the Intervenor's appeal.

10. On February 27, 2012, the ZBA issued ZBA Decision 1 which revoked the Building Permits because they were "invalid as in violation of the Springfield Zoning Ordinances." The ZBA determined that:

The apparent intent of Section 1401.3(n) is to require a special permit for any commercial activity that involves: a) incineration or b) dumping or reduction of offal, garbage or other refuse. The term 'incineration' is not defined in the ordinance and, therefore, the common dictionary definition is to be applied to determine the intended meaning not that used in various states statutes or regulations. Webster's New Collegiate Dictionary, copyright 1975 by G. & C. Merriam Co., defines "incinerate" as "to cause to burn to ashes" and "incinerator" as "one that incinerates." Incineration under the ordinance applies to all commercial burning of products, not only waste products by a non-municipal entity.

11. ZBA Decision 1 was filed with the Springfield City Clerk on March 8, 2012.

12. On July 9, 2012, a public hearing was held to address the City Council's appeal.

13. On July 23, 2012, the ZBA issued ZBA Decision 2, revoking the Building Permits, based on the exact same factual findings used to support ZBA Decision 1.

14. ZBA Decision 2 was filed with the Springfield City Clerk on July 23, 2012.

15. All applicable decisions and appeals of the Building Permit Cases were made under the 1971 version of the Ordinance.

16. Section 1401.2 of the Ordinance creates an as-of-right use for buildings erected or used for "[a]ll other manufacturing, fabricating, processing, storage, retail or service uses EXCEPT those listed in Section 1401-3 below."

17. Section 1401.3(n) of the Ordinance states that:

The following uses [shall be permitted in an Industrial A Zoning District] only when authorized as a special permit by the City Council, subject to the general provisions prescribed in Section 2005...

n. Incineration, reduction of or dumping of offal, garbage or refuse on a commercial basis, EXCEPT where controlled by the municipality.

18. The City of Springfield has a widespread practice of burning commercial products that dates back to before the Ordinance was enacted.

19. The City of Springfield has never before granted, or even considered, an application for a special permit in regards to commercial burning of non-waste products under the Ordinance.

20. The Project will process green wood chips into electrical energy for sale and distribution to the public, and such green wood chips shall consist of clean (uncontaminated) non-forest woody material, such as tree stems, branches, stumps, and brush from sources such as commercial tree care service and landscaping firms, state and municipal tree and brush removal operations.

21. The Project will emit 13.2 tons per year of gaseous Hazardous Air Pollutants (HAPs)

and 13.4 tons per year of gaseous ammonia.

22. Following an appeal proceeding, the MassDEP found that the Project's Air Plan Approval granted on June 20, 2011 was in compliance with the law and regulations.

Motions to Strike

There are two motions to strike before this court for this matter: one motion by the Municipal Defendants and another by Plaintiff.

I. The Municipal Defendants' Motion to Strike

The Municipal Defendants have moved to strike all mentions of the issuance and revocation of the Special Permit to operate an energy facility. Specifically, the Municipal Defendants request that the following be stricken: ¶¶ 8-17 and 20-22 from Plaintiff's Statement of Material Facts, ¶¶ 7-19 from the section of Plaintiff's Memorandum of Law in Support of its Motion for Summary Judgment entitled "Zoning Permitting of the Plant: The City Council Special Permit," ¶¶ 7-10, 12-14, and 17-19 of the Affidavit of Victor E. Gatto, and ¶¶ 7, 18, and 19 of the Affidavit of Dale T. Racynski. The Municipal Defendants argue that these paragraphs should be stricken because the Special Permit Case is not relevant or beneficial in resolving the issues in the summary judgment motion, and will only add unnecessary additional materials to the record.

Even though the parties have agreed to a stay on the matter of the Special Permit Case, and the only matter currently before this court is whether the incineration of green wood chips is an as-of-right use or requires a special permit, the issue regarding the Special Permit is inextricably intertwined with the Building Permit Cases, not for the validity of the ZBA's decision in that matter, but as part of the procedural history of this case.

As a result, I find that the Municipal Defendants' Motion to Strike is DENIED.

II. Plaintiff's Motion to Strike

Plaintiff has moved to strike portions of the Intervenor's summary judgment materials. Specifically, Plaintiff requests that the following be stricken: ¶¶ 34-38, 42, and 43 of the Intervenor's Additional Statement of Material Facts, as well as Exhibit A, Exhibit B, Exhibit C, and portions of the Intervenor's brief that a) characterize green wood chips as waste and b) discuss poisonous gas from the Project. Plaintiff argues that ¶¶ 34-38, 42, and 43 of the Intervenor's Additional Statement of Material Facts and Exhibit A do not comply with Land Court Rule 4 or Mass. R. Civ. P. 56. Plaintiff also argues that the cover page of Exhibit B, which contains Appendix E of Plaintiff's Notice of Project Change, should be stricken because this cover page belongs to Appendix D. Plaintiff also argues that the remainder of Exhibit B, as well as Exhibit C and the arguments arising therefrom, should be stricken because they misconstrue the evidence, as indicated by Plaintiff's evidence that suggests the contrary.

The paragraphs of the Intervenor's Additional Statement of Material Facts need not be stricken because Plaintiff has already disputed these paragraphs in its response to the Intervenor's Statement of Material Facts. Exhibit A contains a letter to the Intervenor from the Department of Public Health. This exhibit was not referenced in any pleadings, depositions, answers to interrogatories or admissions, and is not supported by an affidavit; therefore, Exhibit A should be stricken. To the extent that the cover page of Exhibit B is misleading because it is a cover page belonging to a different exhibit, the cover page only of Exhibit B should be stricken. Exhibit B and C need not be stricken just because Plaintiff and the Intervenor's interpret the facts differently. The Intervenor's arguments regarding the green wood chips and poisonous gas should not be stricken, even though they were not explicitly raised in the Complaint or Answer,

because these arguments were made before the ZBA and are referenced in ZBA Decision 1; therefore, these issues were raised implicitly in the attack and defense of ZBA Decision 1.⁷

As a result, I find that Plaintiff's Motion to Strike is ALLOWED IN PART and DENIED IN PART as follows: Exhibit A and the cover page of Exhibit B are stricken; ¶¶ 34-38, 42, and 43 of the Intervenor's Additional Statement of Material Facts, the remainder of Exhibit B, Exhibit C, and the Intervenor's arguments regarding green woods chips and poisonous gas are not stricken.

Motion for Summary Judgment

"Any person aggrieved by a decision of the board of appeals or any special permit granting authority...may appeal to the land court department." G. L. c. 40A, § 17. Plaintiff claims to have been aggrieved by the ZBA Decisions and challenges the validity of the ZBA Decisions as they relate to whether a special permit is needed for incineration, as defined in Section 1401.3(n) of the Ordinance, resulting from the Project and whether the Project is entitled to the Building Permits. "The court shall hear all evidence pertinent to the authority of the board... and determine the facts, and, upon the facts so determined, annul such decision if found to exceed the authority of such board." *Id.* The Land Court may also "on appropriate proceedings make binding declarations of right, duty, status and other legal relations sought thereby...in any case in which an actual controversy has arisen and is specifically set fourth in the pleadings." G. L. c. 231A, § 1. Whether or not the Project requires a special permit is such an actual controversy.

Plaintiff argues that the Project does not involve incineration or the handling of offal, garbage, or refuse on a commercial basis, which requires a special permit. Plaintiff further

⁷ Although these arguments are mentioned in ZBA Decision 1, it is unclear whether the ZBA based their decision on either of these arguments.

argues that the Project is an as-of-right use, relying on Section 1401 of the Ordinance, which allows, in an Industrial A Zoning District, as-of-right "manufacturing, fabricating, processing, storage, retail or service uses EXCEPT those listed in Section 1401.3 below." Therefore, Plaintiff argues that the Building Permits should not have been revoked. The Municipal Defendants argue that the Project is not an as-of-right use because of Section 1401.3(n) which requires a special permit for "incineration, reduction of or dumping of offal, garbage or refuse on a commercial basis, EXCEPT where controlled by the municipality." The Municipal Defendants contend that the Project requires a special permit because it involves incineration and thus falls under Section 1401.3(n). The Intervenor joins in the Municipal Defendants arguments, and in addition argue that even if Plaintiff's interpretation of Section 1401.3(n) were correct, the Project would still need a special permit because the Project would be burning waste, as well as emitting poisonous gases, which is prohibited under Section 1401.3(x).

I. The Definition of Incineration

The Ordinance does not explicitly define "incineration," thus the common definition should be applied. Bld'g Comm'r of Franklin, 48 Mass. App. Ct. at 717; Livoli v. Zoning Bd. Of Appeals, 42 Mass. App. Ct. 921, 922 ("[W]e are to respect the plain meaning of words in accordance with common usage."). "We derive the words' usual and accepted meanings from sources presumably known to the [by-law's] enactors, such as their use in other legal contexts and dictionary definitions."⁸ Framingham Clinic, Inc. v. Zoning Bd. Of Appeals, 382 Mass. 283, 290, quoting Commonwealth v. Zone Book, Inc., 372 Mass. 366, 369 (1977). Plaintiff

⁸ The Durning Affidavit points out that the International Building Code lists "refuse incineration" as a Moderate Hazard. The International Building Code was incorporated into the Ordinance when the International Building Code was adopted by the Eighth Massachusetts State Building Code. 780 CMR 101.1. Section 200 of Article II of the Ordinance outlines how the definitions and classifications of the Massachusetts State Building Code were adopted and made part of the Ordinance.

references case law, historical context of the City of Springfield and this particular provision, other provisions of the Ordinance and other ordinances cited therein, and dictionary definitions to show that the verb “incinerate” is usually associated with waste and refuse, and was not concerned with incineration in general.⁹ For example, the list of prohibited uses in Industrial Park Districts contained in Section 1302 of Article XIII of the Ordinance, which closely parallels the list in Section 1401.3, includes: “[i]ncineration except for the destruction of wastes resulting from the primary use of the land and in compliance with the provisions of ARTICLE XIII Industrial Park Districts.” It is clear in this subsection that the drafters contemplated the term “incineration” to be limited to the burning of waste. It is unlikely that the drafters intended to apply a different definition of incineration in Section 1401 than that used in Section 1302.

The ZBA applied the Webster’s New Collegiate Dictionary definition of incinerate, “to cause to burn to ashes” and concluded that the Ordinance applied to the commercial burning of all products, not just waste. While the Municipal Defendants point out that dictionary definitions support both their interpretation as well as Plaintiff’s interpretation, they give no indication as to why they chose to rely on this particular dictionary definition in isolation.¹⁰ Plaintiff cites to numerous definitions of the various forms of the word “incinerate” that refer to the burning of waste. Furthermore, Plaintiff highlights the fact that the definitions of incineration

⁹ Plaintiff also questions why the ZBA did not also require a special permit for incineration, prohibited by Section 1401.3(n), when it issued the Special Permit for a recycling center, prohibited by Section 1401.3(gg): the original proposal also involved combustion of non-waste materials, albeit a different material than that contemplated by the current Project.

¹⁰ The ZBA appears to have purposely overlooked the definition following “incinerate” in Webster’s New Collegiate Dictionary which defined “incinerator” as “one that incinerates; especially a furnace or container for incinerating waste materials.”

adopted by the U.S. Congress, Massachusetts Legislature, and MassDEP¹¹ all refer to incineration in respect to waste. This provides strong evidence that the *common* definition, not the isolated definition the ZBA adopted, refers to the burning of waste.

As a result, I find that there is an association with waste in the common definition of incineration.

II. The Statutory Construction of Section 1401.3(n)

Plaintiff points out that under the Municipal Defendants' interpretation of the Ordinance, since the Industrial A Zoning District is the only district where incineration with a special permit is allowed, burning of any products would not be allowed in any other district in the City. The Municipal Defendants rely on the grammar in the Ordinance relative to Section 1401.3(n) as supporting the ZBA Decisions.

The Ordinance should be interpreted in accordance with the principles of statutory construction. Bld'g Comm'r of Franklin, 48 Mass. App. Ct. at 717; APT Asset Mgmt., 50 Mass. App. Ct. at 138. A statute should be interpreted to create a "consistent and harmonious" whole. Livoli, 42 Mass. App. Ct. at 922. "We are to avoid an absurd result when the language is susceptible to sensible meaning." Id.; Commonwealth v. Barber, 143 Mass. 560, 562 ("[W]hen the context shows that this cannot be followed literally without reaching an absurdity, it is reasonable to hold that such was not the intent of the legislation, and that such an interpretation should be rejected...even if strict grammatical construction should demand otherwise.").

A. Modification of "offal, garbage or refuse"

Plaintiff argues that even if the general definition of incineration did not regard the

¹¹ MassDEP defines an incinerator as "any article, machine, equipment, contrivance, structure, or part of a structure, used primarily for the reduction of combustible waste(s) by burning." 310 CMR 7.00.

burning of waste, the placement of “incineration” in section 1401.3(n) suggests that it is modified by “offal, garbage or refuse,” and that the ZBA’s interpretation disregarded this modification by interpreting “incineration” in isolation. The Municipal Defendants argue that the interpretation of incineration, standing alone, was not unreasonable or absurd because incineration is set off from the rest of the clause by a comma. The Municipal Defendants also argue that if they had interpreted incineration to apply to “offal, garbage or refuse,” it would have made the presence of “reduction of” in the clause redundant, as opposed to their interpretation that gave “incineration” and “reduction of” separate meanings.

The general rule of statutory and grammatical construction that states that a modifying clause refers only to the last antecedent, is only meant to be utilized to “ascertain the legislative intent, and is not to be adopted to thwart such an intent.” Selectman of Topsfield v. State Racing Com., 324 Mass. 309, 312 (1949). Furthermore, a principal of statutory construction “leads us to relate the words in question to the associated words and phrases in the statutory context.” Bld’g Comm’r of Franklin, 48 Mass. App. Ct. at 717-18 (The definition of “towers” was determined based on the other terms listed in the provision.); Selectman, 324 Mass. at 313 (All parts should be “construed as consistent with each other so as to form a harmonious enactment to accomplish its manifest purpose.”). The Massachusetts Appeals Court determined that the “tower” listed in a Franklin by-law did not allow for a freestanding cell phone tower, because the common theme apparent from the other terms contained in that same provision was elements of a building, not freestanding structures. Bld’g Comm’r of Franklin, 48 Mass. App. Ct. at 717-18. Similarly, in the instant case, the common theme of Section 1401.3(n) is methods of dealing with offal, garbage or waste. If incineration was not intended to also refer to offal, garbage or waste, the drafters would have separated incineration from “reduction of or dumping of offal, garbage or

refuse” by creating two separate subsections rather than just separating by a comma. See Moulton v. Brookline Rent Control Bd., 385 Mass. 228, 232 (1982) (In determining which provisions were modified by the phrase, the court determined that separation by a comma suggests a closer association than would a semicolon which separates independent clauses.). In the list of prohibited uses contained in Section 1302 of the Ordinance, incineration is listed in a separate subsection from “reduction of or dumping of offal, garbage or refuse” because incineration is modified by a clause allowing incineration of certain types of waste. This suggests that when drafting Section 1401, the drafters combined these two subsections because they intended incineration, reduction of, and dumping of to all be modified by “offal, garbage or refuse.”

The Municipal Defendants’ interpretation of Section 1401.3(n) leads to an absurd result—it includes incineration, which they claim is not restricted to burning of waste, in a subsection that otherwise provides restrictions to the treatment of offal, garbage and refuse. Furthermore, based on the grammatical rules applied by the ZBA, the remainder of Section 1401.3(n) would not make sense because, according to the ZBA, the comma after “offal” would set it off from “garbage or refuse.” If offal, garbage and refuse were all meant to modify reduction of and dumping of, then by the same rule of sentence structure utilized by the drafters, they must also modify incineration. The Municipal Defendants’ argument that “incineration” and “reduction of” would be redundant if incineration was restricted to the burning of waste is also unpersuasive. Section 1302 permits the incineration of certain types of waste in subsection twelve,¹² but bans

¹² “Incineration, except for the destruction of wastes resulting from the primary use of the land and in compliance with the provisions of ARTICLE XIII Industrial Park Districts.” Section 1302(12)

the reduction of all offal, garbage, or refuse in subsection fourteen.¹³ These two subsections would directly contradict each other if the drafters had not intended "reduction" to refer to a process other than incineration; therefore, it is unreasonable to conclude that incineration is not modified by "offal, garbage or refuse" just because "reduction of" is also modified by "offal, garbage or refuse."¹⁴

As a result, I find that the term "incineration" in Section 1401.3(n) of the Ordinance is modified by the phrase "offal, garbage or refuse."

B. Modification of Commercial Burning

Plaintiff argues that even if the definition of incineration did not include waste, and incineration was not modified by the clause "offal, garbage or refuse," the Project still would not fall under this restricted category because Plaintiff will not be burning green wood chips on a "commercial basis." Plaintiff argues that the purpose of the Project is to produce energy, not the service of burning green wood chips. Neither the Municipal Defendants nor the Intervenor respond to this argument. Because this court has already determined that incineration is modified by "offal, garbage or refuse," this argument need not be addressed.¹⁵

C. The Purpose of Section 1401.3(n)

The express intent of the Ordinance with respect to the Industrial A District, as set out in

¹³ "Reduction of or dumping of offal, garbage, or refuse." Section 1302(14).

¹⁴ Plaintiff cites to Gilmore v. City of Quincy, 346 Mass. 22, 25 (1963), where the court applied a similar zoning ordinance which prohibited "incineration, reduction, or dumping of offal, dead animals, garbage or refuse on a commercial basis..." to the contested rubbish incinerator. The main issue in that case was whether the city's zoning ordinance was properly amended. The grammar of that statute is different from the grammar in the Ordinance, making it clear that both "incineration" and "reduction" are modified by "offal, dead animals, garbage or refuse." If this is not considered to be redundant, Section 1401.3(n) should not be considered redundant either if incineration is modified by "offal, garbage or refuse."

¹⁵ It should be noted that Plaintiff's argument in this regard does not appear unreasonable to this court.

Section 1400, is to “make provisions for the full range of industrial and business uses compatible with a major urban center. However, special review and approval is required in the case of certain potentially hazardous or obnoxious uses.” Plaintiff argues that it would be inappropriate to find that the burning of any material would require a special permit in Industrial A District. Such an interpretation is overly broad and would encompass any business that operates a commercial heater or boiler in the Industrial A District, directly contradicting the Ordinance’s intention to “make provisions for the full range of industrial and business uses.” See Springfield Pres. Trust, Inc. v. Springfield Library & Museums Ass’n, 447 Mass. 408, 415 (2006) (the literal meaning of the statutory provision was rejected because it resulted in a “flagrant betrayal of the statutory purpose.”).

The Kelleher Affidavit states that the burning of commercial products was widespread throughout the City of Springfield when the Ordinance was enacted, and that this practice remains widespread today; yet, as Plaintiff points out, the ZBA has never granted, or denied, an application for a special permit for the commercial burning of products other than waste. Even though the ZBA cannot lose authority granted by the Ordinance by failing to exercise that authority, “just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.” Simon, 395 Mass. at 246 quoting FTC v. Bunte Bros., 312 U.S. 349, 352 (1941).

The Municipal Defendants point out that incineration of any product, whether it be waste or not, can be unhealthy, particularly in a densely populated industrial area. Plaintiff, however, contends that the simple burning of products does not have the hazardous potential of burning waste. Furthermore, as the practice of burning products is so widespread in the City of

Springfield, to allow the Zoning Board to regulate this use through the issuance of special permits would give the Zoning Board "roving and virtually unlimited power to discriminate as to uses between landowners similarly situated." SCIT, Inc. v. Planning Bd. of Braintree, 19 Mass. App. Ct. 101, 108 (1984) (the Zoning Act dictates that zoning ordinances should apply uniformly within a district, and any exceptions to uniformity that allow for special permits should not result in such "roving and virtually unlimited power."):

As a result, I find that the Municipal Defendants' interpretation, that Section 1401.3(n) of the Ordinance prohibits the burning of any product, does not correspond with the statutory purpose of Section 1401.

III. The Intervenor's Arguments

The Intervenor's joined in the Municipal Defendants' arguments as discussed, supra, and individually raise the following two arguments: 1) that green wood chips are waste and thus cannot be burned without a special permit, and 2) that the Project will emit poisonous gases that also require a special permit.

A. Green Wood Chips

The Intervenor's argue that regardless of what is found to be the correct interpretation of incineration, Section 1401.3(n) is still applicable to the Project because green wood chips are "refuse."¹⁶ In support of this argument, the Intervenor's refer to a mention of "waste wood" in Plaintiff's Notice of Project Change filed with the MassDEP as an admission by Plaintiff that green wood chips are refuse.

In response, Plaintiff argues that green wood chips are not waste. The Raczynski

¹⁶ Although it does not appear that the ZBA revoked the Building Permits based on this argument, and the Municipal Defendants do not join the Intervenor's in pursuing this argument on summary judgment, this court will address this issue because it was also raised by the Intervenor's at the ZBA level.

Affidavit explains that waste wood is a term used for wood that is not harvested and collected. The Raczynski Affidavit further explains that this category of wood was only used as a comparison point in a study, included in Plaintiff's Notice of Project Change (the "Environmental Impact Study"), of the emission of greenhouse gases from wood that decayed naturally, as opposed to the green wood chips that would be burned by the Project. The DiMaio Affidavit also definitively states that green wood chips are not only not a waste, they are a valuable commodity. The green wood chips are purposely collected, chipped, transported, and sold; not disposed of as a useless or unwanted material. Furthermore, the MassDEP stated that Plaintiff's proposal to burn green wood chips did not constitute the burning of solid waste.

As a result, I find that green wood chips are not refuse.

B. Poisonous Gas

The Intervenors contend that the Project also requires a special permit under a different section of the Ordinance, Section 1401.3(x), which prohibits uses that emit "poisonous gases." The Intervenors argue that because the MassDEP Conditional Approval stated that the Project will create and emit gaseous Hazardous Air Pollutants (HAPs), the Project may cause cancer or other serious health effects. The Intervenors, however, provide no evidence to support their conclusion.

Plaintiff argues that the emissions from the Project will not fall within the category of poisonous gas prohibited by Section 1401.3(x). As discussed above, Plaintiff conducted its own research in the Environmental Impact Study regarding the impact of greenhouse gases resulting from the Project and found the burning of green wood chips to be carbon neutral, as there was no difference in emissions between green wood chips that decayed naturally and green wood chips that were burned.

The Raczynski Affidavit points out that Section 1511.1 of the Ordinance dictates that compliance with MassDEP air pollution regulations is the standard for determining compliance with the Ordinance. The MassDEP initially issued, after an extensive review process, a Conditional Air Plan Approval on June 30, 2011. After an adjudicatory proceeding, the MassDEP confirmed that the Project's Air Plan Approval complies with the law and regulation on September 11, 2012. MassDEP concluded that the concentrations of potential HAPs and ammonia that would be released into the air are not poisonous. The Intervenor presents no evidence to suggest that either the MassDEP's estimate of the anticipated levels of HAPs is incorrect, or that the conclusion that at those anticipated levels the HAPs are not dangerous is incorrect. The Raczynski Affidavit notes that MassDEP would not have issued an Air Plan Approval to the Project if it would emit poisonous gases.

As a result, I find that the Project will not emit poisonous gases as contemplated by Section 1401.3(x) of the Ordinance.

IV. Deference to the ZBA

The parties agree that the meaning of a phrase in a zoning by-law is a question of law, not a question of fact, Bld'g Comm'r of Franklin v. Dispatch, 48 Mass. App. Ct. 709, 713 (2000); APT Asset Mgmt. v. Board of Appeals of Melrose, 50 Mass. App. Ct. 133, 138 (1999), and therefore, this review is *de novo*. Costa v. Fall River Hous. Auth., 453 Mass. 614, 620 (2009); City of Lawrence v. Civil Serv. Comm'n, 66 Mass. App. Ct. 309, 311 (2006). With respect to deference, Plaintiff argues that the ZBA is given deference only if its interpretation is on a "legally tenable basis" and not on whether it is "reasonable." See Britton v. Zoning Appeals of Gloucester, 59 Mass. App. Ct. 68 (2003). The Municipal Defendants argue that they are entitled to deference in their interpretation of the Ordinance, and that the courts must give deference to

their interpretation unless such interpretation is unreasonable, even if the courts might have come out a different way. In this regard, the Municipal Defendants point out that Plaintiff admits that the wording of the Ordinance might give "some support" for the Municipal Defendants' strict reading of the Ordinance. The Intervenor also argue that the Municipal Defendants' interpretation of the Ordinance is entitled to deference unless it is unreasonable, and that in the ZBA Decisions the ZBA gave a reasonable interpretation of the Ordinance.

While statutory interpretation is generally the duty of the courts, an administrative agency's interpretation of a statute is given some weight and deference, as long as that interpretation is not incorrect.¹⁷ Shirley Wayside Ltd. P'ship v. Bd. of Appeals, 461 Mass. 469, 475 (2012) ("We accord deference to a local board's reasonable interpretation of its own zoning by law, with the caveat that an incorrect interpretation of a statute...is not entitled to deference.") (internal citations removed); E. Cas. Ins. Co. v. Comm'r of Ins., 67 Mass. App. Ct. 678, 683 (2006); City of Lawrence, 66 Mass. App. Ct. at 311 (When the issue is a question of law, the commission is "not accorded the substantial deference typically afforded the commission."); Britton v. Zoning Bd. of Appeals, 59 Mass. App. Ct. 68, 73 (2003) ("[T]he approach is deferential only to the extent that the court gives 'some measure of deference' to the local board's interpretation of its own zoning by-law."); APT Asset Mgmt., 50 Mass. App. Ct. at 138 (Some measure of deference given to the board's interpretation.). "[A]lthough interpretation of the by-law is in the last analysis a judicial function, deference is owed to a local zoning board's home grown knowledge about the history and purpose of its town's zoning by-law." Duteau v.

¹⁷ A statutory interpretation is considered to be incorrect if the interpretation is contrary to the "plain and unambiguous terms" contained in the statute. School Comm. of Springfield v. Board of Educ., 362 Mass. 417, 441 n.22 (1972).

Zoning Bd. of Appeals, 47 Mass. App. Ct. 664, 669 (1999). In the instant case, the ZBA has admitted that they have never before had to address this provision; therefore, their local knowledge about this particular provision and its history appears to be limited.

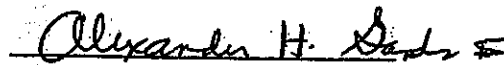
While acts of a municipality's officers cannot be used to forfeit the municipality's ability to properly enforce its by-laws, Bld'g Comm'r of Franklin, 48 Mass. App. Ct. at 715, it should be noted that the City Solicitor, Associate City Solicitor, and Building Commissioner, are all of the opinion that the Project does not involve incineration, as contemplated in the Ordinance, and does not require a special permit.

As a result, I find that although some deference should be given to the ZBA's interpretation of the Ordinance, in the case at bar such deference is outweighed by other factors.

Remedy

As a result of the foregoing, I find that the Project does not require a special permit, and the Building Permits should not have been revoked; as a result, the Building Permits are hereby reinstated. The Plaintiff's Motion for Summary Judgment is ALLOWED and the Municipal Defendants' Cross Motion for Summary Judgment and the Intervenor's Cross Motion for Summary Judgment are DENIED.¹⁸

Judgment to enter accordingly.


Alexander H. Sands, III
Justice

Dated: August 14, 2014

¹⁸ As a result of the foregoing, the parties shall notify this court as to the status of the Special Permit Case, and whether it should be dismissed. The parties shall so reply on or before September 2, 2014.

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

LAND COURT

DOCKET NO. 12 PS 461494 (AHS)

DOCKET NO. 12 PS 468569 (AHS)

PALMER RENEWABLE ENERGY, LLC

Plaintiff,

VS.

**ZONING BOARD OF APPEALS FOR THE
CITY OF SPRINGFIELD,**

BRENDA DOHERTY, DANIEL MORRISSEY,

HENRY NOWICK, MARIA PEREZ,

JOSE GONZALEZ, AND WALTER GOULD

Defendant

NOTICE OF APPEAL

The City Council for the City of Springfield, Massachusetts ("Springfield City Council") hereby gives notice that it appeals from the Judgment entered in the above captioned matter on August 14, 2014. Annexed hereto as Exhibit A is a certified copy of the vote taken by the Springfield City Council which authorizes the filing of this Notice of Appeal.

Respectfully submitted,

SPRINGFIELD CITY COUNCIL, Appellant

Date: September 10, 2014

By: _____

Michael A. Fenton

Springfield City Council, President

36 Court Street

Springfield, MA 01103

Phone: 413-787-6170

Attachment: Notice of Appeal 9-10-2014 (2751 : An Order to File Notice of Appeal)