

Town of Plympton Zoning Board of Appeals
CERTIFICATE OF DECISION ON APPEAL OF BUILDING COMMISSIONER'S
ZONING DETERMINATION

RECEIVED

To: Plympton Town Clerk
Plympton Town Hall
Five Palmer Road
Plympton, MA 02367

FEB 05 2024

Time: 1:25 pm
Town Clerk's Office

Re: Applicant: RBPB, LLC & S L T Construction Corporation **PLYMPTON**
3 Marion Drive, Carver MA 02330
Application Type: Appeal from Building Commissioner's Zoning
Determination
Property: 0 Spring Street, Plympton, MA (the "Property")
Assessor's Map 19, Block 2, Lot 4
Zoning: Industrial ("I")
Case #: 23-1115
Filing Date: November 15, 2023
Publication of Notice: December 8, 15, 22, 29, 2023
Hearing Date/Time: January 4 & 23, 2024
Hearing Location: Deborah Sampson Meeting Room, Plympton Town House
Members Present: Suzanne Jafferian (Chair)
Ethan Stiles (Secretary)
Lukasz Kowalski (Member)
David Alberti (Alternate Member, Non-voting) on January
23
Members Absent: David Alberti on January 4

I. OPENING AND PROCEDURAL HISTORY

On May 24, 2023, RBPB, LLC & S L T Construction Corporation, (the "Applicant") filed a Commercial and Industrial Zoning Application with the Building Department for a new proposed use of a "Material Processing Facility." The Applicant's representatives and counsel met with the Building Commissioner and Zoning Enforcement Officer Thomas Millias and Zoning Enforcement Officer Kathleen Cannizzo on August 17, 2023 ("Building Commissioner and/or ZEO"). The Building Commissioner issued a letter responding to the Applicant's application on or about October 17, 2023 wherein the Building Commissioner determined that the proposed "material processing facility" use does not constitute an allowable "light manufacturing" use as that term is defined in the Plympton Zoning Bylaw. The Building Commissioner's October 17, 2023 written determination formed the basis for the instant appeal.

The Applicant filed this appeal on November 15, 2023. At 6:30 P.M on January 4, 2024, the Board opened a duly-noticed public hearing on the appeal. The hearing was continued to and closed on January 23, 2024.

Due to an equipment malfunction, the hearing of January 4, 2024 ended up not being recorded by the Board. A recording of the hearing on January 23, 2024 was made by the Board and at least one member of the public.

The Board's Secretary read out the statutory prerequisites at the beginning of the hearing. The hearing proceeded with the Applicant's counsel and representatives making a presentation with a handout for the board members. Once the Applicant had finished, the Secretary read out the unique components of the Building Commissioner's decision. Thereafter members of the public in attendance had the opportunity to present questions and state their views on the subject matter of the appeal. At the end of the hearing on January 4, 2024, the Board voted unanimously at 8:30 P.M. to continue the hearing until January 23, 2024, to afford the members more time to consider the arguments and materials presented by all interested parties.

On January 23, 2024 the Board reconvened the public hearing and heard further submissions from both the applicant and the public. The Board then deliberated and voted as described below to uphold the Building Commissioner's determination in its entirety. The Board unanimously voted at 7:55 P.M. to schedule a meeting to consider issuance of a written decision on January 30, 2024 at 6:30 P.M. and to adjourn.

II. THE APPLICANT'S POSITION AND PUBLIC RESPONSE

The Property consists of 24.3 acres of land located off Spring Street on the southerly side of Route 44 and on the Plympton-Carver border. The property is within the Industrial Zone and within the Groundwater Protection District I (GPD I).

The Applicant sought a determination that its proposed use for a facility to process asphalt, brick and concrete (ABC) was within the definition of "Light Manufacturing" and allowed as of right in the Industrial Zone. The Building Commissioner's October 17, 2023 written determination raised three (3) ways the proposed use does not comply with the Bylaw. First, the Building Commissioner determined that the use was not within the definition of Light Manufacturing as defined within the Bylaw. Second, the determination held that the Bylaw does not expressly permit recycling facilities and therefore the proposed use is prohibited. Third, the determination found that the Applicant's operations would result in the production of Process Liquids in violation of the Groundwater Protection provisions of the Bylaw. *discharge*

Argument I – Light Manufacturing

The definition of "Light Manufacturing" is given in § 300-11.1 of the Zoning Bylaws:

LIGHT MANUFACTURING

Fabrication, assembly, processing, finishing work and packaging in such a manner that noise, dust, odor, vibration, or similar objectionable features are confined to the premises and are in no way objectionable to abutting property, and incidental storage and distribution of the same, and expressly excluding the manufacture of acid, asphalt, cement, explosives, fertilizer, gas,

glue, gypsum, pesticide and petroleum; hazardous or radioactive waste storage, processing or disposal; and petroleum refining.

LIGHT MANUFACTURING, INTENSIVE

Light manufacturing which employs over 20 persons or discharges into the ground wastewater containing chemical substances not normally present in domestic wastewater; or maintains an impervious area in excess of one acre.

The Applicant argued that its proposed use was within the definition of Light Manufacturing. It stated that it would receive broken pieces of used asphalt, brick and concrete, then use a crushing machine to process the ABC material into reusable asphalt, brick and concrete product. It denied that it would be engaging in the manufacture of asphalt or cement. It argued that the text of the definition only prohibited those activities expressly described in the definition.

Argument II – Recycling Uses

The Applicant argued that because the definition of “light manufacturing” does not explicitly prohibit recycling facilities, then to the extent the proposed use constitutes a recycling facility, it is not prohibited.

Argument III - Groundwater Protection

The Applicant argued that its proposed use would not fall within any of the 21 prohibited uses in the Groundwater Protection District as described in Section 300-8.3(E) of the Bylaw. It emphasized ~~that~~, contrary to the Building Commissioner’s determination, that its operations will not involve the creation of “process liquids” as defined in § 300-11.1 of the Bylaw.

PROCESS LIQUIDS

Liquids used in cooling or in the manufacturing process which contact raw materials, product, wastes or machinery and which because of that contact contain hazardous wastes or do not meet state drinking water standards.

Entered with the Application was:

- A letter dated November 9, 2023 from Gregory C. Wirsén, Green Seal Environmental, LLC to Peter J. Opachinski, Present of S L T Construction Corporation
- Site Plans G-1, EX-1, EX-2, C1, C-2, C-3
- A four page statement from Hinckley, Allen LLP (Applicant’s Counsel)
- A Release Deed from the Massachusetts Department of Transportation to RPBP, LLC.

Submissions and Discussions of January 4:

The Applicant, through counsel, presented a thirty-five page handout to the Board. It also showed samples of pre and post-processed asphalt and concrete.

The following representatives of the Applicant spoke during its presentation:

Robert T. Ferguson, Jr., Esq. & David B. Connolly, Esq. - Hinckley, Allen LLP
Erik Schoumaker - McKenzie Engineering Group
Gregory C. Wirsén - Green Seal Environmental, LLC
Jason Martin - S L T Construction's General Manager and Health and Safety Officer
Peter Opachinski - President of S L T Construction Corporation & Manager of RBPB, LLC

The handout accurately summarized their presentations.

Several residents and members of the public from surrounding towns including Mark Rothfuss, Howard Randall and Rebecca Lipton voiced their opposition to the Application. They cited concerns of groundwater contamination from the proposed operation and argued that, however characterized, the proposed use is not allowed under the Bylaw. Ms. Lipton also showed two photographs of existing concrete material on a different property owned by the applicant as well as a photograph of Ricketts Pond.

Submissions and Discussions of January 23:

The Town Clerk stamped in a two page letter from Kevin Rafferty on January 16. Despite the letter being labeled as "Confidential, not to be shared with S L T and their attorneys", as Town Counsel deemed the letter to be a public document upon its submission, the letter was shared with members of the Board and made a part of the record.

A letter dated January 17, 2024 from Hinckley, Allen LLP with a copy of the Draft Approval from the Massachusetts Department of Environmental Protection (DEP) for the Applicant's Recycling, Compositing or Conversion Permit was submitted. These materials were mailed to the Board via overnight delivery on January 17th but the Board was not aware of the submission until January 23rd.

The Applicant submitted two photographs of sound amplitude measurements at the hearing. At least one resident of Plympton or Carver complained of the noise and dust from existing operations.

At the January 23rd hearing, the Chair permitted members of the public to speak who had not previously spoken on January 4th. John Devine and Eric Donovan spoke to their concerns of the potential for contamination of their well water. Meg Sheehan, Esq. observed that state permits were outstanding and the Applicant had provided no studies on the impact of dust and noise from their operations. She submitted to the Board an unpublished decision by the Appeals Court, Attleboro Sand & Gravel Corp. v. City of Attleboro, 96 Mass. App. Ct. 1112 (2019), in which the court held that an asphalt plant did fall within the definition of Light Manufacturing according to that city's bylaw. Attorney Ferguson pointed out that the Applicant's proposed use was not for an asphalt manufacturing plant.

David Alberti, who was speaking as a private citizen and not an alternate board member because he was not present during the January 4th hearing, stated in his opinion that he did not consider the proposed use to be light manufacturing and expressed a concern that Plympton did not have

the resources to monitor the Applicant's activities on the Property. During this time the Applicant stated it was not seeking a "Light Manufacturing, Intensive" use determination as it would be employing considerably fewer than twenty people at the property.

The Board discussed whether the Applicant owned the three lots extending southerly from the Property, shown on the Site Redevelopment Plan G-1 as Lots 3, 4, 5 and 6 (Carver portion). Mr. Opachinski explained that he sold Lot 5 and had Lots 3 and 4 under agreement. The parcel sits on twenty-two 22 acres and the operations are 815 feet from the nearest home.

Mike Faucini owned one of the lots on Ricketts Pond Drive just south of the Applicant's parcel. He spoke in favor of the proposed use because he did not anticipate that it would adversely impact his business. He planned to buy the Applicant's remaining Carver lots and had no issue with dust or noise caused by the Applicant's operations. Peter Sprague, who owned Lot 2B, also spoke in favor of the proposed use. His building housed commercial tenants and they had no complaints about the noise and dust from the Applicant's operations.

Mr. Wirsén explained the DEP approval process. After the Draft RCC Permit was approved, there is a period for public comment and the permit applicant would have to respond to those comments. The response deadline was originally January 26th but the Applicant has applied for a sixty-day extension. Once the comment and response period had ended, the DEP will then consider the submissions and issue a Final Permit, with potential modifications from the Draft Permit. He also stated that the Applicant must obtain site plan approval from the Planning Board and possibly obtain a Determination of Applicability by the Conservation Commission. Town Counsel stated his understanding that the Applicant expressed a willingness to install a groundwater monitoring well if required by the Planning Board or Conservation Commission.

The Board moved to close the evidentiary portion of the hearing and begin the deliberation portion of the hearing at 7:15 P.M.

II. DISCUSSION AND FINDINGS:

A. Light Manufacturing

The Board found that the proposed use constituted the manufacture of asphalt and concrete (of which cement is a principal component) which is expressly forbidden by the definition of Light Manufacturing. It did not matter to the Board whether the operation was termed "remanufacturing" or "recycling," the Board found that the process described resulted in the production of usable asphalt and concrete which is explicitly excluded as part of a "light manufacturing" use under the Bylaw.

The statement from Hinckley Allen accompanying the application describes the ABC materials resulting from the proposed use as "manufactured product" and claims "that asphalt and cement are *not* the products that will be manufactured on the site" despite the fact that the manufactured materials, regardless of their physical form, are chemically composed of asphalt and concrete. [emphasis in original]. The letter from Green Seal Environmental states "S L T proposes to

crush existing asphalt and concrete that was previously fabricated off-site . . . and then use the crushed material to manufacture a new stone/aggregate material.”

The Board was unpersuaded by the Applicant’s statutory construction argument. Its “inclusion of some requires exclusion of others” argument must yield to the bylaw’s language which does not limit its application to “expressly excluded” activities. The Board acknowledges that such maxims of statutory construction are not rules of law but aids in interpreting a statute or bylaw and must yield when such constructions would frustrate the general beneficial purposes of the bylaw or if their applications would lead to an illogical result. Bank of Am., N.A. v. Rosa, 466 Mass. 613, 619–20 (2013).

The Bylaw begins with “Fabrication, assembly, processing, finishing work and packaging in such a manner that noise, dust, odor, vibration, or similar objectionable features are confined to the premises and are in no way objectionable to abutting property, and incidental storage and distribution of the same [emphasis added]” The use of the words “or similar objectionable features” expresses an intent that prohibited uses were not strictly constrained to those which emit excessive noise, dust, odor or vibration but could include uses with other potentially deleterious off-site impacts such as groundwater contamination. The Board determined that the Applicant did not meet its burden of proving that the proposed use would not cause noise, dust or similar objectionable offsite impacts to abutting properties.

It should be noted that the only direct abutters to the Applicant in Plympton are other properties owned by the Applicant, two parcels used for commercial solar panels and the Department of Transportation for Route 44. The nearest commercial abutters to the Applicant’s adjacent parcels in Carver did speak in favor of the proposed use. Residents more distant than those abutters spoke against it, citing concerns of noise, dust and groundwater contamination.

B. Recycling Facility Use

The Board also agreed with the Building Commissioner’s determination that the Applicant’s proposed use was a recycling facility and not allowed under the Zoning Bylaw. The Applicant is indisputably reclaiming previously made and used ABC material and processing it into a form which can be used again in a different physical form of the same chemical composition of material. The DEP considers processing ABC material to be recycling. See “Using or Processing Asphalt Pavement, Brick & Concrete Rubble”, Updated February 27, 2017 and Draft RCC Permit. The Zoning Bylaw expressly states that uses not defined in it are not allowed and recycling facilities are not mentioned in the bylaw. § 300-4.1

The statement from Hinckley Allen accompanying the application describes the proposed use as “previously manufactured asphalt and cement will be *recycled* at the site and converted into the granular, recycled product that S L T will sell.” [italics in original] The letter from Green Seal Environmental states that the Building Commissioner was incorrect to make a determination that the proposed use was “recycling.” As counsel and its expert cannot seem to agree on whether the proposed use is recycling or not and the DEP considers the proposed use to be recycling, the Board finds that the use does involve recycling which is not referenced as an allowed use under the Bylaw.

C. Groundwater Protection District

Given the submission of the Draft DEP proposal subsequent to issuance of the Building Commissioner's written determination and the description of the processes which the Applicant must undergo in order to obtain regulatory and municipal approval, the Chair proposed that the Board overturn the Building Commissioner's determination that the proposed use would result in creation of Process Liquids or otherwise violate the Groundwater Protection District requirements in the Bylaw, subject to a condition that the Applicant obtain all necessary approvals from MassDEP and the Planning Board and comply with all conditions imposed by any such permits.

III. DECISION:

On January 23, 2024 at 7:40 P.M. the following determinations were made:

1. On a motion by Mr. Stiles and seconded by Mr. Kowlaski, to uphold the determination by the Building Commissioner that the Applicant's proposed use is not Light Manufacturing:

Ms. Jafferian – Yes, Mr. Stiles – Yes, Mr. Kowalski – Yes.

2. On a motion by Mr. Stiles and seconded by Ms. Jafferian, to uphold the determination by the Building Commissioner that the Applicant's proposed use as an ABC material recycling facility is prohibited under the Bylaw.

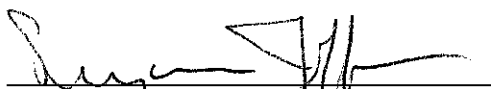
Ms. Jafferian – Yes, Mr. Stiles – Yes, Mr. Kowalski – Yes.

3. On a motion by Mr. Stiles and seconded by Ms. Jafferian, to reverse the determination by the Building Commissioner that the Applicant's proposed use violated the Groundwater Protection District provisions of the Bylaw, conditional on obtaining all necessary permits from MassDEP ~~and~~ the Plympton Planning Board and complying with all conditions imposed therein.

*and other regulating
authorities*

Ms. Jafferian – Yes, Mr. Stiles – Yes, Mr. Kowalski – No.

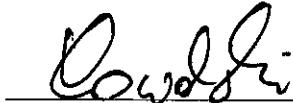
As a unanimous vote was required by the three-member Board to overturn any of the determinations by the Building Commissioner, the Building Commissioner's written zoning determination dated October 17, 2023 is upheld in its entirety.


Suzanne Jafferian, Ph. D., Chair

2-2-2024
Date



Ethan C. Stiles, Esq., Secretary



Lukasz Kowalski, Member

Appeals of this decision, if any, shall be made pursuant to G.L. c. 40A, §17 and shall be filed within twenty days after the date of filing of the notice of this decision in the office of the Town Clerk.

Received by Plympton Town Clerk on: February 5, 2024

Notice of Decision sent to:

Applicant RPBP, LLC & S L T Construction Corporation on: February 5, 2024 by certified mail.

Interested Parties on: N/A by hand or regular mail.