



The Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES

D.T.E./D.P.U. 06-60-A

November 14, 2008

Petition of Russell Biomass LLC, pursuant to G.L. c. 40A, § 3, for exemption from the zoning by-laws of the Town of Russell to construct and operate a wood-burning electric generating facility.

ORDER ON MOTION FOR RECONSIDERATION AND LATE FILED MOTION FOR LIMITED PARTICIPANT STATUS

APPEARANCES:

John A. DeTore, Esq.
Rebecca L. Tepper, Esq.
Rubin and Rudman LLP
50 Rowes Wharf
Boston, MA 02110
FOR: Russell Biomass LLC
Petitioner

Alice E. Taverna
Russell Planning Board
65 Main Street
Russell, MA 01071
FOR: Town of Russell Planning Board
Intervenor

James E. and Robin L. Unger
240 Frog Hollow Road
Russell, MA 01071
Intervenor

Ruth Kennedy
140 Highland Avenue
Russell, MA 01071
Intervenor

Brian P. Janik
360 Westfield Road
Russell, MA 01071
Intervenor

Sybil Miezejewski
31 Lincoln Avenue
Russell, MA 01071
Intervenor

Sheila A. Miezejewski
31 Lincoln Avenue
Russell, MA 01071
Intervenor

John and Jana Chicoine
189 Frog Hollow Road
Russell, MA 01071
Intervenor

Michael K. Callan, Esq.
Doherty, Wallace, Pillsbury & Murphy, PC
1414 Main Street
Springfield, MA 01144-1900
FOR: Town of Russell/Russell Board of Zoning Appeals
Intervenors

James and Marita Barlow
163 Main Street
Russell, MA 01071
Intervenor

Margaret, Philip, and Caitlyn Bodoh
83 Main Street
Russell, MA 01071
Intervenor

Thomas E. and Cheryl A. Burns
145 Main Street
Russell, MA 01071
Intervenor

Helen Champiney and David Champiney, Jr.
95 Main Street
Russell, MA 01071
Intervenor

Raymond P. Coach and Kelly A. Green
21 Pomeroy Terrace
Russell, MA 01071
Intervenor

Lorrie B. Cowles
31 Pomeroy Terrace
Russell, MA 01071
Intervenor

Christina L. DeAngelis
94 Main Street
Russell, MA 01071
Intervenor

Pauline J. Donovan
79 Pomeroy Terrace
Russell, MA 01071
Intervenor

Robert E. Giusti
17 Pomeroy Terrace
Russell, MA 01071
Intervenor

Louise Harlow
186 Huntington Road
Russell, MA 01071
Intervenor

Alan J. and Debra F. Kochanek
42 West Main Street
Russell, MA 01071
Intervenor

Barbara Kochanek
24 Lincoln Avenue
Russell, MA 01071
Intervenor

Harold and Debra LaFreniere
26 Main Street
Russell, MA 01071
Intervenor

Scott and Julie Loomis
95 Main Street
Russell, MA 01071
Intervenor

Andrea L. and Jason Marge
115 Main Street
Russell, MA 01071
Intervenor

David B. and Tracy Meczywor
39 River Street
Russell, MA 01071
Intervenor

Deborah Ostaff
184 Main Street
Russell, MA 01071
Intervenor

Sarah Page
94 Main Street
Russell, MA 01071
Intervenor

Amber L. Roos
31 Pomeroy Terrace
Russell, MA 01071
Intervenor

Peter H. Martin, Esq.
Office of City Solicitor
59 Court Street
Westfield, MA 01085
FOR: City of Westfield
Limited Participant

Jonathan D. Eichman, Esq.
Kopelman and Paige, P.C.
101 Arch Street
Boston, MA 02110
FOR: Town of Montgomery
Limited Participant

Owen R. Broadhurst
96 Elbert Road
Agawam, MA 01001-3202
Limited Participant

Stephen Klionsky, Esq.
100 Summer Street
Boston, MA 02110
FOR: Western Massachusetts Electric Company
Limited Participant

I. INTRODUCTION AND PROCEDURAL HISTORY

In June 2006, Russell Biomass LLC (“Russell Biomass” or the “Company”) filed a zoning exemption petition with the Department of Public Utilities (“Department”) pursuant to G.L. c. 40A, § 3, seeking: (1) four individual zoning exemptions; and (2) exemption from the Russell zoning by-law in its entirety (“comprehensive zoning exemption”) in connection with the Company’s proposed construction of a 50-megawatt biomass (wood-fired) electric generating facility in Russell (the “Project”). The Project would qualify as a new renewable generation unit under the Massachusetts renewable portfolio standard and would be qualified to earn Renewable Energy Credits (“RECs”) for its generation output. The Department docketed the petition as D.T.E./D.P.U. 06-60. The Department reviewed the petition in an adjudicatory proceeding that included over 400 evidentiary requests, 13 days of evidentiary hearings, and the testimony of 26 witnesses.¹

On August 22, 2008, the Department issued a final order denying the Company’s petition. D.T.E./D.P.U. 06-60 (2008) (“Order”). In our Order, the Department found that the Project would have clear public benefits. Id. at 80. Such potential benefits include supplying added renewable energy resources and fuel supply diversity to the New England region, and helping meet electricity demand in a manner that at least initially provides carbon control benefits, consistent with the Commonwealth’s mandate to reduce greenhouse gas emissions. Id. However, in reviewing the overall request, the Department concluded that

¹ In June 2005, the Town of Russell Planning Board and Zoning Board of Appeals granted a special permit to the Company allowing construction of the Project with conditions. The Special Permit was appealed to the Massachusetts Land Court by four

local impacts – particularly related to traffic – were significant. On balance, the Department found that it could not conclude that the public benefits of the project warrant overriding the right of the Town to determine whether and how to address local impacts. Id. at 81-82.

Finding that addressing the identified local traffic impacts were “exactly the types of decisions that are optimally made by the Town,” the Department did not separately rule on the individual zoning exemption requests. Id. at 82.

On September 9, 2008, Russell Biomass filed a motion requesting that the Department reconsider its denial of the individual zoning exemptions from the Town of Russell’s Zoning By-Laws Section 3.2 (“By-Laws Section 3.2”) regarding the by-law’s 35-foot height restriction and the by-law’s 30-foot setback requirement (“Motion for Reconsideration”).² The Town of Russell Planning Board (“Planning Board”) filed an opposition to the Company’s motion on September 27, 2008. On September 29, 2008, Jim and Robin Unger, on behalf of a group of 21 individual residents of Russell, all of whom were intervenors in the underlying proceeding (the “Residents”),³ filed a response opposing the Company’s motion. On September 30, 2008, Ms. Ruth Kennedy, also an intervenor in the proceeding, filed an opposition to the Company’s

Russell residents, where it is stayed pending a final outcome in this proceeding.

² The Motion for Reconsideration is titled “Motion to Reconsider Denial of Exemption From Section 3.2 of the Town of Russell’s Zoning By-Laws for Project Structures Requiring Heights and Setback Variances.”

³ The response indicates that it is filed on behalf the following intervenors: Jim and Robin Unger, Scott and Julie Loomis, John and Jana Chicoine, Christina DeAngelis, Sarah Page, Pauline J. Donovan, Robert Giusti, Brian Janik, Alan and Debra Kochanek, Barbara Kochanek, Harold and Debra Lafreniere, Andrea and Jason Marge, Dave and Tracy Meczymor, Sheila Mizejewski, Sybil Mizejewski, Deborah Ostaff, James and Rita Barlow, Philip and Margaret Bodoh, Tom and Cheryl Burns, David and Helen Champiney, and Lorrie Cowles.

motion. In addition, on September 29, 2008, the Department of Energy Resources (“DOER”) requested leave to intervene as a limited participant for the purpose of submitting comments to the Department concerning the Motion for Reconsideration.⁴

II. STANDARD OF REVIEW

The Department's Procedural Rule, 220 C.M.R. § 1.11(10), authorizes a party to file a motion for reconsideration within twenty days of service of a final Department Order. The Department's policy on reconsideration is well-settled. See, e.g., Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); Western Massachusetts Electric Company, D.P.U. 558-A at 2 (1981). Reconsideration of previously decided issues is granted when extraordinary circumstances dictate that we take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. Berkshire Gas Company, D.P.U. 905-C at 6-7 (1982) (finding extraordinary circumstances where union contract expiration and subsequent strike prevented company from providing ratified union contract payroll increases until several days after final Order issued); cf. Boston Gas Company, D.P.U. 96-50-C at 25 (Phase I) (1997) (finding creation of nonunion compensation pool after the close of the record was not an extraordinary circumstance). Alternatively, a motion for reconsideration may be based on the argument that the Department's treatment of an issue was the result of mistake or inadvertence. See, e.g., Boston Gas Company, D.P.U. 96-50-C (Phase 1) at 22 (1997); New England Telephone and Telegraph Company, D.P.U. 86-33-J at 2, 25-26

⁴

Because DOER has a statutory mandate to promote renewable energy and administer the Commonwealth's Renewable Portfolio Standards, and requests the opportunity to offer its views based on the record that has already been established in this case, and because no party will be prejudiced by DOER's comments, we hereby grant DOER's

(1989); cf. Boston Edison Company, D.P.U. 1350-A at 5 (1983).

A motion for reconsideration should not attempt to reargue issues considered and decided in the main case. See, e.g., Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 2-3, 7-9 (1991); Boston Edison Company, D.P.U. 1350-A at 4-5 (1983). The Department has denied reconsideration where the request rests upon information that could have been provided during the course of the proceeding and before issuance of the final Order. See, e.g., Boston Gas Company, D.P.U. 96-50-C (Phase 1) at 36-37 (1997); Boston Gas Company, D.P.U. 96-50-B (Phase 1) at 8 (1997). The Department has stated that the record in a proceeding closes, at the latest, when an Order is issued. Western Massachusetts Electric Company, D.P.U. 85-270-C at 18-20 (1987). Thus, the Department may deny reconsideration when the request rests on a new issue or updated information presented for the first time in the motion for reconsideration. See, e.g., Western Massachusetts Electric Company, D.P.U. 85-270-C at 18-20 (1987).

III. POSITIONS OF THE PARTIES

A. Russell Biomass, LLP

The Company requests that the Department address its request for an individual zoning exemption from By-Laws Section 3.2 which it originally petitioned for in the underlying proceeding (Motion for Reconsideration at 1). Russell Biomass maintains that because of either mistake or inadvertence, the Department did not analyze the Company's individual zoning exemption requests. Russell Biomass suggests that it would better serve the public

interest in this case to grant an individual exemption from By-Laws Section 3.2 instead of denying the requests “en bloc” (id. at 2).

The Company states that without an exemption from By-Laws Section 3.2, Russell Biomass will require variances from the height and setback requirements (id. at 5).⁵ The Company maintains that the requirement that Russell Biomass apply for, obtain, and defend in court the variances for these structures creates a large, perhaps insurmountable, obstacle to getting the Project built (id.).

Russell Biomass supports this assertion with the following arguments:

(1) Unlike the Special Permit for use, the Zoning Board has not already considered and approved the variance requests. Therefore, the Zoning Board would have to conduct new variance proceedings under the procedural requirements of the By-Laws and G.L. c. 40A, § 10, including the notice, hearing and appeal requirements and rights (id. at 6).

(2) The standard for obtaining a variance under § 6.3.2 and under the Massachusetts Zoning Act, G.L. c. 40A, § 10, is very difficult to meet. This contrasts with the more flexible approach in the By-Laws and State law with respect to special permits (id.).

(3) Under current law, an appeal of a variance would continue to stay the issuance of a permit, whereas an appeal of a special permit would not. Therefore, even if Russell Biomass were able to obtain variances from Russell Zoning Board, the approval could be appealed under G.L. c. 40A, § 17, and the filing of that appeal would stay the issuance of the variances under G.L. c. 40A, § 11 (id.).

⁵ The Company asserts that there are several Project structures that exceed the 35-foot height restriction in the By-Laws and three that encroach into the 30-foot setback

The Company maintains that the uncertainty of the variance permitting process, the delay associated therewith and the possibility of appeals, at a minimum, will impede construction and implementation of the Project and warrant an exemption from the height and setback requirements of the By-Laws (id. at 7). Based on the Department's finding in its Order that the Project "would have clear public benefits," Russell Biomass contends that granting a single exemption from By-Laws Section 3.2 for the Project structures that require height and setback variances is reasonably necessary for the convenience or welfare of the public because it will: (1) have no traffic impacts and little to no environmental impacts; (2) not prevent the Town from addressing local concerns through the Special Permit process; and (3) ensure that if the Town and Russell Biomass are able to address traffic issues and other local concerns to their mutual satisfaction, that this beneficial renewable energy project could be built (id. at 8).

B. Town of Russell Planning Board

The Planning Board opposes the Motion for Reconsideration, and argues that the building height issue should have been part of the Special Permit discussions that have already taken place (Planning Board at 1). The Planning Board requests that the Department consider the impacts that buildings taller than 35 feet would have on the Town fire department's ability to respond to fires or other emergencies at the site (id.).

According to the Planning Board, the Company has changed the layout and configuration of the plant buildings after the issuance of the Special Permit (id. at 2). Consistent with the Department's Order seeking to resolve issues at the local level, the

minimum requirement (id.).

Planning Board maintains that by requiring the Company to work through the Town for approval of potential zoning and building height restrictions, the Department can be assured that related emergency preparedness issues will be addressed locally (id.).

C. The Residents

The Residents oppose the Motion for Reconsideration (Residents at 2). The Residents disagree with the Company's conclusion that granting an exemption from By-Laws Section 3.2 for the structures that require height and setback requirements will have no impact on traffic or traffic-related impacts (id. at 1). Because Russell Biomass needs zoning variances on building height and setback requirements to be able to construct the Project, and building the Project will have an impact on traffic-related issues, the Residents conclude that granting the requested exemption will have an impact on traffic and traffic-related issues (id. at 2).

D. Ruth Kennedy

Ruth Kennedy contends that the Motion for Reconsideration should be denied because the Department's Order correctly analyzed the facts and the law and the Department has already made a fair decision (Kennedy at 2). Ms. Kennedy also raises concerns about the Town's ability to fight fires at the Project because of the fire department's lack of equipment for fighting fires in buildings much larger than 35 feet (id.).

E. Department of Energy Resources

DOER recommends that the Department grant the Motion for Reconsideration (id. at 3). According to DOER, Russell Biomass would greatly assist utilities in meeting the newly mandated renewable portfolio standard requirement of fifteen percent renewable energy by 2020, established in the Green Communities Act (id. at 2, 3). DOER states that the facility

would also promote diversity of supply, and reinforce the message that Massachusetts welcomes the development of alternative energy resources (id. at 3).

DOER maintains that the serious legal uncertainty associated with the variances leads it to conclude that the Company has demonstrated that it requires an exemption from the zoning by-law in order to proceed (id. at 4). DOER believes that given the importance of this facility, the Company should be given an opportunity to resolve the traffic issues, for example by developing a different access route or traffic mitigation that meets the approval of the local authorities (id.). DOER recommends that the Department grant the Motion for Reconsideration with the express condition that before construction commences, the Company must file with the Department evidence that it will use an alternative road, or that it will implement an alternative traffic mitigation plan that has been approved by the appropriate Town zoning authorities (id. at 5).

IV. ANALYSIS AND FINDINGS

A Petitioner seeking exemption from a local zoning by-law under G.L. c. 40A, § 3 must meet three criteria. First, a petitioner must qualify as a public service corporation.⁶ Princeton Municipal Light Department, D.T.E./D.P.U. 06-11 (2007); Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667 (1975). Second, a petitioner must establish that it requires an exemption from the zoning ordinance or by-law. NSTAR Electric Company, D.P.U. 07-60/07-61, at 2 (2008); New England Power Company/Massachusetts Electric

⁶ In our Order we found that Russell Biomass is a public service corporation for purposes of G.L. c. 40A, § 3. Order at 15.

Company, D.T.E. 04-66/04-81, at 4 (2005). Finally, a petitioner must demonstrate that its present or proposed use of the land or structure is reasonably necessary for the public convenience or welfare. Tennessee Gas Pipeline Company, D.T.E. 01-57, at 4 (2002); USGen New England, Inc., D.T.E. 03-83, at 6 (2004).

In this case, the Company seeks reconsideration of the Order, arguing that either through inadvertence or mistake the Department focused exclusively on Russell Biomass' request for a comprehensive zoning exemption and did not address Russell Biomass' individual zoning exemption requests. The Company is correct that in addressing and denying the Company's Petition, we omitted any analysis of the separately requested individual zoning exemptions. In fact, our Order did not address the second prong of the standard of review for zoning exemptions – whether the petitioner has established that it requires an exemption from the zoning ordinance or by-law. In light of the Company's arguments, we are persuaded that such a review is appropriate for the specific exemptions identified in the Motion for Reconsideration.

The individual zoning exemptions being requested in the Motion for Reconsideration relate to the need for a variance for the Project's structures that would exceed the height and setback requirements set forth in By-Laws Section 3.2. As noted by the Company, there are several Project structures that exceed the 35-foot height limit, and three that encroach into the 30-foot setback requirement. To obtain the necessary approvals, Russell Biomass would need to submit a variance request to the Russell Zoning Board of Appeals.⁷

⁷ Under Russell By-Laws 6.3.1(b), the Board of Appeals may grant a variance from the terms of the applicable provision where it specifically finds that "owing to the

The Department favors the resolution of local issues on a local level whenever possible to reduce local concern regarding any intrusion on Home Rule⁸ authority. Tennessee Gas Pipeline Company, D.T.E. 01-57, at 19-20 (2002). In this case, however, given the litigation surrounding the Project and the difficult standard for obtaining a variance, we believe it is reasonable for the Department to address the request for a zoning exemption rather than leaving the Company to seek a variance at this time. See, e.g., Lussier v. Zoning Board of Appeals of Peabody, 447 Mass. 531, 534 (2006) (variances are not allowed as a matter of right and should be sparingly granted); Gamache v. Town of Acushnet, 14. Mass. App. Ct. 215, 217, n. 6 (1982) (the power to grant variances is sparingly to be exercised, and only under exceptional circumstances).⁹ Moreover, to require Russell Biomass to seek, obtain and potentially defend in court variances for the requested structures could create an obstacle to getting the Project built. See, e.g., Berkshire Power, D.P.U. 96-104, at 38-39 (1997). Accordingly, we find that the requested zoning exemptions from Russell Zoning By-Laws

circumstances relating to the soil conditions, shape or topography of such land or structures and especially affecting such land or structures, but not affecting generally the zoning district in which it is located, a literal enforcement of the [By-Law provisions] would involve substantial hardship to the owner . . . and where desirable relief may be granted without substantial detriment to the public good and without substantial derogation from the intent and purposes of [the By-Laws], but not otherwise.”

⁸ The Home Rule Amendment to the Constitution of the Commonwealth is intended to preserve the right of municipalities to self government in essentially “local matters” by allowing them to adopt and amend their own charters, while preserving the Commonwealth’s right to legislate with respect to State, regional and general matters. Gordon v. Sheriff of Suffolk County, 411 Mass. 238, 244 (1991).

⁹ By comparison, the standard for granting a special permit is more flexible. Randall, 18A Municipal Law and Practice, § 17.55 (Mass. Practice Series, 5th ed).

Section 3.2 are required pursuant to G.L. c. 40A, § 3.

In addition to qualifying as a public service company, and successfully demonstrating that the requested zoning exemptions from By-Laws Section 3.2 are required, the Company must also demonstrate that the proposed facility is reasonably necessary for the public convenience or welfare. The Department evaluates this requirement by balancing local impacts against project benefits. See Save the Bay v. Department of Public Utilities, 366 Mass. 667, 686 (1975).

As stated above, in our Order, the Department found that the Project would have clear public benefits. Order at 80. We do not change that finding here. The facts presented by this case are unusual because primarily a single facet of the Project – truck traffic on an access route extending several thousand feet away from the proposed site – prevented us from approving the requested exemptions from the Zoning By-Laws of the Town of Russell. In effect, in its Motion for Reconsideration, the Company is requesting that the Department rule on the individual exemptions, conditioned on resolution of the traffic issues to the satisfaction of the Town. The Department finds that, if the Company is successful in resolving the traffic issues, then the Project benefits would outweigh the remaining local impacts, including those relating to stack height and setback. Therefore, with respect to the requested individual exemptions, we find that the Project is reasonably necessary for the public convenience or welfare (i.e., that its public benefits outweigh the local impacts), conditioned upon an agreement between the zoning authority of the Town and the Company that addresses the traffic issues to the Town's satisfaction. We note that that this finding will also serve the Department's interest in administrative efficiency. To deny the requested zoning exemptions

for height and setback requirements and require the Company to seek a variance instead would likely lead to a later petition to the Department following the denial or appeal of a Company-requested variance.

We do not agree with the argument made by the Residents that granting the requested exemption will have an impact on traffic and traffic-related issues because it will allow the Project to be built. As stated above, our approval of the individual exemptions is conditioned upon resolution to the Town's satisfaction of the traffic issues. Thus, the Project will not be built unless the Town and Russell Biomass reach a decision on how to address the identified traffic concerns.

The Planning Board and Ruth Kennedy object to the Motion for Reconsideration, in part, because of the importance of using the variance proceeding to provide the Town with the authority to impose certain requirements on the Project that would allow the local fire department to fight fires or effectively address other emergencies at the Project given the expected height of certain buildings at the site. We share this concern and therefore require Russell Biomass to include as part of its traffic discussions with the appropriate Town zoning authorities issues concerning fire-fighting and other emergencies associated with the height of the buildings at the site. As we stated in the Order:

If the proposed facility ultimately were to be built, the Department expects that consultations between the Company and the Fire Chief would occur; that the Company would arrange for the conduct of a fire protection study as recommended by the State Fire Marshal; and that the biomass facility would be designed and operated in conformance with applicable federal and state fire protection requirements.

Order at 59.

V. ORDER

Accordingly, after due consideration, it is

ORDERED: That Russell Biomass' Motion for Reconsideration requesting exemptions from Section 3.2 of the Town of Russell's Zoning By-laws for the Russell Biomass Project structures that require height and setback requirements is granted, conditioned upon an agreement between the Town of Russell zoning authority and the Company that would resolve the traffic issues to the satisfaction of the Town. Should such an agreement be reached, Russell Biomass shall make a compliance filing with the Department within 30 days of its execution providing the agreement as well as a description of the outcome of discussions regarding fire protection.

By Order of the Department,

/s/

Paul J. Hibbard, Chairman

/s/

W. Robert Keating, Commissioner

/s/

Tim Woolf, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).