

(SEAL)

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

NORFOLK, ss

CASE NO. 08 MISC 384054 (CWT)

NORFOLK ASPHALT COMPANY, INC.,

Plaintiff

v.

PATRICK J. MULVEHILL, JOHN R.  
PERRY, HARRY T. SPENCE,  
BARBARA A. KINTER, and PHILIP W.  
RILEY, as they are members of the  
ZONING BOARD OF APPEALS OF THE  
TOWN OF NORWOOD; and  
MARK G. CHUBET, in his capacity as the  
BUILDING INSPECTOR OF THE TOWN  
OF NORWOOD,

Defendants

**DECISION**

Plaintiff Norfolk Asphalt Company, Inc. commenced this case on September 12, 2008, as an appeal, pursuant to G.L. c. 40A, § 17, from a decision of the Defendant the Zoning Board of Appeals of the Town of Norwood to deny the Plaintiff's application for various forms of zoning relief to allow the upgrade of equipment for the manufacturing of bituminous concrete, concerning a parcel of real property and buildings, known as and numbered 601 Pleasant Street in Norwood, owned of record by Plaintiff.

On July 10, 2009, Plaintiff filed a Motion for Partial Summary Judgment. Defendants opposed the motion on August 7, 2009, and filed a Cross-Motion for

Summary Judgment and an Affidavit of Mark Chubet in support thereof. Defendants filed also a Motion to Strike the portions of the Plaintiff's motion which request that the court deem the Plaintiff's Request for Admissions as admitted.

Plaintiff opposed the Defendants' Cross-Motion for Summary Judgment on September 4, 2009, and filed an Affidavit of Alan D. Perkins in support thereof. Plaintiff filed also a Response to the Defendants' Motion to Strike and a Motion to Strike the Affidavit of Mark Chubet.

On September 15, 2009, Defendants filed a Motion to Strike the Affidavit of Alan D. Perkins. Plaintiff opposed the motion on September 25, 2009.

The motions were argued on September 29, 2009, and are the matters presently before the court.

After reviewing the record before the court, I find that the following facts are not in dispute:

1. Plaintiff Norfolk Asphalt Company, Inc. (Norfolk Asphalt/Plaintiff) is a commercial manufacturer of bituminous concrete.
2. Plaintiff is the owner of a parcel of real property and buildings, known as and numbered 601 Pleasant Street in Norwood (Property).
3. The Property is located in the "M" Zoning District of the Zoning Bylaws of the Town of Norwood. In the "M" Zoning District, manufacturing use is allowed as of right.
4. In 1970, the then owner of Norfolk Asphalt applied for a special permit to manufacture bituminous concrete on the Property. The Town of Norwood Zoning Board of Appeals voted to grant the special permit.
5. From 1970 to 1990, Plaintiff manufactured bituminous concrete on the Property.
6. The Property is the location of a bituminous concrete manufacturing plant, storage tanks, various buildings, and equipment related to that use.

7. In 1983, Gerard C. Lorusso purchased Norfolk Asphalt and the Property and continued to manufacture bituminous concrete on the Property.
8. In 1983, Plaintiff filed an application to amend the 1970 special permit to explicitly state that the permit would run with the land. The Board of Appeals voted to allow the amendment.
9. In 1990, Plaintiff suspended manufacturing operations on the Property because of a decreased demand for bituminous concrete.
10. Plaintiff intended to resume operations when the economy improved. To that end, since 1990, Plaintiff has maintained the plant, buildings, storage tanks, and equipment on the Property as well as certain local and state permits and licenses required for the manufacturing of bituminous concrete. Plaintiff has also continued to store liquid asphalt in the storage tanks on the Property.
11. In 1997, Norwood Contractor's Supply, LLC, another company owned by Mr. Lorusso, applied for two special permits to allow an open lot sales area in the open lot area and a showroom for building supplies in an existing building on the Property (Sales Area and Showroom). The Board of Appeals voted to grant the special permits.
12. Norwood has operated the Sales Area and Showroom on the Property from 1997 to the present.
13. The bituminous concrete facilities are located on the southern portion of the Property. The Sales Area and Showroom is located on the northern portion of the Property.
14. In 2006, Plaintiff proposed to upgrade the bituminous concrete manufacturing equipment on the Property in order to resume manufacturing operations on the Property.
15. Town officials informed Plaintiff that it was required to obtain a special permit for the storage of toxic or hazardous materials on the Property, pursuant to § 5345 of the Zoning Bylaws of the Town of Norwood.
16. As a result, Plaintiff filed an application with the Board of Appeals seeking:
  1. a determination that the manufacturing of bituminous concrete is a manufacturing use, allowed as of right on the Property in the "M" Zoning District;
  2. a determination that the equipment upgrade and operation of the facility is not a use substantially more detrimental to the neighborhood, pursuant to G.L. c. 40A, § 6;

3. a determination that the use of the Property to manufacture bituminous concrete has not been abandoned and, therefore, a special permit, pursuant to § 1630, should be issued to allow the equipment upgrade and use of the facility;
  4. a special permit, pursuant to § 5345; and
  5. other relief the Board of Appeals deems appropriate.
17. Simultaneously, Plaintiff filed an application with the Building Inspector of the Town of Norwood for a foundation permit to conduct the equipment upgrades. The Building Inspector denied the application and Plaintiff appealed to the Board of Appeals. That appeal and the application for various forms of zoning relief were consolidated into one action.
18. On August 19, 2008, following a duly noticed public hearing, the Board of Appeals voted to deny the Plaintiff's application and appeal, and a decision was filed with the Town Clerk on August 26, 2008. The decision states that "the Norfolk Asphalt Plant is a manufacturing use pursuant to the Zoning Bylaw definition of 'Manufacturing' and therefore allowed as a matter of right" but denies all other relief requested by Plaintiff.
19. Bituminous concrete is a composite material used as pavement. It is manufactured in a process which combines sand, aggregates, and bitumen or asphalt or liquid asphalt.
20. Therefore, the manufacturing of bituminous concrete requires that the components, including liquid asphalt, be stored at the location of the manufacturing facility.
21. Bituminous concrete consists of approximately five percent liquid asphalt.
22. Plaintiff does not store liquid asphalt on the Property for any purpose other than for use in the manufacturing of bituminous concrete.

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*Defendants' Motion to Strike*

As an initial matter, Defendants move to strike the Plaintiff's Motion for Summary Judgment or such portions of the motion which suggest that the Plaintiff's Request for Admissions should be deemed admitted for failure of the Defendants to appropriately respond. Defendants correctly point out that Plaintiff has not moved for such relief. Accordingly, it is hereby **ORDERED** that the Defendants' Motion to Strike

is **ALLOWED IN PART**; the Plaintiff's Request for Admissions are not taken as true, but as they are responded to by Defendants.

### *Motions to Strike Affidavits*

Secondly, Plaintiff moves to strike portions of the Affidavit of Mark Chubet and Defendants move to strike the Affidavit of Alan D. Perkins. After considering the arguments, both written and oral, it is hereby **ORDERED** that the Plaintiff's Motion to Strike Portions of the Affidavit of Mark Chubet is **DENIED** and the Defendants' Motion to Strike the Affidavit of Alan D. Perkins is **DENIED**.

### *Summary Judgment*

Summary judgment is granted where there are no issues of material fact and when the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); Cassesso v. Comm'r of Corr., 390 Mass. 419, 422 (1983); Cnty. Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976). The moving party bears the burden of demonstrating affirmatively the absence of a triable issue, and its entitlement to judgment as a matter of law. Pederson v. Time, Inc., 404 Mass. 14, 16-17 (1989). In viewing the record before it, the court reviews "the evidence in the light most favorable to the nonmoving party." Donaldson v. Farrakhan, 436 Mass. 94, 96 (2002).

In the instant matter, there are no genuine issues of material fact, within the meaning of Mass. R. Civ. P. 56(c), and, therefore, this case is proper for summary judgment.

General Laws chapter 40A, § 17 requires that "[t]he court shall hear all evidence pertinent to the authority of the board or special permit granting authority and determine the facts, and, upon the facts as so determined, annul such decision if found to exceed the

authority of such board or special permit granting authority or make such other decree as justice and equity may require.” 40A, § 17. The Supreme Judicial Court has interpreted § 17 to require that a court hearing an appeal pursuant to 40A, § 17 apply a combination of *de novo* review and deference to the judgment of the municipal authority. Bicknell Realty Co. v. Bd. of Appeal of Boston, 330 Mass. 676, 679 (1953) (and case cited). The Trial Court must review the evidence and make findings of fact without deference to the board’s findings. Id.; Willard v. Bd. of Appeals of Orleans, 25 Mass. App. Ct. 15, 24 (1987); see G.L. c. 40A, § 17. In this review, the court is not limited to the evidence that was before the board. Bicknell Realty Co., 330 Mass. at 679; Marr v. Back Bay Architectural Cmm’n, 32 Mass. App. Ct. 962, 963 (1992); Crittenton Hastings House of the Florence Crittenton League v. Bd. of Appeal of Boston, 25 Mass. App. Ct. 704, 713-24 (1988).

However, this review is circumscribed by the requirement to defer to the judgment of the municipal board. Pendergast v. Bd. of Appeals of Barnstable, 331 Mass. 555, 557-58 (1954); Geryk v. Zoning Appeals Bd. of Easthampton, 8 Mass. App. Ct. 683, 684 (1979); S. Volpe & Co., Inc. v. Bd. of Appeals of Wareham, 4 Mass. App. Ct. 357, 360 (1976). The court is solely concerned with “the validity but not the wisdom of the board’s action.” Wolfman v. Bd. of Appeals of Brookline, 15 Mass. App. Ct. 112, 119 (1983). A court hearing a § 17 appeal is not authorized to make administrative decisions. Pendergast, 331 Mass. at 557-58; Geryk, 8 Mass. App. Ct. at 684. If reasonable minds may differ on the conclusion to be drawn from the evidence, the board’s judgment is controlling. ACW Realty Mgmt., Inc., 40 Mass. App. Ct. 242, 246 (1996); Dowd v. Bd. of Appeals of Dover, 5 Mass. App. Ct. 148, 154-55 (1977); Copley v. Bd. of Appeals of

Canton, 1 Mass. App. Ct. 821 (1973). However, in limited circumstances the Trial Court may substitute its judgment for that of the board's, where "justice and equity" require. G.L. c. 40A, § 17; Pendergast, 331 Mass. at 558.

Therefore, the court may overturn the board's decision only if the decision is "based on a legally untenable ground or is unreasonable, whimsical, capricious or arbitrary." Britton v. Zoning Bd. of Appeals of Gloucester, 59 Mass. App. Ct. 68, 72 (2003); accord MacGibbon v. Bd. of Appeals of Duxbury, 356 Mass. 635, 639 (1970); ACW Realty Mgmt., Inc., 40 Mass. App. Ct. at 246. Moreover, where the court's findings of fact support any rational basis for the municipal board's decision, that decision must stand. MacGibbon, 356 Mass. at 639; Davis v. Zoning Bd. of Chatham, 52 Mass App. Ct. 349, 356 (2001); ACW Realty Mgmt., Inc., 40 Mass. App. Ct. at 246.

*i. Whether storage of liquid asphalt is the principal use of the Property.*

Defendants argue, firstly, that § 5345 of the Zoning Bylaws of the Town of Norwood applies to require Plaintiff to obtain a special permit in order to manufacture bituminous concrete on the Property. Section 5345 provides in relevant part: "Manufacture, storage, transfer, transport, or disposal of toxic or hazardous materials as the principal use of the premises may be permitted only if granted a special permit ...."

The Zoning Bylaws do not define the phrase "principal use." Where the language of a statute is clear and unambiguous, it must be given its plain and ordinary meaning. Bornstein v. Prudential Ins. Co., 390 Mass. 701, 704 (1984) (citing Hashimi v. Kalil, 388 Mass. 607, 610 (1983)). If "the use of the ordinary meaning of a term yields a workable result, there is no need to resort to extrinsic aids such as legislative history." Id. The common meaning of "principal" is primary, main, or chief. Black's Law Dictionary,

1230 (8th ed. 2004). Thus, the phrase “principal use” means the primary use to which the property is put. This meaning is reinforced by the Zoning Bylaws, which defines “accessory use” as: “An activity incidental to and located on the same premises as a principal use .... No use ... shall be considered ‘accessory’ unless functionally dependent on ... the principal use to which it is related ....” Zoning Bylaws of the Town of Norwood, § 8000.

In the present case, it is clear that, the Sales Area and Showroom use aside, the principal use of the Property is the manufacturing of bituminous concrete and that the storage of liquid asphalt on the Property is incidental to this use, wholly dependent on the manufacture of the finished product. Plaintiff does not store liquid asphalt on the Property for any purpose other than for use in the manufacturing of bituminous concrete, and therefore, §5345 cannot be applied to its storage in this manner.

*ii. Whether bituminous concrete is a toxic or hazardous material.*

Defendants argue further that bituminous concrete is “fresh asphalt”, within the meaning of § 8000 of the Zoning Bylaws, and therefore, §5345 applies to the manufacturing of bituminous concrete. Section 8000 of the Zoning Bylaws defines “Toxic or Hazardous Materials”, in part, as “oil and petroleum derivatives, including ... fresh asphalt.” The phrase “fresh asphalt” is not defined by the Zoning Bylaws, other than its inclusion in the category of oil or petroleum derivative. It is clear that the word “asphalt”, as it is used colloquially, is used to describe both a liquid material refined from petroleum as well as a finished composite material used to pave roadways. Thus, the term is commonly used synonymously with the term concrete. However, this is a routine misuse of the word. Asphalt, technically speaking, means a naturally-occurring, black,

viscous liquid, often found in crude petroleum. The Oxford American Desk Dictionary 32 (1998). Asphalt is obtained by a process of distillation of petroleum and is used as one ingredient in compounds used to surface roads. Id.

Bituminous concrete is a composite material manufactured in a process, which combines sand, aggregates, and bitumen or asphalt or liquid asphalt. It does not occur in nature. Furthermore, it cannot be said that bituminous concrete is a derivative of oil or petroleum. A derivative is a substance obtained from a root or source substance. Id. at 153 (derive). In other words, a derivative is something extracted, reduced, or refined from a more general, encompassing compound. Id. Asphalt is a derivative of petroleum, because it can be obtained from petroleum. Bituminous concrete cannot be derived from oil or petroleum alone, but is a composite material, which requires a number of other ingredients.

Lastly, there is no evidence that the drafters of either § 5345 or § 8000 intended that bituminous concrete be considered a toxic or hazardous material, nor was such a meaning applied by the Board of Appeals in its decision. Therefore, bituminous concrete is not “fresh asphalt”, as defined in the Zoning Bylaws, and § 5345 of the Zoning Bylaws does not apply to the use of the Property to manufacture bituminous concrete.

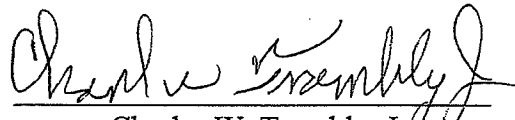
### ***Conclusion***

For the foregoing reasons, this court concludes that the decision of the Board of Appeals is based on legally untenable ground. The use of the Property to manufacture bituminous concrete is allowed as of right and not subject to the special permit requirement of § 5345 of the Zoning Bylaws. The storage of liquid asphalt is not a principal use of the Property, and furthermore, bituminous concrete is not a toxic or

hazardous material, as defined by § 8000. In accordance with the foregoing, the Plaintiff's Motion for Partial Summary Judgment is hereby **ALLOWED**, and the Defendant's Cross-Motion for Summary Judgment is **DENIED**.

As a result the court does not rule on the issue of the validity of §5345 of the Zoning Bylaw.

Judgment to enter accordingly.

  
Charles W. Trombly, Jr.  
Justice

Dated: December 7, 2009

COMMONWEALTH OF MASSACHUSETTS

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RILEY, as they are members of the  
ZONING BOARD OF APPEALS OF THE  
TOWN OF NORWOOD; and  
MARK G. CHUBET, in his capacity as the  
BUILDING INSPECTOR OF THE TOWN  
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Defendants

**JUDGMENT<sup>1</sup>**

Plaintiff Norfolk Asphalt Company, Inc. commenced this case on September 12, 2008, as an appeal, pursuant to G.L. c. 40A, § 17, from a decision of the Defendant the Zoning Board of Appeals of the Town of Norwood to deny the Plaintiff's application for various forms of zoning relief to allow the upgrade of equipment for the manufacturing of bituminous concrete, concerning a parcel of real property and buildings, known as and numbered 601 Pleasant Street in Norwood, owned of record by Plaintiff.

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<sup>1</sup> If not specifically defined herein, each term carries the same definition employed in the Decision.

Plaintiff opposed the Defendants' Cross-Motion for Summary Judgment on September 4, 2009, and filed an Affidavit of Alan D. Perkins in support thereof. Plaintiff filed also a Response to the Defendants' Motion to Strike and a Motion to Strike the Affidavit of Mark Chubet.

On September 15, 2009, Defendants filed a Motion to Strike the Affidavit of Alan D. Perkins. Plaintiff opposed the motion on September 25, 2009.

The motions were argued before the court on September 29, 2009, and taken under advisement.

After careful consideration of all of the evidence, the court issued a Decision today, ruling that the decision of the Board of Appeals is based on legally untenable ground.

In accordance with that Decision, it is hereby:

**ADJUDGED and ORDERED** that the decision of the Zoning Board of Appeals of the Town of Norwood is **ANNULLED**;

**ADJUDGED and ORDERED** that the Plaintiff Norfolk Asphalt Company, Inc.'s use of the property, known as and numbered 601 Pleasant Street in Norwood to manufacture bituminous concrete is allowed as of right; and it is further

**ADJUDGED and ORDERED** that § 5345 of the Zoning Bylaws of the Town of Norwood does not apply to the manufacture of bituminous concrete.

CWT  
By the court (Trombly, J.).

Attest:

\_\_\_\_\_  
Deborah J. Patterson  
Recorder

Dated: December 7, 2009

**A TRUE COPY  
ATTEST:**

*Deborah J. Patterson*  
RECORDER