COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

14-P-1630

PALMER RENEWABLE ENERGY, LLC

vs.

ZONING BOARD OF APPEALS OF SPRINGFIELD[1] (and a companion case[2]).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The city council of Springfield (city) and the individual defendants (collectively, defendants) appeal a Land Court judgment entered in favor of the plaintiff, Palmer Renewable Energy, LLC (Palmer), after the allowance of Palmer's summary judgement motion. Palmer sought to build a biomass power plant that burns "green wood chips"[3] to generate electricity. The city's building commissioner granted two as-of-right building permits on November 15, 2011. The city's zoning board of

[1] The board did not file a notice of appeal.

[2] Palmer Renewable Energy, LLC vs. Zoning Board of Appeals of Springfield, the city council of Springfield, Michaelann Bewsee, Toni Keefe, and William Keefe. The individual defendants intervened in this case below as residents of Springfield.

[3] The city's zoning board of appeals made no findings as to what constitutes "green wood chips," however, Palmer submitted at summary judgment an affidavit stating that they are plant matter "derived from utility line construction and maintenance, commercial tree care service companies, land clearing services for development and agriculture, and state and municipal tree and brush removal operations."

appeals (board) voted twice to revoke those permits -- once on appeal by the individual defendants, and once on appeal by the city council. The board revoked the building permits because it determined that a special permit was required under the city's zoning ordinance due to the power plant's plan of on-site "incineration." The motion judge overturned the board's decisions that revoked the two as-of-right building permits issued to Palmer for the construction of a power plant, thereby reinstating the building permits. We affirm the judgment.

We review an interpretation of zoning by-laws de novo. Grady v. Zoning Bd. of Appeals of Peabody, 465 Mass. 725, 729 (2013). "We accord deference to a local board's reasonable interpretation of its own zoning bylaw, with the caveat that an 'incorrect interpretation . . . is not entitled to deference.'" Shirley Wayside Ltd. Partnership v. Board of Appeals of Shirley, 461 Mass. 469, 475 (2012) (citation omitted).[4]

There is no dispute that the proposed power plant is located within an area zoned as an "Industrial A" district. Within such a district, § 1401.3(n) of the city's zoning ordinance requires that "[b]uildings may be erected or used . . . for . . . [t]he following uses only when authorized as a

[4] The defendants' argument that the motion judge did not defer to the expertise of the board is without merit.

special permit by the City Council . . .: [i]ncineration, reduction of or dumping offal, garbage or refuse on a commercial basis, EXCEPT where controlled by the municipality."[5] The board decided, and the defendants agree, that "[t]he 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." Relying on the 1975 edition of the "Webster's New College Dictionary," which defines "'incinerate' as 'to cause to burn to ashes' and 'incinerator' as 'one that incinerates,'" the board determined that "[i]ncineration under the ordinance applies to all commercial burning of products, not only waste products by a non-municipal entity." We disagree.

"Incineration" -- a term not defined in the city's zoning ordinance -- is understood through its "plain meaning . . . in accordance with common usage." Livoli v. Zoning Bd. of Appeals of Southborough, 42 Mass. App. Ct. 921, 922 (1997). Moreover, "[a] general term in a statute or ordinance takes meaning from the setting in which it is employed." Kenney v. Building Commr. of Melrose, 315 Mass. 291, 295 (1943).

In § 1401.3(n) of the zoning ordinance, incineration means the burning of waste. The use of the word incineration within a

[5] Although the city's zoning ordinance was substantially modified in 2013, we use the 1971 zoning ordinance provided by the parties and in effect at the relevant times during this case.

subsection of the zoning ordinance that otherwise applies to disposal of waste implies that "incineration" should be understood within that context. See Kenney, supra (the term "greenhouse" within a zoning ordinance that is used in conjunction with a stock farm, truck garden, and nursery was not meant to encompass a home conservatory for personal use). Other subsections of § 1401.3 address a distinct land use, such as an "[a]battoir" (a slaughterhouse), § 1401.3(a); the manufacturing of asphalt, § 1401.3(c); and "[f]at rendering," § 1401.3(i). Therefore, we interpret § 1401.3(n) to address a distinct land use -- waste disposal. See Franklin Office Park Realty Corp. v. Commissioner of the Dept. of Envtl. Protection, 466 Mass. 454, 462 (2013) ("Words grouped together in a statue must be read in harmony, and we are not free to interpret [them] in a way that makes it exceptionally broader than its neighbors"). Moreover, to interpret "incineration" as all forms of burning to ashes would lead to an "absurd" result.[6] See Green v. Board of Appeal of Norwood, 358 Mass. 253, 264-265 & n.9 (1970).

[6] The defendants cite the rule of last antecedent, but then, inconsistent with that notion, claim that "the intent of the ordinance is to require a special permit where the proposed use is the commercialization of incineration, for example . . . the burning of wood chips." Regardless, the last antecedent rule does not apply here, as "there is something in the subject matter or dominant purpose which requires a different interpretation." Bednark v. Catania Hospitality Group, Inc., 78 Mass. App. Ct. 806, 812 & n.15 (2011), quoting from Druzik v. Board of Health of Haverhill, 324 Mass. 129, 133 (1949).

The defendants also argue that, in any event, green wood chips are "refuse" and the burning of them requires a special permit, and that § 1401.3(x) of the city's zoning ordinance, which prohibits poisonous gas emissions, requires a special permit.[7] These were not reasons relied upon by the board in its decisions, nor did the board make any factual findings in support of these rationales. "We are not obliged to search for facts in the record to support a rationale that the board did not itself provide." Wendy's Old Fashioned Hamburgers of N.Y., Inc. v. Board of Appeal of Billerica, 454 Mass. 374, 387 (2009).

Judgment affirmed.

By the Court (Sullivan, Maldonado & Massing, JJ.[8]),

Clerk

Entered: September 8, 2015.

[7] These arguments are without merit as set out in two uncontroverted affidavits submitted by Palmer at summary judgment. The affidavits established that the wood chips have many uses, not just as fuel, notwithstanding that they derive from "waste wood"; and that the Department of Environmental Protection, after extensive review, determined that the project's air plan complied with the law and regulation. As this evidence was not controverted by the defendants, the argument is without merit.

[8] The panelists are listed in order of seniority.