

*****MOTION: Mr. Vasti offered the following resolution; seconded by Mr. Fox.**

On July 18, 2013, a resolution to adopt the following Decision was offered by Mr. Vasti, seconded by Mr. Keegan, and carried by a majority vote of the board, based upon the evidence in the record:

DECISION

The Record of the Proceedings

In this matter, the following documents were duly considered and the same constitute the record of the proceedings herein:

1. Interpretation/Appeal Application submitted by the Town of Haverstraw ("Haverstraw" or the "Applicant") on or about February 5, 2013;
2. Letter of Steven M. Silverberg, Esq., of Silverberg Zalantis, LLP, dated February 5, 2013, containing Exhibits "A" through "H" (Silverberg Supporting Letter"), including correspondence dated January 10, 2013, on Town Building & Zoning Department letterhead, signed by Special Counsel, Kevin Thomas Mulhearn, Esq.;
3. The Minutes of the meetings at which the application for Interpretation/Appeal was considered;
4. The transcript of the May 16, 2013 public hearing; and
5. The letter of David M. Zigler, P.L.S., of Atzel, Scatassa & Zigler, P.C., dated March 25, 2013, representatives of James Boyle and JMM Industries, Ltd., with respect to the Hudson River View Industrial Park Building D ("Hudson River View") application, withdrawing Hudson River View's application for site plan approval before the Town Planning Board.

Procedural Posture

The applicant filed its Request for Interpretation/Appeal from Decision of Building Inspector dated January 10, 2013 which responded to Silverberg Zalantis' request for an interpretation of various sections of the Town Code. The property which is the subject of the application is designated on the tax map as Section 20.02, Block 11, Lot 25.

The applicant was represented by Silverberg Zalantis, LLP.

The Zoning Board of Appeals was represented by Special Counsel, Joseph G. McKay, Esq. of Tarshis, Catania, Liberth, Mahon & Milligram, PLLC.

The proposed Appeal/Interpretation of the Town Code is a Type II action under Part 617.5(c)(31), the regulations promulgated pursuant to the New York State Environmental Quality Review Act ("SEQRA"), and is exempt from SEQRA review.

A public hearing was held on May 16, 2013, and the testimony of the following persons was duly considered: Katherine Zalantis, Esq. and Building Inspector, William Sheehan.

Questions Raised by the Applicant

Haverstraw appeals the various decisions and code interpretations of the Town's Building Inspector, as they are set forth in a letter to Silverberg Zalantis, dated January 10, 2013, on Town letterhead, executed by Special Counsel, Kevin Thomas Mulhearn, Esq., (hereinafter the "Building Inspector's Decision") and requests that this Board reverse those interpretations and determinations in favor of those it posits.

**HAVERSTRAW's Appeal with Respect
to the Building Inspector's Interpretation
of Stony Point Town Code Section 215-9D**

Haverstraw first asserts that the now-withdrawn application of Hudson River View for site plan approval of a proposed gasification plant violated Town Code section 215-9D, because a gasification plant is not within the zoning code's list of approved uses. Haverstraw relies upon section 215-9D which provides that "[a]ny use not permitted by this chapter shall be deemed to be prohibited."

The Building Inspector's decision dated January 10, 2013 determined that the proposed gasification plant was permitted as-of-right because the Town Code specifically authorizes "industrial uses" in the LI District. The Building Inspector determined that the proposed gasification plant would constitute a permissible "industrial use" because, under the Town Code, industrial uses "may include the manufacturing, fabricating, processing, converting, altering, assembling, testing, or other handling of products." (See Town Code, Use Table – LI District.) The Building Inspector explained that "[t]he proposed gasification facility, which contemplates the conversion of solid waste to re-useable (and environmentally beneficial) products, . . . constitute[d] an industrial use involving the processing, converting, and altering of products."

This Board finds that the Building Inspector's determination was correct. It is true that the words "gasification plant" do not specifically appear in the Town Code. Neither does the Town Zoning Code contain definitions of the terms "manufacture", "fabricate", "process", "convert", "alter", "assemble", "test" or "handling". The Town Code is written, as it must be, in broad terms. Section 215-4 of the Town Code provides that the "terms and words used herein shall have the meanings of common usage as set forth in the latest edition of Webster's New Collegiate Dictionary."

Webster's New Collegiate Dictionary defines "manufacture" as "to produce, create or turn out in a mechanical way." That dictionary also defines "convert" as "to change into another form, substance, state or product." So too, the word "process" is therein defined as: "a series of actions, changes or functions that achieve an end result." This Board finds that a plain reading of the text of the zoning code, along with the common usage of the terms "manufacture", "convert" and "process", as well as the manner in which those words are defined in Webster's New Collegiate Dictionary, demonstrate that the proposed gasification plant, would constitute a industrial use under the Town Code since the proposed gasification plant would "convert" or "process" raw materials ("carbon feedstock") into "syngas". The Board agrees with the Building Inspector's interpretation of Town Code section 215.9.D.

The Zoning Board has further reviewed Haverstraw's argument that the Building Inspector's determination is incorrect because "solid waste" cannot be considered a "product" that may be "converted" or "processed" under the Town Code. This Board finds that such an interpretation would be inconsistent with the definition of industrial uses under the Town Code. Webster's New Collegiate Dictionary defines "product" simply as "something produced by human or mechanical effort or by a natural process." While the term "solid waste" is defined in the Town Code as "materials or substances discharged or rejected as being spent, useless, worthless or in excess of the owner at the time of such discard or rejection", that definition does not preclude that such materials may have value to and be used by others. Certainly, an entire waste management industry exists to recycle and reuse items discarded by some to be used as a commodity or raw materials by others. In this case, "discarded" "solid waste" materials (i.e. "products") are to be used as "carbon-based feedstock" for the production of– a new "product" that may be sold, distributed and used by others.

Moreover, the Town Code does not contemplate the word "product" to be the equivalent of "something that is marketed or sold as a commodity", as argued by Haverstraw. (See Silverberg Supporting letter at p. 3, ¶ 5.) Simply stated, such an interpretation would be inconsistent with the code's clear language that allows products to be "processed, converted and altered". One would not "process", "convert" or "alter" an already fully-manufactured final "product", and for this Board to adopt Haverstraw's proposed definition would be wholly-inconsistent with the plain text of Town Code.

**HAVERSTRAW's Appeal with Respect
to the Building Inspector's Interpretation
of Stony Point Town Code Section 215-13**

Haverstraw argues that the proposed gasification plant is a prohibited use because its primary purpose is the production of hydrogen and potash, which are prohibited by Town Code 215-13. The Stony Point Town Code prohibits certain manufacturing uses within the Town. Haverstraw argues that the proposed use would be barred by section 215-13.A(2) that prohibits "[m]anufacturing uses involving primary production of the following products from raw materials: . . . (2) Chemicals; . . . hydrogen and oxygen, . . . potash, The Building Inspector determined that the use was permitted because "potash" is "not the primary production purpose of the proposed facility."

Webster's New Collegiate Dictionary defines "primary" as "first or best in degree, quality or importance". Based upon the common usage of the term "primary", as well as the manner in which that word is defined by Webster's New Collegiate Dictionary, in order to be a prohibited use, the gasification plant's principal product would have to be "potash". Haverstraw's appeal provides a copy of Hudson River View's project narrative. That narrative, which was submitted to the Planning Board and relied upon by the Building Inspector, states that the proposed facility would convert carbon-based feedstock, such as municipal waste, into a combustible gas comprised largely of carbon monoxide and hydrogen . . . to produce "syngas" or "producer gas". There is no indication in the record that the gasification process will result in the primary production of potash. The Board agrees with the Building Inspector's interpretation of Town Code section 215.13.A(2).

Similarly, although Haverstraw did not specifically argue in its letter seeking an opinion, that a prohibited production of hydrogen will result from the plant, inasmuch as that issue was raised in the appeal documents and made at the public hearing, the Board accepts the statement in the project narrative, that the gasification process converts carbon-based feedstock, such as municipal waste, into a combustible gas comprised largely of carbon monoxide and hydrogen to produce "syngas" or "producer gas". The ZBA finds, in the absence of any expert testimony to the contrary, that the plant's primary output will be "syngas" or "producer gas", not hydrogen. To the extent that the Building Inspector's determination implicitly found that the proposed plant would not be prohibited for "primarily" producing hydrogen, the Board agrees with the Building Inspector's interpretation of Town Code section 215.13.A(2).

**HAVERSTRAW's Appeal with Respect
to the Building Inspector's Interpretation
of Stony Point Town Code Section 215-13.F**

Haverstraw argues that the proposed gasification plant would constitute a "dump", "sanitary landfill" or "junkyard", in violation of Town Code 215-13.F. Town Code section 215-13.F states that: "[d]umps, sanitary landfills and junkyards [are prohibited], except those owned and operated by the Town." "Dumps" and "Junkyards" are defined as "an area of land, with or without buildings, used for or occupied by a deposit, collection or storage, outside a completely enclosed building, of used or discarded materials such as wastepaper, rags or scrap material or used building materials, house furnishings, machinery, vehicles or parts thereof, with or without the dismantling, processing, salvage or sale of other use or disposition of the same. A deposit or the storage on a plot of two or more unregistered, wrecked or broken-down vehicles or parts of two or more such vehicles for one week or more in an R District, or for three weeks or more in any other district, shall be deemed to be a "junkyard"."

The Building Inspector found that the common meaning of the words used in the Town Code demonstrated that the proposed facility was not a "dump" or "junkyard". To the contrary, the Building Inspector equated the proposed use to a "waste transfer station", which has been distinguished from "junkyards" and found permissible in other jurisdictions.

Haverstraw's appeal provides no record to demonstrate where or in what manner the above-referenced "materials" would be stored. Haverstraw has not placed in the record any facts tending to show that the "materials" prohibited by the Town Code, such as "used building materials, house furnishings, machinery, vehicles", etc., would be brought to the site, let alone whether the same would be "placed outside a completely enclosed building". The Board agrees, based upon the facts in the record, with the Building Inspector's interpretation that the gasification plant would not constitute a "junkyard" or "dump" in violation of Town Code section 215.13.F.

Haverstraw's Appeal with Respect to the Building Inspector's Interpretation of Stony Point Town Code Section 215-13.G

Haverstraw argues that the proposed gasification plant is a prohibited use because the gasification process would "incinerate" waste materials in violation of Town Code 215-13G. Town Code section 215-13G states: "Incineration of waste materials [are prohibited], except in a plant owned and operated by the Town."

The Building Inspector determined, based upon reference to New York State Department of Environmental Conservation ("NYSDEC") regulations, that the proposed gasification plant will not use an incinerator, and that the process of pyrolysis, not incineration, will be used to produce the syngas. Under NYSDEC regulation 360-3.2(d), pyrolysis is defined as a process "using applied heat in an oxygen-deficient or oxygen-free environment for chemical decomposition of solid waste". This is consistent with Webster's New Collegiate Dictionary's definition of pyrolysis, which is a "chemical change due to heat". On the other hand, Webster's New Collegiate Dictionary defines "incinerate" as "to burn or burn up." This Board finds that a plain reading of the text of the zoning code, along with the common usage of the term "incinerate" as well as the manner in which the terms "incinerate" and "pyrolysis" are defined in Webster's New Collegiate Dictionary, demonstrate that the proposed gasification plant would not constitute a prohibited industrial use under the Town Code since the proposed gasification plant would not "incinerate" the feedstock, but rather, would use the chemical process of "pyrolysis" to "convert" or "process" that raw material into "syngas". The Board agrees with the Building Inspector's interpretation that the process of pyrolysis is not prohibited by Town Code section 215.13.G. To the extent that Haverstraw's argument can be read to dispute that the process of "pyrolysis" was not going to be used at the gasification plant, and that the process would constitute true "incineration", this Board determines that review of that claim is mooted by Hudson River View's withdrawal of its application for approval of the gasification plant.

Haverstraw's Appeal with Respect to the Building Inspector's Interpretation of Stony Point Town Code Section 182

Haverstraw also argues that the proposed gasification plant would be in violation of Chapter 182 of the Town Code that prohibits importation of "solid waste" into the Town of Stony Point. Chapter 182-1 and 182-6 provide that:

"No person, firm or corporation shall leave or deposit any garbage, refuse or rubbish of any kind upon any street, avenue, highway, park or public place within the Town of Stony Point, except that householders may place garbage, rubbish or refuse in properly covered containers in front of their premises for authorized collection and removal.

Chapter 182-6:

"No garbage, refuse or rubbish of any kind collected outside the territorial limits of the Town of Stony Point shall be conveyed over any street, avenue, parkway or highway within the Town of Stony Point for delivery to the town dump."

The Building Inspector determined that Chapter 182 did not apply to the proposed gasification plant, because that chapter prohibits the depositing of waste "upon any street or avenue" within the Town and further prohibits the transportation of waste "over any street" to the "Town dump".

Based on the information in the record, there is no proposal to deposit refuse on a public street or in a public park, and since there is no proposal to transfer waste to the "Town dump", a plain reading of the text of the statute demonstrates that the proposed use would not be prohibited. The Board agrees with the Building Inspector's interpretation of Chapter 182 of the Town Code.

**HAYERSTRAW's Appeal with Respect
to the Building Inspector's Interpretation
of Stony Point Town Code Section 215-13.I**

Haverstraw argues that the proposed gasification plant is in violation of Chapter 215-13.I, which prohibits any "detrimental use" of a property within the Town of Stony Point. Town Code section 215-13.I provides that a "detrimental use" is:

Any other use, whether specified above or not, that is of such a nature as to be detrimental to neighboring properties by reason of emission of odor, dust, refuse matter, garbage, smoke, vibration, gas, radiation, noise or any other factor that is dangerous to the comfort, peace, enjoyment, health or safety of the area or the community.

The Building Inspector determined that there was insufficient information before the Planning Board to determine whether this section of the Town Code was violated. Stated differently, the Building Inspector did not render an opinion or provide an interpretation of section 215-13.I. As such, there is no action of the Building Inspector for this Board to review with respect to this section of the Town Code. Moreover, since Hudson River View's application for approval of a gasification plant was withdrawn before a record could be made with respect to these environmental, health and safety issues, we find that Haverstraw's request for a determination that the proposed use violates Town Code Section 215.13.I is moot.

For the foregoing reasons, this Board determines that the decision of the Building Inspector, which interpreted sections 215-9D, 215-13.A(2), 215-13F, 215-13.G and Chapter 182 of the Town Code, were correct and denies Haverstraw's appeal with respect to those interpretations.

Upon roll call, the vote was as follows: Mr. Morlang, yes; Mr. Keegan, yes; Mr. Casscles, yes; Mr. Vasti, yes; Mr. Fox, yes; Mr. Porath, yes; and Chairman Wright, yes.

Chairman Wright: With that that's all the items on the agenda so I will take a motion to adjourn.

*****MOTION:** Mr. Vasti made a motion to adjourn the meeting of July 18, 2013, seconded by Mr. Porath. Hearing all in favor; the motion was carried.

Respectfully submitted,

Kathleen Kivlehan
Secretary
Zoning Board of Appeals