IN THE CITY OF CHICAGO, ILLINOIS
DEPARTMENT OF ADMINISTRATIVE HEARINGS

CITY OF CHICAGO, a Municipal Corporation, Petitioner,)
v.)
)
General Iii, Llc)
11554 S. AVENUE O)
CHICAGO, IL 60617)
, Respondent.)

Address of Violation:
11600 S Burley Avenue

Docket #: 22DE00001A

Issuing City
Department: Environment

FINDINGS, DECISIONS & ORDER

This matter coming for Hearing, notice given and the Administrative Body advised in the premises, having considered the motions, evidence and arguments presented, IT IS ORDERED: As to the count(s), this tribunal finds by a preponderance of the evidence and rules as follows:

Finding	*NOV#*	*Count(s)*	*Municipal Code Violated*	*Penalties*
The Decision of the Commissioner is vacated.	ENVABT21725	1	11-4-2530 Permit--Application.	$0.00

Sanction(s):

Storage Fee

Tow Fee

THE FINDINGS, DECISION AND ORDER ENTERED 06/01/2023 IS FILED OF RECORD AND MADE A PART HEREOF

Admin Costs: $0.00

JUDGMENT TOTAL: $0.00

Balance Due: $0.00

ENTERED: Mitchell C. Ex 87 Jun 1, 2023

Administrative Law Judge ALO# Date

This Order may be appealed to the Circuit Court of Cook Co. (Daley Center 6th Fl.) within 35 days by filing a civil law suit and by paying the appropriate State mandated filing fees.

Pursuant to Municipal Code Chapter 1-19, the city's collection costs and attorney's fees shall be added to the balance due if the debt is not paid prior to being referred for collection.

IN THE CITY OF CHICAGO, ILLINOIS
DEPARTMENT OF ADMINISTRATIVE HEARINGS
ENVIRONMENTAL DIVISION

CITY OF CHICAGO,	)	
Department of Public Health,	)	
	)	
Petitioner,	)	
	)	
	)	**Docket No. 22DE00001A**
v.	)	
	)	
General III, LLC.	)	
	)	
Respondent.	)	

FINDINGS, DECISION AND ORDER

This is an appeal from a decision by the Commissioner of the Chicago Department of Public Health ("CDPH') issued pursuant to Chapter 11-4 of the Municipal Code of the City of Chicago ('MCC") denying a permit to the Respondent/Appellant, General III, LLC dba Southside Recycling, hereinafter ("GIII" or "SSR"). PX-001[1]

On February 18, 2022, the Commissioner of CDPH sent a letter to GIII denying its application for a Class IVB Recycling Facility Permit at 11600 S. Burley Avenue. Pursuant to MCC §§ 11-4-025(d) and 11-4-040, upon denial of a permit, the CDPH shall send a notice to a permittee of the right to demand a hearing within 15 days to challenge the permit denial.

On March 2, 2022, GIII timely filed its Demand for Hearing. Thereafter, on March 30, 2022 CDPH timely sent a Notice of Hearing to GIII advising that a hearing would be held on April 21, 2022 in the City of Chicago,

[1] PX-001. denial letter, (SX-033 with exhibits), and (RX-002 without exhibits) are other versions of the letter.

Department of Administrative Hearings ("DOAH") at its Central Hearings location at 400 W. Superior Street, Chicago, Illinois.

Pursuant to MCC §§ 11-4-025(c), 11-4-40(b), 2-14-030 and 2-14-040, DOAH is vested with the authority to conduct a hearing pursuant to the Rules of DOAH, and to determine whether the Commissioner's denial of the permit application should be affirmed or vacated. [2]

A hearing having been concluded, and evidence having been presented, this Findings, Decision and Order is entered as follows:

FINDINGS OF FACT

For over 60 years General Iron Industries Inc. (GI) owned and operated a metal scrap recycling business at 1909 N. Clifton Avenue in the Lincoln Park neighborhood of the City of Chicago. The principal owners of GI were members of the Labkon family. GI purchased obsolete scrap metal items in the form of vehicles, appliances and other materials for shredding and/or recycling.

Once processed, the metal scrap was then sold to steel mills to be repurposed into usable new metal products. GI was one of two facilities in the greater Chicago area which performed similar recycling. Beginning in approximately 2015, the City advised GI that it would prefer the company close its operations in Lincoln Park and move them to a different part of the City. Before GI would consider a move, it wanted assurances from the City that it would be able to relocate its business operations without any interruption and loss of income.

By July 2018, GI had found a buyer for certain assets of its business which was an Ohio holding company named Reserve Management Group Inc. ("RMG"). RMG owns and operates recycling and related facilities in ten states throughout the United States as well as on a 175-acre site at 116th

[2] Throughout this finding, references will be made to exhibits entered of record as SX (exhibits identified in a Stipulation of Facts agreed to by and between the parties), RX (exhibits entered on behalf of GIII/SSR), and PX (exhibits entered on behalf of CDPH/City). While the parties have stipulated to certain facts and exhibits, the City has reserved its right to object to the relevancy of some exhibits while agreeing to the foundation for those exhibits. The official record of proceedings reflects exhibits entered without objection, over objection, subject to cross examination, or denied entry. Referenced exhibits are available by FOIA request to DOAH.

and Burley Ave in the City's Hegewisch/South Deering/East Side neighborhoods.

On September 10, 2019, the City, by its Corporation Counsel, entered into a written agreement with GI, General Metals, LLC., and RMG whereby GI agreed to close the Lincoln Park operation in return for the City's reasonable and expeditious assistance in securing permits and licenses to build and operate a new metal recycling facility at the Burley site. The City further agreed to assist the new facility in scheduling required public hearings. The City retained the right to enforce its ordinances, rules, regulations, licenses, permits and policies necessary to protect the public health and safety and welfare. The new facility was to be named Southside Recycling ("SSR"). The agreement also called for GI to close most of its operations at the Clifton facility by December 31, 2020. RX-025. [3]

Before SSR could operate the proposed facility, it was required to obtain several permits or approvals. These included zoning approval from the Chicago Zoning Board of Appeals ("ZBA"), a construction permit from the Illinois Environmental Protection Agency ("IEPA"), an inspection approval from the Chicago Department of Buildings ("DOB"), and air pollution control permit as well as a large recycling facility operating permit from the CDPH.

On February 22, 2019, General III, LLC dba SSR, applied to the ZBA for a Class IV-R special use permit, which is required to operate a metal shredding facility in the PMD-6 Zoning District and as also required to obtain a Large Recycling Facility ("LRF") permit from CDPH. SX-001 [4]

The Findings of the ZBA identified RMG as the "parent entity" of General III, LLC ("the Applicant"), and further noted that GI recently merged with RMG and that the property "is improved with an existing Class IV-B recycling facility…operated by the Applicant's parent entity Reserve Management Group ("RMG")."

On March 15, 2019, the ZBA held a public hearing on SSR's application pursuant to the Chicago Zoning Ordinance, MCC § 17-1, et seq. Numerous witnesses were called on behalf of SSR, including experts in the areas of real estate appraisal, traffic analysis, landscape architecture, civil and

[3] Exhibit RX-025 (term agreement sheet)
[4] Exhibit SX-001 (ZBA special use application)

environmental engineering, water management and economic theory (analysis of the economic impact of the proposed facility to the South Deering community).

The ZBA heard from an assistant Zoning Administrator regarding the Chicago Landscaping Ordinance and proposal for installation of trees on the subject property.

The ZBA heard from witnesses opposed to the application including an attorney/witness from the Natural Resource Defense Council, from an attorney/witness on behalf of Openlands, and from numerous community members who provided statements in opposition to the application.

On April 22, 2019, following the public hearing, the ZBA issued its Findings as follows: SX-002.[5]

a. The proposed special use complies with all applicable standards of the Chicago Zoning Ordinance.

b. The proposed special use is in the interest of the public convenience and will not have a significant adverse impact on the general welfare of the neighborhood or community.

c. The proposed special use is compatible with the character of the surrounding area in terms of site planning and building scale and project design.

d. The proposed special use is compatible with the character of the surrounding area in terms of operating characteristics, such as hours of operation, outdoor lighting, noise and traffic generation.

e. The proposed special use is designed to promote pedestrian safety and comfort.

f. The proposed special use will have no negative effect on existing manufacturing activities, including the potential for land use conflicts and nuisance complaints.

[5] Exhibit SX-002 (ZBA Findings)

g. The proposed special use will have no negative effect on efforts to market other property within the planned manufacturing district for industrial use.

h. Strict compliance with the regulations and standards of the Chicago Zoning Ordinance would create practical difficulties or particular hardships for the subject property.

i. The requested variation is consistent with the stated purpose and intent of the Chicago Zoning Ordinance.

j. The property in question cannot yield a reasonable return if permitted to be used only in accordance with the standards of the Chicago Zoning Ordinance.

k. The practical difficulties or particular hardships are due to unique circumstances and are not generally applicable to other similarly situated property.

l. The variation, if granted, will not alter the essential character of the neighborhood.

m. The particular physical surroundings, shape or topographical condition of the specific property involved would result in a particular hardship upon the property owner as distinguished from a mere inconvenience, if the strict letter of the regulations were carried out.

n. The conditions upon which the petition for the variation is based would not be applicable, generally, to other property within the same zoning classification.

o. The purpose of the variation is not based exclusively upon a desire to make more money out of the property.

p. The alleged practical difficulty or particular hardship has not been created by any person presently having an interest in the property.

q. The granting of the variation will not be detrimental to the public welfare or injurious to other property or improvements in the neighborhood in which the property is located.

r. The variation will not impair an adequate supply of light and air to adjacent property, or substantially increase the congestion in the public streets, or increase the danger of fire, or endanger the public safety, or substantially diminish or impair property values within the neighborhood.

The ZBA authorized the permit application subject to review under the Illinois Administrative Review Law, 735 ILCS 5/3-101, et seq. No review having been filed within the time period allowed, the decision became final and unappealable.

On September 25, 2019, GIII, LLC dba SSR applied to the IEPA pursuant to the Illinois Environmental Protection Act, Illinois Revised Statutes, Chapter 111-1/2, for a permit to construct and operate a new scrap metal recycling facility at the Burley Ave. site. SX-005 [6]

Pursuant to an IEPA environmental justice ("EJ") notification for the new construction permit, advocacy groups submitted a request for hearing on the project. Recognizing the significant public interest in the facility, IEPA issued a notice of public comment period beginning on March 30, 2020 and for two virtual public hearing sessions to be held on May 14, 2020. The purpose of this action was to allow for public participation in the permitting process for a draft construction permit developed by the IEPA's Bureau of Air.

The IEPA held two sessions: the first session featured seven speakers and approximately 117 participants, and the second session featured 14 speakers and approximately 86 participants. All told, over 200 people participated in the public hearings.

On June 25, 2020, IEPA issued a construction permit for General III, LLC. This final permit determination was rendered after consideration of all comments, submissions and in accordance with the Illinois Environmental Protection Act and after consultation with the U.S. EPA Region 5's Air and Radiation Division.

As noted in a 73-page Responsiveness Summary, issued at the time of the permit:

[6] SX-005 (IEPA permit application)

> "under the Environmental Protection Act, the Illinois EPA is required to issue a permit to an applicant upon proof that the proposed facility or equipment will not cause a violation of the Act or promulgated regulations. See, 415 ILCS 5/39(a). This standard is a mandatory one, expressed in the language of the provision as a "duty" that is imposed upon the Illinois EPA. While agency deliberation of certain aspects of the permit may be grounded in the exercise of discretion, the broader legal standard governing permit issuance or denial limits the discretion of the Illinois EPA. The Illinois EPA finds that the legal standard noted above has been met. Nothing in the record, including the public comments on the draft construction permit, adduces otherwise."

In summary, the IEPA determined after an extensive analysis, which included an environmental justice review, that the proposed facility met all applicable state and federal air pollution emissions standards and would not adversely impact the nearby community. SX-006. [7]

In July 2020, GIII, LLC dba SSR, applied to CDPH for an air pollution control permit ("APC") as required by MCC §11-4-620. "Pollution control device" means any equipment or device used to eliminate, prevent, reduce or control the emission of air contaminants to the outdoor atmosphere. Pollution control devices include, but are not limited to, scrubbers, dust collectors, thermal oxidizers, cyclones, mist collectors, catalytic converters, and electrostatic precipitators. MCC §11-4-610.

On September 15, 2020, after examining each air control device to be used at the site, CDPH issued the APC permit(s), subject to special conditions allowing SSR to install and operate nearly 200 devices at the site as listed in the application. SX-008. APC permit. [8]

By issuing the APC permit, the CDPH confirmed that SSR (or the operator or owner of any regulated equipment or area for which permit is sought) was not in violation of any substantive standards set

[7] SX-006 Responsiveness study

[8] SX-008 Air control permit

forth in Part "C" of MCC §11-4-700, or any regulations promulgated pursuant to that article and, that any control equipment or technology to be utilized to control the emission of air contaminants is appropriate for the facility's operations and throughput; provided, however, any control equipment or technology permitted by state or federal law or regulation shall be considered appropriate. Substantive standards set in Part "C" include visible emissions of particulate matter, nitrogen oxide emissions, and discharge of lead emissions. The APC permit was issued under the signature of CDPH Commissioner Dr. Allison Arwady.

On December 8, 2020, the application by SSR for building permits to construct the recycling facility and related administrative office structures was issued by the City of Chicago - Department of Buildings under the signature of Commissioner Matthew Beaudet. SX-007. [9]

Between September 2020 and March 2021, during the pendency of the final LRF permit application, and after having obtained zoning approval from ZBA, a construction permit from the IEPA, building permits from the DOB, as well as the APC permit(s) from CDPH, SSR began construction of the shredder facility. According to SSR officials, the cost of the facility was approximately $80 million dollars. The newly completed facility appears in exhibits RX-140, RX-146, RX-151.[10]

In June 2020, the City issued a new set of rules for the permitting of large recycling facilities entitled "Rules for Large Recycling Facilities" ("LRF Rules"). SX-009.[11] In addition to the LRF Rules, CDPH had existing General Recycling Facility Rules ("Existing Rules" and together with the LRF Rules collectively the "Rules"), as well as certain requirements contained in the Chicago Recycling Facility Ordinance ("Ordinance") for permitting recycling facilities. SX-010.[12] The LRF Rules contain additional requirements (in addition to those set forth in the Ordinance and the Existing Rules) for the operation of large recycling facilities. The LRF Rules were developed over the course of almost two years with involvement from industry, NGOs and environmental activists.

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[9] SX-007 Building permit(s)

[10] RX-140 and RX-146 photos of exterior of shredder enclosure; RX-151, configuration of pollution control system

[11] SX-009 2020 LRF rules

[12] SX-010, 2014 rules

As SSR met the legal definition of a "large recycling facility," it was subject to the additional requirements of this new rule.

A community town hall meeting was held on July 25, 2020 to inform the public as to SSR's intention to apply for a LRF permit and to allow interested parties to offer comments and raise concerns about the proposal. In attendance were officials from the City as well as from SSR and the local alderperson representing the 10th Ward. There were thirty-one written comments received in addition to submissions from nine health and environmental advocacy groups. CDPH Commissioner Allison Arwady appeared by video to explain permit requirements. RX-001. Agenda. RX-117 Video. [13]

On or about November 13, 2020, General III, LLC dba Southside Recycling, by the company's environmental consultant, RK & Associates, Inc., ("RK") filed its LRF permit application with CDPH. The application consisted of almost 300 pages which the company believed was responsive to the requirements of the LRF rules. SX-016. [14] Before the formal filing, SSR, by its authorized agents, had numerous communications with CDPH officials concerning the format for the LRF application as there were no specific instructions or application forms yet available from CDPH to inform an applicant of permit requirements. On December 23, 2020, CDPH sent a letter to SSR requesting additional information regarding the application. On January 13, 2021, after additional discussions with CDPH, SSR filed a new, or revised, LRF application encompassing its response to the earlier application. The new application contained approximately 1,165 pages of documentation responsive to the CDPH's December 23, 2020 letter. SX-019. [15]

During the course of this administrative hearing, SSR presented the in-person testimony of John Pinion, the Principal Environment Engineer from RK. The witness testified that he is a civil and environmental engineer with over 35 years of experience in environmental compliance and permitting for industrial facilities whose primary focus is on air compliance and permitting matters in Illinois. Mr. Pinion stated that he handles approximately 30-40 permit applications each year and routinely interacts with the IEPA as well

[13] RX-001 community town hall agenda; RX-117 Arwady video.
[14] SX-016, LRF initial application and filing communications
[15] SX-019 revised LRF permit application

as the U.S.EPA Region 5. Mr. Pinion was principally involved with this matter having prepared both the permitting for air pollution controls as well as for the LRF permit. Mr. Pinion's CV was received into evidence together with an affidavit without objection and is part of the official record as RX-094.[16]

The witness offered several opinions concerning his examination of SSR's proposed shredding facility which are summarized, in pertinent part, as follows:

1. The facility is designed and proposed to be operated to meet all applicable state and federal emissions standards. This includes standards established under the federal Clean Air Act's national ambient air quality standards ("NAAQS"). The facility exceeds the federal VOC/VOM (Illinois IEPA term, hereinafter referred to as "VOC"), Volatile Organic Materials/Compounds standards of emissions capture and control requirements of at least 81% from the emission (shredder) unit. Based upon testing done of a similar capture system at the former General Iron facility in 2020, the new shredder, as constructed inside of an enclosed building with acoustic panels surrounding the shredder to limit noise generation and employing state of the art high-capacity fan and hoods above the shredder for capture of emissions, a high-efficiency cyclone and roll-media filter system for control of particulate matter and metal emissions and a regenerative thermal oxidizer ("RTO") and wet scrubber for control of VOC emissions. According to the witness, this pollution control system is estimated to destroy up to 98% of VOC emissions, or a 20% increase over the minimum federal standards of 81% capture.

2. The LFR rules, § 3.9.21, require that the facility contain an air quality impact assessment to evaluate the dispersion of various metals as well as PM_{10} emissions, a dust monitoring plan which continuously monitors those emissions in ambient air, a calibration plan for the monitors, and a metals sampling plan to determine concentrations of metal HAPs (Hazardous Air Particles). SX-009.[17] The witness explained that air dispersion modeling, conducted initially for the IEPA permit, showed off-site maximum emissions rates of PM_{10} at levels well below the federal NAAQS standard of 150 *ug/m.* Under the dust monitoring plan, the witness described the presence

[16] RX-094. Pinion affidavit, CV and supporting documentation
[17] SX-009. LFR rules

of two continuous PM_{10} monitors, as well as a continuous weather monitoring station on the SSR site. These monitors measure and record real-time airborne PM_{10} levels which is automatically uploaded to CDPH in fifteen-minute intervals as required by the LRF rules.

3. The rules also address certain operational standards pertaining to fugitive dust monitoring (those particles that travel beyond the facility boundaries) and the Fugitive Dust Operating Plan was submitted by RK to CDPH. The witness affirmed that the Plan was designed to meet the air quality standards and monitoring requirements set forth in § 4.7 of the LRF Rules.

4. In his review of CDPH'S Denial Letter, the witness testified that he took issue with the finding that risks associated with large metal recycling facilities can only be mitigated by operating in strict compliance with permit conditions. SX-034, HIA Summary Report. [18] As he stated, there are effective VOC capture systems installed on several metal shredders throughout the country which are enclosed, as is SSR's proposed facility. He pointed-out that SSR is one of the few facilities of its type in the country designed with other state-of-the-art emissions controls designed to remove particles and control gas emissions with a capture rate above current federal standards. Based upon SSR's control technologies, he opined that the "intrinsic uncertainties and unique risks" referenced by the CDPH are adequately addressed and that even *"the CDPH's air quality consultant, Tetra Tech, confirmed in its air modeling findings that the facility would not exceed any established standards and that there would be no significant adverse impact to the community from the Facility."*

Another material issue raised by this witness concerned the HIA's "negative impact" rating with respect to air pollution. He posited that the proposed facility will not cause "air pollution" as that term is defined in MCC, § 11-4-730 - Air pollution prohibited as:

> "It shall be unlawful within the City of Chicago for any person to cause, suffer or allow the emission of air pollution: provided, however, emissions in compliance with state or federal law or regulations shall not constitute air pollution."

[18] SX-034, HIA summary

In November 2020, CDPH issued "CDPH Guidelines Regarding Permitting Processes for Consequential Large Recycling Facilities" ("Guidelines"). SX-017. [19]

In accordance with the new Guidelines, CDPH began receiving public comments on the permit application. On December 10, 2020, CDPH conducted a community meeting on the application. In January 2021, CDPH extended the public comment period until January 29, 2021. Pursuant to the Guidelines, CDPH was to post a draft permit online, or issue a denial of permit, by March 15, 2021 – neither a draft permit nor a denial were posted. On March 15, 2021, CDPH sent a letter to SSR stating that it would be requesting additional information. SX-020. [20]

On or about October 21, 2020, a lawsuit was filed by residents living in the vicinity of the Burley site in the United States District Court, Northern District of Illinois, seeking a preliminary injunction against the issuance of the LRF permit at the Burley site. This matter captioned: *Ricardo Martinez, et al., v. City of Chicago* alleged various Title VI and Equal Protection violations together with the potential harm to the community should the recycling facility be allowed to operate. SX-011. [21]

In December 2020, the City filed a response in opposition to the complaint in which it detailed how the facility had already met both stringent ZBA and IEPA approval and was designed to meet the standards for LRF approval. It goes on to describe the various pollution controls as the "best in class," and specified how, utilizing "the latest technology," would "create a clean, efficient, and environmentally sensitive plant."

The response reviewed the progression of steps in the proposed shredding process and described how the air pollution devices were designed to remove the "vast majority of volatile organic compounds, according to sworn testimony, over 98% of organic particulate matter."

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[19] SX-017 Guidelines

[20] SX-020 Letter of March 15, 2021

[21] SX-011 Complaint - Martinez v. City of Chicago

The City's response also distinguished how the former General Iron facility "is very different from the RMG expansion described in the [LRF] permit application and at the ZBA hearing, and the new CDPH regulations being used here were promulgated only last year and were thus not applied to the old facility." It further critiqued the North Clifton, General Iron, facility and pointed out how the operations and operators at GI and the proposed Burley site were not the same entities. SX-012. [22]

On or about November 10, 2020, the City received notice of a complaint initiated by the U.S. Department of Housing and Urban Development, Midwest Region V, ("HUD"), expressing environmental concerns from the planned expansion of existing metal recycling operations at the Burley site. On November 20, 2020, the City Law Department, by its Deputy Corporation Counsel, sent a response to HUD. SX-013.[23] The response stated, in relevant part:

> " RMG has been conducting metal recycling operations at South Burley including some metal shredding in a lawful and environmentally safe manner for decades. RMG is planning to incorporate new processes and associated environmental controls into their current operations, resulting in a higher volume of more efficient, cleaner recycling. Contrary to the narrative propagated by the Complainants and others, General Iron is not "moving to the southeast side." Rather, RMG has purchased General Iron's assets, and will be incorporating some of General Iron's environmental mitigation equipment (i.e., a particulate matter filter, regenerative thermal oxidizer, and wet scrubber) into a new, fully enclosed, state-of-the-art shredder that utilizes a European enclosure designed to contain dust and noise. Neither the shredder nor the enclosure is being imported from the General Iron facility. Importantly, this new equipment, together with the installation of particulate and air control equipment, utilize state of the art technology that has already undergone review by the Illinois Environmental

[22] SX-012. City response in opposition to injunction
[23] SX-013. City letter to HUD

Protection Agency (IEPA), which approved RMG's permit application on June 25, 2020."

"Another important fact lost in the blizzard of hyperbolic allegations is the fact that the RMG facility is more than 2,000 feet or the equivalent of almost seven football fields away from the nearest residence, in contrast to the General Iron facility, which is immediately adjacent to a public way and much closer to the nearest residential neighborhood... See Exhibit A."

"For all of these reasons, any past environmental complaints against the General Iron facility are of no relevance at all to the RMG facility. RMG has operated safely for decades in the exact location. RMG's application for expansion will and must be evaluated on the merits. None of these facts are yet before HUD."

"Furthermore, review of the RMG permit is being conducted by the City's Department of Public Health pursuant to new, detailed rules specific to the particular type of facility associated with the South Burley site (Rules for Large Recycling Facilities, adopted June 5, 2020). The 63-page Rules address all pertinent aspects of such facilities, including (as relevant to emissions control) Material Management and Enclosure, Air Quality Standards and Monitoring, Shredder and Shredder Enclosure. The Air Quality Standards and Monitoring Section in and of itself consists of some six pages and incorporates by reference the environmental standards in the Illinois Administrative Code (IAC)."

From approximately January 13, 2021, when SSR submitted its second and revised LFR application, and continuing through May 2021, there were numerous communications between CDPH and SSR representatives concerning the status of the application and related issues. Several witnesses from SSR provided testimony that during those communications, they were repeatedly advised by representatives from CDPH that SSR had satisfied the LRF Rules, and that no further information was required from SSR. Further, that the City was on track to issue the draft permit within weeks. SX-016.

On March 15, 2021, the same date that a draft permit was to have been posted per the LRF Guidelines, CDPH's environmental engineer, Renante Marante, sent a letter to SSR requesting a meeting to discuss questions and concerns related to the relationship between Southside Recycling and other business entities operating on the Burley site which included: Reserve Marine Terminals, South Shore Recycling, Napuck Salvage of Waupaca and Regency Technologies. SX-020. [24]

On March 17, 2021, in preparation for the upcoming meeting, CDPH sent another letter to SSR detailing specific items and requesting answers or documentation responsive to this latest inquiry. SX-021. [25]

On March 24, 2021, Southside Recycling submitted its response to CDPH's March 15th and 17th letters. In the response, SSR pointed out to CDPH "that the cumulative impact of the existing companies on the Campus Property, along with the addition of Southside Recycling, was thoroughly reviewed and fully vetted by the IEPA and its modeling expert during a 9-month permit application review process." SX-022. [26]

On or about April 22, 2021, CDPH was prepared to issue a draft permit to SSR. RX-004. [27]

At the same time a draft press release was prepared to accompany the above-referenced document. In part, the press release stated, "Today, CDPH is posting a draft permit for Southside Recycling." The draft press release further stated, in part, "The law is the law, but we can change the law. 'We can't change it retroactively-just like we can't pull over a driver and then lower the speed limit to justify giving them a ticket.'" RX-006. [28]

Also, a Responsiveness document was prepared by a CDPH policy analyst, as required by the Guidelines, and containing draft responses to public comments relating to the permit application. This document included, in pertinent part, the following question and draft response:

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[24] SX-020. Letter from CDPH

[25] SX-021. CDPH request for information regarding other recycling operations at Burley

[26] SX-022. SSR response to request for additional information

[27] RX-004 Draft permit

[28] Rx-006. Draft press release

Q: "Why are you not denying the permit on the basis of environmental justice/racism?"

A: "Many advocates and community members want us to deny the permit outright and it would be a significant and publicly popular act. But given the current limits of our authority, denying the permit would ultimately be a symbolic act. We pored over the application materials with a fine-tooth comb and even consulted independent experts, but could find no defensible scientific, technical or legal basis for denial. If we denied now, the company could sue us and would likely win, then proceed to operate anyway." RX-039.[29]

On May 7, 2021, U.S. EPA Administrator, Michael Regan, sent a letter to Mayor Lightfoot expressing concerns with the City's siting of the SSR facility and suggesting that the City delay a decision on SSR's permit application in order to complete an environmental justice analysis, such as a Health Impact Assessment ("HIA"). Administrator Regan also added that "EPA is closely following the investigation by the U.S. Department of Housing and Urban Development under Title VI of the Civil Rights Act of 1964 and agency regulations." SX-023. [30]

On or about May 7, 2021, Mayor Lightfoot responded to the EPA's letter and also issued a public statement in which she wrote:

"today, I directed the Chicago Department of Public Health (CDPH) to initiate an environmental study recommended by the U.S. EPA and to delay a final decision on RMG's permit application seeking to expand its metal recycling facility operated on the Southeast Side, pending completion of this further analysis." The Mayor added, "My administration aims to foster economic growth and jobs creation in our communities, while improving the health and quality of life for our residents. In pursuit of this objective, I have directed the City's Chief Sustainability Officer and the Department of Public Health to propose a new cumulative impact ordinance for consideration by the City Council before the end of this year. The ordinance

[29] RX-039. Responsiveness document

[30] SX-023. May 7, 2021 letter from USEPA to Mayor

would require an assessment of the additional environmental impact of an industrial business operation on the surrounding community when reviewing a permit application. We are also exploring additional policy steps the City can take to protect our most vulnerable communities from pollution as this ordinance is being developed." SX-024. [31]

In March 2021, with support from CDPH, Chicago's City Council approved the Air Quality Zoning ordinance, which required certain industrial zoning applicants to submit an air quality impact study and get a written recommendation from CDPH at the time of initial zoning decisions. RMG received its zoning approval prior to passage of this ordinance, and CDPH did not play a role in earlier siting decisions for the proposed Southside Recycling operation. CDPH acknowledged that this ordinance was inapplicable to SSR's permit application.

On May 10, 2021, Commissioner Arwady sent a letter to SSR stating that CDPH was suspending its review of SSR's permit application. She added, "...the City will be complying with U.S. EPA's recommendation and has therefore suspended its review of RMG's permit application until the recommended analysis can be undertaken. In the coming weeks, CDPH will be developing a project plan in coordination with U.S. EPA and a timeline for that undertaking. As soon as a schedule is known, we will promptly notify you." SX-025. [32]

From approximately mid-May 2021 until mid-February 2022, the City conducted the HIA review as referenced in the U.S. EPA letter.

An HIA is described in the HIA Summary as: "a practice that aims to increase considerations of health and equity in decision making. HIAs use a range of data sources, methods, and stakeholder input to increase understanding of how a proposed policy, plan, or project will impact the health of a population. Once the potential health impacts are assessed, an HIA makes recommendations to maximize health benefits and mitigate health threats. RX-016, SX-034 [33]

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[31] SX-024. Lightfoot public statement

[32] SX-025. Arwady letter to SSR/RMG CEO Steven Joseph.

[33] RX-016, HIA Summary, and SX-034 HIA Summary with source documentation, respectively. SX-029. Tetra Tech Human Health Risk Assessment, RX-116 Tetra Tech video presentation.

The HIA Summary notes that it was conducted in close coordination with and reliance on both the U.S. EPA and CDPH's environmental consultant, Tetra Tech, Inc., an air quality assessment company, and with input from community members, environmental justice advocates, and public health stakeholders. RX-016. RX-116 Tetra Tech video presentation. SX-029.

Tetra Tech evaluated the Burley site's existing recycling facilities and the proposed SSR shredding facility. They performed air quality dispersion modeling to calculate the estimated amounts of emissions that could be generated by Burley. The results of their survey were compared to USEPA benchmarks for carcinogens and non-carcinogens. The review did not consider other industrial activity in the area that could contribute to emissions. The study further concluded that calculated risks in residential areas are less than the U.S. EPA benchmark thresholds for both carcinogens and non-carcinogenic hazards to the nearby community.

Additionally, as part of the HIA review, the Agency for Toxic Substances and Disease Registry (ATSDR), a federal public health agency overseen by the director of the U.S. Centers for Disease Control and Prevention (CDC), conducted an analysis of possible environmental exposures from past and current recycling activities at RMG and other industrial sources within one mile of the site.

ATSDR determined that breathing PM_{10} and $PM_{2.5}$ could be harmful for highly sensitive people, especially if they live downwind from RMG and other industrial and commercial sites. Highly sensitive populations are people who have pre-existing heart and lung conditions like asthma, heart disease, or chronic obstructive pulmonary disease (COPD). Highly sensitive individuals exposed to PM over short periods of time (24-hours) and long periods of time (several months) are susceptible to respiratory symptoms and an exacerbation of lung and heart disease. ATSDR does not expect people without these pre-existing conditions living near RMG to develop health problems from breathing PM in the air.

ATSDR also determined, based on recent air monitoring (2015-2020) and historic data (1982-2015), that people living downwind of RMG (now or in the past) are not likely to develop health problems from breathing metals in the air. The metals looked at include arsenic, cadmium, chromium, lead, manganese, and nickel. It is not likely that people will experience an

increased risk of cancer or other health problems from breathing the metals. SX-028. [34]

Based upon the HIA, CDPH made a number of findings that informed the department's decision to deny the permit. Several of these findings were inconsistent with findings made earlier by the ZBA, IEPA, DOB and/or, its own consultant(s) or sources including Tetra Tech and ATSDR and as more fully discussed in the Analysis section below.

Shortly before the permit suspension, on April 26, 2021, RMG CEO, Steven Joseph, sent a second letter addressed to CDPH Commissioner Allison Arwady which included the following statement:

> "The City has an obligation to consider the realities of this case, particularly the fact that shredding obsolete metal scrap is a necessary part of the recycling process, and to set aside the repeated misinformation being presented in opposition to Southside Recycling. The simple fact is that Southside Recycling has designed and constructed the most environmentally friendly shredding facility in the United States on a property that is well-buffered from its neighbors. Our facility and the application for its permit fully comply with all requirements, and CDPH has repeatedly said this to Southside Recycling. Those facts preclude any remaining explanation for CDPH's continued delay in issuing a draft permit at this time. We implore CDPH to recognize these facts and issue the draft permit immediately. Should CDPH fail to take that step, I again hereby request an immediate meeting - per the terms of our agreement dated September 19, 2019 - with you and any other officials you deem necessary in order to resolve this delay as soon as possible." RX-040. [35]

CDPH did not respond to the letter.

On May 10, 2021, CEO Joseph sent a letter to U.S. EPA Director, Michael S. Regan, addressing issues raised in his earlier letter to Mayor Lightfoot.

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[34] SX-028 ATSDR air study, 2/22

[35] RX-040. Letter Joseph to Arwady.

In part, Mr. Joseph wrote:

> "I am writing to respond to statements made in your May 7, 2021 letter to City of Chicago Mayor Lori Lightfoot regarding the Southside Recycling (SR) Large Recycling Facility Permit Application."
>
> "Given our expectation that the permit will be issued, as required by the LRF Rules, I am very disturbed by your suggestion to the City that it hold up a decision on SR's Large Recycling Permit Application in order to perform an additional 'environmental justice analysis,' the content of which is totally unclear and appears to be just under development. While we appreciate and support the EPA's commitment to environmental justice, your suggestion is merely unduly delaying this project, while the City and EPA come up with some type of criteria for this analysis on the fly. For all we know, the criteria for the environmental justice analysis will be developed, with EPA's assistance, such that SR's application will be indefinitely delayed (as we have just recently learned) or denied for some yet to be determined reason that is not currently contained in the CDPH LRF Rules or Guidelines. I want to emphasize that an 'environmental justice analysis' is not required by the CDPH LRF Rules or Guidelines and is not part of any EPA enforceable rule or regulation that would be applicable to this permit. EPA has no legal basis to insert itself into the City's permitting process and require an analysis outside of the CDPH LRF Rules and Guidelines, thereby, in essence, bypassing its own established rulemaking procedures. We would certainly agree that EPA, the State of Illinois and CDPH are well within their authority to develop new and more stringent rules and regulations; however, those would be applied to future projects, following their proper adoption." RX-042. [36]

The U.S. EPA did not respond to the letter.

[36] RX-042. Letter from S. Joseph to M. Regan.

As noted in the preface, on February 18, 2022, the Commissioner of CDPH sent a letter to GIII denying its application for a Class IVB Recycling Facility Permit at 11600 S. Burley Avenue. PX-001.[37]

MISCELLANEOUS FINDINGS OF FACT

During the course of this hearing, and as addressed prominently in the Denial Letter, there was mention of the four other recycling facilities that occupy the Burling site and their legal relationship to SSR. The evidence presented established as follows:

Reserve FTL, LLC dba Reserve Marine Terminals (RMT) is an Illinois registered foreign LLC. The property owner is South Chicago Property Management Ltd. (SCPM). RMG Investment Group LLC is the owner of 42.49% of the LLC and RMG Investment Group II, LLC, owns 57.51% of the LLC. The majority managers are Hal Tolin (20.5%), Steven Joseph (17.5%), Scott Joseph (17.5%), and four other individuals and one Trust. All managers are registered at Ohio addresses. The site manager is Hal Tolin. The house manager is Dennis Stropko. Reserve receives materials via truck and/or railcar from other businesses and directs materials to various locations in the facility for further processing.

Reserve Partners (RSR) LLC, dba Regency Technologies, is an Illinois registered foreign LLC. The property owner is South Chicago Property Management Ltd. The managers of the LLC are the same as shown for Reserve Marine Terminals. The house manager is Dennis Stropko. RSR operates an indoor electronics recycling process that consists of manual breakdown of electronic materials.

Napuck Salvage of Wisconsin, LLC, is an Illinois registered foreign LLC as well as a Wisconsin LLC. The property owner is SCPM. The managers of the LLC are the same as shown for Reserve Marine Terminals. The site manager is Hal Tolin. Napuck Salvage operates an indoor aluminum and cast-iron recycling process.

South Shore Recycling, LLC, is an Illinois registered LLC. The property owner is South Shore Recycling Ltd. The LLC member is Steven Joseph.

[37] PX-001. denial letter dated 2/18/22.

The registered agent is Hal Tolin. South Shore Recycling operates an indoor/outdoor ferrous and non-ferrous scrap recycling center and also processes scrap metal.

This permit applicant, General III, LLC dba Southside Recycling (SSR), is an IL registered foreign (Ohio) LLC. A registered manager of the LLC is Steven Joseph.

The LRF application describes the intended operation of SSR as: PX-015[38]

> "General III, LLC (d/b/a Southside Recycling) will purchase discarded and end of life recyclable scrap metal from a variety of sources including independent recyclers, demolition companies, end-of-life vehicle suppliers, other recycling facilities, etc. Approximately 98 percent of the scrap metal delivered to Southside Recycling will be processed by a hammermill shredder and ferrous material separation system in order to separate ferrous metal (iron/steel) from nonferrous materials (nonferrous metal and nonmetallic material). Recovered ferrous metal will be loaded into barges, trucks and/or rail cars for delivery to steel mills and foundries. Non-ferrous material, also known as shredder residue, will be further processed by the non-ferrous material separation system to separate nonferrous metals (i.e., aluminum, copper, brass, etc.) from nonmetallic material (i.e., plastic, foam, etc.). Recovered nonferrous metal will be loaded into trucks for delivery to secondary nonferrous metal processing facilities, refiners, smelters, etc. All metals recovered from the process will be re-melted by steel mills, foundries, refiners, smelters, etc. and will eventually be transformed into consumable ferrous and nonferrous products. The nonmetallic material, also known as shredder fluff, will be loaded into trucks and sent to a landfill for use as alt mat daily cover."

SCPM Ltd is an Illinois registered corporation which has an assumed name of South Chicago Property Management Company, LLC (SCPMLLC). SCPMLLC is registered as an Illinois foreign (Ohio) LLC. The managers of the LLC are Hal Tolin, and Steven Joseph of Stow, Ohio. The principal

[38] PX-015. LRF application Nov. 11, 2020

office of the corporation and the LLC is 11600 S. Burley, Chicago, IL. Neither SCPM Ltd nor SCPMLLC operate recycling activities at the Burley site.

CONCLUSIONS OF FACTS AND LAW

Applicable Standards of Review

The Respondent/Appellant, GIII, LLC dba SSR, has the burden of presenting convincing evidence that the decision of the CDPH was clearly erroneous based upon the facts and applicable law. This standard of review is consistent with other appeals heard before this department from decisions of city agencies and is consistent with Illinois law. Precedent can be found in *Chicago Department of Procurement Services v. Ravenswood Disposal Service, Inc.,* Docket No.19PS000001, and in *Chicago Department of Procurement Services v. McDonagh Demolition,* Docket No. 21PS00000, and contained in an Order entered on August 15, 2022.

Additionally, contrary to Respondent's arguments, this review is not conducted *de novo,* except as to questions of law. Further, pursuant to state statute, an administrative agency's findings and conclusions on questions of fact are deemed to be *prima facie* true and correct. 735 ILCS 5/3-110 (West 1994).

We are also guided in this matter by Rule 1.7 of the Department of Administrative Hearings which provides, in relevant part, that the controlling statutory authorities in municipal administrative adjudicatory proceedings are Article 1, Division 2.1 of the Illinois Municipal Code (65 ILCS 5/1-2.1) and Chapter 2-14 of the Municipal Code of Chicago. Pursuant to § 2-14-076(h) of the Municipal Code of Chicago and §1-2.1-6 of the Illinois Municipal Code, "the formal and technical rules of evidence shall not apply in the conduct of administrative hearings." Evidence, including hearsay, may be admitted only if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. Pursuant to Illinois case law, the Illinois Administrative Procedure Act, the Illinois Code of Criminal Procedure and the Illinois Code of Civil Procedure are inapplicable to these types of administrative adjudicatory proceedings. (See, *Macon Co. v. Bd. of Ed. of Decatur School Dist. No. 61*, 165 Ill.App.3d 1 (4th Dist. 1987) app. den 119 Ill.2d 588, *City of Chicago v. Joyce*, 38 Ill.2d 368, 373 (1967), and

Desai v. Metropolitan San. Dist. of Greater Chicago, 125 Ill.App.3d 1031, 1033 (1st. Dist. 1984), and also DOAH Rule 8.3 which provides that administrative law judges do not have the authority to pass upon the constitutionality of a statute, ordinance, rule and regulation, or other legislative or administrative action. (See *Hunt v. Daley*, 286 Ill.App.3d 766 (1st Dist. 1997) and *Yellow Cab Company v. City of Chicago,* 938 F.Supp. 500 (1996)). Parties may, however, make an objection to the constitutionality of a statute, ordinance, rule, regulation, or other legislative or administrative action for the record. (Amended November 8, 2011), (Amended January 29, 2020).

Applying the applicable standards, within the context of the MCC and he Rules of the DOAH, we review the reasons for the denial of the LRF permit. According to the testimony presented at hearing, the Denial Letter identifies three general bases for the permit denial: (1), the past and present history of the applicant, (2), the results of the HIA, and (3), the inherent risks of recycling/the lack of Responsiveness. PX-001. Denial Letter.

The Health Impact Assessment

The HIA findings form the basis for the permit denial and the findings contained therein touch upon relevant issues to be determined in this appeal.

By May 10, 2021, SSR had submitted all required documentation required by the LRF Rules. At the hearing, Managing Deputy Commissioner Megan Cunningham, who had authority over the HIA creation, testified that "Southside Recycling met 'all of the explicit requirements' within the LRF Rules. (Cunningham Tr. 01/18/23 at 338:5-8). Assistant Commissioner David Graham also testified that Southside Recycling had submitted all of the information required under the LRF Rules for issuance of an LRF Permit. (Graham Tr. 01/20/23 at 131:4-22). Cunningham also testified that Mayor Lightfoot directed CDPH to delay the permit application and to initiate the HIA. (Cunningham Tr. 01/18/23 at 125:6-10).

Both Cunningham and Graham stated that the HIA does not appear in the city's ordinances, or in CDPH's rules. See 01/18/23 Tr.at 183:17-24; 01/20/23 Tr. 137:16-18. Cunningham further stated that there are no published standards that govern how CDPH would evaluate the HIA. In arriving at its conclusions, CDPH personnel, together with its consultant,

Tetra Tech, and persons from the U.S. EPA, applied their own subjective standards and expertise. CDPH also was guided by minimum standards and practices published by a nonprofit organization called Human Impact Partners. The minimum standards and practices are not referenced in the MCC or city rules. (See Cunningham Tr. 01/18/23 at 174:1-24). SSR was not asked to participate in the HIA.

In the Zoom public meetings held in July and December 2020, Commissioner Arwady specifically explained how the LRF permit application would be reviewed and judged by CDPH. RX-001 and RX-117 (video). During these public sessions, Commissioner Arwady made clear that CDPH would review the Southside Recycling permit application based on the standards contained in the Municipal Code and the newly developed and extensive LRF Rules. As CDPH clearly and unequivocally explained: "In order to obtain a recycling facility permit, an applicant must comply with the requirements of CDPH's Rules for Large Recycling Facilities and the Municipal Code of Chicago." Applicants who do not meet these requirements will be denied a permit. It was also equally clear that nothing was stated during either public meeting about the need to go through a health impact assessment or environmental justice review.

City's Arguments Regarding CDPH Authority to Conduct HIA and Apply Its Findings to Deny Permit [39]

In the Denial Letter, the City identifies the various ordinances and rules addressing the authority of the Commissioner of CDPH. Those ordinances and/or rules provide, in relevant part:

2-112-070 Adoption of Health and Environmental Rules.

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[39] Both the City and the Petitioner have filed lengthy post-hearing briefs in which they present their respective arguments and identify legal authorities in support thereof. The briefs have been reviewed and their respective arguments are taken into consideration in this Order as well as made part of the official record. Relevant portions of the briefs may be incorporated herein.

(a) The Commissioner is authorized to issue rules necessary or proper for the administration or enforcement of health ordinances, including but not limited to the provisions of this Code pertaining to the regulation of food establishments, including Chapters 4-8, 7-38, 7-40, and 7-42 of this Code, and for the administration or enforcement of environmental ordinances. The Commissioner shall not enact any rule, except those emergency rules described in subsection (b), until the Commissioner holds a public hearing on such rule or until the Commissioner provides an opportunity for the public to submit comments in written or electronic form. If the Commissioner holds a public hearing, the Commissioner shall give not less than ten (10) calendar days' notice of the time and place of such hearing by publication in a prominent location on the Department's website. The Commissioner shall also e-mail notices of all public hearings to persons who file a request with the Department for notice of the Commissioner's intention to issue such rules. If the Commissioner solicits written or electronically submitted comments, the Commissioner shall give public notice by e-mailing a notice of the solicitation of comments to all persons who file such a request with the Department and by publishing such notice in a prominent location on the Department's website with the text of the proposed rule. The Commissioner shall accept written or electronically submitted comments for a period of not less than thirty (30) calendar days from the date of the notice. However, the Commissioner shall have the power to make reasonable administrative and procedural rules *interpreting or clarifying the requirements that are specifically prescribed in this chapter and Chapters 4-8, 7-38, 7-40, 7-42, and 11-4 of this Code, without notice, hearing or solicitation of written or electronically submitted comments* (emphasis added).

(b) The requirements for notice, hearing, and solicitation of comments shall not apply when immediate effectiveness is required to address an imminent or actual emergency. As soon as practicable after promulgation, such emergency rules shall be published on the Department's public website with notice that they are in force in the City. (Prior code § 9-7; Amend Coun. J. 3-10-99, p. 91043; Amend Coun. J. 12-13-17, p. 63286, § 1; Amend Coun. J. 1-27-21, p. 26741, Art. II, § 5; Amend Coun. J. 2-24-21, p. 27657, Art. I, § 1) and;

2-112-110 Commissioner – Additional Powers and Duties.

(b) Environmental protection powers and duties:

(1) To supervise the execution of and implement all laws, ordinances, and rules pertaining to environmental protection and control as provided in Chapter 11-4 of the Municipal Code of Chicago;

(6) *To issue rules necessary or proper for the implementation of environmental ordinances and to accomplish the purposes of Chapter 11-4 pursuant to Section 2-112-070, and to publish a code of recommended practices under which Chapter 11-4 is to be administered, providing with clarity and in detail the necessary information by which the public is to be guided and to establish standards of quality;*

(7) To publish adopted rules or standards and the code of recommended practices in a convenient form; (emphasis added) and,

11-4-020 Enforcement of Provisions

Except as otherwise provided, the provisions of this chapter, known as the Chicago Environmental Protection and Control Ordinance, shall be enforced by the commissioner of the department of health. All duties and powers granted herein shall be exercised by each such official (emphasis added).

11-4-040 Permit Issuance or Renewal – Requirements.

(a) In addition to the standards for permit issuance set forth elsewhere in this Chapter, the commissioner may deny an application for an initial or renewal permit or written authorization for the following reasons:

(1) where such application does not meet all applicable requirements set forth in the Code; and

(2) where the applicant has not paid all fees required by this Code and any outstanding debts owed to the City as debts are defined in subsection (a) of Section 4-4-150 of this Code.

(b) When an application for issuance or renewal of a permit is denied, the commissioner shall send notice of such denial to the applicant in accordance with the applicable provisions of subsection (d) of Section 11-4-025 of this Code, and provide any such permittee an opportunity to

demand a hearing in accordance with the procedures set forth in subsection (c) of Section 11-4-025 of this Code.

(c) The commissioner may impose reasonable permit conditions to protect the public health, safety or welfare of the city. (Added Coun. J. 10-7-09, p. 73413, § 1; Amend Coun. J. 11-16-11, p. 13798, Art. II, § 6; Amend Coun. J. 7-29-15, p. 4110, § 2)

11-4-630 Standards for Issuance of Air Pollution Control Permits.

(a) The *commissioner shall grant an air pollution control permit only if the commissioner has determined that:*

(1) the owner or operator of the regulated equipment or area for which a permit is sought is not currently in violation of any substantive standards set forth in Part C of this article or any regulations promulgated pursuant to this article (emphasis added), and

11-4-2520 Permit – Required.

No person shall engage in the business of operating a recycling facility in the City of Chicago without having first obtained a written recycling facility permit from the Commissioner. Recycling facilities requiring a permit under this section shall comply with this article, the rules promulgated hereunder, the permit and its conditions and any other applicable laws and ordinances. Each permit shall be renewed in accordance with the rules adopted by the Commissioner, but in no case shall the permit be for longer than three years.

No initial recycling facility permit shall be issued for any class of recycling facility set forth in Section 11-4-2540 unless the activity for which a permit under this section is required is a permitted or special use within the zoning district where such facility will be authorized to operate.

*If a permittee under this section fails to submit in a timely manner the annual recycling report required under Section 11-4-2540 or submits an incomplete annual recycling report, such permittee's permit under this section shall not be renewed by the Department of Public Health until such time that the annual recycling report required under Section 11-4-2540 is submitted and is complete (*emphasis added). (Coun. J. 12-9-92, p. 25465;

Amend Coun. J. 10-7-98, p. 78812; Amend Coun. J. 4-9-08, p. 24657, § 6; Amend Coun. J. 2-9-11, p. 112149, § 15; Amend Coun. J. 7-20-16, p. 28694, § 5; Amend Coun. J. 10-27-21, p. 39543, Art. VI, § 2)

11-4-2525 Permit Issuance Prohibited.

No permit shall be renewed or issued to:

(a) *any person whose permit issued under this article has been revoked for cause within the past three years (*emphasis added);

(b) any corporation, general partnership, limited partnership or limited liability company, if any partner, if a general partnership; any general partner, if a limited partnership; any principal officer, if a corporation; any managing member, if a limited liability company; any owner of 25% or more of the applicant; or any other individual required to be identified in the permit application would not be eligible to receive a permit under subsection (a); or

(c) any corporation, general partnership, limited partnership or limited liability company, if any partner, if a general partnership; any general partner, if a limited partnership; any principal officer, if a corporation; any managing member, if a limited liability company; any owner of 25% or more of the applicant; or any other individual required to be identified in the permit application was a principal officer, partner, general partner, managing member or owner of 25% or more of any entity whose permit issued under this article has been revoked for cause within the past three years.

The City does not dispute that the term "Health Impact Assessment" does not appear in any ordinance, rule, regulation or other City legislative enactment. It argues that the Commissioner has the sole authority to issue permits pursuant to the above-mentioned authorities and that, despite the Mayor's involvement in the process, the Commissioner decided to conduct the HIA following discussions with the U.S. EPA pursuant to her own authority.

The City further argues that SSR has failed to meet its burden of proof to show that the Commissioner's decision to deny the permit, for the reasons identified in the Denial Letter, was clearly erroneous. That the HIA was

developed as a tool to assist the Commissioner in reviewing the "real-world impact" of the permitting decision in light of the burdens imposed on the surrounding community and that SSR's challenges are merely differences of opinion about how the findings should have been considered by the Commissioner.

The City contends that the CDPH was well within its authority to consider the compliance history of the alleged violations on the Burley campus site by affiliated entities and that SSR also failed to prove that that the Commissioner's assessment was clearly erroneous. It goes on to argue that SSR, rather than showing that the facts relied upon by the Commissioner were wrong, merely attempted to downplay the seriousness of those concerns.

The City also asserts that SSR's "inventive" arguments regarding principles of estoppel or vested rights as a basis for the permit issuance are inapplicable to the Commissioner's discretionary review required under the LRF permit regime. (City's Post-Hearing brief).

SSR's Arguments Regarding City's Lack of Authority To Conduct HIA and Its Right To The LRF Permit

SSR argues that the CDPH invented completely new standards not previously codified in the Municipal Code or the LRF Rules and used those new standards as the basis for denying the LRF Permit. CDPH by doing so, usurped the legislative authority of the City Council and the authority granted to and exercised by the Zoning Board of Appeals ("ZBA") in siting this facility at its exact location on the Southeast Side.

CDPH, they argue, took these steps after receiving political pressure related to the Southside Recycling facility that could have involved the City losing hundreds of millions of dollars in federal funding. As such, SSR contends that the City's actions were pretextual, lacked authority under the Code, and were arbitrary and capricious.

SSR further asserts that the Commissioner violated Southside Recycling's due process rights by denying its LRF Permit because: (i) Southside Recycling did not receive proper notice or an opportunity to be heard on the alleged bases for the denial; (ii) Southside Recycling was denied a fair

adjudication of the alleged noncompliance of the other business entities; (iii) Southside Recycling was unlawfully denied a permit for the alleged acts and omissions of other corporate entities; and (iv) Southside Recycling, a stakeholder, was not included in the HIA process and was not given an opportunity to respond to or contest the HIA's findings.

SSR further argues that the decision of the ZBA to issue a special use permit to operate a Class IVB metal recycling facility in a PMD-6 industrial corridor, was a determination that the use (the shredding facility) would not adversely affect the surrounding neighborhood and was intended by the City Council to grow traditional industrial uses at the site. The decision, not having been appealed by the City within the time allowed, has now became final on the issue and is binding against the CDPH and not a proper subject for collateral attack.

SSR also points to the term agreement signed in 2019 in which the City agreed to assist SSR in obtaining a permit to operate a new facility on the Burley site in exchange for General Iron's agreement to shut down the Lincoln Park recycling facility in 2020 – a condition that SSR has since met.

SSR asserts that the IEPA determination to issue a construction permit to operate its facility, would meet all state environmental standards and that the determination included an environmental justice review as part of its review. 01/18/23 Tr. (Cunningham) at 136:22-137:9. SSR further argues that the time for CDPH to seek appeal of the decision has expired and that the decision was also now final.

SPECIFIC CONCLUSIONS OF FACTS AND LAW REGARDING APPLICATION OF HIA TO LRF PERMIT PROCESS

As stated by Commissioner Arwady during the public meetings held in July and December 2020, the SSR permit application would be decided based upon the standards contained in the Municipal Code and the newly developed and extensive LRF Rules. RX-001 & RX-163. The first mention of an HIA came in May 2021 when Mayor Lightfoot announced that she was directing CDPH to pause the permit application review consistent with the suggestion made by the U.S. EPA when she stated:

> "My administration aims to foster economic growth and jobs creation in our communities, while improving the health and

quality of life for our residents. In pursuit of this objective, I have directed the City's Chief Sustainability Officer and the Department of Public Health to propose a new cumulative impact ordinance for consideration by the City Council before the end of this year. The ordinance would require an assessment of the additional environmental impact of an industrial business operation on the surrounding community when reviewing a permit application. We are also exploring additional policy steps the City can take to protect our most vulnerable communities from pollution as this ordinance is being developed." SX-024.

Notably, the Mayor seemed to recognize as early as May 2021 that the City Council needed to enact a "cumulative impact ordinance" authorizing any environmental study (such as an HIA) as part of the permitting application process. The City Council did not enact such an ordinance by the end of 2021 as the Mayor requested.

The City argues that the Municipal Code gives the Commissioner broad discretion to issue permits and enforce the Environment Protection and Control Ordinance, which includes the sole power to issue permits, certificates, notices or other documents required under the provisions of MCC §§11-4, 2-112-110(b)(9) as well as to adopt rules necessary and proper to administer the City's environmental ordinances. MCC §§ 2-112-070, 2-112-110(b)(6), as well to consult with public and private agencies to advance environmental protection in furtherance of the Environmental Protection and Control Ordinance.

MCC 2-112-070 provides that the Commissioner shall not enact any rule, except those emergency rules described in subsection (b), until the Commissioner holds a public hearing on such rule or until the Commissioner provides an opportunity for the public to submit comments in written or electronic form. If the Commissioner holds a public hearing, the Commissioner shall give not less than ten (10) calendar days' notice of the time and place of such hearing by publication in a prominent location on the Department's website. The Commissioner shall also e-mail notices of all public hearings to persons who file a request with the Department for notice of the Commissioner's intention to issue such rules. If the Commissioner solicits written or electronically submitted comments, the Commissioner shall give public notice by e-mailing a notice of the solicitation of comments

to all persons who file such a request with the Department and by publishing such notice in a prominent location on the Department's website with the text of the proposed rule. The Commissioner shall accept written or electronically submitted comments for a period of not less than thirty (30) calendar days from the date of the notice. *However, the Commissioner shall have the power to make reasonable administrative and procedural rules interpreting or clarifying the requirements that are specifically prescribed in this chapter and Chapters 4-8, 7-38, 7-40, 7-42, and 11-4 of this Code, without notice, hearing or solicitation of written or electronically submitted comments (emphasis added).*

(b) The requirements for notice, hearing, and solicitation of comments shall not apply when immediate effectiveness is required to address an imminent or actual emergency. As soon as practicable after promulgation, such emergency rules shall be published on the Department's public website with notice that they are in force in the city.

2-112-110 Commissioner – Additional Powers and Duties.

(b) Environmental protection powers and duties:

(1) To supervise the execution of and implement all laws, ordinances, and rules pertaining to environmental protection and control as provided in Chapter 11-4 of the Municipal Code of Chicago;

(6) *To issue rules necessary or proper for the implementation of environmental ordinances and to accomplish the purposes of Chapter 11-4 pursuant to Section 2-112-070, and to publish a code of recommended practices under which Chapter 11-4 is to be administered, providing with clarity and in detail the necessary information by which the public is to be guided and to establish standards of quality;*

(7) To publish adopted rules or standards and the code of recommended practices in a convenient form; (emphasis added).

MCC1-4-090 entitled: Definitions for Code provisions provides, in relevant part:

Unless the context requires other interpretations, the following words and terms are defined for purposes of this code as follows:

(l) *"Rule" means the whole or part of any statement, communication, standard, procedure or requirement of general applicability, having the force of law, issued by a department or department head pursuant to authority delegated by law to such department or department head that (1) implements or applies law or policy, or (2) prescribes the procedural requirements of a department including an amendment, modification, suspension or repeal of any such statement, communication, standard, procedure or requirement. The term "rule" encompasses any and all references to "rules and regulations" set forth in this Code.* (emphasis added).

It appears, from a review of the law cited above, that the City Council requires public notice of new rules (which by definition includes standards, communications or procedures "having the force of law"), and which implement new policy, to be published prior to implementation, with sufficient clarity and detail to help guide the public and providing an opportunity for the public to comment on the proposed rules or standards. The intent of these provisions of the Municipal Code go beyond just rules but also covers "standards" or "procedures" as well. We turn to rules of statutory construction to assist in better reconciling these issues.

The cardinal rule of statutory construction, to which all other canons and rules are subordinate, is to ascertain and give effect to the true intent and meaning of the legislature.'" (*People v. Boykin (1983), 94 Ill.2d 138, 141, 68 Ill.Dec. 321, 445 N.E.2d 1174*, quoting People ex rel. *Hanrahan v. White (1972), 52 Ill.2d 70, 73, 285 N.E.2d 129.*) "In determining the legislative intent, courts should consider first the statutory language." (*Boykin, 94 Ill.2d at 141, 68 Ill.Dec. 321, 445 N.E.2d 1174*; *Harvey Firemen's Association v. City of Harvey (1979), 75 Ill.2d 358, 27 Ill.Dec. 339, 389 N.E.2d 151.*) Unambiguous terms, when not specifically defined, must be given their plain and ordinary meaning. (*Hayes v. Mercy Hospital & Medical Center (1990), 136 Ill.2d 450, 455, 145 Ill.Dec. 894, 557 N.E.2d 873.*) Moreover, "[t]he courts also will avoid a construction of a statute which would render any portion of it meaningless or void." (*Harris v. Manor Healthcare Corp. (1986), 111 Ill.2d 350, 362-63, 95 Ill.Dec. 510, 489 563*563 N.E.2d 1374*; *People v. Tarlton (1982), 91 Ill.2d 1, 5, 61 Ill.Dec. 513, 434 N.E.2d 1110; People v. Lutz (1978), 73 Ill.2d 204, 212, 22 Ill.Dec. 695, 383 N.E.2d 171.*) The courts presume that the General Assembly, in passing legislation, did not intend absurdity, inconvenience, or injustice. *Harris, 111 Ill.2d at 363,*

95 Ill.Dec. 510, 489 N.E.2d 1374. Construction of a statute requires identification of legislative intent and the effect it should be given. *Glynn v. Retirement Board of Policemen's Annuity, 263 Ill. App.3d 590, 593, 200 Ill.Dec. 484, 635 N.E.2d 823 (1994)*. Legislative intent is ascertained by examining the statute's language and considering each section in connection with every other section. *Glynn, 263 Ill.App.3d at 593, 200 Ill.Dec. 484, 635 N.E.2d 823*. The most reliable indicator of legislative intent is the statute's language and, where it is clear and unambiguous, the plain and ordinary meaning of the words will be given effect. 96*96 *Board of Education of Rockford School District No. 205 v. Illinois Educational Labor Relations Board, 165 Ill.2d 80, 87, 208 Ill. Dec. 313, 649 N.E.2d 369 (1995)*. The rules which govern the construction of statutes are also applied in the construction of municipal ordinances. *City of Chicago v. Pioneer Towing, Inc., 73 Ill.App.3d 867, 870, 29 Ill.Dec. 575, 392 N.E.2d 132 (1979).*

The City has referred to the HIA as simply a "tool" to be used by the Commissioner to inform her decision. This characterization greatly understates the critical effect that the HIA played in the decision to deny the permit. The HIA set new standards for an LRF permit – standards which were only known to the CDPH and were admittedly "subjective" at best. 01/l8/23 Tr. (Cunningham) at 173:8-14. In assessing the results of the screenings, the CDPH arrived at negative findings and potentially negative findings which in turn contributed to the CDPH's denial of the permit.

After examining the language contained in §§11-4 & 2-112 and considering each section in connection with every other section, implementation of the HIA does not simply "interpret or clarify" existing ordinances but creates new policy and requirements to be met by LRF permit applicants. As such, it lacked any authority from the City Council, fails to reference any specific ordinance from which it derived its authority, and as minimally required for rules, was never formally disclosed by publication in any way. This determination takes in account the holding in *Abrahamson v. Illinois Department of Professional Regulation, 153 Ill.2d 76, 98, 180 Ill.Dec. 34, 606 N.E.2d 1111 (1992)* that some deference is to be given to an agency's [CDPH's] interpretation of its own rules and regulations. However, an agency's interpretation of the meaning of the language of a statute constitutes a pure question of law and is not to be given deferential treatment, *City of Belvidere v. Ill. State Labor Rel. Bd. 692 NE 2d 295, 181 Ill. 2d 191, 229 Ill. Dec. 522 – (IL Supreme Court 1998)*

Accordingly, the HIA findings were improperly applied to the LRF permit process and the findings are to be disregarded as beyond the authority of the Commissioner to implement. [40] [41]

AFFILIATED ENTITIES VIOLATIONS
PAST AND PRESENT HISTORY OF APPLICANT

In the Denial Letter, the Commissioner identifies several concerns related to the four other recycling operations that have occupied the Burley campus for many years prior to the LRF permit application filed by SSR and which form the basis for the permit denial.

As identified, beginning on page six of the Denial Letter, these are:

1. Apparent exceedance of permitted capacity by RMT in 2018 and 2020 as reported by RMG in March 2021. Specifically, CDPH asserts that RMT was authorized to receive and process no more than 750 tons of recyclable materials per day and according to a review of monthly figures submitted in its report actually exceeded its permitted limit in each of six months in 2018 and 2020.

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[40] SSR argues that CDPH also violated its own Guidelines by not issuing a draft permit or denial letter within the time required, and that the Guidelines required the CDPH to issue such a letter by March 15, 2021. Instead, on March 17, 2021, CDPH issued a request for additional information. SX-021. The parties met the following day to discuss what exactly CDPH needed. 01/11/23 Tr. (Kallas) at 26:19-27:6, 30:23-32:18. Following this, on March 24, 2021, Southside Recycling submitted the information sought by CDPH. SX-022. After the March I7th request, CDPH did not ask for any additional information from Southside Recycling and acknowledged that they had all of the information they needed. See 01/11/23 Tr. (Kallas) at 41:3-42:2. Given the finding that the HIA was beyond the CDPH's authority, this issue need not be resolved. The record however shows that SSR made this argument to preserve their appellate rights of review.

[41] *Health Impact Assessment Legislation in the States*, a collaboration of the Robert Wood Johnson Foundation, the Pew Charitable Trust and the National Conference of State Legislatures examined state legislation which addresses the appropriate legal authority to implement HIAs. See: https://www.pewtrusts.org/~/media/assets/2015/01/hia_and_legislation_issue_brief.pdf

2. Failure to obtain appropriate permits for foundry sand operation. CDPH asserts that RMT did not possess appropriate Air Pollution Control permit(s) to conduct foundry sand processing on its site. The assertions were based upon CDPH's review of Google satellite images appearing to show that RMT has been handling outdoor foundry sand operations since 2019 without the proper permit.

3. Failure to Notify CDPH of IEPA Notices of Violation. CDPH asserts that in December 2019 the IEPA issued a notice of violation to SCPM alleging that the company failed to apply for air construction permits and related violations. Further that RMG had a duty to notify CDPH of this notice and failed to do so.

4. Failure to control dust. CDPH asserts that in June 2019, one of its inspectors issued a notice to RMT for failure to control dust during barge loading and unloading at the site. In September 2019, RMT pled liable at DOAH to the violation and paid an administrative fine and costs.

5. Soil sampling results show high levels of lead on site. On December 21, 2021, as part of the HIA review process (as well as for two pending permit applications from RMT and Napuck), CDPH together with its environmental consultant, Tetra Tech, and representative(s) of the U.S. EPA conducted soil sampling on the Burley site to determine potential lead levels. Results from the analysis found excessive levels of lead in the samples. CDPH further claimed that during the day of sampling RMG personnel interfered with the collection by verbal interruptions and argumentative behavior.

6. Recycling activity on unpermitted area. CDPH asserts that during the December 21, 2021 sampling event (above), they observed recyclable materials consisting of small iron fragments and fines (called "shrinkage" by RMG personnel) generated from the breaking and screening of large pieces of scrap metal (iron) at the RMT operation on the northern part of the site and then trucked to the southern part of the property for further processing. They allege that this activity was not included in any of RMG or RMT's permit materials.

7. Building collapse. On or about July 26, 2021, CDPH was informed by the Department of Buildings (DOB) that a building collapsed on the RMG property. RMG never reported this building collapse to CDPH. As CDPH later learned, the building was a large unused warehouse located in the

southwestern portion of the property. According to RMG's Facility Plot Map, the warehouse was in an area on the border between the areas delineated as occupied by RMT and Napuck. CDPH issued a ticket based on the owner's violation of 11-4-2180(a), for failing to properly maintain asbestos containing materials (ACM) in a Facility. The ticket is currently pending at the Department of Administrative Hearings. In addition, the Applicant's failure to report the collapse raises concerns about RMG's transparency.

Having determined that the HIA was not authorized as a requirement of the LRF permitting scheme, it follows that any new findings included in the Denial Letter as a result of the HIA process are also not applicable and should be disregarded. Nonetheless, there are additional issues that apply to the Commissioner's concerns that need to be addressed.

The City argues that the Commissioner had authority under the 2014 Rules (SX-010) to consider the compliance history of related entities prior to issuing a permit for a new operation. To that end, the City asserts that for purposes of the Rule, violations committed by an entity (presumably RMG or any of the four entities it owns or controls) may be attributed to any person having ownership or control of the entity or any of its operations. As SSR falls under that definition, they argue, the concerns identified above are attributed to SSR even though SSR was not yet formed at the time of the violations and did not have any role in those violations.

SSR argues that it was improper for CDPH to consider alleged violations by the other companies occupying the Burley site as they are separate entities from SSR and, even if determined to fall under the definition in the ordinance, have never had a permit revoked for cause at any time. They point to an MCC §11-4-2525, an ordinance, rather than a rule, as the controlling law.

The ordinance reads:

MCC 11-4-2525 Permit Issuance Prohibited provides:

> No permit shall be renewed or issued to:
>
> (a) any person whose permit issued under this article has been revoked for cause within the past three years;

(b) any corporation, general partnership, limited partnership or limited liability company, if any partner, if a general partnership; any general partner, if a limited partnership; any principal officer, if a corporation; any managing member, if a limited liability company; any owner of 25% or more of the applicant; or any other individual required to be identified in the permit application would not be eligible to receive a permit under subsection (a); or

(c) any corporation, general partnership, limited partnership or limited liability company, if any partner, if a general partnership; any general partner, if a limited partnership; any principal officer, if a corporation; any managing member, if a limited liability company; any owner of 25% or more of the applicant; or any other individual required to be identified in the permit application was a principal officer, partner, general partner, managing member or owner of 25% or more of any entity whose permit issued under this article has been revoked for cause within the past three years.

The first issue to be determined is whether RMG, or any of the four companies on site, owns 25% or more (for purposes of MCC 11-4-2525) of SSR, or owns or controls SSR (for Rule 4.0), or any of its operations.

RMG Investment Group LLC is the owner of 42.49% of RMT and both Hal Tolin and Steven Joseph own over 35% interest as managers of the LLC. A similar ownership structure applies to Reserve Partners (RSR) LLC, dba Regency Technologies, and to Napuck Salvage. Hal Tolin is also site manager for both RMT and Napuck. Steven Joseph is a member/manager of Shore Recycling, LLC. The registered agent is Hal Tolin. SCPM Ltd is an Illinois registered corporation which has an assumed name of South Chicago Property Management Company, LLC. The managers of the LLC are Hal Tolin and Steven Joseph.

This permit applicant, General III, LLC dba Southside Recycling (SSR), is an IL registered foreign (Ohio) LLC. A registered manager of the LLC is Steven Joseph. The LRF application [PX15] shows Hal Tolin as signatory for applicant.

The greater weight of the evidence establishes that there are sufficient legal interconnections between RMG, the four entities, and SSR to invoke ownership or control as described in both MCC §11-4-2525 and Rule 4.0.

The second issue involves a determination as to how the Ordinance and the Rule are to be applied in considering the concerns raised by CDPH in the Denial Letter.

Rule 4.0 and MCC §11-4-2525 are legally inconsistent. The ordinance appears to mandate permit denial to those situations where a permit granted to the applicant, or an affiliated entity, has been revoked for cause within the past three years. Rule 4.0 lowers that bar by allowing permit denial for any violation, by an affiliate, of federal, state, or local laws, regulations, standards, permit conditions, or ordinances in the operation of any junk facility, recycling facility, or any other type of waste or recyclable materials handling facility or site, including, but not limited to, the operation of a junk, recycling, or waste handing facility without permits.

The Commissioner has broad authority to implement ordinances by enacting rules consistent with the powers granted her by the City. Here, it is difficult to accept the City's argument that the Commissioner can expand on the City Council's ordinance, by enacting a rule that allows a permit to be denied for minor violations of law, or standards, where the City Council, by ordinance, imposed a much higher standard. Ordinances reflect the will of the City Council – rules implement ordinances enacted by the Council. The ordinance provides that a new permit must be denied where another permit has been revoked within three years represents the intent of the City Council and prevails over a rule. The City Council has not moved to lower the threshold for a permit denial as CDPH contends. *See Evans v. Benjamin School Dist. No. 25, 134 IL.App.3d 875, 880 (2d Dist. 1985)* ("Statutes conferring authority on a board must be considered not only as a grant of power, but as a limitation thereof.") [42]

[42] Rules for the Conduct of Administrative Hearing Proceedings, Rule 1.6, entitled Supremacy of Ordinances, is instructive where it provides that: "Nothing in these rules shall act to override, restrict or relax the procedural requirements and/or provisions of the applicable provisions of the ordinances of the Municipal Code of Chicago. In the event of a conflict between provisions of these rules and provisions of the Municipal Code of Chicago, the Municipal Code of Chicago shall take precedence.

None of the concerns raised by the Commissioner which have to do with RMT, RMG, Napuck, or SCPM, as identified above, involved a revoked permit. As such, the Commissioner's denial of the LRF permit for lesser violations, as described herein, was beyond her authority and should be disregarded.

Apparent Contradictory Prior Statements Made by City Regarding RMG and The Affiliated Companies

It should also be noted that there are additional, relevant factual issues, regarding claimed violations on the Burley site. On several occasions the City, by its authorized agents, has made inconsistent statements concerning the Burley site.

As noted in the Findings section, above, in December 2020, the City, in its response to the *Martin* lawsuit held a different position regarding the Burley site when it described the site as having the "best in class," and specified how, utilizing "the latest technology," would "create a clean, efficient, and environmentally sensitive plant." The City described how the air pollution devices were designed to remove the "vast majority of volatile organic compounds, according to sworn testimony, over 98% of organic particulate matter." There was nothing is the response which described the Burley operations in a negative light – as CDPH later did in the Denial Letter. SX-012.

In the City's November 10, 2020 letter to HUD regarding the federal agency's expressed concerns as to the proposed SSR recycling facility, the City's Deputy Corporation Counsel wrote that:

> "RMG has been conducting metal recycling operations at South Burley including some metal shredding in a lawful and environmentally safe manner for decades.... RMG is planning to incorporate new processes and associated environmental controls into their current operations, resulting in a higher volume of more efficient, cleaner recycling. Contrary to the narrative propagated by the Complainants and others, General Iron is not "moving to the southeast side." Rather, RMG has purchased General Iron's assets, and will be incorporating some of General Iron's environmental mitigation equipment (i.e., a particulate matter filter, regenerative thermal oxidizer,

> and wet scrubber) into a new, fully enclosed, state- of-the-art shredder that utilizes a European enclosure designed to contain dust and noise. Neither the shredder nor the enclosure is being imported from the General Iron facility. Importantly, this new equipment, together with the installation of particulate and air control equipment, utilize state of the art technology that has already undergone review by the Illinois Environmental Protection Agency (IEPA), which approved RMG's permit application on June 25, 2020....Another important fact lost in the blizzard of hyperbolic allegations is the fact that the RMG facility is more than 2,000 feet or the equivalent of almost seven football fields away from the nearest residence, in contrast to the General Iron facility, which is immediately adjacent to a public way and much closer to the nearest residential neighborhood...For all of these reasons, any past environmental complaints against the General Iron facility are of no relevance at all to the RMG facility. RMG has operated safely for decades in the exact location..."

These statements appear to directly contradict the subsequent assertions made in the Denial Letter that the other RMG owned, and/or controlled, recycling facilities posed a risk to the community and thereby supported the denial of the LRF permit to SSR.

As stipulated by and between CDPH and SSR during this hearing, "CDPH inspectors have conducted routine and regular inspections of the Existing Recycling Operations to ensure compliance with their permits and related environmental laws. Since 2006, CDPH has conducted over 100 inspections of each of the Existing Recycling Operations." RX-061.

Despite the many inspections conducted since 2006, CDPH had never raised any concerns with RMG, or its affiliated companies, (with the possible exception of the 2019 dust violation against RMT for which the company paid an administrative fine) until the Denial Letter of February 18, 2022.

CDPH has never taken any action to suspend or revoke a permit issued to RMG, or any of its affiliated companies, although the Commissioner has the authority to do so.

SSR's Lack of Transparency and Responsiveness During Permitting Process

As identified above, and as detailed in the Denial Letter, CDPH raised additional concerns regarding the lack of responsiveness and/or transparency on the part of SSR during the permit application process. As stated therein… "upon review of RMG's initial permit application, CDPH identified many significant omissions and inconsistencies, some of which were only remedied after repeated requests from CDPH. In particular, CDPH noted the following significant deficiencies:"

1. The proposed facility boundaries provided by the Applicant inexplicably omitted the 100' wide section of the Property the Applicant intends to use for the barge-loading of recyclables.

2. The Applicant failed to provide a copy of the April 22, 2019 Findings of the Zoning Board of Appeals, CAL 178-19-S & 179-19-Z (hearing held March 15, 2019), and any plans and drawings referenced there, as required under section 3.8 of the Rules for Large Recycling Facilities ("the Large Recycling Rules").

3. The Applicant failed to provide process flow diagrams and other information required under § 3.9.21.1 of the Large Recycling Rules. Although this information was provided to the IEPA, the Applicant refused to give this information to CDPH, citing business confidentiality.

4. The Applicant misrepresented drainage and federal Clean Water Act status by not disclosing that portion of the facility and the surrounding Property area are covered under a National Pollutant Discharge Elimination System (NPDES) permit and not providing a Storm Water Pollution Prevention Plan.

5. The Applicant requested CDPH to authorize operating hours that conflicted with the hours authorized under IEPA's air construction permit.

In a similar analysis to the HIA, where it has now determined that CDPH lacked sufficient authorization and that the HIA was not a requirement under the LRF Rules, there is no requirement under the Rules that an applicant meet a "responsiveness" threshold in order to be awarded a

permit. It should be noted that there was relevant testimony at the hearing that addressed the five described deficiencies that bear review.

1. The proposed facility boundaries provided by the Applicant inexplicably omitted the 100' wide section of the Property the Applicant intends to use for the barge-loading of recyclables.

   As testified to at hearing by SSR witness, James Kallas, the barge loading activities were disclosed to the City from "day one." 01/11/23 Tr. (Kallas) at 125:8-11. As Mr. Kallas explained, the boundaries of the Southside Recycling leased premises do not extend to the Calumet River, as disclosed in the initial application. Id. at 134:15- 17. Southside Recycling responded to CDPH's questions regarding the facility boundaries and barge loading both verbally and in the March 24, 2021 supplemental application. Id. at 135:7-137:22. After Southside Recycling submitted the March 24, 2021 response, CDPH never requested additional information or issued a deficiency letter relating to barge loading. Id. at 138:11-21. None of the CDPH witnesses provided rebuttal testimony to refute Mr. Kallas' testimony.

2. The Applicant failed to provide a copy of the April 22, 2019 Findings of the Zoning Board of Appeals, CAL 178-19-S & 179-19-Z (hearing held March 15, 2019), and any plans and drawings referenced there, as required under section 3.8 of the Rules for Large Recycling Facilities ("the Large Recycling Rules").

   The LRF Rules do not require an applicant to submit the findings of the ZBA. Instead, § 3.8 of the LRF Rules requires the submittal of a "copy of any Special Use (pursuant to §17-13-0900 of the Code) . . .approved by the Zoning Board of Appeals (ZBA), and any plans and drawings referenced therein." SX-009 at 0018. Id. at 139:19-22; 140:16-20 At the hearing, Mr. Kallas stated that Southside Recycling provided a copy of the Special Use in the form of the official minutes of the ZBA meeting approving the special use. 01/11/23 Tr. (Kallas) at 141:5-142:1. Southside Recycling also provided the drawings and plans of the facility in the original application. Id. at 145:9-17. When CDPH instead requested the findings of the ZBA, Southside Recycling promptly provided them in the January 13, 2021 submittal. Id. at 145:9-17, 147:16-148:8. After the January submittal, CDPH never requested additional information regarding the ZBA approval.

The witness also testified that the March 17, 2021 letter did not request any additional information on the topic. None of the CDPH witnesses provided rebuttal testimony to refute Mr. Kallas' testimony.

3. The Applicant failed to provide process flow diagrams and other information required under § 3.9.21.1 of the Large Recycling Rules. Although this information was provided to the IEPA, the Applicant refused to give this information to CDPH, citing business confidentiality.

   Mr. Kallas disputed the statement that Southside Recycling refused to provide process flow diagrams. 01/11/23 Tr. (Kallas) at 151: l6-23. The process flow diagrams dealt with equipment layout diagrams that are proprietary in nature and it would be harmful if they became public. CDPH could not assure Southside Recycling that confidential business information ("CBI") would not be made public even though MCC §11-4-310 recognizes trade secret confidentiality. According to the witness, he discussed this concern with Jennifer Hesse, CDPH's attorney, and Mr. Graham, who told Mr. Kallas he did not blame Southside Recycling for not wanting to provide these documents to the City. Id. at 152:1-19, 163:11-164:8; 1/13/23 Tr. at 109:19-110:13, 111:6-12. IEPA has a process for handling CBI. Southside Recycling went through that process in submitting the diagrams to IEPA, and IEPA determined that the documents were trade secret information and would be protected. 01/11/23 Tr. (Kallas) at 152:8-162:10. Mr. Kallas offered to have CDPH come to Southside Recycling's facility, or he would go to CDPH, or they could meet at a mutually agreed location to review the documents. Eventually, Mr. Kallas went to CDPH's offices and showed them the diagrams and understood they were satisfied. Id. at 164:9-165:4. After this, no one at CDPH ever asked for additional information and the March 17, 2021 letter from Mr. Marante does not request this type of information. Id. at 167:18-168:4. None of the CDPH witnesses provided rebuttal testimony to refute Mr. Kallas' testimony.

4. The Applicant misrepresented drainage and federal Clean Water Act status by not disclosing that portion of the facility and the surrounding Property area are covered under a National Pollutant Discharge Elimination System (NPDES) permit and not providing a Storm Water Pollution Prevention Plan (SWPPP).

At hearing, Mr. Kallas denied that Southside Recycling misrepresented anything in its original application. As Mr. Kallas testified at hearing, SSR informed CDPH in the original application that the Southside Recycling property drains into the treatment system and discharges to the Metropolitan Water Reclamation District (MWRD) sewer, so a NPDES permit is not needed. Id. at 168:18-169:22. CDPH requested additional information in the December 23, 2020 letter and Southside Recycling responded again in the January 13, 2021 submittal stating that an NPDES permit is not required because the facility will not be discharging storm water into the waters of the U.S. Id. at 170:10-173:1. CDPH requested an updated SWPPP in the March 17, 2021 request for information. According to the witness, Southside Recycling updated the SWPPP for the campus and provided it in its March 24, 2021 submittal. Id. at 173:9-177:11. After those submittals, CDPH never informed Southside Recycling that they needed additional information related to water drainage. Id. at 178 7-22. None of the CDPH witnesses provided rebuttal testimony to refute Mr. Kallas' testimony.

5. The Applicant requested CDPH to authorize operating hours that conflicted with the hours authorized under IEPA's air construction permit.

   Mr. Kallas testified that the hours in the IEPA permit only pertain to emissions producing activities; however, other activities at the site would be conducted 24/7. Id. at 179:7-21. The January 13, 2021 supplemental application states that Southside Recycling would operate in accordance with the most restrictive operating permit limit if there is conflicting or overlapping hours in the LRF Permit and IEPA construction permit. Id. at 182:20-183:16. After the January 13, 2021 submittal, CDPH never addressed this issue or requested additional information relating to hours of operation. Id. at 183:17-184:15. None of the CDPH witnesses provided rebuttal testimony to refute Mr. Kallas' testimony.

In the course of seven days of hearings, this ALJ had the benefit of listening to the in-court testimony of all witnesses, observing their demeanor while testifying and reviewing exhibits referenced by the witnesses in real time. Mr. Kallas' testimony was forthright and credible. Given the lack of rebuttal

evidence from the City's witnesses, Mr. Kallas' testimony refuted CDPH's assertions that SSR was not responsive and/or transparent in dealing with CDPH during the permit application process.

Additionally, it was clear from reviewing the evidence presented during the hearings that SSR was appropriately responsive to each request from CDPH. As one example, and as noted above, on December 23, 2020, CDPH's Renante Marante sent a letter to SSR requesting additional information regarding the initial LRF application. On January 13, 2021, over the course of the Christmas and New Years' holidays, and after additional discussions with CDPH, SSR filed a new or revised LRF application encompassing its response to the earlier application. The new application contained approximately 1,165 pages (an additional 700 pages) of documentation responsive to the CDPH's December 23, 2020 letter. This despite not having the assistance of an LRF-formatted application form from CDPH as their Rules require to be available for permit applicants. SX-019. [43]

MISCELLANEOUS ISSUES RAISED AT HEARING

Vested Rights

During the course of this hearing, SSR, by its counsel, argued that Illinois law recognizes the concept of "vested rights" as a basis for overturning the CDPH Commissioner's decision denying the permit.

As SSR argues in its Post-Hearing Brief:

"The Illinois Supreme Court has long found that 'where there has been a substantial change of position, expenditures or incurrence of obligations made in good faith by an innocent party under a building permit or in reliance upon the probability of its issuance, such party has a vested property right and he may complete the construction and use the premises for the purposes originally authorized, irrespective of subsequent zoning or a change in zoning classifications.' *Pioneer Trust & Savings Bank v. Cook County [County of Cook, et al], 71 Ill. 2d 510, 522 (1978)* (emphasis added) (citations omitted); see also *Interchemical, 29 Ill. 2d at 448 (1963)* (same). "The purpose of this exception is to mitigate the unfairness caused to property owners who have made a substantial change in position in good-

[43] SX-019, revised LRF permit application

faith reliance on the probability of obtaining a building permit, only to have their efforts thwarted by a change in the zoning classification of their land." *Gribbin v. City of Chicago, 384 I11. App. 3d 878, 887 (1st Dist. 2008)* (citations omitted); see also *Furniture L.L.C. v. City of Chicago, 353 Ill. App. 3d 433, 442-43 (1st Dist. 2004)* (holding developer had vested right to construct building because by the time the developer first learned of a potential zoning change the developer had expended approximately $900,000 towards the development at issue). Here, Southside Recycling obtained the necessary special use approval from the Zoning Board, building permits from the Department of Buildings, and all other necessary permits from the IEPA, CDPH and the City for construction of the facility - except for the LRF Permit - when it constructed the new $80 million facility. However, after Southside Recycling submitted its application for the LRF Permit and completed constructing the facility, CDPH then abruptly and materially changed the requirements for an LRF Permit by imposing a new HIA requirement and using the HIA to formulate new standards that Southside Recycling was never given previous notice of (such as the new standard that a facility cannot have one additional truck per day, cannot have any risk of noise from potential explosions, etc.) This HIA requirement was not foreseeable when Southside Recycling began construction of the new facility. The 9-month HIA process was also not foreseeable when RMG and General Iron entered into the Agreement with the City in 2019, wherein the City promised to reasonably cooperate in achieving "the efficient, expeditious transition" of the metal recycling operation to the Burley Property. See RX-025. As the cases above make clear, Southside Recycling had a good faith belief and vested right to operate the facility for its approved use (recycling metal) due to the approvals from the Zoning Board, the City Department of Buildings, the IEPA and CDPH. it would be unjust and unfair for the City to spring unforeseen requirements at the last minute of the regulatory process to thwart Southside Recycling's good faith reliance on the City's approval to construct the facility at the Burley Property; particularly after the facility was constructed. Therefore, because Southside Recycling has a vested right to use the facility for its approved purpose, this tribunal should vacate the CDPH's denial of the LRF Permit and order issuance of the necessary permit. (Respondent General III, LLC'S Post-Hearing Brief filed February 24, 2023 pgs. 85-86).

The vested rights argument raises substantive due process and potential equitable estoppel questions which, as the City argues, are beyond the scope of authority of the DOAH. There are no provisions in the applicable

Illinois statutes, City of Chicago ordinances, or Rules governing DOAH that provide such authority. This is an argument more appropriately to be raised in the Circuit Court which would have authority to adjudicate the issue and is therefore not considered in this Order.

Sims Metal Recycling

Throughout this hearing, SSR argued that Sims Metal, in the nearby Pilsen neighborhood, the only other vehicle shredding facility in the Chicago Metropolitan area, was allowed to operate by CDPH despite having a long history of code violations and operating a far less efficient recycling process than SSR's new facility would have upon operation. SSR raises equal protection claims in support of its arguments.

SSR was given limited opportunity to explore Sims operation to determine relevancy to SSR's permit denial, if any. After hearing proffered evidence, it appears that the two facilities' matters are not equivalent. The record shows that Sims was allowed to operate on an expired permit while its application for a new permit was pending. This is not a similar situation as SSR was applying for a New LRF permit – not an extension of an expired permit. Additionally, DOAH lacks authority to adjudicate constitutional and potential substantive due process claims.

The Term Agreement

The Term Agreement dated September 10, 2019, and entered into by and between the parties, did not have any bearing on this Decision. See Exhibit RX-025. It is referenced herein only for historical context and to identify the various entities who were signatories to the Agreement. The Department of Administrative Hearings does not have authority to adjudicate, or to enforce, potential contract issues and none of the terms contained in the Agreement are material to this decision.

CONCLUSION

According to the evidence presented during the hearing, which included extensive testimony from Southside Recycling as well as Chicago Department of Public Health witnesses, as of March 2021, Southside Recycling had met the LRF rules and requirements for an operating permit. Pursuant to Chicago Department of Public Health guidelines, General III,

LLC dba Southside Recycling should have been issued a permit, or a denial notice, within 60 days. Instead, at the direction of Mayor Lightfoot, the Chicago Department of Public Health, acting without City Council legislative authority, paused the permit application process and initiated a health impact assessment, which itself lacked authorization from the Council. As a result of the HIA, additional concerns were raised and included in the Denial Letter. For the most part, these additional concerns had never been raised before although the Chicago Department of Public Health was aware of, or should have been aware of, the items prior to February 2022.

The Denial Letter is predicated on all of the items contained in the letter - the findings of the HIA, the allegations concerning the four affiliated companies, and the concerns of lack of transparency and responsiveness during the application process. As noted, some raise legal issues, others involve factual determinations. It is not possible to separate out any one item from another to determine how much weight the Commissioner gave to any individual item(s).

Accordingly, for the reasons contained in this FDO, the determination of the Commissioner of the Chicago Department of Public Health to deny a recycling permit to General III dba Southside Recycling is vacated.

Pursuant to Illinois Municipal Code, 65 ILCS 5/1-2.1-7, this Order is a final determination for purposes of judicial review and subject to review under the Illinois Administrative Review Law, 735 ILCS 5/3-103, by filing an appeal in the Circuit Court of Cook County, Illinois within 35 days from the date that a copy of the decision sought to be reviewed was served upon the party affected by the decision. Enforcement of this Order is governed by 65 ILCS 5/1-2.1-8.

Mitchell C. Ex
Administrative Law Judge
City of Chicago
Department of Administrative Hearings

June 1, 2023.
Entered