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Attorney Edward M. Pikula  
City of Springfield Law Department  
36 Court Street  
Springfield, Massachusetts 01103

Dear Attorney Pikula:

The Conservation Law Foundation ("CLF") greatly appreciates the Springfield City Council's timely consideration of issues that have been raised by concerned residents regarding the power plant project proposed by Palmer Renewable Energy ("PRE"), including a review of the Special Permit that was granted in 2008 for an earlier – and very different – version of the project. This letter is intended to follow up from my brief remarks at the City Council's December 13 meeting and to respond to many of the misleading arguments and unsupported assertions laid out in correspondence of that same date from PRE's lawyers, John Fitzgerald and Tom Mackie.

As discussed below, it is evident that (1) a Special Permit and/or use variance is needed by PRE in order to move forward with its power plant project, and (2) the permit granted in 2008 for a different version of the PRE project does not apply to the project currently proposed by PRE in light of substantial differences between the two versions of the project, differences that even PRE has admitted are material.

By its own actions, PRE repeatedly has admitted that it needs a special permit in order to go forward with its project, and the record reflects that the new version of the project falls under an entirely different Special Permit category than the old project. Accordingly, we respectfully ask the City Council to revoke the 2008 Special Permit for just cause.

Further, Attorney Fitzgerald's attempt to strong-arm the City with the threat of litigation that he claims could result in substantial damages against the City is contrary to the plain letter of the law. The City unquestionably has the right to revoke a special permit for just cause, and Massachusetts law prohibits any claim for damages that is based upon the issuance, denial, suspension or revocation of any permit, license, certificate, approval, order or similar authorization. G.L. c. 258, § 10(e).

**Background:**

PRE submitted to Springfield City Council a Preliminary Application for a Special Permit, dated August 25, 2008. The petition explicitly sought a special permit as follows:

...for the construction and operation of a biomass energy plant (recycling center) at the property known as WS Cadwell Drive (02195-0104)(a.k.a. 1000 Page Boulevard) as allowed by M.G.L. and the Springfield Zoning Ordinance Article XIV, Section 1401.3.gg.



The petition was signed by Janet Callahan on behalf of the property owner, Palmer Paving Corporation, and by David Callahan on behalf of the petitioner, PRE, and was docketed by the City Clerk on August 27, 2008 with a hearing set for less than one month later, on September 23. The docketed petition is marked to reflect that the proposed use is "IN VIOLATION OF ZONING ORDINANCE until approved by the City Council on [sic] accordance with the provisions of the Zoning Ordinance." According to the 2008 application, the project was a "38-MW [Megawatt] renewable biomass energy plant using recycled wood," and would combust an average of 700 tons per day (tpd) of "recycled wood" from C&D processors and 200 tpd of green wood chips. As noted in the preliminary application for special permit and Office of Planning & Economic Development's Analysis for a Special Permit, the application called for the development of a project that would utilize primarily "positively picked construction and demolition ["C&D"] debris" to generate electricity.

PRE also sought two approvals for the project from Massachusetts DEP: (1) a *Major* Comprehensive Air Plan Approval with respect to the project's air emissions; and (2) a Beneficial Use Determination ("BUD") to reclassify C&D-derived material from "solid waste" to fuel. In the face of significant issues raised by numerous stakeholders – including concerned local residents, scientists, public health interests and environmental organizations such as CLF – the Patrick Administration appropriately suspended review of these permit applications and set in motion a plan to undertake a health impacts assessment.

PRE changed course this year, however, and is now proposing a very different version of its project – one that would not use C&D-derived material as fuel and thus will avoid the need for a BUD and, in PRE's view, will require a *Non-Major* Comprehensive Plan Approval rather than a "major" source approval. The new version of the project would rely primarily on green wood chips and would require a striking 31% *more* fuel to produce 8% *less* power. PRE accordingly filed a Notice of Project Change (NPC) with the Massachusetts Environmental Policy Act (MEPA) office, specifying several "material changes" to the project. A Secretary's Certificate on that NPC was issued on November 19, 2010.

For the sake of clarity, this letter refers to the previous version of PRE project as the "PRE C&D Project" and the current version of the project as the "New PRE Project".

CLF has been actively involved in reviewing and commenting on the different versions of PRE's project since early 2008. In light of the potentially significant environmental and public health impacts of both versions of the project, CLF repeatedly has raised concerns with state environmental regulators regarding the need for comprehensive environmental review. Upon request, we would be happy to share copies of the comments filed by CLF from 2008 through 2010 with respect to the state environmental review of the project and the provisional BUD.

#### **The New PRE Project Requires a Special Permit Just as the PRE C&D Project Did.**

As noted in your September 16, 2010 Memorandum to City Council President Tosado ("Sept. 16 Memo"), Special Permits may be issued pursuant to the Springfield Zoning Ordinance "only for uses which are in harmony with the general purpose and intent of the ordinance."

PRE applied for a Special Permit for the PRE C&D Project in 2008 under Zoning Ordinance Section 1401.3.gg, which allows Special Permits in the Industrial A Zone for a "recycling center." The PRE C&D

Project presumably was reviewed under, and secured a Special Permit pursuant to, this section on the basis that the project proposed to “recycle” significant quantities of C&D-derived material as fuel. Yet no such C&D debris “recycling” component is present in connection with the New PRE Project, and it would not be appropriate to consider or grant a Special Permit for the new project under this section of the Zoning Ordinance. The New PRE Project arguably could be reviewed pursuant to Section 1401.3.n, which allows for special permits for incineration of refuse, but it does not reasonably fall within the ambit of Section 1401.3.gg.

Although PRE now asserts that it somehow may proceed with its project “as of right,” without a special permit, this argument is contrary to the Springfield Zoning Ordinance<sup>1</sup> and is belied by numerous admissions of record. For example, the Secretary’s Certificate on the NPC for the New PRE Project reflects that a Site Plan Review, Special Permit and Building Permit were required from the City of Springfield, and the Secretary “strongly encouraged” PRE to coordinate closely with the City and the neighborhood during project permitting and beyond. In addition, PRE’s current posturing is self-contradicting and begs the question: how is it that PRE claims it will sue for over \$100 million in damages if the city revokes its 2008 Special Permit if the permit supposedly is not needed anyway? PRE clearly believes it needs a special permit to proceed, and on this point we are in agreement.

### **There is More than Ample “Just Cause” for Revocation of the 2008 Special Permit for the PRE C&D Project.**

In accordance with Section C-1406 of the Springfield Zoning Ordinance, the following standard for revocation of a special permit applies:

Revocation. The Building Commissioner may revoke the Certificate of Occupancy, the Planning Board and City Council *may revoke a Special Permit for just cause*. Examples of just cause include, but are not limited to, failure to comply with any conditions attached to the Special Permit, substantial deviation from the Site Plan, false or misleading testimony at a public hearing, failure to comply with applicable city ordinances and regulations.

As I discussed at the December 13 City Council meeting, PRE itself admits that the New PRE Project reflects “material changes” to the PRE C&D Project, including many aspects that were specifically flagged in the application that gave rise to the 2008 Special Permit.<sup>2</sup> These changes include:

1. Nature of the Project: The New PRE Project is not a “recycling center” and, unlike the PRE C&D Project, does not entail any “recycling” of C&D debris as fuel.<sup>3</sup> Attorney Fitzgerald’s comments on December 13 regarding the original project’s focus on C&D debris only serve to underscore this substantial deviation from the project as originally

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<sup>1</sup> The industrial uses allowable “as of right” do not include “electric power generation” or “power plants.” Moreover, PRE’s interpretation would lead to patently absurd results, including as of right siting for nuclear and coal-fired power plants.

<sup>2</sup> PRE’s NPC explicitly delineates changes that it admits are “material.”

<sup>3</sup> The special permit explicitly indicates that it was granted *solely* for the construction and operation of a biomass energy plant (*recycling center*), and that compliance with that and other conditions is *required*.

proposed.<sup>4</sup> The change is so significant that it thrusts the PRE project outside the scope of the Special Permit category in which it previously fell and was found allowable. Whereas the project previously was subject to a Special Permit under Section 1401.3.gg (“recycling center”), it now arguably may fall in the special permit category for “incineration” of “refuse” under Section 1401.3.n. Alternatively, a use variance may be required.

2. Fuel Type and Volume: The New PRE Project proposes to rely primarily on green wood chips rather than C&D-derived material. It is also significant that the New PRE Project would consume 31% more fuel, an increase of 284 tons per day.
3. Increase in Size and Number of Trucks: Truck size is proposed to increase from 20 to 25 tons per truck (25% per vehicle), and the New PRE Project would require 36 more truck trips per week.
4. Reduced Benefits: Despite consuming significantly more fuel, the New PRE Project would produce 8% less power – 35 MW instead of 38 MW.
5. Major to Non-Major Source of Emissions/Less Protective Standard Applies: Whereas PRE had submitted a Major Comprehensive Plan Approval application to Massachusetts DEP for the PRE C&D Project, and the project would have had to meet a standard of “Lowest Achievable Emissions Reductions” (LAER), PRE now is seeking a Non-Major Comprehensive Plan Approval for the New PRE Project – and a less stringent standard (Best Available Control Technology) would apply.<sup>5</sup>
6. Change in Fuel Source and Questionable Supply: PRE previously proposed to get a significant portion of its fuel from New England Recycling subject to a BUD, but now proposes to secure fuel from Northern Tree Service without a BUD and without a clear indication of where and how the fuel will be produced. This change gives rise to concerns about potential transport of invasive species (e.g., Asian Long-horned beetle) and, in the event sufficient green wood chips prove not to be available, the prospect of fuel switching later in time.
7. Changes to the Site Plan: PRE flagged a number of site plan modifications as part of the basis for the NPC it filed with the MEPA office, but it is unclear to what extent those changes are comprised of modifications made to accommodate city permitting requirements and conditions, or may be entirely new changes to the site plan. At a minimum, the City Council should take a close look to discern whether any material changes have been proposed to the site plan subsequent to the City’s review of the PRE C&D Project.

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<sup>4</sup> As noted in the Sept. 16 Memo (at p.2), the 2008 Special Permit gives permission “to build and operate *the proposed facility* if the other requirements are met.” (Emphasis added.) The memo notably details the characteristics of the “proposed facility,” including its planned reliance on C&D-derived fuel, the volume of fuel that was proposed, the anticipated power output, etc. The “proposed facility” that is the subject of the Special Permit is materially different from the New PRE Project, and the 2008 Special Permit thus provides no right or authorization for PRE to move forward with the new and different project.

<sup>5</sup> The assertion of PRE attorney Tom Mackie that “[i]t is undisputed that the project changes reduce the air pollution of the project” is demonstrably false. See, e.g., the extensive comments of Dr. Mary Booth submitted on November 9, 2010 regarding the NPC. In addition, no air permit has yet been granted by Massachusetts DEP for the New PRE Project, so there is no basis for Attorney Mackie’s argument that the New PRE Project supposedly “meets the performance standard for air pollution set forth in the City’s Zoning ordinance.” Even to the extent the City’s air emissions standards are tied to DEP standards and approvals, no such approvals have been granted, nor are they assured. Indeed, no draft permit has yet been released and the corresponding public comment period has not even begun.

8. Health impacts: The 2008 Special Permit was predicated in part on a finding that “the use as developed will not adversely affect the neighborhood.” Yet The Massachusetts Department of Public Health has since weighed in with respect to significant concerns about the anticipated impacts on adjacent communities that are seriously overburdened with air pollution and associated public health impacts such as elevated levels of pediatric asthma. In addition, there have been significant developments regarding published literature on the health impacts of particulate matter (PM) and other pollutants that will be emitted by the New PRE Project.
9. Air Emissions Violations by Palmer Paving: Just this year, Palmer Paving has been the subject of significant enforcement action and fines with respect to exceedances of air emissions limits at the asphalt facility at the project site. To the extent City Council considered the cumulative impact of air emissions from the existing hot asphalt facility and a new power plant project at the same site when it reviewed the 2008 application for a special permit, it presumably did not take into account emissions from the asphalt facility that were above and beyond permit limits. Given the subsequent enforcement action against Palmer Paving, the Council should reconsider the cumulative impact of the existing plant taken together with a new power plant project on the same site.
10. Miscellaneous Other Changes: The above-listed changes represent some of the most significant ones, but numerous further changes should not be ignored. They include: modifications to the air pollution control system, water withdrawals and discharges, changes to the building envelope, an increase in impervious surface area and substantially increased moisture content of the fuel supply.

Many of these changes, even taken individually, represent “substantial deviations” from the PRE C&D Project that was the subject of the 2008 Special Permit and, accordingly, demonstrate “just cause” for revoking that permit. Taken together, these changes compel a conclusion that just cause exists for revocation. In fact, it is very difficult if not impossible to see how the City Council could conclude otherwise, given that the special permit category (1401.3.gg) that was the basis for the 2008 Special Permit no longer applies at all.

CLF believes PRE’s attorney Mackie significantly mischaracterizes the Sept. 16 Memo to the extent he suggests that the memo supposedly reflects a determination of a lack of “just cause” for permit revocation. December 13, 2010 letter from Mackie to Gatto, at p. 1. To the contrary, the Sept. 16 memo carefully points out that (1) as of September 16, *the Law Department had not been provided with evidence* of non-conformities with Special Permit conditions or other evidence that would constitute grounds for revocation, which is quite different from saying that no such evidence exists; (2) the Council *may* consider permit revocation; and (3) a determination regarding whether to revoke is an issue for the Council to decide pursuant to notice and public hearing, based on the evidence. CLF fully agrees with these latter two points and, as discussed above, we believe the record compels a finding that “just cause” exists for revoking the 2008 Special Permit.<sup>6</sup>

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<sup>6</sup> CLF is in agreement with the conclusion memorialized in the Sept. 16 Memo that the City Council has revocation authority over special permits, including the one in question here.

In addition, it is worth noting that PRE cannot be granted a Certificate of Occupancy (or any other city permit tied to the Special Permit) because it will not be able to demonstrate compliance with the 2008 Special Permit in light of all of the deviations noted above.<sup>7</sup>

**Provided Appropriate Procedures for Notice and Public Hearing Are Followed, A Decision by City Council to Revoke the 2008 Special Permit Should Readily Survive Any Threatened Legal Challenge, Contrary to PRE's Assertions.**

The record reflects substantial evidence in favor of revoking PRE's 2008 Special Permit, more than what is required to warrant revocation and defend against any ensuing challenge. Indeed, the City Council may revoke the permit so long as there is *any* rational basis for doing so (i.e., so long as it is not based on legally untenable grounds and is not unreasonable, whimsical, capricious or arbitrary). *Davis v. Zoning Bd. of Chatham*, 52 Mass.App.Ct. 349, 355 (2001). Controlling Massachusetts jurisprudence on this issue indicates that the bar is not as high as the Sept. 16 Memo might otherwise suggest for the Council to revoke the special permit and successfully withstand any ensuing legal challenge. As the Massachusetts Court of Appeals opined in *Davis v. Zoning Bd. of Chatham*:<sup>8</sup>

On a G.L. c. 40A, § 17 appeal [e.g., an appeal of a decision from a special permitting authority], review of the board's decision, while based upon *de novo* fact finding, is nonetheless "circumscribed.... [That decision] 'cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary.'" Even if the record reveals that a desired special permit could lawfully be granted by the board because the applicant's evidence satisfied the statutory and regulatory criteria, *the board retains discretionary authority to deny the permit, so long as that denial is not based upon a legally untenable or arbitrary and capricious ground.*

*Even when a zoning board cites no particularized reasons or any specific evidence for its denial decision, its action will be upheld, as will that of a judge affirming that action under G.L. c. 40A, § 17, if a rational basis for the denial exists which is supported by the record. So long as "any reason on which the board can fairly be said to have relied has a basis in the trial judge's findings and is within the standards of the zoning by-law and The Zoning Enabling Act, the board's action must be sustained regardless of other reasons which the board may have advanced."*

*Davis*, 52 Mass.App.Ct. at 349, 355-56 (emphasis added, internal citations omitted). See also, *81 Spooner Rd. LLC v. Zoning Bd. of Brookline*, 78 Mass.App.Ct. 233, 246 (2010); *Britton v. Zoning Bd. of Appeals of Gloucester*, 59 Mass.App.Ct. 68, 76 (2003). Here, as discussed above, one of the most basic reasons why revocation of the 2008 Special Permit is warranted is that the special permit category under which the permit was granted – i.e., "recycling center" – does not apply to the New PRE Project; the project would need to secure a special permit pursuant to the appropriate category in order to proceed. Moreover, it would be reasonable for the Council to conclude that the other material changes to the project, taken individually or collectively, provide just cause for revocation.

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<sup>7</sup> See *Chambers v. Bldg. Inspector of Peabody*, 40 Mass. App. Ct. 762, 767 (1996) ("The foundation and building permits in this case, incorporating as they did substantial changes to the facility from what the city council had first approved, were issued in derogation of the provisions of the zoning ordinance and the terms and conditions of the 1990 special permit.")

<sup>8</sup> The memo suggests that a "substantial evidence" standard may apply, yet the relevant jurisprudence supports a "rational basis" test, as discussed herein.

In *Davis*, the Massachusetts Court of Appeals also made the following observation that underscores both the responsibility that City Council bears with respect to evaluating circumstances such as those present here, and the level of deference that ought to be accorded to the Council in that role:

Judicial deference appears especially appropriate as to decisions such as that at issue here, which reflect the intimate knowledge, experience, and judgment of local officials, elected by the people...

*Davis*, 52 Mass.App.Ct. at 356.

Further, Massachusetts law provides governmental immunity against any claim for damages that is based upon the issuance, denial, suspension or revocation of any permit, license, certificate, approval, order or similar authorization. G.L. c. 258, § 10(e). See *Morrissey v. New England Deaconness Assoc.*, \_\_\_ Mass. \_\_\_, 2010 WL 5158560 (Mass. 2010) (noting that the language regarding sovereign immunity “is plain and unambiguous, and it ‘cuts a broad swath, exempting from recovery ‘any claim’ in a variety of named circumstances.”). Accordingly, even in the highly unlikely event PRE could successfully bring an action to challenge a revocation of its 2008 Special Permit, the remedy would entail remand of the proceeding to City Council and/or reinstatement of the permit, not monetary damages as PRE would have the Council believe.

**Should PRE Seek Modification of the 2008 Special Permit or a New Special Permit, Formal Notice and Public Hearing Would Be Required – and the Council May Deny the Modification or New Permit On Any Rational Basis.**

Given that the New PRE Project does not fall in the “Recycling Center” special permit category under which the 2008 Special Permit was granted, as well as all of the other substantial project changes noted above, PRE needs to seek a new Special Permit rather than modification to the 2008 permit. In either case, a formally noticed public hearing clearly is required. See, e.g., *Chambers v. Building Inspector of Peabody*, 40 Mass.App.Ct. 762, 764 (1996) (holding that substantial modifications require submission of a revised site plan to the permit granting authority and a public hearing).

PRE’s attorney Tom Mackie’s reliance on *Barlow v. Planning Board of Wayland*, 64 Mass. App. Ct. 314, 319 (2005) to avoid such scrutiny of a new or modified Special Permit is misplaced.<sup>9</sup> Importantly, as discussed above, the changes between the PRE C&D Project and the New PRE Project are substantial, not “minor deviations.” Further, if the City Council permits PRE to seek modification to the existing permit or if PRE seeks an entirely new permit, the Council not only must conduct a formally noticed public hearing but also must take a look anew at the proposed project – and the normal discretionary review

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<sup>9</sup> Attorney Mackie’s December 13, 2010 letter cites the *Barlow* decision in support of the proposition that “minor deviations do not require a modified special permit.” The *Barlow* decision sets forth no such holding. Rather, the court in *Barlow* referred to its earlier decision in *Chambers* where the court had reversed Superior Court and local board approvals of a project that differed from the corresponding special permit beyond the “minor deviations” that were contemplated in one of the conditions of that permit. *Barlow*, 64 Mass. App. Ct. at 319. In *Chambers*, the Court notably held that “The significant increase in the building’s size or footprint and the change (however slight) in the building’s actual location upon the locus were changes of substance.” The special permit under consideration in that case was found not to encompass the revised project, given the “changes of substance” between the original and revised projects; the remedy laid out by the Court allowed the project proponent an opportunity to seek a new special permit.



standards would apply. See *id.* at 320-21. In other words, even if the Council could approve the project, it may deny the project on any rational basis that is not “arbitrary or capricious.”

**Conclusion:**

For all of the foregoing reasons, we respectfully encourage the City Council to hold a properly noticed revocation hearing regarding the Special Permit that was granted to PRE in 2008, pursuant to the procedural guidance laid out in the Sept. 16 Memo. The evidence of record already is abundantly clear that the Council has more than ample justification for revoking the Special Permit.

Alternatively, the Council should direct PRE to seek a new Special Permit in the event it wishes to proceed with the New PRE Project. If PRE applies for such a new Special Permit, the Council would need to hold a properly noticed public hearing and take a hard look at whether the New PRE Project meets the standards of the Springfield Zoning Ordinance, including avoidance of impacts on the neighborhood – a standard that CLF believes cannot be met by either the PRE C&D Project or the New PRE Project.

Please do not hesitate to contact me at (617) 850-1740 or sreid@clf.org if you have any questions or would like to discuss the foregoing.

Sincerely,

A handwritten signature in black ink that reads "Susan M. Reid". The signature is written in a cursive, flowing style.

Susan M. Reid  
Senior Attorney

cc: Springfield City Council