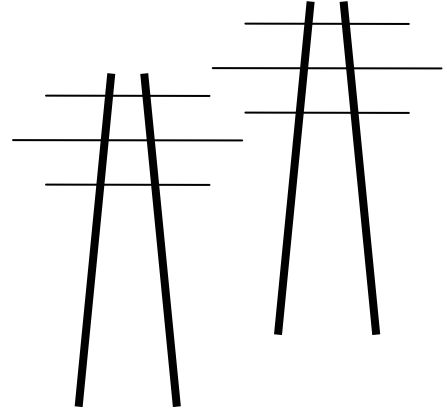


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June 22, 2009

Kimberly Holien
City Planner

via email: kimberly.holien@ci.minneapolis.mn.us

Erik Nilsson
Asst. City Attorney

via email: erik.nilsson@ci.minneapolis.mn.us

City of Minneapolis
350 So. 5th St.
Minneapolis, MN 55415

RE: City Attorney Opinion
Downtown Minneapolis Garbage Burner

Dear Mr. Nilsson and Ms. Holien:

I have been asked by Neighbors Against the Burner to review Mr. Nilsson's Memorandum regarding the City's authority to regulate air emissions from the HERC facility. Neighbors Against the Burner is comprised of Minneapolis residents and residents of St. Paul who would be affected.

I find this Memorandum confusing and conflating, raising several important issues. In short, Minnesota law expressly allows a city to set more stringent emissions regulations than those of the MPCA. Further, the "Target Field" EIS was very narrow in scope and in no way addresses the full potential range of impacts of the HERC burner – it only addressed potential impacts on ballplayers, staff and fans, and addressed potential impacts only over a very low percentage of hours of operation of the facility.

First, the Memorandum opens conflating "ambient air quality standards" with specific point source regulation. Yes, regulation of ambient air quality standards is prohibited, BUT as acknowledged, beginning with "However," the Memorandum notes the converse -- the black letter statute governing local authority over air emissions states that:

... local units of government may set emission regulations with respect to stationary sources which are more stringent than those set by the Pollution Control Agency.

Minn. Stat. §116.07, Subd. 4 (emphasis added). HERC is not a moving target, it is a "stationary source."

Following that clear statement of authority, the Memorandum claims, without support, that a statutory provision regarding compliance with federal and state environmental laws and regulations prohibits local regulation:

This omission indicates that the legislature did not intend for HERC to be bound by local emissions regulations.

Memorandum, 2, citing Harris v. County of Hennepin, 679 N.W. 2d 728, 731 (Minn. 2004). But as "Jimmy Jam" Harris' tax case also states, "[s]tatutes should be read as a whole with other statutes that address the same subject. See State v. Chambers, 589 N.W.2d 466, 480 (Minn. 1999)." *Id.* When considered in light of the statutory permission to regulate, reiteration of this statutory permission is not necessary, and, absent any legislative history showing otherwise, omission is not prohibition. Legislative interpretation is not to be twisted with contortions where plain language of the statute has a reasonable result:

The object of statutory interpretation is to ascertain and effectuate the intention of the legislature Minn. Stat. § 645.16 (2002). Courts must give effect to the plain meaning of statutory text when it is clear and unambiguous. Green Giant Co. v. Comm'r of Revenue, 534 N.W.2d 710, 712 (Minn. 1995).

...

*We look to other sections of the law and our canons of statutory construction to determine the intent of the legislature. We may examine, among other considerations, the "occasion and necessity for the law" and "the circumstances under which it was enacted." Minn. Stat. § 645.16 (2002). We may also look to the state of the law before a statute was enacted. *Id.* In doing so, we will attempt to read statutes in a way that gives effect to all their provisions. *Id.* Statutes should be read as a whole with other statutes that address the same subject. See State v. Chambers, 589 N.W.2d 466, 480 (Minn. 1999).*

Id. There is no support for the interpretation of the Memorandum that the "omission" is an exclusion. There is nothing by way of citation or legislative history to provide any reason for interpretation of Minn. Stat. §383B.235, Subd. 3 as other than its black letter meaning. There is no support to interpret the statute in direct contradiction to a related state statute. Sometimes an omission is just an omission. There is no conflict in the laws as written, only in the erroneous interpretation in the Memorandum.

Further, this Memorandum disturbingly conflates an EIS which examined the impacts of the "Target Field" and addressed potential impacts of HERC upon the Target Field development site as an Environmental Impact Statement addressing impacts of HERC. The Target Field EIS addressed impacts to the Target Field site only, a very narrow scope, addressing impacts on "ballplayers, ballpark staff and fans," only during hours of play, not hours the HERC facility was burning. Target Field EIS, p. ES-1; 3-6. Further, it did not address in any way the impacts of HERC on others areas of the city and made no statement that "no adverse effects were anticipated and that no mitigation was necessary" regarding HERC impacts on the city over the full hours of operation, again, only narrowly regarding the Target Field ball players, ballpark staff and fans. It is misuse of the EIS document to claim a broader context of these statements.

"Conditional use" by definition invites conditions to be set for use of land. The City has the power to order conditions, including more stringent limitations of emissions, authorized by Minn. Stat. §116.07, Subd. 4.

Further, please keep in mind that conditions on a permit **DO NOT STOP** the project, but allow it to **GO FORWARD** with public health and safety a clear priority. If such a condition would stop the project, it speaks to the veracity of the permit applicants as to the emissions of the project.

Very truly yours,



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