

Waste Derived Fuels/Cement Manufacturing Facility: Indiana Appellate Court Addresses Zoning Classification Issue



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The Court of Appeals of Indiana “Court” in an April 18th opinion addressed a zoning question associated with a cement kiln’s desire to utilize liquid waste derived fuels (“LWDF”). See *Essroc Cement Corp v. Clark County Board of Zoning Appeals and Sierra Club*, Court of Appeals Case No. 10A04-1709-PL-11-2199.

LWDF would be used to supplement or supplant the current use of coal for powering the cement kiln.

Essroc Cement Corporation (“Essroc”) operates a cement kiln (“kiln”) in Clark County, Indiana. The kiln is on land zoned M2 for heavy industrial use. Coal has been used to power its production process.

The opinion indicates that Essroc began considering utilization of LWDF to fire its kiln. As a result, it requested what is described as an “informal determination” from the Clark County Plan Commission (“Commission”) regarding whether LWDF could be utilized on land zoned M2. The Executive Director of the Commission provided Essroc with what is described as a “private letter” stating that the use of LWDF in this manner was prohibited in an M2 zone.

Commission staff subsequently issued a second “private letter” to Essroc that revoked the prior private letter. They concluded that Essroc must obtain a variance or re-zone its property to an M3 classification if it wished to utilize LWDF to power the kiln.

Essroc appealed the second private letter to the Clark County Board of Zoning Appeals (“CCBZA”). A public hearing was held and it was determined that the use of LWDF in the requested manner in an area classified as M2 was prohibited. Therefore, Essroc would either have to re-zone to M3 (described as a Hazardous Waste Disposal District) or petition for a use variance.

A trial court was asked by Essroc to review this administrative determination. It affirmed the CCBZA decision. A Motion to Correct Error was filed by Essroc which was granted in part and denied in part.

Essroc appealed to the Court of Appeals of Indiana and raised the following issues:

1. Does the Clark County Zoning Ordinance (“CCZO”) permit the burning of LWDF on land zoned M2 or only on land zoned M3?
2. Can Essroc nevertheless burn LWDF on its land zoned M2 because such burning is permitted as an “accessory use”?

3. Does Plan Commission staff have the authority to revoke a prior staff-issued, non-public, informal zoning determination letter by sending another staff-issued letter?
4. If Plan Commission staff could revoke the initial staff determination, was Essroc entitled to notice and a public hearing before that revocation?
5. Is the CCBZA equitably estopped from requiring Essroc to rezone because Essroc had spent money in reliance on the Plan Commission's first determination letter?
6. Should Finding 18, Finding 19, and Conclusion 7 be struck from the trial court's final order because the issue of whether the CCZO is preempted by federal law was not before the trial court?

Essroc initially argued that its proposed use of alternative fuels is a matter of right in the M2 district. Permitted uses are the uses which are allowed in a specific zoning district.

The Court therefore undertook an analysis of the intention of the district as to the term "Heavy Industrial." The "Permitted Uses" associated with this classification were also described. The Court determined that the storage and burning of hazardous materials does not fit into any one of the Permitted Uses listed for the M2 district. It stated that the CCBZA had determined that the only zoning district that permitted the burning of hazardous waste is the M3 district. Noted was the described "intention" in an M3 Hazardous Waste Disposal District to include the "disposal, destruction, or recycling of toxic chemicals . . . through incineration, land filling, or other mechanical, chemical or technological means."

The Court also rejected Essroc's argument that its conversion to LWDF as an off-limit fuel does not fit into the into any of the M3 Permitted Uses because it is not engaged in the storage, processing, or recycling of LWDF. It also concluded:

- LWDF cannot be utilized in the referenced manner as an "accessory use"
- The Commission does have the authority to revoke a prior staff-issued, informal zoning determination letter
- Essroc was not entitled to notice and public hearing before the revocation of the first private letter
- The CCBZA is not equitably estopped from requiring Essroc to rezone because the company spent money in reliance on the first determination letter
- A federal preemption issue could not be addressed

The trial court's findings that upheld the CCBZA's decision regarding the inability of LWDF to be burned in an M2 district were upheld.

A copy of the opinion can be found [here](#).