

<b>CLERK'S NOTICE</b>		DOCKET NUMBER <b>1785CV00782</b>	<b>Trial Court of Massachusetts</b> <b>The Superior Court</b>
CASE NAME: <b>United Medical Waste Management, Inc. vs. Board of Health of the Town of Webster</b>			Dennis P. McManus, Clerk of Courts
TO: <b>George F Hailer, Esq. Lawson &amp; Weitzen, LLP 88 Black Falcon Ave Suite 345 Boston, MA 02210-2414</b>			COURT NAME & ADDRESS <b>Worcester County Superior Court 225 Main Street Worcester, MA 01608</b>
<p>You are hereby notified that on 12/04/2017 the following entry was made on the above referenced docket:</p> <p><b>ORDER: /MEMORANDUM OF DECISON AND ORDER ON THE PLAINTIFF'S MOTION FOR JUDGMENT ON HE PLEADINGS</b></p> <p>It is hereby ORDERED that United Medical's Motion for Judgment on the Pleadings is ALLOWED. It is further ORDERED that Judgment enter un favor of United Medical reversing the Board of Health's decision denying the site assignment application located at 56 Worcester Road and that the Board of Health issue United Medical its requested site assignment forthwith as modified during the course of the Board of Health's proceedings.</p> <p>Judge: Wrenn, Hon. Daniel M</p>			
DATE ISSUED <b>12/06/2017</b>	ASSOCIATE JUSTICE/ ASSISTANT CLERK <b>Hon. Daniel M Wrenn</b>	SESSION PHONE# <b>(508)831-2357</b>	SCV016_X11 08/2014

<b>JUDGMENT ON THE PLEADINGS</b>		<b>Trial Court of Massachusetts The Superior Court</b>
DOCKET NUMBER	1785CV00782	Dennis P. McManus, Clerk of Courts
CASE NAME	United Medical Waste Management, Inc. vs. Board of Health of the Town of Webster	COURT NAME & ADDRESS Worcester County Superior Court 225 Main Street Worcester, MA 01608

This action came before the Court, Hon. Daniel M Wrenn, presiding, upon a motion for judgment on the pleadings,

After hearing or consideration thereof;

**It is ORDERED AND ADJUDGED:**

That judgment is hereby entered for the plaintiff United Medical Waste Management, Inc. reversing the Board of Health of the Town of Webster's decision denying the site assignment application located at 56 Worcester Road, and that the Board of Health of the Town of Webster issue plaintiff United Medical Waste Management, Inc. its requested site assignment forthwith as modified during the course of the Board of Health of the Town of Webster's proceedings.

DATE JUDGMENT ENTERED 12/05/2017	CLERK OF COURTS/ASST. CLERK X Joanne C. Henry
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COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 17-00782

UNITED MEDICAL WASTE MANAGEMENT, INC.

vs.

BOARD OF HEALTH OF THE TOWN OF WEBSTER

MEMORANDUM OF DECISION AND ORDER ON THE  
PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

The plaintiff United Medical Waste Management, Inc. ("United Medical" or "plaintiff") filed the instant action on May 15, 2017 against the defendant Board of Health of the Town of Webster ("Board of Health"), after the Board of Health took "no action" on United Medical's submission of a site plan proposing the construction of a biomedical waste transfer facility ("the Waste Facility") in the town of Webster. On August 17, 2017, United Medical filed a motion for judgment on the pleadings pursuant to Mass. R. Civ. P. 12(c) and Superior Court Standing Order 1-96, which the Board of Health opposes. The Court heard arguments from the parties on November 9, 2017, and subsequently took the matter under advisement. For the following reasons, the Plaintiff's Motion for Judgment on the Pleadings is ALLOWED. 7

**BACKGROUND**

The following facts derive from the administrative record.<sup>1</sup>

United Medical sought to construct the Waste Facility at 56 Worcester Road in Webster, Massachusetts. On February 25, 2016, United Medical simultaneously filed with both the Department of Environmental Protection ("DEP") and the Board of Health a "BWP SW 01-Site

<sup>1</sup> The full administrative record totaled twenty exhibits, including a DVD of the Board of Health's hearings from March 20, 2017 and April 24, 2017; United Medical's DEP application; DEP's letter on site suitability; United Medical's contingency plan; and letters from a town engineer and a consulting firm.

Suitability Report for a New Assignment” for the proposed Waste Facility (“site assignment application”). Pursuant to United Medical’s proposal to both the DEP and the Board of Health, the Waste Facility would be permitted to accept up to forty-nine tons of medical waste per day, with an annual allowance of 9,800 tons. The Waste Facility would serve as a transfer station where packaged biomedical waste would be transported, from one truck to another, to temporarily store waste. The waste would then be permanently moved off the Waste Facility by United Medical.

On March 29, 2016, after reviewing the site assignment application, the DEP requested additional materials from United Medical regarding the proposed Waste Facility and its operations. On September 7, 2016 and September 27, 2016, United Medical supplemented the site assignment application in accordance with the DEP’s request. Upon review of the supplemental materials, the DEP issued a Notice of Administrative Completeness of the Site Assignment Application for United Medical. The DEP also issued a twenty-one day public comment period, which was set to end on January 6, 2017. On February 16, 2017, the DEP issued a “Report on Site Suitability,” finding a “positive report regarding the suitability for site assignment.” The DEP also determined that United Medical’s site met “the site suitability criteria as set forth in 310 [Code. Mass. Regs.] [§§] 16.40(3)(d) and [16.40(4)] of the Site Assignment Regulations.”

On March 20, 2017, the Board of Health held a two-hour public hearing to address United Medical’s site assignment application. At the time of the hearing, the Board of Health was comprised of three members: David Zalewski (“Zalewski”), James Avery (“Avery”), and Iwona Miller (“Miller”). Miller was unavailable at the public hearing on March 20, 2017, and recused herself from participation. The Board of Health appointed attorney Gregor McGregor as

the hearing officer. During the hearing, United Medical's Vice President David Ryan ("Ryan"), along with environmental consultants and engineers, answered questions posited by the Board of Health. At the close of the hearing, the Board of Health kept the administrative record open and continued the hearing.

On April 24, 2017, the Board of Health again continued the hearing. Prior to that hearing, United Medical submitted modifications to address concerns raised in the initial public hearing. At the hearing's close, Avery moved to deny the site assignment application. He stated that he wanted to see the site assignment application "as a warrant on a town meeting" or "a binding referendum at the next election." Avery's motion was not seconded. Zalewski then made a motion for the Board of Health to "approve the site assignment application." Zalewski stated that "the site is suitable for the assignment, [and] meets the criteria contained in the regulations of the [DEP]." Zalewski's motion to approve was also not seconded.

On May 3, 2017, the Board of Health issued a letter to United Medical stating "that the Board of Health of the Town of Webster has taken no action on the [Waste Facility's site assignment application] within the regulatory time period."

## **DISCUSSION**

### **I. Standard of Review**

An appeal filed by an aggrieved party to a local board of health's decision is conducted pursuant to G.L. c. 30A and, for the limited purpose of such an appeal, the local board is considered a state agency and its decision is deemed an adjudicatory proceeding. See G.L. c. 111, § 150A; *Board of Health of Sturbridge v. Board of Health of Southbridge*, 461 Mass. 548, 556 (2012). When reviewing a decision under G.L. c. 30A, the Court is required to give "due weight to the experience, technical competence, and specialized knowledge of the agency, as

well as to the discretionary authority conferred upon it.” G.L. c. 30A, § 14(7); see *Doe v. Sex Offender Registry Bd.* No. 380316, 473 Mass. 297, 301 n.5 (2015). A court may reverse, remand, modify, or “compel any action unlawfully withheld or unreasonably delayed, if [a court] determines that the substantial rights of any party may have been prejudiced” by an erroneous agency decision. G.L. c. 30A, § 14(7); see *Cohen v. Board of Registration in Pharmacy*, 350 Mass. 246, 253 (1966) (affirming court’s decision ordering board to register a drug store and issue a permit to the pharmacist to manage it). The appealing party holds the heavy burden of demonstrating the invalidity of an agency decision. See *Board of Health of Sturbridge*, 461 Mass. at 562; *Springfield v. Department of Telecomms. & Cable*, 457 Mass. 562, 567-568 (2010); *Bagley v. Contributory Ret. Appeal Bd.*, 397 Mass. 255, 258 (1986).

## II. Statutory Framework

An applicant seeking to “maintain or operate a site for a new facility . . . shall submit an application for a site assignment to the local board of health and simultaneously provide copies to the department and the department of public health.” G.L. c. 111, § 150A; *Wood Waste of Boston, Inc. v. Board of Health of Everett*, 52 Mass. App. Ct. 330, 332 (2001) (hereinafter “*Wood Waste*”).<sup>2</sup> Within sixty days of receiving the application, the DEP conducts an initial review, subject to the standards and criteria promulgated in G.L. c. 111, § 150A½,<sup>3</sup> and then

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<sup>2</sup> The applicant also must file an application with any municipality’s board of health falling within one-half mile of the proposed facility. G.L. c. 111, § 150A.

<sup>3</sup> The DEP’s review is subject, but not limited to, the following criteria identified in G.L. c. 111, § 150A½:

- (1) the location, nature and extent of any existing or potential sources of public or private drinking water supplies in relation to the site, including the recharge area of a sole source aquifer;
- (2) the relationship of the site to groundwater elevations;
- (3) the proximity of wetlands, as defined in section forty of chapter one hundred and thirty-one;
- (4) the proximity of surface water bodies;
- (5) the proximity of flood plains;
- (6) the nature and extent of residential areas in proximity to the site;
- (7) the availability and suitability of access roads to the site;
- (8) whether areas adjacent to the proposed site have been previously used for solid waste disposal;
- (9) the potential for adverse impact on air quality;

issues a report commenting on “any potential impact of a site on the public health and safety.”

G.L. c. 111, § 150A; see *TBI, Inc. v. Board of Health of N. Andover*, 431 Mass. 9, 11 (2000).

If the DEP issues a positive report, the local board of health is required to hold a public hearing within thirty days of receipt of the DEP’s report. See G.L. c. 111, § 150A; *RicMer Props. Inc. v. Board of Health of Revere*, 59 Mass. App. Ct. 173, 173 (2003). The DEP’s decision is not binding on the local board of health, but the local board’s review is subject to the same criteria listed in G.L. c. 111, § 150A½, as well as 310 Code Mass. Regs. 16.40. See G.L. c. 111, § 150A; *TBI, Inc.*, 431 Mass. at 11-12. Within forty-five days after the initial public hearing date, the local board shall render a written decision along with a statement of reasons articulating its decision, and publish notice of its decision. G.L. c. 111, § 150A. “A local board of health shall assign a place requested by an applicant as a site for a new facility . . . unless it makes a finding, based on the siting criteria established by [G.L. c. 111, § 150A½], that the siting thereof would constitute a danger to the public health or safety or the environment.” *Id.*

### III. Analysis

The sole issue before the Court is the remedy to be furnished since the Board of Health took “no action” on United Medical’s site assignment application. Pursuant to G.L. c. 111, § 150A, the Board of Health was required to “assign a place requested by an applicant as a site for

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- (10) the potential for creation of a nuisance from noise, windblown litter, or the proliferation of rodents, flies or other vermin;
- (11) the potential for the adverse public health and safety impacts;
- (12) the potential impact on agricultural uses;
- (13) the potential adverse impact on wildlife or on wildlife habitat;
- (14) the potential impact of increased traffic volume on roads to the site;
- (15) the extent to which existing solid waste disposal facilities are located within a municipality. Site assignments for new facilities are preferred in municipalities without existing facilities;
- (16) the extent to which the solid waste disposal needs of the municipality in which the site is sought are met as a member of a regional refuse disposal district. Site assignments in municipalities not participating in regional refuse disposal districts are preferred.
- (17) the potential adverse impacts on communities within one-half mile of the proposed site including the potential adverse impacts on the considerations stated within this section for which site suitability standards and criteria are established.

a new facility . . . unless it ma[de] a finding, based on the siting criteria . . . that the siting thereof would constitute a danger to the public health or safety or the environment.” Therefore, the Board of Health could take one of two actions: (1) grant the site assignment; or (2) deny the site application due to a finding that the site would constitute a danger to the public health, safety, or the environment. See G.L. c. 111, § 150A; *Wood Waste*, 52 Mass. App. Ct. at 333 (“Other than allowing the imposition of conditions, the statute provides for no other disposition of an application by a board.”); cf. *RicMer Props., Inc.*, 59 Mass. App. Ct. at 179-180, 179 n.11 (affirming defendant’s denial of plaintiff’s site application where there was substantial evidence in the record supporting the board’s decision that the site “constitute[d] a danger to the public health, safety or the environment . . . ”).

The written findings provided by the defendant offer no indication that its decision was based on a danger to public health, safety, or the environment. On the contrary, as evidenced by the DVD of the April 24, 2017 hearing, Zalewski moved to approve the site, stating that not only was the site suitable, but the site met all the criteria contained in the DEP’s regulations. The administrative record supports Zalewski’s conclusion. While Avery moved to deny the site application, his denial was due to wanting the issue to be heard as either a “warrant on a town meeting” or “a binding referendum at the next election,” as opposed to any concerns for public health, safety, or the environment.

The Board of Health argues their failure to render either an affirmative or negative decision regarding United Medical’s site assignment application is a non-decision requiring the Court to remand the matter to the Board of Health. The Court disagrees. The statutory framework authorized the Board of Health to issue a ruling within forty-five days of the public hearing date. See G.L. c. 111, § 150A. The Board of Health taking “no action” on United

Medical's site assignment application had the effect of a denial, thereby prejudicing United Medical's substantial right to the site assignment, as the Board of Health was required to issue the assignment absent a finding that the assignment was a danger to public health, safety, or the environment. See G.L. c. 30A, § 14(7); cf. *Wood Waste*, 52 Mass. App. Ct. at 333-334 (affirming that the defendant's request for more information was "not a finding").

The Court relies on *Wood Waste*, 52 Mass. App. Ct. at 330 in guiding its decision. In *Wood Waste*, the plaintiff filed a site suitability application with the DEP, which was approved, but the defendant local board of health denied the application because the defendant argued that the plaintiff failed to submit adequate information for the defendant to determine whether the siting criteria had been met. *Id.* at 330-331, 332. A Superior Court judge<sup>4</sup> found that the defendant "was without discretion to deny the site application" for failing to submit adequate information. *Id.* at 332. The defendant subsequently appealed. *Id.* The Appeals Court agreed with the judge's determination that the defendant's request for more information was "not a finding" for which an application for site suitability could be denied. *Id.* at 333.<sup>5</sup> Furthermore, the Appeals Court concluded that the judge did not err by reversing the defendant's decision and ordering the defendant to issue the site assignment. *Id.* at 337-338.

Similar to *Wood Waste*, the Board of Health here was provided with a substantial record, and held approximately three and one-half hours of public hearings to address United Medical's site assignment application. Cf. 52 Mass. App. Ct. at 334-335 (finding the defendant "was presented with a substantial record prior to the deadline for its decision," which included an expert to review the application, an environmental impact review record, and the DEP's report).

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<sup>4</sup> See *Wood Waste of Boston v. Board of Health of Everett*, 9 Mass. L. Rep. 425 (1998) for a complete recitation of the judge's ruling.

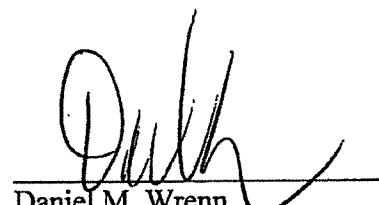
<sup>5</sup> The defendant in *Wood Waste* also made findings regarding issues of dangers to the public health, safety or the environment; however, the Appeals Court affirmed the Superior Court judge's ruling that those decisions were not supported on the record. See 52 Mass. App. Ct. at 332-333 n.5.

Remanding the case to the defendant for additional hearings or further review, as the defendant suggests, “would constitute an unjustified interruption of a carefully designed and comprehensive legislative process.” *Id.* at 337.

The site assignment application is “merely an interim step in a lengthy and detailed administrative process.” *Id.* at 337. Therefore, as suggested in the alternative by the Board of Health in both its motion and at the November 9, 2017 hearing, the Court **ORDERS** that United Medical’s motion for judgment on the pleadings be **ALLOWED**. The Court reverses the Board of Health’s decision, and **ORDERS** that the Board of Health issue United Medical’s site assignment as modified during the course of the Board of Health’s proceedings. See G.L. c. 30A, § 14(7) (providing that the court can “compel any action unlawfully withheld or unreasonably delayed, if it determines that the substantial rights of any party may have been prejudiced . . . .”).<sup>6</sup>

#### **ORDER**

For the aforementioned reasons, it is hereby **ORDERED** that United Medical’s Motion for Judgment on the Pleadings is **ALLOWED**. It is further **ORDERED** that judgment enter in favor of United Medical reversing the Board of Health’s decision denying the site assignment application located at 56 Worcester Road, and that the Board of Health issue United Medical its requested site assignment forthwith as modified during the course of the Board of Health’s proceedings.



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Daniel M. Wrenn  
Justice of the Superior Court

December 4, 2017

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<sup>6</sup> The Court’s decision is limited to United Medical’s site assignment application and does not encroach upon the DEP’s ultimate determination regarding issuance of a permit for the Waste Facility.