

# EXHIBIT G

## COMMONWEALTH OF MASSACHUSETTS

HAMPSHIRE, S.S.

HOUSING COURT DEPARTMENT  
WESTERN DIVISION  
CIVIL ACTION NO. 15-CV-395

TOWN OF WESTHAMPTON, )  
 )  
 Plaintiff )  
 )  
 v. )  
 )  
 DAVID COTTON, )  
 )  
 Defendant )

### ORDER DENYING DEFENDANT'S MOTION TO DISMISS

After hearing on June 15, 2015 on the defendant's motion to dismiss or in the alternative to deny the plaintiff's motion for temporary restraining order, at which both parties appeared, the following rulings and order are to enter:

**1. Background:** On May 30, 2012, the plaintiff (hereinafter, "Town of Westhampton") issued cease and desist orders to the defendant (hereinafter, "Cotton") for wood processing operations on Cotton's property on Northwest Road in Westhampton under the town's Zoning Bylaws. Cotton appealed the order and The Town's Zoning Board of Appeals twice upheld the order. On December 13, 2013, Cotton filed a special permit application with the Town's Planning Board ("Board") to use the property as a sawmill for commercial uses. On February 4, 2014, the Board notified all parties involved and held its first public hearing and continued the meetings every month between February 4, 2014 and March 10, 2015, with the exceptions of February 17, 2015 and March 3, 2015 due to no quorum and due to a snowstorm, to consider evidence regarding the approval or denial of the special permit. At a July, 2014 meeting, Cotton made the planning board aware that he no longer agreed or consented to any further continuances of the public hearing process. On January 20, 2015, the Board held another

meeting of the continued public hearing for the special permit. Cotton attended. On March 10, 2015, the Board met and voted to close the public hearing and on April 21, 2015, the Board voted and denied the special permit application. On April 24, 2015, Cotton filed a Notice of Constructive Grant of Special Permit. On May 28, 2015, the Board filed its decision to deny the special permit with the Town Clerk. On May 4, 2015, the Town of Westhampton filed a temporary restraining order against the Cotton for the continued use of commercial activities at the subject property.

**2. Standard for constructive grant of special permit:** The relevant statute regarding the constructive grant of special permit can be found at G.L. c. 40A, §9. In pertinent part, the statute requires that “The special permit granting authority shall hold a public hearing, for which notice has been given within sixty-five days from the date of filing such application...[and] the decision of the special granting authority shall be made within ninety days following the date of such public hearing.” *Id.* The ninety day time limit may be extended with written agreement between the petitioner and the special permit granting authority. *Id.* If the special permit granting authority fails to make a final decision within the ninety days, and there is no agreement in writing extending the time limit, the granting authority shall be considered to have granted the special permit. *Id.*

**3. A public hearing in the zoning context** “connotes the opportunity for interested persons to appear and express their views pro and con.” *Milton Commons Assoc. v. Bd. Of Appeals of Milton*, 14 Mass. App. Ct. 111, 114-115 (1982). The special permit granting authority (hereinafter, “SPGA”) may continue or adjourn the hearing to a subsequent date by publicly announcing the specific date, time and place of the continued hearing before close of the previous hearing. *Kendrick v. Bd. Of Appeals of Wakefield*, 27 Mass. App. Ct. 774 (1989). In the zoning context, “a public hearing ends when the right of interested parties to present information and argument is cut off.” *Milton*, 14 Mass. App. Ct. at 115. Section 9 of the Zoning Act provides if the SPGA fails to take “final action” on the application for special permit within ninety days after the date of the public hearing it “shall be deemed to be a grant” of the

special permit. Mass. Gen. Laws. Ch. 40A, §9, ¶13. The Appeals court has held that the ninety days begin to run from the final day of a hearing, as reasonably continued. *Kendrick*, 27 Mass. App. Ct. at 776.

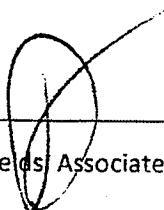
4. **Argument:** Cotton argues that a special permit was constructively granted. He predicates this argument on several assertions. First, he argues that the last public hearing was scheduled, held and closed on January 20, 2015. Secondly, that in order for the public hearing to continue, there must be a written agreement between the petitioner and the Board; further arguing that ninety days from January 20, 2015 is April 20, 2015 and because the Board did not act within this timeframe, a special permit was constructively granted.

5. Such arguments have no merit. First, the record before the court supports a finding that the public hearing was not closed on January 20, 2015. The Board did not vote to close the public hearing. The Board may vote at the hearing or may close the hearing and adjourn its decision until a subsequent hearing. *Building Inspector of Attleboro v. Attleboro Landfill, Inc.*, 384 Mass. 109 (1981). The Board adjourned the hearing until the next meeting, February 17, 2015, which was not held due to a lack of a quorum. The meeting was rescheduled for March 3, 2015 but was not held due to a snowstorm. It was rescheduled and held on March 10, 2015. March 10, 2015 marked the final day of the public hearing, at which extensive testimony was presented by Cotton and other interested parties. On that day, the Board voted and closed the public hearing. The ninety-day time limit, as imposed by G.L. c. 40A, §9, began to count down, therefore, on March 10, 2015. Secondly, the Board does not need to have written permission from the petitioner to continue the public hearing. The extension of time provision of G.L. c. 40A, §9, which states that "the required time limits for a public hearing...may be extended by written agreement between the petitioner and the special permit granting authority" is to extend the decision beyond ninety days after the close of the public hearing. A written agreement for a time extension is not needed between petitioner and Board for sessions adjourned but not closed in accordance with open meeting law. *Tebo v. Bd. Of Appeals of Shrewsbury*, 22 Mass. App. Ct. 618, 623 (1986).

6. **Conclusion and Order:** March 10, 2015 was the final date that the Board held the public hearing. On that day, the Board voted and close the public hearing. It is from March 10, 2015 that the ninety-day time limit begins to toll in regards to a constructive grant of a special permit. Ninety days from March 10, 2015 was June 8, 2015. On April 21, 2015 the Board voted and denied the Special Permit Application and filed its decision with the Town Clerk on May 28, 2015---well within ninety days after the close of the March 10, 2015 public hearing---and Cotton's filing of a Notice of Constructive Grant of Special Permit on April 24, 2015 was premature.

7. For the foregoing reasons, Cotton's motion to dismiss is denied. The parties may now schedule with the Office of the Clerk Magistrate a hearing on the Town of Westhampton's application for an injunctive order regarding commercial wood processing operations at the defendant's property. Until further order of the court, the agreement of the parties to maintain the terms of the May 18, 2015 agreement, that there shall not be any commercial use of the subjected premises, shall remain in full force and effect.

So entered this 22nd of September 2015.

  
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Robert Fields Associate Justice

cc: Peter Montori, Esq., Clerk Magistrate