

Commonwealth of Massachusetts

MIDDLESEX, SS.

SUPERIOR COURT
CA 75-2051

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Gibbs Oil Company .
-vs- .
City of Malden, et al .
.

FINDINGS OF FACT AND RULINGS
OF LAW FILED PURSUANT TO
RULE 52

STATEMENT OF THE CASE:

The plaintiff seeks declaratory relief under Chapter 231 that it is the holder of a valid license permitting it to operate a self-service automated gasoline station upon certain premises occupied by it within the defendant municipality. However, Gibbs no longer seeks the injunctive relief prayed for in the complaint preventing Malden from interfering with the aforesaid operation of the same. Lastly, Gibbs presented no evidence with respect to the individual defendant.

FINDINGS OF FACT:

1. The plaintiff is a duly existing Massachusetts corporation with a usual place of business in Revere, and among its business activities, operates and maintains retail gasoline stations serving the retail motoring public throughout the greater metropolitan Boston area and in other places and states. Nearly forty of its outlets are of the self-service type.

2. The defendant city is a municipal corporation located within Middlesex County. The individual defendant is the City Solicitor thereof.

3. On or about February 7, 1964, the plaintiff acquired a gasoline outlet on Main Street, Malden. These premises have been continuously used as a gasoline station since 1924 when the original license under Chapter 148, Section 13 was issued. The license has been renewed every year thereafter to the present date. Gibbs has used this site as a gasoline outlet, all as appears from Exhibits 8 through 13, since its acquisition in 1964. (Gibbs Tire Depot, Inc., is the license holder and land owner and Gibbs Oil is the tenant under a written license, Exhibit No. 29. The City raises no issue, however, with respect to absence of Gibbs Tire Depot, Inc., as a party hereto.)

4. Sometime in the fall of 1974, Gibbs decided to convert these premises into a self-service type of operation from the more conventional type of maintained service operation. Plaintiff's employee conferred with the Chief of the Malden Fire Department, informing him of Gibbs' intention to alter the method of dispensing gasoline at its Malden facility. At that time, there were no self-service stations in Malden. The head of the fire department approved the same with certain extra fire extinguishers.

5. Thereafter, Gibbs caused plans and specifications for the installation of an automated self-service gasoline dispensing system

to be filed with the state's Fire Marshall. Pursuant to the provisions of Rule 43 of the Board of Fire Prevention Regulation Form F.P.R.-4 (all as more fully appears on page 10 of Exhibit No. 5), the Fire Marshall approved the proposed installation in writing on January 27, 1975, all as appears in Exhibit No. 6.

6. Shortly thereafter, in early February, 1975, approximately a week to ten days after receiving such approval, Gibbs began conversion work at the site, including some excavation, electrical changes, building renovation and equipment installation. By March 13, 1975, Gibbs had expended \$8,383.76 on such work.

7. In early December 1974, some individual members of the Malden City Council began to contemplate some regulation of self-service gas stations, and subsequently, on February 25, 1974, by vote of 10 to 1, approved the following proposal: "That all self-service gas stations be prohibited from operating in the City of Malden." When it was returned unsigned by the Mayor on March 7, 1975, it passed under operation of law, all as appears in Exhibit No. 2. On March 13, 1975, the City Solicitor informed Gibbs in writing of the ordinance and ordered a cessation of the conversion work. Gibbs ceased its alteration forthwith and instituted the present action.

RULINGS OF LAW:

Based upon the findings of fact above, the Court, pursuant to Rule 52, hereinafter sets forth separately its conclusions of law.

- A. The Board of Fire Prevention Regulations was created by the Legislature (See General Laws (Ter.Ed.) Chapter 22, Section 14) and it gave the aforesaid Board the duty to ". . . make rules and regulations for the keeping, storage, use . . . (and). . . sale . . ." of inflammable petroleum products. (See General Laws (Ter.Ed.) Chapter 148, Section 9.) These rules are adjudicatory in nature and subject to the Administrative Procedures Act, all as is plainly shown by Section 10 of the aforesaid chapter. As a part of its statutory scheme to regulate the dangers of explosion and fire hazards, the Legislature granted to the heads of local municipal fire departments a power to make some specifically "limited" orders or rules ". . . not inconsistent therewith. . ." Chapter 148, Section 28.
- B. The defendant first contends that the statutory scheme does not entirely preempt the regulatory field and there remains or exists inherently in cities and towns a power to regulate the storage and use of inflammables, at least to the extent that any such ordinance is not inconsistent with the legislative state-wide plan. However, such an argument is of no avail since the particular ordinance in question is an absolute prohibition and not a regulation. It has long been settled in the Commonwealth that "the

words 'regulated and restricted' does not confer power to prohibit absolutely and without bound but only to establish reasonable limitations." Opinion of the Justices, 232 Mass. 605, 610. Chief Justice Rugg asserted "Nothing can be more drastic than absolute prohibition." General Outdoor Advertising Co. v. Department of Public Works, 289 Mass. 149, 207 (1935). (See p.160 for good discussion of the difference between regulation and prohibition.) In the case at bar, the Board of Fire Prevention Regulations, in the discharge of its duty pursuant to the statutory state-wide scheme, has deemed, in its wisdom, after notice and hearings and the issuance of regulations in 1974, that ". . .the dispensing of gasoline by means of a self-service automated gasoline dispensing system shall be permitted. . ." subject to the applicant's compliance with certain enumerated conditions, all as more fully appears as Rule 43 on page 10 of Exhibit No. 7. The municipal action taken by Malden in this case would effectively and completely negate the Board's decision, reached pursuant to its legislative mandate and in the field of its expertise, i.e., the determination of fire hazards. Whether or not Malden does possess any regulatory power with reference to the storage and use of petroleum products, therefore, is really not the fundamental issue, since assuming the existence of the

same, such power would be in the area of regulating in a manner consistent with the legislature's state-wide scheme. This ordinance does not so attempt to do. Consequently, the ordinance is invalid and must fall.

- C. Assuming, however, that this Court is in error and that it could be said this prohibitory ordinance is somehow deemed consistent with the state-wide scheme, the result would remain unchanged since the Court rules that the statutory scheme devised by the legislature divested any power that cities and towns might otherwise have had to regulate the storage and use of inflammables by municipal prohibitory ordinances. The legislature seems to have made it plain that local supervision was restricted to heads of fire departments in certain "limited" circumstances. Chapter 148, Section 28. The so-called "Home Rule" amendment upon which the city relies is inapplicable since the statute has placed local fire hazard considerations within the area of the local fire department head, thereby clearly indicating that was not an issue that was to be left to a city council.

CONCLUSION:

Judgment should enter in accordance with the above on this petition for declaratory relief that Gibbs Oil Company is the holder of a valid license which permits it to operate a self-service

automated gasoline dispensing services in compliance with Rule 43 of the Board of Fire Prevention Regulations and any further regulations lawfully imposed by the head of the Malden Fire Department. The cause as against the individual defendant is to be dismissed. The plaintiff is to recover his costs of action.

John T. Ronan

Justice of the Superior Court

Entered: September 11, 1975.

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Gibbs Oil Co. vs. City of Malden, et al,
Findings of fact and rulings of law ruled pur
pursuant to rule 52., re: ordinance on
self-service gas stations.

April 5, 1976