

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT

MIDDLESEX, SS:

No. 75-2051

GIBBS OIL COMPANY)

)

VS.)

)

CITY OF MALDEN,)

)

ET AL)

)

PLAINTIFF'S BRIEF IN SUPPORT
OF ITS PRAYER #1 SEEKING A
TEMPORARY RESTRAINING ORDER

Statement of the Case: This is an action brought under the provisions of General Laws Chapter 231A, Sections 1, and 2 for declaratory judgment and for injunction relative to efficacy of Malden Revised Ordinance of 1950, Section 88 which states:

"Self-Service gasoline stations are hereby prohibited from operating in Malden"

and as to its enforcement by the Defendants.

Statement of the Facts: Under Chapter 148, Section 13 of the General Laws, the City of Malden granted a license to store and sell gasoline initially in 1923. On February 7, 1964 the plaintiff succeeded to the license, and has continuously exercised it. There are no restrictions on the license applicable to self-service, and the license is a grant attached to and running with the land. Adamsky vs. City Council of New Bedford, 326 Mass. 706.

Under Chapter 148, Section 9 of the General Laws,

authorizing the board of fire prevention to make regulations relative to the storage and sales of gasoline, the Department of Public Safety, Division of Fire Prevention published "Form FPR-4," in March of 1974. Under Rule 43, page #10, the State has pronounced that "self-service automated gasoline dispensing systems shall be permitted..." subject to approval of the Marshal and compliance with certain other provisions, all of which the plaintiff had or will comply with.

Under the said section #9 of Chapter 148, cities and towns may also make and enforce ordinances that are not inconsistent with said rules and regulations of the State Board.

On January 27, 1975 the plaintiff's plans for the conversion of its Malden station to self-service were approved by the State Fire Marshal of the Commonwealth of Massachusetts. Thereafter, the plaintiff commenced to convert its gasoline station to self-service, and has expended much time, effort, and monies toward that end. Copies of its efforts as set forth in invoices and bills and plans are annexed hereto. On February 25, 1975 the Malden City Council enrolled and ordained the above quoted ordinance. By March 7, 1975 the Mayor of the

City of Malden, having declined and failed to sign and approve the ordinance, it became law under "operation of Law".

Issues: Is the plaintiff being presently and continually injured by an ordinance, which on its face appears discriminatory, arbitrary, and improper, as to warrant the imposition of an interlocutory injunction?

Arguments: The City of Malden's right to apply conditions and restrictions to a license under Section 13 of Chapter 148 clearly is intended to apply at the time the license is issued and to be incorporated in that license. For after the license has issued, according to the wording of the section, it shall "from the time of the granting thereof by the licensing authority, be deemed a grant attaching to the land described therein and as an incident of ownership thereof running with the land and shall not be deemed to be merely a personal privilege." See I. Baron & Sons, Inc. v. Eastern Storage Industrial Park Corp., 355 Mass. 245, at 253. There are no restrictions or conditions on the plaintiff's license involving self-service.

The right of the City of Malden to make ordinances

*File Chapter 148
to ensure
above required
by Chapter 148*

under Section #9 of Chapter 148, is conditioned upon the fact that such ordinances will not be inconsistent with those of the Commonwealth. Accordingly, if, as here, the Commonwealth has stated that self service automated gasoline dispensing systems shall be permitted, then the City ordinance with a complete prohibition of such systems, is on its face inconsistent with the Commonwealth's determination to permit self-service stations. See Pereira vs. New England Lng Co., Inc., 301 N.E.2nd 441, 448 (Mass. 1973): "It is not to be presumed that the Legislature intended to give to the local licensing board the authority to thwart the reasonable necessary efforts of the....commissioners (of the Department) to perform their duty as agents of the State".

Finally, the plaintiff, having complied with State requirements, providing greater safety devices than other stations, and having been uniquely singled out for elimination of its activities, the ordinance is unreasonable, serves no real purpose, and is an unconstitutional interference with plaintiff's business. Coffee-Rich, Inc. vs. Commissioner of Public Health, 348 Mass. 414, 425-426.

By failure to grant an injunction against the City

Solicitor, his notice to the plaintiff to cease and desist the further conversion of its station, will leave the plaintiff in a partly completed and less competitive position. It will adversely affect the business of the plaintiff during the forthcoming Spring and Summer when business will be at its height, and when its profits would, anticipatedly, be highest level.

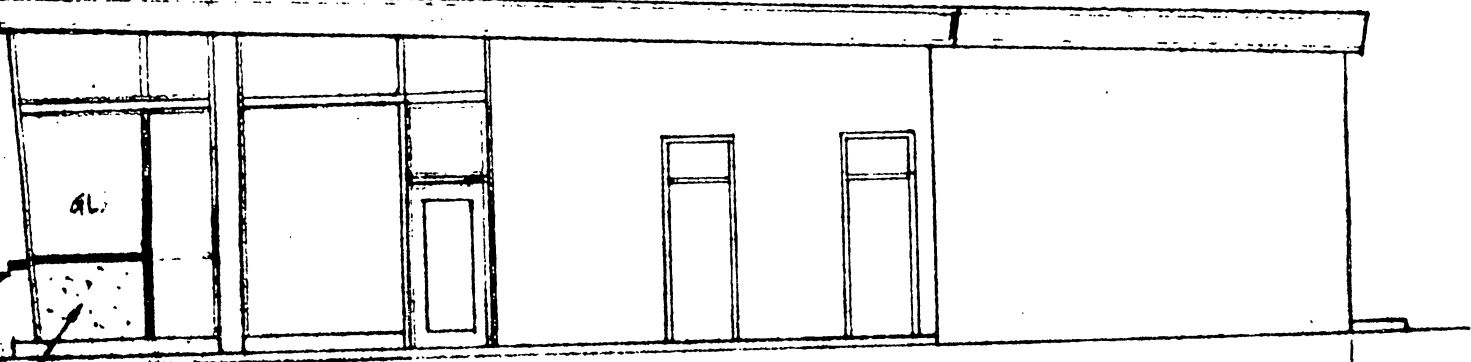
Wherefore, the plaintiff prays the Court will grant its first demand, as set forth in its Complaint, to wit, to grant an injunction against the Solicitor and City of Malden enjoining the enforcement of said ordinance pending a final determination of this action.



Richard D. Gilman, Esquire
Attorney for the Plaintiff
1 Salem Street
Malden, Massachusetts, 02148
324-2682

LEFT SIDE ELEVATION

SCALE: 1/8" = 1'-0"



RIGHT SIDE ELEVATION

SCALE: 1/8" = 1'-0"

APPROVED

EFFECTIVE: 1/24/75

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC SAFETY
OFFICE OF THE STATE FIRE MARSHAL

Joseph G. Snieder
JOSEPH G. SNEIDER
STATE FIRE MARSHAL

● GIBBS OIL COMPANY ●

CONVERSION TO SELF SERVICE
732-730 MAIN ST., MALDEN, MASS.

SCALE: AS NOTED

APPROVED:

DRAWN: S.P.

DATE: 12-11-74

REMOVED

ALBERT COSTA ASSOCIATES, ARCHITECTS

SITE PLAN & DETAILS

DRAWING NO.
S-1

ALBERT COSTA ASSOCIATES ARCHITECTS

77 STADIUM WAY • BOSTON, MASSACHUSETTS 02134 • (617) 783-3480

February 4, 1975

Gibbs Oil Company
40 Lee Burbank Highway
Revere, Mass.

RE: Architectural professional services
Remodeling existing Station - self service
Site Plans - Elevations -
new office-layout-csah window & desk
732-738 Main Street- Malden, Mass.

principal \$ 55.00
drafting-design-layout, \$180.00
graphics-blueprinting, \$ 5.00

total amount due \$240.00

950729

16/25

OK
JLM
2/12/75-



Catrone Electric Co.

MASTER ELECTRICIANS

COMMERCIAL - INDUSTRIAL - RESIDENTIAL

58 DERBY ROAD

Revere, Mass., March 24 1975 196

Gibbs Oil Co.

40 LeeBurbank Hwy. Revere, Ma.

Barnes Getty Main St. Malden

Ord. # G8812

Installed 4 pumps

Material & labor

\$295.00

900587
049

OK
JW
3/24/75

Ell



SM NO 20868

GIBBS OIL COMPANY 40 Lee Burbank Highway Revere, Mass. 02151 Phones: 289-7700-233-3900

STATION MAINTENANCE

BARNES GETTY
MALDEN

DATE 4/22 19 51

REASON FOR CALL		FOLD	
TIME REC'D.			
SERVICE RENDERED			
TIME DISP.			
TIME ARR.			
TIME COMP.			
MATERIAL USED			
TIME TOTAL			
Fabricating Dept.			
49.302 27 Hours			810.00
TOTAL MATERIAL			
STATE TAX			
LABOR			
TOTAL CHARGE			810.00

12.0
SERVICE MAN

THANK YOU FOR CALLING GIBBS OIL COMPANY

SERVICEMAN'S COPY



No. 14382

GIBBS OIL COMPANY 40 Lee Burbank Highway Revere, Mass. 02151 Phones: 289-7700-233-3900

BARNEYS GETTY
MALDEN, MASS.

DATE 2-11- 1975

REASON FOR CALL	
FOLD	FOLD
TIME REC'D.	
SERVICE RENDERED	INSTALL 2 PUMPS
TIME DISP.	UNCOVER SIPHON
10 ⁰⁰	
TIME ARR.	
10 ²⁰	
TIME COMP.	
5 ⁰⁰	MATERIAL USED
TIME TOTAL	1-MOP# 732-15 ELECTRIC RESET
	SCALE # 031880
	1-MOP# 732-15 ELECTRIC RESET
	SCALE # 0312844
NEW READINGS	
991766	993198
997749	998256
991412	992920
99746.6	99908.4
OLD READINGS	
409696	399588
271346	824454
TOTAL MATERIAL	
STATE TAX	
LABOR	
TOTAL CHARGE	

EARL-MAC-ELEC.

SERVICE MAN

THANK YOU FOR CALLING GIBBS OIL COMPANY



No. 14383

GIBBS OIL COMPANY 40 Lee Burbank Highway Revere, Mass. 02151 Phones: 289-7700-233-3900

BARNNEY'S GETTY

DATE 2-12 19 75

REASON FOR CALL		FOLD	
INSTALL Two pumps			
SERVICE RENDERED			
TIME DISP.	INSTALL Two pumps AND REMOVE		
8:00	ONE pump		
TIME ARR.	DIG HOLE IN OFFICE FLOOR FOR SMC		
8:45			
TIME COMP.			
3:10	MATERIAL USED		
	MOD* 1E-732-15 SEAL* 0317767	N.C.	
TIME TOTAL	MOD*		
NEW READINGS			
991174	990958	990997	990859
997868	997113	997100	996966
OLD READINGS			
075593	018800		
685306	582049		
TOTAL MATERIAL			
STATE TAX			
LABOR			
TOTAL CHARGE			

EARL + MAC + ELEC.
SERVICE MAN

THANK YOU FOR CALLING GIBBS OIL COMPANY

may be constructed of materials other than standard open-hearth steel tank plate when approved by the Marshal, and shall be constructed, installed and located in accordance with the provisions of Board of Fire Prevention Regulations Form FPR-8.

Rule 38. No gasoline pump shall be located above the street floor of a garage, nor shall gasoline be handled above the street floor unless the garage is a building of first-class construction.

Rule 39. No motor vehicle shall be supplied with gasoline while in a garage in any other way than by means of a hose from either a portable tank or direct from a storage tank.

Rule 30A. Any person, firm or corporation installing dispensing pumps for gasoline or other motor fuel in gasoline stations shall provide adequate protection against physical damage to said dispensing pumps.

Rule 40. Each portable gasoline tank used in a garage shall not exceed fifty-five (55) gallons in capacity, shall be mounted on a substantial iron or steel frame with rubber-tired wheels, and shall be equipped with a suitable hose not exceeding sixteen (16) feet in length, having a shut-off valve located near the pump connection.

The shut-off valve shall be kept closed when not in use.

Rule 41. Any portable or permanent electrically operated gasoline dispensing system authorized under Rules 39 and 40 shall, in addition to the safety devices already required, be protected by a heat activated shutoff switch, which will shut off the pump automatically when the temperature reaches 165°F. This switch shall be located within two (2) feet of the ceiling and within ten (10) feet of the location of the nozzle discharge.

Rule 42. No gasoline shall be delivered to the tank of any motor vehicle from a storage tank except by means of a hose equipped with an approved self-closing nozzle which shall be held open manually while

making delivery or by an approved automatic shut-off nozzle, and no such delivery shall be made except by the owner-operator or a duly authorized employee. No gasoline shall be delivered into a portable container having a maximum capacity of seven (7) gallons or less which is not labeled in accordance with the pertinent provisions of Rule 44A of these regulations.

Rule 43. The dispensing of gasoline by means of self service automated gasoline dispensing systems shall be permitted provided that the applicant for such a system has submitted complete plans and specifications of the proposed installation to the Marshal and obtained approval of same and further provided:

(a) that the gasoline service station is under the direct control of the owner, operator or duly authorized employee who shall be on duty at all times while gasoline is being sold or dispensed.

(b) that said gasoline shall be dispensed only by a competent licensed motor vehicle operator or by the station attendant.

(c) in addition to Rule 33, signs bearing the words "Extinguish All Smoking Materials" in block letters at least two inches (2") in height shall be conspicuously posted at both ends of the pump island visible to approaching vehicles.

(d) that the controlling mechanism console providing power to the pump motor is in constant attendance by the owner, operator or duly authorized employee at all times while gasoline is being dispensed and is properly protected against physical damage from motor vehicles and further, that the room or area housing the controlling mechanism console is used for no other purpose.

(e) that there be constant contact between the controlling mechanism console operator and the pump island by means of an intercommunication system which shall be maintained in proper operating condition at all times while gasoline is being dispensed.

(f) that a means be provided for the controlling mechanism console operator to observe the filling op-

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Gibbs Oil Co. vs. City of Malden et al
Plaintiff's Brief in support of its prayer
#1 seeking a temporary restraining order
re: ordinance on self-service gas stations.

April 5, 1976