



**AGENDA
CITY OF HARRISONVILLE
BOARD OF ZONING ADJUSTMENTS
REGULAR MEETING
CITY HALL
AUGUST 10, 2021
6:00 PM**

- 1. Call to Order**
 - A. Roll Call**
- 2. Approval of Minutes**
 - A. Board of Zoning Adjustments - Regular Meeting - Jul 13, 2021 6:00 PM**
- 3. Agenda Items**
 - A. Harrisonville Marketplace / Price Chopper Appeal - Public Hearing**
 - B. Harrisonville Marketplace / Price Chopper Appeal**
- 4. Discussion Items**
- 5. Adjourn**

Posted on City Hall Bulletin Board this 6th day of August, 2021.

Daniel Barnett , City Clerk



DRAFT
MINUTES
CITY OF HARRISONVILLE
BOARD OF ZONING ADJUSTMENTS
REGULAR MEETING
CITY HALL
JULY 13, 2021
6:00 PM

1. Call to Order

The meeting was called to order at 6:01 PM by Gerald Saling.

Attendee Name	Organization	Title	Status	Arrived
Jennifer Love	Harrisonville		Present	
Michelle Hart	Harrisonville		Present	
Charles Hotchkiss	Harrisonville		Present	
April McLaughlin	Harrisonville		Present	
Gerald Saling	Harrisonville		Present	
Viola Wieberg	Harrisonville		Present	

Also in attendance were Steven Mauer, City Attorney; Alex Felzien, City Attorney; Roger Kroh, Community Development Planner, and Jamie Martin, Recording Secretary.

2. Approval of Minutes

A. Board of Zoning Adjustments - Regular Meeting - Jun 8, 2021 6:00 PM

With no additions or corrections, the minutes from the June 8, 2021, meeting were unanimously accepted.

RESULT:	ACCEPTED [UNANIMOUS]
MOVER:	Charles Hotchkiss
SECONDER:	April McLaughlin
AYES:	Love, Hart, Hotchkiss, McLaughlin, Saling, Wieberg

3. Agenda Items

A. BZA Member Training

Roger Kroh introduced Steve Mauer and Alex Felzien to the Board. They went through an outline to train new members.

1. BZA Member's Role

2. BZA Member's Authority

3. BZA Member's Individual Liability and Responsibility

4. BZA Standards

4. Discussion Items

There were no discussion items.

5. Adjourn to Executive Session pursuant to RSMO 610.021 (1) Litigation

Charles Hotchkiss made a motion to adjourn to Executive Session. Jennifer Love seconded the motion. A roll call vote was taken. The motion passed unanimously. The Executive Session began at 6:46 PM.

6. Adjourn from Regular Session

Viola Weiberg made a motion to adjourn to Regular Session. Charles Hotchkiss seconded the motion. A roll call vote was taken and the motion passed unanimously. The Executive Session adjourned at 7:11 PM.

With nothing further to come before the Board, April McLaughlin made a motion to adjourn. Jennifer Love seconded. The meeting was adjourned at 7:12 PM.

Respectfully Submitted,

Jamie Martin, Recording Secretary

Minutes Acceptance: Minutes of Jul 13, 2021 6:00 PM (Approval of Minutes)



STAFF REPORT

TO: Board of Zoning Adjustments
FROM: Roger Kroh, Planner
DATE: August 6, 2021
SUBJECT: Harrisonville Marketplace / Price Chopper Appeal - Public Hearing

Type of Item: *Approval*

City of Harrisonville, MO
 Notice of Public Hearing
 Board of Zoning Adjustment

Notice is hereby given that the Harrisonville Board of Zoning Appeals (BZA) will conduct a public hearing on Tuesday, August 10, 2021, at 6 PM at Harrisonville City Hall at 300 E Pearl St., Harrisonville, MO 64701 to receive public testimony on an application from the Harrisonville MarketPlace II LLC/Four B Corp. appealing the City of Harrisonville's denial of Four B Corp.'s and Harrisonville Marketplace II LLC's application dated April 9, 2021, to construct a 400kW natural gas generator at the Price Chopper Grocery Store at 520 South Commercial St. in Harrisonville, Missouri 64701. Individuals are invited to make oral comments in the meeting or send written comments for the BZA to Roger Kroh, City Planner, at rkroh@harrisonville.com <<mailto:rkroh@harrisonville.com>> or at City Hall, 300 E. Pearl St., Harrisonville, MO 64701.

Jamie Martin

Secretary to the Planning and Zoning Commission

A. Action Item (ID # 3974)

Harrisonville Marketplace / Price Chopper Appeal - Public Hearing



STAFF REPORT

TO: Board of Zoning Adjustments
FROM: Roger Kroh, Planner
DATE: August 6, 2021
SUBJECT: Harrisonville Marketplace / Price Chopper Appeal

Type of Item: *Approval*

General Information:

BZA Meeting: August 10, 2021

Applicant: Harrisonville Marketplace II LLC, and Four B Corp.

Property Owner: Same

Represented by Counsel: John Duggan, Duggan Shadwick Doerr & Kurlbaum, LLC

Location: Price Chopper Grocery Store
 520 S Commercial St, Harrisonville, MO 64701

Zoning: CP-2 Service Business District

Appeal to BZA: Applicants contend that the City did not properly apply its zoning regulations when it refused to issue applicant's building permit to construct a 400kW natural gas cogeneration unit.

Background:

In 2020, Price Chopper came to the City with a proposal to install a 400kW natural gas generator that would produce all of Price Chopper's electricity. However, the plan conflicted in several areas with local zoning and subdivision regulations and state energy regulations.

In April 2021, the applicants submitted a modified plan. A 400kW natural gas generation unit would still produce all of Price Shopper's electricity. However, because private entities unregulated by state and local governments cannot produce and sell the electricity to others, the applicants purchased the gas generation unit from its prior owners and propose to take the Price Chopper off the grid. All other businesses in the shopping center will remain on the City power grid. In the event that Price Chopper's cogeneration system goes down, a diesel backup generator will be brought in and placed into service.

Although the new plan satisfies some of the regulatory conflicts, it does not resolve the zoning issue. In the opinion of the City, a privately-owned electrical generation unit generating electricity 24/7, 365 days a year falls in the use category of “Public and Private Utility Facility”, which is not permitted in the CP-2 Zoning District in which the Price Chopper is located.

The City notified the applicants in a letter from the City Attorney dated May 27, 2021, (attached) that it cannot issue the building permit for the reason stated above. It did, however, offer two courses of action the applicants could take to resolve the issue. First, seek rezoning or a special use permit. Second, the city adopts a 6-month moratorium for issuance of construction permits for electrical generation facilities and utilize that time to examine the City Code. Instead, the applicant is appealing to the BZA under Section 405.575 and Section 405.625 of the Zoning Regulations of the City to overturn the decision of the City to not issue a building permit, contending that the City did not properly apply its zoning regulations in refusing to issue applicants’ requested building permit.

-Section 405.575 Application for Building or Land Use Permit Generally.
<<https://ecode360.com/27909339>>

The City Administrator or his/her duly authorized representative shall be empowered to act within the provisions of this Chapter upon all applications for permits. In the event of refusal to issue a permit upon an application as herein provided, the applicant shall have the right to appeal to the Board of Adjustment as set forth in this Chapter. *Emphasis added.*

Section 405.625 Appeals

An appeal may be taken to the Board of Adjustment by any person, firm or corporation, from any decision of the office of the City Administrator or Building Inspector made under this Chapter.

The applicants are not seeking a variance, in which the BZA is asked to vary the provisions of the zoning ordinance based on findings that unique circumstances are present. Instead, the applicant is asking the BZA to determine whether the City improperly applied its zoning regulations in refusing to issue the applicant’s requested building permit on the basis of zoning, and to reverse the decision. . Section 405.610 states, in part, “The concurring vote of four (4) members of the Board shall be necessary to reverse any order, requirement or decision of the party appealed from or to issue an order or variance or to decide in favor of an appellant.”

Discussion:

The applicants set forth their arguments that the 400kW cogeneration unit is allowed by the Zoning Code in their letter of April 23, 2021 (attached). The City Attorney summarizes the City's position regarding zoning in his letter responding to the applicant dated May 27, 2021 (attached).

For the following reasons, the City believes that a reasonable interpretation of the Zoning Code is that a privately-owned power generating units providing 100 percent of the electricity for a building on a 24/7, 365 days a year basis are a "Private Utility Facility" and appropriately allowed as permitted uses in the M-1 and M-2 industrial zoning districts and not allowed in any commercial zoning district, including the CP-2 zoning district in which Price Chopper is located.

- 1) Noise is a major issue with primary power generation. To use the proposed 400kW generator as an example, the airborne weighted average at all frequencies is 113 decibels +/- 4 decibels. Placing this generator inside a sound attenuation box, such as is proposed at Price Chopper, the projected noise is 55 decibels. Primary power generation can generally meet the Performance Standards in the M-1 and M-2 zoning districts, which are that noise cannot exceed 75 decibels at the property lines. However, primary power generation cannot meet Performance Standards in the commercial zoning districts. The Performance Standard for noise in the C-2 zoning district and CP-2 zoning district, in which Price Chopper is located, is as follows:

Art. XV "C-2" Service Business District (applicable to Planned C-2 Districts)

Section 405.320 Performance Standards

C. No noise, smoke, radiation, vibration or concussion, heat or glare shall be produced that is perceptible outside a building and no dust, fly ash or gas that is toxic, caustic or obviously injurious to humans or property shall be produced. (*emphasis added.*)

The Performance Standards regarding noise in the C-O, CP-O, C-1, CP-O and CP-1 Zoning Districts are identical to the above Performance Standards for CP-2. There is good reason for such noise restrictions in commercial districts: many residential neighborhoods abutting commercial districts throughout the City. Residents do not want to live by businesses that generate noise 24/7, 365 days a year.

- 2) The City allows standby generators to exceed Performance Standards regarding noise because generators are accessory uses that operate intermittently due to failure of primary grid power sources. We believe this is reasonable. However, it is not reasonable to allow the

noise associated with primary power generation to occur in commercial zoning districts all day, every day.

- 3) Solar panels generating electricity are permitted as accessory uses in all zoning districts. Solar panels, however, do not emit noise in violation of Performance Standards.

Recommendation:

Deny the applicants' appeal based upon the reasons contained in this staff report and the letter dated May 27, 2021, from Steven Mauer, City Attorney, to John M. Duggan, applicants' counsel, denying the request of the applicant to overturn the staff interpretation that the proposed 400kW cogeneration system is a Private Utility Facility which is not a permitted use in the CP-2, Service Business District and order the issuance of the building permit.

Attachments: Attachment I.

Letter from John Duggan, July 24, 2021
Application to BZA, June 24, 2021
Building Permit Application, April 9, 2021
Letter from John M. Duggan, April 23, 2021

Attachment II.

Letter from Steven E. Mauer, May 27, 2021

Attachment III

Vicinity map

Attachment IV.

Photos of 400kW cogeneration unit, 100 Ton chiller
and cooling tower

B. Action Item (ID # 3975)

Harrisonville Marketplace / Price Chopper Appeal

Attachments:

EXHIBITS (PDF)

Attachment I.

Letter from John Duggan, July 24, 2021

Application to BZA, June 24, 2021

Building Permit Application, April 9, 2021

Letter from John M. Duggan, April 23, 2021



DUGGAN SHADWICK
DOERR & KURLBAUM LLC

June 24, 2021

VIA HAND DELIVERY

City of Harrisonville
Board of Zoning Adjustment
300 E. Pearl Street
Harrisonville, MO 64701

Re: *Harrisonville Building Permit Application No. 20379 – Four B Corp.*

Dear Board of Adjustment:

We represent Four B Corp. and Harrisonville Marketplace II LLC (“Applicants”). Applicants submitted an application on April 9, 2020 (the “Application”) for a building permit to construct a 400kW natural gas generator at 520 South Commercial in Harrisonville, Missouri. See Application, Exhibit B (attached without building plans). The Application complies with the City of Harrisonville’s (the “City”) Municipal Code Chapter 405, Article XXI, Sections 405.575-405.580. The City denied the Application through its letter from counsel dated May 27, 2021.

As you know, pursuant to Municipal Code Section 405.580, “[n]o building or structure shall be erected, added to or altered until a permit therefor has been issued by the City Administrator.” And, Municipal Code Section 405.575 gives applicants “the right to appeal to the Board of Adjustment” in “the event or refusal to issue a permit upon an application” to the City Administrator. Municipal Code Section 405.575 (emphasis added). The City’s refusal to grant the Application misapplies the City’s Municipal Code, as further established by Applicants’ April 23, 2021, letter (attached hereto as Exhibit C) which is incorporated herein by reference.

Applicants hereby appeal the City’s denial of a permit upon Applicants’ Application pursuant to Municipal Code Sections 405.575 and 405.625 (see attached Application, Exhibit A). Enclosed is a check for \$200 “to cover the costs of staff time to process the application, and the costs of publication of notice of the appeal and public hearing” pursuant to Municipal Code Section 405.620.B. **RECEIVED**

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CITY OF HARRISONVILLE

June 24, 2021
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Because the Board of Adjustment “shall fix a reasonable time for the hearing of the appeal” pursuant to Municipal Code Section 405.620.C, please provide our office with available hearing dates. Time is of the essence for our clients therefore we request the hearing occur at the first possible date (July 13, 2021). We request that the Board of Adjustment provide public notice of the hearing, and then decide the same “within a reasonable time” as required in Section 405.620.C.

We look forward to addressing the Board of Adjustment at the public hearing.

Very truly yours,

DUGGAN SHADWICK DOERR & KURLBAUM LLC



John Duggan

CC (via e-mail): Steven E. Mauer, City Attorney

Attachment: EXHIBITS (Harrisonville Marketplace / Price Chopper Appeal)

**APPLICATION
FOR
VARIANCE OR APPEAL
City of Harrisonville**

Case No. VAR-_____

BZA Date: _____
(Staff use only.)

Please print or type

It is recommended that the applicant schedule a meeting with city staff prior to the submission of an application. An application will not be considered complete until all required material has been submitted. An application will not be considered complete and The Board of Zoning Adjustment meeting will not be scheduled until all required material has been submitted and the filing fee has been delivered to the City per City Code. It is the applicant's responsibility to submit evidence that a variance is justified. The applicant should be aware that obtaining a variance is difficult and ample evidence justifying a variance must be provided. It is the applicants responsibility to obtain a copy of the agenda, staff report and staff recommendation prior to the scheduled meeting. Attach additional sheets if necessary.

Location or address of subject property: 520 South Commercial St., Harrisonville, Missouri 64701Zoning on subject property: CP-2 Current Land Use: Grocery Store (Price Chopper)

Request: Cite section and subsection of the Land Use Ordinance from which a variance or appeal of a zoning decision is being requested and describe the reason for requesting a variance.

Appeal is requested from the City's denial of Four B Corp.'s and Harrisonville Marketplace II LLC's Application

dated April 9, 2021, to construct a 400kW natural gas generator (attached). See the attached letters from the applicants' counsel and the City's attorney for additional information concerning Land Use Ordinances from which

appeal is sought on the City's refusal to issue a building permit.

Add additional pages if necessary

PROPERTY OWNER'S NAME: Harrisonville Marketplace II LLC/Four B Corp. PHONE: 913-573-1203

MAILING ADDRESS:	<u>5300 Speaker Road,</u>	<u>Kansas City</u>	<u>Kansas</u>	<u>66109</u>
	<u>STREET</u>	<u>CITY</u>	<u>STATE</u>	<u>ZIP</u>

APPLICANT/AGENT'S NAME: Harrisonville Marketplace II LLC Four B Corp. PHONE: 913-573-1203

MAILING ADDRESS:	<u>5300 Speaker Road,</u>	<u>Kansas City</u>	<u>Kansas</u>	<u>66109</u>
	<u>STREET</u>	<u>CITY</u>	<u>STATE</u>	<u>ZIP</u>

Represented by Counsel: John Duggan, Duggan Shadwick Doerr & Kurlbaum, LLC
9101 West 110th Street, Suite 200, Overland Park, Kansas 66210 (913) 498-3536

Deposit Filing Fee: \$100.00

RECEIVED

JUN 24 2021

APPLICANT'S SIGNATURE: _____ DATE: _____

CITY OF HARRISONVILLE

Received By: _____ TIME: _____

1/1/2018

APPLICATION FOR VARIANCE OR APPEAL

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(Attach additional sheets if necessary.)

1. Can the subject property yield a reasonable return if used under the regulations governing the zoning district in which it is located?

☐ Yes ☐ No

Explain: N/A. Applicant does not request a variance. Rather, Applicant contends that the City did not properly apply its zoning regulations in refusing to issue Applicant's requested permit. Applicants appeal from the City's refusal to issue a permit upon Applicant's Application pursuant to Sections 405.575 and 405.625.

2. Is the plight of the owner due to unique circumstances? (Unique circumstances may include, but is not limited to, the shape, topographical conditions, or physical surroundings of the property.)

☐ Yes ☐ No

Explain: N/A. Applicant does not request a variance. Rather, Applicant contends that the City did not properly apply its zoning regulations in refusing to issue Applicant's requested permit. Applicants appeal from the City's refusal to issue a permit upon Applicant's Application pursuant to Sections 405.575 and 405.625.

3. Will the variance, if granted, alter the character of the locality and/or neighborhood?

☐ Yes ☐ No

Explain: N/A. Applicant does not request a variance. Rather, Applicant contends that the City did not properly apply its zoning regulations in refusing to issue Applicant's requested permit. Applicants appeal from the City's refusal to issue a permit upon Applicant's Application pursuant to Sections 405.575 and 405.625.

4. Will the variance adversely affect the public health, safety, morals, order, convenience, prosperity, or general welfare? ☐ Yes ☐ No

Explain: N/A. Applicant does not request a variance. Rather, Applicant contends that the City did not properly apply its zoning regulations in refusing to issue Applicant's requested permit. Applicants appeal from the City's refusal to issue a permit upon Applicant's Application pursuant to Sections 405.575 and 405.625.

5. Does the request arise from a condition which was created by an action(s) of the property owner or the applicant? ☐ Yes ☐ No

Explain: N/A. Applicant does not request a variance. Rather, Applicant contends that the City did not properly apply its zoning regulations in refusing to issue Applicant's requested permit. Applicants appeal from the City's refusal to issue a permit upon Applicant's Application pursuant to Sections 405.575 and 405.625.

It is the applicant's responsibility to demonstrate that these conditions have been met at the time of application. Applicants are encouraged to submit any materials which will support their case, including site plans, photographs, studies, letters of support, etc.

BOARD OF ZONING ADJUSTMENT INSTRUCTIONS

SUBMISSION REQUIREMENTS FOR A VARIANCE APPLICATION

1. Complete Application Form (2 pages)
2. \$100.00 Filing Fee
3. A site plan drawn to scale showing dimensions of the subject property, the dimensions and location of structures whether existing or proposed, and other information necessary for the city staff and Board of Zoning Adjustment to make a decision.

The City will publish an ad in a paper of general circulation and notify all adjacent property owners by USPS First Class mail of the hearing.

BOARD OF ZONING ADJUSTMENT REVIEW AND DECISION: The Harrisonville Board of Zoning Adjustments meets (as needed) on the 2nd Tuesday of the month at 6:00 PM in City Hall. The agenda and staff report(s) will be available the Friday preceding the Board of Zoning Adjustment meeting. The chairperson will open the public hearing for each case to hear presentations by the owner or authorized agent, the public, and the city staff, respectively. After everyone has had the opportunity to speak, the Board of Zoning Adjustment will close or continue the public hearing at a later date. A concurring vote of at least four (4) members of the Board of Zoning Adjustment is necessary to grant a variance.

1/1/2018

Exhibit B

BUILDING PERMIT APPLICATION RECEIVED			
Jurisdiction of City of Harrisonville FOR INSPECTIONS CALL (816) 380-8958			
Date	04/09/21	Permit No.	
JOB ADDRESS	520 South Commercial, Harrisonville, MO	PARCEL NO.	
1 LEGAL DESCR.	USE ZONE	DATE TO COMMENCE	05/01/2021
2 OWNER	Four B Corp./Harrisonville Marketplace II, LLC	MAIL ADDRESS	5300 Speaker Road, Kansas City KS 66106
3 CONTRACTOR	MGES, LLC	MAIL ADDRESS	2890 Fairfax Trafficway, KCKS 66115
4 ARCHITECT OR DESIGNER	Alan Lankford - Lankford Fendler	MAIL ADDRESS	
5 PLUMBER	TBD	MAIL ADDRESS	
6 ELECTRICIAN	Smart Power KC	MAIL ADDRESS	1151 SE Century Dr, Lee's Summit, MO 64081
7 MECHANICAL	Martin Energy Group Services	MAIL ADDRESS	PO Box 729, Tipton, MO 65081
8 CLASS OF WORK	☒ NEW ☒ ADDITION ☐ ALTERATION ☐ REPAIR ☐ MOVE ☐ REMOVE	PHONE	913-573-1203
9 DESCRIBE WORK	Co-Generation - 400kW Natural Gas Generator/Absorption chiller/cooling tower/battery Containers positioned outside of Building - connections for thermal to RTU		
10 TYPE OF BUILDING	Retail Grocer Exterior for Energy Generation	PLAN CHECK FEE	PERMIT FEE
CHANGE OF USE TO FROM		Type of Const. Steel	Occupancy Group
11 ESTIMATION OF WORK \$	1,500,000	Sum of Side (Total Sq Ft)	800
SPECIAL CONDITIONS		No. of Stories	1
		No. of Entrances	0
		No. of Working Units	2
		No. of Rooms	1
APPROVED BY:	DATE	INSPECTIONS	REQUIRED
SETBACKS	COMMENTS	NOT REQUIRED	FEE
FRONT		TEMP ELEC	
SIDE		FOOTING	
SIDE		UND FL PLUMB	
REAR		FRAMING	
LOT AREA		ROUGH PLUMB	
WATER SUPPLY		ROUGH ELEC	
SEWER DISPOSAL		WATER	
		SEWER	
		GAS	
		FINAL PLUMB	
		FINAL ELEC	
		MECHANICAL	
		SPECIAL	
		OCCUPANCY	
SIGNATURE OF CONTRACTOR OR AUTHORIZED AGENT	(DATE)	WATER SYSTEM CONNECTION FEE	\$
SIGNATURE OF OWNER (IF OWNER BUILDER)	(DATE)	WASTEWATER SYSTEM CONNECTION FEE	\$
		ELECTRIC CONNECTION FEE	\$
		TOTAL	\$

THIS PERMIT BECOMES NULL AND VOID IF WORK AUTHORIZED IS NOT COMMENCED WITHIN 180 DAYS, OR IF WORK IS SUSPENDED OR ABANDONED FOR A PERIOD OF 180 DAYS AT ANY TIME AFTER WORK IN COMMENCED.

Attachment: EXHIBITS (Harrisonville Marketplace / Price Chopper Appeal)



April 23, 2021

Via E-Mail and U.S. Mail

Steven E. Mauer
Zerger Mauer LLP
1100 Main Street, Suite 2100
Kansas City, MO 64105
semauer@mauerlawfirm.com

Re: Harrisonville Building Permit Application – Four B Corp.

Dear Steve,

As you likely know, Four B Corp. (“Four B”) and Harrisonville Marketplace II LLC (“Harrisonville Marketplace”) submitted a new Building Permit Application on April 9, 2021, to construct a natural gas generator at 520 South Commercial in Harrisonville, Missouri. This letter is an attempt to proactively address issues raised in your letter dated February 5, 2021, as they may apply to the new application.

First, the City raised a concern that Four B does not have “an easement or ownership for the purported site of the construction.” The site is owned by a related entity, Harrisonville Marketplace, which has common ownership with Four B. As Mike Beal stated during our January 27 video meeting, Harrisonville Marketplace approves the construction. Accordingly, the building application submitted this past week is a joint application by Four B and Harrisonville Marketplace.

Your letter further states that the City received “incomplete plans” which do not reflect the permanent backup diesel generator referenced during our January 27 meeting. You requested updated plans describing where the mobile unit would be parked, how it could safely operate, and what would be excluded from prior plans. Further, you requested that updated plans address removal of the backup battery connection previously included in submitted plans. Four B/Harrisonville Marketplace attached to the re-submitted application the updated, complete plans addressing these concerns. Four B suggested locations for the portable mobile generator, but is willing to consider any feedback concerning the location. Please let us know if there is anything additional the City considers “incomplete” regarding these plans.

Your letter also requested additional information concerning ownership for the project and construction. Specifically, you raised concern that Four B would merely hold “paper ownership” to “circumvent a plainly prohibited activity.” Four B does not merely hold “paper ownership,” and in no way plans to circumvent Missouri law. Four B has always desired to use the power generated at the Property. The prior application was submitted by MicroGrid 37, LLC, an entity jointly-owned by Four B and MGES Holdings. MicroGrid 37, LLC sold its interest in the project to Four B through a “Bill of Sale.” The Bill of Sale is attached. As such, Four B desires to generate its own power.

Finally, your letter suggests that Four B may not self-generate power under the current zoning for the property. Rather, the City interprets its municipal code so that Four B may only self-generate power on land zoned M-1 or M-2 because these zoning classifications alone permit “[p]ublic and private utility facilities.” The Harrisonville Municipal Code, however, does not define “private utility facilities.” Section 700.010 defines “utility” to mean and include “water, sewer, electricity and/or other utility service furnished by the City to consumers thereof,” but does not separately define “private utility facility.” (emphasis added).

Unlike utilities such as the City, Evergy, or Spire, Four B does not seek to generate and sell energy to consumers. Rather, Four B seeks to construct a facility to self-generate energy for Four B’s exclusive grocery store use. F.E.R.C. confirms that a power generating facility (like Four B seeks to construct) does not sell power when self-supplying power for its own use. *PJM Interconnection, L.L.C.*, 94 FERC ¶ 61,291 (2001).¹ Accordingly, Four B does not operate a “private utility” by self-generating and using its own power (without selling power to third parties).

The City’s municipal code in no way restricts private property owners such as Four B from self-generating power. Suggesting that only property owners who own property zoned M-1 or M-2 may own and operate a generator is a distortion of the zoning ordinance. Notably, the City’s M-1 “Light Industrial District” zoning permits manufacturing and processing of commodities; medical marijuana cultivation; warehousing and wholesaling of commodities; motor vehicle body shops; freight terminals, and “[p]ublic and private utility facilities.” See Section 405.485(A). M-2 “General Industrial District” zoning permits the uses specified in M-1, along with building material stores and yards; bus barns/lots; cleaning, pressing and dying

¹ “When a generator self-supplies its station power requirements, the traditional practice of netting appropriately reflects the fact that there is no sale, whether for end use or otherwise.” *PJM Interconnection, L.L.C.*, 94 FERC ¶ 61251, 61890 (2001). FERC defines “station power” as “electric energy used for the heating, lighting, air-conditioning, and office equipment needs of the buildings on a generating facilities’ site, and for operating the electric equipment.” *Calpine Corp. v. F.E.R.C.*, 702 F.3d 41, 42 (D.C. Cir. 2012).

Steve Mauer
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plants; cold storage plants, farm supplies and equipment sales/service; machine and welding shops; petroleum storage; plumbing and sheet metal shops; truck and bus storage, sales, and services. *See* Section 405.505(A).

Any interpretation that only these “industrial” businesses are entitled to generate and use their own power—while restricting residential, agricultural, and commercial property owners to purchasing from the City—is simply untenable. In other words, any suggestion that a motor vehicle body shop or medical marijuana cultivation building may self-generate power while a grocery store, a farm, a hospital, or a single-family residence must purchase from the City runs counter to any common sense reading of the zoning ordinances.

Hospitals, for example, are permitted on land zoned C-O and C-1, but not on land zoned M-1 and M-2. According to the City’s zoning interpretation, Harrisonville’s hospitals may not use generators to produce backup power absent an exemption or special use permit. In reality, hospitals routinely install extensive natural gas and/or diesel backup generators to ensure their patients remain safe if their primary power source fails.

Price Chopper’s current CP-2 zoning ordinance permits “[a]ccessory uses customarily incident to the normal operation of the above uses.” *See* Section 405.315(A)(7). The “above uses” include grocery store operations. Generating power for self-use is an “accessory use customarily incident to normal operation” of a grocery store. Section 405.550 defines a structure as “accessory” when “it is associated in conjunction with the principal use and is incidental and integrally related to the principal use.”

Grocery stores must use power to operate. Accordingly, grocery stores frequently use generators—diesel, natural gas, or otherwise—in the event the power grid fails. Power generation is “incidental and integrally related to” the property’s principal use as a grocery store. Four B is permitted to power its store using natural gas and diesel generators as an accessory use customarily incident to normal grocery store operations.

As noted in your December 30, 2020, letter, grocery stores like Price Chopper use freezers and coolers to store food. Without freezers and coolers, meat, milk, ice cream, and other food products spoil/melt. Grocery stores often maintain backup power generators to ensure the coolers and freezers continuously operate when the power grid fails (like we saw across the metro this past winter when outside temperatures significantly dropped). Indeed, Four B already uses a backup generator.

Using the City’s reasoning, a grocery store may not construct a natural gas backup power generator without violating Harrisonville’s zoning laws. Indeed, the City argues that a power generator qualifies as a “private utility” which Harrisonville

Steve Mauer
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zoning laws only permit on land zoned M-1 and M-2. In other words, grocery store owners must risk food spoilage if the City's power grid fails rather than taking preemptive steps to construct a backup generator. Surely the City does not intend to prohibit business owners from protecting their businesses from power interruption? Businesses install such backup power generators all the time.

Here, Four B wishes to construct a 400 kW natural gas power generator to serve as the property's primary power source. Harrisonville's land use/zoning restrictions do not distinguish between power facilities constructed to serve as a primary rather than backup power source. Indeed, Harrisonville's land use/zoning restrictions do not specify that power generators may be constructed on land not zoned M-1 or M-2 if the power generator is used only to supply backup rather than primary power. If the City permits business owners to install natural gas backup generators on commercial land, it must also permit business owners to construct natural gas power generators to serve as the primary power supply.

My clients believe that the City's land use interpretation reveals the City's true motive for refusing to issue a building permit: to prevent a large commercial business like Four B/Price Chopper (which uses significant power) from disconnecting from the City's power supply. The City does not care if business owners construct natural gas generators merely for backup power. Rather, the City cares that Four B plans to disconnect from, and no longer pay significant money for the City's power supply. Even though Four B does not seek to operate a "private utility" and sell power to consumers, the City nevertheless cites zoning restrictions that apply to a "private utility" as an excuse to forbid Four B from disconnecting from the City's power supply. We obviously disagree with the City's position.

Four B and Harrisonville Marketplace respectfully request that the City approve their new building permit submitted April 9, 2021. Please contact me if you wish to further discuss or have additional questions. Thank you for your attention to this matter.

Very truly yours,



John M. Duggan

Attachment: EXHIBITS (Harrisonville Marketplace / Price Chopper Appeal)

GENERAL BILL OF SALE

MICRO-GRID 37, LLC, a Missouri limited liability company ("Seller"), for good and valuable consideration, the receipt of which is hereby acknowledged, does hereby sell, transfer, convey and assign to FOUR B CORP., a Kansas corporation ("Buyer"), the following assets and properties of Seller:

All the equipment, fixtures and personal property described on Exhibit A attached hereto.

If requested by Buyer, Seller shall execute, subject to the terms of this General Bill of Sale, any further particular assignment or title documents relating to the items described herein.

This General Bill of Sale is given pursuant to that certain Purchase Agreement by and between Seller and Buyer, dated as of March 21, 2021 and is subject to all of the terms, conditions and limitations contained therein. Any term not defined herein shall have the meaning as defined pursuant to the Purchase Agreement.

IN WITNESS WHEREOF, Seller has caused this General Bill of Sale to be executed as of this 30th day of March 2021.

MICRO-GRID 37, LLC

By 

Name Michelle C. Woodard

Title MANAGING MEMBER

Attachment: EXHIBITS (Harrisonville Marketplace / Price Chopper Appeal)

EXHIBIT A TO GENERAL BILL OF SALE

Foley Cat / GIRTZ	Generator/Container – 400 kW
Lithium Storage Limited	Lithium Batteries – 250kW with rack/wiring
Nuvation	Wiring - BMS
Yazaki	Thermal Chiller
Midwest Mechanical	Thermal Cooling Tower & VFD
Midwest Mechanical	Pumps and Motors
Lankford Fendler Eng	Engineering and Design
McMaster Carr	Heat Exchange Water Jacket
MCHX--Andy Schlote	Heat Exchange Exhaust
Ollson - Site Survey	For Permit requirements
LS Energy	Inverters
Jeffrey Bennett	Engineering - Chiller Stand & Pad
KM Architect - Keith Mueller	Architect
Smart Power	Electrical Services/Maintenance Services
Martin Energy	Moving - Testing -Preparation
Martin Energy	ECM-Software
Martin Energy	Metal-Stand-Pumps-Motors
Design - Concrete	2 - Pads+Interior

Includes: all miscellaneous parts, supplies, software, and engineering
All warranties associated with above listed equipment.

Attachment II.

Letter from Steven E. Mauer, May 27, 2021

Mauer | LAW FIRM^{PC}

Steven E. Mauer
semauer@mauerlawfirm.com

May 27, 2021

VIA: E-Mail:

John M. Duggan, jduggan@kc-dsdlaw.com
David L. Ballew, dballew@kc-dsdlaw.com
Duggan Shadwick Doerr & Kurlbaum LLC
9101 West 110th Street, Suite 200
Overland Park, Kansas 66210

Re: *Harrisonville Building Permit Application – MGES No. 37 / Four B Corporation*

Dear Mr. Duggan & Mr. Ballew:

Thank you again for your courtesies and patience in my delayed response. My family situation required me to be out of town for several days. I reviewed your last letter with the City. We have discussed your arguments at length. Rather than addressing all of them, we focus on one that appears to be dispositive – zoning. Your letter acknowledges that the current zoning for the parcel where your clients wish to construct an electrical generation facility is not zoned for such use. Without proper zoning, the City cannot issue a building permit because the use at the end of the construction would not be authorized.

To address this issue, the City has considered your arguments and find interesting your suggestion that the generation of electricity is “part” of operating a grocery store. While this is an interesting argument, we are unaware of any other grocery store that generates its own electricity and is completely off the grid of any electrical supply. Further, there is a vast difference between a backup emergency generator to be used sparingly and a primary generator which operates 24/7, 365 days a year.

In order to address this issue, the City suggests one of the following options:

- 1) Your clients seek rezoning or a special use permit. Either of these alternatives would follow currently existing City Code and could end up with a decision to authorize the construction and use of an electrical generation facility although we cannot make any guarantees. Under either alternative, your clients would have to follow City Code and make an application for rezoning or a special use permit to the Planning and Zoning Commission and Board of Aldermen; or,
- 2) The City adopts a moratorium for issuance of construction permits for electrical generation facilities and utilizes the next six months to examine its existing City Code. Your argument of the electrical generation being “incidental” to the operation of a grocery store is new to the City of Harrisonville. We would be willing to examine any other grocery store that has

Attachment: EXHIBITS (Harrisonville Marketplace / Price Chopper Appeal)

Duggan / Ballew
May 27, 2021
Page 2

primary generation facilities to support its operation and are completely "off grid." As mentioned previously, we are unfamiliar with any such situation but presume that your clients could direct us to many such facilities. There is certainly no guarantee that at the end of the moratorium the City would agree to change its Code but the City is willing to undertake such an effort if your client wishes to participate in such a review.

Please contact us to let us know which of the options you prefer. In the alternative, if there is another option, please let us know. Again, I appreciate your patience and courtesy. Thank you for your time and attention.

Very truly yours,



Steven E. Mauer

cc. Brad Ratliff
Andy Pollard
Roger Kroh
Chris Arthur

Attachment: EXHIBITS (Harrisonville Marketplace / Price Chopper Appeal)

Attachment III.

Vicinity Map



Attachment IV.

Photos of 400kW cogeneration unit, 100 Ton chiller and cooling tower

The equipment will be installed behind Price Chopper consists of a 400KW natural gas generator approximately 30 ft x 10 ft. in size and a 100 ton chiller and cooling tower approximately 6 ft. x 10 ft. in size.

400 kW GENERATOR



100 TON CHILLER AND COOLING TOWER

