

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

GENERAL III, LLC d/b/a SOUTHSIDE)	
RECYCLING,)	
)	
and)	
)	
RMG INVESTMENT GROUP, LLC,)	Case No. 21-cv-02667
)	
Plaintiffs,)	Judge Robert M. Dow, Jr.
)	Magistrate Judge Young B. Kim
v.)	
)	
CITY OF CHICAGO and DR. ALLISON)	
ARWADY, in her Official Capacity as the)	
Commissioner of the Chicago Department of)	
Public Health,)	
)	
Defendants.)	

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR
MOTION FOR A WRIT OF MANDAMUS AND/OR INJUNCTIVE RELIEF**

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INTRODUCTION

This is a case about a company with a strong and lengthy track record of Chicago operations that made a massive, \$80 million investment in the City of Chicago and, in reliance on a written contract with the City, and on CDPH's published permitting rules, submitted a permit application to operate a large recycling facility known as Southside Recycling. Following a two-year zoning, rulemaking, and permitting review process, SR built the most environmentally conscious recycling facility in the country and has fully complied—and then some—with every City requirement necessary to be granted an operating permit. Over several months in early 2021, City officials repeatedly told SR that it had met all requirements for issuance of the permit and that the permit would be issued. The CDPH Commissioner, Dr. Allison Arwady, has publicly stated that under these circumstances, "CDPH cannot deny permits that meet existing zoning and environmental requirements . . .".¹ Yet, when it came time for the City to follow its own rules and promises, and to award the permit to SR, the City chose to avoid, delay, and suspend its review of SR's permit application. As a result, facing irreparable harm and financial damage, SR asks this Court today to do what the City was obligated to, but failed to do: issue SR the operating permit.

Southside Recycling files this motion seeking a writ of mandamus, requiring the City to issue to Southside Recycling a Large Recycling Facility ("LRF") permit pursuant to Section 11-4-2520 of the City's Municipal Code and the City's Rules for Large Recycling Facilities ("LRF Rules") and an injunction, enjoining the City from interfering with SR's right to operate a large recycling facility on its property. The case for mandamus and injunctive relief is compelling:

- (a) After receiving a written promise from the City to cooperate in the transition of the business to the new Southeast Side location, including the efficient and expeditious review of permits;

- (b) After receiving a special use permit from the Chicago Zoning Board of Appeals to operate a Class IVB recycling facility on the property it has owned for decades;
- (c) After obtaining an air pollution control construction permit from the Illinois Environmental Protection Agency (IEPA) which reflected review and comments from the United States Environmental Protection Agency (USEPA) and which expressly addressed the important environmental justice concerns of the community;
- (d) After obtaining air pollution control permits from CDPH—the same entity that grants the permit at issue in this case—to construct and install all of the equipment necessary to operate the facility;
- (e) After submitting a permit application to CDPH, establishing that it has satisfied the new, stringent LRF Rules that CDPH created in the middle of this process;
- (f) After the owners of SR closed their profitable operation on the North Side in reliance on all of the preceding;
- (g) After spending \$80 million to construct the best in class recycling facility, which testing and air dispersion modeling has proven will be protective of human health in a manner beyond what is required by health-based standards, even when considering the cumulative impact on an environmentally burdened community; and

- (h) After being told by CDPH repeatedly, over multiple months, that the permit application met all requirements under the LRF Rules and that its permit would be issued imminently;

Southside Recycling now confronts a City which has violated its LRF Rules and its Contract with SR by failing to issue the permit, without offering even a single, legally justifiable excuse. There are many business risks undertaken when building an \$80 million state-of-the-art recycling facility. But one risk that SR did not take was that after full compliance with every requirement, the City would decide to set aside its rules and Agreement and suspend the permit review. This Court must step in to remedy the City's violations and award the permit.

This request for mandamus is far stronger than a typical request to enforce a City's permitting regulations. Here, the City's intentional delay in issuing the LRF permit violates not only its own Municipal Code and the LRF Rules, but also violates the express terms of a signed "Term Sheet Regarding General Iron/RMG Interim Operating Plan, Cessation of Northside Operations and Southside Transition," dated September 10, 2019 (the "Agreement"), attached hereto as Exhibit A. In that Agreement, the City promised the owners of Southside Recycling that the City would cooperate in the transition of Southside Recycling's business to the new location, not only by following its permitting rules, but by doing so expeditiously and efficiently. The City's obligations under the Agreement were not subject to the political winds or any sort of discretion. The owners of SR relied heavily on the City's promise and its carefully crafted rules. SR permanently ceased operations at its very profitable North Side facility, and it spent approximately \$80 million on its new state-of-the-art Southeast Side facility that complies with (and in many cases exceeds) all permitting requirements. The large footprint and pollution control equipment at the new facility were designed specifically to make sure that the facility would meet the

particular health and safety needs of an already environmentally burdened community. Moreover, under the LRF Rules, SR's air emissions will be monitored 24 hours a day, 7 days a week to make sure that the facility remains in compliance.

The owners of Southside Recycling abided by the Agreement, but the City has not honored its bargain. As explained in detail in the Argument section below, under these circumstances, Illinois law provides for mandamus relief in the form of a court order to Commissioner Arwady to issue a permit to Southside Recycling. In the alternative, this Court should enjoin the City from delaying SR's law-abiding recycling operation.

The City's purposeful delay in issuing the LRF permit finds no justification in the City's rules, in its Agreement, or in the law generally. Instead, the City has justified its permit delay on a false debate over the issue of environmental justice. The most recent salvo on that issue was a May 7, 2021 letter from the United States Environmental Protection Agency (the "USEPA") asking the City to halt its review of SR's permit application for an indefinite period of time in order to conduct some undefined environmental justice analysis. A copy of the USEPA's letter is attached hereto as Exhibit B. The May 7 letter came after a conversation between the Mayor and Administrator Regan on May 3. The USEPA request comes almost a year after the USEPA made a detailed review of the proposed air pollution control permit that the Illinois Environmental Protection Agency (the "IEPA") has since issued to Southside Recycling. The USEPA approved that permit and commended the IEPA for addressing the community concerns. The USEPA's about-face on May 7, 2021 cited no issues whatsoever with the facility itself or its compliance with all rules and regulations. The letter contained no legal authority for requesting the delay. No environmental law or regulation provides for the undefined environmental justice review that the USEPA now seeks. This latest response by the USEPA does not qualify as a proper agency

regulatory action, but is more properly characterized as political placation. The USEPA Administrator stated, "I do not believe U.S. EPA's public comments submitted by the prior administration during the state permitting process were adequate, and they do not reflect the current priorities and policies of the U.S. EPA." Exhibit B, p. 2. Somehow, the USEPA believes it can simply change its mind, without any legal authority, and thereby magically negate its own prior actions, the City's binding contract, and Southside Recycling's \$80 million reliance. The City has honored the USEPA's request and has suspended the LRF permit issuance indefinitely. *See* May 10, 2021 letter from Commissioner Arwady to Southside Recycling suspending the permit, attached hereto as Exhibit C.

It is understandable that some members of the Southeast Side community and environmental advocates might question the closing of a metal recycling operation on the wealthy, predominantly white North Side community and its transition to a lower income Southeast Side community of color. But the uncontroverted facts and the law make clear that the new proposed facility adequately addresses environmental justice concerns. In fact, Southside Recycling's new facility does not create an environmental justice problem, but instead, as the most environmentally conscious metal recycling facility in the country, it provides a solution. It has demonstrated the effectiveness of its millions of dollars' worth of pollution control devices through USEPA-supervised testing. The IEPA, under the USEPA's supervision, has validated air dispersion modeling which demonstrates that the facility will easily comply with all applicable health and safety standards. Importantly, and consistent with environmental justice concerns of the community, the modeling took into account the existing sources of pollution in the community and the existing background monitored concentrations from the nearby IEPA monitoring station.

Through several rigorous regulatory processes, including repeated rounds of public comments and hearings, the facility satisfied the Chicago Zoning Board of Appeals, a nine-month IEPA air pollution control construction permit review, and a six-month review by CDPH of its LRF permit application. The new SR facility sits in the middle of a 175-acre parcel which provides buffering for any air emissions and dust mitigation, far superior to the 10-acre parcel on which the North Side facility operated. The new location is also served by two railroads which provide an alternative to truck transportation. The size and design of the new facility, and the comprehensive regulatory review of it, all confirm the health and safety of this operation, even given the existing community burdens.

There exists an additional and critical reason why the expressed environmental justice concern over this facility rings hollow. The only other large recycling facility in the Chicagoland area—Sims Metal Management—operates in the heart of the Pilsen neighborhood, one of the most environmentally burdened communities in Chicago. Yet, unlike the proposed SR facility, Sims operates with no environmental controls on its shredder. It is a grave mistake for anyone truly concerned with environmental justice to support a delay in permitting the most environmentally conscious metal recycling operation in the country, and thereby direct the recycling of 700,000 tons of Chicagoland's obsolete metal to a recycler using no pollution controls on its shredder, to other less regulated recyclers, or to landfills.

The City's failure to issue the LRF permit immediately threatens the very existence of Southside Recycling and its principal owner, RMG. It was contemplated by all parties to the September 2019 Agreement that the LRF permit would be issued by the time that the North Side operation closed on December 31, 2020. That timing would have allowed a smooth transition for Southside Recycling to retain the suppliers from whom it purchased obsolete metal and to retain

its customers to whom it sold recycled product. The delays have either ruined or threatened most, if not all, of these relationships, and scrap sellers now must travel significantly farther to sell their product and/or sell it to less environmentally conscious recyclers. Moreover, RMG has invested tens of millions of dollars in this new facility, and failure to recoup that investment threatens the company's 10-state operation. These damages are also creating an avalanche of problems for hundreds of employees, small minority-owned businesses, and other vendors, all of whom rely on the economic engine of this recycling operation.

The bottom line is that the City's Agreement, combined with its repeated acknowledgement that SR has satisfied the LRF Rules and all other regulatory requirements, give SR a legal right to a permit, and Illinois law gives SR the legal right to a writ of mandamus. Ordering the City to issue the permit is not only the right thing to do, it is legally required.

FACTS

I. BACKGROUND AND PERMITTING TIMELINE

For more than 60 years, the family of General Iron companies performed the essential service of metal recycling at its North Side campus located at 1909 N. Clifton Avenue. *See* Declaration of Adam Labkon, ¶ 1, attached hereto as Exhibit D. For the past 15 years, General Iron was one of the Midwest's largest and most successful metal recyclers, recycling more than an annual average of 700,000 tons of obsolete metal from Chicago and the surrounding area. *Id.* That tonnage is the equivalent of all of the garbage collected in Chicago in a year. Through the recycling process, obsolete metal gets reused rather than deposited in a landfill. *Id.* Thus, it is undeniable that metal recycling not only has a significant positive effect on the environment, but it is critical for the Earth's sustainability.

Beginning no later than 2018, the City had been pressuring General Iron to close its lawfully run, properly permitted metal recycling facility, which it had operated on the

North Side for decades. Labkon Declaration, ¶ 2. General Iron finally succumbed to the pressure and sold its assets to RMG. *Id.* On March 16, 2018, General Iron and RMG executed a Letter of Intent for the asset sale. *See* Declaration of Steve Joseph, ¶ 1, attached hereto as Exhibit E. Upon the purchase, RMG planned to build the most environmentally conscious metal recycling facility in the country, on a 175-acre property at 11600 South Burley that RMG has owned and used for other recycling operations without issue for decades. *Id.*, ¶ 2.

RMG promptly applied to the Chicago Zoning Board of Appeals for a special use permit to build and operate a Class IVB recycling facility on RMG's Southeast Side property. The Chicago Zoning Board of Appeals conducted an extensive public hearing, which included testimony from sophisticated environmental advocates, air emissions experts, and City officials. The Chicago Zoning Board of Appeals issued a 15-page report, including findings of facts, approving Southside Recycling's special use application to build and operate a Class IVB recycling facility. *See* "Findings of the Zoning Board of Appeals in the Matter of the Special Use and Variation Applications for 11600 S. Burley Avenue by General III, LLC," attached hereto as Exhibit F.

On September 10, 2019, the City, General Iron and RMG entered into an Agreement to facilitate the closing of the metal recycling facility on the North Side and the permitting of a new metal recycling facility to be constructed and operated by Southside Recycling on the RMG property described above. *See* Labkon Declaration, ¶ 3; Exhibit A; Joseph Declaration, ¶ 3. Under the Agreement, RMG and General Iron (the company whose assets RMG purchased) agreed to cease operations of its validly permitted, profitable business on the North Side by the end of 2020. Labkon Declaration, ¶ 4. In exchange, the City agreed to "reasonably cooperate with RMG in achieving the efficient, expeditious transition" of the metal

recycling operation to the new Southside Recycling facility, including reasonable assistance with processing and review of license and permit applications, and the scheduling of public hearings. *See* Exhibit A; Labkon Declaration, ¶ 4. Notably, RMG was unwilling to close on its purchase of General Iron's assets until it had secured this Agreement with the City. Joseph Declaration, ¶¶ 3 and 6. It was critical to RMG that the City promised, in writing, to follow its own permitting rules efficiently and expeditiously before RMG would undertake an \$80 million project to build the country's most environmentally conscious metal recycling facility. *Id.* After securing the Agreement on September 10, 2019, RMG then closed on the asset sale on September 30, 2019. *Id.* at ¶ 4.

RMG's facility on the Southeast Side is simply a far superior location at which to operate a large recycling facility. Labkon Declaration, ¶ 5. It has 175 acres of buffering space to mitigate and contain air emissions and dust, as compared to the 10 acres on which the North Side facility operated. *Id.* In addition, the expansive footprint avoids the staging of trucks in the public way. *Id.* Also, unlike the North Side facility, the new facility is serviced by two railroads which reduces the need for truck transportation. *Id.*

On September 24, 2019, two weeks after securing the Agreement with the City, Southside Recycling submitted an application to the Illinois Environmental Protection Agency Bureau of Air for an air pollution control construction permit, pursuant to 35 Ill. Adm. Code 201.146 (the "IEPA Permit").² SR's application demonstrated, among other things, how the new facility would control air emissions in a manner that would be protective of human health and the environment. SR's application went beyond the permit requirements and included rigorous air dispersion modeling analyses that took into account the existing air quality in the community surrounding the new facility.³ The modeling utilized worst-case scenarios by using a shredding

rate equal to 175% of the amount allowed in the IEPA permit, and used background emissions that far exceeded historical values. *See* Declaration of James Kallas, ¶ 1, attached hereto as Exhibit G. The air dispersion modeling analyses demonstrated that the air emissions from the new facility would comply with all applicable health-based standards, even when the existing levels of air emissions from other surrounding sources were taken into account. *See* Endnote 3, pp. 18-19.

The IEPA conducted a rigorous permit application review and approval process, in accordance with its Environmental Justice Policy that was developed in coordination with the USEPA, during which it conducted a public hearing and received 329 written comments, including from many of the most sophisticated and vocal environmental advocacy groups operating both locally and nationally. *See* Endnote 3. In addition, the USEPA reviewed the proposed permit and provided detailed comments. *See, e.g.*, June 12, 2020 letter from Genevieve Damico, USEPA Region 5, Chief of Air Permits Section, to Raymond E. Pilapil, Manager of the Permit Section of the IEPA, Division of Air Pollution Control, attached hereto as Exhibit H. On June 25, 2020, the IEPA issued to SR an air pollution control construction permit to construct the new facility.⁴ Concurrently, the IEPA issued a 73-page Responsiveness Summary which addressed all significant permit-related comments, and explained how the IEPA enhanced the draft construction permit by adding conditions specifically to address the public comments raised during the permitting process. *See* Endnote 3. All of the USEPA comments were fully addressed in the IEPA's Responsiveness Summary, and the USEPA commended the IEPA for addressing the community's concerns in the permit. *See* Exhibit H.

Also in June 2020, the City issued a radically new set of rules for the permitting of large recycling facilities entitled "Rules for Large Recycling Facilities".⁵ *See* Joseph Declaration, ¶ 5. These LRF Rules were created after the City consulted with well-respected local and national

environmental advocates, as well as local recycling companies. The resulting LRF Rules have been regarded as some of the most environmentally stringent regulations for recycling facilities anywhere in the country. *See id.* The City has acknowledged that the LRF Rules were created primarily to address the new SR facility.

In accordance with Section 11-4-2520 of the City's Municipal Code and the new LRF Rules, on November 12, 2020, Southside Recycling submitted an application to the City for a LRF permit. Labkon Declaration, ¶ 6; Kallas Declaration, ¶ 1; Declaration of Hal Tolin, ¶ 1, attached hereto as Exhibit I. It was received by the CDPH no later than November 14th.⁶

After SR submitted its permit application, CDPH issued Guidelines Regarding Permitting Processes for Consequential Large Recycling Facilities (the "Guidelines"). These Guidelines contained additional permitting rules under Section 11-4-2520 of the Municipal Code which govern CDPH's determination of when and how to issue a LRF permit. Those Guidelines are attached hereto as Exhibit J.

In accordance with Section 1 of the Guidelines, the City began receiving public comments on SR's permit application, and on December 10, 2020, the City conducted a public hearing. In accordance with Section 3 of the Guidelines, on December 23, 2020, the City issued to Southside Recycling a letter alleging certain informational deficiencies with SR's permit application. Kallas Declaration, ¶ 1; Tolin Declaration, ¶ 1. Many of the supposed deficiencies had nothing to do with the LRF application requirements, but were instead designed to satisfy miscellaneous comments from the public. On January 13, 2021, SR submitted a supplemental application providing full information addressing each and every one of the City's alleged deficiencies.⁷ Labkon Declaration, ¶ 6; Kallas Declaration, ¶ 1; Tolin Declaration, ¶ 1. In addition, SR and the City conducted several hours of phone calls to review, in great detail, specific

responses to each and every one of the alleged deficiencies. *Id.* Since that time, the City has repeatedly acknowledged to SR that not only were all of the alleged deficiencies adequately addressed, but also that Southside Recycling's permit application, as supplemented, satisfied the LRF Rules, and that no further information was required from Southside Recycling. *See* Labkon Declaration, ¶ 7; Kallas Declaration, ¶ 1; Tolin Declaration, ¶ 1. Thus, under Section 4 of the Guidelines, the City was required to issue a draft permit to SR by no later than March 15, 2021; and with another 30-day public comment period, the City was required to issue a final permit as early as April 15, 2021, but in no event later than May 15, 2021. *See* Guidelines, Exhibit J.

II. THE CITY'S REPEATED ACKNOWLEDGMENT THAT SOUTHSIDE RECYCLING HAS SATISFIED THE LRF RULES.

On January 25, 2021, Dave Graham, the Assistant Commissioner of CDPH, told SR that Renante Marante, an Environmental Engineer for CDPH, was finalizing a draft LRF permit for Southside Recycling so that it could issue that draft permit by February 3, 2021. Labkon Declaration, ¶ 8. The issuing of a draft permit means that SR has satisfied all permitting requirements and that the draft permit is subject only to further public comment. *See* Guidelines, Exhibit J. In fact, no draft permit was issued on February 3, 2021, but the City did not reveal any deficiency in the application to justify its failure to issue the draft permit by that date. Labkon Declaration, ¶ 9.

On or about February 11, 2021, Mort Ames, Senior Counsel in the City Law Department, spoke to counsel for Southside Recycling and communicated that the City had all of the information it needed from SR regarding the draft LRF permit and that the City was reviewing the final comments on the draft permit. *See* Declaration of Patrick Collins, ¶ 4, attached hereto as Exhibit K. In that conversation, Mr. Ames did not reveal any deficiency in SR's application to justify the City's failure to issue the draft permit.

On February 24, 2021, Jim Kallas, the Environmental Manager for Southside Recycling, and Adam Labkon, a principal of Southside Recycling, spoke to Dave Graham. *See* Kallas Declaration, ¶ 2; Labkon Declaration, ¶ 10. Mr. Graham indicated that the City was now drafting a responsiveness document (called a Summary Document in Section 5 of the CDPH Guidelines) to go along with the draft LRF permit. *Id.* As laid out in Section 5 of the Guidelines, the Summary Document is meant to address the public comments to the permit application, explaining why the City decided to issue the final permit. *Id.* Mr. Graham indicated that the responsiveness document, to be issued contemporaneously with the draft LRF permit, would expedite the process of the City's issuing the final permit. *Id.* Mr. Graham explained that the City had already received several rounds of extensive public comments and therefore, by issuing the responsiveness summary with the draft permit, there would be no need to make further revisions for the final permit. *Id.* Mr. Graham indicated that the City was on track to issue the draft permit within two weeks. *Id.* Again, the City did not reveal any deficiency in SR's permit application to justify failure to issue the draft permit. *Id.*

On March 3, 2021, Jim Kallas and Adam Labkon again spoke with Dave Graham about the timing for the draft permit. Kallas Declaration, ¶ 3; Labkon Declaration, ¶ 11. Mr. Graham indicated that the City was on track to issue the draft permit by March 14th. *Id.* Again, not only did the City not reveal any deficiency in the permit application to justify the failure to issue the draft permit, but rather, Mr. Graham confirmed that SR had provided all the information the City needed. *Id.*

On March 12, 2021, Steve Joseph sent a letter to Commissioner Arwady to confirm that the permit would be issued by March 15, 2021. *See* Complaint, ECF No. 1, ¶ 27, and Exhibit D thereto, ECF No. 1-1. To the extent that the City did not issue the permit as required,

Mr. Joseph requested a meeting with Commissioner Arwady. *Id.* Commissioner Arwady was required to participate in such a meeting pursuant to Section 6 of the Agreement. *Id.* The City did not issue the permit on March 15, 2021, and Commissioner Arwady did not agree to participate in a meeting. Instead, the City violated its legal duties and asked Southside Recycling for information extraneous to the LRF permitting process.

On March 17, 2021, CDPH issued a letter to SR requesting—for the very first time—information about long-existing facilities/businesses adjacent to the new SR facility, which have some overlapping ownership with the owners of SR.⁸ Labkon Declaration, ¶ 12; Tolin Declaration, ¶ 2. The City had complete knowledge regarding the ownership and operation of the adjacent facilities at the time SR first submitted its application. *See* Tolin Declaration, ¶ 2. Moreover, the above-referenced air dispersion modeling analyses performed for the IEPA accounted for background air emissions, including from the adjacent businesses, which the IEPA acknowledged were not of concern. *See* Endnote 3, pp. 18-23. The City failed to provide any explanation as to how the new requested information fell within the scope of the LRF Rules or the permitting criteria for a large recycling facility. *See* Labkon Declaration, ¶ 12. The City admitted that it had changed its approach to the permit review in order to address political opposition to the LRF permit. *Id.* In the spirit of cooperation, on March 24, 2021, SR submitted another lengthy response to the City about these adjacent facilities, and responding to a few other information requests that were essentially duplicative of previous requests.⁹ Labkon Declaration, ¶ 13. CDPH did its own modeling with independent experts and confirmed the accuracy of the IEPA's modeling experts. CDPH then acknowledged that the submitted information satisfied the City's concerns and would not affect SR's right to the draft LRF permit or the timing of its issuance. *Id.*

Indeed, on March 27, 2021, Dave Graham told Adam Labkon and Jim Kallas there was no reason not to issue the draft LRF permit by March 31, 2021. Labkon Declaration, ¶ 14; Kallas Declaration, ¶ 4. No permit was issued by March 31, 2021.

For the next two weeks, SR had repeated phone conversations with various representatives of the City who continued to report that the draft LRF permit was "days away" from issuance, though it would contain some special conditions. See Labkon Declaration, ¶ 14; Kallas Declaration, ¶ 5; Tolin Declaration, ¶ 3. One such conversation occurred between Mort Ames, Senior Counsel in the City Law Department, and counsel for SR on March 31, 2021. See Collins Declaration, ¶ 5; Tolin Declaration, ¶ 3. In none of those calls did any City official indicate that there was any deficiency in SR's permit application. See Kallas Declaration, ¶ 5; Tolin Declaration, ¶ 3. In fact, in a phone conversation between Dave Graham and Jim Kallas on April 12, 2021, Mr. Graham stated that the only reason he thought a draft permit could be delayed beyond that week would be due to other political/PR issues facing the City. See Kallas Declaration, ¶ 5. This statement was yet another admission by Mr. Graham that the City had violated its own Guidelines which required the City to have issued the draft LRF permit by March 15, 2021.

Finally, during a phone call on April 19, 2021, Hal Tolin, a principal of RMG, was informed by Dave Graham that Commissioner Arwady had stated that it was time to move forward with issuing the draft LRF permit to SR. Tolin Declaration, ¶ 4. Mr. Tolin then asked Mr. Graham, "will she be allowed to?" Mr. Graham replied "I don't know." *Id.* On April 20, 2021, CDPH had still not issued the permit. *Id.*, ¶ 5. On that date, Mr. Tolin had another conversation with Mr. Graham in which Mr. Tolin said to him, "your own department isn't following the rules." Mr. Graham responded, "that is a fair statement." *Id.* Later in that same conversation, Mr. Graham told Mr. Tolin that Mr. Graham had informed multiple people,

including Commissioner Arwady, that Mr. Graham didn't know any legitimate reason that anybody could provide for not issuing the permit. *Id.*

No permit has been issued. The City's failure to issue the permit is in violation of the LRF Rules and CDPH Guidelines. It also contravenes the City's written Agreement with the owners of Southside Recycling. In addition, the City refused to honor the requirement, in Section 6 of its Agreement, that it arrange a meeting between Commissioner Arwady and SR, despite an express request by SR in yet another letter to Dr. Arwady dated April 26, 2021, attached hereto as Exhibit L. *See also* Labkon Declaration, ¶ 4; Exhibit A.

ARGUMENT

I. SOUTHSIDE RECYCLING IS ENTITLED TO A WRIT OF MANDAMUS.

Southside Recycling meets the three elements required for mandamus relief under Illinois law. In addition, the Illinois vested rights doctrine entitles Southside Recycling to mandamus relief. Therefore, this Court should order CDPH Commissioner Arwady to issue the LRF permit to SR.

A. Southside Recycling Meets the Three Elements for Mandamus Relief.

Southside Recycling is entitled to a writ of mandamus ordering Commissioner Arwady to issue a permit allowing Southside Recycling to operate its Large Recycling Facility. The law authorizing the writ of mandamus in this case is straightforward. While "[m]andamus is an extraordinary remedy," it is used to enforce "the performance of official duties by a public officer where no exercise of discretion on [her] part is involved." *1350 Lake Shore Assocs. v. Hill*, 761 N.E.2d 760, 765 (Ill. App. Ct. 2001). *See also Dadian v. Vill. of Wilmette*, No. 98 C 3731, 1999 WL 299887, at *7 (N.D. Ill. May 4, 1999) ("[m]andamus is the appropriate remedy for a party allegedly aggrieved by the wrongful refusal of a city official to grant him a building permit required by a municipal building or zoning ordinance"); *River Park*,

Inc. v. City of Highland Park, No. 93 C 1179, 1993 WL 281079, at *6 (N.D. Ill. July 26, 1993) (state law mandamus claim is the proper remedy to compel city to issue building permit to deserving applicant). There are three simple elements to Southside Recycling's mandamus claim: (1) a clear right to the LRF permit; (2) the CDPH Commissioner's authority to issue it; and (3) the duty of the CDPH Commissioner to issue it. *See 1350 Lake Shore Assocs.*, 761 N.E.2d at 765 ("The issuance of a writ of *mandamus* is appropriate only where the plaintiff shows a clear, affirmative right to the requested relief, a clear duty to act on the defendant's part, and clear authority in the defendant to comply with the writ."). Here, Southside Recycling easily meets its burden on all three elements.

1. Southside Recycling Has a Clear Right to the LRF Permit.

The actions and unqualified statements of CDPH officials leave no doubt that Southside Recycling's LRF permit application satisfies all applicable permitting requirements under Section 11-4-2450 of the City's Municipal Code (the "Ordinance") and the LRF Rules, and therefore, Southside Recycling has a clear right to the permit. These actions and statements followed an extensive multi-part permitting process. As discussed above, SR initially submitted a detailed permit application to the City on November 12, 2020, in accordance with the LRF Rules. *See* Labkon Declaration, ¶ 6; Kallas Declaration, ¶ 1; Tolin Declaration, ¶ 1. CDPH issued SR a letter dated December 23, 2020 citing informational deficiencies. Kallas Declaration, ¶ 1; Tolin Declaration, ¶ 1. SR then submitted a supplemental permit application on January 13, 2021, to provide the requested information. Labkon Declaration, ¶ 6; Kallas Declaration, ¶ 1; Tolin Declaration, ¶ 1. The City posted the supplemental permit application on its website on January 14, 2021, in accordance with Section 1 of the Guidelines. *See* Exhibit J. Under Sections 2 and 3 of the Guidelines, CDPH was then required to make a determination whether the application was complete and met all requirements of the LRF Rules and Ordinance by no later than 30 days

from the end of the public comment period, which the City had extended to January 29, 2021, and to notify SR if any deficiencies were identified. *Id.* The City did not identify any further deficiencies in the application and never issued a deficiency letter following receipt of the supplemental permit application. Rather, the City repeatedly told SR that the supplemental permit application was complete, satisfied the LRF Rules and Ordinance, and no further information was required. Labkon Declaration, ¶ 7; Kallas Declaration, ¶ 1; Tolin Declaration, ¶ 1. Therefore, under the City's Guidelines, the supplemental application is deemed complete and meets all requirements of the LRF Rules and Ordinance. *See* Exhibit J.

Notwithstanding, on March 15 and 17, 2021, the City made additional requests for information, which it acknowledged were outside the scope of the LRF Rules and not based on any deficiency in the permit application. Labkon Declaration, ¶ 12; Tolin Declaration, ¶ 2. On March 24, 2021, SR submitted another extensive and thorough response to address these remaining questions from the City. Labkon Declaration, ¶ 13.

Since then, as explained in detail in Part II of the Facts section above, high-level CDPH officials and the City's legal counsel have repeatedly and consistently confirmed and represented to SR that the supplemental permit application was complete and satisfied all of the permitting criteria under the LRF Rules and the City's Municipal Code, and that a draft permit would be issued imminently. *See* Labkon Declaration, ¶ 14; Kallas Declaration, ¶¶ 4-5; Tolin Declaration, ¶¶ 3-5; Collins Declaration, ¶ 5. Once CDPH made the determination that the permit application was complete and met all applicable permitting requirements, it was required under Section 4 of the Guidelines to issue a draft permit within 60 days of posting the supplemental application. *See* Exhibit J. Section 4 of the Guidelines, which governs CDPH's determination of when and how to issue a LRF permit, states as follows:

If, within sixty (60) days of posting of the application or supplemental application, CDPH finds that the application is complete and meets all requirements of the Rules and Ordinance, CDPH will prepare and post a draft permit on the City's website for public review and comment.

Exhibit J, p. 2.

Therefore, under Section 4 of the Guidelines, the City both has the authority and was *required* to post a draft permit for public comment by no later than 60 days following the January 14, 2021 posting of the permit application, or by March 15, 2021. Indeed, between January 13, 2021—the date SR's supplemental application was submitted—and March 15, 2021, CDPH repeatedly told Southside Recycling that its application was complete and that the draft permit would be issued within the 60-day period, as required under Section 4 of the Guidelines. Even after requesting additional information on March 17, 2021, CDPH officials indicated that this additional information request would not affect permit timing and acknowledged SR's March 24, 2021 response to that request as sufficient.

CDPH did not post a draft permit by March 15, 2021, as required by Section 4 of the Guidelines, and has yet to post the draft permit. Had CDPH posted the draft permit, as required, the permit would have gone through a 30-day public comment period, pursuant to Section 5 of the Guidelines, after which time, CDPH was required to issue the final permit to SR. Therefore, under Section 5 of the Guidelines, the City had the authority and was *required* to issue a final permit by May 15, 2021. *See* Guidelines, Exhibit J.

2. The CDPH Commissioner Has the Authority to Issue the LRF Permit to Southside Recycling.

There can be no dispute over the fact that Commissioner Arwady has the authority to issue the LRF permit. The LRF Rules expressly give her that authority. *See* Endnote 5.

3. Commissioner Arwady Has the Duty to Issue the LRF Permit to Southside Recycling.

The Commissioner has the duty to issue the LRF permit, given that SR's permit application fully complies with the LRF Rules. The Commissioner has no discretion to deny or delay issuance of the permit. Indeed, Commissioner Arwady has expressly acknowledged her duty to issue the LRF permit under these circumstances, noting that "CDPH cannot deny permits that meet existing zoning and environmental requirements . . .". *See* Endnote 1.

Most importantly, in addition to Commissioner Arwady's duty under the LRF Rules and Guidelines to issue the permit, the Commissioner promised in the Agreement to cooperate in the transition of RMG's recycling business to the Southeast Side facility, efficiently and expeditiously, including the issuance of permits. Any reasonable interpretation of that Agreement provides that if SR satisfied the LRF Rules, the City must issue the permit. Indeed, the reason why RMG signed the Agreement and agreed to cease its North Side operation by December 31, 2020 was to obtain the City's express commitment that if SR satisfied the LRF permitting rules, the City would issue the permit. *See* Joseph Declaration, ¶ 6.

Under Illinois law, "[a] permit must be issued once a developer meets the criteria imposed by a governmental unit." *Pittsfield Dev., LLC v. City of Chicago*, No. 17 C 1951, 2019 WL 1125818, at *5 (N.D. Ill. Mar. 12, 2019). Because the City has failed to issue the permit to Southside Recycling in violation of the LRF Rules, the CDPH Guidelines, and the Agreement, mandamus relief is warranted. *See 1350 Lake Shore Assocs.*, 761 N.E.2d at 765-68 (trial court erred in denying property owner's petition for a writ of mandamus where the Department of Planning and Development of the City of Chicago had "both the duty and the authority to issue a Part II Approval letter [a prerequisite to the issuance of a building permit] when the plans submitted to him comply fully with the relevant planned development ordinance"); *Heerey v. City*

of *Des Plaines*, 587 N.E.2d 1119, 1125-26 (Ill. App. Ct. 1992) (where building permit applicant's proposed remodeling project met prerequisites for issuance of building permit, trial court properly granted mandamus relief compelling city to issue building permit).

B. The Illinois Vested Rights Doctrine Entitles Southside Recycling to Mandamus Relief.

RMG relied in good-faith on its Agreement with the City and on the expectation of issuance of a permit under the new LRF Rules when it spent \$80 million to build a more than compliant operation. Courts in Illinois have repeatedly recognized that a company's reliance on permitting rules entitles it to obtain the permit through mandamus: "the principle that a landowner that substantially changes its position through expenditures or the incurrence of obligations in good faith reliance on the issuance of a building permit obtains a vested right to the issuance of the permit" *1350 Lake Shore Assocs.*, 761 N.E.2d at 767. *See also Furniture L.L.C. v. City of Chicago*, 818 N.E.2d 839, 839 (Ill. App. Ct. 2004) (owner had vested right to build residential development despite zoning change where owner made substantial expenditures in good-faith reliance on *probable issuance* of building permit); *Cribbin v. City of Chicago*, 893 N.E.2d 1016, 1020 (Ill. App. Ct. 2008) (finding plaintiffs had a vested right in an existing zoning classification and affirming mandamus order requiring the City of Chicago to issue building permits based on that classification after plaintiffs' property was rezoned). The purpose of the vested rights doctrine "is to mitigate the unfairness caused to property owners who have made a substantial change in position in good-faith reliance on the probability of obtaining a building permit, only to have their efforts thwarted by a change in the zoning classification of their land." *Id.* at 1026.

The *1350 Lake Shore Assocs.* decision is particularly instructive. There, the developer relied on an 18-year-old zoning designation that entitled the developer to build a residential high-rise on specific property. Eighteen years after obtaining the zoning designation,

the developer finally decided to apply for a building permit. Shortly before that permit was issued, but after the developer had made a relatively minor investment in architectural plans, the Chicago City Council introduced a zoning ordinance that would have prohibited the high-rise. The city waited for the new zoning ordinance to pass and then failed to issue the building permit. The developer sued for mandamus, and the trial court denied the relief. On appeal, the Illinois Appellate Court found that the city had no discretion to wait for passage of the new zoning ordinance and instead was required to issue the building permit. Thus, the Illinois Appellate Court reversed the trial court and granted mandamus relief, compelling the city to issue the building permit. *1350 Lake Shore Assocs.*, 761 N.E.2d at 767.

The same principles apply here, but with even greater force. In *1350 Lake Shore Assocs.*, the court honored the developer's reliance, even after it waited 18 years to make only a modest investment. Moreover, the court honored the developer's plans, even though they had become inconsistent with the city's current ordinance. Here, Southside Recycling is not even seeking to act inconsistently with the most current set of rules. Rather, Southside Recycling embraced and fully complied *with the new, more stringent LRF Rules* and spent \$80 million to meet or exceed the *new* requirements. Southside Recycling has made substantial investment and massive changes to the property based on good-faith reliance on the LRF Rules, a written Agreement, and assurances from the City regarding the permitting process. Now those efforts are being thwarted by the City's refusal to honor SR's compliance with the new, more stringent and continually changing permitting rules. Southside Recycling has established a clear right to the issuance of the permit, and the authority and duty on the part of the City to issue the permit. This Court should issue a writ of mandamus ordering the City to issue a permit allowing Southside Recycling to operate its Large Recycling Facility.

C. The USEPA Cannot Erase or Abridge the City's Agreement and Obligations.

In direct contravention of its obligations under its own Guidelines and the Agreement, and after having already determined that the application was complete and met all applicable requirements, CDPH Commissioner Arwady sent SR a letter dated May 10, 2021, stating that, at the behest of the Biden EPA Administration, CDPH was indefinitely suspending its review of the permit application in order to undertake some type of undefined environmental justice analysis. *See* Exhibit C. Notably, the IEPA had already conducted an environmental justice analysis in connection with SR's air pollution control construction permit, and that permit took into account comments from the USEPA. By its own admission, the USEPA's request for the City to suspend SR's permit process is supported only by a change in political control and not by any legal authority whatsoever. Indeed, there is no requirement in the LRF Rules, Ordinance or Guidelines for SR to perform an undefined, undesigned environmental justice analysis. Southside Recycling's permit application was deemed complete and in full satisfaction of the requirements of the LRF Rules and Ordinance as of March 1, 2021—30 days after the expiration of the public comment period following the submission of SR's supplemental application. At the very least, a draft permit should have been issued pursuant to Section 4 of the Guidelines by March 15, 2021—60 days after the posting of SR's supplemental application. That would have required a final permit to be issued between April 15 and May 15, 2021. Therefore, this Court should require Commissioner Arwady to issue the LRF permit to SR immediately.

II. SOUTHSIDE RECYCLING IS ENTITLED TO INJUNCTIVE RELIEF.

Southside Recycling also requests a preliminary injunction in Southside Recycling's favor and against the City, enjoining the City from interfering with SR's use of its property to operate a Large Recycling Facility. "[W]here there is no legal justification for

the refusal to issue a building permit, a court may grant incidental injunctive relief to prevent a municipality or its officers from interfering with the plaintiff's use of his or her property." *Dadian*, 1999 WL 299887, at *7 (citing *Heerey*, 587 N.E.2d at 1127) (affirming grant of injunctive relief enjoining municipality from interfering with property owner's use of property where elements of mandamus were proven, and there was no legal justification for refusal to issue building permit). *Cf. Lovers Lane & Co. v. Vill. of Libertyville*, 128 F. Supp. 2d 1126, 1126 (N.D. Ill. 2000) (granting permanent injunction to issue zoning certificate of compliance to gift shop where village unlawfully denied it a permit to operate its retail store under the village zoning ordinance). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Ill. Republican Party v. Pritzker*, 973 F.3d 760, 762 (7th Cir. 2020), *cert. denied*, No. 20-1081, --- S. Ct. ---, 2021 WL 1163871 (Mar. 29, 2021). Applying these factors, Southside Recycling has a clear and compelling right to an injunction, enjoining the City from interfering with its use of the property to operate a Large Recycling Facility.

A. Southside Recycling Has a Strong Likelihood of Success on the Merits.

Southside Recycling easily meets this standard, for it has a strong likelihood of prevailing on the merits of its mandamus claim under Illinois law. Southside Recycling "need not show that it definitely will win the case" but must demonstrate how it "proposes to prove the key elements of its case." *Id.* at 763. Southside Recycling is extremely likely to prevail on its mandamus claim because, as set forth at length in Section I above, Southside Recycling can prove each and every element of that claim: Southside Recycling has established a clear right to the issuance of the permit, as well as the authority and duty on the party of the City to issue the permit. Southside Recycling clearly has more than a reasonable likelihood of success on the merits.

B. Southside Recycling Will Suffer Irreparable Harm Without a Preliminary Injunction.

Without a preliminary injunction allowing it to operate the Large Recycling Facility, Southside Recycling's very existence will be threatened due to its inability to recoup on its \$80 million investment in the new facility. In addition, the City's failure to issue the permit to Southside Recycling has caused significant and potentially permanent damage to Southside Recycling's business. *See* Joseph Declaration, ¶ 7. Now, the USEPA request has injected unlimited delay into a process already two years in the making. *Id.* SR's suppliers have been forced to find other buyers for their scrap metal. *Id.* SR's customers have had to turn to other recyclers to provide processed product. *Id.* These suppliers and customers are not only lost for now, but may never be regained. *Id.* The City's complete failure to follow its LRF Rules and Guidelines and to provide clear and honest messaging to the marketplace about the timing and process, in a manner consistent with the City's obligations, has left Southside Recycling without any ability to mitigate the damage to its business. *Id.* The City's continued delay in issuing the permit also poses an extremely damaging threat to Southside Recycling's parent company, RMG, and its 1,500 employees around the country. *Id.*

C. The Balance of Harms Favors Southside Recycling.

Southside Recycling will suffer more harm if the requested preliminary injunction is not granted than the potential harm the City will suffer if the injunction is granted. To start, Southside Recycling has satisfied all of the permit requirements and is entitled to use of its property as a Large Recycling Facility. The balance of harms tips even more so in Southside Recycling's favor in this case because the City has not only violated its own Municipal Code and the LRF Rules in refusing to issue the permit, but has also violated the terms of the Agreement requiring it to cooperate in the transition of Southside Recycling's business to the new location, on which

Southside Recycling has relied to its great detriment. The alleged harms to the City are virtually non-existent because the new facility was designed to meet the health and safety needs of the community. In fact, as explained in Section II.D below, the City and the public interest actually *benefit* from Southside Recycling's LRF permit. Moreover, allowing Southside Recycling to operate the Large Recycling Facility will not "impose adverse consequences on defendants, for they are still plainly entitled to reasonable regulation of plaintiff's activities consonant with public safety concerns." *Rubin v. City of Berwyn*, 553 F. Supp. 476, 482 (N.D. Ill.), *aff'd*, 698 F.2d 1227 (7th Cir. 1982). The adverse effects to Southside Recycling thus clearly outweigh any speculative harm to the City or to the public by virtue of the operation of the Large Recycling Facility.

D. The Public Interest Will be Served by a Preliminary Injunction.

Entry of a preliminary injunction prohibiting the City from interfering with Southside Recycling's use of its property as a Large Recycling Facility is clearly in the public interest. As explained above, metal recycling is a critical function and the most environmentally conscious way to handle the more than one million tons of obsolete metal created annually within the City and the surrounding areas. Moreover, the only other large recycling facility in the Chicagoland area—Sims Metal Management—operates in Chicago's Pilsen neighborhood, recognized as one of the most environmentally burdened communities in Chicago. Unlike the proposed SR facility, Sims operates with no environmental controls on its shredder, and therefore, the failure to issue the LRF permit to Southside Recycling means that the recycling of obsolete metal is being allocated to an operation that is increasing uncontrolled air emissions in an already burdened community. *See* Complaint, ECF No. 1, ¶ 7, and Exhibit B thereto, ECF No. 1-1, at pp. 6-75.

In addition to exposing Chicago, and more specifically the community of Pilsen and its surrounding neighborhoods, to elevated air emissions, the City is causing additional harm

to a host of stakeholders, not limited to Southside Recycling. Labkon Declaration, ¶ 15. The North Side operation was a major purchaser of obsolete metal within the City and surrounding areas. *Id.* Much of that material is collected and sold by hundreds of other small businesses and thousands of individual recyclers in Chicago. *Id.* The vast majority of these individual recyclers are Black and/or Latinx Chicagoans. *Id.* With one of the Midwest's major scrap metal purchasers not able to operate, and with no replacement in sight, these individuals and businesses have faced a 30% or more reduction in the prices they would have received for the material they collect and sell had SR been able to contribute to a competitive marketplace. *Id.* This decrease in the Chicagoland area's recycling capacity is causing serious financial losses to many of these individual recyclers and small businesses who are running out of space to store material and who will be forced to lay off employees and/or close their businesses. *Id.*

Southside Recycling itself employs more than 100 people, most of whom earn head-of-household incomes with pension and healthcare benefits. Labkon Declaration, ¶ 16. The vast majority of these positions are filled by people of color, and all of these positions are now at serious risk of elimination if the LRF permit is not promptly issued. *Id.*

Finally, there is substantial public interest in the enforcement of the fair and lawful application of the permitting requirements found in the City's Municipal Code and LRF Rules, and a strong public interest in the protection of property rights. An injunction that enforces a valid contract, here the Agreement, further serves the public's interest. *See Brown & Brown, Inc. v. Ali*, 494 F. Supp. 2d 943, 955 (N.D. Ill. 2007) ("Courts in this District have recognized that the public interest is served by enforcing valid contracts.").

CONCLUSION

For the foregoing reasons, Southside Recycling respectfully requests that this Court issue a writ of mandamus ordering the City to issue a permit allowing Southside Recycling to

operate its Large Recycling Facility or, in the alternative or pending resolution of Southside Recycling's claims by further order of this Court, enter a preliminary injunction, enjoining the City from interfering with Southside Recycling's use of its property as a Large Recycling Facility.

Dated: May __, 2021

Respectfully submitted,

GENERAL III, LLC d/b/a
SOUTHSIDE RECYCLING

and RMG INVESTMENT GROUP LLC

By /s/ David J. Chizewer
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¹ <https://www.chicago.gov/content/dam/city/sites/rgm-expansion/documents/RMG-Expansion-Community-Meeting-Notes-1.pdf>

² <https://external.epa.illinois.gov/WebSiteApi/api/PublicNotices/GetAirPermitDocument/5950>

³ <https://external.epa.illinois.gov/WebSiteApi/api/PublicNotices/GetAirPermitDocument/6381>, pp. 18-19

⁴ <https://external.epa.illinois.gov/WebSiteApi/api/PublicNotices/GetAirPermitDocument/6380>

⁵ https://www.chicago.gov/content/dam/city/depts/dol/rulesandregs/CDPH%20Rules-for-LargeRecycling-Facility_Effective.6_5_20.pdf

⁶ <https://www.chicago.gov/content/dam/city/sites/rgm-expansion/documents/2020-11-12-Southside-Recycling-LRF-Permit-App.pdf>

⁷ <https://www.chicago.gov/content/dam/city/sites/rgm-expansion/documents/2021-01-13-Southside-Recycling-CDPH-LRF-Permit-App.pdf>

⁸ <https://www.chicago.gov/content/dam/city/sites/rgm-expansion/documents/Request-for-Information-3.17.21.pdf>

⁹ <https://www.chicago.gov/content/dam/city/sites/rgm-expansion/documents/Response-to-CDPH-Request-031721.pdf>

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that on May 24, 2021, he caused a copy of the foregoing **PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR A WRIT OF MANDAMUS AND/OR INJUNCTIVE RELIEF** to be filed via the Court's ECF/electronic mailing system and/or via electronic mail, upon the undersigned:

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