

STATE OF WISCONSIN
TAX APPEALS COMMISSION

CITY OF DE PERE,

Petitioner,

DOCKET NOS. 06-M-142
AND 06-M-143

vs.

WISCONSIN DEPARTMENT OF REVENUE

RULING AND ORDER

and

FOX RIVER FIBER CO., LLC,

Respondents.

DAVID C. SWANSON, COMMISSIONER:

These matters come before the Commission on a stipulation of facts filed by the parties on May 17, 2007 (the "Stipulation") and a motion for summary judgment filed by respondent Fox River Fiber Co. LLC, a Wisconsin limited liability company ("Fox River") on May 25, 2007. Fox River appears by Attorney Maureen A. McGinnity of Foley & Lardner LLP. Petitioner, the City of De Pere, a Wisconsin municipality (the "City"), appears by Attorney Robert Horowitz of Stafford Rosenbaum LLP. Respondent, the Wisconsin Department of Revenue (the "Department"), appears by Attorney Donald J. Goldsworthy.

Having considered the entire record before it, the Commission finds, concludes, rules and orders as follows:

FINDINGS OF FACT¹

A. Fox River and the Property

1. The respondent taxpayer, Fox River, is a privately held company engaged in the business of using industrial wastepaper to produce a product usually referred to in the industry as wet lap recycled pulp, a form of wet lap pulp (Fox River's product shall hereinafter be referred to as "wet lap pulp" or "wet lap"). Through its production process detailed in paragraph 15 below, Fox River recycles industrial wastepaper by removing contaminants and recovering fibers to produce the wet lap pulp, which is used by others to make paper products. Fox River sells such wet lap pulp to its paper manufacturer customers, who use it to produce a wide variety of tissue and paper products such as facial tissue, toweling, office paper and commercial printing paper.

2. Fox River and its predecessor, Fox River Fiber Company, have been engaged in the business described in paragraph 1 for 14 years. Fox River owns and operates a single facility located at 1751 West Matthew Drive, De Pere, Wisconsin ("the Property" or "Mill"). A copy of the site plan for the Property is attached to the Stipulation as Exhibit 1.² The Property has a total footprint of 631,624 square feet, allocated approximately as follows:

¹ These Findings of Fact are the facts stipulated by the parties, with certain non-substantive changes made. Exhibits 1 through 7B attached to the Stipulation are incorporated herein by reference. Except as otherwise noted, all facts are as of January 1, 2005.

² In Exhibit 1, the Plant is shown in yellow (excluding mezzanine and lower level), the Office is shown in Blue, and surface parking spaces for employees and visitors are shown in green.

Plant	77,536 sq ft
Office	3,432 sq ft
Substation	1,958 sq ft
Truck scale area	875 sq ft
Surface parking spaces for employees and visitors	19,000 sq ft
Trailer parking and access	214,945 sq ft
“Gravel” drive (now paved)	28,800 sq ft
Unimproved land	285,078 sq ft

The total area (as opposed to the footprint) of the office and plant, including the mezzanine and lower levels, is 120,793 square feet, allocated approximately as follows:

Plant footprint (main level) excluding office	77,536 sq ft
Office	3,432 sq ft
Mezzanine	5,845 sq ft
Lower level	33,980 sq ft ³

3. The State of Wisconsin (“State”) assesses the Property as manufacturing property, and all of Fox River’s machinery and equipment is exempt as manufacturing machinery and equipment under Wis. Stat. § 70.995, except the machinery and equipment originally assessed at \$340,600 as referenced in paragraph 4.

³ The parties stipulated that the footprint and area allocations set forth in this paragraph 2 and in Exhibits 2, 3 and 4 are approximations. The parties further agreed that, in the event the Commission’s decision makes it necessary to determine precise allocations, the parties will attempt to agree upon a process to determine precise allocations and, in the absence of such agreement, will defer to the Commission as to how to determine such allocations. (Stip. ¶ 2).

B. Jurisdictional Facts

4. On or about June 13, 2005, the State issued notices of real property and personal property assessments for the Property for the year 2005 (hereinafter “the 2005 assessments”). The State assessed Fox River’s real property (land and improvements) at \$7,040,200, and assessed its personal property at \$369,600, including \$340,600 for machinery and equipment.

5. Fox River timely objected to the 2005 assessments by filing Objections to Property Assessment with the State Board of Assessors (the “Board”). In its Objections, Fox River asserted that, pursuant to the Dane County Circuit Court’s decision in *The Newark Group, Inc. v. Wis. Dep’t of Revenue*, Case Nos. 04-CV-1192, 04-CV-1468, 04-CV-1736, and 04-CV-1941, its Property qualifies as a waste treatment facility, and its real and personal property therefore are exempt from property tax pursuant to Wis. Stat. § 70.11(21).⁴

6. On or about March 28, 2006, the Board issued its notices of determination. The Board concluded that Fox River’s operations are similar to the taxpayer’s operations in *Newark Group* and that Fox River is entitled to the waste treatment facility exemption under Wis. Stat. § 70.11(21)(a). The Board determined that the waste treatment facility exemption under Wis. Stat. § 70.11(21)(a) did not apply to personal property used for office functions and non-production supplies. The Board therefore reduced the assessment of personal property to \$18,100 (eliminating the

⁴ See, *The Newark Group, Inc. v. Wis. Dep’t of Revenue*, Nos. 99-R-70, 99-R-72 through 99-R-83, and 00-M-44 through 00-M-48, Wis. Tax Rptr. (CCH) ¶ 400-740 (WTAC Mar. 22, 2004) and Wis. Tax Rptr. (CCH) ¶ 400-761 (WTAC June 2, 2004), *aff’d in part and rev’d in part*, Nos. 04-CV-1192, 04-V-1468, 04-CV-1736, 04-CV-1941, Wis. Tax Rptr. (CCH) ¶ 400-809 (Dane Co. Cir. Ct. Jan. 31, 2005) (collectively herein, *Newark Group*).

assessment of non-manufacturing machinery and equipment valued at \$340,000, which the Board found to be exempt under Wis. Stat. § 70.11(21)(a)) and reduced the real property assessment to zero.

7. On or about May 24, 2006, the City timely filed a Petition for Review with the Commission, challenging the Board's determinations. The City's Petition asserts, among other things, that the Property does not qualify for exemption under Wis. Stat. § 70.11(21)(a), that the Commission should reconsider its decisions in *Newark Group*, and that if the waste treatment facility exemption in Wis. Stat. § 70.11(21)(a) applies, Fox River is entitled to only a partial exemption.

8. Fox River, as a real party in interest, timely filed its Answer on June 22, 2006.

9. The City filed an Amended Petition for Review on February 22, 2007, to which Fox River timely responded on March 2, 2007.

10. All of the real and personal property at issue was purchased by Fox River after July 31, 1975.

C. Fox River's Raw Material

11. Fox River uses exclusively industrial wastepaper as its raw material in manufacturing wet lap pulp. It purchases the following seven grades of industrial wastepaper for this purpose by contract and/or auction:

a. White Ledger ("WL"), consisting of waste generated in the printing and converting of soft covered books, which may include glued ends.

b. Poly Window Envelopes ("PWE"), consisting of waste

generated from printing and converting of poly window envelopes.

c. Sorted Office Paper ("SOP"), consisting of normal daily reclaimed office wastepaper containing a maximum amount of 5% of certain materials.

d. File Stock-6 ("FS-6"), which consists of normal daily reclaimed office wastepaper similar to SOP, but allowing a maximum amount of 10% of certain materials.

e. Office Fiber ("OF"), which is similar to WL or SOP except it may contain a higher percentage of ground wood.

f. Boxes on Skids, consisting of waste (defective) soft cover books, manuals and ledgers, which may be poly overwrapped, in boxes strapped on skids.

g. File Stock-7 ("FS-7"), consisting of shredded or pulverized normal daily wastepaper from office buildings, waste from medical facilities, and/or waste from industrial converting plants that is contaminated with pressure sensitive adhesive material.

12. Fox River does not purchase or accept residential wastepaper for use in its manufacturing process and does not use residential wastepaper in such process.

13. Fox River operates 24 hours a day, 7 days a week. In the year 2005 it recycled an average of approximately 415 tons of wastepaper per day, for a total of 151,339 tons. It produced an average of approximately 290 tons of wet lap pulp per

day, for a total of 105,840 tons.

14. All of the wastepaper processed by Fox River as described herein would be disposed of in landfills or incinerated if not recycled by Fox River or by another manufacturer.

D. Fox River's Operations

15. The following paragraphs describe Fox River's operations, with plant area references corresponding to the labeled areas on Exhibits 2, 3 and 4:⁵

a. The wastepaper Fox River uses as its raw material is delivered by trucks to the receiving/waste material storage area of its plant, usually baled. (Ex. 2, Area A.) When the trucks are unloaded, Fox River's employees manually sort the wastepaper into grades. They use forklifts either to stack the bales in inventory according to the grade of paper within Area A, or to move them to the pulper openings in Area A for immediate use.

b. When Fox River's employees convey wastepaper bales to the pulper opening in Area A, they place the bales on the floor next to the pulper opening. They remove the wires from the bales and then use forklifts to break apart the bales. They then inspect the wastepaper for quality compliance, remove large contaminants that are readily visible (such as plastics, engine blocks, tools, and cans) and use forklifts to push the wastepaper into the pulper openings in Area A for the batch pulpers in Exhibit 2, Area B.

c. The batch pulpers in Area B are essentially huge blenders.

⁵ Exhibits 2, 3 and 4 are sketches (not drawn to scale) and area summaries of Fox River's main floor plant layout (excluding the office), lower level layout, and mezzanine layout, respectively.

There is a rotor at the bottom and breaker bars at the sides. Water is pumped into the pulpers and mixed with the wastepaper to break up the wastepaper into fibers.

d. When the pulpers finish mixing the wastepaper with water, the resulting stock, called "pulp slurry," is at a consistency of approximately 95.5% water by weight with the remaining 4.5% consisting of fiber and both heavy (sand, glass, staples, etc.) and light (plastics, styrofoam, etc.) contaminants. The pulp slurry is pumped from the batch pulpers through a detrasher and drum sorter (Ex. 2, Area B), which remove remaining large contaminants such as cans, plastic, bottles, tramp metal (i.e. tools, staples, etc.) , and overhead sheets (i.e. the plastic sheets used with overhead projectors).

e. The pulp slurry is then pumped continuously through a series of screens to remove contaminant material that is larger than fiber. (Ex. 2, Area C.)

f. Next, the pulp slurry, diluted with recycled water that contains some fiber and contaminants, is pumped continuously to and through floatation cells. (Ex. 2, Area D.) There, ink and other contaminant material (primarily glues and adhesives of a size similar to fiber) float to the surface and are removed.

g. The next step is to pump the pulp slurry continuously through centrifugal cleaners, which remove heavy material such as sand. (Ex. 2, Area E.)

h. The pulp slurry is then pumped through a high-speed washer to remove fines (i.e. broken fiber pieces that are not desirable for paper making), contaminants and water. (Ex. 2, Area F.)

i. The pulp slurry is then pumped continuously through a kneader and disperger, where the remaining ink and other contaminants are reduced in size so they later can be removed in floatation and washing. (Ex. 2, Area G.)

j. The pulp slurry is then diluted with water and once again pumped through a high-speed washer to remove ink, fines, other contaminants and water. (Ex. 2, Area F.)

k. Bleaching chemicals are then added, and the pulp slurry is pumped continuously to a bleaching retention tower, where dyes and other remaining contaminants are removed by bleaching. (Ex. 2, Area H.)

l. The pulp slurry from which the contaminants have been removed is then pumped continuously to a wet lap machine. (Ex. 2, Area I.) There, the stock is formed into a continuously moving wet lap about one-quarter inch thick. The pressing action of the wet lap machine reduces the size of remaining contaminant particles such as ink and pressure sensitive adhesives to permit them to pass through the wet lap mat into the water stream, thereby removing such contaminants. Slightly more than half (54%) of the water is pressed out of the wet lap. The wet lap is then cut into sheets 32" wide x 39" long. The water and contaminants removed at the wet lap machine are recycled

to dilute the pulp slurry before the pulp slurry is pumped through the floatation cells as described in paragraph 15.f. above; the contaminants removed at the wet lap machine are thus removed via the process steps starting with and following the floatation cells in Exhibit 2, Area D.

m. The wet lap sheets are then stacked either adjacent to the wet lap machine in Area I, or in the wet lap storage area (Ex. 2, Area J), where they are stored prior to shipping them to customers. No contaminant removal occurs in Area J.

16. The lower level of the plant (Ex. 3) has a total area of 33,980 square feet and lies beneath all areas of the main level of the plant except the office, waste material storage area (Ex. 2, Area A) and the wet lap areas. (Ex. 2, Areas I and J.) The lower level houses auxiliary equipment such as tanks, pumps and piping used for the process steps described in paragraphs 15.c. through 15.k. above, with the area allocated to such auxiliary equipment approximately equating to the area allocated to the corresponding process step on the main level as shown in Exhibit 2, except that the miscellaneous area on the lower level contains small spare parts, directly attributable to the production of wet lap pulp.

17. The mezzanine level of the plant has a total area of 5,845 square feet, allocated as set forth in Exhibit 4.

18. Fox River produces different grades of wet lap pulp, depending on the grade of wastepaper it uses as its raw material. It sells printing, writing and tissue grade pulp in wet lap form to numerous customers who in turn use it to produce a wide

variety of recycled printing and writing paper and tissue paper products. Fox River derives revenues from sales of wet lap pulp.

19. In addition to producing wet lap pulp from industrial wastepaper, Fox River also treats the water streams used in the production process to recycle the contaminants that are removed during the treatment of the wastepaper. Water from the washers (Ex. 2, Area F) is pumped to clarifiers (Ex. 2, Area L), where the contaminants are separated from the water. Contaminants from the clarifiers are then combined with contaminant streams from other parts of the process. The combined contaminant streams are pumped continuously to a gravity-dewatering table and then to a sludge dewatering press, both in the contaminant dewatering area (Ex. 4, Area 7). There, water is removed to leave solid contaminants, which are used, in one of the two ways described in paragraph 20 below. The removed water is then transferred to the City's wastewater treatment plant for further treatment.

20. Approximately 2% by weight of the solid contaminants described in paragraph 19 is used in the manufacture of an encapsulated seed product. The remaining 98% is used as daily cover for landfills. "Daily cover" is the material that municipal landfills are required by Wisconsin law to use to cover landfills each day to control vectors, windblown materials and odors. The Wisconsin Department of Natural Resources regulates the composition and quality of daily cover and has approved the use of Fox River's solid contaminants for daily cover.

21. Fox River's process as described above alters industrial wastepaper by making physical changes to it and bleaching dyes and other contaminants in it such

as brown fibers in order to convert the wastepaper into marketable wet lap pulp sheets.

22. The total square footage of Fox River's plant, including the office, is 120,793 square feet. Of that total, approximately 112,815 square feet, or 93.4%, is directly attributable to the production of wet lap pulp, and approximately 7,978 square feet, or 6.6%, is attributable to office space, maintenance files, janitorial supplies, and employee restrooms and lockers, all of which directly support the production process.

23. Fox River's plant, machinery and equipment, and real property and improvements are not used for any purpose other than as described above.

CONCLUSIONS OF LAW

1. Areas A, B, C, D, E, F, G, H and I and allocated portions of the lower level and mezzanine of the Fox River Mill are exempt from property tax as waste treatment facilities under Wis. Stat. § 70.11(21)(a).

2. Excluding Areas A, B, C, D, E, F, G, H and I and allocated portions of the lower level and mezzanine of the Fox River Mill, the remaining portions of the Fox River Property, including Area J, the Office, parking and access areas and unimproved land, are not exempt from property tax under Wis. Stat. § 70.11(21)(a).

RULING

I. Introduction

This case involves the City's appeal of the Department's 2005 assessments of certain manufacturing and related property of Fox River located in the City (collectively herein, the "Property" or "Mill"). Through the Mill's production process, Fox River recycles industrial wastepaper by removing contaminants and recovering

fibers to produce wet lap pulp, which is used by others to make paper products. Fox River sells such wet lap pulp to its paper manufacturer customers, who use it to produce a wide variety of tissue and paper products such as facial tissue, toweling, office paper and commercial printing paper.

On or about June 13, 2005, the State issued notices of real property and personal property assessments for the Mill for the year 2005 (the "assessments"). The State assessed Fox River's real property (land and improvements) at \$7,040,200, and assessed its personal property at \$369,600, including \$340,600 for machinery and equipment. Fox River timely objected to the assessments by filing objections with the Board. In its objections, Fox River asserted that, pursuant to *Newark Group*, the Mill qualifies as a waste treatment facility, and its real and personal property therefore are exempt from property tax pursuant to Wis. Stat. § 70.11(21).

On or about March 28, 2006, the Board issued its notices of determination, generally holding for Fox River. The Board reduced the assessment of personal property to \$18,100 (eliminating the assessment of non-manufacturing machinery and equipment valued at \$340,000, which the Board found to be exempt under Wis. Stat. § 70.11(21)(a)) and reduced the real property assessment to zero.

The City timely filed a Petition for Review with the Commission, challenging the Board's determinations. The City's Petition asserts that the Mill does not qualify for exemption under Wis. Stat. § 70.11(21)(a), that the Commission should reconsider its decisions in *Newark Group*, and that if the waste treatment facility exemption in Wis. Stat. § 70.11(21)(a) applies, Fox River is entitled to only a partial

exemption. Fox River, as a real party in interest, timely filed its Answer. After the parties filed the Stipulation, Fox River filed its motion for summary judgment and the parties filed briefs according to the Commission's briefing schedule. The parties presented oral arguments to the Commission on December 19, 2007.

The Department, also a respondent in these matters, notes that it "vigorously litigated" the *Newark Group* cases. (Dep't. Brief at p. 4.) However, the Dane County Circuit Court ruled against the Department in *Newark Group* on the question of the taxpayer's claimed exemption under Section 70.11(21)(a), and the Department did not appeal that issue to the Court of Appeals. By not appealing, the Department was deemed to acquiesce to the Circuit Court's holding in *Newark Group* pursuant to Wis. Stat. § 73.015(2).⁶

In *City of Green Bay v. Dep't of Revenue and Green Bay Packaging, Inc.*, Wis. Tax Rptr. ¶ 401-070 (WTAC Dec. 21, 2007), the Commission considered essentially the same issues presented here in a case that involved very similar facts. The facility at issue in *Green Bay Packaging* was a combined paper recycling and manufacturing plant that the Board had held to be exempt under § 70.11(21)(a). The Commission reaffirmed the central holdings of *Newark Group*, but limited the scope of that decision, holding that the facility was partially exempt under § 70.11(21)(a).⁷

⁶ "If the circuit court construes a statute adversely to the contention of the department of revenue, the department shall be deemed to acquiesce in the construction so adopted unless an appeal to the court of appeals is taken, and the construction so acquiesced in shall thereafter be followed by the department."

⁷ Briefing in these matters had been completed when the Commission issued its decision in *Green Bay Packaging*; consequently, the parties do not address that decision in their briefs.

II. Applicable Law

A. Wis. Stat. § 70.11(21)(a) and Related Rules

In 2005, Wis. Stat. § 70.11(21)(a)⁸ provided an exemption from property tax for the following type of property:

(21) TREATMENT PLANT AND POLLUTION ABATEMENT EQUIPMENT. (a) All property purchased or constructed as a waste treatment facility used for the treatment of industrial wastes, as defined in s. 281.01(5), or air contaminants, as defined in s. 285.01(1), but not for other wastes, as defined in s. 281.01(7), for the purpose of abating or eliminating pollution of surface waters, the air, or waters of the state if that property is not used to grow agricultural products for sale and, if the property's owner is taxed under ch. 76, if the property is approved by the department of revenue. For the purposes of this subsection, "industrial waste" also includes wood chips, sawdust, and other wood residue from the paper and wood products manufacturing process that can be used as fuel and would otherwise be considered superfluous, discarded, or fugitive material. The department of natural resources and department of health and family services shall make recommendations upon request to the department of revenue regarding such property. All property purchased or upon which construction began prior to July 31, 1975, shall be subject to s. 70.11(21), 1973 stats.

Wis. Stat. § 281.01 provided the following relevant definitions:

(5) "Industrial wastes" includes liquid or other wastes resulting from any process of industry, manufacture, trade or business or the development of any natural resource.

(7) "Other wastes" includes all other substances, except industrial wastes and sewage, which pollute any of the surface waters of the state. The term also includes unnecessary siltation resulting from operations such as the washing of vegetables or raw food products, gravel

⁸ Section 70.11(21)(a) has since been amended, effective January 1, 2007. See 2007 Wis. Act 19.

washing, stripping of lands for development of subdivisions, highways, quarries and gravel pits, mine drainage, cleaning of vehicles or barges or gross neglect of land erosion.

The applicable administrative rules interpreting § 70.11(21)(a), Wis.

Admin. Code § Tax 12.40, provided as follows in relevant part:

§TAX 12.40 Waste treatment facilities--industrial.

(1) STATUTE. The general property tax exemption for a waste treatment facility is contained in s. 70.11(21), Stats.

(3) INDUSTRIAL WASTE TREATMENT FACILITY EXEMPTION. (a) The words "waste", "treatment" and "facility" are deemed to have the following meanings:

1. "Facility" means tangible property that is built, constructed or installed as a unit so as to be readily identifiable as directly performing a waste treatment function.

2. "Treatment" means removing, altering or storing waste.

3. "Waste" means that which is left over as superfluous, discarded or fugitive material. In addition, "industrial wastes" is defined by reference to s. 281.01(5), Stats., as including liquid or other wastes resulting from any process of industry, manufacture, trade, business or the development of any natural resource. "Air contaminant" is defined by reference to s. 285.01(1), Stats., as dust, fumes, mist, liquid, smoke, other particulate matter, vapor, gas, odorous substances or any combination thereof but shall not include uncombined water vapor.

4. "Waste treatment facility" means tangible property that is built, constructed or installed as a unit so as to be readily identifiable as directly removing, altering or storing leftover, superfluous, discarded or fugitive material.

B. Legislative History of the 2001 and 2007 Amendments

The legislature created Section 70.11(21)(a) in 1953 as an exemption from property tax for property purchased and constructed for the purpose of abating or eliminating air or water pollution. Until 2001, qualifying for this exemption required

the approval of a particular state agency, most recently the Department. *See, e.g.*, Laws of 1953, Ch. 183, § 1; Laws of 1965, Ch. 614, § 28; Laws of 1967, Ch. 83, § 5; Laws of 1969, Ch. 206, § 1; Laws of 1975, Ch. 39, § 450. However, in 2001, the statute was amended to remove that requirement, except for taxpayers taxed under Chapter 76. 2001 Wis. Act 16, § 2104. The legislative history of the 2001 amendment to Section 70.11(21)(a) indicates that this amendment was intended to save time and money for the Department and its personnel, totaling approximately \$750 per year in printing and mailing costs for exemption applications and 300 employee hours per year spent processing these applications. *See, Green Bay Packaging, Part V.A.* In short, the legislative history contains no indication that the legislature intended to broaden the exemption by enacting this amendment, and the 2001 amendment appears to have been intended as an innocuous technical amendment.

Effective January 1, 2007, the Legislature amended Section 70.11(21)(a), renumbered it as Section 70.11(21)(am) and created new Section 70.11(ab). 2007 Wis. Act 19, §§ 1-2. This amendment tightens the requirements for this exemption by adding the requirement that property exempt under this section be used “exclusively and directly to remove, store, or cause a physical or chemical change” in industrial waste or air contaminants, as well as adding specific definitions of certain terms used in the statute. Wis. Stat. § 70.11(21)(ab)-(am) (2007). In addition, the amendment’s legislative history indicates that the legislature intended to limit the reach of *Newark Group*. *See, Report of the Joint Survey Committee on Tax Exemptions, 2007 S.B. 122 (May 30, 2007); Green Bay Packaging, Part V.B.*

C. *The Newark Group and Green Bay Packaging Decisions*

After the 2001 amendment of Section 70.11(21)(a)⁹ removed the Department from its prior role as gatekeeper for this exemption, a number of taxpayers questioned its limits. The *Newark Group* appeal was the first to reach the Commission with respect to this issue, and the Commission held that all of the property at issue used in recycling and related manufacturing was exempt under Section 70.11(21)(a). *Newark Group* involved a paper recycling and manufacturing facility where the recycling portion of the facility functioned very much like Fox River's Mill. The Dane County Circuit Court affirmed the Commission's decision entirely with respect to the claimed exemptions.¹⁰

In *Newark Group*, neither party argued that the combined recycling and manufacturing facility at issue could be partially exempt under Section 70.11(21)(a), because portions of the facility qualified for the exemption while others did not. In *Green Bay Packaging*, both the taxpayer and the municipality argued in the alternative that the facility at issue at least (or at most) qualified for a partial exemption. As in this case, the Department's position was based upon its acquiescence to *Newark Group*.

In *Green Bay Packaging*, the Commission reaffirmed the central holdings of *Newark Group* to allow the exemption under Wis. Stat. § 70.11(21)(a) of a waste treatment facility that is located on property that is also used for other types of purposes or facilities. However, based on the legislative histories of the 2001 and 2007

⁹ 2001 Wis. Act 16, § 2104.

¹⁰ The Circuit Court reversed the portion of the Commission's decision that awarded certain costs and attorneys' fees to the taxpayer, The Newark Group.

amendments to § 70.11(21)(a), as well as *Owens-Illinois v. Town of Bradley* and *Consolidated Papers, Inc. v. Wis. Dep't of Revenue*¹¹ (two cases decided prior to *Newark Group*), the Commission limited the scope of the exemption provided under § 70.11(21)(a), as interpreted in *Newark Group*, to exempt only the parts of an integrated manufacturing facility that qualify under the statute.

Like the facilities in *Newark Group* and *Green Bay Packaging*, the facility at issue here is a paper recycling and manufacturing facility taxed under Wis. Stat. § 70.995, not Chapter 76, and is therefore eligible for exemption under § 70.11(21)(a). In addition, as in those prior cases, most of the machinery at the Mill is exempt under § 70.11(27), and this case primarily involves the Mill's land and buildings. In these matters, the parties offer essentially the same arguments that the parties offered in *Green Bay Packaging*, but we see no reason to revisit those same issues or repeat the analysis provided in that case. Consequently, we reaffirm the interpretation of § 70.11(21)(a) adopted by the Commission in *Green Bay Packaging* based on its analysis of the applicable rules of statutory construction, the legislative histories of the 2001 and 2007 amendments to § 70.11(21)(a), and *Owens-Illinois* and *Consolidated Papers*. See, *Green Bay Packaging*, Part V.

Fox River argues that the Commission does not have the authority to depart from the analysis of § 70.11(21)(a) adopted in *Newark Group*, citing *U.S. Shoe v.*

¹¹ *Owens-Illinois v. Town of Bradley*, 132 Wis. 2d 310, 315-316, 392 N.W.2d 104 (Ct. App. 1986) (paper mill's boiler and power house that burned refuse produced by the mill and produced steam and heat for the facility were exempt under § 70.11(21)(a)); *Consolidated Papers, Inc. v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-250 (WTAC 1996) (washer/filter facility that removed certain waste from raw material at a paper mill was exempt under § 70.11(21)(a)).

Wis. Dep't of Revenue, 158 Wis. 2d 123, 136-137, 462 N.W.2d 233 (Ct. App. 1990). In that case, the Court of Appeals stated that the purpose of Wis. Stat. § 73.015(2) is served if the Department *and* the Commission are bound by an unappealed decision of the circuit court, which is true of the decision in *Newark Group*. However, in *Green Bay Packaging* and in this case, the Commission has reaffirmed the central holding of *Newark Group*. Although the Commission has modified that holding, it is in response to an issue never raised in *Newark Group*, which is whether a facility can be partially exempt under § 70.11(21)(a). Nothing in either the Commission opinion or Circuit Court opinion in *Newark Group* indicates that partial exemption is inconsistent with those decisions. Applying the *Green Bay Packaging* analysis to this case, Fox River's Mill qualifies for partial exemption under § 70.11(21)(a), as set forth in Part VI of this Ruling.

III. Summary Judgment

Summary judgment is warranted where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Wis. Stat. § 802.08(2). The parties have stipulated all relevant facts, Fox River has moved for summary judgment and the City has requested summary judgment in its favor. (City Brief, p. 50.) Thus, there is no genuine issue as to any material fact, and these matters are appropriate for summary judgment as a matter of law.

IV. Standard of Review

The Department's assessment is presumed to be correct, and it is the petitioner's burden to demonstrate that the assessment is incorrect. See *Hormel Foods Corp. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-741 at 32,962 (WTAC 2004), *aff'd*, Case No. 04-CV-1278 (Dane Co. Cir. Ct. 2004). If there is credible evidence that may in any reasonable view support the assessor's valuation, that valuation must be upheld. *Universal Foods Corp. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-316 at 31,111 (WTAC 1997).

In this case, the Board reduced the assessment of Fox River's personal property at the Mill to \$18,100 and the real property assessment to zero. The City challenges those assessments, but argues that Fox River, the taxpayer, has the burden of proof in these matters under Wis. Stat. § 70.109.¹² (City Brief, pp. 19-20.)

The Commission addressed this same issue in *Green Bay Packaging* and rejected the City's position. See also, *City of La Crosse v. Wis. Dep't of Revenue and Gundersen Clinic, Ltd.*, Docket Nos. 03-M-134, 04-M-134 and 04-M-139 (WTAC Jun. 9, 2008); *City of West Allis v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 203-043 (WTAC Mar. 27, 1989). As in *Green Bay Packaging*, the City cites § 70.109 and various cases in which a taxpayer sought to overturn a municipality's denial of a claim of exemption, but that is not the case here. The Board has issued its assessments in these matters, and the City has challenged those assessments. By defending its exemptions, Fox River is not "claiming" exemptions; the exemptions have been granted by the Board.

¹² "Exemptions under this chapter shall be strictly construed in every instance with a presumption that the property in question is taxable, and the burden of proof is on the person who claims the exemption."

Like the taxpayer in *Green Bay Packaging*, Fox River is not a necessary party to these matters. Had Fox River stayed on the sidelines, the City's petition for review would have proceeded with the Department as respondent. According to the City's argument, the Department then would have had the burden of proving the correctness of the Board's assessments, contrary to long-standing precedent and practice. As the party challenging the Board's assessments, the City has the burden of proof in these matters.

V. Rules of Statutory Construction

Statutes conferring tax exemptions are to be strictly construed. Wis. Stat. § 70.109; *Columbus Park Housing Corp. v. City of Kenosha*, 267 Wis. 2d 59, 671 N.W.2d 633 (2003). Wisconsin courts apply a "strict but reasonable construction" in interpreting tax exemption statutes. *FH Healthcare Dev., Inc. v. City of Wauwatosa*, 276 Wis. 2d 243, 254, 687 N.W.2d 582 (Ct. App. 2004). An exemption statute need not be given the narrowest possible construction. See *Columbia Hospital Assn. v. City of Milwaukee*, 35 Wis. 2d 660, 668, 151 N.W.2d 750, 754 (1967); *Friendship Village of Greater Milwaukee, Inc. v. City of Milwaukee*, 181 Wis. 2d 207, 219, 511 N.W.2d 345, 350 (Ct. App. 1993) (pet. den'd).

When interpreting a statute, we assume that the legislature's intent is expressed in the statutory language. Statutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *State ex rel. Kalal v. Circuit Court*, 271 Wis. 2d 633, 663, 681 N.W.2d 110 (2004). "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional

meaning.” *Id.*; *see also*, Wis. Stat. § 990.01(1). Context and structure are also important factors, and construction should strive to avoid absurd or unreasonable results. “If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning.” *Id.*

A court will look beyond the apparent plain meaning of a statute and consult its legislative history to find legislative intent in order to: (1) confirm the statute’s meaning; (2) clear up any ambiguity that remains after considering all intrinsic sources; or (3) verify that the legislature did not intend absurd, unreasonable or unthinkable results produced by the statute’s plain meaning. *Teschendorf v. State Farm Ins. Cos.*, 293 Wis. 2d 123, 134-135, 717 N.W.2d 258 (2006). As discussed in *Green Bay Packaging*, we consulted the legislative history of Section 70.11(21)(a) to confirm the legislative intent behind the statute, and here we reaffirm the interpretation of § 70.11(21)(a) followed in *Newark Group* and *Green Bay Packaging*.

VI. Partial Exemption of the Mill under Section 70.11(21)(a)

In *Green Bay Packaging*, the Commission found that a theory of partial exemption under § 70.11(21)(a) had been applied in the past and was consistent with the plain meaning and legislative intent of the statute, and held that waste treatment facilities located on the premises of a manufacturing facility may be exempt under § 70.11(21)(a). Fox River argues that applying a partial exemption to the Mill is premised upon a primary purpose condition not found in the statute and expressly rejected by the Court of Appeals and Supreme Court, citing *Owens-Illinois* and *Village of Lannon v. Wood-Land Contractors, Inc.*, 267 Wis.2d 158, 672 N.W.2d 275 (2003). (Fox River Brief, pp.

19-20.)

As noted below in subsection B, we agree that the statute does not require that property be primarily used for waste treatment, as opposed to manufacturing or some other use. However, our interpretation of § 70.11(21)(a) is that the statute requires at least *some* use for waste treatment. *Owens-Illinois* does not support Fox River's argument, because only the parts of the facility actually used to treat waste were at issue and found to be exempt in that case. The Court of Appeals did not address any claim that parts of the facility devoted entirely to other uses were also exempt under § 70.11(21)(a), nor did that issue arise in *Village of Lannon*. In this case, as in *Green Bay Packaging*, we find that portions of the Mill qualify for exemption as waste treatment facilities under Section 70.11(21)(a), while other portions do not so qualify, as set forth below.

A. Areas A, B, C, D, E, F, G and H

The City agrees in the alternative that, if the Commission determines that the Mill is partially exempt under Section 70.11(21)(a) and *Newark Group*, then Areas A, B, C, D, E, F, G and H of the facility would qualify for that partial exemption. (City Brief, p. 45) In accordance with our finding that qualifying portions of the Mill are exempt under Section 70.11(21)(a) and *Newark Group*, we thus find that Areas A, B, C, D, E, F, G and H are exempt under Section 70.11(21)(a) without further discussion of the facts concerning those areas.

B. Area I

Applying a theory of partial exemption to the Mill, the City does not

concede that Area I qualifies for that exemption, asserting that Area I is used for manufacturing, not waste treatment. With respect to Area I, the exemption in question concerns the land and buildings in that portion of the Mill, because most of the machinery and equipment located there is exempt as manufacturing property under Wis. Stat. §§ 70.11(27) and 70.995.

With respect to Area I, the Stipulation provides as follows:

The pulp slurry from which the contaminants have been removed is then pumped continuously to a wet lap machine. (Ex. 2, Area I.) There, the stock is formed into a continuously moving wet lap about one-quarter inch thick. The pressing action of the wet lap machine reduces the size of remaining contaminant particles such as ink and pressure sensitive adhesives to permit them to pass through the wet lap mat into the water stream, thereby removing such contaminants. Slightly more than half (54%) of the water is pressed out of the wet lap. The wet lap is then cut into sheets 32" wide x 39" long. The water and contaminants removed at the wet lap machine are recycled to dilute the pulp slurry before the pulp slurry is pumped through the floatation cells as described in [Stipulation] paragraph 15.f. above; the contaminants removed at the wet lap machine are thus removed via the process steps starting with and following the floatation cells in Exhibit 2, Area D.

(Stip., ¶ 15.1.)

For purposes of Section 70.11(21)(a), "treatment" means "removing, altering or storing waste." Wis. Admin. Code § Tax 12.40(3)(a)2. Similarly, "waste treatment facility" means "tangible property that is built, constructed or installed as a unit so as to be readily identifiable as directly removing, altering or storing leftover, superfluous, discarded or fugitive material." Wis. Admin. Code § Tax 12.40(3)(a)4.

The City argues that Area I is not exempt because it is used for

manufacturing, and that any removal of contaminants “is merely incidental to pressing the excess water out of the wet lap.” (City Brief, p. 46.) But nothing in § 70.11(21)(a) prohibits the exemption of a facility where manufacturing and waste treatment occur simultaneously, and the Commission previously held in *Newark Group* and *Green Bay Packaging* that such facilities, or portions thereof, may be exempt under that statute.

We find that Area I qualifies as a waste treatment facility under Section 70.11(21)(a), according to the applicable definitions. The Area I wet lap machine removes contaminants from the wet lap and returns them to the pulp slurry, which is pumped back to the floatation cells in Area D where the contaminants are removed. (Stip. ¶¶ 15.f and l.) This process qualifies as waste treatment under the statute, and Area I is therefore exempt under Wis. Stat. § 70.11(21)(a), as interpreted in *Newark Group* and *Green Bay Packaging*.

C. Lower Level and Mezzanine

The lower level contains auxiliary equipment used for the corresponding process equipment housed above it on the Mill’s main level. (Stip. ¶ 16.) The mezzanine area contains contaminants dewatering areas and areas that serve other functions. (Stip. ¶ 17 and Ex. 4.)

Consistent with subsections A and B, above, portions of the lower level and mezzanine areas also qualify for exemption under § 70.11(21)(a), to the extent they are related to the functions of Areas A through I or other waste treatment processes. As stipulated by the parties, the Commission will not attempt to calculate the exact dimensions of the areas entitled to exemption. Instead, the parties will attempt to agree

on a process to determine the precise allocations of these areas. (Stip., ¶ 2.)

D. Area J, Office, Parking and Access Areas and Unimproved Land

Based on the stipulated facts, no part of Area J,¹³ the Office, the parking and access areas and unimproved land at the Mill site contains a waste treatment facility, or a portion thereof. Instead, these parts of the Property appear to function as support areas for the waste treatment, manufacturing and other facilities at the Mill, and thus do not qualify for exemption under Section 70.11(21)(a). *See, e.g., Green Bay Packaging.*

VII. Fox River's Motion for Attorneys Fees and Costs

Citing *Newark Group* and Wis. Stat. § 227.483(1), Fox River states that the City's arguments in these matters are frivolous and therefore requests an award of attorneys' fees and costs. Consistent with our determination that the Fox River Mill is partially exempt under Wis. Stat. § 70.11(21)(a) based on our holdings in *Newark Group* and *Green Bay Packaging*, we find that the City's arguments are not frivolous.¹⁴ Consequently, we deny Fox River's motion for attorneys' fees and costs.

Conclusion

For the reasons discussed herein, the Commission reaffirms the central holdings of *Newark Group* and *Green Bay Packaging* to allow the exemption under Wis. Stat. § 70.11(21)(a) of a waste treatment facility that is located on property that is also

¹³ The parties stipulated that no contaminant removal occurs in Area J, which is used for storage of the wet lap pulp prior to its shipment to customers. (Stip. ¶ 16.)

¹⁴ As previously noted, briefing and arguments in these matters were completed before the Commission issued its decision in *Green Bay Packaging*. Consequently, while arguments that were clearly rejected in that case cannot be termed frivolous in this case, their continued repetition in future cases could be vulnerable to that charge.

used for other types of purposes or facilities. Applying this interpretation of Wis. Stat. § 70.11(21)(a), Areas A, B, C, D, E, F, G, H and I of the Mill are exempt, portions of the lower level and mezzanine are exempt to the extent they are related to the functions of Areas A through I or other waste treatment processes, and the remaining portions of the Property are not exempt under that statute.

IT IS ORDERED

1. Fox River's motion for summary judgment is granted in part and denied in part, and the State Board of Assessors' determinations in the City's appeals of the assessments of the Fox River Property at issue in these cases are affirmed in part and reversed in part, consistent with the Commission's findings set forth in Part VI hereof.

2. Fox River's motion for attorneys' fees and costs is denied.

Dated at Madison, Wisconsin, this 16th day of June, 2008.

WISCONSIN TAX APPEALS COMMISSION

David C. Swanson, Chairperson

Roger W. LeGrand, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"