

COMMONWEALTH OF MASSACHUSETTS  
NORTHAMPTON ZONING BOARD OF APPEALS

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In the Matter of ) ) Appeal of Building Inspector's  
) ) Decision on Zoning Enforcement  
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**APPELLANTS' PRE-HEARING MEMORANDUM IN SUPPORT OF APPEAL**

Appellants Jo-Anne Bessette, M.D., Norman Perr, M.D, Linda Hiesiger, Ellen Tobiassen, Michael S. Fedora, Lillian B. Fedora, and the other thirty-six appellants submit this pre-hearing memorandum in support of their April 30, 2008 to the Zoning Board of Appeals from the April 1, 2008 refusal of Anthony Patillo, Building Commissioner, to take appropriate enforcement actions with regard to the series of violations of the City of Northampton Zoning Ordinance which are described in the request for zoning enforcement letter dated March 18, 2008.

**A. JURISDICTION AND REQUESTED RELIEF**

This is an appeal from the refusal of the Building Commissioner to enforce the City of Northampton Zoning Ordinance, as set forth in Chapter 350 of the City of Northampton Code, in regard to zoning violations associated with use of the property at 170 Glendale Road, Parcel # 42-089-001, Assessors' Map 42, which is owned by the City of Northampton and used as the City of Northampton Regional Sanitary Landfill under the direction and control of the City of Northampton Department of Public Works ("DPW").

This appeal has been taken pursuant to the provisions of Mass. General Laws Chapter 40A, §§ 8 and 15, and Section 350.4-10 of the City of Northampton Zoning Ordinance, by forty-two

residents of Northampton (hereafter collectively referred to as the “appellants”) who are aggrieved by reason of their inability to obtain enforcement action in regard to the zoning violations with regard to use of the property at 170 Glendale Road as the City of Northampton Regional Sanitary Landfill.

The appellants respectfully request that the Zoning Board of Appeals (hereafter the “Board”) reverse the Building Commissioner’s decision and enforce the violations of the Zoning Ordinance by ordering discontinuance of use of the premises at 170 Glendale Road as a regional sanitary landfill, and discontinuance of all other unlawful uses unless and until all zoning requirements have been met.

**B. FACTS**

Based upon a thorough examination of public records of the City of Northampton, the appellants believe that the following facts are uncontested:

1. The parcel of land at 170 Glendale Road which is the subject of this appeal is owned by the City of Northampton. This property is hereafter referred to as the “parcel.”
2. The parcel is currently entirely located within the Suburban Residence (SR) District.
3. The parcel is currently being used as the City of Northampton Regional Sanitary Landfill.
4. The following facts are taken from the decision in the case entitled Rose v. Commissioner of Public Health, 361 Mass. 625 (1972), in which the Supreme Judicial Court ruled upon certain issues regarding use of the parcel as a municipal sanitary landfill under the City of Northampton zoning ordinance which was in effect in 1969.

- a. The parcel was acquired by the City of Northampton on June 23, 1969, by eminent domain for landfill refuse disposal purposes.
- b. At that time the parcel was located within the Residence A zoning district.
- c. At that time one of the allowable uses in the Residence A zoning district was “municipal use.” Northampton Ordinances, Chapter 44, § 11(e).
- d. On January 8, 1969 the Northampton Board of Health assigned the parcel as a public dumping ground.
- e. On appeal from that assignment, and after hearing, the Massachusetts Department of Public Health (the “department”) on June 10, 1969 modified the assignment by requiring it be a “sanitary landfill.” After this matter was appealed to the Superior Court and remanded to the department to take further evidence, on March 16, 1970 the department reaffirmed its prior action.
- f. On March 6, 1969 the Northampton City Council directed the City Board of Health to select a waste disposal site, in light of the fact that the City’s former dumping area was to be closed by court decree, effective July 1, 1969.
- g. On March 20, 1969 the Board of Health selected the parcel as the waste disposal area.
- h. On or about July 6, 1969 the City Board of Health was advised by the City building inspector to obtain a permit to conduct a landfill refuse operation on the parcel.
- i. After a public hearing the City Board of Appeals denied the permit.
- j. Two legal actions were brought in Superior Court regarding use of the parcel as a landfill, one brought by abutters to contest the department’s approval of the site assignment; and

the second brought by the City Board of Health appealing the denial of the permit by the Board of Appeals.

5. On April 20, 1972 the Supreme Judicial Court held in the Rose case that use of the parcel as a municipally-owned and controlled sanitary landfill site, “solely for the benefit of residents ... of Northampton” is a use expressly allowed, without need for a permit, under the provisions of the then-existing zoning ordinance, Northampton Ordinances, Chapter 44, § 11(e).

6. In or about July of 1969 the City, under the direction and control of the City Board of Health, commenced use of a 12-acre portion of the parcel at its western end as a municipal sanitary landfill. This portion of the parcel is hereafter referred to as the “original landfill” and is identified with the words “CAPPED (unlined)” on Figure 4-1, a drawing prepared by Dufresne-Henry which was filed with the appeal.

7. The original landfill accepted solid waste from within the municipal boundaries of the City.

8. Starting in about 1983 the City began plans to expand the landfill into a 12-acre portion of the assigned site where a lined landfill, with leachate collection and treatment facilities, would be constructed.

9. On February 4, 1988 the City Council approved the recommendation of Mayor Musante, the Board of Health, and the Finance Committee to appropriate \$6.9 million to close out the original landfill, open a new landfill area, and construct recycling, composition, and resource recovery facilities.

10. In November of 1988 the City Council, upon the recommendation of Mayor Musante, approved a resolution authorizing development of a regional solid waste disposal program.

11. In May of 1989, upon the recommendation of the Mayor and the Board of Health, the Northampton City Council authorized the City to submit a solid waste capacity development application to the Massachusetts Department of Environmental Quality Engineering (now Department of Environmental Protection) seeking approximately \$7.5 million of the estimated \$8.3 million construction cost of a 16-acre lined landfill at the Glendale Road property to be operated as a regional solid waste disposal facility through cooperative agreements with the neighboring communities of Easthampton, Hatfield, Williamsburg, Huntington, Westhampton, Ashfield, Chesterfield, Worthington, Goshen, Cummington, Plainfield, and Middlefield.

12. Memoranda of understanding were then entered into between Northampton and adjoining communities.

13. The original landfill ceased accepting waste in 1990.

14. Landfill disposal operations on the parcel were then relocated to the new lined expansion area, known as Phases 1-4, on the parcel.

15. There are four lined landfill cells located to the east of the original unlined landfill in an area approximately 18 acres in size. Phase 1 (approximately 5 acres) was constructed in 1989, began accepting waste in 1990, and was finally capped in August 2004. Phase 2 (approximately 6 acres) was constructed in 1993, began accepting waste in 1994, and was finally capped in 2005. Currently the City is using Phase 3 and Phase 4 for landfill disposal. Phase 3, which has a 7-acre footprint, was constructed in 1995 and began accepting waste in 1996. Phase 4 is a vertical expansion of the landfill created by filling of Phase 3 and the eastern side slope of the original unlined landfill area, which was constructed in 2002 and began accepting waste in 2002.

16. Presently approximately 40 communities have agreements with the City of Northampton for use of the Northampton Sanitary Regional Landfill.

17. Approximately 80% of the solid waste now being received at the landfill is commercial waste originating from area businesses, residents using private haulers, and institutions.

18. In 2005 the DPW entered into a landfill gas purchase agreement with Ameresco Northampton LLC, a Delaware limited liability company, pursuant to which Ameresco obtained the right to construct and operate a landfill gas electric generation facility at the landfill to supply electricity to the grid by conversion of landfill gas produced from decomposing refuse at the landfill and the conversion of that gas into electricity.

19. In accordance with its agreement with the City, Ameresco has constructed a landfill gas electric generation facility at the southern end of the landfill, which facilities include a trailer housing a Caterpillar diesel engine generator (with an output capacity of 800 kW) and other equipment including transformers and switchgear, gas blowers, and gas dehydration equipment. The electricity generated by this facility is being sold to, and purchased by, CNE, a local power provider and private electric utility, which is connected to the national electric grid.

20. The Ameresco operation started-up in December 2007. On or about February 25, 2008, Ameresco actually began generating electricity for resale to the grid.

**C. NORTHAMPTON ZONING ORDINANCE REQUIREMENTS**

The appellants believe that the relevant zoning ordinance provisions which are applicable to this appeal are as follows, after review of all available City records regarding the adoption and amendment of its zoning ordinance from 1969 (when the City first acquired the parcel) to the present

(as now existing under the current City of Northampton Zoning Ordinance codified as Chapter 350 of the Code of the City of Northampton).<sup>1</sup>

1. When the parcel which is the subject of this appeal was originally acquired by the City and first used as a municipal sanitary landfill in 1969, the parcel was located in the Residence A zoning district, which district had been created by a zoning ordinance amendment adopted in 1958.

2. At that time a “municipal use” was allowed in the Residence A zoning district, but the ordinance did not define “municipal use.”

3. In September of 1974 the zoning ordinance was amended to allow use of a parcel located in the Residence A zoning district as a “municipal use,” provided it is not injurious to the neighborhood “and only if authorized by permit issued by the Board of Appeals after a public hearing.” Chapter 44, Section 11(i)5.

4. On July 22, 1975 the City adopted a new zoning ordinance to replace the existing Chapter 44 in its entirety. The new zoning ordinance established various zoning districts, including a new Suburban Residence (SR) zoning district in which the parcel was entirely located at the time this ordinance was adopted.

5. The 1975 zoning ordinance included the following use regulations:

a. Use as a “sanitary landfill” conducted by the City of Northampton was allowed as a “heavy public use” (as defined in Section 2.1) only by a “special exception” from the City Council. Section 11.6 provided standards for the City Council to use in considering an

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<sup>1</sup>To the extent additional zoning records are made known to the appellants or become available, the appellants reserve their right to supplement this memorandum.

application for a heavy public use, which included potential odors and other detrimental environmental nuisances, and traffic.

- b. Use as a power plant was not permitted.
- c. Use as a private utility was allowed only by special permit from the Board of

Appeals.

6. Article XII (entitled “Environmental Performance Standards”) of the 1975 zoning ordinance provided in part as follows:

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Section 12.1 - Any use permitted by right, by special permit, or by special exception in any district shall not be conducted in a manner as to emit any dangerous, noxious, injurious, or otherwise objectionable .. hazard; noise or vibration; smoke, dust, odor or other form of environmental pollution; ... liquid or solid refuse or wastes ... in an amount as to affect adversely the surrounding environment.

- 1. In meeting these objectives, the following general standards shall apply: ...
  - c. No emission which can cause any damage or irritation to the health of persons, animals or vegetation ... shall be permitted.
  - d. No discharge, at any point into a ... stream or the ground, or any material in such a way, or of such a nature or temperature as may contaminate any running stream, water supply ....
  - e. No emission of odorous gases or odoriferous matter in such quantities as to be offensive shall be permitted.

7. Section 9.1 of the 1975 zoning ordinance provided as follows:

Section 9.1 - Nonconformity by Initial Enactment or Amendment.

The provisions of this section apply to actions in connection with nonconforming uses, structures and lots as created by the initial enactment of this Ordinance or by any subsequent amendment thereto. *It is the intent of this Ordinance to discourage the perpetuity of nonconforming uses whenever possible.*

The lawful use of any building or land existing at the time of the enactment of this Ordinance may be continued, except as otherwise provided. (emphasis added).

8. Section 9.2 of the 1975 zoning ordinance provided in part as follows:

Section 9.2 - Extension and Alteration.

1. Any nonconforming use ... of any open space on a lot outside a structure, or of a lot no occupied by a structure, shall not be extended....

9. Subsequent amendments to the zoning ordinance adopted between 1975 and 1988 include the following changes:

a. Section 9.2 was amended to provide that with respect to “uses lawfully in existence or lawfully begun ... before the first publication of notice of the public hearing,” the zoning ordinance shall apply to “any change or substantial extension” of any such nonconforming uses.

b. A new Section 9.3(b) was added to provide the following regarding changes, extension, or alterations of pre-existing nonconforming uses:

(b) Pre-existing nonconforming uses may be extended or altered provided that no such extension or alteration shall be permitted unless there is a finding by the Zoning Board of appeals that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood ....

c. The Table of Use Regulations and related requirements for a “special exception” approval from the City Council for a “heavy public use” were changed to require a “special permit” from the City Council.

10. The current zoning ordinance, as set forth in Article 350, regulates the following uses in the SR zoning district as follows:

a. Use as a public “sanitary landfill” is allowed as a “heavy public use” (as defined in Section 350-2.1) only by a “special permit” from the City Council. Section 350-10.7.C. provides standards for the City Council to use in considering an application for a heavy public use, which includes potential odors and other detrimental environmental nuisances, and traffic.

- b. Use as a power plant is not permitted.
- c. Use as a private utility is allowed only by special permit from the Planning

Board.

11. Section 350-4.2 of the current zoning ordinance provides that Chapter 350 shall not apply to the existing use of land, “to the extent to which it is legally used at the time of adoption of this chapter, but it shall apply to any change of use ... thereof...”

12. Section 350-4.4 of the current zoning ordinance requires a zoning permit from the Building Commissioner for any change in the use, or increase in the intensity of use.

13. Sections 350-11 through 350-11.6 of the current zoning ordinance require site plan approval prior to the review and approval of the required zoning permit and special permit needed for the parcel.

14. Sections 350-12 through 350-12.1 contain environmental performance standards, similar to those adopted in 1975, which apply to “[a]ny use permitted by right, by special permit, or by special exception...”

#### **D. LEGAL ISSUES PRESENTED**

The Staff Report dated June 4, 2008 correctly recognizes that the primary legal issues in this appeal revolve around what “grandfather” rights may exist regarding the current use of the parcel as a landfill. Nevertheless, the particular questions which the Staff Report suggests be taken into consideration by the Board do not completely and properly frame the legal issues presented. In particular, the Staff Report does not take account of all of the factual and legal issues which must

be determined pursuant to Mass. General Laws Chapter 40A, § 6, i.e. whether any current uses of the parcel constitute unlawful changes or substantial extensions of nonconforming uses.<sup>2</sup>

Accordingly, the appellants provide the following restatement of the major legal issues which are presented by the appeal and which must be determined by the Board in exercising its responsibilities under Mass. General Laws Chapter 40A and the Northampton zoning ordinance:

1. From 1969 to the present, has the parcel been used, or is it now being used, by the City of Northampton for any of the following uses, as listed in the Table of Use Regulations and otherwise defined by the Northampton Zoning Ordinance:

- a. Municipal landfill.
- b. Heavy public use.
- c. Power plant.
- d. Private utility.

2. For each of the above uses which are applicable to the parcel, whether each use is a permitted use, conditional use (i.e. subject to further permits, approvals, and/or allowance of a variance), or prohibited use in the zoning district in which the parcel is located.

3. If any of the uses of the parcel which are conditional were commenced after the zoning amendment was first adopted, does this use constitute a change or substantial extension of a preexisting nonconforming use of the parcel, applying the following three-part test:

- a. Does the use reflect the nature and purpose of the use prevailing when the zoning ordinance took effect.

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<sup>2</sup>In addition, the Staff Report raises an issue (question 3) about “common law” grandfather rights which is not relevant to this decision.

- b. Whether there is a difference in the quality or character, as well as the degree, of the current use.
  - c. Whether the current use is different in kind in its effect on the neighborhood.
4. If there has been a change or substantial extension of a nonconforming use, then the following issues must be addressed:
- a. Does the zoning ordinance permit such a change or substantial extension.
  - b. If so, does the change or substantial extension comply with the zoning ordinance.
  - c. Is the change or substantial extension substantially more detrimental than the existing nonconforming use to the neighborhood.
5. If the Board determines that any uses of the parcel are either prohibited or are not in compliance with zoning requirements, then the Board must determine (a) whether the appellants have waived their rights to challenge the zoning violations by the passage of time from when the zoning violations occurred; and, if not, (b) what zoning relief is required.

**E. THE BOARD SHOULD ENFORCE THE ZONING VIOLATIONS**

As will be documented at the hearing, the original unlined City of Northampton Sanitary Landfill, which became a nonconforming use in 1975 with the adoption of zoning amendments, has been unlawfully changed from use as a sanitary landfill solely for the citizens of the City of Northampton into a regional sanitary landfill; has been substantially extended into a much different and larger regional sanitary landfill serving over 44 communities, which has had and is now having significantly greater impacts on residents in the surrounding neighborhood; and has been operating over the years without having obtained the necessary zoning permits and approvals.

Based upon the facts to be presented at the hearing, and by application of the relevant provisions of the City of Northampton zoning ordinances and Mass. General Laws Chapter 40A, the appellants request that the Board make the following determinations:

1. The use of the parcel as a regional sanitary landfill is not permitted.
2. Even if use of the parcel as a regional sanitary landfill is permitted, this use is unlawful unless and until there has been a finding by the Board, if it can be so found as a matter of law, that the substantial changes and substantial extensions are not, and have not been, substantially more detrimental than the nonconforming use was in 1990 prior to the opening of the regional sanitary landfill.
3. The changes in use and/or substantial extensions of nonconforming uses have resulted in substantially more detrimental impacts to the surrounding neighborhood, including but not limited to, increased numbers of refuse trucks coming to and from the landfill, increasing noise and odor impacts, and increasing the quantity of leachate generated from the landfill which has migrated off-site and caused damage to wetlands, groundwater, and drinking water resources.
4. Uses of the parcel have been made, and are now being made, without the required permits and approvals required under the applicable zoning ordinances.
5. To the extent a portion of the parcel is being used for operation of a landfill gas electric generation facility, this use of the parcel as a “Power plant” is prohibited under the Table of Use Regulations; and to the extent this use of the parcel is a “Private utility” under the current Zoning Ordinance, this use for this purpose is prohibited without a special permit from the Planning Board.

6. The appellants have not waived their rights to seek enforcement of the zoning violations which are the subject of this appeal.

**F. CONCLUSION**

For the above reasons, the appellants request that the Board reverse the action of the Building Commissioner and enforce the zoning violations by ordering discontinuance of use of the premises at 170 Glendale Road as a regional sanitary landfill, and discontinuance of all other unlawful uses unless and until all zoning requirements have been met.

By their attorney,

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