



Parties who appeared, were represented, and/or provided testimony at the hearings before this Board on June 12, 2008 and June 26, 2008 include the appellants; various members of the general public; the DPW, as owner of the parcel which is the subject of this appeal; Ameresco Northampton, LLC (“Ameresco”), operator of a gas-to-energy facility on the parcel; and the Building Commissioner, whose decision of April 1, 2008 is the subject of this appeal.

The appellants maintain, as highlighted in the exhibit submitted to the Board on June 26, 2008, that eight specific zoning violations justify action by this Board to enforce the provisions of the City’s zoning ordinance. See Proposed Conclusions of Law, ¶ 17.

## **II. ISSUES PRESENTED**

The following factual and legal issues are presented by this appeal and must be decided by the Board:

### **A. Procedural Issues**

1. Do one or more of the appellants have “standing” as an “aggrieved person” to maintain this appeal?
2. Is this zoning enforcement appeal barred by the doctrine of “laches” or by a relevant statute of limitations?

### **B. Substantiative Issues**

Assuming this Board concludes that neither procedural issue precludes the Board from reaching the merits of the zoning enforcement appeal, the following substantive issues are presented for decision with regard to the various uses of the parcel (i.e., as a municipal landfill, heavy public use, and power plant and/or private utility) between 1969 and the present as to which violations have been alleged:

1. Has the parcel been used, or is it now being used, for any prohibited use?
2. Even if the parcel had been a conforming use, has the City of Northampton enacted any zoning ordinance amendments making that use a conditional use (i.e. subject to further permits, approvals, and/or allowance of a variance), thereby creating a non-conforming use(s) of the parcel?
3. Subsequent to the parcel becoming a non-conforming use(s), has there been 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; (b) is there a difference in the quality or character, as well as the degree, of the current use; and (c) is the current use different in kind in its effect on the neighborhood.
4. If there has been a change or substantial extension of a nonconforming use, (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; and (c) is the change or substantial extension substantially more detrimental than the existing nonconforming use to the neighborhood?
5. Is the use of the parcel for Ameresco's landfill gas electric generation facility an accessory use permitted by the zoning ordinance?
6. With respect to any uses of the parcel which have resulted in zoning violations, what is the appropriate relief which this Board should order at this time to enforce the provisions of the zoning ordinance?

### **III. PROPOSED FINDINGS OF FACT**

The appellants propose that the following facts, established in the record of this proceeding, be adopted by the Board in its decision:

1. The parcel of land at 170 Glendale Road (the “parcel”) which is the subject of this appeal is owned by the City of Northampton and is currently be being used as the City of Northampton Regional Sanitary Landfill.

2. The parcel is currently entirely located within the Suburban Residence (SR) District.

3. The parcel was acquired by the City of Northampton on June 23, 1969, by eminent domain for landfill refuse disposal purposes. At that time the parcel was located within the Residence A zoning district, where one of the allowable uses was “municipal use.” Northampton Ordinances, Chapter 44, § 11(e).

4. On January 8, 1969 the Northampton Board of Health assigned the parcel as a public dumping ground. 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.

5. 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. On March 20, 1969 the Board of Health selected the parcel as the waste disposal area. 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. After a public hearing the City Board of Appeals denied the permit. 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. On April 20, 1972 the Supreme Judicial

Court held in Rose v. Commissioner of Public Health, 361 Mass. 625 (1972), 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. Between 1991 and 2007 the number of communities outside of Northampton which use the landfill for disposal of waste has ranged from a low of 11 to a high of 27 communities, accounting for between 8% and 27% of the annual tonnage. Testimony of James Laurila, Tr. 100-

102 (June 26, 2008); exhibit entitled “Member Community Tonnage Summary for the Northampton Landfill, 1991-2007.”

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, 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.

21. The parcel has been used, or is it now being used, by the City of Northampton for each of the following uses, as listed in the Table of Use Regulations and otherwise defined by the Northampton Zoning Ordinance during the following periods of time: (a) municipal landfill, July 1969 to present; (b) heavy public use, July 1975 to present; (c) power plant, February 2008 to present; and (d) private utility, February 2008 to present.

22. Records from the City of Northampton DPW and the Board of Health (the previous operator of the landfill) have the following relevant facts:<sup>2</sup>

- a. 1984 Annual Municipal Waste Report, submitted to DEP, Bureau of Solid Waste disposal, by Peter McErlain, Health Agent, Northampton Board of Health, estimates 25,000 tons disposed of at the landfill (based on a site estimate of cubic yards, converted to tons on the basis of 4 cubic yards per ton).
- b. Draft Environmental Impact Report, Landfill Expansion, EOE # 5391 (23 January 1986), prepared by Dufresne-Henry, Inc., Table 1 (volumes of refuse disposed of at the Northampton Sanitary Landfill (in cu. yd. loose refuse):

1969 (9/1 to 12/31)	187,000
1970	668,000
1971	832,000
1972	875,000
1973	928,000
1974	906,000
1975	813,000
1976	883,000
1977	920,000
1978	908,000
1979	901,000
1980	964,000
1981	1,174,000
1982	721,000
1983	579,000
1984	528,000

c. “Overview of Solid Waste & Sludge Management,” Northampton Board of Health (May 5, 1997):

- The landfill at that time was serving fourteen municipalities. By agreement with the Massachusetts Department of Environmental Protection (“DEP”), which funded the landfill’s expansion as a regional sanitary landfill, the landfill is required to be available to accept residential waste from these communities, but not commercial waste.

---

<sup>2</sup>The appellants request leave to submit by August 22, 2008 those documents referred to in paragraphs 22-23 which are not already in the record.

- The annual operating permit with DEP allows the landfill to accept 50,000 tons/year of solid waste and sludge. The landfill was actually receiving at that time 44,150 tons per year, or on average 120 tons per day year round.
- The landfill then received 6,240 tons/year of sludge from the Northampton sewer system.
- The annual solid waste tonnages come from the following sources:
  - 10,500 tons/year from member towns;
  - 10,650 tons/year from Northampton residents, plus an additional (unquantified) number of tons from private haulers;
  - 15,5000 tons/year from commercial sources, including large solid waste haulers and various small regional businesses (including contractors, builders, and other businesses).

b. Memorandum to Honorable Northampton Mayor Clare Higgins and Northampton City Councilors from Edward S. Huntley, P.E. Director of Public Works and James R. Laurila, P.E. City Engineer, dated September 12, 2007:

- The City has a memorandum of understanding regarding use of the landfill with 38 communities, of which 17 direct haul to the landfill. A previous survey indicated that private waste haulers have routes in up to 44 area towns.
- The landfill accepts up to 50,000 tons per year. In 2006 48,482 tons were received (of which 6% was from City drop off centers, 11% from 16 member towns, 2% from Smith college, and 80% “commercial” waste from area businesses, residents using private haulers, and institutions.

23. Records obtained from DEP have the following relevant facts:

- Letter dated January 26, 1979 from Angelo Iantosca, Regional Environmental Engineer, Massachusetts Division of Water Pollution Control, to Robert Cady, Construction Grants Division, Massachusetts Division of Water Pollution Control estimates that “approximately 30,000 tons or 60,000 cubic yards of solid waste, in place, are disposed of each year at the Northampton sanitary landfill.”
- The solid waste contract between the City of Northampton and its then operator, Cauduwood Enterprise, Inc., prohibited dumping of out-of-city waste at the landfill.

24. The figures in the graph of solid waste land-filled per year included as the seventh

PowerPoint slide presented at the hearing on June 12, 2008 came from figures in monthly tonnage reports submitted by the Board of Health and DPW to DEP.

25. The figures of tonnage estimates presented by the DPW are not in all cases consistent with other facts in the record and contain errors. For example, figures presented by the DPW in Exhibit 17 (“Summary of Waste Disposed at Landfill”), upon which calculations were made to convert cubic yards into tonnage for the years 1969-1990, erroneously are based upon double-counting some of the cubic yard figures contained in reports submitted to DEP by the Board of Health.<sup>3</sup>

26. Based upon the credible evidence in the record of this hearing, the Board should find that commencing in and about 1990 when the landfill expanded into the new areas, the quantity of refuse being land-filled has significantly increased.

27. Photographic evidence in the record shows that the wetlands downstream from the landfill have considerable evidence of contamination caused by the discharge of leachate from the landfill. See the PowerPoint slides with photographs of wetlands on the Fedoras’ property, the tributary to Hannum Brook, and contaminated iron flocs; testimony of Michael Fedora, Tr. 45-46 (June 12, 2008).

28. Expansion of the landfill and its conversion into the Northampton Regional Sanitary landfill has resulted in the following increased detrimental impacts to the neighborhood:

- a. Increased truck trips by haulers of trash and by cover material;
- b. Increase noise from landfill operations;
- c. Increased adverse impacts to surrounding private drinking water wells, wetlands, and ground and surface water.

---

<sup>3</sup>The appellants request leave to submit by August 22, 2008 a supplemental exhibit showing one or more examples of this double-counting.

- d. Increased odor impacts.
- e. Significant expansion of nuisance conditions caused by the landfill.

See, for example, the PowerPoint slides and the June 12, 2008 testimony of Michael Fedora, Tr. 34-61; Lillian Fedora, 62-65; Craig and Mary Augers, Tr. 66-69; Bob Aronson, Tr. 69-73; Linda Hiesiger, Tr. 73-75.

29. The record shows that the following appellants are direct abutters to the parcel, appear on the official abutters' lists, and are parties in interest to this appeal, beside being appellants:

- a. Michael and Lillian Fedora, who reside at 238 Glendale Road.
- b. Linda Hiesiger and Ellen Tobiassen, who reside at 981 Park Hill Road.

#### **IV. PROPOSED CONCLUSIONS OF LAW**

1. When the parcel 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 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:

---

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 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...”

15. The protections afforded to preexisting non-conforming uses apply only to uses lawfully established prior to the effective date of a zoning change. Healy, Massachusetts Zoning Manual, vol. I at 6-5 (4th ed. 2007).<sup>4</sup>

16. As shown by the appellant's exhibit of zoning uses and violations, over the life of the parcel it has changed from being a conforming use (in 1969) to three non-conforming uses (starting in September 1974):

- Non-conforming use #1: in September of 1974 a permit was required for "municipal use;"
- Non-conforming use #2: in July of 1975 a special exception approval from the City Council was required for a "sanitary landfill" conducted by the City of Northampton, defined to be a "heavy public use."
- Non-conforming use #3: between 1975 and 1988 the use of the parcel as a "heavy public use" became allowed only by a special permit from the City Council. The parcel is now being use of the parcel as a regional sanitary landfill is not permitted.

17. The appellants have shown that the following eight zoning violations have resulted from unlawful uses of the parcel starting in 1990 with the change in use from the Northampton Sanitary Landfill to the Northampton Regional Sanitary Landfill:

---

<sup>4</sup>Enactment of a new conditional use requirement makes an exiting conforming use a non-conforming use. Bruno v. Board of Appeal of Wrentham, 62 Mass. App. Ct. 527, 536 (2004). See also the definition of "preexisting nonconforming use" in § 350-2.1 of the Northampton Zoning Ordinance: "A use which, when originally commenced, was lawfully in existence or lawfully begun and was permitted in the zoning district in which it was located, but since then this chapter has been amended so that such use would now require a special permit or would be prohibited and would require a use variance."

- Zoning violation #, 1990 (unlawful change of use and/or intensification of nonconforming use in connection with commencement of use as a regional sanitary landfill and opening of Phase 1);
- Zoning violation #2, 1990 (lack of the finding from Zoning Board of Appeals required by then Section 9.3(b), now codified as § 350-9.2.B.);
- Zoning violation #3, 1990 (lack of special permit issued by City council for “heavy public use”);
- Zoning violation #4, 1994 (unlawful change of use and/or intensification of nonconforming use in connection with opening of Phase 2);
- Zoning violation #5, 1996 (unlawful change of use and/or intensification of nonconforming use in connection with opening of Phase 3);
- Zoning violation #6, 2002 (unlawful change of use and/or intensification of nonconforming use);
- Zoning violation #7, February 2008 (City operating power plant in violation of use prohibition);  
and
- Zoning violation #8, February 2008 (City allowing use of parcel as a private utility without special permit).

18. 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 whether 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.

19. 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.

20. Uses of the parcel have been made, and are now being made, without the required permits and approvals required under the applicable zoning ordinances.

21. 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.

22. Ameresco’s use of the parcel is not a lawful accessory use as defined by the Northampton Zoning Ordinance because the use has not been “customarily incidental and subordinate to the principal use of a ... lot ... , provided that said accessory use is permitted in that district under this chapter....” Northampton Zoning Ordinance § 350-2.1.

23. The appellants have not waived their rights to seek enforcement of the zoning violations which are the subject of this appeal. First, the doctrine of “laches” is not applicable. See, e.g., Cape Resort Hotels, Inc. v. Alcoholic Licensing Bd., 385 Mass. 205, 224 (1982) (neither laches nor estoppel is a defense to an action to enforce a municipal ordinance). Second, use violations unsanctioned by any permit do not enjoy the six-year limitations period of G. L. C. 40A, § 7. Moreis v. Board of Appeals of Oak Bluffs, 62 Mass. App. Ct. 53, 60 (2004).

24. Ameresco’s challenge to the appellants’ standing should be summarily dismissed. A number of the appellants – including the Fedoras, Ms. Hiesiger, and Ms. Tobiassen, among others – are direct abutters to the landfill parcel; were included on the official abutters’ list for service of the appeal; and, accordingly, enjoy the presumption of standing as parties in interest. G. L. c. 40A, § 11. Because this presumption of standing was not rebutted by either Ameresco or the DPW, the

issue of standing must be decided in favor of the appellants. Furthermore, there is adequate evidence in the record to demonstrate that these appellants are ‘aggrieved’ and have standing to pursue this appeal.

**V. RELIEF REQUESTED**

The appellants respectfully request that 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.

By their attorney,

---

Peter L. Koff  
Engel & Schultz, LLP.  
265 Franklin Street, Suite 1801  
Boston, MA 02110  
Tel: 617-951-9980

Dated: August 21, 2008