COMMONWEALTH OF MASSACHUSETTS
NORTHAMPTON ZONING BOARD OF APPEALS

In the Matter of	)	Appeal of Building Inspector's Decision on Zoning Enforcement

APPELLANTS' REBUTTAL MEMORANDUM

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 (hereafter collectively referred to as "the appellants") submit this post-hearing memorandum in reply to the arguments of the City of Northampton Department of Public Works ("DPW") and Ameresco Northampton, LLC ("Ameresco") in their post-hearing memoranda.[1]

The DPW and Ameresco urge this Board to conclude that the appeal should be denied because the landfill's operations, including the specific use of the site for the Ameresco gas-to-energy unit, do not constitute a change or substantial extension of a pre-existing nonconforming use of the landfill parcel on Glendale Road. In addition, Ameresco argues that its gas-to-energy use of the site is an accessory use to the landfill, and therefore exempt from the zoning changes.

The appellants will, therefore, briefly address each of these two legal arguments in this rebuttal memorandum.

[1]See Appellee's Final Memorandum in Opposition to Appeal, dated August 21, 2008, submitted on behalf of the DPW; and Ameresco Northampton, LLC's Post-Hearing Memorandum in Opposition to Neighbors' Appeal Re: Zoning Enforcement, dated August 21, 2008.

A. The Landfill's Use Is An Unlawful Change Or Substantial Extension Of A Nonconforming Use

The appellants agree with the DPW and Ameresco that the test which this Board should apply to determine whether there has been an unlawful change or substantial extension of a pre-existing nonconforming use within the meaning of G. L. c. 40A, § 6, is the familiar three-part test of Powers v. Building Inspector of Barnstable, 363 Mass. 648, 653 (1973), and Town of Bridgewater v. Chuckran, 351 Mass. 20, 33 (1966):

(a) does the current use reflect the nature and purpose of the use at the time the zoning ordinance changes took effect;

(b) is the current use different in their quality, character, or degree; and

(c) is the current use different in kind in their effects on the neighborhood.

See generally Healy, Massachusetts Zoning Manual, vol. I, § 6.6.1 (4th ed. 2007). The same factors are relevant in applying the comparable provisions of § 350-9.2.A. of the Northampton Zoning Ordinance.

The operation of the landfill would not constitute an unlawful change or substantial extension of a pre-existing nonconforming use only if the DPW can prove that all three elements of the test are satisfied. Green v. Board of Appeals of Provincetown, 26 Mass. App. Ct. 469, 472, *rev'd on other grounds*, 404 Mass. 571 (1989). Contrary to the position of the DPW, Tr. 27 (June 26, 2008) and Ameresco, Tr. 142-143 (June 26, 2008), the DPW – not the appellants – bears the burden of establishing that there has not been a change or substantial extension of a nonconforming use. See Cape Resort Hotels, Inc. v. Alcoholic Licensing Bd. of Falmouth, 385 Mass. 205, 212 (1982), citing Town of Bridgewater v. Chuckran, 351 Mass. at 24.

The appellants believe that the DPW had failed to carry its burden. First, use of the parcel for a major regional sanitary landfill, complete with a gas-to-energy facility, does not reflect the "nature and purpose" of the original use of the landfill in 1974, 1975, and the period 1975-1978 when the relevant zoning changes took place which made the use of the landfill a nonconforming use because, respectively, the necessary permit, special exception, and special permit from the City Council had not been obtained.[2]

Under the second and third elements of the Powers/Chuckran test, the evidence in the record demonstrates that the current uses are in fact different in their "quality, character, or degree" and in kind in their effects on the neighborhood. For example, in Oakham Sand & Gravel Corp. v. Town of Oakham, 54 Mass. App. Ct. 80, 84-85 (2002), a number of significant changes in use had taken place in regard to how a sand and gravel removal business was being operated, including a substantial increase in the volume of operations, an attendant increase in truck traffic, the increased use of heavy equipment, a more than doubling in the area of the parcel actively used for sand and gravel removal, and a substantial increase in the hours of operation. The Appeals Court sustained the findings of the Land Court that these changes in use constituted a change in the quality and character, as well as degree, of the prior non-conforming use, and that the current use was "different in kind in its effect on the neighborhood." See Quincy v. Miller, 2008 WL 2151526 at *14 (Mass. Land Ct. 2008), where the proposed change from a hardware store to a pharmacy was found to be "different in kind in its effect on the neighborhood, different in character, and different in nature and use...."

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[2]See appellants' exhibit entitled "Northampton Landfill, Zoning Uses and Violations."

Here the evidence in the record shows that while the previous municipal landfill had adverse impacts, as the DPW openly conceded at, e.g., Tr. 35-38 (June 26, 2008), the nature, quality, and effects on the neighborhood of these impacts have significantly increased. The testimony of the neighbors, and the exhibits offered on behalf of the appellants, show that the following changes, among others, have taken place in use of the parcel by the DPW, which changes collectively constitute a "change or substantial extension" within the meaning of G. L. c. 40A, § 6, under the Powers/Chuckran test:

- since 1990 there has been a significant increase in the numbers of refuse and cover truck trips coming to and from the landfill;

- since 1990 there has been an increase in the quantity of refuse being disposed at the regional sanitary landfill, in comparison to the quantities being disposed of when the parcel was operated only as a municipal sanitary landfill which did not lawfully accept waste from outside Northampton;

- a substantial increase in the areas of the parcel being actively used for landfill operations, in comparison to the small original 12-acre unlined landfill dumping site, has taken place as the landfill has greatly expanded its operations since 1990 into Phases 1, 2, 3 and 4 which were not previously permitted, or being used;

- new uses at the parcel have been established with the construction and operation of the Ameresco gas-to-energy unit and the construction of a cell tower;

- new noise impacts have been caused in the neighborhood (that previously did not exist) as a result of operation of the Ameresco generator;

- there has been a substantial increase in odor impacts in the neighborhoods and adverse impacts to aesthetics of the views and quality of the parcel the neighborhood as a consequence of expansion of the landfill and the construction of new facilities;

- the views and aesthetic quality of the neighborhood has been harmed as a consequence of expansion of the landfill and the construction of the new facilities; and

- the quantity of leachate generated from the landfill which has migrated off-site into Hannum Brook and the surrounding wetlands areas (including those on the property

owned by the Fedoras) has significantly increased, causing damage to wetlands, groundwater, and drinking water resources.

B. <u>Ameresco's Use Is Not A Lawful Accessory Use</u>

Finally, Amersco attempts to argue that the use of the parcel for Ameresco's landfill gas electric generation facility is permitted as an accessory use under the zoning ordinance. But that argument fails to acknowledge that in order for a non-conforming use to receive protection as an accessory use, the accessory use must be "permitted in that district under this chapter." Northampton Zoning Ordinance § 350-2.1, definition of "Use, Accessory."

Here there can be no dispute that use of the parcel as a power plant in the SR district is "not allowed," i.e. is a prohibited use. See Table of Use Regulations for "Power plant" under the sub-heading "Utilities, Telecommunications, Municipal Facilities." When Building Commissioner Patillo testified, he made no effort to state that the Ameresco facility is not a "power plant" within the meaning of the ordinance. In fact, on page 3 of his own April 1, 2008 letter denying the appellants' enforcement request, Commissioner Patillo referred to the methane gas to electric turbine facility located at the landfill as a "power plant."

Instead, the focus of his testimony at the hearing, and the arguments made on behalf of Ameresco, are that this facility is a permitted accessory use. Tr. 72-73, 130-132 (June 26, 2008). But that simply is not the case since the definition is "Use, Accessory" includes only permitted uses, which a power plant is not. Therefore, none of the other arguments advanced by Ameresco can resurrect the lawfulness of this prohibited use.

C. **Conclusion**

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,

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

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