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March 18, 2008

Anthony Patillo, Building Commissioner
Puchalski Municipal Building
212 Main Street
Northampton, MA 01060

Re: Zoning enforcement request

Dear Commissioner Patillo:

I represent the following forty-two residents of the City of Northampton: Jo-Anne Bessette, M.D. and Norman Perr, M.D., 228 Sylvester Road; Linda Hiesiger and Ellen Tobiassen, 981 Park Hill Road; Dorrie Bluemer, 36 Indian Hill; James G. Brooks and Elizabeth Brooks, 229 Glendale Road; Jean Witherell, 235 Glendale Road; Ron Baranowski, 219 Glendale Road; Cathy M. Strader, 209 Glendale Road; Jeff Childs, 34 Pine Valley Road; Stephen Childs, 209 Glendale Road; Margaret Brown and Gary Brown, 137 Glendale Road; William M. Bresnahan, 220 Glendale Road; Joan Bowler and Richard Bowler, 165 Glendale Road; Debra Cummings, 160 Glendale Road; Peter Stone, 150 Glendale Road; Annie Rosis, 59 Glendale Road; Geraldine Gromelski, 123 Glendale Road; Craig Odgers and Mimi Odgers, 97 Glendale Road; Douglas Townsend and Sheila Townsend, 45 Glendale Road; Paul L. Herbert, 11 Brisson Drive; Mary Ann Paul and Robert Paul, 22 Brisson Drive; Bill Hamel and Joan Hamel, 21 Brisson Drive; JoAnne Bushey, 984 Park Hill Road; Christine LePage, Hector LePage, and Jarod LePage, 29 Brisson Drive; Mark Frost and Kathy Frost, 38 Brisson Drive; Tricia Walker and Arielle Perry, 30 Brisson Drive; Michael S. Fedora and Lillian B. Fedora, 238 Glendale Road; and Roger Benoit and Rosalie Benoit, 942 Park Hill Drive.

I am writing on behalf of my clients to request, pursuant to §§ 350-4.3 and 350-4.8 of the Zoning Ordinance of the City of Northampton, Massachusetts, that you issue a notice of violation and order to the Department of Public Works (DPW) of the City of Northampton, as the owner and operator of the parcel of land located at 170 Glendale Road, to cease accepting for storage, transfer, and/or disposal at the landfill any refuse, solid waste, or other materials which originate from municipal waste collected in any municipality other than the City of Northampton and otherwise discontinue the unlawful use of the landfill property, including the unlawful use of the property for commercial and industrial purposes, unless and until all necessary local permits and approvals have been obtained.

1. History of the site and its assignment for landfill purposes. The landfill is situated on a parcel of land, approximately 52 acres in size, which is entirely located within the Suburban Residence (SR) Zoning District, as shown on Northampton Assessors and Zoning Map Sheet 42. The parcel is identified by the City of Northampton Assessor's List: 2007 as Parcel 42-089-001 and is known and is presently being used as the City of Northampton Regional Sanitary Landfill. A portion of the parcel at its eastern side is depicted on Zoning Map Sheet 42 as being within the Watershed Protection Overlay District. Prior to the City's acquisition of this parcel in 1969, the property was known as the Omasta Gravel Pit and was used for that purpose.

The Northampton Board of Health, acting in accordance with Mass. General Laws Chapter 111, Section 150A, voted on January 8, 1969 and March 20, 1969 to assign the Calduwood Enterprises Inc. Site (Omasta Gravel Pit) for sanitary landfill purposes.¹ This site was chosen in order to replace the privately-owned and operated open dump operated by James L. Allen, which was closed after regulations were adopted by the DPH to ban open burning and an order was issued from Hampden Superior Court to close this dump effective July 1, 1969. The Board of Health's written recommendation, presented to the Northampton City Council on March 20, 1969, described the City's need for a sanitary landfill site to dispose of its "garbage and other refuse from all sources - residential, commercial and institutional..." The parcel was acquired by the City on June 23, 1969 by eminent domain for landfill refuse purposes.

2. History of zoning applicable to the site. At the time the parcel was acquired by the City in 1969, the parcel was located within the Residence A zoning district, for which one of the allowable uses was "municipal use," a use not further defined at that time. See Northampton Ordinances, c. 44, § 11(e). After the Northampton Board of Appeals refused to issue a permit for this facility, the Massachusetts Supreme Judicial Court held in Rose v. Commissioner of Public Health, 361 Mass. 625, 627-32 (1972), that the City was authorized to operate a sanitary landfill "solely for the benefit of the residents ...of Northampton" as a "municipal use" in the Residence A zoning district allowed by then-existing Section 11(e) of the zoning ordinance without the necessity of a permit.

In 1975 the City amended its zoning ordinance to create the Suburban Residence (SR) zoning district and make other zoning changes, including elimination of the Residence A zoning district.

¹This site assignment was appealed to the Massachusetts Department of Public Health (DPH), which approved the assignment with certain modifications on June 10, 1969. According to a June 10, 1969 letter to the Northampton Board of Health from DPH Commissioner Alfred L. Frechette, the evidence presented at the public hearing on May 8, 1969 indicated that the proposed site "would be used strictly for the operation of a sanitary landfill for the city of Northampton." That decision was then appealed to the Hampden Superior Court, which remanded the matter to the DPH to take more evidence. On March 10, 1970 the DPH reaffirmed its prior approval of the site assignment, with additional conditions.

Anthony Patillo, Building Commissioner
March 18, 2008
Page Three

The landfill property was located in the SR district, for which the Table of Use Regulations then allowed certain defined “heavy public uses” including a “sanitary landfill” conducted by the City or privately-operated, provided that a “special exemption” was approved by the City Council as required by § 11.6 of the zoning ordinance. By adoption of that amendment, and even though the landfill had previously been operating in conformance with prior zoning requirements, the use of the landfill property became a nonconforming use which, under §§ 9.1 and 9.2 of the 1975 zoning ordinance, could not be extended without first obtaining a “special exemption” for the heavy public use. Furthermore, the Table of Use Regulations adopted with the 1975 zoning ordinance required issuance of a special permit from the Board of Appeals for use of the property in the SR district as a “Private utility;” and prohibited location of a “Power plant” in all districts.

Subsequently the zoning ordinance was further amended to require a special permit from the City Council for a “Heavy Public Use” (including use as a sanitary landfill) in all zoning districts, instead of the “special exemption” previously required. Power plants continued to be prohibited uses in all zoning districts, and a private utility continued to require a special permit from the Zoning Board of Appeals in all districts. These provisions were in effect in the 1988 version of the zoning ordinance which I have reviewed.

Under current zoning applicable to the SR district, a public or private sanitary landfill, which is defined as a “Heavy Public Use” in § 350-2.1, continues to require a special permit from the City Council as provided by §; a “Power plant” is not allowed; and a “Private utility” is allowed only by special permit from the Planning Board. Moreover, provisions of §§ 350-9.2 and 350-9.3 require findings from the Zoning Board of Appeals that a prior nonconforming use proposed to be changed, expanded or altered “will not be more detrimental to the neighborhood....”

3. Development and expansion of the landfill. In July of 1969, after the property had been acquired by the City, the City began to use an unlined section of the parcel located on the western end of the property as a sanitary landfill, which portion of the site is variously described as being between 20 and 22 acres in size.² This area was actively used as the Northampton Sanitary Landfill,

²See, for example, the January 23, 1985 memorandum from Peter J. McErlain, Health Agent, to Mayor David B. Musante (“Northampton currently operates the 20 acre Northampton Sanitary Landfill at a 50 acre assigned site on Glendale Road, Northampton.”); the Initial Site Assessment Report (April 1992) prepared for the Board of Health by C.T. Male Associates, P.C. (the “unlined landfill covers about 22 acres” of the 52-acre landfill property); the Final Environmental Impact Report for the Northampton Regional Sanitary Landfill Phase 5/5B Expansion Project (Dec. 2005), prepared by Dufresne-Henry, Inc., at page 4-1 (the original unlined landfill is a “21-acre area on the west end of the site....”).

Anthony Patillo, Building Commissioner
March 18, 2008
Page Four

accepting solid waste from within the municipal boundaries of the City.³ The original unlined landfill ceased accepting waste in 1990 and was capped in 1995. See Final EIR at page 4-1.

Starting in about 1983 – in recognition of the fact that the unlined landfill was predicted to reach its capacity by the late 1980's – the City began a process of developing recommendations for a long-term solid waste disposal policy for Northampton. The City went forward with 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. The City then began negotiations with the City of Easthampton about how to construct, and finance, a new lined landfill to serve the combined solid waste needs of both communities. The City of Northampton's Solid Waste Management Task Force recommended in 1985 that the City develop a solid waste disposal plan in concert with the City of Easthampton, but one which would not "give away" valuable landfill space and would show a significant benefit for Northampton.

As this discussion was going forward, momentum began to build for developing an even more ambitious "regional approach" to solid waste disposal: in 1987 the Hampshire County Solid Waste Task Force made specific recommendations for a regional approach to solving the growing problems of lack of adequate landfill capacity for Northampton and neighboring municipalities; and in June of 1988 the Pioneer Valley Solid Waste Action Team (SWAT) interim solid waste report, prepared as a guide for the cities and towns in Hampshire and Hampden Counties, recommended development of a regional solid waste management system including grouping of towns into "wastesheds" and, in the case of the western hill towns, "begin negotiations with Northampton to determine maximum volumes of waste they will accept in the city's landfill, etc." SWAT report at p. 32.

Meanwhile, 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 existing landfill area, open a new landfill area, and construct recycling, composition, and resource recovery facilities. 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. 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

³For example, the 1984 Municipal Waste Report prepared by the City's Board of Health, dated February 15, 1985, stated that no solid waste from any other community was being brought to the municipal compactor located at the landfill for residential waste transported to the landfill in private vehicles. In addition, Table 1 of "An Interim Regional Solid Waste Management Plan for the Pioneer Valley" (June 1988), prepared by the Pioneer Valley Solid Waste Action Team (SWAT) for the Mayors of Chicopee, Holyoke, Northampton, Springfield, and Westfield, does not show that the Northampton landfill was then being used as the waste disposal location for any of the 43 separate communities from Agawam to Worthington other than Northampton.

Anthony Patillo, Building Commissioner
March 18, 2008
Page Five

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

Starting in 1990 the landfill began acceptance of refuse in the expansion area known as Phases 1-4, which are four lined landfill cells located to the east of the original unlined landfill in an area approximately 18 acres in size. This change in use substantially increased the detrimental impacts on the surrounding neighborhood by increasing the number 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. 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; and 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. Presently approximately 40 communities have agreements with the City of Northampton for use of the Northampton Sanitary Regional Landfill. 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.

The most recent major new landfill activity – and unlawful change in the use of the landfill property – is use of the parcel for conversion of landfill gas into electricity. 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. 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 consist of 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. It is my understanding from public information that this operation started-up in December 2007, and on or about February 25, 2008, Ameresco actually began generating electricity for resale to the grid.

4. Unlawful uses of the landfill property. The landfill property is presently being used in violation of requirements of the Northampton Zoning Ordinance. Even if the landfill was originally operating in compliance with existing zoning requirements when it first opened in 1969, the subsequent changes in the zoning requirements and the substantial expansion and changes in use of this property when it became a regional landfill, and more recently when it began using a portion of its property for use by a private utility, mean that (a) the landfill is no longer protected as a prior nonconforming use; (b) the landfill should have obtained, but improperly did not, a special permit from the City Council in 1990 when it substantially expanded the nature of its operations to become a regional solid waste facility; (c) to the extent any continued operation of the landfill is lawful, the landfill must comply with current requirements for local permits and approvals related to expansion of prior nonconforming uses; and (d) the zoning changes enacted after the landfill went into operation are applicable to the new uses of the landfill property for commercial and industrial purposes.

For example, the DPW has neither applied for, nor received from the Building Commissioner, the necessary zoning permit required by § 350-4.4. It is obvious that the judicial interpretation in the 1972 litigation that the parcel may be used, without the necessity of a zoning permit, for sanitary landfill purposes “solely for the benefit of Northampton residents” applied only to the extent the parcel was then not being used for acceptance of waste from other communities. Once the City decided to expand the nature of the landfill – turning it into a *regional* facility which began to accept waste from outside Northampton and substantially increasing the intensity of the uses of the property – the landfill ceased being used for authorized municipal purposes “solely for the benefit of” Northampton residents.” Over the years the scope and intensity of the uses of the parcel have significantly changed and constantly expanded, but without compliance with the requirements of § 350-4.2 of the zoning ordinance to obtain necessary permits which were not originally required when the landfill first commenced operating in 1969; and of § 350-9.2 to obtain a finding from the Zoning Board of Appeals that the changes are “not more detrimental to the neighborhood.” See also the provisions of Mass. G. L. 40A, § 6, relative to the limitations on expansion of nonconforming uses.

In addition, the DPW did not obtain the necessary special permit from the City Council in 1990 when the landfill was converted to a regional solid waste facility, meaning that for the past almost twenty years the landfill has been operating unlawfully and may have, by that failure, forfeited any right to obtain a future special permit for future landfill expansion of Phases 5/5B which is being proposed. Furthermore, and depending upon how the commercial and/or industrial uses of the landfill parcel for generation of electricity under the landfill gas agreement with Ameresco are interpreted under the current zoning ordinance’s Table of Use Regulations, the DPW is unlawfully using its property as a power plant (prohibited by current zoning) and/or as a private utility (issuance of a special permit by the Planning Board is required, but has not been obtained).

Anthony Patillo, Building Commissioner
March 18, 2008
Page Seven

Therefore, it is appropriate and necessary for you, in your capacity as the zoning enforcement officer for the City of Northampton, and consistent with your responsibilities under §§ 350-4.3 and 350-4.8 of the zoning ordinance, to enforce the zoning ordinance requirements by issuance of the appropriate notice of violation and order to the DPW.

I will be pleased to answer any questions you may have in regard to this matter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Peter L. Koff", written in a cursive style.

Peter L. Koff