

BROWN, OLSON & WILSON

PROFESSIONAL CORPORATION  
ATTORNEYS AT LAW  
501 SOUTH STREET  
CONCORD, NEW HAMPSHIRE 03304

TELEPHONE: 603-225-9716  
FACSIMILE: 603-225-4760; 225-6394  
E-MAIL: bowlaw@tiac.net

PETER W. BROWN  
ROBERT A. OLSON  
WILLIAM H. WILSON, JR.  
HOWARD B. MYERS  
BRYAN K. GOULD  
PAUL A. SAVAGE  
AMY L. FRACASSINI  
DAVID J. SHULOCK  
DAVID K. WIESNER  
PAMELA G. VAN HORN

240 MECHANIC STREET  
LEBANON, NEW HAMPSHIRE 03766  
TELEPHONE: 603-448-1021  
FACSIMILE: 603-448-1029

July 7, 1998



HAND-DELIVERED

Philip J. O'Brien, Ph.D.  
Director, Waste Management Division  
Department of Environmental Services  
6 Hazen Drive  
Concord, NH 03301

Re: North Country Environmental Services, Inc.

Dear Dr. O'Brien:

We are writing at the request of our client, North Country Environmental Services, Inc. ("NCES"), to follow up on your discussions with John Casella and James Bohlig on July 2, 1998. Specifically, this letter addresses the question of whether the department has adequate authority to issue a construction permit for Stage II, Phase 2 of the NCES landfill in Bethlehem.

We have organized the letter to address three subjects:

- (1) the department's authority under recodified RSA ch. 149-M to issue construction permits;
- (2) the current state of local approval for landfilling on the NCES parcel; and
- (3) the lawfulness of the 1992 amendment to the Bethlehem zoning ordinance.

We first demonstrate that the 1996 revision of RSA 149-M authorizes the department to issue an effective construction permit without having to inquire into or resolve whether NCES has received all applicable lawful local approvals. We next

address the issue of local approvals and demonstrate that NCES's acquisition of a special exception in 1986 satisfied the requirement for local approval for Stage II, Phase 2 because the legal effect of the issuance of that special exception by the Town is an acknowledgment that landfilling is a lawful permitted use on the entire NCES parcel. Although the Town passed an ordinance purporting to prevent the expansion of existing landfills in 1992, we maintain that this ordinance, even assuming it is lawful, cannot be applied to preclude the development of Stage II, Phase 2 given the earlier issuance of the 1986 special exception.

Finally, we establish that application of the ordinance to Stage II, Phase 2 would be pre-empted because allowing municipalities to ban permitted solid waste facilities is impermissibly exclusionary and clearly frustrates the purpose of the department's statewide waste management authority.

A. *Local Approval is Not a Condition Precedent to Issuance of a Construction Permit*

As we understand it, you have raised the question whether the department may issue a construction permit for Stage II, Phase 2 of the NCES landfill in Bethlehem, given the status of local approvals. In light of the 1996 recodification of RSA ch. 149-M, we think it is clear that the department may issue a construction permit to NCES without first having to satisfy itself that NCES has obtained all necessary local approvals.

Before the 1996 recodification, RSA 149-M:10, IV, provided, "A permit for a private facility *shall not be effective* until the applicant submits evidence of compliance with all lawful local ordinances, codes and regulations that are consistent with a district plan." Emphasis supplied. Thus, the statute expressly conditioned the validity of the permit upon compliance with lawful local requirements. This condition was eliminated in the 1996 revision:

The issuance of a facility permit by the department shall not affect any obligation *to obtain local approvals* required under all applicable, lawful local ordinances, codes, and regulations not inconsistent with this chapter . . . .

Emphasis supplied. RSA 149-M:9, VII (1996). In other words, while the department may issue an effective permit, that does not relieve the owner of the obligation to obtain "applicable, lawful" approvals.

Based upon the prevailing statutory language, then, we conclude that the department may issue the Stage II, Phase 2 construction permit without having to

Philip J. O'Brien, Ph.D.  
July 7, 1998  
Page 3

determine whether all necessary local approvals are in place. Notwithstanding this conclusion, it is our view that NCES has complied with "all applicable, lawful" local regulation within the meaning of RSA 149-M:9, VII (1996) in any event.

B. *NCES Has Complied With All Lawful Local Regulation of its Landfill*

1. Landfilling is a Permitted Use on NCES's 80-Acre Parcel

On July 13, 1976, the Bethlehem Zoning Board of Adjustment ("ZBA") granted Harold Brown a variance to construct and operate a landfill on his parcel of roughly 80 acres on Trudeau Road in Bethlehem. Mr. Brown constructed a 3.6-acre unlined landfill (the "Original Landfill") and a 1.3-acre extension to the Original Landfill (the "Original Landfill Extension") pursuant to state-issued permits.

In July of 1985, Mr. Brown's successor, Sanco, Inc., sought a building permit to expand the landfill beyond the existing footprint and to construct a transfer station. The Town treated the application as a request for a special exception. The ZBA granted the special exception subject to certain conditions on January 15, 1986. Sanco, Inc., and its successor, Consumat Sanco, Inc. (now known as North Country Environmental Services, Inc.), constructed and operated an 18-acre expansion of the Landfill (the "18-Acre Expansion") and Phase 1 of Stage II of the Landfill after receiving the special exception.

In granting the special exception, the ZBA determined in effect that landfilling was a permitted use under the Bethlehem zoning ordinance. P.J. Loughlin, *15 New Hampshire Practice: Land Use Planning and Zoning (2d ed.)* § 23.01 at 249 ("Simply stated, a special exception is a use of land . . . that is permitted subject to specific conditions that are set forth in the ordinance.") There is no qualitative difference between a use permitted as of right and a use permitted by special exception once the latter is approved by the ZBA. *Id.*, § 23.05 at 255.

While certain factions within the Town have at various times contended that the variance and special exception were only valid with respect to the Original Landfill and part of the 18-Acre Expansion, there is no legal support for this argument. To begin with, as DES has recognized, "[t]he special exception did not contain any express limitation as to the size of the landfill." N.H. D.E.S., Waste Management Division

Philip J. O'Brien, Ph.D.  
July 7, 1998  
Page 4

(Department) Response to Public Comment on Stage II Landfill Permit Modification Application by NCES, Bethlehem, NH (November 1994).<sup>1</sup>

More importantly, any argument that a town can limit the areal extent of a permitted use through conditions on a special exception misconceives the nature of zoning. Zoning is meant to classify land within the town by districts, not by individual parcels. P.J. Loughlin, *15 New Hampshire Practice: Land Use Planning and Zoning* (2d ed.) § 2.01 at 11.

In considering an application for a special exception, the ZBA must concern itself only with the question whether the proposed use is permitted under the criteria applicable to that parcel of land under the zoning ordinance. *Id.* § 23.02 at 251. Once the ZBA grants the special exception, however, the proposed use is permitted on the owner's entire parcel. The ZBA may no more attempt to limit the extent of the use than it may regulate subdivision of the parcel or conduct site-plan review, both of which are planning board responsibilities.

Because landfilling is a permitted use on NCES's 80-acre parcel, no further local approvals are necessary to construct or operate additional stages or phases of its landfill.

2. The 1992 Amendment to the Bethlehem Zoning Ordinance is Unlawful

As you are aware, in 1992, the Bethlehem Town Meeting amended the Town's zoning ordinance to prevent the expansion of existing solid waste disposal facilities in the Town. While there are a number of reasons that this amendment is unlawful as applied to NCES, only one of these reasons is discussed here.

The amendment has the intent and the effect of excluding the NCES landfill altogether upon completion of Stage II, Phase 1. While towns continue to play a role in the management of their solid waste under New Hampshire law, RSA ch. 149-M also preempts town regulation which impinges upon DES's regulatory authority. Town of Pelham v. Browning Ferris Indus. of N.H., Inc., 141 N.H. 355 (1996). Only town regulations which operate "without exclusionary effect" survive the preemptive effect of

---

<sup>1</sup>The DES Response notes that NCES was at that time engaged in a declaratory relief action against the Town (Grafton Super. Ct. Docket No. 93-E-035) part of which sought a declaration as to the scope of the 1976 variance. On February 13, 1995, the court approved a stipulation dismissing Case No. 93-E-035 without prejudice. The issue concerning the scope of the variance was never reached by the court. A copy of the stipulation and order accompanies this letter.

Philip J. O'Brien, Ph.D.  
July 7, 1998  
Page 5

RSA 149-M. Id. at 364, citing Stalex Corp. v. Town of Hooksett, 122 N.H. 1091 (1982).

While RSA 149-M:9, VII (1996) provides some measure of local land use control over a "facility," that control is limited to "regulation of facility *location*" (emphasis supplied) and then is only valid when undertaken "in good faith." Here, the Town is not attempting to regulate the location of a facility; it is attempting to ban all facilities. The supreme court has already held, however, that local regulation which is exclusionary conflicts with state authority over solid waste management. BFI, 141 N.H. at 364. It follows that such regulation cannot be administered "in good faith" as required by RSA 149-M:9. Thus, the zoning amendment does not fall within the narrow carveout of statutory authority granted municipalities respecting land-use regulation.

The landfill is the disposal facility for the Pemi-Baker and Androscoggin Solid Waste Districts, as well as municipalities throughout the state formerly participating in a solid waste district. As such, it plays an important role in the solid waste management of many communities in the state. It would plainly frustrate the purpose of statewide waste management (see RSA 149-M:6) to permit one community to do away with a crucial facility to the detriment of the many other communities which rely upon it. The amendment is preempted by RSA ch. 149-M as a result.

### C. *Conclusion*

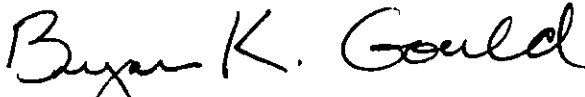
The department has the authority under the recodified RSA ch. 149-M to issue a construction permit for Stage II, Phase 2 of the Landfill. It falls to NCES under the statute to ensure that it has complied with all necessary and lawful local regulation. Because landfilling is a permitted use on NCES's parcel and the exclusionary zoning amendment is invalid in any event, no further local approvals are necessary before NCES begins construction of the next phase of its landfill.

We should also point out that our conclusions are consistent with the November 21, 1994, Response to Public Comment circulated by the department. As the Response notes, as of November of 1994, the Town had not established, despite repeated litigation, that it can limit the area of the landfill, and nothing in the special exception even purports to impose an areal limitation on the landfill. Even today, 12 years after the issuance of the special exception, the Town has never obtained a ruling that it may impose a limit on landfill size that is unstated in the special exception.

Philip J. O'Brien, Ph.D.  
July 7, 1998  
Page 6

Thank you for the opportunity to address these issues. Should you have any questions, we would be pleased to discuss them with you by telephone or in person.

Very truly yours,

  
Bryan K. Gould, Esq.

BKG:bmb

Enclosure

cc: John Casella  
James W. Bohlig

GRAFTON, SS.

SUPERIOR COURT

Consumat Sanco, Inc.

v.

#93-E-035

Town of Bethlehem

STIPULATION FOR DISMISSAL WITHOUT PREJUDICE

Plaintiff, Consumat Sanco, Inc.<sup>1</sup>, and defendant, the Town of Bethlehem, New Hampshire, stipulate as follows:

1. Plaintiff instituted this action on April 13, 1993, seeking declaratory relief, on several grounds, arising out of a dispute with defendant over the locally-permitted areal extent of certain phases of plaintiff's landfill in Bethlehem, New Hampshire.

2. Since the commencement of this litigation, the issues raised in this action have been resolved and the Town's threatened enforcement action against the plaintiff arising out of the February 22, 1993, cease-and-desist order of the Board of Selectmen has become moot.

3. The parties acknowledge that they may, in the future, have further disputes over permitting of further areas of the landfill.

4. Accordingly, the parties agree that this case may be dismissed without prejudice to their right, should a ripe dispute

---

<sup>1</sup> In mid-1994, Consumat Sanco, Inc., became North Country Environmental Services, Inc.

arise between them, to advance any cognizable theory of recovery or defense against the opposing party.

NORTH COUNTRY ENVIRONMENTAL SERVICES, INC.,  
Formerly known as  
CONSUMAT SANCO, INC.

Date: 1-20-95

By: Bryan K. Gould  
Bryan K. Gould, Esq.  
Its Attorney  
Brown, Olson & Wilson, P.C.  
501 South Street  
Concord, NH 03304  
(603) 225-9716

Date: 1/25/95

TOWN OF BETHLEHEM  
By: Philip Waystack, Jr. Esq.  
Philip Waystack, Jr., Esq.  
Its Attorney  
Waystack & King  
Box 137  
Colebrook, NH 03576

Stipulation approved; order in accordance therewith.

2/03/95  
Date

[Signature]  
Clerk/Presiding Justice