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STATE OF NEW HAMPSHIRE

Grafton, SS. Superior Court

No. 98-E-0141

North Country Environmental Services, Inc.

v.

Town of Bethlehem

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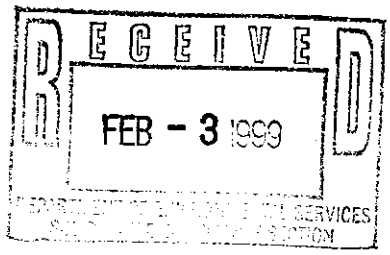
No. 98-E-0151

Town of Bethlehem

v.

North Country Environmental Services, Inc.



ORDER RE: MERITS

I. Introduction

These actions arise from the efforts of North Country Environmental Services, Inc., and its predecessors-in-title, to develop a sanitary landfill on land situated in Bethlehem, New Hampshire. A hearing on the merits of the Town of Bethlehem's petition for injunctive relief and Counts I through VIII of North Country Environmental Services' ("NCES") petition for declaratory relief was held November 30, 1998. Both parties were represented by counsel. The Court received evidence and heard oral argument in support of the parties' respective positions prior to taking the matters here addressed under advisement. In addition, the Court received memoranda from each of the parties at the hearing.

The Court has reviewed the evidentiary record of the November 30, 1998, hearing, the arguments and representations of counsel and

the applicable law. In addition, the Court has examined the record of the October 30, 1998 hearing on the Town of Bethlehem's request for preliminary injunctive relief. After due consideration, the Court rules as follows.

II. Findings of Fact

The Court finds the following facts relevant to disposition of the issues here addressed.[1] In 1976, Harold Brown sought and obtained approval from the Town of Bethlehem Zoning Board of Adjustment to operate a landfill on a portion of an 87-acre tract of land then under his ownership. See Defendant's Exhibit B (ZBA decision, Jul. 13, 1976). The ZBA decision allowing this use

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[1]The Court notes that the history of dispute between the parties, and between the Town and NCES' predecessors-in-interest, over the landfill at issue in this case is both lengthy and complex. A total of seven actions involving this landfill have been filed in this Court since early 1986. See Town of Bethlehem v. North Country Environmental Services, Inc., No. 98-E-0151 (Grafton Super. Ct. 1998), Index 10 at 1. Prior to the hearing on the merits, the Town requested that the Court take judicial notice of the records of these actions, and to treat actions or statements made therein "depending upon the way in which they were made" as admissions of fact for purposes of the instant action. See id. at 2-3 (Town's motion in limine). "As a general rule, courts will not judicially notice the records of another cause of action, even if tried in the same court and involving the same parties, to supply facts that have not been formally introduced into evidence." State v. Cox, 133 N.H. 261, 266 (1990). Judicial notice of facts averred or found in prior proceedings may, in the Court's view, nevertheless be taken where such facts are not reasonably in dispute between the parties to the pending action. The Court has reviewed each of the seven prior actions related to the instant dispute, and finds the records thereof helpful in understanding the present positions of the parties in the case at bar. In addition, the Court finds that the background facts available from these records, and relied upon in this decision for historical purposes, are not reasonably likely to be in dispute. Consequently, the Court takes judicial notice of facts averred in the prior actions, together with facts established by Court orders in those cases, for the limited purpose of illuminating the history behind the instant dispute.

contained no express condition for an areal limitation. See id. Shortly thereafter, Brown obtained state approval to operate a landfill on his property, and began accepting solid waste. See Defendant's Exhibit C (letter of Maynard H. Mires, Sep. 2, 1976). At the time, Brown's State approval was for the operation of a landfill within an approximately 3.82 acre footprint on his property. See id. The following year, Brown obtained additional approval from the State to expand the original footprint. See Defendant's Exhibit D (letter of Maynard H. Mires, December 30, 1977) Brown did not seek the Town's approval for this expansion.

Over the course of the next nine years, Brown twice obtained Town Planning Board approval to subdivide the original tract. See Defendant's Exhibit E (Planning Board survey, approved Apr. 21, 1983) and Exhibit G (Planning Board survey, approved Mar. 22, 1985). In 1983, Brown conveyed to SANCO, Inc., ("SANCO") a ten-acre parcel on which the original landfill was located. See Defendant's Exhibit F. Two years later, Brown conveyed a second, 41-acre parcel out to SANCO. See Defendant's Exhibit H. This second parcel was contiguous with the 10-acre parcel conveyed in 1983. See Defendant's Exhibit G.

At the time Brown was seeking this second subdivision approval, SANCO was in the process of applying to the ZBA for a special exception to expand its landfill onto the 41-acre parcel, and to establish a sold waste transfer station on a third, roughly 7-acre lot, also under its ownership. See Defendant's Exhibit I (application for special exception, Jul. 22, 1985) This third lot

was adjacent to the 41-acre lot. See Defendant's Exhibit G. The ZBA initially denied SANCO's application. See Defendant's Exhibit J at 2 (ZBA decision, November 7, 1985). However, upon re-hearing, the ZBA reversed itself and approved the use on the 41-acre parcel, subject to 23 express conditions and limitations. See id.; Defendant's Exhibit K (ZBA decision, Jan. 28, 1986). None of these conditions, however, in any way purported to limit the planned use to any specific area on the 41-acre lot. See Defendant's Exhibit K.

Following this approval, abutting landowners, various concerned citizens, and the Town itself, undertook efforts to limit further expansion of the landfill, including the adoption of an amendment to the zoning ordinance that would, if valid and enforceable, have prohibited the use altogether within the municipality. In 1986, George Tucker, an abutting landowner, attacked the special exception through two actions in the Grafton County Superior Court. The first action was a direct appeal of the ZBA decision granting SANCO's application for special exception. See George Tucker, et al. v. Town of Bethlehem, No. 86-E-0044 (Grafton Super. Ct. 1986) (hereafter "Tucker I"), Index 1 (petition for appeal). Tucker alleged that the ZBA erred as a matter of law in concluding that SANCO's proposed use was permitted at all in the zoning district wherein the 41-acre lot was situated. See id. In addition, Tucker claimed that the evidence submitted to the ZBA for its consideration was insufficient to support its conclusion that a special exception was warranted. See id. Tucker's second action sought an injunction prohibiting either the Town or SANCO from

taking any action in reliance upon the special exception, on the ground the ZBA decision approving the application was made in violation of RSA Chapter 91-A, then the State's "open meeting" law. See George Tucker, et al. v. town of Bethlehem, No. 86-E-0046 (Grafton Super. Ct. 1986) (hereafter "Tucker II"), Index 1 (petition for injunction). The Town prevailed in both these Superior Court actions, and the special exception was upheld. See Tucker I, Index 20 (order on the merits); Tucker II, Index 50 (order on the merits).

As Mr. Tucker pursued his actions in the Superior Court, Town residents took collective action against the continued operation of the landfill. In 1987, the citizens of Bethlehem, assembled at the annual Town meeting, adopted an amendment to the zoning ordinance which stated, in part:

> . . . [N]o solid waste disposal facility or site shall be located in any [zoning and land use] district except a facility operated by the Town. This prohibition shall include but not be limited by any private solid waste disposal facility or site, sanitary landfill or incinerator.

Defendant's Exhibit M. This amendment was itself amended by popular vote in 1992, in an attempt to prohibit any further expansion of then existing landfills. Defendant's Exhibit *. At the time, the landfill operated by SANCO (which as of 1992 had been purchased by Consumat Sanco, Inc.) was the only active sanitary landfill in Bethlehem.

In addition to these efforts, a group of local residents formed a citizens action committee, AWARE, Inc., to lobby for limitations upon, or the closure of, the SANCO landfill. See Sanco,

Inc. v. Bethlehem Zoning Board of Adjustment, et al., No. 87-E-0203 (Grafton Super. Ct. 1987), Index 1 at 1 (petition for appeal). Following the initial, preliminary approval of the special exception applicable to the 41-acre lot, AWARE petitioned the Town Selectboard, in its capacity as zoning administrator, to issue a cease and desist order declaring that the landfill was being operated in violation of the terms of the 1976 variance. See id. at 5. The Selectboard declined to pursue any enforcement against SANCO for the alleged violation and, several months later, AWARE petitioned the ZBA to review the Selectboard's non-action in the matter. See id. at 6.

The ZBA, after hearing, determined that the Selectboard erred in failing to issue a cease and desist order against SANCO. The ZBA concluded that "[t]he Selectmen should have taken action on the November 1986 letter from AWARE. The variance was not broad enough." Id., Index 15 at 6 (order on the merits). SANCO thereafter appealed to the Superior Court, which vacated the ZBA decision on the ground it had failed to state, with clarity or specificity, the factual and legal bases for its conclusion that the landfill had exceeded the use permitted by the 1976 variance. See id. at 5-6.

Efforts to limit the size of the landfill were again undertaken by Town residents in 1992. First, George Tucker filed a third action in the Superior Court, seeking to enjoin further landfill operations on the ground that both SANCO and Consumat Sanco, Inc. had allowed leachate and water run-off to contaminate his abutting property. See George Tucker, et al. v. Consumat Sanco,

No. 92-E-0196 (Grafton Super. Ct. 1992) (hereafter "Tucker III"), Index 1 at 2 (petition for injunctive relief). In addition, in the same year AWARE, Inc. filed a petition for mandamus seeking to compel the Town Selectboard to undertake enforcement action against Consumat Sanco, for alleged violations of the Town zoning ordinance. See AWARE, Inc. v. Bethlehem Board of Selectmen, No. 92-E-0215 (Grafton Super. Ct. 1992) (hereafter "AWARE, Inc."), Index 1 (petition for mandamus). In its petition, AWARE contended, again, that the 1977 extension for which Brown had obtained State approval had never been approved by the Town, and that the 1976 variance had granted Brown (and his successors-in-interest) the right to operate a landfill only within the original 3.82-acre footprint. See AWARE, Inc., Index 1 at 1-2. Both of these actions were voluntarily non-suited by the petitioners before the Superior Court could reach the merits. See Tucker III, Index 9; AWARE, Inc., Index 8.

In November of 1992, AWARE again petitioned the Town Selectboard to enforce the zoning ordinance against Consumat Sanco, Inc. See Consumat Sanco, Inc. v. Town of Bethlehem, No. 93-E-0026 (Grafton Super. Ct. 1993) (hereafter "Consumat Sanco I"), Index 54 at 2 (order on the merits). This time, AWARE charged that the 1986 special exception authorized operation of the landfill within a 14-acre footprint, and that Consumat-Sanco, Inc. was operating the landfill on an 18-acre portion of its property, contrary to the zoning ordinance. See id.

The Selectboard failed to take action on AWARE's request, which led the citizens group to file an appeal with the ZBA of the

decision not to institute enforcement action. See id. The ZBA held two public hearings on AWARE's appeal, during which the question of the scope of the 1976 and 1986 municipal approvals was addressed. See id., Index 1 (petition for appeal), Attachment E (ZBA decision, Jan. 28, 1993). The ZBA found, despite the absence of any express limitations in its 1986 notice of decision, that the special exception approved a landfill use for no more than 14 acres. See id. at 3. On this basis, the ZBA concluded that the landfill was being operated in violation of the special exception and of the Town zoning ordinance. The enforcement issue was therefore remanded back to the Selectboard, for its consideration. See id. at 3. Consumat-Sanco's request for re-hearing was denied, and an appeal to the Superior Court was subsequently filed. See Consumat Sanco I, Index 1. The Superior Court, on March 25, 1994, granted Consumat-Sanco's appeal. The Court concluded that the Selectboard decision not to commence enforcement proceedings was not, under the circumstances, reviewable by the ZBA. See id., Index 54 at 7-9.

In the penultimate legal proceeding filed in this court, relative to the landfill, Consumat Sanco sought declaratory rulings as to the scope of the existing local approvals. See Consumat Sanco, Inc. v. Town of Bethlehem, No. 93-E-0035 (Grafton Super. Ct. 1993) (hereafter "Consumat Sanco II"), Index 1 at 11-17 (petition for declaratory judgment). The petition appears, at least in part, to have been prompted by a February 22, 1993 cease and desist order issued by the Selectboard, in which the Town for the first time challenged the scope of the 1976 variance granted to Brown. See id.

at 11-12. After nearly two years of litigation in this matter, the Town and Consumat Sanco (which became North Country Environmental Services in 1994) stipulated to a dismissal without prejudice. See id., Index 24 (stipulation). The parties expressly agreed as follows:

> . . . 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.
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> . . . The parties acknowledge that they may, in the future, have further disputes over permitting of further areas of the landfill.
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> . . . Accordingly, the parties agree that this case may be dismissed without prejudice to their right, should a ripe dispute arise between them, to advance any cognizable theory of recovery or defense against the opposing party.

Id., Index 24 (stipulation). No further action was instituted in this court until NCES filed the instant petition for declaratory relief in October of 1998. See North Country Environmental Services, Inc. v. Town of Bethlehem, No 98-E-0141 (Grafton Super. Ct. 1998) (hereafter "NCES"), Index 1 (petition). The Town followed suit ten days later, with its own petition for injunctive relief. See Town of Bethlehem v. North Country Environmental Services, Inc., 98-E-0151 (Grafton Super. Ct. 1998) (hereafter "Bethlehem").

III. Analysis

Upon review of the record and the applicable law, the Court concludes that NCES may both operate and expand its landfill on the 41-acre lot, to the extent permissible under the zoning ordinance as it existed when the use was first established thereon, and in conformity with the conditions established under the 1986 special

exception. The Court further finds that NCES is estopped, by the conduct of its predecessor-in-interest SANCO, from claiming that the 1976 variance contained no areal limitation. Similarly, the Town is barred, under the doctrine of municipal estoppel, from asserting that the 1977 extension of the landfill constituted a violation of the variance. Finally, the Court rules that the uses established on the subject premises were pre-existing and permitted at the time the 1987 amendment to the zoning ordinance was adopted. As such, NCES possessed a vested right of use unaffected by the 1987 and 1992 amendments. See RSA 674:19. Each of these rulings is addressed in greater detail in the following discussion.

A. The 1986 Special Exception

NCES asserts that the special exception permitting landfill uses on the 41-acre lot conveyed to SANCO in 1985 neither expressly nor impliedly limits its landfill to any area less than the full extent of the lot. The Town contends, in opposition, that while there are no express limitations in the notice of decision granting the special exception, the circumstances of under which SANCO applied for approval to establish its landfill on the property were such that the approval contains an implied area limitation, consistent with the proposal submitted to the State for its review and approval. The Town's argument is without merit.

NCES argues that, under New Hampshire law, uses permitted by special exception may be conditioned, if at all, only upon those matters expressly set forth in the body of a ZBA decision or order. See Bethlehem, Index 7 at 23 (NCES memorandum in support of motion

to dismiss). In support, NCES cites to Geiss v. Bourassa, 140 N.H. 629, 632 (1996). The Court has reviewed the cited portion of the Geiss decision, and concludes that NCES has incorrectly represented the current state of New Hampshire law. The issues presented to the Supreme Court by the appellant in Geiss were limited to: i) the trial court's failure to rule on each of the parties' proposed findings of fact and rulings of law, and; ii) whether the trial court erred in ruling that the landowner's use of her property had not exceeded the scope of the special exception under which she was permitted to use the property. See Geiss, 140 N.H. 629, 631. The Supreme Court's consideration of the trial court's ruling regarding the special exception in Geiss is limited to the following:

> The trial court made extensive findings in its narrative order. Although it found that *if* there were implied conditions attached to the exception with regard to hours of operation, number of containers, and storage of trash, they had "arguably" been violated, the court concluded that the character of the use remained the same. The court found that "the only times that hours [of operation] have been extended or that trash has been stored was during emergencies when trucks had broken down and were unable to complete their trips to the dump." In addition, although it found that the number of containers currently stored on the property "is far larger than originally planned," the court concluded that this did not exceed the scope of the special exception. We find ample evidence in the record to support the trial court's conclusion that the defendants' use of the property did not violate conditions of their special exception, and conclude that the court did not abuse its discretion in denying the plaintiffs' requested relief.

Id. at 632 (emphasis in original). The entire discussion of implied conditions in Geiss is thus limited to the trial court's consideration of a hypothetical scenario, and not to any explicit holding that implied conditions may or may not be found in a ZBA decision to grant a special exception.

NCES has failed to point to existing case law within this jurisdiction which supports its argument. However, NCES has pointed to the case law of other jurisdictions which the Court finds persuasive. See Bethlehem, Index 7 at 22-23. Of these, the Court finds In re Kostenblatt, 640 A.2d 39 (Vt. 1994) particularly helpful. The Vermont Supreme Court there considered whether the trial court erred in determining that representations regarding the scope and intensity of a proposed use, made in the course of an application to a zoning board of adjustment for a special exception, could be found to bind the landowner, in the absence of an express condition stated in a zoning board decision. See id. at 43. The Vermont Supreme Court reversed the trial court, concluding that "conditions imposed by a zoning board must be expressed with sufficient clarity to give notice of the limitations on the use of the land, and cannot incorporate by reference statements made by an applicant at a hearing." Id. at 43. The Vermont Court specifically noted that:

> Without the requirement of explicit conditions . . . aggrieved parties would have difficulty appealing permits for they would have no notice of all conditions imposed, and similarly, subsequent purchasers would lack notice of all restrictions running with the property.

Id. (citations omitted).

This Court concurs with the decision in Kostenblatt. The Town ZBA was duty bound to state with clarity those conditions which it meant to impose upon SANCO's proposed use for the 41-acre lot. In the absence of any express, areal limitation on the use permitted by special exception, NCES is entitled to develop its landfill use

to the fullest extent permitted, subject to the supervision and approval of the New Hampshire Department of Environmental Services and to the setback, and other applicable requirements of the Town zoning ordinance.

B. The 1976 Variance

NCES asserts that, as with the 1986 special exception, the 1976 variance contains no express area limitation on the landfill use granted therein, and is therefore applicable throughout the entire 87-acre tract originally owned by Harold Brown. Under most circumstances, the Court is inclined to agree with the position taken by NCES. However, in this case the Court finds that NCES is estopped, by the conduct of its predecessor-in-interest SANCO, from claiming an unlimited right to develop landfill uses on the original Brown tract. In reaching this decision, the Court relies upon the doctrine of waiver as applied to SANCO during the relevant time period.

Waiver, in the context of a legal dispute such as that presently before the Court, is the voluntary relinquishment of a known right. See United States F. & G. Co. v. Kancer, 108 N.H. 450, 452 (1968). Waiver is most readily established through express and explicit language, employed by the one against whom it is asserted, which evidences both actual knowledge of, and an intention to relinquish a right recognized at law or in equity. See Margolis v. St. Paul Fire & Marine Ins. Co., 100 N.H. 303, 307 (1956). However, where the conduct or inaction of a party justifies a reasonable inference that he has relinquished a right subsequently asserted

against another, waiver by implication may be found. See id.; Kancer at 452; In re Stafford's In The Field, 192 B.R. 29 (Bkrptcy. D.N.H. 1996).

Here, it is clear that SANCO, by its conduct relative to the 1985 application for special exception, waived its right to claim the 1976 variance granted landfill use rights beyond the original footprint presented to the ZBA by Harold Brown. First, there is no evidence in the record that SANCO asserted, at any time during the application process, that a special exception was unnecessary, given the ZBA's prior issuance of the 1976 variance. SANCO made no reference to the earlier approval in its application, nor did it challenge therein the Town's authority to require a special exception to operate a landfill on the 41-acre parcel. See Defendant's Exhibit I.

Second, after the initial, adverse decision on the application, SANCO again failed to challenge the necessity of a special exception. The only evidence of SANCO's position on the ZBA denial of the application consists of a letter submitted on its behalf by attorney Anton Moehrke, in which the ZBA's interpretation of the zoning ordinance is called into question. See Defendant's Exhibit J-1 (letter of attorney Moerhke, Oct. 10, 1985). SANCO's exclusive argument in support of its petition for re-hearing was that the zoning ordinance could not be construed to prohibit landfill uses throughout the Town and that the ZBA's initial denial of the requested special exception was therefore in error. See id.

SANCO had a third opportunity to put forth the expansive

construction of the 1976 variance asserted here by NCES, after the ZBA rendered its November 7, 1985 decision on the petition for re-hearing. In its decision granting SANCO the special exception, the ZBA specifically made reference to the 1976 variance in the following passage:

> On July 13, 1976 the minutes of the Zoning Board of Adjustment reveal that:
>
> > Harold Brown's application to construct a landfill dump on Muchmore Road was approved after considerable discussion. The following points were made: The public will be unable to use the dump. It will be under the supervision of the State, and it has to be run according to State specifications. There should be no odor and dump must be filled in every day with six inches of dirt. There will be a private road which has to be locked up at all times. Luigi Castello, Esq. [an owner of abutting land] had no objection to the landfill dump provided it involves only an area 400' by 400' and definitely is laid out with set distances from the Castello and McDonnell property.
>
> There was no indication as to whether or not this approval was for a variance or a special exception. According to Sanco representatives, it was originally a variance.

Defendant's Exhibit J at 2 (emphasis added). Following this discussion of the 1976 approval, the ZBA then proceeded to assess the propriety of granting the special exception. Though implicit, the ZBA approval of SANCO's special exception was clearly predicated upon the legal conclusion that the 1976 variance was limited to the original 400 foot by 400 foot footprint referred to in the minutes of the July 13, 1976 ZBA meeting. SANCO did not appeal this aspect of the ZBA decision.

SANCO had at least three opportunities, beginning with its initial decision to request Town approval to expand its landfill operations, to assert that the 1976 variance was applicable to all

of Brown's original land. It failed to do so. The only reasonable conclusion this Court can reach is that SANCO made its decisions on the assumption that the 1976 approval was limited as the Town now asserts. It is, further, clear that the ZBA consideration of SANCO's request for a special exception was based, of necessity, on the conclusion that the 1976 variance did not authorize landfill use throughout the 87-acre tract. On this basis, the Court concludes that SANCO acquiesced in the limited construction of the 1976 variance relied upon by the ZBA in 1985. NCES, as successor in-interest to SANCO, is therefore bound by SANCO's waiver of any right to claim the 1976 variance applies to all of the former Brown tract.

As NCES is bound by the prior conduct of SANCO from asserting any right to develop landfill uses throughout the original 87-acre tract under the variance, so too is the Town estopped, as a matter of equity, from asserting any right to enforcement based upon the 1977 expansion of the landfill. The doctrine of equitable estoppel has been found applicable to municipalities where necessary to prevent unjust enrichment or "to accord fairness to those who bargain with the agents of municipalities for the promises of those municipalities." Aranosian Oil Co. v. City of Portsmouth, 136 N.H. 57, 59 (1992). To find that the Town is estopped from enforcing its zoning regulations against NCES, the record must establish each of four elements:

> [F]irst, a representation or concealment of material facts made with knowledge of those facts; second, the party to whom the representation was made must have been ignorant of the truth of the matter; third, the representation must have been

> made with the intention of inducing the other party to rely upon it; and fourth, the other party must have been induced to rely upon the representation to his or her injury.

City of Concord v. Tompkins, 124 N.H. 463, 467-68 (1984). Each of the require elements is present in the instant cases.

In Consumat Sanco II, NCES, under its former corporate name, specifically sought a declaratory ruling from the Superior Court that the Town was without authority to enforce the cease and desist order issued by the Selectboard February 22, 1993. See Consumat Sanco II, Index 1 at 12-13. In that order, the Selectboard specifically found that Harold Brown had violated the Town zoning ordinance by expanding the original landfill in 1977, without first obtaining municipal approval. See Plaintiff's Exhibit 21. The Town and NCES later stipulated to a dismissal of that declaratory judgment action, specifically noting that "the issues raised in this action have been resolved and the Town's threatened enforcement action against the plaintiff [NCES] arising out of the February 22, 1993, cease-and-desist order of the Board of Selectmen has become moot." Plaintiff's Exhibit 9 at 1 (emphasis added). On the basis of these representations, NCES terminated its litigation against the Town and proceeded with its plans for further development of the landfill site.

From these facts the Court concludes that equity requires the application of estoppel against the Town. The Town represented to NCES that the issues raised by the 1977 landfill expansion had been rendered moot by virtue of the resolution of the issues raised in the declaratory judgment action. Despite this representation, the

Town now seeks to enjoin further operation of the landfill on the precisely the same ground on which the 1993 cease and desist order was based. The Town's subsequent conduct suggests, and the Court so concludes, that the Town never intended to relinquish its enforcement rights vis-a-vis the 1977 expansion. The first and second estoppel elements, concealment of material facts and NCES' ignorance of the Town's true intentions, are thus established.

The Court further finds that the Town intended its representations to induce NCES' specific reliance, and that NCES did in fact so rely thereon, to its detriment. Upon filing of the stipulation in Consumat Sanco II, NCES terminated litigation in which it had a substantial likelihood of success. The interrelationship of the representations and the outcome of Consumat Sanco II lead inescapably to the conclusion that the Town intended this result. In addition, once Consumat Sanco II was concluded, NCES proceeded with its plans for expansion as evidenced by the State approvals obtained in 1998, immediately prior to the Town commencing its action for injunctive relief. NCES' termination of the Consumat Sanco II litigation, and the substantial efforts it thereafter made to complete development of the two-stage landfill plan approved by the State clearly establish the reliance required to apply estoppel principles. Each element of municipal estoppel is established by the facts and circumstances of these cases. The Town may not, therefore, claim any right to enjoin NCES from operating the landfill on the ground it was illegally expanded by Harold Brown in 1977.

C. Applicability of Pre-emption

NCES asserts that RSA Chapter 149-M, as a comprehensive regulatory statute enacted to serve the State's solid waste management needs in accord with Federal mandate, pre-empts the Town's authority to regulate area limitations on landfill uses within its zoning jurisdiction. In support of this view, NCES argues that the retention, by municipalities, of local control over the size of landfill operations "would be to intrude upon the state's exclusive purview" over solid waste management throughout the State of New Hampshire. Bethlehem, Index 7 at 21. The argument is without merit.

Contrary to the view espoused by NCES, RSA Chapter 149-M does not assign exclusive regulatory control over solid waste management to the State. The statutory scheme expressly recognizes the regulatory authority of municipalities over the operation of solid waste disposal facilities under their territorial jurisdiction:

> . . . The issuance of a facility permit by the department [of environmental services] shall not affect any obligation to obtain local approvals required under all applicable, lawful local ordinances, codes, and regulations not inconsistent with this chapter. Local land use regulation of facility location shall be presumed lawful if administered in good faith, but such presumption shall not be conclusive.

RSA 149-M:9 (VII). The power to locate solid waste disposal facilities within the municipality necessarily includes the implied authority to regulate limits on the size of such facilities, at least to the extent such limitations do not interfere with the statutory purposes. A municipal ordinance that limits the location of solid waste disposal facilities to a particular zoning district

necessarily limits the extent to which such a facility may expand to that available land in the district. The real question for determination is not whether municipalities are in all instances precluded from setting area limits on solid waste disposal facilities but whether, in these cases, the municipal approvals at issue conflict with the specific state approvals to operate the landfill. No such conflict here exists, from which the Court could find that the Town has regulated NCES' enterprise in a manner inconsistent with RSA Chapter 149-M.

The land subject to the 1976 variance and the 1986 special exception, as they are interpreted by the Court, is presently in excess of the land approved, under the state permitting process, for use as a landfill. On this basis, the Court concludes that neither of the municipal approvals at issue here are subject to pre-emption with respect to any area limitations contained therein.

D. The 1987 and 1992 Amendments

The Town asserts that the 1987 and 1992 amendments to the zoning ordinance, which purport to prohibit the establishment or expansion of landfills, may be relied upon to obtain injunctive relief against NCES. The argument is wholly without merit. NCES had obtained permission from the Town to operate its landfill facility on two lots, comprising a fifty-one-acre tract, prior to the enactment of either of the prohibitory amendments. As such, NCES' operation of the landfill falls outside the ordinance, as a pre-existing use. See Conforti v. City of Manchester, 141 N.H. 78, 80-81 (1996); Town of Hampton v. Brust, 122 N.H. 463, 468 (1982).

Consequently, the Town is without authority to enforce the 1987 and 1992 amendments to the zoning ordinance against NCES.

The Court has no reason to consider the myriad pre-emptory and constitutional arguments put forward by NCES as grounds for declaring the ordinance invalid. The uses currently approved under the 1976 variance and the 1986 special exception do not conflict with the challenged amendments to the zoning ordinance. In addition, NCES has failed to establish any present intention to undertake activities that would bring the landfill within the scope of the amendments. Finally, given the Court's conclusion that NCES' current operations are exempt from the amendments, there is no reasonable likelihood that the Town will seek further enforcement of the ordinance against NCES on this ground. There is therefore no justiciable controversy "with sufficient immediacy and reality as to warrant action by the courts." Delude v. Town of Amherst, 137 N.H. 361, 364 (1993). The Court therefore declines to issue declaratory rulings as to the validity of the 1987 and 1992 amendments.

E. Attorney's Fees and Costs

In Counts I and II NCES alleges that the Town, through its agents, engaged in bad faith conduct justifying an award of fees and costs in these cases. Specifically, NCES alleges that the Town's attempt to enforce the 1987 and 1992 amendments to the zoning ordinance, in the face of prior notice that it could not regulate land use so as to exclude landfills from within its boundaries, impermissibly interfered with NCES' clearly defined

rights of use on the subject land. See NCES, Index 15 at 5 (NCES' objection to motion to dismiss). On this basis, NCES claims it is entitled to recover the costs of litigating these cases. The Town, in opposition, avers that neither the adoption of the 1987 and 1992 amendments, nor the Selectboard's subsequent efforts to enforce the ordinance against NCES can in any way be construed as evidencing intentional bad faith conduct. See id., Index 10 at 1 (motion to dismiss).

"Where an individual is forced to seek judicial assistance to secure a clearly defined and established right, which should have been freely enjoyed without such intervention, an award of counsel fees on the basis of bad faith is appropriate." Harkeem v. Adams, 117 N.H. 687, 690 (1977). However, when a municipality simply defends the actions of its agents or component parts taken within the scope of their authority, there are no grounds for awarding attorney's fees absent the additional showing of dilatory or obdurate conduct. See e.g. Taber v. Town of Westmoreland, 140 N.H. 617 (1996) (fees not recoverable from town for its defense of zoning board's decision); State v. Dexter, 136 N.H. 669, 673 (1993) (attorney's fees not recoverable from municipality for bad faith conduct of officials with immunity).

Here, there are two potential sources from which the Court might find bad faith. NCES first suggests that the Town citizenry ought to be found to have acted in bad faith by adopting the 1987 and 1992 amendments. In support of this claim, NCES asks the Court to impute knowledge, on the part of the electorate assembled at the

relevant Town meetings, of the ZBA deliberations over SANCO's 1985 application for a special exception. It was there urged by SANCO that the Town was without power to exclude landfill uses entirely from the municipality. A second possible basis for claims of bad faith is the Town's effort to enjoin further landfill operations on the ground that the amendments are applicable and enforceable against NCES. A review of the record establishes that neither of the proffered bases are sufficient for the Court to conclude that an award of fees and costs is appropriate under the circumstances of these cases.

There was no evidence adduced at trial which would allow the Court to impute to the citizens at the relevant Town meetings any knowledge of the 1985 ZBA deliberations over SANCO's special exception application. In addition, there was no credible evidence that the Town citizenry's legislative actions were taken for any purpose other than to serve its view of the public health and welfare. Those who voted in favor of the amendments may have been mistaken about the constitutionality of the amendments. Mistaken belief as to the validity of an amendment, without more, is insufficient to establish bad faith.

Similarly, the Town's attempt to enforce the ordinance against NCES, though misguided, cannot by itself support a finding of bad faith. The amendments had not, as of the time these actions were commenced, been conclusively determined as invalid. The Selectboard cannot, therefore, be said to have been on notice that enforcement of the amendments against NCES was patently unreasonable. In

addition, the record fails to establish that the Selectboard members, either individually or as a group, held any specific animus towards NCES that drove their efforts to enjoin further operation of the landfill. Finally, the record is devoid of any effort on the part of the Town or its agents to delay resolution of these proceedings. The Court is therefore unable to find bad faith on this basis.

IV. Conclusion

In consideration of the foregoing findings of fact and legal analysis of the parties' respective claims, the Court rules as follows. The Town's petition for injunctive relief is DENIED in its entirety. The Town has no basis for seeking enforcement against NCES on the ground of the violations asserted in its petition. Relief is awarded to NCES as requested in Count VII of its petition for declaratory judgment. NCES may continue to develop, construct, and operate its landfill within the 10-acre and 41-acre parcels pursuant to the 1976 and 1986 municipal approvals, which pre-date the 1987 and 1992 prohibitory amendments.

The Court declines to render declaratory rulings as requested in Counts I through V, on the ground the issues raised therein are not ripe for judicial determination at this time. The Court GRANTS the relief sought in Count VI of NCES' petition, with respect to the 1986 exception. The relief requested therein is DENIED with respect to the 1976 variance, on the ground NCES is estopped from claiming rights of use throughout the original, 87-acre Brown tract. The relief sought under Count VIII of NCES' petition is

DENIED, on the ground the evidence does not support the conclusion that the 1987 and 1992 amendments constitute an attempt at illegal spot zoning. The merits of Counts IX, X, and XI shall be determined by the Court at a subsequent hearing, to be scheduled in due course.

V. Proposed Findings of Fact and Rulings of Law

The Court declines to rule on the extensive requests for findings of fact and rulings of law submitted by the parties in these cases. See Geiss, 140 N.H. at 632-33. The findings of fact and rulings of law contained in this decision are of sufficient detail to dispose of all material issues and to comport with the requirements of RSA 491:15. See id.

SO ORDERED.

DATE: 2/1/99

Edward J. Fitzgerald, III
Presiding Justice