

Jim Boy
Duplicate 17415



Casella Waste Systems, Inc.

*Casella Waste Management
Sawyer Environmental Services
Superior Disposal Services
New England Waste Services*

September 15, 1998

Philip O'Brien
NH DES
Waste Management Division
6 Hazen Drive, PO Box 95
Concord, NH 03302-0095



25 Greens Hill Lane
Rutland, Vermont 05701

(802) 773-7252
(802) 775-6198 Fax

Dear Phil:

During discussions with Dick Reed on September 14 related to the issuance of the NCES Stage II Phase II permit, Dick asked if we would copy you on the information which we have submitted to the Town of Bethlehem Selectboard. Accordingly, please find attached the relevant sections of a submittal, which we made to the Town of Bethlehem on September 11, 1998.

While I have not included all of the information, I have incorporated the principal documents for your review and will be pleased to forward any other documents you might require for your records.

Each of the Selectboard members have been given copies of the documents; individual presentations were made to Wedick, Bushway and Brown. Scheduling conflicts precluded us from making presentations to Woods and Presby prior to Monday, September 14th.

I have also suggested that we would like to come to Concord upon your return from vacation and present to you information, which we have discovered, related to the local authority under which we operate the NCES landfill. I believe you will find the information we have assembled to be compelling with regard to our continued authority to operate beyond Stage II, Phase II, and would like to brief you on our offer that we have made to the Town of Bethlehem in a final attempt to resolve these issues through a new settlement and host community agreement. I have asked Brown, Olson & Wilson to pick a few dates and to notify your office so that we might immediately schedule such a meeting upon your return on September 24th.

Sincerely,

CASELLA WASTE SYSTEMS, INC.

James W. Bohlig
Sr. Vice President & COO



Casella Waste Systems, Inc.

*Casella Waste Management
Sawyer Environmental Services
Superior Disposal Services
New England Waste Services*

September 10, 1998

*25 Greens Hill Lane
Rusland, Vermont 05701*

Selectboard
Town of Bethlehem
Bethlehem, NH 03574

*(802) 773-7252
(802) 775-6198 Fax*

Dear Selectboard:

As you know, John and I have presented (on several occasions over the past few months), North Country Environmental Services' (NCES) views related to the continued operation of the landfill located on Trudeau Road. In these meetings we have stressed that we desire to find a non-litigious route to resolve our differences, and that we would work toward a negotiated resolution on this issue, rather than resorting to the enforcement of our rights through the courts.

Over the past few months we have undertaken a comprehensive review and re-analysis of documents available from public records associated with the initial development of the landfill since 1976. In the course of this review, we have examined information, which we believe may significantly alter the premise under which the general public and the Selectboard members have been previously operating.

We remain firmly convinced that we have the legal authority under which to construct and operate Stage II, Phase II of the NCES landfill on Trudeau Road. We believe the evidence is compelling and have therefore assembled a summary of this information in order for the Selectboard to re-evaluate the facts known to the parties regarding our authority to expand the landfill.

In light of these developments we request that you closely review and familiarize yourself with the information contained in the attachments to this letter, and if appropriate due to the legal nature of the information, that you consult with the Town's attorney for assistance in evaluating our right to continue the expansion of the landfill into Stage II, Phase II.

As you know, since 1996 we have attempted to negotiate a contemporary host community agreement that would bring into harmony the interest of the Town with the continued operation of the landfill. This host community agreement is included herewith, and is our effort to continue to advocate that the parties enter into an agreement that would allow both parties to benefit from the NCES assets in Bethlehem. We remain committed to honor the terms of the host community agreement, or a related document to be negotiated between the parties.

Selectboard
September 10, 1998
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In light of the near exhaustion of Stage II, Phase I and of the dependence of the Town and of North Country communities, on NCES for disposal capacity, we ask that you inform us by October 12, 1998 with regard to whether the Town intends to contest our legal authority to operate Stage II, Phase II or as an alternative, whether the Town will resolve this matter by negotiating a new "updated" host community agreement.

If we can be of any assistance in clarifying the information enclosed herewith or answering any questions, please do not hesitate to give me, John or Bob a call.

Sincerely,

NORTH COUNTRY ENVIRONMENTAL SERVICES, INC.

James W. Bohlig
President

Enclosures

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 - 40 Acre Subdivision
 - Stage I
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TOWN OF BETHLEHEM
SUBDIVISION APPLICATION

NAME: Harold Brown

ADDRESS: Bethlehem, N.H. 03574

DATE FILED: 2/7/85

ADJUTTERS AND ADDRESSES:

John G. and Marjorie McDonell
6242 Hidden Woods Ct., Apt 22
Springfield, VA 22152

Edson and Fay Sholz
4711 N. Grady 7
Tampa FL 33614

Robert and Frances Piche
Box 573
Bethlehem, N.H.

Sandra Poisson
Box 565
Bethlehem, N.H. 03574

George and Barbara Tucker
Box 171
Bethlehem, N.H.

Sanco, Inc.
Bethlehem, N.H. 03574

Frank E. and Evelyn Hagen
Box 743
Bethlehem, N.H. 03574

Daniel Tucker
Bethlehem, N.H. 03574

John Ireland
Bethlehem, N.H. 03574

Attach check in the amount of \$100.00 for filing fees, mailing advertising and recording.

Attach three (3) print copies of the Preliminary layout
(1 Mylar and 2 Blue line copies)

NOTICE OF DECISION

Bethlehem, New Hampshire
Zoning Board of Adjustment

RE: Application by Sanco, Inc.
For Special Exception

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. 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 McDonell 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.

On July 22, 1985 Sanco filed with the Selectmen an application for a permit to build a new and make an addition to a solid waste transfer station and to operate a new solid waste transfer station and landfill and expand an existing solid waste landfill. The Selectmen determined that the application did not meet the provisions of the Town of Bethlehem's zoning regulations for the following reasons: "Industrial use for zoning approval." The matter was thus referred to the Zoning Board of Adjustment for review.

The first hearing was held on August 13, 1985, at which time the former Chairman, Joseph J. Cabaup, opened by stating to the Sanco representatives that he felt the proposed use required a variance rather than a special exception. Representatives of Sanco disagreed and asked the Board to determine that the proposed use should be allowed as a special exception under District No. 2, subparagraph B.

The August 13, 1985 hearing was continued to August 20, 1985, at which time written legal arguments were submitted by Edmond J. Ford, Esq. on behalf of Sanco by Laurence F. Gardner, Esq. on behalf of Daniel and George Tucker, and by William J. Schultz, Esq. on behalf of several other abutters. Attorney Ford

contended that the proposed Sanco facility is of the same general character as a public utility, is similar to a junkyard, is similar in character to the commercial removal of sand, fill, gravel, stone or loam, and, further, that the proposed sanitary landfill is in conformity with the area and district. Attorneys Gardner and Schultz argued that the proposed use of a sanitary landfill is not specifically mentioned in the Bethlehem Zoning Ordinance and thus a variance is required to permit such a use. Further, they argued that the proposed use is not of the same general character as the other special exception uses set forth in paragraph B subparagraphs 1 through 4. Further, they contended that the proposed use does not meet the requirement that it be in conformity with and not detrimental to the area and district. The August 20, 1985 hearing was continued to September 3, 1985. No requests for specific findings of fact were submitted on behalf of Sanco or any abutters at that time.

On September 3, 1985, this Board interpreted the Bethlehem Zoning Ordinance to preclude entirely the operation of sanitary landfills within the Town of Bethlehem, unless authorized either by variance or by subsequent amendment of the zoning ordinance itself.

On September 13, 1985, Sanco filed a motion for rehearing. On September 24, 1985, the Board granted a hearing on Item 5.05 which states:

"The zoning ordinance should be construed to be legal. The zoning ordinance may not legally zone out sanitary landfills. In order to avoid a construction of the Bethlehem zoning ordinance that would make that ordinance illegal, the zoning ordinance must be construed to allow sanitary landfills as a special exception use in District 2."

The Board scheduled a hearing for October 10, 1985 to consider evidence in support of Sanco's motion for rehearing. Prior to that hearing, counsel for the Board, Stephen U. Samaha, Esq., was contacted by Anton T. Moehrke, Esq. as new counsel for Sanco. He told Mr. Samaha that as a result of listening to the tape recording of the August 18, 1985 hearing, he would challenge the impartiality of Chairman Joseph J. Cabaup.

At the outset of the October 10, 1985 hearing, Chairman Cabaup admitted that he had made an opening statement at the August 13, 1985 hearing to the effect that he felt a variance rather than a special exception would be required for the proposed use. However, he explained that this statement was only for the purpose of framing the issue to be considered and he subsequently did, in fact, consider Sanco's arguments impartially. However, in order to preclude the issue of impartiality from being raised at any subsequent appeal, Mr. Cabaup asked Sanco representatives if they wished him to step

down from the Board. When they answered in the affirmative, Mr. Cabaup stepped down as a member of the Board of Adjustment and the Board then unanimously elected Gerald Davidson Acting Chairman. Since no alternate members to the Board of Adjustment had been appointed by the Board of Selectmen, and since no alternate members were available to fill Mr. Cabaup's vacancy, no designation was made as is allowed by R.S.A. 673:11. Pursuant to R.S.A. 673:10(III), a majority of the Board constitutes a quorum and thus the remaining four members of the Board continued with the hearing. Mr. Moehrke submitted a written argument dated October 10, 1985 on behalf of Sanco. Subsequently, a written legal argument was also submitted by Attorney Gardner.

Sanco contends that the New Hampshire Legislature intended to preclude a town from prohibiting a landfill such as that proposed by it when it passed R.S.A. Chapter 149-M. We believe that the New Hampshire Legislature did not necessarily preempt the Town's control over the use of land for a sanitary landfill when it enacted R.S.A. Chapter 149-M "Solid Waste Management." However, R.S.A. 149-M:13 does state: "Each town shall either provide or assure access to an approved septage and solid waste facility for its residents." This certainly evidences a statement of policy which cannot be ignored. We must also take into account the fact that this Board did approve a landfill on July 13, 1976 and that Sanco's landfill has been operated as a private landfill since that time. The proposed solid waste transfer station and landfill expansion will be beneficial to the community, because refuse disposal capacity is in increasingly short supply and the facilities will insure a place for the disposal of the Town's refuse. We also recognize that because of the short-fall of refuse disposal capacity throughout the State of New Hampshire, the Town of Bethlehem otherwise faces uncertainty with regard to potential places for refuse disposal and dramatically increased disposal costs. We also find that a special exception for the transfer station and landfill expansion would be in harmony with the general purpose and intent of the zoning ordinance of the Town. Therefore, this Board concludes that as a matter of public policy, the ordinance should be interpreted so as to allow a sanitary landfill as a special exception so long as it meets all applicable provisions of the zoning ordinance and, further, that it meets the specific provisions of Section B(5); (i.e. it must be the same general character of any of the other uses spelled out in Section B(1-4), it must be in conformity with the area and district, and it must not be detrimental to the area and district). Therefore, we must now determine whether Sanco's proposed landfill meets the other requirements as a matter of fact. For the following reasons we believe it does:

1. The landfill has been operated since approximately July 1976. Sanco has operated the landfill since 1982. The landfill appears to have been well run at all times as evidenced by the inspection reports from the Bureau of Solid Waste Management of the State of New Hampshire.

2. There was no credible evidence presented at any of the public hearings which would justify the Board in concluding that the landfill represents a threat to the public health, safety or the environment.

3. The management of Sanco is reliable and credible inasmuch as it has an excellent track record as evidenced by the State inspection reports. Moreover, management of the company includes long-time residents of the Town of Bethlehem who are sensitive to and respectful of community conditions.

4. The landfill is located in an area appropriate for such a use, inasmuch as it is relatively sparsely populated. There are only a few homes in the general area. These homes should not be adversely affected by the landfill which has been there since 1976.

5. The area around the landfill is serviced by a public water supply.

6. There will be no detrimental impact on the neighborhood from sanitary landfill operations.

7. The neighborhood surrounding the landfill will not be adversely affected by vehicles using the facility, particularly when most of the truck traffic is diverted off Route 3 onto Trudeau Road after the culvert there is repaired.

8. Sanco presented evidence from well-qualified experts in civil engineering and geotechnology that the expansion would incorporate state-of-the-art technology including a leachate liner and leachate collection system.

9. The proposed expansion is similar in character to the commercial removal of loam, sand, fill or stone which is a permitted use under the Town zoning ordinance and which is an existing use in the immediate area of the landfill.

An additional policy reason for interpreting the zoning ordinance as stated above is that the ability to expand the landfill into a new facility using state-of-the-art technology will allow Sanco to close the existing portion of the landfill, cap it and prevent any future impact upon ground water at the existing site.

NOW, THEREFORE, in consideration of the findings and conclusions of this Board as set forth above, it is hereby

**UNANIMOUSLY
RESOLVED:**

To grant a Special Exception to Sanco, Inc. to expand its existing sanitary landfill off

Trudeau Rd. in strict accordance with the limiting terms and safeguards set forth in an agreement to be negotiated between Sanco, Inc. and the Board of Selectmen which agreement shall be reviewed and accepted by this Board as a condition of such Special Exception.

BETHLEHEM ZONING BOARD
OF ADJUSTMENT

By *Gerald F. Davidson*
Gerald F. Davidson
Acting Chairman.

George C. Ennis
George C. Ennis, Member

Donna Kiernan
Donna Kiernan, Member

Eleanor B. Stephenson
Eleanor B. Stephenson, Member

Dated: November 7, 1985

ZONING BOARD OF ADJUSTMENT

Hearing - January 15, 1986 - 7:30 PM

fer to Tapes I, II & III sides A&B.

Members Present:

George Ennis

Skip Davidson

Don Lavoie

Elly Stephenson

Donna Kiernan

Atty. Samaha

Meeting called to order by Acting Chairman Davidson, at 7:35 PM.

Mr Davidson took a roll call for attendance, and then turned the meeting over to Atty. Samaha who reviewed the preceeding information for the public and requested any input to support the disqualification of Mr. Davidson. Several people spoke to this fact, but it was determined that the conversion in question took place before the negative first vote of the Board to refuse the expansion permit.

Mr. Hoebrke then asked if a list of names of those present could be made, and a lengthy discussion followed. No list was made.

Mr. Davidson stated that he felt he had not shown any prejudice. Mr. Davidson then asked the Board to move on his qualification. Mr. Ennis made a motion to keep Davidson on the Board. Mrs. Kiernan seconded the motion, and all voted in favor.

All of the Board members were then questioned as to thier objectivity, and all stated that they felt they were able to be objective.

Mr. Davidson then opened the meeting on the conditions of the special exception that was granted by the board to Sanco Inc. Mr. Pollak asked who was responsible for the agreement, Mr. Lavoie answered that the Selectmen, Sanco representatives and the ZBA.

There was a lengthy discussion on the conditions, one by one:
see attached sheets

Each item was voted on separately as stated, and each board member answered a roll call vote affirmatively.

Ennis made the following motion:

After having reviewed the proposed agreement between Sanco, Inc. and the Board of Selectmen, and after having considered all public input regarding the limiting terms and safeguards and other conditions to be imposed on the special exception granted to Sanco, Inc. to expand its existing sanitary landfill off Trudeau Rd. this Board hereby imposes the following terms and conditions to said special exception, all of which must be complied with before the expansion area can be operated as a sanitary landfill.

Mrs. Kiernan seconded the motion, and all voted in favor.

Mr. Ennis moved to adjourn the meeting, Kiernan seconded and all voted in favor. The meeting adjourned at 11:10 PM.

J. Blake, Secretary

SECTION

A10

Bethlehem, New Hampshire
Zoning Board of Adjustment

RE: Application by Sanco, Inc.
For Special Exception

By Notice of Decision dated November 7, 1985 this Board voted to grant a special exception to Sanco, Inc. to expand its existing sanitary landfill off Trudeau Road in strict accordance with the limiting terms and safeguards set forth in an agreement to be negotiated between Sanco, Inc. and the Board of Selectmen, which agreement was to be reviewed and accepted by this Board as a condition of such special exception. Another public hearing was held on January 15, 1986 to review the agreement negotiated between Sanco, Inc. and the Board of Selectmen and to finally impose the conditions of said special exception.

By letter dated November 20, 1985, Laurence F. Gardner, Esquire, on behalf of the abutters, George Tucker and Daniel Tucker, requested a rehearing on the basis that this Board's decision of November 7, 1985 was final. It was made clear to Attorney Gardner that no final decision had been made as of that date. In Attorney Gardner's letter of November 20, 1985 he alleged that Acting Chairman, Gerald Davidson, should be disqualified by reason of prejudgment and/or bias. By letter dated November 26, 1985 this Board advised Attorney Gardner to provide it with evidence to prove any alleged bias and/or prejudgment by December 16, 1985. By letter dated December 9, 1985 Attorney Gardner acknowledged that no final decision had been made and that he would renew the motion for rehearing when the Board's decision is final. He produced no evidence to prove the alleged bias and/or prejudgment, but simply stated that "According to information furnished to me, Gerald Davidson is disqualified because of his contacts with Roy Sanborn one of the owners of the Sanco corporation, and also because of statements made at public meetings indicating that he prejudged the application and was in favor of the application."

Having considered all evidence submitted concerning any alleged bias and/or prejudgment this Board, has presently constituted, feels that it has acted and will continue fairly and impartially in accordance with the standards set forth in Winslow v. Town of Holderness Planning Board, 125 NH 262 (1984).

After having reviewed the proposed agreement between Sanco, Inc. and the Board of Selectmen, and after having considered all public input regarding the limiting terms and safeguards and other conditions to be imposed on the special exception granted to Sanco, Inc. to expand its existing sanitary landfill off Trudeau Road this Board hereby imposes the following terms and conditions to said special exception, which must be complied with before the expansion area can be operated as a sanitary landfill:

1. The Bureau of Solid Waste Management of the State of New Hampshire must issue all plan approvals, licenses or permits required under applicable state law, before operations commence.

2. Any other local, state, or federal permits, licenses or approvals necessary to have the construction and operation of a sanitary landfill in the expansion area must be issued, before operations commence. ✓

3. All appeal periods from local, state and federal actions relating to this special exception and/or the matters set forth in paragraphs 1 and 2 above must have expired, or, in the event of an appeal from one or more of said actions, a decision by the highest Court of competent jurisdiction upholding said action(s), before operations commence.

4. In order to guarantee operation and closure of the expansion area in accordance with applicable law, all permits and licenses and in an environmentally sound manner, Sanco shall post financial security with the Town in an amount appropriate to cover all reasonable and necessary operation and closure costs as agreed upon by Sanco and the Town. The financial security per acre shall be determined by a formula using the total closure costs of the expansion area divided by the total number of acres proposed in the expansion area as approved by the New Hampshire Bureau of Solid Waste Management. The financial security shall be posted in phases according to the portion of the expansion area to be subject to active landfilling. The said financial security shall be posted with the Town not later than 90 days prior to the commencement of landfilling on the segment of the expansion area which is subject to the posting of security and shall be in a form of a surety bond, letter of credit, trust fund or other financial security device acceptable to the Town. The terms of the financial security shall insure that the expansion area shall be operated and closed in full accordance with this special exception, applicable state laws and operating plans and specifications approved by the Bureau of Solid Waste Management of the State of New Hampshire.

5. In order to insure that operation of the expansion area does not result in an adverse effect on public health and safety or upon the environment, Sanco shall conduct testing of the groundwater at least four times annually, each such test to be conducted on a quarterly basis. The tests shall be conducted by an independent groundwater consulting firm selected by Sanco licensed by or acceptable to the State of New Hampshire. Sanco shall give the Town advance notice of the testing and make available to the Selectperson, split samples of any quarterly tests.

6. The location of all monitoring wells shall be subject to the approval of the Bureau of Solid Waste Management of the State of New Hampshire and the Selectmen.

7. In order to insure that the above mentioned expansion area is operated in accordance with strict environmental safeguards, the design and construction of the expansion area shall be carried out pursuant to engineering plans and specifications prepared by an experienced and qualified independent consulting engineer. Plans and specifications shall be approved by the Bureau of Solid Waste Management of the State of New Hampshire and Selectmen and shall, include, without limitation, provisions for the installation of a leachate liner and a leachate collection system.

8. Sanco shall provide to the Selectmen within seven days of its receipt, copies of all state inspection reports, notices of violation or the like, for the expansion area. All such inspection reports shall be maintained by the Town at the Town Hall for review by any interested member of the public during normal business hours.

9. Sanco shall provide disposal space for all residential solid waste generated by the inhabitants of the Town of Bethlehem for a minimum of fifteen years commencing on the effective date of this special exception and Sanco shall limit the tonnage of material deposited in the landfill so as to meet this requirement. Sanco shall provide reports to the Selectmen as to the total tonnage of material deposited each year.

10. Sanco shall charge the Town for disposal in the expansion area in accordance with the existing billing procedure between the parties by providing the Town a five percent reduction on the computation of tonnage actually disposed of at the landfill.

11. Sanco shall provide disposal capacity to the Town at a tipping fee of \$20.00 per ton (which is the rate of charge to the Town in effect on November, 1985) for the entire active life of the expansion area; provided, however, that the tipping fee shall be increased or decreased by Sanco once each year following the effective date hereof by the percentage increase or decrease in the Consumer Price Index, all Urban Consumers, All Items less Shelter, published by the United States Department of Labor, Bureau of Labor Statistics for the City of Manchester for the year 1986. Notwithstanding the foregoing, the tipping fee charged to the Town by Sanco shall be not less than \$20.00 per ton.

12. In reliance on the credibility, experience and integrity of the ownership of Sanco and because the credibility, experience and integrity of the landfill operator is important in insuring its proper operation, the principals of Sanco shall not sell, transfer or assign their ownership interest in the landfill except to an individual, corporation or entity of good moral character, is a reputable operator, experienced in the disposal of solid wastes and has a net worth of more than \$1,000,000.

13. Sanco shall, prior to commencement of any operation in the expansion area, install and maintain at the landfill at no charge to the Town, a refuse transfer station for use by individual, non-commercial residents of the Town with appropriate permit issued by the Selectmen. Provided, however, such businesses or commercial establishments within the Town as may be approved by Sanco and the Town Board of Health may also use said refuse transfer station. This provision shall not apply to commercial haulers. Sanco shall not accept hazardous waste or demolition debris at the transfer station. Any recycling operations at the transfer station shall be the sole responsibility of the Town and shall be conducted at its expense. Sanco and the Town shall agree upon the hours of operation of the transfer station. In the event the sanitary landfill area ceases to operate for any reason hereunder, the transfer station may continue to be operated subject to the approval by the Town.

14. In order that the majority of the vehicular traffic using the expansion area may enter and exit using Trudeau Road and United States Route 3, Sanco will share equally with the Town the costs of rebuilding the posted bridge on Trudeau Road.

15. Sanco shall reimburse the Town for its share of the costs of repair as provided herein by crediting said amounts against the tipping fees due and payable to it by the Town.

16. All truck traffic using the expansion area, except that servicing the local area, shall enter and exit the expansion area from Route 3 by means of Trudeau Road after the bridge has been repaired.

17. In order to insure that materials deposited at the landfill are acceptable, and do not present a threat to the public health and safety or to the environment, Sanco shall provide to the Town a list of all municipalities and other sources of refuse to be deposited at the facility. The list shall include the names of all businesses within any municipality using the landfill and the constituents of any solid waste other than residential refuse.

18. Absolutely no hazardous wastes of any kind as defined by applicable state or federal law shall be deposited at the landfill.

19. For all solid waste disposed of in the expansion area which originates from outside the Town of Bethlehem, Sanco shall pay to the Town a fee of \$.50 per ton of said refuse. The fee shall be paid quarterly, in arrears, not later than the tenth business day following the close of the quarter. If incineration or resource recovery is incorporated in landfill operations at the expansion area, Sanco shall also pay the host community fee of \$.50 per ton of said refuse before said refuse is incinerated or otherwise disposed of. For any other incinerated material which originates from outside the Town of Bethlehem, Sanco shall pay the Town a fee to be negotiated between Sanco and the Board

20. In addition to any other penalty provided by law, if Sanco violates a term of this special exception or of any applicable law relating to solid waste disposal, this special exception shall immediately terminate and the landfill shall be closed. Provided, however, prior to instituting any legal proceedings to enforce this provision, the Town shall provide Sanco with seven days advance written notice of said violation and permit Sanco five business days in which to cure the violation. However, this provision relative to advance written notice and opportunity to cure by Sanco shall not apply if the alleged violation will cause immediate or irreparable harm to the Town or its residents, and the Town, in its sole discretion, may proceed immediately with appropriate legal action.

21. The Town may have a representative present during site preparation for the expansion area in order to insure that the base preparation is completed in accordance with the plans and specifications approved by the Bureau of Solid Waste Management.

22. In accepting the terms of this special exception, Sanco shall allow a representative of the Town to enter upon the landfill at any time during business hours or at any other time provided that an authorized representative of Sanco accompanies the representative of the Town, which authorized representative shall be made available upon two hours advance notice. The Town may conduct inspections for the purpose of monitoring operations in the expansion area or the construction of the expansion area.

23. In order to guarantee the shielding of adjacent residences from view of disposal operations in the expansion area, Sanco shall maintain a buffer zone of not less than fifty feet of existing natural vegetation between any area of active solid waste landfilling and the property boundaries of the expansion area.

THE TOWN OF BETHLEHEM

BY:

Michael F. Danaher

Clarence [unclear] 1/23/86

Dennis Kivern 1/24/86

MEMORANDUM

To: Town of Bethlehem
Board of Selectmen

From: North Country Environmental Services, Inc.

Re: Invalidity of Town Ordinance Purporting to Prevent
the Operation of Stage II, Phase II of the Bethlehem landfill

Date: September 10, 1998

I. INTRODUCTION AND SUMMARY

This memorandum briefly reviews the Town of Bethlehem's (the "Town") 1987 ordinance as amended in 1992, which purports to preclude the development of solid waste facilities in the Town by anyone other than the Town. Specifically, this ordinance has been held out as precluding the operation of Stage II, Phase II of the North Country Environmental Services, Inc. ("NCES") landfill.

Section II of this memorandum documents certain key regulatory events in the development of the NCES property as a landfill, beginning with the issuance of a variance in 1976 and certain subdivision approvals for landfill development in 1983 and 1985, and culminating with the 1989 state approval for Stage II .

Section III of this memorandum considers the lawfulness and validity of the 1987 ordinance as amended in 1992 when applied to the NCES Stage II, Phase II landfill. Review of the controlling legal principals demonstrates that application of the ordinance as amended to Stage II, Phase II of the NCES landfill is unlawful and presents serious risk of liability to the Town.

as amended to Stage II, Phase II of the NCES landfill is unlawful and presents serious risk of liability to the Town.

The legal principals presented in Section III include:

1. Under the law, NCES has the right to continue its landfilling activities in Stage II, Phase II as the continuation of an existing permitted use made nonconforming by the ordinance, but not made unlawful.

2. The Stage II, Phase II landfill has been approved and permitted by the State under the State solid waste statute. The ordinance attempts to completely exclude this State approved facility and, hence the ordinance is preempted.

3. The ordinance is invalid spot zoning. The ordinance singles out NCES as the sole landfill in Town and purports to eliminate its business while allowing Town-run or Town-owned landfills in the same zoning district.

4. The ordinance is also unconstitutional given its arbitrary and unreasonable nature. It promotes no legitimate public purpose and imposes great harm to NCES. The ordinance fails as a public health and safety measure because, among other reasons, the Town's Zoning Board of Adjustment ("ZBA") found the landfill to be well run, located in an appropriate area for such a use and to impose no detrimental impact on the neighborhood.

5. Application of the ordinance will constitute a regulatory "taking" or "inverse condemnation" of NCES property. The Town must compensate NCES for this loss, and if litigation results to vindicate NCES's position, the Town will be further responsible for NCES' legal fees and double court costs. This takings lawsuit can also be pursued in federal court under the federal constitution.

6. NCES will also be entitled to proceed in federal and state court under 42 U.S.C. § 1983 for deprivation of its rights and recovery of its attorneys' fees and other damages.

It bears noting that this memorandum does not seek to present the complete set of legal principals under which NCES has the present right to operate Stage II, Phase II.

II. FACTUAL BACKGROUND

On July 13, 1976, the Town's ZBA approved Harold Brown's application to construct a landfill on an 80-acre parcel of land he owned at Trudeau Road and Muchmore Road in Bethlehem. The original landfill was constructed and operated by Brown.

On April 21, 1983, the Town Planning Board approved a 10-acre subdivision plan submitted by Brown. This approved plan shows the area of the landfill existing at that time (constituting roughly 5 acres of the parcel) and a lower portion of the 10-acre parcel which is identified as "Future Land-fill Site." Attachment D.1.

By Warranty Deed dated July 7, 1983, and recorded at the Grafton County Registry of Deeds at Book 1502, Page 620 (Attachment D.2), Brown and his wife conveyed the 10 acres to Sanco, Inc., a corporation having a principal place of business in Bethlehem, N.H. The only business of Sanco, Inc., was operating the landfill. The "Future Land-fill Site" has been continuously used by Sanco and its successors for landfilling and landfilling related activities such as a source of fill for the then current operating area and as space to stockpile various materials necessary to the operation.

On March 22, 1985, the Planning Board again approved a subdivision plan which enabled Brown to sell additional acreage to Sanco for its landfilling business. This approved plan shows the location of the 10 acres previously subdivided and approved, and shows a 40.99-acre area which completely surrounds and encloses the 10-acre area. Attachment D.3. Regarding the 40.99 acres, Note 5 on the approved Plan states that the "attached survey was prepared . . . for the purpose of a landfill site and protective zone." Note 6 on the approved Plan states that "Contour information as shown hereon reflects conditions as found during date of survey since the intended use of parcel shown is 'landfill use,' the contours are subject to change." The contours are shown on the entire 40.99-acre parcel.

By deed dated April 4, 1985, Brown and his wife conveyed this 40.99-acre parcel to Sanco, Inc. Brown and his successors-in-interest have at all times since 1976 operated a landfill business on these sites, obtaining all necessary permits from the Waste Management Division of the NHDES or its predecessors.

By Notice of Decision dated November 7, 1985, the ZBA unanimously granted a special exception to Sanco, Inc. to expand its existing landfill. Attachment A.7. The ZBA determined that the landfill would be beneficial to the community and in harmony with the general purpose and intent of the zoning ordinance. As a matter of public policy and because the landfill met all the statutory and regulatory requirements, the ZBA allowed this expansion. Id. at 3. Among other things, the ZBA also determined that the landfill had been well run at all times; it was located in an area appropriate for such a use, there would be no detrimental impact on the neighborhood and it would incorporate state-of-the-art technology. Id. at 3-4.

The ZBA further noted that landfill capacity was in short supply and approval of landfilling on the NCES property would benefit the Town as it faced uncertainty with regard to refuse disposal options. Additionally, the ZBA found that further landfill development would allow closure of the existing portion of the landfill that was unlined. Stage II, Phase II continues to further this purpose because its development is part of the remediation plan for the site contemplated by the NHDES in its approval of stage II.

The minutes of the ZBA's meeting on January 15, 1986, reflect that the Town and Sanco had agreed upon numerous conditions to be placed upon the special exception. Attachment A.9. Each of the 23 conditions was voted on separately and each member of the ZBA voted affirmatively for each condition. Id. at 3. By Notice of Decision dated January 1986, the ZBA set forth all of the approved conditions; nowhere does it contain a limitation on the size of the landfill. Attachment A.10. To the contrary, Condition 9 states that Sanco shall provide a disposal space for Town residents for a "minimum of fifteen years." Id. at 3. Additionally, Condition 11 provides that Sanco will provide disposal capacity to the Town at a tipping fee of \$20.00 per ton for the entire active life of the expansion area. Id.

Although a dispute has arisen in the past regarding the proposed (and approved) size of the landfill, at the time the special exception was granted, size was not at issue. In fact, notwithstanding the separate discussion and vote on the 23 conditions noted above, the ZBA did not impose a condition limiting the number of acres in the approved subdivision areas which could be used for landfilling. The plan submitted to the Town by Sanco was clearly "conceptual" because the first state application was not submitted until approximately July 1986, after ZBA special exception approval. It is for this reason

that the conditions expressly defer to the state regulatory process for a determination of the location and dimensions of any future areas of landfill. In fact, approximately 18 months after the special exception was granted, NHDES finally approved a design for a double-lined 18-acre landfill as Stage I of the various landfill stages to be developed on the property which was the subject of the Town's subdivision and other approvals.

In April, 1989 the NHDES issued a permit to NCES for the development of Stage II, on the 10-acre area that was the subject of the 1983 subdivision. NCES expects to receive NHDES construction approval in the near future for Stage II, Phase II.

In 1987, as amended in 1992, the Town enacted a restrictive ordinance pertaining to solid waste disposal. The ordinance in its current form states:

Further, no solid waste disposal facility, site, or expansion of any existing landfills shall be located in any district except a facility operated by the Town. This prohibition shall include, but not be limited to, any private solid waste disposal facility or site, sanitary landfill or incinerator.

Bethlehem, N.H. Town Ordinances & Regulations, General Provisions, paragraph 6.

The landfill was the only such facility in the Town at the time this restrictive provision was adopted.

Paragraph 1 of the General Provisions of the same zoning ordinance states that

Any lawful building or other structure, or any lawful use of a building or other structure or land, existing on the effective date of this Regulation, which does not conform with the provisions of this regulation, shall be considered a lawful non-conforming building, structure, or use, and may be continued, except as otherwise herein provided.

Emphasis supplied. Thus, while the "expansion" of any existing landfill is banned by the language of the restrictive ordinance, the "continuation" of a lawful non-conforming use is expressly permitted under Paragraph 1 of the zoning ordinance.

III. DISCUSSION

A. NCES has the Legal Right to "Continue" its Nonconforming Use of Landfilling in Stage II, Phase II

By virtue of the 1976 variance and the 1985 special exception, Brown and his successors had the right to operate a landfill business as a permitted use under the Town's zoning ordinance. This permitted use became a prior existing nonconforming use upon the enactment of the restrictive ordinances. A nonconforming use is a use in fact existing on the land at the time of adoption of an ordinance. New London Land Use Assoc. v. New London Zoning Bd., 130 N.H. 510, 516 (1988). "Once the right to a use is acquired, any zoning ordinance that would prevent that use is inapplicable to the party having the right to the nonconforming use." Town of Hampton v. Brust, 122 N.H. 463, 468 (1982). The legal right to continue a prior nonconforming use is well recognized and is based upon the fact that one has an established or vested right in a nonconforming use which can be continued into the future if the intent to use property in a particular way is evident at the time the ordinance creating the nonconforming use was enacted. New London Land Use Assoc., 130 N.H. at 516.

The New Hampshire Supreme Court reviews the following factors in deciding whether a proposed use of real estate is a continuation of a prior existing nonconforming use: 1) to what extent does the proposed use in question reflect the

nature and purpose of the prevailing nonconforming use?; 2) is the proposed use merely a different manner of utilizing the same use or does it constitute a new use, different in character, nature and kind?; and 3) does the proposed use have a substantially different effect on the neighborhood? New London v. Leskiewicz, 110 N.H. 462, 467-68 (1970).

In Town of Wolfeboro v. Smith, 131 N.H. 449, 454 (1989) the New Hampshire Supreme Court adopted the rule that lateral expansion (in that case, of a gravel pit) will be considered a "continuation" of a previous use if the land had been "appropriated" for that use prior to the effective date of the restrictive regulation. Appropriation is demonstrated by actions which objectively show the owner's intent to use the land in that fashion.

As early as 1983, NCES's predecessor-in-interest, Mr. Brown, had manifested his intent to conduct landfill activities on the entire 10-acre parcel. Evidence of that intent includes the subdivision of the 10 acres for landfill purposes and the conveyance of that 10 acres to Sanco, Inc., a company whose sole purpose is landfill development and operation. This intent was reaffirmed and expanded to the 40-acre parcel by the 1985 subdivision plan, the further conveyance of that property to Sanco, Inc., and the 1986 special exception making landfilling a permitted use. This appropriation took place, of course, well before the Town purported to prohibit "expansion" of any existing landfills in 1992. Given these appropriation facts and others, the zoning ordinance amendments cannot lawfully be used to prevent continued landfilling operations in Stage II, Phase II.

B. The Town's 1987 Ordinance as Amended in 1992 is Preempted by State Law

RSA chapter 149-M is "an expansive solid waste management statute' that 'calls upon the State, through the division of waste management, to conduct comprehensive solid waste planning and to regulate and enforce the State's solid waste laws.'" Town of Pelham v. Browning Ferris Industries of New Hampshire, Inc., 141 N.H. 355, 362 (1996). While RSA 149-M provides for some local involvement in the management of solid waste, the Town's power to regulate cannot be exercised in a manner that is inconsistent with state law. Id. at 362-63 (citations omitted). Town regulations, like the 1987 ordinance and its 1992 amendment, will be preempted if they have the intent or the effect of frustrating the State's regulatory authority under RSA 149-M. Id.

An extreme form of the power of a town regulation's ability to frustrate state regulation occurs when the town regulation is exclusionary. Id. at 364. Under these principles, the Town's 1987 ordinance and its 1992 amendment which purports to exclude the NCES landfill will be deemed by a court to be invalid and preempted as inconsistent with RSA 149-M, the State's solid waste regulatory role and state permits issued by NHDES to NCES for Stage II, Phase II.

C. The 1987 Ordinance and its 1992 Amendment Effects Reverse Spot Zoning and are Therefore Invalid

The 1987 ordinance and its 1992 amendment which prohibit the expansion of the landfill are a classic example of "reverse spot" zoning. Reverse spot zoning occurs when a land-use decision arbitrarily singles out a particular parcel for different, less

favorable treatment than the neighboring ones. Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 132 (1978) (citing 2 A. Rathkopf, The Law of Zoning and Planning 26-4, and n.6 (4th ed. 1978)). Such rezonings, often requested by neighborhood land owners, are generally invalid as discriminatory or confiscatory. Rathkopf, § 28.01[2].

Penn Central focused on two criteria in making its reverse spot zoning determination: 1) whether the regulation was part of an overall comprehensive plan; and 2) whether the regulation applied evenly to owners similarly situated. Penn Central, 438 U.S. at 132. Applied here, these factors compel a finding of impermissible reverse spot zoning.

The Town's Master Plan discusses the Town's agreement with the Sanco Landfill and how that agreement creates a "unique" situation for the Town, one under which the Town pays less for disposal of its solid waste than do the neighboring communities. The Master Plan also states that the Town's solid waste agreements should be maintained provided they continue to offer the town a substantial reduction in per ton costs. Therefore, the subject regulation which prohibits the expansion of the landfill is inconsistent with the express provisions of the Town's Master Plan. Nothing in the Master Plan suggests that the landfill should be eliminated.

The ordinance does not apply evenly to all others. The plain language of the ordinance allows the Town to operate and expand the very landfilling and solid waste disposal activities that NCES is prohibited from expanding and operating. Furthermore, the ordinance was clearly intended to single out the Sanco/NCES parcel for rezoning, because there are no other facilities in the Town which were rendered nonconforming

by the ordinance. See Munger v. Town of Exeter, 128 N.H. 196 (1986) (no public need or compelling reason for the rezoning, action related solely to particular property, rezoning not in accordance with comprehensive plan, and cannot be justified on the basis of the health, safety, morals or general welfare of the community). Here, in fact, the ZBA Notice of Decision granting the 1986 special exception found that landfilling on NCES property would not have a detrimental impact on the neighborhood.

Given these factors, the ordinance is impermissibly arbitrary and discriminatory and is invalid as "reverse spot" zoning.

D. The Ordinance is Arbitrary and Unreasonable and Hence, Unconstitutional

Local restrictions and regulations cannot be unreasonable and be expected to pass constitutional muster. Metzger v. Town of Brentwood, 117 N. H. 497, 503 (1977) makes this clear by stating:

When the restriction as applied to a particular piece of land is unnecessary to accomplish a legitimate public purpose or the gain to the public is slight but the harm to the citizen and his property is great, the exercise of the police power becomes arbitrary and unreasonable and this court will afford relief.

Id. (citations omitted). In Metzger, the offending ordinance was found invalid because it contained a requirement which the court found was not necessary to the justifiable purpose of the ordinance; in other words the court found there was no substantial relationship between the legitimate public needs of the town and the requirement at issue. Id. at 502.

In this case there is no legitimate public purpose to be served by the 1987 ordinance and its 1992 amendment. For example, these ordinances cannot legitimately

be viewed as promoting public health because of the ZBA 1985 findings and the fact that only private (not Town) landfills are purportedly excluded. The harm to NCES is great; application of the ordinance ends NCES landfill business. Public gain is nonexistent because the Town could create the very landfill it used the ordinance to preclude. This harm and this lack of legitimate purpose renders the ordinance unconstitutional.

**E. If Applied to NCES, the Ordinances are a Compensable
"Taking" of Property by Inverse Condemnation**

Inverse condemnation occurs when the government takes property in fact through regulation, but does not formally exercise the power of eminent domain, giving rise to a cause of action for compensation. Sundell v. Town of New London, 119 N.H. 839, 845 (1979). Burrows v. City of Keene, 121 N.H. 590 (1981) was the seminal inverse condemnation case in New Hampshire. In Burrows, the court emphasized that allowing damages even for a temporary taking should act to encourage local officials to stay on the "constitutional side of the line," and should also discourage harassment of property owners by repeated amendments of zoning regulations and the enactment of new ones. Id. at 599.

The general rule of inverse condemnation is that arbitrary or unreasonable restrictions which substantially deprive an owner of the economically viable use of his land to, in some way, benefit the public constitute a "taking" of that property under the New Hampshire Constitution. Burrows, 121 N.H. at 598. The owner need not be deprived of all valuable use of his property; if the denial of use is substantial and is

to recover its attorney's fees and double costs. Burrows, 121 N.H. at 601. See also, Funtown USA, Inc. v. Town of Conway, 127 N.H. 312, 315-317 (1985).

F. Violation of 42 U.S.C. § 1983

In New Hampshire's seminal "takings" case, the Supreme Court took pains to issue the following warning:

Planners and other officials should be aware of possible personal liability for bad faith violations of a landowner's constitutional rights which may go beyond the damages recoverable for inverse condemnation. Cities and towns should also be aware of possible 42 U.S.C. § 1983 actions for damages for violations of the constitutional rights of citizens to be compensated for injuries suffered.

Emphasis supplied. Burrows, 121 N.H. at 599. In addition to damages under § 1983, NCES will also be entitled to its attorney's fees as the prevailing plaintiff. 42 U.S.C. § 1988. The § 1983 lawsuit can be commenced in state court or in federal court joined with NCES's inverse condemnation claim under the federal constitution.