



## PLANNING AND DEVELOPMENT • CITY OF NORTHAMPTON

planning • conservation • zoning • housing partnership • redevelopment • northampton GIS  
economic development • community development • historic • community preservation • central business architecture

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### STAFF REPORT

TO: Planning Board  
FROM: Carolyn Misch  
APPROVED: Wayne Feiden  
RE: Mar 25, 2010 Planning Board Meeting  
DATE: Mar 18, 2010

#### 1. Joint Hearing with Ordinance Committee: Ordinance Amendment to “Remove exceptions for sanitary landfills in Water Supply Protection Districts” Section 350-15.4:

##### **§ 350-15.4 Prohibited uses.**

The following uses are prohibited in the Water Supply Protection Districts:

{no changes to paragraphs A through D and no changes to paragraphs F through O. Amend paragraph E as shown:}

- E. Sanitary landfills and open dumps, ~~as defined in 310 CMR 19.01 as amended, except for sanitary landfills that have a site assignment permit issued in accordance with 310 CMR 16.000 that predates the adoption of this amendment and a heavy public use special permit from City Council. Specific landfill operations and types of wastes accepted must be in accordance with Massachusetts Department of Environmental Protection Solid Waste Management Facility Regulations (310 CMR 19.000) and policies. Ancillary operations associated with the landfill facility are also acceptable, including various recycling collections, household hazardous waste collection events, leaf and yard waste composting and composting of other organic materials.~~

Section 350-15.4 currently prohibits landfills, except for “grandfathered” sites that already have DEP site assignment from DEP. The City Glendale Road property is the only site that is so grandfathered. The proponents of the proposed ordinance have stated that their intention is to prohibit any landfill expansion.

##### **Outside counsel, zoning expert Mark Bobrowski, ruled that regardless of proposed zoning amendment:**

1. The current landfill site (landfill and proposed new cell site) is grandfathered and the zoning change would NOT affect the operations at the landfill nor the option to create a third new cell.
  1. IF a landfill expansion reaches certain defined thresholds, a Zoning Board Finding would be required.
  2. IF a landfill expansion does not reach these thresholds, no Finding would be required.
  3. IF a landfill expansion met Site Plan Approval thresholds, a Site Plan Approval would be required.
  4. The landfill, because of its grandfathering, would not require a Special Permit.(See attached zoning opinion and the background memo from Wayne Feiden requesting the opinion.)

##### **Staff Recommendation:**

The existing ordinance is clear that no new landfills are allowed. The proposed ordinance has no affect on the use or continued use or expansion of the landfill. It would, however, create confusion by denying a grandfathering that exists under state statute. Therefore, staff suggests that the Board recommend to Council to deny the amendment in order to avoid confusion about what is allowed.



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March 5, 2010

TO: Andrew McAmis  
Elaine Reall

FR: Mark Bobrowski

RE: Landfill Parcels 1 and 2  
Glendale Road

You have asked me several questions regarding the above-referenced parcels in connection with the operation of the municipal landfill.

In order to respond, I am relying upon the facts contained in the Memorandum of Wayne Feiden to Ned Huntley, dated February 12, 2010, and your email to me dated March 3, 2010. As I understand the matter, Parcel 1 was purchased by the City for use as a landfill in 1969. This use predates any "modern" zoning in the City, which was instituted in 1975. I am assuming that the landfill on Parcel 1 is a prior, lawful nonconforming use.

Parcel 2 was acquired by the City in 1988. Soon after acquisition, Parcel 2 was used for purposes ancillary to the landfill operation on Parcel 1. Currently, Parcel 2 is used for access to Parcel 1, leaf composting, stormwater control and groundwater monitoring. According to the DPW staff, these uses have been consistent since 1988. No permitting has ever been done with regard to Parcel 2.

Both Parcels are located in the Suburban Residential district. The Parcels are also situated in a Water Supply Protection Overlay District. A landfill is classified as a "heavy public use" in the Suburban Residential District. A heavy public use requires a special permit, but the activities on Parcel 1 are not so authorized. A sanitary landfill with a site assignment from the DEP is currently an allowed use in the Water Supply Protection Overlay District. A citizen petition proposed in February of 2010 would amend the Northampton Zoning Ordinance (NZO) to prohibit even sanitary landfills with a DEP site assignment.

**Question 1: Has Parcel 1 merged with Parcel 2 and therefore considered a single landfill site?**

In my opinion, Parcel 1 and Parcel 2 have merged for zoning purposes. I have not been provided with any information as to lot area and frontage requirements, but the activities that cross from one parcel to the other indicate an intent to merge the parcels. See, e.g., *Seltzer v.*

*Board of Appeals of Orleans, 25 Mass. App. Ct. 15 (1987).*

**Question 2: If it is one landfill site, would any new construction for a new landfill cell be considered an expansion of operations, but not a new use for the site?**

As stated above, the landfill on Parcel 1 is a prior lawful conforming use. Any “change, extension, or alteration” of a nonconforming use requires a finding pursuant to Section 9.3 of the NZO.

To determine whether an activity reaches the level of a “change, extension or alteration,” the court has fashioned a three-part test:

1. Whether the use reflects the “nature and purpose” of the use prevailing when the zoning ordinance took effect (in 1975)?
2. Whether there is a difference in the quality and character, as well as the degree of use?
3. Whether the current use is “different in kind in its effect on the neighborhood”?

*Powers v. Board of Appeals of Barnstable, 363 Mass. 348 (1973).* If the proposed use trips *any* of the thresholds, it constitutes a change and must obtain a finding.

From the facts related to me, it is not clear that the activities on Parcel 2 (to date) constitute a change from uses historically conducted on Parcel 1.

**Question 3: If Council were to adopt the new proposed ordinance amendment would the expansion of the landfill be allowed to move forward through a permit application for a finding from the Board of Appeals? If so, would that be the only local permit required?**

Assuming, for the purposes of answering this question only, that the “expansion” of the landfill will trip one (or more) of the *Powers* tests, the correct procedure for such expansion would be Section 9.3 of the NZO.

In my opinion, this would be the only local permit required. The landfill predates the heavy public use special permit requirement and it also predates any requirements set forth in the Water Supply Protection Overlay District. I have not been informed of any site plan review thresholds applicable in the instant matter.

I hope this answers your questions. Please let me know if I can be of further assistance.



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Wayne Feiden, FAICP, Director of Planning and Development • Wfeiden@NorthamptonMA.gov • 413-587-1265

**TO:** Ned Huntley, PE, Director of Public Works

**CC:** Jim Laurila, PE, City Engineer  
Elaine Reall, City Solicitor

**FROM:** Wayne Feiden, FAICP, Director of Planning and Development

**DATE:** February 12, 2010

We need to understand the legal ramifications of the proposed zoning amendment relating to landfills in Water Supply Protection Districts. Can DPW engage expert zoning counsel to for a legal opinion on the grandfathering of the current landfill site, as detailed below?



### Background:

In 1969, the city purchased land on Glendale Road to use for a landfill (parcel 1 on the photo above). Parcel 2, just north of the original landfill site was purchased at some later date. Parcel 2, as shown in both photos, contains some aspects of the landfill function including access roads through across and around the landfill and the northerly side slopes of the actual cells on the landfill. Although parcel 2 has not received a permit for the construction of a separate

landfill cell, it does contain operations critical to the function of the existing landfill and these two parcels appear operate as one “landfill site”.

In 1975 when Northampton’s “modern” zoning was instituted, these city-owned parcels were zoned Suburban Residential, in which typically single family detached residences are allowed. Some additional non-residential uses were and are currently allowed by special permit, including “heavy public uses” defined to include landfills. Since the landfill was already in operation there, no special permit was or has been granted for the operations.



#### **Current zoning ordinance SR/WSPII**

In 2007, as part of the agreement with Massachusetts Department of Environmental Protection (DEP) to issue site assignment for the expansion of the existing landfill on Glendale Road, the City Council adopted a Water Supply Protection overlay (WSP II) to protect drinking water supplies serving Easthampton. This WSPII overlay extends over much of the southwest quadrant of Northampton including both parcels shown above.

Certain uses are prohibited in the WSP II. In 2007, City Council (with approval by DEP) adopted an exemption to a standard prohibition against landfills for those landfills that receive DEP site assignment within the WSP.

In 2008, abutting residences raised the issue of whether expansions of the operation from its inception in the late 1960’s had been done without appropriate permits. The Northampton Zoning Board of Appeals disagreed and the decision was challenged in court, but settled before a final court decision.

Under current zoning, we believe that the expansion of the landfill with a new cell to be constructed in compliance with the DEP site assignment would require:

1. Site Plan approval by the Planning Board; and
2. Either a City Council Special Permit for the landfill OR a Zoning Board of Appeals Finding in conformance with section 9.3 for expansion of a pre-existing non-conforming use.

### **Proposed Zoning**

On February 4, 2010, City Council referred out for public hearing the following zoning ordinance amendment submitted by citizen petition. This would eliminate the landfill exemption for sites with grandfathered site assignment within WSP districts. The language is shown below.

### **§ 350-15.4 Prohibited uses.**

The following uses are prohibited in the Water Supply Protection Districts:

{no changes to paragraphs A through D and no changes to paragraphs F through O. Amend paragraph E as shown:}

- E. Sanitary landfills and open dumps, ~~as defined in 310 CMR 19.01 as amended, except for sanitary landfills that have a site assignment permit issued in accordance with 310 CMR 16.000 that predates the adoption of this amendment and a heavy public use special permit from City Council. Specific landfill operations and types of wastes accepted must be in accordance with Massachusetts Department of Environmental Protection Solid Waste Management Facility Regulations (310 CMR 19.000) and policies. Ancillary operations associated with the landfill facility are also acceptable, including various recycling collections, household hazardous waste collection events, leaf and yard waste composting and composting of other organic materials.~~

### **Legal Questions to be answered**

If City Council adopts this zoning amendment, a landfill expansion would no longer be eligible for a Special Permit. The existing landfill site would be a pre-existing non-conforming for use.

Based on Section 9.2 Extension and Alteration of Nonconforming Uses as well as MGL Chapter 40A §6 pre-existing non-conforming uses may continue as stipulated:

*B. A finding, as used in this chapter, requires that the Zoning Board of Appeals determine that a change, expansion or alteration to a preexisting nonconformity will not be substantially more detrimental to the neighborhood than the existing nonconforming nature of the structure, lot and or use. The Zoning Board may impose conditions as part of approving a finding.*

### **9.3 Changes to Non-Conforming Uses:**

*Legally preexisting nonconforming structures, uses, or lots may be changed, extended or altered as set forth below. If a use is not eligible under one subsection, proceed to the next subsection.*

*A. A preexisting nonconforming structure or use may be changed, extended or altered:*

*With a finding from the Zoning Board of Appeals so long as the change does not involve a sign (see § 350-7 for signs) and § 350-9.3A(5) above does not apply and when the expansion extends (vertically or horizontally), but does not increase the nonconforming nature of the property and does not create any new zoning violation (such as further reducing a setback or minimizing open space).*

Questions:

1. Is Parcel 2 merged with parcel 1 and therefore considered 1 landfill site?
2. If it is one landfill site, would any new construction for a new landfill cell be considered an expansion of operations, but not a new use for the site?
3. If Council were to adopt the newly proposed ordinance amendment would the expansion of the landfill be allowed to move forward through a permit application for a Finding from the Zoning Board of Appeals? If so, would that be the only local permit required?