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October 11, 2016

Board of Selectmen:

Peter Berry, Chair
Janet Adachi, Vice-Chair
Frances Osman, Clerk
Katie Green
Chingsung Chang

472 Main Street
Acton, MA 01720

Subject: Background Documents Referenced in My September 12, 2016
Testimony on Concord's Proposed Nagog Pond Water Treatment
Plant

Dear Selectmen:

At the conclusion of the September 12, 2016 public hearing on the proposed Nagog Pond Water Treatment Plant, the audience was requested to provide, for the record, copies of documents referenced during public statements at the hearing. The following identifies those documents, and each document is provided as an attachment. **I respectfully request that each of these documents be entered into the record for this proposed project.**

I also request that **the Acton 2020 Master Plan, and the Town of Acton Open Space & Recreation Plan 2014-2021, each be entered into the record in their entirety.** I have not attached these document here, but I request that they be included in the record. I assume that Acton's zoning bylaws are already in the record, and therefore I do not add them here even though my testimony quoted extensively from the bylaws.

For documents that are already part of the public record, I identify which document I quoted from, but I do not include the document here.

Finally, I am not addressing my testimony as it related to the proposed generators, or the noise emanating from the generators. The generators have been removed from consideration at the site and therefore documentation of my quotes is irrelevant at this point.

1. **Chapter 201 of the Acts of 1884**

Chapter 201 of the Acts of 1884 is the underlying law that allows Concord to withdraw water from Nagog Pond. A copy of that law is attached here.

2. **Meeting Minutes – Water Supply District of Acton, March 28, 2016**

The discussion at this March 28, 2016 meeting was the source of my comment that the Acton Water District could lay approximately 1,400 feet of pipe in two weeks, and service Acton residents along Route 2A that are presently being supplied by Concord. The minutes don't capture the discussion in that level of detail, but they do state Mr. Chris Allen's assertion that Acton could provide water to Concord's Route 2A customers, subject to infrastructure upgrades. These minutes are attached.

3. **DEP Northeast Regional Office December 29, 2015 MEPA Comments**

Page two of these DEP comments contains the quotes that I read regarding Concord's intentions for Nagog Pond. Concord is moving from seasonal usage, whereby Concord historically has withdrawn approximately 4% of their overall water usage, to full-time use of Nagog Pond as a water source, thereby resulting in resting Concord's municipal wells. These DEP comments are attached.

4. **July 7, 2016 Email From Chris Allen**

This email (specifically paragraph 3) was the source of my quote by Chris Allen regarding the impact of full-time water withdrawal on Nagog Pond. Mr. Allen states that, "if they (i.e., Concord) were to sustain withdrawal at their permitted rate, I'd assume depletion of the overall pond volume would occur." This email is attached.

5. **Acton 2020 Master Plan, and Open Space and Recreation Plan 2014-2021**

I quoted from the following sections in the Acton 2020 Master Plan and the Open Space and Recreation Plan 2014-2021:

- 2020 Goal 2 – "Protect the quality and quantity of Acton's water," taking "surface water into account."
- 2020 References the Open Space and Recreation Plan
 - State's scenic landscape inventory – Nagog Pond and its shoreline are included in this state inventory
 - "Broad wildlife corridor ... connects the Nashoba Brook Basin with Lake Nagog..."
 - Nagog Brook "meanders, forming a series of deep pools ... & broad floodplains. This is a prized area for fishing and is populated by both beaver and otter."

Note: These documents are not included here, although I request that they be included in their entirety for the record.

6. **Special Permit Application Discussion of Fence**

Page 10 of Attachment C (Zoning Compliance Analysis) to Concord's Special Permit Application is the source of my quotes on the fence. Concord says that "some fencing" will be needed, and that the fencing is an "enhancement." This document is not included here because it is already in the record as part of the Special Permit Application.

7. **Variance Findings**

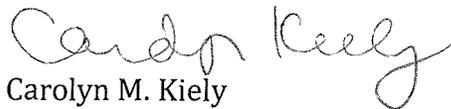
Attachment D (Variance and Special Permit) to Concord's Special Permit Application is the source of my quotes regarding Concord's 1994 Variance which allowed Concord to build their ozone treatment plant at Nagog Pond. I quote from pages 1 and 2 of the 1994 Variance (specifically, I quote from #2 on page 1 of 4, and I quote from #4 on page 2 of 4). This document is not included here because it is already in the record as part of the Special Permit Application.

Additionally, Page 2 of Attachment C of the Special Permit Application (Zoning Compliance Analysis) is the source of my quote regarding Concord relying on the 1994 Variance for this proposed project. This document is not included here because it is already in the record as part of the Special Permit Application.

I also quote from the leading case on variances that is directly applicable to this proposed project - Cesar A. Mendes v. Board of Appeals of Barnstable (28 Mass. App. Ct. 527 [1990]). This case is attached in its entirety. I quote from page 531 of the case.

If you have any questions, feel free to contact me.

Sincerely,


Carolyn M. Kiely

Attachments:

1. Chapter 201 of the Acts of 1884
2. Meeting Minutes - Water Supply District of Acton, March 28, 2016
3. DEP Northeast Regional Office December 29, 2015 MEPA Comments
4. July 7, 2016 Email from Chris Allen, Acton Water District
5. Court case -- Cesar A. Mendes v. Board of Appeals of Barnstable (28 Mass. App. Ct. 527 [1990])

Attachment 1:
Chapter 201 of the Acts of 1884

13

LAWS AND RESOLVES

PASSED BY THE

Legislature of Massachusetts

DURING THE

SESSION OF 1884.

PUBLISHED BY THE

Secretary of the Commonwealth.

WRIGHT & POTTER PRINTING CO., STATE PRINTERS, 18 POST OFFICE SQUARE, BOSTON.

passed at a town meeting held the seventh day of April in the year eighteen hundred and seventy-nine authorizing its treasurer to hire the sum of thirty-five hundred dollars for water works construction in addition to the twelve thousand dollars specified in the last preceding vote, the two debts contracted under said two last mentioned votes both amounting to fifteen thousand five hundred dollars and the two notes given therefor:—The vote of said town passed at a town meeting held on the twenty-sixth day of May in the year eighteen hundred and seventy-nine authorizing its water commissioners to purchase an engine for its water works and appropriating eight thousand dollars therefor:—The vote of said town passed at a town meeting held on the twentieth day of October in the year eighteen hundred and seventy-nine authorizing its treasurer to hire a sum not exceeding fifty-five hundred dollars for its water works construction, the two debts contracted under said two last mentioned votes both amounting to thirteen thousand three hundred dollars and the two notes given therefor; and the vote of said town passed at a town meeting held on the thirtieth day of July in the year eighteen hundred and eighty authorizing its treasurer to hire the sum of twenty-five thousand dollars appropriated to water works construction, the debt of fifteen thousand dollars contracted thereunder and the note given therefor.

SECT. 2. The action of said town in establishing sinking funds in accordance with any of said votes is hereby made valid and confirmed.

SECT. 3. In addition to the water debts amounting to sixty-six thousand three hundred dollars made valid and confirmed as set forth in section one of this act, said town may further increase its permanent water debt to an amount not exceeding thirty-three thousand seven hundred dollars upon complying with the provisions of chapter twenty-nine of the Public Statutes and any acts in amendment thereof or in addition thereto so far as the same are applicable.

SECT. 4. This act shall take effect upon its acceptance by a two-thirds vote of the voters of said town present and voting thereon at a legal town meeting called for the purpose within two years from its passage. [*Approved April 30, 1884.*]

[CHAP. 201.]

AN ACT to authorize the town of Concord to increase its Water Supply.
Be it enacted, etc., as follows:

SECT. 1. The town of Concord, in addition to the powers now conferred upon it by law, is hereby authorized to supply itself and its inhabitants and other persons, towns and corporations on the line of its water works with pure water to extinguish fires, generate steam and for domestic and other purposes, and may establish public fountains and hydrants and regulate their use, and discontinue the same, and may collect rates to be paid for the use of the water.

SECT. 2. Said town, for the purposes aforesaid, may take and hold the waters of Nagog Pond, so called, in the towns of Acton and Littleton and the waters which flow into and from the same, and may also take and hold by purchase or otherwise all necessary lands for raising, holding, diverting, purifying and preserving such waters, and conveying the same to any and all parts of said town of Concord, and may erect thereon proper dams, reservoirs, buildings, fixtures and other structures, and make excavations and embankments, and procure and operate machinery therefor; and for such

purposes may construct and lay down, dig up and repair conduits, pipes and other works in, under or over any lands, water courses or railroads, and along any street, highway, alley or other way, in such manner as not unnecessarily to obstruct the same, and may dig up, raise and embank any such lands, street, highway, alley or other way in such manner as to cause the least hindrance to travel thereon.

SECT. 3. Instead of taking the entire waters of said Nagog Pond, said town of Concord may, if it shall so elect, take a part of said waters, such election to be made by a vote of said town declaring the quantity or proportion of said waters to be so taken.

SECT. 4. Within ninety days after the time of taking any lands, waters or water courses as aforesaid otherwise than by purchase, said town shall file in the registry of deeds for the southern district of the county of Middlesex a description thereof sufficiently accurate for identification, with a statement of the purpose for which the same is taken, signed by a majority of the water commissioners of said town; and if said town shall have made the election authorized by section three of this act, said description and statement shall be accompanied by a copy of the vote of said town signifying such election.

SECT. 5. Said town of Concord, if it shall have made the election authorized by section three of this act, may thereafter from time to time, if it shall so elect, take an increased proportion of said waters, each successive election to be made by a vote of said town declaring the additional quantity or proportion of said waters to be so taken, and upon each such successive election and within ninety days thereafter said town shall file in said registry of deeds a description, statement and copy of the vote therefor as provided for in section four of this act.

SECT. 6. If said town shall make the election authorized by section three of this act, said town shall provide a reliable means or method of measuring and registering the amount of water taken, such register or record to be at all times accessible to any interested parties.

SECT. 7. The said town of Concord shall pay all damages sustained by any person in property by the taking of any land, right of way, water, water source, water right or easement, or by any other thing done by said town under the authority of this act; said damages to be based and proportioned in case of the taking of water or water rights upon the amount of water taken as aforesaid. Any person or corporation sustaining damages as aforesaid under this act, who fails to agree with said town as to the amount of damages sustained, may have the damages assessed and determined in the manner provided by law when land is taken for the laying out of highways, on application at any time within three years from the time when the water is actually withdrawn or diverted, and not thereafter. No application for the assessment of damages shall be made for the taking of any water, water right, or for any injury thereto, until the water is actually withdrawn or diverted by said town under the authority of this act.

SECT. 8. Said town of Concord, for the purposes herein authorized, may from time to time borrow money and issue notes, bonds or scrip therefor to an amount not exceeding fifty thousand dollars in addition to the amount already authorized by law in the manner and under the restrictions provided by section four of chapter one hundred and eighty-eight of the acts of the year eighteen hundred and seventy-two.

SECT. 9. The board of water commissioners of said town of Concord shall execute, superintend and direct the performance of all the works, matters and things mentioned in this act and exercise all the rights, powers and privileges hereby granted to said town and not otherwise specifically provided for herein, subject to the vote of said town. The provisions of sections seven, eight, nine and ten of chapter one hundred and eighty-eight of the acts of the year eighteen hundred and seventy-two shall apply to this act as if inserted herein.

SECT. 10. Nothing contained in this act shall prevent the town of Acton nor the town of Littleton from taking the waters of said Nagog Pond whenever said towns or either of them may require the same for similar purposes, and in case of such taking by either of said towns or both of them, if from any reason the supply of water in said pond shall not be more than sufficient for the needs of the inhabitants of the towns of Acton and Littleton, then the needs of the inhabitants of said towns shall be first supplied; and if either of said towns of Acton or Littleton shall hereafter be authorized to take and shall take the waters of said Nagog Pond or any part thereof which the town of Concord may have taken under this act, said town so taking shall pay to said Concord a just and proportionate part of whatever sums the said town of Concord shall have paid or become liable to pay for water damages to any persons or corporations for the taking of water rights from said pond or the outlet thereof, to be ascertained, if the parties shall fail to agree, by three commissioners to be appointed upon the application of either party by the supreme judicial court; the report of said commissioners made after hearing the parties, and returned to and accepted by said court shall be final between the said parties.

SECT. 11. The Commonwealth of Massachusetts shall have the right to take from said Nagog Pond, for use in buildings owned by said Commonwealth in the town of Concord, an amount of water not exceeding two hundred thousand gallons per day, and the said right is hereby reserved. If the said Commonwealth shall take from said pond its waters, or any part thereof, which the town of Concord may have taken under this act, otherwise than by contract with said town of Concord, the said Commonwealth shall pay to said town of Concord a just and proportionate part of whatever sums the said town of Concord shall have paid or become liable to pay for water damages to any persons or corporations for the taking of water rights from said pond or the outlet thereof, to be ascertained and determined as is provided for in section ten of this act. But if upon the expiration of the contract made on the first day of October in the year eighteen hundred and eighty-three between the said town of Concord and said Commonwealth to provide for the delivery of water from the Concord water works for use within the walls of the state prison, said town of Concord by its water commissioners shall renew said contract for five years on the terms named therein, or shall tender to the governor of the Commonwealth a renewal of said contract for five years on the terms named therein, with the option upon the part of said Commonwealth of a further renewal for a term of twenty years upon said terms, then the right of said Commonwealth herein provided for shall cease.

SECT. 12. This act shall take effect upon its passage, but shall become void unless it is accepted by a vote of said town of Concord at a legal meeting held for the purpose within one year from its passage. [Approved April 30, 1884.]

Acton & Littleton are
to be first supplied
if from any reason
the supply of water
in said pond shall
not be more than
sufficient for the
needs of the
inhabitants of
the towns of
Acton and
Littleton

Attachment 2:

Meeting Minutes – Water Supply District of Acton, March 28, 2016

Commissioners Meeting
Water Supply District of Acton
Meeting Minutes
March 28, 2016

Agenda:

- A. Comments from Citizens
- B. Approve Minutes from the March 7, 2016 Meeting
- C. OLD BUSINESS:
 - 1. Town of Concord's Proposed Connection to the District off Knox Trail to Supply Their School Bus Depot.
 - 2. Nagog Pond Water Rights
 - 3. Nuclear Metals Superfund Update
- D. NEW BUSINESS:
 - 1. Reserve Fund transfer to Legal Account
 - 2. Spring Water Main Flushing

The Board of Water Commissioners meeting was called to order at 7:30 pm on Monday, March 28, 2016 at the Acton Water District Office by Mr. Ronald Parenti.

Present at Tonight's Meeting:

Commissioners: Ronald Parenti (Chair), Leonard Phillips, Stephen Stuntz
District Manager: Chris Allen
District Treasurer: Mary Jo Bates
Finance Committee: Bill Guthlein
WLMAC: John Cipar
Bob Sekuler, 17 Parkland Lane
Barry Elkin, 57 Skyline Drive
Franny Osman

A. Comments from Citizens:

Mr. Sekuler and Mr. Elkin are present for the Town of Concord proposed connection to the system and the Nagog Pond Water rights. Mr. Sekuler had written the letter to the Editor that was in the Acton Beacon regarding Nagog Pond when he read that Concord would be utilizing the pond to give their wells a rest. He updated the Commissioners that as a "great pond," Nagog is actually owned by the Commonwealth of Massachusetts. Concord owns land around the pond. He distributed copies of the original act. Mr. Elkin questioned whether Acton has access to the pond. Mr. Allen said that the Nagog Hill Tank abuts the pond.

Mr. Allen updated the Board on the meeting with Katie Green and Steve Ledoux from the town of Acton. The Acton BOS has written a letter to Rep. Atkins, who suggested that the BOS from both Towns should meet and discuss this issue. Concord was not interested at this time.

Ms. Osman asked about the future water needs for Acton and if our supply can handle projected demand. Mr. Allen said that currently we are using below our permitted withdrawal of 1.94mgpd. The current permit renewal is requested at the same rate we have now. Ms. Osman asked if Acton could supply those services in Acton that Concord currently supplies. Concord is currently not taking on any additional

Acton customers. Mr. Allen responded that we could, but there is no water main in that section of Town. There would need to be infrastructure upgrades.

Ms. Osman inquired if the Commissioners would express an opinion on Nagog Pond. Mr. Parenti indicated that there are legal issues as well as feasibility issues. Discussion continued about the capacity of the pond, new source permitting, and future growth projections.

Mr. Allen has discussed purchasing additional water from Littleton in the event of a shutdown of any of our South Acton sources. The South Acton Treatment Plant has room for additional treatment if that would be needed in the future.

B. Approve Minutes of March 7th meeting:

Mr. Stuntz moved to accept the minutes of the meeting held on March 7, 2016 and Mr. Parenti seconded the motion and it was unanimously approved.

C. Old Business:

1. Town of Concord's Proposed Connection to the District off Knox Trail

Mr. Allen updated the Commissioners that the Town of Concord intends to drill a bedrock well for their use at Knox Trail.

2. Nagog Pond Water Rights

Discussed above in Comments from Citizens.

3. Update on the Nuclear Metals Superfund Site.

Mr. Allen informed the Commissioners that the S. Acton wells had been turned off for a week and they are currently back on line pumping at the summer rate to assist with data collection. The most recent 1.4 dioxane testing showed levels below .3. New data is expected in April from the most recent sampling.

D. New Business:

1. Reserve Fund Transfer to Legal Account

The request is to transfer \$25K to the Legal Account. This is due to the increased legal costs associated with the NMI Superfund site. The Finance Committee approved the request at their last meeting.

Mr. Parenti made a motion to approve the transfer and Mr. Stuntz seconded it. The motion was unanimously approved.

2. Spring Water Main Flushing

Mr. Allen stated that the Spring flushing program will begin April 4 in Acton Center. Flushing will be done Monday through Thursday between the hours of 8:00 am and 8:00 pm. If time permits, there may be additional flushing in S. Acton.

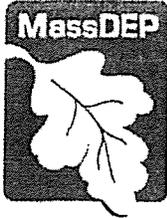
Mr. Allen also informed the Commissioners that the S. Acton Treatment Plant has been chosen as the tour site for the NEWWA Annual conference to be held this week on Wednesday and Thursday. 100 are expected to tour the facility over 2 days.

The District will hold an open house at the South Acton Water Treatment Plant on Saturday, May 7, 2016.

Mr. Parenti moved to adjourn the meeting at 8:25 pm and it was unanimously approved.

Attachment 3:

DEP Northeast Regional Office December 29, 2015 MEPA Comments



Commonwealth of Massachusetts
Executive Office of Energy & Environmental Affairs

Department of Environmental Protection

Northeast Regional Office • 205B Lowell Street, Wilmington MA 01887 • 978-694-3200

Charles D. Baker
Governor

Karyn E. Polito
Lieutenant Governor

Matthew A. Beaton
Secretary

Martin Suuberg
Commissioner

December 29, 2015

Matthew A. Beaton, Secretary
Executive Office of
Energy & Environmental Affairs
100 Cambridge Street
Boston MA, 02114

RE: Acton/Concord
Nagog Pond Water Treatment Plant
180 & 182 Skyline Drive
EEA # 15446

Attn: MEPA Unit

Dear Secretary Beaton:

The Massachusetts Department of Environmental Protection Northeast and Central Regional Offices (MassDEP-NERO and CERO) have reviewed the Environmental Notification Form (ENF) submitted by the Concord Public Works, Water & Sewer Division to demolish an existing disinfection facility and replace it with a two-story water treatment plant (7,165 square feet) in the same area of the 59.793 acre site in Acton (EEA #15446). The treatment plant is designed as a zero discharge facility, where all waste will be recycled, except sanitary waste. The existing 16-inch cast iron intake pipe in Nagog Pond, which is over a century old, will be replaced by a 16-inch high density polyethylene (HDPE) pipe. Concord also will construct a solar photovoltaic (PV) array, (17,768 sf on a 68,743 sf site) to provide power to the new facility.

Nagog Pond, located in the Towns of Acton and Littleton, is a public surface water supply for the Town of Concord. The intake pipe for the water supply and an ozone disinfection facility are located in Acton. Additional chemical treatment of the Nagog Pond water is provided at a pump station on State Route 2A. The remainder of the land is undeveloped to protect the watershed of the public water supply. MassDEP provides the following comments.

Concord proposes to construct a water treatment plant with a capacity of 1.5 million gallons per day. The water pumped from Nagog Pond will be treated at the plant via potassium permanganate for pre-oxidation, polyaluminum chloride for coagulation, flocculation, dissolved air flotation for clarification, ozone for primary disinfection, granular activated carbon filtration for particulate removal, potassium hydroxide for pH adjustment, zinc orthophosphate for corrosion control, sodium hypochlorite for secondary disinfection, and sodium fluoride for

fluoridation. Concord has conducted a treatability study of the proposed treatment method. MassDEP approved a pilot study report that presented the results of this study on March 25, 2015.

MassDEP presumes that construction of the proposed filtration plant will eliminate the use of the Rte. 2A pump station as a treatment facility. However, this is not explicitly stated in the ENF.

The design plans and specifications for the proposed treatment plant, including the design for the new intake, must be reviewed and approved by MassDEP prior to construction. As noted in the ENF, this will constitute an application for MassDEP Permit Category BRPWS24, "Approval to Construct a Facility to Treat One Million Gallons per Day or Greater." In its review of the ENF, MassDEP has not reviewed the "Permitting Design Plans" presented in Appendix D.

Concord presently has a "Filtration Avoidance Waiver" for Nagog Pond, in accordance with the Surface Water Treatment Rule (SWTR). SWTR imposes rigorous requirements for use of a public surface water supply that does not provide filtration treatment. As a result, Concord has tended to use Nagog Pond in recent years on a limited basis to meet peak seasonal demand. In 2014, Nagog Pond provided only about four percent of Concord's water supply. Construction of the proposed facility will allow Concord to meet the filtration standard of SWTR. This will give the Town more flexibility in management of its water sources. Concord is likely henceforth to use Nagog Pond more often as a water source as a result of constructing the facility, which in turn means that it will likely withdraw less water from its municipal wells.

The MassDEP Drinking Water Program (DWP) has prepared a guideline titled "Information to be Submitted to MassDEP for Proposed Wind and Solar Energy Projects on Lands Owned or Controlled By Public Water Systems for Drinking Water Purposes." This document applies to all wind and solar energy projects on lands held by public water systems for drinking water purposes; it is accessible at the following MassDEP website: <http://www.mass.gov/eea/docs/dep/water/laws/numeric/1101g.pdf>. The guideline requires that a public water supplier must submit a written certification to MassDEP that proposed projects will not have a significant adverse impact upon the water supply, and describes the documentation that must be submitted to support this finding. If the certification and documentation are submitted to DWP in accordance with this guideline, presumptive approval will occur unless MassDEP denies the request or requests additional information within 30 days of its receipt of the submittal. Because of this timeline, the submittal should be made to MassDEP separately from the BRPWS24 permit application submittal. The PV array submittal must be made prior to construction of the PV array, but does not need to be concurrent with the BRPWS24 permit application. Concord should consult with Town counsel to determine whether approval under Article 97 of the Massachusetts Constitution may be required for the change of land use associated with the PV array.

The ENF does not state whether Concord intends to lease or otherwise convey a portion of its property at Nagog Pond to another party for operation of the PV array.

The ENF does not describe the plans for an emergency power supply for the treatment plant. An emergency power generator for the plant may require an air quality permit from MassDEP, in accordance with 310 CMR 7.02. If the engine in the generator will have a rated power output of 37 kilowatts or more, and was constructed, substantially reconstructed or altered after March 23, 2006, then Concord must comply with the requirements of 310 CMR 7.26(42).

Wetlands

Nagog Pond is classified an Outstanding Resource Water (ORW). Construction activities associated with the project will temporarily alter approximately 712,543 square feet of Land Under Waterbodies (LUWB) and permanently alter 290 square feet of LUWB to install a water intake structure. This will be achieved through a temporary drawdown of the pond. There is an additional 46,602 square feet of work proposed within the 100-foot buffer zone to Nagog Pond. The ENF indicates that the project conforms to the stormwater regulations at 310 CMR 10.05(6) 2 (k) 1-10 inclusive. The following comments are offered.

- 1) Given the amount of temporary and permanent impacts to LUWB associated with the drawdown of the pond, the proponent will be required to file a 401 Water Quality Certification (WQC) pursuant to 314 CMR 9.00. As long as less than 100 cubic yards of LUWB is proposed, it is unlikely that a 401 WQC for dredging will be required from DEP Wetlands in Boston.
- 2) The proponent should discuss how turbidity will be minimized and controlled (i.e., using silt curtains, booms, etc.), during dredging of the pond bottom. An erosion control specialist or monitor is recommended to be onsite or conduct regular inspections of erosion, sedimentation and turbidity controls during construction.
- 3) The proponent should consult with the US Army Corps of Engineers (USACOE) to determine if a 404 permit is required.

Recycling Issues

MassDEP applauds the proponents for proposing 100 percent recycling to become a zero discharge facility. In addition, the proponent is advised that demolition activities must comply with both Solid Waste and Air Pollution Control regulations, pursuant to M.G.L. Chapter 40, Section 54, which provides:

“Every city or town shall require, as a condition of issuing a building permit or license for the demolition, renovation, rehabilitation or other alteration of a building or structure, that the debris resulting from such demolition, renovation, rehabilitation or alteration be disposed of in a properly licensed solid waste disposal facility, as defined by Section one hundred and fifty A of Chapter one hundred and eleven. Any such permit or license shall indicate the location of the facility at which the debris is to be disposed. If for any reason, the debris will not be disposed as indicated, the permittee or licensee shall notify the issuing authority as to the location where the debris will be disposed. The issuing authority shall amend the permit or license to so indicate.”

For the purposes of implementing the requirements of M.G.L. Chapter 40, Section 54, MassDEP considers an asphalt, brick, and concrete (ABC) rubble processing or recycling facility, (pursuant to the provisions of Section (3) under 310 CMR 16.05, the Site Assignment regulations for solid waste management facilities), to be conditionally exempt from the site assignment requirements, if the ABC rubble at such facilities is separated from other solid waste materials at the point of generation. In accordance with 310 CMR 16.05(3), ABC can be crushed on-site with a 30-day notification to MassDEP. However, the asphalt is limited to weathered bituminous concrete, (no roofing asphalt), and the brick and concrete must be uncoated or not impregnated with materials such as roofing epoxy. If the brick and concrete are not clean, the material is defined as construction and demolition (C&D) waste and requires either a Beneficial Use Determination (BUD) or a Site Assignment and permit before it can be crushed.

Pursuant to the requirements of 310 CMR 7.02 of the Air Pollution Control regulations, if the ABC crushing activities are projected to result in the emission of one ton or more of particulate matter to the ambient air per year, and/or if the crushing equipment employs a diesel oil fired engine with an energy input capacity of three million or more British thermal units per hour for either mechanical or electrical power which will remain on-site for twelve or more months, then a plan application must be submitted to MassDEP for written approval prior to installation and operation of the crushing equipment.

The demolition activity also must conform to current Massachusetts Air Pollution Control regulations governing nuisance conditions at 310 CMR 7.01, 7.09 and 7.10. As such, the proponent should propose measures to alleviate dust, noise, and odor nuisance conditions, which may occur during the demolition. Again, MassDEP must be notified in writing, at least 10 days in advance of removing any asbestos, and at least 10 days prior to any demolition work. The removal of asbestos from the buildings must adhere to the special safeguards defined in the Air Pollution Control regulations, (310 CMR 7.15 (2)).

Waste Ban Regulation – 310 CMR 19.017

Section 310 CMR 19.017 Waste Bans of the Massachusetts Solid Waste regulations prohibit the disposal of certain wastes in Massachusetts. These wastes include, but are not limited to, recyclable paper (including cardboard). On October 1, 2014, the Massachusetts Organics Waste Ban on the disposal of commercial organic wastes by businesses and institutions takes effect. It prohibits the disposal of organic wastes from businesses and institutions that generate a ton or more of organic materials per week, which necessitates the composting, conversion (such as anaerobic digestion), recycling or reuse of organic the waste.

As the lead state agencies responsible for helping the Commonwealth achieve its waste diversion goals, MassDEP and EEA have strongly supported voluntary initiatives to institutionalize source reduction and recycling into their operations. Adapting the design, infrastructure, and contractual requirements necessary to incorporate reduction, recycling and recycled products into existing large-scale developments has presented significant challenges to recycling proponents. Integrating those components into developments such as the Nagog Pond Water Treatment Plant at the planning and design stage enables the project's management and occupants to establish and maintain effective waste diversion programs. For example, layout and

design that provides sufficient space and electrical services will support consolidating and compacting recyclable material and truck access for recycling material collection.

By incorporating recycling and source reduction into the design, the proponent has the opportunity to join a national movement toward sustainable design. Sustainable design was endorsed in 1993 by the American Institute of Architects with the signing of its *Declaration of Interdependence for a Sustainable Future*. The project proponent may be aware of organizations that provide additional information and technical assistance, including Reuse Marketplace (<http://www.reusemarketplace.org/>), USEPA's WasteWise Program (www.epa.gov/wastewise/), and MassRecycle (<http://www.massrecycle.org/>). The listed organizations and programs are notable for offering valuable and effective waste reduction and recycling assistance, web-based resources, case studies, and tools for C&D projects.

The MassDEP Northeast and Central Regional Offices appreciate the opportunity to comment on this proposed project. Please contact James.Persky@state.ma.us at (978) 694-3227 in MassDEP-NERO for further information on the water supply issues, Joseph.Bellino@state.ma.us, at (508) 767-2709, and Kevin.Tyson@state.ma.us at (617) 292-5705 if you have questions regarding the air quality requirements for the emergency power generator. If you have any general questions regarding these comments, please contact Nancy.Baker@state.ma.us, MEPA Review Coordinator in MassDEP NERO at (978) 694-3338 and Stella.Tamul@state.ma.us, MEPA Review Coordinator in MassDEP CERO at (508) 767-2763.

Sincerely,

This final document copy is being provided to you electronically by the Department of Environmental Protection. A signed copy of this document is on file at the DEP office listed on the letterhead.

John D. Viola
Deputy Regional Director

cc: Brona Simon, Massachusetts Historical Commission
Kevin Tyson, MassDEP-Boston
Tom Mahin, Jim Persky, Sean Griffin, Nick Zessoules, MassDEP-NERO
Stella Tamul, Joe Bellino, MassDEP-CERO

Attachment 4:

July 7, 2016 Email from Chris Allen, Acton Water District

Fwd: A few questions

rsekuler

Mon 10/10/2016 4:27 PM

Inbox

To: Carolyn Kiely <cmkiely@msn.com>;

"If stupidity got us into this mess, then why can't it get us out?"

—Will Rogers

Begin forwarded message:

From: Chris Allen <Chris@actonwater.com>

Subject: A few questions

Date: July 7, 2016 at 11:51:51 AM EDT

To: rsekuler <sekuler@brandeis.edu>

Good morning, Bob.

Answers to the best of knowledge below in RED

Chris:

Sorry to bother you, but I've got a few questions I'd been meaning to ask someone at the AWD. I had intended to come to another meeting of the AWD commissioners in order to ask these questions in person, but something prevents me from attending. So here goes.

Editorials in the Beacon and in the Concord Journal two weeks ago claimed that Acton had asked Concord whether it would provide additional water to Acton in case of an emergency. I was wondering if the AWD's request was prompted by the dioxane plume, or whether it was just a normal precaution that AWD makes this time of year. I was also interested in what Concord's response was, after all, Concord claims again and again that is an excellent, cooperative neighbor when it comes to water and other things. Concord was approached due to the possibility of shutting down the Assabet 1A source for the aquifer restoration from the Nuclear Metals contamination; this was due diligence requested by MA DEP. Littleton Water was also approached. Concord did not quantify the excess capacity that they may be able to supply, but said it would require further investigation. Littleton did provide us with a daily volume, and per unit cost. We did not approach Maynard, as we are aware that they do not have excess capacity. We currently have emergency interconnects with Concord, Littleton & Maynard.

Chris Allen

On another front, I and my neighbors near Nagog Pond have been wondering what impact we'd see if Concord were to draw all or most of its water supply from the Pond for a protracted period while it rested its wells. I don't know the exact depth of the pond, but have been told it's actually pretty shallow. I also have no clue to the recharge rate of the Pond. Can you or Matt give me some idea of how much the Pond's water level might drop, if at all, should Concord drew all its water there? I'm particularly

interested in the possibility that falling water level in the Pond would expose more of shoreline. As with any surface water reservoir, withdrawal in excess of recharge will deplete overall volume. Since Nagog Pond is largely recharged by surface runoff, I assume, especially given the recent below average precipitation, and falling water table, sustained withdrawal would cause the overall level to fall, and expose shoreline. To what degree, I'm not sure. Concord is limited by permitted withdrawal of how much they can extract from the pond per day; I believe that is 1.5-million gallons per day (MGD). If they were to sustain withdrawal at their permitted rate, I'd assume depletion of the overall pond volume would occur. Concord's seasonal outdoor watering restriction is nowhere near the degree of our program. I believe that in the past, I'd heard that the depth of the pond is 35' at its greatest.

Mr. Allen
answered

Finally, my visit to the May Open House at the AWD's new plant got me interested in learning about the complexities our water supply. Because of my home's proximity to Nagog, I began by reading the DCR's online document "The Massachusetts Lake and Pond Guide" (2004), and learned a lot about water and ponds from it. Can you recommend anything else, perhaps more general and short, that would be suitable for a modestly intelligent layperson (me)? MA DEP would be a potential source of many resources on the environment in MA, drinking water, stormwater, etc. For specifics related to us, our website at www.actonwater.com is a great resource. You could also try EPA's website at EPA MA

Mr. Allen
answered

Many thanks.

Bob Sekuler
17 Parkland Lane
Acton

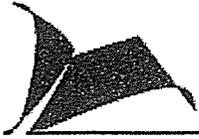
Chris Allen
District Manager
Water Supply District of Acton
PO Box 953
693 Massachusetts Ave
Acton, MA 01720
Ph# 978-263-9107
Fax# 978-264-0148
Email: chris@actonwater.com

"When the well's dry, we know the worth of water"—Benjamin Franklin 1776

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Attachment 5:

Court case -- Cesar A. Mendes v. Board of Appeals of Barnstable (28 Mass.
App. Ct. 527 [1990])



CESAR A. MENDES vs. BOARD OF APPEALS OF
BARNSTABLE & others. [Note 1]

28 Mass. App. Ct. 527

January 11, 1990 - April 17, 1990

Barnstable County

Present: BROWN, DREBEN, & KASS, JJ.

Where business use of a certain parcel of land had begun by virtue of a zoning variance granted by a town's board of appeals after the locus was already zoned for residential use, and where the town thereafter adopted no by-law amendment further restricting the use of the locus, the business use was not a "pre-existing nonconforming use" which the owners could alter or extend under a special permit issued pursuant to G. L. c. 40A, Section 6. [529-532]

CIVIL ACTION commenced in the Superior Court Department on October 9, 1987.

The case was heard by Herbert F. Travers, Jr., J.

Michael D. Ford for Charles D. Rogers & another.

KASS, J. Rogers and Marney (the "owners") operate a construction company and are the owners of a parcel of land, containing close to four acres, on Osterville/West Barnstable Road in Barnstable (the "locus"), located in a residence zoning district. Under successive variances, granted to them in 1969, 1972, and 1980, the owners erected a building for construction shop work, an addition to that building, and a storage yard for construction materials and equipment.

In 1985, the owners wished to add still further to their building but a change in Barnstable's zoning by-law ruled out cutting another slice of the salami through use of the

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variance procedure as the means to that end. At their 1983 annual town meeting, the inhabitants of Barnstable had amended Section Q.2.(e) of the town's zoning by-law to provide that "no [use] variance shall be granted within 300 feet of the major arteries known as Route 28, Route 132, Route 149, and West Main Street." [Note 2] The locus is located in part within 300 feet of Route 28.

Thus barred from pursuing a variance, the owners applied for a special permit for their proposed addition under Section G.B. of the zoning by-law, [Note 3] which authorized the board to grant a special permit for an "increase in size of an existing non-conforming building or structure to extend the non-conforming use on the same lot" [Note 4] The owners reasoned that, as their building did not comply with the use restrictions of the residence zone in which it was located but was there lawfully, it was a nonconforming use. Ergo, it could be added to under a special permit. After several false starts, the owners in 1987 secured a special permit to build a 4,556 square

foot addition. A Superior Court judge annulled the permit on the ground that the owners' use of the locus was not nonconforming. He was right and we affirm.

The flaw in the owners' argument lies in a failure to appreciate the statutory meaning of the phrase "nonconforming use." As used in the first paragraph of Section 6 of The Zoning Act (G. L. c. 40A, as inserted by St. 1975, c. 808, Section 3) [Note 5] and

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Section G. A. of the town by-law, a nonconforming use is one which is lawfully carried on at the time a provision of a zoning code or an amendment to the zoning code is adopted which prohibits that use. So it is that Section 6 speaks of "structures or uses lawfully in existence . . . before the first publication of notice [Note 6] of the public hearing on [the prohibitive zoning] ordinance or by-law." That point, that the rights attaching to nonconformity pertain to a use extant prior to commencement of the process leading to adoption of provisions which prohibit that use, is driven home in the next sentence of the first paragraph of Section 6, which sets out the basis on which "[p]re-existing nonconforming structures or uses" (emphasis supplied) may be extended or altered.

Guided by the The Zoning Act, Section G. A. of the town by-law describes a nonconforming use as "[a]ny lawful use of a building or premises, or part thereof, *existing at the time the zoning by-law was originally adopted in the area in which such building or use is . . . located*" (emphasis supplied). Again, the reader will note, a use achieves the status of nonconformity

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conformity for statutory purposes if it precedes the coming into being of the zoning regulation which prohibits it. This is the construction supported by the cases. See *Connors v. Burlington*, 325 Mass. 494 , 495 (1950); *Morin v. Board of Appeals of Leominster*, 352 Mass. 620 , 623 (1967); *Cullen v. Building Inspector of No. Attleborough*, 353 Mass. 671 , 673-674 (1968). [Note 7] See also *Powers v. Building Inspector of Barnstable*, 363 Mass. 648 , 651-652 (1973); *Tamertane Realty Trust v. Board of Appeals of Provincetown*, 23 Mass. App. Ct. 450 , 454-455 (1987); *Willard v. Board of Appeals of Orleans*, 25 Mass. App. Ct. 15 (1987). By way of example, if, when the locus was first classified by the town as Residence F, permitting only residential use, a building used for offices and manufacturing ancillary to the construction business had been on the site, that would have been a classic nonconforming use.

In the instant case, since the time the owners first began to use the locus for construction business purposes, the town has adopted no by-law amendment which further restricts or alters the use restrictions which have at all times been impressed on the locus. The owners' use of the premises has never been permitted by the town's zoning regulations and has never been nonconforming in the special sense that it existed "at the time the [use restricting] zoning by-law was originally adopted [or amended]." Section G.A. of the town by-law. See also G. L. c. 40A, Section 6, 1st par. Use of the site for the construction business began only after the locus was already zoned for residence use. It came about, not through preexisting right, deprivation of which might raise constitutional questions, but through the after-the-fact dispensation of a variance.

For purposes of deciding whether a use is nonconforming within the meaning of G. L. c. 40A, Section 6, the question is not merely whether the use is lawful but how and when it became lawful. It would be anomalous if a variance, by its nature sparingly granted, [Note 8] functioned as a launching pad for expansion as a nonconforming use. Variance procedures pre-suppose the prohibition of the use sought and operate as a safety valve to relieve an owner of real estate from the hardship of compliance with a zoning regulation resulting from particular physical characteristics that burden the real estate. *Norcross v. Board of Appeal of Boston*, 255 Mass. 177 , 184-186 (1926). *Hammond v. Board of Appeal of Springfield*, 257 Mass. 446 , 447-448 (1926). *Everpure Ice Mfg. Co. v. Board of Appeals of Lawrence*, 324 Mass. 433 , 439 (1949).

The statutory criteria for a variance set out in G. L. c. 40A, Section 10, are demanding, and variances are difficult to obtain. *Gamache v. Acushnet*, 14 Mass. App. Ct. 215 , 217 & n.6 (1982). By comparison, the special permit power presupposes the allowance of certain uses, but only with the sanction of the local permit granting authority acting in accordance with the fairly flexible criterion of "harmony with the general purpose and intent of the ordinance or by-law." G. L. c. 40A, Section 9, 1st par., as inserted by St. 1975, c. 808, Section 3. In view of the different approaches to the grant of a variance and a special permit, the former grudging and restricted, the latter anticipated and flexible, [Note 9] we do not think the Legislature intended in G. L. c. 40A, Section 6, to authorize the expansion of uses having their genesis in a variance pursuant to the more generous standard applicable to a special

permit. See *Kiss v. Board of Appeals of Longmeadow*, 371 Mass. 147 , 153-154 (1976), and cases cited; *Shalbey v. Board of Appeal of Norwood*, 6 Mass. App. Ct. 521 , 529 (1978). Compare *Vasilakis v. Haverhill*, 339 Mass. 97 , 99 (1959), and *Vokes v. Avery W. Lovell Inc.*, 18 Mass. App. Ct. 471 , 473, 485 & n.22 (1984), in which there appears language which could be read to mean that the court viewed a use begun under a variance as having the status of a nonconforming use. In neither case, however, did the holding turn on an analysis of the statutory meaning of nonconforming use.

For the reasons stated, the administrative remedy of seeking expansion of a nonconforming use was not available to the owners.

Judgment affirmed.

FOOTNOTES

[Note 1] Charles D. Rogers and Edison C. Marney, who had obtained from the board of appeals the special permit which is the subject of the appeal.

[Note 2] The by-law amendment was approved by the Attorney General February 4, 1984.

[Note 3] A listing of the relevant purposes for which the board may grant special permits for exceptions to the zoning by-law appears in Section P.A.4. of the zoning by-law.

[Note 4] The by-law provision elaborated on the power conferred by The Zoning Act on permit granting authorities to extend or alter preexisting nonconforming uses upon a finding that "such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood." G. L. c. 40A, Section 6, 1st par., as inserted by St. 1975, c. 808, Section 3.

[Note 5] The full text of G. L. c. 40A, Section 6, 1st par., is as follows:

"Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by section five, but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of said public hearing, to any reconstruction, extension or structural change of such structure and to any alteration of a structure begun after the first notice of said public hearing to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent except where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure. Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood. This section shall not apply to billboards, signs and other advertising devices subject to the provisions of sections twenty-nine through thirty-three, inclusive, of chapter ninety-three, and to chapter ninety-three D."

[Note 6] This is a reference to the procedure prescribed in G. L. c. 40A, Section 5, for adopting or amending a zoning ordinance or by-law. The process begins with publication of notice that there shall be a public hearing on the proposed zoning enactment.

[Note 7] Although these cases were decided before the enactment of the currently effective Zoning Act (St. 1975, c. 808 Section 3), the predecessor act (St. 1954, c. 368, Section 2) placed a similar provision in what, under the old act, appeared as G. L. c. 40A, Section 5: "a zoning ordinance or by-law or any amendment thereof shall not apply to existing buildings or structures, nor to the existing use of any building or structure, or of land to the extent to which it is used at the time of adoption of the ordinance or by-law"

[Note 8] *Gamache v. Acushnet*, 14 Mass. App. Ct. 215 , 217 & n.6 (1982), and cases cited.

[Note 9] Under the relatively flexible standard applicable to the allowance of a special permit, the power of a local board to grant a special permit is a discretionary one and such a decision can be reversed only if arbitrary, capricious, whimsical or based on a legally untenable ground.

Pendergast v. Board of Appeals of Barnstable, 331 Mass. 555 , 559-560 (1954). Subaru of New England, Inc. v. Board of Appeals of Canton, 8 Mass. App. Ct. 483 , 486-487 (1979).

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