

**TOWN OF DOVER ZONING BOARD OF APPEALS REGULAR MEETING HELD ON WEDNESDAY, August 4, 2010, AT 7:00 P.M. AT THE DOVER TOWN HALL:**

**PRESENT:** Chair Marilyn Van Millon  
Member George Wittman  
Member Henry Williams  
Member Debra Kaufman  
Member Anthony Fusco

Also in attendance was Secretary to the Board, Maria O’Leary, and Attorney Michael Liguori.

Chair Van Millon called the meeting to order at 7:02 p.m. and began with the Pledge of Allegiance. She then read the first item on the Agenda as follows:

CONTINUED DISCUSSION/PUBLIC HEARING - **LukOil** - Z 2009-07 – The applicant seeks to appeal Sections 145-39 C. (2) and D. (3) of the Town of Dover Zoning Law. The requested area variances would, if granted, allow the applicant to have a freestanding price sign exceeding the 16’ maximum dimension by 9’ and exceeding the 10’ height maximum by 2.6’ and also be internally illuminated. This property is located at 3160 NY Route 22 in Dover Plains, NY, and is located in the HM district on tax map #7063-11-534507.

In attendance was Rob Spiak of CoreStates Group to speak on behalf of LukOil. Mr. Spiak was sworn in.

Mr. Spiak: As you are all aware, it has been a couple of months since we’ve been here, and May was the last Agenda I was here. In the meantime, I know we’ve received a letter recently from your counsel discussing the application and the possibility of relocating the freestanding sign as part of this application. I can refresh the Board and go through the whole application, if you’d like, or we can just pick up from where we left off.

Chair Van Millon: Pick up from where we left off.

Mr. Spiak: Basically, what we’re proposing to do is, it was a former Citgo site, it was refaced to LukOil. We now have a dealer in there who’s operating the station, and we’re asking for three variances, one for the overall height of the sign, one for the size of the price sign and the last for internal illumination. As your counsel noted, we put the plywood up at the site, you went out and took a look at it and obviously there are some conflicts with other existing signs in the area, which is something we talked about last May also. At this time, there are a lot of expenses associated with picking up and relocating that sign with new footings, foundations, etc., so we’re not as inclined to be open to that suggestion. The only way that would sort of make sense for us is if we’re able to pick up the entire sign “as-is” and relocate it, which would involve a greater height variance if the Board were willing to entertain that. Beyond that as stated at the last meeting related to the illumination, we know our competitors still have illumination out there. We were informed that they had been notified by the Code Enforcement Officer. We’re just trying to keep competitive with our neighbors here and we would like to keep the internal illumination until such a time that our competitors are also in compliance and would have no issue of a condition of that. Again, we’re looking to lower the height of the sign to bring it almost into compliance with the Code. We’re reducing the square footage on the property from Citgo by about 22 square feet overall, so we think we’re making some improvements in still keeping in

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character with the neighborhood and all the other statutory criteria this Board is supposed to be reviewing as part of this application. Beyond that, I'd be happy to answer any questions you have.

Chair Van Millon: When the boards were put up, when you drive south on 22, they block all the other signs that are in compliance. Coming north, the signs when lowered like that, those signs are going to be blocking your price sign and I don't think anybody took that into consideration when you went to the ARB originally.

Mr. Spiak: I think originally the closest sign, the Mexican restaurant sign, wasn't there, and that was the location that they chose; it's one of those situations where we sort of there first. We're trying to comply. The only other solution is leaving the sign in that location to keep the sign exactly as it is today as related to the height, and I'm sure if the Board is willing to entertain the additional height variance and leave the sign alone on that end, which would be, I believe, that it's current height of 22' 6" versus the required 10'. There is a large amount of cost to remove that sign and relocate it to the opposite side of the property. We did look at that and we also don't feel that there's even enough room in the corner of the property over there. The pavement is basically over the line over there, and also the curb cut opening, so you're sort of putting the sign in the curb cut; new curbing would have to be constructed and foliage would have to be replaced around the sign to protect it from vehicles also.

Member Wittman: We have a few things to consider. The first thing I think that maybe we should look at is the internal illumination. If we get that out of the way, then I think we can talk about some of the other things. I personally think that the internal illumination is a pretty clear "yes or no" decision to make, where as the other one gets involved in square footage and height. My personal feeling is that, I understand what you're saying about there are other people that have internal illumination, they're in violation and they have been cited. My personal feeling is that the Zoning Law is pretty clear on this. The fact that somebody else is in violation does not allow any applicant to automatically ask for something like that. I personally think that we should comply with the Zoning Law and the other people will eventually be in compliance with the Zoning Law.

Member Williams: I agree. Two wrongs don't make a right; we need to get the other people in compliance. We can't add another wrong on top of another wrong; it's not going to make it right.

Mr. Spiak: We understand that, too, it never hurts to ask.

Attorney Liguori: Cumberland just came in and removed the internal illumination.

Chair Van Millon: They did, I noticed that the other illuminated signs are coming into compliance; they went in front of the ARB.

Member Kaufman: With the boards up, I didn't think it looked right. It's going to block other people's signs.

Member Wittman: The way the boards were, those boards were the exact same size as the currently existing signs, correct?

Mr. Spiak: Yes.

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Member Wittman: You're asking for an increase in the square footage there exceeding the 16 square foot maximum?

Mr. Spiak: That's correct, we're asking for 25 square feet.

Member Wittman: The only thing I can see is that if we want to minimize the amount of confusion of that whole there is to keep the signs the same size as they are now. Not having actually seen that dimension at that size square footage on the boards up there, I can't really say how much that's going to improve the situation, but I'm just trying to see what we can do about getting this thing moving along.

Mr. Spiak: If the Board chose to deny the variance for the square footage of the price sign, in effect, the price sign is going to be in the same location anyway, it's just going to be smaller on those poles there.

Member Wittman: If you go with the 10' height, you would start at the top and have the two signs down there, actually they would be the same, 5' wide, and be just a little less in height. In order to reduce the square footage, you're going to have to reduce one of the dimensions.

Mr. Spiak: Correct, and I don't know which one that would be at this moment, but in effect, you're staring at the same issue, though.

Member Wittman: My feeling is that if we went with the reduced height figure, and did not grant the square footage variance, and did not grant the internal illumination variance that I think that would probably be the best solution to the problem.

Member Kaufman: The only thing I have to comment on is can you put the pricing in the canopy somehow, this way it could be seen? I'm just wondering if that's something that could be done.

Mr. Spiak: The problem with getting it up on the canopy and not being able to internally illuminate it is you're going to lose it at night.

Member Kaufman: Don't they have digital ones?

Mr. Spiak: If there were such an option like that for digital or something like that, which I'm pretty sure there's not, then that certainly would be a consideration, but losing the illumination would most likely you're going to be some sort of ground and over the top of the sign illumination at this point in doing that on top of the canopy just doesn't work well and I don't think it would look right either because then you have additional spot lights staring up and the illumination's coming down and I don't think that's what this Board would like to see.

Member Wittman: If we went with that type of solution to this I would also like to assign places high up on that 10' post as possible. I have a feeling that's probably what you wanted to do anyway, you want to get those signs up as high as possible.

Mr. Spiak: Absolutely, we would prefer to leave it at the 22' 6" height.

Member Wittman: That reduces the amount of confusion between your signs and the signs for the other people there because there's more room underneath and your sign goes up above their sign.

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Mr. Spiak: Obviously they went in there and just changed those panels out and that's why I'm here tonight. I'd probably request that based on what I'm hearing tonight, I go back and look at what other sign panels may be available to utilize there that would solve the clearance issue, and maybe get this to where we're all happy at the end of the day and everything is seen and we're not blocking anybody on there.

Member Wittman: Are you saying then that you don't want us to make a decision on this tonight?

Mr. Spiak: I think I may have some other options that will make everybody happy at the end of the day. For the purposes of record keeping, I would like to withdraw formally the request for the illumination to the application, period, and leave the other two requests in there. But I think there may be an option to your point to try to get these as high up as possible, maybe to go with a narrower or thinner sign to get the price sign up and I would like to take a look at that and present that and another option to the Board next month.

Member Williams: The only thing I want to add is that I'm OK with that, I just don't want that one month to be one month to be two months, three months, and four months down the line.

Mr. Spiak: I'll make sure it gets done this time, I apologize for the past two months, but I got thrown into this project and I'm sort of the stand-in here, but I want to bring it to a conclusion also.

Member Wittman: We still have this public hearing open and I don't know if we've heard from anybody else.

Chair Van Millon: Is there anybody here who would like to address the Board on LukOil?

There was no one present from the public for this application.

Chair Van Millon: Mike, do they have to go back to the ARB with this?

Attorney Liguori: I don't know off hand, but my gut reaction is that they may have to, I just don't recollect exactly if they do or not. I think they would.

Member Wittman: We don't know what he's going to propose.

Attorney Liguori: That's right, and I would leave the public hearing open because you don't want to re-notice it.

Mr. Spiak: My intent would be to come back here and we're looking for 2' 6" on the height of the sign; I would still be requesting that variance. I heard it loud and clear from the Board that the area variance for the sign square footage is probably not a good idea, so I would do my best to either reduce or eliminate that variance and show you something according to all those lines.

Member Wittman: Could you also perhaps lay out for us some sight lines there as it appears from Route 22 going north and south so we can get a better idea, something on a drawing or sketch. I think that would help to decide what seems to be reasonable under the circumstances.

Mr. Spiak: I've got photos heading in both directions and I can photoshop in the sign that we're proposing there that will hopefully get the Board at least some idea of what this thing will look

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like at the end. I think we're all on the same page, we don't want to be blocked, they don't want to be blocked and we'll look for something else.

**MOTION:** Member Wittman motioned to hold the public hearing open until next month; seconded by Member Williams.

VOTE: Chair Van Millon – Aye                      Member Fusco – Aye  
Member Wittman – Aye                      Member Williams – Aye  
Member Kaufman – Aye

Attorney Liguori: I don't know if there is any intention to come back with anything greater than the variance for 2.6, but just note for yourself that if you do, we just have to re-notice because our notice is for 2.6.

Mr. Spiak: If it turns out to be something that we think is workable different, then we will provide that submittal prior to action.

Chair Van Million read the next item on the Agenda as follows:

DISCUSSION/PUBLIC HEARING – **RASCO Interpretation** - Z 2010-03 – The applicant seeks an interpretation of a determination of the Code Enforcement Officer regarding whether the use of the property as a cold-mix asphalt facility is pre-existing nonconforming. This property is located at 2241 Route 22, Dover Plains, NY and is located in the M district on tax map numbers 7061-00-580190 & 7061-00-5850063.

Chair Van Millon: We did have a sign-up sheet for anyone who would like to address the Board tonight. If there is anyone here who has not signed it, please do so.

In attendance was Jon Adams, Esq., of Corbally, Gartland & Rappleyea, to speak on behalf of the applicant, Rasco Materials. Mr. Adams submitted additional material to all Board members.

Attorney Adams: While I'm starting my comments, I'm handing out for Mr. Nelson, who is a principal at Rasco Materials, LLC, some additional materials which I will explain during the course of my presentation. You'll find that these additional materials compliment whatever I submitted to you. For the record, my name is Jon Adams, I'm with the firm of Corbally, Gartland & Rappleyea; we represent Rasco Materials, LLC. Before I start with my presentation addressed to the issue is correctly framed by the Chair lady, you will recall that at the start of my addendum to the application, I had several legal reservations. I'm not going to go through those with you, I'm simply acknowledging that I made those, I'm not waiving those. I really want to get to into the supplement issue as contrast to the legal issues. I want to give you a little context as to how this whole application before you evolved because I think you need the context to understand why I'm here tonight.

Our client, Rasco Materials, was the successor to TT Materials, which operated by what I call "layman's" terms, not the "correct" terms, the manufacturer facility for coal mix down at the industrial facility on Route 22 that everybody's acquainted with, which has been there, I think, from the war going forward. In 2005, our client had to cease activities in response to a stop work activity given to our client by the Town's Code Enforcement Officer. We also had to stop work because there was a consent letter from DEC, which is one of the documents in the supplement materials that also record as a stop work. We had to stop work because the permit had expired; we previously applied for renewal, but during the renewal process, and that

application was made before expiration of the permit, DEC decided that rather than a renewal permit, they wanted a new permit; and I'm going get into the history of that permit in a second.

In any event, we went through that permit process, got the new permit in 2009 and came back to the Town, and again, going through proper channels, attempted to attain clarifications on how to resume. We had the stop work order in 2005. We don't want to act contrary to the Code Enforcement Officer, so we wrote a letter to the Supervisor and the Code Enforcement Officer in June 2009 inquiring as to how we are to proceed to reinstitute this use. We engaged in a series of discussions over four months. During that period of time, it's my belief that the Town wanted to satisfy itself that from a legal standpoint, our use was a legal nonconforming use. If I need to define anything, I want to define that term as I understand it, I think, it's the standard issue we should be going by tonight. The question is whether our use is a lawful use because it existed prior to the adoption of the current Zoning Law, which was adopted approximately 1999. In 1999, the Zoning Law basically adopted a policy prohibiting solid waste facilities. We are a solid waste facility. However, the Zoning Law also recognized, and I'll get into greater detail on that, that there were existing solid waste facilities within the Town and they, as a matter of right, could continue to operate and we believe we fall under that particular umbrella.

In any event, after a series of discussions, meetings, presumably revealed documents by the Town, I can't speak for the Town, on December 1, an agreement was signed. That agreement is in your package and that agreement provides in part that the use was acknowledged to be a legal nonconforming use. Mr. Hearn signed it as the Code Enforcement Officer, but the Town wanted to have documentation on record as to the use, like any other site plan approval, so we agreed, I will accommodate you, we'll go through site plan approval as part of that process. We initiated that process in January.

Starting in February, I believe we had a number of public hearings as part of the Planning Board process and a speaker raised the issue of the legality of the continuation of the use and we repeatedly indicated, and incidentally that agreement that I referred to, the December 1<sup>st</sup> Agreement, was also ratified by the Planning Board during the course of it's proceedings. This issue kept resurfacing through public comment and finally in May, the Code Enforcement Officer wrote a letter which is actually a trigger for this particular proceeding and that's the next two materials, it might be the first document after the application page, that letter is dated May 5, 2010, and it consists of a series of statements by Mr. Hearn, I don't think he really ever made the determination, he was sort of reciting, this is what I have in my file, these following letters and these following letters say the same. I'm going to focus on one particular letter in a second. As a result of that, and I believe on advice of counsel, the Planning Board said, "Look, this is not our issue to decide, the Zoning Board is the proper body to decide this issue." So, they, for whatever reason, could not undertake a direct appeal, so they asked the applicant to make that appeal. I, quite frankly on behalf of the applicant, said, "I really don't want to go to the Zoning Board, because I think that issue was decided back in December 2009." However, in order to move the process forward, I'm before you.

Again, with those legal reservations I expressed on the onset, including the fact that it's our belief that as a matter of law, that December 1 decision is what we call, "law of final decision." Let me explain that concept. When a decision is made, whether in Court or by an administrative body or administrative person, there has to be an element of what we call "finality" to it. And if that decision is not challenged within a certain period of time, for instance by an Article 78 proceeding, it becomes what the law be used as a final decision, that's a legal decision, also a legal issue which I'm not asking you to decide, but I'm asking you to at least know that that decision was made back in December 1, 2009. The letter that Mr. Hearn cites sort of triggered

the issue of whether or not this was a legal nonconforming use. The letter dated October 4, 1994, which is in your materials, and in that letter, that's the letter written by the prior Code Enforcement Officer to TT, keep in mind that Rasco didn't take over until 2004, in that, the Code Enforcement Officer said, "This office has not received any documentation as to a process being considered or has a site plan approval been received for any modification or alteration to the site as required under the current Zoning Law." That's the letter that has created all the confusion. There is nothing in the file to indicate any further history on that issue, do you need approval. I have submitted to you, and if you look at your letters, two pages before the October 4, 1994 letter, you will see a letter dated May 20, 1992 from Thomas Taylor, who was the Chairman of the Planning Board, and while Mr. Taylor was not writing in this situation with respect to this particular site, I believe there is an analogy here because Mr. Taylor is expressing the view of the DEC that the Zoning Law didn't require in the circumstance of that letter a site plan approval. That letter factually was similar to our situation in that we had an existing building, just a change of use within an existing building.

I also respectfully suggest to you and I don't know if anybody has considered the contents of the Zoning Law which I brought with me, but I know that the Zoning Law the Town of Dover adopted in 1979, which was then the governing zoning document, and to some extent the Bible which you have to go by because the question is, did I need site plan approval under the prior Zoning Law. My answer is no and for your convenience, I'm happy to hand out a copy of the Zoning Law if it will assist the Board, I know you may already have access to it, but I respectfully suggest that the Board read it. The structure of the Zoning Law was a little less sophisticated back then, obviously the existing Zoning Law has the benefit of what we've learned through all the years and it's a much more sophisticated law, this is a fairly rudimentary law, and didn't require site plan approval every time something changed. It required site plan approval under various circumstances and simply changing the occupancy of an existing building is not a situation where site plan approval is necessary. And I believe that not only did Mr. Taylor collaborate that interpretation with his letter, but if you look at the subsequent sequence of letters by Mr. Binotto, he writes three or four letters to T&T after 1994 raising issues, but never raising the issue of legality of use. I think there's a reasonable inference that had he still be concerned with his subsequent correspondence, which is in your file, such as the 1998 correspondence and so forth, he would have raised that issue; he never raised that issue, he never raised the issue again, in fact, in your file, you have several building permits that he issued after that letter and I think it's a fair reference that he issued those permits having decided but never memorialized in writing, this decision that T&T did not need as an occupant of an existing building to go to the Planning Board for site plan approval.

And it gets more interesting. I've also included in the material that I submitted extracts of a survey or inventory of solid waste facilities that was undertaken by the Chazen Companies for the benefit for the Town of Dover while that was revealing modifications to the then existing Zoning Law. One of the solid waste facilities identified in this material is T&T Materials. In other material, T&T Material is operating in petroleum and contaminated sole treatment facility at the Mid-Hudson Recycling Center, Route 22, in the Manufacturing District, it talks about the history and operation, page 21 of the Chazen letter, which is amount the materials. That was supplemented by commentaries also included in you're the submissions to you where, I'm going to read, there is a document entitled, "Proposed Amendments to the Town of Dover Master Plan, October 1998" in your material. If you go to the third page, second paragraph, it states, "The Town Board has reached its conclusion because, which refers to the moratorium, because there are already a large number of solid waste facilities in the Town, which can continue as nonconforming uses" so the Town is recognizing that, and it's legal preset if you have a legal use, you can't design a law to simply terminate when it previously was a legal use.

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We have materials submitted to the Town Board in addition to correspondence acknowledging the existing of TT Materials and its activities and quite frankly, I think, by obvious implication implicating that there was no issue as to the legal use by TT. The Town did adopt the new Zoning Law in 1999. TT continued operations until 1999, 2000, 2001, 2002, 2003, and stopped operations at the outset of this when his permit expired and the Code Enforcement Officer, you can't continue to operate because your DEC permit had expired.

Just as an aside, that brought up the issue when we were discussing this between September and December of 2009, what was the implication of the stop work order; did more than a year pass because of that stop work order and because it passed a year, did TT or in this case, Rasco, lose their right because the stoppage continued for a period in excess of a year. We cited case law and, I believe, the Town accepted the case law that says when you have a stop work order, that's an involuntary stoppage, so you can't say that you've abandoned or walked away from that use and we immediately came back to the Town once the permit was reinstated in 2009 and that permit is in the package and we didn't simply start up, we said what do we need to do to start up, we wanted to do this according to procedures of Town Code appropriate for that purpose. It's our belief that with the Town's own documentation of records, that it's indisputable that the use was a lawful use in 1994, that site plan approval was not necessary in 1994 when TT took over for another firm doing the same work at the same location, then that activity continued without interruption until the stop work order in 2005.

Among the materials I submitted tonight, I just want to explain that briefly. I submitted an affidavit from the property owner Howland Lakes Partners, LLC, who indicates that TT and then Rasco have occupied this property continuously, the same property owner also indicates the property owner has never received at any time any notice from the Town that any activity there was not a permitted activity. If you look at the Zoning Law, notice has to be given to the property owner, not just the occupant. I've also submitted some property cards. Property cards are records of the Dutchess County Department of Property Services and I submitted them simply to show the ages of the buildings. You'll see when you look at the property cards an inventory of buildings on both of these sites and you will see the ages of the buildings. I just wanted to have some background information and I think these buildings are so well known in the Town that everybody knows they have been there, I shouldn't say forever, but for a long time.

I also submitted to you documents from Spectra Engineers. Spectra was the engineer for the applicant for Rasco when they applied for and obtained a new solid waste permit. The purpose of submitting those records was to show a continuity of activity. When you look at those records, you will see that there was continuous activity as part of the permit process. Additionally, and I realize there's a lot of material here, we submitted to the Town as part of our discussions in 2009 a chronology and so several chronologies of activity which are attached to the memorandum, July 27, 2009, addressed to the Town attorney. We generated that to demonstrate, and I think for the satisfaction because it was a signed agreement, that even during the permit process there was a continuous activity and there was never a break so as to result in a period of a year or more of inactivity, which could avoided our rights to a legal nonconforming use.

I also have here tonight, Jack Nelson as a principal of Rasco. He has a lot of personal knowledge as to the activities of this site. If the Board has questions, he's the proper person to address those questions too, because I'm simply the attorney for the project but he will be able to assist the Board if the Board has questions. That completes my presentation in terms of the

factual background. If the Board has any questions, I'm happy to respond to them. If the Board deems it appropriate after the public has spoken, if I have any additional comments that I think would be helpful to the Board, I would like to make those comments.

**MOTION:** Member Wittman motioned to open the public hearing; seconded by Member Williams.

VOTE: Chair Van Millon – Aye  
Member Wittman – Aye  
Member Kaufman – Aye

Member Fusco – Aye  
Member Williams – Aye

First public speaker, Constance DuHamel of 212 Duell Hollow Road, Wingdale, NY, was sworn in: I had a number of concerns about this project, but from what I understand, I'm going to confine myself to what the issue is around this letter. I do want to say that just because Tom Hearn didn't submit a letter like this before, or that Terry Binotto didn't put anything in writing, that the proper permits were in place doesn't mean that they were and that just because the Chazen report refers to this business in operation doesn't mean that it was legally permitted to be doing whatever it was doing. I think the Chazen Company would rely on the Town Board and the Code Enforcement Officer to determine whether or not something was a legal ongoing use and I don't think we should rely on anybody's determination that this was an ongoing operation. From, I would say about the December 1 stipulation agreement that the existence of a stipulation agreement brings issues in my mind as to whether or not everything is as clear as Jon Adams presents it. I think if it was that clear, we wouldn't need a stipulation agreement and if the final decision, when he says the December 1 decision was a final decision, what if it's based on faulty information, so this letter that Tom Hearn has submitted now, if he had submitted it then or if he had raised the issue then, I don't think this stipulation agreement, I don't think the Town attorney would have advised the Board to sign this stipulation agreement. I think there would have been questions in his mind, which would have raised questions in the Supervisor's mind and the Chair of the Planning Board as well.

I don't put a lot of stock in a final decision if it's not based on accurate information and you didn't have the information at the time, but we have it now. So I would have to say that you have to look at that agreement differently now. There were no comments in Jon Adams' description of just the facts that there were violations. I don't have the record of violations in front of me. I don't know if any of those violations resulted in stop work order, but it's my impression that some of them did; I could be wrong, but as long as you brought it up, I guess that would be something that we would want to have clarified.

The site footprint for the new project is larger than the site footprint for TT. I would think that in and of itself requires something to go to the Planning Board in terms of a site plan application. It's not exactly confined to the old footprint of operation and then just in general I would encourage the ZBA to look very closely at the entire application, after all this is a solid waste facility that is being cited over our single source aquifer and supplies drinking water for 20,000 residents in Eastern Dutchess County, I would direct all of your attention and I can send you a copy if you'd like it, to an article written by Jane Daly called, "What's needed to effectuate resource protection," which talks about the nine year battle the Town had with Palumbo and some of the reasons why it's important to protect our water supply, Dover doesn't have 20,000 residents, so obviously there are other residents in Dutchess County who are relying on this Town to keep their drinking water clear.

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Next public speaker, Evelyn Chiarito, resident and taxpayer was sworn in: I have been a resident of Dover for 27-30 years. My greatest concern is the possible contamination of the water we all require and want to maintain. The 1999 Chazen Companies study of the Harlem Valley Aquifer indicates the Harlem Valley towns from Amenia to Patterson all share the same aquifer, which provides water for 20,000 people. Water does not protect town lines, so it has the possibility of contaminating water for a large number of people and that's not a good thing. I do realize that the decision you are asked to make tonight is different, it's not concerning water or water protection, but nevertheless, it's of great concern to me, to the people, and to your children as well.

In addition, this application just came into the Town in a very, kind of a back-door type of way. Supervisor Courtien and Mr. Galayda and Ms. Frame approved the stipulation which was drawn up by the Town Attorneys. It's clearly not authored, because it's not the Code Enforcement way of writing, so it was clearly not authored by him, so I would say it really is not his written opinion, and if so, why would you seek an interpretation, it seems to be an oxymoron. From Town minutes of November 23, 2009, the stipulation is captioned, "Stipulation Agreement between Town of Dover and Planning Board and Rasco Materials, LLC." the CEO is not included. Then the Town Board said they authorized, and this is their decision, their words, "Authorized the Supervisor, Building Inspector and Planning Board Chair to execute the stipulation." The CEO did sign it, but his name is not in the heading. It doesn't say Stipulation between Town Board, Planning Board and the CEO; but however, he did sign it, but certainly doesn't appear to me to be his written opinion, which in the paper submitted to you kind of back and forth, the CEO made his decision and this December 1 decision wasn't his decision; but the CEO never seemed to have issued a decision that said this is legal nonconforming; this is not, he didn't seem to do that.

I am wondering why the applicant didn't do the normal and proper procedure, which I've always seen happen in the Town of Dover and also in the other towns, and the first stop for the applicant would be to go to the CEO. It's not the Town Board's authority as I understand it to make these type of decisions. If the applicant is not pleased with the decision, he can go to the ZBA for a determination; I always thought that was the proper procedure, maybe I'm totally incorrect, I don't know. As a layperson, and familiar with Town Boards, I attended a lot of seminars given by Dutchess County Planning Federation, and the whole procedure seems to be different, and it just makes me quite suspicious that it just has that feeling to me, so the impression I'm looking at is why did they do that, it just does not make sense.

Since much of the history of TT Materials and Rasco Materials is tainted with contamination of violations of their DEC permit, future contamination is a very real possibility and it could contain MTBE since it is a frequent contaminant in petroleum contaminated soil. As I've always heard, past behavior is the best predictor of future behavior, so this makes me a little leery of what may happen in the future. This applicant doesn't come to you with clean hands. He has DEC violations and he eventually signed a consent agreement and paid fines for their violations and I attached letters here from DEC because I have gone through the DEC files, so I have those letters and you can look at them and you can see for yourself what the violations were.

According to Planning Board minutes of 1/16/10, Mr. Nelson worked at the site for one year prior to the DEC permit expiring, so he was totally aware of the violations and the DEC permit expiring and the DEC consent order needed to be signed and fines paid. He was aware of that, so there's no reason for him to have not taken care of that and then his permit would have been renewed, I'm sure, a lot more promptly. They operated under a DEC consent order until November 15, 2005, and the fact that his permit expired, he had numerous violations and could

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no longer operate is no fault of the Town of Dover, it's his own doing. It's his own doing and he lost his pre-existing nonconforming use. I don't think you're allowed to operate without a permit, he didn't have a permit, so therefore, he's not legal, so do you think we should wait five years? If it were a period of one year, I could understand this position, but five years is stretching it out quite a lot. I went through the DEC file in New Paltz and you see note after note and it has stamped on it, "Notice of Incomplete Application." They were sent those letters, they were told, so they took a long time, for whatever reason, doing a complete application, I don't know why, it seems to me that shouldn't take five years. If it takes them five years to get a DEC application right, then I don't know how they can manage a contaminated soil facility. Most towns, as I understand it, allow one year and then after that year, you're out in the cold, you're not five years, they'll probably laugh at you. Now in 2010, it's an emergency they get approval and I wonder why.

This material that they are currently producing currently is not allowed in the Town of Dover under our Zoning Law. I do not know how they're going to sell this product in the Town unless the zoning is changed to allow it to be used. That's what the whole Palumbo dump site was about and I was very much involved in that and that's why the law not permitting this type of material in the Town was produced, because we didn't want the Town to always be under a cloud and waiting for another solid waste place to come in here and try to set up shop.

Also, I was a bit upset that the application was not put up on the Town website. The Planning Department and the Building Department did put the materials related to Rasco up on the Town website, which made it very easy for people to look at it and see the various documents and understand what's going on, but for whatever reason, the Attorney for ZBA decided not to put the application up on the web and it seems to me that's a shame because we have such very capable Town Hall employees and we have the marvelous technology.

Chair Van Millon: It's not our policy at this point, so just keep to the Rasco application.

Evelyn Chiarito: That is the Rasco application that came into the Town, that's what I'm talking about and it seems a shame the website was not used to put that on there because anyone could easily access it, and we do have the technology, and we do have the very capable Town employees who can do that very easily. Another concern I have is the Attorney for ZBA, who I think is prejudiced towards the Applicant since he appeared before the Planning Board and supported the Rasco application and also the same attorneys did draw up the stipulation agreement for the Town Board.

Member Wittman: Ms. Chiarito, you stated you had some documents you were going to submit to the Board?

Evelyn Chiarito: Yes (she gave a copy to Secretary O'Leary).

Next speaker, Jill Way, was sworn in: I'm Jill Way and I live on 20 Jean's Drive in the Town of Dover and I'm here on behalf of the Oblong Land Conservancy. Oblong just received notice of this public hearing yesterday and was unaware that the ZBA had convened to set a public hearing date. I'm submitting the following comments and documents for placement into the Board's record. They're voluminous and Oblong requests that the ZBA members take some time to read and consider them. These documents demonstrate that the use proposed by Rasco is not a legal pre-existing, nonconforming use. I'm going to read a cover letter and then I have about 50 pages of attachments, which I will not read into the record. And this is in

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reference to the May 18, 2010 letter from the Planning Board requesting an interpretation in the matter of Rasco Materials 2241 Route 22 Wingdale, NY.

Dear Chair Van Millon and ZBA members: This letter is written at the request and direction of the Oblong Land Conservancy. As the ZBA is aware, the Dover Planning Board, in accordance with provisions in state and local law, requested that the ZBA review and decide whether Code Enforcement Officer George Hearn's May 5, 2010 determination that the operation proposed by Rasco at the above property is not a legal nonconforming use is proper. The ZBA then required Rasco to also submit an application, which appears to have been submitted on July 12, 2010. Oblong had assumed that the ZBA then apparently met at an unnoticed special meeting to set the public hearing on the above applications. The Oblong has been advised that contrary to Section 267-a of the New York State Town Law and Section 145-59 of the Dover Zoning Law, the ZBA did not set a public hearing date on this application. Pursuant to these relevant statutory provisions, it is the ZBA that sets the public hearing date. On the Robert's Rules of Order, such action requires a meeting of a quorum of the ZBA with a formal resolution setting the date of the public hearing. Under the New York State Open Meetings Law, such meeting would have been properly noticed and Oblong would not have been left once again scrambling to determine what is happening to Rasco applications.

Oblong is a contiguous property owner. Under Section 145-59 of the Zoning Law, Oblong did not receive written notice of the public hearing until yesterday and was unable to obtain a copy of the application submitted by Rasco to the ZBA for two weeks in spite of the fact that it was readily available. The Town refused to place the ZBA application materials on the Town's website. The special treatment the Town has given Rasco has, at best, been less than transparent and at worse, unscrupulous. Oblong is very disappointed in the manner in which the Town's several Boards, especially the Town Board, has permitted this manner to unfold.

The ZBA has the jurisdiction to review determinations of the CEO under Section 267-a and 267-b of the New York State Town Law and in Section 145-59 of the Dover Zoning Law. Rasco's assertion that the past decisions of the CEO concerning this matter including, but not limited to, the May 5, 2010 letter to the Planning Board and the June 29, 2009 letter to Attorney Jon Adams and the 2005 stop work order are not appealable are incorrect. All correspondence from the CEO is filed in his office and is part of the public record. All three of the correspondences, the CEO determinations, are consistent with past findings of the former Building Inspector. The land use at the Rasco site never received the necessary permits and/or approvals to operate. Rasco's proposed use is not a legal pre-existing, nonconforming use. The CEO determinations are appealable and Rasco never appealed them. All three concern Zoning Law violations at Rasco's property.

As set forth in the letters annexed hereto, neither Rasco, the Town Board or the Planning Board can resuscitate Rasco's time to appeal these prior determinations with a stipulation of agreement. Section 149-59 F. of the Town of Dover Zoning Law provides that these determinations had to be challenged within 60 days of the filing of the determination through an appeal to the ZBA. Rasco failed to do this and as the law cited in Rasco's application to the ZBA indicates, Rasco cannot now be heard to complain. The Stipulation of Agreement repeatedly referenced by Rasco was a stipulation by and between the Town of Dover Town Board and Planning Board and Rasco Materials, LLC. Contrary to Rasco's assertions, it does not state that it is an interpretation by the CEO. In fact, the stipulation clearly states that the purpose of the stipulation is so that the Town can avoid the cost of litigation in New York State Supreme Court. As set forth in the annexed letters, no Town Board can validate a baseless and specious claim such as the claim made by Rasco here under the guise of Section 68 of the

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Town Law. The Town Board settlement with Rasco was not just and reasonable or in the best interest in the Town because there was no valid claim to be made by Rasco (i.e., no plausible argument that they had a lawful pre-existing nonconforming use). A Town Board simply has no jurisdiction to enter into such a settlement.

The cases cited by Rasco in its application to the ZBA in a matter of *Foy v. Schechter et al*, and *Gorman V. Town of Huntington*, are not helpful to Rasco. Such cases indicate that the Dover Town Board “settlement” stipulation can be collaterally attacked where the Town Board had no authority to render it. Moreover, because Rasco failed to avail itself of available administrative and judicial avenues of review with respect to the stop work order issued by the Dover Building Inspector in 2005 and the CEO’s June 29, 2009 letter, the review of the issues therein are waived and may not be raised as a defense in a subsequent action. See *Village of Westhampton Beach v. Cayea*. Withdrawing their administrative appeal, challenging a stop work order issued to them, the defendants relinquished any right they possessed to administrative review of the stop work order, their claims that the work complied with the building permit and village code, and their claim of vested rights. In addition, by failing to exhaust their administrative remedies, they waived their right to judicial review of those issues.

Rasco has not reasonably relied to its detriment on the Town’s actions and the Town’s Boards are not equitably stopped from making decisions contrary to the December 2009 Town Board stipulation. The decision in *Town of Putnam Valley v. Sacramone* illustrates the well-established principle that estoppel generally will not bar a municipality from enforcing and applying the zoning regulations despite prior error. There, a building permit allowing the owner to increase the height of a building was issued in error. Under such circumstances, estoppel may not be invoked against a municipal agency to prevent it from discharging its statutory duties nor for the purpose of ratifying an administrative error. *Parkview Assoc, v. City of New York, 1988*. Estoppel is not available to preclude a municipality from enforcing the provisions of its Zoning Laws and the mistaken or erroneous issuance of a permit does not estop a municipality from correcting errors, even where there are harsh results.

The *Glacial Aggregates LLC v. Town of Yorkshire* case cited by Rasco is not analogous to the facts here. As explained in detail in the annexed documents, the use proposed by Rasco is not a legal pre-existing, nonconforming use entitled to the protections of Article VI of the Dover Zoning Law because no legal pre-existing, nonconforming use was ever created by TT Materials, Rasco’s predecessor. Thus, Rasco’s proposed use is not permitted. Unlike *Glacial Aggregates LLC*, the Town of Dover had a Zoning Law in effect when TT Materials started its operation and permits and approvals were needed for the operation. In Dover, the Building Inspector/CEO has the jurisdiction to interpret the Zoning Law and not the Planning Board Chair. Since the inception of solid waste management facility use at the property in question, the Building Department has consistently found that the property’s operators never obtained the required permits and approvals.

The documents annexed hereto also show that Rasco’s purported pre-existing, nonconforming use was discontinued for longer than a year and is not protected as a lawful pre-existing, nonconforming use. Rasco’s reference to *Greentree Realty LLC v. Village of Croton-on-the-Hudson et al*. is peculiar given the fact that *Greentree Realty* concerned a preliminary injunction issued by a state court and, more importantly, Rasco took no action to clarify, challenge or rectify the zoning law violations referenced in the 2005 stop work order and older letters from the former CEO until 2009.

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Based on the foregoing, the ZBA should uphold the CEO's several and consistent determinations that the use proposed by Rasco at the above property is not a legal, pre-existing, nonconforming use. Oblong appreciates ZBA's consideration.

Member Wittman: Did I misunderstand you when you said that we had a secret meeting or some other unannounced meeting to set the public hearing?

Jill Way: I think you did.

Member Wittman: I did tell you today when you called and you asked the same question, that we were following a proceeding that we had established for a better part of the year.

Jill Way: Thank you for clarifying that this afternoon. I think what we are questioning is the contradiction between the existing procedure and Town Law and Open Meetings Law, so we would appreciate the ZBA looking into that and clarifying the proper procedure; so there is confusion, you're absolutely correct about that.

Member Wittman: When you're talking about open meetings, this wasn't advertised.

Jill Way: Correct, and the point is that generally a Board convenes to vote on submitting a notice of public hearing to a newspaper and so that's what's at question here.

Member Wittman: This has been in the record here for the better part of the year and it's the way we've been operating and you're the first one to question it.

Jill Way: And we have just recently learned that, and I did appreciate you clarifying that this afternoon.

Member Wittman: There was no illegal meeting.

Jill Way: Maybe I should re-read, I think you did misunderstand.

Member Wittman: The implication was that we held some sort of an illegal meeting to set this, that it was not noticed. We had no meetings so there was no notice necessary.

Jill Way: Let me re-read the sentence. Oblong had *assumed, had*, until I spoke with you today, that the ZBA then apparently met at an unnoticed special meeting to set, *had*, to set, because we didn't know. We couldn't find the information, it wasn't on the web, we did not know about the new procedure and so we were fairly confused, so I appreciated you clarifying that, and I'm sorry if I didn't read it very clearly for you.

Chair Van Millon: And I'd also like to clear up the fact that the reason it was not on the web is that not only the attorney, but also I felt that it was not my decision to put it on the web; it's the Board's decision to change our policy, and that is something that's going to come up in the future, but we hadn't done it in the past and it was also my decision whether anyone wants to believe it was the lawyer; we decided not to only because we had not done it in the past and it's not our policy. If we choose to change it in the future, then fine, but I just don't feel that we should change our policy just because Rasco is on our Agenda this month.

Jill Way: We would very much appreciate if all Boards could provide that information for the public. It does make it so much easier to be aware of what is happening in the community.

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Chair Van Millon: I just don't think it's my decision a week before the meeting to say OK, put it on the web. I think the whole Board should decide.

Jill Way: I agree, and if the Board could reconsider that in the very near future, that would be incredibly helpful.

Chair Van Millon: Is there anybody who has not signed who would like to address the Board at this time?

Next public speaker, Cybill Gilbert, Vice Chair of Oblong Land Conservancy, was sworn in: I was in the Dover Town Hall this morning reviewing the material that the secretary had in relative to this public hearing and I think what impressed me the most was the background of this information concerning all of the pending proposals that confronted the Town of Dover which would have, if they had been approved, resulted in Dover becoming the regional trash designation from all over Connecticut, Massachusetts, Dutchess County, Putnam County and Westchester County and the Dover residents rebelled against that future and successfully established a new Master Plan and Zoning Code for the Town of Dover and it's a remarkable story, a remarkable achievement for a small town.

Rasco is still a left-over from those dark days late in the 1990's and they continue to assume that they have a legal right to continue the operation of the bankrupted and disgraced TT Materials. Unfortunately, Rasco's track record is very disturbing and is indicative of their following in TT Materials' example and creating the same problems. TT left hazardous material, illegal hazardous material in towns throughout Dutchess County, including Pawling, which was a site that I am very familiar with. You have heard the story from our legal counsel, I also noticed that in DEC's public notice published in the environmental notice bulletin that Rasco's application for a permit is called a "re-use," which to me implies that they're using the same site over again but it's a new application, which indeed it was.

Some years ago, I am a member of a family that had a contract to purchase a property that had a closed gasoline station on it and the underground storage tanks were still in the ground as a condition of our purchase. The contractor required that the tank be removed and that a clean up would be effected that complied with the New York State regulations. I was president when the tanks were removed, I was familiar with that process and I was shocked to learn that it's more or less a voluntary process. The DEC inspector only comes and looks to see that the tanks are indeed removed and that the clean up is underway and then he presents the DEC forms and the rest is up to whomever the owner of the property is or their representative and there is no protocol for sampling. In effect, it's a voluntary procedure and in most cases, it's controlled by vested interest in the waste industry. MBTE's could easily slip through that and it's a procedure that's full of loop holes and that was one of the reasons I have very passionate concern about seeing that Dover consider this proposal very carefully.

Attorney Adams: There are several issues that most were extraneous, but I think warrant this briefly. There was a question as to whether or not the stop work order cited violation, we're talking now about the 2005 stop work order, aside from the absence of the DEC permit; that stop work order cited nothing other than the absence of the DEC permit. There was a question of whether or not the footprint of the building is being is being changed, it's not being changed. There are continuing questions and concerns about contamination. The Planning Board, with the assistance of the engineer, a planner and attorney, has done a thorough environmental review. They have, in fact, issued a conditioned negative declaration, which basically means

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they determined there would not be any significant adverse impacts. This is all extraneous to you, this is an interpretation, you don't have any SEQRA obligations under this particular application, but because of those concerns, I thought it is useful for the Board to know that that happened.

There have been a series of legal issues raised, I'm going to defer to your attorney, I'm not going to go through all those legal issues again; in a sense, we've already addressed them in correspondence you have, but I was somewhat surprised when a claim was made that Oblong didn't know about this until yesterday. The Board should have among its records a letter dated July 20, 2010, that was addressed to the Planning Board, but copied to the Zoning Board by an Attorney claiming to be writing on behalf of the Oblong Land Conservancy. I assumed she copied the Zoning Board because she was aware of the fact that there was ultimately some Zoning Board involvement. I question this late notice. I'll defer to the Board in terms of scheduling issues, but this letter seems to be inconsistent with the remarks made by one of the speakers.

Chair Van Millon: Maria, was Oblong notified the same time as everybody else?

Secretary O'Leary: I sent it out on July 23, but that doesn't mean that everybody received it on July 23.

Chair Van Millon: According to this, the letter went out July 23 to Oblong. I need more time to digest the new material that we received this evening.

Member Wittman: I think we should hold the public hearing open until the next meeting and I think what we need to do is to review the material that was entered tonight at the public hearing and also the written materials that have been submitted.

**MOTION:** Member Wittman motioned to hold the public hearing open to September 1, 2010 so the ZBA members can review the new material submitted; seconded by Member Kaufman.

VOTE: Chair Van Millon – Aye	Member Fusco – Aye
Member Wittman – Aye	Member Williams – Aye
Member Kaufman – Aye	

**MOTION:** Member Kaufman motioned to approve the July 7, 2010 minutes; seconded by Member Williams.

VOTE: Chair Van Millon – Aye	Member Fusco – Aye
Member Wittman – Aye	Member Williams – Aye
Member Kaufman – Aye	

**MOTION:** Member Kaufman motioned to approve to put every ZBA Application on the Town of Dover Website simultaneously with the Agenda; seconded by Member Williams.

VOTE: Chair Van Millon – Aye	Member Fusco – Aye
Member Wittman – Aye	Member Williams – Aye
Member Kaufman – Aye	

Attorney Liguori: The Zoning Code doesn't call for notice to adjacent property owners?

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Secretary O'Leary: We're contiguous.

Attorney Liguori: I'm not sure if we're required to send them certified.

Secretary O'Leary: I send them regular mail.

Attorney Liguori: That's something the Board may want to consider in the future to make a request to the Town Board to amend our law. It puts a burden on the applicant to send certified mail, but that would eliminate the issue that was presented this evening about getting noticed.

Secretary O'Leary: I normally send them out myself and it's a lot easier. If we're going to send them certified, it's an extra \$5.54 per letter, so maybe we can take it out of escrow so we don't have to raise the application fee because some only have two or three neighbors, some have 20 or 30. If we can take it out of escrow, we won't have to raise our application fee. I have no problem doing it myself.

Attorney Liguori: Right, and if you're in a condo, you can have 250.

Member Kaufman: Some towns have the applicant do it themselves and have the applicant turn the green cards in.

Chair Van Millon: Do we want to send a letter or request to the Town Board asking if we can send the mail out certified mail in the future?

Attorney Liguori: What you want to do is to discuss whether or not you want to make a recommendation to the Town Board to request them to amend our Zoning Code to either require that notice be given to contiguous property owners by certified by mail or conversely to require the applicant to do it. It's something for you to discuss, not make a recommendation or a motion tonight. I'd prefer for you to talk about it then have me prepare a resolution for the Zoning Board for the recommendation and then send it to the Town Board, and that way the Town Board knows exactly what you want. Maybe we can just put it on the Agenda for next month.

**MOTION:** Member Wittman motioned to adjourn the meeting at 8:31 p.m.; seconded by Member Kaufman.

VOTE: Chair Van Millon – Aye  
Member Wittman – Aye  
Member Kaufman – Aye

Member Fusco – Aye  
Member Williams – Aye

Meeting adjourned at 8:31 p.m.

Respectfully submitted by:

Maria O'Leary  
Secretary to the Zoning Board of Appeals