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BY APPOINTMENT:
CLEARWATER, FL 34617

March 11, 2010

Hon. David Wylock, Co-Chairman
Town of Dover Planning Board
126 East Duncan Hill Road
Dover Plains, NY 12522

Re: RASCO Materials, LLC, Site Plan Approval

Dear Chairman Wylock:

At the March 1, 2010 Planning Board meeting our client expressed misgivings as to the Board decision to retain, at the applicant's expense, a structural engineer to re-evaluate the structural integrity of the buildings.

RASCO submitted a Structural Evaluation Report prepared by Spectra Engineering, Architecture & Surveying, P.C. dated October 10, 2006. The report concluded that with minor exceptions, the conditions of the building were good. This Report was reviewed and accepted by the NY DEC. The conclusions and recommendations of the Report are the basis of the Special Conditions in the NY DEC permit that relate to the condition of the buildings. See Special Conditions of the NY DEC Permit under Construction Conditions nos. 25, 26, 27, 28 & 29 and General Conditions no. 29. The Special Conditions noted above clearly cover all of the concerns voiced by your Board.

By this decision I formally protest that step as being in providing for a structural engineer at the expense of our client as being arbitrary and in excess of the Board's jurisdiction. Such step, in my opinion, is clearly beyond the powers of a Planning Board, as the primary jurisdiction relative to building conditions is either the Town's building department or, in this instance, the Department of Environmental Conservation, which as consideration of a solid waste permit passed on the structural integrity of the building.

At the outset of this application, I outlined to the Board the areas of the Board's jurisdiction as defined by the Town of Dover zoning law, which are layout, landscaping, site circulation, off-street loading, access to public highways and access by emergency vehicles (see Dover Code at 145-65(D)). I also noted that because this is a change of use application where there are existing buildings, the Board's review is more circumscribed than would be the circumstance if there were no existing buildings.

The Code's provisions for payment of escrow fees limits the use of escrow fees to those professional expenses necessary for a thorough review of the application (§ 145-58). The structural elements of the building are unrelated to the elements of review found at § 145-65(D).

The Board must also confine it to the physical area comprising the site plan. These areas are functionally independent of the other parcels and improvements owned by the common landlord.

Courts have steadfastly observed that the Planning Board must confine itself to matters within its jurisdiction. Planning Boards have no inherent powers; rather, they enjoy only those powers expressly delegated to it, which in this instance are limited to the factors outlined in the preceding paragraph. The Planning Board is not authorized to assume powers of other Town agencies (see, e.g., *In the Manner of Woodland Community Association v. Planning Board of Town of Shandaken*, 52 AD3d 991(2008); *Hill v. Planning Board of Town of Amherst*, 140 AD2d 967 (4th Dept., 1998; *Moriarty v. Planning Board of Village of Slatsbury*, 119 AD2d 188, 196 (2nd Dept., 1986)). As noted by the *Moriarty* court, the powers delegated to the Planning Board must be viewed in a restrictive manner; it must strictly remain within the confines of those areas of review delegated to it.

I also note in the stipulation made with the Town for purposes of site plan review, the focus was to be on steps necessary to protect adjacent properties, and in particular, the Great Swamp. The scope of inquiry being undertaken by the Board is not one consistent with that agreement.

I would also submit to you that by embarking in an area not within your jurisdiction, you are also unwittingly potentially inviting a Board or Town liability on the issue of structural fitness that you may not want to invite. Under the doctrine of "special relationships" as applicable to governmental tort liability, by addressing an area not normally within your concerns, you may be creating a special relationship that would give rise to potential liability as your site plan approval would necessarily be placing the Board's imprimatur on the structural elements of the building by taking this extra step, which presumably would be relied upon by those occupying the building. Does the Board really want to invite this additional liability when other agencies have primary jurisdiction over structural elements?

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While the Board may have understandable concerns as to the structural elements, the Board should limit itself to those areas of review delegated to it and avoid those areas neither delegated to it or for which it does not have expertise to address.

If the Board does not dispense with the evaluation by a structural engineer, I ask that such be a condition of the signing of the site plan as the condition of the building does not affect those issues within the province of the Board, and the applicant should not be burdened with this additional expense unless it is actually necessary.

Very truly yours,

CORBALLY, GARTLAND AND RAPPLEYEA, LLP

By:

JON HOLDEN ADAMS

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cc: Jack Nelson
Frank Peduto
Victoria Polidoro, Esq.