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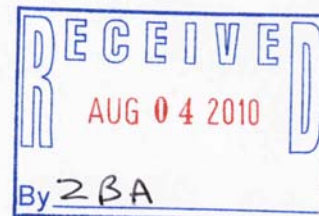
Dover Planning Board
126 East Duncan Hill Road
Dover Plains, NY 12522

Re: Rasco Materials, LLC, 2241 Route 22, Wingdale, NY
Dover Planning Board Site Plan Application

Dear members of the Planning Board:

This letter is written on behalf of the Oblong Land Conservancy ("Oblong") in regard to the above matter. Oblong is in receipt of a letter dated June 17, 2010 to the Planning Board from the applicant's counsel. Oblong obtained a copy of this letter this afternoon and requests time to submit further comments as the delay in the submission of the letter has left little time to respond. As it is unclear how the Zoning Board of Appeals intends to address the Planning Board's May 18 letter, Oblong further requests that the Planning Board include this letter in the record of the public hearing on the above matter.

For the reasons set forth herein, the use proposed by Rasco Materials, LLC ("Rasco") is not a lawful preexisting, nonconforming use entitled to the protections of Article VI of the Dover Zoning Law. The documents referred to by the applicant's counsel in his June 17 letter do not alter this conclusion.



From Jill Way

I.A. LAWFUL PREEXISTING, NONCONFORMING USE WAS NEVER CREATED BY TT MATERIALS, RASCO'S PREDECESSOR AND, THEREFORE, RASCO'S PROPOSED USE IS NOT PERMITTED

It is incumbent upon Rasco to establish that the use of the premises was legally created prior to the restrictive Zoning Law. *Walter v. Harris*, 163 A.D.2d 619, 558 N.Y.S.2d 266; *Town of Virgil v. Ford*, 160 A.D.2d 1073, 1074, 553 N.Y.S.2d 554. A use *initiated* in violation of an existing zoning law will not be granted protected nonconforming use status. *Costa v. Callahan et al.*, 41 AD3d 1111 (3d Dept. 2007)(In *Costa*, the landowner had commenced the offending land use prior to any law being enacted by the Town to regulate such use); *Tralow Realty Corp. v. Murdoch et al.*, 261 AD 173 (1st Dept. 1941)(Landowner did not secure "vested rights" to use land where use was commenced without obtaining the proper approvals). Dover Zoning Law Section 145-23 confirms that in order to be entitled to protection under Article VI "Nonconforming Uses, Structures and Lots" of the Dover Code a use must have been legal when built or commenced.

The Dover zoning law which was in force when TT Materials began its operation in 1993 was enacted on July 1978 and amended in 1987 ("1978 Zoning Law"). The 1978 Zoning Law does not list a solid waste or contaminated soil recycling facility as a permitted use. Arguably, the operation which began in 1993 was not a permitted use. See 1978 Zoning Law, Article III District Regulations.

Should Rasco argue that the TT Materials use was the "[m]anufacture, processing, or storage of coal, tar, asphalt or petroleum products" under the 1978 Zoning Law then Rasco would have to acknowledge that such use needed a special use permit from the Dover Zoning Board of Appeals ("ZBA") and site plan approval from the Dover Planning Board and show that such use was capable of complying with the Industrial Use Regulations set forth in Section 414. See 1978 Zoning Law, pages 9 and 17. There is apparently no evidence that TT Materials ever obtained the required local approvals necessary to lawfully run its operation. The Town's records indicate that TT Materials never applied for or received a special use permit from the ZBA or site plan approval from the Planning Board. The letter from the former Planning Board Chair in the early 1990s is of no consequence as said Chair could not confer any rights on TT Materials in violation of the 1978 Zoning Law.

Based on the forgoing, the use proposed by Rasco cannot be granted protected nonconforming use status.

II. THE PROPOSED USE BY RASCO IS NOT A MERE CONTINUATION OR A LAWFUL EXTENSION OF THE USE MADE OF THE PROPERTY BY TT MATERIALS AND SHOULD NOT BE PERMITTED

An increase in the volume or intensity of a preexisting, nonconforming use coupled with a variation or alteration in the specific type of use will generally result in an illegal extension. *Gilmore v. Beyer*, 46 AD2d 208 (3d Dept. 1974) (Enjoining a proposed increase in the volume of a preexisting, nonconforming use of milk hauling coupled with a change in the qualitative [volume, density, appearance and structure] use to general trucking); *Hull v. Town of Ithaca*, 139 A.D.2d 887 (3d Dept. 1988) (Holding that the extent to which a nonconforming use can be extended is a question for the Zoning Board). Additionally, where an expansion of a preexisting, nonconforming use involves new land, the New York courts will typically find that such expansion is illegal. *Todem Homes, Inc. v. Board of Appeals*, 74 AD2d 908 (2d Dept. 1980) (Holding that the developer only had vested rights to build the project in accordance with the permit that existed when the zoning law was amended and had no rights to change the project if the new plans were inconsistent with the present zoning law).

Oblong is in the process of gathering historical documents on the property in question. In fact, Oblong just received documents from the Town Clerk today. Oblong still does not have documents from the New York State Department of Environmental Conservation, Solid Waste Division. It appears from the documents Oblong does have that Rasco's plans for the site are stated inconsistently. Rasco's Engineering Report indicates that new structures, including a canopy and leachate control pad, will be built at the property and that further improvements will be made to unused lands. Rasco's Engineering Report states "RASCO will upgrade and improve the immediate surrounding landscape in support of an efficient recycling process." It does appear that Rasco may be proposing to use new lands and/or new buildings for its operation. Further review of these documents is necessary. Oblong requests that the Planning Board examine and clarify the facts concerning this issue and that it allow Oblong time to review the recently received documents and submit citations to documents and factual information for the Planning Board's consideration on this matter. It does appear that even if Rasco successfully argues that TT Materials established a lawful preexisting, nonconforming use, the Rasco proposal is an impermissible extension of such use.

Additionally, Section 145-25 of the Dover Zoning lists the only ways in which a nonconforming use can be extended or enlarged. It states that an "[e]xpansion of uses prohibited by Section 145-10C shall not be permitted." Rasco's proposed use is prohibited by Dover Zoning Law Section 145-10C and, therefore, any purported lawful preexisting, nonconforming use cannot be expanded. Section 145-10C provides

The following uses are prohibited under all circumstances (existing uses may be continued pursuant to the nonconforming use provisions of Article VI): heavy industry, asphalt plants . . . facilities for the disposal of hazardous or radioactive material, and, except as provided in Section 145-50, solid waste management facilities as defined in Article XII, including but not limited to the use of solid waste or material that has previously been part of the solid waste stream

(whether or not is has a beneficial use designation from the Department of Environmental Conservation) as fill. Any such specifically prohibited use which when commenced was not listed as a permitted or special permit use in the Town of Dover Zoning Law (and was therefore commenced in violation of the Zoning Law) shall not be protected as a nonconforming use by the provisions of Article VI.

III. THE PURPORTED PREEXISTING, NONCONFORMING USE WAS DISCONTINUED FOR LONGER THAN A YEAR AND IS NOT PROTECTED AS A PREEXISTING, NONCONFORMING USE

Section 145-24.A of the Dover Code clearly states that “If a nonconforming use of land or structures is discontinued for a period of one year, it shall not thereafter be reestablished except as provided in Subsection B, and any future use shall be in conformity with this chapter.” Subsection B does not apply to the Rasco application before the Planning Board. Courts in this State have held that language in a zoning law that provides that a nonconforming use will be terminated if discontinued for a set period of time forecloses any inquiry as to an owner's intent to abandon if the specified period is reasonable. *Walter et al. v. Harris*, 163 AD2d 619 (3d Dept. 1990); *Sapakoff v. Town of Hague Zoning Board of Appeals*, 211 AD2d 874 (3d Dept. 1995)(finding that the two-year period of discontinuance contained in section 9.030 (1) of the zoning ordinance is not only reasonable but determinative and any inquiry into the property owner's intent to abandon the nonconforming use was foreclosed). A time period of ten months has been deemed by New York courts to be reasonable. *Sun Oil Co. of Pennsylvania v. Board of Zoning Appeals of Town of Harrison*, 44 NY2d 995 (1978)(Where the zoning law provides that a nonconforming use may not be resumed after it has been discontinued for a period of ten months, a gasoline station discontinued for such period may not be maintained as a nonconforming use, without regard to the owners lack of intent to abandon it).

It is undisputed in the record that the applicant's and landowner's operation of a solid waste management facility at the site ceased in November 2005. Rasco did not obtain State permits for its proposed operation for roughly 4 years after it ceased operations. Based upon the available records, it appears that TT Materials may have also discontinued its operations at the site for more than a year prior to Rasco's takeover in 2004. TT Materials State permit expired on October 2003. DEC denied the operators' requests for permit renewal in February 2005 and Dover issued a stop work order in the same month.

Based on the forgoing, any purported preexisting, nonconforming use at the site was discontinued for a year and cannot be reestablished.

Oblong appreciates the Planning Board's consideration of the matters presented herein and reiterates its request that the public hearing be held open.

Sincerely,



Shannon Martin LaFrance

SML:fhs

Cc: Chris Wood