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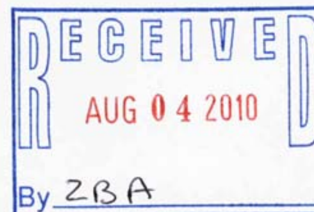
August 4, 2010

Dover Zoning Board of Appeals ("ZBA")
126 East Duncan Hill Road
Dover Plains, NY 12522

Re: May 18, 2010 Letter From Planning Board Requesting Interpretation
Rasco Materials, LLC ("Rasco"), 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 ("Oblong"). As the ZBA is aware, the Dover Planning Board, in accordance with the provisions in state and local law, requested that the ZBA review and decide whether Dover Code Enforcement Officer George Hearn's ("CEO" or "Building Inspector") 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. 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. Under Robert's Rules of Order, such action requires a meeting of a quorum of the ZBA with a formal resolution setting the date for 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 with the Rasco applications.



Received 8-4-10
From Jill Way

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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 web site. The special treatment the Town has given Rasco has, at best, been less than transparent and at worst unscrupulous. Oblong is very disappointed in the manner in which the Town's several boards, especially the Town Board, has permitted this matter to unfold.

The ZBA has the jurisdiction to review determinations of the CEO under Sections 267-a and 267-b of the New York State Town Law ("Town Law") and Section 145-59 of the Dover Zoning Law. Rasco's assertions that the past decisions of the CEO concerning this matter, including, but not limited to, the May 5, 2010 letter to the Planning Board, 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 these CEO determinations are consistent with the 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, preexisting, nonconforming use. These 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 nor the Planning Board can resuscitate Rasco's time to appeal these prior determinations with a "Stipulation of Agreement." Section 149-59.F of the 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 costs 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 Town Law. The Town Board's settlement with Rasco was not just and reasonable or in the best interest of the Town because there was no valid claim to be made by

Rasco (i.e. no plausible argument that they had a lawful preexisting nonconforming use). A town board simply has no jurisdiction to enter into such settlement.

The cases cited by Rasco in its application to the ZBA, *In the matter of Foy v. Schecter 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*, 38 A.D.3d 760 (2d Dept. 2007)(By 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,* 16 A.D.3d 669 (2d Dept. 2005) illustrates the well-established principle that estoppel generally will not bar a municipality from enforcing and applying its 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 Assocs. v. City of New York,* 71 N.Y.2d 274 (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 Aggreggates 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 preexisting, nonconforming use entitled to the protections of Article VI of the Dover Zoning Law because no lawful preexisting, 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 preexisting, nonconforming use was discontinued for longer than a year and is not protected as a lawful preexisting, 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.

Based on the forgoing, 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, preexisting, nonconforming use. Oblong appreciates the ZBA's consideration.

Sincerely,

Shannon Martin LaFrance

SML:fhs

Cc: Chris Wood