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May 11, 2009

John F. Moak, Mayor  
James Shanley, City Council President  
Kathleen O'Connor Ives, Esq., Councilor-at-Large  
City of Newburyport  
Newburyport City Hall  
60 Pleasant Street  
Newburyport, MA 01950

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NEWBURYPORT, MA  
2009 MAY 11 P 9:21

RE: City of Newburyport/Our File No. 2509/Crow Lane Landfill

Dear Mayor Moak, President Shanley, Councilor Ives, and members of the City Council:

This Firm has been engaged by the Mayor of the City of Newburyport acting on the authorization of the City Council to render a legal opinion relative to certain matters pertaining to the Crow Lane Landfill, as described in an Order of the City Council dated March 30, 2009. We appreciate this opportunity to assist the City.

According to the City Council Order, the Council is aware that the Health Director, at the request of the Mayor, is issuing an administrative order to New Ventures to close the Crow Lane Landfill.

In the City Council Order, the Council seeks to ascertain its rights and options with respect to the Host Community Agreement ("HCA"), said Crow Lane Landfill, and its ordered closure.

In summary, we advise that the HCA has not been cancelled or substantially amended. It remains in effect and has not been terminated or revised by the Covenant and Agreement signed by the Mayor and New Ventures. By its terms HCA cancellation or substantial amendment requires approval by the City Council.

We advise that the Health Director's Administrative Order is legal and enforceable on its face and under the procedures of the Board of Health, which has powers independent of the HCA, Agreement and Covenant, and DEP.

We advise that the Landfill needs to comply with the HCA, Agreement and Covenant, Administrative Order, any site assignment and modifications thereto, and any DEP requirements and consent judgments.



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Response to your questions necessitated that we review as background the relevant City Charter provisions, the HCA, landfill siting and operations, the Agreement and Covenant, the Administrative Order, and Board of Health powers. However, we have not reviewed any litigation papers, judgments, or settlements, as we were not hired to answer any questions about them.

Let us stress that we have not reviewed past or pending litigation or proposed settlements. That was beyond the scope of our work. For example, we are unfamiliar with the original solid waste site assignment, if any; the noisome trade site assignment, court appeal thereof, judgment upholding it and what may be a judgment upholding a cease and desist order; litigation by DEP against the Landfill; litigation by the Landfill against the City; counterclaims and third-party claims bringing in other defendants in those cases; DEP approvals, administrative orders and penalty assessment notices, if any; consented-to administrative orders and penalties, if any; and consent judgments and other settlements entered in these cases or pending or proposed. These court claims, past or pending judgments, final administrative orders that may remain in effect and settlements either in court as judgments or outside as side contracts are very important to consider toward the universe of rights and options of the City.

### THE CITY CHARTER

The City has a Plan B form of government. The City Charter repeats G.L. c. 43.

The City Council at any time may request from the Mayor specific information on any municipal matter within its jurisdiction, and may request him to be present to answer written questions relating thereto at a meeting to be held not earlier than one week from the date of the receipt by the mayor of said questions. The Mayor shall personally or through the head of a department or a member of a board attend such meeting and publicly answer all such questions. The Mayor may attend and address the City Council upon any subject. Sec. 19.

Every order, ordinance, resolution and vote passed by the City Council shall be presented to the Mayor for his approval. The Mayor may approve it and sign it or disapprove it and return it to the Council. If so, the Council will reconsider it and if passed by a two-thirds vote of all members, it will be effective. Sec. 55.

The Mayor is the chief executive officer of the City. Sec. 58. The legislative powers of the City are vested in the City Council. Sec. 59.

### HOST COMMUNITY AGREEMENT

The Host Community Agreement (HCA), dated October 7, 2002, is between the City of Newburyport and New Ventures Associates, LLC (NVLLC), and its successors and assigns. It is



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signed by the Mayor and NVLLC. It provides that NVLLC will operate the Crows Lane Landfill in accordance with the procedures specified in the Agreement. The HCA provides that it does not limit or expand the right of the City to enforce all laws, ordinances, and regulations applicable to the landfill operation. Sec. 7.2.

NVLLC agrees that it will not request a modification of the Final Grading Plan from the DEP that exceeds the volumes contained in the Final Grading Plan (Exhibit 1) without affirmative vote and written approval by the City Council and the Mayor. Sec. 3.3.

The HCA says that it sets forth the entire agreement between the parties, and may be canceled or substantially amended only by a written instrument executed by the Mayor and NVLLC, subject to the affirmative vote and written approval by the City Council. Sec. 9.1

### **AGREEMENT AND COVENANT**

One of the implied questions is whether an Agreement and Covenant dated March 23, 2009 executed between NVLLC and the City acting by and through its Mayor terminated or modified the HCA. The Agreement and Covenant provides for the suspension of all litigation regarding the Crows Lane Landfill, including litigation under G. L. c. 21E. It says that the City will not commence any action against NVLLC or prevent closure of the Landfill, provided that NVLLC is in substantial compliance with the Board of Health Order dated on or about March 2009. It says that it will take effect upon full execution by the parties and the issuance of the Order by the Board of Health to NVLLC to close the Landfill. It does not say that it must be approved by the City Council.

The Agreement and Covenant does not explicitly amend or mention the HCA. It does say that it is the sole and entire agreement between the parties as to "this matter" (which is not specifically defined) and that there are no other inducements and/or representations being relied upon by either party, and the "Whereas" clauses refer to the Crows Lane Landfill. It leaves open whether the terms of the Agreement and Covenant impliedly supersede or amend the HCA, in whole or in part. (The Agreement and Covenant makes explicit reference to the Administrative Order to be issued by the Board of Health, and that Order includes a requirement for compliance with the HCA).

In any event, the Agreement and Covenant did not terminate the HCA because the City Council did not agree to a cancellation or substantial change in the HCA.

### **CITY COUNCIL ROLE IN SETTLEMENT OF LITIGATION**

The Agreement and Covenant includes agreements to suspend all litigation relative to the Landfill. One of the "Whereas" clauses says that the parties wish to amicably resolve the Landfill closure and Chapter 21E issues that have been raised to the extent possible.



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While the above provisions do not constitute by themselves settlements of litigation or claims (just suspension of litigation), for purposes of analysis we will consider the question to be whether the Mayor acting unilaterally has the power to settle claims and litigation. We understand that one or more suits have been or are being settled.

In the case of Galligan v. Leonard, 204 Mass. 202, 204-205 (1910), the SJC said that the powers of mayors have continued to grow over time. He is responsible directly to all the people and is possessed of large administrative functions. The city council has been clothed only with the power of a deliberative body and not an executive board.

A mayor is the chief executive officer of a city, having general supervision over the various municipal departments and the conduct of its officers and employees. Commissioner of Corporations & Taxation v. City of Malden, 321 Mass. 46, 49 (1947).

Despite this, the available authority from throughout the country and including Massachusetts is that a mayor does not have the power acting unilaterally to settle litigation involving the City. We did not find any cases or authority holding that a mayor does have the right to settle litigation unilaterally. Nonetheless, we are aware of a common but not universal practice in Massachusetts cities that mayors settle litigation by themselves with no added authorization.

It is well established that a city has the right to settle claims and litigation. Northgate Construction Corp. v. Fall River, 12 Mass. App. Ct. 859, 860 (1981) ("Fall River, as part of its general power to sue and be sued, has the inherent implied power to effect a settlement by compromise in good faith of genuine claims against it.").

In George A. Fuller Co. v. Commonwealth, 303 Mass. 216, 221-222 (1939), the SJC held that a town could settle claims against it as a right inherent in the right to sue and be sued, but that this does not mean that an officer or agent of the town has that right. ("The municipality ...may itself compromise claims, but...this is far from saying that one of its officers or agents would have the same authority.")

See for example the West Virginia case of Fairmount v. Hawkins, 304 S.E.2d. 824, 826 (W.Va., 1983), collecting and citing cases from throughout the country, where that court specifically held that, in the absence of some contrary provision in the statute, the right to compromise a claim is lodged with the legislative branch of the municipality and that, therefore, a mayor is not empowered to compromise claims.

The Massachusetts statute, G.L. c. 40, sec. 2, authorizes a municipality to sue and be sued. It does not authorize a mayor to settle claims and litigation. It is silent as to who must act in



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order to settle claims and litigation. Again, we are aware that some cities handle it one way, some another.

56 Am Jur 2d., sec. 751 says that in municipal corporations, the power to compromise claims or litigation usually exists in the governing legislative body, that is, the city council.

McQuillen, Municipal Corporations, section 4820, says that in municipal corporations, the power to compromise claims usually exists in the mayor and the governing legislative body.

A city council can entrust the execution of its orders to others, such as the mayor or city manager. In Sancta Maria Hospital v. Cambridge, 369 Mass. 586, 592 (1976), the SJC said that the sale and conveyance of city property was essentially a legislative function, and that the legislative functions of the city were vested in a city council. However, at the same time "it is basic that the execution of council orders may be entrusted to and carried out in their particulars by, among other officers, the city manager."

In our opinion, synthesizing the above sources, the legal authority to settle claims and litigation rests in your City Council and Mayor, that is, requires approval of both. Certainly that is the cautious way to proceed in settlement of major litigation resolving the rights and duties of a city. If the City Council and Mayor do not agree, of course, the issue would be settled by the veto provision in the City Charter.

In addition to this background law, in this case, in the HCA itself, the then-Mayor agreed on behalf of the City that any cancellation or substantial amendment requires a written instrument signed by the Mayor and the vote and written approval of the City Council. The Agreement and Covenant does not explicitly say that it cancels or amends the HCA and in any event it does not have the vote and approval of the City Council. NVLLC has acknowledged that the Council needs to approve substantial amendments of the HCA by writing directly to the Council and appearing before it, asking for its approval under the HCA, and by its cross-claim filed in Court, in which it names the Council members as parties and admits in its Cross-Claim that the HCA includes a provision that the approval of the City Council and Mayor is required for a change in the grading.

Therefore, in our opinion, insofar as it settles claims and litigation, the Agreement and Covenant needs approval of the City Council to actually settle them. The same is true of any pending settlements of suits by or against the City. Independently, insofar as the Agreement and Covenant cancels or substantially amends the HCA, it needs approval of the City Council to do that.

### **ADMINISTRATIVE ORDER**

The Administrative Order ("Order") is dated March 25, 2009. It says that it is issued in accordance with the authority accorded under the provisions of c. 111, sec. 122 and the Rules and



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Regulations of the Newburyport Board of Health, promulgated pursuant to G. L. c. 111, sec. 31, and entered by the Director of the Newburyport Board of Health.

The Order states that the Director of the Board of Health has determined that conditions at the Landfill may be injurious to the public health due to odors, failure to maintain leachate collection facilities, failure to maintain the flexible membrane liner, and failure of NVLLC to complete closure activities as referenced in numerous previous orders issued by the Board of Health and the Health Department.

The Order recites that the Director is authorized by Section 1.2.003 (a) of the Regulations of the Board of Health.

The Director orders the following:

1. NVLLC shall immediately undertake closure of the Landfill in accordance with the authorizations and approvals from Massachusetts Department of Environmental Protection (DEP);
2. NVLLC shall comply with all outstanding Orders and determinations by the Board of Health, including but not limited to the Noisome Trade Site Assignment and the existing Preliminary Injunction entered in Essex Superior Court.
3. The Board of Health acting by and through its Director shall maintain oversight of the Landfill in accordance with the Noisome Trade Site Assignment and the provisions of G. L. c. 111, sec. 122.

The Order says that it does not relieve NVLLC of any other obligation to the City, including any obligations under the HCA, to the extent that the provisions of that agreement do not conflict with the Order.

The Order says that it may be appealed to the Board of Health by NVLLC within 21 days.

Board of Health Regulation 1.2.003(a) provides that the Director of Public Health may issue administrative orders, which may require actions deemed necessary to enforce public health laws and regulations. Regulation 1.2.004 says that a decision by the Director of Public Health may be appealed to the Board of Health within twenty-one days of the issuance of a decision. The Board of Health Regulations do not require an administrative order by the Director of Public Health to be submitted to the Board of Health if no appeal is filed.

The time for appeal has expired with no appeal having been taken, as far as we know. That being so, the Order is deemed consented to. In this case, NVLLC's president actually signed the Order under the notation "Received and Accepted," which is further support for the fact that NVLLC has agreed to it.



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In Board of Health Regulation 1.2.003(a), the Board of Health has conveyed authority to the Health Director to issue administrative orders deemed necessary to enforce public health laws and regulations. The Regulations do not require such orders to be submitted to the Board for approval, unless an appeal is taken. Even though the Regulations do not require it, it would be prudent to submit the Order to the Board for its review and approval, particularly if the Order is controversial and may be challenged. In this regard, we note that G. L. c. 111, sec. 30 also provides that a health director may issue orders in case of emergency or in case the board cannot be assembled, but under that statute the order must be submitted to the board for its approval within two days of its issuance. This reinforces the prudence of submitting an especially important Order, or one likely to be challenged, to the Board for ratification.

### **BOARD OF HEALTH POWERS**

The Agreement and Covenant includes a provision that the City agrees not to commence any action against NVLLC provided that NVLLC is in substantial compliance with a Board of Health Order dated on or about March 2009, except to the extent that such action is in response to imminent threats to public health or safety or in response to the gross negligence or willful or wanton acts or omissions of NVLLC that causes a threat to public health and safety. In the event that the Board of Health finds that an imminent threat to public health and safety has occurred or that NVLLC has been guilty of willful or wanton acts that causes a threat to public health and safety, under the Agreement and Covenant, the Board of Health is required to notify NVLLC in writing. The parties shall confer, and NVLLC shall be given ten days to cure the condition. The City may bring in action for the imminent threats only if the parties are unable to resolve the alleged imminent threats to public health and safety through this dispute resolution process. P. 2, par. 2.

As legal background, while they have roles in commencing or settling litigation in the name of the City, neither the Mayor nor City Council has authority to direct the Board of Health to reach a particular result in a Board hearing, no more than they could direct the Zoning Board of Appeals or the Planning Board to reach a particular conclusion in a particular case. This is illustrated by the case of RicMer Properties, Inc. v. Board of Health of Revere, 59 Mass. App. Ct. 173 (2003), in which the Board of Health held a site assignment hearing for a landfill. The Mayor and City Council formally intervened in the hearing before the Board of Health, which ultimately denied approval of the site assessment. The applicant appealed, alleging that the Mayor and City Council improperly influenced the Board of Health and substantially prejudiced the applicant's rights. The Appeals Court rejected the applicant's argument, concluding that the city's intervention, rather than advancing a political agenda, benefited the proceedings by expanding the evidentiary record. *Id.* at 179. Implicit in the Appeals Court's ruling is that the decision of the Board of Health is its own independent decision. While the Board of Health may receive input from a mayor and others, the Board of Health makes its own decisions on site assignments.



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G.L.c. 111, Sec. 150A is the statute dealing with site assignments for solid waste disposal facilities. It requires among other things that the local Board of Health has authority over the local solid waste facility approval known as the site assignment. This approval by the local Board is separate from and in addition to the required approval by the Department of Environmental Protection. Goldberg v. Board of Health of Granby, 444 Mass. 627, 637 (2005) (“There is no question that the board thoroughly exercised its independent review of the facts underlying the department’s determination. The statute neither requires nor contemplates that the board evaluate the reasonableness of the department’s regulation or second-guess the department’s interpretation of its own regulations.”); TBI, Inc. v. Board of Health of North Andover, 431 Mass. 9, 11 (2000) (“By statute, the DEP’s site suitability determination is not binding on the local board which must make an independent determination whether the proposed site complies with the site suitability criteria established in Gal. 111, sec. 150A ½, ... and its own regulations.”)

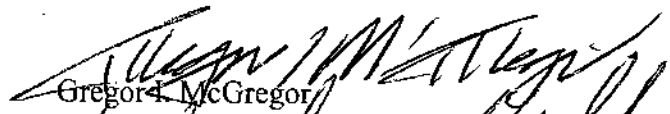

Other statutory sections of G.L.c.111 give a Board of Health powers to promulgate regulations, regulate noisome trades and other activities, and take steps to abate nuisances. Court cases confirm broad, historic common law and statutory powers of a Board of Health.

We noted above the powers of the Director and Board to issue administrative orders under the Board of Health Regulations. We are aware the Board here granted a Noisome Trade Site Assignment. We are unaware of a landfill site assignment as such.

In summary, we observe that the Board of Health in many respects of its jurisdiction and authorities has independent powers and procedures.

We believe that the Agreement and Covenant may bind the City not to sue civilly except in certain circumstances. We doubt, however, whether it is effective to bind the Board of Health administratively, impose extra procedures or burdens of proof, constrain its enforcement orders, or limit it when taking criminal court action. Before reaching any final opinions on this, however, we would need to review any expressed doubts about Board of Health powers in this regard, and any Board of Health consent or approval to be bound this way.

Very truly yours,

  
Gregor C. McGregor  
  
Michael J. O'Neill

