THE STATE OF NEW HAMPSHIRE

GRAFTON, SS. **SUPERIOR COURT**

Docket No: 01 – E - 177

North Country Environmental Services, Inc.

v.

Town of Bethlehem,
Bethlehem Planning Board and
Bethlehem Zoning Board of Adjustment

ORDER ON THE MERITS OF THE PETITION FOR DECLARATORY RELIEF

The extended history of this case can be found in North Country Environmental Services, Inc. v. Town of Bethlehem, 146 N.H. 348, 350-52 (2001). At stake are the interests of the Town of Bethlehem (Town) in exerting local control over the expanding private landfill operations of North Country Environmental Services, Inc. (NCES) within Town boundaries, and the interests of NCES in pursuing the essential job of accepting and processing municipal solid waste, subject to the State's comprehensive plan for Solid Waste Management, RSA 149 – M.

Statement of Facts.

Harold Brown owned 87 acres of land in Bethlehem. In 1976 Brown received a variance from the Town to operate a 4 acre landfill which expanded, in 1983, into 10 acres, before Brown sold it to Sanco, Inc, (Sanco). In 1985, Brown obtained permission from the Town to create a further 41 acre subdivision for landfill use, which he then also sold to Sanco. Sanco applied for a special exception from the Town to expand landfill operations to the 41 acres. The special exception was initially denied, but then granted in November 1985, subject to 23 conditions that were detailed in January 1986. From 1986 onward, the

granting of this special exception has been a source of litigation between Town residents and the Town and between the Town and the landfill, culminating in NCES 1, the previous litigation between these parties before this Court in 1999.

In 1987 the Town amended its zoning ordinances to prohibit the existence of any privately owned solid waste facility in any town district. In 1992, the Town again amended its zoning ordinance to prevent the location or expansion of any solid waste facility in any town district, except if it were a facility operated by the Town. Concurrent with these amendments, Sanco sought State permits to expand landfill operations within the 51 acres (the original 10 and special exception 41) for which it already had local permissions. State permission was sought in stages: 18 acres (Stage I, granted 1987) and 7 acres (Stage II, granted 1989). In 1989, without having started Stage II, Sanco sold the land to NCES.

NCES developed Stage II in two phases, phase one in 1996 and phase two in 1998. The dispute before this Court in 1999, NCES 1, centered around the Town's petition to enjoin the Stage II, phase two, September 1998 expansion. In that suit, NCES cross-petitioned for a declaration by the Court that the 1987 and 1992 Town zoning amendments were preempted by RSA 149-M. The preemption issue was not reached by the Court in deciding that case. Instead, the Court ruled that the 1987 and 1992 amendments could not control landfill use within the 51 acres because they were enacted after the Town had granted the variance and special exception which permitted that use. Amended Order, Fitzgerald, J., April 22, 1999, p. 20. Both parties appealed and the decision was affirmed on May 1, 2001 by the Supreme Court, who similarly held that it was unnecessary to address the issue of State preemption.

Between the time of this Court's final Order on NCES 1 in April, 1999, to the Supreme Court's affirmation of that Order, in May, 2001, the parties were not idle. In March, 1999, the Town notified NCES that further landfill expansion required site-plan review and building permits from the Town, though they later indicated that they would "stay compliance proceedings" until the Supreme Court had ruled. In October, 1999, NCES applied for the State permit to construct Stage III of the landfill and in July, 2000, the permit was granted by the State Department of Environmental Services (DES). This permit allows NCES to landfill a further 6.52 acres of land situated entirely within the 51 acres for which local permission had been granted for landfill use. Construction started on Stage III in August, 2000, without site plan review from the Town. NCES started to receive waste in December of 2000. It is estimated that Stage III will be able to receive between 650,000 and 850,000 tons of commercial solid waste, at a rate of 2,700 tons a week for four-and-a-half years, or until about July, 2004. Stage III, Standard Permit, p. 2.

NCES also entered into a lease with Commonwealth Bethlehem Energy, LLC (CBE), consenting to the use of the 51 acre parcel for the purpose of construction and operation of a Landfill Gas Utilization Facility (LGUF). The purpose of the LGUF is to burn methane gas generated by the landfill in a controlled flame, and spray leachate, also generated by the landfill, into the flame to evaporate it. On February 22, 2000, the Town sent a letter to CBE asserting that no construction of the LGUF – a structure some 40 feet high - may begin without a building permit and prior site plan approval. CBE, after responding that site plan review was preempted by the State, received a temporary permit from the DES to operate the LGUF. The LGUF is currently operational, despite assertions

by the Town that it is not legally constructed without a building permit and site plan review, and is in violation of a 1986 Town ordinance prohibiting incinerators.

In March, 2000, two members of EANNH, known opponents of the landfill, ran for the Town Select Board and were elected. A height amendment concerning landfills was immediately passed and subsequently revised in March, 2001, to include a reference point from which the height could be measured. The revised amendment reads: "No solid waste disposal facility shall have a height exceeding 95 (ninety-five) feet measured from the natural and undisturbed contour of the land under any existing or future landfill."

After some difficult communication between NCES and the Town to determine the extent of any possible site plan review, NCES filed action before this Court in September, 2001. The Town cross-claimed. After the suit was filed, in April 2002, NCES applied for a permit to develop Stage IV of the landfill, a further 11.05 acres, almost all of which falls outside of the 51 acres for which NCES has received Town permission for landfill use. In March, 2003, NCES received State permission to construct and operate Stage IV. This puts the issue of State preemption under RSA 149-M squarely before this Court. The preemption issues break down as follows:

(1) The ability of the Town to control and regulate any aspect of landfill construction and operation within the 51 acres which have received local permission for landfill use. Possible forms of local control pled by the Town includes site plan review; enforcement of the 9 remaining conditions of the special variance pled in this proceeding[1]; the 1986

[1] 2 of the 23 conditions were found unenforceable by this Court in NCES 1, and this ruling was upheld by the Supreme Court. The conditions would only apply to the 41 acres for which the special variance was granted.

ordinance prohibiting incinerators, and the height ordinance. Any res judicata effect from NCES 1 must be considered as to any ordinance applicable within the 51 acres.

(2) The ability of the Town to prohibit further development of the landfill outside the 51 acres, through the 1987 and 1992 ordinances.

NCES also brought action against the Town for bad-faith conduct towards NCES. The Court rules first upon the merits of the bad faith action as NCES presented it in the pleadings and at trial.

Bad Faith Conduct of the Town of Bethlehem against NCES.

The foundation for this claim is the nexus between the current Town government and Environmental Action of Northern New Hampshire (EANNH), the public interest group actively working against the landfill. After NCES 1, EANNH sought further action from the Town against NCES urging the use of site plan review and building permits, forms of local control on which they asserted no Court had ruled. Two leaders of EANNH were elected to the Town's Select Board on a specifically anti-landfill platform. Immediately, the Selectmen moved to pass the height ordinance and wrote again to NCES requiring site plan review. NCES asked the Town the scope of site plan review, citing State preemption of regulatory issues. The Town refused to clarify, saying scope could not be defined without an application. At trial several members of different Town boards testified that they felt NCES was trying to cut a private deal with the Town, rather than undergo the same process of application for site plan review to which everyone else in the Town was subject.

The Town sought legal counsel who advised that the Town could exert site plan review under NCES 1. When NCES filed suit against them, the Town counterclaimed

seeking judicial imposition of 9 of the 21 conditions of the 1987 special exception to the 41 acres, without the notice to NCES or the opportunity to cure that the special exception specifically required. Finally, members of Town Boards have been quoted in many, heated newspaper articles as holding a position adverse to NCES.

"That which is necessary to constitute bad faith is not easy to define and must be determined on a case-by-case basis. It will be inferred by the court from the facts in any particular situation." Peter Loughlin, 14 New Hampshire Practice and Procedure, Local Government Law, § 1054, p. 323. The Court does not find that the facts as alleged rise to the level of bad faith.

The claims of NCES against the Town are vague. The facts are possibly suggestive of a conflict of interest, see e.g. Atherton v. Concord, 109 N.H. 164 (1968); the lack of due process because of quasi-judicial prejudice and bias, see e.g. Funtown, USA, Inc. v. Town of Conway, 127 N.H. 312 (1985); or prejudgment of an application, see e.g. Quinlan v. City of Dover, 136 N.H. 226 (1992). NCES, however, has not formally pled any of these specific causes of action.

Instead, NCES cites four factors considered by federal courts as probative of discriminatory intent by a decision making body. See Waste Management Holdings, Inc. v. Gilmore, 252 F.3d 316, 336 (4th Cir. 2001), cert. Denied 122 S.Ct. 1203 (2002). The Town contends such a test is immaterial. New Hampshire law holds as irrelevant the intention of any selectman in placing a proposed ordinance on the warrant because the decision to enact the ordinance ultimately rested with the voters. Dow v. Town of Effingham, 148 N.H. 121, 131 (2002). Intention of the selectmen should be excluded from

consideration by this Court. Id. One of the acts alleged against the two Selectmen elected from EANNH, is that they placed the height ordinance on the warrant. The Court agrees that this specific action is protected from the consideration of this Court.

The other facts recited by NCES to support bad faith against the Town do not levy accusations with sufficient specificity to enable this Court to give relief against named defendants known to have acted in their official capacity. State v Ratte, 145 N.H. 341, 348 (2000) (the burden is upon the party alleging bias to present sufficient evidence to rebut the presumption of conscience and the capacity to reach a just and fair result). This paucity of particularity is compounded by the fact that the alleged deeds are directed toward different entities - the Town in the aggregate, the official bodies of the Selectmen and the Planning Board, as well as individual Town officials.

Though the Court does find that circumstances and personalities exist within the current Town government such that all Town officials must be vigilant to ensure due process in their dealings with NCES, the Court finds that the facts, as pled and argued at trial, do not rise to the level of proof required for bad faith by New Hampshire law. Atherton v. Concord, 109 N.H. at 165 - 66 (1968) (to qualify for conflict of interest a public officer must have a direct personal and pecuniary interest); New Hampshire Milk Dealers' Ass'n v. Milk Control Board, 107 N.H. 335, 339 (1966) (a distinction must be made between a preconceived point of view of law or controlling public policies, and a prejudgment concerning precise issues of fact in a particular controversy). NCES's claim of bad faith and prayer for legal fees based on the bad faith of the Town is DENIED.

RSA 149 – M: Purpose and Case Law.

In 1976, the United States Congress passed the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.* (1994) (RCRA), to counter the generally held "Not In My Backyard", or "NIMBY" response to the general perception that "a solid waste facility is not a desirable neighbor." Anderson's American Law of Zoning, 4th edition, 1996, § 17.23, p. 120. RCRA placed the primary responsibility for municipal solid waste management squarely before state and local governments. Richard J. de Seve Comprehensive Legislative Approaches to Solid Waste Management, 32 N.H.B.J. 96, 98 (1991). New Hampshire RSA 149 – M implements the solid waste directives of RCRA. Town of Pelham v. Browning Ferris Industries of New Hampshire, Inc., 141 N.H. 355, 358 (1996) (BFI). BFI is the leading New Hampshire Supreme Court case interpreting RSA 49 – M. That case states in pertinent part: "Any power that towns might have to regulate solid waste cannot be exercised in a way that is inconsistent with State law." BFI, 141 N.H., at 363 (quotations omitted). It also states: "A central feature of RSA chapter 149 – M is the continued role of local government in solid waste management." Id., at 359.

These statements from BFI form the opposing legal parameters from which the parties argue in the case at hand. Relying on BFI, NCES represents to the Court that RSA 149 – M is a comprehensive, detailed, regulatory scheme that manifests a legislative intent to preempt effectively all aspects of local control. See Arthur Whitcomb, Inc. v. Town of Carroll, 141 N.H. 402 (1996). The Town, however, argues that BFI affirms the continued role of local government, which can be applied wherever it is not inconsistent with State law. Also, the Town argues that BFI can be distinguished from the case at hand, as it

applies to landfill closures, not landfill operation.

Statutory Preemption: Current Law.

In a field regulated by the State the doctrine of preemption is usually successful as a basis for avoiding municipal land use controls. Peter J. Loughlin, 15 New Hampshire Practice, Land Use Planning and Zoning, § 12.02, p. 163 - 64, citing Stablex Corp. v. Hooksett, 122 N.H. 1092 (1982) and Applied Chemical Tech, Inc. v. Merrimack, 126 N.H. 45 (1985). However, an exception is made when the State regulates a particular field, but the legislature permits local regulation as well. Derry Sand & Gravel, Inc. v. Town of Londonderry, 121 N.H. 501, 504 (1981) (local approval of a disposal site is required as well as State approval). RSA 149 – M is a statute that expressly permits local control. RSA 149 – M:9 (VII), recodified after BFI and effective in August 1996, reads:

> The issuance of a facility permit by the department shall not affect any obligation to obtain local approvals required under all applicable, lawful local ordinances, codes, and regulations not inconsistent with this chapter. Local land use regulation of facility location shall be presumed lawful if administered in good faith, but such presumption shall not be conclusive.

When interpreting a statute this Court examines the statutory language itself and construes the law consistently with its plain meaning. Penrich v. Sullivan, 140 N.H. 583, 589 (1995). The Court rules that the plain meaning of the statute clearly allocates a role for local regulation in the field of waste management alongside the State. The more difficult issue is the extent to which such local regulation is allowed.

BFI states New Hampshire's traditional test of preemption: "[l]ocal regulation is repugnant to State Law when it expressly contradicts a statute or is contrary to the legislative intent that underlies a statutory scheme." BFI, 141 N.H. at 362. The current codification of RSA 149 – M:9 (VII) states that local regulation is permitted when "not

inconsistent with this chapter." This Court looks to all three legal tests - express contradiction, legislative intent, and the details of internal consistency within the statutory scheme - to clarify the extent and exact nature of local control reasonable to the regulation of NCES's current waste facility and the expansion or establishment of a further facility, under State solid waste management plans.

Express Contradiction with the Statute: State Regulation.

BFI stresses that the comprehensive and detailed technical standards governing the closure of landfills is the principal reason why preemption should apply to those landfill closures. BFI, 141 N.H. at 362. These technical standards are embodied in a statutorily ordered permitting process constrained by detailed administrative rules. DES "shall not issue a permit for a solid waste facility unless the facility meets the terms and conditions required in rules adopted by the commissioner." RSA 149 – M:9 (X). The permit terms and conditions are laid out in the New Hampshire Solid Waste Rules, Env. Wm 100-300 & 2100 – 3700. One purpose of RSA 149 – M is to establish these State regulatory standards that then have the same preemptive force as the State statute itself. Koor Communication, Inc. v. City of Lebanon, N. 2001 – 440 (N.H. Sup. Ct. Slip op. at 2, December 12, 2002).

These technical rules apply to landfill closure, operation, and location. However, this Court finds that they apply differently to these areas:

1) Closure of a landfill, as found in BFI, is a specific, finite technical process detailed in step-by-step instructions including Env-Wm rules 2507.01 to Env-Wm 2507.05, with design standards of caps to be found in Env – Wm rule 2005.10.

2) Operation of a landfill is necessarily a more flexible and open-ended process that is held to State standards in a variety of different ways. These include complicated protection of ground water, Env – Wm 2504.03; extensive training of landfill operators, Env – Wm 3301 *et seq*.; State inspection, Env – Wm 3702 *et seq*; and frequent reporting from the landfill to the State of the development of operations on a regular basis, Env – Wm 2805.07. Within these different systems of State scrutiny, the trained landfill operator has license to make all the day-to-day choices necessary to run a landfill.

3) Finally, the technical regulations on where to locate a landfill are relatively few and restricted to the physical characteristics of the piece of ground in question. Concerns include an adequate distance from other facilities, access and easement rights. Env – Wm 2703. Also important is groundwater and the geologic formation of the underlying rock. Env – Wm 2504.05.

The Court finds, therefore, that while the finite rules of landfill closure leave no room for concurrent local control, the rules of operation leave somewhat larger interstices between defined State monitoring procedures in which the Town may exert some measures of local control that do not interfere with the state regulatory scheme. See State v. Hutchinson, 117 N.H. 925 (1977) (if the State has not promulgated regulations dealing with a specific activity, the municipality may be permitted to fill the regulatory gap.)

The regulations as to location, however, leave significant room for local control. This is because the State's technical rules are relevant only to the physical considerations of the land that affect its scientific suitability for a landfill, and which pertain only after the land is legally allocated for landfill use. They quite deliberately contain no word or direction

as to the political considerations that might affect the allocation of land for landfill use, because this is a separate issue, conceptually and temporally quite distinct from operative safety concerns. Local control over the location of a solid waste facility, permitted by the State but not by the municipality, is an issue of first impression in this State, and this Court looks to the statute for guidance as to legislative intent.[2]

The Legislative Intent of RSA 149 – M:6. The Role of Local Control in the Location of Solid Waste Facilities.

"Where the statutory language is ambiguous or where more than one reasonable interpretation exists, [the Court] review[s] legislative history to aid in [its] analysis." Appeal of Routhier, 143 N.H. 404, 405-06 (1999). Since more than one reasonable interpretation can exist as to the extent of local control in the location of solid waste management facilities, the Court looks to the legislative history of RSA 149 – M:9 (VII) for guidance.

The public hearing minutes of RSA 149 – M:9 (VII)'s 1996 recodification, show that Waste Management, Inc., submitted the following proposed amendment:

> Nothing in this section shall be construed to preempt properly adopted local zoning or other ordinances regulating the location of solid waste facilities within the boundaries of any town, except that no ordinance shall prohibit the siting of a solid waste facility in any town.

Attachment to minutes of Public Hearing, January 3, 1996.

Bernard Waugh for the New Hampshire Municipal Association submitted an alternative proposed amendment for the same section of the statute:

> Nothing in this section shall be construed to preempt properly adopted local zoning or other ordinances regulating the location, siting or design of solid waste facilities within the boundaries of any town.

[2] NCES is extending its facility beyond the area locally approved for landfill use. Legally, this is the same analysis as the location of a new facility.

Id.

The private landfill owners sought to place landfill "siting" entirely outside any form of local control, while allowing regulation of "the location" of solid waste facilites. By contrast, the towns seek complete control over the "location, siting or design" of landfills. Private landfill owners, therefore, draw a distinction between the "location" of a landfill and the "siting" of a landfill that is not made by the towns. NCES extends this distinction in the case at hand by arguing that the second sentence of the codified version of RSA 149 – M:9 (VII), "[l]ocal land use regulation of the facility location shall be presumed lawful if administered in good faith," refers only to where a facility can go (its "location"), not whether a facility may be permitted (its "siting").

The Court does not agree. The legislature did not choose to codify any distinction between "location" and "siting." RSA 149 – M:4, Definitions. This is consistent with the New Hampshire Code of Administrative Rules governing landfill regulations which use the words "siting" and "location" interchangeably.[3] It is also consistent with the overlap found in the dictionary definitions of "location" and "siting."[4]

Because the legislature declined to narrow the definition of "location," or to distinguish it from "siting," this Court rules that the word "location" is used in the statute in its plain and most commonly understood meaning. Penrich v. Sullivan, 140 N.H. at 589.

[3] Env-Wm 2703, Universal Siting Requirements, (a) "The location of a facility shall be…" (b) "The location of the facility may be …" Likewise, Env-Wm 2903, Siting Requirements: "Location Restrictions."

[4] Black's law dictionary defines "location" as: 1. The specific place or position of a person or thing. 2. The act or process of locating. BLACK'S LAW DICTIONARY, 7th Edition (abridged), p. 761. It further defines "site" as: [a] place or location; esp., a piece of property set aside for a specific use. Id. at p. 1119 ("siting" is not defined). The Oxford American Dictionary defines "location" as: 1. the place where something is situated. OXFORD AMERICAN DICTIONARY 1980, p. 520. "Siting" is defined as: "to locate, to provide with a site." Id., at 854.

To ask if a landfill can be located on a piece of land is to ask if it is allowed to be situated there. The issue is permission, whether it can be located there. In response to this issue, the legislature chose to codify that the DES permit shall not affect any obligation to obtain local approvals. This Court rules that the legislature intended to require landfill operators to get permission from local authorities to site or locate landfills within their boundaries, so long as such local control is made in good faith and does not violate the overall State plan for solid waste of RSA 149 – M.

Consistency with the Statutory Scheme of RSA 149 – M. How Local Control and Responsibility fit into Statewide Solid Waste Management Plans.

"We examine a statute not in isolation, but in relation to the overall statutory scheme." Opinion of the Justices (Solid Waste Disposal), 135 N.H. 543, 545 (1992). The statutory scheme of RSA 149 – M declares itself in pursuit of three goals: to protect human health; preserve the natural environment; and conserve precious and dwindling natural resources. RSA 149 – M:1. The means to achieve these goals is "proper and integrated management of solid waste." Id. This includes a 40% reduction in the landfilling or incineration of solid waste through a preferred hierarchy in waste handling, which starts with source reduction and ends by placing refuse in a lined landfill. RSA 140 – M:2 and 3. The State estimates the amount of solid waste that will be generated by the State for the next 20 years and pledges that there will be adequate landfill space to meet that volume. RSA 149 – M:11.

To implement the State's waste reduction goals and ensure facilities with the capacity to meet the State's estimate of anticipated solid waste, each town is responsible for arranging for the disposal of its own municipal refuse, in compliance with the hierarchy

of waste handling. RSA 149 – M:17 (IV). It was ruled constitutional by the Supreme Court to require Towns to absorb the increased costs associated with the hierarchy of waste handling in the Opinion of the Justices (Solid Waste Disposal), 135 N.H. 543 (1992).

The Town can either provide its own landfill facility, or assure access to other approved solid waste facilities for its residents. RSA 149 – M:17 (I). A Town can provide for solid waste facilities by itself, or by forming solid waste districts with other towns. RSA 149 – M:24 (I). If a town fails to provide landfill facilities the State department endeavors to mediate an agreement, but if that doesn't work, DES can step in and establish a facility within the town, on town land, through its power of eminent domain. RSA 149 – M:21.

When considering its solid waste management plan, each town needs to consider environmental impact, economic impact, and area impact, including the planning processes, plans and solid waste management practices of other area towns. RSA 149 – M:24. Towns are released from antitrust legislative standards imposed by RSA 356, to better exercise their authority under the chapter to carry out the goals of the chapter. RSA 149 – M:26. Also, to ensure that in–state solid waste needs are met before out-of-state needs, the proposed facility has to prove to DES that it meets a substantial public benefit to New Hampshire by accepting State generated waste. RSA 149 – M:11.

This Court finds that the comprehensive plan of RSA 149 – M provides for the proper and integrated management of solid waste through the active participation of municipalities and the waste districts they chose to form. Towns are accorded specific, designated responsibilities by the State, which they must discharge autonomously by exercising significant choices within defined State guidelines. If they discharge their

responsibility within those guidelines, their authority will not be appropriated by the State.

It is entirely consistent with the comprehensive scheme of RSA 149 – M that towns should be given discretion to apply local approvals to solid waste facilities within their boundaries. It is, in fact, the explicit goal of the statute to give towns (or their functional equivalent) such discretionary power, subject only to the imperative that they process their own solid waste according to the State established guidelines.

To be considered lawful, however, each individual ordinance a town enacts also has to be consistent with the general goals of RSA 149 – M. The Court will now examine the two Town ordinances at issue with respect to NCES Landfill, Stage IV, in this regard.

Stage IV.

The two Town of Bethlehem ordinances under consideration are the 1987 amendment which prohibits the existence of any privately owned solid waste facility in any town district, and the 1992 amendment which prevents the location or expansion of any solid waste facility in any town district, except if it were a facility operated by the Town.

The Court finds that the 1987 amendment is not consistent with the statutory plan of RSA 149 – M. The statute sought to address NIMBY problems with solid waste disposal by dispersing responsibly to all municipalities under defined statutory guidelines. It is not consistent with the goal of this statute that the Town make any bald and blanket prohibition of the existence of any privately owned solid waste facility in any Town District. See Sawyer Environmental Recovery Facilities, Inc. v. Town of Hampden, 760 A.2d 257 (Me. 2000). This is particularly true as the Town does not define how it proposes to undertake responsibility for its part of municipal solid waste disposal under the statute.

The 1992 amendment, however, is consistent with the statutory plan of RSA 149 – M. With this amendment, the Town seeks to prevent location or expansion of any solid waste facility in any town district, except if it were a facility operated by the Town. Here the Town is not proposing to exempt themselves of their obligation to partake in the State plan of integrated solid waste management by processing their own waste according to State guidelines. They are simply electing to undertake their responsibility through a facility sited and operated by the Town. This is precisely the choice a town is permitted to make under the general parameters of municipal responsibility established in RSA 149 – M:17 (I).

As the 1992 ordinance governing land use regulation of facility location is consistent with the statutory scheme of RSA 149 – M, the requirement of RSA 149 – M:9 (VII) that the local ordinance is "not inconsistent with this chapter" is satisfied. Since the Court has ruled that the Town administered the local ordinance in good faith, the ordinance is presumed lawful, and is in fact ruled lawful by this Court.

NCES 1 ruled that the 1992 Town ordinance was not allowed to be applied retroactively to the 51 acres already approved by the Town for landfill use under the 1985 special exception. However, the 1992 ordinance may be applied to any part of the Stage IV expansion that projects beyond the boundaries of the 51 acres. Thus, NCES's claim for a declaration from the Court that it may proceed with development of the landfill subject only to applicable State regulation, but without interference from the Town, is DENIED. The Town's counterclaim that the 1992 zoning ordinance apply to that part of Stage IV that projects beyond the boundaries of the 51 acres is GRANTED.

The remainder of this Order deals with the State's administrative, permit based,

regulatory control of NCES's landfill established on the 51 acres that has received local permission for landfill use.

The Applicability of the Town's Ordinance against Incinerators as applied to the LGUF.

The syntax of the statute makes it clear that presumptive lawfulness does not apply to a municipality attempting to impose technical regulations, only land use regulations. The only way municipal regulations of the actual landfilling process can survive state preemption is if no actual conflict can occur between such regulations and the administrative rules. Koor Commincation, Inc. v. City of Lebanon, No. 2001 – 440 (N.H. Sup. Ct. Slip op. at 2 – 3), Dec. 12, 2002.

The New Hampshire Code of Administrative Rules defines incinerator as:

> A device engineered to burn or oxidize solid, semi-solid, liquid, or gaseous waste for the primary purpose of volume reduction, disposal, or chemical destruction, leaving little or no combustible material. Such devices include, but are not limited to, heat recovery systems.

Env-A 101.152

This process, according the Town's expert at trial, is exactly the purpose of the LGUF. Leachate is pumped at high pressure into the methane flare. Most of the leachate is water, which is evaporated off. However, leachate also contains other constituents that are evaporated off even faster than water. These include alcohols, organic acids and volatile organic compounds. These compounds are not released to the air, but are combusted in the LGUF to destroy them, leaving a solid ash residue that is periodically scraped off the LGUF's interior and land filled.

NCES denies none of this. Rather, at trial they put forward uncontested evidence

that the amount of chemicals burned in the methane flame is under the threshold required before an incinerator permit is needed by DES Air Resources Division. If less than 200 pounds of waste material per hour is destroyed, the LGUF does not have to be permitted as an incinerator, but rather as a fuel-combustion device. Trial Transcript, Vol. IV, p. 102. About 25 pounds of waste material per hour is destroyed in the LGUF. Id., at 129.

Since an incinerator permit is not required, the LGUF is not an incinerator under State regulations. Though the combustion process remains the same, it cannot be classified as an incinerator by the Town. To allow the Town to classify the LGUF as an incinerator, would mean that the LGUF would both be, and not be, an incinerator. This is a physical impossibility and precisely the situation which preemption is designed to prevent.

The Court finds that this is a classic example of where the regulatory power of the State has stepped in to give expert guidance as to the acceptable levels of chemical compounds that can be released into the environment. See e.g., Town of Salisbury v. New England Power Co., 121 N.H. 983, 985 (1981). The rules governing the release of such compounds are complex, explained by technical equations and different for different years. It is also an area in which the State agency's ability to investigate and enforce uniform standards statewide is important. See e.g., Public Service Co. v. Town of Hampton, 120 N.H. 68, 71 (1980). Since State regulations preempt this field, and since those regulations do not define the LGUF as an incinerator, the Town's ordinance forbidding incinerators does not control the LUGF on NCES's landfill.

The Application of the 2001 Height Ordinance.

As referenced above, the Town seeks application of its 2001 height ordinance on

Stage III and, if relevant, Stage IV of the landfill. NCES argues that the height ordinance is barred both by statutory preemption and through *res judicata* by Judge Fitzgeralds' ruling in NCES 1. The Court first addresses the argument of *res judicata*.

In NCES 1 Judge Fitzgerald ruled that "the uses established [land filling] on the subject premises were pre-existing and permitted at the time the 1987 amendment to the zoning ordinance was adopted. As such, NCES possessed a vested right of use unaffected by the 1987 and 1992 amendments." Amended Order, Re: Merits, Fitzgerald, J., April 22, 1999, p. 10.

NCES has long maintained that the Court in NCES 1 gave NCES all the local approvals necessary to develop, construct and operate its landfill on the 51 acres. This argument is based on the fact that the Court granted NCES its request for relief that NCES had phrased in such language. However, NCES's contention has been rejected as an unacceptable extension of the above language of Judge Fitzgerald's Order by the Court. Order on Motion to Dismiss Counterclaims, Burling, J., October 8, 2002, p. 7 (*res judicata* is based on a final judgment by a court). Though NCES's vested right to landfill use was protected, voiding later ordinances that sought to take away that use, all ordinances passed later are not necessarily rendered inapplicable.

The determining factor is that no ordinance can prohibit NCES from exercising its vested right to use the land for landfill purposes. Germane to this analysis is the ruling of the Supreme Court of Connecticut in Bauer v. Waste Management of Connecticut, Inc., 662 A.2d 1179 (1995), which identified two components of landfill use. One is the continued depositing of refuse on the landfill. The second is the storage of that refuse

which has already been deposited. The Connecticut Court found that to truncate one of the uses, the depositing of refuse, did not prevent the active use of the other, refuse storage. Id., at 1192.

This Court accepts the findings of the Connecticut Supreme Court and rules that NCES's vested use of the land is not prohibited if it can deposit refuse in all areas of the landfill not affected by the height ordinance, and can continue to store refuse for all areas of the landfill that are affected by the height ordinance. *Res judicata* does not control.

As to preemption, it was uncontested at trial that State regulations do not specifically address the issue of height. NCES, however, argues that since the State regulates the landfill's footprint, stability and volume, that height is necessarily preempted by the regulatory scheme. The Court does not find the State regulations so inflexible. First, as stated above, the State does not assign a precise volume to Stage III. It gives an estimate, the parameters of which vary by 200,000 tons of solid waste. Second, the State's regulations do not address the density of the waste. Third, technological advances are providing ways to increase the stability of landfills at ever greater heights. See e.g. NCES Erosion Control Measures Stage III Design, Sheets 5, 16.

Important to this analysis is the holding of the New Hampshire Supreme Court in Smith v. Town of Wolfeboro, 136 N.H. 337, 344 (1992) where the municipality was allowed to set stricter regulations than the State's minimal requirement, since the statute allowed for local control. The town's ability to set stricter regulations depended in large part, on the legitimacy of the town's concern. The town was permitted to set higher septic system standards than the State required because its concerns about lake pollution were

legitimate. It was not, however, allowed to deny subdivision approval on an *ad hoc* basis because of "vague concerns." Id.

Here the Court finds that the Town's concerns about the height of the 51 acre landfill are legitimate, particularly in light of the stated scheme of RSA 149 – M, which is to distribute responsibility for solid waste management across all municipalities and districts, under State guidelines. It is contrary to the legislative scheme that any one town should be burdened by the uncontrolled growth of a landfill. The Court rules that the Town's height ordinance is valid to control the vertical growth of the landfill within the 51 acres. Height should be measured from Ainsworth's 1985 survey that depicts the land contours in the area beneath the landfill, prior to landfill construction.

Site Plan Review, Applied to all Landfill Construction after Stage II, Phase 2.

The State of New Hampshire designates the power of site plan review to town planning boards in RSA 674:43. Because a municipality's power of site plan review is delegated to it by the State, the municipality must exercise this power in conformity with the enabling legislation. Britton v. Town of Chester, 134 N.H. 434, 441 (1991). However, any power that towns might have to regulate solid waste cannot be exercised in a way that in inconsistent with State law. BFI, 141 N.H. at 363. The Court finds that where the State's site plan regulations conflict with the State's environmental and waste management rules, the environmental rules must preempt.

Site plan review has been described as "an informational tool." Patrick J. Rohan, Zoning and Land Use Controls, Vol 6, , Site Plan Review, Background, § 33C.01[2]. Indeed, absent such a review procedure, a planning board is powerless to examine uses

permitted by right, to assess their impact on the community. Id. § 33C.01[1]. The Court finds it reasonable for the Town to require site plan review in a project as large as the NCES landfill. NCES should apply for site plan review in the same manner as any other industrial site, with clear understanding on the part of the Town that there are areas normally within their site plan review regulation authority, detailed in RSA 674:44, that the Town must waive because they are preempted.

The most pertinent areas of overlap between the RSA 674:44 site plan review regulations and the environmental rules are as follows:

1) Drainage, flooding, and protection of the groundwater. These are all areas extensively planned and monitored by DES. Env-Wm 2504.03 Surface Water Protection Standards (including protection of rivers, lakes, drinking water, and flood hazards); Env-Wm 2505.08 Groundwater and Surface Water Monitoring System Design Standards; Env-Wm 2505.09 Stormwater Management System Design Standards; Env-Wm 2506.05 Leachate Management Requirements (for water that gets into the landfill); Env-Wm 2506.06 Stormwater Management Requirements (to stop water getting into the landfill). It is clear from BFI, that:

> Any attempt by the town to condition site plan approval upon its own independent review of the adequacy of the protection afforded … against groundwater contamination and harmful discharges must be viewed as frustrating the State's exclusive authority to regulate the technical aspects of landfill closure, and hence preempted.

BFI, 141 N.H. at 364.

This Court finds that the degree of regulation as to groundwater protection is equal in landfill operation as landfill closure. This area, normally designated to towns as within the

jurisdiction of site plan review in RSA 674:44, II (a) (1) and (2), is preempted by the State.

2) Smoke, soot and particulate discharge, sources of pollution normally covered by RSA 674:44 II (a) (3) are preempted by the DES Air Resources Division rules on the burning of waste material. (See Supra, p. 18 – 19 on the LGUF.) However, the Court finds no administrative rule concerning noise pollution in the regulation of landfills. The Town may enforce rules as to noise pollution from the landfill, should this be a concern.

Not mentioned in the statute, but of more concern to the Town (Trial Transcript, Vol IV, p 24 – 29), is the issue of odor, which can be considered a form of pollution. To minimize the dispersal of odors, DES requires the landfill to place approved cover (natural soils) over all sides and working faces of the landfill no less frequently than at the end of each operating day. Env – Wm 2506.03 Landfill Cover During Operations. There was testimony from one member of the Town's planning board that NCES and DES are very concerned about odors, "and I believe that they have done everything that the present technology allows them to do." Trial Transcript, Vol VI, p. 28. Under RSA 674:44 II (a) (3), site plan review is available to regulate "undesirable and preventable elements of pollution." In so far as the odor from the landfill is not preventable, any attempt by the Town to try and impose conditions to affect odor through site plan review is not appropriate. However, the Town can ask that NCES keep the Town informed of how they are continuing to address the problem of odor as a condition of site plan approval.

3) Env – Wm 2506.03 also provides that landfill cover during operation shall minimize the potential for fire. The Court has not found other regulations pertaining to fire within the environmental rules. This is an area in which site plan review is appropriate.

The Town should be informed of the exact State regulations preventing fire, what NCES's emergency plans are, and how the Town's crisis response teams would be involved in the case of an emergency.

4) Setbacks and Landscaping. RSA 674:44 II (b) states that site plan review may "provide for the harmonious and aesthetically pleasing development of the municipality and its environs." Env – Wm Rule 2504.04 Set-back Requirements require that there shall be minimum "buffer strips" between the footprint of the landfill and the property line (100 ft); roads (300 ft Class I and II, 100 ft Class III and IV); residences not owned by the landfill (500 ft) and airport runways (10,000 ft if turbojet aircraft, 5,000 ft if piston type aircraft). The issue becomes the ability of the Town to impose greater regulation if the State has set a minimum. Since the language of the State, in this instance, is deliberately "a minimum" this falls into the category in which the Town can coregulate under its legislatively permitted local approvals. Smith v. Town of Wolfeboro, 136 N.H. at 344. This Court rules that the Town is allowed to pass ordinances requiring more setbacks or vegetation screening in certain, specific areas, providing that there is legitimate concern about the setbacks or screening currently used in that area. "Vague concerns" are inadequate to require more than the State standards. Id.

5) RSA 674:44 provides that suitable streets are required so that any facility will not unduly impact the traffic flow of the Town. Traffic Flow is also regulated by Env – Wm 2704.02 Roads and Traffic Control. Section (a) states: "the management of traffic on roads leading to and from the facility's entrance and exit points shall meet all applicable local standards if the roads are municipal streets or roads…" A Town Selectman testified

that upgrades to certain roadways used by the landfill was previously required of Sanco. Trial Testimony, Vol. II, p. 177. This is an area where site plan review is appropriate.

Building Permits

NCES is required to get a building permit for the LGUF subject to the understanding of the Town that the LGUF is not an incinerator, and that the allowable particulate matter released into the air is a preempted issue. NCES is also required to get a building permit for any other specific structure. NCES is not required, however, to get any building permit for the landfill's refuse cells. As the Connecticut Supreme Court found, a landfill is both a structure and a use. Bauer v. Waste Management of Connecticut, Inc., 662 A.2d 1179, 1192 (1995). Within the 51 acres, the landfill is a use permitted by the Town. Its form as a structure (footprint, content and final slope grade) is regulated by DES.

The Nine Relevant Town Conditions to the 1985 Special Exception.

As detailed above, the Town attached 23 conditions to the 1985 Special Exception, 9 of which are pled in this case with the claim that NCES is in violation. NCES argues that the ordinances are preempted. The Court finds that preemption applies differently to the different conditions. Each ordinance is detailed below.

2. Any other local, state or federal permits, license or approvals necessary to have the construction and operation of a sanitary landfill in the expansion area must be issued, before operation commence.

The violation sited by the Town in this respect is the failure to get site plan review and building permit approvals for Stage III and the LGUF. The applicability of site plan review and the necessity for a building permit for the LGUF, but not for Stage III, has been ruled on above.

3. All appeal periods from local, state and federal actions relating to this special exception and/or the matters set forth in paragraphs 1 and 2 above must have expired, or, in the event of an appeal from one or more of said actions, a decision by the highest Court of competent jurisdiction upholding said action(s) before operation commence.

The Court rules that NCES's obligation to seek site plan review from the Town subjects NCES to adequate Town process. The process for State appeals is controlled by the State, and so preempted.

5) In order to insure that operation of the expansion area does not result in an adverse effect on public health and safety or upon the environment, Sanco shall conduct testing of the groundwater at least four times annually… Sanco shall give the Town advance notice of the testing and make available to the Selectperson, split samples of any quarterly tests.

The State has preempted the right to regulate groundwater testing.

6) The location of all monitoring wells shall be subject to the approval of the Bureau of Solid Waste Management of State of NH and Selectmen.

The Board of Selectmen is preempted from acting on this matter.

7) Plans and specifications shall be approved by the Bureau of Solid Waste Management of the State of NH and Selectman

The Board of Selectmen is preempted from approving or disapproving plans and specifications, except in the limited areas of site plan review defined above.

8) Sanco shall provide to the Selectmen within seven days of its receipt, copies of all state inspection reports, notices of violation or the like, for the expansion area

This is an enforceable condition. It does not violate the State inspection prerogatives for NCES to provide informational copies to the Town. It also addresses a need of the

Town reiterated frequently at trial: “We’ve got to give our residents of Bethlehem some information, some answers.” Trial Transcript, Vol II, p. 175.

> **17) In order to insure that materials deposited at the landfill are acceptable, and do not present a threat to the public health and safety or to the environment, Sanco shall provide to the Town a list of all municipalities and other sources of refuse to be deposited at the facility. The list shall include the names of all businesses within any municipality using the landfill and the constituents of any solid waste other than residential refuse.**

This is an issue preempted by the State.

> **18) Absolutely no hazardous wastes of any kind as defined by applicable state or federal law shall be deposited at the landfill**.

This is an issue preempted by the State.

> **23) In order to guarantee the shielding of adjacent residences from view of disposal operations in the expansion area, Sanco shall maintain a buffer zone of not less than fifty feet of existing natural vegetation between any area of active solid waste land-filling and the property boundaries of the expansion areas.**

The 100 ft minimum buffer zone the State requires is more ample than this. The Town has the right to impose vegetation buffer zones within the limits outlined in the site plan review section above.

Pursuant to RSA 491:15, this opinion constitutes the Court’s findings of fact and conclusions of law. Any of the parties’ requests for findings and rulings not granted or denied herein, either expressly or by implication, are determined to be unnecessary for resolution in light of the decision rendered.

SO ORDERED.

Dated: April 24, 2003

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Jean K. Burling
Presiding Justice