

## **Applicant's Closing Statement**

**By Stephen Richmond, Esq.**  
**For E.L. Harvey & Sons, Inc.**

On behalf of E.L. Harvey & Sons, Inc. I want to thank each of the Board members for your patience and attention during the many months of hearings on our application for seven special permits. This has been a long and complex process, and we appreciate the service you are providing to the Town.

There are two separate sets of standards that apply to your deliberations on our application. For special permits in general, there is one standard, and for the special permits requested in the Water Resources Protection Overlay District (WRPOD) there is a second standard. I would like to briefly review these standards with you, and then offer some comments on each.

I will not try to exhaustively cover all of the facts that relate to our application, as our very lengthy record speaks to those facts and our consultants from Brown and Caldwell and Greenman-Pedersen, Inc. have done a very good job providing summaries for you. Instead, I want to try to place this project into the proper perspective and to view the project through the lens of the Zoning By-Law.

For Special Permits in the Industrial District, this Board must find that the requested permits are in harmony with the general purpose and intent of the Bylaw, and are subject to appropriate conditions and safeguards the Board may prescribe. In this regard, the Board must:

- (i) give due consideration to promoting the public health, safety, convenience and welfare,
- (ii) encourage the most appropriate use of land, and
- (iii) permit no building or use injurious, noxious, offensive or detrimental to a neighborhood.

The project parcel is located entirely in the Industrial District established under the By-Law. Each of the proposed uses for this project is authorized in the Industrial District, some as of right, and some by special permit.

The project parcel is on land that has been in industrial use for many years – in this case, as a municipal landfill under contract with the Hopkinton Board of Health. In the 1990s, this parcel was rezoned to Industrial by Town Meeting for the specific purpose of allowing the construction of a recycling center.

It is entirely appropriate to reuse this site for a recycling center – what better use could there be for the site of a closed landfill. Both our federal and state environmental agencies have developed policies to encourage the reuse of such sites because their reuse lessens the pressures on undisturbed greenfields sites.

The project site is located in an industrial corridor that is sheltered from the rest of Hopkinton by the Massachusetts Turnpike. Immediately adjacent to this site along Route 135, there are buildings that now or in the recent past housed an abrasives manufacturer, a chemicals

distributor, an auto repair facility, a metals fabrication company, a manufacturer, and a bark and loam facility. The proposed use is entirely consistent with the adjacent uses in this corridor and is consistent with the intended use of the parcel as approved by Town Meeting.

The project incorporates an enormous array of mitigation measures to protect the town, the neighbors, and the swamp from project impacts.

With respect to traffic, Greenman-Pedersen, Inc. has provided an exhaustive analysis on projected truck traffic that demonstrates there will be insignificant traffic impacts, and Fay, Spofford & Thorndike, LLC, the Board's traffic consultant, has concurred with the Greenman-Pedersen analysis. With respect to design and operation, Brown and Caldwell has explained the many project features that will be incorporated to prevent adverse impacts, and again, the Fay, Spofford & Thorndike, and Earth Tech, the Board's engineering and hydrogeological consultants, have generally concurred in these analyses.

The mitigation measures adopted by the Applicant are extremely protective. The project will protect surface water runoff. The project will improve existing groundwater quality. The project will not adversely impact groundwater quantity. The project will not produce light pollution. The project will incorporate operational controls that protect the town and our neighbors from adverse impacts: these controls are designed to prevent receipt of improper materials, prevent spills of the very small amounts of chemicals that will be used on site, prevent odors, reduce noises, reduce air pollutants. This will be a state-of-the-art recycling facility of which the Town can be proud.

Most of the attention in this very lengthy proceeding has been focused on existing site conditions and concerns about the potential for impacts to the swamp and the town's drinking water supplies. This is why the Board has several times cautioned that information provided must be relevant to the project, not to existing conditions. I am of the firm belief that the existing conditions are of marginal relevance to this hearing, which is a zoning proceeding, but we have worked patiently with you to address each and every concern raised, as we appreciate that many of these issues are of importance to the Town.

There has also been some discussion of whether the Board should consider cumulative impacts that may be caused by the proposed facility in combination with existing site conditions. This is an unsupportable proposition.

One commenter has insisted that the Board should speculate about impacts that "may be caused" and about "potential ongoing pollution" and, on the basis of this mere speculation, must decline to grant the use permits sought by the applicant. The sole support for this assertion was drawn from the inapplicable solid waste site assignment regulations. There has been no cited zoning law, no cited zoning court case, no zoning precedent from this Board; in fact, there is no rational justification that would require or even suggest that the Board should conduct a cumulative impact analysis. This has simply been an attempt by a project opponent to confuse the Board by speculating that the sky might fall and that the Board therefore may not act.

If this were the case, if there were precedent and lawful authority for you to so speculate, you would need to involve risk assessment professionals every time you granted a special permit in the WRPOD, or maybe in any zoning district. You would need to speculate about the cumulative impact of growth on the Town's resources and on neighborhoods every time someone appeared before you seeking approval to construct a house. You would need to do capacity demand studies to determine whether the schools could handle all projected new students plus the additional students in each proposed house, whether the police and fire departments could handle the additional loads that are projected plus the additional needs from each proposed house, and whether the roads could handle the projected increases in use plus each additional house.

Think about the variance application that EMC just submitted to install a 12,000 gallon oil tank for an emergency generator near Lake Maspenock. You would need to conduct a risk assessment on existing air pollution loads to see whether the diesel generator served by the oil tank would add an unacceptable burden to cumulative air pollution loads; you would need to evaluate all potentials for pollutants to enter the lake and add the cumulative risks from the requested tank. You would need to evaluate whether the continued use of the building added impermissibly to the cumulative impacts from all the vehicles accessing the building. Where would it stop?

The scope of the speculation that has been suggested is mind boggling if this Board were actually to succumb to this argument. Every project would turn into a hearing like the EL Harvey hearing. As a member of my own Board of Appeals, I can tell you I shudder at the thought. Fortunately, this is not only not desirable, it is not only not required, it is simply not authorized.

There is nothing in your enabling statute or bylaws that permits this Board to engage in this type of speculation. Please bear in mind that the Massachusetts Supreme Judicial Court has ruled in *Colangelo v. Board of Appeals of Lexington*, 407 Mass. 242 (1990), that a substantial departure from past Board practice in denying a special permit is an important factor in determining that a Board of Appeals has abused its discretion. You can take comfort in the conclusion that a cumulative analysis is not within your purview and that it has been reserved for other governmental bodies. A cumulative impact analysis was required by DEP regulations when it reviewed the site assignment for the proposed facility, and it was reviewed by the Board of Health when it site assigned. There were clear scientific principles applied to that analysis and they have been successfully completed. Both the DEP and the Board of Health found that the proposed facility did not pose an unacceptable risk to public health, safety or the environment.

Moving to the standard of review for Special Permits in the WRPOD, this Board must find that the proposed uses in the water district (those uses being a solid waste transfer station, impervious surface, and handling of toxic or hazardous materials) must:

1. In no way, during construction or thereafter, adversely affect the existing or potential quality or quantity of water that is available in the WRPOD.
2. Be designed to avoid material disturbance of the soils, topography, drainage, vegetation and other water-related natural characteristics of the site to be developed.

3. Not be in conflict with the purposes and intent of the WRPOD article.
4. Be appropriate taking into consideration the natural topography, soils and other characteristics of the site.

The listed purposes of the WRPOD article are:

- A. To ensure adequate quality and quantity of drinking water;
- B. To preserve and protect existing and potential sources of drinking water supplies;
- C. To conserve the natural resources of the Town; and
- D. To prevent temporary and permanent contamination of the environment.

First, with respect to the quality and quantity of drinking water and the protection of drinking water supplies, Brown and Caldwell has submitted an enormous amount of information that establishes there will be no adverse affect on water quality or quantity in the WRPOD. Just as importantly, the Board's own hydrogeological consultant, Earth Tech, has opined on several occasions that neither the site nor the proposed project presents a threat to current or future public drinking water supplies.

Significantly, Earth Tech has recently completed a revision to the Zone II wellhead protection area for the Town's drinking water supply wells. It should provide this Board with great comfort that a Zone II delineation has just been completed for this area. As you know, Zone II is defined as the area that will contribute groundwater to a public drinking water well during conditions of maximum pumping under severe drought conditions. Often times, there are disputes about where the Zone II line should be drawn based on the age of the last determination but this Board has the benefit of having had the Zone II delineated during the permitting process by the Town's own expert independent consultant.

Earth Tech stated the following in the cover memo transmitting the new Zone II evaluation:

*"The revised Zone II does not include any of the property owned by E.L. Harvey and Sons on which the former Hopkinton Landfill is located. Nor has Earth Tech included any recommendations for monitoring groundwater between the former landfill and the existing or proposed Fruit Street wells. In our opinion, the former landfill site poses no threat to Hopkinton's public water supply wells."*

Second, with respect to protection of natural resources and the prevention of contamination from the project, the purpose of the project is to enhance and promote our natural resources by increasing recycling. The many environmental controls the Applicant has agreed to adopt should provide this Board with the comfort it needs that the project will not have a negative impact on the environment, and particularly on drinking water supplies. Brown and Caldwell has listed for you tonight the different mitigation measures and studies that have been conducted to provide you with that comfort and to show how the project will prevent temporary and permanent

contamination. You have been provided with expert independent evaluation of this work by your two consulting firms to provide you with additional comfort. It is clear from all of this studying of the project that the project will have no current or future adverse impacts on groundwater in the WRPOD, and will not conflict with the purpose or intent of the WRPOD.

One additional general comment about environmental impacts is in order. The controls and analysis demonstrate that the Town's drinking water and the swamp will be well protected. In fact, the groundwater impacted by the existing landfill in most respects still meets the stringent health-based standards for drinking water. Let's bring some common sense to this discussion. Our opponents have tried to alarm you about potentials to impact the swamp, which as you know forms the headwaters of the Sudbury River. A few brief words are in order about the Sudbury River Basin to see what they want you to be so alarmed about:

- The Bay State Abrasives\Dresser Industries Landfills are located in Cedar Swamp in Westborough. This EPA listed site contains five unlined landfills spread over 40 acres where EPA has documented the disposal of chlorinated and unchlorinated industrial solvents and alcohols, sodium hydroxide, mineral spirits, phenolic/formaldehyde resins, sludges, spent cyanide baths, paints and paint thinners, and caustic cleaners.
- Not far downstream along the Sudbury River, you have the Nyanza Chemical Waste Dump in Ashland, where over 45,000 tons of mercury containing chemical sludges are buried adjacent to the River, and the site operator used to discharge mercury and other wastes directly to the River through a small canal known as Chemical Brook.
- The EPA and the MA DPH have posted fish consumption advisories along large portions of the Sudbury River to prevent children and pregnant women from eating any species of fish from the river due to mercury contamination.
- A little bit further downstream beyond the Nyanza site, you have the Raytheon Chemical Waste Site, which involves ongoing remediation of significant chemical releases to the area adjacent to the river.
- The Towns of Wayland and Sudbury both have their former landfills located in the floodplains of the Sudbury River, and Wayland still operates an active cell of its landfill there. Anyone driving along Route 20 has seen the two large hills immediately on either side of the river where these old landfills are situated. There are hundreds of landfills just like that in the state. The Hopkinton landfill is actually quite small by comparison.
- The Division of Fish and Wildlife has documented what it calls "intense eutrophication" in the Sudbury River. This is a condition caused by algae growth from the phosphorus in wastewater treatment plant discharges to the river. There are portions of the river basin where during the summer it is estimated that more than

50% of the water is comprised of sewage treatment plant discharges. Think about what that means.

The groundwater monitoring that the Applicant has completed at this site shows that the leachate in the groundwater coming from the closed Hopkinton landfill essentially meets drinking water standards. Notwithstanding the cleanliness of this groundwater, Earth Tech has definitively determined that this water could never be drawn upon as a public water supply for the Town, and could never impact the Town's wells. Further, the proposed project will reduce any landfill impacts on groundwater and will therefore lead to cleaner groundwater.

Compared to the rest of the picture in Cedar Swamp and the Sudbury River Basin, the story in Hopkinton looks extremely good. We know that everyone is pleased that the monitoring results from around the Hopkinton landfill have shown the landfill leachate to be so clean, and this Board should understand the context in which these results exist.

Every development project creates an opportunity for a town and this project puts that opportunity in stark contrast. There is an old municipal landfill sitting on industrially zoned land in an industrial corridor along Route 135. This landfill is no different than many other closed municipal landfills in this state. In many respects it may be far better. The landfill was closed under closure standards in effect twenty years ago, and everyone would agree that the standards are now more stringent and that better environmental protection is available if the cap were enhanced.

Under newer standards, which are not required for this site, a less porous cap would be installed, and this is what the Applicant has proposed as a mitigation measure. Brown and Caldwell has conservatively calculated that with the new cap in place, 50,000 gallons or more per year of rainwater will be kept out of the landfill and will not percolate through the town's old trash. When water passes through trash, it can pick up contaminants. The less water that gets in, the less of an impact there can be to area groundwater. It is as simple as that. The Applicant has proposed to construct this beneficial cap, and this Board has the authority to ensure that the cap is constructed by approving this project.

These are the opportunities that the project presents for the Town:

1. The Applicant has proposed a project that will benefit the environment by promoting recycling in our region. The DEP has just issued its draft C&D recycling regulations and it has proposed, as expected, to require the recycling of C&D materials. Enhanced recycling presents a tremendous environmental benefit to the community and to the region, but there must be facilities to take and sort the materials if they are to be recycled.
2. The Applicant has proposed to add a much denser cap on top of the old landfill as an environmental benefit. Without this project, no cap would be proposed, and no cap would be required. Keep in mind that E.L. Harvey & Sons, Inc. provided a public service to the Town in operating the landfill for the Town's trash and, consequently, the Town is the primary contributor to that landfill. This Board has the opportunity to ensure that the

enhanced cap is installed.

3. The Applicant has agreed to offer substantial economic benefits to the Town, as detailed in the economic impact analysis that we submitted at the Board's request. Without this project, those benefits will disappear.
4. The Applicant has agreed to provide recycling drop off services to the Town from this site.

This Board has all of the information that it needs to make the necessary findings and grant the requested permits. The Applicant has made the demonstrations necessary to obtain the requested permits, and a grant of the permits is the right action for this Board to take. We are convinced that you will look back at this permitting process as bringing a beneficial project to the Town and that each Board member will view the project as a welcome addition to the community.