

SEN April 23, 2009

Road, landfill cases reaching home stretch

PECCI DOCUMENTS REJECTED, NEW DEP APPEAL FILED

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Kirstie Pecci

SOUTHBRIDGE — The bell has rung to start round three of the legal fight over the industrial park access road, while the marathon that has been a related lawsuit over the landfill can now see the finish line.

Over the weekend, Sturbridge resident and pro bono lawyer Kirstie Pecci announced she is seeking an administrative appeal of

this month's state Department of Environmental Protection's decision upholding last August's Conservation Commission order that gave the road a green light. But the same timeframe saw a blow to her case against the Board of Health's site assignment decision, as a Superior Court judge rejected almost all of the material she sought to add to the record.

"My big issue is the adequacy of the MEPA review," Pecci said of the DEP appeal. "They didn't look at the totality of the project."

Pecci claims DEP's review should only have considered the road as it relates to the landfill expansion, not the proposed industrial park, because she believes the latter won't happen. She also argued the review did not request a traffic study of Route 169 and did not consid-

er "alternatives" — including building the road straight north to Route 20, for which plans do not exist, or not building it at all.

"I can't say it can't be about both, but I don't think it is about both," she said, regarding her main issue. "... If Casella weren't expanding the landfill, this road wouldn't be going forward. Nothing else was hap-

Landfill legal issues move forward

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pening there except that expansion of tonnage" between 1999 — when ConCom first approved the road — and 2007.

Town Manager Chris Clark disagreed, characterizing Pecci's assertion as "an absolute and complete falsehood."

"With the last five years, there have been multiple actions, and the town has spent \$1 million designing the road" and doing preparatory work, Clark said. Beyond that, he points out that the voters approved seeking special legislation to build the road, but, after that request went nowhere in Boston, the Town Council approved borrowing funds to build the project.

If the access road were to run to Route 20, he added, "it would be in her back yard. If it came to that, she'd be adamantly opposed."

Last month, the council voted against awarding a contract to actually do the work, with some naysayers citing the ongoing litigation as a concern. In response, Clark asked the low bidder (Marois Brothers) to keep their \$5.6 million bid valid for six more months and said he hasn't heard anything to the contrary from them.

According to DEP spokesman Joe Ferson, the DEP appeal now goes before a still-to-be-named administrative judge. Within 30 days, there will be a "prescreening conference, then [the judge] will establish a schedule for how the case will unfold," Ferson said.

He could not predict how long it might take, saying, "They're all unique."

The process will likely invoke more detailed elements of the Wetlands Protection Act (310 CMR 10). One relevant section specifically states, "The burden of going forward means having to produce at least some credible evidence from a competent source in support of the position taken.

This burden shall be upon the person contesting the Department's position when the Department has been requested to hold an adjudicatory hearing."

As that unfolds, however, the second appeal may finally come to a conclusion. Since last fall, Pecci has also been fighting the Board of Health's June 2008 site assignment decision approving the landfill expansion with 53 conditions in Worcester Superior Court. Most recently, that case had a hearing in which Pecci attempted to expand the case record to include 16 additional exhibits, all but one of which were rejected by Judge Dennis Curran.

"The standard for exclusion is whether the disputed statements and documents 'set forth motives and thought processes used [by the agency] in arriving at [its] decision,'" Curran wrote in his April 16 decision, quoting a 1999 case in which the DEP was a defendant. He noted the record already totals "some 3,682 pages" and addressed Pecci's documents in groups of related material.

The first three looked at "whether the Southbridge Board of Health is a 'legally designated health authority,'" but Curran argued they were "hearsay" and "unauthenticated public documents" and that "the plaintiffs also lack standing to raise this issue."

Group two included email from 1999, a DEP letter about an unrelated facility and draft conditions. Curran found those "inappropriate for inclusion" in part because doing so "would stifle open debate and chill the deliberative process if decision-makers knew every tentative thought they had during deliberations might be exposed to public scrutiny."

Group three included minutes, transcripts and recordings of the board's post-hearing deliberations and pre-hearing meetings. Curran noted none of them were "made part of the proceedings" of the pub-

lic hearing and would be equally "inappropriate" for the reason above.

Group four "alleged to show irregularities in the public hearing process," but Curran rejected them on the grounds that they were again "inadmissible hearsay" and Pecci's "statutory challenge is limited only to damage to the environmental issues."

The final item was the one Curran accepted, noting the board "does not object to this exhibit being substituted" for an existing one. The decision does not, however, describe the document.

Pecci said she the decision was "disappointing," but believes she can get "a lot of it in another way. The information is probably in the record in some form, but I wanted to make it as clean as possible."

In an e-mail summarizing both cases, Pecci claimed, "there are thousands of pages of convincing testimony and documents in the record that prove the inevitable danger expanding this landfill will pose to the community."

To Clark, Curran's decision "indicated the process followed by the town has been done appropriately." He noted Casella is paying most of the legal costs for that case, but the town is footing the bill for the DEP process.

"In the 15 'relevant' points she tried to make, she's 0 for 15," Clark added. "Maybe she should consider the validity of continuing costly litigation against the town."

Pecci noted the court set a deadline of June 1 for receipt of her final motion for judgment, after which the town and Casella will have time to submit their own. After that, a judge (not the same one) will set a date to hear the arguments and render a decision.

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