

# ELLMAN BURKE HOFFMAN & JOHNSON

A P R O F E S S I O N A L L A W C O R P O R A T I O N

601 CALIFORNIA STREET  
NINETEENTH FLOOR  
SAN FRANCISCO, CA 94108  
415.777.2727  
WWW.ELLMAN-BURKE.COM

HOWARD N. ELLMAN  
415.296.1710 DIRECT FAX  
HELLMAN@ELLMAN-BURKE.COM

December 7, 2005

Christopher Gilkerson  
Chairperson  
No Wetlands Landfill Expansion  
936-B Seventh Street, Box 157  
Novato, CA 94945

Dear Mr. Gilkerson:

You have asked us to advise you regarding the upcoming expansion of the Redwood Landfill in Marin County. Specifically, you have asked us to review the 1958 use permit, the memorandum of County counsel concerning legal issues pertaining to the expansion, and other similar and related documentary issues.

Contrary to the assessment of County Counsel, the County's authority to review permit conditions, scope, and compliance rests on solid ground. As the land use authority, the County may and should conduct hearings to consider evidence that a permit holder, especially one of this magnitude, is violating critical permit conditions.

County counsel correctly states that Waste Management has acquired a vested right to operate a landfill on the site. *Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519. The "vested rights" doctrine imposes a heavy burden on the County before it can revoke the permit. *Id.* The doctrine does not, however, prevent the County from conducting hearings. On the contrary, it mandates a fair hearing and weighing of evidence before a local government can take action detrimental to an entity's permit.

A conditional use permit or CUP is by its very nature conditional. "A CUP is conditional by definition, and the violation of conditions attached to its grant may lead to revocation." *Malibu Mountain Recreation v. County of Los Angeles* (1999) 67 Cal.App.4th 359, 367. In order to appropriately assess the landfill's compliance with its CUP, the Board has the authority, and may initially need, to evaluate the scope of that permit, including what operations and conditions were intended at the time. The Redwood Landfill operates pursuant to a 1958 land use permit with limited specifications and conditions. One explicit condition, though, requires compliance with all applicable laws, including operating permit conditions such as those under the solid waste facility permit. Prior adjudicated findings of violations are not necessary. Since No Wetlands Landfill Expansion has presented credible information of violations, this alone

Christopher Gilkerson  
December 7, 2005  
Page 2

constitutes a basis for conducting hearings on compliance. Even though, as County Counsel points out, the solid waste landfill permit process can readily address many violations, this does not preempt or prevent the County from doing so. In addition, as the governing land use authority, only the County can determine compliance with the General Plan, another issue raised by the landfill's recent operations.

We note that although the solid waste facilities permit provides a vehicle for addressing certain issues regarding the operation of the landfill, it is administered by the State with Marin's Environmental Health Services Division acting as the state's "local enforcement agency" or LEA, technically with no direct constituency in this County. As your elected officials, the Supervisors have a responsibility to provide the forum for this type of discussion. In this role, the Board may also be able to serve as facilitator or mediator between the landfill operator and the community, who ultimately have to coexist.

The Board of Supervisors may employ one of a number of non-exclusive procedures to address the issues raised by the landfill's CUP. Pursuant to State law, the Board of Supervisors wields broad power to do and perform all acts necessary to the full discharge of its duties and responsibilities. Gov't Code § 25207. State law also instills the Board with the power to regulate waste disposal facilities and to ensure the health and safety of County residents. Gov't Code § 25823.

First, the Marin County Municipal Code gives the Board clear authority to consider permit compliance.

In the event any person, firm or corporation holding a use permit ... violates any of the provisions of this title, or any other law or ordinances, or conducts or carries on the use in such manner as to materially affect adversely the health, welfare or safety of persons residing or working in the neighborhood of the property of the permittee, or conducts or carries on the use so that the use is materially detrimental to the public welfare or injurious to property or improvements in the neighborhood, the board of supervisors shall have the power to revoke or suspend the use permit.

(Marin County Municipal Code (MCMC) § 22.88.040I.) The Code also specifies procedures as follows. It requires a noticed hearing to be held by the Planning Commission. The notice must include the following information:

1. The ground for complaint or reasons for the revocation or suspension in clear and concise language;
2. The time when and the place where the hearing is to be held.

