

October 15, 2004

John Atkin, Chairman
Norwalk Water Pollution Control Authority
Silvermine Avenue
Norwalk, CT 06850

RE: Cranbury Sewer Extension Status and ARS Project

Dear John:

I am writing in response to the request of the Westport Board of Selectmen acting as the Westport Water Pollution Control Authority in its vote on September 29, 2004 to meet with the Norwalk WPCA, as described in news reports, "to discuss and possibly rescind a permit to extend a city sewer" to the ARS development (The Advocate, 10/01/04) and/or "to possibly rescind both board's approval of a much-contested sewer line" (The Hour, 10/01/04).

My letter also responds to the inquiry from the Westport Planning & Zoning Director, dated September 7, 2004, asking me: "Could you please let me know if the previously approved sewer extensions to the ARS property by Norwalk is still valid?" This is the first time this question has been formally posed to me.

While a joint meeting of the two water pollution control authorities to discuss general policy issues affecting our neighboring municipalities may be beneficial, I have reached a different conclusion concerning the legal status of the ARS permit in Norwalk and therefore believe that a joint meeting to rescind these permits is neither necessary nor advisable at this time.

It is my opinion that there is no existing valid permit from the Norwalk WPCA for ARS to extend and construct its proposed sewer line in Norwalk. My conclusion is based on the fact that the Norwalk WPCA approval granted on November 18, 2002 to ARS was conditional on ARS obtaining Westport Planning & Zoning approval for its application. The Westport Planning and Zoning Commission denied the ARS application on April 7, 2003.

Approval by the Westport P&Z of the ARS application that had been acted on by the Norwalk WPCA was an explicit condition of the Norwalk WPCA's approval process.

Therefore, by its own terms, the Norwalk WPCA conditional approval never ripened into a final approval.

The position I am recommending to the Norwalk WPCA is that under the current legal authorities there is no existing valid permit based on the November 18, 2002 vote that could be the subject of a rescission action.

I have consulted with Norwalk Corporation Counsel Louis Ciccarello and he concurs in this opinion and recommendation.

Of course, the burden of showing compliance with all conditions falls on the applicant. There has been no subsequent showing by ARS that complied with the conditions imposed by the Norwalk WPCA on November 18, 2002. It is not the customary practice of land use or other regulatory agencies to initiate contact with an applicant to inform them that a necessary condition involving action by an outside agency in another jurisdiction such as the Westport P&Z has not been fulfilled.

Nonetheless, by letter dated September 7, 2004, I was informed by Katherine Barnard that the Westport P&Z Commission “has received a new application for the project known as the ARS project”. By implication, it is obvious that ARS’ prior application was denied. I understand that various parties have appealed from that denial and those appeals are still pending. The P&Z denial was without prejudice, which entitles ARS to make a new application.

The ARS applicants are entitled to make a new request for a permit from the Norwalk WPCA to serve their new application to the Westport P&Z. The Norwalk WPCA is entitled to take into account the significant new information that was either not available prior to November 18, 2002 or was not presented to the WPCA on November 18 that may be presented to it in the future during consideration of a new ARS application.

Consideration of a new ARS application by our WPCA is a far different legal and procedural matter than consideration of a rescission action on the old ARS permit, for the reasons explained in Attorney Bloom’s Legal Memo to the Westport WPCA dated September 28, 2004.

As the following chronology indicates, my conclusion that ARS is required to submit a new permit application to the Norwalk WPCA to accompany its new Westport P&Z application does not place the ARS applicants in any different position than they have been in the past on their prior applications.

The Norwalk Common Council acting as the Norwalk WPCA approved an ARS application on August 8, 2000 with a one-year expiration period. That permit expired by its own terms.

On October 9, 2001, the Common Council approved a new one-year permit. That permit also expired by its own terms.

On November 18, 2002, the new Norwalk WPCA approved a new permit conditioned on Westport P&Z approval. That permit expired or never became valid by its own terms when the Westport P&Z denied the ARS application on April 7, 2003.

This is the third time in three years that a Norwalk WPCA approval for this project has expired or been extinguished by its own terms. After each expiration, ARS made a new application. Thus, the regulatory situation now facing ARS to obtain a Norwalk WPCA permit is precisely the same facing it before its prior three applications and approvals. There is no sound legal reason to treat the expiration of its third permit any differently than the expiration of its two prior permits.

In my view, it is without question a sensible policy for a regulatory agency like the WPCA to impose reasonable limitations on its permits so that a permit approval does not become stale. The WPCA should be able to take into account either new information about an existing condition or review old information as it applies to a new condition. That is why zoning permits, ZBA variances and most other land use regulatory permits include an expiration date.

My recommendation is intended to set the stage for a fair and orderly review by the WPCA of a new application, if one should be submitted, and that review should include consideration of the final report from the Cranbury Task Force that I established to review land use issues in the Cranbury neighborhood. The Task Force is expected to meet soon to consider a draft final report and ARS representatives and neighbors have been assured of an additional public hearing to comment on the report and the general sewer issue before the Task Force's final report is adopted.

In light of the request made by the Westport WPCA, I have informed First Selectwoman Diane Farrell of my recommendation and she concurs that it renders her request for a joint recession meeting as unnecessary.

I should note that I have received many requests from Westport residents to rescind Norwalk's permit and to hold a joint recession meeting. I have not agreed to these requests for the reasons stated in this letter. It goes without saying that these residents are still entitled to pursue the remedy of requesting the Westport WPCA to reconsider and rescind its permit independent of any action by the Norwalk WPCA.

In terms of future proceedings by the Norwalk WPCA, the decision of the Norwalk WPCA to grant a permit to ARS was one of its earliest actions taken after it was established as a separate authority. The issue of whether to impose a time limitation in addition to the other conditions was never presented by the professional staff or discussed by the Authority. This matter certainly points out the need in the future to include in any WPCA permit decisions not just subsequent conditions such as approval by a neighboring P&Z but also explicit time limitations comparable to other land use regulatory permits.

In order to avoid any confusion of issues, I am intentionally not including in this letter any statement or opinion concerning whether legal grounds exist to rescind the Norwalk WPCA permit if it were determined by a court of law still to be valid or whether a new ARS permit application should be approved.

I am releasing my opinion and recommendation to the Norwalk WPCA in anticipation of the item being discussed at its meeting on Monday, October 18, 2004. The Norwalk WPCA is entitled to determine whether its conditions for the granting of a permit have been fulfilled. Concurrence by the Norwalk WPCA in the conclusion I have reached would not necessitate any new affirmative action by the WPCA at this meeting.

Sincerely yours,

Alex Knopp
Mayor

Cc:
Diane Goss Farrell, Westport First Selectman
Members of the Norwalk WPCA
Harold Alvord, Norwalk DPW
Katherine Barnard, Westport P&Z Director
John Izzo, Westport Second Selectman
Louis Ciccarello, Esq.
Ira Bloom, Esq.
Frank Zullo, Esq.
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