
In Re: Town of Newton

Cite as 6 *N.J.A.R.* 449

**IN THE MATTER OF THE PETITION
OF THE TOWN OF NEWTON TO PERMANENTLY
DISCONTINUE ITS SANITARY LANDFILL**

Decided May 31, 1979

Initial Decision

SYNOPSIS

The Town of Newton filed a petition with the Board of Public Utilities requesting the Board's approval to permanently discontinue service at its sanitary landfill.

The administrative law judge assigned to the case determined that the town fell into the definition of "person" set forth in the Solid Waste Management Act and was therefore required to register its landfill with the Department of Environmental Protection. As a solid waste facility the landfill was deemed to be a public utility subject to the Board's jurisdiction. The judge concluded that the closing of petitioner's landfill would not adversely affect the public convenience and necessity and should therefore be approved by the Board pursuant to *N.J.S.A.* 48:2-24.

Sanford Lloyd Hollander, Esq., for petitioner (Trapasso, Dolan & Hollander, attorneys)

SUKOVICH, ALJ:

On March 28, 1979, the Town of Newton (petitioner or Newton) filed a petition with the Board of Public Utilities (Board) requesting the Board's approval to permanently discontinue service at its sanitary landfill. This matter was transmitted by the Board to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

A prehearing conference was held on May 3, 1979. A Prehearing Order was issued by the Administrative Law Judge on the same day. After proper notice, including notice posted at the landfill and in a newspaper circulated in the landfill's service area, a public hearing was held on May 16, 1979. Notice of the hearing was also sent to the Solid Waste Administrative of the New Jersey Department of Environmental Protection (DEP), the Sussex County Board of Chosen

In Re: Town of Newton
Cite as 6 *N.J.A.R.* 449

Freeholders and the Division of Rate Counsel of the New Jersey Department of the Public Advocate, none of which appeared at the hearing. In addition to providing information concerning the hearing, the public notices stated that members of the public could present their views or objections by testifying at the hearing or filing written statements with the Board. No members of the public attended the hearing. Mr. Hyman Schwartz, a Traffic Supervisor with the Board's Bureau of Movers and Solid Waste Control (Staff), stated on the record that, to his knowledge, the Board had received no written comments concerning the proposed closing of the landfill. Mr. Richard Deaney, Newton's Town Manager, represented that the landfill actually closed on May 1, 1979.

The threshold question presented is whether or not the Board has jurisdiction over the landfill, which Newton has operated as a municipal facility for at least 30 to 40 years. The landfill services Newton and neighboring municipalities. Although not formally making a motion to dismiss or to withdraw its petition, Newton reserved its right to dispute the Board's jurisdiction if its petition is not granted. It is the petitioner's position that the Board does not have jurisdiction over the landfill. For the reasons hereinafter discussed, the administrative law judge concludes that the Board does have jurisdiction over Newton's landfill and that petitioner therefore requires the Board's approval to discontinue service pursuant to *N.J.S.A.* 48:2-24.

The Board has jurisdiction over persons and other entities engaged in solid waste collection or disposal pursuant to both its general statutory grant of jurisdiction, *N.J.S.A.* 48:2-13, and the Solid Waste Utility Control Act of 1970, *N.J.S.A.* 13A-1 *et seq.* Interpreting "persons" to exclude governmental entities, the Appellate Division has held that these provisions do not give the Board jurisdiction over municipal corporations in the absence of a specific statutory grant of jurisdiction. *Jersey City Incin. Auth. v. Dept. of Pub. Util.*, 146 *N.J. Super.* 243 (App. Div. 1976). Petitioner bases its argument that the Board does not have jurisdiction over the Newton landfill on the Jersey City Incinerator case.

Amendments to the Solid Waste Management Act, *N.J.S.A.* 13:1E-1 *et seq.*, adopted on February 23, 1976, interpreted as a whole, give the Board jurisdiction over solid waste facilities operated by municipalities. The amendments mandate the DEP to register new and existing collection and disposal facilities, *N.J.S.A.* 13:1E-4, and authorize the DEP to register all persons engaged in solid waste collection or disposal within the State, *N.J.S.A.* 13:1E-2b(6). "Solid

In Re: Town of Newton
Cite as 6 *N.J.A.R.* 449

waste facilities” includes sanitary landfills acquired or operated by any person pursuant to any act, *N.J.S.A.* 13:1E-3; “person,” in turn, includes public authorities, *N.J.S.A.* 13:1E-5(b). Finally, the amendments define “public authority” to include any public body “corporate and politic” for solid waste management purposes in any municipality pursuant to the provisions of any law. *N.J.S.A.* 13:1E-3(i). Pursuant to these provisions, Newton is a “public authority” and therefore a “person” which operates a solid waste facility, and both the landfill and petitioner must register with the DEP. Petitioner’s landfill is, in fact, a registered facility. Finally, the 1976 amendments provide that any solid waste facility operated pursuant to the provisions of the Solid Waste Management Act is deemed to be a public utility subject to the Board’s jurisdiction. *N.J.S.A.* 13:1E-27. Therefore, petitioner’s landfill is subject to the Board’s jurisdiction because it was operated pursuant to the Solid Waste Management Act.

No public utility may discontinue service without the Board’s approval. The Board may withhold its permission until after a hearing to determine if the discontinuance will adversely affect the public convenience and necessity. *N.J.S.A.* 48:2-24. In support of its petition to cease operations, Newton offered the testimony of Mr. Harold E. Pellow, its engineer, and Mr. Richard W. Deaney, the Town Manager, as well as 15 exhibits. The Board’s Staff did not present any witnesses. At the close of the hearing, Mr. Schwartz stated on the record that the Staff does not oppose discontinuance of the landfill operations.

The relevant facts are not in dispute. The landfill, a 5.5 acre site, is located within the Town of Newton in Sussex County. In 1970, petitioner registered it with the DEP, and the following year, submitted engineering designs for the site to the DEP. On June 22, 1977, the DEP rejected petitioner’s plans because of 21 engineering deficiencies. After granting Newton several extensions, the DEP issued an Order on December 20, 1978, directing petitioner to submit a revised engineering design meeting all requirements no later than March 1, 1979, or alternatively, to terminate its landfill operations by May 1, 1979. The May 1 closure date was subsequently extended to June 1, 1979. Rather than comply with the DEP’s engineering requirement petitioner filed the present petition with the Board. As noted previously, the landfill was actually closed on May 1, 1979.

In determining whether a public utility may be permitted to cease operations, the Board must consider the use made by the public of the service in question, the availability of alternative service, the cost of providing the service, and operating losses suffered by the utility.

In Re: Town of Newton
Cite as 6 *N.J.A.R.* 449

Susquehanna, etc., Ass'n v. Bd. of Pub. Util. Comm'rs., 55 *N.J. Super.* 377 (App. Div. 1959); *Application of Central R. Co. of N.J.*, 41 *N.J. Super.* 495 (App. Div. 1956). In weighing these factors, primary consideration must be given to the public convenience and necessity and the local need for the service in question. *In re New Jersey & New York R. Co.*, 12 *N.J.* 281 (1953). After a review of the entire record herein, the administrative law judge is satisfied that petitioner has met the burden of proving that the public convenience and necessity in the instant case is outweighed by the other pertinent considerations.

Mr. Richard Deaney, petitioner's Town Manager and the Chief Administrative Officer of the landfill, testified that in addition to servicing Newton, the landfill received trash originating in Andover and Fredon, which are in Sussex County, and several nearby municipalities in Warren County. Petitioner charged \$.50 per cubic yard of trash dumped. For the past five years, only two private collectors dumped at the Newton site. One of them, Hamm's Sanitation, itself operates a large landfill in Sussex County. The other collector, Sanico, is located in Warren County and makes irregular use of the petitioner's site. Petitioner has been dumping at Hamm's landfill since the May 1st closure.

Mr. Deaney testified that in 1978, approximately 14,000 tons of garbage were dumped at petitioner's landfill. Of this amount, 6,000 tons, or 43 percent, came from outside the municipality and was collected by Hamm's Sanitation. There are six landfills, in addition to the Newton site, which are located in Sussex County. Mr. Deaney testified that one of these restricts dumping to municipal trash. The remaining five landfills, including that operated by Hamm's Sanitation, range in size from 2 to 220 acres, have remaining lives of between 7 and 15 years, charge rates of between \$.75 and \$.95 per cubic yard, and are located from between 6 and 10 miles from petitioner's landfill. Based on this evidence, the administrative law judge concludes that these five landfills are of sufficient proximity and size to accommodate the trash which was dumped at petitioner's site. Hamm's landfill, a 220-acre facility, can itself handle most, if not all, of the trash. The Newton landfill, a relatively small (5.5 acres) site has reached full capacity. In light of the reasonable alternatives available, the administrative law judge is satisfied that the permanent closure of Newton's landfill would not adversely affect the public convenience and necessity. The other considerations pertinent to a discontinuance of service by a public utility also support the granting of Newton's petition. Petitioner offered into evidence copies of its

 In Re: Town of Newton
 Cite as 6 *N.J.A.R.* 449

Income Statements for the landfill for 1972 through 1978. It is apparent from these statements, which are on file with the Board, that petitioner has experienced substantial operating losses for the past seven years. These exhibits can be summarized as follows:

	1972	1973	1974	1975
Operating Revenues	\$ 6,084	\$12,025	\$ 4,528	\$17,323
Operating Expenses	15,443	27,727	17,496	27,599
Operating Loss	(\$ 9,359)	(\$15,702)	(\$12,968)	(\$10,276)
	1976	1977	1978	
Operating Revenues	\$17,884	\$14,753	\$15,260	
Operating Expenses	24,148	31,579	31,549	
Operating Loss	(\$ 6,264)	(\$16,826)	(\$16,289)	

There is nothing in the record to suggest that petitioner would experience operating profits in future years.

In order to meet the DEP's engineering requirements, petitioner would have to engage in a large-scale improvement program, including the installation of a leachate treatment system and a methane gas venting system, the construction of two water observation wells and a 10' x 8' dike, and the drilling of three soil borings. Mr. Deaney, petitioner's Town Manager, testified that he estimated the total cost of the improvements would be \$156,092. Mr. Pallow, Newton's engineer, testified that, in his opinion, the total cost would be much larger, more than \$500,000. Mr. Pallow also stated that even if petitioner complies with the engineering requirements, there was no assurance that it would not be ordered to close by the DEP. Assuming that the engineering improvements would cost \$156,092, petitioner projected an operating loss of \$228,238 for 1979. In order to reach a break-even point, petitioner would have to raise its rate from \$.50 to \$8.25 per cubic yard of trash. As noted previously, comparable rates in the Newton area range between \$.75 and \$.95 per cubic yard. It is ap-

In Re: Town of Newton
Cite as 6 *N.J.A.R.* 449

parent from these estimates that it would not be cost-effective for the Newton landfill to remain open.

Mr. Pallow testified that the landfill would still be at full capacity if it meets the DEP's requirements and that it would not be feasible for petitioner to expand the size of the site because of its location. The landfill is bounded on the north by Hampton Township, on the west, by private property, and on the south, by parkland. To the east, the only possible area of expansion, is swampland which Mr. Pallow described as "carlyle muck", very poorly drained organic soil. Mr. Pallow testified that this area is not suitable for construction of a landfill.

The Solid Waste Utility Control Act of 1970, *N.J.S.A.* 48:13A-1 *et seq.*, authorizes the Board to require a solid waste utility subject to its jurisdiction to remain open for up to one year if the utility's registration is revoked by the DEP. *N.J.S.A.* 48:13A-9. The administrative law judge concludes that a reopening of petitioner's landfill would not be justified because of the existence of reasonable alternative sites in the Newton area, the adverse financial impact upon petitioner that would result from continued operation, and the fact that petitioner has reached full capacity.

Based upon the record in this proceeding, I **FIND** that:

1. On March 28, 1979, petitioner, the Town of Newton, filed a petition with the Board of Public Utilities to permanently discontinue operation of its landfill located in Newton in the County of Sussex;
2. Petitioner has operated the landfill for at least 30 to 40 years and has registered it with the DEP;
3. The DEP ordered petitioner to submit revised engineering designs by March 1, 1979 or to close the landfill by June 1, 1979; petitioner did not comply with this request and closed the landfill on May 1, 1979;
4. In 1978, approximately 14,000 tons of garbage were dumped at the petitioner's landfill; of this amount, 6,000 tons originated in nearby municipalities in Sussex and Warren Counties and the balance came from Newton;
5. There are five reasonable alternative landfill sites which can accommodate the trash which was dumped at petitioner's landfill;
6. Petitioner's landfill has experienced a substantial operating loss for every year from 1972 through 1978, and there is no evidence that these losses will not continue;

In Re: Town of Newton
Cite as 6 *N.J.A.R.* 449

7. It will cost petitioner at least \$156,092 to meet the DEP's engineering requirements, resulting in a projected operating loss of \$228,238 at the present rate and requiring a rate of \$8.25 per cubic yard for petitioner to reach a break-even point, and would therefore not be cost-effective;
8. Petitioner's landfill has reached full capacity and will be at full capacity even if the DEP's requirements are met, and it is not feasible to expand the size of the landfill; and
9. Based on a consideration and balancing of the above factors, a permanent discontinuance of petitioner's landfill would not adversely affect the public convenience and necessity.

CONCLUSIONS OF LAW

Petitioner falls within the definition of a "person" set forth in the Solid Waste Management Act, *N.J.S.A.* 13:1E-1 *et seq.*, and was therefore required to register its landfill with the DEP. *N.J.S.A.* 13:1E-4. As a solid waste facility which was operated pursuant to the provisions of the Solid Waste Management Act, the landfill is deemed to be a public utility subject to the Board's jurisdiction. *N.J.S.A.* 13:1E-27. The closing of petitioner's landfill would not adversely affect the public convenience and necessity and should therefore be approved by the Board pursuant to *N.J.S.A.* 48:2-24. Although the Board can require petitioner to reopen the landfill for a period of up to one year, a reopening would not be justified under the circumstances of this case.

Therefore, based upon the foregoing, the Town of Newton's petition to permanently discontinue service at its sanitary landfill is hereby **APPROVED** effective May 1, 1979, *nunc pro tunc*.

**After reviewing this Initial Decision,
the Board of Public Utilities on
June 20, 1979, issued the following Final Decision:**

The Board of Public Utilities pursuant to *N.J.S.A.* 52:14B-10(c), upon a review of the record in the above matter and the initial decision submitted by Administrative Law Judge Diana C. Sukovich, hereby **ADOPTS** the initial decision of said administrative law judge, dated May 31, 1979 and filed with the Board on June 8, 1979.