



CITY OF CAMBRIDGE
DEPARTMENT OF HEALTH AND HOSPITAL
1493 CAMBRIDGE STREET CAMBRIDGE, MASSACHUSETTS 02139
Telephone 498-1000

PUBLIC NOTICE

The City of Cambridge Department of Health and Hospitals announces the filing of its DECISION conditionally confirming MICH-LIN REALTY TRUST's site assignment for a demolition waste transfer station at 45 Mooney Street. The DECISION was prepared in conjunction with the Attorney for the City and is based upon information and testimony submitted at the March 18, 1987 and August 19, 1987 public hearings. The DECISION was issued on December 7, 1987 and is available for review at the City Clerk's office during business hours.

Melvin H. Chalfen, M.D.
Commissioner



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Summary of decision on conditional
site assessment of Mich-Lin Realty
Trust at 45 Mooney Street

Public hearings were held on March 18, 1987 and August 19, 1987. The purpose of the hearings was to gather all available information necessary to determine whether Mich-Lin Realty Trust Waste Transfer Station has a valid site assignment, and if there is a valid assignment whether the operation or maintenance of the transfer station results in either a nuisance or danger to the public health requiring rescission, suspension or modification of the assignment.

It was determined that :

- (1) Mich-Lin Realty Trust's property at 45 Mooney Street has a site assignment by operation of law since it was in use as "a dumping ground for garbage, rubbish or other refuse or as a site for a refuse disposal incinerator" on April 25, 1955, the effective date of Chapter 310 of the Acts and Resolves of 1955; and is a prior, non-conforming use since solid waste operations lawfully pre-existed a 1943 zoning ordinance requiring storage; and
- (2) The site assignment is confirmed subject to specific conditions necessary to ensure the waste transfer facility shall be maintained and operated in such a manner as will protect the public health, comfort and convenience, and will prevent a nuisance to or a danger to the public health by reason or odor, dust, fires, smoke, the breeding or harboring of rodents, flies or vermin, or other causes.

The conditions include DEQE review of plans, site specificity, landscaping security, fire protection, time of operation, volume of waste to be accepted, waste monitoring, recordkeeping and reporting, training of personnel, traffic management, community relations and complaint response, insect and rodent control, annual performance review, assessment of threats to public health, comfort and convenience, Department of Health and Hospitals right to access and inspection, reporting requirements, and insurance coverage.

DECISION ON CONDITIONAL SITE ASSIGNMENT

I. This Decision is rendered and issued by the Commissioner of Health and Hospitals of the City of Cambridge pursuant to the provisions of Massachusetts General Laws, Chapter 111, Section 150A on the February 10, 1986 application by Mich-Lin Realty Trust (aka C.J. Mabardy) to determine whether its Mooney Street Waste Transfer Station has a valid site assignment as a pre-existing use under Chapter 310 of the Acts and Resolves of 1955. After duly posted and published notice, public hearings were conducted in the Sullivan City Council Chamber at Cambridge City Hall on March 18, 1987 and August 19, 1987. Oral, written, and documentary evidence was presented by Mich-Lin Realty Trust, the City of Cambridge, and the Public.

Upon full consideration of all the evidence of record, it is hereby determined that:

- (1) Mich-Lin Realty Trust's property at 45 Mooney Street has a site assignment by operation of law since it was in use as "a dumping ground for garbage, rubbish or other refuse or as a site for a refuse disposal incinerator" on April 25, 1955, the effective date of Chapter 310 of the Acts and Resolves of 1955; and is a prior, non-conforming use since solid waste operations lawfully pre-existed a 1943 zoning ordinance requiring storage of waste material in a wholly enclosed building; and

- (2) The site assignment is confirmed subject to specific conditions necessary to ensure the waste transfer facility shall be maintained and operated in such a manner as will protect the public health, comfort and convenience, and will prevent a nuisance to or a danger to the public health by reason of odor, dust, fires, smoke, the breeding or harboring of rodents, flies or vermin, or other causes.

II. Evidence of Record

Oral, written and documentary evidence was submitted by Mich-Lin Realty Trust, the City of Cambridge, and the Public. The Record in this matter consists of the following evidence:

A. Mich-Lin Realty Trust

- (1) Oral Testimony - The following persons testified on behalf of the waste transfer station operator:
- (a) Robert Cummings, P.E., GHR Engineering;
 - (b) Garrett G. Hollands, IEP, Inc.;
 - (c) Eugene L. Ratner, Sudbury, MA;
 - (d) Charles J. Mabardy, Mich-Lin Realty;
 - (e) John Mahoney, P.E., GHR Engineering; and
 - (f) Anton T. Moehrke, Esq., Wright & Moehrke.
- (2) Written Evidence - The following written evidence was submitted by Mich-Lin Realty Trust:
- (a) Letter from Charles J. Mabardy, dated April 9, 1987;
 - (b) Affidavit of Thomas J. Delaney with Exhibits A1 through A3, dated August 20, 1985;

- (c) Affidavit of Richard R. DeBenedictis, P.E., GHR Engineering, dated August 22, 1985;
 - (d) Affidavit of Paul Arakelian, Cambridge, MA, dated August 23, 1985;
 - (e) Affidavit of Charles J. Mabardy, dated August 23, 1985;
 - (f) Affidavit of Eugene L. Ratner, dated August 19, 1985;
 - (g) Affidavit of Ellen R. McLaughlin, with Exhibits F-1 and F-2, dated August 23, 1985;
 - (h) Affidavit of Garrett G. Hollands, dated August 26, 1985;
 - (i) Memorandum of Law, Anton T. Moehrke, Esq., dated August 23, 1985;
 - (j) Environmental Site Assessment, Gordon Associates, January 1984;
 - (k) Request for Findings of Fact and Conclusions of Law, Anton T. Moehrke, Esq., dated May 1, 1987; and
 - (l) Letter Memorandum, Anton T. Moehrke, Esq., dated May 4, 1987.
- (3) Documentary Evidence - The following documentary evidence was submitted:
- (a) December 15, 1938, photograph CSF #8148 from Mass DPW, with land use overlay by Garrett G. Hollands;
 - (b) November 19, 1947, photograph 000-471-350-35 from Mass DPW, with land use overlay by Garrett G. Hollands;
 - (c) April 20, 1951, photographs 8861-4-10 and 11 from Mass DPW, with land use overlay by Garrett G. Hollands;
 - (d) December 1, 1955, photographs 1-63 and 1-64 from Mass DPW, with land use overlay by Garrett G. Hollands;

(e) May 5, 1969, photographs 1799-17-1493, 1494, and 1495 from Mass DPW, with land use overlay by Garrett G. Holland; and

(f) 3.5' x 2.5' enlargement of April 20, 1951 with land use overlays for December 1, 1955 and May 5, 1969.

B. The City of Cambridge

(1) Oral Testimony - The following persons testified on behalf of the City of Cambridge:

- (a) Kevin Doherty, Public Health Coordinator, Department of Health and Hospitals;
- (b) Vincent P. Clark, Senior Code Enforcement Inspector, Inspectional Services Department;
- (c) Shiela T. Russell, City Councillor; and
- (d) Thomas W. Danehy, City Councillor

(2) Written Evidence - The following written evidence was submitted by the City of Cambridge:

- (a) Affidavit of John F. Shea, Esq., McGregor, Shea & Doliner, Attorney for the City with four (4) attachments, dated March 18, 1987;
- (b) Seventeen Questionnaire Responses from residents living near the Mich-Lin Realty Trust Transfer Station, distributed by the Inspectional Services Department and collected by Kevin Doherty, Department of Health and Hospitals, February - March 1987;
- (c) Records of Inspectional Services Environmental Health Division, "Spot Checks" by P.F. Connolly, December and January 1986;
- (d) Records of Inspectional Services Department, Reports and Notations, 1985-1986;
- (e) Sixteen Questionnaire Responses from Residents living near the Mich-Lin Realty Trust Transfer Station, distributed by the Inspectional Services Department on July 16, 1987, and collected by Kevin Doherty, Department of Health and Hospitals, July-August 1987;

- (f) Site Visit Log, Kevin Doherty, Department of Health and Hospitals, July 16-August 18, 1987;
- (g) Letter from Edward O'Connell, Esq., City Law Department to Melvin Chalfen, M.D., dated August 18, 1987; and
- (h) Petition of Residents, submitted by Councillor Shiela Russell.

- (3) Documentary Evidence - The following documentary evidence was submitted by the City of Cambridge:
- Six polaroid photographs taken by the
Inspectional Services Department.

C. The Public

- (1) Oral Testimony - The following persons testified as members of the public:
- (a) Woodrow Quimby, South Normandy Ave., Cambridge;
 - (b) Joe Ignazio, Cambridge;
 - (c) Henry Aceto, Cambridge;
 - (d) Walter Fabianski, Blanchard Road, Cambridge;
 - (e) Margaret Callahan, Blanchard Road, Cambridge;
 - (f) Luca Seta, Cambridge;
 - (g) State Senator Michael Barrett;
 - (h) Ann M. Tennis, Vice President of Cambridge Highland Neighborhood Association;
 - (i) John Tennis, Cambridge; and
 - (j) James Rafferty, Cambridge.
- (2) Written and Documentary Evidence - The following written and documentary evidence was submitted by the Public:
- (a) Summary of Cambridge Fire Department Activity at 45-51 Mooney Street, 1959-1963, from Cambridge Highland Neighborhood Association (CHNA);
 - (b) Assessors Records 1955-1981, 45-47 Mooney Street from CHNA;

- (c) Deed: B&M Railroad to Trustees of Israel and Dora Ratner Trust, June 6, 1955, with Plan of Land dated December 1954, and Release from Deed Restriction, dated February 13, 1980, submitted by CHNA;
- (d) Improved Property Sale and Analysis by R.M. Bradley & Co., Inc. from Board of Assessors, submitted by CHNA;
- (e) Deed: Frederick Dyer to Fitchburg Railroad Co., July 1, 1887, submitted by CHNA.
- (f) Cambridge Architectural firm document from Cambridge Historical Commission showing building erected by Priggins Steel in 1955 with an addition in 1958, submitted by CHNA; and
- (g) Two building permits October 4, 1955 and November 6, 1958, submitted by CHNA;

III. Background

Dr. Melvin H. Chalfen, the City of Cambridge Commissioner of Health and Hospitals, presided over the public hearings conducted on March 18 and August 19, 1987 pursuant to Massachusetts General Laws, ch. 111, Sec. 150A. The purpose of the public hearings was to gather all available information necessary for him to determine whether the Mich-Lin Realty Trust Waste Transfer Station has a valid site assignment, and if there is a valid assignment, whether the operation or maintenance of the transfer station results in either a nuisance or danger to the public health requiring rescission, suspension or modification of the assignment.

Notices of the public hearings were published in the Cambridge TAB, the Cambridge Chronicle and duly posted in the City Clerk's office under the Open Meeting Law. The public was invited to attend and interested parties were urged to give written or oral testimony on the issues to be examined. The first hearing was originally scheduled for February 18, 1987 and was continued at the request of Anton T. Moehrke, the attorney for Mich-Lin. A stenographer prepared transcripts of the hearings and the City of Cambridge shared the cost equally with Mich-Lin Realty Trust.

The parties are in agreement on the following procedural history and facts. This controversy arose in response to complaints by neighbors about the Mooney Street Transfer Station. The City of Cambridge conducted an investigation, observed various trash and debris on the site and determined that no permits to operate the site as a waste disposal facility had been issued under Gen. Laws ch. 111, Sec. 150A, state DEQE regulations, or the Zoning Ordinance of the City of Cambridge. The operator of the facility, Mr. Mabardy, was given notice of these violations on June 26, 1985 and a July 8, 1985 Order to remedy them within 10 days. Through legal counsel Mr. Mabardy responded to the July 8, 1985 Administrative Order from the City of Cambridge Inspectional Services Department and argued that, since the site had been used since prior to World War II for waste disposal and transfer activities, no other approvals are necessary from the City of the DEQE.

Subsequent reinspection showed the violations continued to exist and on August 15, 1985 the City of Cambridge filed a suit against Mr. Mabardy asking the Court to order that the owner and operator cease from using the property as a dumpsite and to remove existing debris. On September 10, 1985 the City of Cambridge and Mr. Mabardy entered into a Stipulation filed with the Court which governs to this day the operation of the refuse disposal facility in accordance with certain conditions pending the resolution of this case. One of the conditions of the Stipulation was that within 30 days of the execution of the Stipulation Mr. Mabardy was required to submit to the DEQE plans, specifications, and design data for the facility in accordance with the regulations governing the operation and maintenance of a solid waste transfer station.

By letter dated February 10, 1986 to Commissioner Chalfen, Mr. Moehrke informed him that the DEQE would not review the engineering plans and specifications for upgrading the transfer station until such time as the Department of Health ruled on the issue of whether or not the site was appropriately assigned under M.G.L. ch. 111, sec. 150A. Mr. Moehrke requested that the City conduct a public hearing and issue a determination on this issue.

A hearing was scheduled and noticed for April 1, 1986; however, by a letter dated March 20, 1986 to Dr. Chalfen, Mr. Moehrke contended that the notice of the hearing was erroneous and that it be scheduled for some time after April 2, 1986 due to

his unavailability. By letter dated April 9, 1986 to the City of Cambridge Law Department Mr. Moehrke requested a hearing be scheduled for the week of May 12, 1986.

During the summer of 1986 the City of Cambridge determined that it needed the advice of legal counsel experienced in environmental, zoning and public health law. Accordingly, the City sought proposals to work as a special city solicitor, and in early September 1986 selected the law firm of McGregor, Shea & Doliner of Boston. That firm reviewed available data, visited the site, and advised the Commissioners of the Departments of Health and Hospitals and of Buildings and Housing on the best way of addressing and resolving the transfer station matter.

On January 28, 1987 Commissioner Chalfen gave written notice to Mr. Moehrke that the City of Cambridge Department of Health would conduct a public hearing on the Mich-Lin Realty Trust Refuse Transfer Station on two (2) issues:

1. Whether the transfer station has a valid site assignment under M.G.L. ch. 111, Sec. 150A; and
2. if there is a valid site assignment, whether the operation of maintenance of the facility results in either a nuisance or danger to the public health requiring rescission, suspension or modification of the assignment.

The hearing was conducted on March 18, 1987 and held open to receive written comments until April 10, 1987.

After receipt of the transcript of the public hearing, legal counsel and Commissioner Chalfen began a review of all the evidence and were formulating a decision which was anticipated for release in mid-July 1987. However, they and Mr. Mabardy and his counsel were invited to a public meeting to be held by the Cambridge City Council Committee on Public Safety on July 8, 1987. At that meeting the Commissioner heard testimony from citizens and City Councillors that there was not adequate public notice as to the issues involved in determining whether the transfer station has a valid site assignment. Specific complaints were that the public notice did not state that the alleged use of the property as a solid waste facility prior to 1955 and continuously from that time would be addressed at the March 18, 1987 public hearing. In sum, it was alleged that citizens and public officials had not properly prepared for that issue and had relevant evidence to offer. Questions were put to the Commissioner, his legal counsel and the Assistant City Manager. It was the unanimous vote of the City Council to have the Commissioner reopen the public hearing to take testimony on that issue.

Although he was not bound by the City Council vote, based on the testimony which he heard on July 8th, Commissioner Chalfen determined that the public notice was inadequate; that there is new and relevant evidence which he should consider; and that it is in the public and private interests to conduct a full and open inquiry in order to reach a fair and proper decision on the merits which will withstand appellate review.

The reopened public hearing was conducted on August 19, 1987, and was held open until September 1, 1987 to receive written comments. By letter dated August 26, 1987 Ann M. Tennis, Vice-President of CHNA request a two week continuance to obtain and supply documentary evidence. On August 31, 1987 Commissioner Chalfen by Kevin Doherty granted the continuance until September 15, 1987.

IV. Does the Mich-Lin Realty Trust Waste Transfer Station Have a Valid Site Assignment under M.G.L. ch. 111, sec. 150A?

Mich-Lin Realty Trust claims it enjoys "grandfather" status under M.G.L. ch. 111, sec. 150A pursuant to Chapter 310 of the Acts and Resolves of 1955 because the property at 45 Mooney Street was in use on or before April 25, 1955 as "a dumping ground for garbage, rubbish or other refuse or as a site for a refuse disposal incinerator." It also argues that it is "grandfathered" under zoning as a prior, non-conforming use since solid waste operations preexisted a 1943 zoning ordinance requiring storage of waste material in a wholly enclosed building and have continued such operations to date. In order to determine the legal status of the waste transfer operation a careful analysis of the applicable law and relevant facts as adduced in the public hearing is necessary.

A. The Law

The present version of M.G.L. ch. 111, sec. 150A provides that:

"No place in any city or town shall be established or maintained or operated by any person, including any political subdivision or agency of the commonwealth, as a site for a facility, unless such place has either been assigned by the board of health of such city or town as a site for a facility after a public hearing, subject to the provisions of any ordinance or by-law adopted therein under chapter forty A or corresponding provisions of earlier laws, or, in the case of an agency of the commonwealth, has been assigned by the department of environmental quality engineering, in this section called the department after a public hearing and unless public notice of such assignment has been given by the board of health. The assignment of a place as a site for a facility shall be subject to such limitation with respect to the extent, character and nature of operation thereof as may be necessary to protect the public health, comfort and convenience. The department shall advise, upon request, any board of health previous to the assignment of a place as a site for a facility."

"Facility" is defined as

"a sanitary landfill, a refuse transfer station, a refuse incinerator with a grate area in excess of ten square feet, a refuse composting plant, a residual waste storage or treatment plant, a dumping ground for refuse or any other works for treating or disposing of refuse."

"Refuse" is defined as

"all solid or liquid waste materials, including garbage and rubbish, sludge and residual waste, but not including sewage."

Thus, the statute provides that no place shall be established, maintained or operated as a refuse transfer station unless it has been assigned as such by the Board of Health, subject to the

provisions of any ordinance adopted under the Zoning Act, M.G.L. c. 40A. In this case, the operator of the Mich-Lin Realty refuse transfer station contends that since it is a pre-existing, non-conforming use under Chapters 150A, 40A and the Cambridge City Ordinance, the transfer station does not need a site assignment. It claims "grandfather" protection under chapter 310 of the Massachusetts Acts and Resolves of 1955.

Chapter 310 added Section 150A to Chapter 111 of the General Laws. Section 2 provided that:

"Any place in use as, or publicly held or licensed for use as, a dumping ground for garbage, rubbish or other refuse or as a site for a refuse disposal incinerator on the effective date of this act shall be deemed to have been assigned under section one hundred and fifty A of chapter one hundred and eleven of the General Laws, but such assignment may be rescinded, suspended or modified in like manner as an assignment made under said section one hundred and fifty A, as appearing in section one of this act."

The effective date of the Act was April 25, 1955 when approved by the General Court. Property used for two classes of refuse operations were deemed to have site assignments if in use as of April 25, 1955: dumping grounds for garbage, rubbish or other refuse and refuse disposal incinerators. There was no definition of "dumping ground". It was not until Chapter 839 of the Acts and Resolves of 1970 that terms were defined and the provisions of section 150A were made applicable explicitly to all kinds of facilities for treatment and disposal of refuse and the sites for such facilities, including transfer stations.

Chapter 310 also required compliance with "the provisions of any ordinance or by-law adopted under chapter forty A or corresponding provisions of earlier law."

There are State Department of Environmental Quality Engineering (DEQE) regulations on refuse transfer stations which are found at 310 CMR 18.00 (1980). These regulations are minimum uniform standards for facilities for the handling and processing of solid waste prior to final disposition. Refuse Transfer Station Facility is defined at 310 CMR 18.01(12) as:

"A solid waste handling facility used for the loading of solid waste (refuse) from one container or vehicle to another prior to transporting to the location of further processing or treating or ultimate disposal."

All transfer stations shall be designed in accordance with those regulations and accepted engineering principals by an engineer experienced or knowledgeable in matters of solid waste processing and disposal. No transfer station shall be operated or maintained unless the plans and design data have been approved by the DEQE and the location of final disposal has been approved by the DEQE. (310 CMR 18.03(1)) Any transfer station which was assigned or operated as such on or before the effective date of the regulations must still comply with all the requirements of the regulations. These existing facilities shall be placed on a

compliance schedule in which to complete conformance with the regulation. (310 CMR 18.23(2)) These regulations very broadly define "garbage" (18.01(6)), "rubbish" (18.01(13)), "refuse" (18.01(11)), "bulky waste" (18.01(2)), "waste" (18.01(16)), and "solid waste" (18.01(14)).

The site assignment law, M.G.L. ch. 111, section 150A, also requires compliance with M.G.L. ch. 40A, the Zoning Act and the City of Cambridge Zoning Code. The current zoning ordinance does not permit the solid waste transfer station in this zoning district. However, under M.G.L. c. 40A, sec. 6 the zoning prohibition does not apply to structures or uses lawfully in existence or lawfully begun before the zoning prohibition is effective, except in very limited circumstances. Article 8.21 of the Cambridge Zoning Ordinance similarly protects prior, non-conforming uses. A non-conforming use is one which was lawfully in existence before a zoning change with which the use does not comply becomes applicable. If the use is lawfully in existence before such zoning change applies, the use acquires the status of a lawful non-conforming use with respect to the change.

The 1924 Zoning Law and Building Code of the City of Cambridge was the first zoning ordinance adopted by the City. It designated three use districts (residence, business and unrestricted) and had a Zone Map. The subject property was in the U-3 district where no uses were prohibited. (Affidavit of Thomas J. Delaney with Exhibits A-1 to A-4)

The second zoning ordinance was adopted by the City of Cambridge in 1943. The subject property was in an Industry B district which allowed "(s)torage of waste material, but only when such storage is contained within a wholly enclosed building." That ordinance also protected non-conforming uses. (Affidavit of Thomas J. Delaney with Exhibit A-1 to A-4).

Non-conforming use protection can be lost if the use is extended or altered to be substantially more detrimental than the existing nonconforming use to the neighborhood. Additionally, protection can be lost if the non-conforming uses are abandoned and not used for a period of two years or more. In dealing with a change in use, evidence on changes in use and impacts to the neighborhood must be evaluated to determine:

- (a) whether the use reflects the nature and purpose of the use prevailing when the Zoning Ordinance took effect;
- (b) whether there is a difference in the quality or character, as well as the degree of use; and
- (c) whether the current use is different in kind in its effect on the neighborhood.

Bridgewater v. Chuckran, 351 Mass. 20 (1966)

On the question of abandonment evidence needs to be evaluated to determine whether there is a concurrence of:

- (a) an intent to abandon the use; and
- (b) voluntary conduct which carries the implication of abandonment.

Cape Resorts Hotel, Inc. v. Alcoholic Licensing Board of Falmouth, 385 Mass. 205 (1982); Pioneer Insulation and Modernizing Corp. v. Lynn, 331 Mass. 560 (1954); Dobbs v. Board of Appeals of Northampton, 339 Mass. 684 (1959).

B. The Facts

(1) In Favor of Site Assignment Confirmation

Expert and lay witness testimony, affidavits, reports, questionnaire responses and photographs establish that the land in and around 45 Mooney Street has been used for a variety of solid waste operations from 1938 to the present day. These uses included the dumping of refuse; the storage, recycling, salvage, incineration, and transfer of automobiles, parts and tires; the storage, salvage and transfer of metals, paper and cloth; and the storage and transfer of demolition waste.

The subject property was originally part of a larger parcel owned by Frederick Ayer of Lowell who for \$8100 sold the property to the Fitchburg Railroad Company in June, 1887 (Deed provided by Ann M. Tennis, CHNA). The Boston and Maine Railroad Corp. acquired ownership of the land and conveyed the subject parcel to George A. Ratner, Eugene L. Ratner and William A. Ratner, as Trustees of the Israel and Dora Ratner Trust on June 8, 1955. (Deed provided by Ann M. Tennis, CHNA). The land was leased from

1955 to 1979 to the O. Hodgkins Corporation and Weganto, Inc. (Affidavit of Eugene L. Ratner) The property was sold to Charles J. Mabardy, Trustee of the Mich-Lin Realty Trust on December 20, 1979 who owns it to this day. (Affidavit of Eugene L. Ratner; Testimony of Eugene L. Ratner, 3-18-87 Hearing Transcript ("H.T.") at 71; Testimony of Charles Mabardy, 3-18-87, H.T. at 82; R.M. Bradley "Improved Property Sale and Analysis" provided by Ann M. Tennis, CHNA)

The Boston and Maine Railroad allowed the property to be used as a dump from at least 1938. (Testimony of Garrett Hollands, March 18, 1987 Hearing Transcript ("H.T.") at 32; Testimony of Eugene Ratner, 3-18-87 H.T. at 65; Affidavit of Garrett G. Hollands) Refuse disposal at the site continued through the 1940's (Affidavit of Paul Arakelian). Dumping of rubbish by the City occurred from 1950 through 1955 and gradually ceased after 1955 as buildings were constructed. (Questionnaire Response of Josephine C. Feeney; Testimony of Eugene Ratner, 3-18-87 H.T. at 65-66; Testimony of Woodrow Quimby, 3-18-87 H.T. at 63-64) Automobiles also were disposed of since 1940 (Questionnaire Responses of John L. Grady and Woodrow Quimby). Junk cars were salvaged through 1955. (Questionnaire Response of John W. Tennis).

From 1949 through 1952 the Boston and Maine Railroad continued storing and disposing of railroad ties on the property. (Testimony of Eugene Ratner, 3-18-87 H.T. at 66-67).

When the Ratner Trust purchased the property in 1955 it was necessary to drive wooden piles and footings through solid waste in order to construct buildings. In some spots borings showed more than 13 feet of solid waste. (Affidavit of Eugene Ratner; Testimony of Eugene Ratner, 3-18-87 H.T. at 66)

O. Hodgkins Corp. operated a commercial salvage and recycling business on the Ratner Trust property from 1955 to 1979. That waste salvage business involved the collection of sorted and unsorted solid waste debris; the separation and recycling of paper, metal, and other materials with resale value; and the storage and transfer for disposal at landfills of unsalvagable solid waste. (Affidavit of Eugene L. Ratner; Testimony of Eugene Ratner 3-18-87 H.T. at 67-68)

Weganto, Inc. operated an automobile scrap and salvage yard on the Ratner property from 1955 through 1979. It operated an incinerator for burning cars until 1962. It stored old tires, ash from burned cars and non-salvageable waste on the site and transferred the accumulated debris to nearby dumps. (Affidavit of Eugene Ratner; Testimony of Eugene Ratner, 3-18-87 H.T. at 67-68). This use is confirmed by questionnaire responses (Joseph

Amoroso, Robert C. Clark, Ronald L. Ellis), a November 6, 1987 building permit for a dempster steel baler, Cambridge Assessor's Records 1959-1962, and the City of Cambridge Fire Department Records from 1959-1963 (Provided by Ann M. Tennis, CHNA).

Charles J. Mabardy purchased the property in December 1979 and his demolition disposal company has been using the transfer site since 1982. (Affidavit of Charles J. Mabardy) The whole parcel at 45 Mooney Street is approximately 43,650 sq. feet in area (Assessor's Records, 1987 provided by Ann M. Tennis, CHNA). It is used for the storage of trucks, parking of heavy equipment and trucks, and a welding shop. The demolition transfer station is located on the rear portion of the land along the area toward the Boston & Maine Railroad right-of-way. It is approximately 2,100 square feet in area or about 70 by 30 feet. (Affidavit of Charles Mabardy). The pile of waste is surrounded on three sides by concrete block walls approximately 12 feet tall. (Affidavit of Richard R. DeBenedictis P.E.) The parcel is fenced and access to the site is restricted to authorized personnel. (Affidavit of Charles Mabardy).

Mr. Mabardy purchased the site specifically for use in connection with his company's demolition waste business. He owns a demolition waste landfill in Winchendon. The transfer station allows for the collection of small loads for transfer to Winchendon in one large trailer truck at the end of each day's operation. (Affidavit of Charles Mabardy)

By Stipulation dated September 10, 1985 in the City of Cambridge v. Charles J. Mabardy, Middlesex C.A. No. 85-4935, the City of Cambridge and Mr. Mabardy agreed inter alia that:

- a. The hours of operation shall be 8:00 A.M. to 4:00 P.M. each weekday.
- b. There shall be no weekend operations.
- c. The facility shall accept only demolition waste for processing pending approval of its operational plans by the Department of Environmental Quality Engineering, including without limitation, tree branches, yard trimmings, grass clippings, metals, glass, ashes, construction wastes, demolition wastes, roofing material, street sweepings and other non-putrescible solid wastes.
- d. The facility shall not accept putrescible solid waste including domestic food waste pending approval of its engineering plans by the Department of Environmental Quality Engineering.
- e. Processing and disposal operations shall be confined to the area located behind the concrete block screening walls.

(Affidavit of John F. Shea)

In January 1985, C.J. Mabardy had an Environmental Site Assessment performed by Gordon Associates, 780 Chestnut Street, Newton, MA. Although the report does not mention the use of the northwestern portion of the site as a transfer station, the engineer observed that "(M)iscellaneous debris, consisting of rubber, glass, plastic, metals, paper, etc., was observed stock-piled in this area." (Report at 5) Test borings indicated brick fragments, ash, glass, vinyl. (Report at 6 and Test Boring Logs). The engineer concluded that the "properties are located in an industrial urban area that has been filled with various materials over a period of years. (Report at 8)

The most compelling evidence came from the testimony and affidavit of Garrett G. Hollands who provided expert interpretation of the aerial photographs listed in Section II A(3), supra. of this Decision covering the years 1938, 1947, 1951, 1955 and 1969. Mr. Hollands has been interpreting aerial photography professionally since 1966. He taught aerial photography interpretation as an officer in the U.S. Army Corps of Engineers in 1968 and used his skills in Viet Nam as a Combat Intelligence Officer in 1969. Mr. Hollands has updated his skills by graduate level courses, teaching, and in his daily work experience as a Senior Geologist with IEP, Inc. (Affidavit of Garrett G. Hollands with Resume; Testimony of Garrett G. Hollands, 3-18-87 H.T. at 28-29)

Mr. Hollands examined the photographs stereoscopically allowing him to see the landscape in a three-dimensional manner and enlarging the image twenty (20) times. He then prepared overlays delineating land use activities including waste disposal. (Affidavit of Garrett G. Hollands; testimony of Garrett Hollands, 3-18-87 H.T. at 29-30)

The December 15, 1938 photograph depicts abandoned railroad beds over which waste was being dumped. (Affidavit of Hollands; Testimony of Hollands, 3-18-87 H.T. at 32, 34, 39, 55; Photograph CSF #8148 with overlay) The November 11, 1947 photograph depicts large trucks disposing of waste. Again, waste was being dumped over a large area with abandoned railroad tracks. The dumping area was estimated as tens of acres in size. (Affidavit of Hollands; Testimony of Hollands, 3-18-87 H.T. at 32, 34, 53-55; Photograph 000-471-350-35 with overlay) The April 20, 1951 photographs depict clearly a roadway into an active dumping area and disposal activities near abandoned railroad beds. There are piles of debris, trucks, a mound of coal ash. The area of dumping activity appears to be the largest in this photograph (Testimony of Garrett G. Hollands, 3-18-87, H.T. at 30-33, 54-55; Photographs 8861-4-10 and 11, 3.5' x 2.5' enlargement with overlays)

The December 1, 1955 photographs show a smaller area of dumping activity in front of (south) and on each side (east and west) of the building at 45 Mooney Street. The majority of the

landfill area has been abandoned (Testimony of Garrett G. Hollands, 3-18-87 H.T. 33-34; photographs 1-63 and 1-64 with overlay, and 3.5' x 2.5' overlay). The May 5, 1969 photographs depict a smaller area of dumping adjacent to 45 Mooney Street. Major land use changes included construction of new industrial buildings and the loss of agricultural fields. At the Mooney Street site there were 52 automobiles parked in rows. (Testimony of Garrett G. Hollands, 3-18-87 H.T. 34-36; photographs 1799-17-1493, 1494 with overlay, 1495 and 3.5' x 2.5' overlay)

(2) Against Site Assignment Confirmation

Testimony, affidavits and documents from citizens and public officials provided evidence against site assignment confirmation.

Mr. Henry Aceto disputed the use of the property as a transfer station in 1955 and during Mr. Ratner's ownership. He pointed out that the Ratner use was classified as a warehouse by the Assessor's Office. (Testimony of Henry Aceto, 8-19-87 H.T. at 25-28)

Mr. Woodrow Quimby testified that he lived on Normandy Avenue since 1941 and that there was not an ongoing, continuous dump. He recalled efforts to stop Mr. Ratner from burning automobiles and in the 1970's seeing a small pile of debris a little pickup truck might bring in which was claimed by "Chuckie" to be sneaked in at night. (Testimony of Woodrow Quimby, 8-19-87 H.T. at 36-38)

Councillor Danehy disputed that debris from Harvard University was stored at the Mooney Street site in 1955.

(Testimony of Thomas Danehy, 8-19-87 H.T. at 46)

Ann M. Tennis argued that the determination of a valid site assignment must be made on site specific use, not activities "in and around" the site. She stated that according to the real estate office of the B&M Railroad, the railroad was not in the dump, junk or transfer business at any time. She provided Assessor's records from 1955-1958, in 1979 and 1987 indicating the property was assessed as a warehouse, and in 1959 as an incinerator. She provided summaries of fire responses by the Cambridge Fire Department from 1959-1963 showing fires in junk cars, not dump fires. (Testimony of Ann M. Tennis, 8-19-87 H.T. at 48-52; Assessors' and Fire Department Records). She submitted building permits for the years 1955 and 1958 for a "type IV storage building" and "a one story building-cinder block to house a dempter steel baler."

Mr. John Tennis testified that as a police officer assigned to the area between 1970 and 1980 he did not see a transfer station on the site. He stated that there was a sand and gravel operation and a Mini-Cost Car Rental Co. on the property.

(Testimony of John Tennis, 8-19-87, H.T. at 52)

Mr. James Rafferty testified that as a child in the mid-1960's to mid-1970's he played in the area, and that it was always a field. He recalled sand and gravel, school buses and abandoned cars. He agreed that the neighborhood testimony was

correct "that at times there were activities taking place at that site that may constitute uses than are now being subscribed to. It was not continuous..." (Testimony of James Rafferty, 8-19-87, H.T. at 52-55) He also indicated that as a fireman from 1955 to 1980 he responded to grass and automobile fires at the site (Questionnaire Response).

Mr. Charles Shannon stated that since 1955 he observed a car rental business and repair. (Questionnaire Response) Mr. John J. Holian stated the site was used as a warehouse and automobile storage area (Questionnaire Response). An unsigned questionnaire response stated that the refuse station started functioning in the last 7 to 10 years (1977-1980). (Questionnaire Response). Mrs. Kathleen Halway during walks from 1972 to 1983 never noticed trash of any kind was dumped on the property. (Questionnaire Response)

C. Findings

(1) After having weighed the evidence of record, it is decided that Mich-Lin Realty Trust has proved by a preponderance of the evidence that it is more likely or probable that 45 Mooney Street was in use as "a dumping ground for garbage, rubbish or other refuse" on April 25, 1955, and therefore enjoys "grandfathered" site assignment status under M.G.L. ch. 111, sec. 150A. Even though there remains some doubt that the site was

used as a dumping ground on that exact day, the applicant has met the necessary measure, standard or degree of proof needed to prevail on the issue. Sargent v. Massachusetts Accident Company, 307 Mass. 246 (1940). All evidence has been critically scrutinized and weighed from the point of view of its reasonableness, fairness, trustworthiness and reliability in supporting these findings of fact. Cohen v. Board of Registration in Pharmacy, 350 Mass. 246 (1966). There is substantial evidence in the entire record to reasonably support the "grandfather" finding.

There can be no doubt that the subject property was used as a dumping ground for garbage, rubbish or other refuse from at least 1938 through 1951. Similarly, there is no doubt that soon after the sale of the property on June 8, 1955 to Eugene L. Ratner's intensive salvage, recycling, incinerator, and transfer operations commenced. There was dumping activity to the east, west and south on the property when the December 1, 1955 photograph was taken. Yet, there is no direct and conclusive evidence that the property was used as a "dumping ground" on the effective date of Chapter 310 of the Acts and Resolves of 1955; that is, on April 25, 1955.

However, it is a permissible deduction from the facts that the site was used for dumping on the effective date of Chapter 310. Dumping occurred before and after April 25, 1955. Railroad ties were stored and disposed of on the property from 1949

through 1951. Property owner and neighbors recalled that dumping of rubbish by the City occurred from 1950 through 1955 and gradually ceased as buildings were constructed. Mr. Ratner constructed a storage building by Permit No. 55453, dated October 4, 1955. While it would have been ideal to have an aerial photograph dated April 25, 1955, the weight of the evidence supports the finding. It is the Department's belief and conclusion that it is more likely than not that 45 Mooney Street was used for dumping of refuse on April 25, 1955, and the site enjoys a "grandfathered" site assignment.

It has been argued that the "grandfather" status should not apply since there has been a change in use from the pre-1955 dumping of refuse to the present transfer station operation. Chapter 310 of 1955 did not address transfer station operations, but only dealt with any place used as a "dumping ground" and as a "refuse disposal incinerator." However, temporary and permanent dumping appear to be treated the same under the Act. Ash from incinerators must have been transferred from the burn site to a landfill. Moreover, the change in use has been an evolution from an intensive landfill with its permanent adverse impacts to the surrounding area and the environment, to salvage, recycling, incineration and transfer of waste, to a less intensive transfer station with its temporary impacts. All are elements of solid waste management and reflect the same nature and purpose of use protected by Chapter 310.

Finally, there were no attempts by the Commonwealth or the City of Cambridge to terminate the solid waste operations under M.G.L. ch. 111, sec. 150A until 1985. Local and state efforts terminated incineration operations in 1962, but all other solid waste activities continued under Section 150A. Thus, from 1955 to 1985 solid waste operations have occurred with presumed site assignment status. It might be fairly said that it is too late to challenge now a waste transfer operation, an enforcement effort which placed the burden of production and persuasion that dumping occurred on that site thirty-two years ago on a subsequent owner who purchased in good faith the property from the previous owner (who was in the solid waste business) with the intent to continue waste handling operations. Mich-Lin Realty Trust has satisfied its burden of proof on a difficult issue with documentary and testimonial evidence.

The site assignment is confirmed.

(2) Although the Commissioner of the Department of Health and Hospitals is not the City of Cambridge official charged with the interpretation and enforcement of the Cambridge Zoning Ordinance under M.G.L. ch. 40A, secs. 7 and 12, he is required by M.G.L. ch. 111, sec. 150A to withhold the grant of a site assignment unless the proposed facility and property complies with "the provisions of any ordinance ... adopted therein under chapter

forty A...." The Commissioner is empowered, then, to make at least a preliminary determination whether the transfer station complies with the requirements of zoning. The findings in this section of the decision are for purposes of the site assignment and are advisory to the Cambridge Building Commissioner and Board of Appeals. It was the intent of the City to resolve the zoning issue in the context of the administrative hearing on the claimed site assignment. (Remarks by Commissioner Chalfen, 3-18-87 H.T. at 7, 9; and Mr. Shea, 3-18-87 H.T. at 17 and 19) Mich-Lin Realty Trust agreed to submit documentation on zoning issues, although it reserved the right to adjudicate the zoning issue in Superior Court (Mr. Moehrke at 17-19). Additionally, Joseph J. Cellucci, the Commissioner of Buildings and Housing, distributed two sets of questionnaires to the neighborhood and consulted with the Attorney for the City and the Commissioner of the Department of Health and Hospitals on the zoning issue.

As was stated in Section IV A, supra., the current City of Cambridge Zoning Code does not permit the solid waste transfer station in this zoning district. However, Mich-Lin claims that it enjoys prior non-conforming use protection under M.G.L. ch. 40A, sec. 6 and Article 8.21 of the Zoning Ordinance. Mich-Lin submitted a Memorandum with the Affidavit of Thomas Delaney which had been filed previously in the Superior Court litigation

(Middlesex C.A. No. 85-4935) but was not reviewed by the Court since the parties agreed to a Stipulation. It was persuasively argued therein that since the property had been used for solid waste disposal since at least 1938 and continuously so since then, the first zoning ordinance controls of waste operations in 1943 and the current zoning ordinance prohibition do not apply to this transfer station use.

The 1943 zoning ordinance allowed in this district the "storage of waste material, but only when such storage is contained within a wholly enclosed building." Since the demolition waste transfer facility is not now enclosed, the use of the site prior to December 1943 must establish the non-conforming use status. As described in Section IV B(1) supra., dumping, storage, recycling and transfer operations occurred from at least 1938 to the present day. Refuse disposal continued through the 1940's, and gradually ceased after 1955 as buildings were constructed. Waste was stored on the property pre and post the 1943 zoning regulation. It is noted that the proposed upgrade of the transfer station would be in an enclosed building. (Testimony of Robert Cummings, 3-18-87 H.T. at 24) Thus, a change in the non-conforming use is towards conformity with the 1943 provision.

There is no evidence that the City of Cambridge attempted to enforce zoning from 1943 until 1985. On the contrary, various building permits were issued in the 1950's which could have been withheld for zoning non-compliance. While laches or estoppel is

not a defense to an action to enforce zoning, the City's historical failure to enforce zoning may be evidence that non-conforming use status was deemed to attach to the property. Moreover, the November 6, 1958 building permit to erect a one-story building to house a dempter steel baler was issued based upon plans and disclosure of the use of the property and structure: to collect, sort, bale and transfer solid waste. Thus, the current use of the property is likely in accordance with permits granted to previous owners and is protected under M.G.L. ch. 40A, sec. 7 which provides in part that:

"no action, criminal or civil, the effect of which is to compel the abandonment, limitation or modification of such use allowed by said permit ... by reason of any alleged violation of the provisions of this chapter, or of any ordinance or by-law adopted thereunder, shall be maintained, unless such action suit or proceeding is commenced and notice thereof recorded in the registry of deeds ... within six years next after the commencement of the alleged violation of law."

Well over six years has elapsed between the time the permitted baler building and storage building were built in the 1950's and the time the City brought its action to cease use of the property for waste transfer operations. Thus, the attempt to enforce the current zoning ordinance may be barred by the statute of limitations. Cape Resort Hotels, supra., at 217-218.

Non-conforming use protection can be lost if the use is extended or altered to be substantially more detrimental than the existing non-conforming use to the neighborhood. As observed in Section IV C(1), supra., there has been an evolution in use of

the property from an intensive landfilling operation, to moderate and heavy salvage, recycling, transfer, and incineration businesses, to a less intensive demolition waste transfer station. Certainly, the current use reflects the solid waste management use and purpose when the 1943 zoning ordinance took effect and there has been a lessening in the effect of the different waste management uses on the neighborhood. The evidence of record supports a finding that the alteration of the prior waste operations to the current transfer station use is substantially less detrimental to the neighborhood than the uses in the 1940's, 1950's and 1960's. Therefore, the evidence appears to satisfy the three tests adopted in Bridgewater v. Chuckran, supra. at 23.

Non-conforming use protection can be lost if the use is abandoned and not used for a period of two years or more. The transition from dumping to waste salvage and recycling in 1955 occurred gradually during that same year. The seeming gap in use from the December 20, 1979 sale to Mr. Mabardy to his use of the site as a waste transfer facility in 1982 requires careful scrutiny to determine whether abandonment exists. The sale of the property does not establish an abandonment of the use. Wayland v. Lee, 325 Mass. 637 (1950). 82 Am. Jur. 2d Zoning and Planning, §181(1976). "The right to continue ... a nonconforming use after adoption of zoning regulations is not personal to the

particular owner or occupant on the effective date of the regulation." Revere v. Rowe Contracting Co., 362 Mass. 884, 885 (1972). The mere passage of the two year period does not in itself establish abandonment. In Paul v. Selectmen of Scituate, 301 Mass. 365 (1938) mere non-use of a non-conforming use of a restaurant was held not to show an abandonment although the building was vacant for three years. In Dobbs v. Board of Appeals of Northhampton, 339 Mass. 684 (1959) mere non-occupancy did not establish an intent to abandon a non-conforming use.

In those cases there was missing the intent to abandon the use. As described in Section IV B supra., there must be a concurrence of (1) an intent to abandon and (2) voluntary conduct which carries the implication of abandonment. Mr. Mabardy specifically purchased the site for use in connection with his company's demolition waste business. (Affidavit of Charles Mabardy) DEQE has confirmed his claims that he owned and operated a demolition waste transfer landfill in Winchendon beginning in 1977. Thus, the only evidence of record clearly supports the intent to use the property for solid waste operations. Abandonment is not established by the evidence of record.

To the extent required and authorized by M.G.L. ch. 111, sec. 150A, the prior non-conforming use status of the waste transfer facility is confirmed.

V. Does the Operation or Maintenance of the Mich-Lin Realty Trust Waste Transfer Station Result in Either a Nuisance or Danger to the Public Health Requiring Rescission, Suspension or Modification of the Confirmed Site Assignment?

A. The Law

Under M.G.L. ch. 111, sec. 150A the Department in granting a site assignment may impose such conditions so as to protect the public health, comfort and convenience and prevent a nuisance and danger to the public health.

The statute also provides that:

"Every person, including every political subdivision of the commonwealth, maintaining or operating a facility, shall maintain and operate the same in such manner as will protect the public health, comfort and convenience and prevent a nuisance or a danger to the public health by reason of odor, dust, fires, smoke, the breeding or harboring or rodents, flies or vermin, or other causes. Upon determination that the operation or maintenance of a facility results in a nuisance or a danger to the public health, such assignment may be rescinded or suspended or may be modified through the imposition or amendment of conditions, at any time after due notice and public hearing, by the board of health of the city or town where such facility is located, upon its own initiative or upon complaint by any person aggrieved by such assignment, or by the department, upon its own initiative or upon complaint by any person aggrieved by such assignment."

Therefore, the Department of Health or DEQE may rescind, suspend or modify a site assignment upon a determination that an existing facility is not operating properly or poses a danger to the public health.

Finally, if the site assignment is allowed to continue (that is, it is not rescinded or suspended) with or without modification by the imposition of conditions, the facility must meet the current DEQE requirements for the maintenance and operation of a transfer station pursuant to 310 CMR 18.23(2).

B. The Facts

Expert and lay witness testimony, reports, documents, questionnaire responses and photographs establish that the operation and maintenance of the demolition waste transfer station results in a danger to the public health and convenience, and may constitute a nuisance. The evidence highlighted problems with traffic, noise, odor, the types of materials stored on site and hours of operation.

(1) Traffic and Noise

Questionnaire responses and testimony indicated that truck traffic and noise pose a modest danger to the public health and convenience. One neighbor observed: "Trucks going and coming up Concord Avenue constantly. Tops bearly [sic] covered and debris flying off overloaded." (Questionnaire Response) It is claimed that "Trucks headed for the transfer station frequently block Concord Avenue at Mooney Street in the morning rush hour around 8:00 a.m. Trucks sometimes use Blanchard Road which is closed to trucks over 2 1/2 tons. Trucks also speed on Concord Avenue ... Debris has been known to fall off trucks enroute to Mooney

Street." (Questionnaire Response) Another neighbor stated: "We live across the street from houses adjacent to the site. ...The noise is constant... Trucks start up at 5:00 a.m. and keep going sometimes in the Spring and Summer until 10:30 p.m. There is the noise of some kind of machine often very late at night."

(Questionnaire Response). Still another resident noted heavy traffic volume and "during warm weather when windows are open, we are awakened by "back-up" signals on their equipment, operating between 5:00 a.m. and 8:00 a.m. These noises are very annoying so early in the morning (when)...most of the work (loading/unloading) is done..." (Questionnaire Response) One resident observed that "on several occasions last summer, trucks around 5:00 p.m. during busy traffic times have brought their loads into the area." The person complained about "14 wheel large and heavy vehicles, bringing large amounts of trash and other materials..." (Questionnaire Response) Many neighbors complained about trucks and front loader noise as early as 5 and 6 a.m. (Questionnaire Responses)

Walter Fabianski testified that 14 wheel tractor trailer trucks caused spillage on the road, "constitutes a severe safety problem among children ... (and) older people in that area. And those trucks don't go ten miles an hour, they go pretty rapid.

Matter of fact, I think they go beyond the speed limit."

(Testimony of Walter Fabianski, 3-18-87 H.T. at 50) Ms. Margaret Callahan noted "barrel trucks going down the street, excessive speed, etc., using as an access road that is posted." (Testimony of Margaret Callahan, 3-18-87 H.T. at 86)

Mr. Kevin Doherty, the Public Health Coordinator for the Department of Health and Hospitals, testified that in driving by the facility he observed C.J. Mabardy trucks travelling at high speed (30-40 m.p.h.) going into the facility on about six days. (Testimony of Kevin Doherty, 3-18-87 H.T. at 95-97)

Councillor Shiela Russell also identified the heavy traffic problem which would be worsened by "a new and bigger transfer station...." (Testimony of Shiela Russell at 135)

There was contrary evidence on the issue of truck traffic and noise. Mitchell Goldstein of Normandy Terrace noted that the truck noise is troublesome "occasionally" and "not too loud and it occurs infrequently and can't pinpoint the time." He also noted "unpleasant odors at times, but they could be from the sewer." (Questionnaire Response) Mr. Mabardy testified that "there are no large trucks coming in with demolition debris. Absolutely none. The trucks that are coming in may have sand and gravel in them." (Testimony of Charles Mabardy, 3-18-87 H.T. at 51) He admitted that "big trucks are a nuisance, we try to

control them." (Testimony of Mabardy, 3-18-87 H.T. at 79) He noted that "not only has C.J. Mabardy created traffic, but there's a lot of other industry in the area.... there's tremendous of warehousing that's being done now, and the lumberyards, warehousing and the steel companies. And up and down Smith and Mooney Street, it's a high traffic area." (Testimony of Mabardy, 3-18-87 H.T. at 79-80) He described large trucks servicing Porter Chevrolet, Tellos, Henry Owens, Martignetti Liquors, Rex Lumber and Co-operative Resevere Lumber and Belmont Springs Water. (Testimony of Mabardy, 3-18-87 H.T. at 80-81)

(2) Material Storage

The most serious concern historically has been the types and amount of refuse stored on the site. Residents and commercial neighbors (Owens Moving Co.) complained about odors. (Testimony of Vincent P. Clark, 3-18-87 H.T. at 105-109) These complaints resulted in numerous inspections by the City of Cambridge Inspectional Services Department and eventually an Order dated July 5, 1987 to "remove trash and debris" and obtain "proper permits to have a dump site." An Application for Complaint was filed in the District Court on July 17, 1985. A lawsuit was filed in the Superior Court by the City of Cambridge and Joseph Cellucci against C.J. Mabardy on August 15, 1985 which resulted in a Stipulation dated September 10, 1985 establishing operational parameters until the permitting issue is resolved. Inspections of the facility post-Stipulation have revealed only minor infractions.

Complaints from neighbors about rats caused the Inspectional Services Department to visit the Mooney Street property on February 21, 1985. Mr. Mabardy agreed to exterminate that week. (Joe Cremen's Complaint Record No. 19411) A July 5, 1985 Inspection Report resulted from complaints by neighbors on June 14, 1985. The inspection was conducted on June 26, 1985 and identified trash and debris dumped in the lot allegedly without permits under M.G.L. ch. 111, sec. 150A, 310 CMR 18.23 and in violation of zoning. The owner was ordered to remedy the violations within 10 days or face prosecution by the City of Cambridge. (Housing Inspection Report and Order No. 8930) No progress was noted on July 16, 1985 and an Application for Complaint was filed in District Court by Vincent P. Clark on July 17, 1985. The District court case was continued from August 21, 1985 to September 6, 1985. (Application for Complaint; Notation Sheet)

A complaint from homeowners in the area resulted in another inspection on August 6, 1985 which confirmed the dumping of building materials. (Complaint Record No. 17394; Notation Sheet) On August 30, 1985 Mr. Mabardy informed Vincent P. Clark that he had "architectural engineers drawing up plans for new system with cooperation of DEQE." Mr. Clark advised Mr. Mabardy to contact Kevin Doherty "for site approval from Health Dept." (Notation Sheet)

Numerous inspections by Inspectional Services from November 18, 1985 through July 25, 1986 revealed compliance with the Stipulation, except when "garbage bags with burgers, bread, fruit remains, etc." were discovered (Notation Sheet, 4-23-86), nineteen (19) car batteries were in a waste pile (Notation Sheet, 5-2-86), and batteries and "bad" odor were noticed (Notation Sheet, 7-25-86).

Spot checks by P.F. Connolly of the Inspectional Services Environmental Health Division from November 1985 through January 1986 failed to reveal any refuse or materials not allowed by the Stipulation. (Reports by P.F. Connolly)

Photographs showed produce cartons (but no produce was directly observed) and rubber tires. (Photographs; Testimony of Vincent P. Clark, 3-18-87 H.T. at 107, 120-121)

Mr. Kevin Doherty inspected the site on twenty-three (23) occasions from July 16 to August 18, 1987. He observed only "one minor discrepancy in that a portion of the retaining wall had been knocked out." It was repaired within four days. (Testimony of Kevin Doherty, 8-19-87 H.T. at 31-32)

Many citizens complained about rats but could not attribute them to the transfer station site. (Questionnaire Responses; Testimony of Vincent P. Clark, 3-18-87 H.T. at 113-120) Allen J. Hayes, Jr. observed personally garbage and rodents during the summer of 1986. (Questionnaire Response)

Concerns were raised about asbestos material being handled at the site. (Testimony of Vincent Clark, 3-18-87 H.T. at 109)

Although no asbestos was found on site during an inspection (Testimony of Vincent Clark, 3-18-87 H.T. at 129-130), "in any demolition of old building material, asbestos is required to be handled separately through contractors. Basically they're required to place the asbestos in plastic bags. Mr. Mabardy's people will not allow this material to be built on site. It will be identified as being in plastic bags, and it isn't allowed to be disposed of at this facility." (Testimony of Robert Cummings, 3-18-87 H.T. at 26) However, Mr. Cummings had no knowledge whether Mr. Mabardy's personnel had any training in the identification of asbestos type materials, whether it be piping or insulation. (Testimony of Robert Cummings, 3-18-87 H.T. at 26).

Richard R. DeBenedictis inspected the site on August 22, 1985 and "found no significant quantities of garbage or other putrescible refuse." (Affidavit of DeBenedictis) One can assume some quantity was observed.

(3) Operations

A description of the site is provided in Section IV B.(1), supra. The demolition materials stored and transferred from the facility includes pipes, wood, plaster, bricks, concrete, asphalt, shrubbery, grass clippings, roofing materials, street sweepings, glass, ashes, tree branches, and other demolition and construction wastes. No domestic food waste, household garbage or other putrescible waste is accepted by the facility. No hazardous waste material in any form is accepted at the site. Operations commence at 8:00 a.m. and cease at 4:00 p.m. each

weekday. There is no weekend operation. Demolition material is removed from the site on a daily basis or no longer than two or three days after deposition. Processing operations are confined to the area located behind the concrete block screening walls. At the close of each day all large, heavy equipment and trucks are parked in front of the transfer station so it cannot be seen from Mooney Street. Every three months a rodent control specialist conducts extermination operations at the site. (Affidavit of Charles Mabardy; Testimony of Charles Mabardy, 3-18-87 H.T. at 82; Testimony of Robert Cummings, 3-18-87 H.T. at 21-23; Stipulation)

Small contractor vehicles enter the concrete blocked area and dump their construction or demolition material. It is loaded by heavy equipment into large tractor trailers, and is transported for final disposal in approved demolition landfills. (Testimony of Robert Cummings, 3-18-87 H.T. at 22)

GHR Engineering has prepared a conceptual design for upgrading the transfer station to comply with 310 CMR 18.00. It is the intent to construct a new building within the area where the existing transfer station is and to totally enclose the operation. The upgraded facility would have additional capacity to handle waste materials in that it could storage material for two or three days. GHR has not calculated the volumes of material that could be stored in the existing and proposed facilities. (Testimony of Robert Cummings, 3-18-87 H.T. at 24, 26-27)

Richard R. DeBenedictis observed that:

"The subject site is remote yet accessible from major arteries and is centrally located relative to areas of substantial building renovation and demolition activity. The industrial nature of the surrounding properties and the prior use of the acreage for solid waste disposal adds to the viability of the demolition transfer station site. ... Based on my professional experience and training, my personal observations of the parcel and my knowledge of the transfer station regulations, it is my opinion that engineering plans and specifications can be prepared which are approvable by the Department of Environmental Quality Engineering and which will allow the facility to be operated in full compliance with the Department's regulations." (Affidavit of Richard R. DeBenedictis)

C. Findings

After having weighed the evidence of record, it is decided that the operation and maintenance of the Mich-Lin Realty Trust transfer station results in a danger to the public health and convenience and may result in a nuisance if not properly operated. There is insufficient evidence to warrant a finding that the site assignment must be rescinded or suspended. There is substantial evidence that the transfer station operation can be operated and maintained if the assignment is modified by the imposition of conditions.

At present the facility is operated and maintained only under the September 10, 1985 Stipulation in the Middlesex Superior Court Action No. 85-4935 which sets the terms and conditions operations only during the pendency of that litiga-

tion. When that litigation is terminated, there will be no conditions on the operation. It is apparent that the facility needed and needs specific, written guidelines to ensure protection of the public health and to prevent a nuisance. Without the Stipulation conditions and frequent inspections by the City, the operations complained of by neighbors and businesses may have gone unchecked and unabated. Modification of the assignment by the imposition of conditions will continue to provide guidance to the operator, and an inspection enforcement framework for the City. Even Mr. Mabardy agreed that certain restrictions should be included on the site assignment. (Letter of Charles Mabardy to Dr. Melvin Chalfen, dated April 9, 1987)

Moreover, since this Decision confirms the "grandfathering" of a site assignment after 32 years, which had no public hearing or limitations placed on the assignment to protect the public health, comfort and convenience and to prevent a nuisance or danger to the public health, it is especially appropriate to place conditions on the operation now.

Controls are needed to prevent adverse traffic, odor, noise, storage and operational impacts. The following conditions are reasonable, fair and necessary, and if adhered to, shall protect the public health, comfort and convenience, minimize and mitigate the danger to the public health, and prevent a nuisance.

VI Conditions on Demolition Waste Transfer Station Site
Assignment Confirmed on December 7 , 1987 to Mich-Lin
Realty Trust

A. General

1. The following Conditions are hereby made an integral part of the site assignment for a demolition waste transfer station facility confirmed and issued in writing on December 7 , 1987, and shall be considered binding upon Mich-Lin Realty Trust ("the Operator" of said facility). Failure to comply with these Conditions in a manner satisfactory to the Department of Health and Hospitals ("the Department") may constitute a danger to the public health and shall be due cause for rescinding, suspending, or modifying the site assignment after due notice and public hearing as provided for by M.G.L. ch. 111, sec. 150A, as amended. All Conditions which follow are intended to be in conformance with any state or local permits which may be required, and are deemed necessary to protect the public health, comfort and convenience and to prevent a nuisance or danger to the public health. This conditional confirmation of site assignment is granted subject to such rules and regulations of the Department as may be promulgated in the future under M.G.L. ch. 111, secs. 31, 31A and 31B authorizing any reasonable health regulations.

2. The Operator shall submit within sixty (60) days to the Department and DEQE all plans, specifications and design data required by 310 CMR 18.03. The facility shall comply at all times with the requirements of 310 CMR 18.00 pursuant to a schedule to achieve full compliance under 310 CMR 18.23(2).

B. Location, Exclusions and Limitations

1. Location - This assignment shall be specific to that portion of the property at 45 Mooney Street which is used currently as a demolition transfer station: that is the rear portion of the land along the area toward the Boston & Maine Railroad right of way, approximately 2,100 square feet in area and about 70 feet by 30 feet. An accurate plan of the site shall be prepared by a Registered Land Surveyor and submitted to the Department for review and approval, and the DEQE for approval under 310 CMR 18.03 and 18.23(2) within sixty (60) days from the date of this Decision.

2. Exclusions - Specifically excluded from this assignment are those areas of the site which are not used currently for waste transfer operations or approximately 41,550 square feet. The fence which now surrounds the site and limits access only to authorized personnel and the roadway into the site are deemed part of the assigned area only to the degree those elements serve to secure the site and provide access to trucks. Waste transfer dumping, storage, and loading functions cannot be expanded into those areas and are limited to the 2,100 square foot area. Expansion of the assigned area must be approved in writing by the Department after due notice and public hearing.

3. Limitations

a. Period of Assignment: This assignment shall be valid for ten (10) years from the date hereon, and shall be renewable from time to time thereafter provided the Operator is in full compliance with these Conditions, as amended.

b. Change of Ownership: This assignment is granted only to Mich-Lin Realty Trust and shall not be transferred without prior written approval of the Department, such approval to be based on a determination by the Department of the financial and transfer station management abilities of the prospective new owner(s) to perform in full compliance with these Conditions, as amended.

c. Type and Extent of Facility: This assignment is for a demolition waste transfer station only, and specifically excludes any type of waste disposal by landfill or combustion processes. The facility shall accept only demolition waste for processing, including: demolition wastes, construction wastes, pipes, wood, roofing materials, plaster, bricks, concrete, asphalt, shrubbery, tree branches, grass clippings, yard trimmings, and street sweepings. The facility shall not accept putrescible solid waste (including household garbage), hazardous materials (including asbestos); large machinery; automobiles or parts thereof; sewage; liquids; toxic, hazardous or radioactive

waste; or ash residue from combustion processes. Processing of demolition waste shall be confined to the area located behind the concrete block retaining walls only until the facility is upgraded to include a new building in which all transfer station operations shall occur pursuant to plans to be approved by DEQE under 310 CMR 18.03 and 18.23(2).

C. Site Plan

1. Approval of Plans - All site plans, specifications and design data shall be in compliance with DEQE regulations and policies as amended, and shall be submitted concurrently to the Department for review and DEQE for approval. As soon as possible thereafter, the Department shall recommend to DEQE any changes it deems necessary. Failure of the Department to act shall not be cause for delay of the approval process. No changes, alterations or deviations from approved plans and specifications shall be made without prior notice to the Department and written approval of DEQE, and, if approved, may warrant an amendment to these Conditions.

2. Landscaping - A plan for post-construction landscaping of the facility shall be submitted to the Department for review and DEQE for approval prior to the commencement of site redevelopment. This plan shall include evergreen trees and other plant species in sufficient density to provide noise control and aesthetic value.

D. Design and Construction of Facility

1. Approval of Plans - All plans, specifications and design data shall be in compliance with DEQE regulations and policies as amended, and shall be submitted concurrently to the Department for review and DEQE for approval. As soon as possible thereafter, the Department shall recommend to DEQE any changes it deems necessary. Failure of the Department to act shall not be cause for delay of the approval process. No changes, alterations or deviations from approved plans and specifications shall be made without prior notice to the Department and written approval of DEQE, and, if approved, may warrant an amendment to these Conditions.

2. Security - The facility shall continue to be surrounded by a security fence to prevent access by unauthorized personnel. Only authorized persons and vehicles shall be allowed onto the site. The Department shall maintain with the Operator a current list of Town officials and consultants to be authorized access to the facility for official business. The entry of all persons and vehicles must be recorded in log books maintained by the Operator.

3. Fire Protection - The Operator shall install and maintain at all times in the waste processing and storage building fire alarms which comply with the Uniform State Building Code, Section 72. The Operator shall install and maintain such fire fighting equipment as required by law or deemed necessary by the City of Cambridge Fire Department and DEQE.

E. Operation of the Facility

1. Approval of Plans - All operational plans, specifications and design data shall be in compliance with DEQE regulations and policies as amended, and shall be submitted concurrently to the Department for review and DEQE for approval. As soon as possible thereafter, the Department shall recommend to DEQE any changes it deems necessary. Failure of the Department to act shall not be cause for delay of the approval process. No changes, alterations or deviations from approved plans and specifications shall be made without prior notice to the Department and written approval of DEQE, and, if approved, may warrant an amendment to these Conditions.

2. Days and Hours of Operation - The facility shall accept, process and transfer waste Monday through Friday between the hours of 8:00 a.m. and 4:00 p.m. only. The facility shall not operate on Sundays or State holidays. The Operator shall prominently post at the entrance to the facility the hours of operation and all limitations and conditions of access.

3. Volume of Waste to be Accepted - The transfer station shall be limited to input of the volume of waste which can be stored presently in the 70 foot by 30 foot by 12 foot area for a period of 48 hours. Calculations to determine that volume of waste shall be prepared by a Registered Professional Engineer and submitted to the Department for review and approval within sixty (60) days from the date of this Decision.

4. Acceptable Waste/Monitoring - The facility shall accept only the wastes listed in Condition B 3(c), above. The Operator shall be responsible for inspecting all incoming waste, and shall include in the facility Operating Plans a description of the equipment and procedures to be utilized. Any vehicle containing non-acceptable waste or material shall be prohibited from dumping and reported to the Department within five (5) days. Any material that is determined to be non-acceptable after dumping shall be removed immediately, and a written report made to the Department within five (5) days. The Operator shall inspect all closed containers (drums, cartons, plastic bags) before dumping to determine whether the waste materials therein are acceptable. All demolition material will be inspected for the presence of asbestos.

5. Recordkeeping and Reporting - Accurate and complete records of volumes of waste accepted, stored and transferred shall be maintained by the Operator and filed with the Department on a quarterly basis. Within sixty (60) days of the date of this Decision the Operator shall submit to the Department for review and approval a description of the recordkeeping procedures and proposed format for daily logs and quarterly reports. The logs and reports shall include, but not be limited to, the following information: date and time of delivery, name and address of

delivery truck company, vehicle type, size and registration number, source and type of waste material, volume of waste delivered, inspected amounts and type of waste excluded, personnel used, length of storage at transfer station, date and time of shipment out, and landfill destination.

6. Training of Personnel - The Operator shall conduct an annual training program for all employees to acquaint such personnel with the operation of the facility; the nature, characteristics and identification of unacceptable waste (including asbestos); and appropriate forms of action that should be taken when unacceptable materials are presented for acceptance to the site, or in case of any accident or emergency situation affecting the facility or its operations. The training received by each employee shall be documented in a log book which shall be available for inspection by the Department and be summarized in the Annual Performance Review.

7. Traffic Management - All delivery and transfer vehicles shall comply strictly with posted speed limits on Smith Place and Mooney Street. All loads shall be covered to ensure no material is spilled enroute and to minimize dust. There shall be sufficient on-site parking areas so that no vehicles will queue up and on Mooney Street or Smith Place awaiting entrance to the facility. The Operator shall ensure all vehicles and loaders owned, leased or operated by the Operator are in safe and clean condition, in good repair, and carry adequate liability insurance.

8. Community Relations and Complaint Response - The Operator shall maintain a community relations dedicated telephone number along with a call answering machine on a 24 hour basis. This call answering machine will be monitored on a twice per working day basis by the Operator. The telephone or any written community questions will be addressed directly with either telephone contact or written explanation depending on the nature of the question. All questions or complaints will be documented along with the responses by the Operator and summarized in the Annual Performance Review.

9. Insect and Rodent Control - The Operator shall cause operations to be carried out promptly and shall take all preventative measures to maintain conditions unfavorable for the production of insects and rodents. There shall be maintained a routine program for the control and elimination of insects and rodents at the site, including the use of insecticides and rodenticides applied by an applicator who is properly licensed by the Massachusetts Pesticide Board.

10. Annual Performance Review - By February 15 each year starting in 1988, the Operator shall submit to the Department a report summarizing facility operations for the preceding year. This report shall include, but not be limited to, the following items:

- (a) Volume of waste accepted;
- (b) Types of waste accepted by percentage;
- (c) Volume, types and sources of waste rejected;
- (d) An assessment of odor, dust and vermin control measures;
- (e) Accidental or unintentional deviations from the approved Operating Plan and any unusual situations encountered;
- (f) Any construction or corrective work conducted within the facility boundary;
- (g) A summary of all complaints received and action taken;
- (h) All training of personnel;
- (i) A professional opinion by the supervising transfer station engineer of the facility's impact on the surrounding environment, with particular emphasis on noise, air, surface and groundwater quality, and traffic; and
- (j) Recommendations based upon observation of the operations for improvement in the design, construction and operation of the transfer station.

11. Emergency Plan - An emergency plan providing for an alternative disposal method in the event of mechanical breakdown or other cause preventing the normal operation of the facility shall be filed with the Department and implemented whenever needed as conditions of health and public safety may require. Whenever the emergency plan is implemented, the Department shall be notified immediately.

F. Miscellaneous1. Threats to Public Health, Comfort and Convenience -

The Department reserves the right to impose such remedial measures and conditions as may be necessary, in its judgment and discretion, to correct any threats to public health, comfort and convenience, at the expense of the Operator.

2. Department's Right to Access and Inspection - The

Department reserves the right to access and inspect the site during all hours of operation in order to monitor its operation and to assess the extent to which the facility is being operated in conformance with these Conditions. During such visits the Department shall comply with all safety requirements prescribed by the Operator. When the Operator is notified that a DEQE representative, or any Federal, State or local regulatory agency intends to inspect the facility, the Operator shall so notify the Department which may elect to be present at the facility during such inspection.

3. Reporting - The Operator shall furnish contemporaneously with delivery to the Department copies of all monthly operating reports, yearly operating reports and facility plan modification requests submitted to any Federal or State agency or instrumentality having jurisdiction over the facility or its operations.

4. Reporting of Alleged Violations - The Operator shall furnish promptly after receipt to the Department copies of any written communications from Federal, State or local authorities alleging or pertaining to any violation or contravention, or any alleged violation or contravention, of any Federal, State or local regulation relating to the facility or the actions of the Operator with respect to the facility.

5. Liability Insurance Coverage - The Operator shall maintain comprehensive general liability insurance, combined limit of not less than one million dollars (\$1,000,000) per incident and three hundred thousand (\$300,000) per person for bodily injury and property damage, including broad form supplementary coverage for all activities associated with the site and transfer operations or any default therefrom. Proof of such insurance shall be provided annually to the Department.

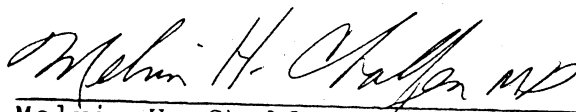
6. Liability of the City - The Operator shall indemnify, defend and hold the City harmless for any and all claims for damages resulting from activities associated with the siting, design, construction and operation of the facility.

7. Severability - If any provision of these Conditions is held invalid or unenforceable by any agency or court of competent jurisdiction, the remainder of the Conditions shall remain in full force and effect without alteration except as the context may require.

8. Enforceability - These Conditions may be enforced at law or equity by any court of competent jurisdiction.

VII Appeals

Any person aggrieved by the action of the Department in conditionally confirming the site assignment may appeal to the DEQE within sixty (60) days of the publication of notice of such assignment confirmation. After due notice and public hearing, the DEQE may rescind, suspend the assignment or modify it by the imposition or amendment of conditions. Any appeal must be filed in accordance with M.G.L. ch. 111, sec. 150A.



Melvin H. Chalfen, M.D.
Commissioner of Health and
Hospitals

Dated: December 7, 1987

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CITY OF CAMBRIDGE

CAMBRIDGE, MASSACHUSETTS 02139
TEL. 498-9011

EXECUTIVE DEPARTMENT
ROBERT W. HEALY
City Manager

RICHARD C. ROSSI
Deputy City Manager

December 21, 1987

To the Honorable, the City Council:

Enclosed please find copy of the decision of the City of Cambridge Department of Health and Hospital conditionally confirming MICH-LIN REALTY TRUST's site assignment for a demolition waste transfer station at 45 Mooney Street.

Very truly yours,

Robert W. Healy
City Manager

RWH/mbf
Enc.

5-948

Re: copy of enclosed decision of the
Health & Hospitals Dept. conditionally
confirming Mich-Lin Realty Trust's site
assignment for a demolition waste transfer
station at 45 Mooney Street.

In City Council,

December 21, 1987

Placed on file