

STATE OF NEW YORK  
COUNTY OF ALBANY

SUPREME COURT

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In the Matter of the Application of

SAVE THE PINE BUSH, REZSIN ADAMS, JOHN WOLCOTT,  
LYNNE JACKSON, SANDRA CAMP, RUSSELL ZIEMBA,  
SHARON CASTERLIN, PAULA SPRATT, SALLY CUMMINGS,  
CLAIRE NOLAN, GRACE NICHOLS, JAMES A. TRAVERS III,  
and TIM TRUSCOTT,

Petitioners,

**Affidavit**

Index No.

for judgment pursuant to Article 78 of the CPLR

-against-

The NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL  
CONSERVATION, and the CITY OF ALBANY,

Respondents.

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State of New York     )  
                                  ) ss:  
County of Albany     )

Dominick Calsolaro, being duly sworn, deposes and says:

1. I am a member of the City of Albany Common Council for Albany's First Ward.

Although I am not a party to this proceeding, I make this Affidavit in support of petitioners' application for a temporary restraining order and preliminary injunction, enjoining the City of Albany from: 1) proceeding with the development of the Eastern Expansion of the Rapp Road Landfill, and 2) spending any public money, including the proceeds of bonds that were recently issued, for the purposes of paying fees assessed under special condition 34 (a) of the permits that were issued by the New York State Department of Environmental Conservation for the landfill.

2. I believe that the preliminary injunction is necessary to preserve the status quo pending the resolution of the merits of petitioners' claims. In the absence of a preliminary injunction, the City of Albany will proceed to take a portion of land for the purposes of constructing a landfill cell, and will irreparably destroy irreplaceable Pine Bush land.
3. Special condition 34 (a) requires the City of Albany to set aside \$10.00 for every ton of solid waste that is accepted at the facility for a habitat restoration fund. However, the permit does not specify whether this fee is to be paid by entities who deposit waste at the landfill, or by the City itself.
4. The City has determined to pay the fee itself and, since the effective date of the permit (June 25, 2009), has been responsible for paying this fee.
5. On July 15, 2009, the Common Council approved six bonds for the landfill. One of these bonds, in the amount of \$2,400,000, is intended to pay the fees under condition 34 (a). I voted against this bond ordinance along with Council Members Ellis, Fahey and Smith.
6. I agree with petitioners that the proposed Eastern Expansion is ill considered, and that DEC should not have approved it. In particular, I spoke at the December 3, 2008 public hearing, expressing the grounds for my opposition. I noted that the City had not developed an adequate Solid Waste Management Plan, and had not fully investigated alternatives to the expansion of the landfill. In conclusion, I stated "the City has failed to meet its obligation of finding alternatives to operating a landfill in the environmentally and ecologically sensitive Pine Bush. The City has known about the need to find alternatives since the early 1990s and has failed to do so. DEC must no longer be an 'enabler' to the City's addiction to the garbage for profit business. The DEC must act like

a strong parent and put its foot down and tell the City that enough is enough." A complete copy of my statement is annexed hereto as Exhibit A.

**Probability of success**

7. For the reasons set forth in the Petition and in the Affirmation of petitioner's counsel, Peter Henner, in support of this motion, I believe that petitioners have a good probability of success on the merits of this action.
8. In particular, I believe that petitioners are likely to prevail with respect to their claims that the landfill expansion should not have been approved by DEC in the absence of a Solid Waste Management Plan which sets forth a viable and realistic plan for the handling of solid waste in the CRSWMP communities.
9. Furthermore, I believe that the petition establishes that DEC has not adequately performed a thorough analysis of viable alternatives, as is specifically required by both SEQRA and by the Part 360 regulations.
10. I have also been a strong critic of the City's proposal to fund compliance with special conditions 34 (a) of the permits by bonding. I attempted to raise the issue of why the City was proposing to pay for the cost of complying with this condition in a series of conversations with City officials, consultants and the City's environmental lawyer.
11. I expressed the thought that the City should not pay the cost for private haulers to dump trash in the landfill, especially since the City accounts for only 12% of the total tonnage of waste accepted at the landfill.
12. I was told by representatives of the Department of General Services for the City of Albany, the City's consultant Clough Harbour, and by Ruth Leistensnider of the law firm of Nixon Peabody, that the fee could not be imposed upon the waste haulers because, if

the City imposed the fee, the private haulers such as Allied Waste, a multinational multibillion-dollar business, would no longer utilize the landfill.

13. I responded by saying, in substance, that if the waste haulers did not use the landfill, the life of the landfill would be extended.
14. The City's consultants and lawyer told me that if private haulers did not use our landfill, we would lose revenue.
15. I do not believe that the City can legally subsidize private haulers, either by a bonding resolution, or by paying the \$10 per ton fee out of the City's general revenues. Either way, the payment of this \$10 fee represents the use of public moneys to subsidize a private enterprise.
16. For the reasons stated in the Petition, I believe that the payment of this fee represents an unconstitutional gift of public monies to a private entity, in violation of Article 8 § 1 of the New York State Constitution.

#### **Irreparable harm**

17. The effective date of the permits was June 25, 2009. The permits, by their terms, authorized construction of the Eastern Expansion, and also directed the City to establish, within 30 days, a fund for habitat restoration, funded by the \$10 per ton fee described in special permit Condition 34 (a).
18. Upon information and belief, this \$10 per ton fee is now being paid to the fund, for every ton of garbage which is presently deposited at the Rapp Road Landfill.
19. Absent an injunction, the City will continue to pay this \$10 fee to the fund, despite the fact that the payment of this money represents an unconstitutional subsidy to private waste haulers.


20. As a Common Councilman, I have made inquiries as to what the City is actually doing with respect to the construction of the Eastern Expansion.
21. On October 15 2009, I had a conversation with Joe Giebelhaus, the Solid Waste Manager for the City of Albany.
22. Mr. Giebelhaus advised me that the City now believes that it will not exhaust capacity at the existing landfill until June 2010. Nevertheless, the City has commenced the construction of a new landfill cell in lands that are part of the Eastern Expansion.
23. Absent an injunction, the Pine Bush land that is included in the Eastern Expansion will be buried by municipal solid waste, will become part of the existing landfill, and will be permanently lost for possible preservation purposes.
24. Therefore, an injunction is necessary to prevent any additional landfill construction in the Eastern Expansion, to protect the land that is part of the Eastern Expansion until the ultimate resolution of this lawsuit.

#### **Balance of equities**

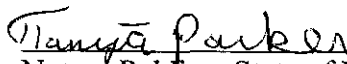
25. Because the City of Albany has had over 20 years to devise a meaningful solution to its solid waste problems and because the City has refused to consider any alternative strategies for the handling of its solid waste besides further insults to the Pine Bush, the equities do not favor the City of Albany in this case.
26. Furthermore, inasmuch as the City has adequate capacity in its existing landfill until June 2010, the City cannot claim that it needs to utilize the Eastern Expansion of its landfill on an emergency basis.

27. Finally, the City should not be permitted to irrevocably spend public money to fund its compliance with condition 34 (a). The balance of equities favor an injunction against the City paying this fee pending the resolution of this lawsuit. If the waste haulers are required to pay this fee themselves, and, at the conclusion of this lawsuit, it should be determined that the City can legally subsidize this payment, the fee can be refunded to the waste haulers. However, once the City pays this money, it will not have any effective way of recouping it from the waste haulers.

**Wherefore**, your deponent respectfully urges this court to enjoin the City from paying the \$10 per ton fee required by special condition 34 (a) of the Department of Environmental Conservation permits for the Eastern Expansion of the Rapp Road landfill, and from undertaking any additional construction work for landfill purposes in the area designated as the Eastern Expansion, pending the resolution of this lawsuit.

  
Dominick Calsolaro

Sworn to before me this 12<sup>th</sup> day of October, 2009

  
Notary Public – State of New York

**Tanya Parker**  
**Notary Public, State of New York**  
**Qualified in Rensselaer County**  
**No. 01PA6201891**  
**Commission Expires March 9, 2013**