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September 22, 2014

VIA HAND DELIVERY

Hon. Kevin Hardwick
Erie County Legislator - District 4
92 Franklin Street, 4th Fl.
Buffalo, NY 14202

Re: Sheridan Park, Inc.
Our File No. 11-2289

Dear Hon. Hardwick:

I am in receipt of your proposed resolution with regard to the Sheridan Park, Inc. crematory located at 2600 Sheridan Drive in the Town of Tonawanda. I would like to clarify some of the factual statements asserted in the resolution and discuss the process by which you are attempting to shut down the crematory.

The crematory was opened in August 1991. Over the nearly 25 years of operation there have been few "complaints" with regard to the facility. The complaints were either determined to be unfounded by local authorities or were isolated and Amigone responded appropriately. In response to a neighbor's complaint the New York State Department of Environmental Conservation in 2012 issued a letter referencing a *possible* violation of the facility's opacity limits based on a single event.

Your resolution correctly asserts that in July 2013, the New York State Attorney General brought a Petition seeking to enjoin Sheridan Park, Inc. from reopening or operating the crematory on the basis that the crematory was a "nuisance". Your resolution, however, fails to advise your fellow legislators or the public that the court *dismissed* Attorney General Schneiderman's request for relief. The Court noted that Sheridan Park, Inc. had been cooperating fully with the AG and the neighbors in attempting first to relocate the crematory to another location and then to find an appropriate engineering proposal (see Decision attached).

Amigone has done everything that has been requested of it, including voluntarily discontinuing its operations temporarily and spending significant money in an attempt to obtain permission to move. Their efforts to move included: seeking permission from the NYS Cemetery Board which was denied; bringing an Article 78 Petition requesting that an Erie

County Supreme Court judge require the NYS Cemetery Board allow Sheridan Park, Inc. to move the crematory which was denied; appealing the denial of that request to the Supreme Court Appellate Division, Fourth Department. The Fourth Department denied the request for permission to move the crematory. We are waiting for a decision from the appellate court for permission to take their denial to the NYS Court of Appeals for a final review. Amigone has taken every step, at its expense, to address the issues raised by its neighbors.

When Amigone proposed to move the crematory, no one from the County Legislature took any steps to assist Amigone with obtaining approval from the Cemetery Board. The Attorney General, who sits on the NYS Cemetery Board, recused himself as opposed to championing the idea of granting permission to move the crematory from the current location.

Amigone recently, and prior to your proposed resolution, advised the neighbors and the Attorney General that they would be submitting a proposal for an abatement system to be added to the crematory. This abatement system is beyond any regulatory requirement and beyond anything currently in operation in the State of New York. Amigone's commitment to finding an appropriate resolution to the neighbors' complaints is without precedent.

Your resolution suggests that the Erie County Legislature resolution reference INT.21-114 is no longer "legally relevant". I disagree wholly. The temporary cessation of operations at Sheridan Drive has been in conformity with an agreement reached with the Attorney General and the NYSDEC. That agreement did not require any specific timeframe for Amigone to resubmit a proposal. This was confirmed by the Supreme Court in dismissing the Attorney General's request to find that the crematory constituted a nuisance. Amigone has sought solutions in every corner, visiting operations out of state and even in Canada. I hope that the Legislature does not use Amigone's persistence in making sure that they "get it right" against them.

Your resolution states "*it has been clearly established that the public's health and welfare has been and will continue to be negatively affected should the crematory recommence operations*". It is unclear what evidence you are referencing to support this statement. The Supreme Court, after a review of significant documentation and after hearing arguments from both the Attorney General and Amigone's counsel, reached a different conclusion in denying the Attorney General's request for a permanent injunction.

Finally, and perhaps most importantly for your fellow legislators and the taxpayers, you assert that your resolution will have no fiscal impact. That is incorrect. Sheridan Park, Inc. has vested rights in the operation of this crematory and in the designation of the land as cemetery land. I am not aware of any provision of law that allows a County to repeal a designation of cemetery land. This would be especially so for a designation that is almost a quarter of a century old. Your resolution would constitute a "taking" of that legal right that would require significant compensation under the US and New York State Constitutions. I note that the Court of Appeals, New York's highest court, has recently confirmed;

"{A} property owner obtains a vested right when "pursuant to a legally issued permit, the landowner demonstrates a commitment to the purpose for which the permit was granted by effecting substantial changes and incurring substantial expenses to further the development" Glacial Aggregates, LLC v Town of Yorkshire. 14 N.Y.3d 127; 924 N.E.2d 785; 897 N.Y.S.2d 677; 2010 N.Y. LEXIS 29 (NY Court of Appeals 2010).

Amigone has held this legally issued designation for over 20 years and invested significantly in the property. Your resolution would constitute a "taking" of their vested right triggering a significant obligation on the part of the County for substantial compensation.

It is my hope that the information provided to you and your colleagues by others will be considered in the context of this information. I urge you to seek a reasoned legal opinion as to the rights of the County Legislature to repeal this designation including and not limited to the financial obligations of the County, in the event a taking occurs. That would include any "temporary takings" that a failed resolution process may cause.

It is my hope that the County Legislators will take a realistic and fair review of the facts. I urge you to consider thoughtfully your legal basis and the limitation of your authority to repeal this designation. I urge you to recognize the financial jeopardy that you will be exposing Erie County taxpayers to. I urge you to allow the process to proceed as agreed to between the Attorney General, the New York State Department of Environmental Conservation and Amigone.

Respectfully, this resolution should not proceed out of committee.

Respectfully,

THE KNOER GROUP, PLLC

Robert E. Knoer

REK/ds

Enc.

CC: Hon. Barbara Miller-Williams (via mail and e-mail w/ enc.)
Hon. Patrick B. Burke (via hand delivery w/ enc.)
Hon. Betty Jean Grant (via mail and e-mail w/ enc.)
Hon. Ted B. Morton (via hand delivery w/ enc.)
Hon. Peter J. Savage, III (via mail and e-mail w/ enc.)
Hon. Lynne M. Dixon (via hand delivery w/ enc.)
Hon. Joseph C. Lorigo (via hand delivery w/ enc.)
Hon. Thomas A. Loughran (via mail and e-mail w/ enc.)
Hon. John J. Mills (via hand delivery w/ enc.)

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Hon. Edward A. Rath, III (via hand delivery w/ enc.)
Erie County Comptroller Stefan I. Mychajliw (via hand delivery w/ enc.)
Erie County Executive Mark Poloncarz (via hand delivery w/ enc.)
Sheridan Park, Inc. (via mail w/ enc.)

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

PEOPLE OF THE STATE OF NEW YORK,
The NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION, and
JOSEPH J. MARTENS, COMMISSIONER OF
THE NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION, by
ERIC T. SCHNEIDERMAN, Attorney General
for the State of New York,

Petitioners,

vs.

AMIGONE FUNERAL HOME, INC.,
AMIGONE VENTURES, L.P.,
AMIGONE ENTERPRISES, INC., and
SHERIDAN PARK, INC.,

Respondents.

MEMORANDUM DECISION
AND ORDER

INDEX NO. I-2716-2013

FILED
2014 MAR 25 AM 11:40
CLERK'S OFFICE

HENRY J. NOWAK, J.S.C.
Justice Presiding

I. CLAIMS BY THE PARTIES

Petitioners bring the instant petition for a permanent injunction and penalties pursuant to ECL § 71-2103. Specifically, petitioners claim that respondents violated 6 NYCRR §§ 211.1 and 219-4.5 (a), as well as their May 27, 2009 air facility registration that previously authorized operation of a crematory located at 2600 Sheridan Drive in Tonawanda, New York. Respondents move to dismiss the petition pursuant to CPLR § 404 (a), contending that a July 25, 2012 Interim Assurance of Discontinuance [hereinafter "AOD"] is a complete bar to the petition.

II. PAPERS CONSIDERED

In support of their petition, verified on September 23, 2013, petitioners submitted and the court considered the following:

- the affidavit of Alfred Carlacci, a regional air pollution control engineer for the New York State Department of Environmental Conservation, sworn to on September 20, 2013;
- the September 24, 2013 affirmation of Assistant Attorney General Jane C. Cameron, Esq.;
- the affidavit of Jennifer Nalbene, an Environmental Scientist employed by the New York State Attorney General's Office, sworn to on September 24, 2013;
- the affidavit of Rebecca Newberry, lead community organizer in the Town of Tonawanda for the Clean Air Coalition of Western New York, sworn to on September 23, 2013;
- the affidavits of Joseph Emminger, sworn to on September 12, 2013, and Lisa M. Chimera, sworn to on September 18, 2013, both members of the Town Board of the Town of Tonawanda;
- the affidavits of 43 people who live in the neighborhood adjacent to 2600 Sheridan Drive in Tonawanda, New York; and
- 127 exhibits submitted along with the affidavits.

In support of respondents' motion, the court considered:

- the affidavit of Robert E. Knoer, Esq., sworn to on October 28, 2013;
- the affidavit of Anthony P. Amigone, Sr., sworn to on October 28, 2013;
- the affidavit of Ernest Kassoﬀ, national sales manager for Facultatieve Technologies, sworn to on October 25, 2013;
- the answer to the petition, verified on October 28, 2013; and
- eight exhibits submitted along with the affidavits.

In addition, the court considered oral argument by counsel for all parties on November 6, 2013, as well as memoranda of law submitted by counsel for all parties both before and after oral argument.

III. SUMMARY OF POSITIONS

Petitioners bringing this action pursuant to Executive Law § 63 (12), which empowers the Attorney General to bring a special proceeding seeking injunctive relief whenever any person engages in repeated illegal acts or otherwise demonstrates persistent illegality in carrying on, conducting or transacting business. The illegal activities that petitioners allege are (1) that respondents caused or allowed emissions of air contaminants to the outdoor atmosphere of such quantity, characteristic or duration which unreasonably interfered with the comfortable enjoyment of life or property, in violation of 6 NYCRR § 211.1; and (2) that respondents emitted visible emissions from their crematory with a six-minute average opacity of 10 % or greater, in violation of 6 NYCRR § 219-4.5 (a). Because respondents' May 27, 2009 air facility registration required compliance with application air pollution regulations, including the sections referenced above, petitioners claim that respondents violated the air facility registration as well.

Respondents do not dispute that neighbors have made complaints about the crematory during the time it was in operation from 1991 to July 2012, but point out that they have never been found in violation of any air pollution or noise limits. The basis for their motion, however, is that the AOD resolved all allegations of violations in the petition as well as all civil penalties that may be available to petitioners. In fact, respondents contend that the mere commencement of the petition is a breach of the AOD.

The AOD (Petitioners' Exhibit 100) contains ten specific stipulations of the parties. The first provides for an initial period for six months whereby respondent Sheridan Park, Inc. [referred to in the AOD as the "Operator"] would cease operating the crematory, from July 22, 2012 through January 22, 2013. The second stipulation requires respondents to take steps during that time to secure an alternative location for the crematory facility and apply for all required state and local government approvals. Petitioners do not contend that respondents failed to do so, and the record reflects extensive efforts by respondents to find an alternative location for the crematory.

The third stipulation permits respondents to recommence operation of the crematory within the six-month period, as long as three conditions are met:

- a. The Operator will provide proof to the Attorney General of a final state or local government determination foreclosing the possibility of relocation; and
- b. The Operator will retain a reputable third-party consulting firm with expertise in crematory operations to determine the validity of and develop recommendations for on-site operational changes that will address the Residents' concerns regarding odors, soot, smoke and noise and further insure compliance with the law; [and]
- c. The recommendations of said consultant, together with Sheridan Park's proposed implementation of those recommendations, must be submitted to DEC and the Attorney General for review. As part of this submission, the Operator may request DEC and Attorney General approval to re-commence operations prior to January 22, 2013, with such approval to be solely within the discretion of DEC and the Attorney General.

The fourth stipulation is entitled "Notice." It provides that respondents must give petitioners two weeks' written notice before reopening the crematory, and one week's notice of the consultant's report referred to in section "b" of the third stipulation, as set forth above. Respondents contend that the notice provision remains in effect indefinitely and is not limited to

the six-month time period referred to in the first three stipulations. Petitioners agree with respect to the first part of the "Notice" provision; the petition alleges that "[i]f six months passed, as it has, and Amigone wished to reopen the crematory, it was required to serve two weeks' notice of same to the State" (September 23, 2013 Petition, ¶ 63). However, petitioners claim that the AOD did not impose a continuing obligation that respondents retain a third-party consultant and forward a plan showing operational and equipment changes to petitioners before re-opening at the present site. Respondent contends that it does.

The fifth paragraph of the AOD, entitled "Entire Settlement," provides:

This Interim Assurance shall constitute the entire agreement of the parties with respect to settlement of the alleged violations specifically referenced herein and is in full satisfaction of all civil and criminal claims that were or could have been raised with respect thereto by the Attorney General and the New York State Department of Environmental Conservation.

There is no dispute that the AOD references the same violations alleged in the petition. It is also stipulated that the day after the AOD was signed, respondents ceased operating the crematory on Sheridan Drive. There is no allegation of any violations after the AOD was signed.

IV. FINDINGS OF THE COURT

This court finds that the July 25, 2012 interim AOD remains in effect indefinitely. If respondents wish to open the crematory at the current location, they first must provide two weeks' actual written notice to the Attorney General advising of any plan to renew operation. Second, respondents must retain a reputable third-party consulting firm with expertise in crematory operations, to determine the validity of and develop recommendations for on-site operational changes that will address the residents' concerns regarding odors, soot, smoke and

noise and further insure compliance with the law. Third, at least seven days before recommencing operation, respondents must submit a report of such recommendations along with their proposed implementation to the DEC and the Attorney General.

This court further finds that pursuant to the "Entire Settlement" stipulation in the AOD, petitioners may not bring any civil or criminal claim referenced in the AOD, which include all of the claims alleged in the petition. That provision is not ambiguous, particularly when read in conjunction with the ninth stipulation of the AOD, which provides that the AOD "shall not be construed to prohibit the Attorney General from exercising his authority to prosecute any future violation of the law" (emphasis added). Accordingly, the petition is dismissed.

In regard to respondents' claim for attorney's fees based upon frivolous conduct, this court does not find that the petition was completely without merit. One of petitioner's claims sought injunctive relief, after counsel for respondents referred to the possibility of re-opening on July 30, 2013 (Petitioners' Exhibit 117A). Therefore, respondents will be responsible for their own attorney's fees.

This decision constitutes the order of this court.

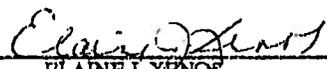
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HENRY J. NOWAK, J.S.C.

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ELAINE J. XENOS
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