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SCOTT COUNTY JUDGE/EXECUTIVE

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May 24, 2021

Dear Mayor Gorton and Council Members:

I am writing to you on behalf of the Scott County Fiscal Court, to express our grave concern regarding the proposal, discussed at the May 18, 2021 meeting of the Environmental Quality and Public Works Committee, to pass a resolution addressed to the Secretary of the Energy and Environment Cabinet in support of expansion of the Central Kentucky Landfill ("CKL").

As you are no doubt aware, there is pending before that agency an administrative case filed by Waste Services of the Bluegrass LLC ("WSB") against the Energy and Environment Cabinet ("Cabinet") and the Scott County Fiscal Court, seeking to overturn the decisions of the Cabinet to (a) approve the request by Scott County to amend that 2018-2022 Scott County Solid Waste Management Plan, (b) approve an amendment to that plan which eliminated capacity which had been authorized but for which no permit had been issued, and (c) to return two requests for modification of the landfill that would have expanded the capacity beyond which had been previously permitted.

It would be, we believe, highly inappropriate for the Lexington-Fayette Urban County Government to adopt a resolution seeking to influence a decision by the Secretary in a pending administrative case. The briefing on the issues raised in the case of *Waste Services of the Bluegrass LLC v. Energy and Environment Cabinet and Scott County Fiscal Court*, File No. DWM-20-1-0816, consolidated with DWM 20—1-0888 will be completed on May 28, after which time the case will stand submitted to Environmental Administrative Hearing Officer Gorley for Findings of Fact, Conclusions of Law, and Recommendations, which will then be reviewed and will be subject to a final order by the Cabinet Secretary.

Lexington has had every opportunity to intervene in the pending case to assert any legal interest it might have in the case and did not do so. The City of Lexington has been, or should have been, aware before renewing the contract in 2020 with Waste Services of the Bluegrass that the future expansion onto a 500-acre tract by the Central Kentucky Landfill was not assured *even before* the Scott County Fiscal Court acted on the solid waste plan amendment, and for reasons wholly unrelated to the solid waste plan amendment.

For your information, I am attaching a copy of a recent unpublished opinion of the Kentucky Court of Appeals in the case of *Waste Services of the Bluegrass LLC v. Scott County Board of Adjustment*, No. 2018-CA-1225-MR. Among the findings of the Scott County Circuit Court affirmed by the Court of Appeals decision was that as early as 2015 Waste Services of the Bluegrass “counsel for the McBrayer law firm¹ requested a zoning letter for both the 500-acre tract and the landfill tract as part of WSB’s mortgaging process” and was informed by the Planning Director that “expansion onto the 500-acre parcel could not occur without rezoning or a conditional use permit because it was zoned Agricultural (A-1). *COA Opinion* at p. 8-9.

Waste Service’s attempt to rezone the 500 acres was rejected by the Scott County Planning Commission, which voted 9-0 to recommend against rezoning, and the Fiscal Court, which voted 5-0 to accept that recommendation and deny rezoning. Waste Services has appealed that decision to Scott Circuit Court. Also currently pending in Scott Circuit Court is a case brought by a group of Scott County residents, who allege that zoning laws also prevent Waste Services from expanding its landfill on the remaining 100 acres.

Waste Services was issued a Draft Permit for an expansion on December 16, 2016, which was challenged in the Office of Administrative Hearings. After extensive litigation, a Hearing Officer issued a Report on December 30, 2019, recommending that the permit be denied. On April 17, 2020, the Secretary of the Cabinet accepted the recommendation of the Hearing Officer and directed the Division of Waste Management to deny Waste Services’ application to expand and not to “approve or finalize the Draft Permit associated therewith.”

As to the current status of the landfill, WSB has stipulated in a pending case in the Franklin Circuit Court, that the landfill had exhausted permitted landfill capacity in 2020. It has continued to accept waste after that time, triggering a Notice of Violation by the Cabinet on January 22, 2021 claiming that by doing so after exhausting permitted capacity, it was operating “without a permit.” According to the Cabinet, Waste Services does not currently have a permit to operate CKL but has been allowed to continue to accept waste without a permit until October 31, 2021. Lexington was notified at or around the time of issuance of the NOV that it would need to make plans for the time after closure of the landfill.

Regarding the Scott County Solid Waste Plan Amendment, on March 6, 2019, Scott County began a lengthy process of considering whether to amend its Solid Waste Management Plan (SWMP) to reduce or eliminate capacity for disposal of waste within the County. The process was open and transparent and involved multiple public notices and opportunity for hearing. It

¹ We assume that Council Member Worley has obtained the necessary ethics opinion(s) regarding his reported employment with that firm and his participation in this discussion, or will be recusing himself from further involvement in this issue as a member of the Council.

culminated on August 12, 2020, when the Cabinet approved a SWMP Amendment that eliminated new capacity for disposal of waste within the County beyond that for which a “consistency determination” had been issued. The process was deliberate, and Scott County attempted through months of negotiations to find a path forward with WSB that would address the numerous operational problems at the landfill and persistent odor violations at the facility.

As you are aware, Kentucky law gives each county the authority to determine whether, and under what conditions, it will host a municipal solid waste landfill. It also imposes on each county the obligation to have a plan for management and disposal of waste generated within the county for a rolling 10-year period. Scott County has satisfied all obligations of the solid waste planning process.

As to the proposal to adopt a resolution addressed to the Cabinet Secretary in support of expansion of the landfill, Scott County believes such a step would be inappropriate. According to comments made at the May 18 EQPW Committee Meeting by Council members McCurn and Worley, a Resolution urging the Cabinet Secretary to allow expansion of the landfill notwithstanding the recommendation of the Hearing Officer in a pending administrative case, will be presented at Council’s work session on May 25.

A representative of Waste Services, who was apparently invited to speak at the Committee meeting, told the Committee a Resolution might “persuade” the Cabinet Secretary to issue Waste Services an expansion and “would send a powerful message to the Secretary and the Governor.”

We are troubled that Lexington would contemplate attempting by resolution to influence the judicial and quasi-judicial decisions of the Cabinet Secretary and permitting decisions of the Energy and Environment Cabinet with respect to Waste Services’ landfill expansion.² The determination of whether a solid waste plan amendment or an expansion permit should be approved is a matter of compliance with the laws and regulations of Kentucky. The cost to the City of Lexington of disposal of its’ waste is not a factor that is relevant to the permitting and solid waste planning decisions of the agency, and the implication that Scott County and the citizens residing near the current landfill should be obligated to continue, against their will, to host a landfill in order to accommodate Lexington’s garbage, is offensive.

It is our understanding that as part of the initial bidding process, bidders were required to provide “alternative disposal facilities” in case a bidder’s primary disposal location was unable

² There are currently ten lawsuits pending in five different courts, all pertaining to whether Waste Services should be allowed to expand its landfill. Actions are pending in Scott Circuit Court, Franklin Circuit Court, U.S. District Court, Kentucky Court of Appeals, and the Office of Administrative Hearings. The City of Lexington has not, to our knowledge, intervened in any of those cases.

to accept Lexington's waste, and that Waste Services provided three alternative landfills it would use if CKL was not available. We have received confirmation from both Republic Services and Rumpke of Kentucky that there is ample constructed capacity at their landfills to accept waste now being disposed of at the Central Kentucky Landfill, notwithstanding the suggestion of the Cabinet in the pending Franklin Circuit Court to the contrary.

In conclusion, we are mindful of the positive relationship Fayette and Scott Counties have forged over the years, and the need for the elected officials in our two neighboring counties to continue to work together for the betterment of all our citizens. These were hard decisions for our county, made after years of serious compliance issues stemming from Waste Services' operation.

It is not Lexington's place to seek to undercut our decisions, and we would encourage Lexington to reconsider "sending a message to the Secretary and Governor" in an attempt to do so.

Sincerely,

A handwritten signature in black ink, appearing to be "J.P.C.", followed by a long horizontal line extending to the right.