

# MAHB Quarterly Reprint

(Originally printed in vol 14-5 & vol 15-1)

## Hot Asphalt: the Boston BOH Decision A Citizen's Viewpoint

by Lloyd Fillion

This article relates part of the four year history behind a recent Boston Board of Health decision (May 1, 1996) prohibiting the construction of an asphalt plant within the inner city because of potential threats to the public health. This history attempts to discuss some of the many missed opportunities of various other city and state boards and agencies to come to the same determination for virtually the same reasons. Both the developer and the residents were required to exhibit extraordinary staying power while city and state administrators waited for each other to take the initiative to stop this development.

Many individuals, from the developer to city officials, attempted to convince the public that Boards of Health do not have the authority to prohibit proposed developments as potential health threats, or to prohibit this development. It is to be noted, however, that the authority of Boards of Health to prohibit a development for health reasons is one issue not challenged by the developer's own attorney in his lawsuit challenging the Board's decision.

In urban areas, most, if not all, development decisions impact public health. The inner city neighborhoods of Boston, like that of most urban areas, are comprised of populations with typically higher rates than the populations as a whole of morbidity and mortality from a host of medical conditions. Large economic developments are frequently subject to state environmental review. However, there is no formal health impact review for development proposals, at either the state or city level. The connection between "public health" and the "environment" is even now undergoing review within the state administration in order to formalize appropriate public health concerns and the role for health agencies within the context of Environmental Impact Reports.

In Boston, proposed development is publicly reviewed before the Boston Redevelopment Authority and the Zoning Board of Appeal. These formal reviews are almost always preceded by extended meetings with local neighborhood groups. These meetings are a vehicle allowing developers to inform potential neighborhoods of their plans, and receive informed consent for the development proposal. At their best, they provide an informal opportunity for abutters and interested residents to help developers refine projects in order to minimize negative environmental impacts. Relevant health concerns are sometimes raised within this context.

Mirroring current city priorities however, health concerns are not infrequently given short shrift before zoning authorities when the driving force is the creation of jobs and/or revitalization of a particular neighborhood. Development proposals are too often approved with no analysis of the environmental/ public health impacts.

Within Boston, potential emission impacts are regulated by city and state ordinances controlling the many kinds of pollution. However, its Board of Health does not, as a matter of course, play any formal and public role in economic development decisions. Issues come before the Board only as residents or some other political entity successfully petition the Board to exercise its broad, discretionary, police power to review and make a site assignment for the development in question.

The Boston Board of Health's active involvement in the proposed construction of an asphalt plant in the inner city came late in a process which the city wrestled with for four years. The timing appears to have been determined within the city's administration, beyond the control of the Board. The tardiness of the involvement necessitated the expenditure of enormous amounts of time and money by many residents and their significant number of technical experts, a number of political leaders at the city and even the state levels, as well as by the developer. While the educational value of such political struggles cannot be underestimated, many residents believe their expenditures of time and money could have been better channeled toward the many remaining public concerns that face urban neighborhoods at the close of the twentieth century.

### **BACKGROUND**

Since 1990, the Todesca Equipment Company (TEC) has been attempting to site an asphalt (aka "hot mix" or "bituminous concrete") plant within the city limits

of Boston. (At the time of publication, TEC currently is challenging a number of decisions which deprive it of the ability to proceed. The issue is still alive.) Currently there is only one such facility, in the Readville section of Hyde Park of Boston. That plant is some fifty years old, and is operated by a competitor. TEC is a road builder of some import in eastern Massachusetts and in Rhode Island. Their main goal appears to be having their own production facility in a central location from which to service the metropolitan Boston area (i.e., two hours by truck in any direction using the interstate highway system). From this location, TEC would also become a formidable player in the bidding for downtown Boston paving contracts.

There are approximately a dozen hot mix facilities within the 495 beltway surrounding Boston; however, none are as centrally located as a downtown Boston facility would be. And it is on a site immediate to downtown that TEC has spent the last four years working to overcome tremendous inner city residential opposition. Prior to this site, TEC attempted to locate a hot mix facility at other locations, but chose to back off after relatively minimal neighborhood resistance.

The battle between TEC and the inner city residents has been waged on six fronts:

- in front of the Boston Zoning Board of Appeal (ZBA) (6 appearances in 4 years);
- in Suffolk Superior Court;
- a 30 month environmental review before the Massachusetts Environmental Policy Act (MEPA) unit of the Commonwealth which included five separate submissions by the proponent;
- before the Department of Environmental Protection (DEP) and a DEP administrative judge reviewing a DEP granted conditional air quality permit (decision pending as of this writing);
- extensively in the local press;
- and finally, before Boston's Board of Health.

Most of these fronts were driven by the collective of residents and neighborhood organizations, aided by several local environmental activist organizations. Locally, this issue has enabled very disparate communities to unite for the common good, which has also gained the issue national attention through an Associated Press story and through recent Audubon Magazine coverage. It has provided the

local political elected leadership-both city and state - with opportunities to be in the correct position for all of their voting constituents with no concern for negative fallout.

Many of these fronts have been active simultaneously and so separating one from another is difficult. Concentrating on one with no knowledge of the others, or outside a political context, will give a limited understanding of the role played by the parties in that particular battle. This article will attempt to narrow the focus to the Board of Health as one venue and one player, and yet acknowledge critical interplay with other venues and players. The backroom politicking practiced by developers on public decision makers is also a major part of this history. This part is one which neither the public decision maker nor the private developer is likely to fully acknowledge. And yet without that part, any account of this story remains incomplete.

#### INITIAL ZBA CONFRONTATIONS; HINTS FROM THE HEALTH COMMISSIONER

In July of 1992, Boston's ZBA denied TEC permission to locate a hot mix plant in the heart of the South Bay area of Boston. The ZBA's authority for review came from the necessity for the developer to gain a conditional variance from the Zoning Code, which otherwise prohibited this industry at this location. Opposition came from several of the neighborhoods, from the business community already in the area, and from several city councilors representing the residential populations. The opposition was based on an almost total lack of information regarding the operations of the plant and its potential impact on the local urban environment and public health. TEC had represented to the community and to the ZBA that it had not yet purchased the property under question, and that due to "real estate" timing constraints, it was unable to do the standard community review process.

This area was once a heavy industrial area, including major railroad freight yards. However, by 1992, it had achieved its present character. Meatpacking, produce and cut flower distribution centers for Boston and New England are being surrounded by increasing numbers of retail outlets (the South Bay Mall came on line in 1994). These light commercial uses represent 12,000 day-time employees in the Boston economy. Indeed, ten years earlier, in 1982, the ZBA had rejected another developer's proposal for an asphalt plant at the very same location.

Boston City Hospital and University Hospital (merged now as the Boston Medical Center) and the Boston University Medical School are immediately adjacent, and a major correctional facility with over 1200 inmates in residence is directly across the street from the proposed location. Four densely populated neighborhoods abut this area. The communities of (North) Dorchester, Roxbury, South Boston and the South End independently and collectively display excesses in both morbidity and mortality from a large number of illnesses impacted by airborne toxins - lung and heart conditions, asthma, AIDS to name a few - and elevated levels of many other diseases. Additionally these communities are home to large at-risk populations of young and elderly. There are 60,000 residents within a mile radius of the proposed location. Populations nearly as immobile as the inmates in the correctional facility. There are 60,000 residents within a mile radius of the proposed location.

One year later, in 1993, TEC approached the ZBA a second time. With no difference in the facility except for exchanging the main entrance with the rear entrance, the ZBA unanimously granted TEC the required conditional variance. By that time, the semblance of a community review process had occurred. However, a large number of key questions regarding health and environmental impacts were left unanswered, with several remaining unresolved to this day. At neither the first nor the second ZBA review were any questions posed by ZBA members regarding environmental or health impacts. These members, representing contractors, unions, architects, and realtors, never demonstrated a concern for balancing health and environment concerns with the demands for new construction. There was not even an interest in requesting input from the city's own health and environmental officers. Indeed, a formal request by a representative for the Commissioner of Health and Hospitals that the record remain open for that department's input was ignored by the members of the ZBA. A simple assertion by TEC that they would comply with all relevant city and state regulations satisfied a board more interested in encouraging new business than listening to the numerous citizens who testified about the stonewalling by TEC to the health and environmental matters raised in the review process.

It was around that major confrontation between TEC and an expanded opposition before the ZBA that involvement of Boston's Board of Health (BoH) first surfaced. A loose confederation of leaders from the four neighborhoods and businesses had petitioned the Commissioner of Health and Hospitals months earlier requesting a meeting to discuss this issue, but

had received no reply. (In Boston, the Commissioner is, and was, critically involved with setting the agenda for the BoH). However, in the hallway outside the ZBA chambers after the vote, one of the attorneys for TEC indicated to a few residents that he had had a conversation with the Commissioner and had been assured that the BoH would play no role in this development decision.

It should be noted that at least six months earlier, staff of the Office of Environmental Health within the Division of Public Health of Boston's Department of Health and Hospitals had met with a group of residents. Within the parameters of their obligation to assist citizens in investigating matters of public health, the staff suggested areas of concern not already apparent to the residents, avenues of research and available resources. Within less than one month of the ZBA decision, as the opposition grew even larger and more vocal and geared up for a lawsuit challenging that decision, and as the state began the first formal steps of requiring an environmental review, the Commissioner took the extraordinary step of publishing an open letter in the local media to the Commissioner of the Inspectional Services Department (ISD), the department responsible for granting the construction permit, and a comparable letter to the State's chief environmental officer. These letters asked the city to delay granting the construction permit to allow for a requested state environmental review and for possible BoH action, because "...we lack sufficient information regarding gaseous and particle emissions from this proposed project to evaluate air quality concerns expressed by residents living in communities near the site."

The letters also laid out the legal grounds for intense scrutiny of this development proposal by the Public Health officers of the city, and possible involvement of the BoH. The letters suggested BoH involvement based on M.G.L. Chap.111, sec.122, allowing the Board to " 'examine into all nuisances... which may, in its opinion, be injurious to the public health...' " sec 143, which provides for involvement in site assignment for any " 'trade or employment which may result in a nuisance or be harmful to the inhabitants, injurious to their estates, dangerous to the public health.... ' " (Just prior to the publication of that letter in local newspapers, a public letter to the Commissioner from residents decrying his absence and that of the entire department had appeared in those very newspapers).

This was a very confusing time for Boston, with a change of mayors which took nearly six months. The outgoing mayor, who resigned to take a position with

the federal government, had been in office for over 10 years and had built a well-coordinated administration, while the incoming acting mayor was laboring with many in that administration who were unsure of where to place their loyalties. He was facing a special election against a number of credible opponents. As a major urban center, there were any number of other problems competing for attention. Still, the absence of any testimony from the Health or Environment Departments, both of whom had been briefed by citizens, made TEC's job of convincing the ZBA to grant the zoning variance that much easier. Without the citizen leadership and opposition, this facility would certainly now be completing its third year of production, rather than remaining as a question mark.

Through the offices of an environmental law firm, selected residents immediately filed a lawsuit challenging the ZBA decision, recognizing that the lack of information forthcoming from TEC made it difficult to identify specific harm to any one plaintiff. Additionally, airborne pollution results in relatively even distribution of the pollutants upon a large area and all occupants within that area. Zoning law deals only with specific harm to specific individuals. A class action lawsuit, seemingly quite appropriate in this kind of a matter, is not allowed under current state statutes.

Ultimately, the court dismissed the suit. The court appeared to determine that the ZBA decision had implicitly authorized a certain level of environmental degradation impacting the area residents indiscriminately. Therefore, specific plaintiffs could not claim probable health impacts without showing that they would be more harmed than any other thousands of neighbors. This certainly cries out for a change in the laws which govern eligibility in challenging zoning decisions.

#### STATE ENVIRONMENTAL REVIEW

The focus for the opposition now moved away from city agency review and the state's Executive Office of Environmental Affairs began to play a major role in eliciting information regarding health and environment. The Secretary had determined that the "unique characteristics" of the situation - i.e. dense population - allowed her to make use of the fail-safe provisions and require an environmental review for a project that, according to the developer's assertions, fell well below the triggering levels for a mandated review. The Secretary made clear the limitations on state ordered environmental reviews: eliciting such information as is necessary for any state agency required to grant permits.

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#### RESIDENTS AND HEALTH INSTITUTIONS PUT PRESSURE ON BoH

On September 15, 1994, community leaders from the four neighborhoods sent a letter to the Mayor requesting him to "authorize and encourage [the commissioner] to institute hearings before the Boston Board of Health regarding the potential impact by the proposed asphalt plant ... on the environment and health of the thousands of residents...surrounding the [proposed] site." The letter received no direct response. Though the 1993 letter from the Health Commissioner had intimated a role for the BoH, the local elected leadership, from the Mayor through certain city councilors, insisted that the BoH had no authority. This was made clear both in private conversations with community leaders as well as within the context of larger public meetings hosted by the administration. Local activists could not decide whether this was an effort to force the state to accept the role of stopping the project, or an indirect attempt to allow TEC to proceed. What was not generally known, was that in 1983, the BoH had voted to delegate its authority to regulate noisome trades under M.G.L. chap.111, sec. 143, to the Inspectional Services Department.

By the end of 1994, with signs appearing of the completion of the state environmental review, the citizens determined that increased pressure on local health institutions, as a possible end run around the Mayor, could activate the BoH towards ownership of this issue.

The State in turn, through the continuing series of Certificates issued in response to each of the several environmental reports, carefully delineated its responsibility as information gathering only, and in limited areas of concern at that. It repeatedly reminded all involved that it could not, and would not, overstep its jurisdiction and usurp city responsibilities in either health or in land-use decision making. It remains a fault that there is no formal interface of the State Department of Public Health with the Environmental agencies in such matters, despite the nexus between health and environment. The residents began a campaign to focus attention on the potential role for the BoH. A few meetings were held with board members, past and (then) present to confirm, or broaden, their understanding of their power as delineated in M.G.L. Chapter 111, sec. 143.

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## **RELUCTANTLY ACCEPTING THE LEAD**

The backdrop for this action by the BoH was the ongoing evolution of the merger discussions involving Boston City Hospital and Boston University Medical which overwhelmed most other issues on the public health debate within Boston. Issues included union-management relations, concerns about health care for the poor, the relationship of the city to the several community health clinics networks, and fiscal questions regarding the viability of “profitable” Boston City Hospital as against the reported deficit spending of Boston University Hospital. There was significant opposition to the merger throughout Boston.

Seemingly the least relevant concern within this universe of the merger was the role of public health officers as a preventive instrument for the welfare of Boston’s citizens. The blue-ribbon commission charged with examining the proposed merger appeared to not even be aware that Boston had employees and offices in a Public Health Division engaged in lead poison prevention, environmental health evaluations, or other out-of-clinic services that benefitted Boston’s citizens in ways most were unaware of (this being the department that actually exercised the BoH’s state-granted powers to maintain a healthy city and prohibit noxious activities).

Through the summer of 1995, despite the Chair’s statement that the BoH would monitor the environmental review and maintain an ability to intervene, the Mayor’s office continued to find every opportunity to insist to the residents that the BoH had no authority in this case. Just as frequently, citizens countered through the weekly newspapers. These false pronouncements by the Mayor’s office tended to add credence to one theory among some residents that despite the Mayor’s continuing proclamations of opposition to the siting of an asphalt plant within the inner city, his true allegiances lay otherwise.

Those suspect allegiances were thought to be shaped by his commitment to helping business grow, and by his having been, prior to becoming Mayor, a city councilor representing Hyde Park, the location of TEC, which had been a campaign supporter of his. Additionally, TEC had wisely engaged for one of its attorneys the finance committee chairman of the Mayor’s 1993 election campaign.

By the end of the summer, women from the two communities of Roxbury and South Boston, with assistance from the environmental organizations which had been providing continuing support, presented to the Mayor and the Chairman of the BoH nearly 3000 residents’ signatures in a petition asking for relief from the prospect of the proposed development, the health impacts of which remained unclear even then. This coalition, independent from the original collective, was able to operate without the burden of hostility that existed between the city’s administration and the older group. This hostility resulted from an ongoing dispute over

basic facts and the seeming inaction by the city. Although the city accepted the petitions, they again told the delegation of women and children that only the state had the authority to stop this project, and that the petitions were more appropriate for the governor and his staff.

## **PREPARING FOR THE BoH HEARING**

In late August, the BoH voted to ask its staff to prepare a proposal for review of the siting of an asphalt plant at this location. (One week later, in a television studio, the Chief of Environmental Services made the city’s final pronouncement that the BoH had no power to do what it had stated as its intention.)

The BoH and its staff spent the fall working to find the most appropriate review schedule. At times a short, quick review appeared needed, at other times, a more fulsome review was seen as more appropriate to the quagmire surrounding this issue. Formats were proposed, modified, repropose and remodified.

By late November, the completion of the state’s environmental review was expected. At this point the BoH voted to accept a 17 week schedule, providing for several public hearings and an extensive (several month) investigative process by the Office of Environmental Health staff.

As this schedule was accepted, the residents held a “teach-in” in early December. Simultaneously, an accelerated BoH schedule was announced, clipping weeks off the formal schedule and quickmarching the first public hearing from the end of February of 1996 up to the first week of the new year. The announcement had all the appearances of city hall attempting to maintain control over the issue against charges from the public that, as in 1993 before the ZBA, no one was in charge. There were also hints of tension between the Health Department, connected with Boston City Hospital, and the Environmental Department, located in City Hall. A separate technical review commission was engaged, which included at least one representative connected with a law firm that was a) simultaneously representing another asphalt plant developer in the bordering towns of Revere and Malden, and b) had worked for the Boston asphalt plant opposition several years earlier. The BoH’s regular staff went into overdrive, temporarily assigning extra employees to complete a canvas of other municipalities and states across the country, at the request of the BoH, to uncover other decisions, regulations, and anecdotal information which might prove instructive to Boston’s dilemma.

## **MEPA AND DEP SIDESTEP CONFRONTATION**

By November 29th, 1995 the chief environmental officer for the Commonwealth had determined that the 30 month review under the fail-safe provisions had adequately addressed all the necessary issues. The delay and nonresponsiveness by TEC prevailed on several key concerns. The state decided to not require responsive answers to all the questions the state itself had specified, as well as to several questions by the city or by

Fortuitously, in early 1995, Boston City Council held a special hearing about a variety of concerns involving public health, the environment and economic development. The Mayor's point person on this issue, the city's Chief of Environmental Services, used the first hour of a well-attended public hearing to continuously assert that the BoH could do nothing until after a facility was constructed and running and evidence was clear that residents' health had been impacted. Though she was supported by one city councilor, her assertions rang hollow with many residents and other councilors. Prior to this, the collective of neighborhood leaders had been using local newspapers to inform residents of the broad reaching powers created by the state legislature and accorded to BoHs. The inaccurate public posturing made the BoH a concern for hundreds of local residents that editorial writing by the local activists could never have done.

Within the first three months of 1995, through the citizen organized campaign, eleven local community health clinics, two major area teaching hospitals, the union for the majority of the hospitals' employees, and other key players in the health professions sent letters to the Health Commissioner requesting BoH involvement.

The lawyers for the citizens prepared an extensive legal memorandum outlining the case for involvement. Simultaneously, a local state representative drafted his own legal memorandum to the same end and garnered the signatures of ten other members from both chambers of the Boston state house delegation. Both documents were presented to the BoH at the end of April at a BoH meeting.

Shortly thereafter, a formal statement was issued by the Chair that the BoH would continue to monitor the state's environmental review and maintain an option of (unspecified) involvement at an appropriate time. This statement was issued in the face of TEC's own memorandum, submitted simultaneously, that there was no role for the BoH to play and that any interference by the BoH would compel a lawsuit by TEC with damages estimated to be in the millions of dollars.

End of Part One...

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## **MEPA AND DEP SIDESTEP CONFRONTATION**

By November 29th, 1995 the chief environmental officer for the Commonwealth had determined that the 30 month review under the fail-safe provisions had adequately addressed all the necessary issues. The delay and nonresponsiveness by TEC prevailed on several key concerns. The state decided to not require responsive answers to all the questions the state itself had specified, as well as to several questions by the city or by private sector commenters. The state's final Certificate concluding the review did outline key concerns of the MEPA unit remaining unanswered. These issues included a) total enclosure of the entire facility to prohibit airborne fugitive airborne pollutants, b) drainage systems to eliminate water run off contaminated with pollutants, c) unanswered questions regarding fine particulates' impact on health, and d) actual truck impact on traffic and vehicle pollution, in that all TEC's traffic studies were based on large 25-ton load trucks, while the TEC had indicated an interest in serving the smaller so-called "gypsy" drivers that live in Boston.

There were other issues, not mentioned by the Secretary, left unresolved. These included noise levels, actual fugitive emission levels, housekeeping as a mitigation measure, and even contradictory numbers in the application submitted to the DEP. In choosing to not require the Proponent to answer these and other issues, the state forfeited one of its opportunities to require full disclosure without which the project could be prohibited by the state.

MEPA's Certificate allowed the DEP to finish its analysis and make a final determination on granting the air quality permit. It also requested that DEP address these unanswered issues with TEC as appropriate. DEP, having already spent more than its usual amount of time on this one application, on December 29th issued the requested Air Quality Permit. There is no evidence that DEP did any independent analysis, choosing rather to rely on the TEC's assertions and on US Environmental Protection Agency information which was itself a product of trade association analysis. In brief, the DEP's main concern was insuring that TEC had answered every question without necessarily ensuring that the answers were accurate. However, the permit was worded in part to try to persuade the involved public that additional significant changes had been instituted within the final month. Some of the changes were of substance but cosmetic, others were of no substance but rather the product of misleading language within the permit itself. Had full disclosure been demanded and had TEC been completely forthright, the DEP could then have stipulated effective pollution controls as a condition for siting the facility at that location.

The state thus passed up its second and last opportunity to require candor and accuracy by the proponent as a condition for doing business in the state. The permit, issued with no citizen hearing or opportunity for review, was challenged by the citizens in late January. A court hearing was held before an administrative law judge whose decision is awaited.

## **THE BoH HEARING AND DECISION**

The BoH public hearing was held January 4th, 1996, running from 7 p.m. to nearly midnight. Testimony was presented by many elected officials (including the Chief of Environmental Services who on behalf of the Mayor had for so long denied the existence of power she now asked to be used), physicians in both public and private practice, professors from schools of public health, a wide array of citizens, (many of whom waited three and four hours to speak), and from technical consultants. As was expected, all refuted the assertions made by TEC's consultants who outlined the case that had been presented in the various filings to the state's environmental office.

Though the BoH announced that written comments would be accepted for the next 20 days, TEC successfully petitioned to extend that period, charging that the BoH's staff had not been legally compliant with requests for information in a timely manner. This extended review thereby closed the public input to the Board by mid February. Then began another period of waiting with spokespersons for administration announcing a continuing projection of dates by when the Board would come to a finding, each date coming and going with no announcement of a formal decision.

Finally, in late April, one day before the regular BoH monthly meeting another public demonstration was held during rush hour at a major traffic intersection. With some thirty residents from the four communities, several large banners and fliers asked residents to call the Mayor and asking him to explain the delay. The BoH office received dozens of calls. It may be safely presumed that the Mayor's office experienced the same activity. Within four hours, the Board determined to place a discussion of this issue on the next day's meeting. (Residents had been previously informed that the issue was definitively not on that month's agenda.) At that meeting the Board acknowledged having received a report from the appointed commission reviewing all the evidence.

This Draft Report was made public at the April meeting as it was apparent from news reports in both city daily newspapers that it had been leaked to the press. The BoH thereupon scheduled a special meeting for May 1st to vote a decision on this matter, declaring that their regular meetings were too crowded with merger issues.

On May First the BoH finally issued a unanimous decision that prohibited the siting of an asphalt plant at the specific location under review.

## **CHALLENGES TO THE BoH DECISION**

TEC immediately appealed that decision first to Suffolk Superior Court and then administratively to the DEP.

TEC's court challenge to the BoH ruling raises a number of claims regarding flawed procedure, the veracity and consequence of which are for the court to decide. They are: the BoH denied TEC access to relevant public documents; public meetings were held without proper public posting as required under the state's Open Meeting Law; those meetings were called with improper votes, required under the Open Meeting Law; quorums did not exist at BoH meetings at which binding decisions were made or information gathered; BoH members not present at those meetings subsequently participated in votes, required under the Open Meeting Law; BoH had no authority under M.G.L. Chap. 111. sec. 143 on this matter as it had delegated that authority to ISD in 1983 through 1995 which included the period of ZBA oversight; the final resolution prohibiting the facility was prepared and adopted with no public deliberation by the members of the BoH; and, almost as an afterthought, TEC has charged that the BoH had no substantive evidence that the facility would impact the health of the residents.

At the end of June, TEC also filed a claim for an adjudicatory hearing before the DEP (Docket No. 96-065), which claim landed on the docket of the same judge who would hear the challenge regarding the DEP's air quality permit. TEC asserted that prohibiting construction of the facility constituted a (negative) site assignment within the language of M.G.L. chapter 111, sec. 143, and asked the DEP to annul the BoH's decision. The BoH filed a motion to dismiss this appeal, which motion the judge upheld. He ruled that "...M.G.L. c.111, sec. 143, does not provide for an appeal to the Department unless a board of health has approved an assignment.: (Emphasis added). TEC has chosen not to ask for a reconsideration of this decision by DEP.

## **BACK TO THE ZBA -AN EPILOGUE OF SORTS**

At the end of 1995, Boston's Commissioner of Inspectional Services determined that TEC had lost its 1993 granted variance because the variance had not been used to begin construction within a two year period to "use it or lose it" as required by the Boston Zoning Code. TEC immediately appealed this issue to the ZBA. A hearing on this issue was scheduled for early May. However, by the time of the hearing, TEC had filed its challenge of the BoH in Suffolk County Superior Court and had included this issue as one of the complaints demonstrating city double-dealing. The ZBA directed TEC to either resolve this complaint in court, or remove the issue from court to allow the ZBA to hear the matter. TEC chose this latter course.

In early September, the ZBA scheduled another hearing on this matter and on October 8 orally voted to uphold the Commissioner's decision to revoke the conditional variance. TEC has yet to indicate a clear response, other than to say that it is reviewing its legal options.

## **CONCLUSIONS OF ONE CITIZEN ACTIVIST**

There is much evidence in the written record that both the state and the city were eager for the other to stop this project. Opportunities by the city to stop this project several years ago were passed over. These lie outside the scope of this article. The state, as has been discussed, likewise stopped short of exercising its authority to the fullest.

Municipal zoning authorities and the state's DEP and MEPA unit need to be constantly aware of the public health ramifications of decisions they make. It does not do communities a service to pigeonhole health concerns as only within the province of BoHs. Results are likely to include the continued benign neglect of public health and environmental impacts, and possible turf wars between BoH on the one hand and DEP and zoning authorities on the other. The political/economic landscape in the immediate future does not suggest that BoHs will hold their own, though there are troubling signs that stresses on the planet's environment may eventually change that balance of power.

In Boston it fell to community members for four years to continue agitating until one level of government could not avoid its responsibility. And the number of citizens involved, while substantial, was a small percentage of the total residential and workforce population that would have felt the effects of this facility. Though the proposed facility's site is abutted by businesses, with a few singular exceptions, the immediate business community for that part of Boston played a relatively minor role. Privately many of them expressed gratitude that the local residents did stand up and resist.

