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November 15, 2011
- Delivered by Hand -

Wendy Graves, Chair
Zoning Board of Appeals of the Town of Duanesburg
5853 Western Turnpike
Duanesburg, NY 12956

Re: 05-11 Bill & Cyndi Miner - Issuance of Certificate of Occupancy to Long Energy
Agenda Item and Public Hearing, November 15, 2011 ZBA Meeting

- ***Point 1**: **The failure of the Planning Board and Code Enforcement Officer** to comply with the Duanesburg Zoning Ordinance and to insist upon additional safety measures **is clearly relevant to the question of the level of risk from vehicular traffic**.*

- ***Point 2**: **The Planning Board acted with Inadequate & Incorrect Safety Information** when it failed to require important safety features, as did the Schenectady County Planning office.*

- ***Point 3**: ZBA has **the power and responsibility to order the installation of adequate and additional vehicular impact protection** as required under the Fire Code, NFPA 58.,*

- **Point 4**: *Because the entire tank is **clearly exposed to vehicular damage due to the proximity of driveways and parking areas** within the meaning of Fire Code §3807.4**,** the strict requirement of Fire Code §312 must be met for the facility to be in compliance with Duanesburg's Zoning Ordinance and the Fire Code.*

Dear Chairman Graves and Members of the Zoning Board of Appeals:

I am a retired member of the New York State Bar who has written about zoning issues such as those raised by the Long Energy propane facility for several years, and I am making this submission in further support of the appeal of Bill and Cyndi Miner relating to the Issuance of a Certificate of Occupancy ["C of O"] for Long Energy's Duanesburg Propane Facility. Because I was not aware of Mr. Siegel's letter to the Board dated October 6, 2011 until Thursday, November 10, am replying at this time to his major assertions as part of this additional information and argument.[1]

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[1] I agree with Mr. Siegel that NFPA 58 does not mandate a perimeter fence around the entire facility. However, the failure of the Planning Board to require Long Energy as a condition of the special use permit to keep its promise to erect such a fence in order to keep out unwanted traffic and persons placed neighboring people and property in significantly increased danger and makes it even more urgent that ZBA order that the entire circumference of the tank be fully secured against vehicle impact.

In making your decision in this matter, I urge the Board to keep in mind that Mr. Siegel has responded on behalf of the Town in an effort to justify the actions and omissions of the Code Enforcement Officer ["EO"], rather than as your counsel and advisor offering an objective perspective on the Board's authority and responsibility, or the best way to protect the health and safety of the Town and of those who live, work, shop and worship near the Long propane facility. Unlike a reviewing court, your role is *not* to ask whether there was a reasonable basis for the Code Enforcement Officer's interpretation of the Uniform Code and the Zoning Ordinance, nor to defer to the EO's expertise, or the advocate's position of the Town counsel.

Instead, NYS Town Law § 267-b(1) both mandates the role of this Board and states its power when acting on an appeal or request for interpretation. The Board "*shall* make such order, requirement, decision, interpretation or determination as *in its opinion ought to have been made in the matter by the administrative official* charged with the enforcement of such ordinance or local law and to that end *shall have all the powers of the administrative official* from whose order, requirement, decision, interpretation or determination the appeal is taken." (emphasis added)

Due to the irresponsible and unlawful actions of the Planning Board and the Code Enforcement Officer, every person who lives, works, worships or shops along virtually all of Routes 20 and 7 in the Town of Duanesburg must now fear the placement of high-hazard and industrial uses in an area zoned C-1 commercial. We urge the Board to do all that it can to repair the damage that has been done to the trust and certainty that must exist in the zoning and planning process and to minimize the hazards created by this inappropriate use and occupancy by requiring the strict vehicle impact protection mandated under Duanesburg's Zoning Ordinance and the Fire Code. As argued below, you have the full responsibility and all the authority necessary to do so.

For you convenience in reviewing and referring to this information, I will make each Point on a separate page, with any relevant materials attached to each section.

Thank you for your time and full consideration. For more information on safety issues concerning the Long facility, I urge Board members and the public to see the facts and analysis, and photos, contained in a weblog posting located online at http://tinyurl.com/propanetanked .

Respectfully, submitted,

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David A. Giacalone

Attachments

- ***Point 1*: *The failure of the Planning Board and Code Enforcement Officer to comply with the Duanesburg Zoning Ordinance and to insist upon additional safety measures is clearly relevant to the question of the level of risk from vehicular traffic.***

Mr. Siegel is correct that the additional issues raised by Bill and Cyndi Miner in their Supplemental Letter of September 20, 2011, do not add any additional "counts" that must be ruled upon by this Board. The Miners took pains to call the letter Supplemental Argument and Plea, not additional charges. They were aware that additional charges may not be made more than sixty days after proper filing of a Certificate of Occupancy ["C of O"]. Town Counsel is wrong, however, when he asserts that "the issues raised in the supplemental submission are wholly irrelevant to the Notice of Appeal."

Town Attorney Siegel states in his letter of October 6, that "Although Section 3807.4 of the 2010 Fire Code speaks for itself, *the threshold determination* is whether, and in what areas, the facilities are *actually exposed to vehicular damage* due to proximity to alleys, driveways or parking areas. [emphasis added] As stated in my submission of October 17, 2011, many of the failures of the Planning Board and Code Enforcement Officer increase the actual exposure to vehicular damage due to proximity to driveways and parking areas. For Example:

- failure to insist on a perimeter fence (well within the powers of the Planning Board) makes it easier for unauthorized vehicles to enter the unmanned and unguarded facility, including those who merely need to turn around
- failure to place the tank further back on the property increased exposure to traffic from curiosity seekers and from out-of-control vehicles
- failure to require significant landscaping to act as a buffer also increased the risk of damage, especially to the north side of the tank, which faces the street.

Moreover, NFPA 58 §6.6.1.2 presents a vehicle protection mandate in addition to the Fire Code. It states without qualification that "LP-Gas containers or systems of which they are a part shall be protected from damage to vehicles." As the Illinois State Fire Marshall explains in a website FAQ, when asked whether collision protected is required for a particular tank,[2] "The answer to this question depends upon the location of the LP-Gas tank in relation to roadways and the anticipated vehicular traffic in proximity to the tank." The Fire Marshall goes on to note that "[T]he NFPA LP-Gas Handbook offers explanation that this is intended as a "performance provision". "Performance" means requiring the protection called for by the conditions at the tank site. To assess the requirements of §6.6.1.2, this Board should therefore take into account all factors relating to the level of risk and exposure to traffic. To the extent that missing safety precautions increase the possibility of traffic on the Long Energy facility, those inadequacies are clearly relevant to this Board's determination.

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[2] http://www.sfm.illinois.gov/commercial/lpg/faq.aspx

- ***Point 2: The Planning Board acted with Inadequate & Incorrect Safety Information when it failed to require important safety features, as did the Schenectady County Planning office.***

The Planning Board, and therefore the Schenectady County planning office and NYS DOT as well, acted without full knowledge of the facts relating to fire safety. Its actions are not in any case binding out ZBA, but they

Here are examples of the information failure:

1. FIRE CHIEF LETTER. At its December 2010 public meeting, the Planning Board asked the Applicant to supply "a paper" from the fire department assuring the Board that "everything is okay". Long's engineer and representative at the sketch plan review, William Smart, promised to have such a letter to the Board ten days before the next Meeting, in February. No such letter appears in the record or has been referenced by any Board member or office staff.

2. FIRE POND REPORT. In its sketch plan review at the December 2010 Board Meeting, Long Energy also stated it had an expert working with the Fire Department to establish its specific requirements for a fire pond on the subject parcel. Long never reported back on the results of that fire pond analysis, but instead relied "as a last resort" on the three ponds located on neighboring properties. Long thereafter never supplied, and the Planning Board never asked for, details on how ponds in remote locations on private land, without dry hydrants and frozen much of the year, would be accessed and utilized if needed.

3. WELDING NEARBY. In its Fire Safety Analysis, Long twice failed to indicate that welding and metal fabrication activities were ongoing at a "neighboring" location, despite the specific request for that information in the Fire Analysis Manual, and the conspicuous existence nextdoor of JHI Industries, which regularly performs welding and metal fabrication as part of its heavy equipment servicing and repairs. Metal fabrication and welding are neighboring activities considered to present External Hazards to an LP-GAs plant, and their existence requires that additional precautions be implemented. Nevertheless,

- In the section on Facility Neighbors on Form 4.3 (which contains Additional Information on the LP-Gas Facility), Long did not place an "X" in the box that asks about "Industrial Acitivity (metal fabrication, cutting and welding, etc.)". In fact, although there is a footnote symbol after the words "Facility neighbors" in the version of Form 4.3 submitted by Long in its Fire Safety Analysis, Long's form 4.3 fails to contain the footnote text found in every published version of the Fire Safety Analysis Manual (dated 2000, 2004, 2008, 2011). That footnote explains that "Facility neighbors" means "All properties either abutting the LP-Gas facility or within 250 feet of the container or transfer point nearest to facility boundary." As Long well knows and knew, 2261 Western Turnpike, the abutting property to the east, is the site of JHI Industries, The JHI facility is also considerably less than 200 feet from the bulk propane tank.

- In addition, Item #2 of Form 7.2 (Exposure to LP-Gas Facility from External Hazards) specifically ask whether 'Metal cutting, welding, and metal fabrication" exists at any Neighboring Operation. Long placed "N/A" in columns C and D on Form 7.2, which instructions state is to be done if a particular activity "does not exist."

- Then, because Long incorrectly stated on Form 7.2 that welding, etc., did not exist in a neighboring facility, it erroneously stated on Form 9.2 (Analysis Summary on Exposure from

and to the LP-Gas Facility) that there were zero outside exposures. Had Long correctly indicated the existence of the welding exposure hazard on that form, it would have been required under Chapter 9 of the Fire Safety Analysis Manual to "implement any necessary changes in design to bring the new facility into compliance with the Code." Such changes should have included procedures for monitoring the neighboring activity, shutting the propane facility down in an emergency, and implementing quick and effective communication systems with the neighbor.

4. VEHICULAR PROTECTION FORM. Long did not include in its Fire Safety Analysis the Fire Safety Manual **Form 6.7 "Protection from Vehicular Impact"**, which specifically asks for the type of physical protection provided for Storage containers, Transfer stations and Entryway to plant. Attached is a copy of Form 6.7 and the sample provided in the appendix of the Fire Safety Manual

5. SEQR Long Environmental Assessment Form. Long Energy's LEAF had many shortcomings.[3] The most relevant to this discussion is its indication that, although there was a risk to health and safety from explosion, that risk was small to moderate, and that "it could not be mitigated through changes in the project." With that denial of the potential for mitigating the risk of explosion, Long failed to discuss and the Planning Board failed to consider the many additional steps available to make the site safer and less susceptible to intentional or accidental release of gas that could cause an explosion and devastating fireball (*e.g.*, placing the tank underground, siting it much farther back on the parcel, preventing unauthorized access to the facility with perimeter fencing, and preventing vehicle impact with adequate barriers).

[3] For example, Long indicated that the facility will not have an effect on the existing community, will not set an important precedent, and is not likely to face any significant public opposition

- **Point 3: ZBA has the power and responsibility to order the installation of adequate and additional vehicular impact protection as required under the Fire Code, NFPA 58.**

Mr. Siegel has asserted and the Board has indicated that it might not have the authority to enforce the Fire Code or to revoke the Certificate of Occupancy. It clearly does have the power to do so, and equally important, has the direct responsibility to ensure that the Long facility is in full compliance with the Fire Code, NFPA 58 before its Certificate of Occupancy is awarded (or maintained).

As stated above, NYS Town Law § § 267-b(1) both mandates the role of this Board and states its power when acting on an appeal or request for interpretation. The Board "*shall* make such order, requirement, decision, interpretation or determination as *in its opinion ought to have been made in the matter by the administrative official* charged with the enforcement of such ordinance or local law and to that end *shall have all the powers of the administrative official* from whose order, requirement, decision, interpretation or determination the appeal is taken." (emphasis added)

The Code Enforcement Officer has the duty under §14.2 of the Zoning Ordinance to "refuse to issue or revoke the same in the event of non-compliance." This Board therefore has those same powers and duties.

In addition, under NYS Executive Law § 381, the Town of Duanesburg, the Code Enforcement Officer, and this Board, must comply with Title 19 (NYCRR), Chapter XXXII. In relevant part, those regulations of the NYS Department of State state:

1203.3 Minimum features of a program for administration and enforcement of the Uniform Code. A program for administration and enforcement of the Uniform Code shall, include all features described in subdivisions (a) through (j) of this section. A government or agency charged with or accountable for administration and enforcement of the code must provide for each of the listed features through legislation or other appropriate means.

(4) A certificate of occupancy or certificate of compliance issued in error or on the basis of incorrect information shall be suspended or revoked if the relevant deficiencies are not corrected within a specified period of time.

Therefore, this Board clearly has broad duties and powers to act so as to ensure Long has no Certificate of Occupancy if the facility is not in compliance with the Fire Code and NFPA 58..

- **Point 4: Because the entire tank is clearly exposed to vehicular damage due to the proximity of driveways and parking areas within the meaning of Fire Code §3807.4, the strict requirements of Fire Code §312 must be met for the facility to be in compliance with Duanesburg's Zoning Ordinance and the Fire Code, including vehicular impact protection around the entire tank.**

Attorney Siegel is correct that the Board must make the "threshold determination" whether the facilities are exposed to vehicular damage due to proximity to alleys, driveways or parking areas. We believe it clearly is exposed to damage due to its proximity to driveways and parking area, and thus comes within the meaning of Fire Code §3807.4, triggering the protections of §312. Thus:

1. The tank is set at the top of a semicircular driveway, and is entirely "in proximity" to that driveway, by the everyday meaning of that word.
2. "Proximity" means nearness or closeness, it does not mean abutting or sitting on top of. In the context of a facility housing a giant propane tank, proximity surely encompasses far more than a few feet, as Mr. Siegel apparently believes. Here, much of the tank actually does abut the driveway, and the north face is as close as 5 or 6 yards from the driveway; even its midsectionis no more than 15 or 16 yards from the driveway.
3. §3708.4 does not say "the part of the container that is in proximity" to the driveway must be protected, it says any container/tank that is in proximity must be protected.
4. Mr. Siegel says there is no parking area. There may be no designated parking area, but that actually increases the risk, because there is virtually no place to park other than on the driveway -- so parked cars are not only near the tank, they are often in the way of the very large trucks that use the facility. You can often see pick-up trucks and other vehicles parked on the driveway of the Long Energy facility.
5. When the County Planning Department received the Referral on Feb. 14, 2011, Long had not yet announced it would not be putting in the perimeter fence and the papers submitted surely indicated a fence would be installed around the facility. The County, which turned the referral around in two days and thus may have done very little assessment of traffic and impact issues, did not have sufficient information to make a decision on impact risk.
6. Similarly, State DOT apparently received Long's application in December. It most certainly did not know the fence would not be installed. Also, DOT was dealing with the curb-cut issue, not the safety of the entire driveway.
7. The assertion with no explanation that 3 bollards are enough by Mr. Smart has little probabtive value. The installation recently of two more bollards at that location suggests clearly 3 was not enough.
8. Mr. Siegel asserts that by putting inadequate cement barriers in front of the part of the tank that actually abuts the driveway, the tank is is no longer "exposed to traffic." Of course, large vehicles can go right over the short barriers, or merely push them toward the tank. §3807.4 clearly assumes that it is the proximity that creates the exposure, and the short cement barriers do not change the proximity of the south side of the tank or the appurtenance area. Therefore, that entire area must receive §312 protection.
9. The 26" cement barriers do not meet the requirements of §312.

Photos showing the proximity of the driveway to all parts of the tank will be distributed at the Public Hearing along with this submission.