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Wendy Graves, Chair
December 1, 2011
Zoning Board of Appeals of the Town of Duaneburg
5853 Western Turnpike
Duaneburg, NY 12056

re: Miner Appeal - Issuance of Certificate of Occupancy to Long Energy Propane Facility

Response to Oct. 26, 2011 Letter of Ganz Law Firm re Opinion of Engineer William Smart

Dear Chairman Graves:

I am submitting this letter on behalf of my clients, Bill and Cyndi Miner, in response to a letter to Dale Warner from Ganz Wolkenbrett & Siegfeld LLP, attorneys for Long Energy, dated October 26, 2011, which was submitted by attorney Robert E. Ganz to the Board during the public hearing on November 15, 2011. The letter also indicates "cc: Town of Duaneburg, Zoning Board of Appeals." Nevertheless, when Bill Miner inquired at the Zoning Office on Nov. 10 and then again with me on Nov. 14 as to whether any submissions had been made by Long Energy or any others regarding this matter, he was never informed of the October 26 letter, which was handed to me/us at the public hearing.¹ The subject letter states the conclusions of Long's engineer William Smart concerning the need for vehicle impact barriers under the Fire Code.

Both Town attorney Jeffrey Siegel and Mr. Ganz stressed at the public hearing that because Mr. Smart -- who was not made available for questioning at the hearing -- is the only certified engineer to have addressed the issue of Fire Code requirements for vehicular protection of propane tanks, his opinion should be given great weight by this Board. Due to the importance opposing counsel assign to Mr. Smart's assessment of the most important issue remaining before the Board, our inability to know the contents of his assessment or to address his conclusions prior to the public hearing, or to properly assess them when handed the letter in the middle of that hearing, we ask that this letter in response be entered into the public record.

The October 26 letter tells of the intention of Long to voluntarily insert two bollards between the three already at the east side of the tank, "to avoid any confusion or controversy" about the number and spacing of the bollards. It then states:

¹ When the October 26 Letter, signed by attorney David E. Siegfeld, was written, the Ganz law firm was well aware of the Miners' appeal to this Board regarding the very issues addressed in the Letter. For example, Robert Ganz attended the Board's October 18, 2011 meeting on his client's behalf, when the matter appeared on the ZBA agenda. Nonetheless, the letter of October 26 inexplicably fails to mention this proceeding or the Miners, and refers instead to "concerns [that] have been raised by third parties."

“My clients’s engineer, William Smart, has carefully reviewed the arguments made by such third parties, and has *determined that additional barriers are not needed to address safety concerns as there is no exposure to vehicle impact as a result of the tank’s proximity to any alley, driveways and parking areas which has not been adequately addressed. While my client voluntarily placed 28” inch jersey barriers on the south side of the propane tank in order to accommodate your request during the construction process, the engineer believes that such additional barriers were more of a channelization device than needed to address any safety concerns. As such, the installed barriers do not need to comply with Code’s size requirements.”* [emphasis added]

When Mr. Smart was asked during the Planning Board site plan review last February whether the “few bollards on the end” were “enough to protect the tank if you have trucks refueling,” he merely answered, “Absolutely. I think that we have three bollards in this area. [Inaudible]”. Unfortunately, although the October 26 letter claims Mr. Smart “has carefully reviewed the arguments made by such third parties,” he has again given only a conclusory assessment of the sufficiency of the existing vehicle barriers and whether the tank is “exposed to vehicular damage due to proximity” to the facility’s driveway, within Fire Code § 3807.4. We believe Board members deserve much more in deciding the paramount issue on this appeal.

First, as to the physical setting: Long’s bulk storage propane tank is surrounded on three sides by the semi-circular driveway that is the only means of access to, and egress from, the tank and the facility, by giant tanker trucks that fill the tank and by Long’s “bobtail” tank trucks that fill up at the location and then “distribute” the propane to Long’s customers. There is no differentiation between the gravel immediately surrounding the tank and the gravel of the driveway. More than being merely “proximate,” the lengthy south side of the tank is entirely contiguous to the driveway, as is the fenced in “appurtenance area” where the tank is filled and the bobtails are fueled; in addition, the east end of the tank where the original three bollards were placed is either contiguous to the gravel driveway or no more than a few feet from it. [see the attached photo collage, and those included with my letter to the Board dated Oct. 17, 2011.]

Second, as to the meaning of statutory words: We are once again asked by Long’s attorneys and Mr. Smart to suspend all common sense and knowledge when considering the meaning of words. By not admitting that the three bollards originally placed at the east end of the tank were spaced too far apart under the Code, and by insisting that the 28-inch-high jersey barriers along the south side of the tank “do not need to comply” with Fire Code standards,² Mr. Smart is telling this Board that the tank is either not in “proximity” to the driveway or not “exposed to vehicle damage.”

“Proximity” means nearness or closeness, according to countless dictionaries, including the Merriam-Webster online dictionary/thesaurus.³ Since the east and west ends of the tank,

² The installed jersey barriers are inadequate under § 312.3, both because they are less than the required “minimum of 36 inches (914 mm) in height” and because they cannot “resist a force of 12,000 pounds (53 375 N) applied 36 inches (914 mm) above the adjacent ground surface.” Even as a matter of good engineering, they are simply too short and too light to handle the giant tankers and the bobtail tank trucks.

³ As is customary in statutory and regulatory schemes, NFPA 58 Liquified Petroleum Gas Code § 3.1 states that “Where terms are not defined in this chapter or within another chapter, they shall be defined using their ordinarily accepted meanings within the context in which they are used. *Merriam-Webster’s Collegiate Dictionary*, 11th edition, shall be the source of the ordinarily accepted meaning.”

along with its entire south side, are actually contiguous/adjacent to the driveway, the tank is clearly in the proximity of the driveway.

Therefore, the Board must decide whether the tank is “exposed to vehicle damage” due to the expected traffic on that driveway. Such traffic includes the tanker trucks and bobtail tank trucks that are the primary facility visitors,⁴ plus company or contractor vehicles on-site for maintenance, repair or delivery of the customer-location tanks, as well as unauthorized traffic engaged in u-turns, repairs or mischief, or otherwise trespassing. As you know, the facility is located close to a busy road, with two roadside “curb-cuts” over 40’ wide, no entryway gate or guards to keep out unauthorized vehicles, and no personnel to help guide the movements of vehicles when maneuvering close to the tank. It is already being used as a turn-around and a spot to attend to vehicle repairs. In assessing the Long Energy tank’s exposure to vehicle damage, several additional factors should be considered:

- In common usage, “exposure to vehicle damage” means a tank is *in jeopardy* of sustaining such damage, not that the damage is inevitable.
- The exposure to damage does not mean only exposure that exists when all vehicles, drivers, and other personnel are operating in a *completely correct and safe manner*
- A meaningful exposure assessment must include situations where there has been *driver error or misadventure*, or a failure of one or more of a *vehicle’s parts or systems* (e.g., brakes), and it includes risk of impact created by unauthorized vehicles, and created by *intentional as well as accidental* impact.
- Such exposure is increased at the Duanesburg facility by *weather conditions* that regularly occur there -- especially during the extensive heating season when the facility will be the busiest -- such as fog, rain, snow, sleet, ice, etc.
- The difficulty of clearing down to its surface a *gravel-covered driveway* of snow and ice increases the exposure by reducing traction, even if the driveway were plowed and salted as soon and as often as needed
- Exposure is also increased by other facts: there is virtually no place for a vehicle to park other than the driveway; chains used to keep unauthorized vehicles from making a turn-around will force them to back down an incline to return to the road; the grassy portion in front of the tank is level and easy to access halfway up the driveway; and the fence surrounding the customer tank storage area behind the tank greatly limits the space at the top of the driveway through which all traffic must pass when coming and going.

Fire Code § 3807.4 has no adverb or adjective limiting the relevant “exposure”. Given the catastrophic results of a tank fire or explosion, the threshold triggering the Code-standard barriers needs to be far lower than that implied by Mr. Smart.⁵ And, the cost-benefit calculus should be an easy one. As the propane dealers who created the website *Propane 101* state [at <http://www.propane101.com/propanetankprotection.htm>]:

“Propane tanks are subject to protection requirements for obvious reasons. Propane tanks that are ‘subject to vehicular traffic’ as the rules state, clearly *should be protected from any sort of impact caused by a vehicle.*” [emphasis added] . . .

“Propane tanks that are installed where automobile traffic can be expected or is present should be protected from potential impact.”

⁴ In their Fire Safety Analysis, Long estimates there would be an average maximum at peak times of 8 deliveries per month by the large tankers and 2 bobtails outgoing daily.

⁵ For example, OSHA requires vehicle barriers if damage from vehicle traffic is a “possibility” [29 CFR1910.110]; and NFPA 30 § 4.3.2.7, regarding storage of flammable liquids, mandates that “Where a tank *might be exposed to vehicular damage*, protection shall be provided to prevent damage to the tank.” [emphases added]

Far from giving trust-worthy guidance, Mr. Smart was clearly wrong with regards to Fire Code compliance when he allowed the original bollards to be installed more than 48" apart. He was also wrong when he initially had no barriers installed on the south side of the tank, and then allowed Long to put non-complying barriers there, after Dale Warner "recommended" jersey barriers be installed just prior to issuing the Certificate of Occupancy. Moreover, it makes little sense for Smart to argue that the jersey barriers "were more of a channelization device than needed to address any safety concerns." The reason the traffic needs to be "channeled" away from the tank is that it exposes the tank to vehicular damage.

This is not an instance where a propane tank is "in proximity" to a driveway but already protected by a suitable wall or secure entryways. Therefore, unless the site has a miraculous, invisible shield preventing vehicle impact, the south side, and east and west ends of the tank are "exposed to vehicular damage" under any reasonable assessment. Given that exposure, vehicle impact barriers are mandated to protect the tank under Fire Code § 3807.4 and the strict requirements of Fire Code § 312 must be met. Anything less will not achieve the additional mandate of NFPA 58 §6.6.1.2, which states that LP-Gas containers "shall be protected from damage from vehicles".

In addition, Mr. Smart ignores the street side of the tank in his analysis. We have argued elsewhere, and continue to contend, that the north or street side of the tank is also exposed to vehicular damage due to the proximity of the driveway and the nearly-level grading in front of the tank, and it must also be protected with barriers that comply with Fire Code § 312.

Finally, I'd like to correct the factual history of the jersey barriers given by Mr. Smart. The October 26 letter states that the jersey barriers were placed on the south side of the propane tank "during the construction process." The barriers, however, were not in Long's initial plans and were not "requested" by the Code Enforcement Officer until the week before the Certificate of Occupancy, at the urging of Bill Miner, at the end of the construction process. The pictures in the attached photo collage were taken by me on June 25, 2011. They clearly show the tank's proximity to the driveway and the absence of the jersey barriers only a few days before Long's bobtails started fueling up at the site, and ten days before Mr. Warner actually issued the Certificate, on July 5. That lack of factual precision does not help Mr. Smart's credibility with regards to a propane tank his client has asked be treated as if it were a retail shop.

This Board did not need an engineer last May to decide that David Wissenbach either move a propane tank or protect it with bollards from vehicular damage when building his pole barn. (ZBA Minutes, May 17, 2011 Meeting) We suggest that the Board rely again on its own common sense and good judgment, on the actual facts, and on the plain meaning of the words set forth in the Fire Code, rather than the credentials and unexplained conclusions of Long Energy's engineer. We believe that if it does, the Board will require that the entire propane tank be protected from vehicle impact with barriers that meet the requirements of NYS Fire Code §312.

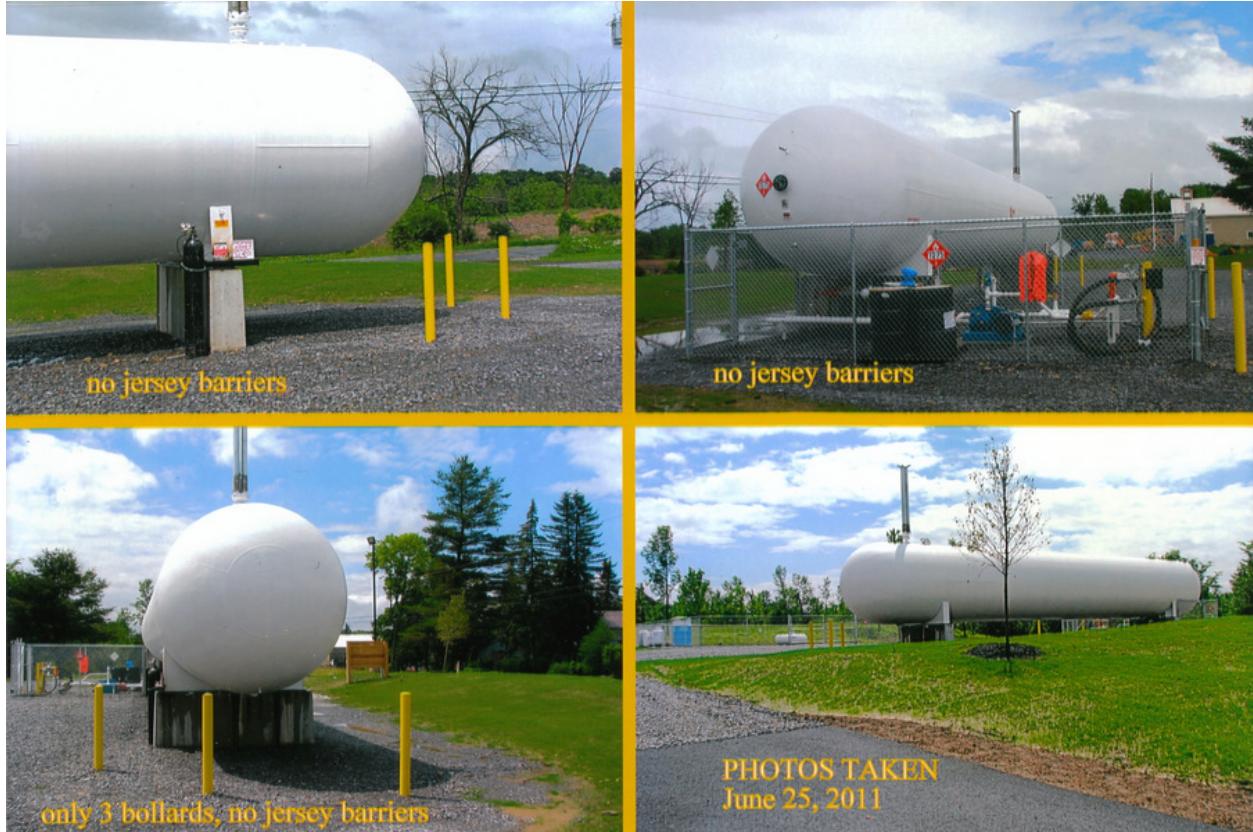
If the Board requires additional copies of this letter or the photo attachment, please let me know by phone or email and I will submit them as quickly as possible.

Respectfully submitted,

David A. Giacalone, Attorney for Bill & Cyndi Miner

cc: Robert E. Ganz, Esq.
David E. Siegfeld, Esq.
Jeffrey A. Siegel, Esq.
Dale Warner

PHOTO ATTACHMENT
to Letter of December 1, 2011 to Wendy Graves, Chair



- collage made from photographs taken of the Long Energy Duanesburg Facility on June 25, 2011 by David A. Giacalone -