

Case Number 513780

To be argued by: David A. Giacalone

Time Requested: 15 minutes

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : THIRD DEPARTMENT**

In the Matter of WILLIAM B. MINER and CYNTHIA L. MINER

Appellants,

-against-

TOWN OF DUANESBURG PLANNING BOARD,
LONG OIL HEAT, INC., d/b/a Long Energy,
SAMUEL DONADIO, and MAREBO, LLC,

Respondents.

BRIEF AND APPENDIX OF APPELLANTS

Dated: March 19, 2012

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Statement of Facts section of Appellants' Brief
in *Miner v. Duanesburg Planning Board*, Case #513780
[pagination and font size differ from Brief]

Statement of Facts

In the Spring of 2011, a 30,000-gallon bulk propane tank [R271], measuring 8 feet high and over 60' long [R77, ¶3], was installed by Respondent Long Energy at an unmanned facility about 75 feet from the road, at 2321 Western Turnpike, in Duanesburg, New York, in the County of Schenectady. [R491, bottom photo] There are no buildings on the site [R217; R235], no place for the public to park or walk [R80, ¶6(b)], and there are no sales made at the facility. [R220-221]. Respondent Town of Duanesburg Planning Board nevertheless granted respondent Long Energy a special use permit, on March 17, 2011, for this bulk propane storage facility in its C-1 (Commercial) zone, under Town Zoning Ordinance Section 11.2(3), which is the special use category for “retail or wholesale shops or stores”. [R162, 233] The application and approval process for the bulk plant took only four months, from December 2010 to March 2011 [R207, R350], and installation of the tank was completed in late June 2011 [R360], with a Certificate of Occupancy issued on July 5, 2011, in the H-3 (High-Hazard) use and occupancy category [R362; NYS Building Code, §307.1 & §307.5, App. A-4].

The propane tank sits across a two-lane country road less than 200 feet [R77-78, ¶4(a); R113, ¶30] from a house owned by Petitioners William and Cynthia Miner, who live there with their daughter [R89, bottom photo].

The Neighborhood

The Miners purchased their home and surrounding lands, located at 2382 Western Turnpike in the Town of Duanesburg, in 1999, at a time when their property and the parcels across the road were zoned R-2 Agricultural and Residential. [R75, ¶1(A)] In 2001, the Town enacted a fully revamped version of the Town of Duanesburg Zoning Ordinance [“DZO”], replacing the Town’s “original” 1984 zoning ordinance [R129, R132]. At that time, the Town superimposed along both sides of a lengthy portion of Western Turnpike a 500’-deep C-1 Commercial zone stretching over lands previously zoned agricultural-residential. Since that time, the front strip of Petitioners’ property, including their residence, and the roadside lands they face across Western Turnpike are zoned C-1 to a depth of 500 feet. The C-1 district is more restrictive than the Town’s C-2 (Manufacturing and Light Industrial) district [Section 12, R164]. No Heavy Industrial zoning exists in the Town.

The bulk propane tank itself was placed on an open field covered with brush and trees [R217], about 250 feet wide and 300’ deep [R77, ¶4(a)]. Contrary to respondents’ allegations [R41, LL8-14, R109, ¶20(c)], the Long Energy facility has not been placed into a “predominantly commercial” neighborhood. Instead, the immediate neighborhood of Petitioners’ homestead borders a country road that has mostly residences and agricultural or vacant lands, along with a small church, and a few commercial entities. That stretch of Western Turnpike is poorly depicted on an aerial map submitted by respondent Long Energy with its Fire Safety Analysis [R292]. The Record on Appeal lets us identify many of the structures and uses that are not designated on Long Energy’s map:

- Immediately to the east of the tank is JHI Enterprises [R273, R44], which leases and services heavy equipment, and is the only commercial use respondents could name on its side of the street.
- Immediately to the west of the tank on its south side of the road stretch, for about 230', the brush-covered vacant land and fields of Long Energy's grantee, Sam Donadio [R44, R212-213]
- Abutting Donadio's parcel on the west is a single-family residence [R79, ¶5(c)], and "three doors down" from the tank site is another single-family residence, the home of Betty Powers [R318; R327]
- Across from the tank to the east is a small church, the Jehovah's Witness Kingdom Hall [R109, R329]
- Directly across from the tank are two parcels owned by Petitioners, one is an undeveloped field [R476, R445] and the other is the front lawn on the 600-foot-wide lot that contains Petitioners' home [R79; R89, bottom photo]
- Near the far end of Petitioners' homestead, perhaps 500 feet the propane tank, sits an antique shop in a barn [R476], which Board Member Barnes stated in his Affidavit is "directly across from the tank" [R109, 20(c)]
- West of that barn is undeveloped pastureland owned by Petitioners [R476]

Therefore, the Record shows many homes and undeveloped lots, with only two "commercial" uses in the vicinity of the propane facility, one of which is an antique shop. The view from the road is a typical rural mix that also includes the agricultural and undeveloped lands that still lie beyond the superimposed 500-foot-deep C-1 zone.

High-Hazard Occupancy

The DZO specifically defines as an "Industrial, Heavy" use "a use engaged in storage of . . . flammable or explosive materials". [§3.5.68; R143] Propane is a Liquefied Petroleum Gas ("LP-Gas") that is considered highly flammable and explosive [R497-498]. As such, when issuing the Certificate of Occupancy for the subject facility [R362], the Uniform Code Enforcement Officer ["UCEO"] Dale Warner ["Mr. Warner or "UCEO"] placed the facility in the H-3 (High-Hazard) use and occupancy category under the 201 NYS Building Code §307.5, rather than placing it in the M (Mercantile) category,

which is applicable to structures used for the display and sale of merchandise or goods and accessible to the public, under §309.1 (App. A-5). Furthermore, 30,000 gallons is more than twice the threshold set by the Department of Homeland Security (60,000 *pounds* or about 15,000 *gallons*, R480 ¶28) for an amount of propane constituting a Chemical of Interest under its Chemical Facility Anti-Terrorism Standards, as a potential terrorist target in the “release-Flammables category” [R479-480, ¶28; 6 CFR Part 27, Appendix A, 72 FedReg. 65431 (2007) [App. A-1 to A-3]

Permit Application Process

On December 6, 2010, to start the application process, Respondent Long Energy submitted an Application for Sketch Development Plan Approval to the Town of Duaneburg Zoning Department, seeking the subdivision of land owned by Respondent Samuel Donadio, and proposing to use the resulting 1.9-acre site for “Storage of propane and propane tanks for retail distribution” in the C-1 Commercial district. [R206] Long Energy had contracted to purchase the parcel from Donadio if the subdivision and necessary special use permit were granted. [R212-213] The subject parcel is about 250 feet wide and 300 feet deep. [Site Plan, R495; R212]

At its next regular Meeting, on December 16, 2010, during a Sketch Plan Review, the Planning Board learned the details of the proposal from Long Energy’s engineer William Smart that Long Energy wanted to install a 30,000-gallon bulk propane tank at the location, 75 feet from Western Turnpike [R235], a busy two-lane road. The bulk tank would be filled by large tractor-trailers, and the Company’s smaller “bobtail” trucks would fill up at the facility and then distribute the propane to the homes and businesses of Long’s customers. [R213] In addition, there would be a fenced area for storage of 100-

or 200-gallon storage tanks that would be taken from the facility by Long Energy's trucks for installation at houses and businesses. [R214] When asked by acting Planning Board chair Wiedemann "Is this going to be basically delivery, or are you going to have a space where people can come?", Long Energy's President Robert Long replied "No, it would be all delivery." [R220-221].

No Buffer or Screening

To fulfill the Planning Board's obligation under DZO §14.6.2.4(c)(9) to ensure the "Adequacy of the type and arrangement of trees, shrubs, and other landscaping constituting a visual and/or noise deterring buffer" [R189-190], Acting Chair Carl Wiedemann asked Mr. Smart for a commitment about landscaping [R218]. Mr. Smart said he "envisioned" planting 4 or 5 deciduous trees across the 250' frontage of the facility, and using a total of 8 evergreens as screening along both sides of the 300'-deep parcel [R218-219], and put 4 deciduous and 8 evergreen trees in the final Site Plan [R495]. The Planning Board unanimously approved that landscaping/screening/buffer plan [R255; see photos at bottom of R491 and R492]

Formal Application

After having its pre-submission conference with the Planning Board and meeting with Dale R. Warner, the Uniform Code Enforcement Officer (under DZO §14.6.2.2(a), R188-189) Long Energy submitted its formal Application, dated Feb. 7, 2011, for a special use permit, under Section 11.2(3) of the Zoning Ordinance, which is the special use category "retail or wholesale shops or stores." [R233] The Application describes the proposal as follows:

“Proposal: Develop a 1.9 acre parcel into a facility for the retail distribution of propane. Improvements to include storage area, installation of a 30,000 gal propane storage tank and driveway facilities.”

Along with its formal application, Long Energy submitted its final Site Plan [R495], its Full Environmental Assessment Form [R297] under SEQRA, and its Fire Safety Analysis [R265].

Under the Duanesburg Zoning Ordinance, the enforcement officer must refer an application to the appropriate Board: either to the Planning Board for a special use permit, or to the Zoning Board of Appeals ["ZBA"] for a necessary use variance, if the proposed use is not permitted as of right or as a special use. [DZO § 14.2.3 , R178; DZO §15.2(C), R194] On February 8, 2011, the Code Enforcement Officer referred the application to the Planning Board for a special use permit. [R234] In his referral to the Planning Board, he described the project as “retail distribution of propane” and simply cited to Section 11.2(3) of the Town Zoning Ordinance as his “Reason supporting determination”. Mr. Warner has explained that he deemed it a “retail establishment” appropriate under Section 11.2(3) because the propane at the facility is distributed from there to retail customers. [R344; and R101-102]

February Planning Board Meeting

At the February 17, 2011 Planning Board Meeting, the Board held its formal Site Plan Review. The following interchange occurred between Board Member Elizabeth Novak and Long’s engineer and representative William Smart:

MEMBER NOVAK: I just needed to clarify; the application says retail. We discussed this. This wouldn’t be a retail facility. It would be just transfers.
Mr. SMART: Right.

The Planning Board unanimously approved a Negative Declaration under SEQRA at the February meeting, finding there would be no significant environmental effects, and stating: “The potential for any significant adverse environmental impact is minimal because the area is zoned for commercial use.” [R258-259]

Flawed Fire Safety Analysis

The Planning Board also uncritically accepted Long Energy’s Fire Safety Analysis. It did so even though Long never submitted the letter it promised to the Board from the Fire Department approving Long’s fire safety plan. [R225] In addition, the Board allowed Long Energy to renege on its major promise in the Fire Safety Analysis that the [R280]:

“Tank and piping is protected from vehicular traffic and tampering by a chain link fence of at least 6 ft height that encompasses the entire property.”

There is no perimeter fence and gate to keep out uninvited persons and vehicles [R495; R491, bottom photo]. Duanesburg's other bulk propane storage facility, Esperance LP-Gas [ELPG], has fencing around the entire tank storage area, with a secure gate to prevent unauthorized entry [top photographs, R491, R492].

The Planning Board also overlooked Long Energy’s failure at two places in the Fire Safety Analysis to acknowledge that an External Hazard existed from nearby welding and metal fabrication. [R286, Item #2; R272] JHI Enterprises regularly does welding and the other hazardous operations [R78-79], and is located perhaps a hundred feet from the tank, right next door. [R273] Because that external hazard was not acknowledged [R294], design alternatives or contingency plans were not considered to reduce the hazard to the tank.

In addition, the Planning Board concluded, based on findings presented in the Fire Safety Analysis [R284, R285], that there was no risk to neighboring uses in the event of a release of propane causing a fireball or explosion. [see Negative Declaration, R258] The Board never considered, however, that the release scenario models used and listed in Table 7.1 are each “due to or from” discrete, relatively minor releases, from valves, hoses or piping of the indicated lengths and sizes. [R284] Therefore, the release models do not address vapor dispersion, explosion hazard or fireball radiation distances in the event that the entire tank is ruptured or has a significant breach due to a catastrophic accident or intentional impact or explosion. Thus, such releases or explosions were not addressed by Long Energy in its submissions nor by the respondent Planning Board in its SEQRA or general safety analysis.

Lack of Public Awareness of the Proposal

There had been no public input in the December and February Planning Board meetings. The agendas and board meeting minutes for the December 2010 sketch plan review [R210] and February 2011 site plan review [R240] gave virtually no clue of the nature of Long Energy’s planned use of the parcel across the road from the Miners. In fact, the December Agenda item mentions only an application for “a minor subdivision” and the Minutes [R210] used the following six words to summarize the session: “The Board had no major requests.” Yet the item takes up 15 pages of transcript [R211-226] in which the proposed use is fully described.[R213-215, R223] Moreover, like the required Public Notice published and mailed to neighboring parcel owners on March 8th [R314-315], the February agenda item merely stated [R240]:

LONG ENERGY: SBL#: 68.00-2-40, (C-1) located adjacent to 2261 Western Turnpike is seeking approval for a Special Use Permit under section 11.2(3) of the Town of Duanesburg Zoning Ordinance.

The February Minutes never specifically mention propane or a bulk storage propane facility. The only reference was that: “Board Member Barnes questioned if the Applicant should extend their fencing around the tank and if the 3 bollards were enough to protect the tank”. [R240]

Petitioner Is Told the Tank Is Permitted

As a result, Petitioners were not aware that respondent Long Energy was seeking to place a bulk propane tank on the parcel across from their property until shortly before receiving the Public Notice of the March 17, 2011 public hearing from the Town. Petitioner Bill Miner learned about the proposed placement from Joe Hamman, who was familiar with the actual plans because his lot was part of the requested 3-part subdivision [R60, 444]. As a result, prior to knowing that a special use permit was being sought under DZO Sec. 11.2(3) and before knowing the content of DZO §11.2(3) [R62-63], Bill Miner went to the Planning and Zoning Office at Duanesburg’s Town Hall to confirm whether a bulk propane tank was being proposed and whether it would be allowed in the C-1 zone. He spoke with Maryann Murphy the Town’s Building, Planning & Zoning Assistant. Ms. Murphy told Bill Miner that the propane tank was allowed in the C-1 zone and that he could not prevent the Respondents obtaining a special use permit. [R60, R475]

One Unanswered Telephone Message

At that point Bill Miner was deeply concerned, as he believed the tank was an inevitability. He concluded that the best way to protect his home and family from the

effects of a nearby bulk propane plant might be to have it located on one of his side-lots, where it would be farther away from his home than on the subject parcel, and where he could best assure a visual, sound and safety buffer between his home and the tank.

[Verified Reply, ¶ 23, R475-476; Oral Argument, R61-62; R334, lines 18-25] With those thoughts in mind, Bill Miner left one recorded telephone message at Robert Long's office asking about the possibility of placing the tank facility on one of Petitioners' sidelots [R475, ¶23]. That telephone message was never returned by Mr. Long or anyone else at Long Energy.

Then, after learning from the public notice of March 8 that the application was made under § 11.2(3), and that the subsection referred to retail shops and stores, Bill turned his attention to opposing the application. [R62, lines 17-23] Nonetheless, although he did not deny there was only the one unanswered phone message, Robert Long told the court below in an affidavit there had been "negotiations" and stressed that Mr. Miner had never raised issues related to safety and closeness to his home [R445, ¶7]. Long also called Mr. Miner a hypocrite for opposing the tank after trying to have it moved on his own land "for his own personal profit." [R446, ¶11] Robert Long's distorted version of what happened led the court below to mistakenly conclude there had been prolonged discussions in which Mr. Miner tried to sell Long his own parcel [R68 lines 1-12; R59 lines 19-24; R61-62], and Special Term thereafter adopted a disparaging tone toward Petitioners, as if it were they who had acted in bad faith.

The Public Hearing and Granting of the Application

The public hearing on the propane tank special use permit was held on March 17, 2011. At least five (5) close neighbors spoke out strongly at the public hearing against

the placement of the propane facility at that location, including Petitioner Bill Miner [R324-347], with four mentioning that the tank was industrial in nature and should be in an industrial park. Bill Miner raised many issues, but focused on the tank not being a retail store, and on the failure to have standard fire safety measures. In addition, Mr. Miner pointed out that the facility lacked any security in contrast to the locked gate at the Esperance LP-Gas company. [R332-347; Board Minutes, R319].

Dale Warner, the Uniform Code Enforcement Officer, stated very forcefully at the public hearing that he made the decision that the proposed use came within §11.2(3), the special use category for retail stores [R344]:

“I make that determination and I never said it was a store. You said it was a store. It’s a retail establishment.”

Only a couple minutes after the public hearing was closed, without any discussion of the issues raised by the public, the Planning Board unanimously voted to grant the special use permit, without adding any conditions to protect the adjacent users [R347-350]. Notice of the Board’s decision granting the application was filed with the Town Clerk on April 26, 2011 [R77, ¶3] The Verified Petition was filed on May 26, 2011 [R73], within the Statute of Limitations provided in Town Law §274-b(9).

Petitioner Offers a Compromise Settlement

Within a few days of the March 17 Meeting, Bill Miner sought out Robert Long, calling his office frequently [R512, ¶3(a)], and offered a very minimal request as a compromise to keep the Miners from bringing a lawsuit against the propane facility. [See Verified Reply, ¶18, R474; Affidavits of Robert Long, ¶16, R448; R511] Mr. Miner thought he had a commitment from Robert Long to construct a very large berm with many evergreen trees that would serve as a visual and vehicle buffer for the tank. Only

when they realized that the landscaping process was almost finished without those features being incorporated, did the Petitioners decide to bring the instant Art. 78 proceeding. [R474, ¶ 18]

The Esperance LP-Gas Story

Respondents frequently point to the existence of Esperance LP-Gas [“ELPG”] in the C-1 district as a precedent for having such a facility as a retail establishment in Duaneburg. ELPG, which is owned by Donald Largeureau [R383], was established in 1983 [R493], prior to the existence of the original Duaneburg Zoning Ordinance, which was enacted in 1984 [R134], and superseded by the current DZO in 2001 [R134]. ELPG’s 1997 Special Use Permit application lists the zoning district as “General Business” (not Commercial C-1) and in the space to describe the use-requested makes no reference to retail activity, but states: “use for L.P. Gas Tank Storage 30,000 gal. and fenced work area.” [R387] The word “retail” does not appear on any of the 66 pages submitted by the Planning Board’s counsel regarding the ELPG permit applications. [R368-R434]

At Oral Argument [at R69, lines 11-14], Special Term relied on the mistaken claim of the Planning Board’s counsel that ELPG’s 2009 Special Use Permit amendment was sought “under the exact same section at issue here.” [R65, ll. 17-22, citing to R369 of the instant Record on Appeal] In reality, ELPG’s 2009 Special Use Permit application says it is being made “Under §14.6.2.5”, which is merely a procedural provision for amending a permit and does not designate any special use category [R189] ELPG’s applications do, however, show that it has many features that make it a safer and more appropriate facility for its setting than the Long Energy facility: For example, the 2009

Largeteau-ELPG Site Plan [R428] shows, in contrast to Respondent Long Energy's Site Plan [R495]:

- a 20' gate controlling access to the facility and a cyclone fence surrounding the entire tank area (as opposed to open access, with no gate or perimeter fence at Respondent's site);
- 9 bollards to protect from vehicle impact (as opposed to 3 at Respondent's site);
- two bulk storage tanks placed perpendicular (rather than parallel) to the road, and set about a 120' from the road) [R492], rather than Respondent's 75';
- existing large maintenance building and a bobtail truck garage on the site (as opposed to a facility with no other structures or personnel).

Finally, ELPG is across from agricultural lands [R494] and about 1000' from the closest residence [R479]. In contrast, Respondent's installation is across from a church and a home -- about 200' from the living room of Petitioners, Bill and Cyndi Miner.

Additional facts necessary for the determination of issues raised on this appeal are set forth as needed in the Legal Argument that follows.