



Phillips Lytle LLP

Via Email and Regular Mail

November 4, 2015

Town of Pendleton Planning Board
c/o Joseph McCaffrey
Planning Board Chairman
Pendleton Town Hall
6570 Campbell Blvd.
Pendleton, NY 14094

Re: October 20, 2015 Sketch Plan Review Conference with Planning Board
Empire Pipeline, Inc.
5657 Killian Road

Dear Chairman McCaffrey and Members of the Town of Pendleton Planning Board:

As you know, we represent Empire Pipeline, Inc. ("Empire") with respect to the proposed construction and operation of a 22,214 horsepower compressor station and related equipment ("Facility" or "Project") on a 20-acre parcel located at 5657 Killian Road ("Site") in the Town of Pendleton ("Town"). The Facility is part of Empire and National Fuel Gas Supply Corporation's (collectively, "National Fuel") Northern Access 2016 Project, which involves improvements to existing interstate pipeline systems in Northern Pennsylvania and Western New York. On behalf of Empire, we want to sincerely thank the Planning Board for the extensive feedback that we received during the Sketch Plan Review conference ("Conference") held at the Planning Board meeting on October 20, 2015. We also would like to thank the Planning Board for providing a copy of the draft minutes from its October 20, 2015 meeting ("Meeting Minutes"). The purpose of this letter is to confirm some of our discussions with the Planning Board during the Conference, to request that additional discussion concerning a few key items be considered as part of the resulting Meeting Minutes, and to more fully explain how we intend to move forward with the site plan review process for the Facility based upon your feedback.

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I. Sketch Plan Conference

A. Discussion of "Use by Right" Determination

The Conference began with an extensive discussion with the Planning Board about the process for determining whether the Proposed Facility is an "essential service" (described in the Meeting Minutes as a "use by right" determination) under the Code. On this point, the Planning Board readily - and rightly - acknowledged that it has no authority to make the essential services determination under the Code or New York State law. The Planning Board agreed that the Town's Building Inspector is the individual, or office, vested with such authority under the Code. Code § 247-69. We appreciate the Planning Board's acknowledgement of the limits of its own authority in this instance, which is not only consistent with the Town Code, but also with New York State law. *See Jamil v. Vill. Of Scarsdale Planning Bd.*, 24 A.D. 3d 552, 554 (2d Dep't 2005) ("The Planning Board is without the power to interpret the provisions of the local zoning law, a power which is invested exclusively in the building inspector and the Zoning Board of Appeals"); *Hill v. Planning Board of the Town of Amherst*, 140 A.D. 2d 967, 968 (1988) (a planning board's authority is "limited to a consideration of the layout, design, and related aspects of the proposed development and. . . is not . . . to assume the powers of other town agencies or departments"); *see also* Rice, Practice Commentary, McKinney's Con. Laws of NY, Book 9, Town Law § 274-a (2013) (" . . . neither Town Law § 274-a nor the respective functions of a municipality's building inspector and planning board permit a planning board to. . . determine if a particular use is permissible pursuant to the zoning law. Instead, that function is confined to the jurisdiction of the building inspector in the first instance and, upon appeal, to the zoning board of appeals).

At the Conference, the parties were further aligned in their recognition that the Code does not set forth a clear process for how, or when, the Building Inspector must make an essential services determination. However, we discussed that this determination may be made by the Building Inspector at the time the Final Site Plan is referred to his office by the Planning Board pursuant to § 247-54(D)(4) of the Code (i.e., concurrent with, but outside the scope of, the Planning Board's site plan review).



What was abundantly clear, at this point in time, is that the essential service determination is not part of the Planning Board's site plan review process as set forth in the Code and, therefore, can have no impact upon the Planning Board's review of Empire's final site plan application. *See* Code § 247-54; *see also* Town Law § 274-a (setting forth the limited jurisdictional perimeters of site plan review); *Swantz v. Planning Board of the Village of Cobleskill*, 34 A.D. 3d 1159, 1160 (3d Dept. 2006) (holding Planning Board had no authority to deny site plan approval of parking lot based on permitted use basis, as such determination fell outside Board's site plan review authority). To put it another way, the Planning Board may not delay or deny Site Plan approval for the Facility based on a Code interpretation issue that is, or will at some point be, separately before the Town's Building Inspector. *Jamil*, 24 A.D. 3d at 554; *see also J & R Esposito Builders, Inc. v. Coffman*, 183 A.D. 2d 828 (2d Dept 1992) ("The . . . Planning Board was without power to deny site plan approval on the ground that the proposed use is in violation of the zoning ordinance").

While the Code does not require the essential services determination to come before, or be made in conjunction with, the site plan review process, the Planning Board nonetheless strongly recommended that National Fuel engage the Town Building Inspector directly for clarification of when such determination will be made. As recommended by the Board, we will engage the Building Inspector concerning the process and timing of this determination, but reiterate the parties' correct understanding that such determination is separate and apart, and should in no way impact, site plan review by the Planning Board.

B. Discussion of the Unique Nature of Empire's Site Plan Review Application

Next, the Conference continued with an extensive presentation by the National Fuel team on the Project, which included a discussion of the cooperative nature of Empire's site plan review process. To this end, National Fuel reaffirmed its commitment to working cooperatively with the Planning Board through the site plan review process to provide information on issues of concern and to address reasonable concerns regarding the Facility prior to its construction.

As an initial matter, we appreciated the Board's recognition of the meaningful steps taken by National Fuel to address community concerns to date, which have included



relocating the Facility from a residential to light industrial zone, developing a state-of-the-art design to make the Facility appear as a series of barns and barn silos, and agreeing to restrict development on the remaining acreage of the Site that will not be utilized for Facility operations. The National Fuel team also provided the Planning Board with information on various noise mitigation measures being incorporated into the design of the Facility.

During the Conference, the Board raised a number of issues and/or concerns for National Fuel's consideration, as summarized below. While most, if not all, of these items are being addressed through the Federal Energy Regulatory Commission's ("FERC") review of the public version of National Fuel's application for the Northern Access 2016 Project, National Fuel, nonetheless, agreed to provide supplemental information on these items to the Planning Board¹:

- Drainage: The Planning Board identified stormwater drainage as the number one planning challenge in the Town of Pendleton. As discussed, Empire will provide the Planning Board with detailed grading and drainage plans with appropriate engineering support. Empire will also provide a draft Stormwater Pollution Prevention Plan to the Planning Board for consideration.
- Landscaping: The Planning Board identified landscaping as the other major issue (in addition to drainage) that it typically focuses on during the site plan review process. One member of the Planning Board strongly suggested that Empire pay particular attention to a comprehensive landscaping plan for the proposed Facility. Empire will work to develop such a plan, which it will provide to the Planning Board.

¹ The supplemental materials mentioned in this Section II will be provided in addition to the materials specified for a final and complete site plan application in the Code. Empire's offer to provide such additional materials shall in no way be construed as an expansion of the required materials under the Code for a complete final site plan.



- Security: One of the Planning Board members asked for information about Facility security during the Conference. While some basic information on security was provided to the Planning Board by the National Fuel team during the Conference, Empire (to the extent possible) will provide further written details on Facility security to the Planning Board.
- Wetlands: During the Conference, the Town Engineer asked whether there were any wetlands on the Site. The National Fuel team explained that a wetland delineation of the Site by a wetlands expert was underway. Empire will provide the Planning Board with a copy of the final wetlands delineation report.
- Photo-Simulations: During the Conference, the Town Engineer noted that Empire had submitted some visual renderings of the proposed Facility in conjunction with its Sketch Plan Conference application materials. He asked whether photo-simulations (before and after) of the Proposed Facility could be submitted with the final site plans from key surrounding viewpoints. National Fuel will further investigate whether it can provide these before and after photo-simulations of the Proposed Facility.
- Construction Routes: During the Conference, the Town Engineer requested information on proposed construction access routes and scheduling. Once available, Empire will provide detailed information to the Planning Board on construction access routes and scheduling.
- Acreage to be Disturbed: Members of the Planning Board asked questions about the total acreage to be disturbed on the Site by the Project. As Project plans are still progressing (including stormwater control designs), the National Fuel team indicated that exact numbers were not yet available. However, they also indicated that it is likely (based on past experience constructing other compressor stations) that a majority of the Site will be disturbed during construction, but much of this disturbance will be temporary in nature. Once



available, Empire will provide the Planning Board with detailed information on the acreage to be disturbed on the Site during construction of the Project.

- SEQR: The discussion of the acreage to be disturbed led to a discussion of the State Environmental Quality Review Act (“SEQR”) process for the Project. As the Chairman noted during the Conference, if the Project will physically disturb more than 10 acres, it is considered a Type I action pursuant to SEQR. However, as we explained in our sketch plan letter of intent, as we discussed with the Planning Board during the Conference, and as the Planning Board Chairman confirmed, SEQR is entirely preempted by FERC’s environmental review of the Project pursuant to the National Environmental Policy Act. If the Planning Board has any questions regarding this issue, we refer you to National Fuel’s September 9, 2015 letter (see pages 8-9) and encourage you to discuss with the Town Attorney.
- Other permits Required: During the Conference, the Town Engineer inquired about other approvals required for the Project besides a FERC certificate. Empire will provide the Planning Board with a complete list of all permits and approvals required for the Facility.
- Lighting: During the Conference, one of the Planning Board members asked about Site lighting. As explained by the National Fuel team during the Conference, Site lighting is fairly minimal. Nonetheless, detailed lighting plans and specifications on Facility lighting will be provided to the Planning Board.
- Access to Full FERC Filings: Several members of the Planning Board inquired whether the Board would be provided with copies of all of Empire’s FERC filings relative to the Project. As National Fuel pointed out at the Conference, the FERC record is several thousand pages long at this point and continues to grow. Also, the entire FERC docket is available online at <http://www.ferc.gov>². Nonetheless, for the convenience for the Planning Board, Empire will file one

² Click on the eLibrary link, click on “General Search” and enter the docket number (CP15-115-000).



printed full set of its Northern Access 2016 FERC application, its responses to FERC's environmental data requests and its amended FERC application with the Planning Board's administrative assistant in conjunction with the final site plan submittal.

National Fuel looks forward to working cooperatively with the Planning Board to address the items described above as it continues through the Town's site plan review process.

III. Review of Meeting Minutes

Again, National Fuel thanks the Planning Board for providing it with a opportunity to review the Meeting Minutes in advance of their finalization. Upon review, and based on the foregoing discussion of the Conference, National Fuel would offer the following summary of key points:

- Site Plan Review: The Meeting Minutes note that site plan review was tabled pending the outcome of an initial conference between the Town Building Inspector and Empire as to a "use by right" determination. However, as noted above, it would be most appropriate for the Building Inspector to review the Final Site Plan and make any necessary "use by right" determination concurrent with the Planning Board's separate and distinct review of such Plan. Put another way, site plan review for the Project should not be contingent upon (or tabled until) a conference (preliminary or otherwise) with the Building Inspector concerning whether the proposed Facility is an "essential service". These reviews should have parallel, but separate paths.
- FERC as Lead Agency: During the public comment portion of the meeting, the Chairman recognized (in response to a request that the Board request more information from Empire) that, though it is highly unusual for the Town, FERC will be the lead agency for the siting process and that the Planning Board "only has limited latitude over the proposed Facility."



- SEQR: During Empire's Conference, there was significant discussion between the Planning Board and Empire as to the preemption of the SEQR process. Moreover, as part of the public comment portion of the meeting, the Chairman stated that the SEQR process was preempted.

IV. Continuation of Site Plan Review Process

At the close of the Conference, we discussed Empire's continued work on its final site plans, and its efforts to date in assembling all of the supporting documentation discussed with the Board and required by the Code. See Code § 247-54. We anticipate filing for final site plan approval with the Planning Board within the next 30 to 60 days. We anticipate that our submittal will include a detailed letter of intent with basic site plans, elevations, drainage and landscaping plans, as well as relevant supporting documentation set forth at Code § 247-54(D)(2).

In the meantime, as recommended by the Planning Board, we intend to reach out to the Building Inspector to discuss the essential services issue. If there are any additional items or matters that the Board would like us to address in our final site plan submittal, please just let us know. Again, we sincerely appreciate the Planning Board's time to date, and look forward to working cooperatively with the Board as we continue to progress the site plan review process.

Very truly yours,

Phillips Lytle LLP

By 

Adam S. Walters

ASWpjs

cc: Joe Kania
Claude Joerg, Esq.
The Town Building Inspector