

TOWN OF HENNIKER ZONING BOARD OF ADJUSTMENT

In re. Application of Laidlaw Energy Group, Inc.

2008-105

Objection to Application for Use Variance from the Town of Henniker Zoning Ordinance, Article VIII – Commercial District Regulations, Section 133-28

NOW COME, certain residents of the Towns of Henniker and Hopkinton, being voluntarily associated under the name of REACH, and respectfully submit this Objection to the Application by Laidlaw Energy Group, Inc. (“Laidlaw”) for an area variance from the Town of Henniker Zoning Ordinance, saying as follows:

I. Standing and Overview

The Town of Henniker Zoning Board of Adjustment (“ZBA”) has unanimously determined that this application for an Area Variance and the companion application for a Use Variance to allow a 20 Megawatt Biomass Energy Facility at 1192 Old Concord Road, Henniker, NH, (Tax Map 1, Lot 549 F2) with an 80 foot high Boiler Building are applications which propose a Development of Regional Impact in accord with NH RSA 36:54, et. seq. REACH is comprised of citizens of Henniker, Hopkinton, and surrounding towns, many of whom are proximate to the property and will be directly harmed by the relief sought in these applications.

An eighty foot building exceeds the height maximum set forth in Henniker’s ordinance. As demonstrated below, Laidlaw has failed to satisfy the five criteria for an area variance and the application should be denied on the strength of both the law and the facts.

II. Burden of Proof

Laidlaw has the burden of proving that they meet each of the criteria for a use variance. In all zoning proceedings, the party seeking the variance has “the burden of proving *all elements necessary for the granting of a variance*, including the requirement that the variance will not be inconsistent with the spirit of the ordinance and not contrary to the public interest.” Nine A, LLC v. Town of Chesterfield, __ NH __ (Slip Opinion, June 3, 2008)(emphasis added).

Laidlaw must prove the following five elements:

- Special conditions exist such that literal enforcement of the ordinance results in unnecessary hardship.
- The variance is consistent with the spirit of the ordinance.

- Substantial justice is done.
- The variance will not diminish the value of surrounding properties.
- The variance will not be contrary to the public interest.

See NH RSA 674:33(I)(b)(Supp. 2007).

1. **ENFORCEMENT OF THE ZONING ORDINANCE WILL NOT RESULT IN UNNECESSARY HARDSHIP**

In proving unnecessary hardship, an applicant for an area variance must demonstrate unnecessary hardship by showing 1) an area variance is needed **given the unique conditions of the property** and 2) the benefit sought by the applicant cannot be achieved by some other method reasonably feasible. Boccia v. City of Portsmouth, 151 N.H. 85, 94 (2004). Laidlaw has failed to demonstrate that there is anything unique about the property on which it desires to build the plant that necessitates a variance from the three story height limitation. In fact, Laidlaw admits that its parcel is level like most of the other parcels in the heavy commercial zone. Therefore, a variance should be denied on this basis of Laidlaw's failure to demonstrate uniqueness of the property.

2. **GRANTING THE VARIANCE WOULD BE INCONSISTENT WITH THE SPIRIT OF THE ORDINANCE**

The Henniker Zoning Ordinance does not explicitly state the purpose behind the 3 story height limitation. Nevertheless, the stated purpose of other size limitations in the Henniker Zoning Ordinance are so as not to "detract from the overall rural character which the town, through its Master Plan, wants to maintain." 133-43. The Master Plan specifically identifies scenic viewsheds as an important community resource for the Town of Henniker to maintain and protect. Scenic vistas "can be seen from Dodge Hill Road, Ray Road, Hemlock Corner Loop, Shaker Hill Road, Mount Hunger Road, and Bear Hill Road, just to name a few." Henniker Master Plan, p. 227-228. The granting of a variance to allow an 80 foot tall building with a smoke stack of even greater height above that would violate the spirit of both the Henniker Zoning Ordinance the Henniker Master Plan.

The 3 story height limitation is also to protect against fires. The Henniker Fire Department's ladders can only reach 35 feet. Laidlaw proposes an 80 foot tall building. Laidlaw has not addressed how it intends to deal with fire suppression. A fire at Laidlaw's site could quickly spread out of control to neighboring properties.

3. **Granting the Variance Would Not Result in Substantial Justice**

Substantial justice is only accomplished by the granting of an area variance where other landowners are not harmed and "and the project is an otherwise permitted use." Malachy Glen Associates, Inc. v. Chichester, 155 N.H. 102, 104 (2007). Laidlaw is requesting a use variance in addition to an area variance. Laidlaw's 80 foot building will

deprive the Town of Henniker of its rural charm and residential properties of their scenic views. Therefore, substantial justice will not result.

4. **Granting the Variance Will Diminish the Value of the Surrounding Properties**

Laidlaw has only discussed the effect of the proposal on the abutting properties. New Hampshire law does not read the phrase “surrounding property” as narrowly as Laidlaw proposes. In Nester v. Town of Meredith ZBA, abutters appealed the issuance of a special exception. 138 N.H. 632, 633 (1994). The abutters raised numerous arguments on appeal, including “that the ZBA applied an overly broad definition of ‘neighborhood’ when assessing the impact of the proposed project.”¹ Id. at 635. The ZBA countered this argument stating that “the proposed use will not impermissibly impair the value of surrounding properties.” The Court adopted a broad reading of neighborhood: “we reject the [abutters’] argument that ‘neighborhood’ should be narrowly defined to include only owners or occupants of adjacent property.” Id. at 636.

The proper “surrounding properties” for consideration are those properties from which the 80 foot tall building or the smoke stack to be constructed on top on the building can be seen. The current uses in the heavy commercial district are well screened from the residential district by natural buffering. The proposed building and smoke stack will rise above the tree line and diminish the property values of all properties that can see it. Many properties are currently assessed taxes based on their views. Therefore, the variance must be denied because of the effect on the surrounding property values.

5. **Granting the variance will be contrary to the public interest.**

Henniker is a relatively small, rural New England town. Any commercial uses are secondary to the primary rural and residential uses in the Town. Unlike the permitted uses, this proposed eighty foot high building with an approximately 150 foot smoke stack use has an adverse aesthetic impact that spills outside of the district and to the surrounding residential districts. The impact on the rural character of Henniker will be significant. When a proposed use has an impact beyond its zone, and that impact is adverse, it is insufficient for the applicant to dwell on how it will benefit their immediate abutters. Here, the residents of Henniker who reside in rural and residential zones, would be subjected to a permanently marred viewshed in the form of an 80 foot tall boiler building and an almost 150 foot tall smoke stack.

¹ The Meredith ordinance stated that before granting a special exception, the ZBA had to determine “that the use will not be detrimental to the character or enjoyment of the neighborhood. Although Nester addressing a ZBA granting a special exception, not a variance, the Court cites variances cases, e.g., Vannah, *infra*, so there is no apparent reason to think that *Nester* is inappropriate to cite for this case.