NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT

At a session of the New York State Board on Electric Generation Siting and the Environment held in the City of Albany on October 21, 2002

BOARD MEMBERS PRESENT:

Neal N. Galvin, Alternate for
Maureen O. Helmer, Chairman
New York State Public Service Commission

David L. Smith, Alternate for
Antonia C. Novello, M.D., M.P.H., Commissioner
New York State Department of Health

Michael Santarcangelo, Alternate for
Charles A. Gargano, Commissioner
Empire State Development

Jo Anne W. Di Stefano, Alternate for
Erin M. Crotty, Commissioner
New York State Department of Environmental Conservation

Jacquelyn Jerry, Alternate for
Vincent A. DeIorio, Chairman
New York State Energy Research Development Authority

Hanon Dorfman, Ad Hoc Member

Vincent J. Martorana, Ad Hoc Member

CASE 00-F-0566 - Application of Brookhaven Energy Limited Partnership for a Certificate of Environmental Compatibility and Public Need to Construct and Operate a 580 Megawatt Electric Generating Facility in the Town of Brookhaven, Suffolk County.

ORDER DENYING PETITION FOR REHEARING AND GRANTING PETITION FOR CLARIFICATION

(Issued and Effective October 24, 2002)

BY THE BOARD:

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PETITION FOR REHEARING

On September 10, 2002, the Town of Brookhaven (the Town) submitted a petition for rehearing in the above case. On September 17, 2002, Brookhaven Energy Limited Partnership (Brookhaven Energy or the Applicant) filed its response and, on September 25, 2002, Staff of the Department of Public Service (DPS Staff) filed its response; no other party responded. Pursuant to 16 NYCRR §3.7(b), rehearing may be sought only on the grounds that we "committed an error of law or fact or that new circumstances warrant a different determination." In each instance, the Town has failed to make the requisite demonstration as discussed below.

I. Alternative Sites

The Town applies for rehearing of our decision with respect to reasonable alternatives, the Shoreham site, and the status of Brookhaven Energy as a private applicant.

A. Reasonable Alternatives

The Town requests rehearing of our decision, which held that the Applicant is a "private applicant" and therefore is not required to address in its application alternative sites that it does not own or otherwise control.[1] According to the Town, Brookhaven Energy's corporate parent had evaluated at least 14 alternative sites, including Shoreham, and selected the Yaphank site before initiating the Article X process, and that the Applicant acquired options on the Yaphank site immediately prior to commencing the Article X process. Our decision, the Town argues, allowed the Applicant to circumvent necessary public consideration of alternative sites that had actually been considered and rejected before the Article X process began.

The Town claims that our decision improperly affirms prior rulings that refused (1) to require Brookhaven Energy to

[1] Case 00-F-0566, Brookhaven Energy L.P., Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (issued August 14, 2002), (Opinion and Order), p. 50.

address its site selection process in its application, and (2) to allow the Town to inquire into the alternative site locations rejected by the Applicant in advance of filing its Article X application. According to the Town, such a comparison would show the inferiority of the Yaphank site and the superiority of other existing sites.

The Town submits that an evaluation of alternative sites is mandated by Public Service Law (PSL) §164(1)(b), which requires that an application contain:

> A description and evaluation of reasonable alternative locations to the proposed facility, if any, . . . (emphasis added).

Believing there are some alternative locations, the Town contends that "if any" term is applicable and it should have been allowed to address and question them. Since alternative sites are not discussed in the application, the Town maintains that Brookhaven Energy ignored and violated PSL §164(1)(b).

The Town contends that we invoke dictum in the Appellate Division's decision in CHV,[2] when we stated that a private applicant such as this one need not present information concerning alternative sites. In CHV, the Town points out that the intervening citizens were permitted to offer evidence on site alternatives, but they failed to make an adequate showing. In the instant case, the Town claims, it was not allowed to address the alternatives considered prior to the Article X filing.

Finally, the Town observes that our rules themselves are permissive, that examination of site alternatives "may" be limited to parcels owned or under the control of an applicant, which does not prohibit evaluation of site alternatives, and does not deny intervenors the right to examine an applicant about its site selection process. The Town suggests, for

[2] Citizens for the Hudson Valley v. New York State Board, 281 A.D.2d 89, 97 (3d Dept. 2001), (CHV).

example, that 16 NYCRR §1001.2(d) is derived from the holding in Horn v. IBM.[3] In Horn, the court addressed the sufficiency under the State Environmental Quality Review Act (SEQRA) of discussion of alternative sites in an environmental impact statement for a proposed office park development. The court said that it is appropriate to take into account whether the project sponsor has, or does not have, the power of eminent domain. The Town notes that the court did not ban any consideration of alternative sites, but rather invoked a rule of reason. It asserts, moreover, that the Horn decision holds that consideration of alternative sites even with a private developer, may be necessary and appropriate in some circumstances. After Horn was decided, the Town points out that the Department of Environmental Conservation (DEC) adopted a SEQRA regulation that private project sponsors may limit site alternatives, and 16 NYCRR §1001.2(d), adopted in 1997, was modeled on the SEQRA regulation.[4]

DPS Staff agrees that the alternative sites analysis of PSL §164(1)(b) is analogous to SEQRA, but DPS Staff states that the court in Horn, found that "it would be an illogical and unwarranted extension of SEQRA to require every private developer to address . . . the possible development of other sites which it has no control over, which might not be for sale, or which are not economically feasible."[5] Further, DPS Staff notes the Siting Board in Athens determined that the applicant would not be required to submit an analysis on alternative sites it does not own or have option to purchase.[6]

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[3] Horn v. IBM, 110 A.D. 2d 87 (2d Dept., 1985).

[4] See Memorandum Adopting Article X Regulations, Case 97-F-0809 (December 16, 1997).

[5] Horn v. IBM, 110 A.D. 2d 87, 95 (2d Dept. 1985).

[6] Case 97-F-1563, Application by Athens Generating Company, L.P., Order Concerning Interlocutory Appeals (issued January 28, 1999), p. 7.

DPS Staff argues that we ruled consistently with the Athens Siting Board because the fundamental basis for the decision on alternative sites rests on the availability of, or control over, the alternative site by an applicant. DPS Staff agrees with our determination that the availability of the Shoreham site as an alternative should have been demonstrated before intervenors would be allowed to submit evidence concerning its superiority to the proposed site.

Brookhaven Energy responds that the Town advances a number of arguments which were previously raised by the Town and properly considered and rejected by us. First, Brookhaven Energy states that the Town is rehashing the argument that the Applicant's corporate parent had in fact evaluated at least 14 alternative sites, including Shoreham, and selected the Yaphank site before initiating the Article X process. Yet, Brookhaven Energy asserts, it is undisputed that it has control only over the Yaphank site. The Applicant also faults the Town's failure to point to any statutory or legal authority requiring that an applicant present an alternative sites analysis in an Article X application simply because it conducted a preliminary investigation of several possible sites before obtaining control over the project site.

Brookhaven Energy also supports our conclusion that the words "if any" in PSL §164(1)(b) refer to "reasonable alternatives" that are actually available to an applicant, and cannot be read to require consideration of alternatives over which an applicant has no control.[7] The Town, Brookhaven Energy claims, identifies no legal authority to contradict our conclusion.

Brookhaven Energy disagrees with the Town's assertion that we employed dictum in CHV. It is not dictum, according to Brookhaven Energy, because the court had to expressly find that the Siting Board in that case rationally determined that the applicant was a "private applicant" to hold that it was not required to describe and evaluate alternative sites in its

[7] Opinion and Order, p. 50.

Article X application.[8] Brookhaven Energy concedes that the intervenors in the Athens case were allowed to present evidence on alternative sites, but Brookhaven Energy notes there is a stark distinction between the Athens proceeding and this proceeding, which the Town continues to ignore, i.e., prior to the evidentiary hearing in this case, the owner of the Shoreham site had already unequivocally stated the site was not available for sale or lease to Brookhaven Energy.[9] The discussion of the Shoreham site is set forth more completely infra.

Lastly, with respect to the Town's argument that examination of site alternatives are not absolutely prohibited, Brookhaven Energy notes, the fact that the regulations use the permissive language "may" does not logically lead to a conclusion that sites not under the control of the Applicant must be considered.

Three sections of PSL Article X deal with alternative sites, including the information to be included in an application (PSL §164(5)), the information to be considered at a hearing (PSL §167(4)), and the findings a board must be able to make with respect to an alternative site before it can certify a proposed facility (PSL §168(2)(e)).

In this case, the Applicant is a private applicant that lacks the power of eminent domain and it therefore did not have to include information on alternative sites that it did not own or otherwise have control over. This approach, codified in 16 NYCRR §1001.2(d)(2), is fully consistent with procedures that would apply in a review pursuant to SEQRA, and is fully

[8] CHV.

[9] LIPA Response to B-56.

consistent with the holdings of Horn.[10] This approach was reviewed in CHV, wherein the Court held that the Athens Siting Board rationally concluded that a private applicant, lacking the power of eminent domain, cannot be required to present information on alternative sites it does not own or otherwise control.[11]

After CHV, it would not be reasonable to interpret the "if any" language of PSL §164(1)(b) as requiring consideration of alternative sites that are not owned or otherwise subject to the Applicant's control. Such alternatives are not "reasonable" in these circumstances. Moreover, such an interpretation would imply that the extent of review of alternative sites under Article X would have to exceed that required by SEQRA. This contention is inconsistent with the express language of PSL §164(1)(b), which states that information to be provided by an applicant concerning alternatives shall be no more extensive than required under Article Eight of the Environmental Conservation Law.

Given that the application materials need not and do not discuss alternatives considered by the Applicant or its affiliates prior to the Article X filing, inquiry to such matters is neither relevant nor material.[12] Accordingly, the Town was properly barred from inquiring into or submitting evidence concerning such alternatives.

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[10] There is nothing in Horn to suggest that the facts and circumstances in this case would warrant review of alternate sites not owned or under the control of the Applicant. The only example the court gave of where such review might be reasonable is where two or more private entities are competing to obtain approval from a municipality for a particular type of facility, such as a shopping mall. There is no competing proposal to build a gas-fired combined cycle facility at Shoreham.

[11] Citizens for the Hudson Valley et al v. NYS Board on Electric Generation Siting and the Environment, 723 N.Y.S. 2d 532, 538 (App. Div. 3rd Dept.).

[12] PSL §167(1)(a).

While the Article X application in this instance need not discuss alternative sites, intervenors such as the Town nevertheless had an opportunity to develop the record on alternative sites that are available and greatly superior. The Town was afforded the opportunity by our prior order.[13] The Town never produced any evidence that an alternate site was available; indeed the record shows that the Shoreham site favored by the Town is not available.[14] Accordingly, there has been no circumvention of the review process, no interference with the ability of local parties to participate, and no adoption of a review process that is less comprehensive than one under SEQRA.

Turning to the argument that 16 NYCRR §1001.2(d)(2) employs permissive language and, thus, that a broader review of alternative sites could be required, we fail to see any benefit of such an inquiry unless it could actually lead to the use of such an alternative site. This is a reason why intervenors must be prepared to show that an alternative site is available before the benefits and detriments of such a site should be considered relative to those of the proposed site.

The Town argues that we were arbitrary and capricious in excluding its evidence on the Shoreham site because the Athens Siting Board allowed evidence to be admitted into the record on whether alternative sites were available and whether they were preferable to the proposed site. The Town's reliance on CHV for the proposition that its evidence on alternative sites had to be admitted is unavailing. In that case, the Appellate Division upheld the Athens Siting Board's determination that reasonable alternative sites are those that are both available and preferable.[15] Given that the Town has failed to show that the Shoreham site is available to the

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[13] Case 00-F-0566; Order Concerning Interlocutory Appeals (issued January 2, 2002)(January 2 Order).

[14] LIPA Response to B-56, supra.

[15] CHV, 281 A.D.2d, pp. 97-98.

Applicant, we adhere to the determination in our January 2 Order and in the Opinion and Order that evidence on the superiority of alternative sites need not be admitted into the record unless such alternative sites are first shown to be available to the Applicant.

Finally, the Town contends greater consideration of alternative sites should be required in a case where a waiver of local laws is proposed. This argument is improperly raised for the first time here.[16] This contention is also inconsistent with the express terms of PSL §167(4) and §168(2)(d), and it is, therefore, rejected.

In sum, we find that the Town has not demonstrated any error of fact or law or that new circumstances warrant a different determination. Consequently, the Town's request for a rehearing on this issued is denied.

B. Shoreham Site

The Town seeks rehearing of our decision that reaffirmed our January 2 Order. In our January 2 Order, we upheld the examiners' issues rulings that: Brookhaven Energy, as a private applicant, was not required to address alternatives sites; and the Town was properly precluded from introducing evidence regarding the Shoreham site. However, we then stated that if:

> The Town is hereafter able to show on a timely basis through an affidavit that the Shoreham site is indeed available for sale or lease to the [A]pplicant, the Town will then be permitted to proffer testimony on the factual issue of whether the Shoreham site would be superior to the proposed Yaphank site.[17]

We also required that any such presentation address the current lack of natural gas pipelines in the vicinity of the Shoreham site. In our Opinion and Order, we agreed with the

[16] 16 NYCRR 4.10(d)(2).

[17] January 2 Order, p. 6.

examiners that the Town subsequently failed to make the necessary showing.[18]

The Town claims that at the time it filed its Proposed Issues, October 2, 2001, it did not have an opportunity to make any showing that the Shoreham site was available or greatly superior. Next, the Town alleges that the Shoreham site has a source of gas, which the Town claims is a matter of record at the Public Service Commission. Furthermore, the Town maintains that in its Proposed Issues it requested (but was denied) the opportunity to cross examine and file direct testimony on the "environmental, technological and economic suitability of Shoreham" and on "the shortcomings of the Yaphank site." The Town now claims that the availability of gas is a component of Shoreham's "environmental, technological and economic suitability," as is the design of alternate cooling systems, noise, and other matters. The Town asserts it should have been allowed to examine the Applicant's witnesses on all parts of their application and their filed direct testimony that relate to site selection and that shed light on the preferability of the Shoreham site and the inferiority of the Yaphank site.

Lastly, the Town argues that our refusal to allow such examination is not excused by our power to regulate the hearings under State Administrative Procedures Act (SAPA) §306(1), as we used that power irrationally and arbitrarily to exclude probative evidence of a critical issue in the application - the location of the plant.

Brookhaven Energy states that the Town was required to show that the Shoreham site was available and (not "or") greatly superior. Thus, Brookhaven Energy reasons any dispute about whether the Town had been given a reasonable opportunity to show that the Shoreham site was greatly superior became moot as soon as it became known that the site was not available.

Next, Brookhaven Energy challenges the Town's claim that the Shoreham site has a source of natural gas; rather, the Applicant states it has only the possibility of a natural gas

[18] Opinion and Order, pp. 39-50.

supply at some unknown point in the future. Moreover, Brookhaven Energy points out that the Town ignores the fact that, in addition to making a threshold showing with respect to the availability of natural gas at the Shoreham site, the Town was required to produce: (1) an affadavit, (2) in a timely manner, (3) demonstrating that the Shoreham site is available for sale or lease, (4) to Brookhaven Energy. Brookhaven Energy notes that the Town failed to satisfy any of these requirements.

Brookhaven Energy also urges rejection of the Town's claim that its Proposed Issues submitted October 2, 2001 justifies rehearing, noting that the Town's right to pursue these issues became moot once the owner stated that the Shoreham site was not available.

While the Town may assert that its initial filing properly raised natural gas supply as an issue, the Applicant continues, the Issues Ruling set forth a specific list of issues that would be considered concerning whether the proposed facility is in the "public interest" and expressly rejected the issue of natural gas supply.[19] Since the Town never appealed that aspect of the Issues Ruling, Brookhaven Energy asserts, the Town has waived its right to do so at this late stage of the proceeding.

According to Brookhaven Energy, the Town never properly raised natural gas supply as an issue as a single reference to "environmental, technological and economic suitability" of the Shoreham site and "shortcomings of the Yaphank site" in the Town's 32-page Proposed Issues document, without any specific mention or discussion of natural gas supply in relation to the Shoreham site, is entirely too vague to put the examiners on notice that the Town sought to explore the natural gas supply issue at the hearing. This is especially significant, Brookhaven Energy points out, when another potential party, PPL Global, expressly raised natural gas supply

[19] Case 00-F-0566, Ruling on Party Status, Issues, Intervenor Funding and Schedule (issued October 25, 2001), (Issues Ruling), p. 16.

for the project site as an issue, and the examiners did not identify that issue for adjudication.

Finally, Brookhaven Energy notes that the Town admitted in its Brief on Exceptions that the focus of its intended cross-examination of the Applicant's witnesses was the availability of natural gas supply for the Shoreham site. It asserts that this would have been improper because the Town had an affirmative duty to demonstrate the Shoreham site's availability prior to the hearing, pursuant to the January 2 Order. Accordingly, the Applicant concludes, this was not something to be elicited through cross-examination at a hearing.

We disagree with the Applicant's contention that the Town waived its legal right to raise concerns about the Issues Ruling at this stage of the proceeding. The Applicant's claim is inconsistent with the express terms of the applicable rule, stating that a party need not file an interlocutory appeal to preserve its right to object to a ruling in its brief.[20] Moreover, parties must raise their objections on exceptions or they are waived.[21]

As discussed in the previous section of this Order, however, the Town of Brookhaven was offered an opportunity to show that the Shoreham site was available and a greatly superior site to the one proposed in the PSL Article X application. The Town's various arguments that it was denied a right to develop a record on this alternative site all completely ignore the fact that LIPA, the owner of the Shoreham site and which opposed this project during the hearings, unequivocally stated that its site is not available for sale or lease to the Applicant.[22]

In the absence of information suggesting the Shoreham site is available, no useful purpose is served by developing a record on the benefits and detriments of that site, including whether it has or may have access to natural gas. In these

[20] 16 NYCRR §4.7(d).

[21] 16 NYCRR §4.10(d).

[22] LIPA Response to B-56, supra.

circumstances, information about the benefits and detriments is neither relevant nor material, and is properly excluded.[23] Accordingly, denying an opportunity to cross-examine on the benefits and detriments is not a denial of due process and it is completely consistent with SAPA §306(1). Indeed, the right of cross-examination afforded all parties under §306(1) cannot be reasonably read as permitting inquiry into irrelevant matters. In sum, the petition for rehearing is denied on this point as well because the Town has not demonstrated any error of fact or law or any new circumstances that warrant a different determination.

C. Brookhaven Energy's Private Applicant Status

The Town seeks rehearing of our two prior decisions finding that Brookhaven Energy is a private applicant as defined in 16 NYCRR §1000.2(o), which under our rule 16 NYCRR §1001.2(d)(2) limits discussion of site alternatives to parcels owned by, or under option to, an applicant.[24]

The Town claims that Brookhaven Energy is not a "private applicant," but rather an "electric corporation" within the meaning of the Transportation Corporation Law (TCL) §10 and, therefore, is vested with the power of eminent domain contained in TCL §11(3-a). Consequently, the Town argues that Brookhaven Energy's failure to evaluate alternative sites violates PSL §164(1)(b), which the Town contends would preclude us from finding that Brookhaven Energy qualifies for certification pursuant to Article X.

In our January 2 Order, we concluded that TCL §10 requires that an entity be "a corporation and be engaged in the business of supplying electricity directly to utility customers before it can be considered an 'electric corporation' with the

[23] In this regard, we were aware at the time of our decision that FERC had approved the so-called Islander East Pipeline Company facility, which would supply gas to Shoreham and Yaphank. Brookhaven Energy, Opinion and Order, pp. 40-41.

[24] Opinion and Order, pp. 44-47.

power of eminent domain . . . ."[25] The Town submits that we added significant language to TCL §10, as that section says nothing about supplying electricity directly to utility customers. Instead, the Town observes, TCL §10 states that an "electric corporation is a corporation organized to manufacture, to produce or otherwise acquire, and to supply for public use electricity . . ." Alleging that electricity generated by the project will be supplied for public use, the Town concludes that Brookhaven Energy is an electric corporation.

Furthermore, the Town reasons that even though Brookhaven Energy is a Delaware Limited Partnership, it is an "electric corporation" under the PSL, and properly should be deemed to be a "corporation" under the TCL as well. According to the Town, the Applicant should not be allowed to emasculate Article X by selecting a form of organization in order to evade public evaluation of the environmental impacts of a selected site as compared to alternative sites. The Town also observes that the Public Service Commission actually regulates the Applicant as an electric corporation.

The Town dismisses as improper our reliance on Simonelli v. Adams Bakery Co., 286 A.D.2d 805, 730 N.Y.S.2d 358 (3d Dept. 2001), which stands for the legal proposition that the use of a term under one statutory scheme (such as electric corporation in PSL §2(11)) is not binding and not even indicative as to the meaning of the same term under another statutory scheme (such as an "electric corporation" under TCL §10).

Brookhaven Energy responds that TCL §10 defines "electric corporation" as a "corporation organized to manufacture, or produce or otherwise acquire, and to supply for public use electricity . . ." The record demonstrates, Brookhaven Energy asserts, that it has not been "organized . . . to supply for public use electricity." To the contrary, the Applicant points out the proposed facility will operate as a merchant plant generating electricity for sale into the

[25] January 2 Order, p. 5.

wholesale electric market, and the fact that the public ultimately might use electricity generated by the project is irrelevant.

Moreover, Brookhaven Energy contends that the reasoning of Simonelli is applicable. Brookhaven Energy explains that an examination of the PSL section relied upon by the Town for comparison to the TCL supports this conclusion: PSL §2(13) basically defines "electric corporation" as any entity owning an "electric plant" with certain exceptions not relevant here. PSL §2(12) provides, in the relevant part:

> The term "electric plant," when used in this chapter, includes all real estate, fixtures and personal property operated, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power…

As quoted earlier, the TCL uses the conjunctive ("and") rather than the disjunctive ("or") found in the PSL. This difference, Brookhaven Energy continues, coupled with the above referenced language demonstrates that the definition of "electric plant" in PSL §2(12) applies only to the PSL itself ("when used in this chapter") and not to any other New York Law.[26] Moreover, Brookhaven Energy continues, the differences compel the conclusion that a generator can in fact be an electric corporation subject to Public Service Commission jurisdiction (since all it needs to do is own generation), but not an "electric corporation" under the TCL (since it owns no facilities for the delivery of its electricity to consumers as that statute requires.)

DPS Staff agrees with Brookhaven Energy that it is not an entity with the power of eminent domain. According to DPS Staff, the issue of whether Article X applicants should be considered "electric corporations" under the TCL was first addressed by the Siting Board in Athens where it determined that

[26] The term electric plant is repeated in the definition of "electric corporation" in PSL §2(13).

Athens was not an "electric corporation" because it was not offering an essential service, in that it was not required to construct, operate and maintain electric service for the benefit of the public.[27]

DPS Staff points out that not only will Brookhaven Energy provide electricity to the wholesale electric market and not to customers directly but also it is not mandated to "construct, operate and maintain" an electric generation facility for the benefit of the public.

In our January 2 Order, we set forth our discussion of the Applicant's business structure, and our interpretation of TCL §10 requirements. We concluded that Brookhaven Energy is not an "electric corporation" under TCL §10. Even though the Applicant will be involved in the business of generating electricity (producing it), it will not be engaged in the business of supplying electricity (i.e., delivering it to electricity customers). The Transportation Corporations Law requires that an electric corporation provide both of these services to have the power of eminent domain. We also observed that the Appellate Division essentially held in favor of this approach when it held that the Siting Board had rationally determined that the developer in Athens, also a private applicant, lacked the power of eminent domain.[28] This is why it is not reasonable to use the definition of an electric corporation in PSL §2(11) to determine if the Applicant is an electric corporation under TCL §10. Thus the principle from the Simonelli case, which supports differentiating terms in distinct statutory contexts, was properly applied in this instance.

The Town's petition for rehearing has presented no error of law or fact or new circumstance that warrants a different analysis. Therefore, its request for rehearing on this matter is denied and we reaffirm that this Applicant was

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[27] Case 97-F-1563, Application of Athens Generating Company, L.P., Recommended Decision (issued September 3, 1999), p. 285.

[28] CHV, supra, 723 N.Y.S.2d 532, 538.

not and is not required to present evidence concerning alternative sites that it does not own or otherwise control.

II. Local Laws

The Town seeks rehearing of our decision to waive certain local laws including a height limit, setback provisions, special permit, and noise limitations. At the outset, we note that we only granted two waivers - one related to a height limit, the other to a restriction on nighttime construction.[29] As the Town did not take exception to the examiners' recommendation that we grant the latter waiver, our rules provide that it may not seek a different resolution of that issue on rehearing.[30] Consequently, the waiver of the height limit is the only one considered here.

A. The Town's Plan and Code

The Town agrees with us that deference should be given to the Town's Comprehensive Plan (Plan) and zoning ordinance, but it believes that we have misinterpreted the Plan. The Town claims that we approved the Recommended Decision (at pages 27 through 28), which states the project would be consistent with the Plan and Longwood Mini-Master Plan, "which explicitly states that industrial development in the Longwood School District should be located on the south side of the [Long Island Expressway (LIE)]." The Town asserts that the Plan makes no such statement; but rather states only that in order to channel industries away from the Special Groundwater Protection Area

[29] Opinion and Order, pp. 18-19. The Applicant requested a waiver of the latter to carry out construction, drilling, earth moving, excavating or demolition work between 6:00 p.m. and 7:00 a.m. on weekdays, on weekends (typically Saturday) and during legal holidays. To a great extent, this is so it could employ multiple shifts on weekdays and to allow it to complete concrete pours and steam blows that must proceed on a continuous basis. This waiver was allowed subject to the terms of Certificate condition VII(B).

[30] 16 NYCRR §4.10(d)(2).

(SPGA) north of the LIE, "other parcels south of the LIE, close to the [school district] boundary should be designated as future site (sic) for industrial development."[31]

The Town argues that this statement does not support a conclusion that the Plan anticipates and approves construction of a major electric generating plant in Yaphank. According to the Town, the Plan merely urges that industries should be channeled away from the SGPA, but within the school district. In fact, the Town observes that the lands south of the LIE are zoned for light industry. Consequently, it concludes there is consistency between the Plan and the zoning code in relation to light industry development south of the LIE. However, the Town emphasizes that we have not shown that the Plan would support the project, which it characterizes as a mammoth "heavy industry" facility to be built in the light industry L-1 zone at Yaphank. Inasmuch as the Town's witness, an expert planner whose testimony the Town alleges was uncontested, stated that the Plan "absolutely does not endorse or support heavy industrial usage . . .,"[32] the Town concludes that the only rational interpretation of the record is that the project is not consistent with the Town's Plan.

With respect to the portion of the Town Code allowing electric generating facilities in the L-1 light industry zone subject to issuance of a special permit, the Town explains that all electric generating facilities are not created equal, i.e., they vary in size and impact. According to the Town, our "one-size fits all" assumption in finding that the project satisfied the criteria for special permit approval, with the exception of the building height limit, conveniently overlooks the reality that the Town Code, while allowing some generating

[31] The Application at §10.3.4.1.

[32] Tr. 1708.

plants in the L-1 zone by special permit, was intended to exclude others.[33]

Brookhaven Energy asserts that the Town misstates the record given that the Opinion and Order expressly states that "Comprehensive Plan considered industrial development south of the LIE," which is fully consistent with the language the Town quotes from the Plan.[34] In addition, Brookhaven Energy argues the Town's assertion that the "Plan merely urges that industries should be channeled away from the SGPA, but within the school district" is irrelevant because, irrespective of the reason, the Plan as well as the Longwood Mini-Master Plan state that the area in which the project site is located is appropriate for "industrial development."[35] Finally, the Applicant notes that the Town's Zoning ordinance was amended in 2000 to allow for electric generation facilities in a light industrial district.

We do not agree with the Town that we have misinterpreted the Plan, and, insofar as the Town claims the examiners are inconsistent with our decisions, we note that we only adopted those portions of the Recommended Decision that are consistent with our Opinion and Order.[36] We also agree with Brookhaven Energy that the Town Code expressly allows "electric generating facilities" in the L-1 District subject to certain criteria. With one exception, the Project complies with those

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[33] The Town also uses this argument to support its request for rehearing on its motion to strike the testimony related to this subject sponsored by Mr. Solzhenitsyn (Tr. 1692-1695) and to receive into evidence its offer of proof sponsored by Dr. Koppelman (Tr. 203-216 and 1717-1721) related to the Shoreham site. As set forth infra, we reject this argument and therefore this request as well. Moreover, the examiners properly agreed that Mr. Solzhenitsyn's qualifications on this topic go to the weight to be accorded his testimony, while Dr. Koppelman's testimony about an unavailable Shoreham site is irrelevant and was properly stricken.

[34] Opinion and Order, p. 17.

[35] Exh. 1, Vol. 1 at 10-56.

[36] Opinion and Order, p. 84.

criteria. The exception is the height limit, which is further discussed below. The testimony of the Town's planner ignores this basic fact and, thus, is not persuasive. In sum, we conclude that the Town has failed to identify any error of law or fact that warrants rehearing.

B. Height Limit

In our Opinion and Order, we waived the Town's building height limit because it would be unreasonably restrictive in that it is not possible to construct the generator buildings, cooling towers, associated switchyard and electrical transmission towers consistent with good engineering practices beneath the 50-foot height limit.[37]

According to the Town, we erroneously waived the height limit because we failed to weigh the reasonableness of the restrictive code provision as applied to the project at Yaphank in relation to siting the proposed facility at alternative sites such as Shoreham, and failed to consider the possibility that the application should be denied outright, as an alternative to waiving the code provisions.

Article X allows us to waive a local law if we find that "as applied to the proposed facility" it is unreasonably restrictive in view of existing technology or the needs of or costs to ratepayers.[38] We adhere to the discussion in our Opinion and Order that application of the height limits in the zoning ordinance would be unreasonably restrictive in view of available technology, which requires buildings and structures over fifty feet tall to generate and deliver electricity to the power grid. Again, power plants are an allowed use in the light industrial zone, in which the proposed facility will be situated. For this reason, and given the absence of any alternative site owned or controlled by the Applicant, we need not consider the impacts of the project at a different location

[37] Opinion and Order, p. 18.

[38] PSL §168(2)(d).

or in the absence of its construction in deciding this issue. The Town's request for a rehearing is denied on this point.

C. Constitutionally of PSL §168(2)(d)

In our decision, we rejected the Town's argument that PSL §168(2)(d), which grants us the authority to waive local laws if specified criteria are met, is unconstitutional because it did not comply with the double-enactment requirements of Article IX, Section 2(b)(1) of the New York Constitution.[39] That conclusion rests in large part on Siting Board decision in Athens,[40] in which it was concluded and that PSL Article X, and in particular PSL §168(2)(d), are constitutional because the terms apply generally with respect to any and all local laws or regulations. We also explained that the Appellate Division had upheld the Athens Siting Board's determination, rejecting arguments that PSL §168(2)(d) was unconstitutional.[41]

In its petition for rehearing, the Town suggests that Athens is distinguishable inasmuch as we, over the Town's objection, have expressly "refused to apply" provisions of the Town Code, referring to our waiver of the height restriction. Moreover, as applied to the facts of this case, the Town claims that our refusal contravenes Article IX, §2(b) of the State Constitution, and has "impaired" and "diminished" the Town's zoning power and the power granted by §10(1) of the Statute of Local Governments. Claiming that this latter diminution and impairment is not excluded or reserved by §11 of the Statute of

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[39] Opinion and Order, pp. 13-14. That conclusion relied, in part, up on the Court of Appeals decision in which it was determined that a general law, applicable to all municipalities, does not warrant a two-legislative session approval that would be required to amend the statute of local governments, Wambat Realty Corp. v. State of New York, 41 N.Y.2d 490, 498 (1977).

[40] Case 97-F-1563, Application by Athens Generating Company, L.P., Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (issued June 15, 2000).

[41] CHV.

Local Governments, including any law relating to a matter other than the property, affairs or government of local affairs [i.e., a general law], the Town seeks a rehearing on our decision to waive the Town's height restriction.

The Town concedes that PSL Article X overall may be a "general law," but our granting the waiver under PSL §168(2) directly relates to the Town's affairs, and our restraint on the Town's power is specific, not general. Therefore, the Town reasons, our waiver of the code provisions is not excluded pursuant to §11 of the Statute of Local Governments.

Brookhaven Energy replies that the Town's claimed distinction between this case and Athens does not exist because the Athens Siting Board also "refused to apply" certain local provisions.[42] Brookhaven Energy contends, moreover, that the Town's reasoning is circular in that the Town acknowledges that PSL Article X as a whole may be a general law, but claims that PSL §168(d)(2) itself directly relates to the Town's affairs and is therefore specific, not general.

As a threshold matter, to the extent that the Town repeats the arguments it raised on exceptions with respect to home rule, its arguments are denied for the reasons stated in the Certificate. We find that the Town has not distinguished Athens from the instant case because in both cases local laws were waived by the Siting Board pursuant to criteria in a general law expressly permitting such waivers throughout New York. We note that the Third Department in CHV pointed out:

> The test of whether a statute addresses a matter of State-wide concern cannot be determined through subjective analysis on a case-by-case basis. To the contrary, a statute qualifies as a "general law" if it "in terms and in effect applies alike . . . to all cities, all towns, or

[42] Case 97-F-1563, Athens Generating Co., L.P., Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (issued June 15, 2000), pp. 87-88 (granting waivers from a use restriction to allow construction of a pump house, a 50 foot setback requirement, a 35-foot height limitation, restrictions on the construction of the project's gas, electric and water supply interconnects.)

> all villages. [Citations omitted] Consistent with that view, comprehensive regulatory schemes relating to the siting of public utilities have been found to qualify as a 'general law' preempting local zoning ordinances."[43]

As PSL Article X is a general law duly enacted under N.Y. Constitution Article IX, Section 2(b)(2), the Town's contention, that PSL Article X has diminished its powers under the Statute of Local Governments is governed by Article IX, Section 2(b)(1), is not pertinent.[44] Again, the Town has the home rule powers granted by the Legislature, which powers it may exercise to the extent that the Legislature has not overrided them by general law, and the Legislature did so override those powers in enacting PSL Article X. Thus, we find that the Town has not demonstrated any error of fact or law and we deny the request for rehearing on this constitutional question.

III. Joint Stipulations

The Town petitions for rehearing with respect to the Joint Stipulations.[45] In general, the Town contends that the Joint Stipulations represent a prima facie case for Brookhaven Energy, and reflect the opinions and conclusions of the signatory parties. The Town argues that the Joint Stipulations do not include the "whole record." According to the Town, the Joint Stipulations have no evidentiary weight, and therefore, cannot serve as the basis for any of the findings required by PSL §168(2).

The Town states further that the statutory determinations at pages 82-84 of the Opinion and Order are defective because they merely restate the wording in the findings required by PSL §168(2). The Town cites case law to

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[43] CHV, 281 A.D.2d at 95.

[44] The same conclusion applies if the Town were basing its arguments on the portion of N.Y. Const. Article IX, §2(b)(2) following the words "only by general law."

[45] Town's Petition for Rehearing, pp. 16-19.

support its argument that such a practice is inappropriate.[46] Believing our Opinion and Order lacks specific findings of fact with detailed record citations and analysis, the Town concludes that the Opinion and Order does not meet the standard outlined at PSL §170(1).

Referring to pages 9-10 of the Opinion and Order, the Town objects, in particular, to the assertion presented in the Joint Stipulations that the site is surrounded by infrastructure.[47] In addition, the Town contends that the Opinion and Order incorrectly concludes that the project would comply with all regulatory requirements. Rather, the Town asserts that the Opinion and Order overrides Town Code requirements on the grounds that such requirements are "unreasonably restrictive."

In its response,[48] Brookhaven Energy argues that the Town did not preserve any objections about the Joint Stipulations. Brookhaven Energy continues that the Town's petition for rehearing identifies portions at the beginning, and the end of the Opinion and Order, but neglects to mention the intervening 80 pages of analysis and discussion. The Applicant points out that the Town cites no legal authority to support its argument that no weight should be assigned to the Joint Stipulations.

Citing the transcript,[49] Brookhaven Energy states that the Town's attorney suggested that the stipulations should be made part of the record. The Applicant asserts that the Town is being inconsistent about the significance of the Joint

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[46] Doremus v. Town of Oyster Bay, No. 2006/97, slip opinion at 14 (Sup. Ct. Kings Co., Jan 22, 1989), aff'd. 274 A.D.2d 390 (2d Dept. 200); Montauk Improvement, Inc. v. Procaccino, 41 N.Y.2d 913 (1997); Regional Action Group v. Zagata, 245 A.D. 2d 798, (3d Dept. 1997).

[47] Town's Petition for Rehearing, p. 18.

[48] Brookhaven Energy Limited Partnership's Response to Town Petition for Rehearing, pp. 17-19.

[49] Tr. 314, lines 23-24.

Stipulations, which undermines the Town's criticisms of our reliance on them.

Brookhaven Energy maintains that the Joint Stipulations including their attachments and exhibits provide us with a sufficient record on which to base all necessary findings required by Article X. The Applicant explains further that we are not bound by the Joint Stipulations. In addition to the Joint Stipulations, Brookhaven Energy states that the Opinion and Order also relied upon the record developed during the adjudicatory hearing concerning the issues advanced by the Town and others.

We note that under cover letter dated January 30, 2002, the Applicant filed copies of the Joint Stipulations and attachments with the Secretary to the Siting Board, the examiners, and the parties to the adjudicatory hearing including the Town. Tab C to the Joint Stipulations is a Joint Exhibit List with items numbered 1-25. The items identified on the Joint Exhibit List include the application materials, responses to interrogatories, and draft environmental permits.

During the adjudicatory hearing on February 4, 2002, the attachments to the Joint Stipulations were marked for identification as Exhibits 1-25.[50] Before the hearing session adjourned for the day, the presiding examiner inquired whether anyone objected to the receipt of Exhibits 1-25, which previously had been marked for identification. There were no objections, and the presiding examiner received Exhibits 1-25 into evidence.[51] Therefore, the Town's claim that the Joint Stipulations have no weight as evidence is incorrect.

As explained in the Recommended Decision,[52] the Joint Stipulations contain 12 topic agreements that identify the

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[50] Tr. 255.

[51] Tr. 484-485. At the end of the February 4, 2002 hearing session, Exhibits 26-31 were also received into evidence without objection.

[52] Recommended Decision, pp. 4-5.

probable environmental impacts of the proposed facility. Each topic agreement contains stipulated facts and cross-references to the application and exhibits, which are part of the evidentiary record, that demonstrate the basis for the Signatories' agreements. Although the Town did not sign the Joint Stipulations, at no time during this proceeding did the Town specifically object to the topic agreements addressing air resources, soils/geology/seismology/tsunami occurrence, terrestrial ecology, and water resources. To the extent that the Town objected to the other topic agreements, an extensive adjudicatory hearing was held where the Town had an opportunity to examine the evidence proffered by the Applicant and the DPS Staff concerning the disputed topic areas, and to present evidence to rebut the Applicant's and the DPS Staff's presentations.[53]

In its petition for rehearing, the Town is inappropriately attempting to expand the scope of its objections related to the Joint Stipulations. Initially, the Town limited its objections to the Joint Stipulations to the extent that the Joint Stipulations were inconsistent with the Town's position concerning the topic agreements that addressed land use/local laws/decommissioning, noise, public interest, reasonable alternatives, traffic, and visual and cultural resources.[54] Those specific objections were addressed in the Opinion and Order, and herein to the extent that they are the subject of the Town's petition for rehearing. At this point in the proceeding, however, the Town cannot expand its objections about the Joint Stipulations to include the other topic agreements that initially had not been contested at the commencement of the

[53] The parties who actively participated in the adjudicatory hearing were the Town, LIPA, the Applicant and the DPS Staff. The appearances at the February 4, 2002 hearing session are noted in the transcript at pages 199-201.

[54] Town's Brief on Exceptions, p. 69.

hearing.[55] We deny the Town's petition for rehearing on the Joint Stipulations.

IV. Intervenor Funding

The Town seeks rehearing of our decision to deny reimbursements of counsel's fees. We noted that PSL §164(6)(a) authorizes disbursements "to defray expenses incurred by municipal and other local parties to the proceeding . . . for expert witness and consultant fees."[56] We further explained that Article X refers to legal advisors as "counsel" and does not authorize use of intervenor account funds to defray the costs of counsel.[57]

According to the Town, the standard under PSL §164(6)(b) for disbursement from the fund is that the expenditure should "contribute to an informed decision as to the appropriateness of the site and facility." Claiming that the Town's Article X attorney has unique experience and expertise with Article X and with power plant siting in New York, the Town believes it conforms to this standard. The Town reasons that the land use and development decisions are normally made by local governments, including towns, but the Legislature made an exception to the normal practice when it vested the Siting Board with authority to override local laws in major power plant siting cases. As a quid pro quo, the Town states, the Legislature provided for half of the intervenor fund as financial support for participation by local governments before the Siting Board, to assure compliance with local law.

The Town concludes that we do not have discretion to deny funding to it because its participation contributed to our making an informed decision. Accordingly, the Town seeks rehearing and reimbursement from the intervenor fund for the Town's Article X attorney's fees.

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[55] 16 NYCRR §4.10(d)(2).

[56] Opinion and Order, p. 51.

[57] Id.

The Town basic argument is that whether or not a municipality or other local party makes a contribution to an informed decision is the sole criteria for determining if intervenor funding is available. We previously determined, on two occasions, that "counsel" is the specific term used in the PSL to refer to attorneys. While the Town calls the distinction between "counsel" and "expert witnesses and consultants" "specious," it provides no good reason for ignoring the difference. As we previously determined in this case, allowing intervenor funding to be used for counsel fees is not consistent with the statute's intent to limit such funding to consultants and experts that contribute to the technical development of issues on the record.[58] The Town's argument that the Legislature dedicated half of the intervenor fund to municipalities makes no headway against the Legislature's intention that such funding be used for technical development of the record by consultants, not legal representation, which would quickly deplete the intervenor fund in degradation of that purpose. As the Town has not demonstrated any error of fact or law, its request for a rehearing is denied on this point.[59]

V. Approved Procurement Process

According to the Town, we incorrectly found that no party had objected to the examiners' recommended finding that the project has been selected pursuant to an approved procurement process.[60] The Town alleges that LIPA expressly excepted to the examiners' recommendation, contending that the

[58] January 2 Order, pp. 6-7.

[59] We note that of the nearly 40 bills currently pending to amend PSL Article X, only three would provide for a limited use of intervenor funds to pay for counsel. These include A. 715 and A. 11755, both of which would allow use of intervenor funds for attorney's fees, though the latter would prohibit such use for judicial review. S. 7596 would provide for use of up to 10% of all intervenor funds for legal fees.

[60] Opinion and Order, p. 9.

project will adversely affect competition.[61] The Town states we have neglected to rule on the question of whether the project has been selected pursuant to an approved procurement process.

Brookhaven Energy observes that inasmuch as the Town failed to argue this issue in its Brief on Exceptions, it failed to preserve this issue for consideration at this stage of the proceeding.[62] Brookhaven Energy also notes that no party opposed its motion for a declaratory ruling that the project has been selected pursuant to an approved procurement process.

The Town did not raise this issue at any point prior to now, including in its brief on exceptions. Accordingly, it may not raise it now.[63]

Brookhaven Energy submitted with its Article X application a motion for a declaratory ruling that the project has been selected pursuant to an approved procurement process in compliance with PSL §168(2)(a)(ii). No party, including the Town, objected to this motion, and we expressly concluded that the project has been selected pursuant to an approved procurement process.[64] Rather than support the Town, the fact that LIPA complained about the economic effects of the new facility on its generation portfolio, tends to support the conclusion that the facility will foster competition.[65] In addition, the section of LIPA's brief cited by the Town addresses the project's effect on competition, which LIPA

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[61] LIPA Brief on Exception, April 29, 2002, pp. 27-29.

[62] 16 NYCRR §4.10(d)(2).

[63] 16 NYCRR §4.10(d)(2). This rule was enforced recently in Institute of Legal Research v. Siting Board, 744 N.Y.S.2d 441 (App. Div., 2nd Dept.) and previously in CHV, supra.

[64] Opinion and Order, p. 50. Information supporting this conclusion may be found in the Application, Vol. I, pp. 1-2 through 1-6. See, also, Opinion and Order, pp. 78-80.

[65] The latest state energy plan was adopted in June 2002. It readopts the conclusions of the 1998 SEP about the benefits of competition in electricity markets, pp. 1-20.

contended would be adverse to and not in the "public interest."[66] The public interest standard is contained in a separate section, PSL §168(2)(e), not the section cited by the Town, and does not go to the threshold question of whether a proposed plant has been selected pursuant to an approved procurement process, i.e., a merchant plant proposing to sell its output into the State's electric grid. In any event, there has been no showing of destructive competition.

VI. Decommissioning Fund

The Town seeks rehearing with respect to our decision to establish a $4.5 million decommissioning fund instead of the $12 million requested by the Town. We rejected the Town's position because it had not justified employing a "reverse construction" approach to decommission the project when a less expensive alternative is available and because the $4.5 million allowance was supported by actual experience that demonstrates it is sufficient to cover anticipated decommissioning costs.[67]

The Town claims that the $4.5 million fund would inadequately protect it. According to the Town, an orderly demolition process would cost $12 million and that scrap value of plant components would not be adequate to cover major decommissioning costs.

Both of the Town's concerns were addressed in our Opinion and Order. There, we noted that Brookhaven Energy's studies demonstrated that the $4.5 million itself is sufficient to cover the cost of decommissioning even without any salvage or scrap value. In addition, we pointed out that there is a world-wide second-hand market for generating equipment and that it would be all but impossible for the Applicant to finance the Project without insurance coverage for catastrophic contingencies.[68]

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[66] LIPA's Brief on Exceptions, April 29, 2002, p. 27.

[67] Opinion and Order, p. 32.

[68] Opinion and Order, p. 31, relying on Tr. 640, 611, and 661. This evidence was unrebutted.

We also disagreed with the Town on the decommissioning method. We rejected the Town's approach to remove piece by piece the structures and agreed that, once the machinery is removed, the structures could simply be ripped down. No good reason has been offered to reconsider these issues and no issue of fact or law or change in circumstances has been raised. Consequently, this portion of the Town's request for rehearing is denied.

VII. Visual, Aesthetic, and Historic Sites

The Town requests rehearing of our conclusion that the project would minimize adverse visual impacts and not impair historical or cultural resources.[69] According to the Town, our conclusion overlooks the fact that the project's massive structures would be in plain view from the roads abutting the site. As a result, the Town argues, that over 10,000 persons who travel on Sills Road daily between the Long Island Railroad and the LIE, and over 64,000 motorists who daily pass by the site on the LIE would be distracted by the project's structures compared to the current setting.

According to the Town, the Applicant's mitigation is minimal, given the project's size compared to the area of the proposed site. The Town cites Lane Construction v. Cahill, 270 A.D.2d 609 (3d Dept. 2000) for the proposition that where a project's adverse impacts on the historical and scenic character of the community, including visual and other potential impacts, cannot be mitigated, the application for the project should be denied.

The Town asserts further that the Opinion and Order is unlawful because it does not compare the project's potential visual and aesthetic impacts at the Yaphank site with potential alternative sites. According to the Town, this omission "cuts the heart out of SEQRA and equivalent requirements of Article X."[70]

[69] Town's Petition for Rehearing, pp. 23-25.

[70] Town's Petition for Rehearing, pp. 24-25.

In its response, Brookhaven Energy notes that the Town's petition for rehearing concerning the potential visual impacts to cultural and historical resources fails to mention that the highways bordering, or near, the site are not scenic highways and do not otherwise have any recognized cultural or historical significance. From the Applicant's perspective, individuals traveling in vehicles along Sills Road and the LIE are passing through, or near, an industrial zoned area, and would have brief views of the project.

With respect to the Town's claim that the project would be out-of-character with the area, the Applicant points out that the area is zoned for industrial use. Brookhaven Energy argues that the Town's witnesses and evidence were discredited at the hearing. Accordingly, the Applicant supports our conclusion that potential visual impacts to cultural and historic sites would be minimized. In any event, the Applicant notes, such views of the project were taken into account when determining if the project's impacts are reasonably minimized.

With respect to pages 20 through 29 of the Opinion and Order, the Town argues in its petition for rehearing that the potential visual impacts of the project cannot be mitigated, and references the testimony of its experts to support its argument. For the reasons discussed in the Recommended Decision, the examiners found the Applicant's evidence more compelling than the Town's.[71] Given the Town's exceptions, we reviewed the record concerning this issue, and agreed with the examiners.[72]

The Town's arguments in its petition for rehearing are not persuasive. Specifically, we reject outright the suggestion

[71] Recommended Decision, pp. 20-27. Among other things, the Examiners concluded that significant weight should be accorded to the opinion of the Office of Parks, Recreation and Historic Preservation (Ex. 20), that the proposed facilities would not have adverse impacts on historic or archeological resources. They also concluded that visual impacts would be reasonably mitigated by maintenance of some existing vegetation and the proposed residential landscaping plan.

[72] Opinion and Order, pp. 20-29.

that drivers on the LIE or Sills Road will be perpetually distracted by the mass of the project, and disagree that the required mitigation is trivial. Unlike views of or from Scenic Areas of State-wide Significance or historic properties, highway views through breaks in the vegetative screen by drivers who are focused on traffic safety do not have the same level of significance.[73]

As discussed in our Opinion and Order, we do not read the Appellate Division decision in Lane Construction as requiring that projects be rejected where there will be visual impacts that cannot be mitigated. That case stands for the proposition that the reviewing court found an adequate evidentiary basis for the DEC Deputy Commissioner to reject a proposed mining project in the specific factual circumstances presented. As previously explained, this does not diminish our discretion in this case to determine whether this proposed electric generation facility reasonably minimizes adverse environmental impacts with respect to the interest of the state, aesthetics, and preservation of historic resources.

We deny that the Opinion and Order is unlawful to the extent it does not compare the project's potential visual and aesthetic impacts at the Yaphank site with those that might occur at alternative sites. We note that the Town does not provide a specific citation to either Article X or SEQRA or their implementing regulations to show that such a comparison is warranted. As discussed elsewhere in this Order, the scope of any alternative site analysis is limited to parcels owned by or otherwise under the control of the Applicant.[74] It is well established that the Town's preferred site at Shoreham is not available. For all of these reasons, the Town's request for rehearing is denied.

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[73] See Case 97-F-1563, Athens Generating Company, L.P., Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (June 15, 2000), pp. 51-52, 71-72.

[74] 16 NYCRR §1001.2(d)(2).

VIII. Noise

With respect to our findings concerning noise levels, the Town requests a rehearing because it claims we failed to consider the fact that noises that would emanate from the project would be "out of character" with the existing and planned light industry uses of the area.

Brookhaven Energy responds that the Town cannot seriously claim that noise generated by the project would be "out of character" with/ what is contemplated for the area when the Town Code expressly contemplates the development of electric generating facilities in the L-1 District.

In our Opinion and Order, we agreed with the examiners that the concerns raised by the Town with respect to noise should not preclude issuance of a Certificate.[75] Not only would the noise levels be below EPA guidelines and HUD regulations, but also would comply with the Town's Code. In addition, the Town's Zoning Code permits the construction and operation of generating facilities on the proposed site. Consequently, we deny the Town's request for a rehearing on this issue.

IX. Miscellaneous

The Town claims it is aggrieved by each and every part of our prior Opinion and Order.[76] The Town also states that it is incorporating into its petition by reference other documents prepared by it and dated October 2, 2001, March 12, 2002, and April 26, 2002.[77]

This Order evaluates only those matters properly raised, separately identified, and specifically explained and supported in the Town's petition for rehearing.[78]

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[75] Opinion and Order, p. 38.

[76] Petition, p. 1.

[77] Ibid., p. 2, n. 1.

[78] 16 NYCRR §§3.7(b), 4.10(d)(2), and 1000.1.

X. Conclusion

The proposed Brookhaven Energy electric facility has been the subject of a comprehensive and formal review since August 15, 2001 and the general outline of the proposal has been the subject of public scrutiny for a longer period.

During the process, public comments were submitted, evidence was submitted, witnesses were sworn and cross-examined, written pleadings were submitted, a recommended decision was issued, and further pleadings were entertained.

All of this information was scrutinized and evaluated carefully and thoroughly, to the extent that some of the arguments of the town were considered three or more times before we rendered our Opinion and Order.

The Town of Brookhaven is clearly dissatisfied with our decision, despite the numerous conditions and ameliorative measures that have been required to minimize the plant's overall impacts. We conclude that the Town is dissatisfied because it focuses entirely on local considerations and interests, and fails to weigh appropriately, as we must under PSL Article X, the overall interests of Long Island and the State of New York. These interests include: (1) ensuring electric generating capacity to meet peak demand levels during contingency periods, (2) encouraging the development of competitive electric markets, (3) ensuring reasonably priced electricity in retail markets, (4) encouraging development of new, cleaner, state-of-the-art generating facilities, and (5) accomplishing these goals while minimizing environmental impacts to the extent practicable. Notably, the Town does not dispute any of our findings with respect to these broader interests.

The Town's dissatisfaction with our decision does not establish in any manner that the Town's positions have not been thoroughly and fairly considered or that the conclusions we have reached are not well supported in the record.

In this context, having reviewed carefully the Petition for Rehearing of the Town of Brookhaven, and for the reasons discussed above, we find and determine that the Petition for Rehearing should be and is denied in all respects.

PETITION FOR CLARIFICATION

By petition dated August 29, 2002, Brookhaven Energy seeks clarification of our Opinion and Order and errata dated August 21, 2002 and, pending clarification, a stay of the time period in which it is required to accept the Article X Certificate.

Brookhaven Energy notes that page 10 of the Opinion and Order as corrected states:

> In the normal course of business, Brookhaven Energy expects to require certain permits and approvals under regulations issued by Suffolk County and its agencies, including, but not limited to, building permits, highway permits, sanitation permits, and permits related to fire prevention. The Joint Stipulation contains agreement among the parties that we should authorize Suffolk County and its agencies to issue the permits or approvals listed in Section 10.4 of the Applications.
>
> The request is reasonable, and no party opposes it. Accordingly, we authorize Suffolk County and its agencies to issue the various permits and approvals listed in Section 10.4 of the Application.

According to Brookhaven Energy, Section 10.4 of the application addresses all Suffolk County approvals and permits to which the project would be subject absent Article X, as well as all substantive Suffolk County requirements applicable to the project. However, Brookhaven Energy states that Section III (B) of the Land Use/Local Laws/Decommissioning Topic Agreement lists only five specific Suffolk County permits/approvals (one conditioned on whether a nearby sewer district is formed) that the Signatories requested Suffolk County and its agencies be authorized to issue. The five approvals/permits are:

1. County Sanitary Code Article 12 permit;

2. County Sewer Agency Formal Approval for sewer connection as soon as a sewer district is formed;

3. County Sanitary Code Article 6 permit, only if and as long as a sanitary-only septic system

is required because a sewer district will not yet have been formed;

4. County DPW Highway Permit (Traffic Division traffic signal alteration plan); and

5. County DPW Highway Permit (Traffic Division improvements, per Certificate Condition X).

The same list of five permits/approvals were then incorporated into the Signatories' Proposed Certificate Conditions at Condition VI (F), and also the final Certificate Conditions approved in the Opinion and Order.

Absent clarification, Brookhaven Energy fears that the Opinion and Order could be construed to authorize Suffolk County and its agencies to issue permits/approvals beyond those specifically requested. Therefore, Brookhaven Energy requests that we clarify the Opinion and Order by authorizing Suffolk County and its agencies to issue only the permits/approvals specifically listed in Condition VI (F) of the Certificate Conditions.

No party objects to this clarification; it appears reasonable and is granted.

Brookhaven Energy further requests that the time period in which it is required to accept the Certificate be stayed until after we rule on this petition. By letter dated September 10, 2002, the Secretary, Janet Hand Deixler, extended the date by which Brookhaven Energy must file its unconditional acceptance of the Certificate to within ten days of our issuance of a decision on its petition for clarification.

The Board on Electric Generation Siting and the Environment for Case 00-F-0566 orders:

1. For the reasons discussed above, the petition for rehearing filed by the Town of Brookhaven is denied in all respects and the petition for clarification filed by Brookhaven Energy Limited Partnership is granted.

2. This proceeding is continued.

By the New York State Board on
Electric Generation Siting and the
Environment for Case 00-F-0566

(SIGNED) JANET HAND DEIXLER
Secretary to the Board