Via FedEx

Honorable Janet Hand Deixler, Secretary
New York Board on Electric Generation Siting and the Environment
Three Empire State Plaza - 14th Floor
Albany, New York 12223-1350

Re: Case No. 00-F-0566: Brookhaven Energy Limited Partnership
Response to Town of Brookhaven Petition for Rehearing

Dear Secretary Deixler:

Enclosed please find an original and 25 copies of Brookhaven Energy Limited Partnership’s Response to the Town of Brookhaven’s Petition for Rehearing of the Siting Board’s Opinion and Order with respect to the above-referenced application. As the issues raised by the Town have been either waived or already considered and rejected by the Siting Board, the Applicant respectfully requests an expedited determination with respect to the Petition.

If you have any questions, please do not hesitate to contact me at this office.

Respectfully submitted,

[Signature]
Stephen L. Gordon

Enclosures

cc: Hon. Walter Moynihan
Hon. Daniel O’Connell
Active Party List
STATE OF NEW YORK
BOARD ON ELECTRIC GENERATION
SITING AND THE ENVIRONMENT

IN THE MATTER

-of the-


BROOKHAVEN ENERGY LIMITED PARTNERSHIP'S RESPONSE TO TOWN PETITION FOR REHEARING

Stephen L. Gordon, Esq.
Michael G. Murphy, Esq.
Beveridge & Diamond, P.C.
477 Madison Ave., 15th Floor
New York, New York 10022

George M. Pond, Esq.
Hiscock & Barclay, LLP
50 Beaver Street
Albany, NY 12207

September 17, 2002
TABLE OF CONTENTS

Introduction .................................................................................................................................1

Discussion .................................................................................................................................3

I. The Siting Board Properly Determined That The Town
Failed To Justify Consideration Of Alternative Sites
In This Facility Specific Proceeding .........................................................................................3

   A. Brookhaven Energy’s Pre-Application Investigation
      Into Possible Development Sites Does Not Provide Either
      A Factual Or Legal Basis For Rehearing On The Issue Of
      The Shoreham Site Where The Owner Has Unequivocally
      Stated That It Is Not Available To Brookhaven Energy ............3

   B. No Error Of Law Or Fact Occurred When The Siting Board
      Determined That Brookhaven Energy Is A Private Applicant
      Without The Power Of Eminent Domain ..................................9

II. The Siting Board’s Local Law Determination Complied
With The Mandate Of PSL § 168(2)(d) ................................................................................12

   A. The Siting Board Correctly Concluded That The
      Comprehensive Plan And Longwood Mini-Master
      Plan Both Allow Industrial Development At The Project Site .......12

   B. After Misstating The Number Of Waivers Needed For
      The Project, The Town Offers No Basis To Conclude
      That The Siting Board’s Determination To Grant A Waiver
      From The Town’s Building Height Limitation and Nighttime
      Construction Noise Limitation Constituted Either An
      Error Of Law Or Fact .........................................................................13

   C. The Siting Board Properly Rejected The Town’s
      Constitutional Argument .................................................................16

III The Town Waived Its Right To Object To The Joint Stipulations
And Failed To Identify An Error Of Law Or Fact Based
On The Siting Board’s Reliance On The Joint Stipulations
In Rendering Its Findings ........................................................................................................17

IV. The Siting Board’s Refusal To Grant Intervenor Funding
To Offset The Town's Counsel Fees Was Correct

V. The Town's Attempted Adoption Of An Issue Allegedly Advanced By LIPA Was Not Preserved By The Town And, In Any Event, Does Not Constitute An Error Of Law Or Fact

VI. The Siting Board's Conclusions With Respect To Decommissioning Is Fully Supported By The Record

VII. The Town's Petition Identifies No Error Of Law Or Fact With Respect To The Siting Board's Findings Concerning Visual Impacts To Cultural And Historical Resources

VIII. The Town Fails To Identify Any Error Of Law Or Fact With Respect To The Board's Determination Concerning Noise Impacts

Conclusion
INTRODUCTION


Rehearing is warranted only if it is shown that the Siting Board committed "an error of law or fact or that new circumstances warrant a different determination."1 The

1 16 NYCRR 3.7(b). A party that has not taken exception to the resolution of an issue may not seek a different resolution of that issue on rehearing. 16 NYCRR 4.10(d)(2).
Town does not assert that any new circumstances have arisen to warrant a different
determination. Further, a review of the Town’s Petition reveals that it raises arguments
that have been either waived or already fully considered and rejected (many several
times) by the Siting Board. No error of law or fact has occurred. Thus, the Petition must
be denied.

The Town claims that the Siting Board’s determinations “are illusory because
they merely regurgitate the findings requirements of Article X.” 2 This clearly is not
correct. Each finding in the Siting Board’s 85-page Order is supported by a detailed
discussion of legal precedent and relevant information from an extensive record, with
particular attention paid to areas that were in dispute at hearing. Moreover, the Siting
Board adopted, consistent with its Order, the Examiners’ comprehensive Recommended
Decision (“RD”). 3

The Town accuses the Siting Board of “refus[ing] to evaluate whether the people
of Brookhaven and Long Island would have a better quality of life if the Project were
built on a larger, more remote site . . .” 4 The Town attempts to convey the notion that
there is a great public outcry against the current location of the Project. Nothing could
be further from the truth. As documented in the Examiners’ RD and the transcript,
public opposition to the Project at the public statement hearing was virtually nonexistent.
Moreover, the Yaphank Taxpayers & Civic Association (a local Yaphank civic group
organized to address the concerns of the local community in relation to health, safety,

2 Town Pet. at 1.
3 Order at 84. See 16 NYCRR 4.9.
4 Town Pet. at 2. Elsewhere, the Town states “the Siting Board bears a heavy burden to analyze all
alternatives to overriding local law, because it vitiates the will of the people of Brookhaven . . .” Town
Pet. at 7.
welfare and quality of life) informed Secretary Deixler, by letter dated May 14, 2002, that the Applicant had addressed all of its concerns and that it had no objections to the Project. Completely ignoring the local community’s actual position, the Town resorts to misstatements of both law and fact to claim a miscarriage of justice. None of the Town’s arguments are even remotely persuasive.

As the Town’s failure to present a legitimate argument casting doubt on the validity of the Order is readily apparent, Brookhaven Energy respectfully requests that the Siting Board act as expeditiously as possible to reject the Petition.

DISCUSSION

I. THE SITING BOARD PROPERLY DETERMINED THAT THE TOWN FAILED TO JUSTIFY CONSIDERATION OF ALTERNATIVE SITES IN THIS FACILITY SPECIFIC PROCEEDING

A. Brookhaven Energy’s Pre-Application Investigation Into Possible Development Sites Does Not Provide Either A Factual Or Legal Basis For Rehearing On The Issue Of The Shoreham Site Where The Owner Has Unequivocally Stated That It Is Not Available To Brookhaven Energy

The Town requests rehearing because, it asserts, Article X mandates consideration of alternative sites. The Town advances a number of bases in support of its assertion, all of which have been raised before by the Town and properly considered and rejected by the Siting Board. What the Town continues to ignore, as if it is not even relevant, is the undisputed fact that the owner of the Shoreham site has stated in the most unequivocal terms that Shoreham “or any portion thereof are not currently available for sale or lease to [Brookhaven Energy].”\(^5\) None of the Town arguments even purports to

\(^5\) Order at 41 (citing Long Island Power Authority (“LIPA”) response to B-56).
overcome this fatal flaw. The Shoreham site is not available. The Siting Board’s decision not to allow consideration of Shoreham is justified on this ground alone.

Rehashing an old argument, the Town first notes “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 it is undisputed that the Applicant only has control over the Project site. The Town points to no statutory or legal authority that supports the notion that Brookhaven Energy was required to 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. Such an investigation may make good business sense, but it is completely irrelevant to what Article X requires.

The Town contests that the “Board invokes the dictum in the Appellate Division’s decision in Citizens for the Hudson Valley,” stating that a private applicant need not present alternative sites.” This was not dictum, as the Town asserts, because the court had to expressly find that the Athens Siting Board rationally determined that the applicant was a “private applicant” to hold that it was not required to describe and evaluate alternative sites in its Article X application. To the contrary, the Third

---

6 Town Pet. at 3. The Town also states that “it is a matter of public record that the Applicant, formed as a Delaware limited partnership, was registered to do business in New York, and acquired options on the Yaphank Site immediately prior to commencing the Article X process,” id. at 3-4, but the relevance of this statement to the Town’s alternative sites argument is never clearly explained.


8 Town Pet. at 4.

9 CHV, 281 A.D.2d at 97, 723 N.Y.S.2d at 537-38.
Department’s subsequent discussion of the petitioner’s evidence on alternative sites in that case was *dictum* precisely because the developer was a private applicant.

The Town next claims: “The Board’s decision, at page 50, concludes without support that PSL § 164(b)(1) cannot be read to require consideration of alternatives over which the applicant has no control, but only as to ‘reasonable alternatives’ which are actually available.” It is difficult to see how the Town can justifiably claim that the Siting Board reached this conclusion “without support” after reviewing the text on page 50 and the preceding pages, the adopted RD’s discussion of the same issue, and the Siting Board’s January 2, 2002 Interlocutory Appeal Order. The Siting Board considered and rejected the Town’s argument based on a plain reading of Article X (specifically PSL §164(1)(b), which speaks of “reasonable” alternative locations, “if any”). The Siting Board also correctly noted that its reading of Article X was consistent with what would be required under the State Environmental Quality Review Act (“SEQRA”) (even though SEQRA is not applicable to Article X projects). The Siting Board logically concluded that the “words ‘if any’ in PSL § 164(1)(b) refer to ‘reasonable alternatives’ that are actually available to the applicant, and cannot be read to require consideration of alternatives over which an applicant has no control.” The Town identifies no legal authority to contradict the Siting Board’s conclusion.

The Town next argues that the Siting Board’s reliance on “Board and DEC regulations that say that ‘site alternatives may be limited to parcels owned by, or under

---

10 Town Pet. at 5.
11 Order at 50 (emphasis added). The Town seems to be under the misapprehension that as long as another site exists it must be considered even if it is not available. However, “availability” is a minimal threshold to consideration of another site as an “alternative” to the Project site.
option to, a private applicant" was erroneous because "these rules do not absolutely prohibit developing the record on site alternatives."\footnote{Town Pet. at 5 (emphasis theirs)(citations omitted).} The Town then points to the fact that intervenors in \textit{Athens} were allowed to present evidence on alternative sites.\footnote{As noted earlier, the Appellate Division's discussion of the intervenor's presentation of evidence on alternative sites was \textit{dictum}. The Town's discussion of \textit{Horn v. IBM}, 110 A.D.2d 87, 493 N.Y.S.2d 94 (2d Dept. 1985) is similarly off the mark. The Town first notes that \textit{Horn} did not ban any consideration of alternative sites, and then goes on to assert that \textit{Horn} requires that the "rule of reason" be applied when considering alternatives sites. \textit{Town Pet. at 6-7}. Even if true, this assertion does not explain why the Board's decision not to allow consideration of the Shoreham site was unreasonable when the owner stated that it was not available. Nothing in the \textit{Horn} decision suggests that the Siting Board did not have the discretion to make such a logical decision.} 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 \textit{must} be considered. Moreover, there is a stark distinction between the \textit{Athens} proceeding and this proceeding that the Town continues to ignore. 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.\footnote{Order at 41 (citing LIPA response to B-56). What is striking about LIPA's response to interrogatory B-56 is the fact that LIPA opposed the Project on other grounds at hearing. LIPA therefore had no incentive whatsoever to make the Applicant's life any easier on the issue of alternative sites.}

The Town attempts to sidestep this dilemma by asserting: "The Town was not allowed to question the Applicant's witnesses about its efforts, if any, to obtain control of a Shoreham site. Instead the Board shifted the burden to the Town to obtain an affidavit establishing that the site owner would make the site available."\footnote{Town Pet. at 5.} This assertion misses the point. The issue of who had the burden of presenting evidence relating to the availability of the Shoreham site became moot as soon as the owner of the site stated
that it was not available. At that point, any attempt to encumber the record with the issue of the Shoreham site became frivolous.

The Town next claims that its cross-examination and direct evidence on the suitability and availability of the Shoreham site was “unlawfully excluded.” In support, the Town reiterates an old argument from its Brief on Exceptions that it had shown that “Shoreham has a source of gas for a plant at the site,” as required by the Siting Board’s January 2, 2002 Interlocutory Appeal Order. In fact, the Town has not shown that Shoreham “has a source” of natural gas; only the possibility of a natural gas supply exists at some unknown point in the future. Moreover, the Town once again 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 affidavit, (2) in a timely manner, (3) demonstrating that the Shoreham site is available for sale or lease, (4) to Brookhaven [Energy].

The Town failed to satisfy any of these requirements. The Town has argued that requiring an “affidavit” elevates form over substance; however, the Town has also failed to satisfy the eminently reasonable substantive requirement of showing that the Shoreham site “is available.”

The Town argues that it had not been given an adequate opportunity to “show that the Shoreham site was available or ‘greatly superior.’” The Town was required to

---

16 Town Pet. at 8.
17 Town Pet. at 8.
18 Order at 41.
19 Town Pet. at 8. The Town also summarily restates its argument that its right to be heard was denied in violation of the State Administrative Procedure Act (“SAPA”) and Article X, but offers no new rationale why the Siting Board’s rejection of this argument constituted an error of law or fact.
show that the Shoreham site was available and (not “or”) greatly superior. Any dispute about whether the Town had been given a reasonable opportunity to show that the Shoreham site was “greatly superior” became irrelevant as soon as it became known that the site was not available. In any event, as Brookhaven Energy explained in its Brief Opposing Exceptions, the Town had ample opportunity to make its case.20

The Town finally asserts the Siting Board erred in accepting the Examiners’ decision, “refus[ing] to allow the Town to cross examine on gas availability and other aspects of siting the Project at Shoreham” because the Town had failed to raise the issue in “its October 2 issues filing.”21 The Town points out that its issues filing “requested . . . the opportunity to cross examine and file direct testimony on the ‘environmental, technological and economical suitability of Shoreham’ and on ‘the shortcomings of the Yaphank site.’”22 This argument may be summarily rejected for several reasons. First, as stated earlier, arguments over the Town’s right to pursue these issues became moot once the owner stated that the Shoreham site was not available. Second, while the Town may assert that its initial filing properly raised natural gas supply as an issue, the Examiner’s Issues Ruling sets forth a specific list of issues that would be considered under “public interest” and expressly rejected the issue of natural gas supply. The Town never appealed that aspect of the Examiners’ Issues Ruling and, at this late stage of the proceeding, has waived its right to do so. Third, there is in fact no substance to the Town’s argument. One reference to “environmental, technological and economic

20 Brookhaven Energy Brief Opposing Exceptions at 43-45.

21 Town Pet. at 9.

22 Town Pet. at 9.
suitability” of the Shoreham site and “shortcomings of the Yaphank site” in a 32-page 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 hearing, especially when another potential party, PPL Global, expressly raised natural gas supply for the Project site as an issue, and the Examiners rejected that issue for adjudication. Finally, as the Siting Board correctly notes, the Town admitted in its Brief on Exceptions that the focus of its intended cross examination of Brookhaven Energy’s witnesses was the availability of natural gas supply for the Shoreham site, which was the Town’s affirmative duty to demonstrate prior to hearing pursuant to the Siting Board’s January 2, 2002 Interlocutory Appeal Order and not something to be elicited through cross examination at hearing.  

There is simply no basis to consider the Shoreham site under such circumstances.

B. No Error Of Law Or Fact Occurred When The Siting Board Determined That Brookhaven Energy Is A Private Applicant Without The Power Of Eminent Domain

The Town asserts that the Siting Board committed error by finding that Brookhaven Energy is not an “electric corporation” with the power of eminent domain pursuant to the Transportation Corporations Law (“TCL”). Specifically, the Town incorrectly asserts that the Siting Board “without authority adds significant language to TCL § 10, as that section says nothing about supplying directly to utility customers.”

23 Order at 43. The foundation for this decision was the Siting Board’s correct conclusion that Article X does not require an Applicant to discuss or evaluate sites it does not control. The Shoreham site is not under the Applicant’s control; it is not even available to the Applicant.

24 Town Pet. at 10 (emphasis theirs).
The Town then claims that the “electricity generated by the Project will clearly be supplied for public use.” The Town’s use of the passive voice is revealing. 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 unambiguously demonstrates that Brookhaven Energy has not been “organized... to supply for public use electricity.” To the contrary, the Project will operate as a merchant plant generating electricity for sale into the wholesale electric market. The fact that the public ultimately might use electricity generated by Project is irrelevant. Brookhaven Energy was not organized for that purpose.

The Town also asserts that the Siting Board’s reliance on Simonelli v. Adams Bakery Co, 286 A.D.2d 805, 730 N.Y.S.2d 358 (3d Dept. 2001) was improper. The Siting Board correctly pointed out that this case stood for the legal proposition that the use of a term under one statutory scheme is not binding and not even indicative as to the meaning of the same term under another statutory scheme. The Town discounts the Siting Board’s conclusion, arguing that it is not entitled to rely on Simonelli because the Public Service Commission (“PSC”), which according to the Town “is also the principal component of the Board,” had interpreted the same term under the PSL to include, among others, limited partnerships. This argument, however, does not explain why the reasoning of Simonelli does not apply to the Siting Board’s analysis. It was the Town, after all, who first raised the TCL argument. The Siting Board merely pointed out that

25 Town Pet. at 10.
26 Order at 46.
27 Town Pet. at 11.
the PSC's interpretation of the scope of the term "electric corporation" under the PSL has no bearing on the meaning of the same term under the TCL.

Indeed a closer 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 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, coupled with the above referenced language clearly expressing that the definition of "electric plant" in PSL § 2(12) (which is repeated in the definition of "electric corporation" in PSL § 2(13)) that these definitions apply only to the PSL itself ("when used in this chapter") and not to any other New York Law, compel the conclusion that a generator can in fact be an electric corporation subject to PSC 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).

The Town therefore has identified no error of law or fact in the Siting Board's determination.
II. THE SITING BOARD'S LOCAL LAW DETERMINATION COMPLIED WITH THE MANDATE OF PSL § 168(2)(d)

A. The Siting Board Correctly Concluded That The Comprehensive Plan And Longwood Mini-Master Plan Both Allow Industrial Development At The Project Site

The Town, referring to the Siting Board’s approval of the Examiners’ RD, “which says that 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 LIE,’” claims that the “Plan makes no such statement.” The Town again misstates the record. What the Siting Board actually stated was that the RD noted that the “Comprehensive Plan considered industrial development south of the LIE,” which is fully consistent with the language the Town quotes from the Comprehensive Plan (“parcels south of the LIE . . . should be designated as future site (sic.) for industrial development.”). 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 Comprehensive Plan states that the area in which the Project site is located is appropriate for “industrial development.” So does the Longwood Mini-Master Plan.

The Town attempts to supplement its argument by claiming that the Town Code only allows “light industrial” uses in the L-1 District. This, however, ignores the

28 Town Pet. at 12.
29 Order at 17.
30 Town Pet. at 12.
31 Exh. 1 Vol. 1 at 10-56.
obvious and undisputed fact that the Town itself amended the zoning ordinance in 2000 to expressly allow ‘electric generating facilities’ in the L-1 District.\footnote{The Town attempts to side-step this issue by arguing that ‘not all electric generating facilities are equal,’ Town Pet. at 13, foreshadowing its next argument that this Project requires numerous waivers from the Town Code. As explained below, the Town’s statements regarding the waivers required for this Project are completely incorrect.}

Once again, the Town has failed to identify any error of law or fact that would warrant rehearing.

B. After Misstating The Number Of Waivers Needed For The Project, The Town Offers No Basis To Conclude That The Siting Board’s Determination To Grant A Waiver From The Town’s Building Height Limitation and Nighttime Construction Noise Limitation Constituted Either An Error Of Law Or Fact

On page 14 of its Petition, the Town states: “The Board next erroneously waives height, setback, special permit and certain noise limitations of the Town Code. The Board exercises this extraordinary power on the ground that these Code limitations are ‘unreasonably restrictive’ . . .”\footnote{Town Pet. at 14.}

The Siting Board did not “waive” the Town’s setback requirements or special permit requirements. With respect to the setbacks, the Siting Board found that the proposed setback for the stacks “would be consistent with the range of setbacks authorized in Town Code § 85-308.B.2.b.3.” (i.e., no waiver, merely a positive finding as required by the Town Code).\footnote{Order at 18.} Similarly, the Siting Board found that the setback proposed for the gas metering station would be consistent with the Town Code’s criteria for reducing the default setback for an accessory building.\footnote{Order at 18-19.} The Town offered no
testimony or evidence to contradict the Siting Board’s findings. Thus, the Siting Board did not need to grant a waiver for Project setbacks pursuant to PSL § 168(2)(d). Moreover, the Town’s failure to take exception to the Siting Board’s findings with respect to setbacks precludes it from pursuing this issue now.36

Similarly, no waiver of the Town’s special permit requirement was granted or needed. Special permit review is automatically subsumed into the Article X process. The Siting Board correctly determined that, with the waiver for building height, the Project satisfied all of the Town Code criteria (both specific and general) for special permit approval.37 Once again, the Town offered no testimony or evidence to contradict the Siting Board’s determination.

Thus, the only Article X waivers required for this Project relates to the Town Code’s building height limitation and nighttime construction noise restriction. Notably, the latter, which is not a zoning provision, but a general ordinance,38 is only relevant to the construction period, not after the Project becomes operational. Thus, this waiver is completely irrelevant to the eventual use of the property and the Town’s argument that the Project is inconsistent with the Comprehensive Plan. Moreover, the Town once again did not take exception to the Examiners’ recommendation to grant this waiver, and therefore may not do so now.39 Thus, the only Article X waiver that is even relevant to

36 Order at 19 (citing 16 NYCRR 4.10(d)(2)).
37 Order at 19.
38 In others words, siting the Project at Shoreham would not overcome the developer’s dilemma regarding the Town Code’s restriction on nighttime/weekend construction work.
39 16 NYCRR 4.10(d)(2).
the Town’s discussion of the Project’s compatibility with the Comprehensive Plan or other uses allowed in the L-1 District relates to the building height limitation.

After misstating the number and character of the waivers, the Town then claims that the Siting Board has (1) failed to weigh the reasonableness of each provision in relation to siting the Project at Shoreham and (2) failed to consider the possibility that the Application “should be denied outright as an alternative to” waiver. These arguments completely ignore the statutory standard for granting a waiver. A local restriction may be waived if the Siting Board finds that “as applied to the proposed facility such is unreasonably restrictive in view of existing technology or the needs of or costs to ratepayers.” In deciding whether to grant a waiver, the Siting Board is required to consider the Project, as “proposed”, not a different project at a different location. The Town offered no testimony or evidence to suggest that the restriction was not “unreasonably restrictive in light of existing technology.” Thus, the waiver was properly granted.

In any event, the impacts asserted by the Town as a result of the building height waiver are completely overstated. As the Siting Board has correctly noted, “although the ordinance limits building height, the criteria for special permit allow emission stacks up to 200 feet, which is higher than the 160 ft. stacks associated with the Project.” Thus, the tallest structures associated with the Project are 40 feet lower than that allowed under the Code. The stacks will not even be the tallest structures in the immediate

---

40 Town Pet. at 14-15.

41 PSL § 168(2)(d) (emphasis added).

42 Order at 18.
vicinity of the Project site.  Thus, the notion that this Project will constitute a blight on the surrounding area is utterly ludicrous.

C. The Siting Board Properly Rejected The Town’s Constitutional Argument

The Town reasserts its constitutional argument in its Petition, attempting to repackage its prior argument by claiming that Article X is unconstitutional as applied in this case. The Town states: “The distinction between this case and Athens, cited by the Board, is that here the Board, over the Town’s objection, has expressly “refused to apply” provisions of the Town’s Code.” First, the relevance of this statement is not actually explained. Second, the Athens Siting Board also “refused to apply” certain local code provisions. Thus, the distinction that the Town is claiming does not even exist.

The Town also restates its position that the Siting Board’s “refusal to apply” certain Town Code provisions improperly diminishes and impairs the Town’s zoning power in violation of Article IX, Section 2(b) of the State Constitution, and that this “diminution and impairment is not excluded or reserved by §11 of the Statute of Governments, which are enumerated as . . .(4) any law relating to a matter other than the property, affairs or government of local affairs [i.e., a general law].” The Town, for the first time, acknowledges that Article X as a whole may be a general law, but claims

43 Brookhaven Energy Brief Opposing Exceptions at 47.
44 Town Pet. at 15.
45 Case 97-F-1563, Athens Generating Co, LP, Opinion & Order Granting Article X Certificate, June 15, 2000, at 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).
46 Town Pet. at 15-16.
that PSL § 168(d)(2) itself directly relates to the Town’s affairs and is therefore specific, not general. This circular reasoning does not withstand scrutiny because, if correct, any law that directly or indirectly impacts a Town’s zoning law would be considered a special law. As the Third Department in CHV, supra, 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 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” preempts local zoning ordinances.”

The Third Department expressly rejected the petitioner’s contention “that the Siting Board approval order’s waiver of certain requirements of the [Athens] zoning ordinance pursuant to Public Service Law § 168(2)(d) [not Article X as a whole] violates the home rule provisions of the State Constitution.” The Town’s argument is totally at odds with this decision, and therefore does not raise an error of law or fact warranting rehearing.

III. THE TOWN WAIVED ITS RIGHT TO OBJECT TO THE JOINT STIPULATIONS AND FAILED TO IDENTIFY AN ERROR OF LAW OR FACT BASED ON THE SITING BOARD’S RELIANCE ON THE JOINT STIPULATIONS IN RENDERING ITS FINDINGS

The Town requests rehearing and objects to the Order to the extent that it relies on the Joint Stipulations. The Town boldly states that it “excepted to the Examiners’ conclusions as to the Joint Stipulations,” in an apparent effort to argue that it preserved this issue. The cited reference is to a single sentence on page 69 of its Brief on

47 CHV, 281 A.D.2d at 95, 723 N.Y.S.2d at 536 (citations omitted).
48 CHV, 281 A.D.2d at 95, 723 N.Y.S.2d at 536.
49 Town Pet. at 17.
Exceptions, wherein the Town claims to take exception to the acceptance of the Joint Stipulations “to the extent they are inconsistent with the Town’s position and reasons given above.”\textsuperscript{50} The Town failed, as required by 16 NYCRR 4.10, to articulate a single basis why the Joint Stipulations should not be included in the record and considered by the Siting Board. The Town therefore failed to preserve this issue for reconsideration at this stage of the proceeding.

In any event, the Town’s argument fails on the merits. The Town isolates a few sentences towards the beginning of the Order and the Siting Board’s statutory findings at the end to reach the completely unsupported conclusion that the Siting Board’s findings fail to meet Article X’s requirements.\textsuperscript{51} The Town must have forgotten about the intervening 80 pages of analysis and discussion in the Order.

Apparently confused over the purpose and meaning of a stipulation, the Town also argues that the Joint Stipulations “have no weight as evidence.”\textsuperscript{52} No legal authority is cited in support of this argument. Further, it seems odd that the Town would now object to the Joint Stipulations when one of its own attorneys suggested that they be included in the record in the first instance.\textsuperscript{53}

\textsuperscript{50} Town Brief on Exceptions at 69.

\textsuperscript{51} The fact that the Siting Board issued a detailed 85-page decision clearly distinguishes Doremus v. Town of Oyster Bay, 274 A.D.2d 390, 711 N.Y.S.2d 443 (2d Dept. 2000).

\textsuperscript{52} Town Pet. at 17.

\textsuperscript{53} TR at 314 lines 23-24 (Attorney Bergen: “I don’t believe [the Joint Stipulation] is in the record, and it seems to me it should be.”).
The Town claims that the Joint Stipulations did not include the testimony or exhibits of LIPA or the Town. The Town is correct that the signatory parties believed that the Joint Stipulations (including attachments and exhibits thereto) formed a sufficient record for the Siting Board to make all of the necessary findings required by Article X. However, neither the Examiners nor the Siting Board were bound by the document. Indeed, a full week of hearings was held to adjudicate issues advanced by LIPA and the Town. Thus, the record considered by the Siting Board was not limited to the Joint Stipulations, and the Siting Board’s Order does not suggest otherwise.

IV. THE SITING BOARD’S REFUSAL TO GRANT INTERVENOR FUNDING TO OFFSET THE TOWN’S COUNSEL FEES WAS CORRECT

The Town next restates its argument that it should have received intervenor funding to offset its “counsel fees.” The Town offers nothing new to cast doubt on the Siting Board’s plain reading of Article X to reject the Town’s argument. The Town certainly provides no basis to reopen the hearing on this issue. The Town’s Petition should be rejected for the same reasons stated in the Order.

V. THE TOWN’S ATTEMPTED ADOPTION OF AN ISSUE ALLEGEDLY ADVANCED BY LIPA WAS NOT PRESERVED BY THE TOWN AND, IN ANY EVENT, DOES NOT CONSTITUTE AN ERROR OF LAW OR FACT

The Town asserts that the “Board has neglected to rule on the question of whether the Project has been selected pursuant to an approved procurement process.”

54 The Town’s position that the Joint Stipulations have no independent weight ignores the fact that Exhibit 25 to the Joint Stipulations includes sponsoring affidavits by all of the Applicant’s witnesses in support of its direct case. The Joint Stipulations also include a set of Proposed Certificate Conditions, on which the Siting Board is clearly entitled to rely in making its statutory findings because they represent binding obligations that Brookhaven Energy must accept in order to receive an Article X Certificate.
even though LIPA had contended that “the Project will adversely affect competition.”

The Town failed to argue this issue in its Brief on Exceptions. Therefore, the Town failed to preserve this issue for consideration at this stage of the proceeding.

The Town’s argument also fails on the merits. First, after noting that no party, including LIPA, opposed Brookhaven Energy’s motion for a declaratory ruling that the Project has been selected pursuant to an approved procurement process, the Siting Board made an express finding that the “Project has been selected pursuant to an approved procurement process.” Second, to the extent that LIPA’s claim that the Project would result in destructive competition is even relevant to the issue of whether the Project has been selected pursuant to an approved procurement process, it was rejected by the Siting Board and neither LIPA nor the Town has appealed that determination through a Petition for Rehearing.

VI. THE SITING BOARD’S CONCLUSIONS WITH RESPECT TO DECOMMISSIONING IS FULLY SUPPORTED BY THE RECORD

The Town offers nothing new with respect to its decommissioning argument, certainly nothing that would constitute an error of law or fact to warrant rehearing. The Town merely criticizes the Siting Board for “sid[ing] with the Applicant, with sweeping statements that a world-wide second hand market exists [for salvage equipment] and also the loss of the project would be covered by insurance. These statements are unsupported.” To the contrary, both of these statements are supported by unrebutted

---

55 Town Pet. at 21 (emphasis theirs).
56 16 NYCRR 4.10(d)(2).
57 Order at 9.
58 Town Pet. at 22.
testimony in the record. The Applicant’s witness, Mr. Guy Marchmont, testified to the existence of a thriving worldwide market for salvage equipment.\textsuperscript{59} He also testified that it would be virtually impossible to finance or develop the Project without comprehensive insurance coverage, which would generate proceeds in the event of a catastrophic event.\textsuperscript{60} The Town failed to rebut any of this testimony. In fact, the Town’s witness, Mr. John Shafer, even acknowledged on cross examination that insurance proceeds would be available if a catastrophic event occurred at the Project.\textsuperscript{61}

The Town once again touts the expertise of its witness, when it was patently obvious at hearing that Mr. Shafer had no experience estimating decommissioning costs for an electric generating facility.\textsuperscript{62} The Town continues to confuse the terms scrap and salvage, continues to misunderstand the decommissioning process,\textsuperscript{63} and ultimately fails to identify any error of law or fact to warrant rehearing on this issue. Rehearing on the issue of decommissioning should be rejected. The Town’s petition should be denied.

\textsuperscript{59} TR at 640 line 23 to 642 line 2.

\textsuperscript{60} TR at 611 line 21 to 612 line 4, 629 lines 1-4.

\textsuperscript{61} TR at 661 lines 5-11.

\textsuperscript{62} See Applicant’s Brief Opposing Exceptions at 78-80.

\textsuperscript{63} For example, the Town claims that its $12 million estimate cannot be considered unreasonable or “reverse engineering” in light of the fact that the Project will cost in “excess of $100 million.” Town Pet. at 22. This is a meaningless statement, as it says nothing about how the facility will be decommissioned. It was quite clear from Mr. Shafer’s testimony that he contemplated a reverse engineering approach to decommissioning, which the Siting Board properly rejected.

The Town counters by arguing that “ripping down’ is plainly antithetical to the Board’s first premise that maximum scrap value can be counted on to pay the lion’s share of the decommissioning costs.” Town Pet. at 22. This demonstrates that the Town does not understand the decommissioning process, or the distinction between scrap materials and salvage items. At the commencement of the decommissioning effort, any salvage equipment, as opposed to scrap material, will indeed be carefully removed precisely because it will generate substantial revenues. Once this salvage equipment is removed, the remaining structures, including scrap materials, will be ripped down. There is no incentive to carefully remove equipment that has little or no salvage value. The Town’s decommissioning process envisioned no
VII. THE TOWN'S PETITION IDENTIFIES NO ERROR OF LAW OR FACT WITH RESPECT TO THE SITING BOARD'S FINDING WITH RESPECT TO VISUAL IMPACTS TO CULTURAL AND HISTORICAL RESOURCES

The Town challenges the Siting Board’s findings with respect to minimization of visual impacts to historical and cultural resources. Perhaps an indication of the weakness of the Town’s position on this issue, the Town’s opening salvo is that the Siting Board has “overlooked the fact that the Project’s massive structures . . . would be in plain view from the roads abutting the site.”64 Reference is also made to estimates of traffic volumes on these roads. No claim is made by the Town that these nearby roads are designated scenic highways or otherwise have any recognized cultural or historical significance. What we are left with is the fact that individuals in vehicles traveling along roads passing through or adjacent to an industrial zoned area may have brief views of the Project.65

The Town also restates claims that the Project is out-of-character with the area (even though it is zoned for industrial use) and that the Applicant admitted that the Project’s visual impacts could not be mitigated, both of which the Brookhaven Energy totally discredited in its Brief Opposing Exceptions by relying on the record as

---

64 Town Pet. at 23.

65 Contrary to the impression the Town tries to make, views from adjacent roads, even though not scenic, were in fact considered in the analysis. See Exh. 1 Vol. 1 at 16-47 (VP 80). This extensive analysis helped form the basis for the overall conclusion regarding aesthetics. Views from nearby roads were not overlooked.
developed in this proceeding rather than unsupported notions of visual impacts that will not exist.\textsuperscript{66} 

The Town also states: “The Board incorrectly claims that the Town, ‘for the first time’ contends that the Project as proposed would negatively impact vacant lands and impair the opportunity to develop them.”\textsuperscript{67} The referenced Siting Board language addresses the Town’s failure to either identify at the issues conference, or subsequently submit testimony or evidence at hearing on, the issues of “negative impacts to surrounding vacant property, property values, future development and tax base.”\textsuperscript{68} The Town then relies on vague generalized statements by its witnesses regarding the Project’s inconsistency with the surrounding area or argue that it did submit testimony on these issues. First, the referenced testimony cannot be fairly read to raise these issues. Second, the Town’s testimony was completely discredited by the Applicant’s witnesses and through cross-examination at hearing. Thus, the Siting Board correctly concluded that the “Town’s exceptions are unsupported by the record, and, therefore, are denied.”\textsuperscript{69} 

The Town’s request for rehearing similarly should be denied.

\textsuperscript{66} Applicant’s Brief Opposing Exceptions at 60-70.

\textsuperscript{67} Town Pet. at 24.

\textsuperscript{68} Order at 33.

\textsuperscript{69} Order at 33.
VIII. THE TOWN FAILS TO IDENTIFY ANY ERROR OF LAW OR FACT WITH RESPECT TO THE BOARD'S DETERMINATION CONCERNING NOISE IMPACTS

Finally, the Town seeks rehearing on the issue of Project noise. However, the Town offers nothing but generalized statements without any attempt to even articulate an error of law or fact that would justify rehearing. The Town merely claims that the "Board’s decision in this regard fails to consider the fact that the noises that will be emanating offsite are out of character with the existing and planned light industry uses of the area." There is no support in the record for this statement. To the contrary, Brookhaven Energy only sought and received a waiver from the Town’s nighttime construction noise restriction. The Project’s operations will comply with the Town’s noise limits. Moreover, the Town cannot seriously claim that noise generated by the Project will 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.

The Town’s request should be denied.

---

70 Town Pet. at 25.
CONCLUSION

Brookhaven Energy respectfully requests that the Siting Board deny the Town’s Petition for Rehearing in its entirety. Brookhaven Energy further requests an expeditious review of the Town’s Petition.

Dated: September 17, 2002
       New York, New York

Respectfully submitted,

[Signature]

Stephen L. Gordon, Esq.
Michael G. Murphy, Esq.
BEVERIDGE & DIAMOND, P.C.
477 Madison Avenue, 15th Floor
New York, NY 10022-5802
(212) 702-5400

George M. Pond, Esq.
HISCOCK & BARCLAY, LLP
50 Beaver Street
Albany, NY 12207
(518) 429-4232

Attorneys for BROOKHAVEN ENERGY LIMITED PARTNERSHIP
Certificate of Service

This is to certify that a true and complete copy of the foregoing was served by E-mail (as available) and US Mail on September 17, 2002 on the Brookhaven Energy Active Party List.

Michael Murphy, Esq.