

STATE OF NEW YORK  
BOARD ON ELECTRIC GENERATION SITING AND THE ENVIRONMENT

CASE 12-F-0407 - Petition of Beacon Harbor, LLC for a  
Declaratory Ruling Concerning Article 10.

NOTICE SETTING SCHEDULE  
FOR SUPPLEMENT AND COMMENTS

(Issued October 5, 2012)

Beacon Harbor, LLC (Beacon) is contemplating becoming an applicant for an Article 10 Certificate to construct and operate a major waste-to-energy electric generating facility at a site in the Town of Bethlehem, Albany County. By a petition filed on September 13, 2012, Beacon seeks declaratory rulings on two issues. Beacon's first request regards the Zoning Ordinance of the Town of Bethlehem. Beacon requests a ruling on whether a zoning ordinance that prohibits major electric generating facilities and waste-to-energy facilities on the basis that uses not enumerated are prohibited is the kind of local law that the Siting Board has the authority to find to be unreasonably restrictive. Beacon's second request regards a certain flow control restriction of the Solid Waste Law of the Town of Bethlehem. The local law states that "only solid wastes generated and collected within the Town of Bethlehem and which are not otherwise prohibited will be accepted at any solid waste facility within the Town". Beacon would want to import solid waste into the Town to use as fuel at its facility and requests a ruling on whether the flow control restriction is the kind of a local law that the Siting Board has the authority to find to be unreasonably restrictive.

In its Memorandum and Resolution Adopting Article 10 Regulations,<sup>1</sup> the Siting Board noted:

It is difficult to provide guidance as to how the Siting Board in individual cases will apply the "unreasonably burdensome" standard to local laws because the Ad Hoc members for each Siting Board will be different and no Ad Hoc members are on the Permanent Board promulgating the regulations. Also, the statute requires that local governments be given an opportunity to defend their specific laws before the matter can be considered.<sup>2</sup>

In addition, the Siting Board also noted:

[I]t will be likely that some level of evidence and litigation regarding the issue will be necessary prior to the Board rendering a determination.<sup>3</sup>

Beacon has not sought a determination as to the reasonableness of either local provision at this time, however, it merely wants to understand whether the Siting Board is the proper forum to address its concerns with the local laws.

Use Restrictions of the Zoning Ordinance

A preliminary reading of the Bethlehem Zoning Ordinance and Solid Waste Law provisions submitted as part of the petition indicates that Beacon did not: (1) consider that "Public Utilities" are a permitted use in the Bethlehem Heavy Industry Zone and that there is court precedent that independent generators in some circumstances can be considered public utilities for such zoning purposes; (2) exhaustively consider whether the facility would qualify as one of the other permitted uses listed; and (c) consider that regardless of the Zoning Ordinance, pursuant to the Solid Waste Law, waste-to-energy

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<sup>1</sup> Case 12-F-0036, Rules and Regulations of the Siting Board, Memorandum and Resolution Adopting Article 10 Regulations (issued July 17, 2012).

<sup>2</sup> Ibid., p. 78.

<sup>3</sup> Ibid., p. 77.

facilities appear to be permitted throughout the Town of Bethlehem as overlay special permit uses under the category of Solid Waste Facility. Given these opportunities that might address Beacon's needs that could be explored by Beacon with the Town in the first instance, there appears to be no need to reach the difficult broader issue raised by Beacon that would have ramifications beyond this one instance. Accordingly, by this notice Beacon is requested to reconsider its request and to either withdraw it or provide a supplement to its petition explaining why consideration of the petition should proceed at this time given that it is not clear that waste-to-energy facilities are prohibited by the local laws of the Town of Bethlehem, and that the local laws may raise factual issues that are best resolved after development of a record in a proceeding on an application.

Solid Waste Flow Control Restriction

To resolve the second request made by Beacon, the Siting Board would have to decide whether the solid waste flow control restriction, a ban on importing solid waste as a commodity, is "applicable" "for the construction or operation of a major electric generating facility". That may require factual determinations regarding applicability, volume of solid waste and perhaps other issues that will likely only be resolvable by the Siting Board in a proceeding on an application after some level of evidence and litigation regarding the issue.

In addition, however, it may be more efficient and in Beacon's best interest to seek a resolution of its concerns

directly with the Town of Bethlehem.<sup>4</sup> Even if the Siting Board was to determine that the solid waste control restriction is the kind of a local law that the Siting Board has the authority to find to be unreasonably restrictive and to apply the Public Service Law §168(3)(e) test of whether the solid waste control restriction "is unreasonably burdensome in view of the existing technology or the needs of or costs to ratepayers whether located inside or outside of such municipality", it is not clear that authority to find a restriction "unreasonably burdensome" would allow the Board to address constitutionality. Such a finding could only be made after development of a record, not in the context of a declaratory ruling on a question of law. The Board has authority under State Administrative Procedure Act §204(1) to decide "(i) the applicability to any person, property, or state of factors of any rule or statute enforceable by it, . . . .", but authority to decide applicability might well not extend to validity under the state or federal constitutions. It does seem clear, though, that while the Board must necessarily interpret or apply laws, it is not empowered to issue injunctions or require damages in determining questions of constitutionality in the same way that a court can. Beacon therefore definitely has more efficacious avenues of relief from the Town or in the state or federal courts than provided by a declaratory ruling from the Siting Board. Accordingly, by this notice Beacon is requested to reconsider its request and to either withdraw it or provide a supplement to its petition explaining why consideration of the petition should proceed at this time given that the request may raise factual issues that

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<sup>4</sup> The solid waste flow control restriction at issue appears to be similar to a flow control restriction previously found by the U.S. Supreme Court to be an unconstitutional restraint on interstate commerce in violation of the "dormant" commerce clause of the U.S. Constitution. C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994).

are best resolved after development of a record in a proceeding on an application and Beacon may have other more appropriate remedies from the Town or under Federal law.

Schedule for Supplement and Comments

On or before Friday, October 26, 2012, Beacon shall either provide written notice that it is withdrawing all or part of its petition and/or shall supplement its petition in the manner requested. Thereafter, if Beacon has not withdrawn its petition, responses to the petition as supplemented shall be due on Friday, November 16, 2012.

(SIGNED)

JACLYN A. BRILLING  
Secretary