

(Transcription copy)

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June 15, 2012

Searsport Planning Board  
c/o J. Bruce Probert, Chair  
Town of Searsport  
1 Union St.  
PO Box 499  
Searsport, ME 04974

### **RE: DCP Midstream Application**

Dear Bruce

As a follow up to the meeting on Monday, I want to raise a few items of concern as we move forward with the Planning Board's review of DCP's project. I appreciate that the Planning Board is working hard to conduct an open process and I want to ensure that you and the other Board members have access to all relevant information you need in order to evaluate compliance with the performance standards in your ordinances.

I am concerned however, that opponents of the project are taking advantage of the "open to the public" portion of the Board's meeting agenda in a manner that is prejudicial and disruptive. Of particular concern is what occurred at the meeting Monday, which jeopardizes what has been until now a fair and impartial process. That concern is underscored by the fact that a majority of the people making substantive comments on the application were non-Searsport residents from Islesboro and other towns. DCP asks that the Board please consider the following issues as we move

forward.

**A. Inappropriate and Untimely Public Comments.**

Public comment taken this past Monday was concerning for several reasons. First and foremost the Planning Board has not yet scheduled a public hearing on DC P's application, so the Board should not be taken substantive testimony on the proposed project. As you know, permit decisions must be made on the record properly before the Planning Board, which is the purpose of a public hearing; consideration of substantive comments of the type made Monday night, outside the public hearing, is impermissible and risks the Board reaching conclusions based on information outside the hearing record . See, e.g. City of Biddeford v. Adams, s 727 A.2d 346, 349 (Me. 1999) (holding that an administrative Board acts improperly if it considers extrinsic evidence while reaching its decision; Adelman v. Town of Baldwin, 750 A2d 577, 582 (Me.

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2000) (stating that it is impermissible for a Board member to rely on extrinsic evidence when adjudicating issues before the Board). Of particular concern was the inaccurate and grossly exaggerated nature of the comments with respect to safety, especially by the spokesperson for Islesboro --- the Coast Guard and the Army Corps have already fully evaluated this issue and concluded that the Project will be operated in a safe manner and the Planning Board has voted to retain a consultant to help it evaluate the technical aspects of the project.

Although we appreciate that the Planning Board prior practice has been to permit comment on any issue during the "open to the public" period in your meetings, the public will have a full opportunity to comment on the project after the Board has assembled all relevant information, including balloon tests, 3D models, and third party reviews. The comments made Monday night were simply inappropriate and premature and cast a shadow on the process which we hope can be eliminated, but at a minimum, we ask that the Board make clear, that in order to prevent any continued due process problems, further substantive public comment will be taken only during the

public hearing.

Monday's public comment, moreover, was characterized by yelling, insults and outbursts, frequently by individuals who do not live in Searsport. Although we do not object to the Board hearing from residents of other towns, these individuals do not have legal standing under your ordinances and the performance standards in Searsport's ordinances do not regulate development or property rights or any other issues in other towns. There are state and federal permitting proceedings (in which these individuals have participated, and continue to participate) and the Searsport Planning Board is not responsible for addressing these concerns. It was especially distressing to have been prevented by the crowd outbursts from raising our objections to the problem posed by what was being said in the public comment period, a concern we raised with counsel for the Board both before and during the meeting Monday night.

**B. Requested information must be relevant to performance standards**

The Board is currently deciding on the number and scope of required third party reviews. As noted in our meetings, these third party reviews should be designed to provide the Board with information helpful to its review of the performance standards. As we have stated repeatedly, DCP wants to ensure that the Planning Board has all information relevant to its review of your standards. We have some concerns, however, regarding the proposed scope of the "economic study," as set forth in the Board's recent completeness determination. Many opponents of the project are pressuring the Board to commission a study that is far broader than what is necessary.

We understand that the Board has concluded that the economic study is necessary to evaluate the "economic" impacts of the study under the "undue adverse effect" standard. As you determine what type of study is necessary to evaluate the standard we think it is important to consider two issues. First, which "economic" issues are subject to the "undue adverse effect" standard, such that an economic study would provide relevant information? Second, is it permissible for the economic study to evaluate general impacts of a 135ft. high tank or does the study have to be focused on the specific impacts from this proposed facility?

### **1. Which "Undue Adverse Effect" Standards Have an Economic Aspect?"**

The phrase "undue adverse affect" is used numerous times in the Site Plan Review performance standards, but only three standards arguably have economic aspects: impact on municipal services, public utilities, and property values. See Site Plan Review Ordinance Section VI(6). (Note 1)

Given this, the proposal to include an assessment on "tourism" is inappropriate, as there are no performance standards that address tourism. As the Planning Board will not be evaluating the project's impact on tourism, a study of violating such impacts is not helpful and a waste of both the Planning Board's and DCP's time and resources.

Opponents of the project appeared to be suggesting that because, in their mind, this project will hurt tourism--which will hurt local businesses--which will reduce tax revenue--which will impact municipal services or property values, including tourism in the evaluation of "undue adverse affects" is appropriate. (Note 2) However, the court has been clear that any time a standard of "no unreasonable adverse impact" is applied, such a standard must be sufficiently specific and detailed so that applicants know what is required in order to comply with the standard. See Kosalka vs the Town of Georgetown, 752 A.2d 183 (Me. 2000) (standard that required project to conserve "natural beauty" unconstitutionally vague as it lacked cognizable quantitative standards); Wakelin v. Town of Yarmouth, 523 A. 2d 575 (Me. 1987) (ordinance requirement that project must be "compatible with the existing uses in the neighborhood" was unconstitutionally vague as the ordinance did not include quantitative and specific standards ); Stucki v. Plavin 291 A. 2d 508 (Me. 1972) (applicant must understand what information is required and what specific standards applied or the ordinance is unconstitutionally vague). Because the link between tourism and "municipal services" is so attenuated, and none of the performance standards can reasonably be read to include impacts on tourism, the opponents' interpretation of the town ordinance is likely unconstitutional.

With regard to property values, the ordinance is clear that (1) impact to property values is not town-wide, but specific to certain parcels and (2) the burden is on the property owner, not DCP, to show that the project will "substantially change" the value of property. See section II, "Property Value". DCP can respond, if it chooses, to any specific claim, but is not required to evaluate the impact on the entire Town's property value base, for property tax or any other reason, although it might be reasonable for the Town to retain an independent expert to evaluate a dispute between DCP and a specific landowner on whether the project will "substantially change" someone's property value, a Town-wide assessment of impacts would prto provide no useful

*(Note 1) The other issues are non-economic, including surface water drainage, scenic and environmental resources, lighting, water quality/supply, and erosion. See Site Plan Ordinance Section VI(5) (8), (9). (12), (13), (14).*

*(Note 2) Please note that although we do not believe that an economic impact study is required for reviewing this project, we have submitted a report that shows that the impact of DCP's project on the town's tax structure, under any scenario, is positive.*

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information in resolving such a dispute, and, for the reasons above, is not relevant to assessing impacts on municipal services.(Note3)

## **2. Information Regarding General Economic Impacts of A Large Bulk Fuel Tank Are Not Relevant -- Only Information Regarding Specific Impacts of DCP's Project.**

Even assuming that an economic study might provide relevant information regarding impacts on municipal services and property values, the answer to the second question is that a broad-based economic impact study, evaluating the impacts of this type of development, will provide no relevant or even helpful information to the Board.

This is because the Maine Supreme Court has held that a Planning Board cannot base an "undue" or "unreasonable" adverse effect" determination on the general characteristics of a project when such characteristics are

common to any project of that type. See Davis v. SBA Towers II LLC 979 A.2d 86 (Me. 2009). In the Davis case, the Town of Lincolnville denied a permit for a 195 ft. high cell tower on the basis that the tower was "visible above the tree line" which was one of the ordinance factors in assessing visual compacts. The Supreme Court determined that because the "tree line" was never higher than 50 - 80 feet, and the zoning ordinance permitted 195-foot high cell towers, every tower of that height would necessarily be visible above the tree line. As a result, the Planning Board could not reject the application on the basis that the tower was so visible, even though this was one of the applicable criteria. In other words, because the ordinance permitted cell towers at that height, the Planning Board could not find an undue adverse effect based on a characteristic (taller than the tree line) that would be common to all towers. See Davis 979 A 2d at 93-94. To find otherwise would be to prohibit the type of use (195 foot high cell towers) expressly allowed by the zoning ordinance.

As with the residents of Lincolnville, the voters of Searsport have determined, in enacting the Land Use Ordinance, that DCP's proposed Bulk Fuel Distribution Facility is an appropriate use in the industrial zoning district. See Land Use Ordinance at Section IV. Further, in 2011 Searsport voters amended the land use ordinance to raise the height limit for Bulk Fuel Storage tanks in the industrial district to 150 ft. As a result, the mere fact that DCP has proposed a 135ft. high bulk fuel storage tank in the industry district could never be the basis for the Board finding that there was a "undue adverse affect," as this project, at this height, is an allowed use. See id. Note 4)

Accordingly, to the extent the Board seeks a study of the economic impacts of the project regarding municipal services or any other issues, such a study cannot evaluate the general

*(Note 1) DCP believes the best way to evaluate whether the project will result in an undue adverse affect on municipal services is to ask the Town departments, many of whom have already concluded the project will not have any adverse impact, let alone an undue adverse affect.*

*(Note 2) Further, as more evidence that Searsport residents do not believe that a 135 foot high LPG tank constitutes an "undue adverse affect" on the Town, the voters soundly rejected a recent attempt by Thanks But No Tank and other opponents to impose a moratorium on this project.*

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impacts of the project on the broader issues of property tax burden, tourism, and Town-wide property values. The study cannot evaluate the impact of this type of fuel tank or its height on any town wide or, even more inappropriate, region-wide basis. Even if the Board could identify a qualified consultants to provide relevant information on such a scale, the Planning Board could never rely on such information in evaluating whether this project constitutes an undue adverse affect.

In closing, DCP has proposed to construct a bulk tank storage facility in exactly the area of Town the Land Use Ordinance has designated for such a use. Further, the Town just recently amended its Land Use Ordinance to permit a tank structure of this height and overwhelmingly rejected an attempt to place in moratorium on this project. Although we appreciate that the Planning Board must ensure that this project will not result in an unreasonable and adverse impact on certain resources, it is critical that the Board's request for information, including its retaining of third party experts, be limited to identifying such unreasonable adverse effects, and not include information unrelated to specific performance standards.

Thank you for your consideration of these comments.

Very truly yours,

Kelly B. Boden  
KBB/mtr

cc Kristin Collins.Esq