

STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE
DOCKET NO. 2015-01

**SEA-3, INC.'S OBJECTION TO PETITION TO INTERVENE FILED BY
CITY OF DOVER**

NOW COMES SEA-3, Inc. ("SEA-3"), through its counsel, Shaines & McEachern, P.A., and respectfully objects to the Petition to Intervene (the "Petition") filed by the City of Dover (hereinafter "the City"). In support of its Objection, SEA-3 states as follows:

Introduction

The Committee should deny the City's Petition because the City fails to establish that its "rights, duties, privileges, immunities or other substantial interests might be affected by the proceeding [. . .]" and because the Counsel for the Public adequately represents the issues raised by the City.

Applicable Legal Standards

Standards Governing Consideration of Motions to Intervene.

The New Hampshire Administrative Procedure Act regulates when an administrative agency must allow intervention. RSA 541-A:32, I. The administrative agency must allow intervention when:

- (a) The petition is submitted in writing to the presiding officer, with copies mailed to all parties named in the presiding officer's notice of the hearing, at least 3 days before the hearing;
- (b) The petition states facts demonstrating that the petitioner's rights, duties, privileges, immunities or other substantial interests may be affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law; and
- (c) The presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceedings would not be impaired by allowing the intervention.

RSA § 541-A:32, I. See also N. H. Code Admin. R. Site 202.11(b) (setting forth same requirements).

The statute also regulates when an administrative agency may allow intervention. RSA 541-A:32, II. The statute permits, but does not require, administrative agencies to allow motions to intervene “upon determining that such intervention would be in the interests of justice and would not impair the orderly and prompt conduct of the proceedings.” Id.

Standard to Limit Intervenor’s Participation in Proceedings.

The Administrative Procedure Act and the Site Evaluation Committee’s procedural rules provide for limiting an intervenor’s participation in the proceedings. RSA § 541-A:32, III; N. H. Code Admin. R. Site 202.11(d). The Act gives the Committee discretion in limiting participation; the procedural rules require limitation “if such conditions promote the efficient and orderly process of the proceeding [. . . .]” RSA § 541-A:32, III; N. H. Code Admin. R. Site 202.11(d). The Act and the procedural rules provide three, non-exhaustive limitations for the Committee to impose as follows:

- (a) Limitation of the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition.
- (b) Limitation of the intervenor's use of cross-examination and other procedures so as to promote the orderly and prompt conduct of the proceedings.
- (c) Requiring 2 or more intervenors to combine their presentations of evidence and argument, cross-examination, and other participation in the proceedings.

RSA § 541-A:32, III; N. H. Code Admin. R. Site 202.11(d).

Summary of Petition to Intervene

The City alleges that “the rights, duties, privileges, immunities and other substantial interests of the City of Dover and its residents may be affected by the present proceeding.” See Motion at ¶ 3. In support, the City claims concern over potential impacts in the event:

- 1) Its first responders are called upon in the case of an emergency at the site;

- 2) There is a spill and/or release at the site; or
- 3) The Spaulding Turnpike or General Sullivan Bridge were to close for an extended period of time in the case of a disaster.

See Motion at ¶ 4.

While the City lodges those claims, it fails to explain how the proposed site improvements would exacerbate any existing risk to the City's interests. The City, without any factual basis, implies that any change at SEA-3's property necessarily results in some negative effect that impacts the City. The City fails to allege any facts that causally connect the proposed changes at SEA-3's property to the City's three claims.

Argument¹

The City Fails to Prove a Substantial Interest.

The City fails to prove that it has "rights, duties, privileges, immunities or other substantial interests that might be affected by the proceeding" under New Hampshire law. See RSA § 541-A:32, I. The City does not substantiate an allegation of relevant rights, duties, privileges or immunities: the analysis is therefore limited to whether the City has "substantial interests". New Hampshire's rules on standing to appeal administrative orders are instructive in defining the term "substantial interest" as used in this context. Those standing rules require appellants to distinguish themselves from the general public. See Blanchard v. Boston & M.R.R., 86 N. H. 263, 167 A. 158, 159 (1933) (interpreting statute as conferring standing only upon "those persons only who were interested in or affected by the proceedings in some manner differently from the public, citizens, and taxpayers generally.").

¹ It is SEA-3's understanding that the City has not raised any railroad issues as grounds for intervention. To the extent the City relies on railroad issues, SEA-3 asserts that such issues are preempted by federal law for the reasons set forth in SEA-3's Objection to Petition to Intervene Filed By City of Portsmouth, filed contemporaneously herewith.

The City fails to state any facts showing that it would be specially impacted by the proposed improvements to SEA-3's site. The City lacks proximity to SEA-3's facility and does not allege that it is a propane consumer. While the City claims to share a common transportation system with Newington, that same claim can be made by virtually every community in the State (witness the City of Portsmouth's Motion to Intervene). The City's claims amount to unsubstantiated speculation that has already been rejected by area fire chiefs who met to review and discuss this project. As stated by the City of Portsmouth's own Fire Chief Steven E. Achilles:

The Portsmouth Fire Department and other area fire departments are not debating or questioning the many concerns of our elected representatives or citizens. We met to review and discuss the project, the mode of transportation, our ability to respond, and other related fire and life safety concerns. **At this time the general consensus is that the risk of fire and the accidental release of product is extremely low, but not zero. Most fire departments are extremely familiar with the product and the emergency response required if there is an accidental release or fire.**

See Email correspondence of Steven E. Achilles to Proposed Intervener Richard DiPentima, dated March 24, 2014, Certified Record of the Town of Newington Planning Board, Rockingham Superior Court, Dkt. No. 218-2014-CV-00654 ("C. R.") at p. 577 (emphasis added); see also, C. R. at p. 275 (Seacoastonline news story dated March 22, 2014, reporting Chief Achilles' statement that additional propane tank car transportation does not pose an additional significant hazard.).

Chief Achilles' conclusions are consistent with those of Newington's then acting Fire Chief Dale Sylvia who inspected the Site with two State Fire Marshalls and concluded that, "[f]rom a fire department view I believe this is a positive for Newington, because it gives us the opportunity to update and increase fire protection systems that are already in place but outdated. The operation they are proposing in [sic] not dramatically different then [sic] their current

operation.” See Memorandum of Chief Sylvia to the Planning Board dated October 9, 2013, C. R. at p. 31. As noted by Chief Head, the proposed improvements would increase site safety. As found by the Newington Planning Board, “[t]he proposed site improvements will update and modernize the site’s existing fire protection systems.” See C. R. at p. 520.

LPG is a non-toxic gas that evaporates in to the atmosphere upon discharge. See C. R. at p. 519. The City has not alleged how it would be affected by any release or discharge of LPG. While LPG is combustible, the Newington Planning Board required a Fire Safety Analysis that was reviewed by the Board at public hearing and approved by the Board’s own independent engineer. See C. R. at p’s 49, 322-324 and 378. Notably, the City did not participate in the Town of Newington Planning Board Proceedings and has not challenged or questioned the conclusions of SEA-3’s Fire Safety Analysis, which directly addresses the City’s safety claims. Further, the Rockingham Planning Commission’s Developments of Regional Impacts Committee (“DRIC”) held a hearing on the project and recommended that the Newington Planning Board “engage in post development approval inspections to insure that the new site improvements at the Sea-3 [sic] facility are constructed in accordance with NFPA 58.” See C. R. at p. 128. It should be noted that DRIC did not require SEA-3 to provide an additional study beyond the Fire Safety Analysis required by NFPA 58.

In short, the City’s unsubstantiated allegations of site safety issues are not supported by the record and are too general in nature to distinguish the City from any other member of the public. Since the City has not demonstrated a substantial interest, it cannot satisfy RSA § 541-A:32, I.

Public Counsel Represents the Same General Interests as the City.

The Counsel for the Public already represents the City's interests. "No individual or group of individuals has standing to appeal when the alleged injury caused by an administrative agency's action affects the public in general, particularly when the affected public interest is represented by an authorized official or agent of the State." Appeal of Richards, 134 N. H. 148, 156, 590 A.2d 586, 591 (1991) (citing Blanchard v. Boston & M.R.R., 86 N. H. 263, 264-65, 167 A. 158, 159 (1933)).

RSA 162-H:9 describes the purpose of the Counsel for the Public as follows:

The counsel shall represent the public in seeking to protect the quality of the environment and in seeking to assure an adequate supply of energy. The counsel shall be accorded all the rights and privileges, and responsibilities of an attorney representing a party in formal action and shall serve until the decision to issue or deny a certificate is final.

The Committee may "compel consolidation of representation for such persons as have, in the committee's reasonable judgment, substantially identical interests." RSA 162-H:9, II.

On April 22, 2015, Counsel for the Public filed an Objection to SEA-3's Request for Exemption asking the Committee to evaluate the safety of the site. Counsel for the Public has raised the same alleged interests asserted by the City. Since there is a substantial identify of interests between the City and the Counsel for the Public, the Committee should compel consolidation of representation pursuant to its powers under RSA 162-H:9, II.

CONCLUSION

For all the reasons set forth herein, the Committee should deny the City's Petition because the City failed to articulate a substantial interest that will be affected by the determination of the issues in this proceeding, the City lacks standing, and because the Counsel for the Public represents its interests. Alternatively, the Committee should, pursuant to its

powers under RSA 162-H:9, II, require the City to consolidate representation with the Counsel for the Public and, pursuant to its obligations under N. H. Code Admin. R. Site 202.11, impose conditions upon the City's participation as promotes the efficient and orderly process of the proceeding.

Respectfully submitted,

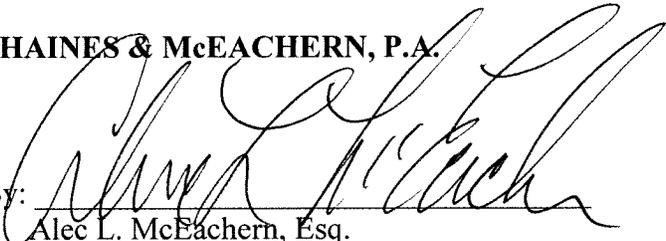
SEA-3, INC.

By Its Attorneys,

SHAINES & McEACHERN, P.A.

Dated: May 1, 2015

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