Jessup council to vote today on Invenergy zoning

BY BRENDAN GIBBONS, STAFF WRITER *Published: August 26, 2015*

Jessup council members will vote today on whether to amend the borough's zoning ordinance, a decision that could help pave the way for a natural gas-fired power plant.

Though the proceedings raised many thorny legal, environmental and economic issues, the most crucial question centers on a 2,000-foot setback requirement in the borough's zoning ordinance.

The vote comes on the heels of months of public hearings, when Chicago firm Invenergy LLC's attorney Mike Blazer sparred with Citizens for a Healthy Jessup attorney Don Miles of Bethlehem over whether the borough's ordinance unlawfully restricts a developer from building a natural gas-fired power plant in Jessup.

In the hearings, Invenergy took the position that not enough space exists in the borough's two M-2 zones, where power plants are a conditional use, to fit any natural gas plant and still abide by the 2,000-foot setback.

"No, none, zero," Mr. Blazer said when asked in an Aug. 14 interview with The Times-Tribune whether any space existed in an M-2 zone to build a plant.

"You'd have to be 2,000 feet from any one of these other structures," he said, pointing to a map of existing buildings in those zones.

His argument relies on a concept known as exclusionary zoning, which is prohibited by state law. Marc Jonas, a zoning and land use attorney with Eastburn & Gray, P.C., who is not involved in the Invenergy case, explained how it works.

Ordinances can be exclusionary when they expressly prohibit a use or when they make a use impossible through restrictions, he said. The latter type is called "de facto."

Invenergy argues the ordinance is de facto exclusionary in three ways, the most significant being the 2,000-foot setback.

"Obviously, you could see if you're the municipality and you want to defend (the ordinance), then you're going to have to bring another utility or another company and say they could locate a viable use on this property," Mr. Jonas said.

Mr. Miles argues a small plant could fit in the M-2 zone. He argued the setback ordinance applies only to residential development, not all development, leaving a small piece of the zone open.

"There are at least 12 or 13 acres within the M-2 zoning district that are more than 2,000 (feet) from existing residential development, more than enough to construct a combined-cycle gas-fired electric generation plant," Mr. Miles wrote in his closing brief.

In a follow-up interview, Mr. Miles said the ordinance's intent is clearly to shield residential development from industrial uses. "If every conditional use had to be 2,000 feet from any other use, whatever was the first thing in that zone could never have anything else in that zone," he said.

"You assume that the people who adopted it were not trying to be nuts," he added.

Evidence exists that Invenergy once followed this interpretation, too.

In Invenergy's February curative amendment application, the company referred to "a conditional use within 2,000 feet of an existing residential development." It created a map of the M-2 zone with the 2,000-foot restriction applied to adjacent neighborhoods, which shows 12 acres remaining outside the setback line.

Twelve acres, Mr. Miles and the opposition group argued, is plenty of space for a combined-cycle natural gas plant, just not the 44-acre version Invenergy wants to build in Jessup.

To support their claim, they dug up a September 2013 testimony by Invenergy vice president Dan Ewan before the Minnesota Public Utilities Commission describing a small plant called Hampton Energy Center.

"The facility itself will require approximately eight acres," Mr. Ewan told the commission then.

Mr. Miles tried to introduce the document at the June 30 hearing but was blocked by borough solicitor Richard Fanucci, who questioned its relevance.

"This is 100 percent reaching," he told Mr. Miles that night.

On Tuesday, Mr. Blazer said the February application's intent was to site the plant in a place that best promotes public health, safety and welfare, which focuses on residential areas. The state's Municipalities Planning Code and Jessup's zoning and subdivision and land development ordinances clearly support Invenergy's interpretation of the setback, he said.

"All three of those say residential and nonresidential. Period. From our perspective and from any lawyer's perspective, there's nothing more to analyze," he said.

For Invenergy, the 2,000-foot setback is only one of three restrictions causing problems. The setback, a height restriction and a requirement to enclose structures add up to an unlawful exclusion, Mr. Blazer said.

"If you're excluding a category of a use, it might be by size, it might be by type, you're excluding all uses," he said.

Instead of trying to change the uses allowed certain zoning district, Mr. Miles suggested in his brief that Invenergy seek variances to allow them to build higher than the height restriction and keep necessary buildings open to the air.

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A zoning ordinance does not necessarily need to accommodate the exact kind of plant a developer wants, said environmental, zoning and land use attorney Jordan Yeager with Curtin & Heefner LLP, who is not involved in the Invenergy case.

“There’s often a missed perception that municipalities have to allow for every different kind of use and that’s an oversimplification of the law,” Mr. Yeager said. “There is no legal authority for the concept that you have to allow every different kind of electric generation plant.”

Jessup council will meet 7 p.m. today at Valley View High School to vote on the amendment. Each side will be allowed 10 minutes to address the council before the vote, Mr. Fanucci said.

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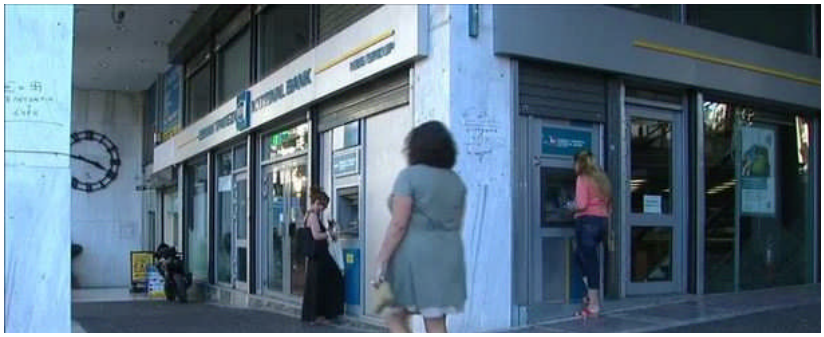

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