

Notice of Appeal to Town of Romulus Zoning Board of Appeals

**of Zoning Enforcement Officer Adam Schrader's Interpretation Letters Regarding the
Proposed Circular enerG Incinerator**

Feb. 1, 2018

To the Romulus Zoning Board of Appeals:

I am a resident of the Town of Romulus, living at 5915 East Lake Road. Circular enerG's proposed waste incinerator will impact my health and my neighborhood, as well as my property values.

I am writing to appeal the interpretations of the Town Zoning Enforcement Officer ("ZEO"), Adam Schrader, which were issued in response to inquiries from the proponents of a waste incinerator to be built at the former site of the Seneca Army Depot.¹

Specifically, I write to appeal

- 1) Schrader's interpretation that the proposed waste incinerator, which would burn trash to generate electricity, "would be classified under the Romulus Zoning Law as 'Renewable Energy Production (Solar, Wind, Biomass, Geothermal, etc.) — Utility scale,'" and
- 2) Schrader's statement that the "Facility would not be prohibited under Article IV, Section 4(A) of the Romulus Zoning Law as a 'noxious or injurious' use provided it substantially complies with applicable environmental regulations."²

These interpretations are unreasonable and exceed the zoning officer's authority.

The public first had notice of these interpretations when Circular enerG filed its Special Use Permit Application with the Town Planning Board. The company mentioned the ZEO's interpretation letters in its presentation to the Town Planning Board on December 4, 2017. Then, on December 7, 2017, the Special Use Permit Application was posted on the Town of Romulus website.³ The letters were included as pages 640 and 641 of its permit application.

¹ See Letter from Adam Schrader, Town of Romulus ZEO, to Earl Martin, Seneca Dairy Systems, & Michael Palumbo, Flaum Management, Mar. 16, 2017 [hereinafter "Schrader Letter 1," attached as Attachment 1]; Letter from Schrader to Martin & Palumbo, Aug. 28, 2017 [hereinafter "Schrader Letter 2," attached as Attachment 2].

² Schrader Letter 1. Schrader's second letter repeats these same interpretations. See Schrader Letter 2.

³ See Special Use Permit Application and Environmental Assessment, Circular enerG Facility, (dated Nov. 2017, posted Dec. 7, 2017),

http://www.romulustown.com/pdfs/discussions/20171207115656~Final_Full_Permit_and_Assessment_for_Circular_enerG_Facility.pdf [hereinafter "Special Use Permit App."].

Standing

As a neighbor who will be negatively impacted by this proposed incinerator, I am a “person aggrieved” with standing to appeal the ZEO’s interpretations under N.Y. Town Law § 267-a(4). My health will be impacted by the air pollution from this incinerator, which will emit lead, mercury, dioxins, furans, acid gases and nitrogen oxides.⁴ My health and quality of life will be affected by the greatly increased traffic in the area with 238 trucks per day entering and leaving the facility. “The Project (trucks only and at full build out), is estimated to generate approximately 176 waste hauling vehicles/day, 2 slaked lime trucks/day, 1 activated carbon truck/day; 1 urea truck/day; 1 lubricating truck/day; 3 scrap ferrous metal trucks/day; 2 non-ferrous metal trucks/day; and 52 ash or concrete sand trucks/day... This traffic would be limited to state highways, either coming from the south on Routes 96 or 414, from the north, via the New York State Thruway, on Routes 96, 96A or 414, or from the east and west on Route 5 (U.S. 20).” (See Special Use Permit, Page 29 and 31.) My property values are also likely to decline because of undesirable air pollution and truck traffic from the facility, as well as the proposed 260-foot smoke stack, which will be visible at a great distance from the plant.

The ZEO’s Interpretations of the Zoning Code Are Unreasonable

First, I urge the Zoning Board of Appeals to overturn Schrader’s interpretation that the proposed waste incinerator would be classified as “Renewable Energy Production” under Romulus Zoning Law, and therefore eligible to apply for a Special Use Permit as an allowable use in its zoning district. This interpretation is unreasonable because waste incineration is not a renewable energy technology, a fact that has long been recognized by New York law.

In New York, waste-to-energy facilities are not considered “renewable.” Waste to energy facilities are not considered renewable in the state’s Clean Energy Standard.⁵ Prior to the Clean Energy Standard, New York operated under the Renewable Portfolio Standard. When Covanta Energy applied to have waste energy incinerators included as an eligible renewable technology under NY State’s Renewable Portfolio Standard, the NY Department of Environmental Conservation (“NY DEC”) filed scathing comments against such a designation.⁶ The NY DEC’s comments provide a detailed analysis of air emissions from ten existing trash incinerators, and showed that they produced worse emissions than eight coal facilities in New York (except for SO₂).⁷ In 2004, the NY Public Service Commission agreed with the NY DEC that “waste-to-energy” facilities did not meet the criteria for eligible renewable resources under the NY Renewable Portfolio Standard program.⁸ The basis for this determination was primarily the NY Public Service Commission’s concerns about air emissions from waste to energy facilities, noting that there is “no dispute” that their “emissions of mercury and NO_x exceed those of the

⁴ See Special Use Permit App. at 15.

⁵ See NY’s Clean Energy Standard, August 1, 2016 PSC Order, Case No.s 15-E-0302 and 16-E- 0270 at 31, 105 and Appendix A.

⁶ See NYDEC August 19, 2011 comments in Case No. 03-E-0188.

⁷ *Id.* at 6-7.

⁸ September 24, 2004 Order, Regarding Retail Renewable Portfolio Standard, Case No. 03-E-0188 at 8, 37, and 39.

dirtiest coal-type fossil fuel generation facilities.”⁹ The ZEO’s zoning code interpretation goes against this long-standing precedent, and therefore it is unreasonable and should be overturned.

Second, the Zoning Board of Appeals should overturn the ZEO’s statement that the waste incinerator would not be prohibited as a ‘noxious or injurious use’ under Article IV, Section 4(A) of the Romulus Zoning Law as long as it “substantially complies with applicable environmental regulations.”¹⁰ This interpretation is unreasonable because it renders Section 4(A) meaningless. Section 4(A) prohibits “[a]ll uses that may be noxious or injurious by reason of the production or emission of dust, smoke, odor, noise, gas fumes, glare, vibration, or because of danger to the general public due to hazards of fire or explosion.” The ZEO’s interpretation would mean that this section prohibits only uses that are already prohibited by other local, state, or federal environmental laws and regulations, and only to the extent that the impacts exceed those regulations. But the provision clearly prohibits uses and impacts that would not be addressed by those other laws, such as noise, glare, and vibration, as well as dangers to the general public due to hazards of fire and explosion. The ZEO’s interpretation is unreasonable because it renders Section 4(A) meaningless and would allow these uses that the Zoning Law plainly restricts.

Further, it was unreasonable for the ZEO to apply this interpretation to the proposed incinerator without first seeing detailed plans and studies of the incinerator’s proposed impacts and emissions. Even if the proposed incinerator operates within the limits of future environmental permits, it still likely to be “noxious or injurious” as defined by the Town of Romulus because of its likely “emission of dust [particulate matter], . . . odor, [and] noise.” Romulus Zoning Law, Section 4(A). In addition, it will have an inherent risk of fire and explosion because it is a combustion facility.¹¹ Without knowing the details of Circular enerG’s plant, Schrader could not reasonably determine whether or not it would fall within Section 4(A)’s prohibitions.

The Interpretations Exceed the Zoning Officer’s Authority

The ZEO did not have authority to give these interpretations of the Zoning Code, which were made as advisory opinions about a specific proposed facility but without any details regarding the proposed facility and well in advance of Circular enerG’s Special Use Permit Application. The Zoning Enforcement Officer position is created under Town law with the following duties: 1) approve, disapprove, or revoke zoning permits or certificates of occupancy; 2) interpret the

⁹ *Id.* at 39.

¹⁰ Schrader Letter 1.

¹¹ Incidents of fires and explosions at other waste incinerators are well documented. See, e.g., Bill Smith, *Lee County Trash Plant Fire Stinks Up Buckingham*, News-Press.com (Fort Myers, Fla.) (Dec. 23, 2017), <https://www.news-press.com/story/news/local/2017/12/23/firefighters-contain-blaze-lee-county-trash-facility/979357001/> (fire at trash plant in Lee County, Florida); Chris Gordon & Daniel Barnes, *Trash Fire Finally Extinguished at Garbage Disposal Plant in Lorton*, NBC Washington (Feb. 6, 2017) <https://www.nbcwashington.com/news/local/3-Stories-Worth-of-Trash-Still-Smoldering-at-Garbage-Disposal-Plant-in-Virginia-412935593.html> (fire at Covanta incinerator in Fairfax, Virginia);

zoning district boundaries on the zoning map; 3) refer appropriate matters to the Zoning Board of Appeals, Planning Board, or Town Board; 4) notify temporary permit holders when their permits will expire; 5) investigate complaints and violations, issue stop work orders and appearance tickets, and refer violations to appropriate authorities; and 6) report to the Town Board the number of permits and certificates of occupancy issued; Town of Romulus Zoning Ordinance, Art. XII, Section 7(B). In other words, the Zoning Enforcement Officer has the power to enforce the Zoning Code, but is not given the power to issue advisory opinions interpreting key terms in the Zoning Code. Thus, these interpretations were outside Schrader's authority and should be overturned by the Zoning Board of Appeals.

This Appeal is Timely

I am filing this appeal within the 60 days allowed by Town Law 267-a(5). The Department of State's Manual for Zoning Appeals states: "If you are a 'third party,' such as a nearby resident, you may still bring an appeal more than 60 days after the permit is filed, if you file within 60 days after you've had a reasonable opportunity to find out about the planned project."¹²

The public first had reasonable opportunity to learn of the ZEO's interpretations during Circular enerG's December 4th presentation before the Town Planning Board. Then, the public first had opportunity to read the letters when the Special Use Application was posted to the town's website on December 7th.¹³ This appeal is filed within 60 days of both dates.¹⁴

¹² N.Y.S. Div. of Local Govt. Servs., Guidelines for Applicants to the Zoning Board of Appeals 5 (2015), https://www.dos.ny.gov/lgs/publications/Guidelines_for_Applicants_to_the_Zoning_Board_of_Appeals.pdf. See also, Alan S. Knauf, Interpretations by the Zoning Board of Appeals 3 (2014), <http://www.nyenvlaw.com/wp-content/uploads/2014/11/Zoning-Board-of-Appeals-Interpretations.pdf> ("[C]ase law has long made it clear that the time to appeal to the ZBA does not begin to run for a neighbor until he or she receives actual notice of the decision.") (citing *Pansa v. Damiano*, 14 N.Y.2d 356, 251 N.Y.S.2d 665 (1964)).

¹³ See Special Use Permit App., *supra*.

¹⁴ The process around this proposed incinerator and the interpretations has been highly irregular and secretive. Although the applicant might argue that the public had notice of the interpretations because of a notice published in the Ovid Gazette, on X date, these notices shield the zoning interpretations from the public eye rather than to notify them. An email between Alan Knauf, lawyer for Circular enerG and Patrick Morell, the Town Attorney, states that the notices of the interpretations should be published "so that no one can claim they did not know about it and claim the 60 days for the appeal did not run" but that "we don't want to give a lot of details." Email dated April 21, 2017, 8:50 AM (received in response to a Freedom of Information Law Request by Mary Anne Kowalski).

And indeed the notice did not give many details. It merely stated that "the Town of Romulus Zoning Officer has issued an interpretation, dated March 16, 2017, regarding the meaning of "renewable energy production" under the Town of Romulus Zoning Law," and that the interpretation was on file with the ZEO. Public Notice, *Ovid Gazette* (May 10, 2017). It did not mention that the law had been interpreted to say that waste incineration was renewable energy. It did not mention that it interpreted the term "noxious and injurious use" or its application to a waste incineration plant. And it did not say that the interpretation was given in regards to a specific proposal of a waste incineration plant at a specific site, the Seneca Army Depot, details of which were already known to the ZEO and the Town's attorney. In short, the notice was not reasonably crafted to give notice to Romulus residents about the nature of the interpretation.

In conclusion, I timely appeal the March 16, 2017 and August 28, 2017 interpretation letters issued by the Zoning Enforcement Officer because they are unreasonable interpretations of the Town of Romulus Zoning Code and because the ZEO had no authority to issue them. As a remedy, the Zoning Board of Appeals should disavow the ZEO's erroneous interpretations and affirmatively state that these interpretations are invalid and inapplicable as to Circular enerG's proposed facility and other waste incineration facilities that may seek to locate in the Town of Romulus.

Sincerely,

Alan Kiehle