

SUPREME COURT  
STATE OF NEW YORK

COUNTY OF SENECA

CIRCULAR ENRG, LLC, AND SENECA DEPOT, LLC,

Petitioners-Plaintiffs,

vs.

**PETITION AND  
COMPLAINT**

TOWN OF ROMULUS and  
TOWN OF ROMULUS TOWN BOARD,

Respondents-Defendants.

Petitioners-Plaintiffs **CIRCULAR ENRG, LLC** and **SENECA DEPOT, LLC** (“Petitioners”), for their Petition and Complaint (“Petition”), by their attorneys, Knauf Shaw LLP, allege as follows:

**INTRODUCTION**

1. Petitioners bring this proceeding pursuant to CPLR Article 78 and section 3001, Town Law § 262, the Environmental Conservation Law (“ECL”), General Municipal Law (“GML”) § 239-m, Public Officers Law § 107, the Eminent Domain Procedure Law (“EDPL”), 42 U.S.C. § 1983, and other legal authorities to seek, *inter alia*, annulment as illegal, arbitrary and/or capricious the enactment of Town of Romulus Local Law No. 3 of 2018, entitled “A Local Law to Amend the Zoning Code of the Town of Romulus,” effective May 11, 2018 (“Zoning Amendments”), approved by Respondent-Defendant (“Respondent”) Town Board (“Town Board”) of the Town of Romulus (“Town”) on April 18, 2018.

2. Stated briefly, the Zoning Amendments, a copy of which is attached as **Exhibit A**, purported to amend the Town of Romulus Local Law No. 1 of 2015, entitled “A Local Law to Amend the Zoning Ordinance of the Town of Romulus, Seneca County, New York” (“2015

Zoning Law”), a copy of which is attached as **Exhibit B**, by prohibiting Waste-to-Energy facilities within the Town.

3. As discussed more thoroughly below, the Zoning Amendments were plainly enacted in an attempt to deter Circular enerG’s Waste-to-Energy project (“Project”), which is proposed to be constructed on a portion (“Project Site”) on the Former Seneca Army Depot (“Depot”).

4. The Zoning Amendments were passed in violation of the State Environmental Quality Review Act (“SEQRA”) (ECL Article 8), and are unlawful on their face and in operation, as it constitutes impermissible spot zoning.

5. Furthermore, the actions of Respondents constitute a taking and abridgement of Petitioners’ constitutional rights.

## **PARTIES**

6. Plaintiff-Petitioner Circular enerG, LLC (“Circular enerG”) is a domestic limited liability company, with offices at 400 Andrews Street, Suite 360, Rochester, New York, 14604.

7. Plaintiff-Petitioner Seneca Depot, LLC (“Seneca Depot”) is a domestic limited liability company, with offices at 400 Andrews Street, Suite 500, Rochester, New York, 14604.

8. Defendant-Respondent Town is a municipal corporation, with offices at 1435 Prospect Street, Willard, New York 14588, in Seneca County, New York.

9. Defendant-Respondent Town Board is a town board existing pursuant to Article 4 of the New York State Town Law, with offices at 1435 Prospect Street, Willard, New York 14588, in Seneca County, New York.

## **PROPERTY HISTORY**

10. The Depot consists of approximately 10,500 acres in the Towns of Romulus and Varick.

11. The Depot was a former military facility owned by the U.S. Government and operated by

the U.S. Army between 1941 and approximately 2000, when the military mission ceased. The Depot's historic military mission included receipt, storage, distribution, maintenance, and demilitarization of conventional ammunition, explosives and special weapons.

12. In its heyday, the Depot employed over 2000 people from 60 different communities. The Depot, now however, is a barren complex with crumbling infrastructure.

13. Due to the activities conducted at the Depot, the United States Environmental Protection Agency ("USEPA") included the Depot on the National Priorities List ("NPL").

14. Eventually, the Depot was designated for closure under the Department of Defense Base Realignment and Closure ("BRAC") process, in order to release non-affected portions of the Depot to the surrounding community for their reuse for non-military purposes.

15. Through the BRAC process, the U.S. Army issued a Finding of Suitability to Transfer portions of the Depot to Seneca County Industrial Development Agency ("SCIDA"), which it did in 2005 and 2011.

16. Petitioner Seneca Depot purchased roughly 920 acres of the Depot in the Town of Romulus ("Seneca Depot Property") from SCIDA on or about November 4, 2014.

17. Petitioner Seneca Depot previously leased the Seneca Depot Property from SCIDA.

18. The majority of the Depot in the Town of Romulus is zoned Warehouse, Industrial, Transportation, Energy ("WITE"), and Industrial/Warehousing ("I/W"), as designated in the 2015 Zoning Law.

19. The Circular enerG Project Site is located on the Seneca Depot Property, and falls entirely within the I/W Zoning District. Attached as **Exhibit C** is the Town Zoning District Map.

20. Petitioner Seneca Depot has attempted many times to redevelop and revitalize the barren complex.

21. A problem it has faced every time is the lack of adequate electricity for the Depot.
22. It is not economically feasible to run electric supply to the Seneca Depot Property to enable industrial development.
23. The Seneca Depot Property is zoned for, and is only suitable for, industrial use.
24. In order to provide electric power from off-site to develop the Seneca Depot Property with industrial uses, it would be necessary to run major transmission lines approximately 12 miles from Border City to the Depot, in order to provide power from the existing power grid in New York State, and provide other equipment upgrades.
25. In 2008, the cost to run those lines and provide the necessary power to the Seneca Depot Property was estimated to be \$37.8 million by Rochester Gas & Electric /New York State Electric & Gas.
26. Therefore, industrial development of the Seneca Depot Property is only feasible if a power supply is developed on-site.

### **THE PROJECT**

27. Petitioner Circular enerG has proposed to construct the Project, which would be a state-of-the-art Waste-to-Energy, Major Electric Generating Facility, as defined by Public Service Law § 160(2), in the Town on the Project Site on the Seneca Depot Property.
28. Seneca Depot has agreed to allow Circular enerG to use the Project Site for the Project, either pursuant to a lease or sale.
29. The Project would combust Municipal Solid Waste (“MSW”), as defined by 6 N.Y.C.R.R. § 360.2(176), to create steam and electricity.
30. The Project would generate sufficient steam and electricity to allow economically feasible industrial development of the Seneca Depot Property, and would generate excess electricity that could be feasibly transmitted to the grid.

31. Representatives of Petitioners engaged in discussions with Town representatives prior to developing detailed plans, studies and permit applications for the Project. The discussions were favorable to the Project.
32. On August 28, 2018, Circular enerG representatives met with two members of the Town Board, two members of the Town Planning Board, and the Town's attorney to discuss the Circular enerG Project. The feedback from the Town was receptive, and certainly not adverse.
33. On November 6, 2017, Circular enerG filed an application for a Special Use Permit Application, which included a request for a subdivision, and a Full Environmental Assessment Form which includes various attachments and appendices with the Town Planning Board ("Town Application"). A copy of the Application can be viewed on the Town's website, <http://www.romulustown.com/pdfs/discussions/20171207115656~Final Full Permit and Assessment for Circular enerG Facility.pdf>, and is incorporated by reference.
34. Circular enerG was made aware by the Town's attorney that certain members of the Town Planning Board had questions whether certain sections of the 2015 Zoning Code could require that the Project seek a use variance, namely Article VI, Section 8, and Article III, Section 15.
35. Circular enerG's attorneys wrote a letter to the Town on November 30, 2017, clarify that that would not be necessary. A copy of the letter is attached as **Exhibit D**.
36. On December 4, 2017, Circular enerG attended a Planning Board meeting to discuss the Project, and gave a presentation on the Project.
37. On December 20, 2017, Circular enerG received a letter from the New York State Department of Environmental Conservation ("NYSDEC"), which was also sent to the Town, dated December 20, 2017, stating that it believed the Project fell under Article 10 of the Public Service Law ("Article 10"), so that SEQRA did not apply to the Project.

38. Furthermore, if Article 10 applied, Public Service Law Section 172(1) provided that local zoning approvals, including a Special Permit from the Planning Board, were not required.

39. Circular enerG determined that NYSDEC was correct, and that Article 10 applied to the Project.

40. As a result, Circular enerG wrote to the Town on January 5, 2018, advising that it was withdrawing its Town Application, since “a Special Use Permit from the Planning Board will not be required.”

41. Petitioner Circular enerG has since proceeded under Article 10 of the Public Service Law in order to properly permit the Circular enerG Project.

42. Circular enerG initiated the Article 10 application process on March 13, 2018 by submitting a draft Public Involvement Plan (“PIP”) to the Department of Public Service (“DPS”). Circular enerG recently revised and resubmitted the PIP pursuant to DPS comments.

43. The Town has attempted to stop the Project in multiple ways; it proposed a Local Law Imposing a Temporary Moratorium on Zoning Board of Appeals Approvals, and a Local Law Imposing A Temporary Six Month Moratorium on Approvals For Waste Handling, Storage or Processing; Mineral Extraction or Mining; and Large Scale Energy Production Facilities.

44. Circular enerG opposed both efforts.

45. Upon information and belief, neither local law was passed and enacted.

### **ZONING INTERPRETATIONS**

46. The 2015 Zoning Law permitted, via Special Permit, “Renewable Energy Production (Solar, Wind, Biomass, Geothermal, ect. [sic]) – Utility Scale” within the WITE and I/W Zoning Districts.

47. On March 16, 2017, the Town of Romulus Zoning Officer issued an interpretation of the

2015 Zoning Law (“Interpretation”), which states that a Waste-to-Energy facility would “be an allowed use [within the WITE Zoning District] if a special permit was approved by the Romulus Planning Board. Furthermore, 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.” A copy of the March 16, 2017 Interpretation is attached as **Exhibit E**.

48. An additional Interpretation, issued on August 28, 2017, confirmed that a Waste-to-Energy facility would be permitted within the I/W Zoning District. A copy of that Interpretation is annexed as **Exhibit F**.

49. Thus, the Town determined that a Waste-to-Energy facility met the definition of “Renewable Energy Production,” and was an allowable use under the 2015 Zoning Law.

50. On February 1, 2018, a resident of the Town appealed the two Interpretations to the Zoning Board of Appeals (“ZBA”).

51. That appeal not only lacked merit, but it was untimely, since it was required to be filed within 60 days of filing of the Interpretations, pursuant to Town Law § 267-a(5)(b).

52. On April 26, 2018, the ZBA granted the appeal and approved a resolution which vacated the two zoning interpretations.

53. Circular enerG brought a proceeding in this Court under CPLR Article 78 against the ZBA and the Town on May 29, 2018, entitled *Circular enerG LLC and Seneca Depot, LLC v. Petitioners-Plaintiffs, vs. Town of Romulus, and Town of Romulus Zoning Board of Appeals, Respondents-Defendants, Alan Kiehle, Earl Martin and John Does, Necessary or Interested Parties*, Index No. 20180064 (“Circular I”). The Petition in that proceeding is incorporated by reference.

## THE ZONING AMENDMENTS

54. Apparently unhappy with the Interpretations, the Town Board undertook efforts to revise the 2015 Zoning Law in an effort to stop the Project.

55. The Town claims that the purpose of the Zoning Amendments was to “clarify the original intent of the [2015 Zoning Law]... clarify definitions and other provisions in the [2015 Zoning Law]; clarify the town’s zoning intent regarding allowable energy production, landfills, and Waste handling and disposal . . .” *See* Environmental Assessment Forms (“EAF”) Part 1, 2, and 3, attached as **Exhibit G**.

56. The Town prepared and drafted an initial version of the Zoning Amendments, dated February 27, 2018. *See* copy annexed as **Exhibit H**.

57. The Town again revised the Zoning Amendments on March 1, 2018 “March 1 Zoning Amendments.” *See* copy annexed as **Exhibit I**.

58. The final revisions are dated March 23, 2018, and are what was filed with the Department of State on May 11, 2018. *See* **Exhibit A**.

59. Essentially, the Zoning Amendments changed the allowable uses within an I/W Zoning District by prohibiting Waste-to-Energy facilities, by replacing the term “Renewable Energy Production (Solar, Wind, Biomass, Geothermal, ect. *[sic]*- Utility Scale” with “Clean Energy Production-Large Scale.” *See* **Exhibits A and B**.

60. The term “Clean Energy Production – Large Scale” is defined as “Utility Scale renewable energy production means Renewable Energy Production facilities with a collective total nameplate generating capacity of 25 kW or larger.” *See* **Exhibit A**, p. 8.

61. The term “Clean Energy Production” is defined as “Energy produced from wind, solar, water power that does not dam or otherwise block an entire flowing body of water, and/or

geothermal heating/cooling systems. . . Renewable Energy Production does not include any uses of combustion or other systems that consume Waste, biogas, biomass, liquid biofuel, or any other fuels and/or produces any combination of solid, liquid, or gaseous wastes or byproducts in the process of producing energy.” *See Exhibit A*, p. 8.

62. The Zoning Amendments give the term “Waste” an expansive definition. *See Exhibit A*, p. 16.

63. The Zoning Amendments prohibit “[a]ll uses not listed herein.” *See Exhibit A*, p. 22.

64. The Zoning Amendments forbid Waste-to Energy in all zoning districts within the Town.

65. Therefore, the Zoning Amendments would prohibit the Project, so residents and businesses in the Town, the surrounding areas, and other areas of the State, would need to continue to use landfills to manage their waste rather than send them to the Project for conversion to energy and recycling.

66. Petitioners opposed the Zoning Amendments, both in oral comments by their attorney, and by submission of a letter dated April 11, 2018, a copy of which is annexed as **Exhibit J**.

#### **GML § 239-M REFERRAL**

67. Under General Municipal Law § 239-m, the Town was required to refer the Zoning Amendments to the Seneca County Planning Board.

68. On March 8, 2018, the Seneca County Planning Board undertook a review under GML § 239-m.

69. The County Planning Board was only provided the March 1 Zoning Amendments, not the final Zoning Amendments that was eventually enacted.

70. The two versions differ dramatically. *See Exhibit K*, Comparison between March 1 Zoning Amendments and March 23 Zoning Amendments.

71. For instance, several definitions were added, definition of “Clean Energy Production,” “Clean Energy Production – Large Scale,” and “Natural Gas,” and several definitions were amended, like “Energy Productions – Natural Gas – Large Scale,” and “Waste.”

### **ENACTMENT OF THE LAW**

72. Prior to the April 18, 2018 the Town Board held a meeting with the Town’s attorneys regarding the Zoning Amendments, but did not notice the public of this meeting.

73. On April 18, 2018, the Town Board passed three resolutions (together “Resolutions”): Resolution #35-18, “Town Board of the Town of Romulus Designates Itself as Lead Agency for SEQR for Proposed Local Law #3”; Resolution #36-18, “Romulus Town Board Established as Lead Agency for SEQR for Proposed Local Law #3”; and Resolution # 37-18, “Revision to current Zoning Ordinance – Local Law #3.” A copy of the minutes of that meeting is attached as **Exhibit L.**

74. The minutes from the April 18, 2018 meeting do not indicate that the Town adopted a Negative Declaration, or EAF Parts 1, 2, or 3 under SEQRA for the Zoning Amendments. *Id.*

75. Further, the minutes do not state that the Town made a reasoned elaboration under SEQRA. *Id.*

76. On May 11, 2018, the Town filed the Zoning Amendments with the New York Secretary of State, and they purportedly became effective.

### **PROCEDURAL ISSUES**

77. Petitioners have no available administrative remedies.

78. Petitioners have made no previous application for the relief sought in this Petition, except to the extent sought in *Circular I.*

79. Petitioners have no adequate remedy of law.

**AS AND FOR A FIRST CAUSE OF ACTION  
FOR A VIOLATION OF SEQRA  
PETITIONERS ALLEGE AS FOLLOWS:**

80. Petitioners repeat and reallege the allegations of paragraphs “1” through “79” of this Petition, as if set forth in this paragraph at length.
81. SEQRA requires strict or literal compliance.
82. Respondents violated SEQRA by not adequately reviewing all impacts associated with the Zoning Amendments.
83. Respondents did not consider or analyze the impacts of future management of waste in the Town, Seneca County and New York State without the Project.
84. The SEQRA regulations recognize that “[a]ctions commonly consist of a set of activities or steps.” 6 N.Y.C.R.R. § 617.3(g). Therefore, “[c]onsidering only a part or segment of an action is contrary to the intent of SEQR[A].” 6 N.Y.C.R.R. § 617.3(g)(1).
85. SEQRA generally prohibits “segmentation,” which is defined as “the division of the environmental review of an action such that various activities or stages are addressed under this Part as though they were independent, unrelated activities, needing individual determinations of significance.” 6 N.Y.C.R.R. § 617.2(ag).
86. Therefore, environmental review of the Zoning Amendments under SEQRA cannot be segmented from the SEQRA review of future waste management practices.
87. The SEQRA review of the Zoning Amendments needed to consider all of the potential environmental impacts of the continued use of landfills to manage waste from the Town, Seneca County and other areas of the State.
88. The SEQRA review did not include those considerations and illegally segmented review of the Zoning Amendments from review of future solid waste management practices.

89. In fact, the Town incorrectly responded to questions on the EAF, Part 1 and Part 2, required as part of its SEQRA review. *See Exhibit G.*

90. Specifically, the Town should have answered “Yes” to the following questions on the EAF Part 1:

h. Will the proposed action generate or emit methane (including, but not limited to, sewage treatment plants, landfills, composting facilities)?	<input type="checkbox"/> Yes <input type="checkbox"/> No
If Yes:	
i. Estimate methane generation in tons/year (metric): _____	
ii. Describe any methane capture, control or elimination measures included in project design (e.g., combustion to generate heat or electricity, flaring): _____	
i. Will the proposed action result in the release of air pollutants from open-air operations or processes, such as quarry or landfill operations?	
If Yes: Describe operations and nature of emissions (e.g., diesel exhaust, rock particulates/dust): _____	

91. By eliminating Waste-to-Energy plants from the Town, the Town has committed to increase its generation and methane emissions by using landfills to dispose of waste, both from sources inside and outside of the Town.

92. It is well-known that landfills generate more methane than a Waste-to-Energy facility.

93. In fact, the current State Solid Waste Management Plan, *Beyond Waste*,<sup>1</sup> encourages additional Waste-to-Energy facilities, and clearly lays out the downsides of continuing on the current path of landfilling the majority of the State’s waste.

94. The Plan states that “[Waste-to-Energy] offers advantages over disposal in landfills. This is primarily because treatment through combustion facilities: reduces the amount of waste sent to landfills for disposal and the methane generated by landfilling; recovers metals that would otherwise be wasted; produces electricity more efficiently than landfill gas-to-energy facilities, and offsets fossil fuel electricity generation.” *See* p. 52.

95. Further, the Town should have answered “Yes” to question “i” because landfills generate

<sup>1</sup> [http://www.dec.ny.gov/docs/materials\\_minerals\\_pdf/frptbeyondwaste.pdf](http://www.dec.ny.gov/docs/materials_minerals_pdf/frptbeyondwaste.pdf)

more air pollutants like greenhouse gases (“GHG”) than Waste-to-Energy facilities.

96. An assessment of the net GHG emissions from the Project and a comparative assessment of landfilling mixed MSW conclude that the Project activities overall *reduce* GHG emissions and have a significantly beneficial GHG emission impact as compared to landfilling the same material. This information was presented to the Town of Romulus Planning Board in the Town Application. The results are detailed in the following chart:

Waste Disposal Method	Net GHG Emissions (TPY CO <sub>2</sub> e) <sup>2</sup>
Project Waste-to-Energy	-31,759
Landfilling	136,726
<b>Net Benefit Waste-to-Energy to Landfill</b>	<b>-168,485</b>

97. By enacting the Zoning Amendments, the Town is trying to stop the Project and similar Waste-to-Energy facilities, and thus is contributing to global warming. This resulting environmental impact must be assessed, since SEQRA requires the assessment of cumulative impacts, including global warming. 6 N.Y.C.R.R. § 617.7(c)(2).

98. Moreover, by limiting “Clean Energy Production” to only 25 kW, the Zoning Amendments prohibit larger scale renewable energy production, including solar and wind power production, resulting in greenhouse gas emissions and air pollution from power plants fueled by fossil fuels. Upon information and belief, this is inconsistent with Town land use plans and goals.

99. Thus, the Town should have answered “Yes” to whether “The proposed action is not consistent with adopted land use plans.” *See Exhibit G*, Section 17, page 10 of 10.

100. On EAF Part 2, the Town should not have answered “No” to whether “The proposed action may include a state regulated air emission source.” *See Exhibit G*, Section 6, page 4 of 10.

101. Specifically, Respondents should have answered and analyzed the level of impact to air for

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<sup>2</sup> A negative value represents a GHG emission reduction.

the following question:

Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
<p>a. If the proposed action requires federal or state air emission permits, the action may also emit one or more greenhouse gases at or above the following levels:</p> <ul style="list-style-type: none"> <li>i. More than 1000 tons/year of carbon dioxide (CO<sub>2</sub>)</li> <li>ii. More than 3.5 tons/year of nitrous oxide (N<sub>2</sub>O)</li> <li>iii. More than 1000 tons/year of carbon equivalent of perfluorocarbons (PFCs)</li> <li>iv. More than .045 tons/year of sulfur hexafluoride (SF<sub>6</sub>)</li> <li>v. More than 1000 tons/year of carbon dioxide equivalent of hydrochlorofluorocarbons (HFCs) emissions</li> <li>vi. 43 tons/year or more of methane</li> </ul>	D2g D2g D2g D2g D2g D2h	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>

*See id.*

102. As mentioned above, landfills emit more methane and other greenhouse gases than Waste-to-Energy facilities. Enacting the Zoning Amendments required the Town to answer “Yes” and indicate a “Moderate to large impact may occur.”

103. Due to the Town’s commitment of perpetual methane emissions, the Town should have answered “Yes” to “The proposed action may have an impact on human health from exposure to new or existing sources of contaminants.” *See Exhibit G*, Section 16, page 9 of 10.

104. Further, the Zoning Amendments will likely impact agricultural resources because Respondents will need more land to continue its landfilling practices, so the Town should have answered “Yes” to whether “The proposed action may impact agricultural resources.” *See Exhibit G*, Section 8, page 5 of 10.

105. Specifically, Respondents should have answered and analyzed the impacts to farmland for the following question:

106. Further, the Respondents further violated SEQRA by, upon information and belief, failing to make a Negative Declaration or perform a reasoned elaboration under SEQRA, since the Town Board failed in the April 18, 2018 minutes to state that it adopted a Negative Declaration or approve EAF Parts 1, 2, and 3. *See Exhibit L.*

107. Regardless, the reasoning embodied in EAF Part 3 is insufficient because the Town failed to consider all environmental impacts of the adoption of the Zoning Amendments. *See Exhibit G.*

108. Accordingly, this Court should annul the Zoning Amendments due to the Town's failure to strictly comply with SEQRA.

**AS AND FOR A SECOND CAUSE OF ACTION  
FOR ARBITRARY, CAPRICIOUS AND ILLEGAL ACTION,  
PETITIONERS ALLEGE AS FOLLOWS:**

109. Petitioners repeat and reallege the allegations of paragraphs "1" through "108" of this Petition, as if set forth in this paragraph at length.

110. The Zoning Amendments specifically exclude "Waste" as a renewable energy resource.

111. However, solid waste is classified as a "renewable energy" in the State of New York. *See* Energy Law § 1-103(12) (defining "Renewable energy resources" as "sources which are capable of being continuously restored by natural or other means or are so large as to be useable for centuries without significant depletion and include but are not limited to solar, wind, plant and forest products, wastes, tidal, hydro, geothermal, deuterium, and hydrogen."); *see also* Public Authorities Law § 1851 (defining "new energy technologies" to include "all methods used to produce, distribute, conserve and store energy by methods not in common commercial use, with emphasis on renewable energy sources including but not limited to solar, wind, bioconversion and solid waste"); *see also* Internal Revenue Code § 45(c)(1)(G).

112. When the Public Service Commission issued its Order Regarding Retail Renewable Portfolio Standard, it recognized municipal solid waste "as a potentially important energy resource and encourages the industry to implement processes such as source separation, gasification, or other practices that would advance the state-of-the-art for waste-to energy technology to mitigate

concerns expressed on the record and make access to RPS incentives more appropriate.”<sup>3</sup>

113. The Zoning Amendments specifically exclude “Waste” as a renewable resource.

114. Thus, the Town’s definition of Waste is plain arbitrary and capricious and has no rational basis.

**AS AND FOR A THIRD CAUSE OF ACTION  
FOR VIOLATION OF GENERAL MUNICIPAL LAW § 239-M,  
PETITIONERS ALLEGE AS FOLLOWS:**

115. Petitioners repeat and reallege the allegations of paragraphs “1” through “114” of this Petition, as if set forth in this paragraph at length.

116. Under GML § 239-m, the Town was required to refer the Zoning Amendments to the Seneca County Planning Board.

117. While the Zoning Amendments were referred to the County Planning Board, and the County reviewed on March 8, 2018, the County did not review the final Zoning Amendments.

118. The County Planning Board reviewed the substantially different earlier version of the Zoning Amendments, the March 1 Zoning Amendments. *See Exhibit K.*

119. Where a referred project is substantially modified, referral of a full statement of the application to County Planning must occur again so that County Planning is given the opportunity to comment on what is actually being acted on. *See GML § 239-m.*

120. Upon information and belief, re-referral to the Seneca County Planning Board did not occur after the Town substantially modified the proposed Zoning Amendments on March 23, 2018.

121. Referral to County Planning is a jurisdictional requirement, so the Zoning Amendments are illegal, arbitrary and capricious, and should be vacated and annulled, and declared illegal and

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<sup>3</sup> *See Case 03-E-0188, Order Regarding Retail Renewable Portfolio Standard at <http://documents.dps.ny.gov/public/MatterManagement/MatterFilingItem.aspx?FilingSeq=9954&MatterSeq=17612>, p. 8.*

invalid.

**AS AND FOR A FOURTH CAUSE OF ACTION  
FOR ARBITRARY, CAPRICIOUS AND ILLEGAL ACTION,  
PETITIONERS ALLEGE AS FOLLOWS:**

122. Petitioners repeat and reallege the allegations of paragraphs “1” through “121” of this Petition, as if set forth in this paragraph at length.

123. The Zoning Amendments are arbitrary and capricious because they fail to define “Renewable Energy Production,” and prohibit energy production over 25 kW.

124. The Zoning Amendments do not define “Renewable Energy Production,” even though it capitalizes that term, and uses it within multiple definitions. *See Exhibit A*, p. 8. (Definition of “Clean Energy Production – Large Scale” is defined as “Utility Scale *renewable energy production* means *Renewable Energy Production* facilities with a collective total nameplate generating capacity of 25 kW or larger.”); *id.* (Definition of “Clean Energy Production” is defined as “Energy produced from wind, solar, water power that does not dam or otherwise block an entire flowing body of water, and/or geothermal heating/cooling systems. . . *Renewable Energy Production* does not include any uses of combustion or other systems that consume Waste, biogas, biomass, liquid biofuel, or any other fuels and/or produces any combination of solid, liquid, or gaseous wastes or byproducts in the process of producing energy.”).

125. The Town’s intent in enacting the Zoning Amendments was to “clarify” the 2015 Zoning Law. It clearly did not accomplish that. *See Exhibit G*, EAF Part 3.

126. Further, the Zoning Amendments limit “Clean Energy Production – Large Scale,” and “Energy Production – Natural Gas – Large Scale” having a maximum nameplate capacity of 25 kW.

127. The Zoning Amendments states “[a]ll uses not listed herein are prohibited,” *see Exhibit*

A, p. 22, so all energy production over 25 kW are prohibited.

128. 25 kW is a relatively small amount of energy and is certainly, not “Large Scale,” as defined in the Zoning Amendments.

129. For example, the NY-SUN program, which provides incentives for solar energy projects in New York State, provides incentives for solar on residential property for systems up to 25 kW and for businesses, schools, and local governments up to 750 kW.

130. Therefore, the Zoning Amendments would essentially prohibit any solar projects larger than residential projects.

131. Numerous Finger Lakes wineries have installed solar systems well above 25 kW to offset the electricity consumed in their operations. For example, Hunt Country Vineyards installed at 109 kW system, Fox Run Winery installed a 50 kW system, Lakewood Vineyards has a 47 kW system, 51 kW at Dr. Frank’s Vinifera Wine Cellars; 250 kW at Wagner Vineyards and 62 kW at O-Neh-Da, among others.

132. Therefore, the Zoning Amendments would essentially prevent area wineries from installing solar energy systems large enough to power their operations.

133. Further, New York State Energy Research and Development Authority’s Small Wind Turbine Incentive Program provides incentives for on-site wind turbines with capacity up to 2,000 kW, with the current wind turbines eligible for incentives ranging from 225 kW to 1,815 kW. Many area farms would be eligible for these incentives, but may be unable to do so because of the Zoning Amendments.

134. The two 1,650 kW wind turbines powering the Zotos facility in Geneva would be banned under the Zoning Amendments.

135. An average wind turbine has a nameplate generating capacity of 2 megawatts (“MW”),

which equals 2000 kW. The Town has essentially prohibited all wind energy production.

136. Thus, the Zoning Amendments are arbitrary and capricious and should be annulled and declared invalid.

**AS AND FOR A FIFTH CAUSE OF ACTION  
FOR A DECLARATION THAT THE ZONING AMENDMENTS  
ARE PREEMPTED BY THE PUBLIC SERVICE LAW,  
PETITIONERS ALLEGE AS FOLLOWS:**

137. Petitioners repeat and reallege the allegations of paragraphs "1" through "136" of this Petition, as if set forth in this paragraph at length.

138. The Town is preempted from regulating Waste-to-Energy facilities that fall under the exclusive jurisdiction of Article 10.

139. Article 10 regulates "Major electric generating facilit[ies]," defined as "an electric generating facility with a nameplate generating capacity of twenty-five thousand kilowatts or more, including interconnection electric transmission lines and fuel gas transmission lines that are not subject to review under article seven of this chapter." Public Service Law § 160.

140. The Town, by enacting the Zoning Amendments, is attempting to regulate, and actually prohibit, electric generating facilities with a nameplate generating capacity of 25 MW.

141. The Town is preempted from regulating these types of facilities under the Public Service Law.

142. Thus, the Zoning Amendments should be annulled and declared invalid

**AS AND FOR AN SIXTH OF ACTION  
FOR A DECLARATION THAT THE ZONING  
AMENDMENTS CONSTITUTE SPOT ZONING,  
PETITIONERS ALLEGE AS FOLLOWS:**

143. Petitioners repeat and reallege the allegations of paragraphs "1" through "142" of this Petition, as if set forth in this paragraph at length.

144. This Court should issue a declaratory judgment, pursuant to CPLR § 3001, that the Zoning Amendments are impermissible spot zoning, and are ineffective, unlawful, and unenforceable.

145. The Zoning Amendments constitute illegal spot zoning, being specifically targeted at the Project and the I/W Zoning District where the Circular enerG Project is proposed, are contrary to the local Comprehensive Plans.

146. The Town Comprehensive Plan encourages the attraction of business activity into the Depot.

147. The Zoning Amendments only allows “Clean Energy Production-Large Scale” in the I/W Zoning District, which substantially limits the type of energy production options with its limiting definition. *See Exhibit A*, p. 8.

148. More importantly, any “Clean Energy Production” is limited to only 25 kW. *See Exhibit A*, p. 22 (“All uses not listed herein are prohibited.”).

149. For the reasons stated above, 25 kW unreasonably restricts the rights of the I/W Zoning District and constitutes spot zoning.

150. Further, the Zoning Amendments are also in conflict with the Seneca County Draft Environmental Conservation Plan (June 2014), which details the importance of waste management.” A “zero waste” management model makes landfilling the last resort, and encourages waste diversion and energy recovery: “Waste material is weighed and sorted, separated into its various constituent parts, inspected for consistency, re-sorted, and reprocessed, or baled for specialist reprocessing and re-manufacture or energy recovery. The goal is to transform everything into something of value, and not landfill anything unnecessarily.”

151. The Zoning Amendments further conflict with Seneca County Draft Economic Development Plan also details the utility service problems with the Depot, which the Project seeks

to correct.

The lack of sufficient electric capacity and distribution at the Depot inhibits its growth as a job and business center, and Seneca County is committed to supporting necessary upgrades. Renewable energy may offer at least a partial solution to the Depot's energy problems. Seneca County is committed to supporting the development and use of green energy sources. The Seneca County IDA helps promote green energy Projects at the Depot."

152. The Zoning Amendments limit utility options for the Depot.
153. Further, the economic goals of the County include Strategy 3H to "Enable alternative and renewable energy production, including, but not limited to, solar, hydro, biogas, and wind resources." Thus, this Plan calls for renewable energy projects like the Circular enerG Project.
154. The Zoning Amendments are contrary to local plans, and plainly constitute illegal spot zoning, and should be annulled and declare invalid and illegal.

**AS AND FOR A SEVENTH CAUSE OF ACTION FOR A  
DECLARATION THAT THE ZONING AMENDMENTS  
ARE PREEMPTED BY ECL ARTICLE 27,  
PETITIONERS ALLEGE AS FOLLOWS:**

155. Petitioners repeat and reallege the allegations of paragraphs "1" through "154" of this Petition, as if set forth in this paragraph at length.
156. The Zoning Amendments are preempted by Title 7 of Environmental Conservation Law ("ECL") Article 27.
157. The relevant portion of the ECL states that "[a]ny local laws, ordinances or regulations of any governing body of a county, city, town or village which are not inconsistent with this title [Title 7 of ECL Article 27] or with any rule or regulation . . . shall not be superseded by [this title]." ECL § 27-0711.
158. The Zoning Amendments are inconsistent with Article 27 by totaling banning Waste-to-Energy facilities, rather than merely regulating such facilities.

159. Thus, the Zoning Amendments are preempted and must be annulled and declared illegal.

**AS AND FOR AN EIGHTH CAUSE OF ACTION FOR  
FOR VIOLATION OF PUBLIC OFFICERS LAW § 103,  
PETITIONERS ALLEGE AS FOLLOWS:**

160. Petitioners repeat and reallege the allegations of paragraphs "1" through "159" of this Petition, as if set forth in this paragraph at length.

161. Public Officers Law § 103(a) states "every meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted thereat in accordance with section ninety-five of this article."

162. Prior to the April 18, 2018 meeting, the Town Board held a workshop meeting with the Town attorneys regarding the Zoning Amendments, but did not notice the public of this meeting.

163. Upon information and belief, an executive session was not called.

164. Thus, the Town Board violated Public Officers Law § 103(a).

165. The Town also violated Public Officers Law § 103(e) by failing to post the Resolutions on the Town's website prior to enacting them on April 18, 2018.

166. The Respondents maintain a regularly and routinely updated website and utilize a high speed internet connection. This website can be accessed at <http://www.romulustown.com/>.

167. The Town was prepared to adopt the Resolutions prior to the April 18, 2018 meeting.

168. However, the Respondents did not post the Resolutions on the Town's website prior to that meeting.

169. Upon information and belief, there is no reason that posting the Resolutions was not practicable.

170. As a result, the Resolutions were adopted in violation of Public Officers Law § 103, and must be annulled and vacated.

**AS AND FOR A NINTH OF ACTION  
FOR INVERSE CONDEMNATION,  
PETITIONERS ALLEGE AS FOLLOWS:**

171. Petitioners repeat and reallege the allegations of paragraphs "1" through "170" of this Petition, as if set forth in this paragraph at length.

172. Due to the major power deficiency at the Depot, the Zoning Amendments deprive Petitioner Seneca Depot of all feasible opportunities to provide its property with power.

173. The Zoning Amendments will eviscerate the vested rights of Petitioners, depriving them of economically beneficial or productive use of the Project Site and/or the Seneca Depot Property, and will thus result in a regulatory taking.

174. Without a large project like the Circular enerG Project, or other projects to provide power that have been banned by the Zoning Amendments, it is not feasible to provide sufficient power for industrial development, and the land owned by Seneca Depot cannot be economically utilized.

175. Enactment of the Zoning Amendments interfered with Petitioners' property rights to such a degree that it resulted in a taking of Petitioners' rights, including their rights to use the Seneca Depot Property.

**AS AND FOR A TENTH CAUSE OF ACTION  
FOR CONSTITUTIONAL VIOLATIONS,  
PETITIONERS ALLEGE AS FOLLOWS:**

176. Petitioners repeat and reallege the allegations of paragraphs "1" through "175" of this Petition, as if set forth in this paragraph at length.

177. The Zoning Amendments, and the other actions of Respondents singling out Petitioners and their Project, and specifically directed at stopping the Project, are unconstitutional as applied to or directed at Petitioners, in violation of constitutional guarantees to due process and/or equal

protection.

178. Respondents have treated Petitioners differently than similarly situated persons.

179. Respondents have acted without legal, scientific or other legitimate justification or reasoning, being motivated entirely by political concerns.

180. Respondents have deprived Petitioners of their rights to use the Seneca Depot Property or proceed with the Project without compensation, and in violation of the rights to due process and equal protection as guaranteed by the Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution, and Article 1, sections 6, 7, 8 and 11 of the New York State Constitution, and are therefore liable for Petitioners' damages (including lost profits from the Project and lost or diminished property value), and expert and attorney fees, pursuant to 42 U.S.C. §§ 1983 and 1988.

**AS AND FOR AN ELEVENTH CAUSE OF ACTION FOR  
ARBITRARY, CAPRICIOUS AND ILLEGAL ACTION,  
PETITIONERS ALLEGE AS FOLLOWS:**

181. Petitioners repeat and reallege the allegations of paragraphs "1" through "180" of this Petition, as if set forth in this paragraph at length.

182. Upon information and belief, and/or as may be further determined upon filing of the record of proceedings, the Zoning Amendments enacted by Respondents may otherwise be in violation of other laws, regulations and procedures, and/or arbitrary and capricious.

**WHEREFORE**, Petitioners respectfully request that this Court grant an Order and Judgment pursuant to CPLR Article 78 and section 3001, Town Law § 262, the Environmental Conservation Law, GML § 239-m, Public Officers Law § 107, the EDPL, 42 U.S.C. § 1983, and/or other legal authorities: (1) vacating, annulling, and declaring illegal, arbitrary and/or capricious the Zoning Amendments enacted by the Town; (2) declaring that the Zoning Amendments are preempted by Article 10; (3) declaring the Zoning Amendments constituted spot zoning; (4)

declaring Petitioners' constitutional rights were violated by the enactment of the Zoning Amendments; (5) declaring that the Zoning Amendments are preempted by ECL Article 27; (6) awarding Petitioners their damages, pursuant to 42 U.S.C. § 1988, the EDPL and/or otherwise; (7) awarding Petitioners their costs, expert fees and attorney fees, pursuant to 42 U.S.C. § 1988, EDPL §§ 701 and 702 and Public Officers Law § 107(2); and/or (8) granting such other and further relief as this Court deems just and proper, including Petitioners' costs and disbursements.

Dated: Rochester, New York  
August 17, 2018

  
**KNAUF SHAW LLP**  
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Alan J. Knauf, Esq., and  
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1400 Crossroads Building  
2 State Street  
Rochester, New York 14614  
Tel: (585) 546-8430

VERIFICATION

STATE OF NEW YORK)  
COUNTY OF MONROE) s.s.:

MICHAEL PALUMBO, being duly sworn, deposes and says that I am a Member of Petitioner-Plaintiff Seneca Depot, LLC. I have read the annexed Petition and Complaint, and know its contents. It is true to my own knowledge, except as to the matters stated to be alleged upon information and belief, and as to such matters I believe them to be true.

  
MICHAEL PALUMBO

Sworn to before me this  
17<sup>th</sup> day of August, 2018

  
Ellen C. Smith  
Notary Public

ELLEN C SMITH  
NOTARY PUBLIC, STATE OF NEW YORK  
MONROE COUNTY  
LIC. # 01SM4601008  
COMM. EXP. 3/30/22