Knauf Shaw LLP
ATTORNEYS AT LAW

November 30, 2017

VIA ELECTRONIC MAIL

Patrick J. Morrell, Esq.
Romulus Town Attorney
102 Fall Street, 2nd Floor
Seneca Falls, NY 13148

Re: Circular enerG Facility

Dear Pat:

As you are aware, we are attorneys for Circular enerG, LLC, the applicant ("Applicant") for the Circular enerG Facility renewable energy project ("Project"), proposed in the Town of Romulus at the former Seneca Army Depot ("Depot"). We are writing to you to follow up on our phone conversation on November 28, 2017, when you indicated that Planning Board members had questioned whether certain sections of the Town of Romulus Zoning Code ("Zoning Code"), namely Article VI, Section 8 and Article VIII, Section 15, could potentially require a use variance for the Project. As set forth below, that is not correct, and no use variance is necessary.

1. **The Code Enforcement Officer Has Already Determined That a Waste-To-Energy Facility Is Allowed With A Special Use Permit.**

The Town of Romulus Code Enforcement Officer ("CEO"), Adam Schrader, has already issued two interpretations (the "Interpretations"), finding that a waste-to-energy facility is "Renewable Energy Production" permitted under the Zoning Code with a Special Use Permit. On March 16, 2017, Mr. Schrader ruled that a waste-to-energy facility, which through combustion of solid waste, would use the resulting heat from the combustion process to generate steam to power a turbine to produce electric power, is an allowed use at the former Depot. The Interpretation goes on the state that a waste-to-energy facility would be classified under Article IV, Section 1 as a "Renewable Energy Production (Solar, Wind, Biomass, Geothermal, etc.) – Utility scale." A waste-to-energy 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." Notice of this interpretation was published in the official Town newspaper, the *Ovid Gazette*, on May 10, 2017.

A second Interpretation, dated August 28, 2017, confirmed that a waste-to-energy facility was an allowed use within the Industrial/Warehouse (I/W) Zoning District where the Project is proposed, as well as in the Warehouse, Industrial, Transportation, Energy Zoning District. Notice of this second Interpretation was published in the *Ovid Gazette* on September 13, 2017.

These Interpretations were never timely appealed within 60 days to the Zoning Board of Appeals ("ZBA"), as would be required by Town Law §267-a(5)(b), nor was any lawsuit initiated.

Thus, the Interpretations are binding on the Planning Board. Only the ZBA can review an interpretation of the CEO. *See* Article XII, Section 8(B)(1); *Bristol Homeowners Environmental Preservation Associates, LLC v. Town of South Bristol*, 122 A.D.3d 1259, 1260, 996 N.Y.S.2d 813, 815 (4th Dep't 2014) ("appeal to the Zoning Board of Appeals [is available] where it is alleged that there is an error in any order or decision made by an administrative officer or body in the enforcement of the Code"). The Planning Board "is not vested with the authority to interpret the Zoning Ordinance." *DeMarco v. Village of Elbridge*, 251 A.D.2d 991, 992, 674 N.Y.S.2d 245, 246 (4th Dep't 1998).

Because the Interpretations were not timely appealed, any action brought to challenge them at this juncture would be dismissed for failure to exhaust administrative remedies. *Dowling v. Holland*, 245 A.D.2d 167, 666 N.Y.S.2d 585 (1st Dep't 1997) (failure to file a timely appeal "constitutes a failure to exhaust administrative remedies," and requires dismissal of further applications for the same relief); *see also Watergate II Apartments v. Buffalo Sewer Authority*, 46 N.Y.2d 52, 412 N.Y.S.2d 821 (1978); *Aliano v. Oliva*, 72 A.D.3d 944, 946, 899 N.Y.S.2d 330, 333 (2d Dep't 2010).

Further, if someone attempted to undo the Interpretations, they would fail. The doctrine of collateral estoppel applies to administrative proceedings, including zoning determinations. *Ryan v. New York Telephone Co.*, 62 N.Y.2d 494, 503-4, 478 N.Y.S.2d 823 (1984); *Freddolino v. Zoning Board of Appeals of the Village of Warwick*, 192 A.D.2d 839, 596 N.Y.S.2d 490 (3rd Dep't 1993); *Lee v. Jones*, 230 A.D.2d 435, 659 N.Y.S.2d 549 (3rd Dep't 1997). Moreover, on the merits, waste-to-energy is clearly a renewable energy source. *See, e.g.,* Internal Revenue Code §45(c)(1)(G).

Therefore, the Planning Board is bound by the Interpretations.

2. Article VI, Section 8 ("Outdoor Storage") Does Not Bar the Project.

Article VI, Section 8, governs "outdoor storage," and states that "[t]he storage of any waste materials, except for food processing or agricultural waste and marketable recyclable materials, is prohibited."

This requirement cannot be taken out of context to mean that no ***indoor*** storage of waste can occur. The section only applies to ***outdoor*** storage. Such an interpretation would lead to an absurd result. *Williams v. Williams*, 23 N.Y.2d 592, 599 (1969) (cannot "blindly apply the words of a statute to arrive at an unreasonable or absurd result."). Otherwise, citizens and businesses could not store waste inside of their homes and buildings.

Furthermore, read in context, we believe the provision should to read to only address "commercial manufacturing, fabricating, or servicing operations," not all properties in the Town. Otherwise, it would be unlawful for citizens of the Town to place their trash outside or at the street, and businesses would be required to keep their dumpsters indoors.

In any event, the Project does not call for the storage of any waste outside. All municipal waste will be deposited inside an enclosed building prior to incineration.

The Project may result in the temporary staging of municipal waste inside sealed rail containers designed specifically for waste transport on rail cars. However, as we are sure you are aware, "transportation by rail carriers" falls within the exclusive jurisdiction of the Federal Surface Transportation Board, and cannot be regulated by a municipality. 49 U.S.C. §10501.

Further, the term "storage" is not defined, and therefore the prohibition is vague and may not be enforceable. *See Turner v. Municipal Code Violations Bureau of City of Rochester*, 122 A.D.3d 1376, 1377, 997 N.Y.S.2d 876 (4th Dep't 2014). Under the Romulus Zoning Code, a property owner does not know how long they can keep waste on their property or where they can hold it before they run afoul of the storage ban. In *Turner*, the City of Rochester banned "outdoor storage," defined as "[s]torage of any materials, merchandise, stock, supplies, machines and the like that are not kept in a structure having at least four walls and a roof, regardless of how long such materials are kept on the premises." The Fourth Department held the provision was unconstitutionally vague:

> In addressing vagueness challenges, courts have developed a two-part test. First, the court must determine whether the statute in question is sufficiently definite to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. Second, the court must determine whether the enactment provides officials with clear standards for enforcement.

Turner v. Municipal Code Violations Bur. of City of Rochester, 122 A.D.3d 1376, 997 N.Y.S.2d 876 (4th Dep't 2014). Similarly, in Romulus, where the Zoning Code does not even provide a definition of "storage," there are no "clear standards for enforcement."

In any event, there will be no outdoor storage subject to regulation. Therefore, the Project is not barred by Section 8 ("Outdoor Storage").

3. The "Transloading/Truck Terminal" Provision in Article VIII Is Inapplicable.

The Project does require a Special Use Permit, and therefore must comply with Article IX ("Special Use Review"). However, compliance with Zoning Code Article VIII, Section 15 ("Transloading/truck terminal"), which contains a prohibition on "[t]he storage, processing or transloading of any waste materials, except for food processing or agricultural waste and marketable recyclable materials" at transloading/truck terminals, is not required, since the Project is not a transloading or truck terminal.

Section 1 of Article VIII states that only "the ***following*** Special Uses shall also meet the requirements specified in this Article" [emphasis added]. Each of the "following" 14 uses listed in Article VIII (Sections 2 through 15) has specified regulations for that particular use that are not generally applicable to all uses in the Town. For example, regulations under Section 4 govern "Gas Stations," Section 9 governs "Restaurants," Section 11 regulates "Communication Transmission

Towers and Telecommunications Facilities," and Section 14 governs "Dog/Cat Breeding Facilities."

Section 15 of Article VIII governs "Transloading/truck terminals." A "Truck Terminal" is allowed by a zoning permit in the I/W District. Section IV, Section 1. However, the Project is not a terminal. In fact, "Transloading or Trucking Terminal" is defined by Article II ("Definitions") as "[a] facility for the receipt, transfer, short-term storage and dispatch of goods other than trash." This definitional exclusion for trash is consistent with the bar to "storage, processing or transloading of any waste materials" for terminals set forth in Section 15. Therefore, Section 15 of Article VIII is not applicable to the Project.

Nor are any other of the other specific provisions of Article VIII applicable, since Renewable Energy Production is not one of the listed 14 uses which have their own particular rules. Individual requirements for particular special uses cannot be taken out of context and applied to all properties in the Town. For example, while subdivision B of Section 9, governing restaurants, states "[t]he minimum distance between any driveway and side lot line shall be thirty (30) feet," that requirement only applies to restaurants, not all parcels in the Town.

Further, as discussed above, the Town, by its CEO, has already determined a waste-to-energy facility is allowed with a Special Use Permit. Trucking is a common means of transporting municipal waste, and was likely considered by the CEO when he issued the Interpretations. Therefore, Section 15 of Article VIII is no bar the Project.

Finally, if there was any doubt, the rule is clear that "[z]oning regulations, being in derogation of the common law, must be strictly construed against the municipality which has enacted and seeks to enforce them, and any ambiguity in the language used must be resolved in favor of the property owner." *Matter of Hess Realty Corp. v. Planning Commission of Town of Rotterdam*, 198 A.D.2d 588, 589, 603 N.Y.S.2d 95 (3d Dep't 1993).

Please do not hesitate to contact me if you have any questions. We look forward to answering the Planning Board's questions on December 4.

Thank you.

Yours truly,

KNAUF SHAW LLP

ALAN J. KNAUF