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August 15, 2017

Todd Bianco
Coordinator
Rhode Island Energy Facility Siting Board
89 Jefferson Boulevard
Warwick, RI 02888

Re: Invenergy Thermal Development LLC – Clear River Energy Center
Docket No. SB-2015-06

Dear Dr. Bianco:

As you know, I represent the Town of Burrillville.

Enclosed are an original and ten (10) copies of the Supplemental Advisory Opinion of the Burrillville Building Inspector to the Energy Facility Siting Board.

If you have any questions, please feel free to call.

Very truly yours,



Michael R. McElroy

cc: Service List

IN RE: APPLICATION OF
INVENERGY THERMAL DEVELOPMENT, LLC;
(CLEAR RIVER ENERGY CENTER) and
ALGONQUIN GAS TRANSMISSION, LLC.
WALLUM LAKE ROAD (R.I. ROUTE 100)
BURRILLVILLE, RHODE ISLAND
ASSESSOR'S PLAT 120
LOT 7, PLAT 135 LOT2, PLAT 137
LOTS 1, 2, 3 and 21, and
PLAT 153, LOTS 1 and 2

SB-2015-06

**SUPPLEMENTAL ADVISORY OPINION TO THE ENERGY FACILITY SITING BOARD
FROM THE BURRILLVILLE BUILDING INSPECTOR**

INTRODUCTION

On April 13, 2017, the Energy Facility Siting Board issued a Decision and Order that supplemental information will assist the Board in its assessment of the above referenced application. Subsequently, the Board has directed that the Burrillville Building Inspector shall supplement his advisory opinion considering the new information that has been provided by the applicant since his original opinion was published on September 07, 2016.

The Building Inspector has been directed to address the following:

- (i) Whether the work proposed in the municipality as part of the Facility's construction and operation is subject to the Town of Burrillville Soil Erosion and Sediment Control Ordinance and, if so, whether Invenergy's Erosion and Sediment Control Plan would conform to the Ordinance; and
- (ii) Whether the Facility would meet the requirements of other Municipal Ordinances.

Following is my supplemental advisory opinion.

SUPPLEMENTAL TO FIRST ADVISORY OPINION

Invenergy Thermal Development, LLC (Invenergy) submitted a draft copy of their Preliminary Stormwater Management Plan to the EFSB on September 27, 2016. Also submitted was a Preliminary Soil Erosion and Sediment Control Plan. In October, I started a cursory examination of the SESC Plan to determine whether the project would be subject to the Town's Soil Erosion and Sediment Control Ordinance ("SESC"). The project would be subject to the Town's SESC Ordinance, however, there are a number of questions regarding the proposed site and wetland issues that have not been addressed.

On March 27, 2017, Invenergy submitted a Preliminary Stormwater Management Plan with a preliminary Soil Erosion and Sediment Control Plan to the Energy Facility Siting Board. As to whether it will comply with the ordinance remains to be seen for a number of reasons. Some of these issues are as follows:

- Referencing the "new" proposed lot for the CREC site, the topsoil stockpile area appears to be smaller than originally proposed, as is the construction staging area. It is unclear how the site contractor will be able to move around the site to utilize both areas due to the wetland constraints on the existing access road as well as the proposed entrance road during construction.
- The directions given as to how the project will progress are again vague. For example, the directions for phasing the project in section 2.1 states: " Due to the cut/fill nature of this development in creating a 17+ acre flat site for the facility, stripping and stockpiling topsoil in order to access desirable soils for fill, it will be very difficult to define distinct boundaries for phasing of the grading operations.... If any semblance of construction phasing exists in the plans, it will be that the construction staging/soil stockpile area will be constructed first followed by excavation of basin "A". Then the main facility site will be mass graded." It is unclear how the access to this site to do all this can be accomplished without first constructing the access road.
- Construction of an access road on the property will incorporate at least four wetland crossings to construct as planned. There already exists an access road on the Algonquin property and this existing road should be shared by Invenergy to access their site to reduce wetland impacts.

The applicant, Invenergy, withheld submitting a legitimate proposed plan creating a lot where the Clear River Energy Center (CREC) is proposed to be constructed until just recently in July, 2017.

This is something that should have been one of the first things prepared by the applicant, as without a definitive plan, it is impossible to determine whether this project can actually be constructed on the site. It goes without saying that in order to evaluate any site development project, let alone one of this magnitude, the borders and site conditions must be delineated upon a plan that sets forth defined lot lines and parameters of setbacks, wetlands edges, overlay districts and all other relevant information and features necessary to identify the constraints of the property and what relief and safeguards and conditions must be applied in order to properly develop the site. It is without question, in my professional opinion, that the applicant has still not submitted a satisfactory plan which meets the minimum requirements necessary to vet the project.

It is astounding to me that a project of this magnitude has been undergoing evaluation for permitting without a legitimate site plan first being finalized and committed to. The project would never have been allowed to proceed in administrative review by the Burrillville Planning or Zoning Boards or my office due to the lack of specific detail and lack of a site plan.

The applicant has yet to receive RIDEM Wetland approval for the proposed project.

Invenergy submitted a Request to Alter Wetlands to RIDEM on April 04, 2017 (#17-0079). The application is under review by the RIDEM biologist at this time. Under the Town's SESC Ordinance, where any portion of a proposed development requires approval by DEM Wetlands, and, where the approval contains provisions for soil erosion and sediment controls, DEM Wetlands approval of the plan shall become a component of the overall SESC plan for the project. Any potential approval for the project should require final approval from DEM for their component of the project as any work undertaken within the wetland areas and wetland jurisdictional areas of the proposed site requires a wetland permit from RIDEM.

Due to the degree of wetland constraints on and around the proposed site, it will be impossible to conclude with certainty that the SESC plan will comply with the Ordinance until the applicants have obtained a wetland permit. Also, this project will require a Rhode Island Pollution Discharge Elimination System (RIPDES) Construction General Permit.

The applicant has yet to receive approval for an on-site wastewater treatment system (OWTS) for the project. Invenergy submitted an application to DEM-OWTS on March 08, 2017 (#1703-0050). I last reviewed the RIDEM OWTS Permit Search on August 09, 2017. The

last entry on the page was dated August 07, 2017 regarding the dry season application, which was received on that date.

I am aware that any permit or license whereby DEM is acting as the permitting or licensing authority pursuant to its delegated authority from the federal government is exempted from the EFSB's jurisdiction. Notwithstanding, whether it is DEM who has jurisdiction over onsite waste disposal or it is the EFSB, you should be aware that in the RI State Building Code, RIGL 23-27.3-113.6.1 Approval of an individual sewage disposal system, it states that,

" No person shall install, construct, alter, or repair or cause to be installed, constructed, altered, or repaired any individual sewage disposal system, nor shall he or she begin construction of any improvement to his or her property from which sewage will have to be disposed of by means of an individual sewage disposal system,..., until he or she has obtained the written approval of the director of the department of environmental management of the plans and specifications for the work....A municipality may only grant a building permit pursuant to the State Building Code where the person applying for the building permit presents to the municipality the written approval of the director as required by departmental regulations on the individual sewage disposal system."

Whether permits for construction are procured through the Town Building Department, or through the EFSB, I believe that the Board will also require the wetland permits and the OWTS permit prior to any building permits being issued.

Moreover, the Town of Burrillville Soil Erosion and Sediment Control Ordinance requires that an applicant submit a plan with the following detail:

Sec. 12-64. - Plan preparation; contents.

(a) The erosion and sediment control plan shall be prepared by a registered engineer, or landscape architect or a Soil and Water Conservation Society certified soil erosion and sediment control specialist and five copies of the plan shall be submitted to the building official or his designee. However, plans requiring planning board approval shall follow the rules as contained in the subdivision and land development regulations.

(b) The erosion and sediment control plan shall include sufficient information about the proposed activities and land parcels to form a clear basis for discussion and review and to ensure compliance with all applicable requirements of this article. The plan shall be consistent with the data collection, data analysis, and

plan preparation guidelines in the current "Rhode Island Soil Erosion and Sediment Control Handbook," prepared by the U.S. Department of Agriculture, Soil Conservation Service, state department of environmental management, state conservation committee and at a minimum, shall contain:

- (1) A narrative describing the proposed land disturbing activity and the soil erosion and sediment control measures and stormwater management measures to be installed to control erosion that could result from the proposed activity. Supporting documentation, such as a drainage area, existing site, and soil maps shall be provided as required by the building official as his designee.
- (2) Construction drawings illustrating in detail existing and proposed contours, drainage features, and vegetation; limits of clearing and grading, the location of soil erosion and sediment control and stormwater management measures, detail drawings of measures; stock piles and borrow areas; sequence and staging of land disturbing activities; and other such information needed for construction.
- (3) Other information or construction plans and details as deemed necessary by the building official or his designee for thorough review of the plan prior to action being taken as prescribed in this chapter. Withholding or delay of such information may be reasons for the building official or his designee to judge the application as incomplete and grounds for disapproval.

(Ord. of 4-25-2001(1), art. VI(a), (b))

The SESC plan must have the requisite information contained within it in order to allow for it to be evaluated in order to ensure that it meets the following performance principles:

Sec. 12-65. - Performance principles.

The contents of the erosion and sediment control plan shall clearly demonstrate how the principles outlined in this section have been met in the design and are to be accomplished by the proposed development project.

- (1) The site selected shall show due regard for natural drainage characteristics and topography.
- (2) To the extent possible, steep slopes shall be avoided.
- (3) The grade of slopes created shall be minimized.
- (4) Post development runoff rates should not exceed predevelopment rates, consistent with other stormwater requirements, which may be in effect. Any

increase in storm runoff shall be retained and recharged as close as feasible to its place of origin by means of detention ponds or basins, seepage areas, subsurface drains, porous paving, or similar technique.

(5) Original boundaries, alignment, and slope of watercourses within the project locus shall be preserved to the greatest extent feasible.

(6) In general, drainage shall be directed away from structures intended for human occupancy, municipal or utility use, or similar structures.

(7) All drainage provisions shall be of such a design and capacity so as to adequately handle stormwater runoff, including runoff from tributary upstream areas, which may be outside the locus of the project.

(8) Drainage facilities shall be installed as early as feasible during construction, prior to site clearance, if possible.

(9) Fill located adjacent to watercourses shall be suitably protected from erosion by means of rip-rap, gabions, retaining walls, vegetative stabilization, or similar measures.

(10) Temporary vegetation and/or mulching shall be used to protect bare areas and stockpiles from erosion during construction; the smallest areas feasible shall be exposed at any one time; disturbed areas shall be protected during the nongrowing months, November through March.

(11) Permanent vegetation shall be placed immediately following fine grading.

(12) Trees and other existing vegetation shall be retained whenever feasible; the area within the dripline shall be fenced or roped off to protect trees from construction equipment.

(13) All areas damaged during construction shall be resodded, reseeded, or otherwise restored. Monitoring and maintenance schedules, where required, shall be predetermined.

(Ord. of 4-25-2001(1), art. VI(c))

As of the present time, it is impossible to state that the SESC plan provided by the applicant fulfills the requirements of the Ordinance because of the lack of definiteness and detail. Therefore, it is my opinion that it does not pass muster.

SUPPLEMENTAL TO SECONDARY ADVISORY OPINION

It is clear that the proposed site for the CREC has changed on a number of occasions since this project began. I previously noted that there is no actual lot yet created for this site, leaving it our responsibility to carefully review anything that is sent to the Board in the form of a "site plan" to determine what has changed. Presently, there still is no lot and the entirety of the property is still owned by Algonquin Gas Transmission LLC. Regarding ownership of the proposed site, the Town has never seen anything except a substantially redacted purchase and sale agreement between Invenergy Thermal Development, LLC and Algonquin Gas Transmission, LLC. As noted in the first advisory, I received a plan on July 19th from Invenergy to subdivide a lot out of the Algonquin property for the CREC site.

I requested assistance from the Town Planner, Ray Goff, regarding what would the process, absent the act, be for the applicant to subdivide the lot. I have included his memo as exhibit A at the end of this opinion.

Based on available information, it is Mr. Goff's position that the applicant would require an Administrative Subdivision to reconfigure the lot lines. Regarding the process for the subdivision, he notes that, "As of this date, information relevant to the submission of these applications has not been forthcoming. With respect to this, the Planning Board has not been provided with enough information to adequately evaluate the project for compliance with local laws and processes." Mr. Goff also notes that the Administrative Subdivision regulations can be found in 15-6.3 of the Burrillville Subdivision Regulations.

Under Chapter 42-98-7,(the Energy Facility Siting Act), (a)(1)," The Siting Board is the licensing and permitting authority for all licenses, permits, assents, or variances which, under any statute of the State or ordinance of any political subdivision of the state, would be required for siting, construction or alteration of a major energy facility in the State." If the Board determines that the proposed subdivision is required for the siting of the CREC, I would request that the Board requires Invenergy to comply with the subdivision requirements of the Burrillville Subdivision Regulations as applicable for this site.

It has been almost a year since I noted that Invenergy failed to submit the proper requests for relief from the Burrillville Zoning Board in their application. My position has not changed. In the Preliminary Decision and Order of the Board dated March 10, 2017 (Order 86), it states that:

“ While the Siting Act makes the Board the final licensing authority, an applicant for a Board license must still apply to all state and local governmental bodies for permits and license that would, absent the Siting Act, be required.” In respect to the Zoning Board application, there is no question that the applicant has clearly not done so. It is also clear that with regard to the Planning Board, the applicant has also failed to properly apply for the requisite relief needed.

The EFSB previously directed the Burrillville Zoning Board to render an advisory opinion as to whether the Facility would meet the requirements of its respective zoning ordinances, and whether any variance should be granted, among other requests. In requesting zoning relief, it is the responsibility of the applicant to know what he or she is requesting and in this instance it was Invenergy’s opinion that all that was needed was a special use permit and assorted dimensional variances for the height of structures on the property. It is my determination, as Zoning Official, that they are incorrect. At a minimum, the following relief is also required:

The CREC Project Requires a Use Variance

The applicant requires a use variance to construct the CREC because this use is not allowed in an Aquifer A-80 Overlay Zone.

The property presently comprising the lot on which the project is to be built is located within an aquifer overlay area and falls specifically within the Clear River Basin (as depicted upon the U.S. Geological Survey Water Resources Investigations 18-74 on the map number plate 1) and the Aquifer Overlay Map of the Town of Burrillville. Therefore, the subject area is subject to more stringent zoning restrictions specifically designed to safeguard water resources. The Burrillville Zoning Ordinance contains these specific restrictions in Sec. 30-202. - *Aquifer zoning*. There is an important rationale behind such heightened protections and it is clearly identified as the underlying basis for maintaining such restrictions. As stated in Sec. 30-202:

- (a) Purposes.
 - (1) In order to protect the water resources of the Town of Burrillville, prevent the development or use of land in the groundwater sources and aquifer area in a manner tending to adversely affect the water quality within the Town of Burrillville, or tending to destroy or have a substantially adverse effect on the environment of the town by virtue of pollution of the land or water by foreign substances including noxious liquids, gases or solid wastes or any potentially harmful conditions which may endanger the health, safety and general welfare of

the citizens of the Town of Burrillville. Through use of the following sections, density and uses will be controlled over and around our groundwater sources and aquifer zones;

(2) To protect, preserve and maintain the quality and supply of groundwater reservoirs upon which the residents of the Town of Burrillville and others depend for drinking water supply;

(3) To protect the quality and supply of water by regulating the use and development of land adjoining wetlands and watercourses which replenish groundwater reservoirs, to protect primary groundwater recharge areas, and to prevent uses of land detrimental thereto; and

(4) To otherwise protect the health, safety and general welfare of the public.

These are legitimate interests advanced by restrictive regulation and protected by the town of Burrillville and adhered to in the best interests of the citizens of the State of Rhode Island and residents of the town. The designation of such protected land is specified within the Aquifer Overlay District provisions of the ordinance which states:

(b) Description and designation. Groundwater sources are those that are upstream from any public well site or lying within the drainage basin of a known public water sources. Some examples of such groundwater sources are as follows:

Wallum Lake, Wilson Reservoir, Chocklog River Basin, Round Top River Basin, Herring Pond (a.k.a. Spring Lake), Slatersville Reservoir, Branch River Basin, Nichols Pond, Tarkiln Pond, Pascoag Reservoir, Chepachet River Basin, Sucker Pond, ***Clear River Basin***, and any other bodies of water which are or may be a recharge area. (*Emphasis added*).

And other such areas as may be from time to time delineated by the Ground Water Protection Act (G.L. 1956, § 46-13.1-1 et seq.).

(1) Designation. The aquifer zones and wellhead protection areas are herein established as overlay zones or districts as shown on the "Aquifer Overlay Map of the Town of Burrillville" (duplicated from the U.S. Geological Survey Water Resources Investigations 18-74 on the map number plate 1) and as most recently identified by the Rhode Island Department of Environmental Management (DEM) Office of Water Resources as public water supply Wellhead Protection Areas. Said maps are hereby adopted by reference and are declared to be a part of this section. Said maps shall be on display at the office of the zoning enforcement officer, or available at the Rhode Island DEM, and shall include all land in the town denoted as overlaying saturated stratified drift or of any thickness and of any

transmissivity and shall identify all groundwater sources and aquifers. These overlay zones shall take precedence over any other zone use regulation overlaying them in this zoning chapter, unless otherwise mentioned.

(2) Description of aquifer zones. All areas of stratified drift delineated on the "Aquifer Overlay Map of the Town of Burrillville."

(3) Appeal of designation. Where the bounds of the aquifer zones are in doubt or in dispute, as delineated by the overlay map, the burden of proof and all associated expenses shall be borne by the owners of the land in question to show where said aquifer zones are property [properly] located. At the request of the landowners, the town shall engage, at the owner's expense, a professional hydrogeologist or a soil scientist to determine more accurately the location and extent of the aquifer zone.

In the event the classification of groundwater is such that the groundwater source is not suitable for public or private drinking with or without treatment, then the applicant may apply for an exemption from the provisions of this section; provided, however, that the applicant can demonstrate by clear and convincing evidence that any intended use will not cause further deterioration, degradation, or, if applicable, materially interfere with restoration of such groundwater source.

(4) Multiple zone parcels. Parcels containing more than one "A" zone, or if any part of a parcel lies within an "A" zone, the most restrictive zone shall take precedence.

(5) Applicability. The provisions of this section shall apply insofar as groundwater sources are suitable for public or private drinking sources with or without treatment as designated by the director of the department of environmental management under General Laws of Rhode Island, as amended.

Because the property falls within the A-80 zone, and is located within the identified Clear River Basin and defined aquifer overlay district, any development within it must conform to the heightened restrictions contained within Section 30-202. While it is true that the applicant has recently provided a plan for a proposed subdivision to create a lot for construction of the CREC, there is not sufficient detail or reliability in that plan to properly evaluate it. This was done presumably for the purpose of attempting to avoid implicating the Aquifer Overlay district and to exclude as much as practicable any wetlands. However, the proposed subdivision would necessarily require planning board approval and in turn, the applicant proving that the lot being created was conforming in all respects with the minimum dimensional and other requirements. This reconfiguration of the property would only be a solution if it can be proven, once the subdivision is approved, that the entirety of the new lot falls outside the Aquifer Overlay District.

In fact, in a case such as the one presented here, where there is a question regarding whether a proposed project's land area is within the Aquifer Overlay District, there is a built in procedure contained within Section 30-202 to resolve the issue. As is stated in the Ordinance,

(3) Appeal of designation. Where the bounds of the aquifer zones are in doubt or in dispute, as delineated by the overlay map, the burden of proof and all associated expenses shall be borne by the owners of the land in question to show where said aquifer zones are property [properly] located. At the request of the landowners, the town shall engage, at the owner's expense, a professional hydrogeologist or a soil scientist to determine more accurately the location and extent of the aquifer zone.

Seeing that the applicant is proposing to create a new lot, for the purpose of creating one outside of the defined Aquifer Overlay Zone, it is up to them to prove that it is. Therefore, the applicant must follow the provisions of 30-202(b)(3) and a professional hydrogeologist or a soil scientist must be retained by the town, at the applicant's expense, to determine more accurately the location and extent of the aquifer located upon the portion of the Algonquin property sought to be made a new lot. In the meantime, however, seeing that the property as it stands now is unequivocally within the Aquifer Overlay District, the applicant must apply for a use variance because the proposed CREC is not allowed.

There are a number of uses and standards for uses that are listed in 30-202 (f) (prohibited uses) which would prohibit the proposed CREC site on this parcel of land without obtaining a use variance. Rather than repeating myself, I will simply mention number 7. "All uses not specifically permitted in the Aquifer Zones and wellhead protection areas (this section) are prohibited." An electric generating facility is not specifically permitted in the Aquifer Zones. Therefore, the use is prohibited. To allow a prohibited use to be created upon property in the Town of Burrillville, absent the Act, an applicant would be required to obtain a use variance. To successfully obtain a use variance, sometimes called a true variance, the applicant must also demonstrate that "the subject land or structure cannot yield **any beneficial use** if it is required to conform to the provisions of the Zoning Chapter."

The applicant would never be able to satisfy the burden for obtaining a use variance. Moreover, since it is determined that a use variance is required, the issue of whether or not the applicant can meet the burden for a special use permit is moot as a special use permit cannot be granted in conjunction with a use variance as a matter of law. This goes without saying because the use for which the variance is sought cannot be a conditionally permitted use.

Section 30-202 specifically lists what the permitted uses are within the various A-zones, and in this case, the A-80 zone. As stated in the ordinance, the permitted uses are listed as follows:

Transmissivity (feet/day)	Overlay District	Permitted Uses
0— 2,500	A-80	Single-family residential, multifamily ¹ , recreation/open space, farming ² , commercial ¹ , industrial ¹

¹ Must be sewerred.

² Permitted by special use permit only.

In addition to specifying the permitted uses within the Aquifer zones, the Ordinance also delineates prohibited uses. As stated in Section 30-202(f)

(f) Prohibited uses. The following uses are prohibited in aquifer zones ("A" zones) and wellhead protection areas:

- (1) Storage and/or loading of road salt or deicing chemicals.
- (2) Incinerators, sanitary landfill sites, solid waste transfer stations and wastewater treatment plants, except publicly owned sewage treatment facilities.
- (3) Septage disposal inconsistent with the requirements of this section.
- (4) All uses which involve the use or storage of hazardous substances designated under 40 CFR 116, pursuant to section 311 of the Federal Clean Water Act and subsequent amendments thereto or other toxic pollutant as defined under G.L. 1956, § 46-13.1-3, as amended. Provided, however, that minor or insignificant quantities of such substances for office use may be used or stored on the premises if, in the opinion of the zoning enforcement officer and building official, the presence of such substance does not constitute a potential for degradation of surface water or groundwater resources in the area and such substance is contained in a suitable storage area. Insignificant quantities of hazardous

substance may be constructed as that which is necessary for the operation of an office or business including the operation of equipment, vehicles or other mechanical systems necessary for the operation of a permitted use. All uses which involve the use or storage of hazardous wastes or materials required for water or wastewater treatment such as storage of chemical products required by statute, rule or regulation are prohibited; such storage in freestanding, above-ground containers with enclosed and covered, full secondary containment are excluded from these criteria.

(5) Storage or piping of petroleum or refined petroleum products, except within buildings in which said petroleum products will provide heat when burned. Storage of liquid fuel for said heating purpose in excess of 300 gallons is prohibited except for storage of said liquid fuel which conforms with the regulations of the Rhode Island Department of Environmental Management (DEM); provided, however, that the department of environmental management has promulgated regulations for said storage. Underground storage of petroleum fuel or refined petroleum products in any quantity is prohibited.

(6) The alteration of any natural site features or topography including but not limited to the cutting or removal of trees or other vegetation, or dumping, filling, excavation, grading, transferring or removal of any gravel, sand, loam or other soft material, rock or ledge, prior to obtaining all permits and approvals for final development plans, including where the use of land is for the primary purpose of agriculture. Where such alteration is less than one-half acre in area or 100 cubic yards in volume and is incidental to a permitted use and performed in the normal course of maintenance or operation of such permitted use, this paragraph shall not apply.

(7) All uses not specifically permitted in the aquifer zones and wellhead protection areas (this section) are prohibited.

The proposed electric generating facilities will violate the provisions of subsections 4, 5, 6 and 7 above, which prohibit the uses which will necessarily be engaged in and which are in violation of Section 30-202 of the Ordinance. To suggest otherwise would be tantamount to blatant misrepresentation. Each of the aforementioned uses and activities are expressly prohibited under the Ordinance yet required to be engaged in connection with the construction and operation of the CREC and thus, will require a use variance to be applied for and granted in order to construct the project. Facts supporting this conclusion include:

- A) An electric generating facility is not specifically permitted in the Aquifer Overlay Zones;
- B) It is not permitted by right in any zoning district in the Town of Burrillville;

- C) As it stands now, the CREC would be constructed in the A-80 Aquifer Overlay Zone.

And despite the fact that the project site is located within the F-5, in accordance with Section 30-202 (b) (4), the more restrictive zone applies. The A-80 zone which prohibits such a use is more restrictive than the F-5 zone which conditionally allows the use via a special use permit. Therefore, the A-80 zone takes precedence over the F-5 zone and mandates that the use not be permitted unless and until a use variance or zone change is obtained for the subject property.

The applicant will also require a use variance as the zoning ordinance only allows an “electric generating facility” (in the singular) as a use in the F-5 zoning ordinance by special use permit. It is clear that the CREC facility is proposed with two electric generating facilities on the site.

From the beginning of this process, there has been clear evidence in all the narrative from Invenergy’s application to the EFSB and to all other parties involved, that the CREC would, in effect, be constructed as two distinct power plants. The applicant’s expert’s erroneous position is that, “There is no basis for the Building Inspector’s assertion that the development entails multiple energy production facilities. The CREC development proposes construction of a singular energy production facility.” (page 21, lines 12-14, pre-filed testimony of Ed Pimental) While challenging my determination by using terms like “multiple energy production facilities”, “singular energy production facility” or even utilizing the term “electric generating facilities” when speaking of our use table in the Zoning Ordinance, it is clear that the term electric generating facility is singular, not plural. This does not change the fact that there is a distinction between the singular and the plural in zoning uses.

In my advisory opinion I previously noted a number of examples of Invenergy demonstrating that this project, the Clear River Energy Center is designed as two distinct power plants to generate electricity on the site, both in narrative and in pictures.

- See Drawings: “single shaft site arrangement”, “single shaft plot plan”
- “The facility will be configured as a two unit one-on-one combined cycle generation station.”
- “ the two units at this facility will be installed in phases”
- “the common BOP systems shall be designed for both units”
- “nor is Invenergy proposing individual ULSD usage limits for each turbine”

It is clear that the language in the Zoning Ordinance noting the use as “electric generating facility” denotes a singular use. Section 30-152 multiple structures on one lot states: “Only one principal structure shall be permitted on any lot in the F-5, F-2, R-40, R-20, R-12 zones as well as the aquifer overlay zone.”

The definition of an electric generating facility in the zoning ordinance is: “any generating facility designed to generate electric energy in excess of 180 megawatts (MW) annually.” As stated by Invenergy, each natural gas combustion turbine will generate up to 500 megawatts of electrical power. Each one of these turbines meets the definition of an electric generating facility.

To make the statement that the CREC development proposes construction of a singular energy production facility merely implies an individual site. For example, Invenergy is constructing an energy center right now in Pennsylvania that will utilize three gas turbines to generate 1,500 megawatts of electrical power. Invenergy’s position is that the site can be as large as the owner wants, utilizing as many turbines as the owner can fit on the site, and as long as it is constructed under the guise of a singular energy production facility, it is an electric generating facility. This is as ludicrous as treating a forty unit apartment house no differently than a single family dwelling because there are both one, single building.

There is no question that the turbines will be the principal structures on the project property. Each of the turbines, in conjunction with their related accessory structures and equipment, will be able to generate electricity in and of themselves. In other words, each of the two turbines may operate exclusive of the other. Under Section 30-152 of the Burrillville Zoning Ordinance, “Only one principal structure may be permitted on any lot in the F-5, F-2, R-40, R-20, R-12 zones as well as the aquifer overlay zone.”

Because there will in effect be two (2) stand-alone electric generating facilities on the subject property if this application is approved, relief in the form of a use variance will also have to be applied for and granted to obtain relief from the restrictions of Section 30-152.

Summary and Conclusion

As there has been no submission from Invenergy to create a lot for the CREC, it is unclear as to whether the subdivision would meet the requirements of the Burrillville

Subdivision Regulations. I would recommend that the EFSB direct Invenergy to submit an Administrative Subdivision Application and Plan to the Burrillville Planning Board, per the requirements of 15-6.3 in the Burrillville Subdivision Regulations, allowing the Planning Board to review and advise the EFSB whether the plan submitted by Invenergy would be, absent the Act, acceptable for subdivision approval, and if not, what else would be needed for compliance.

Invenergy failed to submit the proper information for zoning relief in its application to the Burrillville Zoning Board. As noted above, Invenergy was required to submit an application for zoning relief demonstrating what, absent the Act, would be required to construct the CREC, however they failed to address all of the relief that would have been required.

At a minimum, Invenergy would be required, absent the Act, to obtain a use variance to construct the CREC in the Aquifer A-80 Overlay District.

At a minimum, Invenergy would be required, absent the Act, to obtain a use variance from Burrillville Zoning Ordinance Section 30-152, Multiple Structures on one lot, to construct the CREC.

As one cannot obtain a use variance on a property for a use of that property that is only allowed by special use permit, Invenergy would require, absent the Act, a use variance to construct the CREC.

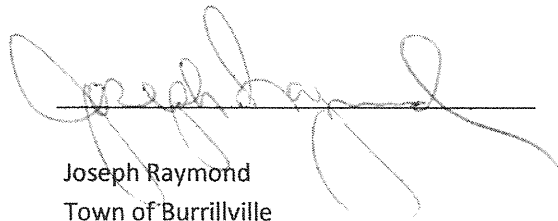
As substantial as the aforementioned issues are in themselves, and with no actual lot definitively determined for the CREC, there may even be other additional zoning relief required once a site is finally determined. The fact that any one of the three aforementioned variances is required also renders moot the issue of whether a special use permit may be granted due to the fact that a special use permit is not allowed to be applied for, let alone granted, in conjunction with a use variance.

In conclusion, it is my determination that the rendering of an additional supplemental advisory opinion will be necessary once the applicant has provided the sufficient, specific information required to be delineated within the Soil Erosion and Sediment Control Plan and the proposed subdivision of the lot on which the project is to be constructed. My prior expressed opinion has not changed as a result of any new information received from the Applicant. Furthermore, the information supplied by the Applicant has not been sufficient enough in substance to address my previous concerns and the concerns stated herein.

It is clear, two years into the public portion of this process, that the choice of a site for the Clear River Energy Center, from a planning and zoning perspective alone, was poorly thought through. Whether the EFSB determines that there is a need for a power plant or not, it is glaringly clear that this proposed location is an extremely poor choice of a lot for one.

I again would like to thank the members of the Energy Facility Siting Board for considering my advisory opinion in rendering your decision.

Dated: Aug 11, 2017

A handwritten signature in black ink, appearing to read "Joseph Raymond", written over a horizontal line.

Joseph Raymond
Town of Burrillville
Building/Zoning Official

EXHIBIT A



TOWN OF BURRILLVILLE
Planning and Economic Development Town Hall Annex
144 Harrisville Main Street
Harrisville, RI 02830-1499

Phone (401) 568-4300 ext. 130
Fax (401) 710-9307
RI Relay 1-800-745-5555

MEMO

TO: Joe Raymond, Building & Zoning Official

FROM: Ray Goff, Director of Planning and Economic Development

DATE: August 10, 2017

CC: Mike Wood, Town Manager

I write this memo in an attempt to help you by outlining the local review process that is normally followed with a large project such as the proposed Invenergy power plant. The state of Rhode Island enabling legislation RIGL 45-23 Section 25 – 74, directs the local community administrative processes for submission of materials and proper review of the subdivision and land development project applications. The town follows these laws through the application of their subdivision regulations to ensure a complete but streamlined local review process. With this project, there would be an Administrative Subdivision to reconfigure the existing lot lines. Additionally, there would also be an application for a Land Development Project which includes simultaneously a Development Plan Review of the entire project. As a matter of expediency, the Planning Board in most cases would include the Administrative Subdivision as part of the local review so that the project would be reviewed and decided upon simultaneously.

As of this date, information relevant to the submission of these applications has not been forthcoming. With respect to this, the Planning Board has not been provided with enough information to adequately evaluate the project for compliance with local laws and processes. A concept set of plans was sent to the Planning Board which was discussed at a meeting on May 2, 2016. A Master Plan was subsequently heard on June 20, July 11, August 15 and finally August 22. As of the close of this last meeting, the Board did not allow the project to proceed to Preliminary due to inadequate details in the filings and incomplete information from the applicant.

In light of this, I provide you with the following summary of each of the required reviews:

Administrative Subdivision

Definition: "Re-subdivision of existing lots that yield no additional lots for development, and involves no creation or extension of streets. Such re-subdivision shall only involve divisions, mergers and divisions, or adjustments of boundaries of existing lots."

This development as proposed involves the adjustment of boundaries of existing lots which does not create a new lot or lots. As such, this proposal should have followed the regulations for Administrative Subdivisions 15-6.3 in the Burrillville Subdivision Regulations.

Since the initiation of review by the EFSB, the Planning Board has occasion to see one plan, dated 5/6/16, that by all accounts was a concept plan for the subdivision. Since that time, a revised plan, dated 6/3/17 showing a second reconfiguration of lots lines has been submitted to the Building Official,

but no subdivision has been submitted to the Planning Board. No further plan has been submitted to the Planning Board for consideration of an Administrative Subdivision.

Land Development Project

Definition: "A project in which one (1) or more lots, tracts or parcels of land are to be developed or redeveloped as a coordinated site for a complex of uses, units, or structures, including but not limited to: planned development and/or cluster development for residential, commercial, institutional, recreational, open space, and/or mixed uses as may be provided for in the Zoning Ordinance."

With relation to this project, there is only one proposed lot that is being considered with the proposal; there is only one land use being considered, not a complex of uses or units. It is assumed that there will be a number of structures. It is therefore determined that this project fits within the definition of a Land Development Project by the town Subdivision Regulations.

With relation to the submission to the Planning Board, an acceptable submission would have involved a pre-application to the Board. If the project progressed, it would have included a Preliminary Wetlands Determination by RIDEM, depiction of vegetative cover that included unfragmented forest, a soils map, location of any stonewalls or rock outcroppings, historic sites or cemeteries or other archeological sites related to the development area. There would have been a discussion about why the lot lines are not rectangular in shape and why the wetlands have been carved out of the development site.

The review of the development project stopped as of the last meeting with the Planning Board. No further information has been provided to answer any of the questions that were asked by the Planning Board.

Development Plan Review

"R.I.G.L. Title 45, Chapter 23, Section 50, which enables the town to perform a comprehensive review of certain proposed land developments, including additions to existing buildings. The Zoning ordinance Section 30-201 enables the town to review certain types of developments, specifically, "Any proposed commercial or industrial development, including additions and expansions of existing development constructed after the effective date of this section which in aggregate, exceeds 10,000 square feet..." The Planning Board is identified to serve as "the technical review committee and is the responsible agent for reviewing Development Plans in their entirety." In addition, projects with building footprints greater than 10,000 square feet shall be reviewed as a Major Development Plan.

A development of this magnitude would generate numerous and in-depth questions which the town Planning Board has not had an opportunity to address. Nor has the board had an opportunity to see any updated plans. Submitting one copy to the building official to share with the entire planning board is ridiculous and uncooperative to any local review process.

With an industrial project of this type, one of the more important review aspects would deal with impact on neighbors, abutters, traffic, town services, just to name a few. In a word, it would be imperative that the board consider all aspects of nuisance in this respect. With that, the concern would be with noise, light, vibration emanating from the site. In addition, other concerns would involve access and egress to the site, loading and unloading areas, hours of operation, lighting of the facility, trash and garbage collection. None of these issues could be discussed with the minimal information that was provided.