STATE OF NEW YORK
SUPREME COURT SENECA COUNTY

CIRCULAR ENERG, LLC and
SENECA DEPOT, LLC,

Petitioners-Plaintiffs,

Decision and Order

-vs-

Index No 20180124

TOWN OF ROMULUS and TOWN OF ROMULUS TOWN BOARD,

Respondents-Defendants,

Attorney appearances
Alan Knauf, Esq., **Knauf Shaw, LLP** for Petitioners-Plaintiffs
Patrick J. Morrel, Esq., **Patrick J Morrell Law Offices** for Respondents-Defendants
Willard R. Burns, Esq., **Burns Law Firm, LLC**, for Respondents-Defendants
David K. Hou, Esq., **Boylan Code LLP**, for Respondents-Defendants
Deborah Goldberg, Esq., **Earthjustice**, for Proposed Intervenor-Respondent-Defendant Seneca Lake Guardian, Inc.

Daniel J. Doyle, J.

Petitioners-Plaintiffs Circular enerG, LLC and Seneca Depot, LLC ("Petitioners") commenced this combined Article 78, Declaratory Judgment and Plenary action asserting eleven causes of action arising out of the adoption of three resolutions by the Respondent-Defendant Town of Romulus Town Board ("Town Board"), which were adopted on April 18, 2018. Those three resolutions were: (1) that the Town Board be designated lead agency under SEQRA for purposes of a proposed zoning amendment (Town of Romulus Resolution #35-

18); (2) adoption of a negative declaration under SEQRA for the proposed zoning amendment (Town of Romulus Resolution #36-18); and (3) adoption of the zoning amendment as Town of Romulus Local Law #3 (Town of Romulus Resolution #37-18). The Respondents have moved pursuant to CPLR 3211[a][2] and CPLR 7804[f] to dismiss the action in its entirety. Non-party Seneca Lake Guardian, Inc., has moved to intervene in this action as a Respondent-Defendant.

A. The standard of review

1. Failure to state a cause of action under CPLR 3211[a][7]

CPLR 3211(a)(7) authorizes the summary dismissal of a complaint for failure to state a cause of action. The Court of Appeals has held that "the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). On a motion made pursuant to CPLR 3211[a][7], the Court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994]). In determining a motion to dismiss under CPLR 3211[a][7], The Fourth Department has held that the Court may consider under CPLR 3211[c] evidentiary material submitted on a motion to dismiss for the limited purpose of assessing the facial

sufficiency of a complaint, but may only grant dismissal if the evidentiary material establishes "*conclusively* that plaintiff has no cause of action" (*Liberty Affordable Hous., Inc. v Maple Ct. Apartments*, 125 AD3d 85, 89 [4th Dept 2015] (emphasis in the original)).

B. The Respondents are entitled to dismissal of the Eleventh Cause of Action

Petitioners' Eleventh Cause of Action appears to be a catch-all cause of action essentially serving as a placeholder for a cause of action that may arise in the future. The Respondents have moved to dismiss this cause of action under CPLR 3211[a][7] because it does not state a cause of action. The Court agrees. A party may not engage in "catch-all pleading" (CPLR 3013; CPLR 3014; *Scholastic Inc. v Pace Plumbing Corp.*, 129 AD3d 75, 79 [1st Dept 2015]). Thus Respondents are entitled to dismissal of the Eleventh Cause of Action pursuant to CPLR 3211[a][7].

C. The Respondents are entitled to dismissal of the Tenth Cause of Action

The Petitioners' Tenth Cause of Action is a litany of claims made pursuant to 42 U.S.C. § 1983, including claims for violations of Equal Protection and Substantive Due Process. These Constitutional claims flow essentially from a

claim that the Respondent's zoning amendment constituted a regulatory taking of property without just compensation.

In order to assert Constitutional claims for a regulatory taking under 42 U.S.C. § 1983 the Petitioners have to demonstrate that they: (1) received "a final decision regarding the application of the [challenged] regulations to the property at issue" from "the government entity charged with implementing the regulations" and; (2) sought "compensation through the procedures the state has provided for doing so" (*Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 734 [1997], quoting *Williamson County Regional Planning Commn. v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186, 194 [1985]). The Second Circuit has held that claims for a regulatory taking are not ripe until a plaintiff has commenced a claim for inverse condemnation, and that New York's inverse condemnation law provides "a reasonable, certain and adequate provision for obtaining compensation" (*Kurtz v Verizon New York*, Inc., 758 F3d 506, 514 [2d Cir 2014]). The fact that Petitioners also included a cause of action for inverse condemnation in the same complaint as the claims for a regulatory taking does not satisfy the second prong that the Petitioner seek compensation through the procedures the state has provided (*Kurtz v Verizon New York, Inc.*, 758 F3d at 514 (Even though Plaintiff had commenced an inverse condemnation action in a New York court,

regulatory taking claim was not ripe until the inverse condemnation action is completed)).

The issue of ripeness affects the Court's subject matter jurisdiction. As the Fourth Department has held:

> a court is without subject matter jurisdiction "when it lacks the competence to adjudicate a particular kind of controversy in the first place. As the Court of Appeals has observed, the question of subject matter jurisdiction is a question of judicial power: whether the court has the power, conferred by the Constitution or statute, to entertain the case before it. Moreover, subject matter jurisdiction requires that the matter before the court is ripe (*State v Calhoun*, 106 AD3d 1470, 1472 [4th Dept 2013] (internal citations and quotations omitted)).

As the regulatory takings claims are not ripe, the Court lacks subject matter jurisdiction over them. Therefore, the Respondents are entitled to dismissal of the Tenth Cause of Action (see *54 Marion Ave., LLC v City of Saratoga Springs*, 162 AD3d 1341, 1344 [3d Dept 2018]; *Davis v State*, 64 AD3d 1197 [4th Dept 2009]).

D. The Petitioners have stated a violation of the Open Meetings Law

The purpose of New York's open meeting requirement is to ensure that "the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials" (Public Officers Law § 100). Because of this, the Court of Appeals has held that "the provisions of the Open Meetings Law are to be liberally

construed in accordance with the statute's purposes" (*Gordon v Vil. of Monticello, Inc.*, 87 NY2d 124, 127 [1995]). Thus, at its core, the purpose of the Open Meetings Law is "to prevent public bodies from debating and deciding in private, matters that they are required to debate and decide in public" (*Zehner v Bd. of Educ. of Jordan-Elbridge Cent. School Dist.*, 91 AD3d 1349, 1350 [4th Dept 2012]).

The Petitioners claim that the Respondents violated the Open Meetings Law in two ways: (1) by not posting the three resolutions it voted on prior to the Town Board's meeting on April 18, 2018; and (2) by having a closed-door private meeting with its attorneys prior to voting on the resolutions on April 18, 2018 without following the procedures for going into executive session pursuant to Public Officers Law § 103. In moving to dismiss, the Respondents admit that they did not post the three resolutions to the Town's website prior to the meeting, but that it was not "practicable" to do so. Also, in moving to dismiss, the Respondents admit that they had a private meeting with its attorneys, but state that its purpose was to discuss privileged attorney-client information.

The Fourth Department has held that Open Meetings Law does not apply when a public body engages in "matters made confidential by federal or state law" (Public Officers Law § 108[3]) and that communication between an attorney and client are confidential (*Brown v Feehan*, 125 AD3d 1499, 1501 [4th Dept 2015]

(citing CPLR 4503)). Other courts have come to a similar conclusion (see *Shibley v Miller*, 212 AD2d 799, 799 [2d Dept 1995]; *Young v Bd. of Appeals of Inc. Vil. of Garden City*, 194 AD2d 796, 798 [2d Dept 1993]). The Fourth Department held that when an exemption under section 108 applies, the Open Meetings Law does not, and the requirements that would operate with respect to executive sessions are not in effect" (*Brown v Feehan*, 125 AD3d at 1501). Thus, the Respondents would not have violated Open Meetings Law if it met privately with its attorneys prior to the April 18, 2018 vote.

On the other hand, the attorney-client exception to Open Meetings Law is "narrow" (Commission on Open Government OML-AO-3012) and ceases when "the attorney has stopped giving legal advice and a public body begins discussing or deliberating" (Commission on Open Government OML-AO-2968). On this record, the Court cannot say that an Open Meetings Law violation did not occur in that meeting.

The Petitioners also allege that the Respondents violated Open Meetings Law by failing to post the three resolutions voted on at the April 18, 2018 meeting. Public Officers Law § 103[e] provides in pertinent part:

> If the agency in which a public body functions maintains a regularly and routinely updated website and utilizes a high speed internet connection, such records shall be posted on the website **to the extent practicable as determined by the agency or the department**, prior to

the meeting.

In its motion to dismiss, the Respondents submitted two affidavits from David Kaiser, Romulus Town Supervisor. Neither affidavit states with any particularity why the resolutions were not posted on the Town's website prior to the meeting. Rather, Supervisor Kaiser stated, without elaboration that "it was not practicable to post the draft April 18, 2018 resolutions on the Town of Romulus website prior to the April 18, 2018 Town Board meeting" (Affidavit of David Kaiser, sworn to September 25, 2018).

The question posed here is the proper effect of the requirement that materials be posted on the Town's website "to the extent practicable as determined by the agency or the department, prior to the meeting." It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature and where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used (*Patrolmen's Benev. Ass'n of City of New York v City of New York*, 41 NY2d 205, 208 [1976]). The Court of Appeals has said that "the clearest indicator of legislative intent is the statutory text" and, therefore "the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof" (*Majewski v Broadalbin-Perth Cent.*

School Dist., 91 NY2d 577, 583 [1998]).

In reviewing Public Officers Law § 103[e], its appears that it establishes a general rule that when a public body maintains a website and uses a high speed internet connection, it must post materials to its website prior to a meeting at which those materials are discussed, and that the phrase "to the extent practicable as determined by the agency or the department" operates as a proviso to the general rule. As such, it is incumbent upon the Respondents to establish the proviso (*People v Davis*, 13 NY3d 17, 32 [2009]). Further, in reviewing the proviso, the language "to the extent practicable **as determined by** the agency or the department" requires the agency or department to make a determination as to why it was not "practicable" to post the materials prior to the meeting. To hold otherwise would permit an agency to simply state that it was "not practicable" without explaining why it was "not practicable" to do so, which would defeat the purposes of Public Officers Law § 103[e]. Thus, the Petitioners have stated a claim for an Open Meetings Law violation.

E. The Petitioners have stated a claim under GML § 239-m

General Municipal Law § 239–m requires a town to, among other things, refer to its county planning agency certain proposed actions, including the

"amendment of a zoning ordinance" (GML § 239-m[3][a][ii]). The failure of a town to comply with GML § 239-m is not a mere procedural irregularity; rather it is "a jurisdictional defect involving the validity of a legislative act" rendering it null and void (*Fichera v New York State Dept. of Envtl. Conservation*, 159 AD3d 1493, 1495 [4th Dept 2018]).

The Petitioners contend that though the Town did send zoning amendment to the Seneca County Planning Board on or about March 1, 2018, the Town subsequently amended portions of the zoning ordinance on March 8, 2018 and those amendments were not sent to the Seneca County Planning Board. The Respondents admit that GML § 239-m was applicable to its zoning amendment, but argues that a new referral was not required because the amendments made on March 8, 2018 were embraced in the original referral which was received by the Seneca County Planning Board or were otherwise not substantial.

Contrary to the Respondents' argument, the March 8, 2018 amendments are neither embraced in the original referral nor insubstantial. The March 8th amendments added several definitions not found in the original referral, including "Clean Energy Production," "Clean Energy Production - Large Scale," and "Natural Gas," and several definitions were substantially amended, including "Energy Production -Natural Gas - Large Scale," and "Waste." It

cannot be said that the changes were insubstantial when the changes literally added matters of substance to the zoning ordinance, and, thus, a new referral under GML § 239-m was required (*Calverton Manor, LLC v Town of Riverhead*, 160 AD3d 842, 845 [2d Dept 2018] (law passed by town contained substantial modifications that warranted a new referral under GML 239-m)). Thus, the Petitioners have stated a claim for a violation under GML § 239-m.

F. The remainder of the causes of action in the Petition/Complaint state valid causes of action

Contrary to the Respondents' arguments, upon the record before the Court, the remainder of the Petitioners' causes of action state a cause of action and therefore, the motion to dismiss those causes of action is denied.

G. Seneca Lake Guardian has not established that it should be permitted to intervene

Seneca Lake Guardian describes itself as a non-profit organization dedicated to preserving and protecting Seneca Lake and the Finger Lakes region, including the region's residents and visitors, its rural community character, and its agricultural and tourism-related businesses. Seneca Lake Guardian pursues its

corporate purposes through public education, citizen participation, engagement with decision makers, and networking with like-minded organizations. Through those means, the organization supports projects that promote sustainable energy or increase investment in water supply/sewer systems, while challenging destructive power plants, reckless development, and decrepit infrastructure in both the Seneca Lake watershed and throughout the Finger Lakes region.

Of the three vehicles for permitting the intervention in an action of a party (CPLR 1012, CPLR 1013, and CPLR 7802[d]), the Court of Appeals has held that CPLR 7802[d] presents the most liberal standard for permitting intervention (*Geater New York Health Care Facilities Ass'n v DeBuono*, 91 NY2d 716, 720 [1998]). In order to intervene in an Article 78 proceeding, a proposed intervenor must be interested in the income and present claims or defenses that present "common question of law or fact" (*Citizens Organized to Protect Envt. ex rel. Brinkman v Planning Bd. of Town of Irondequoit*, 50 AD3d 1460, 1461 [4th Dept 2008]). Seneca Lake Guardian has expressed that it has interest in the Petitioners' desire to build an incinerator on its property. However, the claims that are subject to this action do not directly bear upon that interest. Thus, in the exercise of discretion, the Court denies intervention pursuant to CPLR 7802[d].

In order to intervene as of right pursuant to CPLR 1012, Seneca Guardian

must show the following 2 elements: (1) that the representation of its interests by the parties presently in the action is inadequate; and (2) that it may be bound by the judgment (*Mavente v Albany Med. Ctr. Hosp.*, 126 AD3d 1090, 1090 [3d Dept 2015]). Here, Seneca Lake Guardian has not established either element.

Finally, while Seneca Lake Guardian's motion to intervene comes as part-and-parcel to the Respondents' motion to dismiss, "once let in, the intervenor becomes a party for all purposes (*New York State Senator Kruger v Bloomberg*, 1 Misc 3d 192, 195 [Sup Ct 2003]), which would include all the rights enjoyed by a party – including discovery which may unnecessarily delay by the proceedings (see *Mavente v Albany Med. Ctr. Hosp.*, 126 AD3d at 1091)). Thus the benefit to be gained by the intervention sought in this case is outweighed the potential delay and prejudice to the Petitioners, and, thus, the motion for permissive intervention pursuant to CPLR 1013 is denied (*Quality Aggregates Inc. v Century Concrete Corp.*, 213 AD2d 919, 921 [3d Dept 1995]).

Where a motion to intervene is denied, the Court may grant a party the ability to participate as *amicus curiae* (see, e.g. *Anschutz Expl. Corp. v Town of Dryden*, 35 Misc 3d 450, 456 [Sup Ct 2012], affd sub nom. *Norse Energy Corp. USA v Town of Dryden*, 108 AD3d 25 [3d Dept 2013], affd sub nom. *Wallach v Town of Dryden*, 23 NY3d 728 [2014]; *Pace-O-Matic, Inc. v New York State Liq. Auth.*, 72

AD3d 1144, 1145 [3d Dept 2010]). Thus, the Court grants Seneca Lake Guardian *amicus curaie* status and has considered the arguments raised in its papers in support of dismissal.

Conclusion

Based upon the foregoing, it is hereby

ORDERED that the motion to intervene of the proposed-intervenor Seneca Lake Guardian is granted to the extent of permitting Seneca Lake Guardian to appear as *amucus curiae* and denied as to intervention under CPLR 1012, CPLR 1013, and CPLR 7802[d]; and it is further

ORDERED that the Respondents' motion to dismiss the Petitioners-Plaintiffs' Petition/Complaint is granted in part and the Tenth and Eleventh Causes of Action are hereby dismissed; and it is further

ORDERED that pursuant to CPLR 7804[f] and CPLR 3211[f], the Respondents shall have 10 days in which to serve an answer and return, such time may be extended either upon consent of the parties or upon order of the Court.

Dated: April 4, 2019

The Honorable Daniel J. Doyle
Supreme Court Justice