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Greenwood Township Supervisors  
14743 F Road  
Atlantic, PA 16111

***RE: Erie Renewable Energy Tire Derived Fuel Power Plant to be Located in the Keystone Industrial Park and the Applicability of the Greenwood Township Solid Waste Management Ordinance***

Dear Supervisors:

The Township has generally become aware of the fact that the Company known locally as Erie Renewable Energy, plans to construct a 90 megawatt tire derived fuel power plant at the Hon Industries site in the Keystone Industrial Park off of the Adamsville Road in Greenwood Township. The plant will generate electricity utilizing two circulating fluidized bed boilers which they contend will be equipped with state of the art air pollution control equipment. The idea as we now understand it, is for the plant owner, Erie Renewable Energy, to bring whole waste tires onto the premises via railway cars and trucks where they will be placed in storage for a short time until they are cut into two inch squares and ultimately sent into the boilers and burned to produce the heat which will then create steam and operate the 90 megawatt generators. The project appears to have the support of the Economic Progress Alliance who is the owner of the Keystone Industrial Park and has been actively engaged in promoting industry within the Park. The Township meeting on July 6<sup>th</sup> provided some additional information regarding the location and operation of the Plant, as well as its significant water usage or requirement.

The meeting was attended both by representatives of Erie Renewable Energy and members of an opposing group all of whom were afforded an opportunity, by the Supervisors, to speak and give their impression of the proposed new power generation plant. Prior to the meeting, and in anticipation of the discussion that would occur, the Supervisors requested that I review the Law with respect to this type of facility generally, and specifically to review the applicability of the Greenwood Township Solid Waste Management Ordinance which was adopted as Ordinance No. 1981-1. The Township's Solid Waste Management Ordinance, adopted under the Second Class Township Code and under the Pennsylvania Solid Waste Management Act was designed to regulate two types of solid waste activities. The first would be disposal of solid waste within Greenwood Township which would not appear to be applicable

and the second is a facility that would process solid waste within Greenwood Township. The developer or manufacture has indicated on several occasions that they absolutely do not intend to dispose of any waste at the site in Greenwood Township. Therefore I have turned my attention to the processing aspect of the Ordinance.

First of all it is important to review the definitions contained in the Ordinance. These definitions are similar, although not identical, to the definitions utilized in the Solid Waste Management Act of Pennsylvania. The Township's definition of processing is as follows:

“any technology used for the purpose of reducing the volume or bulk of municipal or residual waste or any technology used to convert part or all of such waste materials for off site reuse. The term processing and facilities include but are not limited to transfer facilities, composting facilities, and resource recovery facilities.”

The Ordinance goes on in Section 403 to state that it is unlawful for any person or municipality to use their land, within the township, for solid waste processing without first obtaining a permit from the township and DEP as required by this Ordinance and the Laws of the State. The processing requirement does have an exception for:

“for short term storage of byproducts which are utilized in the processing or manufacturing of other products, to the extent that such byproducts are not hazardous, and do not create a public nuisance or adversely affect the air, water or other natural resources of this Township.”

The Ordinance goes on to create very extensive regulations and in one section specifically states that “all solid waste processing and disposable facilities permitted under this Ordinance within Greenwood Township shall be municipally owned and operated”. This provision would quite clearly prohibit the proposed activities of Erie Renewable Energy if this Ordinance applies to their proposed use of the land. The company is private in nature and clearly is not a municipality, and therefore this general prohibition on non-municipal ownership and operation of waste disposal and waste processing facilities would, if upheld by the Courts, have created an impossible hurdle for Erie Renewable Energy in locally siting their facility.

In researching the answer to the Supervisors' questions it becomes obvious that a great deal has happened in the Solid Waste Laws of Pennsylvania and the Court decisions construing those Laws since the Ordinance was originally passed in 1981. For example, the Commonwealth of Pennsylvania has passed the Waste Tire Recycling Act which basically directs that waste tires may no longer be disposed of in landfills and directs the Department Environmental Protection to develop methods of properly disposing of waste tires and specifically includes the concept of tire derived fuel applications. I mention this Act specifically for the reason that Erie Renewable Energy's counsel had indicated to me that they believed that the Township was preempted by the State Law and DEP regulations regarding the use of tires as a fuel for the boilers in question.

They argue that the Commonwealth has completely entered this field of waste recovery and has extensively regulated waste tire disposition under the Solid Waste Management Act as well as the Waste Tire Recycling Act. The only provision in the Waste Tire Recycling Act which would lead me to question that preemption has occurred in this case is the statement in the Act to the effect that the Department should "cooperate with local units of government and appropriate private business in carrying out the duties of this Act". That section of the Waste Tire Recycling Act also specifically states that "it shall be the duty of the Department to regulate the disposal of waste tires". The question of whether or not the State has so extensively taken over the waste tire disposal and reutilization field that it can be said that the Townships are preempted from regulating them is still an open question in my mind. A strong case for preemption can be made by Erie Renewable Energy.

The absolute prohibition of any privately owned or non-municipal owned, solid waste processing facilities is quite troubling and will be difficult to support depending upon how wide ranging you wish to construe this Ordinance. The Ordinance is quite clearly designed to regulate landfills and the related transfer stations. The question presented for my consideration is really whether or not the Ordinance applies in this circumstance.

We have already established that the activities of Erie Renewable Energy will not amount to disposal and I have indicated to their counsel that if they do attempt to dispose of tires at that facility that the Township would take a very different view of the whole circumstance. The attention then has to be directed toward processing and consideration given to whether or not this is a processing facility. There is no question that whole waste tires are in fact a residual waste. There is a body of regulations promulgated by DEP which regulate residual waste in general and waste tires specifically. The definition of processing under the Ordinance would not seem to apply to the activities as they were described by Erie Renewable Energy. First of all they would not seem to be utilizing a technology for the purpose of reducing volume or bulk of residual waste rather the volume and bulk of the residual waste would seem to remain essentially the same even though it has been cut up into smaller pieces for purposes of making them easier to incinerate. In addition, the "purpose" of cutting the tires will be to create fuel. These tires, once they are sliced, would actually not be a residual waste at all, but rather would be converted to a tire derived fuel. This concept can be clearly identified in the Supreme Court's decision of *Tire Jockey Service, Inc. vs. DEP* decided in February of 2007. The case is quite instructive on the method by which the Courts are to view the processing of waste tires and DEP's involvement therewith. Further analysis of the term processing, under the Ordinance, would suggest that if the product which they are making, tire derived fuel would then be utilized off site or reused off site, the term processing would apply. Based upon the representations of Erie Renewable Energy the fuel will be utilized on site, not off site. This is clearly not a transfer facility, by definition; a composting facility, by definition; and it is not a resource recovery facility because by definition that deals only with municipal waste and it is clear that whole waste tires are residual waste. Once processed the material made is not waste at all. Ultimately there may be some production

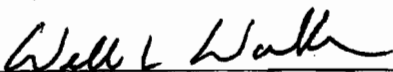
of a waste material, such as ash, wire remnants, which are required to be disposed of in a lawful method similar to any manufacturing facility located at the Keystone Industrial Plant.

For the reasons set forth above I must conclude that I do not believe that the Ordinance 1981-1 of Greenwood Township is applicable to the activities which will be engaged in by Erie Renewable Energy, at least to the extent that they have indicated what their activities would consist of. I believe that there is an off site reuse requirement before it becomes processing facility that would be governed under the Ordinance. I also have concerns about the possibility that preemption has occurred here with respect to waste tire recycling facilities, and the reasonableness of blanket absolute prohibition of non-municipally owned waste processing facilities without an extensive record of the study of non-municipally owned waste processing facilities and a clear indication that municipally owned facilities are better than privately owned facilities. The alternative view would tend to give someone, such as Erie Renewable Energy an avenue to attack the Ordinance which may be very difficult to defend against. In the final analysis I find that what is taking place, again based upon what we have been told, is the cutting and shredding of tires, which are a residual waste, into a fuel which is not waste at all. That fuel is then used on site to generate electricity and I do not believe that the Ordinance which the Township has should be deemed applicable to that circumstance.

If you should have any further questions please feel free to contact me.

Very truly yours,

**THOMAS, SPADAFORE & WALKER, LLP**

By:   
William L. Walker, Esquire

WLW/alh