



STATE OF DELAWARE
**DEPARTMENT OF NATURAL RESOURCES AND
ENVIRONMENTAL CONTROL**

RICHARDSON & ROBBINS BUILDING
89 KINGS HIGHWAY
DOVER, DELAWARE 19901

OFFICE OF THE
SECRETARY

PHONE
(302) 739-9000

NOTICE OF CONCILIATION AND SECRETARY'S ORDER

Pursuant to 7 *Del. C.* § 6005

Order No. 2021-A-0006

*PERSONALLY SERVED BY AN ENVIRONMENTAL
PROTECTION OFFICER*

Issued To:

Congo Funeral Home
Attn: Ernest M. Congo, President
100 N. Cleveland Avenue
Wilmington, DE 19805

Registered Agent:

Ernest Congo
2904 W. 2nd Street
Wilmington, DE 19805

Re: **Permit: APC-2018/0076-CONSTRUCTION (Amendment 1)
Congo Funeral Home Crematory Unit**

This is to notify Congo Funeral Home (“Respondent” or “Congo”) that the Secretary of the Department of Natural Resources and Environmental Control (“Department”) has found that Respondent has violated 7 *Del. C.* Chapter 60 and an Air Pollution Control Construction Permit in Wilmington, Delaware, and that the violation is continuing. Accordingly, the Department is issuing this Notice of Conciliation and Secretary’s Order (“Notice and Order”) in an endeavor to obtain compliance with the requirements of 7 *Del. C.* Chapter 60.

BACKGROUND

In 7 *Del. C.* § 6003(a)(1) it prohibits persons from undertaking activities in a manner that may cause or contribute to the discharge of an air contaminant. Subsection (c)(1) of § 6003 provides for the granting of an air quality permit to areas with appropriate zoning. It states: “(1) No permit may be granted unless the county or municipality having jurisdiction has first approved the activity by zoning procedures provided by law.”

Congo submitted a permit application on Form Nos. AQM-1, AQM-2, AQM-3.11 and AQM-5 dated February 26, 2018. The requested permit was to construct a Crematory Incinerator Unit (Model No. IE43 0 Power Pak II Plus) associated with both a primary combustion chamber and a secondary combustion chamber, to be located at 100 North Cleveland Avenue in Wilmington, Delaware. This property is around the corner from the Congo Funeral Home located at 2904 West 2nd Street in Wilmington, Delaware. The permit application Congo completed provided that the requested use fit within applicable zoning. The City of Wilmington zoning maps show that the zoning for the property is C-2. The Department issued **Permit: APC-2018/0076- CONSTRUCTION** for the unit on May 10, 2018 (the “Permit”). By letter dated January 17, 2020, Ernest M. Congo requested that the expiration date of the permit be changed to allow up to three years for construction. On January 24, 2020, the Department issued **Permit: APC- 2018/0076-CONSTRUCTION (Amendment 1)** (“Amended Permit”). The Amended Permit provides in Condition 1.1 that it expires on May 10, 2021.

Condition 1.2 of the Permit and Extended Permit provides that the crematory unit must be constructed in accordance with the permit applications submitted by Congo. According to the permit applications, the proposed location of the crematory units was 100 N. Cleveland Avenue, Wilmington, Delaware. By letter dated August 19, 2020, from the City of Wilmington, DNREC was informed that the crematory unit does not meet the zoning requirements for the location because a crematory operation is only allowed in a C-2 zone if it is co-located with a funeral home. The letter raised the issue of whether the proposed location in the application is co-located with a funeral home. The Department was unaware of this issue prior to receiving the letter from the City of Wilmington. Although, the zoning letter was received during the processing of a second permit application for an additional crematory unit at the same property, the zoning issue is also pertinent to the Amended Permit.

By letter dated August 21, 2020, the Department informed Congo of the issue that had been raised by the City of Wilmington concerning the zoning for the crematory unit. The Department requested that Congo provide an official letter of determination from the City of Wilmington Zoning Department detailing why a crematory operation is allowed, or why it is not allowed, at the provided property address for the permit application it was processing. That letter also advised Congo not to pursue any construction activities pursuant to the Amended Permit until it had also provided the Department with zoning confirmation for the unit. The Department did not receive the requested zoning information. The Department sent another letter to Congo dated December 11, 2020. In it, the Department reiterated its concern about the zoning relevant both to the permit it was processing and to the Amended Permit. The Department gave Congo an additional month, until January 11, 2021, for the Department to receive the official zoning information that it requested. The December letter gave Congo notice that the Department would move to cancel the Amended Permit if it failed to receive that information by the deadline.¹

To date, Congo has not provided the requested information. Congo did send a letter dated January 10, 2021 asking to extend the deadline to provide the information. The letter did not provide any assurances that the zoning approval was being sought or any indication that the zoning information could be provided. The Department has no evidence that Congo has constructed the crematory incinerator unit.

FINDINGS OF FACT

1. Congo submitted a permit application on Form Nos. AQM-1, AQM-2, AQM-3.11 and AQM-5 dated February 26, 2018, requesting a permit to construct a Crematory Incinerator Unit (Model No. IE43 0 Power Pak II Plus) associated with both a primary combustion chamber and a secondary combustion chamber, to be located at 100 N. Cleveland Avenue in Wilmington, Delaware.

¹ The Department also notified Congo that if it failed to submit the zoning information, the permit application that it was processing would be officially determined to be incomplete and returned.

2. The permit application Congo completed provided that the requested use fit within applicable zoning.

3. The Department issued **Permit: APC-2018/0076-CONSTRUCTION** for the unit on May 10, 2018 (the "Permit").

4. Upon Congo's request, **Permit: APC-2018/0076-CONSTRUCTION (Amendment 1)** ("Amended Permit") was issued on January 24, 2020, extending the expiration.

5. The City of Wilmington sent DNREC a letter dated August 19, 2020, stating that the crematory unit does not meet the zoning requirements for the location because a crematory operation is only allowed in a C-2 zone if it is co-located with a funeral home.

6. The question of whether the location of the proposed crematory unit is properly zoned is within the jurisdiction of the City of Wilmington.

7. By letter dated August 21, 2020, the Department requested that Congo provide an official letter of determination from the City of Wilmington Zoning Department detailing why a crematory operation is allowed, or why it is not allowed, at the provided property address for the permit application it was processing.

8. To date, Congo has failed to provide official correspondence from the City of Wilmington Zoning Department indicating that the crematory operation is an allowable use at the stated site.

9. As of January 27, 2021, the Department does not believe Congo has constructed the crematory unit.

STATUTORY, REGULATORY AND PERMIT PROVISIONS

1. In 7 Del. C. §6003(a)(1) it states:

"No person shall, without first having obtained a permit from the Secretary, undertake any activity in a way which may cause or contribute to the discharge of an air contaminant."

2. In 7 Del. C. §6003(c)(1) it states:

"No permit may be granted unless the county or municipality having jurisdiction has first approved the activity by zoning procedures provided by law."

CONCLUSIONS

Based on the foregoing facts, the Department has determined that Respondent has violated and will continue to violate 7 *Del. C.* Chapter 60 and its permit as follows:

1. The Department relied on Congo's representation in its application for the crematory unit it submitted on February 26, 2018, that the crematory was appropriate for the parcel's zoning.
2. The Department first learned that Congo's representation concerning zoning may not have been accurate by letter from the City of Wilmington dated August 19, 2020.
3. In August and December of 2020, the Department requested that Congo provide evidence of zoning.
4. Congo has not provided proof of zoning.
5. While Congo has requested additional time to submit evidence, four months have already lapsed since the Department requested proof of zoning.
6. Congo has not installed the crematory unit and the permit expires on May 10, 2021.
7. Congo's permit should be revoked based on failure to provide proof of zoning approval.

NOTICE OF CONCILIATION AND ORDER

It is the intent of the Department for Respondent to correct the current violation related to the failure to provide adequate notice of zoning sufficient to justify retention of its construction permit. Therefore, in consideration of the foregoing findings, notice is hereby given that it is proposed, pursuant to 7 *Del. C.* § 6005(b)(2), that Respondent achieve compliance by providing proof of zoning for the construction permit. Therefore, Respondent is hereby ordered as follows:

1. Respondent shall as soon as practical, but no later than 30 days after the date this Order is served on it, present written proof obtained from the City of Wilmington that the construction and use of the Crematory pursuant to the Construction permit is an authorized use under the current zoning for the property.
2. If Respondent fails to submit proof of zoning to DNREC within 30 days of service of this Order, the Construction Permit will be revoked as of the 31st day.

PUBLIC HEARING

Prior to this Order becoming final, Respondent may, pursuant to 7 *Del. C.* § 6005(b)(2), request a public hearing within 30 days of receipt of this Order to present any evidence and/or arguments Respondent believes that the Secretary should consider before the Secretary issues a Final Order determining whether Respondent's Construction Permit should be revoked. The public hearing, if requested, will be conducted pursuant to 7 *Del. C.* § 6006. The Secretary's Final Order following the public hearing may be subject to appeal to the Environmental Appeals Board, pursuant to 7 *Del. C.* § 6008, by any person substantially affected by the Final Order.

To request a public hearing, you must submit your request, in writing, within 30 days of receipt of this Order to:

Department of Natural Resources and Environmental
Control Office of the Secretary
89 Kings Highway
Dover, DE 19901
Phone: (302) 739-9000

In the absence of a timely request for a public hearing, this Order shall be deemed the Secretary's Final Order revoking Respondent's Construction Permit as of the 31st day of Respondent's receipt of this Order. Furthermore, Respondent's decision to not request a public hearing during the 30 days period shall bar Respondent from appealing this Order to the Environmental Appeals Board following expiration of the 30-day period.

APPEAL RIGHTS

In the alternative, pursuant to 7 *Del. C.* § 6008, Respondent may elect to waive its right to request a public hearing before this Order becomes final by appealing this Order directly to the Environmental Appeals Board within 20 days of its receipt of this Order. In the event Respondent waives its right to request a public hearing and elects to appeal this Order directly to the Environmental Appeals Board, this Order shall be deemed the Secretary's Final Order revoking Respondent's Construction Permit as of the date Respondent files its appeal with the Board.

To file an appeal with the Environmental Appeals Board pursuant to 7 *Del. C.* § 6008, Respondent must submit a written statement of appeal and a check, made payable to: "Environmental Appeals Board," for the \$50.00 filing fee, to:

Department of Natural Resources and Environmental
Control Office of the Secretary
Attn: Assistant to the Environmental
Appeals Board 89 Kings Highway
Dover, DE 19901
Ph: (302) 739-9000

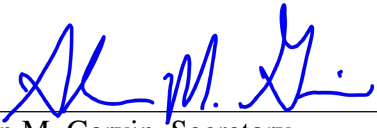
For additional information on filing an appeal with the Environmental Appeals Board and what information Respondent must include in its written statement of appeal, please refer to the Environmental Appeals Board Regulations, codified at 7 DE Admin. Code § 105.

Respondent is further advised that if Respondent declines to request a public hearing within 30 days of its receipt of this Order and declines to file an appeal of this Order directly to the Environmental Appeals Board within 20 days of its receipt of this Order, Respondent shall be barred from challenging this Order. The Department may take any additional legal action necessary to bring about Respondent's compliance with this Order and Delaware law, including, but not limited to an action under 7 *Del. C.* § 6005(b)(1) seeking penalties for past violations, an action under 7 *Del. C.* § 6005(b)(2) seeking penalties for continuing violations, an action in the Court of Chancery pursuant to 7 *Del. C.* § 6005(b)(2) seeking a temporary restraining order or an injunction, and the imposition of administrative penalties and recovery of the Department's costs and attorney's fees pursuant to 7 *Del. C.* §§ 6005(b)(3) & (c)(1).

If you have any questions, please contact Angela Marconi, P.E. at (302) 323-4542.

February 19, 2021

Date


Shawn M. Garvin, Secretary
Department of Natural Resources
and Environmental Control