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Via Email and U.S. Mail

Ms. Betsy Gramkow, Chairperson
City of Hudson Planning Board
City Hall
520 Warren Street
Hudson, New York, 12534

Re: A. Colarusso & Sons Inc. Permit Application Review

Dear Ms. Gramkow:

Our firm represents A. Colarusso & Sons, Inc. (“Colarusso”) related to its applications to the City of Hudson Planning Board (the “Planning Board”) for conditional use permits for 175 South Front Street (the “Dock Application”) and the adjacent haul road (the “Haul Road Application”). The purpose of this letter is to address the permissible scope of the Planning Board’s review of each application under the City of Hudson Code (the “City Code”), because the Planning Board has asked itself this question repeatedly in the past few meetings, and the last invoice from the Planning Board’s counsel indicates it has been an open legal question.

Brief Summary

As set discussed further below, Colarusso has a legal right to continue its dock operations and use of the haul road as conditional uses granted by the City Code. Under the City Code, the scope of the Planning Board’s review of the Dock Application and Haul Road Application, which were triggered by the bulkhead repair and proposed improvements to the haul road, is limited to determining what additional conditions are “necessary...to protect the protect the health, safety and welfare” of residents or the recreating public. The Planning Board may not look beyond the City Code in reviewing the Dock Application and Haul Road Application; therefore, the scope of the Planning

Board's review may not include a determination as to whether Colarusso's may continue its dock operation or use of the haul road.

Likewise, the City's SEQRA review in connection with the Dock Application should also be limited to the bulkhead repair and the additional conditions imposed by the Planning Board that are "necessary...to protect the protect the health, safety and welfare" of the recreating public. With regard to the Haul Road Application, the record is conclusive that such application is not subject to further SEQRA review by the Planning Board.

Relevant Background

Colarusso owns and operates a commercial dock for the transport and shipment raw materials, including loading and unloading facilities, and storage of such raw materials, and an associated private road providing ingress and egress to or from such commercial dock operation (the "Dock Operation"). Colarusso also uses a haul road for transshipment between the applicant's dock and the applicant's quarry located in the Town of Greenport.

In late 2016, as a result of heavy erosion of the dock's river edges and banks, Colarusso completed certain necessary repairs to a 75-foot section of a non-working bulkhead, and the placement of rocks along a 170-foot portion of the Hudson River (the "Bulkhead Repair"). After completing the Bulkhead Repair, the City of Hudson Zoning Board of Appeals ("ZBA"), as confirmed by the court in *A. Colarusso & Sons, Inc. and Colarusso Ventures, LLC v. City of Hudson, et al.*, determined that the Bulkhead Repair constituted an "action or event" that triggered Planning Board review under City Code § 375-17.1. In addition, Colarusso proposed improvements to the haul road in order to increase truck traffic use of the haul road and, thus, reduce truck traffic on City of Hudson streets.

Since that time, Colarusso has submitted two applications to the Planning Board. One of the applications, the Dock Application, seeks conditional use approval for the Bulkhead Repair. The second application, the Haul Road Application, seeks a conditional use approval for the proposed improvements to the haul road within the City limits. The portion of the haul road in the Town of Greenport has already been granted site plan approval by the Town of Greenport.

Relevant Law

Under the City Code, a conditional use is to be permitted by the City Planning Board "[o]n application and after public notice and hearing."¹ The City Code, however, provides certain exceptions to this requirement for certain "conditional uses" in the Core Riverfront C-R District.² One of these exceptions is for the "continuation of existing dock operations" which, as of the date of the legislation (in or around 2011), were permitted to

¹ City Code § 325-34.

² City Code § 375-17.1(D).

continue, as the land use existed on the effective date of the legislation, without an application or public notice and hearing.³

Under the City Code, any commercial dock operations in the Core Riverfront C-R District are permitted to continue to operate “until such time as one or more of the actions or events specified in Subsection D...is proposed to be undertaken.”⁴ Where an “action or event” is proposed

in addition to the provisions of Article VIII, and as more fully set forth in § 325-17.1F(2), the Planning Board shall impose *additional conditions* on such use *as may be necessary* to protect the health, safety and welfare of residents living in close proximity to commercial docks and the public while recreating and using public facilities adjacent to commercial docks as authorized in the Local Waterfront Revitalization Program.⁵

Thus, where an “action or event” is proposed at an existing commercial dock operation, use of the dock does not cease. Rather, “the Planning Board shall impose *additional conditions* on such use,” in addition to those set forth in City Code §§ 325-34 and City Code § 325-17.1(F)(2), which have applied to the Dock Operation. The Dock Operation has been in compliance with the City Code, since Colarusso took ownership in 2014. Now the Board may impose further conditions, “as may be necessary to protect the health, safety and welfare of residents living in close proximity to commercial docks and the public while recreating and using public facilities adjacent to commercial docks as authorized in the Local Waterfront Revitalization Program.”⁶

The conditions set forth in City Code § 325-34, with which Colarusso is in compliance are

- (1) That all proposed structures, equipment or material shall be readily accessible for fire and police protection.
- (2) That the proposed use shall be of such location, size and character that, in general, it will be in harmony with the appropriate and orderly development of the district in which it is proposed to be situated and will not be detrimental to the orderly development of adjacent properties in accordance with the zoning classification of such properties.⁷

The conditions set forth in City Code § 325-17.1F(2) are:

³ City Code § 375-17.1(D)(1).

⁴ City Code § 375-17.1(D)(1).

⁵ City Code § 325-17.1(D)(1) (emphasis added).

⁶ City Code § 325-17.1(D)(1) (emphasis added).

⁷ City Code 325-34(A)(1) and (2). This section of the City Code further provides additional considerations for any use located in or directly adjacent to a residential district. Here, Colarusso’s dock operation is not in or directly adjacent to a residential district, thus, these conditions are not applicable.

- (1) For all conditional uses, where the subject property abuts the water, the Planning Board shall consider the quality and extent of views from the adjacent public streets through the property to the water as well as the design and relationship of development to the water-front as viewed from the water.
- (2) Special conditions for commercial dock operations (including private roads providing ingress and egress to the commercial dock operations):
 - a. Emissions of dust, smoke, gas, odor or air pollution, or by reason of the deposit, discharge or dispersal of liquid or solid wastes in any form in a manner or amount as to cause permanent damage to the soil or waters shall not adversely affect the surrounding area or create a nuisance. See Hudson Zoning Regulations § 325-27, Prohibited uses in all districts.
 - b. In order to minimize nuisance noise from loading dock operations to residential receptors and nearby uses, noise shall be kept within the limits established in Chapter 210, Noise, of the City Code. Control measures may include, as the Planning Board deems appropriate, the placement of noise-attenuating barriers and landscaping around loading docks.
 - c. Loading or unloading operations at the docks and truck arrivals and departures shall be limited to the hours of 7:00 a.m. to 7:00 p.m. This limitation shall not apply to on-water operations by tugboats and barges
 - d. Truck engine idling is prohibited at loading docks.
 - e. Artificial lighting facilities of any kind with light sources visible beyond the lot lines or which create glare beyond such lines are prohibited pursuant to § 325-27, subject to lightening devices deemed necessary for the public safety and welfare by federal, state or City authorities.
 - f. Visual impacts associated with such operation shall be minimized. Corridors from a public street or tract of land that provide a direct and unobstructed view to the water from a vantage point within a public street, public park or other public place shall be protected wherever possible. Outdoor

storage of goods and raw materials shall be screened from the public view to the greatest extent possible.

- g. As far as practical, public access to and along the river shall be incorporated into site designs for conditional uses but shall not substantially interfere with the established uses on the property.
- h. In areas of annual flooding, floodplains and wetlands shall be preserved in their natural state to the maximum possible extent practicable to protect water retention, overflow and other natural functions.
- i. Loading and unloading operations at the docks shall be conducted in a manner designed to minimize adverse effects on water quality, fish and wildlife, vegetation, bank stabilization, water flow, and permitted uses on adjoining property.
- j. Construction, reconstruction or resurfacing of and other improvements to the dock operations (including private roads providing ingress and egress to the commercial dock operations) shall be performed in a manner which preserves natural features and drainways, minimizes grading and cut and fill operations, ensures conformity with natural topography, and retains natural vegetation and vegetative buffers around water bodies to the maximum extent practicable in order to prevent any increase in erosion or the volume and rate or velocity of sedimentation or surface water runoff prior to, during, and after site preparation and work.

(3) Special conditions for a private causeway or private road that provide ingress to or egress from the property upon which a commercial dock operation is conducted include the requirements as set forth § 325-17.1F(2)(h) and (k).⁸

Colarusso has a legal right to operate at the dock and use the haul road

Colarusso's Dock Operation includes the transport and shipment raw materials from Colarusso's quarry in the Town of Greenport and includes loading and unloading

⁸ City Code § 17.1(F)(1)-(3). It is noted that reference to City Code § 325-17.1F(2)(k) is an error, as this section does not exist.

facilities, storage of materials, and associated private road providing ingress and egress to or from the Dock Operation. Colarusso's Dock Operation has been existing at 175 South Front Street since before these provisions of the City Code were adopted in 2011. The Dock Operations clearly constitutes "existing commercial dock operations" under City Code § 375-17.1(D)(1) and, thus, is permitted as a "conditional use" in the Core Riverfront C-R District, subject to the provisions of City Code § 375-17.1(D)(1).

The scope of Planning Board's review of the Dock Application and Haul Road Application

As noted, Colarusso submitted the Dock Application in response to the Court's ruling that the Bulkhead Repair constituted "an action or event" under City Code § 325-17.1. Colarusso also submitted the Haul Road Application to ensure compliance with City Code § 325-17.1 for the proposed improvements to the haul road.

The Planning Board's authority and, thus, scope of review, under 375-17.1(D)(1), is expressly limited to "impos[ing] *additional* conditions on such use" as may be necessary to protect the health, safety and welfare of residents living in close proximity to commercial docks and the public while recreating and using public facilities adjacent to commercial docks as authorized in the Local Waterfront Revitalization Program."⁹ **Indeed, the City Code does not provide that when an "action or event" is proposed, the conditional use shall cease completely and require a new conditional use permit for the existing use.**

Since there are no residents in close proximity to the dock, the Planning Board's review is further limited to those additional conditions necessary to protect the health, safety, and welfare of the public while recreating and using the public facilities adjacent to the dock. Colarusso, of course, repaired the bulkhead for this very purpose. Based on the foregoing, the Planning Board's review of the Dock Application does not include whether Colarusso's Dock Operation should be permitted in the Core Riverfront C-R District as a conditional use or whether Colarusso's use of the haul road should be permitted within the City.

The Scope of SEQRA review of the Dock Application

As noted above, Colarusso has a legal right to operate at the dock as a conditional use granted by the City Code. At the time the City Code was amended to include this right to conditional use, it was subject to SEQRA review. Here, as noted above the scope of the Dock Application is to determine what additional conditions are necessary to "protect the health, safety and welfare" of the recreating public in light of the Bulkhead Repair, not whether the Dock Operation should be permitted within the Core Riverfront C-R District.

A lead agency's review under SEQRA is limited to "determine whether...[an] *action* may have significant adverse impact on the environment."¹⁰ To do so, the lead agency must consider the "impacts that may be reasonably expected to result from the

⁹ City Code § 325-17.1(D)(1) (emphasis added).

¹⁰ 6 NYCRR § 617.7.

proposed *action*” to the list of criteria for determining significance set forth in the regulations.¹¹ Nothing in SEQRA permits a lead agency to consider impacts beyond the “action” that is the subject of a pending application under review.

Here, the only “action” before the board in connection with the Dock Application is the Bulkhead Repair. Colarusso’s right to operate at the dock is granted under City Code and is not a component of the Dock Application. Thus, the Planning Board’s SEQRA review should be strictly limited to the Bulkhead Repair and any additional conditions imposed by the City. The Planning Board’s SEQRA review of the Dock Application should not extend beyond the Bulkhead Repair and should not include a review of the Dock Operation as a whole.

The Haul Road Application may not be subjected to further SEQRA review by the Planning Board

The Haul Road Application relates to the Colarusso’s proposed improvements to the haul road (also known as the “Causeway Improvement and Truck Traffic Diversion Project” or “Causeway Improvement Project”). The Causeway Improvement Project was fully reviewed by the Town of Greenport as lead agency under SEQRA. The Town’s comprehensive analysis including all environmental impacts of the Causeway Improvement Project from the Colarusso Quarry in the Town of Greenport to the gate at the commercial dock in the City of Hudson.

Before issuing a negative declaration concerning the proposed Causeway Improvement Project, the Town of Greenport studied all impacts on the land; surface water; wetlands; flooding; plants and animals; aesthetic resources; historic and archeological resources; open space and recreation; traffic; noise, odor and light; human health; consistency with community plans; and, compatibility with community character. The court determined that the Town of Greenport Planning Board complied with SEQRA and upheld the Town’s Negative Declaration.

This fully litigated court decision and order is a final and binding determination that the project is in compliance with the City Code. The City must now turn to consideration of the pending Dock Application and Haul Road Application, with an understanding that the court-approved negative declaration and detailed finding statement by the Town of Greenport are binding on further proceedings.

The truck traffic from the quarry to the dock has already been subjected to exhaustive review

The City of Hudson sued the Applicant and the Town of Greenport, alleging inadequate SEQRA review of the truck traffic from the Colarusso quarry to the dock via the haul road. The Court found as follows:

¹¹ 6 NYCRR 617.7(c)(1).

For example, with regard to traffic, an area of particular concern to petitioner, the Planning Board consulted with the NYSDOT and considered a traffic evaluation by Creighton Manning & Associates, an engineering firm. This study estimates "[o]n a peak demand day where two barges need to be filled in one day, it is estimated that 142 trucks make the trip (284 one-way trips). An average barge filling is one barge over four days, which amounts to 24 round trips (or 48 one-way trips)." The Court notes that even petitioner's engineer concedes that "the [Colarusso's] method for determining trips generated by the project is considered acceptable. Further [Colarusso] has provided confirmation in the project narrative that there are no current plans to expand operations and therefore there would not an increase in the number of maximum trips per days (284 trips/day) unless [Colarusso's] plans and facilities capabilities change in the future." In addition to considering the traffic evaluation prepared by Creighton Manning (which was updated several times to address concerns by the NYSDOT), the Planning Board also sought the Columbia County Planning Board's opinion on potential traffic issues. The Columbia County Planning Board noted that once completed, the project will actually provide safety benefits to the City via the "separation of commercial traffic and pedestrian interfaces," while minimizing the potential environmental impacts by utilizing and improving a haul road already in existence.

While the EAF evaluation does indicate that there will be a slight increase in traffic along a short section of Front Street, it was rational for the Planning Board to conclude that this slight increase in the volume of traffic did not amount to a significant environmental impact. Moreover, Colarusso proposes to pave a portion of the proposed haul road up to the start of City street pavement on Front Street to reduce potential dust and noise. While the petitioner takes issue with traffic having a negative impact on the Basilica and the waterfront, the Planning Board reasonably reasoned that trucks already traverse near the Basilica and waterfront.

City of Hudson v. Town of Greenport, Index No. 17-05620, pp. 6-7 (Sup. Ct. 2019).

A full record of the Town of Greenport's extensive review, which included consideration of the dock as an ongoing operation, is set forth at pp 113-146 of the Record in No. 17-05620.

The City did not appeal this decision, which finds adequate SEQRA review of truck traffic to the dock to the quarry. The decision is final, and binding and the City does not get a "second bite at the apple." Nothing related to the dock operation allows a second SEQRA look at truck traffic.

Judge Melkonian's decision in *A. Colarusso & Sons, Inc. v. the City of Hudson* does not hold otherwise. The Court merely decided that the bulkhead repair triggered SEQRA review of the additional conditions of upon the Dock Operation.

Just as the Court in the *Town of Greenport* decision compared the impact of the proposed two-land haul road to existing conditions, including existing truck traffic to the ongoing Dock Operation as it passes near the Basilica, so too must the Board compare the impact of the Bulkhead Repair to existing conditions.

For all of these reasons, the SEQRA review before the Planning Board relates only to the “action” of imposing additional use conditions on the dock operation that may be necessary to protect the health, safety, and welfare of the public while recreating and using the public facilities adjacent to the dock. Code § 325-17.1(D)(1).

Conclusion

For these reasons:

- a. since the dock is an ongoing operation, the impact of which is known and fully mitigated by the Code requirements with which we comply, the scope of review of the Dock Application is limited to the impact of the Bulkhead Repair on the recreating public;
- b. the scope of review of the Haul Road Application is limited to the impact of the proposed improvements;
- c. SEQRA review on the Dock Application should be limited to the impact of the Bulkhead Repair and the additional conditions imposed by the Planning Board pursuant to the City Code; and
- d. No further SEQRA review by the Planning Board on the Haul Road Application is required or permitted.

Sincerely,

/s/ John J. Privitera

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