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March 11, 2025

To: City of Hudson Planning Board:
Re: Colarusso application for Conditional Use Permit for Dock Operations

It seems that there may be a misconception among some members of the Planning Board that the Court's determination that the SEQRA review is confined to the actual work done on the bulkhead limits the scope of the Planning Board's review and its authority to impose conditions under the Hudson Zoning Code. **If this is anyone's view, it is wrong.** There is clear and express governing law that plainly and unequivocally establishes that reviews pursuant to SEQRA and those pursuant to local zoning codes are distinct from each other, and that the scope and outcome of one is not, *and may not be*, determinative upon the scope or outcome of the other.

In short, whatever happened during the SEQRA review does not limit or alter the scope or standards of review that the Planning Board must consider under the Zoning Code.

This *clearly established principle* affirms the Hudson Zoning Code's plain requirement that, under the circumstances here, **the applicants need a conditional use permit for the entire dock operation, and the Board is authorized to impose conditions upon the entire dock operation, as needed to protect the surroundings.**

The two types of review—SEQRA and Zoning Code, serve two entirely different purposes: SEQRA requires that an action either 1) be found to have no significant adverse environmental impacts or 2) be carried out in the way that minimizes adverse environmental impacts. This second option is what allows things with major environmental impacts to be built, as long as they are carried out in a way that reduces adverse impacts *as much as is feasible*. SEQRA review is the first hurdle. If a proposed project satisfies either of the two SEQRA options above, it can proceed to being evaluated under the zoning code. If the project fails both of the options above, the project cannot proceed.

If the project satisfies one of the SEQRA standards, as has occurred here, it must then be evaluated against the zoning code. Review under a zoning code requires an entirely different and *independent* thing: it **requires that the project satisfy all the thresholds required in the zoning code for approval**. That determination is made by looking directly at the facts and possible impacts of the project when compared to the standards set out in the zoning code. It is incorrect and unlawful to merely transfer the conclusions of the SEQRA process to the review under the zoning code. If the project meets the standards of the zoning code, it gets approved; if it doesn't meet the standards of the zoning code, it gets denied; or, it may be approved with modifications or conditions that ensure that it will meet the standards of the zoning code.

The key point is that **what happens during the SEQRA review does not constrain, limit, expand, or change the scope or standards of review set out in the zoning code.**

The SEQRA regulations expressly state as much: 6 NYCRR 617.3. General rules (b) “**SEQR does not change the existing jurisdiction of agencies.**”

The Court of Appeals has reiterated the principle, for example: “we note, as did the Appellate Division, that except where the proposed action is a zoning amendment, SEQRA review may not serve as a vehicle for adjudicating ‘legal issues concerning compliance with local government zoning.’” WEOK Broadcasting Corp. v. Planning Bd. of Town of Lloyd, 79 N.Y.2d (1992).

The Appellate Division also made the point in this very concise declaration: “[T]he invocation of SEQRA was not intended to and did not pre-empt nor in any way interfere with the zoning ordinance.” Town of Poughkeepsie v. Flacke, 84 A.D.2d 1, (2nd Dep’t, 1981).

This principle is not only made clear generally by the SEQRA regulations and the high Courts of this State; it was also expressly recognized by both J. Melkonian and J. Rivera in litigation of this Colarusso matter:

In the more recent litigation, J. Rivera’s decision includes the following passages.

In characterizing this as a case of first impression, J. Rivera acknowledges that the Hudson Zoning Code’s requirement to obtain a conditional use permit to continue such nonconforming use is the **underlying precondition and context** for the case:

“This appears to be an issue of first impression, as the parties have not cited any cases specifically addressing whether a limited repair or replacement of a small portion of a nonconforming structure or property * * * could trigger a Type I SEQRA review when a local zoning ordinance requires a conditional use permit to continue such nonconforming use upon undertaking said repair/replacement.”

J. Rivera’s decision expressly acknowledges that the Planning Board has authority to impose code conditions upon the “entire dock” even though only the new work is to be reviewed “for SEQRA purposes.”

“[J]ust because the **Code** may have given the Board the power to impose certain conditions on the continued use of the entire dock upon the happening of the bulkhead repair, it doesn't mean that the entire dock is now also a new ‘action’ for SEQRA purposes.”

He narrows the question before the Court was what was to be evaluated under SEQRA:

“At issue is the identity of the action to be evaluated under the State Environmental Quality Review Act ("SEQRA"): the repair action in and of itself or the continued operation of the entire dock as a preexisting nonconforming use.”

He then describes the Parties’ contentions:

“Petitioners frame the "action" at issue as being limited to the repair and replacement of a 75 foot section of bulkhead. *They likewise frame the associated conditional use permit under Zoning Code 325-17.1(D) as a permit to merely retroactively authorize the already completed repair project.*

“Respondent, on the other hand, argues that the conditional use permit is not merely a permit to retroactively approve the dock repair. Rather, **it is a permit to allow for continued operation of all 12 acres of the dock** as a preexisting nonconforming use, with certain conditions that can now be imposed as per Zoning Code 325-17.1(D), because the repair was a triggering event under that provision. Respondent argues that this continued operation of the entire dock is the "action" subject to SEQRA review...”

The Court made clear that *SEQRA* included only the bulkhead work but *that the conditional use permit* encompassed the entire dock operation, holding that Petitioners (Colarusso) were correct that the *SEQRA review* should only encompass the bulkhead work, but that **Respondents (Hudson Planning Board) were correct that the conditional use permit (a zoning code matter) applied to the continued use of the dock, and that the Planning Board is authorized to impose conditions on the continued use of the dock:**

“Neither party's framing is entirely correct. **As Respondent correctly argues,** as per Zoning Code 325-17.1(D), because part of the dock was being ‘rebuilt,’ **the conditional use permit requirement of the Code was triggered** and the Board is now authorized to impose certain conditions as specified in the Code, along with ‘**additional conditions on such [continued] use [of the dock]**’ 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’ Zoning Code 325-17.1(D)(1). **Thus, the conditional use permit is, contra Petitioners' characterization, not simply a permit to nunc pro tunc authorize the repairs already made, but rather, a permit for continued use of the dock** with such conditions as the Board may impose consistent with law.” (Note: “nunc pro tunc” essentially means “after the fact” or “retroactively..”

J. Rivera is as clear as can be: **“the conditional use permit is, contra Petitioners' characterization, not simply a permit to nunc pro tunc authorize the repairs already made, but rather, a permit for continued use of the dock with such conditions as the Board may impose** consistent with law.”

At every level of law, from the SEQRA regulations to the Court of Appeals and Appellate Courts, to the decisions in this very matter, it is clearly and consistently established that 1) SEQRA review and review under a local zoning code are independent reviews; 2) that “SEQRA review **may not serve** as a vehicle for adjudicating ‘legal issues concerning compliance with local government zoning,’” *WEOK Broadcasting Corp.*, and 3) that in this matter, “the conditional use permit is, contra Petitioners' characterization, not simply a permit to *nunc pro tunc* authorize the repairs already made, but rather, **a permit for continued use of the dock with such conditions as the Board may impose.**”

Any review or approval pursuant to the Hudson Zoning Code that fails to encompass the full, proper scope of the entire dock operation will be inadequate, arbitrary, affected by an error of law, and subject to nullification. The law requires a comprehensive review.

Sincerely,



Kenneth J. Dow