Dear Chairperson Joyner and Members of the Planning Board:

I was the City Attorney for the City of Hudson at the time when Colarusso carried out the dock bulkhead work that led to Colarusso's application for a Conditional Use Permit for its dock and the Planning Board's review. I was closely involved with the enforcement that led to such application and the commencement of the Planning Board's review, and I litigated on behalf of the Planning Board to successfully defend the Planning Board against Colarusso's first Article 78 proceeding in 2017. I am deeply familiar with the origin of this matter, the applicable law, and the scope of the review that the Planning Board undertook and must continue to undertake.

Please see my letter attached to this email, which addresses essential information and guidance that current members of the Planning Board may not be familiar with and emphatically requests that the Board re-open a public hearing on the matter.

In addition, I have attached a brief audio file containing an excerpt of the 2011 presentation by William Sharp, Senior Attorney with the NYS Department of State, explaining to the Hudson Common Council the effect of the enactment of the zoning change (Code section 325-17.1) that is the foundation of this entire matter. Mr. Sharpe states in very express terms that *any* alteration of the dock property—even in a minor way—would require the owner to seek a special use permit **for the entire property,** saying: "at the point where something happens on the property, * * * ***they're going to have to get a conditional use permit for the entire property***…" This is of fundamental importance as it seems that the Board may be improperly limiting the scope of its review. **This 5-minute audio is essential listening for every Planning Board member. I strongly urge every member to listen to it.**

Please see my full attached letter, which will be followed shortly by additional information and documents that were originally submitted to the Planning Board between 2017 and 2019 but that current members are likely unfamiliar with.

Thank you.

Kenneth J. Dow, Esq

THE LAW OFFICE OF
KENNETH J. DOW

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March 4, 2025

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

Dear Chairperson Joyner and Members of the Planning Board:

I was the City Attorney for the City of Hudson at the time when Colarusso carried out the dock bulkhead work that led to Colarusso's application for a Conditional Use Permit for its dock and the Planning Board's review that is still ongoing today, eight years later. I was closely involved with the enforcement that led to such application and the commencement of the Planning Board's review, and I litigated on behalf of the Planning Board to successfully defend the Planning Board against Colarusso's first Article 78 proceeding in 2017. I am deeply familiar with the origin of this matter, the applicable law, and the scope of the review that the Planning Board undertook and must continue to undertake.

I am writing (in my personal capacity as someone who represented and defended this Planning Board in this matter, and not now representing any client) because it has become apparent, probably due to the discontinuous nature of the review (interrupted and delayed primarily due to litigation brought by the applicant) and the fact that not a single current member of the Planning Board was a member at the commencement of this review or during its early stages, and the applicant's persistent efforts to misdirect the Planning Board and mischaracterize the scope of review, that fundamental misunderstandings have arisen with respect to the scope of the application for a Conditional Use Permit and the Planning Board's review. It seems, also, that fundamentally crucial information and guidance from the earlier period has been lost or that current members are unfamiliar with it.

From 2017 through 2019, from the origin of the matter through the first episode of litigation and then the subsequent resumption of the Planning Board's review, the Board was presented with important and authoritative information and guidance that clearly and definitively established the parameters of this matter. Recent events, however, indicate that the current Board members may be unaware of essential facts, history, and law that are the foundation and framework for the Board's review. By far, the most important single thing that the Board seems to have lost or departed from, but which the law requires and which was unequivocally established at the outset of this matter, is this:

The application before the Planning Board is for a Conditional Use Permit for the entire commercial dock operation—the "use", not merely the replacement of the bulkhead.

This cannot be emphasized enough. This is what the review was and *is* about. This is what Section 325-17.1 of the Hudson Zoning Code *requires*. This is what the Planning Board established at the outset. Recent decisions of the Court with respect to SEQRA review do not change this.[1] *There is an unequivocal legal and procedural record establishing that the Board's review and the Conditional Use Permit is for the entire commercial dock operation.*

Additional documents that I am or will shortly be sending to the Board address this in greater detail; I will not do so here, except to highlight one thing: at the time section 325-17.1 was added to the Code in 2011, its purpose and effect was made expressly and unmistakably clear. Accompanying this letter is an audio excerpt of the 2011 presentation by William Sharp, Senior Attorney with the NYS Department of State, explaining to the Hudson Common Council the effect of the enactment of the zoning change (Code section 325-17.1) that is the foundation of this entire matter, as the Council was preparing to enact that zoning change. He had a hand in drafting the law for the City and, as you can hear, states in very express terms that ***any*** alteration of the property—even in a minor way—would require the owner to seek a special use permit **for the entire property**: "it would be at the point where something happens on the property, * * * ***they're going to have to get a conditional use permit for the entire property***..." (he then lists some examples that would trigger a special use permit). In short, *the bulkhead work is not the main issue*; the bulkhead work was the ***trigger*** that caused the ***entire*** commercial dock operation to lose its status as a lawful nonconforming use, to be subject to complete review, and to need a Conditional Use Permit in order to continue. (The audio excerpt is less than 5 minutes long; the statement quoted above begins about 3:15 into it, but the entire excerpt is essential to hear.)

This is crucial for the Planning Board to understand, because the New York Court of Appeals—New York's highest Court—has stated many times that "it is fundamental that a court, in interpreting a statute, should attempt to effectuate the ***intent of the Legislature.***" Patrolmen's Benev. Ass'n of City of New York v. City of New York, 41 N.Y.2d 205 (1976); Kosmider v. Whitney, 34 N.Y.3d 48 (2019). The text of section 325-17.1 and the further illumination from Mr. Sharp's statements to the Common Council make clear that the effect and intent of section 325-17.1 was and is to allow the commercial dock operations to continue as a non-conforming use until any work, change, or modification was done on the property, and then to allow continuation of the use as a commercial dock *only* upon a full Planning Board review of the ***entire*** operation and, if warranted, the granting by the Planning Board of a ***Conditional Use Permit for the entirety of the dock operations***. Upon doing the bulkhead work in 2016, the dock operations ceased to be a lawful non-conforming use. It is a basic tenet of zoning law that a use can only be carried on if it is within one of three categories: allowed by right, allowed by permit, or allowed as a continuing lawful non-conforming use. At present, the use of that parcel as a commercial dock is none of these. To continue lawfully, ***the entire operation***—the ***use***—must get a Conditional Use Permit, and the Planning Board's review must encompass the ***entire use***.

If the Planning Board were to depart from, or fail to thoroughly address, the scope of review mandated by the Code of the City of Hudson, its action would be in contravention of the language of section 325-17.1 and its clear legislative intent, as heard on the audio file, and would mark any decision that did *not* encompass the *entirety* of the commercial dock operation as **"arbitrary * * * or affected by an error of law"**—the very standard that makes a determination by a board such as this subject to nullification by the Courts.

With this letter or in emails to follow, I am re-submitting numerous materials that guided the Planning Board early on in this review and application process. I want to note that all of the documents (including the audio file) that I am or will be sending to you were previously submitted during the earlier public hearing period and are all part of the official record of this matter. As such, I believe it would be very problematic for the Board to act without regard to the information and guidance that they contain. Some are quite lengthy and I think an in-person discussion of their key points, at a public hearing in the near future, would be useful and beneficial. More generally, the fact that much information was presented to the Planning Board

from many sources prior to any current member's tenure underscores the crucial importance of re-opening the Public Hearing on the application for Conditional Use Permit.

The stakes in this matter are extremely consequential, and it is apparent that over time the Planning Board has gone off course. It is essential that the Planning Board carry out its review to the full scope of what is called for by Section 325-17.1 and otherwise. In light of the apparent unfamiliarity of current Planning Board members with the extensive background and foundation of this matter, much of which was which was established or introduced from 2017 through 2019, prior to any current member's tenure on the Board, it is essential that the Planning Board re-open the Public Hearing in order that the members can acquire—both through written submissions and oral explications at a public hearing—a full and accurate understanding of the factual, legal, and historic basis for, and elements of, this review and Conditional Use Permit application and the Planning Board's authority and obligations with respect to it.

Sincerely,

Kenneth J. Dow

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[1] In its decision in the matter of A. Colarusso & Son, Inc, et al. v. City of Hudson Planning Board, dated July 12, 2024, Supreme Court (Rivera, J.) expressly points out that the bulkhead work was the **trigger** that made a conditional use permit necessary for continued dock operations and authorized the imposition of additional conditions upon the **continued** use of the dock: "As Respondent [Planning Board] 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' [Colarusso's] 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 "retroactively." In more common terms, the Court is saying that the conditional use permit is, contrary to Colarusso's claims, not simply a permit to retroactively authorize the bulkhead repairs that were made, but is, rather, a permit for continued use of the dock with such conditions as the Board may impose.

The Court proceeds to distinguish between the scope of review pursuant to *Hudson Zoning Code* section 325-17.1 and the scope of review for *SEQRA*. Having just affirmed that, in accordance with the Zoning Code, the conditional use permit is for "continued use of the dock" and that the Planning Board is authorized to impose additional conditions upon the "continued use of the dock", the Court notes that the SEQRA review is different and looks only at the new work: "*At the same time*, however, the court agrees with Petitioners that **the 'action' *for purposes of SEQRA*** is not the totality of the already existing and operating dock, but rather, is the discrete repair and replacement of the bulkhead in and of itself—i.e., the 'action' that triggered the conditional use permit requirement of Zoning Code 325-17.1(D)." The Court then reiterates the Board's authority pursuant to the Code to address and impose conditions upon the continued use of the ***entire*** dock due to the triggering effect of the bulkhead work, while saying that—at the same time—the SEQRA review itself is limited to the new work and not the continuing operations: "[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." The Court is clear that while the SEQRA review looks only at the new bulkhead work, the conditional use permit application, review, and conditions encompass the **entirety of the continuing dock operations**.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
A. COLARUSSO & SON, INC. and COLARUSSO VENTURES, LLC,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law,

DECISION AND ORDER AND JUDGMENT – AMENDED

-against-

CITY OF HUDSON, CITY OF HUDSON PLANNING BOARD, and HUDSON COMMUNITY DEVELOPMENT AND PLANNING AGENCY,

Respondents.

Index No. 17-906091
(RJI No. 01-17-125670)

(Acting Justice Michael H. Melkonian, Presiding)

APPEARANCES: McNamee Lochner, P.C.
Attorneys for Petitioners
(John J. Privitera, Esq., of Counsel, Ryan J. Coyne, Esq., of Counsel)
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Albany, New York 12207

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O'Connell and Aronowitz, P.C.
Attorneys for Respondent Hudson Community Development and Planning Agency
(Daniel J. Tuczinski Esq., of Counsel)
54 State Street, Albany New York 12207

MELKONIAN, J.:

Petitioners/plaintiffs A. Colarusso & Son, Inc. and Colarusso Ventures, LLC ("petitioners") commenced this Article 78 proceeding action challenging respondents/defendants the City of Hudson's and the City of Hudson Planning Board's August 17, 2017 determination requiring them to obtain a conditional use permit for their commercial dock operations. Petitioners also seek declaratory relief regarding a laundry list of complaints.[1]

In 2014, petitioners purchased a parcel of waterfront land on the Hudson River waterfront in respondent the City of Hudson (the "City") on which they conduct commercial dock operations (the "dock"). The dock is zoned "Core Riverfront (C–R)" pursuant to § 325-17.1 of the City of Hudson Zoning Code (the "City Code") which has, since 2011, been designated as a nonconforming use. Pursuant to City Code § 325-17.1(D), enacted in 2011,

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[1]More specifically, petitioners seek an order (1) vacating and annulling respondents' determination to conduct a second SEQRA review of the Erosion Repair Project; (2) prohibiting respondents from imposing excessive fees on petitioners in connection with respondents' review of the Erosion Repair Project; (3) prohibiting respondents from imposing excessive fees on petitioners in connection with respondents' review of the Truck Traffic Diversion and Haul Road Improvement Project; (4) prohibiting respondents from further regulating the intensity of petitioners' use of their commercial dock and haul road; (5) vacating and annulling respondents' determination that petitioners require a development permit pursuant to Chapter 148 of the Code of the City of Hudson before they may resurface their haul road; (6) declaring that neither the City nor any of its Boards or Agencies, including respondents, may in any way regulate interstate commerce by decreeing any limit upon the number of trucks that may travel by any route between petitioners' Greenport quarry and petitioners' dock on the Hudson River; (7) declaring that respondents lack the power or authority to recommence SEQRA review of the Erosion Repair Project; (8) declaring that the fees demanded by respondents in connection with their review of the Erosion Repair Project are excessive and unlawful; (9) declaring that the fees demanded by respondents in connection with their review of the Truck Traffic Diversion and Haul Road Improvement Project are excessive and unlawful; (10) declaring that petitioners' use of their commercial dock is permissible under the Code of the City and Hudson and that respondents may not lawfully further regulate the intensity of such use; and (11) declaring that petitioners' efforts to resurface their haul road are not subject to floodplain review pursuant to Chapter 148 of the Code of the City of Hudson.

the rebuilding, improvement or alteration, among other things, of a nonconforming use for any purpose in the Core Riverfront C-R District is available only upon proper application.

According to petitioners, in late 2016, as a result of heavy erosion of the dock's river edges and banks, petitioners replaced a 75-foot section of a non-working bulkhead and also placed 2000 tons of rocks along a 170-foot portion of the Hudson River (the "erosion repair project"). For some reason, which is not borne out by the record, petitioners proceeded (and completed) the project without authority, approval or the required permits from the Planning Board. On January 24, 2017, the City Code Enforcement Officer issued petitioners an "Order to Remedy," which identified a violation described as "Replacement of concrete and wood bulkhead with a steel bulkhead on loading dock without approval from the [City] Planning Board as per Section 325-17.1(D) [City] Code."[2] On February 15, 2017, petitioners appealed the Order to Remedy to the City Zoning Board of Appeals (the "ZBA"). On May 9, 2017, the ZBA upheld and affirmed the Order to Remedy and denied petitioners' appeal. In connection with such determination, the ZBA issued a Resolution affirming the determination that the bulkhead work constituted an action or event that "triggers Planning Board Review under section 325-17.1."

On May 23, 2017, petitioners submitted a conditional use permit application to the Planning Board stating "Conditional use permit is needed per Order to Remedy dated January 24, 2017 for bulkhead repair on the north end of the property." On August 17, 2017, the City determined that inasmuch as petitioners' nonconforming use as a commercial

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[2]It is undisputed that petitioners did not obtain any permit from the City, including a building permit, prior to the commencement/completion of the project.

dock operation had ceased, SEQRA review in connection with petitioners' continued dock operations application was necessary. Indeed, the extensive record herein reflects that the Planning Board made it abundantly clear to petitioners that inasmuch as petitioners' nonconforming use of the dock had ceased under the applicable section of the City Code, they would be required to obtain a conditional use permit for their continued commercial dock operations. The City also required that petitioners provide the City with a $10,000.00 deposit to be held in escrow for the review. Rather than participate in the SEQRA process for the conditional use permit, petitioners commenced the instant proceeding.

The real crux of many of petitioners' arguments is that the erosion repair project was, in their opinion, a minor repair and not such an action or event triggering "Planning Board Review under section 325-17.1." However, that issue was squarely resolved by the ZBA in May 2017, when it considered and rejected, *inter alia*, petitioners' claim that the erosion repair project was a "minor repair" and upheld the Order to Remedy requiring petitioners to submit to Planning Board review. To test that determination, petitioners were required to commence a CPLR article 78 proceeding within 30 days after the filing of the Resolution denying the appeal (see, General City Law § 27-a [11]; § 27-b [9]; §§ 38, 81-c [1]; Matter of Ziemba v City of Troy, 295 AD2d 693 [3rd Dept. 2002]; Matter of Manupella v Troy City Zoning Bd. of Appeals, 272 AD2d 761 [3rd Dept. 2000]). Petitioners failed to do so and, to the extent petitioners attempt to re-litigate that issue under the auspices of a challenge to the "second" SEQRA review process, it is untimely.

Moreover, the ZBA's determination was not irrational, arbitrary or capricious in its rejection of petitioners' contention that the erosion repair project was exempt from Planning

Board review. It is well settled that a zoning board's interpretation of a zoning law is afforded great deference and will only be disturbed if it is irrational, arbitrary and capricious (see, Matter of Lavender v Zoning Bd. of Appeals of the Town of Bolton, 141 AD3d 970 [3rd Dept. 2016], appeal dismissed 28 NY3d 1051 [2016]; Matter of Edscott Realty Corp. v Town of Lake George Planning Bd., 134 AD3d 1288 [3rd Dept. 2015]; Matter of Palladino v Zoning Bd. of Appeals of Town of Chatham, 39 AD3d 1004 [3rd Dept. 2007]). Here, the City Code provides that "... no building shall be erected, moved, altered, rebuilt or enlarged, nor shall any land or improvement thereon be constructed, altered, paved, improved or rebuilt, in whole or in part, for any purpose in the Core Riverfront C-R District" without Planning Board review (City Code § 325-17.1[D]).[3] The ZBA determined that when petitioners replaced the 75-foot section of bulkhead (which petitioners describe as being "about half" of the retaining wall), it impermissibly rebuilt, improved, constructed and/or altered its nonconforming commercial dock without Planning Board approval. Substantial record evidence supports this determination – indeed petitioners' own description of the erosion repair project as in the "best interest of the environment and pubic safety;" implemented to "protect the water quality of the Hudson River;" and to eliminate "threats to public safety" puts them directly in the cross-hairs of the City Code. Petitioners also describe the erosion to the dock's river edges as "heavy" and that the old wooden bulkhead

[3]The rational of this zoning ordinance (according to respondents' counsel) was that "it allows the dock owner & operator (Petitioner since 2014) to carry on its commercial dock operations as such operations existed in 2011, as a nonconforming use, as long as the owner/operator (Petitioner) did not seek to make improvements, expansions, or changes. As soon as the owner/operator sought to make an improvement, enhancement, expansion, or change, the right to operate as a nonconforming use ceased."

on the western edge had been "severely eroded" – indeed, this was not a structure that failed overnight, but admittedly failed over an extended period of time. Petitioners' own argument that replacing the bulkhead was "necessary" underscores their need to apply for Planning Board approval and their failure to do so cannot be condoned by the Court. Simply put – by undermining the City zoning laws, petitioners commenced the project at their own risk.

Nor does the Court find any merit to petitioners' contentions that the approval of the erosion repair project by the New York State Department of Environmental Conservation (the "DEC")[4] and/or by the U.S. Army Corps of Engineers exempts petitioners from the requirements of the City Code to obtain planning board approval prior to initiating the project (see, Troy Sand & Gravel Co., Inc. v Town of Nassau, 101 AD 3d 1505 [3rd Dept. 2012] [DEC's SEQRA and permit approvals simply mean that plaintiff's proposal satisfies the applicable state law and regulatory standards]; Rottenberg v Edwards, 103 AD2d 138 [2nd Dept. 2002]; Matter of Haher's Sodus Point Bait Shop v Wigle, 139 AD2d 950, 950–951 [4th Dept. 1988], lv. denied 73 NY2d 701 [1988]; see, also, Matter of S.D. Off. Equip. Co. v Philbrick, 247 AD2d 838, 840 [4th Dept 1998]). As such, petitioners' reliance upon these entities as an entitlement to an exemption from local regulation is misplaced.

The Court also flatly rejects petitioners' contention that actual knowledge on the part of the City that the erosion repair project was taking place somehow obviated their need to seek Planning Board approval.

To the extent petitioners contend that respondents' determination that SEQRA review is necessary for continued dock operations constitutes an unlawful "second" SEQRA review

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[4]Indeed the DEC documentation specifically states "THIS IS NOT A PERMIT."

process, the Court rejects such a contention. Moreover, the Court finds that this argument is couched in terms merely to avoid the statute of limitations issue. Nevertheless, as afore stated, in a proceeding seeking judicial review of administrative action, the Court must determine whether there is a rational basis for the decision or whether it is arbitrary and capricious (Matter of Warden v Board of Regents, 53 NY2d 186, 194 [1981]). The determination will be sustained if it has a rational basis and is supported by substantial evidence (Matter of Fuhst v Foley, 45 NY2d 441 [1978]). With respect to questions relating to the interpretation of the terms of a zoning ordinance, a determination by a Zoning Board is entitled to "great weight and judicial deference as long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute" (Trump-Equitable v Gliedman, 62 NY2d 539 [1984]; Applebaum v Deutsch, 66 NY2d 975 [1985]). The determination must be sustained if it has a rational basis and is supported by substantial evidence (Matter of Toys R Us v Silva, 89 NY2d 411 [1996]).

City Code § 325-17.1 Core Riverfront C-R District plainly states that the commercial dock becomes subject to review by the Planning Board in the event of any alteration, improvement, or rebuild of a structure on the subject parcel, in whole or in part, for any purpose. To recite the exact language from the Code: § 325-17.1(D)(1): "Any existing commercial dock operation may continue to operate as a nonconforming use until such time as one or more of the actions or events specified in Subsection D above is proposed to be undertaken." The "events specified in Subsection D" include, in relevant part, "any land or improvement thereon be constructed, altered, paved, improved or rebuilt, in whole or in part, for any purpose." § 325-17.1(D)(1) continues: "Where one of the actions or events specified

in Subsection D above 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..." Here, respondents rationally concluded that the erosion repair project was one of the "actions or events specified in Section D" triggering the termination of petitioners' right to continue to operate the commercial dock without conditional use permit and that SEQRA review for continued commercial dock operations is necessary.

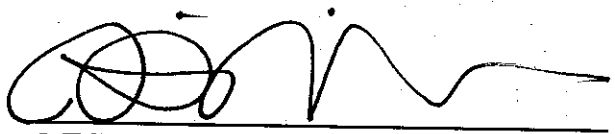
Accordingly, the petition is dismissed in its entirety.

Any and all other relief requested by any party not specifically granted herein is in all respects DENIED. Petitioners are not entitled to any declaratory relief. The Court has specifically declined to address issues with the "Haul Road" project in light of its recent decision in City of Hudson v Town Greenport, et.al., (Index No. 17-05620). No costs or disbursements are awarded to either party. Petitioners' arguments with regard to the fees are premature.

This constitutes the Decision, Order and Judgment of the Court. This Decision, Order and Judgment is returned to the City's counsel. All other papers are delivered to the Supreme Court Clerk for transmission to the County Clerk. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

SO ORDERED.
ENTER.

Dated: Troy, New York
February 28, 2019



MICHAEL H. MELKONIAN
Acting Supreme Court Justice

Papers Considered:

(1) Petition dated September 15, 2017;
(2) Verified Answer dated October 11, 2017;
(3) Affirmation of Kenneth J. Dow, Esq., dated October 11, 2017, with exhibits annexed;
(4) Verified Answer dated October 18, 2017;
(5) Affidavit of Sheena M. Salvino dated October 18, 2017;
(6) Return dated October 24, 2017;
(7) Petitioners Memorandum of Law dated November 13, 2017;
(8) Affirmation of Mitchell Khosrova, Esq., dated November 27, 2017, with exhibits annexed;
(9) Memorandum of Law dated November 27, 2017, with exhibits annexed;
(10) Memorandum of Law dated November 27, 2017.
(11) Reply Affidavit of Michael Heffner, Jr. dated December 6, 2017, with exhibits annexed;
(12) Petitioners Reply Memorandum of Law dated December 6, 2017, with exhibits annexed; and
(13) Transcript of Record Volumes One through Seven.

THE LAW OFFICE OF
KENNETH J. DOW

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(518)817-7394 (C) ♦ KENDOWLAW@HOTMAIL.COM

July 31, 2019

City of Hudson Planning Board

Re: Colarusso application for conditional use permit for dock operations

Dear Chairman Chatham and Members of the Planning Board:

This memorandum is submitted to the record as an elaboration of points that I made—or wanted to make—at the July 9th public hearing. I have had direct and in some cases extensive involvement in several of the issues relevant to this conditional use permit application for the Colarusso commercial dock operations. Most notably, as many of you know, when the applicant sued the City and the Planning Board in 2017 over this matter, I defended the City and Planning Board and won a complete dismissal of the applicant's claims in that Article 78 proceeding.

My intention in this memorandum is not to present things that are controversial or arguable. My purpose is to identify, summarize, and highlight certain things that I believe to be quite clear-cut and indispensable to the Board's consideration of a conditional use permit for the dock operations, but which might get lost in the complexity of the matter or, in some cases, have been subject to confusion or obfuscation. What I mean to contribute is awareness of what to look for and where to find it. The value I seek to add by this submission is in pointing the Board to certain foundations of its authority and clarifying where there has been confusion or obfuscation.

In that light, I do not think that any of the contents of this letter are controversial or seriously debatable. The contents of this memorandum are drawn directly from the Zoning Code, records of Planning Board or Common Council meetings, the Decision and Order of Supreme Court or other papers in the applicant's Article 78, or established case law, and the sources are cited throughout. Supporting documents are included in an Appendix.

I want to be clear that I have not advocated for any particular outcome in the pending review, and I am not arguing for any result here. My purpose is to show how the law and history of this matter defend the Planning Board's authority to undertake a comprehensive review and to ensure that the full scope of the applicant's operations are brought within that review, as required by the Zoning Code of the City of Hudson.

Finally, I want to note that although the dock operations and the haul road are closely related (and should be treated as a common matter), this memorandum does not address the road, but addresses only the use of the waterfront parcel for commercial dock operations.

Below are eight points that I consider fundamental to the Board's review. By no means is this a complete and exhaustive list of relevant matters, but these are things that I have particular familiarity with and appear to me to have been overlooked, misrepresented, or misunderstood.

EIGHT FUNDAMENTAL POINTS:

- This application is not for a conditional use permit for work on the bulkhead; it is for a conditional use permit for the commercial dock operation in its entirety.

- A SEQRA review of the commercial dock operations is needed prior to making a determination on the issuance of a conditional use permit.

- Colarusso lost any right that it had to operate as a nonconforming use.

- It is not clear that Colarusso ever established a right to operate as a nonconforming use.

- No continuing rights to operate; application for conditional use permit akin to a new operation.

- The conditional use that may be approved is limited to what the operations were in 2011.

- In considering the application, the Board must address the City's ownership—not Colarusso's—of a 4.4 acre waterfront parcel adjacent to the dock.

- The Planning Board should take note of powers and obligations applicable to this matter.

FIRST, A SUMMARY OF THE APPLICANT'S ARTICLE 78 LAWSUIT AGAINST THE CITY AND PLANNING BOARD:

To summarize Colarusso's Article 78 against the City and Planning Board: Colarusso did work on the dock property that triggered a need to obtain from the Planning Board a conditional use permit for its entire dock operations, in accordance with § 325-17.1. They were, accordingly, directed to make application to the Planning Board. Shortly after the Planning Board review commenced, and when the SEQRA review for the conditional use permit was about to begin, Colarusso sued the Planning Board. They argued to the Court, essentially, that the Planning Board had no authority to conduct SEQRA review or impose any conditions upon their dock operations. The Court rejected their complaints and claims in their entirety, and denied completely the relief sought by Colarusso, vindicating and affirming the Planning Board's position and authority to carry out a complete review and SEQRA for possible issuance of a conditional use permit for the entire dock operation.

- From 2011 until 2016, when Colarusso did work on the dock bulkhead along the river, the commercial dock operation was designated a **nonconforming use.**
- Colarusso bought the property in 2014, approximately 3 years after it had been designated a nonconforming use.
- The 2011 Zoning Code revisions allowed the dock to operate as a nonconforming use **UNTIL** any of a number of specified things occurred. These are described in Subsection D of section 325-17.1
- One of those things occurred in 2016: Colarusso's work on the dock bulkhead.

- **To be perfectly clear: the bulkhead work was legally, definitively, and FINALLY determined to be one of the "actions or events specified in Subsection D" of section 325.17.1** of the Zoning Code, which triggered Planning Board review. That Colarusso carried out one of the trigger actions of Subsection D is a definitively settled legal matter. (See Appendix pp. 11, 14-15: Decision & Order, pp. 4, 7-8)
- When Colarusso did work on the dock bulkhead along the riverbank, it **triggered** Planning Board review and the **need to obtain a conditional use permit for the entire commercial dock operation**.
- Shortly after the Planning Board review commenced in 2017, Colarusso sued.
    - In essence, they sought to pre-emptively block the Planning Board review and block any SEQRA review of the dock operations.
- Early this year, the Court dismissed their claims entirely and allowed the Planning Board's review—including SEQRA for the dock operations—to proceed.
- The essential takeaway of the litigation is that the Planning Board is fully empowered to do a complete review, and consider granting a conditional use permit, **for the commercial dock operations as a whole**.
- The bulkhead work is, at this point, almost a red herring. The bulkhead work is significant only because it was the trigger that ended the right to operate as a nonconforming use and brought into effect the need to obtain a conditional use permit for the dock operations as a whole.
- The matter now in front of the Board is review of the **entire commercial dock operation**.
- One last point on the litigation: the Court rejected entirely Colarusso's efforts to block review, but at the same time, it did not give prior approval to any result, nor approve any particular determination, finding, condition, or potential mitigation measure. The Board is authorized to proceed as the Zoning Code directs and allows.

THIS APPLICATION IS NOT FOR A CONDITIONAL USE PERMIT FOR WORK ON THE BULKHEAD; IT IS FOR A CONDITIONAL USE PERMIT *FOR THE COMMERCIAL DOCK OPERATION IN ITS ENTIRETY*.

- Section 325-17.1 provides that "the following conditional uses are permitted, subject to the approval of the Planning Board in accordance with Article VIII…" (See Appendix p. 4: Section 325-17.1)
- Such section lists among the authorized "Conditional Uses" the "Continuation of existing commercial dock operations…"
- The "use" is the "commercial dock operations…"
- The most basic point of this section is to establish that—as the listed conditional use—the *existing commercial dock operations* are what need a conditional use permit from the Planning Board. (For further elaboration on this point, see Appendix p. 1)
- However, section 325-17.1 also provides that, as of 2011, *initially*, "[a]ny existing commercial dock operation may continue to operate as a nonconforming use until such time as one or more of the actions or events specified in Subsection D above is proposed to be undertaken."
- When "one or more of the actions or events specified in Subsection D" happens, then the preliminary right to operate as a nonconforming use terminates and the need to obtain a conditional use permit for the entire dock operation is triggered. "…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**…" § 325-17.1(D.)(1).

- In addition to the plain text of the law, which expressly states that the conditional use that needs a permit is the "commercial dock operations…", the effect of section 325-17.1 was specifically explained to the Common Council at the time of its enactment in 2011: "where something happens on the property… they're going to have to get a conditional use permit ***for the entire property***."
    - I have attached an **audio file** of William Sharpe, Senior Attorney at the New York State Department of State, describing for the Common Council (September 26, 2011, as the Council prepared to enact the zoning changes) the effect of section 325-17.1 and the need to obtain a conditional use permit "**for the entire property**" when one of the events in subsection D occurs. (The audio file is submitted with this memorandum and made part of the Planning Board record in this matter. The full audio of the meeting is also available online at https://wavefarm.org/archive/x14rqr. The adopted conditional use provisions in the CR district are discussed beginning at 55:25 of the full recording. The attached 5-minute excerpt begins at 1:05:00 of the full recording.)
- ***The attached 5-minute audio file is incredibly valuable and I strongly urge each Planning Board member to listen to it.***
- It is a **legally settled** matter that the work done on the bulkhead was one of the actions or events specified in Subsection D. (See Appendix p. 11: Decision and Order, p. 4)
- This is the trigger that requires the **entire use** to obtain a conditional use permit.
- The **Decision and Order of Supreme Court** held that "respondents [Planning Board] rationally concluded that the erosion repair project was one of the 'actions or events specified in Section D' triggering the termination of petitioners' right to continue to *operate* ***the commercial dock without conditional use permit***." (See Appendix p. 15: Decision & Order, p. 8)
- The application before the Planning Board is and must be a conditional use permit for the entire commercial dock operation. Therefore**, if the applicant addresses only the bulkhead work, or anything less than the dock operations as a whole, then the application to the Planning Board will be insufficient and the only lawful response by the Board will be outright denial of the conditional use permit application**.

A SEQRA REVIEW OF THE COMMERCIAL DOCK OPERATIONS IS NEEDED PRIOR TO MAKING A DETERMINATION ON THE ISSUANCE OF A CONDITIONAL USE PERMIT

- The Planning Board determined in 2017 that SEQRA review was necessary prior to making a determination on the issuance of a conditional use permit for the dock operations.
- The **Decision and Order of Supreme Court** stated that "the City determined that inasmuch as petitioners' nonconforming use as a commercial dock operation had ceased, **SEQRA review in connection with petitioners' continued dock operation application was necessary**….Rather than participate in the SEQRA process for the conditional use permit, petitioners commenced the instant proceeding." (Appendix pp. 10-11: Decision & Order, pp. 3-4)

- The Decision and Order also states "To the extent petitioners [Colarusso] contend that **respondents' determination that SEQRA review is necessary for continued dock operations** [] constitutes an unlawful 'second' SEQRA review process, the Court rejects such a contention." (Appendix pp. 13-14: Decision and Order, pp. 6-7).
- The Decision and Order dismissed the Colarusso petition in its entirety, denying all claims and relief sought by Colarusso against the Planning Board and other respondents.
- Moreover, the **Decision and Order of Supreme Court** specifically held that "respondents [Planning Board] rationally concluded that…***SEQRA review for continued commercial dock operations is necessary*****.**" (See Appendix p. 15: Decision & Order, p. 8)

COLARUSSO LOST ANY RIGHT THAT IT HAD TO OPERATE AS A NONCONFORMING USE

- Section 325-17.1(D)(1) states: "Any existing commercial dock operation may continue to operate as a nonconforming use **until such time** as one or more of the actions or events specified in Subsection D above is proposed to be undertaken."
- It is a **legally settled** matter that the work done on the bulkhead was one of the actions or events specified in Subsection D.
- Confirming what the law plainly says, the **Decision and Order of Supreme Court** held that "respondents [Planning Board] rationally concluded that the erosion repair project was one of the 'actions or events specified in Section D' triggering *the termination of petitioners' right to continue to operate the commercial dock* without [a] conditional use permit." (See Appendix p. 15: Decision & Order, p. 8)

IT IS NOT CLEAR THAT COLORUSSO EVER ESTABLISHED A RIGHT TO OPERATE AS A NONCONFORMING USE

- This may not be significant now, because the applicant has lost any right to operate as a nonconforming use; however, the Board should be aware of it.
- Section 325-29(A.)(3) states that any type of nonconforming use "shall not be reestablished if such use has for any reason been discontinued for a period of over one year….Intent to resume a nonconforming use shall not confer a right to do so."
- As far as I know, it has never been established that the commercial dock operation has been continuously functioning (without a gap of discontinuance of at least one year) since the dock was designated a nonconforming use in 2011.
- The Article 78 Record does, on the other hand, contain sworn statements by the applicant that "at the time Petitioners acquired the dock, its condition reflected deferred maintenance by prior owners" and other statements that call into doubt the functionality of the dock and whether the dock was used or usable at the time Colarusso purchased it.
- To the extent it was a lawful nonconforming use, it was also subject to the restrictions stated in section 325-29(A.)(1), including: "nor shall **any external evidence** of such use be increased **by any means** whatsoever."
- Note that the relevant time period includes approximately three years prior to the time the applicant purchased the property. If the prior owner or owners had discontinued dock operations for a period of a year between 2011 and 2014, the applicant would have acquired no rights to operate the dock when it purchased the property in 2014.
- Consequently, it is an open question as to whether the right to carry on dock operations terminated subsequent to 2011 due to a period of non-use for a year or more.

NO CONTINUING RIGHTS TO OPERATE; APPLICATION FOR CONDITIONAL USE PERMIT AKIN TO A NEW OPERATION

- Referring again to the **Decision and Order of Supreme Court**: "respondents [Planning Board] rationally concluded that the erosion repair project was one of the 'actions or events specified in Section D' triggering *the* ***termination of petitioners' right*** *to continue to operate the commercial dock* without [a] conditional use permit." (See Appendix p. 15, Decision & Order, p. 8)
- The right to operate the dock (as a nonconforming use) having terminated, the applicant is coming to the Planning Board in the position of having **no rights to operate**. As such, they are akin to a new applicant. They may be able to show that what they intend warrants a conditional use permit, but there is no continuing, carried-over right to operate. Having lost the right to operate as a nonconforming use (if they ever had it), Colarusso must now be treated as though they are starting from scratch—a new application seeking a conditional use permit to commence commercial dock operations on the parcel.

THE CONDITIONAL USE THAT MAY BE APPROVED IS LIMITED TO WHAT IT WAS IN 2011

- General City Law section 27-b(2.) provides: "The legislative body may, as part of a zoning ordinance or local law, authorize the planning board or such other administrative body that it shall designate to grant special use permits **as set forth** in such zoning ordinance or local law.
- If the Planning Board determines that a conditional use permit is warranted, the Planning Board's authority to grant a conditional use permit is limited by the definition or parameters of the description of the subject use, *as set forth* in the Code.
- In adopting a shorthand term for the conditional use being considered, the use is typically and casually referred to as "dock operations" or "commercial dock operations." Those terms are not accurate, however, and the actual description of the use for which a conditional use permit may be granted is, in fact, much more specific.
- The actual conditional use that may be permitted under section 325-17.1(D.)(1) is as follows: "**Continuation of existing commercial dock operations** for the transport and shipment of goods and raw materials, including loading and unloading facilities, and storage of such goods and raw materials, and associated private roads providing ingress and egress to or from such commercial dock operations, **as such uses existed on the effective date of this L.L. No. 5-2011**."
- The use that is allowed as a conditional use is not "commercial dock operations;" it is "continuation of existing commercial dock operations…as such uses existed on the effective date of this local law (2011)." There is a substantial difference between the two.
- The Board is not authorized to grant a permit that does more than allow dock operations **as such uses existed in 2011**.
- The Board cannot comply with this requirement of the law without establishing and knowing the extent to which such operations existed in 2011.
- Establishing the 2011 baseline is a crucial evidentiary component of this review. It is no doubt a challenging one, but it is essential to determining the outer limits of what can be authorized and to avoiding an arbitrary (and therefore invalid) determination.

IN CONSIDERING THE APPLICATION, THE BOARD MUST ADDRESS THE CITY'S OWNERSHIP—NOT COLARUSSO'S—OF A 4.4 ACRE WATERFRONT PARCEL ADJACENT TO THE DOCK

- In 2013, prior to my work for Hudson, I did research into the ownership of a 4.4 acre parcel of waterfront land on the Hudson, immediately south of the applicant's dock facilities, which the applicant evidently claims to own. (See Appendix p. 18, Map of 4.4 acre parcel)
- New York State prohibits cities from selling or otherwise conveying waterfront lands. For over 100 years, NYS General City Law § 20 has barred the alienation by cities of "water front [and] lands under water," a prohibition enforced and reiterated in NYS case law. Such a transaction requires a specific act of the New York State Legislature, and is <u>void without such State legislation</u>.
- Despite this explicit prohibition, 4.4 acres of waterfront just south of the applicant's dock operations was purportedly sold or conveyed by the City in 1981 to St. Lawrence Cement, (and later purportedly conveyed to the applicant).
- There is a **distinction in law between voidable transactions and void transactions**. A "voidable" transaction is one that can be challenged and undone. The flaws are typically procedural. A "void" transaction does not need to be challenged or undone. The law treats a void transaction as *never having happened*.
- New York case law makes clear that a land sale that a municipality had no lawful authority to make is void.
- To be clear, **under law, that transaction effectively never happened.** The City owns that property. (See Appendix pp. 19-23: Dow Memorandum of June 3, 2013)
- Rather than elaborate on the applicable law—although the law is very clear—the simpler point for the Planning Board is that ***the City itself commissioned a title search in 2013, which determined that the City owns that property.*** As stated in the Common Council meeting minutes of October 15, 2013, "President Moore stated a title search had been completed on the Holcim property regarding the 4.4 acres and he said 'we do own it according to our, according to the title company.'" (See Appendix p. 17: Common Council Minutes, Oct. 15, 2013)
- In light of both the applicable law and—even more crucially—the City's own findings and determination, **the Planning Board has no basis or authority to treat the parcel as anything but City-owned waterfront property**.
- As such, the Board **needs to consider the impacts** of granting a conditional use permit for the applicant's dock operations **upon this adjacent parcel of City waterfront.**
    - It is a specific objective of the Planning Board under section 325-34(A.)(2) in connection with a conditional use permit "that **the proposed use shall be of such location, size and character that, in general, it**…**will not be detrimental to the orderly development of adjacent properties** *in accordance with the zoning classification of such properties*."
- The 4.4 acres owned by the City are an "adjacent property," and its "zoning classification" provides for the following permitted uses (§ 325-17.1):
    - C. Permitted uses.
        - (1) **Public docks** and launches for pleasure or recreational watercraft.
        - (2) **Public parks**, including but not limited to **public beaches, boat launch areas, and playing fields**.

        - (3) **Public** and private **recreation facilities and amenities**, including but not limited to snack bar or cafe to service public parks, walking and biking trails, boat rental facilities, information kiosks.
    - The Planning Board therefore has an obligation to investigate and determine the extent to which a commercial dock operation may be detrimental to the development of this parcel as a public dock, public park, public beach, boat launch, or playing field, or public recreation facilities or amenities, and to proceed accordingly.
    - Specific points of concern include the following:
        - The proximity of the dock operations to the City's parcel.
        - That this significant piece of City-owned waterfront—designated to be used for public parks, public docks, and other public recreation facilities—is accessible only by passing the premises on which the applicant seeks to carry on commercial dock operations.
        - That the means of access to the City's 4.4 waterfront acres is the same road used by the heavy gravel trucks and that the access road to the City's waterfront parcel is intersected by the truck ingress and egress for the dock property.
    - The Planning Board has an obligation to determine whether or to what extent the dock operations can be reconciled with the orderly development of the City's 4.4 acre waterfront, and, if warranted, to impose conditions upon the commercial dock operations consistent with the standards set out in the Hudson Code.

THE PLANNING BOARD SHOULD TAKE NOTE OF POWERS AND OBLIGATIONS APPLICABLE TO THIS MATTER

- The Planning Board review is governed by numerous sections, including the following:
    - § 325-17.1
        - § 325-17.1(A.): The district purpose "is to encourage a mixture of **compatible** uses at the riverfront...[and] to ensure that such uses are compatible…"
        - § 325-17.1(D.)(1): Where one of the actions or events specified in Subsection D above 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.
        - § 325-17.1(F.)(1):
        - § 325-17.1(F.)(2):
        - § 325-17.1(F.)(3):
    - § 325-34
        - General conditional use standards.
        - The Planning Board may require that conditional use permits be periodically renewed. § 325-34(C.).

- The application requires review under § 325-35.2(B.) LWRP consistency review of actions. “Whenever a proposed action is located within the City's coastal area, each City agency shall, prior to approving, funding or undertaking the action, make a determination that it is consistent with the LWRP policy standards summarized in Subsection B(8) herein. **No action in the coastal area shall be approved, funded or undertaken by that agency without such a determination**.”
    - The LWRP was adopted by the City and is binding on it. It was not formally adopted by the State, which means that the State cannot provide certain funding. The State’s non-action does not, however, impair the LWRP’s force in relation to the City and its agencies and boards.

I believe there is no question about the merit, validity, and applicability of the eight points identified in this memorandum. They are central to the matter currently before the Board. I have followed the initial statement and identification of these eight points with the facts, law, and reasoning that underlie them. I hope that by being aware of and familiar with the foundations on which they rest, the Planning Board can confidently incorporate these eight points into the Board’s review.

Sincerely,

Kenneth J. Dow

APPENDIX

CONTENTS

Further elaboration of certain points.

- This application is not for a conditional use permit for work on the bulkhead; it is for a conditional use permit for the commercial dock operation in its entirety.

- Colarusso lost its right to operate as a nonconforming use.

Section 325-17.1 of the Zoning Code of the City of Hudson.

Decision and Order and Judgment, A. Colarusso & Son, Inc., et al, v. City of Hudson, City of Hudson Planning Board, et al., Supreme Court, Albany County, Hon. Michael H. Melkonian, February 28, 2019.

Common Council minutes, October 15, 2013, (Addressing City ownership of 4.4 acres of waterfront).

Map of 4.4 acre parcel.

Memorandum of Kenneth J. Dow, dated June 3, 2013, (Addressing ownership and transfer of 4.38 acre Hudson Waterfront parcel).

ALSO:

Audio File of 5-minute excerpt of William Sharpe (NYS DOS) presentation to Hudson Common Council, September 26, 2011.

Further elaboration:

This application is not for a conditional use permit for work on the bulkhead; it is for a conditional use permit for the commercial dock operation in its entirety.

- The Applicant's opening presentation at the July 9th Public Hearing—in that it described the application as being for work on the bulkhead and discussed only that element of the actual matter—was inadequate, misleading and deceptive.
- This is particularly troubling in that the **Decision and Order** specifically states that "the extensive record herein reflects that **the Planning Board made it abundantly clear to petitioners that** inasmuch as petitioners' nonconforming use had ceased, **they would be required to obtain a conditional use permit for their continued commercial dock operations.**" (Decision and Order, p. 4)
- Regrettably, this is consistent with my past experiences and observation—even during the litigation—that the applicant and its agents have consistently and persistently attempted to redirect attention from the proper subject of review—that being the ***entirety of the dock operations***—to mere aspects of the project and its operations, and have sought to prevent, dissuade, or deter the Planning Board from fully exercising its proper authority.
- While it was troubling to hear the applicant persist in their evasion of the full scope of the matter, I was astounded to see, at this stage of the matter, that the Planning Board's public notice on the City's website described this as a "Conditional Use Permit with a Site Plan Component from A. Colarusso and Son, Inc. *for replacement bulkhead* at 175 South Front Street." This is an incorrect and insufficient description that fails to provide a legally adequate public notice of the matter.
    - A correct description would be "Conditional Use Permit with a Site Plan Component from A. Colarusso and Son, Inc. ***for commercial dock operations*** at 175 South Front Street."
- To the extent the applicant thinks, suggests, states, or implies that the conditional use permit is for the bulkhead work—what they have called the "Erosion Repair Project"—they are far off base. Not only is that not what the Code provides for, it doesn't even make any sense. The definition of a conditional or special use permit is "an authorization of a particular land use which is permitted in a zoning ordinance or local law, subject to requirements imposed by such zoning ordinance or local law to assure that the proposed use is in harmony with such zoning ordinance or local law and will not adversely affect the neighborhood if such requirements are met." [Gen. City Law § 27-b]. The relevant "land use" of the land in question, following that definition, is "commercial dock operations..." [Hudson Code § 325-17.1(D.)] A modification, repair, expansion, or other alteration to a structure or improvement does not constitute a "use", and it would consequently be nonsensical to issue a conditional use permit to a modification or alteration such as the Erosion Repair Project bulkhead work."
- As addressed above and in the attached audio, it is very clear that section 325-17.1 requires the applicant to seek and obtain a conditional use for the commercial dock operations in their entirety, and that when that law was enacted, the City Common Council knew exactly what it was doing. Its purpose and effect was made perfectly clear.

The requirement to obtain a conditional use permit for the whole property and operation was deliberate, intentional policy.

- While it was troubling to see the applicant describe the application as being for work on the bulkhead and focus the presentation on only that, the serious ramification of this narrow and misguided focus is that if the applicant persists in addressing only the bulkhead work, or anything less than the dock operations as a whole, the application will be insufficient and the only lawful response by the Board will be outright denial of the conditional use permit application.

Colarusso lost its right to operate as a nonconforming use.

- The applicant is currently operating on the dock parcel without any right to operate. At present, they are in a sort of limbo. They forfeited the right to operate as a nonconforming use, but have not obtained a conditional use permit.
- It is my view that it would, nonetheless, probably be unwarranted to shut down the operations while the applicant is actively seeking a conditional use permit.
- There are two reasons for this: 1) an owner that violates a zoning provision without required permissions or permits is ordinarily allowed to continue operating while undergoing review, unless the continuation creates an imminent and serious hazard, and more specifically in this case 2) the Order to Remedy issued by the City directed the applicant to apply to the Planning Board, which they are doing.
- Upon the determination by the Planning Board, the applicant would be subject to such determination.

Chapter 325. Zoning

Article III. District Use Regulations

§ 325-17.1. Core Riverfront C-R District.

[Added 11-30-2011 by L.L. No. 5-2011]

A. District purpose. The purpose of the Core Riverfront C-R District is to encourage a mixture of compatible uses at the riverfront; to provide access to the riverfront for water-dependent transportation and recreational uses and water-enhanced uses such as restaurants and publicly accessible walking and biking trails; to ensure that such uses are compatible; and to protect the visual, cultural, natural, ecological and historical resources of the City's core riverfront area.

B. Site plan approval. All new uses or change of uses in the C-R District will be subject to site plan approval by the Planning Board pursuant to § **325-35**.
[Amended 2-18-2014 by L.L. No. 2-2014]

C. Permitted uses. Subject to the bulk and area regulations of the Core Riverfront C-R District,[1] no building shall be erected, moved, altered, rebuilt or enlarged, nor shall any land or building be used, designed or arranged to be used, in whole or in part, for any purpose in the Core Riverfront C-R District except the following:

(1) Public docks and launches for pleasure or recreational watercraft.

(2) Public parks, including but not limited to public beaches, boat launch areas, and playing fields.

(3) Public and private recreation facilities and amenities, including but not limited to snack bar or cafe to service public parks, walking and biking trails, boat rental facilities, information kiosks.

(4) Tour, commercial, charter, and/or fishing boat operations.

(5) Boating instruction schools.

(6) Water taxis and ferries.

[1] *Editor's Note: The Schedule of Bulk and Area Regulations for* ***Residential Districts*** *is included at the end of this chapter.*

D. Conditional uses. Other than the permissible uses set forth in § **325-17.1C** and the accessory uses set forth in § **325-17.1E**, and subject to the bulk and area regulations of

the Core Riverfront C-R District, no building shall be erected, moved, altered, rebuilt or enlarged, nor shall any land or improvement thereon be constructed, altered, paved, improved or rebuilt, in whole or in part, for any purpose in the Core Riverfront C-R District, except that the following conditional uses are permitted, subject to the approval of the Planning Board in accordance with Article **VIII** hereof. These uses are further subject to the regulations specified below and elsewhere in this chapter.
[Amended 2-18-2014 by L.L. No. 2-2014]

(1) Continuation of existing commercial dock operations for the transport and shipment of goods and raw materials, including loading and unloading facilities, and storage of such goods and raw materials, and associated private roads providing ingress and egress to or from such commercial dock operations, as such uses existed on the effective date of this L.L. No. 5-2011. Any existing commercial dock operation may continue to operate as a nonconforming use until such time as one or more of the actions or events specified in Subsection **D** above is proposed to be undertaken. Where one of the actions or events specified in Subsection **D** above 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.

(2) A private causeway or private road that provides ingress to or egress from the property upon which a commercial dock operation is conducted as set forth in § **325-17.1F(2)(h)** and (k).

(3) Public and private marinas.

(4) Annual or private membership clubs providing private playgrounds, swimming pools, tennis courts, marina and boat launch facilities, related recreational buildings. At a minimum, such uses shall be subject to the special conditions set forth in § **325-7B(3)**.

(5) Railroad, public utility, radio and television transmission and receiving antennas, rights-of-way and structures necessary to serve areas within the City.

(6) Multiple dwellings, hotels (not including rooming houses and boardinghouses) and motels.

(7) Telecommunications towers as provided for in Chapter **284**.

(8) Eating and drinking places.

E. Accessory uses. Customary and accessory uses, including off-street parking as regulated in Article **IV**, permitted accessory uses as provided for in § **325-7C(1)**, **(2)**, **(4)**, and (5) and signs as regulated in Central Commercial C-C District, §§ **325-14C** and **325-25**.

F. Standards for conditional uses.

(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 waterfront as viewed from the water.
[Amended 2-18-2014 by L.L. No. 2-2014]

(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.
[Amended 2-18-2014 by L.L. No. 2-2014]

(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).

(4) Special conditions for public and private marinas include the following:

(a) Docks and moored vessels must be situated so as not to interfere with the free and direct access to such waters from the property, wharf, dock or similar structure of any other person unless written permission is obtained therefor from such other person.

(b) Any application for a dock to be constructed at the end of a right-of-way will require written consent from all parties having an interest in the right-of-way.

(c) All docks 50 feet or longer in length must be equipped with a U.S. Coast Guard approved regulatory navigation light at the seaward end of the dock facility.

(d) As far as practical, public access to and along the river shall be incorporated into site designs for marinas.

(5) Special conditions for multiple dwellings, motels and hotels include the following:

(a) The design, scale, and appearance of units, structures, and the entire facility shall be compatible with present and potential uses of adjacent properties and structures.

(b) The size, scale or configuration of a proposed facility must be found not to create an undue increase in traffic congestion on adjacent and nearby public streets or highways.

(c) Structures and outdoor activities will be reasonably screened from adjacent properties. Landscaping and buffer zones will be provided to reduce noise, dust, and visibility.

(d) Outdoor lighting shall be contained on the site and shielded to assure that lighting is not visible from neighboring lots.

(e) There shall be no outdoor public address or music system audible beyond the limits of the site.

(f) The number of guest rooms may be limited to the availability of public water and sewage facilities.

(6) Special conditions for eating and drinking places include the following:

(a) There shall be no outdoor public address or music system audible beyond the limits of the site.

(b) The maximum customer capacity of the restaurant shall be calculated in order to determine potential sewage and kitchen waste disposal. A plan demonstrating how the disposal of sewage and kitchen wastes will be handled shall be provided.

(c) Structures and outdoor eating areas will be reasonably screened from adjacent properties. Landscaping and buffer zones will be provided to reduce noise, dust, and visibility.

(d) Outdoor lighting shall be contained on the site and shielded to assure that lighting is not visible from neighboring lots.

G. Salt storage. The stockpiling or storage of road salt is not a permitted, conditional or accessory use.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
A. COLARUSSO & SON, INC. and COLARUSSO VENTURES, LLC,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law,

-against-

DECISION AND ORDER AND JUDGMENT – AMENDED

CITY OF HUDSON, CITY OF HUDSON PLANNING BOARD, and HUDSON COMMUNITY DEVELOPMENT AND PLANNING AGENCY,

Respondents.

Index No. 17-906091
(RJI No. 01-17-125670)

(Acting Justice Michael H. Melkonian, Presiding)

APPEARANCES: McNamee Lochner, P.C.
Attorneys for Petitioners
(John J. Privitera, Esq., of Counsel, Ryan J. Coyne, Esq., of Counsel)
677 Broadway
Albany, New York 12207

Kenneth J. Dow, Esq.
Attorney for Respondents City of Hudson and City of Hudson Planning Board
P.O. Box 25
31 Kinderhook Street
Chatham, New York 12037

O'Connell and Aronowitz, P.C.
Attorneys for Respondent Hudson Community Development and Planning Agency
(Daniel J. Tuczinski Esq., of Counsel)
54 State Street, Albany New York 12207

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MELKONIAN, J.:

Petitioners/plaintiffs A. Colarusso & Son, Inc. and Colarusso Ventures, LLC ("petitioners") commenced this Article 78 proceeding action challenging respondents/defendants the City of Hudson's and the City of Hudson Planning Board's August 17, 2017 determination requiring them to obtain a conditional use permit for their commercial dock operations. Petitioners also seek declaratory relief regarding a laundry list of complaints.[1]

In 2014, petitioners purchased a parcel of waterfront land on the Hudson River waterfront in respondent the City of Hudson (the "City") on which they conduct commercial dock operations (the "dock"). The dock is zoned "Core Riverfront (C–R)" pursuant to § 325-17.1 of the City of Hudson Zoning Code (the "City Code") which has, since 2011, been designated as a nonconforming use. Pursuant to City Code § 325-17.1(D), enacted in 2011,

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[1]More specifically, petitioners seek an order (1) vacating and annulling respondents' determination to conduct a second SEQRA review of the Erosion Repair Project; (2) prohibiting respondents from imposing excessive fees on petitioners in connection with respondents' review of the Erosion Repair Project; (3) prohibiting respondents from imposing excessive fees on petitioners in connection with respondents' review of the Truck Traffic Diversion and Haul Road Improvement Project; (4) prohibiting respondents from further regulating the intensity of petitioners' use of their commercial dock and haul road; (5) vacating and annulling respondents' determination that petitioners require a development permit pursuant to Chapter 148 of the Code of the City of Hudson before they may resurface their haul road; (6) declaring that neither the City nor any of its Boards or Agencies, including respondents, may in any way regulate interstate commerce by decreeing any limit upon the number of trucks that may travel by any route between petitioners' Greenport quarry and petitioners' dock on the Hudson River; (7) declaring that respondents lack the power or authority to recommence SEQRA review of the Erosion Repair Project; (8) declaring that the fees demanded by respondents in connection with their review of the Erosion Repair Project are excessive and unlawful; (9) declaring that the fees demanded by respondents in connection with their review of the Truck Traffic Diversion and Haul Road Improvement Project are excessive and unlawful; (10) declaring that petitioners' use of their commercial dock is permissible under the Code of the City and Hudson and that respondents may not lawfully further regulate the intensity of such use; and (11) declaring that petitioners' efforts to resurface their haul road are not subject to floodplain review pursuant to Chapter 148 of the Code of the City of Hudson.

the rebuilding, improvement or alteration, among other things, of a nonconforming use for any purpose in the Core Riverfront C-R District is available only upon proper application.

According to petitioners, in late 2016, as a result of heavy erosion of the dock's river edges and banks, petitioners replaced a 75-foot section of a non-working bulkhead and also placed 2000 tons of rocks along a 170-foot portion of the Hudson River (the "erosion repair project"). For some reason, which is not borne out by the record, petitioners proceeded (and completed) the project without authority, approval or the required permits from the Planning Board. On January 24, 2017, the City Code Enforcement Officer issued petitioners an "Order to Remedy," which identified a violation described as "Replacement of concrete and wood bulkhead with a steel bulkhead on loading dock without approval from the [City] Planning Board as per Section 325-17.1(D) [City] Code."[2] On February 15, 2017, petitioners appealed the Order to Remedy to the City Zoning Board of Appeals (the "ZBA"). On May 9, 2017, the ZBA upheld and affirmed the Order to Remedy and denied petitioners' appeal. In connection with such determination, the ZBA issued a Resolution affirming the determination that the bulkhead work constituted an action or event that "triggers Planning Board Review under section 325-17.1."

On May 23, 2017, petitioners submitted a conditional use permit application to the Planning Board stating "Conditional use permit is needed per Order to Remedy dated January 24, 2017 for bulkhead repair on the north end of the property." On August 17, 2017, the City determined that inasmuch as petitioners' nonconforming use as a commercial

[2]It is undisputed that petitioners did not obtain any permit from the City, including a building permit, prior to the commencement/completion of the project.

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dock operation had ceased, SEQRA review in connection with petitioners' continued dock operations application was necessary. Indeed, the extensive record herein reflects that the Planning Board made it abundantly clear to petitioners that inasmuch as petitioners' nonconforming use of the dock had ceased under the applicable section of the City Code, they would be required to obtain a conditional use permit for their continued commercial dock operations. The City also required that petitioners provide the City with a $10,000.00 deposit to be held in escrow for the review. Rather than participate in the SEQRA process for the conditional use permit, petitioners commenced the instant proceeding.

The real crux of many of petitioners' arguments is that the erosion repair project was, in their opinion, a minor repair and not such an action or event triggering "Planning Board Review under section 325-17.1." However, that issue was squarely resolved by the ZBA in May 2017, when it considered and rejected, *inter alia*, petitioners' claim that the erosion repair project was a "minor repair" and upheld the Order to Remedy requiring petitioners to submit to Planning Board review. To test that determination, petitioners were required to commence a CPLR article 78 proceeding within 30 days after the filing of the Resolution denying the appeal (see, General City Law § 27-a [11]; § 27-b [9]; §§ 38, 81-c [1]; Matter of Ziemba v City of Troy, 295 AD2d 693 [3rd Dept. 2002]; Matter of Manupella v Troy City Zoning Bd. of Appeals, 272 AD2d 761 [3rd Dept. 2000]). Petitioners failed to do so and, to the extent petitioners attempt to re-litigate that issue under the auspices of a challenge to the "second" SEQRA review process, it is untimely.

Moreover, the ZBA's determination was not irrational, arbitrary or capricious in its rejection of petitioners' contention that the erosion repair project was exempt from Planning

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Board review. It is well settled that a zoning board's interpretation of a zoning law is afforded great deference and will only be disturbed if it is irrational, arbitrary and capricious (see, Matter of Lavender v Zoning Bd. of Appeals of the Town of Bolton, 141 AD3d 970 [3rd Dept. 2016], appeal dismissed 28 NY3d 1051 [2016]; Matter of Edscott Realty Corp. v Town of Lake George Planning Bd., 134 AD3d 1288 [3rd Dept. 2015]; Matter of Palladino v Zoning Bd. of Appeals of Town of Chatham, 39 AD3d 1004 [3rd Dept. 2007]). Here, the City Code provides that "... no building shall be erected, moved, altered, rebuilt or enlarged, nor shall any land or improvement thereon be constructed, altered, paved, improved or rebuilt, in whole or in part, for any purpose in the Core Riverfront C-R District" without Planning Board review (City Code § 325-17.1[D]).[3] The ZBA determined that when petitioners replaced the 75-foot section of bulkhead (which petitioners describe as being "about half" of the retaining wall), it impermissibly rebuilt, improved, constructed and/or altered its nonconforming commercial dock without Planning Board approval. Substantial record evidence supports this determination – indeed petitioners' own description of the erosion repair project as in the "best interest of the environment and pubic safety;" implemented to "protect the water quality of the Hudson River;" and to eliminate "threats to public safety" puts them directly in the cross-hairs of the City Code. Petitioners also describe the erosion to the dock's river edges as "heavy" and that the old wooden bulkhead

[3]The rational of this zoning ordinance (according to respondents' counsel) was that "it allows the dock owner & operator (Petitioner since 2014) to carry on its commercial dock operations as such operations existed in 2011, as a nonconforming use, as long as the owner/operator (Petitioner) did not seek to make improvements, expansions, or changes. As soon as the owner/operator sought to make an improvement, enhancement, expansion, or change, the right to operate as a nonconforming use ceased."

App. 12

on the western edge had been "severely eroded" – indeed, this was not a structure that failed overnight, but admittedly failed over an extended period of time. Petitioners' own argument that replacing the bulkhead was "necessary" underscores their need to apply for Planning Board approval and their failure to do so cannot be condoned by the Court. Simply put – by undermining the City zoning laws, petitioners commenced the project at their own risk.

Nor does the Court find any merit to petitioners' contentions that the approval of the erosion repair project by the New York State Department of Environmental Conservation (the "DEC")[4] and/or by the U.S. Army Corps of Engineers exempts petitioners from the requirements of the City Code to obtain planning board approval prior to initiating the project (see, Troy Sand & Gravel Co., Inc. v Town of Nassau, 101 AD 3d 1505 [3rd Dept. 2012] [DEC's SEQRA and permit approvals simply mean that plaintiff's proposal satisfies the applicable state law and regulatory standards]; Rottenberg v Edwards, 103 AD2d 138 [2nd Dept. 2002]; Matter of Haher's Sodus Point Bait Shop v Wigle, 139 AD2d 950, 950–951 [4th Dept. 1988], lv. denied 73 NY2d 701 [1988]; see, also, Matter of S.D. Off. Equip. Co. v Philbrick, 247 AD2d 838, 840 [4th Dept 1998]). As such, petitioners' reliance upon these entities as an entitlement to an exemption from local regulation is misplaced.

The Court also flatly rejects petitioners' contention that actual knowledge on the part of the City that the erosion repair project was taking place somehow obviated their need to seek Planning Board approval.

To the extent petitioners contend that respondents' determination that SEQRA review is necessary for continued dock operations constitutes an unlawful "second" SEQRA review

[4]Indeed the DEC documentation specifically states "THIS IS NOT A PERMIT."

App. 13

process, the Court rejects such a contention. Moreover, the Court finds that this argument is couched in terms merely to avoid the statute of limitations issue. Nevertheless, as afore stated, in a proceeding seeking judicial review of administrative action, the Court must determine whether there is a rational basis for the decision or whether it is arbitrary and capricious (Matter of Warden v Board of Regents, 53 NY2d 186, 194 [1981]). The determination will be sustained if it has a rational basis and is supported by substantial evidence (Matter of Fuhst v Foley, 45 NY2d 441 [1978]). With respect to questions relating to the interpretation of the terms of a zoning ordinance, a determination by a Zoning Board is entitled to "great weight and judicial deference as long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute" (Trump-Equitable v Gliedman, 62 NY2d 539 [1984]; Applebaum v Deutsch, 66 NY2d 975 [1985]). The determination must be sustained if it has a rational basis and is supported by substantial evidence (Matter of Toys R Us v Silva, 89 NY2d 411 [1996]).

City Code § 325-17.1 Core Riverfront C-R District plainly states that the commercial dock becomes subject to review by the Planning Board in the event of any alteration, improvement, or rebuild of a structure on the subject parcel, in whole or in part, for any purpose. To recite the exact language from the Code: § 325-17.1(D)(1): "Any existing commercial dock operation may continue to operate as a nonconforming use until such time as one or more of the actions or events specified in Subsection D above is proposed to be undertaken." The "events specified in Subsection D" include, in relevant part, "any land or improvement thereon be constructed, altered, paved, improved or rebuilt, in whole or in part, for any purpose." § 325-17.1(D)(1) continues: "Where one of the actions or events specified

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in Subsection D above 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..." Here, respondents rationally concluded that the erosion repair project was one of the "actions or events specified in Section D" triggering the termination of petitioners' right to continue to operate the commercial dock without conditional use permit and that SEQRA review for continued commercial dock operations is necessary.

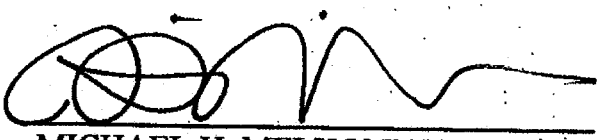
Accordingly, the petition is dismissed in its entirety.

Any and all other relief requested by any party not specifically granted herein is in all respects DENIED. Petitioners are not entitled to any declaratory relief. The Court has specifically declined to address issues with the "Haul Road" project in light of its recent decision in City of Hudson v Town Greenport, et.al., (Index No. 17-05620). No costs or disbursements are awarded to either party. Petitioners' arguments with regard to the fees are premature.

This constitutes the Decision, Order and Judgment of the Court. This Decision, Order and Judgment is returned to the City's counsel. All other papers are delivered to the Supreme Court Clerk for transmission to the County Clerk. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

SO ORDERED.
ENTER.

Dated: Troy, New York
February 28, 2019



MICHAEL H. MELKONIAN
Acting Supreme Court Justice

Papers Considered:

(1) Petition dated September 15, 2017;
(2) Verified Answer dated October 11, 2017;
(3) Affirmation of Kenneth J. Dow, Esq., dated October 11, 2017, with exhibits annexed;
(4) Verified Answer dated October 18, 2017;
(5) Affidavit of Sheena M. Salvino dated October 18, 2017;
(6) Return dated October 24, 2017;
(7) Petitioners Memorandum of Law dated November 13, 2017;
(8) Affirmation of Mitchell Khosrova, Esq., dated November 27, 2017, with exhibits annexed;
(9) Memorandum of Law dated November 27, 2017, with exhibits annexed;
(10) Memorandum of Law dated November 27, 2017.
(11) Reply Affidavit of Michael Heffner, Jr. dated December 6, 2017, with exhibits annexed;
(12) Petitioners Reply Memorandum of Law dated December 6, 2017, with exhibits annexed; and
(13) Transcript of Record Volumes One through Seven.

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Bills.

President Moore stated the bill for Business Automation Services would be removed from the list for further review.

On motion of **Alderman Ramsey,** seconded by **Alderman Stewart,** the following bills were audited and ordered paid by the following vote:

Wm. H. Hallenbeck, Jr.	$75.30	JV Computers	$518.29
Peter Wurster	$58.22	W B Mason Co. Inc.	$643.45
Audubon Road Trust	$30.00	Johnny's Ideal Printing	$3,382.48
Global Montello	$151.89	Staples Credit Plan	$571.03
TGW Consulting Group	$1,458.00	Cheryl A. Roberts	$66.88
Willard Powell	$600.00	City Clerk's Office	$46.00
Wm. H. Hallenbeck, Jr.	$125.00	Col-Greene Media Corp	$95.85
Kristina Lesem	$240.00	Rapport Meyers LLP	$4,535.42
Hudson Valley Resource Gr.	$585.50	Verizon Wireless	$50.35
Cornerstone	$70.23	Xerox Corp.	$102.53
O'Connell Architect. Inc.	$12,000.00	Garth J. Slocum	$438.76
Empire State Appraisal Con.	$2,406.25	Cornerstone Telephone	$258.40

Ayes: President Moore, Aldermen Donahue, Friedman, Haddad, Marston, Miah, Pierro, Ramsey, Stewart and Wagoner.
Nays: None.

Communications.

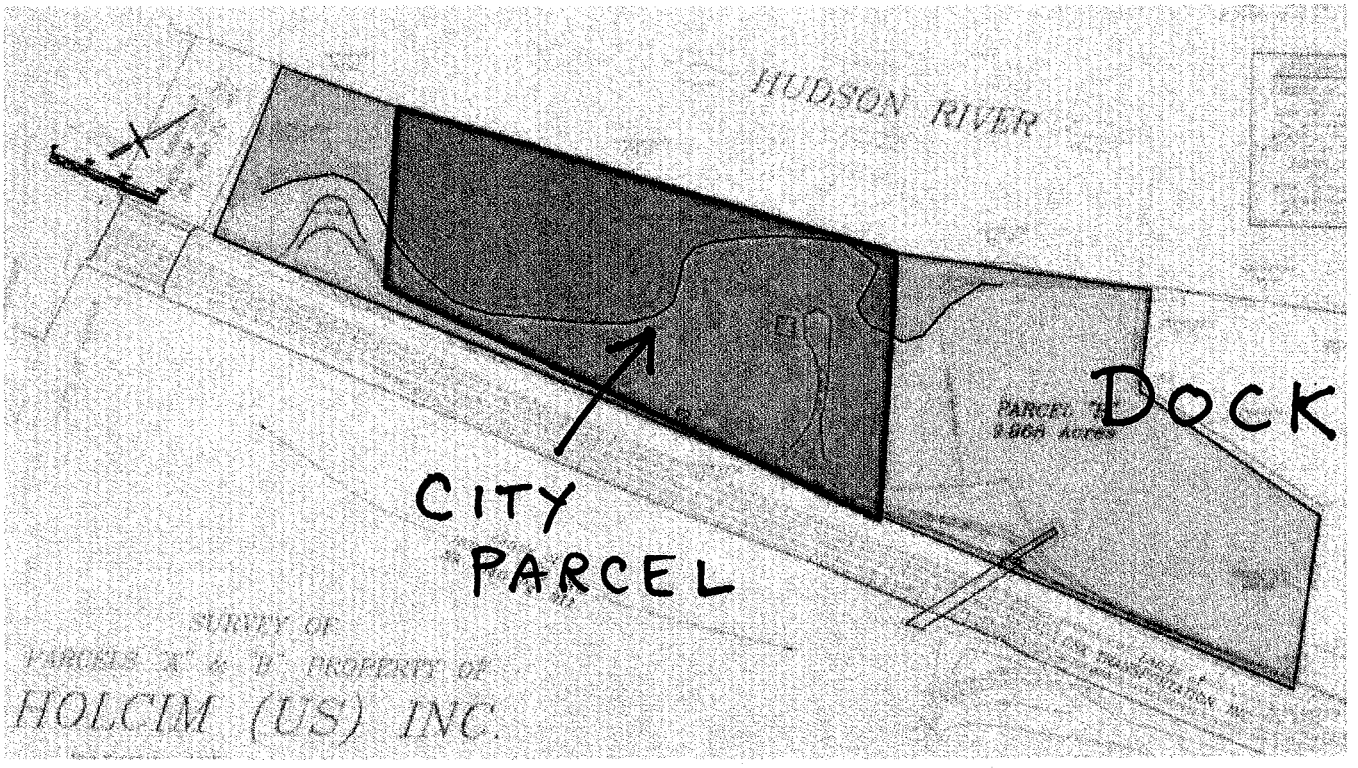
On motion of **Alderman Haddad,** seconded by **Alderman Marston,** the following communications were ordered received and placed on file:

1) Columbia County Planning Board to City Planning Commission regarding Galvan Initiatives Foundation – Special Exception Permit.

2) Invitation from Columbia County VFW Post 1314 inviting council members to participate in Veterans' Day 2013 ceremonies.

Carried.

President Moore stated a title search had been completed on the Holcim property regarding the 4.4 acres and he said "we do own it according to our, according to the title company". In reference to the potential foreclosure sale of 405 Warren Street, he said "the impending sale did not go through last week, it's my understanding that it's been withdrawn". He stated the building would go back out to auction and he said "probably when we know about the, at the point of which we have word on the appeal of the former owners suit so that the, we would want the title to be clear when it goes out for auction again".


HUDSON RIVER
CITY PARCEL
DOCK
PARCEL 'B'
1.869 ACRES
SURVEY OF
PARCELS 'A' & 'B' PROPERTY OF
HOLCIM (US) INC.

THE LAW OFFICE OF
KENNETH J. DOW

P.O. BOX 25 ♦ 22 COUNTY ROUTE 9 ♦ MELLENVILLE, NY 12544
(518)817-7394 (C) ♦ KENDOWLAW@HOTMAIL.COM

June 3, 2013

TO: Deputy Secretary of State George Stafford, NYS Department of State, Division of Coastal Resources
Director James Sproat, NYS OGS Bureau of Land Management
Mr. William Sharp, attorney, NYS DOS Division of Coastal Resources
The Hon. William Hallenbeck, Mayor, City of Hudson
Mr. Donald Tillson, Chairman, City of Hudson Planning Commission
Mr. Donald Moore, President, CIty of Hudson Common Council

RE: Ownership and transfer of 4.38 acre Hudson Waterfront parcel

Dear Sirs:

On behalf of The Valley Alliance, a coalition of residents and businesspeople in the City of Hudson, I am writing to request that your agencies provide an advisory opinion on the following urgent matter. My client's question involves the ownership and transfer in 1981 of lands along the City of Hudson Waterfront, west of the railroad tracks, and extending along and into the Hudson River.

It has come to my client's attention that in December, 1981, the City of Hudson sold to St. Lawrence Cement a roughly 4.38 acre parcel on the City's waterfront that the City had acquired in 1969 from the Lone Star Cement Company. This transaction was recorded at the Columbia County Real Property Department and is described in the minutes of the City of Hudson Common Council.

The 1981 sale has become relevant again because the City of Hudson has been negotiating an agreement with St. Lawrence Cement's successor, Holcim US, which would include the transfer back to the City of these *same lands*—in addition to other neighboring acreage—in exchange for certain legislative, zoning and tax considerations. A surveyor's diagram indicating the location of these 4.38 acres within the larger land transaction now contemplated is attached, along with other relevant documents turned up by my client's research.

Putting aside other questions for now about the legality of the currently proposed agreement, the Valley Alliance's research into the 1981 sale has turned up new information suggesting that this

riverfront land was not properly alienated as required by longstanding and well-established New York Law. Specifically, for the past 100 years, General City Law § 20 has barred the alienation of waterfront lands.[1] Absent specific and express authorization from the New York State Legislature, the City of Hudson would have had no power to alienate its waterfront lands. As far as we can ascertain, no such legislative authority was ever obtained.

If, as the evidence indicates, the City of Hudson had no lawful authority to alienate the subject lands, the 1981 transfer may be void, and despite the City's purported sale of this acreage, the City of Hudson may, in fact, still own the lands in question. If indeed the 1981 sale was not properly transacted and is subject to nullification, that fact would be of urgent current relevance to the City's pending negotiations to re-acquire, in exchange for consideration, waterfront lands it already owns.

A good-faith search of public records has been conducted by my client, including those held at the Columbia County Real Property Department, the Minutes of the City of Hudson Common Council from 1980-1982, microfilm newspaper archives, and State legislative records, to establish whether the 1981 transaction was lawfully authorized.

Our review focused in particular upon the question of whether the City obtained an Act of the Legislature to authorize this sale. Following a request from the Preservation League of New York State, State Legislative Librarian James Giliberto at the Capitol has stated that he found "not a trace" of any such authorization during the 1980-1982 period. We also find no references to the above-referenced law or invocation of exceptions in the City Council minutes, Real Property documents, or published reports. Rather, the City at the time characterized the sale as being pursuant to Municipal Home Rule, which does not override these other prohibitions.

Thus having exhausted all obvious avenues for determining whether this sale was properly conducted—and finding no evidence that it was—my client requests that your agencies verify whether an Act of the Legislature was passed in relation to this sale.

It is our understanding that if the City of Hudson failed to obtain from an act of the State Legislature an exemption from the express dictates of Gen. City Law § 20, then such conveyance would have been made unlawfully and without authority, and would be void.

We note that in an advisory opinion to the City of Hudson in 2012 regarding a different Waterfront parcel (located at Hudson's North Bay), DOS attorney William Sharp noted this same prohibition as a reason why such lands could not be leased or sold to an independent organization. Mr. Sharp advised, in his memorandum to City Attorney Cheryl Roberts regarding the "General Prohibition on Alienation of Waterfront Property," that:

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[1] Chapter 247 of the 1913 Laws of New York.

"General City Law§ 20(2) prohibits the alienation or divestiture by a city in its waterfront property. It states, 'the rights of a city in and to its waterfront, ferries, bridges, wharf property, land under water, public landings, wharves, docks, streets, avenues, parks and all other public places, are hereby declared to be inalienable.'"

Mr. Sharp cited among others the well-known case of Gladsky v. City of Glen Cove, 164 A.D.2d 568 (2nd Dept. 1991), *app. den.* 78 N.Y.2d 859, about which he wrote "the Appellate Division has held that a city may not sell its waterfront property without an act of the State Legislature... The Court stated, 'waterfront property ... is entitled to special protection by virtue of its geographic location rather than by virtue of its use ... Waterfront property is intrinsically unique.'" Mr. Sharp, whose full memorandum is attached, further added that "In those rare instances in which city waterfront or park land has been conveyed to private owners, the State Legislature has passed a special act authorizing the conveyance," citing as an example the Broad Channel Conveyance Act of 1973. It seems to be entirely clear that express legislative authorization is required in order to permit the sale or alienation of a city's waterfront lands.

Our understanding of the consequences of noncompliance with such requirement is that the purported land sale and deed conveyance was and remains void. *See, e.g.,* Heckman v. United States, 224 U.S. 413, 438, (U.S. Supreme Court, 1912); (In matter related to alienation of Indian lands without required statutory authorization; "...conveyances obtained in violation of restrictions would be void. That, of course, is true"); Solar Line, Universal Great Brotherhood, Inc., v. Prado, 100 A.D.3d 862 (2nd Dept., 2012) ("deed is void on the ground that Prado did not obtain court approval for the transfer and, thus, the transfer violated Not–For–Profit Corporation Law §§ 510 and 511."); Potter v. Collins, 156 N.Y. 16, 30-31, (Court of Appeals, 1898). ("The resolution of the common council in 1851 was void, inasmuch as it purported to do something not within the powers of that body...[T]he title of the municipal corporation to the public streets was held in trust for the public, and the power to regulate those uses was vested solely in the legislature. It might delegate that power...but, without such delegation, any such act by the corporation...would be invalid."); Marsh v. Ne-Ha-Sa-Ne Park Ass'n, 25 A.D. 34, 39, (3rd Dept., 1898) (Distinguishes between real property tax sales in which irregularities are, on one hand, in respect to form and manner and, on the other, "jurisdictional in they sense they lie at the foundation of the...power to sell...[and] cannot be made at all, and...cannot be cured."); City of Rochester v. Carnahan, 57 Misc.2d 704 (Sup. Ct., Monroe Cty., 1967), ("if the properties in question are part of the lands conveyed to the City for park purposes by Henry S. Durand in 1908 as claimed by the City, the deed to the defendant is void and must be set aside and cancelled.").

Moreover, it is our understanding that, because the 1981 sale was in contravention of statute, of which the purchaser had notice, the nullification of the 1981 transfer of land from the City does not necessarily require the return of the consideration received by the City in exchange for such land. In Heckman, the U.S. Supreme Court opinion stated: "It is said that the allottees have received the consideration,...Where, however, conveyance has been made in violation of the restrictions, it is plain that the return of the consideration cannot be regarded as an essential prerequisite to a decree of cancelation....The restrictions were set forth in public laws, and were matters of general knowledge. Those who dealt...contrary to these provisions are not entitled to

insist that they should keep the land if the purchase price is not repaid, and thus frustrate the policy of the statute." Heckman v. United States, 224 U.S. 413, 446-447. *But, see,* City of Rochester v. Carnahan, 57 Misc.2d 704 (Sup. Ct., Monroe Cty., 1967).

Furthermore, the lapse in time since the sale does not appear to stand in the way of establishing the City's title to the purportedly conveyed lands. It seems clear that there exists no right of adverse possession against public lands. Nor, where a purported sale is void for fundamental lack of authority rather than voidable for a technical, procedural irregularity, is there any statute of limitations for correcting such errors. *See,* Cameron Estates v. Deering, 308 N.Y. 24, (Court of Appeals, 1954); ("There is a vast difference between a tax deed voidable for irregularity in the proceedings and a tax deed void because the proceedings were a nullity...such recording was a nullity and did not set the statute running at all."); Union & New Haven Trust Co. v. People, 15 A.D.2d 1 (3rd Dept., 1961), (holding seventy-eight years after an unauthorized deed transfer that "the conveyance was void due to noncompliance with the then existing law."). Factors such as the City's having taxed the property since 1981, or that it was the City's error to have improperly sold the property, do not appear to estop the City from now establishing its proper title. City of Geneva v. Cayuga Oil Co., 135 Misc. 673 (Sup. Ct., Ontario Cty., 1929); *see, also,* City of Mount Vernon v. New York, N.H. and H.R. Co., 232 N.Y. 309 (Court of Appeals, 1922).

If the 1981 sale is void, then the City's ownership of the acreage would require no new sale, taking or other transaction. The City of Hudson would not need to "take back" such lands, as they would never have validly left its ownership despite any and all recorded deeds, contracts, or other records apparently to the contrary. If this is indeed the case, that fact would be of urgent relevance to the City's pending negotiations, as they would involve Hudson re-acquiring in exchange for consideration waterfront acreage it already owns.

The matter of the broader land transfer including this acreage already has been submitted by the City to its Planning Commission, and the Mayor has been authorized by the Council to negotiate and sign an agreement which would involve it. There is no sense, either from a legal or public policy standpoint, for the City to continue negotiating to acquire lands if it already owns them. (We note that the negotiations with Holcim seem currently to be suspended; the negotiations could well resume, however, either with Holcim or with an unidentified entity to which Holcim is reputedly negotiating to sell their land holdings). But even apart from current negotiations, if this land may in fact belong to the People of the City of Hudson, the question of its ownership needs to be resolved, and we respectfully request that your agencies conduct an investigation and provide an opinion on this matter.

If evidence comes forth that the necessary Act of the Legislature was indeed secured for the 1981 sale despite there being no obvious reference to such in local or State records, such discovery would resolve that portion of this matter. My client does continue to assert and believe that there are numerous other problems with the currently proposed transaction, but would ask that this immediate question be addressed as soon as practicable.

Sincerely,

Kenneth J. Dow

Attachments: Surveyors' Diagram of Approximate Location of Parcel
Memorandum from William Sharp to Cheryl Roberts

Additional supporting documents can be downloaded via:
http://www.hudsonwaterfront.org

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(518)817-7394 (C) ♦ KENDOWLAW@HOTMAIL.COM

August 11, 2019

Walter Chatham
Chair, City of Hudson Planning Board
City Hall
520 Warren Street
Hudson, NY 12534

RE: Colarusso dock and ownership of 4.4 acres of waterfront land

Dear Walter,

I am glad that you were able to review my submission and found it to be useful. I am out of town this week and so, regrettably, will not be able to attend the upcoming continuation of the public hearing.

In lieu of speaking, I do want to follow up further on the matter of the 4.4 acres. I very strongly disagree with your position in relation to the ownership of that parcel of land.

In your email, you refer to "anything resembling proof that the City owns this land." Without even getting into the underlying legal argument, there is compelling proof that the City owns the land in question: **a title search commissioned by the City that found that the City owns the parcel.** As referenced in my memorandum and as is shown on page 17 of the Appendix submitted with my memo (Common Council minutes of October 15, 2013), the City of Hudson itself commissioned a title search for the 4.4 acres in 2013, which Don Moore, the Common Council President, publicly described at a meeting of the City's Common Council as having confirmed that "***we do own it***." As public officials of the City of Hudson, it is my view that the Planning Board is bound to accept this. I cannot conceive of how one can disregard this fact on the public record.

You state further your belief that the Board has "no choice but to proceed as if Colarusso does in fact have clear title to the property, and it appears they do..." Based upon the City's title search, which determined that the City owns the parcel, it seems to be very clear that Colarusso does NOT have "clear title" to the property.

Moreover, I do not think reliance upon tax maps is well-founded. Tax maps provide no independent corroboration of ownership; they are simply reflective of other information which may be contained in a deed. No one is disputing that there is a 1981 deed that purports to convey the lands from the City to Holcim (and subsequently to Colarusso). Therefore, the tax maps will, of course, show the same information. The point is that the laws of the State of New York establish that the deed is void and invalid.

Furthermore, it has specifically been held that the fact that a person or entity has paid taxes on lands does not confer a right of ownership or prevent a municipality from asserting its ownership.

> "The levying and collecting of taxes does not estop the plaintiff [City of Geneva] from asserting title." City of Geneva v. Cayuga Oil Co., 135 Misc. 673, (Supreme Ct., Ontario Cty., 1929).

> "By payment of taxes thereon, neither that act, nor the error if one was made by the assessors, could operate as an estoppel against the public and vest title to the land in defendant, it being a trespasser thereon. The assessors of the city and the city combined were powerless to thus surrender a public highway or any portion of the same to defendant." City of Mount Vernon v. New York, New Haven & Hartford R.R. Co., 232 N.Y. 309 (Court of Appeals, 1922).

In sum, the fact that tax maps show this parcel in Colarusso's name, and the fact that Colarusso has paid taxes on them, does nothing to establish or promote Colarusso's actual ownership of the parcel. While the City should change its maps and take other actions to clearly assert its ownership, none of that changes the underlying reality of ownership. All that matters is the validity of the 1981 deed, which, under plain New York law, was made without authority in direct violation of explicit statute and is therefore void and a nullity.

I don't want to bog this message down in a great deal of law. I will, however, briefly make one more important point, (which can be elaborated upon and supported extensively).

When a municipal transaction such as this is void because it was outside of the authority to act, it cannot be made valid, ratified, or its purpose achieved by subsequent action or failure to act. Moreover, there is no time period after which a void action becomes effective. To that point, here are a few illustrative passages from New York cases:

> "[D]efendant's contention that the City is estopped by its conduct to deny the validity of the deed must fail, because the strict rules protecting public park lands of municipalities from improper conveyance or encroachment may not be circumvented by the mistaken or irregular conduct of the municipal employees." City of Rochester v. Carnahan, 57 Misc. 2d 704, (Supreme Ct., Monroe Cty., 1967).

> "[S]upposing that the canal commissioners had made a direct grant of a perpetual and irrevocable right to the basin, in face of the law of 1820, which provides, in substance, that no such grant can be made; the transaction would manifestly be illegal and void. Where no express grant can be allowed, the law will not resort to the fiction of an implied grant so as to create a prescriptive right. If it would, the whole policy of the prohibitory statute might be subverted by the supineness or willful fraud of public officers, and the State deprived of most important rights." Burbank v. Fay, 65 N.Y. 57 (Court of Appeals, 1875).

The law in New York, when dealing with a municipal entity, is that the counter-party must know the authority by which the municipality purports to act:

> "'The persons who contract with municipal corporations must, at their peril, know the rights and powers of the officers of such municipalities to make contracts and the manner in which they must make them. Any other rule would destroy all the restrictions which are thrown around the people of municipalities for their protection by the statute laws and the Constitution, and would render abortive all such provisions.'" Town of Guilderland v. Swanson, 41 Misc. 2d 398 (Supreme Ct., Rensselaer Cty., 1963).

Under the laws of New York and well-established principles that go back many, many years, the purported 1981 conveyance of the 4.4 acres to Holcim (subsequently to Colarusso) is a nullity. The law treats it as never having happened. **Because the City had no authority to give up its rights and title to the parcel, the City's title and rights to the parcel cannot be abandoned, forfeited, or lost, no matter what City officials do or fail to do, and no matter how much time passes.**

This is not a matter of two similarly situated private entities claiming the same land. This is a very particular kind of matter involving a municipality's authority—or lack thereof—to sell a piece of waterfront land, and the plain result that is mandatory and inescapable under clear and explicit New York law. *For additional background, I have attached two very short cases, which address fundamental points of this matter: Gladsky v. City of Glen Cove ("a municipality may not convey, alienate or divest itself of title to the various types of property included within the ambit of General City Law § 20 (2) except by special act of the Legislature.") and City of Geneva v. Cayuga Oil Co. (neither levying and collecting of taxes nor failures of public officials estop the municipality from asserting its ownership of lands).*

In that light, I believe that the Planning Board would be making a serious mistake to proceed on the basis of Colarusso's ownership of the 4.4 acres. The status of this parcel is fundamental to evaluating the dock operations' impact on "adjacent properties," as I address on pages 7 – 8 of my earlier July 31 memorandum to the Board. It is crucial that the Planning Board get this right.

Thank you again very much for your time and consideration of this and the other matters that come before you. I know it can be very challenging and your commitment is appreciated.

Regards,

Kenneth J. Dow

Cc: Members of the City of Hudson Planning Board

164 A.D.2d 567, 563 N.Y.S.2d 842

John J. Gladsky, Jr., Appellant,
v.
City of Glen Cove, Respondent.

Supreme Court, Appellate Division, Second Department, New York
3350E
January 14, 1991

CITE TITLE AS: Gladsky v City of Glen Cove

SUMMARY

Appeal from an order and judgment (one paper) of the Supreme Court (Alfred S. Robbins, J.), entered January 30, 1989 in Nassau County, which denied a motion by plaintiff for summary judgment in an action for specific performance of a contract for the sale of real property, granted a cross motion by defendant for summary judgment dismissing the complaint, and declared the subject contract to be null and void.

HEADNOTES

Vendor and Purchaser
Contract for Sale of Real Property
Waterfront Property Owned by Municipality--Specific Performance Absent Legislative Approval of Sale

() In an action against a city for specific performance of a contract to convey waterfront property, summary judgment dismissing the complaint was properly granted where legislative approval permitting the city to sell said property was not obtained, since General City Law § 20 (2) divests the city of the power to convey publicly owned waterfront property except by special act of the Legislature. Although plaintiff submits that the statute does not bar specific performance of the contract since the subject property was neither acquired nor dedicated for public use, that contention is not only contrary to the unambiguous language of the statute, but overlooks the unique nature of water property which has been expressly declared to be inalienable, and is entitled to special protection by virtue of its geographical location rather than by virtue of its use. The Legislature did not see fit to include a public-use limitation in the statute, and none shall be engrafted by the court. Nothing in the contract imposed an obligation on the city to seek legislative approval, which in any event, is a purely discretionary act which cannot be compelled. Accordingly, nullification of the contract was required inasmuch as municipal contracts which violate express statutory provisions are invalid.

Contracts
Illegal Contracts
Recovery of Incidental Expenditures

() In an action against a city for specific performance of a contract to convey waterfront property in which summary judgment dismissing the complaint was properly granted to the city pursuant to General City Law § 20 (2), which divests the city of the power to convey publicly owned waterfront property except by special act of the Legislature, plaintiff, who in reliance upon the contract expended certain sums for a down payment, title examination, and survey, is entitled to recover those expenses pursuant to the parties' agreement.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

***568** Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions, § 549; Vendor and Purchaser, §§ 50, 494, 532.

General City Law §20 (2).

NY Jur 2d, Counties, Towns, and Municipal Corporations, §1390.

ANNOTATION REFERENCES

See Index to Annotations under Municipal Corporations.

APPEARANCES OF COUNSEL

Siegel, Fenchel & Peddy, P. C. (Michael T. Schroder, Robert S. Schwartz and *Victor Michaels* of counsel), for appellant.
John V. Terrana, City Attorney, for respondent.

OPINION OF THE COURT

Eiber, J.

()At issue on appeal is the validity of a contract of sale whereby the City of Glen Cove, as seller, agreed to convey certain waterfront property to the plaintiff, John Gladsky, Jr. Although the plaintiff now seeks to enforce the terms of this contract, we conclude, as did the Supreme Court, that General City Law § 20 (2) divests the city of the power to convey publicly owned waterfront property except by special act of the Legislature. Since legislative approval was not obtained, the city's cross motion for summary judgment dismissing the complaint was properly granted.

I

The salient facts are substantially uncontroverted. The focal point of this dispute is a .78-acre parcel of property with frontage on Glen Cove Creek. The City of Glen Cove acquired title to this waterfront property in the early 1930's, and, since 1971, has leased the property to the plaintiff, John Gladsky, Jr., who operates a commercial marina and salvage business at the site. At the time the city entered into the lease with Gladsky, the area surrounding the marina was used primarily for industrial and manufacturing purposes. In recent years, however, the neighborhood has become increasingly residential due to the construction of several waterfront condominium projects in the vicinity.

In January 1975 the City of Glen Cove published a notice of ***569** sale soliciting bids from prospective purchasers. Gladsky responded to the notice, and on February 7, 1975, offered the city $60,000 for the property. The city accepted his bid, and in April 1975 the parties entered into a standard contract of sale, pursuant to which Gladsky tendered a down payment of $3,000. [1] Although the contract of sale provided for title to be conveyed at a closing to take place on June 16, 1975, the closing date was adjourned when a title report, prepared at the plaintiff's behest, revealed the existence of several adverse chains of title. As a result of the information contained in the title report, and in response to the plaintiff's demands that the city convey clear and marketable title, the parties subsequently entered into two additional agreements which provided, among other things, that the city would commence a proceeding to quiet title and that the closing would be postponed pending the conclusion of that proceeding. Despite its promises, however, the city never instituted a proceeding to quiet title. Indeed, it eventually became clear to the plaintiff, after further unsuccessful demands that the city engage in efforts to remove the cloud on title, that the city had no intention of honoring the terms of the contract of sale.

In December 1981 the plaintiff commenced the instant action seeking specific performance of the contract of sale. He alleged, as an alternative cause of action, that the city was guilty of a breach of contract and that he was entitled to recover damages in the sum of $500,000 as a result of the city's failure to proceed with the sale. In its answer to the complaint, the city asserted, as an affirmative defense, that the contract of sale and subsequent agreements were "illegal and unenforceable as in violation of the duly enacted Charter of the City of Glen Cove and the laws of the State of New York applicable to the conduct of municipal affairs". The litigation proceeded, albeit slowly. [2]

In February 1988 the plaintiff moved for summary judgment, ***570** contending that he was entitled to specific performance of the contract because he had fully performed all of his contractual obligations and was ready, willing and able to consummate the deal. The city cross-moved for summary judgment on the ground that the contract of sale was unenforceable pursuant to General City Law § 20 (2), which prohibits a municipality from conveying title to certain types of publicly owned property, including waterfront property. The Supreme Court, persuaded by the city's argument, declared that the subject contract was null and void and that the city had acted in excess of its authority when it entered into a contract to convey that which the statute had expressly declared to be inalienable.

The plaintiff now appeals.

II

Resolution of this controversy turns upon General City Law § 20 (2) which provides, in pertinent part, that every municipality is empowered to "take, purchase, hold and lease real and personal property within and without the limits of the city ... and to sell and convey the same". Although the statute grants municipalities broad rights to acquire and sell real property, the Legislature, cognizant of the well-settled common-law rule that a "public trust" is impressed upon certain forms of publicly owned property *(see, Brooklyn Park Commrs. v Armstrong,* 45 NY 234; *Village Green Realty Corp. v Glen Cove Community Dev. Agency,* 95 AD2d 259; *Aldrich v City of New York,* 208 Misc 930, *affd* 2 AD2d 760), statutorily restricted a city's ability to convey such property by further providing that: "the rights of a city in and to its waterfront, ferries, bridges, wharf property, land under water, public landings, wharves, docks, streets, avenues, parks, and all other public places, are hereby declared to be inalienable" (General City Law § 20 [2]).

Although the terms of General City Law § 20 (2) are unconditional, the plaintiff, relying upon the "public trust" doctrine, maintains that the statute's prohibition against alienability is not applicable unless a municipality first establishes that the subject property has been used, acquired or dedicated for a public purpose *(see, Brooklyn Park Commrs. v Armstrong, supra; Matter of Ackerman v Steisel,* 104 AD2d 940, *affd* 66 NY2d 833; *Aldrich v City of New York, supra)*. The plaintiff submits that since the subject property was neither acquired ***571** nor dedicated for public use, General City Law § 20 (2) may not serve as a bar to specific performance of the contract. The plaintiff's contention is not only contrary to the unambiguous language of the statute, which imposes no such qualification, but also overlooks the nature of waterfront property, which is unique because of its geographical location. While other forms of city-owned property may be converted to public use and thereby be rendered inalienable under the statute, waterfront property has been expressly declared to be inalienable, regardless of the manner in which the property is used. Although we recognize that the statutory restriction against the alienation of certain municipal property emanates, to a large extent, from the "public trust" doctrine *(see, Matter of Lake George Steamboat Co. v Blais,* 30 NY2d 48; *Brooklyn Park Commrs. v Armstrong,* 45 NY 234, *supra; Matter of Central Parkway,* 140 Misc 727, 729-730; *Gewirtz v City of Long Beach,* 69 Misc 2d 763, *affd* 45 AD2d 841), the Legislature did not see fit to include a public-use limitation in the statute, and we decline to engraft such a limitation in a statute which is otherwise clear and unequivocal on its face.

Nor does General City Law § 20 (7), upon which the plaintiff relies, compel a contrary result. This subdivision creates a "discontinuance" exception to the statute's blanket prohibition against the alienability of public property by empowering a municipality to "lay out, establish, construct, maintain and operate markets, parks, playgrounds and public places, *and upon the discontinuance thereof to sell and convey the same"* (emphasis supplied). Notably absent from the enumeration of the type of property which may be freely sold by a municipality upon the discontinuance of its public use is waterfront property.

The reason for this absence is clear--waterfront property, as we have noted, is entitled to special protection by virtue of its geographical location rather than by virtue of its use. Unlike a public playground, which may cease to be a playground if its use is altered, waterfront property is intrinsically unique. That the discontinuance exception does not, and should not, apply to waterfront property becomes all the more compelling given the significant ecological, scenic, and aesthetic qualities inherent in it. Accordingly, the plaintiff's reliance on General City Law § 20 (7) is misplaced.

Mindful of the line of cases which hold that a municipality may not convey, alienate or divest itself of title to the various types of property included within the ambit of General City Law § 20 (2) except by special act of the Legislature *(see,* ***572** *Grayson v Town of Huntington,* 160 AD2d 835; *Matter of Ellington Constr. Corp. v Zoning Bd. of Appeals,* 152 AD2d 365; *Village Green Realty Corp. v Glen Cove Community Dev. Agency,* 95 AD2d 259, 260, *supra)* the plaintiff argues, in the alternative, that the city was obligated under the terms of the contract of sale to seek legislative approval of the conveyance. We note, however, that nothing in the contract expressly imposed such an obligation upon the city. Moreover, even if the contract of sale had included such a provision, it would have been of minimal value to the plaintiff, since legislative approval is a purely discretionary act which cannot be compelled *(see, Lighton v City of Syracuse,* 188 NY 499; *Village Park Assocs. v City of New York,* 156 AD2d 446). As the Court of Appeals observed in the seminal case of *Lighton v City of Syracuse (supra,* at 506-507): "[h]ere the condition was not within the control of either party, as both parties knew when they assented to it. They could not have intended that the contract should be specifically performed unless the proposed act should be passed, for that was the form of the promise .... Without that condition the contract would be void. With that condition the contract is valid, but it cannot be specifically performed because the condition has not been fulfilled. That condition depended for fulfillment upon an independent body, exercising the highest sovereign power, entirely free from the control of either party to the action." Accordingly, the Supreme Court correctly determined that the plaintiff was not entitled to specific performance of the contract since the State Legislature never authorized the underlying sale. Furthermore, in light of the well-settled principle that municipal contracts which violate express statutory provisions are invalid, nullification of the contract of sale was required *(see, Granada Bldgs. v City of Kingston,* 58 NY2d 705; *Seif v City of Long Beach,* 286 NY 382; *Kelly v Cohoes Hous. Auth.,* 27 AD2d 463, *affd* 23 NY2d 692).

()There remains for consideration the question of whether the plaintiff is entitled to recover any damages as a result of the city's inability to proceed with the sale. Although the plaintiff was chargeable with the knowledge that city officials were not authorized to enter into a contract to sell publicly owned waterfront property and is, therefore, precluded from recovering damages for loss of the bargain *(see, Maidgold Assocs. v City of New York,* 64 NY2d 1121; *Granada Bldgs. v City of Kingston, supra; City of Zanesville, Ohio v Mohawk Data Sciences Corp.,* 97 AD2d 64, 66), the record reveals that ***573** the plaintiff, in reliance upon the contract, expended certain sums for a down payment, title examination, and survey. These expenditures are recoverable by the plaintiff pursuant to the parties' agreement. Accordingly, the order and judgment is modified, on the law, by adding a provision thereto directing the defendant to return the down payment to the plaintiff, and to reimburse him for the costs of a survey and title examination procured by him; as so modified, the order and judgment is affirmed, with costs to the defendant, and the matter is remitted to the Supreme Court, Nassau County, for a calculation of the amount to which the plaintiff is entitled for these expenditures, and for the entry of an appropriate amended order and judgment.

Mangano, P. J., Bracken and Harwood, JJ., concur.
Ordered that the order and judgment is modified, on the law, by adding a provision thereto directing the defendant to return the down payment to the plaintiff, and to reimburse him for the costs of a survey and title examination procured by him; as so modified, the order and judgment is affirmed, with costs to the defendant, and the matter is remitted to the Supreme Court, Nassau County, for a calculation of the amount to which the plaintiff is entitled for these expenditures, and for the entry of an appropriate amended order and judgment. ***574**

Footnotes

1 Although there is some question in the record as to whether the City of Glen Cove formally executed the contract of sale, the parties do not seriously dispute the existence of an agreement to convey the property. Moreover, the record reveals that the contract of sale was ratified in two subsequent extension agreements, entered into by the city.

2 During the period between 1982 through 1985, various events occurred which do not appear to be relevant to the resolution of the instant controversy. Of some significance, however, is a stipulation entered into between the parties on June 20, 1983, which provided, *inter alia,* that the plaintiff would remain in possession of the property during the pendency of this action, at a monthly rental of $400.

135 Misc. 673, 238 N.Y.S. 187

CITY OF GENEVA, Plaintiff,
v.
CAYUGA OIL COMPANY, INC., and Others, Defendants.

Supreme Court, Ontario County.
December 26, 1929.

CITE TITLE AS: City of Geneva v Cayuga Oil Co., Inc.

***673 Municipal corporations**

Title to land --- Action in ejectment for possession of lands on bank of abandoned canal conveyed to plaintiff by State --- City levied and collected taxes thereon, and did not object to defendant's possession ---Defense based on estoppel stricken out

In this action in ejectment for the possession of the lands on the bank of an abandoned canal conveyed to plaintiff city by the State, a defense that the city is estopped from asserting title to the lands because it levied and collected taxes thereon and that the city is further estopped because its officers made no objections to defendant's occupation, must be stricken out.

MOTION by plaintiff to strike out affirmative defense contained in answer of defendant named.

The action was one in ejectment brought against the defendant, Cayuga Oil Company, Inc., for the possession of lands occupied by this defendant. The property in question was situated on the bank of the abandoned Cayuga and Seneca canal which was conveyed to the city of Geneva by the State. In its answer the Cayuga Oil Company, Inc., claimed that the city was estopped from maintaining the action by reason of the city having assessed and collected taxes against the property sought to be recovered, and that the city was further estopped because the city and the State had known that the defendant and its predecessors in title were erecting and maintaining valuable improvements on the premises at considerable expense without making objections and without asserting any claim to the premises.

George I. Teter, for the plaintiff.
Frank W. Brooks, for the defendants.

CUNNINGHAM, J.

The levying and collecting of taxes does not estop the plaintiff from asserting title. (*City of Mt. Vernon v. New York, N. H. & H. R. R. Co.,* 232 N. Y. 309, 319.)

***674** The failure of officers of the plaintiff to perform their duties does not estop the plaintiff from claiming title to the lands in question. (*Village of North Pelham v. Ohliger,* 216 App. Div. 728; affd., 245 N. Y. 593; *People v. Baldwin,* 197 App. Div. 285; affd., 233 N. Y. 672; *People v. Santa Clara Lumber Co.,* 213 id. 61, 67.)

The motion to strike out the defense setting up an estoppel is granted, with ten dollars costs to the plaintiff to abide the event of the action.