

STATEMENT OF OPINION OF STEPHEN W. DUNN REGARDING THE COLARUSSO
APPEAL OF THE HUDSON CODE ENFORCEMENT OFFICER'S CITATION OF THE
CONSTRUCTION OF THE STEEL BULKHEAD

First I would like to thank the ZBA's attorney for his opinion memorandum on this matter (Khosrova Opinion), and the Citizen Amicus Brief (Amicus Brief) submitted to the ZBA by the South Bay Coalition, both of which documents I found helpful. My analysis and opinion of this matter draws on some of the contents of those documents, and the authority adduced therein, along with my own research and analysis.

Colarusso's Appeal contests the legality of the Hudson's Code Enforcement Officer's citation of the construction of steel bulkhead without obtaining a CUP from the planning board on five grounds. Three of those grounds are based on the assertion that even if the steel bulkhead construction would normally be subject to Planning Board review, it is not in this case because (1) the Department of Environmental Conservation (DEC) and Army Corps of Engineers (ACOE) had exclusive jurisdiction over the issuing of permits for the steel bulkhead, (2) the application of the zoning code to the construction of the steel bulkhead would constitute an unconstitutional taking, and (3) the City of Hudson is estopped from enforcing its Zoning Code due to the actions of its Code Enforcement Officer.

The final two arguments Colarusso makes are based on the text of the zoning code, specifically (1) the non-conforming use provisions of section 325-29 and (2) because the construction of the steel bulkhead is a "minor action" as defined by the Zoning Code.

Regarding Colarusso's first argument that the DEC and ACOE had exclusive jurisdiction to issue permits for the steel bulkhead, supplanting any jurisdiction Hudson may have had under its Zoning Code, the Appellant cites no authority for its proposition that two permits is enough, while obtaining three permits, including one from Hudson after Planning Board review, is one too many. As noted in the Amicus Brief, both such agencies seem to disagree with Colarusso that no further permits are required. The ACOE in its letter to Colarusso dated 7-18-16 (Bates stamp numbers 00053 and 00054 of Exhibit B of the Appeal) states in relevant part on page 2 thereof that its "determination does not eliminate the need to obtain any other Federal, State or local authorization required by law for the proposed work" The DEC in its 9-2-16 letter to Colarusso (Bates stamp number 00055 of Exhibit B of the Appeal) states in its penultimate paragraph that "this permit does not eliminate the need to obtain any other federal state or local permits or approvals that may be required for this project."

With respect to Colarusso's Constitutional argument, again it cites no authority for the proposition that subjecting the construction of the steel bulkhead to Planning Board review constitutes an Unconstitutional taking. It is clear that when the amendments to the zoning code were adopted on Nov 30, 2011 establishing the

Core Riverfront District, and adopting provisions thereunder, including among others, section 325-17.1 and the attendant definitions added to section 325-42 of the zoning code, the Common Council was very much aware of the issue of unconstitutional takings. That is why it allowed in section 325-17.1(D) (1) for the existing commercial dock operations to continue as a nonconforming use subject to Planning Board review when any of the actions or events enumerated in the first paragraph of 325-17.1(D) occurred. When the code changes to preclude previously allowed uses, the allowance pre-existing such uses to continue as nonconforming uses is done precisely in order to avoid effecting an unconstitutional uncompensated taking.

Colarusso's third argument as to why Hudson's zoning code is unenforceable is that Hudson is estopped to enforce its Zoning Code due to the actions of Hudson's Code Enforcement Officer, alleging that he was aware of the construction of the steel bulkhead, and took no action until after the steel bulkhead had been completed to inform Colarusso that it must go before the Planning Board first. Even if that were true, that would still not be grounds rendering the zoning code unenforceable. The law in New York is settled that a governmental entity can only be estopped from enforcing its laws where there is a "required showing of 'fraud, misrepresentation, deception or similar affirmative misconduct, along with reasonable reliance thereon" *Town of Copake v 13 Lackawanna Properties, LLC*, 99 A.D. 3d 1061, 1064 (2012). Here, there is no such evidence of any such misconduct, nor any reasonable reliance on such conduct. Rather, the un-contradicted evidence is that the Hudson Code Enforcement Officer took action to issue a citation immediately upon becoming aware of the construction of the steel bulkhead, which construction had already been completed. No estoppel lies here.

Turning to the first of Colarusso's two textual arguments, it asserts that section 325-29(A), which provides that any type of "nonconforming use of buildings" ... "may be continues indefinitely, but" ... "shall not be enlarged, extended or placed on a different portion of the lot," allowed the construction of the steel bulkhead without review of the Planning Board. First, it should be noted that this provision in the Zoning Code predates the 11-30-11 amendments to the Zoning Code establishing the Core Riverfront District. Thus, to the extent it is inconsistent with the provisions of 325-17.1, and cannot be reconciled, it must give way to the later amendments to the Zoning Code.

In that regard, 325-29(A) does not refer to the dock operations, but is a general statement. Section 325-17.1 however does refer specifically to the dock operations, and in paragraph (D)(1) thereof expressly characterizes the dock operations as a "nonconforming use." This specific reference in section 325-17.1 overrides the general statement in 325-29(A) to the extent it is inconsistent (McKinney's Consolidated Laws section 238). Non conforming uses are uses which are tolerated for Constitutional reasons, but which are viewed as "detrimental to a zoning scheme, and the overriding public policy of zoning in New York State and elsewhere is aimed at their reasonable restriction and eventual elimination." *Toys "R" US v.*

Silva, 89 N.Y.2d 411, 417 (1996). The intent of the adoption of 325-17.1 was to respect the Constitutional rights of the dock owners, but to limit its operations to the maximum legal extent, with the intent that when its useful life was exhausted, that non-conforming use would cease.

Moreover, even if one assumes for the sake of argument that section 325-29(A) still has full force and effect as it pertains to the dock operations, the preponderance of the evidence is that the steel bulkhead did constitute an enlargement of the preexisting wood and concrete bulkhead structure, and thus its provisions are inapplicable to the steel bulkhead as constructed.

The amicus brief adduces evidence that the steel bulkhead extended approximately 1.5 feet further out into the water, as evidenced by the existing steel bulkhead extending only 4.5 feet out past the new steel bulkhead, as compared to 6 feet out past the prior concrete bulkhead. (Exhibit D, page 24 of the Amicus Brief). It was also higher than the prior concrete bulkhead. See exhibit C, page 23 of the Amicus Brief wherein photos show the pre-existing steel bulkhead sat on top the old concrete bulkhead, while the photo in Exhibit D of the amicus brief shows the new steel bulkhead to be identical in height to the pre-existing steel bulkhead. See also Bates stamp page 00071 of Exhibit B of the appeal wherein Colarusso's engineer, Dente Engineering in a March 2, 2016 letter to Colarusso states that the new steel bulkhead is to be 10 feet above the water line, while the 5th page of the plans for the new steel bulkhead on 24" by 36" paper submitted by Colarusso to the ZBA after its last meeting at the request of the ZBA show the height of the concrete bulkhead to be from 7.3 to 8.5 feet high.

In addition, given that the new bulkhead was made of steel, it represents a structure that was "structurally altered" from the prior wood and concrete bulkhead, which is proscribed by 325-29(B) (1).

That leaves us to deal with Colarusso's final argument that the steel bulkhead construction constitutes a Minor Action as defined by section 325-42 of the Zoning Code, and thus is not subject to Planning Board review. Colarusso asserts that the steel bulkhead construction is a Minor Action because it constitutes a (1) "repair involving not substantial changes in an existing structure" under paragraph A of the definition of Minor Action, (2) "replacement ... of a structure or facility, in kind" under paragraph B thereof, and (3) "construction ... of a ... structure or facility involving less than 4,000 square feet" [that is] "consistent with local land use controls" under paragraph F.

On this issue, I agree with the analysis in the Khosrova Memorandum that the new steel bulkhead does not fit under any of the three paragraphs. Tearing down a deteriorated concrete bulkhead and replacing it with a steel bulkhead with a longer useful life than the concrete bulkhead had when it was first built, cannot be considered a repair. Colarusso testified that the existing steel bulkhead was built perhaps 70 years ago, and is still functional, while the concrete bulkhead had

deteriorated and needed to be replaced because it had been improperly built in the first instance, and had not been maintained. Even if the new bulkhead had been built the same way as the one it replaced, it would still be a capital improvement rather than a repair. IRS regulation section 1.263(a)-3(k)(1)(iv) provides that construction which "[r]eturns the unit of property to its ordinarily efficient operating condition if the property has deteriorated to a state of disrepair and is no longer functional for its intended use," is a capital expenditure and not a repair.

As to whether the steel bulkhead is an "in-kind" improvement or replacement under paragraph B of the definition of Minor Actions, because of the steel bulkhead's longer useful life, along with the fact that it is constructed with a different material, and is of a different size than the concrete bulkhead, it is not an "in kind" improvement. The Oxford dictionary defines "in kind" as meaning "something similar," while Blacks Law Dictionary defines "in kind" as "in a similar way, with an equivalent of what has been offered or received. A new steel bulkhead does not have such a similarity with a deteriorated concrete and wood bulkhead.

Even if the steel bulkhead installation were considered a "Minor Action," in my opinion it would still be subject to Planning Board review. The Khosrova letter points out that the insertion of the words "or events" after the word "actions" in 325-17.1(D)(1) is a separate prong to trigger the application of the events in the first paragraph of 325-17.1(D), and that is correct. If actions meant the defined term "Actions," the legal mechanics would be that a series of "Minor Actions" that do not constitute an "Actions" in and of themselves, can nevertheless still constitute an "event." An event is defined in Webster's Dictionary as "something that happens: occurrence," and Ballentine's Law Dictionary states that an event is "the consequence of anything; the issue, end, conclusion; that in which an action, operation or series of operations, terminates. The culmination or end that the means may have produced or brought about." Consequently, even if the use of the word "actions" in 325-17.1 means the defined term "Actions," the Zoning Code would then provide in essence that a series of exempt "Minor Actions," which "Minor Actions" culminate in the alteration, improvement or rebuilding of an improvement or structure, nevertheless constitutes an "event" subject to Planning Board review.

I do not believe however that the authors of the 11-30-11 amendment to the Zoning Code intended such a convoluted and hyper-technical legal construct. Rather, they used the word "actions" in section 325-17.1(D)(1) in its ordinary sense, and not as the defined term set forth in 325-42. I say this, because, absent the further insertion of the words "or events," if "actions" meant as defined in 325-42, then the provisions of the first paragraph of 325-17.1(D) would be largely eviscerated. That paragraph states that no improvement shall be "constructed, altered, paved, improved or rebuilt in whole or in part." Yet if Minor Actions are not subject to Planning Board review, arguably entire structures could be replaced or rebuilt of any size, if in kind, and any new structure added up to 4,000 square feet if consistent with local land use controls. In short, if actions meant "Actions" as defined in 325-42, the two

provisions are in great tension with each other, with the Zoning Code at war with itself.

The canons of textual interpretation require that an effort be made to harmonize the text (McKinney's Statutes section 98), give all provisions seem use and meaning rather than rendered as mere surplusage (McKinney's Statutes section 144), avoid absurd results where possible (McKinney's Statutes section 143), and as noted above, deem the particular provision as overriding the general provision where they are inconsistent (McKinney's Statutes section 238). Applying these canons of interpretation, it should first be noted that the first paragraph of the section 325-42 definitions states that such definitions do not apply where it is expressly stated that they do not apply. The use of the term "actions" in 325-17.1(D) refers to the actions "specified in Subsection D above," and not to the definitions. That in my opinion is a sufficient statement that the definitional meaning of actions is inapplicable, since the actions in subsection D above are inconsistent with the definition of "actions" in 325-42. Subsection D states that no building shall be erected or any improvement altered, improved, or rebuilt, while the defined term action allows brand new building of 4000 square feet to be built, if consistent with land use controls, and anything to be replaced or rebuilt. The two provisions are totally inconsistent, at least facially.

So why did the 11-30-11 amendment to the Zoning Code adopt the definition of "action" and "minor action?" What force and effect can be given to the defined term "Actions," so that it is not mere surplusage? A review of the entire amendment provides the answer in my opinion. Section 325-6 was also amended in the 11-30-11 amendment to the Zoning Code, and it states in paragraph B thereof as follows:

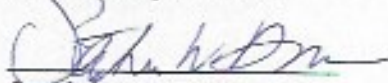
A local waterfront consistency determination in accordance with §325-35.2 shall be required in all districts located within the local waterfront revitalization area boundary as set forth on the map adopted pursuant to §325-3 of this chapter, for the undertaking of all major actions as defined in §325.42. Minor actions, as defined in §325.42, are not subject to local waterfront consistency review.

The definitions of Action, Major Action and Minor Actions were adopted to exempt Minor Actions from "a local waterfront consistency determination" in general, and not to the specific matter of ongoing dock operations which is dealt with in 325-17.1. The canon of interpretation that the particular textual reference overrides the general reference applies here. This interpretation is furthered buttressed by the fact, that the only other use of the term actions in the 11-30-11 amendment are in two places: (1) 325-35.2-1 and 2, also dealing with consistency review of actions, and (2) in the definition of the term "processing," where again the use of the term actions cannot possibly mean the defined term "actions." Processing is defined as the processing, preparation and production activities associated with man-made or raw material and other manufactured items which are altered, restored or improved by the utilization of biological, chemical or physical actions." Obviously this has

nothing to do with the defined term actions, which deals with construction or other activities that change the use, appearance or condition of any resource or structure.

For the foregoing reasons, the decision of the Hudson Code Enforcement Officer's citation of Colarusso's unilateral construction of the steel bulkhead without Planning Board approval should be upheld.

Dated: May 9, 2017



Stephen W. Dunn
Member of the Hudson
Zoning Board of Appeals