

CITY OF HUDSON, NEW YORK
ZONING BOARD OF APPEALS

In re: A. Colarusso & Son, Inc.

Commercial Dock
South Front Street
Hudson, New York
Tax ID# 109.15-1-1

**APPEAL OF DEPARTMENT OF CODE
ENFORCEMENT ORDER TO REMEDY
Dated January 24, 2017**

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I. PRELIMINARY STATEMENT

A. Colarusso & Son, Inc. (the "Company") operates and maintains a commercial dock for the transport and shipment of goods and raw materials, including loading and unloading facilities, and storage of such goods and raw materials. This commercial dock is a fully permitted and lawful use in the Core Riverfront CR District. City of Hudson Code, Section 325-17.1(D)(1).

The Company has maintained continuous use and maintenance of the commercial dock since purchasing the parcel on October 28, 2014.

As discussed more fully below, the Company completed an Erosion Repair Project to control erosion in to the Hudson River. The Project was done months ago and was fully permitted by Federal and State officials, including a gamut of public notice and comment periods in compliance with the National Environmental Policy Act ("NEPA") and the State Environmental Quality Review Act ("SEQRA"). The City of Hudson, which received direct notice, did not comment on the Federal and State permits for the Erosion Repair Project. The Department of Code Enforcement reviewed the Erosion Repair Project during its implementation, without comment, demand, a work stop order or any suggestion that a local permit was needed. The Company completed the repairs in accordance with all permits.

Now, on January 24, 2017, the Department of Code Enforcement mailed to the Company an "Order to Remedy" ("Order", attached as Exhibit A to the accompanying Affidavit of J.R. Heffner), directing the Company to appear for site plan review by the City of Hudson Planning Board ("Board"). The Order arbitrarily directs Board Review of only a segment of the Erosion Repair Project, which armored a total of 245 linear feet of the waterfront dock bank, in the best interest of the environment. The Order is directed only at a 75-foot retaining wall along the non-working, northern edge of the commercial dock that abuts a shallow, narrow inlet. The Order does not mention the 170-feet of stone armoring that was part of the Project. The Company now appeals the Order, because the Order misinterprets the law.

II. THIS APPELLATE BODY HAS JURISDICTION TO REVIEW THE ORDER TO REMEDY BECAUSE IT IS AN INTERPRETATION OF THE HUDSON CITY CODE.

This Board of Appeals has jurisdiction to review the underlying Order to Remedy. In essence, the ZBA has jurisdiction to issue a second opinion about the correctness of the Order to Remedy in interpreting the City Code to direct the Company to seek conditional use approval and site plan approval for the repairs from the Planning Board. Specifically, the Zoning Board of Appeal enabling legislation provides:

The {ZBA} may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, interpretation or determination appealed from and shall make such order, requirement, decision, interpretation or determination as in its opinion ought to have been made in the matter by the Administrative Official charged with the enforcement of such ordinance or local law and to that end shall have the powers of the Administrative Official from whose order, requirement, decision, interpretation or determination the appeal is taken.

General City Law (GCL) § 81-b(2).

Since the Company is aggrieved by the Order to Remedy, it has standing to seek reversal by this Board of the Order to Remedy, which misinterprets the Code. GCL § 81-a(4).

III. THE FULLY PERMITTED HISTORY OF THE EROSION REPAIR PROJECT

The Site Plan for the Company's commercial dock operation is fully set forth in professional drawings attached to the Company's joint permit application to the State and Federal governments, which shows the dock after the Erosion Repair Project, a portion of which is the subject of the Order. Heffner Aff., Ex. B. The Company has not altered, amended or revised the Site Plan. The Company has no new buildings and no new structures at the dock. The Company has made no alterations to the dimensions of the commercial dock.

At the time the Company acquired the commercial dock, its condition reflected deferred maintenance by prior owners. Heavy erosion of the dock's river edges and banks had occurred and the old wooden bulkhead on the western edge had been severely eroded. Storms and ice against the crumbling bulkhead on the northern, non-working edge of the commercial dock had pulled soil, gravel, wood, concrete and asphalt paving into the Hudson River. This degraded the quality of the adjacent waters and was unsafe to recreational boaters and anglers along the inlet. The Company's health, safety and compliance policies adhere to ordinary maintenance and repair of infrastructure. Thus, the Company incurred the expense and pursued the lengthy process of securing all necessary permits for the Erosion Repair Project only, a portion of which is at issue in this proceeding.

Specifically, the deteriorating 75-foot section of the north side retaining wall/bulkhead of the commercial dock previously was poorly repaired with concrete on top of an old wood bulkhead, in a manner that was inferior to the approximately 40-foot section of the retaining wall that is on the western end, which is steel. This caused holes and depressions in the dock where soil, rock, asphalt, wood and concrete were eroding into the river. See pre-existing photographs

Heffner Aff., Ex. B, pp. 7, 8; and Heflner Aff., ¶ 8 and Ex. C; see DEC Project Map at Heflner Aff., Ex. E, p.8.

The Company even invested in a sturgeon habitat assessment in the nearshore areas of the Erosion Repair Project to assure the protection of fish habitat in implementing the Erosion Repair Project. Heflner Aff., ¶ 9 and Ex. D.

A. The Details Of The Erosion Repair Project, Including The Federal And State Permits

Best management practices along dynamic bodies of water, such as the Hudson River, demand an armored edge where the upland is actively used. The City of Hudson parklands to the north of the Company's commercial dock have been fully armored in many places, including the southern edge of the park along the shallow inlet that separates the park from the commercial dock. The Company set about to design and obtains approvals for erosion repairs, similar to those implemented at the waterfront park. The repairs to the commercial dock were undertaken so that soils, gravel, paving, goods and raw materials on site are protected from erosion and degradation of water quality, and to eliminate threats to public safety.

The northern side of the dock's waterfront edge is a low retaining wall, which serves as armor against erosion in the same manner as the rip rap placed by the Company for 170 feet along the western edge of the dock. Only about half of the retaining wall was repaired in implementation of the company's Erosion Repair Project as the western section of the wall is steel. The retaining wall is along the side of a narrow, shallow inlet that is only about 25 feet wide in which the water is only a few feet deep. The low retaining wall, which does not exceed the working surface of the dock, cannot be used for commercial or industrial purposes because of the very shallow conditions of the narrow inlet. The shallow waters are sometimes paddled by

recreational boaters, so the repairs were made in the interest of public safety. Thus, the retaining wall at issue in this proceeding did not enhance commercial use of the site.

1. The New York State Department of Environmental Conservation ("DEC") State Permit

The DEC Stream Disturbance Permit and Water Quality Certificate for the Erosion Repair Project is clearly a permit for repairs. See Heffner Aff. ¶ 10, Ex. E. As stated, **"This permit authorizes stabilization of 170 feet of shoreline and repair of 75 feet of side berth bulkhead on the Hudson River in the City of Hudson."** *Id.*, p. 1 (emphasis added). DEC's state-generated "Project Location Map", dated August 7, 2015, labels the Erosion Repair Project, **"A. Colarusso & Son Property, Hudson Dock Erosion Repairs"**. *Id.* p. 8 (emphasis added). For these reasons, there is no factual basis in the record to describe the Erosion Repair Project as anything other than ordinary maintenance and repair.

Although DEC sometimes refers to the north side of the commercial dock as a "side berth", (Heffner Aff ¶ 10; Ex. E, p.1), it cannot function as such. The inlet is only a few feet deep and only about 25 feet wide, so it has no commercial use, and the low 75 feet of bulkhead cannot function as a "side berth".

2. The U.S. Army Corps of Engineers ("ACOE") Permit

The federal permit granted for the Erosion Repair Project by the United States Army Corps of Engineers, dated July 18, 2016, was issued upon full notice to the City of Hudson and it is consistent with the DEC permit. See Heffner Aff., ¶ 11, Ex. F, p.2.

3. The Department of State Findings

The Department of State, which oversees all permit requirements for coastal zones, determined that no permit was required for the Erosion Repair Project because it was entirely consistent with the Coastal Zone Management Act. See Heffner Aff., Ex. B, p. 51; Ex. G.

B. The City Of Hudson Was Fully Informed Of The Erosion Repair Project Before It Was Undertaken, So It Is Now Barred From Taking Action

Prior to issuance of the Federal permit, the ACOE followed lawful procedure under NEPA and provided an opportunity for public comment, including any comment that might be made by any Department or Board in the City of Hudson.

The New York State Department of Environmental Conservation followed lawful procedure under SEQRA, including an opportunity for public review and comment of the State permit related to the Erosion Repair Project.

The ACOE communicated directly with the City of Hudson on this matter as early as September 9, 2015, Heffner Aff., Ex. B, pp. 10-12. DEC issued a Notice of Complete Application concerning the shoreline and bulkhead repairs on October 16, 2015, which was duly published in the Hudson Register Star during the week of October 19, 2015. Heffner Aff., Ex. B, pp. 26-27. Thereafter, the ACOE copied the City on its November 25, 2015 correspondence concerning the proposed federal permit. Heffner Aff. Ex. B, pp. 31-32. Later, the ACOE also copied the City again when the ACOE issued a Notice to proceed with the repairs on July 18, 2016. Heffner Aff. Ex. B, pp. 53-54. DEC then issued the coordinated permit in accordance with SEQRA on September 2, 2016. On September 15, 2016 DEC summarized and responded to fifty (50) public comments on the coordinated permit for the Erosion Repair Project and copied two members of the Hudson Common Council as well as six members of the South Bay Task Force. Heffner Aff. Ex. B, pp. 68-70. In response to comments, DEC indicated that all of the repairs were necessary to protect the environment. Specifically, DEC determined on September 15, 2016 that "The repairs are necessary to prevent further damage" to the shoreline (emphasis added). Heffner Aff., Ex. B, p. 69.

IV. THE ORDER VIOLATES THE LAW IN DIRECTING BOARD REVIEW OF A MINOR ACTION

There can be no doubt that the fully permitted Erosion Repair Project was a "Minor Action" that is not subject to Planning Board review. The City of Hudson Code provides that the Company's use of its commercial dock is a fully permissible use for all 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. Moreover, the Company's commercial dock operation:

may continue to operate as a non-conforming use and until such time as one or more of the **actions** or events specified in subsection D above, is proposed to be undertaken. (emphasis added)¹

City of Hudson Code, § 325-17.1(D)(1). Further, Subsection D lists a number of improvements that are triggering "Actions".

The fundamental misinterpretation of the law at the core of the Order relates to categorizing the Erosion Repair Project as an "Action". It is not. The City of Hudson Code defines "Action" to exclude "Minor Actions", which are defined. City of Hudson Code § 325-42(A)(3).

A. The Erosion Repair Project Was A Repair, So It Was A Minor Action

A "Minor Action", which is specifically excluded from conditional use or Site Plan review by the Planning Board, is defined to include "maintenance or repair involving no substantial change in an existing structure or facility." City of Hudson Code § 325-42 "Minor Action" (A). Since the Company did not substantially change a structure and since DEC made a finding of fact that the Erosion Repair Project was in fact a "repair", the City cannot treat the job as an "Action".

¹ Whatever "event" means in this context, which is undefined in the Code, it cannot be read to mean "minor action", a defined term. The Order to remedy is clearly not about a concert, wedding, public gathering or other "event".

B. Whether The Repaired Bulkhead Is Regarded As A Replacement, Rehabilitation, Reconstruction Or Repair, It Is Still A Minor Action That Is Not Subject To Planning Board Jurisdiction

The definition of "Minor Action" under the Hudson City Code also includes:

Replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site, including upgrading buildings to meet building or fire codes, unless such action meets or exceeds any of the thresholds in 6 NYCRR Part 617.4(b) and except for structures in areas designed by the Coastal Erosion Hazard Area (CEHA) Law where structures may not be replaced, rehabilitated or reconstructed without a permit.

Hudson City Code § 325-42. "Minor Action", (B)

The Company's work on erosion protection was termed a "repair" by the New York State Department of Environmental Conservation. Even if the Erosion Repair Project is regarded as a "replacement, rehabilitation or reconstruction", it is still a Minor Action, as defined by the City Code because 6 NYCRR Part 617.4(b) relates only to very large projects termed "Type 1" actions under SEQRA and the Department of State made a determination that no permit of any kind was required. The New York State Department of State administers the Coastal Erosion Hazard Area Law (CEHA), and determined that no permit was required under that law. For these reasons, the Erosion Repair Project was a Minor Action under the second definition of Minor Action in the City Code.

C. The Bulkhead Repair Project Is Defined As A Minor Action, Far Too Small To Be Subject To Planning Board Review.

Finally, small construction projects at commercial sites are also "Minor Actions". This includes:

Construction or expansion of a primary or accessory/appurtenant non-residential structure or facility involving less than 4,000 square feet of gross floor area and not involving a change in zoning or a use variance and consistent with local land use controls, but no radio communications or microwave transmission facilities;

Hudson City Code § 325-42 "Minor Action" (F)²

Clearly, the Company's erosion repair project was fewer than 4,000 square feet because the bulkhead work was only 75 feet long and a few feet wide.

The Order to Remedy is fatally defective in identifying the *de minimis* bulkhead repair as "action" under City Law.

Thus, the Erosion Repair Project falls solidly within three of the definitions of "Minor Action" under City Law.

D. The Erosion Repair Project Was A Minor Action Because No Improvements, Enhancements, Or Changes In Use Were Made

The Company made no substantial changes in any existing structure or facility at the commercial dock. The repair used sound environmental planning and construction that was fully permitted by Federal and State officials, on notice to the City, which failed to comment. The repair of the dock's riverside edge, to protect against erosion and as approved by all environmental authorities, did not alter the site plan or change any dimension of the dock. The 75 foot bulkhead repair is the same height and length as the bulkhead was prior to the necessary repairs. Since the northern edge of the commercial dock is not a working edge in any event, it certainly did not change the use or expand the facility or make any change to any existing structure or facility of any significance. Just as the Company has a program of maintenance and repair of the paving and other existing structures within the commercial loading dock, the work that was done to implement the Erosion Repair Project is fully within the definition of a "Minor

² Of course, "in kind" means "in the same way; with something similar" ("in kind", Oxford English Dictionary). The bulkhead, as repaired, is "in kind" because it is in the same place; it is still a bulkhead and it is similar, but stronger, than the eroding bulkhead. Certainly, it is absurd to wander from the English dictionary and define "in kind" as the exact engineering materials that existed before, prior to repairs. The eroded bulkhead had not been engineered at all. It was cracked and eroded concrete poured on top of an old wooden bulkhead and it was structurally unsound. Since all permit applications to the New York State Department of Environmental Conservation and the United States Army Corps of Engineers must be supported by engineering drawings, the Company never could have applied for a "concrete on wood" bulkhead, much less obtain a permit for something as unsound to function as erosion control. For these reasons, the erosion repair project falls squarely within the definition of Minor Action (F).

Action" and thus, not subject to Conditional Use Review or Site Plan Review under Section 325 of the Code.

Moreover, consistency review with the Local Waterfront Revitalization Program (LWRP) is not triggered for "Minor Actions" such as repairs. See Hudson City Code § 325-35.2.

The Coastal Consistency Review Board (CCRB) "shall coordinate" review with the ACOE when the ACOE is taking "action". The CCRB did not respond to the ACOE's letter to the City regarding the Erosion Repair Project federal Permit, dated July 18, 2016, effectively agreeing with the terms of the minor federal permit. This eight-month old federal permit, issued upon notice to the City of Hudson, cannot be revisited.

In any event, the fully permitted Erosion Repair Project furthered the goals of the City of Hudson LWRP policies in repairing a deteriorated commercial waterfront property, retaining the dock's water-dependent use, protecting fish and wildlife habitats and reducing erosion. City of Hudson Code § 325-35.2(b)(8).

V. THE ORDER MISINTERPRETS THE CITY OF HUDSON CODE IN FAILING TO RECOGNIZE THAT THE EROSION REPAIR PROJECT WAS ENTIRELY CONSISTENT WITH ARTICLE VI OF THE CODE

The City of Hudson Code § 325-29(A) guarantees that the Company may continue to use the commercial dock "indefinitely" as long as the dock is not "enlarged, extended, or placed on a different portion" of the waterfront acreage. This provision is entirely consistent with the definition of "Minor Action" set forth above. Thus, conditional use review or site plan review by the Board is not triggered because the Company did not make the dock any bigger in implementing the Erosion Repair Project.

Article VI of the Code then ties the other Code provisions together in stating, in no uncertain terms, that "nothing in this article shall be deemed to prevent normal maintenance and

repair of any building.” City of Hudson Code § 325-29(E). The term “building” includes the term “structure”. City of Hudson Code § 325-42.

VI. THE COMPANY'S USE AND MAINTENANCE OF THE COMMERCIAL DOCK IS CONSISTENT WITH THE PURPOSES OF THE CORE RIVERFRONT C-R DISTRICT

Pursuant to the City of Hudson Code § 325-17.1(A), the C-R District was established to encourage the existing “mixture of compatible uses at the riverfront” including the Company’s commercial “access to the riverfront for water dependent transportation”. City of Hudson Code § 325-17.1(A).

The District requirements specifically embrace and acknowledge the Company commercial dock operations.

The City of Hudson Code at § 325-35.2 also provides that consistency review with a local waterfront revitalization program does not apply to minor actions.

VII. THE COMPANY'S COMPLETION OF THE EROSION REPAIR PROJECT GRANTS IT A CONSTITUTIONALLY PROTECTED, VESTED RIGHT

The City Of Hudson Cannot Infringe Upon The Company’s Vested Property Right

The Company holds a constitutionally protected right to usage of its land and loading dock in furtherance of its mining operation. The “prior conforming uses in existence when a zoning ordinance is adopted are, generally, constitutionally protected even though an ordinance may explicitly prohibit such activity” and “property owners engaging in a particular activity may have a secured ‘vested right’ to use their land accordingly.” Buffalo Crushed Stone Inc. v. Town of Cheektowaga, 13 N.Y.3d 88 (2009). Here, the Company’s longstanding use of the dock, and the Code provisions protecting this use establish a vested right, including a vested right in the Erosion Repair Project.

Since the cost of the Erosion Repair Project was substantial, the Company has a vested right in the Project just as it has a vested right in the Commercial dock itself. cf. People v. Miller, 304 N.Y. 105 (1952) (hobby interests not protected, but business interests are). *See, Glacial Aggregates LLC v. Town of Yorkshire*, 14 N.Y.3d 127 (2010). The City cannot now undo repairs made by the Company, or somehow use the fact that minor repairs were made to regulate the intensity of use of the dock.

VIII. THE ORDER IS NOT IN ACCORDANCE WITH LAWFUL PROCEDURE BECAUSE THE PLANNING BOARD CANNOT REVISIT THE ENVIRONMENTAL BENEFIT AND PERMIT CONDITIONS ESTABLISHED BY THE FEDERAL AND STATE GOVERNMENT

The City of Hudson declined to comment during the public comment period on the Erosion Repair Project. The Department of Code Enforcement reviewed the job as it was commenced and agreed that it was a nonjurisdictional repair. The Federal and State Permit, which granted approval to the Company to implement the Erosion Repair Project, cannot now be amended, undone or revoked. Having fully followed NEPA and SEQRA, the Board lacks jurisdiction to recommence permit review.

IX. COLARUSSO'S VOLUNTARY EROSION REPAIR PROJECT WAS IN THE BEST INTEREST OF THE SAFETY AND WELFARE OF THE COMMUNITY

As expressed in the Hudson City Code and the LWRP, the land use challenge for the community involves balancing the industrial and recreational uses of the waterfront in a manner that allows both water dependent uses to thrive.

Thanks to the growth and vision of the Hudson Sloop Club, Inc. (HSC), a 501(c)3 charitable and educational organization focusing on public boating and education in Hudson, more and more people, including youth, are enjoying the Hudson River in small watercraft.

Photographs of HSC's events, classes and gatherings show recreational uses of the inlet with the commercial dock and barges in the background. See hudsonsloopclub.org. The new Everett Neck Estuary Education Center will be built this year on the waterfront near the commercial dock.

The shallow, narrow inlet, just north of the commercial dock and repaired bulkhead, is used by recreational boaters and anglers in small watercraft. From Colarusso's perspective, the fragile, crumbling concrete and eroded areas, showing washout holes from the dock, under the concrete and through the rotting log substrate, was clearly untenable and unsafe to boaters and anglers. The Company undertook the repairs without any obligation to do so, but in the best interest of preventing a catastrophic collapse of the bulkhead in to the recreational waters.

For these reasons, the Erosion Repair Project was clearly in the best interests of the safety and welfare of the community.

CONCLUSION

Fundamentally, the Order to Remedy is unlawful because it misinterprets the Hudson City Code with respect to local permit jurisdiction over repairs at the dock.

The Order is also deeply flawed because it is only rational and reasonable if there is something to "remedy" at the dock. There is nothing of the sort, so the Order is irrational.

The repairs cannot be undone or changed or altered without violating federal and state environmental permits. There is no improvement to review, no environmental analysis to conduct, no new site plan to study or other reasonable, lawful task for the Board to undertake.

For all of these reasons, the Order to Remedy should be deemed null and void.

Respectfully submitted,

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