

**TO: Sand Lake Town Board**  
**FROM: Fred Erickson, Chairman, Planning Oversight Committee**  
**RE: Revised Zoning Code**  
**DATE: January 10, 2012**

The Town Board has requested that the Planning Oversight Committee (POC) review and analyze the new Zoning Code adopted in 2010 (and subsequently invalidated by the court in the case, Troy Sand & Gravel, Inc. v Town of Sand Lake), and to make recommendations to the Board as to whether the Code should be readopted by the Board 'as is,' or with changes. In conducting such review, the POC paid particular attention to various issues raised in the lawsuit so that should the Board determine to re-enact the Code in substantially the same form, such action would be defensible in any future litigation.

The POC addressed this matter at three separate meetings over the course of more than six hours. Present at each of the meetings were various members of the public, who were allowed to address and make arguments to the Committee. In particular, representatives of Troy Sand & Gravel and their attorneys were present at each of the meetings, and provided extensive commentary. At the final meeting held on December 7, after additional comments and arguments by TS&G and the public, the members of the Committee discussed each of the issues raised and tried to come to a consensus as to each. What follows herein is a brief synopsis of the issues discussed, the Committee's analysis, and the final recommendations of the Committee to the Board.

1. Under current zoning, the southerly portion of TS&G's mine is zoned Commercial Excavation (CE), and the northerly portion is zoned residential. As to the portion zoned residential, TS&G has 'grandfathered' rights to mine, and although the exact extent of such grandfathered rights is presently undetermined, it is possible that such rights extend to other lands owned by TS&G in that vicinity. Under the new zoning code the portion zoned CE would be changed to residential with a Planned Development District (PDD) overlay. The portion zoned residential would remain residential. In either case, TS&G's right to mine their holdings would continue as a prior non-conforming (grandfathered) use. The Comprehensive Plan/GEIS (CP/GEIS) adopted by the Town in 2006 found that the CE portion should be rezoned residential with a PDD overlay, which is exactly what the new zoning code calls for. Thus, the new zoning code conforms with the findings, recommendations and goals of the CP/GEIS. Moreover, since TS&G can continue for the foreseeable future to mine and conduct its other grandfathered activities, including activities conducted as ancillary to mining, there are no significant environmental impacts associated with this re-zoning action. That being so, and considering that additional sources of aggregate are available in the AR-2 zone (see paragraph 2 below), the POC also believes that the proposed new zoning code conforms with Rensselaer County Master Plan Policy #16, pertaining to the advisability of treating aggregate resources as a vital resource and not as simply a nuisance to be zoned out of existence. Local availability of aggregate materials will not be impacted, nor will there be any

increases in greenhouse gasses resulting from the necessity to truck such materials long distances as would be the case if mining and related activities at the site were actually banned. The underlying zoning classification of residential is warranted given the proximity of the site to the core of the West Sand Lake hamlet area, and the PDD overlay provides the owners of the property with a wide range of other possible uses should they ever determine to use the property for some purpose other than mining. It is therefore the recommendation of the Committee that no change be made to the new code regarding the zoning classification of the lands owned by TS&G.

2. Under the current zoning code, mining is permitted by Special Exception in the whole of the Agricultural (A-1) district, which is quite large and comprises most of the western portion of the Town. Currently, the Hoffay property in that district is being mined. Some of the properties adjacent to the Hoffay property also contain gravel reserves. The new zoning code eliminates mining as a permitted use in most of what is now the A-1 zone, but creates a new zoning district, AR-2, comprised of several hundred acres located in the current A-1 zone, in which mining will continue to be allowed by special permit. This encompasses the Hoffay property and several adjacent parcels. The owners of those parcels specifically requested that they continue to be allowed to mine. However, the proposed AR-2 zone does not encompass the entirety of the parcels adjacent to Hoffay's, a portion of each was left as either Agricultural/Residential or Residential so as to provide a buffer between any mining operations and nearby homes. With respect to this general area of Town (the current A-1 district), the CP/GEIS provides that mining could continue by special permit but that 'performance criteria' could be developed to better address impacts. The proposed new zoning code does allow mining to continue, although in an area considerably smaller than the existing A-1 zone (the new AR-2 zone). The new zoning code however does not contain any 'performance criteria' as it was the judgment of the Zoning Revision Committee (now inactive) that imposition of such criteria could run afoul of the NYS Mined Land Reclamation Law. The MLRL imposes severe limits on municipalities' regulation of mining activities. Regardless of the lack of such performance criteria as recommended in the CP/GEIS, it is the judgment of the POC that creation of the AR-2 zone, where mining will be allowed to continue by special permit, is generally in accord with the CP/GEIS, and that in any event, allowing mining of the properties in the AR-2 zone will not cause any significant environmental impacts. It is therefore the recommendation of the POC that the new zoning code be readopted without any changes to the size and extent of the AR-2 zone or the rules regulating mining in that zone. Any issues concerning access routes for removal of material from the properties in the AR-2 zone adjacent to Hoffay's can be addressed at a later date.
3. TS&G claimed in its lawsuit that the CP/GEIS stated that one of its goals was to enhance opportunities for affordable housing, but that the new zoning code fails to do so and therefore does not provide for a 'properly balanced and well ordered community' taking into account regional as well as local needs. While it is true

that the new zoning code does not make specific mention of the manner in which affordable housing will be promoted, it does in fact contain a number of changes from current zoning which will make affordable housing more economically feasible. This was addressed in the Town's brief filed in the lawsuit, which stated as follows:

- “In terms of zoning, the principal manner in which municipalities can provide for low income and affordable housing is by increases in allowable densities. A town cannot direct a developer to build low income housing, but by reducing lot sizes and allowing increased density, such development can be encouraged as the size of required lots has a direct and substantial impact upon the ultimate cost of a dwelling and the tax dollars necessary to provide essential public services, such as roads and sewers. In short, the more dwellings that can fit on a given parcel of land, the lower the cost to develop each individual dwelling unit, and the lower the cost to provide roads and sewers to a given number of families. The net effect is more affordable housing for persons of lesser means.
- The new zoning code encourages development of low income and affordable housing as follows: First, the minimum lot size for single family dwellings has been substantially reduced in a significant portion of the town. Formerly, the minimum lot size for a single family home was one acre in all areas of the town, including the hamlet areas, except the eastern portion (R-2 zone), a forested and mountainous area where two acres were required. A two family home required one and a quarter acres (3 acres in the R-2) zone. Under the new zoning code, in the Hamlet and Mixed Use zones, lot sizes can be as small as 10,000 square feet for one or two family homes. See, Dimensional Table at 250-19 (Attachment 2 of the new zoning law as codified). This will enable further subdivision and/or development of even small lots in the hamlet areas to allow for construction of more affordable homes on smaller lots which are more cheaply served by municipal services. Multifamily dwellings (three or more units in one building) are allowed by conversion of existing dwellings in all districts if there is enough room on the lot for necessary expansion of septic systems, and new multifamily units (apartments) can be constructed in the hamlet areas at an approximate density of 2-4 units per acre. See generally, Zoning Code 250-38. Of course, in the hamlet areas most of the land is currently developed, and so in the outlying residential, rural and agricultural districts, larger lot sizes for multifamily dwellings are required, but the code sets no absolute limit on the total number of dwelling units that could be constructed on any particular lot meeting the minimum size

requirement, provided water, sewerage, parking and other infrastructure requirements could be met. Development of such more rural parcels for multifamily dwellings would most likely proceed as Planned Development Districts.

- Secondly, the rules governing Planned Development Districts (PDD) likewise serve to encourage development of low income and affordable housing. See generally Zoning Code 250-88 et. seq. Under “Objectives” it is stated that all approved PDD’s shall “A. Produce a development pattern in harmony with the land use intensity, transportation facilities and community facilities objectives of the Comprehensive Plan.” This would include, *inter alia*, the affordable and low income housing goals as set forth in the Plan. Subsection E states a PDD must “Use land efficiently, resulting in a smaller networks of streets and utilities and thereby lower development and maintenance costs.” Subsection F: “If residential in land use, provide a maximum choice in occupancy tenure (e.g., individual ownership, leaseholds, and condominiums), type of housing (e.g., detached house, townhouse, garden apartments), lot size and community facilities.” Furthermore, with a PDD, density can exceed by 25% that allowed by the underlying zoning, Zoning Code 250-90(E). Given these provisions, it is apparent that by utilizing a PDD a developer can build a variety of housing types on lots smaller than normally allowed.”

In sum, the POC believes that the provisions of the proposed new zoning code make adequate provision for the development of affordable housing and is therefore in conformance with the goals and objectives of the CP/GEIS; and further, that adoption of those provisions of the proposed code outlined above that serve to encourage affordable housing would not cause any significant environmental impact. The POC does believe, however, that section 250-38 of the new code pertaining to multi-family dwellings could be clarified somewhat, but this could be accomplished afterwards with input from the Town Planning Board.

4. Section 250-10 of the new code sets forth the various zoning districts and the purpose of each. Subsection C addresses the uses allowed in the AR-2 zone, including commercial extraction, and paragraph 1 thereof states “This district is not intended to promote or encourage higher-density mining activities such as quarrying, deep-rock excavation, or blasting.” In its lawsuit TS&G claimed that this language is an attempt by the Town to regulate mining activities and not just where mines can be located, and therefore runs afoul of the Mined Land Reclamation Law. It was the consensus of the POC, which includes as members several members of the now defunct Zoning Revision Commission, that this language was included to establish the intent of the Town with regard to mining uses in the AR-2 zone so that as special permits and DEC permits are considered

in the future it is understood the Town and nearby residents would strongly object due to the increased level of offensive activity that quarrying would entail. However, it was also recognized by the POC that this language by itself, being a mere statement of intent, would not prevent the DEC from granting such a permit. Discussion was had as to whether this language should be removed or left in, but there was no firm consensus either way in recognition that the language does not impose any firm restriction on such activities. Representatives of TS&G present at the meetings continued to object to retention of this language in the code. The Town Board will need to determine whether to leave it in or take it out, with the understanding that even if left in, it will not by its own terms prevent the owners of land in the AR-2 zone from applying to DEC for a permit to engage in the disfavored activities, or DEC from granting such a permit.

5. Article XII of the new zoning code addresses nonconforming uses, structures and lots. Section 250-121B of this Article states that a non-conforming use may not be ‘expanded or enlarged beyond the existing area of use,’ and in its lawsuit TS&G claimed that this language could be used by the Town to prevent them from expanding the area of their mine to previously un-mined land, in contravention of various court cases that recognize that mining is a special kind of use that must expand, or cease. Under current zoning, Article XXII governs non-conforming uses. While the language of the current code is not identical to the language of the new code, the effect of each is the same: non-conforming uses may not be expanded or enlarged. Most if not all zoning codes contain similar language. Regardless of the specific language used, the courts have uniformly recognized the uniqueness of mining, and have found that if the owner of land containing mineral reserves has manifested sufficient intent to mine a parcel prior to the imposition of restrictions on mining, that the miner has a ‘grandfathered’ right to mine that property notwithstanding that it is not being actively mined at the time such restrictions are imposed. Of course, an issue can always be raised as to what is the precise geographic extent of the lands that have been grandfathered, but there is nothing in the language of the new code or in the existing code that would dictate a result, and the answer would depend upon the facts and circumstances of each case. The POC is therefore of the opinion that the language objected to should be left as is. The CP/GEIS specifically states that mining could continue in areas rezoned from CE to residential, and therefore the language of section 250-121B is in conformance with the Plan. Moreover, since mining can continue in the former CE zone and in any other area which TS&G has grandfathered rights to mine, inclusion of such language in the new code will not cause any significant environmental impacts.
6. In its lawsuit TS&G also claimed that the Town failed to fully comply with the requirements of the General Municipal Law regarding referral of certain zoning actions to the Rensselaer County Department of Planning and Economic Development. In moving forward with re-adoption of a new zoning code, the Town Board must ensure that it is in full compliance with the GML.

7. In addition to the matters raised by TS&G in its lawsuit, another issue was raised by a Town resident: a lot on Teal Road near the intersection with Route 43/66 is bisected by the boundary line between the Hamlet district and the Rural Residential (RR) district. The owner of the lot requested that the entire lot be included in the hamlet district as it is already occupied by two residences and is currently zoned commercial. The members of the POC agreed that the entire lot should probably be included in the hamlet district given its current use and proximity to the hamlet, but that such could be accomplished after the new zoning is put in effect.

Ultimately, adoption of a new zoning code for the Town is a legislative determination to be made by the Town Board. The POC presents this memorandum to the Board in an effort to aid it in its deliberation. The POC, having reviewed the code in its entirety in addition to those issues raised by TS&G in the lawsuit, is of the opinion that the new zoning code originally adopted in November of 2010 and subsequently invalidated by the Court, should be readopted without any changes at this time. If, once the new zoning code has been put into place, the Board wishes further input from the Planning Oversight Committee regarding possible future improvements to the code pertaining to matters addressed herein or otherwise, the Committee would be happy to oblige.