

STATE OF NEW YORK
SUPREME COURT RENSSELAER COUNTY

TROY SAND & GRAVEL CO., INC. and
BONDED CONCRETE, INC.,

Petitioners,

-against-

TOWN OF SAND LAKE and THE
TOWN BOARD OF THE TOWN OF SAND LAKE,

Respondents,

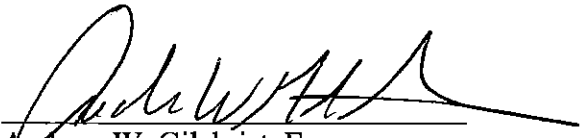
For a Judgment under Article 78 of the Civil Practice
Law and Rules.

NOTICE OF APPEAL

Index No.: 257373
RJI: 41-0815-2017
Hon. Richard J. McNally

PLEASE TAKE NOTICE, that Petitioners, TROY SAND & GRAVEL CO., INC. and BONDED CONCRETE, INC., appeal to the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, Albany, New York, from the Decision and Order/Judgment of Rensselaer County Supreme Court (Hon. Richard J. McNally, J.S.C.) dated January 31, 2019, and entered in the Rensselaer County Clerk's Office on February 19, 2019, with Notice of Entry served by regular mail on February 19, 2019. A copy of the Decision and Order/Judgment with Notice of Entry is annexed hereto as **Exhibit A**.

Dated: March 22, 2019
Troy, New York



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EXHIBIT “A”

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February 19, 2019.

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Re: Troy Sand & Gravel Co., Inc., et al. v. Town of Sand Lake, et al.; Index No:
257373, ("Proceeding #1").
William H. Hoffay, et al. v. Town of Sand Lake, et al.; Index No: 257385,
("Proceeding #2").
Rifenburg Construction, Inc. v. Town of Sand Lake, et al., Index No.: 257384,
("Proceeding #3")

Linda, Andy and Adam:

Enclosed for service on you, please find the Notice of Entry and the attached January 31, 2019 "DECISION and ORDER/JUDGMENT" which I filed with the Rensselaer County Clerk's Office this afternoon. If you have any questions regarding the enclosed, please feel free to call or e-mail me.

Very truly yours,

DuCHARME, CLARK & SOVERN, LLP


John B. DuCharme
JBD:nb
Enclosure

cc: Nancy Perry, Sand Lake Town Supervisor (via e-mail)

STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

In the Matter of the Application of
TROY SAND & GRAVEL CO., INC.,
and **BONDED CONCRETE, INC.,**

Petitioners,
-against-

**TOWN OF SAND LAKE, and THE TOWN
BOARD OF THE TOWN OF SAND LAKE,**

Respondents.

In the Matter of the Application of
WILLIAM H. HOFFAY, DANIEL J. HOLSER,
GREGG GARDNER, RICHARD HASTINGS,
HOFFAY FARMS, LLC, HOFFAY'S HARVEST
HOUSE, LLC, and ANTFIL S. REALTY, LLC,

Plaintiffs-Petitioners,
-against-

**TOWN OF SAND LAKE, and THE TOWN
BOARD OF THE TOWN OF SAND LAKE,**

Defendants-Respondents.

In the Matter of the Application of
RIFENBURG CONSTRUCTION, INC.,

Petitioner-Plaintiff,
-against-

**TOWN OF SAND LAKE, and THE TOWN
BOARD OF THE TOWN OF SAND LAKE,**

Respondents-Defendants.

**NOTICE OF ENTRY OF
DECISION and ORDER/
JUDGMENT**

Proceeding #1
Index No: 257373
RJI No.: 41-0815-2017
Assigned Judge:
Hon. Richard J. McNally, Jr., JSC

Proceeding #2
Index No: 257385
RJI No.: 41-0820-2017
Assigned Judge:
Hon. Richard J. McNally, Jr., JSC

Proceeding #3
Index No: 257384
RJI No.: 41-0822-2017
Assigned Judge:
Hon. Richard J. McNally, Jr., JSC

PLEASE TAKE NOTICE, that the attached is a true and accurate copy of the
“DECISION and ORDER/JUDGMENT” dated January 31, 2019, and duly entered in the
Rensselaer County Clerk’s Office on February 19, 2019.

Dated: February 19, 2019.

Respectfully submitted by:

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At a IAS Term of the Rensselaer County
Supreme Court, held in and for the County
of Rensselaer, in the City of Troy, New
York, on the 15 day of January, 2019.

PRESENT: HON. RICHARD J. MCNALLY, JR.
JUSTICE

STATE OF NEW YORK SUPREME COURT
COUNTY OF RENSSELAER

In the Matter of the Application of
TROY SAND & GRAVEL CO., INC.,
and BONDED CONCRETE, INC.

Petitioners,

-against-

TOWN OF SAND LAKE and THE TOWN
BOARD OF THE TOWN OF SAND LAKE,

Respondents.

DECISION and ORDER/
JUDGMENT
Index No. 257373

In the Matter of the Application of
WILLIAM H. HOFFAY, DANIEL J. HOLSER,
GREGG GARDNER, RICHARD HASTINGS,
HOFFAY FARMS, LLC, HOFFAY'S HARVEST
HOUSE, LLC and ANTFIL S. REALTY,

Petitioners-Plaintiffs,

-against-

TOWN OF SAND LAKE and THE TOWN
BOARD OF THE TOWN OF SAND LAKE,

Respondents-Defendants.

DECISION and ORDER/
JUDGMENT
Index No. 257385

In the Matter of the Application of
RIFENBURG CONSTRUCTION, INC.,

Petitioner-Plaintiff

-against-

DECISION and ORDER/
JUDGMENT
Index No. 257384

TOWN OF SAND LAKE and THE TOWN
BOARD OF THE TOWN OF SAND LAKE,

Respondents-Defendants.

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MCNALLY, J.

Combined petitioners-plaintiffs (“petitioners”) in this matter challenge the 2017 Zoning Law, Local Law No. 4 (“Local Law”), as adopted by respondents-defendants (“respondents”), the Town of Sand Lake and Town Board of Sand Lake. Central to the various claims posited by petitioners is that the actions taken by respondents were arbitrary and capricious or otherwise unlawful. Respondents have answered and oppose all relief requested. Thereafter, the Court heard oral argument in this matter. For the reasons stated below the petitions-complaints must be dismissed.

Standing

Initially, respondents argue petitioners lack standing to challenge the Local Law as adopted by the Town of Sand Lake. “[A] SEQRA challenger must demonstrate that it will suffer an injury that is environmental and not solely economic in nature. However, where the challenge is to the SEQRA review undertaken as part of a zoning enactment, the owner of property that is the subject of rezoning need not allege the likelihood of environmental harm. In those circumstances, the property owner has a legally cognizable interest in being assured that the town satisfied SEQRA before taking action to rezone its land” (*Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 687 [1996]) (internal quotations and citations omitted).

Petitioners Troy Sand & Gravel (“TS&G”), Bonded Concrete (“Bonded”), Hoffay¹, Gardner, Antfil S. Realty, and Rifenburg Construction have sufficiently alleged that they own property within the areas affected by the changes in zoning, as a result of the adoption of the

¹ Petitioner Hoffay is also the owner/operator of Hoffay Farms, LLC and Hoffay’s Harvest House, LLC.

Local Law, and thus have standing to challenge respondents' compliance with SEQRA .

As for petitioners Holser and Hastings, neither party sufficiently states that the property they own is located within the area affected by the changes in zoning (see Holser Aff., Hastings Aff., *Piela v Van Voris*, 229 AD2d 94 [3d Dept 1997]). Likewise, neither affidavit cites a noneconomic environmental injury that falls within the zone of interest sought to be protected (*Matter of Gernatt Asphalt Prods. v Town of Sardinia*). Accordingly, the Courts finds petitioners Holser and Hastings lack standing to challenge the Town's SEQRA compliance.

In addition to the SEQRA challenge, petitioner Hoffay argues the Local Law violates certain provisions of the Agricultural and Markets Law § 25-AA (Third Cause of Action). Petitioner Hoffay specifically challenges the per acre and set back requirements for Farm Stands; accessory uses; minimum acreage requirements for maintaining domestic farm animals such as goats, rabbits, chickens, and ducks; and per acre requirements for maintaining larger domestic animals such as horses, sheep, goats, and pigs. Petitioner Hoffay contends the Local Law unreasonably restricts and/or regulates farming operations in the Town.

"In land use matters . . . the plaintiff, *for standing purposes*, must show that it would suffer direct harm, [or] injury that is in some way different from that of the public at large" (*Soc'y of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 774 [1991]) (emphasis added).

Here, petitioner Hoffay fails to allege any "different" injury that would cause him "direct harm". In fact, the local law at issue is drafted such that owners and operators of properties (like Hoffay's) whose principal use is farming are exempt from the restrictions cited above. Accordingly, petitioner Hoffay lacks standing to challenge the Local Law and its alleged

violations of the Agricultural and Markets Law.

SEQRA Review Process

Turning now to the challenges to the SEQRA review process conducted with the adoption of the Local Law. A court's review is limited to whether the SEQRA determination was made in violation of lawful procedure, was affected by an error of law, or was otherwise arbitrary and capricious. The relevant question before the court is "whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination" (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986]).

The SEQRA requires that social, economic and environmental factors be considered in reaching decisions on proposed activities. Environmental Conservation Law § 8-0103 [7]. SEQRA insures that agency decision makers, enlightened by public comment where appropriate, will identify and focus attention on any environmental impact of a proposed action (*Matter of Jackson*, 67 NY2d at pp. 414-415). Virtually any action taken by the State or local government is subject to SEQRA. If more than one governmental agency is involved, a threshold determination will be which agency shall be considered the "Lead Agency". In this case, the only agency involved was the Sand Lake Town Board, thus the Board rightfully acted as Lead Agency and undertook the second step in the SEQRA process, an Environmental Assessment.

Actions under SEQRA are divided into two categories. Type I actions are those that will presumptively have a significant adverse impact on the environment whereas Type II actions have been determined not to have a significant impact on the environment or are otherwise

precluded from environmental review (6 NYCRR §§ 617.4, 617.5).

Here, the Board correctly determined that the proposed action was subject to SEQRA review as a Type I action, namely the enactment of a new zoning law (6 NYCRR § 617.4). The Board's assessment utilized the Full Environmental Assessment Form ("EAF") (see 6 NYCRR § 617.6 (a)(2)). Thereafter the Board, in detailed written findings, coupled with the Long Form EAF, determined the enactment of the proposed Local Law would have no adverse environmental impact and further determined there was no need for a full environmental review (Cert. Record, Volume 2, bates stamped 376-77). The Board issued a negative declaration completing the SEQRA review process (*id.*).

Substantively SEQRA requires agencies to take a "hard look" at the proposed action. This involves analyzing all the potential adverse impacts of an action. The methodology includes utilization of the long form EAF, incorporating the criteria contained in 6 NYCRR § 617.7 (c)(1)(i-xii), and any other supporting information to identify the relevant areas of environmental concern (*Gernatt Asphalt Products, Inc.*, 87 NY2d 668). Respondent has done that. The record before the Court demonstrates the Board took a "hard look" at the potential environmental impacts of the Local Law, the Board conducted a thorough and extensive environmental assessment, inviting and receiving public comment, creating an extensive record and adopting findings based upon that record, all of which clearly demonstrates that the Board went through the more extraordinary (and arguably more costly) steps of creating and adopting findings in addition to the four corners of the EAF (Cert. Record, Volume 2, bates stamped 355-391).

On May 10, 2017, the Board unanimously adopted its findings pursuant to SEQRA, as

well as the Local Law, which was then filed in the Office of the New York Department of State on May 23, 2017.

The Court finds respondents fully complied with the requirements of SEQRA and that the determinations made are not arbitrary or capricious or in violation of law. Accordingly, petitioners causes of action challenging the SEQRA review process must be dismissed.

Petitioners Troy Sand & Gravel and Bonded Concrete

As to petitioners TS&G and Bonded's arguments related to rezoning, a town's zoning determination is entitled to a strong presumption of validity; therefore, one who challenges such a determination bears a heavy burden of demonstrating, "beyond a reasonable doubt, that the determination was arbitrary and unreasonable or otherwise unlawful" (*Matter of Rotterdam Ventures, Inc. v Town Bd. of the Town of Rotterdam*, 90 AD3d 1360, 1361-1362, 935 NYS2d 698 [2011]). Generally, town land use regulations must be in compliance with a town's comprehensive plan in order to limit ad hoc or "spot" zoning, which affects the land of only a few without proper concern for the needs or design of the entire community (see *Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 685, 664 NE2d 1226, 642 NYS2d 164 [1996]).

TS&G and Bonded contend the Local Law fails to clearly place properties in zoning districts and also fails to provide clear regulatory standards for property specifically designated for commercial extraction uses within the town. The Local Law establishes a Natural Resource Extraction Overlay ("Overlay District"). "The purpose of this overlay district is to permit resource extraction locations within the Town where existing commercial resource extraction

activities are already under permit with the New York State Department of Environmental Conservation and, where applicable, the Town of Sand Lake” (Local Law section 250-10 [G] and 20-88 [A] [3]). In essence the Town has recognized these existing mines and have “grand-fathered” them into the new law. The property owned by TS&G and Bonded, currently being mined, is located in the Natural Resource Extraction Overlay District which includes, in essence, a pre-mapped PDD that is exempt from the requirements of the Natural Resource Extraction PDD.

As to future mining, the Local Law establishes the concept of a Natural Resource Extraction PDD. Respondent Town asserts there are no existing approved Natural Resource Extraction PDDs. However, as pointed out by petitioners, the 2017 Zoning Map identifies the TS&G mine (and others), as a Natural Resource Extraction PDD.² One can easily see the confusion complained about by petitioners. The Zoning Map should have designating this area as an “overlay”. The Town acknowledges the map is not clear and argues that a reading of the provisions related to the Natural Resources Overlay (Local Law 250-12 [E] and 250-88 [A] [3]) define the overlay district which exempts those operations in existence at the time of the adoption of the Local Law from the requirements of the Natural Resource Extraction PDD. Having acknowledged the confusion, and explained as such during the course of this litigation, and offering to amend the Zoning Map to clarify the Overlay District which may now be called the “Grand-Fathered Overlay Natural Resource Extraction PDD” (or not). Respondent argues that this detail is not a basis to invalidate the entire Local Law, this Court agrees (*Boni Enters.*,

² This area on the 2017 Zoning Map is designated by green stripes.

LLC v Zoning Bd. of Appeals of Clifton Park, 124 AD3d 1052 [3d Dept 2015]).

Petitioners also argue the Local Law was adopted in violation of Article 16 of the New York Town Law. New York Town Law § 272-a (10) states that a comprehensive plan shall include “the maximum intervals at which the adopted plan shall be reviewed”. New York Town Law § 272-a (11) states that all zoning law must be consistent with the municipally-adopted comprehensive plan. Petitioners assert that Town Resolution, No. 2015-06-53, adopted by the Town of Sand Lake requires an “update” to the 2006 Sand Lake Comprehensive Plan.

Despite petitioners’ statements to the contrary, the statute does not require an “update”. Only maximum intervals at which the plan shall be reviewed. Here, respondents have complied, the Board formed a Planning Oversight Committee which meets monthly to implement and review the Comprehensive Plan. In addition, the committee reports to the Town Board at public meetings several times a year and also submits an annual report.

Likewise, Town Resolution No. 2015-06-53, recommended the Comprehensive Plan be updated “every 5-10 years” but did not require an immediate update. Although the Town Board has taken steps to hire a consultant to review the 2006 Comprehensive Plan, respondents actions surrounding the process, while at the same time adopting the 2017 Zoning law, is not unlawful.

Petitioners’(Hoffay, Gardner, Antfil S₁ Realty, LLC) Remaining Claims

Petitioners Hoffay, Gardner, and Antfil raise in their First, Second, Third, Fourth, and Sixth Causes of Action the same or similar arguments to those raised by the above petitioners. For the reasons stated above those arguments fail.

Petitioners’ Hoffay, Gardner, and Antfil’s Fifth Cause of Action alleges the Local Law’s

requirement of a minimum set back of 200 feet for all commercial excavation activities (see § 250-45 (A)) preempts Mined Land Reclamation Law Under the MLRL, a municipality has the authority to enact reasonable zoning laws, even if they incidentally affect mining, provided the zoning laws at issue do not directly relate to extractive mining operations. Here, the establishment of set backs for commercial mining operation is a reasonable exercise of the Town Board's authority to create zoning laws. There is nothing in the 2017 Town Law that could be viewed as directly attempt to regulate extractive mining operations and in no way preempts ECL § 23-2711 (3) (a) (i).

Petitioner's (Rifenburg Construction) Remaining Claims

Rifenburg raises in their Second, Third, Fourth Fifth, Sixth, and Seventh Causes of Action same or similar arguments to those raised by the above petitioners. For the reasons stated above those arguments fail.

Rifenburg, in its First Cause of Action, argues that the Local Law limits the use of Town roads for a proposed Natural Resource PDD. The Vehicle and Traffic Law prohibits municipalities from enacting laws "in conflict with" the Vehicle and Traffic Law unless authorized by statute (VTL § 1600). However, a Town Board has the statutory authority to pass a Local Law to "[e]xclude trucks . . . from highways specified by such town board." (VTL § 1660 (a) (17)). Contrary to petitioner's argument, requiring all applicants for a proposed Natural Resource Extraction PDD to demonstrate in their proposed application that they have ingress and egress from the proposed site by County and/or state roads is a reasonable exercise of the Board's authority.

The Court has reviewed the parties remaining contentions and concludes they either lack merit or are unpersuasive given the Court's determination (*Hubbard v County of Madison*, 71 AD3d 1313 [3d Dept 2010]). The Court need not address plaintiffs-petitioner's request for an permanent injunction given the Court's determination.

Accordingly, it is

ORDERED that the verified petition is dismissed.

This shall constitute the Decision and Order of the Court. This Decision and Order is being returned to the attorneys for the respondents. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provision of that rule relating to filing, entry and notice of entry.

SO ORDERED!

ENTER

Dated: January 31, 2019
Troy, New York


RICHARD J. MCNALLY, JR.
Supreme Court Justice

Papers Considered:

1. Verified Petition, dated September 8, 2018, (Troy Sand & Gravel, et al.) with annexed exhibits, Memorandum of Law.
2. Notice of Petition dated September 11, 2017 (Petitioners Hoffay, et al.), Verified Complaint-Petition with annexed exhibits.
3. Verified Amended Petition-Complaint, dated November 13, 2018, (Rifenburg Construction) with annexed-exhibits, Supporting Affirmation with exhibits.

4. Verified Answer, Supporting Affidavits, Certified Record (Volumes 1-6), Memeorandum of Law.
5. Reply dated March 2, 2018 (Troy Sand & Gravel, et al.), Reply Affirmation with annexed exhibits, Reply Memorandum of Law.
6. Memorandum of Law (Petitioners Hoffay, et al.) dated March 2, 2018 with Reply Affidavits.
7. Reply Memorandum of Law (Rifenburg Construction).