

**Resolution of the Town Board of the Town of Nassau
Public Hearing on Troy Sand & Gravel Special Permit Application**

Resolution No. 13

At a special meeting of the Town Board of the Town of Nassau (the "Town Board") held on Tuesday, June 9, 2015, the following Resolution was presented:

WHEREAS:

1. The Troy Sand & Gravel, Co., Inc. ("Applicant") has an application before the Town Board of the Town of Nassau ("Town Board") for a special use permit to develop and operate a hard-rock mine on an approximately 214-acre parcel of land owned by Henkel Realty Associates, LLC, and located on NYS Route 66 (Tax Map No. 182.-3-2) in the Town of Nassau (the "Property") over an area of approximately 89-acres located thereon (the "Project Site"), which will be conducted in six (6) phases, and is suggested to take place over the life, which life is approximately 150 years.
2. The facts relevant to the recommencement of this review, as they are germane to the legal issues raised to the Town Board recently by the Applicant, and even more recently raised by the Applicant to the New York State Supreme Court (Rensselaer County) via motion brought on by Order to Show Cause served on the Town's legal counsel on Friday, June 5, 2015, are summarized below for the sole purpose of placing a context upon the actions to be taken by the Town Board pursuant to this Resolution. This is done for the benefit of the Applicant, the public and any other subsequent readers of this Resolution. The recitation of facts in this Resolution does not purport to be the complete history of this matter.
3. The Applicant submitted its application in or about December of 2005. The New York State Department of Environmental Conservation (NYSDEC) review of the Applicant's mining permit application and its environmental review of the project pursuant to SEQRA began thereafter. The Town of Nassau process began in November of 2011. However, that process was delayed, interrupted and eventually stalled for years due to litigation commenced by the Applicant which raised a variety of legal issues connected in some way with the review.
4. On May 6, 2010, the Town of Nassau (the "Town") and the Applicant, as part the litigation regarding this proposed project, entered into a Stipulation and Order in the case entitled "*In the Matter of the Application of Troy Sand & Gravel, Co., Inc. and Henkel Realty Associates, LLC, Petitioners-Plaintiffs, for a Judgment pursuant to CPLR Article 78 and CPLR 3001, against, Town of Nassau, et al.*", County of Rensselaer Index No.

223394 ("Stipulation and Order"). Pursuant to this Stipulation and Order, which remains in force, the Town of Nassau agreed to review and act upon the Applicant's application for a special use permit in accordance with the provisions of Town of Nassau Local Law No. 2 of 1986 (to the extent that the provisions of that local law are not superseded by the New York Mined Land Reclamation Law) rather than reviewing the project pursuant to subsequent Town of Nassau zoning and planning laws which have since prohibited industrial mining throughout the Town.

5. Pursuant to Local Law No. 2 of 1986, the Town Board is the authorizing body for the issuance of special use permits, and maintains the approval authority for all special use permits. (Local Law No. 2 of 1986, Article VI)
6. On January 26, 2012, in another lawsuit commenced by the Applicant against the Town, the NYS Supreme Court, Rensselaer County, issued preliminary injunction against the Town Board which preliminarily enjoined the Town Board from "reassessing the environmental impact of this project already determined by the DEC [New York State Department of Environmental Conservation] SEQRA ["State Environmental Quality Review Act"] determination." (*Troy Sand & Gravel Co., Inc. v. Town of Nassau*, 34 Misc.3d 1219(A), 950 N.Y.S.2d 494, (Sup Ct, Rensselaer County, January 26, 2012).
7. On August 9, 2012, in response to an appellate court denial of a Town motion to stay the review of this application, the Town Board reluctantly passed a Resolution determining that this application, given the jurisdictional restrictions the Town was operating under due to the aforementioned injunction, was "complete for the purposes of referral to the Town Planning Board and the Rensselaer County Planning Department."
8. Pursuant to the provisions of Local Law No. 2 of 1986, Article VI, Section D, the Town Board referred this application to the Town of Nassau Planning Board (Planning Board) for its review of the application and for a recommendation.
9. Beginning on September 20, 2012, and continuing on September 27, 2012, October 18, 2012, and November 15, 2012, the Planning Board held its public hearing over four sessions.
10. The Town Board did not participate in these public hearings held by the Planning Board since it had intended to hold its own public hearing after receiving the Planning Board's recommendation.
11. On December 27, 2012, the Appellate Division, Third Department, vacated the NYS Supreme Court's preliminary injunction. The appellate court held that the injunction "effectively precluded the Town from following its zoning regulations to the extent that

they authorize consideration of environmental factors in its review of plaintiff's pending applications." [*Troy Sand & Gravel Co., Inc. v. Town of Nassau*, 101 A.D.3d 1505 (3d Dept., 2012)].

12. On January 3, 2013, in view of the vacated preliminary injunction, and because the review which took place under the injunction was necessarily constrained by its terms, the Town Board rescinded its previous resolution that the application was complete and pulled the application back from the Planning Board in order to assess the impact of the lifting of the injunction upon the proceedings conducted up to that point.
13. In response to the Town's action, on January 10, 2013, the Applicant requested that the Town suspend any further review of the application. The Town Board granted the Applicant's request and did not proceed further with the review process. Subsequently, the Applicant filed an Article 78 proceeding against the Town to annul the Town Board's January 3, 2013 resolution.
14. Thereafter, further litigation commenced by the Applicant against the Town prevented the Town Board's review of this application from going forward.
15. In January of 2015, all litigation between Applicant and the Town which affects the processing of this application reached a conclusion.
16. Subsequently, the Applicant asked the Town Board to restart its review of this application.
17. In response to the Applicant's request, the Town Board has begun taking steps to restart its review of the Applicant's special use permit application.
18. At a Town Board meeting held on April 9, 2015, the Town Board engaged the law firm of Grant & Lyons, LLP to act as special counsel to the Town Board for its review of this project. At that same meeting, the Town Board also reauthorized the consulting firm of Community Planning & Environmental Associates, previously engaged in November of 2011, to act as the planning consultant to the Town Board for the review of this project.
19. On April 30, 2015, during a special meeting, and at the suggestion of the Town Board's planning consultant, the Town Board asked the Applicant to provide a written Application Summary that would organize the documents which comprise the application into a form that will be easier and more efficient for the Town Board to review. The Applicant reluctantly agreed to provide that Application Summary. The Town Board asked that a copy of the Application Summary be provided to the Town Board's planning consultant, Nan Stolzenburg of Community Planning & Environmental Associates, so

that she could review the Application Summary upon receipt and issue a report and recommendation to the Town Board as to the completeness of the application for the purposes of conducting the Town Board's substantive review under Local Law No. 2 of 1996.

20. At the Town Board meeting held on May 14, 2015, the Town Board indicated its intention to hold its own public hearing on this application. Because more than two and a half years have elapsed since the Planning Board held its public hearing, and because that public hearing was held under the constraints of the court injunction pending at the time, the Town Board invited the Planning Board to attend its public hearing and to hold the hearing jointly between the two boards. The choice as to whether to accept the invitation was left up to the Planning Board.
21. On May 12, 2015, the Applicant's attorney, Mr. Gilchrist, addressed the Planning Board at its meeting held that night and advocated that Planning Board reject the Town Board's invitation to join the Town Board for its public hearing and that the Planning Board instead rely on its public hearing which was closed in 2012. As part of his argument, Mr. Gilchrist asserted that the Town Board did not have a legal basis to hold its own public hearing.
22. As of this date, the Planning Board has not indicated what choice it will make.
23. At the Town Board meeting held on May 14, 2015, the Applicant's attorney submitted a letter to us objecting to our holding our own public hearing based on various assertions, and claiming that the Town Board did not have the legal authority to hold such a public hearing.
24. The Applicant's objection made on May 14, 2015 was the Town Board's first notice of this objection. Past statements by the Applicant's attorney made at Town Board meetings held on November 16, 2011 and on April 26, 2012 had requested that the Town Board conduct a joint public hearing to be held between the Town Board and the Planning Board. A copy of the minutes of the November 16, 2011 Town Board meeting is attached to this Resolution as Exhibit A. A copy of the minutes of the Town Board meeting of April 26, 2012 are attached to this Resolution as Exhibit B.
25. Despite the fact that the Town Board had always intended to hold its own public hearing on this application, at the Town Board meeting held on May 14, 2015, the Town Board asked its attorneys, Grant & Lyons, LLP, to review the objection raised by the Applicant, to analyze the basis for that objection, and to provide us with formal legal opinion on the validity of the Applicant's objection as well as a recommendation as to how the Town Board should move forward.

26. On May 28, 2015, a letter from the Applicant's attorney, Jonathon Tingley, to our attorney, John Lyons, supplemented the May 14, 2015 letter by Mr. Gilchrist with additional information and arguments in further support of the objection to a Town Board public hearing. This letter was forwarded by Mr. Lyons to the Town Supervisor as requested by Mr. Tingley.
27. On June 2, 2015, the Applicant submitted the Application Summary. Since then, we members of the Town Board have reviewed the Application Summary.
28. On June 5, 2015, our attorneys, Grant & Lyons, LLP, provided to us a formal opinion letter which addresses the public hearing objection raised by the Applicant and makes a recommendation as to how the Town Board should proceed with this review.
29. On June 8, 2015, our planning consultant, Nan Stolzenburg, of Community Planning & Environmental Associates, provided us with a memorandum on her review of the Applicant's Application Summary and her recommendation that the Town Board should consider the application to be substantially complete for the purposes of our restarting our substantive review of this application. For the record, a copy of Ms. Stolzenburg's memorandum is attached to this Resolution as Exhibit C and its content incorporated by reference herein and made a part hereof.
30. The Town Board agrees with Ms. Stolzenburg's conclusion and recommendation regarding the readiness of the application for substantive review. Her conclusion accords with our own review of the Application Summary.
31. We members of the Town Board have carefully reviewed the formal opinion letter received from our attorney. For the record, a copy of that letter is attached to this Resolution as Exhibit D and its content is hereby incorporated herein and made a part hereof.
32. Our attorney has carefully reviewed and analyzed the Applicant's legal objections and has addressed those objections in detail and at length. The full detail and reasoning is set forth in that letter (*see*, Exhibit D hereto). Based the reasoning therein, our attorney concluded as follows:

As explained above, Section 274-b of the NYS Town Law requires the authorizing body to hold a public hearing before making a determination on a special use permit application. The procedures in the 1986 Town of Nassau Zoning Law on silent on this issue and the 1986 law pre-dates the enactment of Section 274-b by seven years. And the enactment of Section 274-b predates the submission of the Applicant's special use permit application by more than ten years. As further explained above, any

inconsistencies in the 1986 Zoning Law must yield to the provisions of Section 274-b of the State Town Law. Further, the Town Board must comply with the State Town Law and hold a public hearing.

Besides this legal obligation, the policy reasons for the Town Board to hold its own public hearing are both many and compelling.

For all these reasons, we recommend that the Town Board hold its own public hearing session as part of its review of this application.

33. We are persuaded by our attorney's reasoning and his opinion and recommendation, and we intend to follow that advice.
34. The Town Board is tasked with the duty to grant or deny a special use permit, and in so doing, the Town Board is not only required, but finds it essential to sound decision-making, to gather public comment and information in order to properly and adequately understand the application and potential adverse impacts to the community and surrounding neighborhood of the project. The Town Board believes that, in order to make an accurate and fair decision on the special use permit for the benefit and protection of the community, it must incorporate into the record direct public comments and concerns for it to properly reflect on the gamut of potential consequences from this project which, based on the assertions in the Applicant's application, will be a presence in the Town of Nassau for 150 years or more.
35. We understand, based on our attorney's opinion, that we are obligated to hold our own public hearing under NYS Town Law Section 274-b. And of course, that reason is of the utmost importance. But, as town legislators and the elected representatives of our community, the public policy reasons which favor holding our own public hearing are just as important to us. At the very least, interested members of the community should have a forum in which to publicly voice their concerns, their objections and/or their support directly to their elected officials in charge of saying yes or no, especially for a project of this size, intensity and duration.
36. We agree with Mr. Lyons that the most compelling public policy reason for us to hold our own public hearing arises from the 1986 Zoning Law. Article VI ("Special Use Permit"), Section A ("General Standards"), which states:

A. General Standards. In reviewing any special permit use, the Town Planning Board and the Town Board shall consider the health, safety, welfare, comfort and convenience of the public, in general, and that of the residents of the immediate neighborhood in

particular, and the environmental impact, as well as the following standards ... (emphasis added)

37. In our view, one of the best ways for this Town Board to make an informed judgment about the impact of this proposed project on the health, safety, welfare, comfort and convenience of the public is to actually engage with our community. We believe that this is best done personally and face-to-face at a public hearing, and not by our simply reading the transcripts of the Planning Board's public hearing sessions from two and a half years ago when the Town was under an injunction that wrongfully constricted the Town's authority and jurisdiction. As a Town Board, we have specifically retained (as set forth in Local Law No. 2 of 1986) the decision-making authority over the issuance of special use permits, and thus, this application. By retaining this authority, we believe that we can best carry out that responsibility by making ourselves personally and directly familiar with the public's comments, concerns, reactions and views, and by being directly accountable to the public in an open and fair forum.
38. The public should be afforded its right to address the authorizing board directly with comments and concerns affecting the neighborhood, their daily lives, the value of their properties, and their future welfare before the Town Board makes its determination on the issuance of a special use permit, especially on a permit that is projected to last at least 150 years.
39. The Grant & Lyons opinion describes four other additional compelling public policy reasons. All together, these reasons demonstrate to us that, aside from our legal obligation, the interests of good governance, justice and fairness warrant that we hold our own public hearing.
40. In addition, holding another public hearing will offer the public more knowledge and opportunity to speak on the project, following a two and a half year hiatus from the previous public hearing held by the Planning Board, which was stymied by an injunction, which is now vacated, and prolonged by litigation.
41. Our public hearing will not supplant the Planning Board review process, but will instead keep the record fresh, current and afford the most up-to-date and current comments and concerns to be addressed by the public, in addition to the public hearing comments received over two years ago by the Planning Board.
42. It is not the intent of the Town Board to delay this process, and the Town Board intends to keep this application moving along but without denying the public its right to due process and the good governance of the Town Board to make an informed decision on the matter.
43. Any delay the Applicant may face from a second public hearing is minimal in comparison to the years the application has been immersed in litigation at the hands of the Applicant.

NOW, THEREFORE, BE IT RESOLVED as follows:

- A. Based on our own review of the application materials presently before the Town Board, and based on the advice and recommendation of the Town Board's planning consultant, together with all prior court decisions and orders issued prior to this date and the insistence of the Applicant to proceed only with the application record materials presently before the Board, the Town Board hereby determines that the Applicant's application for a special use permit pursuant to Town of Nassau Local Law No. 2 of 1986 is substantially complete such that the Town Board can commence its substantive review of this application.
- B. Based on the legal advice provided to us by our attorney, and for the public policy reasons stated in our attorney's opinion letter and in this Resolution, the Town Board shall hold a public hearing on this application on Monday, July 13, 2015, at 7:00 PM at the following location: St. Mary's Parish Hall, 31 Church Street, Nassau, New York.
- C. The Town Board hereby directs the Town of Nassau Town Clerk to place the public on notice of the public hearing in accordance with the requirements of Town of Nassau Local Law No. 2 of 1986 and the requirements of Section 274-b of the New York State Town Law. In addition, we direct the Town Clerk to post notice of this public hearing on the Town web site.
- D. The Town Board hereby directs the Town of Nassau Town Supervisor to send a letter to the Town of Nassau Planning Board asking the Planning Board to respond in writing to the Town Board's invitation to join the Town Board at its public hearing by Thursday, June 25, 2015, so that the public notices may account for its participation if so decided.
- E. The Town Board hereby directs that the Town Supervisor's letter to the Planning Board should further advise the Planning Board that, regardless of whether it accepts the Town Board's invitation to join in the Town Board public hearing, the Planning Board shall submit its written recommendation to the Town Board on or before Friday, July 24, 2015, which date is forty five (45) days from the date of this referral as calculated pursuant to Section 20 of the NYS General Construction Law.
- F. By this Resolution, the Town Board manifests its intention to act upon the Applicant's special use permit application and approve, disapprove or approve the application with modifications or conditions within forty five (45) days of the Town Board's receipt of the Planning Board's written recommendation.
- G. The Town Board, in accordance with the Town Laws and prior resolutions, hereby orders the Applicant to furnish the amount of \$10,000.00 on or before June 30, 2015, to replenish the Town escrow account reserved for the payment of the Town's consultants on this matter

since the amount of the escrow balance at the present time has fallen below the \$2,500 threshold amount designated for the review of this application.

H. This Resolution shall be effective immediately.

Attachments to Resolution:

Exhibit A: Minutes of the Town Board Meeting of November 16, 2011.

Exhibit B: Minutes of the Town Board Meeting of April 26, 2012.

Exhibit C: Memo of Community Planning & Environmental Associates dated June 08, 2015.

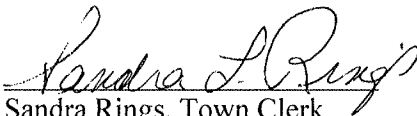
Exhibit D: Opinion letter of Grant & Lyons, LLP, dated June 05, 2015.

Upon motion made by Supervisor Fleming, seconded by Town Board member Mr. Goebel, the foregoing Resolution was duly adopted by the Town Board on June 09, 2015 by vote of a majority of its members as follows:

Town Board Member	yes	no	absent/abstain
Ron Sears, Councilperson	<u>X</u>	—	—
Lani Richards, Councilperson	—	—	<u>X</u>
Jonathan Goebel, Councilperson	<u>X</u>	—	—
Robert Rings, Councilperson	<u>X</u>	—	—
David Fleming, Supervisor	<u>X</u>	—	—

It is hereby certified that the foregoing resolution is a true and accurate copy of that which was adopted by the Town Board on June 09, 2015.

Dated: June 10, 2015


Sandra Rings, Town Clerk

