

SUPREME COURT - STATE OF NEW YORK  
DUTCHESS COUNTY

Present:

Hon. MARIA G. ROSA

Justice.

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RED WING PROPERTIES, INC.,

Petitioner,

-against-

DECISION, ORDER &  
JUDGMENT.

Index No: 194/2017

TOWN OF RHINEBECK, TOWN OF RHINEBECK  
TOWN BOARD, TOWN OF RHINEBECK ZONING  
ENFORCEMENT OFFICER AND TOWN OF  
RHINEBECK ZONING BOARD OF APPEALS,

Respondents.

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X

The following papers were read and considered on this hybrid proceeding:

- SUMMONS
- NOTICE OF VERIFIED PETITION AND VERIFIED COMPLAINT
- VERIFIED PETITION AND COMPLAINT
- NOTICE OF MOTION
- AFFIRMATION OF CHRISTOPHER C. STEVENS
- EXHIBITS A-Z
- AFFIDAVIT OF PAUL H. GRIGGS
- EXHIBITS A-K
- AFFIDAVIT OF FRANCIS DOHERTY
- EXHIBITS A-K
- MEMORANDUM OF LAW

- VERIFIED ANSWER
- CERTIFIED RECORD VOLUMES 1-7

- NOTICE OF MOTION
- AFFIRMATION OF SCOTT BERGIN
- AFFIRMATION OF JOHN LYONS

EXHIBITS A-D  
 MEMORANDUM OF LAW  
 REPLY AFFIRMATION  
 REPLY AFFIDAVIT  
 EXHIBITS A&B  
 REPLY MEMORANDUM OF LAW

REPLY AFFIRMATION

This is a hybrid Article 78/Declaratory Judgment action challenging the constitutionality of Town of Rhinebeck Local Law No. 4 of 2015 and determinations of the Town of Rhinebeck Zoning Enforcement Officer (“ZEO”) and Zoning Board of Appeals (“ZBA”) finding plaintiff-petitioner did not have the right to mine portions of a 241 acre parcel as a pre-existing nonconforming use. Plaintiff challenges the ZEO and ZBA determinations pursuant to CPLR Article 78, seeks a declaratory judgment that Local Law No. 4 is unconstitutional and that its use of the property was a pre-existing nonconforming use. It further seeks damages based on a claim that the local law and ZBA’s decision resulted in an inverse condemnation. Defendants move pursuant to CPLR §3212(a)(7) or, in the alternative pursuant to CPLR §3212, for an order dismissing plaintiff’s claims challenging the constitutionality of Local Law No. 4 of 2015 and for damages based on a claimed inverse condemnation and partial taking.

Red Wing Properties, Inc. (“Red Wing”) is a sand and gravel mining business that owns a 241 acre property in the Town of Rhinebeck. It acquired the property in 2013. At that time, 37.5 acres of the property were actively being mined but there was a pending permit application before the New York State Department of Environmental Conservation (“DEC”) for permission to mine an additional 124 acres. On September 28, 2015, the Town of Rhinebeck (“the Town”) enacted Local Law No. 4 of 2015. The stated purpose of the local law was to prohibit the establishment of large scale mining activities in the Town’s mining overlay zoning district. The Town created the mining overlay zoning district in 2009 in conjunction with its adoption of a new comprehensive plan. When the Town created the district, virtually the entire 241 acre parcel was within the mining overlay zoning district. Local Law No. 4 included amendments to the Town’s zoning district map which changed the boundaries of the mining overlay district to coincide with existing mining operations. Consequently, the local law had the effect of restricting Red Wing’s ability to mine areas on its 241 acre parcel other than the existing mining activity occurring on 37.5 acres. The Local Law included a procedure under which property owners claiming a valid nonconforming vested right to expand existing mining operations could apply to the Town ZEO and, if necessary, to the Town ZBA for a determination on a claimed right to mine as a valid nonconforming use. In February 2016, Red Wing submitted such an application to the ZEO which was denied. Red Wing then appealed to the ZBA, which heard testimony and comments on the application at six public hearings that occurred between May and October 2016. Three members of the ZBA also visited the property. On December 21, 2016, the ZBA issued a seven page resolution that incorporated a 55 page decision denying the application, finding that Red Wing had failed to demonstrate its entitlement to nonconforming use status that would enable it to mine its property outside of the 37.5 acres located

in the mining overlay district. This proceeding followed.

“Although the overriding policy of zoning is aimed at the ultimate elimination of nonconforming uses, nevertheless, a zoning ordinance cannot prohibit an existing use to which the property has been devoted at the time of the enactment of the ordinance.” Syracuse Aggregate Corp. v Weise, 51 NY2d 278 (1980). In general, to establish a right to a nonconforming use, the person claiming the right must demonstrate that the property was used for the nonconforming purpose at the time a zoning ordinance became effective, as distinguished from a mere contemplated use. Matter of Harbison v City of Buffalo, 4 NY2d 553 (1958). Courts, however, have recognized that quarrying involves a unique use of land as it contemplates the excavation of the corpus of the land itself as a resource. Syracuse Aggregate Corp., 51 NY2d at 285. Thus, quarrying, as a nonconforming use “cannot be limited to the land actually excavated at the time a restrictive ordinance is enacted because to do so would effectively deprive the land owner of his use of the property as a quarry.” Id. at 286. A party advancing a prior nonconforming mining use exception to a zoning ordinance must establish specific actions constituting an overt manifestation of its intent to mine the property at the time the zoning ordinance became effective. Buffalo Crushed Stone, Inc. v Town of Cheektowaga, 13 NY3d 88 (2009). This requires a party to “demonstrate substantial quarrying activities on a distinct parcel of land over long period of time and that such activities clearly manifest an intent to appropriate the entire parcel to the particular business of quarrying.” Syracuse Aggregate Corp., *supra*. The extent of protection afforded by the nonconforming use will extend to the boundaries of the parcel even though extensive excavation was limited to only a portion of the property. Id. “This is not to say that a landowner, merely by preparing to engage in a mining operation and undertaking a few self-serving acts of a very limited nature will have thrown a protective mantle of nonconforming use over his entire parcel of land as against a later prohibitory zoning ordinance.” Id.

Applying the above standard, the ZBA found that Red Wing failed to demonstrate conduct demonstrating an overt manifestation of its intent to utilize its entire property for mining at the time the Town passed the 2015 amendment modifying the boundaries of its mining overlay zoning district. In reaching this determination, the ZBA found that in the approximately 30 year period since Red Wing’s predecessor acquired the subject property, Red Wing had engaged in two overt actions in support of its claim that it intended to mine the entire 241 acre area of its property. The first action was Red Wing’s digging of test pits and taking soil borings for the purpose of assessing aggregate reserves. The second action was an application submitted in 2008 to the DEC for a mining permit to mine a 141 acre area that now exists outside the boundaries of the Town’s overlay district. The ZBA also recognized that Red Wing incurred significant costs in connection with the permitting process. Acknowledging these actions and the fact that there had been mining activities on up to 37.5 acres of the property since 1993, the ZBA determined that such activities did not sufficiently demonstrate an intent to mine the entire property. The ZBA found that Red Wing had failed to demonstrate any significant physical improvements evidencing an intent to mine the 141 acre portion of its property, noting a lack of haul roads, processing plant or facility and a failure to resolve a dispute with a neighbor over access. The ZBA further emphasized that over the 30 years Red Wing and its predecessor owned the property, the 141 acres of the property had been used for purposes

other than mining. The ZBA found that in 1998 an application was submitted to the Town planning board for approval of a nine lot residential subdivision to be built on the property. The ZBA further considered that Red Wing had entered into leases under which portions of the property were farmed from at least 2004, had obtained an agricultural exemption for 57 acres of land used to produce for sale crops, livestock or livestock products and 173.8 acres of land used in support of farm operations. In light of these findings and emphasizing that the 2008 DEC permit application to mine the 141 acres had yet to be accepted by NYS DEC as complete and that the preliminary environmental review process had not yet begun, the ZBA ultimately determined that Red Wing had established a mere contemplation to use the 141 acres for future mining purposes but had not engaged in activities sufficient to demonstrate an intent to mine such land in the future.

Judicial review of a ZBA determination is not a *de novo* review nor an opportunity for the issues to be heard and determined by this court. Instead, it is generally limited to ascertaining that the action was illegal, arbitrary and capricious or an abuse of discretion. See Brancato v Zoning Bd. Of Appeals of City of Yonkers, 30AD3d 515 (2<sup>nd</sup> Dep't 2006). Thus, the ZBA's determination that Red Wing's use of the property was insufficient to demonstrate a pre-existing nonconforming use must be sustained if rational and supported by substantial evidence even if this court would have reached a different result. Sand Land Corp. v Zoning Bd. of Appeals of Town of South Hampton, 137 AD3d 1289 (2<sup>nd</sup> Dep't 2016).

This court finds substantial evidence supporting the rationality of the ZBA's determination. A review of the record reveals that the ZBA reviewed Red Wing's submissions, the submissions of neighbors and comments from the Town Board and members of the public before reaching its decision. Its lengthy decision clearly weighed the evidence before it and carefully analyzed all proffered actions Red Wing took in support of its claim that it intended to utilize additional portions of the property for mining as of 2015. The ZBA conducted a careful examination of relevant case law and rationally determined that whether Red Wing met its burden of proof required an analysis of whether it exclusively intended to mine the unmined portions of the land, the development of road and other infrastructure in support of its stated intent to mine, communications and correspondence with local municipalities demonstrating an intent to mine and any reliance upon the Town's permission to mine in the future. The ZBA's consideration of these factors was proper and in accordance with the case law governing applications to mine as a pre-existing nonconforming use. Upon review of the relevant facts and factors, it was rational for the ZBA to determine that mining the entire property was but one of several of Red Wing's contemplated future uses of the property and that the digging of test pits and taking soil borings from the property was an exploratory step that did not manifestly demonstrate an intent to mine the entire property. The ZBA further determined that the record was unclear as to whether the prior owner of the property purchased such property and obtained permits as an agent of Red Wing. The DEC permit to mine the 37.5 acres was issued to the prior owner and makes no mention of Red Wing. Despite this, it is clear from the ZBA's decision that it credited Red Wing for the years that the northern portion of the subject property was mined while owned by the prior owner. The ZBA determined that Red Wing had established that mining had taken place for many years on that portion of the property. However, it rationally found that Red Wing never communicated its intent to mine the entire property to the Town. With respect

to Red Wing having hired a consultant to perform a geological investigation, the contents of that investigation support the ZBA's finding that such step was done to determine the quality of mining that may be available and was merely a contemplative step, not evidence of a commitment to future mining. Similarly, the 2001 letter from Earth Tech, a consultant Red Wing hired to develop a proposed strategy for expanding the prior owner's mining operation, can also rationally be viewed as an initial consultation and a proposal to move forward with a permitting plan and does not necessarily imply a specific intent to move forward with such plans. The fact that the consult was performed in 2001 and that no application was made to the DEC to expand mining to an additional 141 acres until 2008 further supports this conclusion. Further, the ZBA acknowledged that Red Wing's filing for a permit with the DEC does demonstrate a strong intention to mine. See Glacial Aggregates, LLC v Town of Yorkshire, 14 NY3d 127 (2010). However, in light of the other relevant factors considered, the ZBA determined that such application was insufficient evidence of an intent to mine the entire 141 acres. As it is not the function of this court to substitute its judgment for that of the ZBA responsible for making the determination as to whether Red Wing established a pre-existing nonconforming use and there is a rational basis in the record supporting the ZBA's determination, it is

ORDERED that the petition for a judgment declaring that the December 21, 2016 ZBA resolution denying Red Wing's appeal of the ZEO determination is unconstitutional, illegal and/or arbitrary and capricious is denied. The court rejects Red Wing's claim that the ZBA lacked jurisdiction to determine the validity of the Town zoning ordinance and/or Local Law No. 4 of 2015. The record is clear that the ZBA never considered or rendered a determination as to the legality of the zoning ordinance or local law but merely presumed their validity in rendering the challenged determination. The court also finds no merit to Red Wing's claims that the ZBA's determination was arbitrary based on a failure to recognize the prohibition against substantial construction until the approval a DEC mining permit. On page 39 of its decision the ZBA acknowledged legal limitations on building infrastructure without a permit and discussed the lack of infrastructure within the context of addressing Red Wings' failure to build service roads or even obtain lawful access to the proposed future mining site. To the extent that the decision includes a statement that there was no evidence that Vincent Kinlan or Red Wing as purchaser/owner attempted to pursue DEC permits, this statement is clearly contradicted by numerous references and discussion in the decision to the pending DEC permit application and the weight that such application should be given in determining intent. Hence, the isolated statement does not demonstrate that the ZBA's determination was without sound basis in reason or made without regard to the facts. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974). It is further

ORDERED that the petition to annul the determination of the February 25, 2016 of the Town's ZEO is denied as moot. The ZBA properly exercised its lawful authority to review the ZEO's determination *de novo*. Under such circumstances, there would be no legal effect of this court rendering a determination on whether the ZEO's determination was arbitrary and capricious. It is further

ORDERED that Red Wing's motion for a declaratory judgment seeking an order from this

court declaring that its mining activities on the entire 141 acres constituted a pre-existing nonconforming use is denied. This court is without authority to issue a *de novo* review of the ZBA's determination of this issue. As set forth above, this court's function is merely to determine whether the ZBA's determination was arbitrary or capricious or had a rational basis.

Defendants have moved to dismiss those portions of the petition/complaint seeking a judgment declaring Local Law No. 4 unconstitutional and seeking an award of damages based upon a claimed partial taking. Red Wing has further moved for a summary determination as to the constitutionality of Local Law No. 4. Based on the foregoing and there being no disputed factual issues relevant to the constitutional claim, the court deems it appropriate to render a determination on the summary judgment motion despite the fact that issue has not been joined. In exercising the police power to provide for the general welfare of the people, a municipality may reasonably regulate the use of private property notwithstanding the curtailment of private property rights. Modjeska Sign Studios, Inc. v Berle, 43 NY2d 468 (1977). Because zoning ordinances are legislative acts they enjoy a strong presumption of constitutionality. Town of Islip v Caviglia, 73 NY2d 544 (1989). If there is a reasonable relation between the end sought to be achieved and the means adopted to achieve it, the regulation will be upheld. *Id.* Thus, a party challenging the validity of a zoning ordinance as arbitrary and thus unconstitutional must establish beyond a reasonable doubt that the ordinance has no substantial relationship to public health, safety, morals or general welfare. N. Westchester Prof'l Park Assocs. v Town of Bedford, 92 AD2d 267 (2<sup>nd</sup> Dep't 1983). Applying this standard, the court finds no merit to Red Wing's conclusory assertion that Local Law No. 4 of 2015 is unconstitutional because it restricted mining activities to then currently existing DEC approved mining operations. The record reflects that the Town's amendment to its zoning code to curtail the expansion of mining operations was a valid exercise of its police power. The Town clearly had the authority to amend its zoning ordinance to comply with its comprehensive plan to promote the health and welfare of its citizens and the environmental character of the Town.

To prove that an unconstitutional taking has occurred, a landowner must prove that the subject property cannot yield an economically reasonable return as zoned. Loujean Properties, Inc. v Town Bd. of Town of Oyster Bay, 160 AD2d 797 (2<sup>nd</sup> Dep't 2009). A property owner challenging a land use regulation as a taking has a heavy burden of proof to demonstrate with the submission of dollars and cents evidence that under no permissible use will the parcel as a whole be capable of producing a reasonable return. Briarcliff Assocs., Inc. v Town of Cortlandt, 272 AD2d 488, 491 (2<sup>nd</sup> Dep't 2000). A property owner may not establish a taking simply by showing that it was denied the ability to exploit a property interest previously believed to be available for development. Penn Central Transportation Co. v City of New York, 438 US 104, 130 (1978). Red Wing's claim that mining is the highest and best use of its property is woefully inadequate to meet its burden showing that the re-zoning at issue deprived the property of all economic value.

Based on the foregoing, it is

ORDERED that defendants' motion to dismiss Red Wing's claims challenging the constitutionality of Local Law No. 4 of 2015 and for damages based upon an unconstitutional taking

is granted and those claims are dismissed.

The foregoing constitutes the decision, order and judgment of the court.

Dated: July 27, 2017  
Poughkeepsie, New York

ENTER:

  
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Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.