

**TOWN OF STERLING
ZONING BOARD RESOLUTION**

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FEB - 5 2019

RESOLUTION NO. 2019-01

TOWN OF STERLING

**CIRCLE T STERLING, LLC - APPLICATION FOR AN
ACCESS ROAD SETBACK AREA VARIANCE RELATED
TO THE OPERATION OF A SAND AND GRAVEL MINE
AT 13181 SANFORD ROAD, MARTVILLE, NEW YORK
(TAX ID# 20.00-1-68.1)**

January 30, 2019

Present: Richard Palmieri, Chairperson
Charles Itzin, Member
Honore Yuhas, Member
Darrell Uetz, Member
Brad Dates, Member

Lisa Somers, Zoning Board Clerk

Member Brad Dates moved and Member Charles Itzin seconded a Motion to grant the renewed area variance application of Circle T Sterling, LLC by correspondence (with accompanying exhibits) from Applicant's Counsel, Richard J. Andino, Esq. on or about November 30, 2018:

WHEREAS, Christopher J. Ferlito of Christopher J. Construction LLC ("CJC") previously applied to the New York State Department of Environmental Conservation ("DEC") on June 23, 2014 for a mined-land reclamation permit to operate a proposed surface sand and gravel mine at 13181 Sanford Road, Martville, New York (Tax ID# 20.00-1-68.1) ("Martville Mine"); and

WHEREAS, in July 2014, the DEC requested "Lead Agency" status with respect to its review of the Martville Mine under the New York State Environmental Quality Review Act, 6 NYCRR Part 617 ("SEQRA"); and

WHEREAS, CJC submitted an application to the Town of Sterling Planning Board on January 9, 2015 for a Special Use Permit, in accordance with Town of Sterling Land Use Regulations ("LUR") Article 10-4(C), to operate the proposed mine at its property located at 13181 Sanford Road, Martville, New York (Tax ID# 20.00-1-68.1); and

WHEREAS, the LUR specifically allow for "Mining and Extraction of Resources" at Article 10-5(J); and

WHEREAS, on February 20, 2015, CJC completed and submitted Part 1 of the Full Environmental Assessment Form ("EAF") to the New York State DEC for consideration, and the

DEC declared itself to be "lead agency" for the mining Project and, as such, was responsible for completion of Parts 2 and 3 of the Environmental Assessment Form ("EAF"); and

WHEREAS, Christopher Ferlito of CJC appeared before the Planning Board on April 6, 2015 for a preliminary review regarding his special use permit application, at which time the Planning Board advised Mr. Ferlito, *inter alia*, that it must refer him to the Town of Sterling Zoning Board of Appeals ("ZBA") for an area variance with respect to LUR Article 10-5(J)(2)(d) which requires that "[a]ccess roads at all points, including but not limited to the main entrance and exit, shall be at least one thousand (1000) feet from any existing residence or public building"; and

WHEREAS, by letter dated April 8, 2015, the Planning Board advised the ZBA that CJC was being referred to it for the aforementioned area variance; and

WHEREAS, the ZBA duly advertised the April 27, 2015 public hearing for CJC's area variance application, and provided notice by certified mail to adjacent property owners; and

WHEREAS, the ZBA held the public hearing on CJC's area variance application as scheduled on April 27, 2015, at which time it received written opposition to the Project, as well as a letter from CJC's attorney John Klucsik, Esq. in support. During the public hearing, Christopher Ferlito provided responses to questions about the Project. After consideration of the application, and all written and verbal comments in support and in opposition to the Project, the ZBA unanimously approved CJC's area variance application. The ZBA's Resolution approving the area variance was filed with the Town Clerk on May 4, 2015, and again on May 5, 2015; and

WHEREAS, on May 4, 2015, the DEC issued a Notice of Complete Application and a Negative Declaration with respect to CJC's mining application. The DEC also declared the proposed mine to be a "Type I" Action. As indicated in the DEC's Negative Declaration, the DEC, as Lead Agency, determined that the proposed action will not have a significant effect on the environment, and that a Draft Environmental Impact Statement will not be required. In reaching its conclusion regarding no significant effect on the environment, the DEC considered all potential impacts from the Project, including soil, water, traffic, noise, dust, air, cultural and visual resources, and fish and wildlife; and

WHEREAS, after a public hearing on June 22, 2015, the ZBA denied CJC's application for an area variance under LUR Article 10-5(J)(2)(c); and

WHEREAS, by letter dated June 29, 2015, Michael Wiggins, Supervisor, Town of Victory, advised the Town of Sterling Planning Board that the posting of a \$50,000 maintenance bond by CJC will ensure adequate protection of the portion of Sanford Road located in the town of Victory; and

WHEREAS, by letter dated July 1, 2015, George Wethey, Highway Superintendent, Cayuga County Highway Department, advised the Town, *inter alia*, of the following: the Cayuga County Highway Department will trim trees and brush along Peple Road south of Sanford Road to attempt to increase the site distance at the intersection the Cayuga County Highway

Department already sent a Form TE-9a to the Town of Sterling and Town of Victory to start the process of lowering the speed limit through on Pople Road; the concern about potential deterioration of Pople Road/County Route 112 would be minimized if CJC provided a bond in the amount of \$200,000 to cover the costs of road repairs on Pople Road/County Route 112; and

WHEREAS, on July 15, 2015, CJC submitted a revised site plan and "Mined Land Use Plan Clarification," wherein it adjusted its proposal so that the life-of-mine portion of the site was at least 1,000 feet away from any surrounding structures and in compliance with LUR Article 10-5(J)(2)(c). In addition, CJC submitted a revised "Mining Plan Map" dated July 15, 2015 to the Planning Board eliminating one of the two access roads/driveways into the Project site which was closest to adjacent residences; and

WHEREAS, on August 17, 2015, in light of the change made by CJC from a two-driveway to a one-driveway site, the ZBA unanimously voted to rehear CJC's area variance under LUR Article 10-5(J)(2)(d); and

WHEREAS, on September 8, 2015, John M. Clancy of the DEC sent CJC an approved permit authorizing the operation of the Martville Mine through September 7, 2020. Also on September 8, 2015, the DEC issued a detailed "Response to Public Comments on the Martville Mine" to all "Interested Parties." As indicated therein, the DEC received comments regarding the proposed mine from "one individual and four governmental agencies (the Town of Sterling, Cayuga County SWCD, NYS DOT, and the County Highway Department)"; and

WHEREAS, on September 11, 2015, the ZBA published notice of the September 24, 2015 rehearing of CJC's area variance with respect to LUR Article 10-5(J)(2)(d), and mailed same to the surrounding property owners; and

WHEREAS, the ZBA held the rehearing of CJC's area variance under LUR Article 10-5(J)(2)(d) on September 24, 2015. The ZBA considered, *inter alia*, emails received from Town residents in opposition to the Project. Mr. Ferlito explained that the reason for the change from two driveways to one driveway was to reduce potential noise levels. The ZBA engaged in a thorough and detailed discussion of the impact of the change from two driveways to one driveway, and the public was permitted to provide comments regarding the change. Following closure of the public hearing, the ZBA engaged in a lengthy discussion about the variance, and considered the five (5) factor analysis required for area variances by Town Law §267-b(3) and LUR Article 4-10(C)(2). After duly considering the comments from the public, including the emails and written materials submitted, a unanimous vote was taken by the ZBA granting the amended/modified area variance to allow trucks to enter and exit through a single access road/driveway as depicted on the July 15, 2015 site plan; and

WHEREAS, on September 28, 2015, the ZBA filed with the Town Clerk Resolution 2015-09 following the rehearing of CJC's area variance under LUR Article 10-5(J)(2)(d) which provides, *inter alia*, that "[t]he Board has relied on verbal representations made by the applicant during the course of these proceedings as noted in the applicable Board minutes," that "[t]he validity of these statements are expressly made a condition of this approval," and that the amended and modified variance be granted "upon the facts presented and the determinations

made..." Resolution 2015-09 also specifically references and incorporates the original April 27, 2015 area variance and the factual findings and determinations made by the ZBA in granting same; and

WHEREAS, the Planning Board held a public hearing on CJC's site plan application on November 2, 2015; and

WHEREAS, Dr. Virginia Fichera, Robin Allinger, Alvin G. Hammond, Jeffrey A. Couperus, Tia M. Couperus, Dale Ritchie, and Lorraine Ritchie (collectively referred to herein as "Petitioners") commenced an Article 78 Proceeding by filing a Verified Petition on October 28, 2015 with the New York State Supreme Court, Cayuga County, Index No. 2015-0968, against the New York State Department of Environmental Conservation, the Zoning Board of Appeals of the Town of Sterling, the Planning Board of the Town of Sterling, the Town of Sterling, Christopher J. Construction LLC, and Christopher Ferlito, (In the Matter of the Application of Dr. Virginia M. Fichera, PH.D.; Robin Allinger and Alvin G. Hammond; Jeffrey A. Couperus and Tia M. Couperus; and Dale Ritchie and Lorraine Ritchie v. New York State Department of Environmental Conservation; the Zoning Board of Appeals of the Town of Sterling; the Planning Board of the Town of Sterling; the Town of Sterling; Christopher J. Construction, LLC; and Christopher Ferlito) (hereinafter referred to as "Article 78 Action #1"); and

WHEREAS, at its December 7, 2015 meeting, the Planning Board advised that its review of CJC's special use permit application would be stayed until the Article 78 proceeding had been resolved; and

WHEREAS, on May 16, 2016, the Honorable Mark H. Fandrich, Acting Justice of the New York State Supreme Court, Cayuga County, issued an Order denying the Article 78 Action #1 in its entirety, and dismissing the Article 78 in its entirety. The Order was entered by the Cayuga County Clerk on May 17, 2016; and

WHEREAS, the Planning Board reopened the public hearing for CJC's special use permit and site plan application on December 5, 2016, notice of which was duly published in accordance with the law; and

WHEREAS, by resolution dated February 6, 2017, the Town of Sterling Planning Board recognized the DEC's lead agency status for purposes of review under SEQRA, and adopted the DEC's May 4, 2015 "Negative Declaration" with respect to CJC's application, as well as its determination that the proposed action is a "Type I" Action and will not have a significant effect on the environment and that a Draft Environmental Impact Statement will not be required; and

WHEREAS, by resolution dated February 6, 2017, the Planning Board approved CJC's application for site plan approval having determined that the site plan satisfied the requirements of LUR Article XI "Site Plan Review & Approval,"; and

WHEREAS, by resolution dated February 6, 2017, the Planning Board approved and granted CJC's application for a special use permit to operate a sand and gravel mine at 13181

Sanford Road, Martville, New York (Tax ID# 20.00-1-68.1), in specific accordance with the approved site plan, and upon the conditions and findings set forth in said resolution; and

WHEREAS, Dr. Virginia Fichera, Robin Allinger, Alvin G. Hammond, Jeffrey A. Couperus, Tia M. Couperus, and Lorraine Ritchie (collectively referred to herein as "Petitioners") commenced an Article 78 Proceeding by filing a Verified Petition on February 2, 2017, with the New York State Supreme Court, Cayuga County, Index No. 2017-0082, against the Planning Board of the Town of Sterling, the Town of Sterling, Christopher J. Construction LLC, Christopher J. Ferlito, and Steven Keeling (In the Matter of the Application of Dr. Virginia M. Fichera, PH.D.; Robin Allinger and Alvin G. Hammond, Jeffrey A. Couperus and Tia M. Couperus; and Lorraine Ritchie v. the Planning Board of the Town of Sterling; the Town of Sterling; Christopher J. Construction, LLC; Christopher J. Ferlito and Steven Keeling) (hereinafter referred to as "Article 78 Action #2"); and

WHEREAS, on September 6, 2017, the Honorable Mark H. Fandrich, Acting Justice of the New York State Supreme Court, Cayuga County, issued an Order denying the Article 78 Action #2 in its entirety, and dismissing the Article 78 Action #2 in its entirety. The Order was entered by the Cayuga County Clerk on September 8, 2017; and

WHEREAS, Petitioners appealed the Order of the Honorable Mark H. Fandrich, Acting Justice of the New York State Supreme Court, Cayuga County, which denied the Article 78 Action #1 in its entirety, and dismissed the Article 78 Action #1 in its entirety; and

WHEREAS, on appeal of the Article 78 Action #1, the Appellate Division, Fourth Department determined (1) the ZBA's failure to refer the initial area variance application and the amended variance to the Cayuga County Planning Board was a jurisdictional defect, rendering its approval of the application null and void; (2) that the application be remitted to the ZBA for a new determination on the merits; (3) that the DEC complied with State Environmental Quality Review Act (SEQRA) requirements in issuing negative declaration for project; (4) that any technical violations in the Town's responses to Freedom of Information Law (FOIL) requests did not warrant imposition of costs or counsel fees; and (5) any technical violations of Open Meetings Law were insufficient to void town or ZBA's actions; and

WHEREAS, subsequent to the Fourth Department's decision, the ownership of the mine and the various mining permits were transferred from Christopher J Construction, LLC to Circle T Sterling, LLC; and

WHEREAS, in accordance with the Fourth Department's decision that the matter be remitted back to the ZBA for a new determination on the application, the application was renewed in the name of Circle T Sterling, LLC, as owner and Applicant, by correspondence (with accompanying exhibits) from Applicant's Counsel, Richard J. Andino, Esq. on or about November 30, 2018; and

WHEREAS, on or about December 6, 2018 the application was referred to the Cayuga County Planning Department ("CCPD") for review and comment pursuant to General Municipal Law 239-m and said Board having reviewed the submission on December 20, 2018, issued its

report indicating that the matter appears to have no intermunicipal concerns and is of local concern only; and

WHEREAS, the Cayuga County Planning Board further noted that an exemption agreement by and between the County and the Town of Sterling dated March 19, 2001 exempts area variances from mandatory 239 referral to the Cayuga County Planning Board; and

WHEREAS, in accordance with LUR Article 4, Section 13, the ZBA Clerk referred the area variance application to the Town of Sterling Planning Board for review and recommendation; and

WHEREAS, the Planning Board reviewed the area variance at its meeting held on December 6, 2018 and by correspondence to ZBA Chairman Richard Palmieri, dated December 6, 2018, the Planning Board unanimously recommended that the ZBA approve the area variance; and

WHEREAS, the ZBA held a public hearing on the area variance application at a special meeting of the Board held on January 30, 2019 and after due notice by publication in the official newspaper of the Town and due notice to the Owner/Applicant, neighboring landowners and Board Members, in accordance with the law; and

NOW, THEREFORE, BE IT RESOLVED, that upon the facts presented and the record before the ZBA, and considering the comments from the public and materials submitted, the ZBA hereby makes the following findings, determinations, and conclusions:

- (1) **Whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance:**

The ZBA contemplates an individual requirement, a narrowed focus of an element of the project, and assesses its meaning and impact when applied to the surrounding neighborhood. The relief being sought is for setback in relation to the single access point and not the mining operation which was under the purview of the Planning Board in the issuance of the special use permit. The ZBA examined the change to the neighborhood of an additional 100 trips per day of heavy commercial trucks such as tandem dump trucks, triaxle dump trucks and eighteen wheel tractor/dump trailer combination vehicles. The quiet and serene neighborhood would experience the noise of a truck entering or exiting the access road with acceleration and braking every 6 minutes for the duration of a ten hour day Monday thru Friday and an eight hour duration on Saturdays for a projected 20 year timeframe in order to excavate 1.4 million cubic yards of sand and gravel. The historical use of the property was a small family gravel mine that removed less than 750 cy per year or 0.05% of the projected yields of the mining operation. The change to the expanse of the usage is exponential and the ZBA concluded that by implanting a commercial enterprise and utilizing an access point within a rural and residential neighborhood will surely alter the character of that neighborhood. The properties that are located within the setback or even along the designated truck route will experience detrimental effects to their property and quality of life. The commercial trucks will create multiple loud noises throughout every day, noxious odors, air pollution, increased traffic on the roadway, increase safety concerns for

residents entering/leaving their properties and increased concern for safety of children playing outside; all of which can be viewed as harmful, damaging, spoiling or marring the current quality of life experienced by the neighborhood. For these reasons the ZBA finds that the granting of the variance will cause an undesirable change in the neighborhood and cause detriment to nearby properties.

(2) **Whether the benefit sought by the applicant can be achieved by some method feasible for the applicant to pursue, other than an area variance:**

The ZBA recognizes that alternative locations for an access point to the mine were considered and presented throughout the application process. The original concept for access to the mine included two points, a northerly drive and a southerly drive, which would allow ingress at one and egress at the other and consequently reduced the number of trucks passing by any single point during a trip. In their review, the DEC considered the northerly drive to affect a greater number of residential buildings than the southerly drive did, therefore requiring the north drive to be closed and seeded in DEC mining permit approval, which essentially created a single access point for the mining operation. The single southerly drive was also conditioned by the Planning Board's resolution for special use permit to be the only access point to the mine. The ZBA does recognize that due to these impositions the property owner has only one access point available and requires the area variance requested to utilize it. It also finds that the applicant pursued various options for access, acquiesced to conditions imposed by the DEC and Sterling Planning Board, all in an effort to reduce the extent of the required variance needed to access the property. They concur that the benefit sought by the applicant cannot be achieved by another method that is feasible to the property owner.

(3) **Whether the requested area variance is substantial:**

The ZBA acknowledges that compliance with the 1,000' setback requirement would be difficult for most properties to achieve, particularly where scattershot development occurs like that found in rural areas such as Sterling. The ZBA is cognizant of the necessity for the owner to obtain this variance which is crucial to the undertaking of the mining operation, but the relief sought is particularly substantial for four residences, as follows:

- Relief of 37% for residence located at 13123 Sanford Road (#26.00-1-9.212).
- Relief of 58% for residence located at 13138 Sanford Road (#20.00-1-68.2).
- Relief of 66% for residence located at 13177 Sanford Road (#20.00-1-62.211).
- Relief of 29% for residence located at 13199 Sanford Road (#20.00-1-62.12).

Although the applicant attempted to isolate a location requiring the least amount of overall relief, the ZBA determined that the relief sought for the single access point was substantial.

(4) **Whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district:**

The ZBA concurred that the DEC performed an exhaustive review as lead agency of a Type 1 Action under SEQRA. Their final determination of a Negative Declaration that the

project would not have a significant effect on the environment was accepted by the Planning Board as an element of Special Use Permit Approval and Site Plan Review, both of these Town processes involving a larger and more encompassing scope of the project than that afforded to the ZBA. In contrast, the ZBA is allowed to examine an individual requirement, a narrowed focus of an element of the project, and assess its meaning and impact when applied to the surrounding neighborhood. The ZBA must also attempt to ascertain the governing board's intent in enacting the provision being sought relief of. The requirement for a 1,000' setback is unique to mining operations and is not required for any other allowed use, which gives weight to the importance of the provision in regards to the protection of the health, safety and general welfare of the residents. The SEQRA results testify to the mining operation and its effects on the surrounding environment with protection for the roads by bonding, improvement to the short sight distances by requiring a single access road, controlled noise of mining operations through establishing business hours, mitigation of dust by internal watering and other like measures that do not necessarily apply directly to the narrow focus of the variance requested for an access point. The ZBA discussed the potential for adverse effects in regards to the narrow focus of the access road. It found that there is great potential that the neighborhood will be impacted by the introduction of 100 trips per day of heavy commercial trucks such as tandem dump trucks, triaxle dump trucks and eighteen wheel tractor/dump trailer combination vehicles. The quiet and serene neighborhood would experience the noise of a truck entering or exiting the access road with acceleration and braking every 6 minutes for the duration of a ten hour day Monday thru Friday and an eight hour duration on Saturdays for a projected 20 year timeframe in order to excavate 1.4 million cubic yards of sand and gravel. The historical use of the property was a small family gravel mine that removed less than 750 cy per year or 0.05% of the projected yields. The mine utilized the northerly access road, which has been eliminated by both the DEC and Planning Board, while the southerly access road was utilized to access a Christmas tree farm adjacent to the mine area and not historically an access road for the mine. The special use permit condition that limits the maximum number of trucks to 50 per day may effectively control the impacts of the mining operation within the Life of Mine limits, but the ZBA finds that it does not reduce the impact felt by the neighbors that have residences within the 1,000' setback or those who reside along the designated truck route. The notion that the activities of the proposed mine are similar in nature to the agricultural activities that are prevalent throughout the Town of Sterling may again be valid for the activity of the mining operations within the Life of Mine limits where all activity occurs on the property, but not the potential 100 trips per day of commercial truck traffic creating noise, dust and safety concerns that did not exist previously as a result of the historical mining activity. Based on the foregoing, the ZBA hereby finds that there will be adverse impacts to the physical environmental conditions of the neighborhood in regards to increased traffic and noise if the variance is granted.

- (5) *Whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the ZBA, but shall not necessarily preclude the granting of the area variance:*

The ZBA recognizes that the historical use of the property has been a small family gravel mine; and that the LUR allows mining within the A/R zoning district, of which this property is located within, with the issuance of a special use permit. However, the need for the requested area variance is wholly due to the change in the volume of the material to be extracted from the

existing mine which utilized the northerly drive incident free for nearly 50 years. The ZBA hereby finds that the alleged difficulty is self-created.


BE IT FURTHER RESOLVED, that for all of the foregoing reasons and based on the record before the Board, the ZBA hereby **DENIES** the requested area variance with respect to the setback requirement between access roads and residences under LUR Article 10-5(J)(2)(d); and

BE IT FURTHER RESOLVED, that this Resolution shall be effective as of the date of its filing with the Town Clerk.

The question of the adoption of the foregoing Resolution was duly put to a roll call vote, which resulted as follows:

Richard Palmieri	Chairperson	Voted	Yes
Charles Itzin	Member	Voted	Yes
Honore Yuhas	Member	Voted	No
Darrell Uetz	Member	Voted	No
Brad Dates	Member	Voted	No

RICHARD PALMIERI, Chairperson of the Town of Sterling Zoning Board of Appeals, hereby certifies that the foregoing Resolution **DENYING** the requested area variance was duly adopted by a majority of the Zoning Board duly convened and held on January 30, 2019, a quorum being present.



RICHARD PALMIERI, CHAIRPERSON
 Town of Sterling Zoning Board

LISA COOPER, Town Clerk of the Town of Sterling hereby certifies that the foregoing Resolution was duly filed in her office on February 5, 2019.



LISA COOPER
 Town Clerk