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ZBA - Resolution #1-2019  
Kent Hollow Inc.

Appeal from Notice of Violation and Order to Remedy, May 1, 2017  
Findings of Fact and Conclusions

The Order Appealed

Kent Hollow, Inc. ("Kent Hollow") appeals from the May 1, 2017 Notice of Violation and Order to Remedy (NOV/OTR) issued by the Town's Code Enforcement Officer (CEO).

Nature of violation

In 2007, the Town's zoning law was amended. Relevant to this appeal, the amendments defined "soil mining" as a use, created the Soil Mining Overlay (SMO) zoning district, and allowed soil mining activities only in that district by special permit.

The amendments also established provisions regulating nonconforming uses. Existing nonconforming soil mining operations are governed by § 121-27 D.(3), which provides that a nonconforming soil mining operation may expand by mining within the boundaries of the original parcel on which the mine was legally permitted, only to the extent allowed by an existing DEC permit or as otherwise provided by the laws of New York State.

The NOV/OTR states that the 2017 application of Kent Hollow for a DEC permit to allow it to conduct mining of sand and gravel on 34 acres of its property at 341 South Amenia Road, and the soil mining operations being conducted at that location, violate the Town's Zoning Code, in that the property is not located within the SMO Zoning District and that the property owner does not have the required special permit.

The NOV/OTR asserts the following facts

1. The Town of Amenia Zoning Law defines soil mining as the use of land for the purpose of extracting and selling stone, sand, gravel, or other minerals.

2. The operation described in Kent Hollow's DEC application constitutes "soil mining", as defined in Chapter 121 of the Town Zoning Law.

3. Kent Hollow's DEC application represents that soil mining is permitted at the proposed location and no permits are required.

4. The Soil Mining Overlay (SMO) zoning district is the only district where new mining operations (MO) are allowed.

5. Kent Hollow's property is located in the R-A zoning district, not the SMO district.

6. The SMO allows existing mines with current DEC mining permits to renew those permits, but all new mining operations or expansion of existing mining operations require a special permit.

35 8. The proposed operation described in Kent Hollow’s 2017 DEC permit application  
36 is a new operation, is not in the SMO Overlay District and does not have the special  
37 permit required by Chapter 121 to conduct soil mining operations.

38 9. The proposed operation is not allowed by zoning; therefore the property owner  
39 must withdraw that application for the DEC mining permit.

40 10. The DEC application states that Kent Hollow has conducted MO on the property  
41 below the DEC permit threshold.

42 11. The Town’s Code has a specific non-conforming use provision for expansion of  
43 existing non-conforming MO to expand within boundaries of parcel where the MO was  
44 legally permitted, to the extent allowed by an existing DEC permit or otherwise allowed  
45 by law: Kent Hollow has not provided evidence that it is allowed to continue under that  
46 provision.

47 12. Further, the Town Code (§121.27 B.) provides that if a non-conforming use is  
48 “discontinued for a period of one year”, it shall not be continued.

49 13. Based on the information provided, the alleged MO on the site was discontinued  
50 for a period of one year or longer on one or more occasions since 2007.

51 14. Additionally, in 2012 the CEO determined that all MO on the KH property were  
52 prohibited, and that determination was never appealed.

53 15. Therefore, the CEO directed Kent Hollow to remedy those violations by  
54 withdrawing its DEC application, ceasing any current soil mining operations  
55 immediately and refraining from undertaking any further MO on the property without a  
56 Town permit.

57 § 121-57 C., Abatement of Violations, authorizes the Code Enforcement Official to issue  
58 a stop-work or cease and desist order and/or institute an appropriate legal action or proceeding to  
59 prevent, restrain, correct, or abate any violation of Chapter 121 of the Town Code to prevent the  
60 occupancy of premises or to prevent any activity, business, or use that violates Chapter 121.

### 61 The Appeal

62 On this appeal, Kent Hollow does not dispute the following facts: that its property is not  
63 located in the Soil Mining Overlay (SMO) District; that it does not have the Town special permit  
64 required by the SMO regulations to commence a soil mining activity; that it did make application  
65 to the DEC to commence activities on its property that constitute a soil mining activity, as that  
66 term is defined by the Town Code; and that it did not make any submission to the CEO in  
67 connection with the 2017 NOV/OTR prior to commencing this appeal.

68 Kent Hollow asserts that the CEO erred in issuing the NOV/OTR because he failed to  
69 recognize that Kent Hollow was a nonconforming use at the time the 2007 amendments were  
70 adopted, and had a vested right to continue “soil mining” operations on the Kent Hollow Inc.  
71 property and to expand those operations to the land that is the subject of the 2017 DEC

72 application, notwithstanding the 2007 amendments to the Town’s zoning law that established the  
73 Soil Mining Overlay District and required mining activities in that overlay district to obtain a  
74 special permit.

75 In considering these claims, the Board recognizes that determining the nature and extent  
76 of an alleged nonconforming use involves questions of fact and legal principles. In doing so, the  
77 Board considers the nature of the incipient nonconforming use at the time prohibitive zoning was  
78 adopted, and the character and adaptability to such use of the entire property in question, which  
79 necessarily entails an examination of the nature of the particular nonconforming use in issue as  
80 well as the activities engaged in by the landowner in effectuating that use prior to the adoption of  
81 the restrictive ordinance.

82 **ZBA Authority on the Appeal**

83 Both the NYS Town Law and the Town Code provide that the Zoning Board of Appeals  
84 may reverse or affirm, wholly or partly, or may modify the order, requirement, decision,  
85 interpretation, or determination appealed from, and shall make such order, requirement, decision,  
86 interpretation, or determination as in its opinion ought to have been made in the matter by the  
87 administrative official charged with the enforcement of Chapter 121.

88 In so doing, the Zoning Board of Appeals shall have all the powers of the administrative  
89 official from whose order, requirement, decision, interpretation, or determination the appeal is  
90 taken. Section 121-59 A.1.

91 **Relevant Zoning Provisions**

92 Pursuant to § 121-60 A., a “soil mine” requires a special permit issued by the Town  
93 Board. For purposes of the special permit review procedure, a soil mining activity that does not  
94 require a DEC permit is considered a “minor project”, § 121-60.C.(1)(f), and subject to the  
95 standards of §121-63 A.

96 § 121-74{p. 121} SOIL MINING Use of land for the purpose of extracting and selling  
97 stone, sand, gravel, or other minerals, as defined in § 23-2705 of the Environmental  
98 Conservation Law, not including the process of preparing land for construction of a structure for  
99 which a zoning permit has been issued.

100 § 121-17 D.8, Soil Mining Overlay District (SMO), provides that preexisting  
101 nonconforming soil mining operations are governed by § 121-27D(3):

102 D. Restoration, expansion, and repair. A nonconforming use or structure shall not  
103 be extended, enlarged, or structurally altered except as provided below. The  
104 extension of a conforming use to any portion of a nonconforming structure shall  
105 not be deemed the extension of a nonconforming structure or use.

106 (3) A nonconforming soil mining operation may expand by mining within the  
107 boundaries of the original parcel on which the mine was legally permitted, only to  
108 the extent allowed by an existing DEC permit or as otherwise provided by the

109 laws of New York State. Such an operation may not begin to process materials  
110 mined off-site by crushing, screening, sorting, washing, drying, or otherwise,  
111 unless the Planning Board grants a special permit to allow such processing. This  
112 shall not prevent the continuation of any nonconforming soil mining operation  
113 which was processing materials mined off-site at the time it became  
114 nonconforming, nor shall it prevent the continuation of any nonconforming  
115 industrial use of a property where soil mining products mined off site are used as  
116 a raw material. [emphasis added]

117 This appeal is premised on Kent Hollow's assertion that it had the legal right to  
118 apply for the DEC permit because existing activities on the site at the time the 2007  
119 zoning law was adopted constituted lawfully established nonconforming soil mining  
120 activities that could be extended to the entire area of the property. In order to be lawful  
121 on July 24, 2007, such use must either have been established pursuant to the 1973 zoning  
122 law or have been lawfully established prior to it.

123 As no claim is made that the use was established pursuant to the 1973 zoning law,  
124 the Board must therefore consider:

125 1. Whether the soil mining use proposed in the DEC application was a  
126 nonconforming use in existence at the time the Town adopted its 1973 zoning law;

127 2. The nature and extent of the use existing on the property at that time; and

128 3. the restrictions on expansion of a nonconforming use in general and  
129 "quarrying" uses in particular, and whether that use was continued in conformance with  
130 the 1973 zoning law.

131 The definitions, special permit requirements applicable to a "quarrying" use, and  
132 provisions for continuation and expansion of nonconforming uses of the 1973 zoning law  
133 are also relevant, and those provisions considered on this appeal are annexed.

134 **The Record before the Board**

135 On its initial submission, Kent Hollow offered:

136 1. The Affidavit of Mr. Gregory Steiner, president of Kent Hollow, Inc., the owner of the  
137 property at 341 South Amenia Road, and Exhibits A-Y annexed thereto.

138 Mr. Steiner states that Kent Hollow is an "affiliate" of Steiner, Inc.; that Steiner, Inc. is a  
139 homebuilding company in Bethel, Connecticut; that over the years, Steiner would remove  
140 material from the mine and use the sand/gravel for home or road building; and that "...during the  
141 period of our ownership, the mine was not used for any other purpose and, in fact, we purchased  
142 it for use as a mine."

143 The exhibits annexed to Mr. Steiner's affidavit included photographs intended to show  
144 soil mining activities, documents reporting excavation and removal of material from the property  
145 between 1990 and 2016 and a letter-report from Roy T. Budnik and Associates, Kent Hollow's

146 consulting geologist, dated August 9, 2017, which describes Mr. Budnik's estimate of materials  
147 removed from the Kent Hollow property between 2004 and 2017.

148 The application and affidavit was submitted with a letter from Kent Hollow's counsel,  
149 Allan Rapplyea, Esq., to the Board, dated August 21, 2017 which raised a number of legal  
150 arguments:

151 a. That since Kent Hollow has excavated and removed materials from portions of its  
152 property prior to the 2007 amendment to the Town Code, and those activities constitute "soil  
153 mining" operations, the area used for those activities constitutes a mine, and the mine therefore is  
154 a pre-existing, non-conforming use that was in existence prior to the current Zoning Code;

155 b. That since Kent Hollow established and maintained the legal right to lawfully operate  
156 a mine on its property as a non-conforming use, it also has a vested right to expand its mining  
157 operations to include the 34 acres proposed in its application to the DEC for a new mining permit  
158 without the special permit otherwise required by the Town Code; and

159 c. That although Kent Hollow relinquished a prior DEC mining permit in 1989, that did  
160 not end "mining" activities on the property and the use of its property as a nonconforming mine  
161 use was continuous between 1990 and 2007, and did not cease after 2007.

162 Therefore, Kent Hollow has the legal right to conduct the soil mining activities proposed  
163 in the 2017 DEC application. Attorney Rappleyea concluded that the Zoning Board of Appeals  
164 should reverse the CEO's findings and annul the Order.

165 Following the initial presentation by the applicant at the September 18, 2017 meeting, the  
166 Board began its review of Kent Hollow's submissions with the assistance of its conflict counsel,  
167 George Lithco, Esq, and Town Engineer Andrews.

168 The Board directed them to conduct a preliminary review of the application, the annexed  
169 exhibits, the Town's files and files maintained by the Dutchess County Department of Health to  
170 determine whether the facts in the record adequately support the arguments offered on this  
171 appeal. Acting primarily through its counsel, the Board and its consultants have raised factual  
172 issues and concerns throughout its review, and received additional submissions from the  
173 Appellant, its counsel and its consulting geologist, as well as members of the public.

174 Those documents are listed in Schedule A, and with the hearing transcripts of the public  
175 hearings on this appeal, constitute the Board's record. In the interests of brevity, the Board will  
176 only reference specific documents where required.

177 On December 29, 2017, the Board's counsel advised Kent Hollow and its counsel by  
178 letter of factual issues that became evident in the course of the Board's initial review. Based on  
179 that review, the letter specified additional information that would be required.

180 On March 29, 2018, Kent Hollow made an additional submission, which included DEC  
181 permit applications and related documents, and correspondence between Kent Hollow and Town  
182 officials concerning activities between 1975 and 1992.

183 . On April 24, 2018, the Board's counsel issued a letter raising questions regarding those  
184 submissions and identifying information that had not yet been provided.

185 On September 17, 2018, the Board opened a public hearing. Kent Hollow submitted a  
186 letter from its counsel, affidavits from members of the Steiner family involved in the activities on  
187 the Kent Hollow property, and both representatives of Steiner, Inc. and Kent Hollow and  
188 members of the public appeared and offered testimony.

189 On October 3, 2018, the Board's counsel issued a letter summarizing questions and issues  
190 raised by the submissions at the hearing. Kent Hollow's counsel responded by letters on  
191 November 14, 2018 and December 10, 2018. Chairman Metcalfe issued a letter on October 15,  
192 2018 indicating the Board's intent was to close the public hearing at its November meeting, and  
193 it did so after receiving additional testimony and correspondence.

194 Following the close of the public hearing, Kent Hollow agreed to extend the Board's time  
195 to make a determination on the appeal. There were additional submissions by Kent Hollow on  
196 December 10, 2018, January 31, 2019 and March 5, 2019. The Board also received letters from  
197 its engineer on December 6, 2018, January 14, 2019 and January 22, 2019.

## 198 Legal Standards

### 199 **Burden of Proof**

200 "A use of property that existed before the enactment of a zoning restriction that prohibits  
201 the use is a legal nonconforming use". Mtr of Toys "R" Us v Silva, 89 NY2d 411, 417 (1996).

202

203 The burden of proof is on the property owner, who must establish that the allegedly pre-  
204 existing use was legal prior to the enactment of the prohibitive zoning law which rendered it  
205 nonconforming. Tavano v. Zoning Bd. of Appeals of the Town of Patterson, 149 A.D.3d 755,  
206 756 (2d Dept 2017) A nonconforming use may not be established by an existing use of land that  
207 was commenced or maintained in violation of a prior zoning ordinance. Rudolf Steiner  
208 Fellowship Found. v De Luccia, 90 NY2d 453, 458 (1997). The burden of proof must be met by  
209 evidence that is sufficient to demonstrate that the challenged uses existed on its property prior to  
210 the adoption of the prohibitive zoning ordinance. Mtr of Sand Land Corp. v. Zoning Bd. of  
211 Appeals of Town of Southampton, 137 A.D.3d 1289, 1293 (2d Dept. 2016)

### 212 **Nonconforming use**

213 To decide the appeal, the ZBA must first determine whether Kent Hollow has established  
214 that it had the right to conduct "soil mining" activities as a non-conforming use on its property at  
215 the time the 2007 zoning law was adopted. At that time, Kent Hollow did not have a DEC  
216 mining permit, and it had not applied for the special permit required by the Town's zoning law to  
217 conduct mining activities in the R-A Zoning District.

218 The basis for establishing a non-conforming use was recently summarized in Cleere v  
219 Frost Ridge Campground, LLC, 155 AD3d 1645, 1648 (4th Dept. 2017):

220 A use of property that existed before the enactment of a zoning restriction that  
221 prohibits the use is a legal nonconforming use" (Matter of Tavano v Zoning Bd.  
222 of Appeals of the Town of Patterson, 149 AD3d 755, 756 (2d Dept 2017)  
223 [internal quotation marks omitted]; see Toys "R" Us, 89 NY2d at 417). "The  
224 nature and extent of a preexisting nonconforming use generally will determine the  
225 amount of protection accorded that use under a zoning ordinance." Matter of  
226 Rudolf Steiner Fellowship Found. v De Luccia, 90 NY2d 453, 458 (1997). "All  
227 zoning cases are by their nature fact specific, and as a leading authority  
228 recognizes, the right to a nonconforming use must necessarily be decided on a  
229 case-by-case basis" (Toys "R" Us, 89 NY2d at 422).

230 The rules relating to nonconforming uses are clear. The owner who claims a vested right  
231 has the burden of showing the facts that give rise to that right, and demonstrating that the  
232 property was indeed used for the nonconforming purpose, as distinguished from a mere  
233 contemplated use, when the zoning ordinance became effective.

234 As the Court of Appeals has observed, "...use of a limited portion of the premises will  
235 not necessarily serve to pre-empt the entire parcel as against a later prohibitory zoning  
236 ordinance,, [t]he test most often employed in determining the extent of a nonconforming use is  
237 'whether the nature of the incipient nonconforming use, in the light of the character and  
238 adaptability to such use of the entire parcel, manifestly implies an appropriation of the entirety to  
239 such use prior to the adoption of the restrictive ordinance'." Syracuse Aggregate Corp. v. Weise,  
240 51 NY2d 278, 284-285 (1980); Mtr of Dolomite Prods. Co. v. Kipers, 23 AD2d 339, aff'd. 19  
241 NY2d 739, cert. den. 389 US 214 (1967).

242 The Board recognizes that those rules must be carefully applied to the complex issues  
243 that are presented on this appeal. To determine that it had the legal right to conduct the mining  
244 activities proposed in the 2017 DEC application, Kent Hollow must demonstrate that the use  
245 lawfully existed at the time the 2007 zoning amendment was adopted. To do so, it must show  
246 that the use was lawful under the 1973 zoning law, which the Board notes allowed a "quarrying"  
247 use in the R-A zoning district, where the Kent Hollow property was located, by special permit.

248 The Board acknowledges that Kent Hollow does not claim it had a special permit to  
249 conduct quarrying activities. Instead, it asserts that it had established that use by conducting  
250 such activities on its property prior to the adoption of the Town's 1973 zoning law, and that it  
251 continually engaged in such use until the present.

252 The Board must therefore determine whether the evidence Kent Hollow offers  
253 demonstrates the nature and extent of its use prior to the adoption of zoning is sufficiently similar  
254 to the nature and extent of the use proposed in the DEC application that the Board can find the  
255 proposed activity is a nonconforming use.

256 **Vested right**

257 While a zoning ordinance generally cannot prohibit an existing use to which a property  
258 was devoted at the time of the enactment of the ordinance from continuing, it can restrict it. The  
259 use that exists at that time is " 'constitutionally protected and will be permitted to continue,

260 notwithstanding the contrary provisions of the ordinance' " Glacial Aggregates, 14 NY3d at  
261 135, quoting People v Miller, 304 NY 105, 107 (1952); Syracuse Aggregate Corp. v. Weise, 51  
262 N.Y.2d 278, 284-285 (1980).

263 The Board is mindful of its obligation to consider the legal standards established in  
264 Syracuse Aggregate v. Weise, Buffalo Crushed Stone, Glacial Aggregates, and Jones v. Carroll,  
265 a series of cases decided by the Court of Appeals that involved land acquired for mining and  
266 similar uses. In those cases, the Court considered the unique nature of mining operations, where  
267 the owner "contemplates the excavation and sale of the corpus of the land itself as a resource"  
268 Syracuse Aggregate, 51 NY2d at 285), and found a special exception to the general rule that a  
269 nonconforming use may not expand beyond the area used at the time it became nonconforming.

270 The 1973 zoning law restricted the expansion of nonconforming uses in general (§5.72),  
271 and nonconforming mining uses in particular (§6.55 (2)(d.)(3/)(d/)). To show that it had a vested  
272 right to expand soil mining operations to the land proposed in the DEC application, Kent Hollow  
273 must show that it had established such a use prior to the adoption of the 1973 zoning law. In  
274 doing so, it "must demonstrate that the property was indeed used for the nonconforming purpose,  
275 as distinguished from a mere contemplated use, at the time the zoning ordinance became  
276 effective". Syracuse Aggregate, 51 NY2d at 284-285).

277 The cases that establish the mining exception involve, with one exception, mining  
278 businesses. They consider whether the operator acquired the land for that purpose, manifested an  
279 overt intention to use the entire property for the purpose of mining and made substantial  
280 investments in the property for that purpose. The exception recognizes that when only part of a  
281 parcel has been used for a use that was made nonconforming by zoning amendments, a  
282 landowner may seek protection for the remaining portion by demonstrating that the use is unique  
283 and adaptable to the entire parcel and showing that the landowner took "specific actions  
284 constituting an overt manifestation of its intent to utilize the property for the ascribed purpose".  
285 Buffalo Crushed Stone, 13 NY3d at 98.

286 For example, in Jones v. Carroll, the Court found that the following facts demonstrated  
287 the landowner's intent to expand its non-conforming landfill use to its entire property: the town  
288 had granted a use variance that allowed the landfill use on the entire property; the use was  
289 established prior to the zoning amendment; and the owner's activities manifested an intent to  
290 utilize all of their property in a manner consistent with that purpose "by dedicating substantial  
291 areas around the actual landfill site for related purposes, purchased necessary heavy equipment  
292 (such as a bulldozer, a backhoe, an excavator, a loader and a dump truck), employed a dozen  
293 people, developed plans for multi-stage enlargement of the landfill and engaged in discussions  
294 with investors regarding future operations." Considering those facts, the Court held the owners  
295 had adequately demonstrated that they acquired a vested right to operate a C&D landfill on their  
296 entire parcel, subject to regulation by DEC, and that the subsequent local law could not  
297 extinguish their legal use of the land for that purpose.

298 It therefore appears to the Board that there is a common set of facts in the cases that the  
299 Court of Appeals found qualify for the special exception to the general rule that nonconforming  
300 uses cannot expand: they involve property acquired by entities engaged in mining business; the

301 property was acquired for the purpose of commercial mining, and at the time of acquisition, they  
302 had overtly manifested the intent to use the entire property for that purpose.

303 To determine whether the special exception for mining activities applies to Kent Hollow,  
304 the Board has reviewed the record for evidence demonstrating that Kent Hollow acquired the  
305 Property for the purpose of mining and overtly manifested its intent to mine the entire property at  
306 the time of the adoption of the zoning laws that restricted such use, first in 1973 and then in  
307 2007. The Board requested the assistance of Kent Hollow in providing that evidence, such as  
308 showing there was an existing soil mining business before acquisition of the property; that a  
309 business plan had been developed to establish a mining business on the property; the nature and  
310 extent of investigations into the suitability of the property for such purpose; the scope and nature  
311 of the commercial mining operations on the property since it was acquired; evidence of the  
312 quantity of commercial sales since Kent Hollow acquired the property; the investment of the  
313 property owner in establishing the mining business, including the number of employees engaged  
314 in working the site, the construction of buildings on the property and the acquisition and  
315 installation of machinery to conduct mining activities at the site; and the loss in value that would  
316 result if the owner is not able to continue its business operations.

317 **Issues to be Decided by the Board on this Appeal**

318 It seems to the Board that there is no dispute with respect to the CEO's conclusion that:

- 319 1. Kent Hollow's application to the DEC constituted an application to conduct soil  
320 mining activities on its property;
- 321 2. No portion of Kent Hollow's property is located in the Soil Mining Overlay District;
- 322 3. Kent Hollow has not petitioned the Town to apply the Soil Mining Overlay  
323 designation to any portion of its property; and
- 324 4. Kent Hollow does not have, and has not applied for, the Town mining permit that  
325 would be required to conduct the soil mining operations proposed in its application for a DEC  
326 Soil Mining Permit.

327 Based on the undisputed facts available to the CEO, Section 121-57 C. of the Town Code  
328 authorized him to issue the Notice of Violation and Order to Remedy in order to prevent a  
329 violation of the Town Code.

330 On this Appeal, the Board has the power to conduct a *de novo* review and make such  
331 determination as it determines the CEO should have made on the record before the Board. To  
332 reverse the NOV/OTR issued by the CEO, the Board must find that Kent Hollow had the legal  
333 right to conduct the soil mining activities proposed in its DEC application.

334 To do so, the Board must find that Kent Hollow has met its burden of proof on the  
335 following issues:

336 1. The establishment of a nonconforming use on its property prior to the adoption of the  
337 Town's 1973 zoning law that encompassed the mining activities it proposed in its 2017 DEC  
338 application (the "DEC mining use")

339 2. The establishment of a lawfully established vested right to use its entire property for  
340 that nonconforming use, such that the prohibitions in the 1973 zoning law on the expansion of a  
341 nonconforming use did not apply to its activities, by demonstrating that:

342 a. at the time it acquired its property, it was an entity engaged in the business of  
343 "quarrying" or "soil mining", as those terms are respectively defined in the 1973 zoning law and  
344 the 2007 SMO amendments;

345 b. the property was acquired solely for the purpose of engaging in such mining activities;

346 c. the extent of its investment in acquiring the property and engaging in such mining  
347 activities in reliance upon the right to conduct that use; and

348 d. its actions had overtly manifested its intent to use the entire property for that  
349 nonconforming use at the time of acquisition and then at the time that the Town adopted zoning  
350 that made that intended use nonconforming, such that the "mining exception" applied to the  
351 entire property before the 1973 zoning law was adopted

352 3. That to the extent Kent Hollow had established the right to continue a nonconforming  
353 use of the nature and extent proposed in its DEC mining application, that it did so by continuing  
354 lawful mining activities between 1973 and 2017 that maintained the nonconforming status of its  
355 use, initially against the 1973 zoning and then against the 2007 zoning amendments.

356 **Findings of Fact and Determinations**

357 The Board finds that Appellant has not met the burden of proof necessary to show that  
358 Kent Hollow was engaged in a commercial mining business, whether considered as a soil mining  
359 use, as that use is defined in the 2007 amendments, or as a quarrying use, as that use is defined in  
360 the original 1973 zoning law, at the time those laws were adopted.

361 The Board finds that the record shows, on balance, that as of March 24, 1973, the  
362 excavation and removal activities on the Kent Hollow property were being carried out by and for  
363 the benefit of Steiner, Inc. and other affiliated entities, for two purposes: to facilitate the  
364 development of the rental apartment project that Kent Hollow and Steiner Inc. obtained  
365 approvals for during 1971-72, and to provide construction material largely for use at other  
366 construction sites being developed by Steiner related entities.

367 In reaching that conclusion, the Board acknowledges the affidavits submitted by the  
368 Appellant and the testimony provided by Richard Steiner and others on behalf of Kent Hollow at  
369 the public hearing, but finds the 1992 letter from Richard Steiner to Zoning Administrator  
370 Robeson clear and dispositive on that issue.

371 In further support of that conclusion, the Board notes that the Appellant has not provided  
372 any evidence that the excavation and removal activities on the site prior to the 1973 zoning law

373 were undertaken by Kent Hollow employees, used equipment or buildings owned by Kent  
374 Hollow, or that those activities were real economic transactions that, for instance, resulted in any  
375 substantial income to Kent Hollow or any substantial income taxes. The Appellant has also  
376 acknowledged that Kent Hollow is not an independent economic entity.

377 The Board further finds that the Appellant has not met its burden of showing either that  
378 Steiner Inc. is generally engaged in the business of mining or that it created its Kent Hollow  
379 affiliate and acquired the Kent Hollow property for the purpose of engaging in the business of  
380 quarrying materials for sale to the general public.

381 The Board notes that Kent Hollow has only provided two years of income tax forms that  
382 show modest income from mining activities during 1971 and 1972, and a very limited number of  
383 receipts during the pre-zoning period, which primarily acknowledge materials sold to Steiner Inc.  
384 and show transactions with minimal amounts of material in 1971 and modest amounts in 1972.

385 The Appellant has acknowledged that Steiner Inc. employees generally engaged in the  
386 excavation, processing or removal activities on site, using portable equipment owned by Steiner  
387 and brought to the site for very limited periods of time to excavate and remove materials, and  
388 apparently used either Steiner vehicles or contractor vehicles to move material primarily – albeit  
389 not exclusively – to Steiner affiliated sites. Nothing in the record indicates that Kent Hollow had  
390 employees or owned equipment and vehicles to conduct such activities prior to 1973.

391 Although the Board has repeatedly invited the Appellant to provide information about  
392 income tax or sales taxes during this initial period, and has asked for evidence that the entity  
393 carrying out the alleged mining activities on the Kent Hollow property has the attributes of a real  
394 mining business, such as employees, vehicles, equipment, a marketing or business plan, tax  
395 records showing income from the business, it has declined to do so.

396 On the record before it, the Board cannot conclude that the Appellant has met its burden  
397 of proof to show that: the activities conducted on the Kent Hollow property at the time the Town  
398 adopted the 1973 zoning law were commercial “quarrying” activities of the type proposed in the  
399 DEC application; that Kent Hollow has demonstrated it is entitled to be treated as a mining  
400 business for the purpose of vesting a right to extend such use to the entire Kent Hollow property;  
401 or that Kent Hollow was not bound by the prohibition on expanding the nature and area of the  
402 nonconforming use beyond the limit of the use existing on the Kent Hollow property at that time.

403 The Board discusses the basis for its findings in greater detail below.

404

405 **Kent Hollow's assertion that it acquired the Property for the purpose of mining.**

406 Kent Hollow Inc. has not presented substantial evidence in support of its claim that it  
407 acquired the property for the sole purpose of mining.

408 In considering the purpose that resulted in the acquisition of the Property for determining  
409 Kent Hollow's vested rights claim, the Board finds it appropriate to consider the actions of both  
410 Kent Hollow Inc. and Steiner Inc. for the following reasons:

411 a. Kent Hollow, Inc. has acknowledged it is an "affiliated" entity of Steiner, Inc. and its  
412 actions are controlled by Steiner Inc.

413 b. Steiner Inc. has been and is engaged in the business of residential homebuilding.

414 c. As evidenced by the affidavits offered by Appellant, and the testimony of the  
415 individuals at the public hearing, Kent Hollow is a closely held corporation, there is a substantial  
416 identity of interest between the principals of Kent Hollow Inc. and of Steiner Inc. and Kent  
417 Hollow functions as a subsidiary of Steiner Inc.

418  
419 d. While their testimony is that they investigated the sand and gravel resources on the  
420 Property for the sole purpose of acquiring it for mining, there is substantial evidence in the  
421 record that the reason Steiner Inc. undertook the site investigation it did was to determine  
422 whether the Property was suitable for residential septic facilities before it created Kent Hollow  
423 Inc. and acquired the Property in June, 1971.

424  
425 e. Thus, the record shows Kent Hollow/Steiner Inc. developed a plan for residential  
426 development of up to ten apartment buildings on a substantial portion of the Property, dug test  
427 pits prior to Kent Hollow's acquisition of the property that were witnessed by County Health  
428 Department staff, and made application after acquiring the property for approval of the necessary  
429 septic facilities to allow that development, promptly applied for and received, at least two  
430 building permits in furtherance of that development, and promptly proceeded to construct one of  
431 the apartment buildings, using material taken from a pit on the property by Steiner employees,  
432 equipment and vehicles.

433 f. On review of the County Health Department file and the investigation conducted by  
434 Steiner prior to acquisition of the Property by Kent Hollow, it was the Town engineer's opinion  
435 that the nature and extent of those investigations, the presence of Health Department staff in  
436 March 1971 to observe the test pits, the confirmatory letter issued by the Health Department in  
437 April 1971 confirming the soils were acceptable for residential septic purposes, the subsequent  
438 Health Department review of test pits in June, 1971 and the Health Department approval to  
439 construct in September 1971 were all normal and customary events that were consistent with  
440 Health Department practice prior to approval of residential sanitary systems.

441 g. On review of the 1971 sieve test results, the Town engineer also advised the Board  
442 that in his experience, testing to evaluate the suitability of gravel and sand for mining purposes  
443 would normally be more extensive and include testing to determine whether the materials were

444 suitable for use in road construction and other common uses, which typically would include  
445 reference to DOT standards.

446 h. There is no evidence in the record that Kent Hollow, Inc. was in the business of mining  
447 when it acquired the Property, that it had employees that engaged in the excavation or removal of  
448 materials from the site, owned the equipment or vehicles used for that purpose, constructed  
449 buildings or other substantial improvements on the Property used for “mining” activities or made  
450 any capital investment in the acquisition of the Property.

451 i. To the extent that the employees, equipment and vehicles used to remove materials  
452 from the Property were provided by Steiner, Inc. there is no evidence that Steiner Inc. was in the  
453 commercial mining business, and the record shows that that it generally used employees,  
454 equipment and vehicles for that purpose that were primarily employed or used in its existing  
455 homebuilding business.

456 On the record before it, the Board finds that the primary purpose of acquiring the  
457 Property was to develop a residential project on the Property. In doing so, the principals of  
458 Steiner Inc. considered the availability of materials on the Property for use in their homebuilding  
459 activities, both on the Property and at other locations.

460 The Board deems it significant that the income tax worksheets provided with Kent  
461 Hollow’s 1971 and 1972 tax returns show that the \$52,000 cost of the Property was allocated  
462 among the 8 acre portion of its property that was designated for the residential project, the  
463 remaining surface land, and the “gravel deposit”: the land for residential building lots was valued  
464 at \$20,382 and the surface land at \$17,325, more than twice the value placed on the potential  
465 sand and gravel deposits.

466 The Board notes again there is very limited evidence that material on the site was tested  
467 for commercial mining purposes prior to purchase. The Board’s engineer finds that evidence to  
468 be more consistent with evaluating the suitability of using the excavated materials for Steiner  
469 construction projects than with the intent to offer those materials for sale to the commercial  
470 market. The testing receipts available for the post-purchase period show that material excavated  
471 and removed from the property was being delivered to Steiner Inc. for use in Connecticut, and  
472 the material testing procedure in 1972 was limited to evaluating the samples against Connecticut  
473 standards used for construction of foundations and roads.

474 This conclusion is supported by the evidence that the material removed from the Kent  
475 Hollow site was largely being sold to Steiner Inc. between 1971 and 1976, which the Appellant  
476 has acknowledged may have only been an internal transaction between the those two entities,  
477 while there were only two sales to any unaffiliated entity.

478 For the reasons above, the Board finds that Kent Hollow Inc. has not presented  
479 substantial evidence sufficient to support its claim that it acquired the property for the sole  
480 purpose of mining.

481

482 **Kent Hollow's overt manifestation of an intent to mine the Property**

483 On the record before it, the Board cannot conclude the Appellant has met the burden of  
484 proof necessary to show that either Kent Hollow or Steiner, Inc. had clearly and overtly  
485 manifested the intent to acquire the entire Kent Hollow property for mining activities.

486 While the Board acknowledges that the Appellant has provided affidavits from the  
487 current president of Kent Hollow and testimony from a former principal about the activities that  
488 were undertaken to investigate mineral resources on the property before it was purchased, the  
489 Board finds that evidence offset by the fact, as set forth above, that Steiner, Inc. was engaged in  
490 the homebuilding business, that a substantial residential apartment building project was proposed  
491 shortly after the property was acquired, that plans were prepared and submitted for review, water  
492 and sewer facilities were approved, building permits issued and the initial apartment building  
493 was constructed.

494 Although the Appellant asserts that it excavated test pits solely for the purpose of  
495 determining the extent and nature of material on the site, the purpose and extent of those  
496 activities is at the very least equivocal. The Town's engineer has reviewed the evidence  
497 provided by the Appellant and concluded that the work was undertaken as part of the work  
498 necessary to evaluate the site for septic facilities, noting that the test pits were witnessed by the  
499 County Health Department for that purpose.

500 The Board finds it noteworthy that nowhere on the plans and reports prepared for the  
501 water and sewer facilities is there any reference to use of the remainder of the property for  
502 mining activities. Nor is there any indication in the correspondence between Kent Hollow's  
503 counsel and Town officials, which began on June 21, 1971, concerning Kent Hollow's need to  
504 obtain subdivision approval before any building permits could be issued, that Kent Hollow had  
505 any intent to engage in commercial soil mining activities. That correspondence and the  
506 subdivision approval that was issued on September 13, 1971 referenced only the apartment  
507 project.

508 There is not one instance in the record that shows that Kent Hollow or Steiner Inc.  
509 overtly manifested its intent to acquire the property for mining to any local or County official in  
510 any way, despite seeking water and sewer approvals, building permits and the subdivision  
511 approval needed for its residential development.

512 Nor does the Board deem the erection of a single sign at the entrance, assuming the sign  
513 existed prior to 1973, sufficient to demonstrate such intent. Given that Kent Hollow was engaged  
514 in digging test pits for its residential development and shortly thereafter installing wells,  
515 constructing roads and foundations using material from the area at the rear of the property, and  
516 building its apartment building. Therefore, the Board finds Appellant has not met its burden of  
517 proof to show that the activities on the Property overtly manifested its intent to use the entirety of  
518 its property for commercial mining prior to the adoption of the 1973 zoning law.

519 Therefore, on the evidence before it, the Board cannot find that Kent Hollow established  
520 its right to extend whatever nonconforming use existed on the Kent Hollow property in 1973 to  
521 the entirety of the property that is now proposed for the DEC commercial mining activities.

522

523 **The nature of the nonconforming use prior to March 24, 1973**

524 As a defense to the NOV/OTR, Kent Hollow Inc. asserts it had established a  
525 nonconforming mining use, of the same nature and extent as proposed in its 2017 DEC  
526 application, prior to the adoption of the 1973 zoning law.

527 Kent Hollow acquired title to the Property by deed dated June 1971. There is no  
528 evidence in the record that either Kent Hollow or Steiner Inc. was engaged in the mining  
529 business at that time.

530 The Board finds that the substantial evidence in the record indicates that the purpose of  
531 the excavation, processing and removal activities conducted by “Kent Hollow Sand and Gravel”  
532 prior to the adoption of the 1973 zoning law was to provide materials related to the homebuilding  
533 activity on the Property and to provide materials to other homebuilding activities undertaken by  
534 Steiner, Inc.

535 The record contains a letter from Mr. Richard Steiner to Zoning Administrator Barlow,  
536 dated March 25, 1992 (the “1992 Steiner letter”) stating that:

537 a. Kent Hollow, Inc. received a building permit for a six family apartment building on the  
538 Property in May 1971, started building in the summer of 1971, and set up a portable  
539 crushing and screening plant that ran between 1971 and 1976; and

540 b. “the gravel and crushed stone was used for the construction of the apartment building  
541 and roads”, and also for “our residential home construction business in Connecticut”.

542 There was limited testing. Kent Hollow’s initial submission included a document dated  
543 May 3, 1971 which appears to show that a sample of material from the site was tested for a third  
544 party (neither Kent Hollow Inc. or Steiner Inc.), and that the testing done at that time was not  
545 done to evaluate the full potential of the material for commercial uses.

546 There was limited removal of materials. While Kent Hollow subsequently submitted  
547 documents which appear to be the depletion schedule from its 1972 and 1973 income tax returns,  
548 those schedules show limited sales of material from the Kent Hollow property, and invoices  
549 provided by counsel for Kent Hollow show that the majority of sales during this time were  
550 transactions between Kent Hollow and Steiner, Inc.

551 Based on the evidence in the record, the Board cannot determine that the nature of the use  
552 established in 1971 and existing when zoning was adopted in 1973 was the same soil mining use  
553 proposed in the 2017 DEC permit.

554 **The extent of the nonconforming use when the 1973 zoning law was adopted.**

555 Kent Hollow argues that at the time the Town of Amenia adopted its 1973 zoning law,  
556 Kent Hollow was engaged in “mining” activities.

557 The record does not contain any substantial evidence of Kent Hollow Inc. or Steiner Inc.  
558 having engaged in the business of “quarrying” prior to the adoption of the Town’s 1973 zoning  
559 law nor is there evidence of any substantial investment in the Property for the purpose of mining  
560 prior to the adoption of zoning.

561 Despite several requests from the Board for documents or other evidence that would  
562 show Kent Hollow was engaged in substantial mining activities, that it had employees,  
563 equipment, buildings or other evidence that it was a business entity carrying out mining  
564 activities, that it derived any substantial portion of its income from the sale of materials other  
565 than to Steiner affiliated entities, Kent Hollow Inc. has not presented substantial evidence in  
566 support of its claim that it acquired the property for the sole purpose of mining, nor has it shown  
567 evidence of any substantial investment in the Property for the purpose of mining prior to the  
568 adoption of zoning.

569 Over the course of the 1975-1989 DEC mining applications and the reclamation activities  
570 between 1990 -1992, Kent Hollow reported minimal amounts of land as being disturbed and  
571 reclaimed. As noted below, both the DEC and the applicant acknowledged that the mined area  
572 during this period was approximately 3 acres.

573 In addition, the record includes testimony that acknowledges Steiner Inc. is a residential  
574 homebuilder, that Steiner Inc. conducted activities on the Kent Hollow property to excavate and  
575 remove materials for its home building activities, and the 1992 Steiner letter noted above stated  
576 that Steiner Inc. voluntarily relinquished its 1989 DEC permit because it had been removing  
577 materials from the Kent Hollow property at levels at or below the DEC permit threshold, and that  
578 it had determined it was not “economically feasible” to continue removing materials from the  
579 Kent Hollow property.

580 While Kent Hollow has not presented any substantial evidence that the activities on the  
581 Property as of March, 1973 extended either over the entire property or over that portion of the  
582 property on which the 2017 soil mining activities were proposed, the Board is aware of reasons  
583 to conclude that it did not:

584 Limited area of disturbance. Aerial photographs available from the Dutchess County  
585 website show a limited area of disturbance on the Property prior to 1980.

586 Limited ability to expand. While the 1973 zoning law allowed “quarrying” activities –  
587 which included the excavation and sale of sand and gravel, as proposed in the 2017 DEC  
588 application - in the R-A zoning district by special permit, the special permit conditions required  
589 substantial buffers from property lines, limiting a quarry use to approximately 21 acres of the  
590 Kent Hollow property. If a mine met the special permit requirements, whether or not it obtained  
591 the permit, it would be considered a permitted use. However, the existing mine location is  
592 apparently the initial area where excavation and removal took place, and it is located within the

593 required buffer area of the 1973 code and would have been classified as a nonconforming use.  
594 The Board finds it significant that the 1973 zoning law generally prohibited expansion of  
595 any nonconforming use of land, and specifically prohibited expansion of nonconforming  
596 quarrying activities.

597 Based on the evidence in the record, the Board cannot determine that the extent of the use  
598 established in 1971 and existing when zoning was adopted in 1973 was the same as the soil  
599 mining activities proposed in the 2017 DEC permit.

600

601 **The nature of the use of the Property between 1973 and 1992.**

602 The available evidence indicates that the average amount of material removed from the  
603 property since 1971 was at or below the DEC mining threshold of 750 CY of material per year,  
604 that the actual mining activities between 1975 and 2006 involved at most 3 to 5 acres of the  
605 property at one time, and that the active mining area was generally in the present location of the  
606 area near the Webatuck Creek (although it appears one additional area was active in the 1980's).

607 As stated in the 1992 letter from Richard Steiner to the Town Zoning Administrator, the  
608 mining activities on the property between 1971 and 1992 were primarily undertaken by Steiner  
609 Inc. for the purpose of providing material for its residential construction activities, both on the  
610 Property and at other locations where construction activities were being undertaken by Steiner or  
611 affiliated entities.

612 While Kent Hollow has submitted its applications for DEC mining permits between 1975  
613 and 1989 as evidence of its nonconforming status, and places great emphasis on the portion of  
614 the application indicating the use is a nonconforming use that does not require a permit where  
615 officials of the Town signed the form, the Board notes that there is no indication of the nature or  
616 actual extent of that use, and that those forms were signed by the Town officials to acknowledge  
617 receipt of the reclamation plan.

618 Insofar as the forms indicate that there is a “nonconforming” use, the Board observes that  
619 the 1973 zoning law allowed a “quarrying” use by special permit in the R-A zoning district  
620 where the Kent Hollow property is located. The Town engineer has reviewed the special permit  
621 conditions that would have applied then, and advised the Board that the current excavation area  
622 is located in a required buffer. While the use of that area for a “quarrying” use would have  
623 become nonconforming when the 1973 zoning law was adopted, as prevailing law at the time  
624 held that a special permit use was only permitted if it met the special conditions, and they could  
625 not be varied by a zoning board, nothing indicates that any other area of the Property was being  
626 used for that purpose in 1973, or why soil mining activities on the Kent Hollow property outside  
627 of the required buffers would have been nonconforming use.

628 The significance of the acknowledgments on the DEC applications is also questionable  
629 because there was substantial uncertainty during that period as to whether the State Mined Land  
630 Reclamation statute had preempted local zoning authority. In 1987, the Court of Appeals  
631 decided in Frew Run v. Town of Carroll (1987) that local governments could use their zoning  
632 power to regulate the location of mining activities. When Kent Hollow's permit came up for  
633 renewal in May of 1989, after the Frew Run decision made it clear that local zoning could  
634 regulate the location and extent of mining activities, the Board notes that Kent Hollow decided to  
635 relinquish its DEC permit instead of renewing it.

636 In any event, the 1975-1989 DEC permits could not have extended the nonconforming  
637 use beyond the area that existed in 1973. Substantial evidence in the record indicates that the  
638 area of disturbance that took place under the 1978-1989 DEC mining permits did not actually  
639 exceed 3 acres:

640 a. Kent Hollow's Mining Plan and Reclamation Plan Narrative, submitted to  
641 DEC on August 26, 2010, which states in Section 1.0 that the 1978 DEC permit "was  
642 issued for a 3-acre mine on the subject property" and renewed until the 1989 permit was  
643 allowed to lapse because Kent Hollow determined it was not economically feasible to  
644 renew its permit. The narrative also noted that the proposed mining area would include  
645 the 3 acres originally permitted by the Department, and that 2 acres of the property was  
646 previously affected by mining, 0.5 acre was reclaimed and the processing area occupies  
647 about 1 acre;

648 b. The Negative Declaration issued by DEC on September 17, 2012 notes that a  
649 prior MLR Permit was issued by DEC in 1978 for a three acre mine on the subject  
650 property (Page 1) and that "approximately 2 acres of the parcel have been affected by  
651 previous mining activities over the past 30 years." (Page 7). The Negative Declaration  
652 also acknowledged that there was a dispute between the applicant and the Town about the  
653 applicable zoning that would have to be resolved by the parties (Page 8);

654 c. On October 24, 2006 DEC's Division of Mineral Resources Region 3, issued a  
655 Notice to Cease Operation to Kent Hollow Sand and Gravel, Inc. which stated that review  
656 of the DEC on this property indicated permits had been issued between 1978-1989 for a  
657 75 acre life-of-mine area, but only 2-3 acres had been affected when the 1989 permit  
658 expired.

659 Moreover, during the time that Kent Hollow held a DEC permit, the record does not  
660 show any regular pattern of sales to the general commercial market, and, as noted, there is no  
661 indication that a substantial amount of materials was being removed from the property, as would  
662 be expected if a commercial mining operation had existed prior to 1973 and continued thereafter  
663 under the 1975-1989 DEC permits.

664 The Board concludes that the nonconforming use designation on the 1975-1989 permits  
665 application is not sufficient to establish that the nonconforming use in 1973 was a commercial  
666 mining operation of the nature and extent that was proposed in the 2017 DEC application.

667 Nor does the evidence show that the Kent Hollow property was purchased by a  
668 commercial mining operator for the purpose of conducting a mining operation on the entire  
669 property, that there was a substantial investment in buildings, equipment and machinery to  
670 conduct that operation on the property. As noted, Kent Hollow did not offer any evidence of  
671 income during this period or that it had employees, equipment or vehicles on the property.

672 The record indicates that Richard Steiner acknowledged Kent Hollow was relinquishing  
673 the Kent Hollow mining permit in 1989 because it was not economically productive to retain it,  
674 and Kent Hollow then reclaimed areas of the property that had been disturbed by its activities.  
675 Its reclamation work appears to have included all of the disturbed areas on the property except  
676 the original site that was apparently used prior to 1973 and the access road.

677 For all those reasons, the Board finds that the activities carried out between 1971 and  
678 2007 were not of a nature and scale that vested Kent Hollow with the right to expand soil mining  
679 activities on the entire 34 acre Property proposed in the 2017 DEC application.

681 **The nature and extent of the established use that was made nonconforming by the 1973**  
682 **zoning law is not the use proposed in the 2017 DEC application**

683 Kent Hollow argues that at the time the Town of Amenia adopted its 1973 zoning law,  
684 Kent Hollow was engaged in “mining” activities.

685 Kent Hollow Inc. has not presented substantial evidence in support of its claim that it  
686 acquired the property for the sole purpose of mining, nor has it shown evidence of any  
687 substantial investment in the Property for the purpose of mining prior to the adoption of zoning.

688 That Kent Hollow held a DEC permit between 1977 and 1989 does not in itself establish  
689 that Kent Hollow had a vested right to conduct “soil mining” activities regulated by the 2007  
690 zoning law. The evidence offered by Kent Hollow regarding the activities it engaged in on the  
691 Kent Hollow property after it relinquished the permit is equivocal at best as to whether those  
692 activities were “soil mining” activities proposed in the DEC permit application or extend to any  
693 portion of the site beyond the pit that existed in 2007.

694 Kent Hollow asserts that from 1990 through 2017, it wrote letters to the Town of Amenia  
695 that documented the material it had removed from the site each year.

696  
697 The Board finds that the letters sent between 1990 – 2017 are insufficient to establish that  
698 Kent Hollow was lawfully continuing a nonconforming quarrying use that is alleged to have  
699 existed in 1973, in part because the nature and scale of the activities being conducted during this  
700 period were not a quarrying use, as that term is defined in the 1973 zoning law; in part, because  
701 the size and extent of the excavation and removal of materials stated in the letter was not  
702 evidence of the nonconforming use of the entire Property; in part, because the relinquishment of  
703 the DEC permit in 1989 and the reclamation of the disturbed areas of the Property evidenced an  
704 intent to abandon any nonconforming use of those areas.

705 **Abandonment**

706 Mindful that a vested right may be abandoned, the Board considers whether such right, if  
707 it had existed at the time the 1973 zoning law was adopted, had been abandoned.

708  
709 The evidence in the record indicates that the material was removed by Steiner, Inc.  
710 employees, vehicles and equipment temporarily brought on to the property for such purpose, and  
711 the 1992 Steiner letter indicates material not used on the property for building purposes was  
712 largely used at other Steiner projects.

713  
714 Even if facts existed to support Kent Hollow’s claim that it had overtly manifested its  
715 intent to mine the entire 80 acre property in 1973, and Kent Hollow proceeded to obtain a DEC  
716 permit for that purpose, as Kent Hollow claims on this appeal, the Board finds that the 1992  
717 Steiner letter demonstrates that Kent Hollow abandoned any such vested right when it  
718 relinquished its DEC permit in 1989 and reclaimed the ancillary haul roads and lands it had  
719 disturbed under the permit.

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In doing so, Mr. Steiner acknowledged Kent Hollow’s mining activities were at or below the DEC permit threshold and it was uneconomical to continue the permit. Aerial photographs between 1995 and 2004 show that with the exception of the gravel pit near Webatuck Creek, the limited areas where mining activities were conducted during the time that Kent Hollow held a DEC permit were reclaimed by 1994.

As the Board understands vesting, it has typically been demonstrated in the mining context by the acquisition of land for the purpose of mining, construction of roads and buildings in support of that purpose, hiring of employees and acquisition of vehicles and equipment for that purpose, and evidence of continued operations to produce materials for sale or exchange. The evidence in the record indicates that the material removed between 1972 and 1992 was generally removed by Steiner, Inc. employees, using vehicles and equipment temporarily brought on to the property for such purpose, and that the 1992 Steiner letter indicates material not used on the property for building purposes was largely used at other Steiner projects.

On the record before it, which shows limited evidence of investment in the Kent Hollow property for purposes of mining, the Board finds that the actions of Kent Hollow and Steiner, Inc. between 1989 and 1992 constitute an abandonment of any vested right to conduct soil mining activities on the entire Kent Hollow property.

If the Kent Hollow property was being lawfully used for nonconforming mining activities after 1992, and continuously up to the establishment of the Soil Mining Overlay District in 2007, the Board finds that such activities would have been limited to the active excavation site, such as it existed on the effective date of the 2007 zoning law.

Equipment purchased after 1973

Kent Hollow argues that its purchase of equipment in 2015 is a ground for its vested right to continue its mining operations. The Board is not aware of any basis on which the purchase of equipment in 2015 would constitute a basis for vested rights after 1973.

Property Taxes

The evidence before the Board does not show that the Kent Hollow property was ever assessed as a mining operation. The Board is not aware of any basis on which the payment of property taxes between 1973 and the present to be grounds for vested rights.

The Board also notes that on February 22, 1994 Kent Hollow recorded an Agricultural Assessment declaration committing 84.3 acres of its property to commercial agricultural production for 8 years, and in doing so, acknowledged that conversion of any portion of that area to a non-agricultural use will disqualify the assessment and incur a penalty. The Board considers that action inconsistent with Kent Hollow’s assertion that it continuously maintained a vested right to conduct mining activities on all of the Property.

766 Violations of the DEC permit threshold

767  
768 Finally, to the extent that the invoices indicate that the Kent Hollow allowed material to  
769 be removed from the Property 1994, 1995-96, 2004 and 2006 in amounts that were clearly in  
770 excess of the DEC permit threshold, the Board believes those removal activities to have been  
771 unlawful and finds that documentary evidence unreliable. As a non-conforming use must be  
772 lawful at the time it was created, the Board will not rely on unlawful activities to support the  
773 continuation of a nonconforming use.

774 Further, the Board finds those invoices call into question the accuracy of the letter-report  
775 from Kent Hollow's consulting geologist, Roy T. Budnik and Associates, dated August 9, 2017,  
776 which was offered to show that Kent Hollow continuously removed material from the site  
777 between 2004 and 2016.

778 In his letter, Mr. Budnik stated he used surveys from 2004 and 2017 to estimate that  
779 approximately 9,000 yards of material, or an average of 700 yards per year, were removed from  
780 the site between 2004 - 2017.

781 By letter of January 14, 2019, the Town engineer reviewed the surveys used by Mr.  
782 Budnik, which were provided to the Town at the December 17, 2018 Board meeting, and  
783 confirmed his estimate of the total amount of material removed during that time.

784 However, the Board notes that the calculation of the material removed during that twelve  
785 year period is an average. Given that the invoices provided by Kent Hollow show that 8085  
786 yards were removed in July and December of 2004 and DEC reported that 1200 yards were  
787 removed in 2006, the Board is unable to credit either the Kent Hollow letters or the Budnik  
788 report as evidence that Kent Hollow continuously removed material from the site each year.

789 The Board invited Kent Hollow to show by means of sales tax or income tax records that  
790 Kent Hollow or Steiner Inc. had been continuously engaged in commercial mining operations on  
791 the Kent Hollow property since 1990 for two reasons: first, to establish that the Property had  
792 been continuously used for the nonconforming "quarrying" purpose at the time the 2007 Soil  
793 Mining Overlay District was established, and that the nonconforming use had been continuous  
794 up to the issuance of the 2017 NOV/OTR; and, second, to allow the Board to determine that the  
795 nature and extent of the nonconforming use was consistent with the "soil mining" operation  
796 proposed in Kent Hollow's 2017 DEC application.

797 As Kent Hollow has declined to provide the requested records, and the available  
798 information is inconsistent, the Board finds that the Appellant has not met its burden of proof on  
799 this aspect of the Appeal.

800 Extent of disturbance

801 The evidence in the record establishes that Kent Hollow had not disturbed more than 5  
802 acres of the property during its DEC permitted activities, and that by 1992 it had reclaimed all of  
803 the area disturbed for DEC regulated mining activities to the satisfaction of the Department.

804 Nor does that evidence demonstrate that the Kent Hollow property was purchased by a  
805 commercial mining operator for the purpose of conducting a mining operation on the entire  
806 property, that there was a substantial investment in buildings, equipment and machinery to  
807 conduct that operation on the property, or that the activities carried out between 1971 and 2007  
808 were of a nature and scale that vested any right to expand soil mining activities on the entire 34  
809 acre property proposed in the application.

810 The record does not contain any substantial evidence showing that Kent Hollow Inc. or  
811 Steiner Inc. were engaged in the business of “quarrying” or “mining” during this time, despite  
812 several requests from the Board for documents or other evidence that would show Kent Hollow  
813 was engaged in substantial mining activities, that it had employees, equipment, buildings or other  
814 evidence that it was a business entity carrying out commercial mining activities, or that it  
815 derived any substantial income from the sale of materials to non-Steiner affiliated entities

816 Those facts are inconsistent with the assertion in the affidavit of Christopher Steiner and  
817 the testimony of Richard Steiner and other representatives of Steiner, Inc. that the property was  
818 acquired solely for the purpose of “mining”.

819 Vested rights protect a lawfully existing use from subsequent zoning changes. Kent  
820 Hollow had to not only establish that the activities on its property after 1992 were “soil mining”  
821 activities subject to the 2007 SMO regulations, but nonconforming uses lawfully established at  
822 the time the 1973 zoning law was adopted.

823 For the reasons above, the Board cannot find on this Appeal that Kent Hollow has  
824 established that the use of the Property proposed in its 2017 DEC permit application was a  
825 “nonconforming use” of the property when the Town adopted the 2007 SMO amendments.

826

827 **The use made nonconforming by the 1973 zoning law was not continuous until 2007**

828 In support of its appeal, Kent Hollow has presented certain documentary evidence which  
829 it asserts shows that the use that existed at the time of adoption of the 1973 zoning law was  
830 continuously maintained until the adoption of the 2007 amendment that established the Soil  
831 Mining Overlay District, and at all times thereafter until the 2017 NOV/OTR was issued.

832 Following the adoption of the 1973 zoning law on March 24, 1973, until its amendment  
833 in 2007, §5.72, Nonconforming Use of Land, provided that “if such nonconforming use of land,  
834 or any portion thereof, ceases for any reasons for any continuous period of more than one year,  
835 or is changed to a conforming use, any future use of the land shall be in conformity with the  
836 provisions of this law.”

837 A “quarrying use” is defined by the 1973 zoning law as the use of land “for the purpose  
838 of extracting stone, sand, gravel or topsoil for sale, as an industrial operation”, which the Board  
839 finds to be similar in nature to the “soil mining” activities proposed in Kent Hollow’s 2017 DEC  
840 application.

841 The letters submitted as exhibits to the Steiner affidavit in support of the Appeal include  
842 various documents showing the dates on which materials were removed from the property. The  
843 Board finds those letters typically report token activities, limited in their nature, duration and  
844 scale, which appear to have been undertaken at the convenience of Kent Hollow and Steiner Inc.,  
845 not in response to any commercial purpose.

846 Kent Hollow has not provided any evidence that it had employees, vehicles or equipment  
847 engaged in the activities on the Property during this period. It has not demonstrated that it  
848 recognized any significant income from the sale of removed materials during this period. There  
849 is no evidence of any significant investment in the Property for such purpose between the  
850 completion of reclamation activities in 1992 after Kent Hollow relinquished its DEC mining  
851 permit and the adoption of the 2007 Soil Mining Overlay District zoning in 2007.

852 In at least five instances, the documents in the record show that there was no activity on  
853 the property to extract, process or remove material for a continuous period of more than one  
854 year, as material was removed at the end of one calendar year, again at the beginning of the next  
855 calendar year, then not again until the end for the following calendar year. (2/92-12/93; 2/94-  
856 12/95; 1/96-12/97; 1/98-12/99; 1/00-12/01) The Board finds that the use of the word “extracting”  
857 in the definition of a “quarrying” use requires more than maintaining stockpiles of material on  
858 the property indefinitely and removing them intermittently in token amounts without any  
859 substantial commercial purpose, at least as far Kent Hollow indicated in its letters.

860 Mindful that the Town’s zoning law balances the overall policy of zoning that favors the  
861 elimination of nonconforming uses with the right of property owners to maintain investments  
862 made in their property before zoning made such nonconforming, the Board has consulted with its  
863 counsel and been advised that in a case that construed similar language in a zoning code, the  
864 Appellate Division, Third Department held that when the nonconforming use of a concrete plant  
865 ceased for a period of more than twelve months, “incidental” activities during that period were  
866 not sufficient to continue the nonconforming use. In another case, the Appellate Division held

867 that the right to continue a nonconforming manufacturing use ceased when the manufacturing  
868 use ceased operation for a period of greater than one year, notwithstanding that the property was  
869 used for sales and storage of the products it manufactured during that time.

870

871 The Board believes that the rationale in those cases applies to the activities on the Kent  
872 Hollow property between 1990 and 2007 that were being conducted as nonconforming quarrying  
873 uses. As such use had ceased for one or more continuous periods of more than one year, any  
874 nonconforming use that did exist when the 2007 SMO zoning amendments were adopted did not  
875 include the use of the property for quarrying operations.

876

877 Therefore, the proposed 2017 DEC soil mining activities were not allowed as a  
878 nonconforming use.

879

880 **The activity proposed in the 2017 DEC application was not a “nonconforming use” when**  
881 **the Soil Mining Overlay District was created in 2007**

882 Kent Hollow must show that the nonconforming use was of the nature and extent  
883 proposed in the 2017 permit application, and was lawfully established prior to 2007 and  
884 continuously maintained at all times since it was established.

885  
886 As the 1973 zoning law allowed quarrying operations by special permit in the R-A  
887 zoning district where the Kent Hollow property is located, and the conditions of such special  
888 permit required a buffer area from property lines and residential uses, Appellant claims it had  
889 established a nonconforming quarrying use prior to 1973.

890  
891 The record contains applications by Kent Hollow to DEC for a mining permit in 1975  
892 and for subsequent permit applications/permit renewals. Kent Hollow asserts that since on  
893 notices sent to the Town in connection with those applications, the “local authority”, initially the  
894 Town's zoning administrator and then the Town Supervisor, indicated the 1973 zoning law  
895 generally requires special permit for mining, but no permit was required for Kent Hollow  
896 because it was a “nonconforming use”, those Town officials acknowledged that the use allowed  
897 by the permit was a nonconforming quarrying use.

898  
899 The Board does not find that those documents are sufficient to meet the burden of proof  
900 needed to establish the nature and extent of the use that Kent Hollow asserts was established  
901 prior to March 24, 1973.

902  
903 First, the 1992 Steiner letter stated that the materials removed from the property during  
904 1971-1989, when Kent Hollow operated pursuant to the 1977-1989 DEC permit, were mainly  
905 used either in the construction of the residential building and roads on the Kent Hollow property,  
906 and removed to other Steiner properties for use in construction projects, zoning uses which are  
907 different in nature than the soil mining operations proposed in the 2017 DEC application..

908  
909 Second, the 1975 Steiner letter demonstrated the limited extent of the nonconforming use  
910 activity on the property in 1974, which took place on one day in July, when Steiner Inc.  
911 employees and principals brought vehicles and processing equipment onto the Kent Hollow  
912 property to remove five truckloads of material for use by Steiner, Inc. The letter also  
913 acknowledged that the last piece of portable equipment was removed on that date. As noted,  
914 there is no evidence that Kent Hollow was engaged in a commercial mining business prior to  
915 1973, such that it had employees, owned vehicles or equipment used in the excavation and  
916 removal activities on the property, or constructed building or other substantial site improvements  
917 solely for the purpose of conducting mining activities.

918  
919 Third, the initial DEC applications (the 4/24/75 application; the 6/16/75 reclamation plan;  
920 and the 6/17/75 mining plan) indicate that the mining site was ready for equipment, but make no  
921 reference to any installed equipment at the site and also state that there would be no reclamation  
922 in the first year of operation, from which the Board concludes that any activity at the site prior to  
923 1975 was limited in nature and extent.

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Fourth, the Kent Hollow invoices in the record prior to March 23, 1973 show very limited excavation and removal activity had taken place prior to the adoption of the 1973 zoning law, and the majority of the invoices show material were removed to Steiner, Inc.

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Fifth, that even if three Town officials did state Kent Hollow was a “nonconforming use” when acknowledging the DEC notice forms between 1977 and 1989, that statement is not sufficient by itself to establish the nature and extent of the use, if any, that lawfully existed in 1973, or that such use allowed Kent Hollow to conduct “soil mining” activities regulated by the 2007 zoning law.

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The Board therefore finds the statements of Town officials on the DEC notice form are inconclusive as to the nature, extent and lawful status of the “nonconforming use” on the site.

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Sixth, the Board finds that Kent Hollow’s claim that it has the vested right to mine 750,000 yards of material from the 35 acres that are the subject of the 2017 DEC application over a 30 year period to be inconsistent with the evidence in the record of the Property’s past use, which establishes that Kent Hollow has only excavated and removed approximately 40,000 yards of material from the property over 46 years, based on the 1971 and 1972 depletion forms provided by Kent Hollow, the statement in the 1992 Steiner letter that it relinquished its DEC permit because it had excavated and removed materials at or below the DEC threshold between 1977 and 1990, and the subsequent letters stating that Kent Hollow had removed material in amounts below the threshold since 1990.

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The Board finds that the proposed mining activity would be an extraordinary change in nature and extent of use from the activities that took place between 1971 and 2017: as the 2017 Narrative stated that the proposed activity could remove as much as 50,000 yards of material a year during peak periods, more material than apparently has been removed in the past 46 years.

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The proposed DEC soil mining activity would be fundamentally different from the activities between 1992 and 2017, with nearly 500 yards of material being removed every week, instead of one or weeks a year, with the potential for 2000 truckloads a year, instead of 40 or 50 during one or two weeks a year, and commensurate increases in traffic, dust and noise.

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The evidence offered by Kent Hollow regarding the activities it engaged in on the Kent Hollow property after it relinquished the permit is equivocal at best as to whether those activities were “soil mining” activities proposed in the DEC permit application.

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Based on the record before it, the Board finds Kent Hollow has not met its burden of proof that it established a nonconforming soil mining operation of the nature and extent proposed in its 2017 DEC permit application, or to continue soil mining activities on the Property, and therefore that the Appeal from the NOV/OTR of the Code Enforcement Officer must be denied in all respects.

BE IT RESOLVED that the appeal of Kent Hollow, Inc. from the Notice of Violation and Order to Remedy issued by the Town of Amenia Code Enforcement Officer on May 1, 2017 be denied in all respects, for the reasons set forth above.

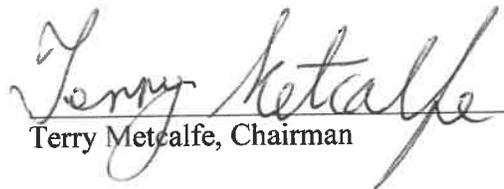
Motion by Member Blackman	Seconded by Member Wright		
	Aye	Nay	Absent/Abstain
Member Blackman	X		
Member Chamberlin	X		
Member Pelosi	X		
Member Wright	X		
Chairman Metcalfe	X		

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The Motion was declared to have been duly adopted at the June 17, 2019 meeting of the Town of Amenia Zoning Board of Appeals.

Dated: June 20, 2019

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 Terry Metcalfe, Chairman

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Filed in the office of the Town Clerk of the Town of Amenia on the date written below

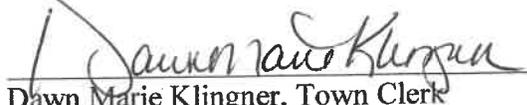
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 6/20/2019  
 Dawn Marie Klingner, Town Clerk Dated