

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Office of General Counsel, Region 4
1130 North Westcott Road, Schenectady, NY 12306-2014
P: (518) 357-2048 | F: (518) 357-2087
www.dec.ny.gov

CERTIFIED - RETURN RECEIPT REQUESTED
7017 1070 0001 0125 7766

May 17, 2019

John Jay Bove, Esq.
677 Broadway, 9th Floor
Albany, NY 12207

Re: Order on Consent
R4-2018-1022-192
Go Ahead Realty, LLC
and Timothy Larned

Dear Mr. Bove:

Enclosed please find a copy of the fully executed Order on Consent referenced above.

This will also acknowledge receipt of \$6,200 as the 1st of 5 payments of the civil penalty pursuant to Paragraph I. Your second payment of \$6,200 is due on or before June 12, 2019.

Sincerely,



Karen S. Lavery
Assistant Regional Attorney
Region 4

Enclosure

ec: P. Wyckoff
T. Gabriel
J. Rider



Department of
Environmental
Conservation

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Violations
of the Environmental Conservation Law
Article 23

by

Order on Consent
File No. R4-2018-1022-192

Go Ahead Realty LLC
90 W. Campbell Rd
Schenectady, NY 12306

and

Timothy Larned
544 Burdeck St
Schenectady, NY 12306 Respondents

WHEREAS:

1. New York State Department of Environmental Conservation ("Department or DEC") has administrative jurisdiction pursuant to Environmental Conservation Law ("ECL") Title 27 of Article 23 to regulate surface mining and reclamation.
2. Respondents Go Ahead Realty LLC and Timothy Larned are co-owners of a mine located on W. Campbell Rd, Parcel 48.-2-8-112 in the Town of Rotterdam (Schenectady County) ("site"). Parcel 48.-2-8-11 is a subdivision of 8.11 which was split into 8.111 (a.k.a. 301 Von Roll Drive) and 8.112.
3. Respondents are "persons," as that term is defined at ECL 23-2705 (12), and regulations at 6 NYCRR 420.1 (p).

Violations

4. Respondents have excavated on parcel 48.0-2-8.11 in the Town of Rotterdam since 2006 without a permit. The Department has calculated that the total material mined from the earth in the past 12 years is in excess of 62,000 cubic yards (more than 5,000 cubic yards in any given 12-month period). The Department maintains that the excavation can be seen increasing in size as depicted in aerial photos of the site taken in 2011, 2014, 2017, and the affected area is currently approximately 5.2 acres in size. Mining activity resumed in June of 2018.
5. Department staff inspected the mine on January 30, 2018, May 14, 2018, June 29, 2018, July 17, 2018, August 9, 2018.

6. ECL 2711(1) provides that *"After September first, nineteen hundred ninety-one, any person who mines or proposes to mine from each mine site more than one thousand tons or seven hundred fifty cubic yards, whichever is less, of minerals from the earth within twelve successive calendar months or who mines or proposes to mine over one hundred cubic yards of minerals from or adjacent to any body of water not subject to the jurisdiction of article fifteen of this chapter or to the public lands law shall not engage in such mining unless a permit for such mining operation has been obtained from the department. A separate permit shall be obtained for each mine site."*

Regulations at 6 NYCRR Part 421.1(a) provide that *"After September 1, 1991, any person who mines or proposes to mine from each mine site more than 1,000 tons or 750 cubic yards of minerals, whichever is less, from the earth within 12 successive calendar months or who mines or proposes to mine over 100 cubic yards of minerals from or adjacent to any body of water not subject to the jurisdiction of article 15 of the Environmental Conservation Law or to the Public Lands Law shall not engage in such mining unless a permit for such mining operation has been obtained from the department. A separate permit shall be obtained for each mine site."*

7. The Department determined that Respondents have mined more than 750 cubic yards per year without a permit and therefore are in violation of ECL 2711(1) and regulations at 6 NYCRR Part 421.1(a).

8. ECL Section 71-1307(1) provides that any person who violates any provision of Article 23 of the ECL or commits any offense described in Section 71-1305 of this title shall be liable to the people of this state for a civil penalty not to exceed eight thousand dollars (\$8,000) and an additional penalty of two thousand dollars (\$2,000) for each day during which such violation continues.

9. Waiver of Hearing

Respondents affirmatively waived their right to notice and hearing in the manner provided by law and has consented to the issuing and entering of this Order on Consent and agrees to be bound by the terms, provisions and conditions contained herein.

NOW, having considered this matter and being duly advised, it is **ORDERED** that:

I. Civil Penalty

In respect of the aforesaid violations, a civil penalty in the amount of FIFTY THOUSAND DOLLARS (\$50,000) of which THIRTY-ONE THOUSAND DOLLARS (\$31,000) shall be paid by money order, or check made payable to the order of "New York State Department of Environmental Conservation," with the enclosed invoice and the Case Number of this Order on Consent written in the memo section of the check. The check shall be sent to:

**The Department of Environmental Conservation
Division of Management and Budget Services
625 Broadway
10th Floor
Albany, NY 12233-4900**

In the alternative, payment of the civil penalty can be made by electronic payment at <http://www.dec.ny.gov/about/61016.html#On-Line>

The balance NINETEEN THOUSAND DOLLARS (\$19,000) shall be suspended so long as Respondents shall comply with the Schedule of Compliance. The obligation to pay the suspended penalty is a joint and several obligation of the Respondents. Payment of the civil penalty is due in accordance with the following schedule:

1. \$6,200 with the return of the Order by May 15, 2019;
2. \$6,200 by June 12, 2019;
3. \$6,200 by July 17, 2019;
4. \$6,200 by August 14, 2019;
5. \$6,200 by September 18, 2019

The penalty assessed in the Order on Consent constitutes a debt owed to the State of New York. Failure to pay the assessed penalty, or any part thereof, in accordance with the schedule contained in the Order on Consent, may result in referral to the New York State Attorney General for collection of the entire amount owed (including the assessment of interest, and a charge to cover the cost of collecting the debt), or referral to the New York State Department of Taxation and Finance, which may offset by the penalty amount any tax refund or other monies that may be owed to you by the State of New York. Any suspended and/or stipulated penalty provided for in this Order on Consent will constitute a debt owed to the State of New York when and if such penalty becomes due.

Payment of the above penalties shall not in any way alter Respondents' obligation to complete performance under the terms of this Order.

In the event that Respondents fail to comply with the requirements of this Order the entire suspended portion of the penalty shall become due and payable upon written notice to Respondents without prejudicing the Department from seeking further appropriate penalties for violations of this Order by Respondents.

The signed and notarized Order on Consent shall be sent to:

**New York State Department of Environmental Conservation
Region 4 Main Office
1130 North Westcott Road
Schenectady, NY 12306-2014
ATTN: Karen S. Lavery, Esq.**

I. Communications

All communications or submissions required herein shall be made to: Department -- DEC Region 4, 1130 North Westcott Road, Schenectady, NY 12306, Attention- Psalm Wyckoff, Mined Land Reclamation Specialist II, Psalm Wyckoff, at psalm.wyckoff@dec.ny.gov. All communications shall include a reference to Order on Consent Case Number R4-2018-0122-192.

II. Schedule of Compliance

Respondents shall comply with the Schedule of Compliance set forth in this Order on Consent which is incorporated and made part of the terms, provisions, and conditions of this Order on Consent.

III. Access

Respondents shall allow duly authorized representatives of DEC access to the facility referred to in this Order without prior notice, at such times as may be desirable or necessary in order for DEC to inspect and determine the status of Respondents' compliance with this Order or the ECL.

IV. Summary Abatement

This Order shall not be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement powers, either at common law or as granted pursuant to statute or regulation.

V. Indemnification

Respondents shall indemnify and hold DEC, New York State, and their representatives and employees harmless for all claims, suits, damages, and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of the provisions hereof by Respondents, their directors, officers, employees, servants, agents, successors or assigns.

VI. Review of Submittals

1. All documents which Respondents must submit pursuant to this Order are subject to Department approval.
2. The Department shall review each of the submittals Respondents make pursuant to this Order to determine whether it was prepared, and whether the work done to generate the data and other information in the submittal was done, in accordance with this Order and generally accepted technical and scientific principles. The Department shall notify Respondents in writing of its approval or disapproval of the submittal. All Department- approved submittals shall be incorporated into and become an enforceable part of this Order; and Respondents shall implement them in accordance with their respective schedules and terms, as approved.

3. a. If the Department disapproves a submittal, it shall so notify Respondents in writing and shall specify the reasons for its disapproval. Within the time frame set forth in that written notification, Respondents shall make a revised submittal to the Department that addresses and resolves all of the Department's stated reasons for disapproving the first submittal.

b. After receipt of the revised submittal, the Department shall notify Respondents in writing of its approval or disapproval. If the revised submission is not approvable as submitted, the Department, at its option, may disapprove it or may approve it on condition that Respondents accept such modifications as may be specified by Department to make it approvable. If Respondents do not accept such modifications, the revised submission will be disapproved. If the Department disapproves the revised submittal, Respondents shall be in violation of this Order. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Order.

4. Respondents shall modify and/or amplify and expand a submittal upon the Department's direction to do so if the Department determines, as a result of reviewing data generated by an activity required under this Order or as a result of reviewing any other data or facts, that further work is necessary. The Department agrees that any modifications it specifies will be reasonable and consistent with customary engineering standards.

VII. Binding Effect

The provisions of this Order shall inure to the benefit of and be binding upon the Department and Respondents and their successors (including successors in title) and assigns.

VIII. Modifications and Extensions

No modifications or extensions of this Order shall be made or become effective except as may be specifically set forth in writing by the Department.

IX. Entire Order

The provisions of this Order constitute the complete and entire Order issued to the Respondents concerning resolution of the violations identified herein.

X. Effective Date

The effective date of this Order shall be the date it is signed by the Regional Director.

XI. Reservation of Rights

Except as specifically provided in this Order, nothing contained in this Order shall be construed as barring, diminishing, adjudicating or in any way affecting:

A. Any legal or equitable rights or claims, actions, proceedings, suits, causes of action or demands whatsoever that the State may have against Respondents for any other violations of the ECL, rules or regulations promulgated thereunder.

B. Any legal or equitable rights or claims, actions, proceedings, suits, causes of action or demands whatsoever that the State may have against anyone other than Respondents, their officers, directors, agents, servants, employees, successors and assigns;

C. Whatever right the Department has to bring any action or proceeding against Respondents and/or any of Respondents' directors, officers, employees, servants, agents, successors, and assigns with respect to claims for natural resource damages; and

XII. Respondents' right to assert all available defenses to any claims, actions, proceedings, suits, causes of actions or demands made or commenced by the State or the Department provided, however, that Respondents waive all legal or equitable rights claims, actions, proceedings, appeals, suits, causes of action, defenses or demands whatsoever that it may have to a judicial review of the validity and binding effect of this Order and whether or not this Order has been entered into voluntarily by Respondents.

XIII. Default

The failure of Respondents to comply fully and in timely fashion with any provision of this Order shall constitute a default and a failure to perform and obligation under this Order and under the ECL, and shall constitute sufficient grounds for revocation of any permit, license, certification or approval issued to Respondents by DEC as it pertains only to the mine located on W. Campbell Rd, Parcel 48.-2-8-112 in the Town of Rotterdam.

XIV. Successors and Assigns

The provisions of this Order shall be deemed to bind Respondents, their agents, employees, successors, and assigns, and all persons, firms, and corporations acting under or for Respondents.

DATED: *May 16* 2019
Rotterdam, New York

Basil Seggos
Commissioner
New York State Department of
Environmental Conservation

BY:



Keith Goertz
Regional Director
Region 4

CONSENT BY RESPONDENT

Timothy Larned

Respondent hereby consents to the issuing and entering of this Order, waives his rights to notice and hearing herein and agrees to be bound by the provisions, terms and conditions contained herein.

Authorized Representative: _____

SIGNED: 

TITLE: Partner

DATE: 5/14/19

STATE OF NEW YORK

)ss.:

COUNTY OF SB)

On the 14th day of MAY in the year 2019 TIMOTHY LARNED before me, the undersigned, a Notary Public in and for the State, personally appeared TIMOTHY LARNED ROBERT JOYINELLA personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.



Notary Public
Qualified in the County of:
My Commission Expires:

Shawn S. Becker
Notary Public in the State of New York.
Qualified in Schenectady County
Reg. #4973427
Term expires 10/22/2022

CONSENT BY RESPONDENT

Go Ahead Realty LLC

Respondent hereby consents to the issuing and entering of this Order, waives their rights to notice and hearing herein and agrees to be bound by the provisions, terms and conditions contained herein.

Authorized Representative: Go AHEAD REALTY

SIGNED: [Signature]

TITLE: Pres

DATE: 5/11/19

STATE OF NEW YORK

)ss.:

COUNTY OF)

On the 17th day of MAY in the year 2019 before me, the undersigned, a SS Notary Public in and for the State, personally appeared ~~ANTHONY LAKNER~~ ROBERT LOVINELLA personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

[Signature: Sharyn S. Becker]

Notary Public
Qualified in the County of:
My Commission Expires:

Sharyn S. Becker
Notary Public in the State of New York
Exp. in Schenectady County
Reg. #4973427
Term expires 10/27 15 2022

SCHEDULE OF COMPLIANCE

1. Within 15 days of the effective date of this Order, Respondents shall construct a stabilized construction entrance, conforming to the requirements of the NYS Standards and Specifications for Erosion and Sediment Control, which shall be installed. The site shall be stabilized to prevent stormwater violations. There shall be no tracking of sand and gravel from the site onto any public roads for the duration of the preparation of the Town approved construction project or the reclamation of the site.

2. Within 30 days of the effective date of this Order, Respondents shall remove all waste and imported materials from the mine site, unless documentation is provided to the Department, demonstrating the imported materials are to be used in the development of a Town approved construction project or the reclamation of the site.

3. By June 1, 2019, Respondents must submit documentation to the Department, demonstrating that the site is a Town approved construction project. No additional excavation and removal of material from the site may take place until the site is approved by the Town for the construction of the highway office/garage facility. Provided, however, that the Department may agree to extend this deadline if the Respondents demonstrate that the Town is still actively working to complete the necessary approvals, or for other good cause which the Department may recognize.

The documentation must show that any additional proposed excavation and removal is solely in aid of onsite construction, is necessary to prepare the site for the approved construction, and the excavation takes place within the construction project area. If the excavation is proven to meet the criteria above, the excavation and removal of materials in accordance with the Town of Rotterdam may be considered a construction project by the Department, and as such, would not require a mined land reclamation permit.

- Copies of all necessary local, state and federal approvals, including a SEQR declaration by the Town for the construction project, if applicable.
- A copy of the Town of Rotterdam approved development plans.
- A copy of a Town approved Stormwater Pollution Prevention Plan (SWPPP) and stormwater pond design. If not provided in the SWPPP, Respondents must provide a narrative showing that the retention volumes in any planned ponds are necessary. In addition, if the plans include ponds in areas unaffected by mining activity (as of the effective date of this order), the narrative must show that the excavation of previously unaffected area is necessary. That is, Respondents must show that stormwater ponds of adequate size cannot be accommodated in currently affected area. If the excavation is proven to meet the criteria above, the excavation and removal of materials in accordance with the Town of Rotterdam may be considered a construction project by the Department, and as such, would not require a mined land reclamation permit. Site grading and preparation shall be done in accordance with the Town

approved development plans. No excavation may take place in excess of what is necessary for the successful completion of the Town's approved development plans or outside the Town's construction project area. If the excavation is proven to meet the criteria above, the excavation and removal of materials in accordance with the Town of Rotterdam may be considered a construction project by the Department, and as such, would not require a mined land reclamation permit.

4. If at any time (i) the Town and/or Respondents abandon the Highway office/garage facility project or (ii) the site is determined to not be approved/approvable, or approval is revoked, by the Town for construction of a highway office/garage facility, the site shall be reclaimed with no further excavation, according to the following schedule:

1) By the following May 1st (2020), or 45 days after the Town's disapproval, failure to approve or revocation of approval (whichever is later), Respondents must ensure that the floor of the site be graded and leveled. All side slopes must be graded no greater than 1V:2H. The MLRS must be contacted when grading is complete to schedule an inspection. The grading must be approved by the MLRS before the application of topsoil.

2) By the following May 15 (2020), or 60 days after the Town's disapproval or failure to approve or revocation of approval (whichever is later), Respondents must spread at least six (6) inches of fertile soil (at least 5% organic matter) over all disturbed areas. Any fertile soil to be used for reclamation must be approved by the Department prior to importation into the site.

3) Within 48 hours of the application of fertile soil, the following must be applied:

- a) Seed with a conservation seeding mixture that contains at least 2 legumes (e.g., red clover, trefoil, etc.) at the rate of 80 pounds per acre.
- b) Perform pH test and lime, as necessary.
- c) Fertilize with a slow release nitrogen fertilizer at the rate of 300 pounds per acre.
- d) Straw mulch at the rate of 2,000 pounds per acre without bare spots.

Note: The MLRS must be contacted after each of the three steps listed above to schedule an inspection prior to commencing with the next step.

4) All areas revegetated must reach 75% vegetative cover in the second growing season after planting.

Additional Notes:

Non-mining activities, such as demolition of the existing building # 28, is not subject to this Order.