Appellate Division Docket No. 532083
Albany County Clerk's Index No. 902239/19

Court of Appeals

of the

State of New York

TOWN OF SOUTHAMPTON; ASSEMBLYMAN FRED W. THIELE, JR.; 101CO, LLC; 102CO NY, LLC; BRRRUBIN, LLC; BRIDGEHAMPTON ROAD RACES, LLC; CITIZENS CAMPAIGN FOR THE ENVIRONMENT; GROUP FOR THE EAST END; NOYAC CIVIC COUNCIL; SOUTHAMPTON TOWN CIVIC COALITION; JOSEPH PHAIR; MARGOT GILMAN; and AMEILIA DOGGWILER,

Petitioners-Respondents,

– against –

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; SAND LAND CORPORATION; and WAINSCOTT SAND AND GRAVEL CORP.,

Respondents-Appellants.

MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS AND A STAY

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September 22, 2021

COURT OF APPEALS
OF THE STATE OF NEW YORK

TOWN OF SOUTHAMPTON; ASSEMBLYMAN FRED W. THIELE, JR.; 101CO, LLC; 102CO NY, LLC; BRRRUBIN, LLC; BRIDGEHAMPTON ROAD RACES, LLC; CITIZENS CAMPAIGN FOR THE ENVIRONMENT; GROUP FOR THE EAST END; NOYAC CIVIC COUNCIL; SOUTHAMPTON TOWN CIVIC COALITION; JOSEPH PHAIR; MARGOT GILMAN; and AMEILIA DOGGWILER,

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-against-

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; SAND LAND CORPORATION and WAINSCOTT SAND AND GRAVEL CORP.,

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Appellate Division Third Dept Docket No. 532083

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NOTICE OF MOTION FOR PERMISSION TO APPEAL TO THE NEW YORK COURT OF APPEALS AND STAY PURSUANT TO CPLR 5602(a)(1)(i) AND CPLR 5519(c)

PLEASE TAKE NOTICE that upon the annexed affirmation of GREGORY M. BROWN, Esq., dated September 22, 2021, Respondents-Appellants Sand Land Corporation and Wainscott Sand and Gravel Corp. (collectively, "Sand Land Appellants") will move this Court, pursuant to CPLR §§ 5602(a)(1)(i), 5519(c) and Rule 500.22 of the Rules of Practice of the Court of Appeals, upon the record of the prior appeal in this case to the Appellate Division, Third Department, and upon the papers submitted herewith, at the Court of Appeals Hall, 20 Eagle Street, Albany, New York, on October 4, 2021, at 9:30 a.m., or as soon thereafter as counsel can be heard, for an order granting permission to appeal to the Court of Appeals from a

Memorandum and Order of the Appellate Division, Third Department, entered on May 27, 2021 ("Order") and a stay of the Order.

PLEASE TAKE FURTHER NOTICE, that answering papers, if any, must be served and filed in the Court of Appeals on or before the return date of this motion.

Dated: September 22, 2021
Syracuse, New York

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COURT OF APPEALS
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TOWN OF SOUTHAMPTON; ASSEMBLYMAN FRED W. THIELE, JR.; 101CO, LLC; 102CO NY, LLC; BRRRUBIN, LLC; BRIDGEHAMPTON ROAD RACES, LLC; CITIZENS CAMPAIGN FOR THE ENVIRONMENT; GROUP FOR THE EAST END; NOYAC CIVIC COUNCIL; SOUTHAMPTON TOWN CIVIC COALITION; JOSEPH PHAIR; MARGOT GILMAN; and AMEILIA DOGGWILER,

Petitioners-Respondents,

-against-

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; SAND LAND CORPORATION and WAINSCOTT SAND AND GRAVEL CORP.,

Respondents-Appellants.

AFFIRMATION IN SUPPORT OF LEAVE TO APPEAL AND FOR A DISCRETIONARY STAY

Appellate Division Third Dept Docket No. 532083

Albany County Clerk Index No. 902239/19

Gregory M. Brown, an attorney duly admitted to the practice of law before the Courts of the State of New York, affirms the following under penalty of perjury:

1. I am a partner at the law firm of Brown Duke & Fogel, P.C., counsel to the Respondents-Appellants Sand Land Corporation and Wainscott Sand and Gravel Corp., (collectively "Sand Land Appellants") and as such, I am fully familiar with the facts and circumstances stated herein. I respectfully submit this Affirmation in support of Sand Land Appellants' motion for an order granting Sand Land Appellants leave to appeal to this Honorable Court from the memorandum and order

of the Appellate Division, Third Department, decided and entered on May 27, 2021, served on Sand Land Appellants by Notice of Entry, dated May 27, 2021, by NYSCEF on that date (the "Order") (s*ee* Exhibit "A" hereto).

2. The Order reversed the Decision, Order and Judgment entered September 3, 2020, of the New York Supreme Court (Hon. James H. Ferreira, Acting Justice of the Supreme Court) (Exhibit "B" hereto).

3. This motion raises the question of whether the Appellate Division, Third Department's interpretation of the Mined Land Reclamation Law (*see* ECL § 23–2701 et seq.) ("MLRL") merits review by the Court of Appeals. Sand Land Appellants also move for an order staying the Order pending the determination of the appeal.

4. The Appellate Division, Third Department's interpretation of ECL § 23-2703(3) as a substantive provision that terminates eligibility for an MLRL permit, which is required to mine more than 750 cubic yards per year, for every mine on Long Island that is a constitutionally protected prior nonconforming use under local zoning law sets new precedent for the 1991 MLRL amendments.

5. Prior to the Third Department's Order, the administrative practice of the New York State Department of Environmental Conservation ("NYSDEC"), the agency tasked with implementing the MLRL, was to apply ECL § 23-2703(3) as a procedural rule. Under that long-standing administrative interpretation, as applied

for Long Island mines, a permit would be processed upon a determination that it could be lawfully used for mining under local zoning law (whether as a specified allowed use or by the zoning law's allowance for the continuation of prior nonconforming use). Outside of Long Island, processing of MLRL applications in relation to local zoning status has been governed by the Appellate Division's, Fourth Department, ruling in *Valley Realty Dev. Co. v Jorling* (217 AD2d 349, 353 [4th Dept 1995]). *Valley Realty* did not rule on the interpretation of ECL § 23-2703(3). However, as detailed below, it is irreconcilable with the Order when the statute is construed as a whole.

6. The Appellate Division, Third Department, interpreted ECL § 23-2703(3) to create a geographic divide for the substantive rights of the regulated community. Justice Pritzker's dissenting opinion, provided a detailed construction of ECL § 23-2703(3) considering its companion provision ECL § 23-2711, also enacted as part of the 1991 amendments to the MLRL. As Justise Pritzker writes, the MLRL text does not purport to address constitutionally protected property rights. (Exhibit A at 9-11).

7. The Court's interpretation of ECL § 23-2703 is novel and departs from how the provision has been understood and applied by the NYSDEC and the regulated community for decades. No other Appellate Court has ruled directly on the issue.

8. The Order results in the deprivation of prior nonconforming use rights of the kind the Court of Appeals has previously held are constitutionally protected. Should the Court grant the motion for leave to appeal, the Sand Land Appellants respectfully request the order also provide for a stay of the Order pending the outcome of the appeal.

JURISDICTIONAL STATEMENT

9. This action originated in the Supreme Court, Albany County. The Third Department's Order is a final determination that completely disposes of the matter below. One Justice dissented from the Order and a divided panel at the Appellate Division denied the motions for leave to appeal, with two of the five justices voting to grant leave. Accordingly, this Court has jurisdiction over Sand Land Appellants' motion for leave to appeal and its proposed appeal (*see* CPLR § 5602[a][1][i]).

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

10. Did the Appellate Division, Third Department, erroneously set new precedent in interpreting the Mined Land Reclamation Law by its order entered May 27, 2021, as it reversed the decision, order and judgment of the Supreme Court, Albany County, entered September 3, 2020?

TIMELINESS

11. Sand Land Appellants moved before the Appellate Division for leave to appeal to this Honorable Court by notice of motion filed and served by the NYSCEF system on June 25, 2021. By a three to two majority, the Appellate Division denied Sand Land's motion for leave to appeal to this Honorable Court, and Petitioners-Respondents served Notice of Entry of the Appellate Division's Order denying Sand Land's motion by the NYSCEF system on August 23, 2021. This motion is timely because it is made within thirty days of the date of service of Petitioners-Respondents' Notice of Entry (CPLR 2103[b][7], 5513[b], [d]). See Exhibit "C" hereto.

BACKGROUND

12. This appeal arises from a Petition challenging the NYSDEC issuance of MLRL permits to Sand Land Appellants for the operation of a sand and gravel mine in Petitioner-Respondent Town of Southampton, Suffolk County, New York (the "Town"). The Town's zoning law prohibits mining use in all districts but expressly provides for the continuation of prior nonconforming uses. The mine has been operating in the Town since the 1960s. The Town issued a certificate of occupancy for the mining use of the 50-acre site as a prior nonconforming use. In prior litigation, the Appellate Division, Second Department, held that Sand Land

Appellants' operation of a sand and gravel mine was a prior non-conforming use allowed under local zoning law (*see Matter of Sand Land Corp. v Zoning Bd. Of Appeals of Town of Southampton*, 137 AD3d 1289 [2d Dept 2016]; *Phair v Sand Land Corp*., 137 AD3d 1237 [2d Dept 2016]). In March 2019, the NYSDEC renewed Sand Land's MLRL permit and in June 2019 modified the permit to authorize mining to a greater depth within the existing mining disturbed acreage. These permitting actions followed a settlement between the NYSDEC and Sand Land.

13. By their petition, the Town and the other petitioners below sought to nullify the NYSDEC's settlement with Sand Land and the two permitting actions. Petitioners-Respondents alleged that the NYSDEC acted in violation of law and excess of jurisdiction by processing Sand Land's applications without making the inquires they alleged were mandated by ECL § 23-2711(3). They alleged that by taking the permitting actions without the inquiry by the NYSDEC and with knowledge of the Town's position that mining is not an allowed use in any Town zoning district the NYSDEC violated ECL § 23-2703(3), irrespective of the acknowledged prior non-conforming use rights.

14. By Decision, Order and Judgment entered September 3, 2020, the Honorable James H. Ferreira, A.J.S.C. ruled that a rational basis exists for the challenged NYSDEC determinations, denied the Petitioners-Respondents' requested

relief, and dismissed the proceeding. As to the Petitioners-Respondents' claim that the NYSDEC violated ECL §23-2711(3) by not making an inquiry to the Town as to local zoning and ECL §23-2703(3) by processing the applications, the court held that applying ECL § 23-2703(3) to bar the NYSDEC from issuing Sand Land Appellants an MLRL permit in this case is "nonsensical":

> [T]he Court discerns no violation of ECL 23-2703 (3) in the processing of the modification application. DEC determined that input from the Town as to the legality of the mining expansion was not required because the proposed modification was a vertical expansion within the current disturbance footprint. DEC's interpretation is consistent with the language of the statute which states that it applies to an 'application for a permit to mine' (ECL 23-2703 [3]). In the Court's view, it would be nonsensical to interpret the statute to apply to modification applications such as this one which only proposes mining deeper within an existing disturbance footprint/area where mining is already otherwise authorized.

15. Reversing the Supreme Court, the majority of the Third Department panel held that ECL § 23-2703(3) prohibited the NYSDEC from processing Sand Land's permit applications to renew and modify the MLRL applications. It held that the plain language of ECL§ 23-2703(3) means that the NYSDEC cannot process an MLRL permit if the table of uses in the local zoning code prohibits mining.

REASONS FOR GRANTING LEAVE

16. Leave to appeal should be granted because the Order presents a novel issue of pure statutory interpretation that is of public importance and statewide significance. Sand Land Appellants also respectfully submit that the Order interprets the MLRL in a manner that conflicts with long-standing Court of Appeals precedent

(a) holding that prior nonconforming mining use cannot constitutionally be terminated by zoning laws and ordinances (b) holding that the supersession provision of the MLRL (ECL 23-2703[3]) reserves to Towns the full zoning power delegated by Town law, and (3) the principles of statutory interpretation as applied to the MLRL.

A. The Interpretation of ECL 23-2703(3) is a Novel Issue of Public Importance

17. There are no other Appellate Division rulings directly interpreting ECL § 23-2703(3), and it is of great public importance. A ruling by this Court is needed to resolve the question of the correct statutory interpretation.[1] The Order calls into question the NYSDEC's processing of MLRL permit applications throughout the state and the ramifications for the mining industry are of great public importance.

18. The legislature amended the MLRL in 1991. This Court has noted that the 1991 MLRL amendment codified *Frew Run* (*Wallach v Town of Dryden*, 23 NY3d 728, 753 [2014]). The 1991 MLRL Amendment also added ECL § 23-2711 which the Appellate Division, Fourth Department construed in *Valley Realty Development Co., Inc. v Jorling* (217 AD2d 349 [4th Dept 1995]). The *Valley Realty*

[1] There is a single lower court ruling that rejected the argument that the Town of Southampton could halt NYSDEC processing based on the assertion that mining is generally prohibited use after it wrote to the NYSDEC that the mine had a right to mine under *Syracuse Aggregate* and it had issued a certificate of occupancy for mining (*Town of Southampton v New York State Dept of Envt Conserv*., Index No. 3931/2019, Slip Op at 6 [Sup. Ct. Suffolk County December 7, 2020]). The Town filed a notice of appeal but has not perfected the appeal (Appellate Division, Second Department Docket No. 2021-00781. NYSECF Doc. No. 3).

ruling has guided implementation of ECL § 23-2711 for the last twenty-six years.

19. In construing ECL § 23-2703(3) as a prohibition on the NYSDEC processing MLRL permit applications as applicable to nonconforming prior use right mine sites, the Order calls into doubt the correctness of how the NYSDEC and regulated community have understood ECL § 23-2711 is to be applied throughout the state in the twenty-six years since the Fourth Department's *Valley Realty* decision and going forward.

20. ECL § 23-2703(3) does not contain any instruction or requirement of the NYSDEC to inquire as to local zoning; rather ECL § 23-2711 provides the mechanism and substance of the inquiry as to local zoning. The instruction to the NYSDEC to inquire about local zoning of the applicant and the local government are set forth in ECL § 23-2711(2) and (3), respectively.

21. In *Valley Realty*, the Town enacted a zoning ordinance prohibiting mining operations anywhere in the Town, which was subsequently upheld in challenge brought by Valley Realty (*Valley Realty*, 217 AD2d at 352, citing *Valley Realty Development Co., Inc. v Town of Tully*, 187 AD2d 963 [4th Dept 1992]). Valley acquired the approximately 392-acre property at issue in 1989 and the MLRL 1991 amendments came into effect during the processing of the permit application. Valley Realty contended that it had a right to mine the property as a prior nonconforming use.

22. In this case there is no dispute as to the zoning, it is prohibited in the table of uses and Sand Land has prior nonconforming use rights to mine. However, in *Valley Realty*, the Town disputed that mining was a prior nonconforming use at the property. The NYSDEC had developed a guidance document for the implementation of the 1991 MLRL amendments under which the NYSDEC would not get involved in disputes with a local government and an applicant over local zoning. In *Valley Realty*, the NYSDEC argued that this guidance did not apply because the Fourth Department had already determined that mining was a prohibited use in the Town. That Valley Realty contended it had a prior nonconforming use right was not germane to applying ECL § 23-2711, argued the NYSDEC. The NYSDEC asserted that that the Fourth Department's decision upholding the local zoning prohibition on mining "provide[s] the answer to this question and is dispositive of the present appeal as well" (Appellants' Reply Brief, *Valley Realty Development Co., Inc. v Jorling*, Onondaga County Index No. 93-6046, Appellate Division, 4th Dept, dated July 26, 1995, at 2). Annexed hereto as Exhibit "D" are the pertinent pages of the NYSDEC's brief in *Valley Realty* stating the NYSDEC's position.

23. The Fourth Department disagreed. The court held that the dispute of nonconforming use rights is not a basis for the NYSDEC to cease processing the MLRL permit when the mine site was not within the geographic area specified in

ECL 27-2303(3) (*Valley Realty*, 217 AD2d at 354). As construed by the Appellate Division, Fourth Department, ECL § 27-2311 is an inquiry into the zoning of the specific location of the area to mined, inclusive of nonconforming use rights. The Fourth Department noted that it is this inquiry that informs whether ECL 23-2703(3) applies for mine sites on Long Island (217 AD2d at 354).

24. Since *Valley Realty*, the NYSDEC has processed MLRL permit applications for sites outside Long Island despite the absence of any disagreement between the applicant and the Town that mining is a prohibited use under current zoning when prior nonconforming use rights are disputed. The Order calls into question NYSDEC's processing of such permits because ECL § 23-2711 is consistent with the Order's construction of ECL § 23-2703(3) only if, contrary to *Valley Realty*, it does not extend to an inquiry of prior nonconforming use rights. To reason otherwise would render the inquiries as to zoning to the applicant and the local government under ECL § 23-2711 mere surplusage divorced from any operative purpose under the MLRL.

25. The Order is also of statewide significance because of the adverse impact on mining. As detailed in the Affidavit of Marc Herbst, the Executive Director of the Long Island Contractors Association, Inc. (LICA), (annexed hetero as Exhibit "E") an interpretation of the MLRL that prevents the NYSDEC from processing MLRL permits of prior nonconforming mines under local zoning laws

for mines located on Long Island is of great public importance (Herbst Aff. ¶ 12).

26. LICA and many other organizations, including the Business Council of New York State, the New York Metropolitan Trucking Association, the Construction Industry Council of Westchester & Hudson Valley, and the Long Island Federation of the AFL-CIO, to name but a few, have actively opposed legislation to achieve the same effect as the Order's interpretation of ECL§ 23-2703(3) (Herbst Aff. ¶¶ 5-12).

27. Justice Pritzker noted that six other mines are operating within the Town of Southampton alone under prior nonconforming use certificates (Exhibit A at 10 n 2). That is just in the Town of Southampton. The impact of the Court's precedent setting interpretation, whereby each prior nonconforming mine use terminates at the expiration of their current MLRL permit term, whether the remaining term is one month or five years, eliminates mining on virtually all Long Island. Nearly all the sand mines on Long Island operate as prior nonconforming uses under local zoning laws (*see* Herbst Aff., Exhibit 1 – Affidavit of Robert Yager).

28. LICA, and many other public interest organizations wrote to Governor Cuomo in late 2020 requesting that he veto legislation (originally introduced by Assemblyman Fred. W. Thiele, Jr.) that would have empowered local governments with the ability to prevent the NYSDEC from processing MLRL permits for mines

on Long Island (Herbst Aff. ¶ 7). They identified some of the "enormous adverse consequences" that would result from the closure of prior nonconforming mines on Long Island (Herbst Aff. ¶ 10). The adverse impacts they identified included "tremendous cost implications for public works, affordable housing and private construction projects," exacerbation of truck traffic in the downstate region, job losses, and increased emissions of greenhouse gases (Herbst Aff. ¶ 10 and Exhibit B thereto). As demonstrated by Mr. Herbst's affidavit, the interpretation of ECL § 23-2703(3) is a matter of great public importance.

B. The Interpretation Terminates Rights in Contravention of *Syracuse Aggregate Corp. v Weise* and *Jones v Town of Carroll*

29. The Order conflicts with this Court's precedent holding that local zoning cannot constitutionally terminate prior nonconforming mining uses. Since 1980, the Court of Appeals has applied the diminishing asset doctrine to mining and quarrying in New York (*Syracuse Aggregate Corp. v Weise*, 51 NY2d 278, 285–86, [1980]). That is, that "quarrying contemplates the excavation and sale of the corpus of the land itself as a resource . . . [such that] . . . as a matter of practicality as well as economic necessity, a quarry operator will not excavate his entire parcel of land at once, but will leave areas in reserve, virtually untouched until they are actually needed" (*Syracuse Aggregate Corp.*, 51 NY2d at 285–86). "Consequently, [the Court of Appeals joined those] courts [which] have been nearly unanimous in holding that quarrying, as a nonconforming use, cannot be limited to the land

actually excavated at the time of enactment of the restrictive ordinance because to do so would, in effect, deprive the landowner of his use of the property as a quarry" (*id*.).

30. This Court has repeatedly reaffirmed the application of the diminishing asset doctrine to mining (*see e.g*., *Glacial Aggregates LLC v Town of Yorkshire,* 14 NY3d 127, 136 [2010] ["mining is a unique land use, which colors our analysis of vested rights and nonconforming use"]; *Buffalo Crushed Stone Inc. v Town of Cheektowaga*, 13 NY3d 88, 92–93 [2009] ["Applying the analysis set forth in *Matter of Syracuse Aggregate* . . . we hold that the long and exclusive quarrying operation of BCS and its predecessors and their preparations to use areas left as aggregate mineral reserves—consistent with the nature of quarrying—established a right of prior nonconforming usage on the disputed subparcels"]).

31. The Court has directed that, under the diminishing asset doctrine, courts must examine the facts on a case-by-case basis to determine what constitutes an expansion of a non-conforming use such that it is not constitutionally protected and thus subject to abridgment by local zoning law or ordinance (s*ee e.g., Buffalo Crushed Stone Inc. v Town of Cheektowaga*, 13 NY3d 88, 92–93 [2009]).

32. There is no question in the Order that under this Court's precedent Sand Land Appellants have a constitutionally protected prior nonconforming use (Exhibit A at 6). Thus, the application of the diminishing asset doctrine to define the extent

of protected prior nonconforming mining use was not in issue. Those rights are plainly defined, and the question raised by the Order is an interpretation of the MLRL that provides that a local government can effectuate the termination of those rights by operation of ECL § 23-2703(3).

33. In *Syracuse Aggregate,* this Court noted that the application of the diminishing asset doctrine to mining did not prevent the elimination of "this nonconforming use provided that termination is accomplished in a reasonable fashion" (*Syracuse Aggregate*, 51 NY2d at 286–87, citing*, inter alia*, *Modjeska Sign Studios v Berle*, 43 NY2d 468 [1977]). In *Modjeska Sign Studios*, this Court characterized an unreasonable termination as one that "renders the property unsuitable for any reasonable income productive or other private use for which it is adapted and thus destroys its economic value, or all but a bare residue of its value" (43 NY2d at 474–75). "To so frustrate an owner's use of his property under the guise of the police power is, in reality, nothing more than a deprivation of property without due process of law" (*id.* at 475).

34. The Order cites *Syracuse Aggregate* for the proposition that ECL § 23-2703(3) may be construed to terminate a prior nonconforming use under the diminishing asset doctrine. However, the facts and holding in *Syracuse Aggregate* demonstrate that the Order contradicts *Syracuse Aggregate* to reach that result.

35. In *Syracuse Aggregate*, "[a]t issue on this appeal is whether a prior

nonconforming use involving the extraction of sand, gravel and related materials from a parcel of land extends to the entire parcel or is limited to that portion of the parcel actually excavated at the time the municipality adopted a zoning ordinance prohibiting the expansion of the nonconforming use" (*Syracuse Aggregate Corp.*, 51 NY2d at 282). The Town claimed that the prior nonconforming use extended to only the five acres of the 25-acre parcel mined at the time of the enactment of a zoning ordinance prohibiting mining and could not be expanded beyond the five acres. Under these facts, this Court ruled that Syracuse Aggregate Corp was entitled to mine the entire 25-acres; holding that the Town "may not prevent petitioner from doing that which it has a legal right to do by arbitrarily denying petitioner a permit to continue to use the land in conjunction with the previously engaged in quarrying operation" (*id.* at 287).

36. The effect of the Order's interpretation of ECL § 23-2703(3) is no different than what this Court found an "arbitrary" denial of property rights in *Syracuse Aggregate*. Interpreting ECL § 23-2703(3) as it has, the Order "prevent[s] [Sand Land] from doing that which it has a legal right to do" under the diminishing asset doctrine, by prohibiting issuance of a permit to the same effect as the Town's denial of the permit in *Syracuse Aggregate*.

37. In *Jones v Town of Carroll* (15 NY3d 139 [2010]), this Court held that a Town cannot lawfully limit a prior nonconforming use subject to the diminishing

asset doctrine to the extent of a DEC permit – the very thing the Oder's interpretation of ECL § 23-2703(3) empowers Towns to do. The Court has held that the diminishing asset doctrine that applies to mining also applies to a landfill (*Jones v Town of Carroll*, 15 NY3d at 144, citing *Syracuse Aggregate*, *Buffalo Crushed Stone,* and *Glacial Aggregates*).

38. In *Jones v Town of Carroll*, the Town amended its zoning law to eliminate landfills in the district in which the landfill was located and then subsequently amended the zoning law to provide that any existing landfills, such as the Jones' 3-acre landfill, could continue without expansion per a valid DEC landfill permit. Jones's right to continue to operate the existing 3-acre business was thus prohibited from extending beyond the limits allowed by Jones' DEC permit on the date the local law went into effect. As in this case, it was undisputed that the use on a 50-acre parcel was lawful before the effective date of the zoning amendment (15 NY3d at 145). This Court held that Jones "acquired a vested right to operate a C & D landfill on their entire parcel, subject to regulation by DEC and that the 2005 local law could not extinguish their legal use of the land for that purpose" (15 NY3d at 145–46).

39. The Order interprets ECL § 23-2703(3) such that after the effective date of the local law banning the mining use, the mine cannot go beyond its current MLRL permit because DEC would be unable to process an application. The

precedent of *Jones v Town of Carroll* holds that such a termination is invalid.

40. "It is a cardinal principle of statutory interpretation that the intention to change a long-established rule or principle is not to be imputed to the legislature in the absence of a clear manifestation" (*Town of Aurora v Vill. of E. Aurora*, 32 NY3d 366, 375 [2018]). Nothing in the MLRL or its legislative history suggests the Legislature sought to reverse the application of the diminishing asset doctrine to mines in one part of the state. Equally, there is nothing to suggest that the legislature intended to define a lawful termination of prior nonconforming mining use as wherever mining stops at the end of an MLRL permit term.

41. The Order's statutory interpretation of that ECL § 23-2703(3) conflicts with the Court of Appeals precedent on the protection to be afforded prior nonconforming mining uses and therefore presents a question of interpretation worthy of Court of Appeals review.

C. The Interpretation Conflicts with the MLRL Supersession Clause (ECL 23-2703[2]) as Interpreted by the Court of Appeals in *Frew Run Gravel*

42. In 1991, the Legislature "codified *Frew Run's* holding in an amendment to the MLRL's supersession clause" (*Wallach v Town of Dryden*, 23 NY3d 728, 753 [2014]). In *Matter of Frew Run Gravel Prods. v Town of Carroll* (71 NY2d 126, 130 [1987]), the Court of Appeals ruled that the MLRL contained an express supersession clause that eliminated the "search for indications of an implied legislative intent to preempt". Interpreting the plain text of the supersession clause,

ECL § 23-2703(2), considering the statute as a whole and its legislative history, the Court held that the provision reserved "the town's powers to regulate land use through zoning powers expressly delegated in the Statute of Local Governments § 10(6) and Town Law § 261" (71 NY2d at 134). Under the holding in *Frew Run*, the MLRL does not limit or expand the power of a Town beyond that delegated by Town Law.

43. The Appellate Division, Third Department's interpretation of ECL § 23-2703(3) cannot be reconciled with this Court' holding in *Frew Run*. The Appellate Division, Third Department, interpretation imbues ECL§ 23-2703(3) with a preemptive effect outside of the express supersession provision (ECL§ 23-2703[2]), depriving local governmental authority to allow mining to continue as a prior nonconforming use.

44. This Court has held that "municipalities may adopt measures regulating nonconforming uses and may, in a reasonable fashion, eliminate them" (*550 Halstead Corp. v Zoning Bd. of Appeals of Town/Vill. of Harrison*, 1 NY3d 561, 562 [2003], citing *Syracuse Aggregate*). This Court has found "nothing in the sparse legislative history of the amendment to the statute suggesting that the Legislature intended the MLRL to go further [than withdrawing municipal control of mine reclamation] and limit municipalities' broad authority to govern land use" (*Gernatt Asphalt Prod., Inc. v Town of Sardinia*, 87 NY2d 668, 682 [1996]).

45. Despite this clear precedent, the Order interprets ECL § 23-2703(3) as superseding such regulation.[2] Because the Appellate Division, Third Department's, interpretation restricts local zoning power inconsistent with this Court's prior holding that ECL § 23-2703(2) reserves that power to local governments, the question of the correct interpretation is worthy of review by this Court.

D. The Order Significantly Departs from the Principles of Statutory Construction the Court of Appeals Has Applied to the MLRL

46. The Order significantly departs from this Court's precedent on the application of principles of statutory construction as applied to the MLRL.

47. This Court recently reaffirmed its well-settled principles of statutory interpretation when construing an amendment to existing law (*Est. of Youngjohn v Berry Plastics Corp*., 36 NY3d 595 [2021]). The Court summarized the principles to be applied "to ascertain and give effect to the intention of the Legislature," which is "a court's primary consideration when presented with a question of statutory interpretation" (*id. at* 595).

48. The Court specified four principles: (1) "the starting point" is the text as "the clearest indicator" of intent; (2) "a statute ... must be construed as a whole and that its various sections must be considered together and with reference to each

[2] Justice Pritzker framed this observation of the Order's result in terms of not holding the Town to compliance with its own law (Exhibit A at 11). The other side of the coin is that the Order's interpretation denies the MLRL permit necessary to continue the constitutionally protected prior nonconforming use; thereby denying effect to the Town's zoning law permitting such use as a preexisting nonconforming use.

other;" (3) "[c]ourts should 'give [a] statute a sensible and practical over-all construction, which is consistent with and furthers its scheme and purpose and which harmonizes all its interlocking provisions; and (4) "amendments should typically be construed together with the original act, with no part of the statute rendered inoperative 'if they can all be made to stand and work together '" (36 NY3d at 595 [citations omitted]).

49. It is respectfully submitted that the Order's statutory interpretation departs from these well-settled principles established by this Court by beginning and ending at the "starting point." The Court of Appeals has applied its principles of statutory interpretation to the MLRL in past decisions. In doing so it has looked beyond the plain language of the particular provision at issue to ensure that it "ascertain[s] and give[s] effect to the intention of the Legislature" (*Samiento v World Yacht, Inc*., 10 NY3d 70, 77 [2008]). The Order departs from applying these same principles to interpreting the MLRL in this case.

50. The Order construes the phrase: "if local zoning laws or ordinances prohibit mining uses within the area proposed to be mined" (ECL § 23-2703[3]). "To find the answer, we look to the plain meaning of the phrase ['prohibit mining uses within the area proposed to be mined'] . . . as one part of the entire Mined Land Reclamation Law, to the relevant legislative history, and to the underlying purposes of the . . . clause as part of the statutory scheme" (*Frew Run*, 71 NY2d at 131).

51. In contrast, the Order's analysis of ECL § 23-2703(3) ends with the "starting point" of statutory construction by examining a single phrase. However, to "give a sensible and practical over-all construction [that] harmonizes all of the [MLRL's] interlocking provisions" requires consideration of the entire 1991 MLRL amendment "construed together with the original [MLRL]" (*Est. of Youngjohn*, 36 NY3d at 595).

52. As described above, the Order's interpretation of the ECL § 23-2703(3) conflicts with the Court of Appeals precedent both in the method of statutory construction and interpretation of the 1991 MLRL amendments. In contrast, construing the provision as part of the whole makes it plain that the legislative intent of ECL§ 23-2703(3) was to establish a rule of procedure and not substance.

53. The MLRL supplies definitions that guide its interpretation and where there are no definitions supplied the ordinary and natural usage applies. The subject of ECL§ 23-2703(3) that is being acted upon by the provision is "an application for a permit to mine." The MLRL defines the area that is the subject of the permit application as "the sum of that surface area of land or land under water which: (i) has been disturbed by mining since April first, nineteen hundred seventy-five and not been reclaimed, and (ii) is to be disturbed by mining during the term of the permit to mine" as the "Affected Land." ECL § 23-2705.

54. Thus, the plain reading of ECL § 23-2703(3) construed with the

definition supplied by the legislature is that the "area proposed to be mined" is the area that is the subject of the permit application. Accordingly, whether "local zoning laws or ordinances prohibit mining uses within the area proposed to be mined" requires a determination regarding the area to be mined on the property, not a zoning district.

55. It also departs from this Court's principles of interpretation by not construing ECL § 23-2703(3) in harmony with ECL§ 23-2711(a), adopted in the same 1991 MLRL amendment. The requirement to solicit local governments about local zoning is triggered by an application to mine (which is for an "Affected Area") "for a property not previously permitted pursuant to this title." The limiting phrase, "for property not previously permitted" is without effect under the Order's construction. Giving it effect and applying the plain terms of the provisions allows for an interpretation consistent with the then long-standing precedent of *Syracuse Aggregate*, *supra*, and *Frew Run*, *supra,* which the Legislature must be presumed to have been aware (*Town of Aurora v Vill. of E. Aurora*, 32 NY3d 366, 375 [2018]).

APPLICATION FOR DISCRETIONARY STAY

56. Sand Land Appellants respectfully request that the Court grant a discretionary stay of the Order's alteration of the status quo pursuant to CPLR 5519(c).

57. "In considering whether to grant a stay under subdivision (c), the court's

discretion is the guide. It will be influenced by any relevant factor, including the presumptive merits of the appeal and any exigency or hardship confronting any party" (Reilly, McKinney Practice Commentary, CPLR 5519[c]; *Grisi v Shainswit*, 119 AD2d 418, 421 [4th Dept 1986] ["stays pending appeal in such cases is, for the most part, a matter of discretion"]).

58. For the reasons stated above, the Sand Land Appellants' appeal is leave worthy and meritorious.

59. A stay "simply suspend[s] judicial alteration of the status quo" (*Nken v Holder*, 556 US 418, 429 [2009]; *see also Ulster Home Care Inc. v Vacco*, 255 AD2d 73, 78–79 [3d Dept 1999]).

60. That status quo is a mine that has been in business for over half a century and operated pursuant to MLRL permits since the MLRL's inception and is prior nonconforming use recognized as permissible under local zoning law with the issuance of certificates of occupancy to continue that use.

61. The Sand Land Appellants will suffer irreparable injury without a stay of the order pending resolution of the appeal by virtue a temporary denial of a constitutionally protected prior nonconforming use right recognized by the Court of Appeals.

62. The Order deprives Sand Land Appellants of the right to mine reserves at a greater depth within the existing footprint of the mine. As more fully discussed

above, courts applying the diminishing asset doctrine to mines, including this Court, have held that prior nonconforming use is constitutionally protected. Without a stay, Sand Land Appellants will suffer an uncompensated temporary depravation of the property's use during the pendency of an appeal even if it should prevail.

63. As more fully set forth in the annexed affidavit of the John Tintle, the President of Sand Land Corporation (Exhibit "F" hereto), Sand Land Appellants will also suffer irreparable harm to its business with the loss of infrastructure and construction related contracts and the impairment of business relationships, as the mine will not be able to supply local requirements at the height of the construction season (Tintle Aff. ¶¶ 10, 11).

64. The operations will suffer the loss of long-term skilled employees, with an average of twenty years of experience with no assurance of being able to rehire them should Sand Land Appellants be successful on appeal (Tintle Aff. ¶¶ 7, 9).

65. At the same time, it is denied any income from its reserves, it will carry the fixed capital costs of its investment in equipment and machinery, and other overhead expenses, such as insurance and local property and school taxes based on the value of a mine, not simply a reclamation liability (Tintle Aff. ¶ 6).

66. The Petitioners-Respondents will not be prejudiced by a stay during the pendency of an appeal. Their attempt to cast the case as one of environmental protection notwithstanding, the Order is based purely on the statutory interpretation

of ECL § 23-2703(3) and not findings of environmental harm or harm to any of the petitioners.

67. To the contrary, the Petitioners-Respondents have repeatedly failed to demonstrate any environmental harm from the mine, and accordingly been repeatedly rebuffed in seeking injunctive relief premised on such bald assertions of harm.

68. Indeed, any purported assertion of environmental benefits delayed by a stay of the Order rings hollow given that the Order nullified a settlement that increased the funds set aside for reclamation, brought a grandfathered three acre mine area into the reclamation fold, and terminated the processing of vegetative organic material on site.

69. For the foregoing reasons, Sand Land Appellants respectfully request that the Court grant their motion for leave to appeal and grant a discretionary stay pursuant to CPLR 5519(c).

Dated: September 22, 2021
Syracuse, New York

Gregory M. Brown, Esq.

Rule 500.1(f) Corporate Disclosure Statement

Respondents-Appellants Sand Land Corporation and Wainscott Sand and Gravel Corp. are not publicly held corporations. They have no subsidiaries or affiliates that are publicly traded.

EXHIBIT A

STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

TOWN OF SOUTHAMPTON; ASSEMBLYMAN FRED W. THIELE, JR.; 101CO, LLC; 102CO NY, LLC; BRRRUBIN, LLC; BRIDGEHAMPTON ROAD RACES, LLC; CITIZENS CAMPAIGN FOR THE ENVIRONMENT; GROUP FOR THE EAST END; NOYAC CIVIC COUNCIL; SOUTHAMPTON TOWN CIVIC COALITION; JOSEPH PHAIR; MARGOT GILMAN; and AMELIA DOGGWILER;

Petitioners-Appellants,

- against –

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; SAND LAND CORPORATION and WAINSCOTT SAND AND GRAVEL CORP.,

Respondents-Respondents.

NOTICE OF ENTRY

Appellate Division Docket No: 532083

Supreme Court Index No.: 902239-19

PLEASE TAKE NOTICE that the attached is a true copy of the MEMORANDUM AND ORDER of the Supreme Court, Appellate Division, Third Judicial Department decided and entered with the Appellate Division Clerk on May 27, 2021.

Dated: May 27, 2021
East Hampton, New York

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Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: May 27, 2021

529380
532083

In the Matter of TOWN OF SOUTHAMPTON et al.,
Appellants,
et al.,
Petitioner,

v

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION et al.,
Respondents.

MEMORANDUM AND ORDER

COUNTY OF SUFFOLK,
Proposed Intervenor-Appellant.

Calendar Date: February 9, 2021

Before: Garry, P.J., Egan Jr., Pritzker, Reynolds Fitzgerald and Colangelo, JJ.

Law Offices of Thomas M. Volz, PLLC, Nesconset (David H. Arntsen of counsel), for Town of Southampton, appellant.

Tooher & Barone, LLP, Albany (Meave M. Tooher of counsel), for 101CO, LLC and others, appellants.

Dennis M. Cohen, County Attorney, Hauppauge (Elaine M. Barraga of counsel), for County of Suffolk, proposed intervenor-appellant.

Letitia James, Attorney General, Albany (Patrick A. Woods of counsel), for New York State Department of Environmental Conservation, respondent.

Matthews Kirst & Cooley, PLLC, East Hampton (Brian E. Matthews of counsel), for Sand Land Corporation and another, respondents.

Whiteman Osterman & Hanna LLP, Albany (John J. Henry of counsel), for Town of East Hampton and others, amici curiae.

Reynolds Fitzgerald, J.

Appeals (1) from an order of the Supreme Court (Ferreira, J.), entered September 13, 2019 in Albany County, which, in a proceeding pursuant to CPLR article 78, denied a motion by the County of Suffolk to intervene, and (2) from a judgment of said court, entered September 3, 2020 in Albany County, which, among other things, dismissed petitioners' application, in a proceeding pursuant to CPLR article 78, to review two determinations of respondent Department of Environmental Conservation granting certain Mined Land Reclamation permits to respondent Sand Land Corporation.

Respondent Sand Land Corporation is the owner and permittee[1] of a sand and gravel mine located on a 50-acre parcel of property in the Town of Southampton, Suffolk County, and respondent Wainscott Sand and Gravel Corporation operates the mine. In 2014, Sand Land and Wainscott Sand and Gravel (hereinafter collectively referred to as Sand Land) applied to respondent Department of Environmental Conservation (hereinafter DEC) for a modification permit seeking, as relevant here, a vertical and horizontal expansion of its mining operations. The

[1] "Permittee" is defined as "any person who holds a valid mining permit from the department for the boundaries of the land identified in the mined land-use plan" (ECL 23-2705 [11]).

proposed horizontal expansion consisted of 4.9 acres – 1.9 acres of previously unmined land and three acres known as the "stump dump."[2] The vertical expansion sought to mine 40 feet deeper to a level of 120 feet above mean sea level. In April 2014, pursuant to the State Environmental Quality Review Act (see ECL art 8), DEC issued a negative declaration. A year later, DEC denied the permit.

Sand Land requested a hearing to challenge the denial of the 2014 permit application. The hearing produced two decisions from the Administrative Law Judge – a January 2018 ruling on a threshold procedural issue and a December 2018 ruling, among other things, denying Sand Land's motion to renew and reargue. Both rulings held that ECL 23-2703 prohibited DEC from processing mining permits for mines located in an area with a population of over one million people that draws its primary drinking water from a designated sole source aquifer,[3] and that petitioner Town of Southampton has a local law prohibiting mining in the Town. In between these two administrative decisions, DEC, in September 2018, issued a notice of intent to modify to Sand Land, which stated that DEC was modifying the existing permit to require Sand Land to cease all mining activity other than reclamation.[4] Also, in October 2018, Sand Land submitted an application to renew its mining permit. This application specified that 31.5 acres were to be included in the life of the mine and sought an increase in the depth of the mine by 40 feet.

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[2] A "stump dump" is a landfill site consisting of wood waste, such as tree stumps.

[3] It is undisputed that Suffolk County, the location of the Sand Land mine, is an area with a population of over one million that draws its primary drinking water from a sole source aquifer.

[4] "Reclamation" is "the conditioning of the affected land to make it suitable for any productive use" (6 NYCRR 420.1 [q]).

In February 2019, DEC and Sand Land entered into a global settlement agreement settling all pending administrative proceedings. As relevant here, under the terms of the agreement, DEC agreed to rescind its notice to modify and issue a "renewal" permit for an expanded life of the mine boundaries and process Sand Land's October 2018 permit application to deepen the mine by 40 feet. The settlement was made expressly contingent on DEC's issuance of said permit, which it did. DEC issued the renewal permit in March 2019. Also, in March 2019, and relying on the prior 2014 negative declaration, DEC issued an amended negative declaration with respect to the permit to deepen the mine. In June 2019, DEC issued the modification permit granting Sand Land the authority to deepen the mine by 40 feet.

In April 2019, petitioners – the Town, several civic organizations and three neighboring landowners[5] – commenced this CPLR article 78 proceeding seeking to annul the February 2019 settlement agreement, DEC's March 2019 amended negative declaration and DEC's March 2019 issuance of a renewal permit. Following DEC's issuance of another modification permit, in June 2019, petitioners filed a supplemental petition seeking to annul that permit. Meanwhile, in May 2019, the County of Suffolk moved to intervene and submitted a proposed petition asserting the same legal claims as the original petition. Respondents opposed the motion. In September 2019, Supreme Court denied the County's motion finding that the County lacked capacity to bring the claims set forth in the proposed petition against DEC as a subsidiary of the state. The County appeals from this order. In September 2020, Supreme Court dismissed the petition finding, as relevant here, no violation of ECL 23-2703 (3), as it does not apply to a modification application such as this one, which proposes only mining deeper within its existing footprint. Petitioners appeal from this judgment.

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[5] Fred W. Thiele Jr. was also a named petitioner but Supreme Court found that he lacked standing. This issue is not being challenged on the appeal.

Initially, Supreme Court did not err in denying the County's motion to intervene. The County argues that authorization to intervene can be inferred from ECL 23-2703 (3) and 23-2711 (3) in conjunction with the County's role in protecting and monitoring groundwater quality. However, these statutes refer to the municipality that enacts local zoning laws. As such, the Town rather than the County would have the capacity to sue DEC. Likewise, the County's assertion that Suffolk County Charter § C16-2 confers capacity upon it is meritless, as "a generic grant of authority to sue or be sued [is] insufficient" (Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig., 30 NY3d 377, 386 [2017] [internal quotation marks omitted]; see Matter of Bethpage Water Dist. v Daines, 67 AD3d 1088, 1090-1091 [2009], lv denied 14 NY3d 707 [2010]). Although "[c]ourts may allow other interested persons to intervene in special proceedings, . . . this permissive determination lies within the court's discretion" (Matter of Pace-O-Matic, Inc. v New York State Liq. Auth., 72 AD3d 1144, 1145 [2010] [internal quotation marks and citation omitted]). We find no abuse of discretion in Supreme Court's decision.

Turning to substantive matters, the Mined Land Reclamation Law (see ECL 23-2701 et seq.) grants DEC broad authority to regulate the mining industry in the state. The law looks to encourage a sound mining industry, provide for the management of depletable resources and assure the reclamation of mined land. The Legislature sought to achieve these purposes through "the adoption of standard and uniform restrictions and regulations to replace the existing patchwork system of local ordinances" (Matter of Wallach v Town of Dryden, 23 NY3d 728, 745 [2014]). In order to assure this uniformity, the law contains an express supersession clause, which provides that the Mined Land Reclamation Law shall supersede all "local laws relating to the extractive mining industry" (ECL 23-2703 [2]). However, the Mined Land Reclamation Law does not supersede all local laws. In Matter of Frew Run Gravel Prods. v Town of Carroll (71 NY2d 126 [1987]), the Court of Appeals clarified the applicability of this supersession clause and differentiated between local laws pertaining to the actual operation and process of mining, which

were subject to the clause, and other local laws, which fell outside its preemptive orbit. In determining that zoning ordinances are not subject to this clause, the Court stated that to do otherwise "would drastically curtail [a] town's power to adopt zoning regulations granted in [Statute of Local Governments § 10 (6)] and in Town Law § 261. Such an interpretation would preclude [a] town board from deciding whether a mining operation – like other uses covered by a zoning ordinance – should be permitted or prohibited in a particular zoning district" (id. at 134 [citations omitted]).

Although a review of the record evidences that the Town's local zoning laws prohibit zoning, because Sand Land's predecessor began operating in the 1950s – prior to the zoning restrictions now in place – mines such as Sand Land's are generally considered to be a legal prior nonconforming use and will be "permitted to continue, nothwithstanding the contrary provisions of the ordinance" (Glacial Aggregates LLC v Town of Yorkshire, 14 NY3d 127, 135 [2010] [internal quotation marks and citation omitted]). At the same time, although "prior nonconforming uses in existence when a zoning ordinance is adopted are, generally, constitutionally protected[,] . . . the law . . . generally views nonconforming uses as detrimental to a zoning scheme, and the overriding public policy of zoning in [this s]tate and elsewhere is aimed at their reasonable restriction and eventual elimination" (Buffalo Crushed Stone, Inc. v Town of Cheektowaga, 13 NY3d 88, 97 [2009] [internal quotation marks, brackets and citations omitted]). Crucially, with respect to the case at bar, in 1991, the Legislature amended the Mined Land Reclamation Law to include the following provision: "No agency of this state shall consider an application for a permit to mine as complete or process such application for a permit to mine pursuant to this title, within counties with a population of one million or more which draw their primary source of drinking water for a majority of county residents from a designated sole source aquifer, if local zoning laws or ordinances prohibit mining uses within the area proposed to be mined" (ECL 23-2703 [3]). The amendment is an outlier in a statute whose purpose is to promote uniformity, as it

articulates a mandate directed at a specific geographic area – Long Island, where the Town is located and where zoning laws prohibit mining.

Respondents argue that per DEC's interpretation, ECL 23-2703 (3) applies only to new permits or permits seeking substantial modifications. They contend that the matter before Supreme Court, wherein Sand Land sought a 40-foot vertical expansion within the existing footprint of the mine, was not a material change, as it did not request any horizontal expansion; as such, respondents contend that input from the Town was not required. Supreme Court agreed, characterizing an alternate interpretation would be "nonsensical."[6] We disagree.

When interpreting a statute, we turn first to its text as the best evidence of the Legislature's intent. As a general rule, a statute's plain language is dispositive (see Riley v County of Broome, 95 NY2d 455, 463 [2000]). Here, ECL 23-2703 (3) provides that, in the event that an application for a permit is received from an applicant whose mine falls within an area described in the statute, the agency may not process the application if the local zoning laws prohibit same. ECL 23-2703 (3) is not vague or ambiguous; it is concise and clear. Contrary to all other permit applications received by DEC, an application received from an area protected under ECL 23-2703 (3) must be put on hold until the status of the local laws is determined (see Matter of Valley Realty Dev. Co. v Jorling, 217 AD2d 349, 354 [1995]). There is no qualification on what type of permit applications must be put on hold; rather, by its certain language, the statute applies to all applications. "'[A] court cannot amend a statute by inserting words that are not there'" (Matter of Chemical Specialties Mfrs. Assn. v

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[6] Although Matter of Syracuse Aggregate Corp. v Weise (51 NY2d 278 [1980]) recognizes that "quarrying contemplates the excavation and sale of the corpus of the land itself" and "constitutes the use of land as a diminishing asset" (id. at 285), the case at bar is easily distinguishable because Sand Land's mine is located in an area with a population of over one million reliant on a sole source aquifer.

Jorling, 85 NY2d 382, 394 [1995], quoting McKinney's Cons Laws of NY, Book 1, Statutes § 363; accord Ronkese v Tilcon N.Y., Inc., 153 AD3d 259, 263 [2017]; see McKinney's Cons Laws of NY, Book 1, Statutes § 94 at 190 ["new language cannot be imported into a statute to give it a meaning not otherwise found therein"]). In keeping with this hornbook rule of construction, this Court declines to furnish modifiers. If the Legislature had intended to limit the type of permit applications to which it applied, it would have done so (see Matter of Marian T. [Lauren R.], 36 NY3d 44, 51-52 [2020]). After all, it very precisely limited the geographic area to which it applies. Given this unambiguous text, "deference to an administrative agency's special competence or expertise does not come into play where, as is the case here, we are called upon to decide a question of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent" (Matter of Polan v State of N.Y. Ins. Dept., 3 NY3d 54, 58 [2004] [internal quotation marks and citation omitted]).

ECL 23-2703 (3) clearly recognizes that the local laws of the municipality are determinative as to whether an application can be processed. Here, where it is unchallenged that the Town's laws prohibit zoning, DEC cannot process the application, let alone issue the permit. It cannot do by fiat what is prohibited under the law. Therefore, the act of issuing the permits here, in contravention of ECL 23-2703 (3), was arbitrary and capricious.

Garry, P.J., Egan Jr. and Colangelo, JJ., concur.

Pritzker, J. (concurring in part and dissenting in part).

Although I agree with the majority's opinion relative to the denial of the County of Suffolk's motion to intervene, I respectfully dissent because it is my opinion that ECL 23-2703 (3) and 23-2711 (3) are inapplicable and do not provide a basis to grant the petition.

Initially, ECL 23-2711 (3) is inapplicable to the modification permit at issue here as this particular subsection applies to properties "not previously permitted pursuant to this title" (see Joan Leary Matthews, Siting Mining Operations in New York - The Mined Land Reclamation Law Supersession Provision, 4 Alb L Envtl Outlook 9, 12 [Spring 1999]). As to ECL 23-2703 (3), this statute provides, in pertinent part, that "[n]o agency of this state shall consider an application for a permit to mine as complete or process such application for a permit to mine pursuant to this title, within counties with a population of one million or more which draw their primary source of drinking water for a majority of county residents from a designated sole source aquifer, if local zoning laws or ordinances prohibit mining uses within the area proposed to be mined" (emphasis added). It is undisputed that petitioner Town of Southampton is within the protected area and that the Town's zoning laws generally prohibit mining within its borders. Nevertheless, respondent Sand Land Corporation and respondent Wainscott Sand and Gravel (hereinafter collectively referred to as Sand Land) have a constitutionally protected prior nonconforming use "within the area proposed to be mined" (ECL 23-2703 [3]; see generally Matter of Syracuse Aggregate Corp. v Weise, 51 NY2d 278 [1980]).[1] This has been recognized not only by the Second Department (see Matter of Sand Land Corp. v Zoning Bd. of Appeals of Town of Southampton, 137 AD3d 1289, 1292 [2016], lv denied 28 NY3d 906 [2016]), but also by the Town, generally, in its local law, and, specifically, by virtue of its issuance of nonconforming use certificates of occupancy in 2011 and 2016. Simply stated, although the Town prohibits new mining operations within its borders, it has both recognized and permitted mining

[1] Although the majority distinguishes Matter of Syracuse Aggregate Corp. v Weise (supra) because the mine at issue in that case was not located in an area covered by ECL 23-2703 (3), the statute neither overrules nor even addresses these well-settled and constitutionally protected property rights.

within "the area proposed to be mined" (ECL 23-2703 [3]) as a legitimate prior nonconforming use.[2]

The interpretation of ECL 23-2703 (3) by petitioners and the amici as applying to all permits is too broad and could render the law unconstitutional. Specifically, if this statute applies to all mining permits, including those based on prior nonconforming uses, then a municipality within the statutorily protected areas could effectively zone out the active and permitted mines throughout covered areas by simply legislating that no mining is permitted. Although a municipality can do so for new mines, and could even reasonably curtail and amortize prior nonconforming uses, it cannot terminate these uses in a wholesale fashion without running afoul of the Takings Clause (see Matter of Syracuse Aggregate Corp. v Weise, 51 NY2d at 287; Philip Weinberg, Practice Commentaries, McKinney's Cons Laws of NY, Book 17½, ECL 23-2703 at 351-355). Overall, this statute achieves its remedial environmental goal while still recognizing and protecting vested constitutional rights. For example, although respondent Department of Environmental Conservation (hereinafter DEC) would not be prohibited from processing a modification permit relative to a mine operating within its prior nonconforming use, it would be prohibited from processing a permit for a new mine, or one seeking to expand outside of a prior nonconforming use, within a protected area.

This conclusion does not change even though the permit at issue is seeking a 40-foot vertical increase because such an increase may be reasonably viewed as a constitutionally protected expansion. As to mining, prior nonconforming uses may be expanded through exploitation of reserves (see Matter of Syracuse Aggregate Corp. v Weise, 51 NY2d at 285-286; see also Buffalo Crushed Stone, Inc. v Town of Cheektowaga, 13 NY3d 88, 98 [2009]). Of course, this does not mean that the permit had to be approved (see generally ECL 23-2711; ECL art 70), but rather that ECL 23-2703 does not prevent review by DEC. Nor does it mean that ECL 23-2703 (3) only applies to new mines. To

[2] There are six other mines operating within the Town under prior nonconforming use certificates.

the contrary, it also applies to expansions that exceed the established prior nonconforming use of an existing mine. As such, DEC's interpretation as to the statute's applicability is correct, as the requested expansion is within the existing footprint and clearly within the existing vertical reserves (see Buffalo Crushed Stone, Inc. v Town of Cheektowaga, 13 NY3d at 100; Matter of Syracuse Aggregate Corp. v Weise, 51 NY2d at 285-286; compare Matter of Dolomite Prods. Co. v Kipers, 23 AD2d 339, 342 [1965], affd 19 NY2d 739 [1967]).

Finally, contrary to the amici's suggestions, the holding in Matter of Frew Run Gravel Prods. v Town of Carroll (71 NY2d 126 [1987]) does not compel a different result, nor does it support the proposition that DEC's actions somehow impaired the Town's municipal home rule authority. Matter of Frew Run Gravel Prods. holds that the Mined Land Reclamation Law does not totally preempt town zoning laws (id. at 133). If, for example, the Town wanted to eliminate all sand mining – current and grandfathered – within its borders via local law, it could do so "provided that termination is accomplished in a reasonable fashion" (Matter of Syracuse Aggregate Corp. v Weise, 51 NY2d at 287). But here, the Town has not done so. Certainly, a municipality's right to home rule authority is not compromised by holding it accountable to its own law.[3] Accordingly, as neither ECL 23-2703 (3) nor 23-2711 (3) applies, Supreme Court's judgment should be affirmed on this ground.

Given this determination, I must reach petitioners' remaining contentions. To that end, I also find that Supreme Court correctly held that the decision of the Administrative Law Judge (hereinafter ALJ) to deny the 2014 application was not binding relative to the instant permit application. "A decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reasons for reaching a different result on essentially the same facts is arbitrary and

[3] In their brief, the amici inadvertently make this point by noting that different local zoning laws, such as those of the Towns of East Hampton and Riverhead in Suffolk County, specifically limit expansion or changes to nonconforming uses.

capricious" (Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington, 97 NY2d 86, 93 [2001] [internal quotation marks, brackets and citations omitted]). Here, among the multiple differences between the applications, the 2014 application before the ALJ sought both a vertical and horizontal mining expansion while the 2018 application, which is subject to the permit at issue, involved solely a vertical expansion.[4] Accordingly, the ALJ's prior decision was not final and binding since it could not have logically reached a "definitive position on the issue that inflicts an actual, concrete injury" (Matter of Essex County v Zagata, 91 NY2d 447, 453 [1998] [internal quotation marks and citations omitted]), namely, whether ECL 23-2703 (3) or 23-2711 (3) was triggered by the vertical expansion uncoupled from the horizontal expansion also sought in 2014. Thus, the ALJ's prior decision on the 2014 modification application "did not constitute a precedent from which the [ALJ] was required to explain a departure" (Matter of Davydov v Mammina, 97 AD3d 678, 679-680 [2012] [internal quotation marks and citation omitted]; see Matter of Iskalo 5000 Main LLC v Town of Amherst Indus. Dev. Agency, 147 AD3d 1414, 1416 [2017], lv denied 29 NY3d 919 [2017]). Moreover, because no final decision on the 2014 permit application had been entered by the ALJ – rather, the matter had been adjourned and not appealed to the Commissioner of Environmental Conservation – no precedential value resulted therefrom (see generally Matter of Circle T Sterling, LLC v Town of Sterling Zoning Bd. of Appeals, 187 AD3d 1542, 1543-1544 [2020]; Matter of Harry's Nurses Registry, Inc. [Commissioner of Labor], 171 AD3d 1410, 1411-1412 [2019], lv denied 34 NY3d 907 [2020]).

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[4] Other than the difference in the expansion sought, the applications also differed in a number of significant ways, including that the 2014 application provided for further processing of vegetative organic waste materials and the continued use of the part 360 registration (see 6 NYCRR 360.16), while the later permit called for quarterly groundwater testing, and included an agreement never to go below 120 feet above mean sea level and limiting the current life of the mine for no more than eight years.

It is also my opinion that Supreme Court properly relied upon the affidavit of Catherine Dickert in reaching its decision. A respondent may submit supporting affidavits with an answer in a CPLR article 78 proceeding (see CPLR 7804 [c]; see also CPLR 4520) to allow the court "to both discern the rationale for the administrative action taken and undertake intelligent appellate review thereof" (Matter of Molloy v New York State Workers' Compensation Bd., 146 AD3d 1133, 1134 [2017] [internal quotation marks and citation omitted]). Nevertheless, such affidavits must be "furnished by individuals having firsthand knowledge of the decision-making process" (id. at 1134 [internal quotation marks and citations omitted]). Here, Dickert, who serves as the supervising official within the Division of Mineral Resources, was authorized to supply an affidavit explaining the rationale for the action of DEC as to issuing the relevant permit herein (see CPLR 4520, 7804 [c]). Moreover, the affidavit itself and the administrative record demonstrate that Dickert had personal knowledge of the policies at issue herein and, further, was directly responsible for those issuing permits (see 6 NYCRR 550.2; Matter of Molloy v New York State Workers' Compensation Bd., 146 AD3d at 1134; Matter of Friends of Hammondsport v Village of Hammondsport Planning Bd., 11 AD3d 1021, 1022 [2004]).

Finally, I find that Supreme Court correctly determined that DEC met its obligations under the State Environmental Quality Review Act (see ECL art 8 [hereinafter SEQRA]) by taking the requisite hard look at the potential environmental impacts of the renewal. "Judicial review of an agency determination under SEQRA is limited to whether the agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination. In conducting its review, this Court may not substitute its judgment for that of the lead agency, and may annul its decision only if it is arbitrary, capricious or unsupported by the evidence" (Matter of Troy Sand & Gravel Co., Inc. v Town of Sand Lake, 185 AD3d 1306, 1310 [2020] [internal quotation marks and citations omitted], appeal dismissed 36 NY3d 943 [2020], lvs denied ___ NY3d ___ [May 6, 2021]; see Matter of

Van Dyk v Town of Greenfield Planning Bd., 190 AD3d 1048, 1049 [2021]). "While the judicial review must be genuine, the agency's substantive obligations under SEQRA must be viewed in light of a rule of reason[,] and the degree of detail with which each environmental factor must be discussed will necessarily vary and depend on the nature of the action under consideration" (Matter of Gernatt Asphalt Prods. v Town of Sardinia, 87 NY2d 668, 688 [1996] [internal quotation marks and citation omitted]). "A degree of finality and stability is properly created once a permitted activity has successfully met the initial SEQRA requirements. In the absence of a material change in conditions or a violation of the terms of a permit, a renewal should be granted without undue burdens imposed upon the applicant" (Matter of Village of Hudson Falls v New York State Dept. of Envtl. Conservation, 158 AD2d 24, 30 [1990] [citations omitted], affd 77 NY2d 983 [1991]; see Matter of Atlantic Cement Co. v Williams, 129 AD2d 84, 88 [1987]).

In support of its 2018 renewal application, Sand Land submitted its predecessor's application from the initial permit application in 1980, as well as the permit issued thereto in 1985. Further, Sand Land submitted the certificate of occupancy issued in 2011 by the Town, as well as the approved site plan and permit that had been issued to Sand Land in 2013. Sand Land also submitted the modification application from 2014, the negative declaration that had been issued thereto, a letter from the Town as to this application detailing the applicable zoning ordinance and DEC's denial of this application. Additionally, the administrative record contains a report completed by the Suffolk County Department of Health as to the effect that the subject mine had on the groundwater in the area and an assessment of this report, which detailed that the "conclusory statements" contained therein "are not supportable and are in fact disproven by [the] on-site investigation."

In addition to the 2018 renewal application itself, the permit issued to Sand Land and the negative declaration, the administrative record contains the ALJ's ruling on the 2014 application to modify Sand Land's permit as well as a February

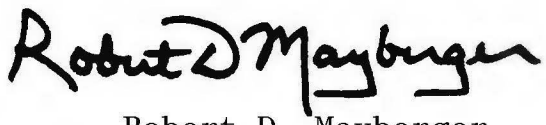
2019 settlement agreement entered into between Sand Land and DEC. Further, the administrative record contains the Mined Land Use Plan completed in 2019 on behalf of Sand Land related to the instant renewal permit application and the full environmental assessment related to same. Notably, as to the issuance of this permit, DEC received a multitude of comments that were considered by DEC and responded thereto. Through the public commenting period, DEC received various affidavits and related scientific materials.

Given the extensive administrative record, DEC satisfied its requirements under SEQRA and took the requisite hard look at the relevant areas of environmental concern (see Matter of Van Dyk v Town of Greenfield Planning Bd., 190 AD3d at 1050; Matter of Town of Waterford v New York State Dept. of Envtl. Conservation, 187 AD3d 1437, 1443 [2020]). Notably, a full environmental assessment was conducted, which established that no threat was posed to groundwater. Further, the groundwater study upon which petitioners rely, as well as the assessment that calls into question the validity of this report, were included in the administrative record. Finally, given the nature of the environmental impact herein, specifically that such action ensures reclamation of the entire mined area, the issuance of the negative declaration was not arbitrary and capricious (see generally Matter of Gernatt Asphalt Prods. v Town of Sardinia, 87 NY2d at 690). "The mere fact that petitioners' concerns regarding certain aspects of the project were not resolved in their favor does not mean that DEC failed to discharge its statutory obligations under SEQRA" (Matter of Save Easton Envt. v Marsh, 234 AD2d 616, 618 [1996], lv denied 90 NY2d 802 [1997]). I have reviewed petitioners' remaining contentions and find them to be without merit. Accordingly, I would affirm the judgment of Supreme Court.

ORDERED that the order is affirmed, without costs.

ORDERED that the judgment is modified, on the law, without costs, by reversing so much thereof as dismissed the petition; petition granted and determinations of respondent Department of Environmental Conservation granting certain Mine Land Reclamation permits annulled; and, as so modified, affirmed.

ENTER:



Robert D. Mayberger
Clerk of the Court

EXHIBIT B

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY

TOWN OF SOUTHAMPTON; ASSEMBLYMAN FRED W. THIELE, JR.; 101CO, LLC; 102CO NY, LLC; BRRRUBIN, LLC; BRIDGEHAMPTON ROAD RACES, LLC; CITIZENS CAMPAIGN FOR THE ENVIRONMENT; GROUP FOR THE EAST END; NOYAC CIVIC COUNCIL; SOUTHAMPTON TOWN CIVIC COALITION; JOSEPH PHAIR; MARGOT GILMAN; and AMELIA DOGGWILER,

Petitioners,

-against-

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; SAND LAND CORPORATION and WAINSCOTT SAND AND GRAVEL CORP.,

Respondents.

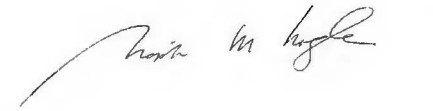
NOTICE OF ENTRY

Index No. 902239-19
RJI No. 01-19-ST0296

PLEASE TAKE NOTICE that the attached is a true copy of the Decision and Order signed by the Honorable James H. Ferreira, Acting Justice of the Supreme Court, dated August 31, 2020, and filed and entered with the Albany County Clerk on September 3, 2020.

Dated: September 3, 2020
Albany, New York

LETITIA JAMES
Attorney General of the
State of New York
Attorneys for Respondent
New York State Department of
Environmental Conservation

By: 
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

TOWN OF SOUTHAMPTON; ASSEMBLYMAN FRED W. THIELE, JR.; 101CO, LLC; 102CO NY, LLC; BRRRUBIN, LLC; BRIDGEHAMPTON ROAD RACES, LLC; CITIZENS CAMPAIGN FOR THE ENVIRONMENT; GROUP FOR THE EAST END; NOYAC CIVIC COUNCIL; JOSEPH PHAIR; MARGOT GILMAN; and AMELIA DOGGWILER;

Petitioners,

-against-

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; SAND LAND CORPORATION and WAINSCOTT SAND AND GRAVEL CORP.,

Respondents.

DECISION, ORDER AND JUDGMENT
Index No.: 902239-19
RJI No.: 01-19-ST-0296

(Supreme Court, Albany County, Article 78 Term)

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HON. JAMES H. FERREIRA, Acting Justice:

This CPLR article 78 proceeding concerns the operation of a sand and gravel mine in respondent Town of Southampton, Suffolk County, New York (hereinafter the Town). The mine is owned and operated by respondents Sand Land Corporation and Wainscott Sand and Gravel Corp. (hereinafter collectively referred to as Sand Land). Petitioners, a group comprised of a variety of individuals and entities, including neighboring landowners and civic groups, challenge, among other things, a settlement agreement entered into between Sand Land and respondent New York State

Department of Environmental Conservation (hereinafter DEC), as well as DEC's issuance of a modified Mined Land Reclamation Permit (hereinafter MLRP) to Sand Land pursuant to the settlement agreement. This proceeding was commenced in April 2019 and has been the subject of considerable litigation since that time. The procedural and factual history of this proceeding can be summarized as follows.

Background

Sand Land owns and operates a sand and gravel mine on a 50-acre parcel of property located on Middle Line Highway in the Town. Petitioners allege that Sand Land's mine "sits directly above the sole source aquifer for the region" which "is the sole source of public drinking water for the Town" (Petition ¶ 33). The mine has been operating since the 1960's. At the time the mine began operating, the parcel was zoned "G-Industrial" and mining was allowed pursuant to a permit. Bridgehampton Materials & Heavy Equipment, Inc. (hereinafter Bridgehampton Materials), Sand Land's predecessor in interest, originally operated the mine pursuant to approval from the Town's Zoning Board of Appeals. In 1972, the Town re-zoned the parcel and surrounding area to "CR-200 County Residence District," a district where mining is prohibited. In March 1981, after the adoption of the Mined Land Reclamation Law, Bridgehampton Materials obtained a MLRP to mine 20 acres of the property (Affidavit in Support of Answer [DEC] ¶ 14; see R at S027).[1] In 1985, DEC renewed the MLRP and granted the application of Bridgehampton Materials to expand the land affected by mining to 31.5 acres. The amended MLRP from DEC permitted mining "only from" 31.5 acres of the 50-acre site (see R at S006). In 1998, the MLRP was renewed and transferred to Sand Land.

[1] References preceded by "R" are to the six-volume, consecutively-paginated administrative record submitted by DEC with its answer.

The 1998 MLRP describes the authorized activity as follows: "To mine sand and gravel from 31.5 acres of a 50 acre site" (Petition, Exhibit A). In addition to mining, Sand Land received and processed vegetative organic waste materials (hereinafter VOWM) at the property pursuant to a Part 360 registration issued by DEC. In 2011, Sand Land obtained a certificate of occupancy from the Town stating that the use of the site as a sand mine was a pre-existing use (R at S025-S026).[2]

DEC renewed Sand Land's MLRP in 2003, 2008 and 2013. The authorized activity described in the 2013 MLRP is "[m]ine sand and gravel from 31.5 acres of a 50 acre site" (R at S042). The 2013 MLRP further provided that "[a]ll mining shall be done according to the plans prepared by David Fox last revised on 10/28/13 and stamped NYSDEC approved on 11/5/13" (id.). The plans prepared by David Fox (hereinafter the 2013 Fox Plans) show an approximately 3.1-acre area which is denominated on the plans as "Stump Dump" (Petition, Exhibit C). The 2013 Fox Plans provide that the area of affected acreage is 34.5901 acres, the area of the Stump Dump is 3.0901 acres and the net area of affected acreage is 31.5 acres. The plans state: "area of mining to remain within 31.5 acre boundary outlined on site plan" (id.). Also in 2013, DEC approved the reclamation of 8 acres of the mine, thus reducing the mineable acres to 23.5 acres. The 2013 MLRP was due to expire on November 4, 2018.

In 2014, Sand Land submitted an application to DEC to modify its MLRP. Sand Land summarized the proposed expansion as a vertical expansion of its mining operation to increase the depth of the mine from 160 feet above mean sea level (hereinafter amsl) to 120 feet amsl. The

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[2] The Town issued an updated certificate of occupancy in 2016 following a decision of the Town's Zoning Board of Appeals that "the processing of trees, brush, stumps, leaves, and other clearing debris into topsoil or mulch, and the storage, sale, and delivery of mulch, topsoil, and wood chips were 'new uses' that were not preexisting and which were not a permitted expansion of any legally established nonconforming use" (Matter of Sand Land Corp. v Zoning Bd. of Appeals of Town of Southampton, 137 AD3d 1289, 1291 [2d Dept 2016], lv denied 28 NY3d 906 [2016]; see R at S100).

application also indicated that 4.9 acres were included in the application which had not been previously approved. The 4.9 acres included in the modification consisted of a 1.8 acre "area of modification" and the 3.1 acre Stump Dump which is characterized on the plans as an "area affected prior [to] 1975" (Petition, Exhibit E). In April 2014, DEC issued a Negative Declaration of Significance with respect to the proposed modification pursuant to the State Environmental Quality Review Act (hereinafter SEQRA), finding that the proposed action will not result in any significant adverse environmental impacts (R at S058). DEC, however, denied the permit modification application by letter dated April 3, 2015 (R at S083-S086). Among the various reasons provided for the denial is the failure of the Environmental Assessment Form and Negative Declaration of Significance to consider several areas of environmental concern, including Sand Land's receipt and processing of VOWM and its impact on groundwater quality. The letter noted that a Suffolk County Department of Health Services (hereinafter SCDHS) report had "documented significant impacts to groundwater quality" of facilities that manage VOWM and that the Negative Declaration had failed to address this issue (id.).

Sand Land requested a hearing on the permit denial. DEC conducted an administrative legislative hearing and issues conferences in October 2015. In a ruling dated January 26, 2018, the Chief Administrative Law Judge (hereinafter ALJ) adjourned the matter pending the submission of proof that the proposed mine expansion is authorized under the Town's local zoning laws (see Petition, Exhibit I; see also ECL 23-2730 [3]; 23-2711). The ALJ specifically determined that ECL 23-2703 (3) and ECL 23-2711 "apply to applicant's present MLRL permit modification application, at least insofar as those statutory provisions require an inquiry into the status of applicant's proposal under local law and a bar on permit processing until that inquiry is completed in applicant's favor"

(Petition, Exhibit I at 10). The ALJ found that ECL 23-2703 (3) "prohibits [DEC] from further processing applicant's mining permit application until the legality of applicant's proposed mine expansion under Town law is definitively established by the appropriate local authorities" (id. at 13). In a ruling dated December 10, 2018, the ALJ, among other things, denied Sand Land's motion to renew and reargue.[3]

Meanwhile, on or about September 11, 2018, DEC issued a Notice of Intent to Modify (hereinafter NIM) to Sand Land advising that DEC proposes to modify the MLRP "to require the mining activities at the facility cease and reclamation activities begin" (R at S430). The NIM stated:

> "Staff's evaluation of the remaining reserves available to Sand Land has determined that only de minimus quantities of sand remain available for mining. The minimal reserves of sand left are insufficient to support any future mining operations, let alone the issuance to Sand Land of a further 5 year mining permit. Therefore, modification of Sand Land's Mining Permit is appropriate to require the cessation of mining activities and the initiation of reclamation of the mine (R at S430-S431).

The NIM further stated:

> "Additionally, multiple investigations into potential groundwater impacts from vegetative organic waste processing activities on Long Island have been completed in the past three months. These studies were conducted by [SCDHS], DEC . . . , and Alpha Geoscience . . . . The groundwater concerns identified in the various studies are raised principally in connection with potential contaminants from vegetative waste and land clearing debris. While Sand Land could potentially remove the de minimus amounts of sand in the existing life of mine, that sand is located predominantly in the area of the mine formerly used for storing and processing of vegetative waste. Future site activities in and around those areas where processing and storing of vegetative waste formerly occurred, have the potential to allow the release of contaminants in that area which could impact the local groundwater" (R at S431).

Sand Land objected to the NIM and requested a hearing.

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[3] Petitioners allege that the deadline for filing appeals from the ALJ's determinations was August 12, 2019. The Court has received no information as to the current status of that proceeding.

Thereafter, as its MLRP was due to expire on November 4, 2018, Sand Land submitted an application for renewal on or about October 2, 2018. The renewal application stated that 31.5 acres were permitted prior to the application and that there was no acreage included in the application that was not previously permitted (R at 446). Sand Land submitted with its application revised plans prepared by Mr. Fox, dated September 27, 2018. The plans provide that the area of affected acreage is 34.5901 acres, the area of the Stump Dump is 3.0901 acres and the net area of affected acreage is 31.5 acres. Sand Land thereafter provided an updated renewal application dated October 12, 2018; attached to the updated application is a map showing – with yellow shading – the area to be mined during the permit term. On this map, the 3.1 Stump Dump area is not shaded (R at S452). On or about October 19, 2018, at the request of DEC, Sand Land filed a Mined Land Use Plan (hereinafter MLUP) in connection with its renewal application. A site map included with the MLUP includes the Stump Dump in the Life of Mine boundary (R at S475).

On February 21, 2019, Sand Land and DEC entered into a settlement agreement (hereinafter the Agreement) which settled "any and all issues" related to the NIM and Sand Land's renewal application (R at S520). The Agreement recites that Sand Land's MLRP "permits Sand Land to engage in 'mining,' as defined in Section 23-2705(b) of the New York State Environmental Conservation Law, within 34.5-acres of the 50-acre Facility in accordance with a mined use plan approved by [DEC]" (R at S518). Pursuant to the Agreement, Sand Land agreed to, among other things, immediately and permanently cease using the facility for the receipt, storage and processing of VOWM and surrender its Part 360 Registration. Sand Land also agreed to conduct quarterly groundwater monitoring and submit the results to DEC. The parties agreed that the NIM would be rescinded, DEC would issue a renewed MLRP "for the 34.5-acre Life of Mine" and would timely

process "a permit application in accordance with" the terms of the settlement agreement "including the proposal for mining to be conducted within the existing Life of Mine to a depth of 120-feet AMSL" (R at S522). Sand Land agreed to cease "all mining within the existing 34.5-acre Life of Mine" within 8 years from the effective date of the "modified permit" (id.). The parties agreed that the submission of a modified permit application "shall not affect or otherwise legally impact" the legal proceedings concerning DEC's denial of Sand Land's prior modification application but Sand Land agreed that, upon DEC's granting of the second modification application, it would discontinue administrative proceedings with respect to the first application (R at S523). The Agreement further states:

> "The Department agrees that the modified permit application referenced . . . above, which would be entirely located within the existing Life of Mine, shall be processed based upon the existing Negative Declaration and the multiple legislative hearings held regarding the prior, more expansive, modification request, which also contemplated the continued use of the Facility for the processing and storage of vegetative waste. . . . In agreeing to the terms of this settlement, the Department affirmatively states it has reviewed the testimony and accompanying correspondence submitted to the Department in connection with the two legislative hearings held on the prior, more expansive, modification proposal, and that the conditions being imposed, and the concessions being required from, Sand Land, as part of this settlement are specifically being required and implemented in direct response to the concerns raised in connection with those prior legislative hearings" (R at S523-S524).

The Agreement also states: "[t]he agreements and covenants set forth herein are expressly contingent upon the Department's issuance of the modified permit . . . on the terms set forth herein" (R at S524).

Sand Land thereafter submitted an application to DEC to modify its MLRP. The modification application stated that 34.5 acres were permitted prior to the application and that there was no acreage included in the application that was not previously permitted (R at S637). Sand Land

submitted with its application a modified MLUP which stated that the purpose of the modification was to deepen the mine to an elevation of 120 amsl "while maintaining the current, 34.5-acre, permitted, mine footprint" (R at S550). The Stump Dump is not identified on a site map included with the MLUP (R at S567). On or about March 15, 2019, DEC issued a renewed MLRP to Sand Land (R at S639-S643). The 2019 MLRP provides that "[m]ining is only permitted on the 34.5 acres of the 50 acre site" (R at S640).

Also on March 15, 2019, DEC issued an Amended Negative Declaration for the modification application. In the Amended Negative Declaration, DEC found, among other things, that the 40-foot deepening of the mine "will not significantly impact groundwater quality," noting that all vegetative waste had been removed from the site and all mulching and composting operations at the site were terminated in 2018 (R at S645). DEC further found:

> "The existing groundwater level is approximately elevation 20' (groundwater levels fluctuate). The elevation of the proposed new bottom of the mine is elevation 120' which will provide a minimum of 90 feet of soil between the bottom of the mine and groundwater. The expected 90 feet of sand and soil will provide filtering and buffering benefits to further protect the groundwater below the new floor of the mine. In addition, some groundwater monitoring wells have been installed at the site and additional ones will be added to periodically sample and test the groundwater quality on at least a quarterly basis. Actions can be taken to mitigate any changes to groundwater quality originating from the mine. Therefore, no significant impacts from composting or past composting activities are expected to [impact] groundwater quality" (R at S645-S646).

Petitioners allege that DEC withdrew the NIM on March 14, 2019 (Petition ¶ 91).

Petitioners commenced this proceeding on April 17, 2019. In the Verified Petition, petitioners seek to vacate and annul the Agreement, DEC's issuance of the renewal permit, DEC's revocation/withdrawal of the NIM and DEC's issuance of the Amended Negative Declaration. Petitioners also seek a permanent injunction enjoining mining in the Stump Dump area and enjoining

DEC from further processing Sand Land's application for modification. Petitioners also moved, by Order to Show Cause, for a preliminary injunction enjoining Sand Land, during the pendency of this proceeding, from "mining outside the previously permitted Life of Mine of 31.5 acres to a depth of 160 feet amsl as shown on the 2013 Fox Site Plan annexed to the Petition as Exhibit C" and from "disturbing the overburden in the 3 acre Stump Dump" and enjoining DEC from continuing to process Sand Land's modification application or from closing the public comment period (Order to Show Cause, dated April 18, 2019).[4] In a Decision and Order dated May 30, 2019, the Court granted petitioners' motion for a preliminary injunction only inasmuch as it ordered that, during the pendency of this proceeding, "Sand Land is enjoined from mining outside the 31.5 acres identified in the 2013 MLRP to a depth of 160 feet amsl as shown on the 2013 Fox Site Plan annexed to the Petition as Exhibit C and from disturbing the overburden in the 3 acre Stump Dump" (Decision and Order dated May 30, 2019, at 17). The Court denied the motion inasmuch as petitioners sought to enjoin DEC from continuing to process Sand Land's permit modification application.

On June 5, 2019, following a public comment period, DEC granted Sand Land's modification application and issued a modified MLRP. The modified MLRP authorizes mining within the 34.5-acre Life of Mine to a depth of 120 amsl, a 40-foot deepening (R at S759-S765). In response to correspondence from the parties, the Court, by Letter Order dated June 10, 2019, clarified that the preliminary injunction issued by the Court applies only to mining in the 3.1-acre Stump Dump area of the mine and does not pertain to any activities outside of that area. The Court amended the Decision and Order to state that Sand Land is enjoined, during the pendency of this proceeding, from

[4] Petitioners also sought a temporary restraining order (hereinafter TRO) in the Order to Show Cause; the Part I Judge struck that relief from the Order to Show Cause when she signed it. Following argument on May 15, 2019, this Court denied petitioners' application for a TRO to the extent that the application was still pending.

"mining outside the 31.5 acres identified in the 2013 MLRP as shown on the 2013 Fox Site Plan annexed to the Petition as Exhibit C and from disturbing the overburden in the 3 acre Stump Dump" (Court's Letter Order, dated June 10, 2019).

Petitioners thereafter moved for: (1) leave to file and serve a Verified Supplemental Petition; and (2) a preliminary injunction enjoining Sand Land, during the pendency of this proceeding, from mining below 160 feet amsl anywhere in the 31.5 acre Life of Mine. By letter Order dated June 19, 2019, the Court granted that part of petitioners' motion which sought leave to file and serve a Verified Supplemental Petition, on consent, and petitioners filed the Verified Supplemental Petition on June 21, 2019. Therein, petitioners add causes of action challenging DEC's issuance of the modified MLRP and seek a permanent injunction enjoining Sand Land from mining below 160 feet amsl throughout the floor of the mine. After hearing oral argument, in a Decision and Order dated August 1, 2019, the Court denied petitioners' second motion for a preliminary injunction. In a Decision and Order dated December 20, 2019, the Court denied petitioners' motion for leave to reargue the second preliminary injunction motion.

Respondents thereafter filed answers to the proceeding and petitioners filed a reply. The Court heard oral argument on the proceeding on September 17, 2019.[5] On September 10, 2019, after the proceeding was fully submitted, DEC filed a supplement to its administrative return consisting of two submissions from petitioners' counsel, with attachments, which were considered by DEC in preparing its response with respect to the public comments that were submitted with respect to the

[5] Prior to oral argument, in a Decision and Order dated September 9, 2019, the Court denied a motion filed by the County of Suffolk (hereinafter the County) seeking to intervene as a petitioner in this proceeding. In a Decision and Order dated February 11, 2020, the Court denied the County's motion to renew its motion to intervene. The County filed an appeal from the Court's denial of its motion to intervene. To date, the Court has not received any information as to whether the appeal was perfected or, if so, whether a decision on the appeal has been issued.

modification application.[6]

Petition and Supplemental Petition

In the petition, petitioners argue that the 2019 renewal permit changed the scope of permitted activity from that approved in the 2013 mining permit by expanding the Life of Mine from 31.5 acres to 34.5 acres; petitioners contend that this was done to circumvent DEC's denial of Sand Land's permit modification application, the ALJ's ruling and the Town's right under ECL 23-2703(3) to review the legality of the mine expansion. Petitioners argue that the expansion of the scope of mining to 34.5 acres constituted a modification rather than a renewal and, inasmuch as DEC had previously denied such an expansion, was arbitrary and capricious and in violation of lawful procedure in the absence of any statement or explanation for the change in position.

Petitioners also assert that the Agreement falsely states that the 2013 permit permitted mining on 34.5 acres of the property and that this "false listing" of the Life of Mine was done to circumvent DEC's denial of Sand Land's permit modification application, the ALJ's ruling and the Town's right under ECL 23-2703(3) to review the legality of the mine expansion (Petition ¶ 112). Petitioners claim that DEC's execution of the Agreement with the false statement was arbitrary and capricious and a violation of the law. Petitioners also allege that the Agreement is arbitrary and capricious, in violation of lawful procedure and in violation of the law because it did not provide any explanation or justification for DEC's "complete reversal of position" – as stated in the NIM – regarding the potential risks of mining in areas where processing and storing of VOWM formerly occurred (id. ¶ 118). Petitioners allege that no groundwater or soil testing was completed in the areas where

[6] The supplemental documents provided by DEC were submitted to DEC by petitioners in the underlying administrative proceeding; as such, the Court discerns no prejudice to petitioners arising from the fact that the documents were inadvertently omitted from DEC's initial administrative return.

VOWM was processed and no review or analysis was done that would support DEC's change of position, and that the Agreement is arbitrary and capricious because it is contrary to DEC's prior findings and the findings in the SCDHS report and fails to provide for testing of the overburden in the mine prior to allowing mining. Petitioners also allege that DEC acted in contravention of ECL 23-2711(3) and 23-2703(3) by issuing the Amended Negative Declaration and was acting in excess of its jurisdiction in continuing to process petitioner's modification application.

In their supplemental petition, petitioners allege that DEC's issuance of the modification permit is subject to annulment for the same reasons as its issuance of the renewal permit inasmuch as the 3-acre Stump Dump was improperly and arbitrarily added to the Life of Mine in the 2019 renewal permit. Petitioners also allege that the issuance of the modification permit violated ECL 23-2711(3) because DEC did not submit the required notice to the Town's chief administrative officer prior to issuing the permit and because the Town has notified DEC that its code prohibits mining in all zoning districts; petitioners note that the ALJ has concluded that there is doubt as to whether previously unpermitted mining is legal under the Town Code and that DEC is prohibited from processing the application without submission of proof of the legality of the modification under the Town law. Petitioners also challenge the modification permit on the ground that DEC failed to sufficiently consider the environmental issues prior to issuing the Amended Negative Declaration, asserting that the statement in the Amended Negative Declaration that the expansion of the depth of the mine will not significantly impact groundwater quality is without any factual basis and is arbitrary and capricious; petitioners assert that the statement is directly rebutted by the findings in the SCDHS report. Petitioners argue that DEC failed to adequately study the current levels of contamination in the sand proposed to be removed and failed to consider evidence that further

mining at the location presents a significant risk of increased contamination of the aquifer. Petitioners urge that the approval of the modification application is directly contrary to its denial of a "nearly identical" application in 2015 and that the differences in the applications do not support their being treated differently (Supplemental Petition ¶ 170).

DEC's Answer - Dickert Affidavit

In response, DEC has submitted, along with its administrative return, the affidavit of Catherine A. Dickert, the Director of the Division of Mineral Resources for DEC. Therein, she states that the term "Life of Mine" is a term memorialized in a July 1987 DEC policy memorandum and is defined as " 'the total area to be mined and the length of time to exhaust the minerals intended to be excavated from that area, generally shown in the Mined Land Use Plan' " (Affidavit in Support of Answer [DEC] ¶ 10). She avers: "DEC has routinely corrected the life of mine acreage when it discovers that a life of mine permit condition or a reclamation plan does not adequately reflect the total acreage permitted under a Mined Land Reclamation Permit and the reclamation plan obligations. Corrections are processed as part of a modification or renewal application review" (id. ¶ 11). She further states:

> "Pursuant to a Memorandum on Mined Land Reclamation Permit Renewals and Modification, staff should make adjustments to mining and reclamation maps to correct and accurately outline the affected areas and the life of mine. This type of correction is appropriate only to correct the documents so that they show areas that have been historically affected by mining activities (e.g., affected prior to initial permit issuance) and have been continuously used as such but were not included in the original Life of Mine Area. This guidance was developed through a process improvement exercise conducted by DEC beginning in March of 2018" (id. ¶ 12).

Ms. Dickert provides the following additional facts in her affidavit. She avers that "[r]oughly five acres" of Sand Land's 50-acre parcel was disturbed by mining prior to 1975 and consequently

not subject to mined land-use plan requirements (Affidavit in Support of Answer [DEC] ¶ 13). She states that approximately 3 acres of the previously-mined area is the area known as the Stump Dump. She states:

> "The original Mining Plan noted that a five-acre 'existing hole' had previously been excavated to a 'depth of 120 ft. below the grade of the surrounding land.' . . . Later, the hole, including the Stump Dump, was filled in with sand from other areas in the mine and is shown on an approved site plan for Sand Land's 2013 permit renewal as having elevations between 160 and 170 feet above mean sea level (amsl); level or nearly level with the mine floor. . . . At 120 feet below grade, the Stump Dump had historically been excavated to an approximate elevation of 110 to 110 feet amsl, before being filled with sand. In other words, the material in the Stump Dump from the surface at 160 to 170 amsl down to approximately 110 to 100 amsl, is stockpiled sand or fill[,] not minerals in their original location" (id. ¶¶ 14-15).

She also asserts that "[f]uture removal of all of th[e] fill material from the Stump Dump area is prevented by the permitted final mine floor elevation, which would be reached before the bottom of the fill can be removed. The bottom of the fill material is estimated at 110 to 100 feet amsl, but the current final mine floor elevation is higher at 120 amsl" (id. ¶ 18). Ms. Dickert avers that the Stump Dump was not reflected in the permits or reclamation plans because it was land affected by mining prior to the enactment of the Mined Land Reclamation Law in 1975. However, the Stump Dump was "continuously disturbed" by excavation activities, was surrounded by actively-mined areas, was considered by DEC inspectors as part of the mine site and was inspected "over the years as though it was part of the total permitted acres" (id. ¶ 17). Ms. Dickert asserts that removing fill from the Stump Dump does not require a DEC permit because such removal is not "mining" under ECL 23-2705 (8) where the fill is not in its original location. She further asserts that, given the mine floor elevation requirements in the modified permit, mining of the virgin material in the Stump Dump below the fill is not authorized. She avers: "Therefore, the corrected permit clarifying that the Stump

Dump was part of the Life of Mine did not authorize mining in the Stump Dump" (id. ¶ 42).

Ms. Dickert asserts that, in late 2018 and early 2019, DEC and Sand Land engaged in a series of discussions in an effort to resolve Sand Land's objections to the NIM. DEC considered a report prepared by a geologist on behalf of Sand Land and determined that there were sufficient quantities of unmined sand within the permitted area – more than a de minimus amount – to support the continuation of a commercially viable mining operation. DEC also found, consistent with published data, that "elevated levels of certain naturally occurring metals and other elements in the soils and groundwater at the site did not present a threat to the groundwater" (Affidavit in Support of Answer [DEC] ¶ 25). Ms. Dickert further asserts that DEC's staff also considered "the absence of reliable data or studies indicating that sand and gravel mining negatively impact groundwater," noting that DEC has approximately 20 years worth of sampling data from three mine sites in Suffolk County that are mining in the water table and that the data has not shown any impacts to groundwater quality arising from mining activities (id. ¶ 26). She states that, in entering into the Agreement, DEC staff "properly considered the significant Sand Land commitments within the context of the agency's statutory mandate to encourage the orderly development of mineral resources necessary to assure satisfaction of economic needs compatible with sound environmental management practices" (id. ¶ 29).

Ms. Dickert further states that, when Sand Land applied for a permit renewal in 2018:

> "DEC staff considered the difference in acreage between the life of mine as inspected in the field (34.5 [acres]) by mined land reclamation specialists and life of mine depicted on maps and in documents (31.5 acres). I directed mined land reclamation specialists performing financial security calculations to consider the 34.5 acres the correct and accurate life of mine acreage. Including the three-acre Stump Dump resulted in accurate and consistent acres reported on permit documents, consideration of the Stump Dump in financial security calculations, and it ensured reclamation of

> the entire disturbed life of mine, including the Stump Dump, at the conclusion of mining" (Affidavit in Support of Answer [DEC] ¶ 30).

She avers that, had the correction not been made, the Stump Dump would not have been reclaimed. In addition, including of the Stump Dump in the permit restricts certain activities from occurring there and limits removal of sand from the area to a depth of 120 amsl (in the modified permit). She notes that the renewal permit "did not include the [1.8-acre] wood processing area that the operator applied to mine in their 2014 permit modification because this area was not historically affected by mining activities and is outside the Life of Mine" (id. ¶ 33). Inclusion of these additional acres would require a permit modification.

Ms. Dickert avers that, in reaching the conclusions underpinning the Amended Negative Declaration, DEC considered the relevant scientific facts, including the facts that the mine is located within an area designated as a Sole Source Aquifer and a Special Groundwater Protection Area and within the Town's Aquifer Protection Overly District, and properly concluded that the proposed deepening "is not expected to result in any impacts to groundwater quality" (Affidavit in Support of Answer [DEC] ¶ 37). She states that it is her understanding that input from the Town was not required under ECL 23-2703 or 23-2711 because the 2019 application was to modify an existing permit within the current disturbance footprint and without material change. She avers that, in evaluating the application, DEC considered the Town's zoning law and two letters from the Town, as well as two Certificates of Occupancy issued by the Town with respect to the site. In conclusion, Ms. Dickert states:

> "DEC properly updated the permit to correct the scope and acreage of the Life of Mine by including the three-acre-Stump Dump for the limited purposes of regulation and reclamation. The renewed permit, modified permit and Settlement Agreement did not authorize mining within the Stump Dump and approval of the application for

> a 40' vertical expansion in 31.5 acres remainder of the life of mine was not a material change because it did not include any horizontal expansion, the mining method did not change, and there were no hydrologic impacts to be considered since mining would not take place in the water table" (id. ¶ 43).

Pending Motions

Preliminarily, there are three motions pending which must be resolved before the Court addresses the merits of the proceeding. First, Sand Land has filed a motion to dismiss petitioner Assemblyman Fred W. Thiele, Jr. (hereinafter Mr. Thiele) as a named petitioner on the ground that he lacks the requisite standing to commence and prosecute this proceeding (Motion No. 5).[7] In addition, petitioners move for an order directing DEC to supplement its administrative return to provide "all documents and materials" pertaining to the various determinations that DEC made with respect to this matter (Notice of Motion [Motion No. 6], dated August 22, 2019) (hereinafter Motion No. 6). Petitioners also move for an order permitting them to file supplemental affirmations, affidavits, exhibits and memoranda of law in support of the Petition and Supplemental Petition (Motion No. 10).

Motion No. 5 (Standing)

In this motion, as stated above, Sand Land seeks an order dismissing Mr. Thiele from this matter as a named petitioner on the ground that he lacks standing. Mr. Thiele opposes the motion. DEC has submitted an affirmation in support of the motion, and Sand Land has submitted a reply. Petitioners also address the issue of Mr. Thiele's standing in their memorandum of law in reply to

[7] The Court herein will refer to the pending motions by the number that they have been assigned in the e-filing system.

respondents' answers.[8]

Upon review, Sand Land's motion is granted. " '[S]tanding is a threshold determination and a litigant must establish standing in order to seek judicial review, with the burden of establishing standing being on the party seeking review' " (Matter of Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO v City of Schenectady, 178 AD3d 1329, 1331 [3d Dept 2019], quoting Rudder v Pataki, 246 AD2d 183, 185 [3d Dept 1998], affd 93 NY2d 273 [1999]). "A petitioner challenging governmental action must 'show injury in fact, meaning that [the petitioner] will actually be harmed by the challenged [governmental] action[,]' and, further, that the injury 'fall[s] within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the [governmental entity] has acted' " (Matter of Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO v City of Schenectady, 178 AD3d at 1331, quoting New York State Assn. of Nurse Anesthetists v Novello, 2 NY3d 207, 211 [2004][internal quotation marks omitted]; see Matter of Curry v New York State Educ. Dept., 163 AD3d 1327, 1329 [3d Dept 2018]). "[I]n limited circumstances, legislators . . . have capacity and standing to sue when conduct unlawfully interferes with or usurps their duties as legislators" (Silver v Pataki, 96 NY2d 532, 542 [2001]). "The alleged conduct must have caused a 'direct and personal injury [that] is clearly within a legislator's zone of interest and unquestionably represents a concrete and particularized harm' that is distinct from that suffered by the general public" (Matter of Townsend v Spitzer, 69 AD3d 1026, 1027 [3d Dept 2010],

[8] Inasmuch as petitioners argue that the motion is procedurally improper and violates CPLR 7804(f) because Sand Land raised the issue in both a pre-answer motion and in its answer, the Court is not persuaded by that argument. CPLR 7804(f) provides that "[t]he respondent may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition." However, nothing in that provision specifically prohibits a respondent from proceeding as Sand Land has here, and petitioners have not submitted any case law in support of their position.

lv denied 15 NY3d 702 [2010], quoting Silver v Pataki, 96 NY2d at 540).

Here, Mr. Thiele is named as a petitioner in his official capacity as an Assemblyman. The petition alleges that Mr. Thiele is "the duly elected New York State Assemblyman for Assembly District 1 composed of the Towns of East Hampton, Southampton and Shelter Island" (Petition ¶ 5). The petition does not contain any additional information as to Mr. Thiele's interest in this matter. In an affidavit in opposition to the motion, Mr. Thiele asserts, in relevant part, that the mine lies within his district and his constituents will be injured in fact by the adverse environmental impacts of Sand Land's activities at the site. He also notes that he lives approximately two miles from the mine site. He asserts that, as an elected official, he "believe[s] it is [his] duty as well as [his] right to advocate on [behalf of his constituents] in this matter that will have significant impacts on their health, safety and welfare" (Affidavit in Opposition [Motion No. 6] ¶ 15). The Court finds these assertions, and the other assertions made by Mr. Thiele in his affidavit, insufficient to establish his standing to commence this proceeding in his official capacity as a legislator. Mr. Thiele makes no assertion that any challenged conduct unlawfully interfered with or usurped his duties as a legislator, and the Court does not find that he has demonstrated that he suffered a direct and personal injury which is within his zone of interest as a legislator and which is distinct from the harm suffered by the general public. As such, Sand Land's motion is granted and Mr. Thiele is dismissed as a petitioner in this proceeding.

The Court notes that, in its answer, DEC raises two related objections in point of law. First, DEC asserts that certain petitioners – namely petitioners Citizens Campaign for the Environment, Group for the East End, Noyac Civil Council and Southampton Town Civic Coalition – lack standing to commence this proceeding. DEC also contends that Mr. Thiele lacks capacity to

commence this proceeding. Inasmuch as the Court has found that Mr. Thiele lacks standing, it is unnecessary for the Court to address the issue of whether he had capacity to bring this proceeding. The Court also finds it unnecessary to address DEC's contention that certain other petitioners lack standing. Importantly, respondents have only specifically challenged the standing of certain petitioners, leaving wholly unchallenged the standing of numerous other petitioners named in the caption, including the Town. Moreover, upon review, the Court finds that the allegations in the petition establish that at least one petitioner has standing to commence this proceeding. Indeed, the petition alleges that several of the petitioners – petitioners 101Co, LLC, 102Co NY, LLC and BRRRubin, LLC – are current owners of land adjoining the mine and that several other petitioners – petitioners Joseph Phair, Margot Gilman and Amelia Doggwiler – own homes that are between 105 and 650 feet from Sand Land's property. Given petitioner's allegations with respect to the negative impact of Sand Land's mining operations on the nearby water supply, the Court finds that these petitioners have sufficiently alleged standing to commence this lawsuit (see Matter of Village of Woodbury v Seggos, 154 AD3d 1256, 1259 [3d Dept 2017]). The allegations in the petition are also sufficient to establish the Town's standing to commence this proceeding (see Matter of Town of Riverhead v New York State Dept. of Envtl. Conservation, 50 AD3d 811, 812-813 [2d Dept 2008]). Again, as noted above, respondents have not challenged the standing of these petitioners to commence this proceeding. Having found that at least one petitioner has standing, the Court finds it unnecessary to address respondents' arguments – which were not raised in a motion but in DEC's answer – with respect to the standing of Citizens Campaign for the Environment, Group for the East End, Noyac Civil Council and Southampton Town Civic Coalition (see Saratoga County Chamber of Commerce v Pataki, 100 NY2d 801, 813 [2003], cert denied 540 US 1017 [2003]; Matter of New

York State Bd. of Regents v State Univ. of N.Y., 178 AD3d 11, 18 [3d Dept 2019]).

Motion No. 6 - Supplement Administrative Return

In Motion No. 6, petitioners argue that the administrative return submitted by DEC is "demonstrably and materially incomplete" (Affirmation in Support [Motion No. 6] ¶ 10). Specifically, petitioners claim that DEC's administrative return provides no insight or documentation as to why DEC decided to enter into the Agreement and "abandon[]" its findings in the NIM (id. ¶ 21). Petitioners also argue that the administrative return is missing documentation explaining DEC's rationale for its decision to grant a horizontal expansion of mining operations to include the 3-acre Stump Dump. They also urge that the record is incomplete with respect to DEC's determination to issue the modification permit. Petitioners assert that, for example, the administrative return is missing emails between Sand Land's counsel and DEC Deputy Counsel Scott Crisafulli, dated February 21, 2019 and March 15, 2019 which concern the Agreement and which petitioners received in response to a Freedom of Information Law (hereinafter FOIL) request. Petitioners also note that there is no documentation in the administrative return reflecting (1) DEC's review of a settlement offer presented by Sand Land, (2) DEC's analysis of the ALJ's decision, (3) the negotiated resolution of the NIM and DEC's consideration of the scientific issues therein, (4) DEC's analysis of a report by Sand Land's consultant and the SCDHS report or (5) DEC's analysis of a dispute in the record regarding the amount of mineable sand. DEC opposes the motion.[9]

[9] By letter dated August 26, 2019, the Court denied the request of petitioners for an adjournment of the deadline for the filing of their reply to respondents' answers to the proceeding pending the Court's determination as to Motion No. 6. The Court advised that, if it determined that further briefing is required after its made a decision on the motion, it would direct the parties to file supplemental papers.

CPLR 7804 (e) provides: "The body or officer shall file with the answer a certified transcript of the record of the proceedings under consideration." Upon review, the Court declines to order DEC to supplement its administrative record. To be sure, petitioners are correct that the administrative record itself does not contain documentation which expressly provides DEC's rationale for several of the determinations challenged herein, including the change in the Life of Mine acreage set forth in the Agreement. However, DEC's rationale is fully set forth in the affidavit of Ms. Dickert. The Court finds that the administrative record, coupled with Ms. Dickert's affidavit, provides "an adequate basis upon which to review" the challenged determinations (see Matter of Benson v McCaul, 268 AD2d 756, 757-758 [3d Dept 2000], lv denied 94 NY2d 764 [2000]; see Matter of Framan Mech., Inc. v State Univ. Constr. Fund, 151 AD3d 1429, 1432 [3d Dept 2017]; Matter of County of Rockland v Town of Clarkstown, 128 AD3d 957, 958 [2d Dept 2015]). In the Court's view, petitioners have not demonstrated that additional records are necessary for the Court to make a decision with respect to this proceeding. As such, Motion No. 6 is denied.

Inasmuch as petitioners argue, in reply to respondents' answers, that Ms. Dickert's affidavit should not be considered as evidence to support the challenged determinations because it was not part of the administrative record, the Court disagrees. "Fundamentally, judicial review of an administrative determination is limited to the record before the agency, and proof outside the administrative record should not be considered" (Matter of Van Antwerp v Board of Educ. for the Liverpool Cent. School Dist., 247 AD2d 676, 678 [3d Dept 1998]). However, where, as here, the issue before the Court is whether the administrative determination has a rational basis, affidavits such as the one submitted by Ms. Dickert are properly considered by the Court where the affiant has "firsthand knowledge of the decision-making process undertaken by the [agency]" (Matter of Office

Bldg. Assoc., LLC v Empire Zone Designation Bd., 95 AD3d 1402, 1405 [3d Dept 2012]; see Matter of Brown v Sawyer, 85 AD3d 1614, 1615-1616 [4th Dept 2011]; Matter of Kirmayer v New York State Dept. of Civ. Serv., 24 AD3d 850, 851 [3d Dept 2005]). Here, in her affidavit, Ms. Dickert states that she is the Director of the Division of Mineral Resources for DEC and has held that position since 2016. She states that her responsibilities include "supervision of DEC's entire mineral resources program, including mining" (Affidavit in Support of Answer [DEC] ¶ 2). She states that her opinions are based upon her personal knowledge, review of the record, education, training and professional experience, relevant scientific literature and the application of commonly accepted methodologies. Upon review, the Court finds that Ms. Dickert's affidavit may be considered by the Court inasmuch as she provides an account of the decision-making process of DEC based upon her first-hand knowledge (see Matter of Molloy v New York State Workers' Compensation Bd., 146 AD3d 1133, 1134 [3d Dept 2017]; 377 Greenwich LLC v New York State Dept. of Envtl. Conservation, 14 Misc 3d 417, 426-427 [Sup Ct, New York County 2006]).

Motion No. 10 - Leave to Submit Supplemental Evidence

In Motion No. 10, petitioners seek an order, pursuant to CPLR 2214(c), permitting them to file supplemental evidence/documents in support of the petition. Specifically, petitioners seek to file: (1) an attorney affirmation; (2) four Analytical Reports prepared for DEC dated March 30, 2019 (2 reports), April 2, 2019 and April 8, 2019; (3) an expert affidavit providing analysis of the Analytical Reports; (4) a memorandum of law; and (5) various other exhibits. Petitioners assert that the Analytical Reports – which provide results of groundwater testing at the Sand Land site – are material to this proceeding, were omitted from DEC's administrative return and were not timely disclosed to petitioners' counsel. Petitioners assert that they received copies of these reports in

November 2019 and December 2019 pursuant to a FOIL request. Petitioners argue that the reports demonstrate that the challenged determinations are arbitrary and capricious, as they "confirm and support the integrity, accuracy, and reliability" of the SCDHS report dated June 2018 and contradict DEC's determination that the cessation of VOWM activities at the site will ensure the protection of the groundwater (Affirmation in Support of Motion [Motion No. 10] ¶ 14). Petitioners also argue that it was arbitrary and capricious for DEC to fail to consider the reports before issuing the modification permit. Petitioners request an order allowing the filing of the documents/exhibits, directing that these papers be considered in support of the petition and providing respondents an opportunity to respond to the supplemental filing and petitioners an opportunity to reply. Respondents oppose the motion.

Upon review, this motion is also denied. As DEC points out, the Analytical Reports post-date most of the challenged determinations in this matter, including the Agreement, renewal permit and the Amended Negative Declaration. As the Reports were not available to, or relied upon by, DEC in making those determinations, they cannot be considered by the Court in reviewing them (see Matter of Paladino v Board of Educ. for the City of Buffalo Pub. Sch. Dist., 183 AD3d 1043, 1045 [3d Dept 2020]). Moreover, even though the Reports were in existence at the time DEC issued the modified permit challenged in this proceeding (June 2019), the Court does not find that this fact requires that the Reports – and petitioners' accompanying evidence analyzing the Reports – be considered by this Court in reviewing that determination. DEC's substantive environmental analysis of Sand Land's modification application is contained in the Amended Negative Declaration, not the June 2019 permit that was issued by DEC. Thus, in the Court's view, it would not be appropriate for the Court to consider groundwater data/analysis that post-dates the Amended Negative

Declaration in determining whether DEC's environmental review of the application – memorialized in the Amended Negative Declaration – was arbitrary and capricious. The Court finds petitioners' contention that it was arbitrary and capricious for DEC to fail to consider the Reports before issuing the modified permit to be without merit. As such, Motion No. 10 is denied in its entirety.

ANALYSIS

Where, as here, a petitioner challenges an administrative determination made where a hearing is not required, judicial review is limited to the issues of whether the challenged determination is rationally based, and whether it was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion (see CPLR 7803 [3]; Matter of Ward v City of Long Beach, 20 NY3d 1042, 1043 [2013]; Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 77 NY2d 753, 758 [1991]; Matter of Bais Sarah Sch. for Girls v New York State Educ. Dept., 99 AD3d 1148, 1150 [3d Dept 2012], lv denied 20 NY3d 857 [2013]). "[A] court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion" (Matter of Arrocha v Board of Educ. of City of N.Y., 93 NY2d 361, 363-364 [1999] [internal citations and quotations omitted]; see Matter of Boatman v New York State Dept. of Educ., 72 AD3d 1467, 1468 [3d Dept 2010]). In addition, where "the judgment of the agency involves factual evaluations in the area of the agency's expertise and is supported by the record, such judgment must be accorded great weight and judicial deference" (Flacke v Onondaga Landfill Sys., 69 NY2d 355, 363 [1987]).

It is the policy of New York State "to foster and encourage the development of an economically sound and stable mining industry, and the orderly development of domestic mineral resources and reserves necessary to assure satisfaction of economic needs compatible with sound

environmental management practices" (ECL 23-2703; see Matter of Lane Constr. Corp. v Cahill, 270 AD2d 609, 611 [3d Dept 2000], lv denied 95 NY2d 765 [2000]). The Mined Land Reclamation Law, which went into effect in 1975, "established a detailed legislative framework under which DEC is empowered to regulate mining and the reclamation of mined lands and to promulgate and enforce rules and regulations for such purposes" (Matter of Valley Realty Dev. Co. v Jorling, 217 AD2d 349, 352-353 [4th Dept 1995]). The Mined Land Reclamation Law supersedes all "local laws relating to the extractive mining industry" (ECL 23-2703 [2]; see Matter of Frew Run Gravel Prods. v Town of Carroll, 71 NY2d 126, 131 [1987]) but also specifically states:

> "No agency of this state shall consider an application for a permit to mine as complete or process such application for a permit to mine pursuant to this title, within counties with a population of one million or more which draw their primary source of drinking water for a majority of county residents from a designated sole source aquifer, if local zoning laws or ordinances prohibit mining uses within the area proposed to be mined" (ECL 23-2703 [3]).

Agreement (Second and Third Causes of Action)

The Court turns first to petitioners' causes of action that seek to nullify DEC's approval of the Agreement entered into between DEC and Sand Land. Importantly, DEC's Commissioner has the power to "[e]nter into contracts with any person to do all things necessary or convenient to carry out the functions, powers and duties of the department" (ECL 3-0301 [2][b]; see Matter of Bayswater Civic Assn. v New York State Dept. of Envtl. Conservation, 159 AD2d 566, 567 [2d Dept 1990]). Petitioners first argue that DEC's execution and approval of the Agreement was arbitrary and capricious and a violation of the law because the Agreement falsely states the Life of Mine acreage. Petitioners urge that the false listing of the Life of Mine – and the agreement that DEC will approve Sand Land's application to renew its MLRP for the 34.5-acre Life of Mine – was done to circumvent

DEC's 2014 denial of a permit modification application, the ALJ's 2014 ruling and ECL 23-2703 (3). The Agreement specifically states:

> "WHEREAS, the Facility is used by Sand Land for the operation of a duly permitted sand and gravel mine under a [MLRP], last renewed by [DEC] on November 5, 2013, which permits Sand Land to engage in 'mining,' as defined in Section 23-2705(b) of the New York State Environmental Conservation Law, within 34.5-acres of the 50-acre Facility in accordance with a mined use plan approved by [DEC]" (R at S518).

The Agreement also refers to a 34.5-acre Life of Mine throughout and states that DEC will approve Sand Land's application to renew its MLRP for the 34.5-acre Life of Mine. It is undisputed that the authorized activity described in the 2013 MLRP is "[m]ine sand and gravel from 31.5 acres of a 50 acre site" (R at S042). Petitioners' claim is that the change in the Life of Mine acreage was done for improper reasons. However, there is no record support for this claim.

In opposition to the petition, DEC has offered evidence – specifically Ms. Dickert's affidavit – which explains the change in acreage. Specifically, Ms. Dickert explains that the change in the Life of Mine acreage was a ministerial correction/update to the Life of Mine and was done, in part, to ensure that the Stump Dump area be reclaimed at the conclusion of mining. Ms. Dickert further explains that the Stump Dump area was not reflected in the prior permits or reclamation plans because it was land affected by mining prior to the enactment of the Mined Land Reclamation Law in 1975; she avers that the Stump Dump was "continuously disturbed" by excavation activities and was historically considered by DEC as part of the mine site (Affidavit in Support of Answer [DEC] ¶ 17). Ms. Dickert states that she personally "directed mined land reclamation specialists performing financial security calculations to consider the 34.5 acres the correct and accurate life of mine acreage" (Affidavit in Support of Answer [DEC] ¶ 30). This explanation is also provided in DEC's published response to comments it received with respect to Sand Land's modification application

(R at S766-767).[10]

Although the Agreement itself is silent as to the change in the Life of Mine acreage, or the reasons therefor, DEC's proffered explanation for the change has a rational basis in the record. First, a DEC policy memorandum dated 1987 submitted by DEC as part of the administrative return confirms that it is the policy of DEC to conduct a "historical review" when considering a renewal permit where, as here, a negative declaration has previously been issued (R at S012). The policy states: "Ideally, one should examine the entire scope of the previous review, comparing previously proposed operations and the potential impacts known at that time with the operations and potential impacts proposed in the renewal" (id.). The administrative return also contains a DEC policy memorandum dated March 11, 2019. Although this memorandum post-dates the Agreement, the Court finds that it is nonetheless instructive as to DEC's policy with respect to MLRP renewals and modifications.[11] This memorandum explains: "Occasionally mined land reclamation permits include areas that have been historically affected by mining or mining activities (i.e. affected prior to initial permit issuance) and have been continuously used as such but were not included in the original Life of Mine" and confirms that it is the policy of DEC to adjust a Life of Mine area and affected areas "[t]o correctly and accurately outline the affected areas at a mine" (R at S635).

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[10] In relevant part, the response to comments states: "The three-acre difference is due to an area in the SW corner of the mine called the 'stump dump.' This three-acre area was mined in the 1960's and later tree stumps were buried there. This mining and burying of stumps pre-dated both the 1975 Mined Land Reclamation Law, which regulates mining and DEC's Part 360 regulations governing disposal of vegetative waste. . . . The three acres should have been included in the life of mine acreage, in all past site descriptions and plans for permitting, but was left out as it was not being actively mined. It was however, inspected as part of the mine site by DEC over the years" (R at S766-767).

[11] The Court notes that, in her affidavit, Ms. Dickert states that the guidance in the March 2019 memorandum "was developed through a process improvement exercise conducted by DEC beginning in March of 2018" (Affidavit in Support of Answer [DEC] ¶ 12).

Ms. Dickert's assertion that the Stump Dump area was an area affected by mining prior to the enactment of the Mined Land Reclamation Law and has been continuously disturbed is also supported by the record. A mining plan submitted in support of Bridgehampton Materials' 1980 application for a mining permit states:

> "[P]rior mining operations created the existing hole outlined in red as LINE B which has a depth of 120 ft. below the grade of the surrounding land and covers a surface area of approximately five acres on the top perimeter. Current mining operations (since 1975) have been using stockpiled sand mined prior to 1975" (R at S003).

A comparison of the map showing the "existing hole 120' deep" (R at S004), which appears to be dated June 1965, and the 2013 Fox Plans (R at S040; Petition, Exhibit C) confirms that the Stump Dump identified on the 2013 Fox Plans appears to be in roughly the same location as the "existing hole." Moreover, the Stump Dump was included in the calculation of the "area of affected acreage" on the 2013 Fox Plans (R at S040; Petition, Exhibit C).[12] In addition, the administrative return contains an evaluation of the mine's compliance with the permit done by Leggette, Brashears & Graham, an environmental engineering firm, in 2013. Among other things, the evaluation found that the "current estimated extent of mining" was 34.9 acres and also included the Stump Dump in the "mined area" on a map included with the evaluation (R at S028, 030). Similarly, the record contains maps prepared by Leggette, Brashears & Graham in 2014 which identify the Stump Dump as an area affected by mining prior to April 1, 1975 (R at S080-S081). In addition, a 2014 evaluation by Leggette, Brashears & Graham characterized the Stump Dump as an area "affected prior to April 1, 1975" and stated that the "currently permitted area" is "31.5 acres (34.6 acres including the 3.1-acre

[12] ECL 23-2705(2) defines "[a]ffected land" and "land affected by mining" as "the sum of that surface area of land or land under water which: (i) has been disturbed by mining since April [1, 1975] and not been reclaimed, and (ii) is to be disturbed by mining during the term of the permit to mine."

area identified as 'stump dump' that was reportedly affected prior to April 1, 1975)" (R at S063). Furthermore, the Stump Dump was included in the Life of Mine boundary on maps included in Sand Land's revised MLUP presented to DEC in 2017, and was included in the proposed reclamation plan (see R at S148, S150). The foregoing record evidence, along with Ms. Dickert's affidavit, provides a rational basis for the 34.5 Life of Mine acreage as stated in the Agreement. As such, the Court declines to nullify the Agreement on that ground.

Petitioners also seek to nullify the Agreement on the ground that DEC's agreement to withdraw the NIM and issue a renewal permit was arbitrary and capricious because it constituted a reversal of its prior position regarding potential groundwater contamination arising from mining in and around the Stump Dump without any explanation or justification. Upon review, the Court finds that DEC's agreement to withdraw the NIM and issue a renewal permit was a rational exercise of DEC's discretion and declines to disturb it. In her affidavit, Ms. Dickert states that DEC, in negotiating a resolution to Sand Land's objections to the NIM and entering into the Agreement, considered: (1) evidence demonstrating that there was enough unmined sand present at the site to support a commercially viable mining operation, contrary to what was stated in the NIM; (2) the absence of data showing that sand mining has any negative impact on groundwater quality; and (3) Sand Land's commitments under the Agreement, including its agreement to surrender its Part 360 registration and to implement a regular soil and groundwater inspection and testing program at the site.

Ms. Dickert's assertions in this regard are supported by the record, including the Agreement itself. Importantly, as noted above, the principal reason provided in the NIM for the proposed cessation of mining was the potential for groundwater contamination arising from VOWM

processing activities and the assertion that the remaining sand

> "is located predominantly in the area of the mine formerly used for storing and processing of vegetative waste. Future site activities in and around those areas where processing and storing of vegetative waste formerly occurred, have the potential to allow the release of contaminants in that area which could impact the local groundwater" (R at S431).

The record – specifically a map prepared by Alpha Geoscience – confirms, however, that there are 98,170.1 cubic yards of reserves available at the Sand Land site, excluding the Stump Dump (R at S435), which supports a finding that there are reserves available which are more than de minimus and which are located outside of the Stump Dump area (see ECL 23-2711 [1][requiring a permit to mine more than 750 cubic yards of minerals from the earth within twelve successive calendar months]). In addition, pursuant to the Agreement, Sand Land agreed to permanently cease the receipt, storage and processing of VOWM, to conduct quarterly groundwater monitoring and to cease all mining within 8 years. The Court finds that the Agreement reflects a considered balancing of DEC's policies of fostering an economically sound mining industry and ensuring sound environmental management practices.

The Court notes that, in support of their petition, petitioners have submitted the expert affidavit of Stuart Z. Cohen, a certified ground water professional. Therein, Mr. Cohen opines that the solid waste material processing activities at the Sand Land site have caused groundwater contamination. He opines that "the conclusions reached in the SCDHS water testing results and the potential threat to the aquifer represented in those results" support DEC's determination, in the NIM, that future site activities in and around the areas where processing and storing of VOWM formerly occurred have the potential to cause groundwater contamination (Cohen Affidavit in Support of Petition ¶ 13). He avers that there is no scientific data supporting DEC's change in position to

consider the Stump Dump a mineable area and, without adequate soil testing of the upper layer of soil known as the overburden to demonstrate it is not contaminated, it is reasonable to conclude that future mining in this area will likely facilitate, and could even increase, the contamination of the aquifer" (id. ¶ 17).

Upon review, the Court does not find that this affidavit demonstrates that DEC's apparent authorization of mining in the Stump Dump area – through its approval of the Agreement and through its issuance of the resulting permits – is arbitrary and capricious, irrational or an abuse of discretion. There is a rational basis in the record for DEC's finding that sand mining itself does not cause groundwater contamination and, as noted above, the Agreement does require Sand Land to perform regular groundwater testing. Although petitioners claim that mining in the Stump Dump area, specifically, will cause groundwater contamination, importantly, there is no indication in the record that Sand Land, in fact, intends to mine in the Stump Dump area. Rather, the record reflects that the Stump Dump area was *already mined to depth below 120 amsl* (the maximum depth permitted under the modified MLRP) prior to the issuance of the first MLRP at the site and therefore does not contain any mineable virgin material.[13] Notably, in its response to comments, DEC indicated that the Stump Dump contains buried tree stumps and stated that "the inclusion of the three-acre stump dump will allow Sand Land to make sure any remaining buried stumps are taken out and disposed of properly and in accordance with Part 360 regulations" (R at S767). Therefore, as the evidence demonstrates that there is no virgin material to be mined in the Stump Dump, the Court does not find the expert evidence submitted by petitioners establishes that DEC abused its

[13] Indeed, DEC's position is that, because the material presently in the Stump Dump is fill and not material in its original location, removing the material is not "mining" as defined by ECL 23-2705 and a permit is not required to do so.

discretion in entering into an Agreement which included the Stump Dump in the Life of Mine. The Court finds that Sand Land's promises under the Agreement, especially its agreement to conduct groundwater monitoring and to cease its processing of VOWM, and the evidence regarding the amount and location of reserves available provide a rational basis for DEC's resolution of the NIM by negotiation and its approval of the Agreement. The Court therefore denies petitioners' challenge to the Agreement.

Renewal Permit (First Cause of Action)

In this cause of action, petitioners argue that the 2019 renewal permit expanded the scope of mining from 31.5 acres to 34.5 acres and, as such, should have been treated as a modification of the permit rather than a renewal. Petitioners urge that the consideration of the application as a renewal was done to circumvent DEC's prior denial of Sand Land's permit modification application, the ALJ's ruling and the Town's right under ECL 23-2703(3) to review the legality of the mine expansion. They argue that it was arbitrary and capricious and in violation of lawful procedure for DEC to change its position on the modification.

MLRPs are renewable pursuant to ECL 23-2711 (11). "Generally, in the absence of a material change in conditions or evidence of a violation of the terms of the permit, a renewal should be granted without unduly burdening the applicant" (Matter of Atlantic Cement Co. v Williams, 129 AD2d 84, 88 [3d Dept 1987]). By contrast, if the permit holder seeks a modification that involves a material change in permit conditions, the application is treated as one for a new permit (see ECL 70-0115[2][b]), and the notice and procedural requirements set forth in ECL 23-2711(3) apply.

Upon review, the Court discerns no error in DEC's treatment of the renewal application as one for a renewal permit rather than a modification. In the Agreement, DEC specifically agreed to

grant the renewal application for the 34.5-acre Life of Mine. As discussed above, DEC's stated rationale for the change in acreage – that the change was a correction to the Life of Mine – has a rational basis in the record. It follows that DEC's treatment of the application as one for a renewal of the MLRP and not a modification of the permit also has a rational basis. Indeed, where the change in the Life of Mine was simply a correction to the Life of Mine in the permit, it was rational for DEC to find that the application did not "involve a material change in permit conditions" (ECL 70-0115 [2][a]) such that it could be treated as a renewal application rather than a modification.

The Court is not persuaded by petitioners' contention that DEC's granting of the renewal permit for the 34.5-acre Life of Mine was arbitrary and capricious because it circumvented DEC's prior denial of Sand Land's permit modification application and the ALJ's ruling that ECL 23-2703(3) applied to the modification application. Importantly, Sand Land's 2014 application to modify its MLRP differed substantially from its 2018 renewal application which is challenged in the First Cause of Action. The 2014 application sought 40-foot deepening of the mine, as well as a horizontal expansion of 4.9 acres. The proposed horizontal expansion included a 1.8 acre "area of modification" and the 3.1 acre Stump Dump, which was characterized in the application as an "area affected prior [to] 1975" (Petition, Exhibit E). The modification also contemplated that Sand Land's processing of VOWM would continue. Given these significant differences, the Court does not find that DEC's determinations in the administrative proceedings with respect to the 2014 modification application are binding on Sand Land's 2018 renewal application to renew its permit, and the Court does not find that DEC abused its discretion inasmuch as it may have departed from those determinations in addressing the 2018 renewal permit. In addition, since the administrative proceedings with respect to the 2014 modification application, Sand Land has ceased its receipt and

processing of VOWM at the site. This is a significant change, as the Negative Declaration's failure to address the environmental impact of those activities was among the reasons provided by DEC for its denial of the modification permit. As such, the Court rejects petitioners' arguments on this point and denies their challenge to DEC's issuance of the renewed MLRP to Sand Land with a 34.5-acre Life of Mine.

Amended Negative Declaration (Fourth Cause of Action) and Modified Permit (Fifth and Sixth Causes of Action)

Initially, inasmuch as petitioners seek injunctive relief prohibiting further processing of Sand Land's modification application, that claim has been rendered moot by the granting of the application and will not be addressed here. In addition, to the extent that petitioners challenge the issuance of the modification permit on the ground that the Stump Dump was improperly and arbitrarily added to the Life of Mine in the 2019 renewal permit, the Court need not address that argument based upon its conclusion, above, that there is a rational basis for the increase in the Life of Mine acreage in the renewal permit.

Upon careful review, the Court is satisfied that there is a rational basis in the record supporting the issuance of the Amended Negative Declaration and modified permit. The Court is unpersuaded by petitioners' argument that DEC violated ECL 23-2711(3) and 23-2703(3) in making these challenged determinations. ECL 23-2711 (3) sets forth certain procedures to be followed with respect to an application for "a mining permit, for a property not previously permitted" including the provision of notice to the local government and, where the proposed mine is considered a major project, the provision of a public comment period. Moreover, as noted above, ECL 23-2703 (3) states:

> "No agency of this state shall consider an application for a permit to mine as complete or process such application for a permit to mine pursuant to this title, within counties with a population of one million or more which draw their primary source of drinking water for a majority of county residents from a designated sole source aquifer, if local zoning laws or ordinances prohibit mining uses within the area proposed to be mined."[14]

Here, there is no indication in the record that DEC provided the notice required by ECL 23-2711 (3) to the local government, even though it did provide a public comment period. DEC's position is that such notice was not required because the application was to modify an existing permit within the current disturbance footprint and without material change. This position is supported by the language of the statute – which requires DEC to provide the notice "[u]pon receipt of a complete application for a mining permit, *for a property not previously permitted pursuant to this title*" (ECL 23-2711[3] [emphasis added]). DEC's position is also supported by DEC's March 2019 policy memorandum, which provides that a change in mining depth "may not be substantial or material if there is no change in already-approved mining or excavation methods, no change in the approved reclamation objective, no need for additional hydrogeologic information to assess local impacts and no change in the approved Life of Mine Area" (R at S633). The Court is not persuaded that the ALJ's determinations with respect to the applicability of ECL 23-2711 [3] to petitioner's 2014 modification application – which sought both a vertical and horizontal expansion of mining – are binding with respect to the 2019 application, which sought only a vertical expansion.

Likewise, the Court discerns no violation of ECL 23-2703 (3) in the processing of the modification application. DEC determined that input from the Town as to the legality of the mining

[14] It is undisputed that Suffolk County, where the mine is located, is a county "with a population of one million or more which draw [its] primary source of drinking water for a majority of county residents from a designated sole source aquifer" (ECL 23-2703 [3]).

expansion was not required because the proposed modification was a vertical expansion within the current disturbance footprint. DEC's interpretation is consistent with the language of the statute which states that it applies to an "application for a permit to mine" (ECL 23-2703 [3]). In the Court's view, it would be nonsensical to interpret the statute to apply to modification applications such as this one which *only proposes mining deeper* within an existing disturbance footprint/area where mining is already otherwise authorized. Again, the Court does not find that the ALJ's determinations with respect to the applicability of ECL 23-2703 (3) to petitioner's 2014 modification application – which sought both a vertical and horizontal expansion of mining – are binding with respect to the 2019 application, which sought only a vertical expansion.

Petitioners also argue that the modification permit must be vacated because DEC failed to sufficiently consider the environmental issues. The Court also rejects this argument. "Judicial review of an agency determination under SEQRA is limited to whether the lead agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination" (Matter of Brunner v Town of Schodack Planning Bd., 178 AD3d 1181, 1183 [3d Dept 2019][internal quotation marks and citations omitted]; see Matter of Keil v Greenway Heritage Conservancy for Hudson River Valley, Inc., 184 AD3d 1048, 1051-1052 [3d Dept 2020]; Matter of Village of Ballston Spa v City of Saratoga Springs, 163 AD3d 1220, 1223 [3d Dept 2018]). "A lead agency need not investigate every conceivable environmental problem during the course of SEQRA review, and generalized community objections or speculative environmental consequences are not sufficient to establish a SEQRA violation" (Matter of Heights of Lansing, LLC v Village of Lansing, 160 AD3d 1165, 1167 [3d Dept 2018][internal quotation marks and citations omitted]).

Here, the record reflects that, in determining that the proposed sand mine deepening will not significantly impact groundwater quality, DEC had before it and considered groundwater sampling data, the fact that the proposed new floor of the mine will be 90 feet above the existing groundwater level and will provide filtering and buffering benefits, the removal of all vegetative waste from the mine site, Sand Land's surrender of its Part 360 registration and the fact that groundwater monitoring wells have been installed at the site. In issuing the permit, DEC also considered public comments submitted with respect to the application, which included comment letters from petitioners raising the environmental concerns raised in this proceeding. The Court finds that this record sufficiently demonstrates that DEC took the requisite hard look at the environmental issues in accordance with SEQRA. DEC also provided a "reasoned elaboration of the basis for its determination" in the Amended Negative Declaration (Matter of Brunner v Town of Schodack Planning Bd., 178 AD3d at 1183).

The record before the Court contains ample support for DEC's determination that the deepening of the mine will not have a significant impact on the environment as petitioners strenuously urge. Notably, the SCDHS report upon which petitioners rely found that VOWM activities/operations have had adverse impacts on groundwater quality; however, the report did not find that sand mining itself or sand mining within 90 feet of the underground water level causes contamination of the aquifer (see Petition, Exhibit L). As such, the Court rejects petitioners' argument that DEC failed to adequately consider the environmental impacts associated with the permit modification. Finally, the Court disagrees with petitioners that the granting of the modification application is arbitrary and capricious because DEC denied Sand Land's 2014 application which sought the same deepening. Importantly, the environmental concerns arising from

VOWM activities which were identified by DEC in response to the original Negative Declaration have been ameliorated by Sand Land's relinquishment of its Part 360 registration.

In sum, upon careful review of the petition, supplemental petition and supporting documents, the administrative record, including Ms. Dickert's affidavit, and the arguments made by the parties, the Court finds that a rational basis exists for the challenged determinations. As such, the relief sought by petitioners is denied and the proceeding is dismissed.

Accordingly, based upon the foregoing, it is hereby

ORDERED AND ADJUDGED that Motion No. 5 is granted and petitioner Assemblyman Fred W. Thiele, Jr., is dismissed as a petitioner in this proceeding; and it is further

ORDERED AND ADJUDGED that Motion No. 6 and Motion No. 10 are denied in their entirety; and it is further

ORDERED AND ADJUDGED that the relief sought in the petition and supplemental petition is denied in its entirety and this proceeding is dismissed; and it is further

ORDERED AND ADJUDGED that the preliminary injunction ordered by the Court in its Decision and Order dated May 30, 2019, as modified by its Letter Order dated June 10, 2019, is hereby vacated in its entirety.

The foregoing constitutes the Decision, Order and Judgment of the Court.

SO ORDERED AND ADJUDGED

ENTER.

Dated: Albany, New York
August 31, 2020

Hon. James H. Ferreira
Acting Justice of the Supreme Court

Papers Considered:

09/03/2020

1. Notice of Verified Petition, dated April 19, 2019;
2. Verified Petition, dated April 17, 2019, with attached exhibits;
3. Affidavit in Support by Stuart Z. Cohen, Ph.D., CGWP, sworn to April 15, 2019, with attached exhibit;
4. Verified Supplemental Petition, dated June 12, 2019, with attached exhibits;
5. Verified Answer (DEC), dated July 29, 2019, with Appendix;
6. Affidavit in Support of Answer (DEC) by Catherine A. Dickert, sworn to July 26, 2019, with attached exhibit;
7. Memorandum of Law in Opposition (DEC) by Stephen M. Nagle, dated July 29, 2019;
8. Verified Answer (Sand Land), dated July 29, 2019;
9. Memorandum of Law in Opposition (Sand Land) by Brian E. Matthews, Esq., dated July 29, 2019;
10. Affirmation in Reply by Meave M. Tooher, Esq., dated August 29, 2019, with attached exhibits;
11. Memorandum of Law in Reply (Corrected) by Petitioners' Counsel, dated August 29, 2019;
12. Affidavit in Reply by Robert S. DeLuca, sworn to August 28, 2019, with attached exhibits;
13. Affidavit in Reply by Adrienne Esposito, sworn to August 29, 2019;
14. Affidavit in Reply by Elena Loreto, sworn to August 28, 2019;
15. Affidavit in Reply by Andrea Spilka, sworn to August 28, 2019;
16. Affirmation in Support of Answer (DEC) by Scott Crisafulli, Esq., filed September 10, 2019, with attached exhibits;
17. Affidavit in Support of Answer (DEC) by Mary Mackinnon, sworn to September 10, 2019;
18. Affirmation in Response by Claudia Braymer, Esq., dated September 12, 2019;
19. Notice of Motion for Partial Dismissal (Motion No. 5), dated July 29, 2019;
20. Affirmation in Support (Motion No. 5) by Brian E. Matthews, Esq., dated July 29, 2019;
21. Affidavit in Opposition (Motion No. 5) by Fred W. Thiele, Jr., sworn to September 9, 2019;

22. Affirmation in Support (Motion No. 5) by Stephen M. Nagle, Esq., dated September 3, 2019;
23. Affirmation in Reply (Motion No. 5) by Deborah Choron, Esq., dated September 16, 2019;
24. Notice of Motion (Motion No. 6), dated August 22, 2019;
25. Affirmation in Support (Motion No. 6) by Meave M. Tooher, Esq., dated August 22, 2019, with attached exhibits;
26. Memorandum of Law in Opposition (Motion No. 6) by Meredith G. Lee-Clark, Esq., dated August 28, 2019;
27. Affirmation in Opposition (Motion No. 6) by Stephen M. Nagle, Esq., dated August 28, 2019, with attached exhibit;
28. Notice of Motion (Motion No. 10), dated December 20, 2019;
29. Affirmation in Support (Motion No. 10) by Meave M. Tooher, Esq., dated December 20, 2019;
30. Affirmation in Support (Motion No. 10) by Claudia Braymer, Esq., dated December 20, 2019, with attached exhibits;
31. Affidavit in Support (Motion No. 10) by Stuart Z. Cohen, Ph.D., CGWP, sworn to December 20, 2019, with attached exhibits;
32. Memorandum of Law in Support (Motion No. 10) by Petitioners' Counsel dated December 20, 2019;
33. Affirmation in Opposition (Motion No. 10) (Corrected) by Stephen M. Nagle, Esq., dated January 10, 2020;
34. Affidavit in Opposition (Motion No. 10) by Kristy A. Salafrio, sworn to January 10, 2020, with attached exhibits;
35. Affirmation in Opposition (Motion No. 10) by Brian E. Matthews, Esq., dated January 10, 2020, with attached exhibit;
36. Reply Affirmation (Motion No. 10) by Meave M. Tooher, Esq., dated January 16, 2020, with attached exhibits;
37. Reply Affidavit (Motion No. 10) by Stuart Z. Cohen, Ph.D., CGWP, sworn to January 16, 2020, with attached exhibits; and
38. Reply Affirmation (Motion No. 10) by Claudia Braymer, Esq., dated January 16, 2020, with attached exhibits.

EXHIBIT C

STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

TOWN OF SOUTHAMPTON; ASSEMBLYMAN FRED W. THIELE, JR.; 101CO, LLC; 102CO NY, LLC; BRRRUBIN, LLC; BRIDGEHAMPTON ROAD RACES, LLC; CITIZENS CAMPAIGN FOR THE ENVIRONMENT; GROUP FOR THE EAST END; NOYAC CIVIC COUNCIL; SOUTHAMPTON TOWN CIVIC COALITION; JOSEPH PHAIR; MARGOT GILMAN; and AMELIA DOGGWILER;

Petitioners-Appellants,

- against –

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; SAND LAND CORPORATION and WAINSCOTT SAND AND GRAVEL CORP.,

Respondents-Respondents.

NOTICE OF ENTRY

Appellate Division Docket No: 532083

Supreme Court Index No.: 902239-19

PLEASE TAKE NOTICE that the attached is a true copy of the DECISION AND ORDER ON MOTION of the Supreme Court, Appellate Division, Third Judicial Department decided and entered with the Appellate Division Clerk on August 23, 2021.

Dated: August 23, 2021
Nesconset, New York

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State of New York
Supreme Court, Appellate Division
Third Judicial Department

529380

Decided and Entered: August 23, 2021

532083

In the Matter of TOWN OF SOUTHAMPTON et al.,
Appellants,
et al.
Petitioner,

v

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION et al.,
Respondents.

COUNTY OF SUFFOLK,
Proposed Intervenor-Appellant.

DECISION AND ORDER ON MOTION

Motion by New York Construction Materials Association, Inc. for permission to appear amicus curiae in support of motion by respondents Sand Land Corporation and Wainscott Sand and Gravel Corp. for permission to appeal to the Court of Appeals.

Motions for permission to appeal to the Court of Appeals and for declaration that automatic stay is in effect or, in the alternative, for discretionary stay pending appeal.

Upon the papers filed in support of the motions and the papers filed in opposition thereto, it is

ORDERED that the motion by New York Construction Materials Association, Inc. for permission to appear amicus curiae in support of the motion by respondents Sand Land Corporation and Wainscott Sand and Gravel Corp. for permission to appeal to the Court of Appeals is granted, without costs, and it is further

ORDERED that the motions for permission to appeal to the Court of Appeals and for a declaration that an automatic stay is in effect or, in the alternative, for a discretionary stay pending appeal are denied, without costs.

Garry, P.J., Reynolds Fitzgerald and Colangelo, JJ., concur.

Egan Jr. and Pritzker, JJ., concur in part, dissent in part and vote to grant leave to appeal to the Court of Appeals.

ENTER:

Robert D. Mayberger
Clerk of the Court

EXHIBIT D

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION FOURTH DEPARTMENT

IN THE MATTER OF THE APPLICATION OF
VALLEY REALTY DEVELOPMENT COMPANY, INC.

Petitioner-Cross Appellant. Onondaga County

For Judgment Pursuant to Article 78 of the Civil Practice Law and Rules Index No. 93-6046

v.

THOMAS C. JORLING, COMMISSIONER, AND THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Appellants.

APPELLANTS' REPLY BRIEF

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July 26, 1995

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STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION FOURTH DEPARTMENT

IN THE MATTER OF THE APPLICATION OF
VALLEY REALTY DEVELOPMENT COMPANY, INC.

Petitioner-Cross Appellant. Onondaga County

For Judgment Pursuant to Article 78 of the Civil Practice Law and Rules Index No. 93-6046

v.

THOMAS C. JORLING, COMMISSIONER, AND THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Appellants.

Preliminary Statement

This brief is submitted by the appellants (collectively, "DEC") in reply to the July 17, 1995 brief of cross-appellant Valley Realty Development Company, Inc. ("Valley"). Parenthetical references, unless otherwise noted, are to the Record on Appeal.

The applicable law and facts of this matter are set forth on pages 3-10 of DEC's April 25, 1995 principal brief ("DEC brief"). A statement of supplemental facts follows.

Supplemental Statement of Facts

In its brief to this Court, Valley repeatedly alleges that it "maintains certain vested land use rights in its property in the Town of Tully", Onondaga County ("the Town"), which have survived the Town's ordinance prohibiting all mining (see, Valley

brief, pp. 3,9,13,15).[1] This claim rests solely upon the conclusory allegations of counsel (172-173) and is contrary to Valley's own admissions elsewhere in the record (98, 113). DEC, in the determination under review, asked Valley to "document" its position (see, DEC brief, Point I). Instead, Valley brought the present lawsuit.

In Point I of its brief, Valley asserts that a "central issue" in this appeal is DEC's alleged involvement in a "dispute" or "controversy" between Valley and the Town regarding the Town ordinance (see, Valley brief, pp. 9-14). However, Valley represented to the lower court that no such dispute exists (see, letter of January 28, 1994 from Laurel J. Eveleigh, Esq. to Hon. Norman A. Mordue, copy appended hereto), and this is in fact the case (see, Point I, infra.).

Finally, Valley's cross-appeal erroneously relies on a phrase taken from a July 16, 1992 memorandum prepared by DEC employee Joe Moskiewicz (Valley brief, Appendix C) to conclude that its permit application was, on that date, "acceptable to

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[1]The validity of the Town ordinance was upheld by this Court in Valley Realty Development Co., Inc. v. Town of Tully, 187 AD2d 963 (4th Dept., 1992), leave den., 81 NY2d 880 (1993) (hereafter, "Valley I"). The case is discussed on pp. 4-5 of the DEC brief.

commence review" (Valley brief, pp. 21-22).[2] The memorandum actually supports DEC's position, and reads (p. 1)

> The latest [Draft Environmental Impact Statement or "DEIS"] submission [from Valley] is incomplete and unsatisfactory in addressing the environmental effects of the proposed project. I recommend that you consider this document with the remainder of the documents constituting the DEIS as unacceptable to commence review (emphasis added).

Moreover, the full sentence from which Valley's out-of-context phrase is taken reads (p.2).

> If the DEIS, EAF [Environmental Assessment Form],Mined Land Use Plan and mining permit application were revised to limit the project acreage to 165 acres, the documents would be consistent and acceptable to commence review, from my point of view.

The four listed documents were never so revised by Valley (125-126, 468-49, 472), and thus remain "unacceptable" (see also, discussion at pp. 8-10 and fn. 4, infra.)

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[2]We object to Valley's remark that this memorandum was "conveniently omitted" from the record. This omission was an inadvertent mistake. Pages iv and v of the Table of Contents both reflect that a "Moskiewicz memorandum" dated "7/16/92" was reproduced at p. 409 of the record. The heading on p. 409 reads "Memorandum (Moskiewicz, 7/16/92)." By mistake, DEC inserted another memorandum on p. 409, which also bears the date July 16, 1992.

ARGUMENT

POINT I

DEC'S MARCH 1993 DETERMINATION IS BASED UPON THIS COURT'S DECISION IN VALLEY I. THE TECHNICAL GUIDANCE MEMORANDUM IS NOT APPLICABLE TO THE FACTS OF THE CASE.

Valley's reliance on a May 1992 DEC Technical Guidance Memorandum (TGM)(180-186)(Valley brief, Point I), addressing procedural issues related to mining permit applications, is misplaced. On the present facts, where this Court in Valley I has sustained the validity of a Town ordinance which prohibits mining on the applicant's property, the TGM has no relevance.

The TGM sets forth a DEC policy to remove itself from "matters of dispute between the local government and the [permit] applicant" and not "make[ ] decisions or interpretations of local government laws or ordinance" (181-183). In this case, any "dispute" between Valley and the Town of Tully ended with this Court's unanimous decision in November, 1992.[3] In March 1993, DEC cited this decision, and not any position assumed by the Town, as the basis for the determination here at issue, stating that Valley's permit application

> is incomplete and will remain so until such time as there is a Judgment reversal [in Valley I] (or Local Law Amendment) to the effect that mining is not prohibited (138).

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[3]See also, the January 28, 1994 letter to the lower court, appended to this brief, in which Valley confirms the absence of any present dispute with the Town.

Moreover, Valley must concede that, between June 1990 (when its mining permit application was first submitted) and March 1993 (i.e., up to the time of this Court's decision), DEC followed the TGM by continuing to process the application. Contrary to Valley's argument, DEC has not attempted in this case to decide the scope or applicability of the Town of Tully ordinance. It has merely followed a unanimous decision of this Court which provides the answer to this question and is dispositive of the present appeal as well.

POINT II

IT IS DEC, AND NOT VALLEY, WHICH HAS FOLLOWED THE MANDATES OF THE UNIFORM PROCEDURES ACT.

In Point III of its brief, Valley contends that this Court should direct DEC to issue a mining permit because of Valley's compliance with the provisions of the Uniform Procedures Act ("UPA", Environmental Conservation Law Article 70, 6 NYCRR Part 621). In fact, the reverse is true; Valley is attempting to circumvent the procedural mandates of UPA, while DEC has followed the law to the letter.

The pertinent statutory and regulatory provisions of UPA are discussed on pp. 5-6 of the DEC brief. In short, where DEC makes a "timely" determination that a permit application is "incomplete", the applicant must resubmit its application or provide DEC with "additional information" addressed to the stated basis for the "incompleteness" determination. Moreover, the

EXHIBIT E

COURT OF APPEALS
OF THE STATE OF NEW YORK

TOWN OF SOUTHAMPTON; ASSEMBLYMAN FRED W. THIELE, JR.; 101CO, LLC; 102CO NY, LLC; BRRRUBIN, LLC; BRIDGEHAMPTON ROAD RACES, LLC;CITIZENS CAMPAIGN FOR THE ENVIRONMENT; GROUP FOR THE EAST END; NOYAC CIVIC COUNCIL; SOUTHAMPTON TOWN CIVIC COALITION; JOSEPH PHAIR; MARGOT GILMAN; AND AMEILIA DOGGWILER,

Petitioners-Respondents,

-against-

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; SAND LAND CORPORATION AND WAINSCOTT SAND AND GRAVEL CORP.,

Respondents-Appellants.

AFFIDAVIT OF MARC HERBST IN SUPPORT OF MOTION FOR LEAVE TO APPEAL

Appellate Division, Third Dep't Docket No. 532083

Albany County Clerk Index No. 902239/19

State of New York)
) ss:
County of Suffolk)

MARC HERBST, being duly sworn, deposes and says:

1. I am the Executive Director of the Long Island Contractors Association, Inc. ("LICA"). I have served as LICA's Executive Director since 2006.

2. LICA represents Long Island's premier heavy construction general

contractors, subcontractors, suppliers, and industry supporters. Focused primarily on the infrastructure construction industry, such as highways, bridges, sewers, parks, other public works, and private site development, LICA's member companies play a significant role in sustaining the region's quality of life and economic engine that is Nassau and Suffolk Counties.

3. I have read the Affidavit of Robert Yager, the New York State Department of Environmental Conservation's ("NYSDEC") Regional Mined Land Reclamation Specialist in the NYSDEC's Region 1, sworn to on June 22, 2021, which was filed with the Appellate Division, Third Department (Docket No. 532083 NYSCEF Doc. No. 171) ("Yager Aff."). Attached as Exhibit 1 hereto is a true and correct copy of Mr. Yager's affidavit.

4. Mr. Yager's states that "nearly all 23 mines on Long Island" will close in the near future if the NYSDEC is prohibited from processing the Mined Land Reclamation Law ("MLRL") permits of mines that are prior nonconforming uses under the zoning law and ordinances of their respective localities (Yager Aff. ¶ 15).

5. In the context of proposed legislation, LICA has previously commented that the closure of these mines would have a recurring and long-lasting adverse impact on Long Island's economy, employment, and the environment. For this reason, LICA, and many other public interest groups, strongly advocated

against proposed legislation that would have had the same result of closing these mines.

6. From time to time, LICA comments on proposed legislation introduced in the New York Assembly or New York State Senate related to the areas of concern and expertise of LICA's membership. One such proposed piece of legislation was Assembly Bill Number 1001, introduced by Assembly Fred W. Thiele, Jr., (identified above as a plaintiff in this case) and its companion bill S.8026, introduced by State Senator Kaminsky.

7. A.10001/S.8026 would have amended the Mined Land Reclamation Law to provide that local governments on Long Island could prevent the NYSDEC from processing mining permits for mines located on Long Island.

8. LICA evaluated the impact of the proposed shifting of authority from the NYSDEC to Long Island's local governments and joined with other public interest groups in submitting comments to the Governor and requesting that he veto the legislation.

9. Attached as Exhibit 2 hereto is a true and correct copy of a letter, dated November 23, 2020, with attachments, submitted to the Governor by LICA along with many other public interest groups advocating that the Governor veto the legislation. Besides LICA, the signatories included:

- Associate General Contractors of New York State

- Building and Construction Trades Council of Greater New York
- Building and Construction Trades Council of Nassau/Suffolk
- Building Contractors Association of Westchester & Hudson Valley
- Business Council of New York State
- Construction Industry Council of Westchester & Hudson Valley
- General Contractors Association of New York City
- International Brotherhood of Teamsters Local 282
- International Union of Operating Engineers Local 138
- Long Island Association
- Long Island Builders Institute
- Long Island Contractors' Association
- Long Island Federation of Labor AFL-CIO
- New York Metropolitan Trucking Association
- New York State Association of Town Superintendents of Highways
- New York State Conference of Operating Engineers
- New York State Construction Materials Association
- New York State Laborers Employment Cooperation and Education Trust
- New York Roadway and Infrastructure Improvement Coalition
- North Atlantic States Regional Council of Carpenters

10. Submitted with the letter, was a summary of the enormous adverse

consequences that LICA, and the other signatories, wrote would result from the closure of prior nonconforming mines on Long Island, including, but not limited to:

- Shutting down the mining industry on Long Island will mean that construction aggregates will need to be imported, most likely from New Jersey or Upstate New York. That will dramatically increase truck traffic and congestion in the metro New York region and increase greenhouse gases emissions as well as fuel consumption. The cost of trucking sand equals the value of the material in the truck after only 20 miles. Therefore, hauling materials long distances to the island will also dramatically increase construction costs.

- The quality of Long Island sand meets or exceeds both ASTM, NYSDOT and DEP standards.

- Long Island mines serve regional demand at JFK and LaGuardia Airport, the Freedom Tower, Eastside Access Tunnels, the Governor Mario M. Cuomo Bridge and many other high profile projects. As well as local demand on the LIE, parkways, various bridges, sewer systems, sewage treatment plants and water distribution systems.

- USGC (United States Geological Survey) estimates that 44% of construction sand and gravel was used for concrete aggregates, and 25% was utilized for road base, road coverings, and road stabilization. This bill would have tremendous cost implications for public works, affordable housing and private construction projects.

- Recent studies show the increase of transportation costs for materials from other locations following mine closures would cause a 59% cost increase for New York State Thruway projects. This will further exacerbate truck traffic in the downstate region.

- If enacted, this legislation would increase project costs and put at risk the jobs of 65,000 hard-working skilled tradespeople working within the jurisdiction of the Building and Construction Trades of Nassau and Suffolk and 100,000

additional workers within the jurisdiction of the Building and Construction Trades of Greater New York.

- Trades are already challenged with the reduction of permitted sand mining facilities on Long Island from 78 down to 23 sites.

- Operating Engineers would eliminate an immediate 54 direct jobs. The total direct and indirect job loss is estimated at 175 positions, costing more than $75.5 million in salaries and reducing the Suffolk County GNP by over $36 million.

- Loss of local aggregate material will jeopardize major projects of significance for the region, such as Brookhaven Labs, Gateway Project (Northeast Corridor), Nassau Hub, Ronkonkoma Hub, and Port Authority airport revitalization projects.

11. As described above and in the attached Exhibit, many of the impacts reach, and are of concern, far beyond the immediate geography of Long Island, adversely impacting the public fisc, state infrastructure, and air quality.

12. Whether by an amendment to the MLRL or by court ruling interpreting the MLRL to the same effect, prohibiting the NYSDEC from processing the MLRL permits of preexisting and prior nonconforming mines under local zoning law or ordinances for mines located on Long Island is a matter of great public interest and concern, as demonstrated by the concern expressed by LICA and other public interest groups in the past.

Marc Herbst

Sworn to before me
this 20 day of September 2021

NOTARY PUBLIC

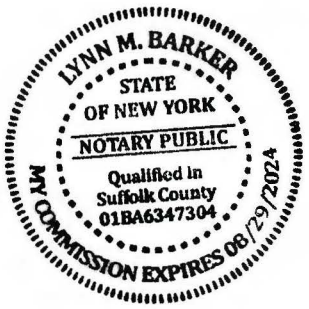

EXHIBIT 1

STATE OF NEW YORK
APPELLATE DIVISION : THIRD DEPARTMENT

TOWN OF SOUTHAMPTON; ASSEMBLYMAN FRED W. THIELE, JR.; 101CO, LLC; 102CO NY, LLC; BRRRUBIN, LLC; BRIDGEHAMPTON ROAD RACES, LLC; CITIZENS CAMPAIGN FOR THE ENVIRONMENT; GROUP FOR THE EAST END; NOYAC CIVIC COUNCIL; SOUTHAMPTON TOWN CIVIC COALITION; JOSEPH PHAIR; MARGOT GILMAN; and AMELIA DOGGWILER;

Petitioners,

-against-

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; SAND LAND CORPORATION and WAINSCOTT SAND AND GRAVEL CORP.,

Respondents.

AFFIDAVIT OF ROBERT YAGER

Appellate Div. No. 532083

Albany Supreme Index No. 902239-19

State of New York)
) ss:
County of Suffolk)

Robert Yager, being duly sworn, deposes and says:

1. I am employed by the New York State Department of Environmental Conservation ("DEC") as the Regional Mined Land Reclamation Specialist in DEC's Region 1 office at Stony Brook University, 50 Circle Road, Stony Brook, New York 11790.

2. I have held that position since March 1998.

3. I have a Bachelor of Science degree in Biology from Iona college.

4. I am fully familiar with the facts and circumstances set forth below. My affidavit is based upon my education, training, professional experience, review of official DEC records

and discussions with DEC staff in the Division of Minerals and Environmental Permits regarding this matter.

5. I am very familiar with the Sand Land Mining site located at 585 Middle Line Highway in Noyack, New York (the "facility"). I have reviewed both permit renewals and modifications for the mine, as well as having conducted dozens of site inspections over the course of my tenure as DEC's Regional Mined Land Recreational Specialist. I am familiar with the location of mines on Long Island and I am aware of some of the Town zoning codes and the mines' locations in particular zoning districts.

6. I submit this affidavit in support of the New York State Department of Environmental Conservation's appeal of the Appellate Division Third Department's ruling of May 27, 2021, which ruling would lead to the closure of nearly all mines on Long Island.

7. There are 23 permitted mines on Long Island covered by ECL 2703(3), all located in Suffolk County. These mines are located as follows:

- Town of Brookhaven - four (4) mines: Roanoke Sand & Gravel Corp., Sparrow Mining of Suffolk LLC, Coram Materials Corp., and Tri-Hamlet Park (Town of Brookhaven).
- Town of Riverhead - five (5) mines: Riverhead CB LLC, Island Water Park Inc, CMA Mine LLC, Suffolk Cement Products Inc., and Town of Riverhead.
- Town of Smithtown - two (2) mines: Cox Industries LLC and All Island Mason Supply Inc.
- Town of Southampton - seven (7) mines: Westhampton Mining Aggregates Inc., Sagaponack Sand & Gravel, Hampton Sand Corp., Westhampton Property Associates Inc., Huntington Ready Mixed Concrete, Inc, Sand Land Corp and East Coast Mines & Materials Corp.
- Town of Shelter Island - one (1) mine: Shelter Island S & G Contracting Inc.
- Town of East Hampton - three (3) mines: Bistrian Gravel Corp, Disunno, Mike & Son and Sand Highway LLC.

- Town of Huntington - one (1) mine: West Hills Silica Sand Mining Corp. (110 Landfill).

8. Mining permits are issued for up to five (5) year terms but may be renewed in accordance with DEC's Uniform Procedures at 6 NYCRR part 621. If a permittee submits a timely and sufficient application for renewal of a mining permit, the existing permit does not expire until the Department has made a final decision on the renewal application.

9. There are currently renewal or modification applications pending for six of the 23 mines on Long Island. Renewals are currently pending for Roanoke Sand & Gravel Corp (Brookhaven) and Bistrian Gravel Corp. (East Hampton). Modifications are currently pending for East Coast Mines & Materials Corp. (Southampton), Huntington Ready Mixed Concrete, Inc. (Southampton), CMA Mine LLC (East Hampton), and Cox Industries LLC (Smithtown).

10. In the next three years there will be permit renewal applications due for 13 mines, and the remaining ten mining permits will need to be renewed by 2025.

11. Mining is generally prohibited or significantly restricted by local town code in the areas in which the 23 existing mines operate. Historically many of those mines have operated pursuant to their status as a pre-existing non-conforming use.

12. Of the 23 mines on Long Island, 19 mines are located in towns that outright prohibit mining or are sited in zoning districts where mining is not an authorized use. There are provisions in the town codes significantly restricting mining in the towns where the remaining 4 mines are located. The status of mining in the towns where the 23 currently operating mines are located is as follows:

(a) The Towns of Southampton and Riverhead prohibit mining. 12 mines are located in these Towns.

(b) The Town of Brookhaven prohibits new mining under its Land Use Legislation in the town code. Existing mines are located in zoning districts in which mining is currently a prohibited use. 4 mines are located in Brookhaven.

(c) The existing mines located in the Towns of Smithtown, Huntington, and East Hampton are in zoning districts in which mining is not an authorized use. 6 mines are located in those towns.

(d) The Town of Shelter Island has one very small 7-acre mine.

13. Of the total 1,164.15 affected acres in the 23 mines on Long Island, 991.05 acres are within mines where mining is prohibited by town zoning code, or by location, with only 173 acres remaining in the rest of the mines.

14. Under ECL 23-2703, the Department cannot "consider an application for a permit to mine as complete or process such application for a permit to mine pursuant to this title, within counties with a population of one million or more which draw their primary source of drinking water for a majority of county residents from a designated sole source aquifer, if local zoning laws or ordinances prohibit mining uses within the area proposed to be mined."

15. If the Department is prevented from processing any permit application for a preexisting mine where mining at that location is a prohibited activity or not an authorized use under the town code, nearly all 23 mines on Long Island would conclude their mining operations at the end of their current five-year permit term—within the next 3 to 5 years.

Robert W Yager

Robert Yager

Sworn to before me
this 22ND day of June 2021

NOTARY PUBLIC

CRAIG L. ELGUT
NOTARY PUBLIC-STATE OF NEW YORK
No. 02EL5051588
Qualified In Suffolk County
My Commission Expires November 06, 2021

EXHIBIT 2

November 23, 2020

Dear Governor Cuomo:

The New York Anti-Sand Mining Bill is bad for business and bad for New York. We encourage you to veto this bill to protect union jobs. Essentially, this bill would:

- Outlaw mining
- Halt construction
- Put union jobs on hold

In these uncertain times, nobody should be putting a stop to construction jobs.

This bill has the potential to severely impair the downstate construction industry, further damaging an already ailing economy.

We are adding our voices to say, Governor Cuomo, please veto this bill.

American Council of Engineering Companies of New York
Associate General Contractors of New York State
Building and Construction Trades Council of Greater New York
Building and Construction Trades Council of Nassau/Suffolk
Building Contractors Association of Westchester & Hudson Valley
Business Council of New York State
Construction Industry Council of Westchester & Hudson Valley
General Contractors Association of New York City
International Brotherhood of Teamsters Local 282
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New York State Conference of Operating Engineers
New York State Construction Materials Association
New York State Laborers Employment Cooperation and Education Trust
New York Roadway and Infrastructure Improvement Coalition
North Atlantic States Regional Council of Carpenters

LONG ISLAND MINING BILL

A.10001 THIELE /S.8026 KAMINSKY — FACT SHEET

INTRODUCTION/OVERVIEW

There is no scientific evidence that legal/permitted mine sites have a negative effect on groundwater quality. Permitted mine sites are heavily regulated and already sample groundwater quality and report the findings to DEC.

The bill is seriously flawed – expertise of DEC oversight should not be usurped by 113 county and municipal governments (2 counties, 2 cities, 13 towns, 96 villages).

If enacted, decisions might be driven by local politics and motivations rather than science.

The co-sponsors of this harmful legislation are conflating the environmental impact of landfilling with sand mining.

ECONOMIC / ENVIRONMENTAL CONSIDERATION

Mining in New York State is a $5 Billion industry with a payroll of over $1.3 Billion, employing roughly 30,000 people.

Mined Land Reclamation Law (MLRL) of 1975 – is when the State recognized and declared that its mineral resources were of statewide significance and that in order to foster a stable mining industry it was necessary for the State, rather than the municipalities, to regulate these activities.

Sand, gravel and crushed stone (collectively "aggregates) are a finite resource that must be extracted from suitable sites. The DEC permitting process is typically a multi-year, multi-million dollar process, meaning applicants must have a level of regulatory predictability to justify the costs.

Shutting down the mining industry on Long Island will mean that construction aggregates will need to be imported, most likely from New Jersey or Upstate New York. That will dramatically increase truck traffic and congestion in the metro New York region and increase greenhouse gases emissions as well as fuel consumption. The cost of trucking sand equals the value of the material in the truck after only 20 miles. Therefore, hauling materials long distances to the island will also dramatically increase construction costs.

The quality of Long Island sand meets or exceeds both ASTM, NYSDOT and DEP standards.

Long Island mines serve regional demand at JFK and LaGuardia Airport, the Freedom Tower, Eastside Access Tunnels, the Governor Mario M. Cuomo Bridge and many other high profile projects. As well as local demand on the LIE, parkways, various bridges, sewer systems, sewage treatment plants and water distribution systems.

USGC (United States Geological Survey) estimates that 44% of construction sand and gravel was used for concrete aggregates, and 25% was utilized for road base, road coverings, and road stabilization. This bill would have tremendous cost implications for public works, affordable housing and private construction projects.

Recent studies show the increase of transportation costs for materials from other locations following mine closures would cause a 59% cost increase for New York State Thruway projects. This will further exacerbate truck traffic in the downstate region.

LEGAL ANALYSIS

Existing Groundwater Monitoring Authorization

The proposed legislation is coming just two years after towns on Long Island were granted the authority to establish groundwater monitoring for impacts resulting from mining or reclamation.

Authority is already in place to address groundwater contamination (CERCLA, RCRA, Navigation Law, CWA) many of which also provide for citizen suit enforcement.

This proposed legislation would apply to far more businesses than traditional mining operations. Eliminating the exclusion for construction and agriculture from the definition of mining means Long Island construction projects and agricultural improvements would also be subject to the MLRL and the power granted to local governments under the proposed law. (23-2705(8) Definition of Mining).

Subparagraph 23-2703(3)(c): The proposed law empowers local governments to prohibit DEC from taking any action on permit applications or renewals based on a naturally occurring contaminant in groundwater. This will likely permanently close
pre-existing, non-conforming mines (with constitutionally protected vested property rights).

The proposed law does nothing to address contamination discovered other than shutter a business that may have no relationship to the contamination.

Subparagraph 23-2703(3)(d): Towns would be allowed to regulate or prohibit the storage, processing and sales of construction aggregates (e.g., sand) from the mine site.

In effect, no justification whatsoever is required to simply shut down a mine if the town chooses – eliminating vested property rights, without due process and in violation of equal protection.

Claim of Concurrent Jurisdiction - The sponsors of the legislation assert that it is merely providing concurrent jurisdiction to local governments – that isn't the case.

Town authority overrides DEC's determinations:

- **23-2703 4a.** – if a locality exercises its authority granted under the proposed law DEC is prohibited from acting.
- **23-2711** – plainly states that the local government's determinations under the authority granted in 23-2703 are not reviewable by the DEC and are therefore binding on the DEC.

Recognizing the problems created by local control, born mostly of political consideration, the legislature in 1991 amended the MLRL to strengthen its supersedure provision.

The MLRL currently provides localities with significant input, but through the uniform state system of regulation, rather than through local laws.

LABOR CONCERNS

If enacted, this legislation would increase project costs and put at risk the jobs of 65,000 hard-working skilled tradespeople working within the jurisdiction of the Building and Construction Trades of Nassau and Suffolk and 100,000 additional workers within the jurisdiction of the Building and Construction Trades of Greater New York.

Trades are already challenged with the reduction of permitted sand mining facilities on Long Island from 78 down to 23 sites.

Operating Engineers would eliminate an immediate 54 direct jobs. The total direct and indirect job loss is estimated at 175 positions, costing more than $75.5 million in salaries and reducing the Suffolk County GNP by over $36 million.

Loss of local aggregate material will jeopardize major projects of significance for the region, such as Brookhaven Labs, Gateway Project (Northeast Corridor), Nassau Hub, Ronkonkoma Hub, and Port Authority airport revitalization projects.

SCIENTIFIC NOTES

Hydrogeologic and geologic study of sites are already part of the mine permitting process. There has never been any evidence of groundwater contamination from strictly mining sites or sites storing inert construction materials.

Iron and manganese are commonly found occurring naturally in Long Island groundwater and are not introduced by the mining process.

Mining permits require groundwater quality and flow directions be monitored for the future life of the project. If another industrial or commercial facility was located at the mine site, there are no requirements for investigating groundwater quality.

Detailed restoration and reclamation plans are required to ensure future use of the site is environmentally responsible. In addition, the mine operators maintain surety bonds to guarantee financial resources are available to achieve a reclamation in line with approved plans.

EXHIBIT F

COURT OF APPEALS
OF THE STATE OF NEW YORK

TOWN OF SOUTHAMPTON; ASSEMBLYMAN FRED W. THIELE, JR.; 101CO, LLC; 102CO NY, LLC; BRRRUBIN, LLC; BRIDGEHAMPTON ROAD RACES, LLC;CITIZENS CAMPAIGN FOR THE ENVIRONMENT; GROUP FOR THE EAST END; NOYAC CIVIC COUNCIL; SOUTHAMPTON TOWN CIVIC COALITON; JOSEPH PHAIR; MARGOT GILMAN; and AMEILIA DOGGWILER,

Petitioners-Respondents,

-against-

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; SAND LAND CORPORATION and WAINSCOTT SAND AND GRAVEL CORP.,

Respondents-Appellants.

AFFIDAVIT OF JOHN B. TINTLE

Appellate Division Third Dept Docket No. 532083

Albany County Clerk Index No. 902239/19

State of New York)
) ss:
County of Suffolk)

JOHN B. TINTLE, being duly sworn, deposes and says:

1. I am the President of Respondent-Appellants Sand Land Corporation, the current owner of the 50-acre mine located north of Middle Line Highway and east of Millstone Road in Bridgehampton, and the majority equity interest in Respondent-Appellant Wainscott Sand & Gravel Corporation, the operator of the sand and gravel mine at the site. In this capacity, I oversee the operations at the

mine.

2. I submit this Affidavit, based upon personal knowledge, in support of the Respondents-Appellants Sand Land Corporation and Wainscott Sand & Gravel Corporation (collectively "Sand Land Appellants") motion for a discretionary stay of the Appellate Division, Third Department's memorandum and order entered May 27, 2021 (the "Order").

3. The property has been dedicated to mining for over half a century, long predating the Mind Land Reclamation Law and a local zoning law rendering the mine a prior nonconforming use. The Town of Southampton has issued certificates of occupancy acknowledging the prior nonconforming mine use, along with the property's use for the processing and sale of aggregate.

4. The New York State Department of Environmental Conservation ("NYSDEC") issued the first MLRL permit for the mine in 1981 and continued to issue renewal permits and modifications; increasing the acreage affected by mining to develop the property's aggregate resources. In 1998, the NYSDEC renewed and transferred the MLRL permit to Sand Land Corporation. The NYSDEC continued to renew and modify the affected acreage for subsequent permit terms, with the last MLRL permit issued and then modified in 2019, and further modified in 2020.

5. Absent a stay, the mine will not be able to access the reserves necessary to continue to satisfy the local demand for aggregate. The mine is the only source

within a ten-mile radius, a haul distance of approximately thirty minutes.

6. As with any capital-intensive business, substantial investments were made with corresponding carrying and overhead costs that continue regardless of the whether the mine generates any income.

7. Similarly, we have invested over the years in recruiting, training, and retention of the skilled workers to operate the mine. The mine has eight employees, with average of twenty years of experience.

8. The NYSDEC filed an Affidavit of Intent to Seek Leave to Appeal the Order and invoked the automatic stay under CPLR § 5519(a)(1) on June 14, 2021. After the NYSDEC invoked the automatic stay, certain of the Petitioners-Respondents filed an action seeking a temporary restraining order and injunction based on the Order, asserting that Sand Land Appellants are mining without an MLRL permit. The Supreme Court and the Appellate Division, Third Department, both denied the Petitioners-Respondents motions for a temporary restraining order and the action for an injunction is pending. A three to two majority of the Appellate Division, Third Department, panel denied the NYSDEC's and Sand Land Appellants' motion for leave to appeal the Order.

9. The mine has limited stockpiles of previously mined materials that will be exhausted in short order. Absent a stay, there is insufficient work or revenue to sustain the employees. Once they are laid off, the company expects that it would be

difficult to regain their services after a prolonged shuttering of the operations or replace them with equally experienced and skilled workers.

10. Absent the stay, long standing customers will necessarily need to establish relationships with other suppliers to meet their requirements. Additionally, given the naturally high levels of demand during construction season for timely deliveries to construction jobsites, the uncertainty occasioned by the absence of a stay is likely to turn customers toward seeking greater certainty of supply to meet immediate needs.

11. The uncertainty and inability to continue to draw upon the mine's reserves during the pendency of Respondents-Appellants' motion for leave to appeal and an appeal forecloses bidding on or entering contracts to supply aggregate.

12. None of the losses occasioned by the results of the Order will be made up should an appeal subsequently reinstate the nullified permit and modification. The construction jobs for which sales were lost will have been sourced by other suppliers, employee wages and benefits will be lost, and capital investments idled.

13. Sand Land Appellants are expeditiously seeking appellate review of the Order and respectfully request a discretionary stay of the order to allow the continuation of mining operation that has been providing the aggregate required for contractions jobs and infrastructure in the area for over sixty years.

John B Tintle

Sworn to before me
this 20th day of June 2021

NOTARY PUBLIC

DAVID E. EAGAN
Notary Public, State of New York
Registration No. 02EA6392526
Qualified in Suffolk County
Commission Expires June 6, 2023

State of New York)
) ss:
County of Suffolk)