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-Appellants,

– against –

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

Respondents-Respondents.

OPPOSITION TO MOTION FOR LEAVE TO APPEAL AND A STAY

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(for continuation of counsel, see inside cover)

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Rule 500.1(f) Corporate Disclosure Statement

Petitioner-Appellants 101Co, LLC; 102Co NY, LLC; BRRRubin, LLC; Bridgehampton Road Races, LLC, Citizens Campaign for the Environment; Group for the East End; and Noyac Civic Council are not publicly held corporations. They have no subsidiaries or affiliates that are publicly traded.

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 AMELIA DOGGWILER;

Petitioners-Appellants,

- against –

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

Respondents-Respondents.

AFFIRMATION IN OPPOSITION TO RESPONDENTS' MOTIONS FOR LEAVE TO APPEAL AND FOR APPELLATE STAY

Appellate Division
Third Dept. Case No.:
532083

Supreme Court, Albany
County Index No.:
902239/19

David H. Arntsen, an attorney duly admitted to practice law before the courts of the State of New York, affirms the following to be true under the penalties of perjury:

1. I am with Volz & Vigliotta, PLLC, attorneys for Petitioner-Appellant Town of Southampton ("the Town") in the above-referenced matter. I am familiar

with the proceedings as counsel for the Town in the underlying special proceeding and successful appeal before the Appellate Division, Third Department.

2. I have conferred with counsel for Petitioner-Appellants 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, and all join in the arguments submitted herein.[1] Petitioner-Appellants will be referenced herein collectively as "Motion Respondents".[2]

3. This affirmation is submitted in opposition to the instant motion by Respondents-Respondents Sand Land Corporation and Wainscott Sand and Gravel Corp. (jointly "Sand Land" or "Movants") seeking leave to appeal to this Court from the Memorandum and Order of the Appellate Division, Third Department dated May 27, 2021 (the "Order") interpreting Environmental Conservation Law ("ECL") § 23-2703(3), and seeking a stay of the Order pursuant to CPLR 5519(c).

[1] Assemblyman Fred W. Thiele, Jr. was a petitioner in the proceedings before Supreme Court but was dismissed for lack of standing. Assemblyman Thiele did not appeal the dismissal and was not an Appellant before the Appellate Division, Third Department. Southampton Town Civic Coalition was an Appellant before the Appellate Division, but I am advised that it has since been dissolved and takes no further part in these proceedings.

[2] Sand Land uses the designation "Sand Land Appellants"; however, Petitioner-Appellants were the successful appellants at the Appellate Division and this Court has not granted leave to appeal. Therefore, Sand Land is not actually an "Appellant" at this point. Petitioner-Appellants will use the designations "Movants" and "Motion Respondents" for clarity and accuracy.

4. Sand Land's caption identifies the New York State Department of Environmental Conservation ("DEC" or "Department") as a "Respondent-Appellant." However, it is essential to note, that the DEC has not filed a motion seeking leave to appeal to this court and is not an Appellant in this matter.

5. ECL § 23-2703(3) commands the DEC to prioritize the protection of Long Island's drinking water by prohibiting DEC from issuing, or even processing, applications for permits to mine in Nassau and Suffolk County towns in which mining is not permitted pursuant to local zoning laws or ordinances in the area proposed to be mined. In fact, unless the Town's Chief Administrative Officer first affirms to DEC that mining is not prohibited by local zoning laws or ordinances, DEC must refrain from processing that application. As such, the Legislature clearly articulated, as the Appellate Division correctly held, that economic balancing must yield to the environmental concerns of the communities that depend on the sole source aquifer of Suffolk County for drinking water.

6. Sand Land seeks to have this Court, by an act of judicial fiat, legislate an amendment to ECL § 23-2703(3) to exempt nonconforming mines from the statute's mandate as expressed clearly within the statute's text. Sand Land's request is improper and does not support granting leave to appeal to this Court.

7. Moreover, Sand Land's request for a stay is baseless as it is premised on a distortion of the very concept of the *status quo,* and potentially delayed mining does not present irreparable harm.

8. We respectfully urge that Sand Land's motions are meritless and should be denied in their entireties.

BACKGROUND

9. Movants' limited recitation of the factual background in this case ignores significant events, including that the DEC originally denied Sand Land's application for a permit modification for essentially the same expansion granted in the separate 2019 permits annulled in the Order; that the DEC's original denial noted that DEC staff had not made the required statutory inquiry; that Sand Land appealed that denial; that the Chief Administrative Law Judge ruled that ECL § 23-2703(3) barred further proceedings on that application; and that the "settlement" (vaguely alluded to in the current motion papers and also voided by the Third Department's decision) improperly sought to resolve that proceeding through the permit process. This history is set forth in the Appellate Division Order and the Verified Petition (R. 61-73).

10. Contrary to Movants' characterization, and as is discussed further below, the Appellate Division Order is a straightforward interpretation of the statutory language and is in accord with the DEC's interpretation of the statute, the

decision of the Chief Administrative Law Judge, and case law from other departments. The DEC has accepted the Appellate Division's construction and application of ECL § 23-2703(3) and is not appealing its ruling to this Court. Clearly, the DEC and the State Attorney General do not consider this an issue of statewide significance warranting Court of Appeals review.

THIS MATTER DOES NOT RAISE LEAVE WORTHY ISSUES

a. No Issue of Statewide Importance

11. The Appellate Division Order simply applied ECL § 23-2703(3), which only applies to mines in Nassau and Suffolk Counties, as clearly written, without indulging in improper judicial legislating. No legal issue "of statewide importance" is presented in the motion for leave to appeal to the Court of Appeals.

12. Movant ignores the singular, regional application of ECL § 23-2703(3) throughout its motion papers. It is undisputed that the statute applies only on Long Island and, as is particularly significant herein, Suffolk County. *See* Memorandum and Order p. 3 & 7 (annexed to the Motion as Exhibit A). *See also* Affidavit of Robert Yager ¶ 7 (annexed to the Motion as Exhibit E-1) (noting that ECL § 23-2703(3) could only apply to at most 23 permitted mines on Long Island "all located in Suffolk County."). The proper construction and application of ECL § 23-2703(3) is relevant in only two of New York's 62 counties, Nassau and Suffolk. *See also*, *Valley Realty Dev. Co. v. Jorling*, 217 A.D.2d 349, 354 (4th Dept. 1995).

13. In *Valley Realty*, the Appellate Division, Fourth Department noted the distinction between how DEC must process mining permit applications statewide as opposed to mining permit applications on Long Island. While setting forth the general procedure for processing applications throughout New York, the Court noted: "The single exception … is found in ECL 23-2703(3), which prohibits DEC from processing a mining application if a local zoning law prohibits mining within an area in counties having a population of one million or more and whose primary source of drinking water is from a designated sole source aquifer." *Valley Realty*, 217 A.D. 2d at 354. Therefore, the *Valley Realty* decision specifically distinguished the facts of that case concerning a mine not on Long Island from the facts relevant to mines on Long Island.

14. Here, this case involves the expansion of a sand mine in the Town of Southampton that sits over the sole source aquifer. Mine expansions that seek to encroach upon Long Island's aquifer are surely matters of concern to the Town, its residents, and other Long Islanders dependent upon it for clean drinking water. Such local expansions are not, however, a matter of statewide importance warranting Court of Appeals review.

15. The DEC's and Attorney General's decision not to seek leave to appeal to this Court is illustrative of the clear conclusion that the Order does not present a legal issue of statewide importance.

b. No Novel Questions of Law are Raised

16. The Order does not present a novel question of law requiring Court of Appeals review. As Sand Land notes, the Appellate Division Order is the first Appellate Division decision directly interpreting ECL § 23-2703(3).

17. The Third Department's determination is also not "novel" as it is based upon settled principles of law and established Court of Appeals precedent regarding the interpretation of a statute. *See Fulton v. Metro. Life Ins. Co.,* 2 Misc. 55, 20 N.Y.S. 989, 989 (Com. Pl. 1892) (underlying decision citing to Court of Appeals precedent is not leave worthy).

18. Movants paradoxically and erroneously suggest that the Order creates an irreconcilable conflict between the Third Department and the Fourth Department's decision in *Valley Realty*. Notably, Sand Land acknowledges that "*Valley Realty* did not rule on the interpretation of ECL § 23-2703(3)." Moreover, and as noted, Sand Land fails to apprise this Court of the direct statement by the Fourth Department in *Valley Realty* on the applicability of ECL § 23-2703(3) to only Long Island, where DEC is prohibited from processing a mining application if a local zoning law prohibits mining within an area proposed to be mined. *Valley*

Realty, 217 A.D.2d at 354. As such, the Fourth Department is in accord with the Third Department as to the meaning of ECL §23-2703(3). [3]

19. Sand Land incorrectly asserts that the Appellate Division's plain language interpretation and application of ECL § 23-2703(3) conflicts with *Syracuse Aggregate Corp. v. Weiss*, 51 N.Y.2d 278, 284 (1980), and its "diminishing asset doctrine."

20. *Syracuse Aggregate* is wholly irrelevant to the interpretation of ECL § 23-2703(3). While ECL § 23-2703(3) references and is explicitly deferential to local municipal zoning, the statute does not apply or enforce local zoning law. Instead, ECL § 23-2703(3) reflects the Legislature's determination as to the preeminence of local zoning laws in protecting Long Island's sole source aquifer, which must be considered when determining whether mining permit applications on Long Island may be processed.

21. Sand Land does not contend that it has a constitutional right to a mining permit from the DEC, nor could they. *See* 6 NYCRR § 421.3 (a) (setting forth grounds for DEC to "refuse to renew a permit"). *See also Wager v. State Liquor Authority*, 4 N.Y.2d 465, 468 (1958) ("'There is no inherent right in a citizen'

[3] Sand Land mischaracterizes *Town of Southampton v. New York State Dept. of Environmental Conservation,* Index No. 3931/2019, Slip Op. at 6 [Sup. Ct. Suffolk County Dec. 7, 2020], to suggest a conflict between that court and the Appellate Division, Third Department. Supreme Court's decision indeed comports with the Third Department's analysis as to the proper inquiries to be made by DEC when it receives a mining permit application on Long Island.

to engage in the business of selling intoxicating liquors . . . the test of the legality of the exercise of the discretionary power is solely whether the agency acted arbitrarily or capriciously") (internal citations omitted).

22. This Court has long recognized the authority of the Legislature to limit the use of property to protect the public health and welfare. In *Town of Islip v. Cuomo*, 64 N.Y.2d 50, 58 (1984), the Court upheld the Legislature's passage of the Long Island Landfill Law (ECL § 27-0704). The Law "sought to prevent contamination of the aquifer by prohibiting new or expanded landfills in Nassau and Suffolk Counties, and by phasing out existing landfills, strictly limiting their operation after 1990." *Soc'y of Plastics Indus., Inc. v. Cty. of Suffolk*, 77 N.Y.2d 761, 764 (1991). *See also, Dittmer v. County of Suffolk, New York,* 59 Fed. Appx 375, 378 (2d Cir. 2003) (upholding the Long Island Pine Barrens Maritime Reserve Act passed "to allow the state and local governments to protect, preserve and properly manage the unique natural resources of the Pine Barrens–Peconic Bay system" as rationally related to a legitimate state interest of "protecting the largest natural drinking water source in New York").

23. Movant notes that the "diminishing asset doctrine" applies to landfills, citing to *Jones v Town of Carroll,* 15 N.Y.3d 139 (2010). However, Movant fails to acknowledge that the Court of Appeals' finding of vested rights therein explicitly recognized that those rights are "subject to regulation by DEC". *Id.* at 145-46.

24. Like the Long Island Landfill Law, ECL § 23-2703(3) was passed in clear recognition of the particular need to protect Long Island's sole source aquifer and thus its fragile drinking water supply. The Legislature's determination to limit the circumstances under which a mine permit may be issued is a similarly reasonable and proper action. "[C]ourts may not substitute their judgment for that of the Legislature as to the wisdom and expediency of the legislation." *All. of Am. Insurers v. Chu*, 77 N.Y.2d 573, 605 (1991) (quoting *Matter of Malpica–Orsini*, 36 N.Y.2d 568 (1975)).

25. Notably, the Appellate Division's interpretation is consistent with the DEC's initial published interpretation. In 1992, DEC promulgated Mined Land Reclamation Permit Processing Technical Guidance Memo MLR92-2 ("TGM") providing for the implementation of the amendment contemporaneous to its enactment. In pertinent part, the TGM provides as follows:

> In Region 1 … DEC accepts the determination of local prohibition only from the Chief Administrative Officer (CAO). For purposes of application completeness, the Department will rely exclusively on the local government CAO's determination concerning prohibition and will not involve itself in matters of dispute between local government and the applicant. Upon receipt of the statement of local prohibition, declare the application incomplete and notify the applicant that processing cannot go forward unless local prohibition is removed.

Department of Environmental Conservation, Mined Land Reclamation Permit Processing, Technical Guidance Memo MLR92-2, *available at* https://www.dec.ny.gov/lands/5922.html.

26. Movants' assertion that the Order conflicts with *Matter of Frew Run Gravel Prods. v Town of Carroll,* 71 N.Y.2d 126, 130 (1987), by removing the Town's authority to allow nonconforming mining, is irrational. If the Town wants to allow continued mining, it has the ability to do so by amending its zoning regardless of ECL § 23-2703(3) and the Order. Respondent's submission of the affidavit of a professional lobbyist demonstrates the appropriate remedy for changes to the ECL is to lobby the Legislature and Town Boards, not the courts.

27. Movants have failed to raise a novel question of law that this Court needs to address.

THE COURT SHOULD DENY SAND LAND'S REQUEST FOR A DISCRETIONARY STAY

28. Sand Land's failure to present a leave worthy issue compels denial of the requested discretionary stay.

29. Sand Land asserts that a discretionary stay is appropriate to preserve the *status quo*, but stands the concept of the *status quo* on its head.

30. Motion Respondents obtained an injunction in Supreme Court and the Appellate Division to bar mining over part of the site and preserve the *status quo*. (R. 13). It is absurd to conclude that Motion Respondents' ultimate success on the

merits of this proceeding transformed the *status quo* from barring mining to permitting mining.

31. Whether it is seeking to stop construction of a building, cutting of trees on property, or to stop unpermitted mining, injunctions and stays to preserve the *status quo* are issued to preserve the affected land in its then existing state. *Green Harbour Homeowners 'Ass'n, Inc. v. Ermiger*, 67 A.D.3d 1116, 117 (3d Dept. 2009) (removal of trees constitutes irreparable harm supporting injunction). If the party challenging the activity prevails, the affected land has not been further irreparably changed.

32. Granting a stay to allow further mining would permanently alter the *status quo* and potentially lead to Petitioner-Appellants' victory being purely pyrrhic.

33. Instead, the Order should remain in effect to prevent Sand Land from altering the natural environment permanently and irreparably without a valid permit from the DEC.[4]

34. If Sand Land's mining ceases immediately the sand will still be there at the end of the appellate process. If Sand Land prevails, the only consequence will have been to postpone monetization of that sand.

[4] Notably, Sand Land does not propose a bond or other measure that could be used to replace sand illegally mined in the event that this Court grants leave to appeal but upholds the vacating of the permits.

35. Monetary damages like those set forth in Movants' papers do not establish irreparable harm supporting a stay.[5] *See e.g., Dhillon v. HealthNow New York, Inc.*, 32 A.D.3d 1197, 1198 (4th Dept. 2006) ("Loss of employment does not constitute irreparable damage.")

36. Allowing the environment to be irretrievably altered cannot be the "*status quo*" the Court intends to maintain.

WHEREFORE, the Court should deny Sand Land's motions seeking leave to appeal and a discretionary stay.

Dated: October 1, 2021

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[5] Motion Respondents note that the self-serving and speculative Affidavit of John B. Tintle is undated but has a notary date of June 20, 2021. Curiously, the affidavit references events post-dating the notary date.