To be Argued by:
GREGORY M. BROWN
(Time Requested: 20 Minutes)

APL-2022-00017
Appellate Division–Third Department Case Nos. 529380 and 532083
Albany County Clerk's Index No. 902239/19

Court of Appeals

of the

State of New York

In the Matter of

TOWN OF SOUTHAMPTON; 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-Respondents,

– and –

ASSEMBLYMAN FRED W. THIELE, JR.,

Petitioner,

– against –

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondent-Respondent,

– and –

SAND LAND CORPORATION and WAINSCOTT SAND AND GRAVEL CORP.,

Respondents-Appellants.

BRIEF FOR RESPONDENTS-APPELLANTS

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Date Completed: April 15, 2022

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.

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QUESTIONS PRESENTED

1. Does "an application for a permit to mine" in section 23-2703(3) of the Mined Land Reclamation Law (ECL art. 23, tit. 27) apply to applications to renew an MLRL permit for successive terms or modify the permit to excavate within the boundaries of a property previously permitted under the MLRL?

The Appellate Division, Third Department, answered this question in the affirmative, holding that ECL § 23-2703(3) applies to all MLRL applications. Appellants Sand Land Corporation and Wainscott Sand and Gravel Corp. respectfully submit that this Court should answer this question in the negative.

2. In amending the MLRL in 1991, did the Legislature intend to eliminate property rights to prior nonconforming mining usage on Long Island by inserting the dependent clause "if local zoning laws or ordinances prohibit mining uses within the area proposed to be mined" in ECL § 23-2703(3)?

The Appellate Division, Third Department, answered this question in the affirmative. Appellants Sand Land Corporation and Wainscott Sand and Gravel Corp. respectfully submit that this Court should answer this question in the negative.

PRELIMINARY STATEMENT

Appellants Sand Land Corporation and Wainscott Sand and Gravel Corp. (collectively, "Sand Land") respectfully submit this Brief in support of their appeal of the memorandum and order entered in this matter on May 27, 2021 ("Order"). [R 9613-9628][1] The Order raises the question of whether the Legislature's enactment of section 23-2703(3) of the Mined Land Reclamation Law (ECL art. 23, tit. 27) ("MLRL") eliminates property rights to prior nonconforming mining usage, with the consequence of shuttering such mines operating in Nassau and Suffolk counties. For the reasons set forth in this Brief, it is manifestly clear that the legislative intent is that ECL § 23-2703(3) should not be construed to such effect.

The Sand Land mine has been operating on a 50-acre property in the Town of Southampton for at least sixty years. It is undisputed that Sand Land has a property right to nonconforming mining usage under this Court's precedent. The mine is still operating today by virtue of this Court's stay of the Order. [R 9612] Absent a ruling by this Court providing clear instruction on the proper construction of section 23-2703(3), the Appellate Division's interpretation will result in the closure of existing mines in Suffolk and Nassau counties. The Appellate Division erred in not construing ECL § 23-2703(3) in a manner the furthers the Legislature's expressed "policy of this state to foster and encourage the development of an economically

[1] References to "R__" are to the Record on Appeal. References to "C__" are to the Appellant's Compendium.

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(1). As the dissenting opinion summarized, there is sensible and practical construction that gives due consideration to this expressly stated legislative purpose.

The fatal flaw in the Order's analysis is a singular focus on ECL § 23-2703(3), without regard to the MLRL's defined terms and integrated structure. The result, which the Order acknowledges [R 9619 n 6], is a departure from this Court's controlling precedent on the scope of the constitutional protection afforded to the property right of prior nonconforming mining usage. When presented with alternative interpretations, the Appellate Division, Third Department, erred in favoring an interpretation that ascribes to the Legislature an intent to deny property rights that this Court has repeatedly reaffirmed are constitutionally protected.

The MLRL's permitting structure is that of a single permit for the property that the permittee is entitled to successively renew as it progresses through the excavation of the mineral reserves over time to reclamation. The State Environmental Quality Review Act ("SEQRA") (ECL art 8) is integrated by provisions within the MLRL so that, together with the permitting structure, the MLRL directs agency action to accomplish the declared policies of the state. Construing ECL § 23-2703(3) together with MLRL's other provisions it is

manifestly clear that the Legislature did not intend to upend the structure of the MLRL and create a geographic divide for the property rights of the regulated community.

The Order derives legislative intent based solely upon the limited geographic reach of ECL § 23-2703 (3). Based on this limitation, the Order derives a legislative intent to eliminate property rights assumedly for the protection of groundwater. However, the location of the property within such a designated area does not suggest an intent to eliminate constitutionally protected rights. On the contrary, the circumstances surrounding the 1991 MLRL amendments do not support that the Legislature considered mining a threat to groundwater quality.

In the record of this case, the DEC reported it has groundwater sampling results going back decades from mine sites in Suffolk County and the data has not shown any groundwater impacts from mining. [R 2713] In the portion of the Supreme Court's Judgment on Petitioners-Respondents' SEQRA claim, which the Appellate Division affirmed, the Supreme Court found that the record "contains ample support for DEC's determination that the deepening of the mine will not have a significant impact on the environment . . ." [R 42] The Appellate Division erred in its assumption of the legislative purpose of ECL § 23-2703(3), where a purpose, far less revolutionary, to merely establish a sequence for the New York State Department of Environmental Conservation's ("DEC") processing of MLRL

permits is evident.

As detailed below, and as the Supreme Court's decision and the Appellate Division's dissenting opinion explain, Sand Land's applications do not constitute "an application for a permit to mine" under ECL § 23-2703(3). Under the MLRL's definitions and other provisions, Sand Land already held a permit to mine to the full extent of the boundaries of its land when it applied to renew and then modify that permit. Once the MLRL permittee has obtained the initial permit, its application to renew, or modify within those boundaries, is not within the scope of the applications subject to ECL § 23-2703(3). Nor does ECL § 23-2703(3) apply when the area is within the boundaries of the property that has been legally recognized as prior nonconforming mining use.

Sand Land respectfully requests that this Court hold that ECL §§ 23-2703(3) and 23-2711(3) did not apply to the DEC's processing of Sand Land's permit renewal and modification applications. This ruling is necessary to construe the MLRL consistent with the express legislative purpose of fostering a sustainable mining industry in New York and to preserve the constitutional protection that this Court has repeatedly held extends to the property right to nonconforming mining usage.

STATEMENT OF JURISDICTION

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. Sand Land moved this Court for leave to appeal, which this Court granted by an order issued on February 15, 2022. [R 9612] Therefore, this Court has jurisdiction. CPLR 5602(a)(1)(i).

The questions raised on this appeal were raised and preserved before the Supreme Court, Albany County, initially in the answers to the Petition and Supplemental Petition, [R 3536, 2672] and then in argument before the Supreme Court [R 9529-9546] and reviewed by the Supreme Court [R 39-41] and then reviewed on appeal to the Appellate Division, Third Department. [R 9617-9623]

STATEMENT OF FACTS

A. Background

This appeal arises from a CPLR Article 78 challenge to the New York State Department of Environmental Conservation's ("DEC") renewal of Sand Land's Mined Land Reclamation Law (ECL art 27, tit 23) ("MLRL") permit in March 2019 and subsequent modification of the renewed permit in June 2019. [R 3379-3383, 3499-3505] The mine has been operating on a 50-acre property in the Town of Southampton for at least sixty years. [R 2861]

Before the 1975 effective date of the MLRL, Sand Land's predecessor in

interest, Bridgehampton Material & Heavy Equipment Corp. ("Bridgehampton Material"), had mined approximately five of the fifty acres of the property, with 3.1 acres of the five acres mined to a depth of about 110 feet AMSL. [R 2707-2708]

Bridgehampton Material's initial MLRL application was to mine mineral reserves of "[s]and, marl, gravel, [and] bankrun," in a "geologic deposit of sand and loam" with an anticipated life of mine of 100 years. [R 2729] The mine plan submitted with the initial application indicated an area of 20 acres would be mined within the 50-acres. [R 2732-2733, 2736] The "life of mine" is a DEC concept adopted for purposes of compliance with SEQRA, under which DEC evaluates initial applications to consider potential impacts for the anticipated duration, area, and reclamation, and is described in DEC policy documents. [R 2706 ¶ 10, 2737-2741]

An initial MLRL permit application requires submission of a Mined Land-Use Plan. ECL § 23-2711(2). The MLRL specifies its required contents, which includes, a mining plan and a reclamation plan. ECL § 23-2713. The mining plan, among other things, identifies the boundaries of the property controlled by the permittee and the area within to be affected by mining during the permit term. ECL § 23-2713(1)(a).

At the time Bridgehampton made its initial MLRL application, applicants could select a permit term of one year or three years (ECL § 23-2711[2] [1974]) and

the initial permit application requested a three-year term. [R 2729] DEC issued the initial MLRL permit to Bridgehampton Material in 1980. [R 2707]

When Bridgehampton Material first applied to renew its permit, it changed its mine plan to increase the area to be mined to 31.5 acres. [R 2708] The DEC renewed the MLRL permit for the 50-acre property with a mine area of 31.5 acres in 1985. [R 2734] Appellant Sand Land Corporation acquired Bridgehampton Material's interests in the property and became the MLRL permittee in 1998. [R 84-85] Since the 1985 renewal, DEC successively renewed the MLR permit for additional terms as the excavation progressed. DEC last renewed Sand Land's permit in 2019 and that renewal is a subject of this appeal. [R 6-7]

As noted above, approximately five acres of the property were affected by mining before the MLRL came into effect. Historically, an area of 3.1 acres, referred to as the "stump dump," within those five acres had been used to dispose of trees stumps and vegetation and then was re-excavated and used to stockpile sand. [R 2708-2709] The 3.1 acres were surrounded by actively mined areas after the initial permit, "and was understood and treated by mine inspectors as part of the total permitted acres," and demarcated as within the life of mine in the field. [R 2708 ¶ 17]

The Town eliminated mining as an allowed use in 2010. [R 1100-1102] At that time, Sand Land was mining under an MLRL permit term expiring October 5,

2013. [R 85-87] The Town eliminated mining as an allowed use with the acknowledgment that mining would continue under the MLRL with DEC oversight. [R 1397-1398] There are six mines in the Town that continue as prior nonconforming uses. [R 9622 n 2]

The Town of Southampton's Chief Building Inspector issued a certificate of occupancy in 2016 allowing for "the operation of a sand mine, including the storage, sale and delivery of sand" as a prior nonconforming use. [R 2828] The Chief Building Inspector issued prior certificates of occupancy allowing mining as a prior nonconforming use. [R 111, 1158] The 2016 certificate of occupancy was issued to conform to court rulings on the scope of Sand Land's prior nonconforming use rights in which the Appellate Division, Second Department, among other things, upheld a zoning board of appeals determination that Sand Land's mine is allowed under local zoning as a prior nonconforming use. *See Matter of Sand Land Corp. v. Zoning Bd. of Appeals of Town of Southampton*, 137 A.D.3d 1289, 1292 (2d Dep't 2016), *lv. denied* 28 N.Y.3d 906 (2016).

In addition to mining, over the years the operations on the property included the receipt of vegetative organic yard waste and processing pursuant to a registration obtained under the applicable DEC's regulation [R 2834-2839] and a certificate of occupancy. However, the scope of this prior nonconforming use was disputed over the years. *See Matter of Sand Land Corp.*, 137 A.D.3d at 1290-92. Sand Land ceased

those operations in 2018 under an agreement with the DEC [R 3252-3259], described below.

In 2014, Sand Land applied to modify the permit to increase the area to be mined by 4.9 acres and excavate to a depth of 120 feet AMSL ("2014 Modification Application"). [R 1397 ¶ 7, 2775-2785] The increase in acreage included 1.9 acres not previously affected by mining and the stump dump that was identified in prior mine plans as having been mined and used to stockpile sand but mined before the 1975 effective date of the MLRL. [R 1396-1397, 1400-1403] Sand Land proposed to continue processing vegetative waste. [R 1397-1398] The DEC determined that approving the proposed modification would not result in any significant adverse environmental impacts and issued a negative declaration under the State Environmental Quality Review Act (ECL art. 8) ("SEQRA"). [R 2786-2788]

In April 2015, the DEC denied the 2014 Modification Application. [R 1397-1398, 2811] Sand Land requested a hearing to contest the DEC's denial of the 2014 Modification Application. [R 1398 ¶ 8]

In May 2015, the DEC issued a notice of violation to Sand Land for mining outside the permitted area. [R 436 ¶ 13] In June 2016, the DEC issued a second notice of violation to Sand Land for failing to maintain area markers and deviating from the approved site plan and mulching vegetative waste outside of the designated area. [R 436] The DEC and Sand Land resolved these two notices of violation by an

administrative order on consent, effective November 10, 2016 ("2016 Consent Order"). [R 2843-2854]

Under the 2016 Consent Order, Sand Land paid a fine and agreed to submit a remediation plan subject to DEC approval. According to the schedule of compliance [R 2853-2854], Sand Land prepared an updated Mined Land-Use Plan including the stump dump within the revised Mined Land-Use Plan. [R 436 ¶ 14, 2855-2903]

During the administrative proceedings on the 2014 Modification Application, the assigned Administrative Law Judge ("ALJ") issued a procedural ruling that the 2014 Modification Application, which sought to add acreage and continue processing vegetative waste, could not be processed without the DEC first asking the Town whether the mine was allowed under the Town's local zoning laws and resolving any dispute as to its status ("ALJ Procedural Ruling"). [R 122-136] The ALJ affirmed its ruling in denying a motion to renew and reargue. [R 139-151] The ALJ reasoned that the 2014 Modification Application was an application for a new permit to mine under the Department's regulations promulgated under the Uniform Procedures Act (ECL art. 70). [R 131-132 citing ECL § 70-0115(2)(b), 6 N.Y.C.R.R. 621.11(h)(1)] The DEC Commissioner has not ruled on the ALJ Procedural Ruling, and the parties agreed to stay the administrative proceeding [R 1398 ¶ 8]

In September 2018, a second dispute arose between Sand Land and the DEC when the DEC issued a notice that it intended to modify Sand Land's permit ("2018

Notice of Intent to Modify"). [R 3164, 1398 ¶ 9] Sand Land requested a hearing to challenge it. [R 3170-3171] DEC issued the 2018 Notice of Intent to Modify claiming insufficient reserves were remaining to justify continuing to mine. [R 3164] The proceedings were subsequently closed after Sand Land and the DEC agreed to settle the dispute. [R 452-453 order of disposition]

On October 2, 2018, with its current permit term set to expire in April 2019, Sand Land applied to renew its permit for a five-year term ("2018 Renewal Application"). [R 3180] When DEC processed Sand Land's 2018 Renewal Application, it determined that the mine under the prior and existing permit terms included the 3.1-acre stump dump. It determined that the stump dump had been mapped and inspected during the current and prior permit terms as part of the mine. [R 2715-2717] It concluded that the stump dump had not been correctly identified on the prior permits because of the pre-1975 mining of that location. Approving the 2018 Renewal Application, the DEC issued the renewal with the corrected acreage of 34.5 acres, to reflect the 3.1-acre stump dump area, in March 2019 ("2019 Permit Renewal"). [R 3379-3383]

In February 2019, Sand Land and DEC reached a settlement agreement to address their disputes over the 2014 Permit Modification Application and the 2018 Notice of Intent to Modify ("Agreement"). [R 3252-3259] In the Agreement, DEC agreed, among other things, that, upon execution, it would revoke the 2018 Notice

of Intent to Modify, issue the permit renewal, and timely process an application to modify the permit, including a proposal to excavate to a depth of 120 feet AMSL within the existing footprint. [R 3256] For its part, Sand Land agreed, among other things, to increase the financial security posted for reclamation, surrender its 6 N.Y.C.R.R. Part 360 registration, cease vegetive waste-related operations, conduct groundwater monitoring, cease mining permanently within the 34.5-acres in eight years and finish reclamation within ten years. [R 3252-3259]

On March 12, 2019, Sand Land filed a second application to modify its permit but limited the modification to increasing the excavation depth to 120 feet AMSL without adding additional acreage ("2019 Permit Modification Application"). [R 3377] DEC determined that excavating to 120 feet AMSL within the existing mine footprint would not have a significant adverse impact on groundwater quality and issued a SEQRA amended negative declaration and notice of determination of non-significance ("SEQRA Amended Negative Declaration") [R 3384-3387] After a public comment period [R 3391], and issuing a summary and response to comments [R 3598-3510], the DEC approved the application and issued the modification on June 5, 2019 ("2019 Permit Modification"). [R 3498-3507] As discussed below, the Appellate Division's Order annulled the 2019 Permit Renewal and 2019 Permit Modification.

B. Proceedings

By notice of petition dated April 19, 2019, the Petitioners-Respondents, consisting of the Town of Southampton, property owners, and organizations (collectively referred to in this Brief as the "Town Respondents") brought the CPLR Article 78. [R 48-50][2] The Town Respondents requested an order, among other things, vacating and annulling the Agreement, the SEQRA Amended Negative Declaration and the 2019 Permit Renewal. [R 80] They also sought to enjoin DEC from processing the 2019 Permit Modification Application. [R 81] The Town Respondents sought a preliminary injunction to enjoin Sand Land from mining to the depth and area specified in the 2019 Permit during the pendency of the proceeding, which the Supreme Court denied. [R 14, 3539-3553] After DEC issued the 2019 Permit Modification, Town Respondents filed a supplemental petition seeking to annul it and a permanent injunction enjoining Sand Land from mining below 160 feet AMSL. [R 676-677]

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 DEC determinations, denied the petitioners' requested relief and dismissed the proceeding. As to the Town Respondents' claim that the DEC violated ECL § 23-2711(3) by not asking the Town about local zoning, and that ECL § 23-2703(3)

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[2] The Supreme Court ruled that Assemblyman Fred W. Thiele, Jr. lacked standing, and the ruling was not appealed. [R 9616 n 5]

prohibited the DEC from processing the applications, the Supreme Court held that neither provision applied because the challenged renewal and modification were for an existing mine to excavate deeper within the existing footprint. [R 39-41]

The majority of the Appellate Division, Third Department, panel disagreed, holding that ECL § 23-2703(3) did apply and prohibited the DEC from processing Sand Land's applications. [R 9620] The Appellate Division held: "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." [R 9619] The Appellate Division distinguished *Syracuse Aggregate Corp. v. Weise*, 51 N.Y.2d 278 (1980) by the reference to ECL § 23-2703(3)'s limited geographic reach and quoted *Buffalo Crushed Stone Inc. v. Town of Cheektowaga*, 13 N.Y.3d 88, 97 (2009) for the proposition that prior nonconforming uses may be eliminated. [R 9619 n 6, 9618]

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. [R 9621] Justice Pritzker identified those applications that are covered by ECL § 23-2703(3) as prohibiting processing a permit for a mine, or one seeking to expand outside of a prior nonconforming use," with the geographic area specified in the provision. [R 9622] With respect to Sand Land's applications, Justice Pritzker writes:

> Simply stated, although the Town prohibits new mining operations within its borders, it has recognized and permitted mining within 'the area proposed to be mined' (ECL 23-2703[3]) as a legitimate prior nonconforming use. . . 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.

[R 9622-9623 underscore in the original (citations omitted)]

The Appellate Division ordered the Supreme Court's Judgment modified, on the law, by reversing so much thereof as dismissed the petition, granted the petition, annulling the DEC's 2019 Renewal and 2019 Modification permitting actions, and, as modified affirmed the Judgement. [R 9628]

This Court granted Sand Land leave to appeal and a stay of the Order. [R 9621]

STATUTORY PROVISIONS

The Mined Land Reclamation Law (art. 23 tit. 27) provides as a Declaration of Policy (ECL § 23-2703), in part:

> 1. The legislature hereby declares that it is the policy of this 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 . . .
>
> 3. 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.

The MLRL supplies definitions as used in title 27 (ECL § 23-2705), and provides, in part

> 2. "Affected land" and "land affected by mining" means 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.
>
> 5. "Mine" means any excavation from which a mineral is to be produced for sale or exchange, . . . and all lands included in the life of the mine review by the department.
>
> 11. "Permittee" means any person who holds a valid mining permit from the department for the boundaries of the land identified in the mined land-use plan.

Regarding permit applications, the MLRL distinguishes between an application for a new mining permit and renewals, ECL§ 23-2711 provides, in part:

> 2. Applications for permits may be submitted for annual terms not to exceed five years. A complete application for a new mining permit shall contain the following : . .
>
> (b) a mined land-use plan;
>
> (c) a statement by the applicant that mining is not prohibited at that location; and . . .
>
> 3. Upon receipt of a complete application for a mining permit, for a property not previously permitted pursuant to this title, a notice shall be sent . . . to the chief administrative officer of the political subdivision in which the proposed mine is to be located . . .
>
> (a) The chief administrative officer may make a determination, and notify the department and applicant, in regard to : . .
>
> (v) whether mining is prohibited at that location.
>
> 6. . . . The department may refuse to renew a permit upon a finding that

> the permittee is in repeated or willful violation of any of the terms of the permit, this title or any rule, regulation, standard, or condition promulgated thereto . . .
>
> 11. Permits issued pursuant to this title shall be renewable. A complete application for renewal shall contain the following : . .
>
> (b) an updated mining plan map consistent with paragraph (a) of subdivision one of section 23-2713 of this title and including an identification of the area to be mined during the proposed permit term;
>
> (c) a description of any changes to the mined land-use plan . . .

The MLRL sets forth the requirements for a mined land-use plan (ECL § 23-2713) and provides, in part:

> 1. All mining and reclamation activities on the affected land shall be conducted in accordance with an approved mined land-use plan. The approved mined land-use plan shall consist of both a mining and a reclamation plan . . .
>
> (a) The mining plan shall consist of a written and graphic description of the proposed mining operation, including the boundaries of the land controlled by the applicant, the outline of potential affected acreage and the general sequence of areas to be mined through successive permit terms . . . .

ARGUMENT

POINT I.

THE APPELLATE DIVISION'S ORDER CONFLICTS WITH AND FAILS TO FOLLOW CONTROLLING COURT OF APPEALS PRECEDENT

A. This Court has held that a prior nonconforming use subject to the diminishing asset doctrine cannot constitutionally be limited to the extent of a DEC permit

This Court's standard of review affords a presumption of good faith on the part of the legislature and constitutionality for its mandates. *41 Kew Gardens Road Assoc. v. Tyburski*, 70 N.Y.2d 325 (1987); *Lighthouse Shores v. Town of Islip*, 41 N.Y.2d 7, 11–12 (1976); McKinney's Cons. Laws of N.Y., Book 1, Statutes, § 151. If the statute is ". . . susceptible of two constructions, one of which will make it constitutional and the other unconstitutional, the former will be adopted." McKinney's Cons. Laws of N.Y., Book 1, Statutes § 150, Comment at 324.

The Appellate Division construes ECL § 23-2703(3) as eliminating the property right of nonconforming mining usage. However, as this Court's precedent makes clear, that construction is constitutionally invalid. 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 N.Y.2d 278, 285-286 (1980). That is, "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." *Id.* at 285. "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*. at 285-86.

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 N.Y.3d 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 N.Y.3d 88, 92-93 (2009) ("consistent with the nature of quarrying—established a right of prior nonconforming usage").

This Court has applied the diminishing asset doctrine to hold that a Town cannot lawfully limit a prior nonconforming use to the extent of the area approved by the then existing DEC permit. *Jones v. Town of Carroll*, 15 N.Y.3d 139, 145 (2010). The Court has held that the diminishing asset doctrine that applies to mining also applies to a landfill. *Id.*

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 for the continuation of landfills to the extent authorized by the DEC permit. Any existing landfill, such as the Jones' 3-acre landfill, was prohibited from extending beyond the limits allowed by its DEC permit on the date the local law went into effect. Invalidating the law, this Court held that Jones had a right to operate a landfill on the "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." *Jones*, 15 N.Y.3d at 145-46.

During an MLRL permit term, the permittee is restricted to the area to be affected by mining for that term. *See, e.g.*, ECL § 23-2711(11)(b) (requiring renewal applicant to update mining plan to identify the area to be mined during the term). The Order construes ECL § 23-2703(3) as limiting the extent of nonconforming mining rights to the affected acreage during the extant permit term when the mine becomes nonconforming, or if it was already nonconforming, upon the effective date of the 1991 MLRL amendment.

Begging the question, the Appellate Division majority distinguishes *Syracuse Aggregate,* by noting that ECL § 23-2703(3) by its geographic limitation. [R 9619 n 6] As the dissent rightly points out, that observation does not distinguish the holding in *Syracuse Aggregate* of the constitutional protection afforded to property rights for a prior nonconforming mining usage. [R 9621 n 1]

The Appellate Division's construction of ECL § 23-2703(3) results in what

this Court previously held is an unconstitutional deprivation of the property right of nonconforming mining usage in *Syracuse Aggregate* – enacting a law that limits the area to less than property devoted to mining usage prior to it becoming nonconforming. The precedent of *Jones v. Town of Carroll* holds that such a termination is constitutionally invalid if that limitation is tied to the limitation within the current DEC permit. The Order interprets ECL § 23-2703(3) such that after the effective date of the local law rendering the mining use nonconforming, the mine cannot go beyond the area to be affected by mining under its current MLRL permit term because DEC would be unable to process an application. Thus, the Appellate Division's Order construes ECL § 23-2703(3) in a manner that renders it unconstitutional.

The Appellate Division's Order quotes *Buffalo Crushed Stone Inc. v. Town of Cheektowaga*, 13 N.Y.3d 88, 97 (2009) for the proposition "[t]he law . . . generally views nonconforming uses as detrimental to a zoning scheme, and the overriding public policy of zoning in New York State and elsewhere is aimed at their reasonable restriction and eventual elimination." [R 9618] The *Buffalo Crushed Stone* Court, in turn, was quoting *Toys R Us v. Silva*, 89 N.Y.2d 411(1996). 13 N.Y.3d at 97.

In *Toys R Us v. Silva*, this Court ruled on the applicability of a New York City zoning resolution that eliminated any nonconforming use when "'the active operation of substantially all the non-conforming uses. . . is discontinued' for a

continuous two-year period." 89 N.Y.2d 411, 420 (holding that abandonment provision applied in that case). It is notable the *Buffalo Crushed Stone* Court chose an abandonment precedent because it is in keeping with the MLRL's recognition of the possibility of elimination of prior nonconforming mine use by way of abandonment. *See*, ECL § 23-2709(j) (authorizing DEC to determine if a mining operation has been abandoned). In contrast, amortization has rarely been applied to mining, which by its nature is unique to the location of the mineral reserves. *See, Validity of provisions for amortization of nonconforming uses*, 8 A.L.R.5th 391 (identifying only two cases involving mines and, in both cases, applying amortization was ruled invalid).

Clearly, as construed by the Order, ECL § 23-2703(3) is not the elimination of the property right of nonconforming mining usage by way of voluntary abandonment. Just the opposite, the Order construes ECL § 23-2703(3) as legislative intent to "deprive the landowner of his use of the property as a quarry." *Syracuse Aggregate Corp.* 51 N.Y.2d at 286.

Sand Land respectfully submits that this Court should adopt an alternative construction from the one given below because the Order's construction of ECL § 23-2703 results in the elimination of constitutionally protected property rights.

B. The Appellate Division's construction of ECL § 23-2703(3) conflicts with the controlling precedent on the MLRL Supersession Clause (ECL § 23-2703[2])

In *Matter of Frew Run Gravel Prods. v Town of Carroll,* 71 N.Y.2d 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." The Court held that MLRL did not preempt "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." *Frew Run*, 71 N.Y.2d 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. The Legislature "codified *Frew Run's* holding in [the 1991] amendment to the MLRL's supersession clause." *Wallach v Town of Dryden*, 23 N.Y.3d 728, 753 (2014).

The Appellate Division, Third Department's interpretation of ECL § 23-2703(3) cannot be reconciled with this Court's 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, or eliminate in a reasonable fashion, the prior nonconforming usage.

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 N.Y.3d 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 N.Y.2d 668, 682 (1996).

Despite this clear precedent, the Order interprets ECL § 23-2703(3) as superseding such regulation. Dissenting, Justice Pritzker framed this observation of the Order’s result in terms of not requiring the Town to comply with Town law. [R 9623] The other side of the coin is that the Order’s interpretation denies the MLRL permit necessary to continue the constitutionally protected prior nonconforming usage; thereby denying effect to the Town’s zoning law expressly permitting the continuation of such prior nonconforming use.

In this case, the Town eliminated its local law regulating mining in 2010. It did so with the acknowledgment that mining would continue under the MLRL with DEC oversight. It also acknowledged specifically that Sand Land’s mine could continue to operate as a prior nonconforming use under local zoning. As interpreted by the Appellate Division, MLRL § 23-2703(3) prevents the Town from the very thing that the Town did in this case of eliminating mining as an allowed use with the expectation that it would continue as a prior nonconforming use. This Court should

reverse the Order because it interprets the MLRL contrary to controlling precedent on the scope of the MLRL's supersession clause, ECL § 23-2703(2).

POINT II.

THE APPELLATE DIVISION ERRED IN HOLDING THAT MLRL § 23-2703(3) APPLIES TO MINE PROPERTY PREVIOUSLY PERMITTED UNDER THE MLRL

Stripped of context, the interpretation of the MLRL § 23-2703(3) phrase "prohibit mining uses within the area proposed to be mined" as having the meaning ascribed to it by the Appellate Division has superficial appeal. However, the phrase must be considered in the context of the entire provision and the other provisions of the MLRL. 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 N.Y.3d 595 (2021).

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 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.'" *Est. of Youngjohn*, 36 N.Y.3d at 603-

04 (citations omitted). "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." *See Frew Run*, 71 N.Y.2d at 131.

Construing the entirety of ECL § 23-2703(3) with consideration and reference to the defined terms and other provisions of the MLRL demonstrates that it (1) applies only to an entirely new mine or the further development of an existing mine beyond its property boundaries, and (2) refers to the zoning status of the specific property proposed to be mined (and simply whether mining is allowed on that property, irrespective of whether it is as a permitted use or legally pre-existing nonconforming use). The Appellate Division erred by affording every application under the MLRL the status of "an application for a permit to mine." The Appellate Division compounded its error by concluding that the clause "prohibit mining uses within the area proposed to be mined" references zoning districts rather than the mine property.

A. ECL § 23-2703(3) considered with the other provisions of the MLRL demonstrates that it applies only to new mines and existing mines to be developed beyond their property boundaries

Once an MLRL permittee obtains the initial MLRL permit, the permittee has a permit for "the potential affected acreage . . . to be mined through successive permit

terms." ECL §§ 23-2705, 23-2713 (definition of permittee defining the scope of the permit by incorporating the definition of Mined Land-Use Plan). In other words, there is but one MLRL permit issued for a mine, in this case, the MLRL permit the DEC issued to Sand Land's predecessor in interest, Bridgehampton Materials, which is successively renewed. During a particular renewal term, the permittee identifies which part of the mine will be affected by mining during that specific term. ECL § 23-2711(11)(b).

Below, the Supreme Court concluded it is "nonsensical" to treat Sand Land's 2019 permit renewal and its subsequent modification as "an application for a permit to mine" under ECL § 23-2703(3) because Sand Land already had an MLRL permit that includes the acreage covered by the modification. [R 41]

Justice Pritzker, dissenting from the Appellate Division's majority decision, highlighted the MLRL's structure that reinforces that the 2019 permit renewal and subsequent modification is not an application for a permit to mine. [R 9621 citing ECL § 23-2711(3)] As Justice Pritzker's dissent highlights, the MLRL expressly distinguishes an initial application to mine "property not previously permitted under the [MLRL]" from renewing the permit for successive terms. ECL § 23-2711(3). Specifically, ECL § 23-2711(2) and (3) state the information required for the initial MLRL permit for a "new" mine permit application; whereas ECL § 23-2711(11) lists the information required when requesting the renewal of the MLRL permit.

In applying for a new MLRL permit, the applicant is required to provide a mining plan and a reclamation plan, which combined constitute the "Mined Land-Use Plan." ECL §§ 23-2711(2), 23-2713(1)(a). The MLRL very deliberately uses the words "proposed" and "potential" in defining the requirements for this initial mining plan submission to encompass the property to be mined throughout the entire course of the mine's development. *See* ECL § 23-2713(1)(a). Not by accident, ECL § 23-2703(3) uses the same words: "area proposed to be mined," reaffirming that ECL § 23-2703(3) is referring to applications for the development of a new mine.

Once the DEC issues the initial MLRL permit, the permittee is entitled to successive renewals of the permit. *See* ECL § 23-2711(11) ("Permits issued pursuant to this title shall be renewable"). To renew the permit, an MLRL permittee must supply an updated mining plan identifying "the area to be mined during the proposed term." ECL § 23-2711(11)(b). Again, the word "proposed" is placed deliberately. After the initial MLRL permit is issued, the word "proposed" no longer modifies "the area to be mined" because the permittee was approved under the MLRL to mine "to the boundaries of the land" identified in the initial approved mining plan. *Compare* ECL § 23-2705 (definition of permittee) *with* ECL § 23-2713(1)(a) (mining plan identifies the "boundaries of the land controlled by the applicant"). Instead, on renewal, "proposed" modifies the word "term" because the MLRL permittee can specify "annual terms not to exceed five years." ECL § 23-2711(2).

The text of ECL § 23-2703(3), construed with its interlocking provisions, is plain that it only applies to applications for the development of new mines (i.e., outside the property boundaries identified in the mining plan).

For the same reason ECL 23-2711(3) does not apply. It clearly states that it only applies to an application to mine "property not previously permitted under the [MLRL]" ECL 23-2711(3). The initial Mind Land-Use Plan is provided at that point which provides the boundaries of the land controlled by the applicant. ECL§ 23-2713. It is determined on that initial permit whether local zoning prohibits mining at the location. ECL§ § 23-2711(2)(c), (3)(a)(iv). Once approved, if the property subsequently becomes nonconforming, or if the permittee had established a right to prior nonconforming use upon the new mine permit application, there is no reason to ask this question again absent an application that involves going beyond the boundaries of the property identified in the original Mined Land-Use Plan. As Justice Pritzker's dissenting opinion explained it is only when an application goes beyond the boundaries of the property with the established nonconforming use that application of this provision makes sense and follows this Court' controlling precedent on the extent of the constitutional protections of the right to prior nonconforming mining use. No doubt the Legislature was aware of this Court's then long-established precedent in the regard.

This Court should reverse the Appellate Division's Order because the

Appellate Division erred in applying ECL § 23-2703(3) to the DEC's 2019 renewal of Sand Land's MLRL permit and subsequent modification of that same permit.

B. ECL § 23-2703(3) considered with the other provisions of the MLRL demonstrates that "zoning" is about the specific property the applicant proposes to mine

The Appellate Division, Third Department, compounded its error in interpreting ECL § 23-2703(3) by concluding that the phrase "prohibit mining uses within the area proposed to be mined" references zoning districts rather than the mine property the applicant proposes to mine. By restricting its consideration to the zoning district level, as the Town Respondents advocated, the Appellate Division improperly excluded consideration of prior nonconforming usage. Consequently, Appellate Division held that ECL § 23-2703(3) impliedly evinced legislative intent to terminate constitutionally protected prior nonconforming mines and empower local governments to do so in the future by banning mine use. [R 9621 n 6] Sand Land respectfully submits that construing the phrase "prohibit mining uses within the area proposed to be mined" in reference and harmony with the other provisions of the MLRL demonstrates that the absence of such legislative intent or purpose.

The totality of ECL § 23-2703(3) is one sentence, with two dependent clauses. The second includes the prepositional phrase "within the area proposed to be mined." The participle phrase "proposed to be mined" describes the area. That area is identified in the application for a permit to mine. Thus, the inquiry as to whether

local ordinances or laws prohibit mining is addressed to the boundaries of the proposed mine.

If the legislature intended the prohibition in ECL § 23-2703(3) to encompass local jurisdictions where mining is not an allowed use in all districts, such as in this case, then the prepositional phrase is superfluous. Similarly, if the legislature intended the prohibition to encompass a geographic area within the jurisdiction as defined by local zoning ordinance or law then the use of the word "area" is incongruous, divorced from boundaries the legislature has used to define zoning. *See, e.g.*, Town Law § 262 ("town board may divide . . . into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this act; and within such districts it may regulate . . . use of . . . land").

Whether for a new permit application or to renew an existing MLRL permit, all signs in the MLRL point to consideration of the specific property or some subpart of it. *See, e.g.*, ECL § 23-2705 (definitions of "Affected Land," "Mined land-use plan," "Mining plan," and "Reclamation plan"). For a renewal, the updated mining plan identifies "the area to be mined." ECL § 23-2711(11)(b). An application for a new mining permit incorporates the mining plan, identifying the "boundaries of the land controlled by the applicant" and to be "affected" by mining. ECL §§ 23-2711(2)(b), 23-2713(1)(a).

Moreover, there are specific provisions directly on point for applications for

a new mining permit. ECL § 23-2711(2)(c), 23-2711(3)(v). These provisions ask the applicant and local government directly whether "mining is prohibited at that location." Thus, the plain reading of ECL § 23-2703(3), construed with the MLRL's definitions and in the context of the MLRL's other provisions, 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 as to the zoning that applies to the area as defined by the boundaries in the application to mine.

In his dissenting opinion, Justice Pritzker observed that because the majority's construction does not provide for consideration of prior nonconforming use status under local zoning it absolves local governments from complying with their zoning laws. [R 9623] That outcome, and the Appellate Division majority's holding that ECL § 23-2703(3) impliedly reveals a purpose of authorizing takings is not necessary because the plain text construed in harmony with the MLRL requires consideration of whether, as in this case, the mine is a lawful prior nonconforming use.

In the only precedent to address ECL § 23-2703(3), the Appellate Division, Fourth Department, noted that it requires an inquiry as to nonconforming use status. *Valley Realty Dev. Co. v. Jorling*, 217 A.D.2d 349, 353 (4th Dep't 1995). Originally, the DEC construed ECL § 23-2711(2) as prohibiting it from proceeding with a new

mine application if the applicant claimed it had a right to mine as an existing nonconforming use, but local zoning prohibited the use. Although the *Valley Realty* court did not rule on the interpretation of ECL § 23-2703(3) specifically, it noted that the inquiry as to zoning includes consideration of prior nonconforming use rights and that same inquiry informs whether ECL § 23-2703(3) applies for applications for mine sites on Long Island.

In *Valley Realty*, the Town enacted a zoning ordinance prohibiting mining operations anywhere in the Town, which was subsequently upheld in a challenge brought by Valley Realty. *Valley Realty Development Co., Inc. v. Town of Tully*, 187 A.D.2d 963 (4th Dep't 1992). Valley Realty acquired the 392-acre property at issue in 1989, and the MLRL 1991 amendments came into effect during the processing of the initial permit application. Valley Realty contended that it had a right to mine the property as a prior nonconforming use, which the Town of Tully disputed. *In the Matter of the Application of Valley Realty Development Co., Inc. v. Jorling*, Index No. 93-6046 at 7, 8 (Sup. Ct. Onondaga Cnty. June 8, 1994) (reproduced in the Addendum to this Brief).

The DEC developed a guidance document for the implementation of the 1991 MLRL amendments under which the DEC would not get involved in disputes with a local government and an applicant over local zoning and process new mine permit applications regardless of the dispute if the mine was outside of Long Island but

defer until the dispute was resolved for sites on Long Island. *Id*. at 8. In *Valley Reality*, the DEC argued that its guidance did not apply because the Fourth Department had already determined that mining was a prohibited use in the Town. The DEC argued that Valley Realty's contention it had a prior nonconforming use right was not germane to applying ECL § 23-2711. *Id*.

The Fourth Department disagreed. The court held that the dispute of nonconforming use rights is not a basis for the DEC to cease processing the new MLRL permit application when the mine site was not within the geographic area specified in ECL § 23-2703(3). *Valley Realty*, 217 A.D.2d at 354. As construed by the Fourth Department, ECL § 23-2711 is an inquiry into the zoning of the specific location of the area to be mined, inclusive of constitutionally protected 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. *Id*.

Sand Land respectfully submits that this Court should reverse the Appellate Division's Order because it errs in applying ECL § 23-2703(3) when Sand Land's mining use of its 50-acre property has been recognized by the Town of Southampton and the Appellate Division, Second Department, to be a lawful prior nonconforming use under local zoning.

C. The history and circumstances surrounding the 1991 MLRL amendments demonstrate that applying ECL § 23-2703(3) in this case would be contrary to the legislative intent of the MLRL

"[I]nquiry must be made of the spirit and purpose of the legislation, which requires examination of the statutory context of the provision." *Matter of Sutka v. Conners*, 73 N.Y.2d 395, 403 (1989). "Pertinent also are 'the history of the times, the circumstances surrounding the statute's passage, and … attempted amendments.'" *Riley v. Cnty. of Broome*, 95 N.Y.2d 455, 464 (2000) "This Court must determine 'the consistency' of the Legislature's reaching its goal 'with the purposes underlying the legislative scheme.'" *People v. Litto*, 8 N.Y.3d 692, 705 (2007) (citing, *Sheehy v. Big Flats Community Day, Inc.*, 73 N.Y.2d 629, 634 [1989]).

The legislature enacted the 1991 MLRL amendments after years of litigation over the preemptive effect of the MLRL's supersession clause, disputes with local governments over reclamation, and litigation between the DEC and applicants over permit processing. *See, e.g.*, *In Matter of Frew Run Gravel Prods. v Town of Carroll*, 71 N.Y.2d 126 (1987) (preemption); *see also Atlantic Cement Co., Inc. v. Williams*, 129 A.D.2d 84 (3d Dep't 1987) (DEC life of mine review policy inapplicable to the renewal of an MLRL permit originally issued before SEQRA took effect). The 1991 MLRL amendments sought to clarify and address many of the issues that arose in litigation since the MLRL's enactment.

Concerning the preemptive effect of the MLRL, the 1991 amendments codified this Court's holding in *Frew Run*. *Gernatt Asphalt Prod., Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 682 (1996) (construing 1991 amendments as codifying *Frew Run*). Regarding permit processing, the 1991 amendments codified the holding in *Atlantic Cement*, 129 A.D.2d 84.

The MLRL became effective April 1, 1975 and did not apply to lands previously mined. From the outset of the MLRL, the defining feature of the property subject to the MLRL has been the Mined Land Use Plan. ECL § 23-2713(1) (1974) (identify "(a) the land affected as it presently exists; (b) an outline of the area of the minerals to be removed"). The 1991 MLRL amendment continued the requirement to identify: "the boundaries of the land controlled by the applicant, the outline of potential affected acreage and the general sequence of areas to be mined through successive permit terms . . . [and] the land affected by mining after April first, nineteen hundred seventy-five." ECL § 23-2713(1)(a).

As originally enacted, the MLRL provided for permit terms of one or three years. ECL § 23-2711(3) (1974). The original enactment limited the DEC to collecting a one-time application fee of $100 for a one-year term and $200 for a three-year term. The 1991 amendment established new regulatory fees and lengthened the term of a mining permit from one or three years to five years. ECL § 23-2711(2) (amended by 1991 N.Y. Sess. Laws ch. 166, § 229, p. 87 [McKinney]);

ECL § 72-1003 (added by 1991 N.Y. Sess. Laws ch. 166, § 238, p. 94 [McKinney]).

Thus, the Legislature did not limit the boundaries of mining to what could be mined in a permit term, just the opposite. The permit term was set in the statute as a matter of administrative convenience tied to the collection of administrative fees; whereas the initial Mined Land-Use Plan defines the extent of the mineral reserves that had been mined, before the effective date, and to be mined in the future, irrespective of the length of permit terms.

The Appellate Division erred in ascribing to ECL § 23-2703(3) an intent to use permit term duration for the substantive effect of eliminating property rights to prior nonconforming usage. That ascribed purpose is directly at odds with the Legislature's contemporaneous 1991 MLRL amendments employing the Mined Land-Use Plan to define the permit granted and the permit term duration to serve administrative convenience and fee collection.

The Town Respondents argued that ECL § 23-2703(3)'s purpose is to protect the groundwater against contamination from mining, repeatedly seeking and failing to secure injunctive enjoying Sand Land's mining that claim. However, there is no legislative history that support's that the 1991 Legislature perceived mining as a threat to groundwater that had to be addressed. Second, nothing in ECL § 23-2703(3) prevents the development of a new mine or an expansion of a prior nonconforming use so long as local zoning approval is obtained. Thus, the purpose of ECL § 23-

2703(3) is to delay the DEC processing scope and not to prevent contamination from mining. *See* Sovas, G., *Sustainable Development and Mining-Perspectives of New York's Mined Land Reclamation Law*. 4-SPG Alb. L. Envtl, Outlook (Spring 1999) (describing DEC's effort to not become embroiled in local zoning disputes).

Applying the MLRL permitting structure's distinction between new mine development and successive renewals of the permit once initially issued is central to accomplishing the MLRL's declared purpose of fostering a mining industry in New York State, ECL § 23-2703(1). The declared policy of encouraging and fostering a sustainable mining industry applies statewide. The Appellate Division's majority holding disregards the intricate and carefully crafted language of the MLRL that creates this structure by focusing solely on ECL § 23-2703(3) without accounting for the definitions and other provisions of the MLRL.

D. Construing the MLRL in pari materia with other provisions of the Environmental Conservation Law forecloses the Appellate Division's application of ECL § 23-2703(3) to all applications

"Statutes that relate to the same subject are *in pari materia* and should 'be construed together unless a contrary intent is clearly expressed by the Legislature'" *Albany L. Sch. v. New York State Off. of Mental Retardation & Developmental Disabilities*, 19 N.Y.3d 106, 121 (2012) (citation omitted). The MLRL has been expressly modified for purposes of conforming with the Uniform Procedures Act, L 1977 c. 723. ("UPA") and to incorporate DEC's approach to SEQRA as applied to

mining. Construing the MLRL together with those statutes demonstrates that the Appellate Division's construction of ECL § 23-2703(3) is contrary to the Legislature's intent.

The Town Respondents claimed below that the designation of Long Island under the Sole Source Aquifer Groundwater Protection Areas Law, ECL art 55 ("SPGA"), and the SPGA's designation of the aquifer as a Critical Environmental Area ("CEA") for purposes of SEQRA review, impliedly evinced a Legislative desire to empower local governments to eliminate property rights to prior nonconforming mining usage by the enactment of ECL § 23-2703(3). However, the SPGA and MLRL do not address the same subject and there is no support for the assertion that the 1991 Legislature had such an intent, or, for that matter, considered mining use to be a threat to groundwater quality.

1. *ECL § 23-2703(3) cannot be applied to an existing permit without contradicting the Uniform Procedures Act, ECL Art 70.*

In 1977 the legislature enacted the Uniform Procedures Act, L 1977 c. 723, codified at ECL art. 70 ("UPA"). The UPA was enacted, in part, "to assure the fair, expeditious and thorough administrative review of regulatory permits [and] . . . establish reasonable periods for administrative agency action on permits" ECL § 70-0103. In 1979, the Legislature amended ECL articles, including the MLRL, to conform procedural provisions to the UPA, without "substantive changes to existing law." [C 2] (Attorney General's Mem, June 12, 1979, Bill Jacket, L. 1979, ch. 233).

If the DEC fails to process a permit application per the UPA's time frames, a permit application, including an MLRL renewal permit, may be deemed complete and "shall be deemed approved and a permit deemed granted subject to any standard terms or conditions applicable to such a permit." ECL § 70-0109 (1)(b), 3(b).

Construing ECL § 23-2703(3) to be consistent with ECL § 70-0109(1)(b), 3(b), ECL § 23-2703(3) cannot logically be read to apply to existing MLRL permits, for which an application may be deemed complete and issued by operation of the statute by DEC's inaction.

The DEC has adopted regulations to implement the UPA. 6 N.Y.C.R.R. Part 621. The regulations define when the DEC considers a permit application to be a "new" application for purposes of applying the UPA's time frames and procedures. *See* 6 N.Y.C.R.R. 621.11. Indeed, DEC has discretion on when to treat a renewal application as a new application. 6 N.Y.C.R.R. 621.1(h). However, the UPA does not alter the substantive law of the various ECL articles to which it applies. As the 1991 MLRL amendments make abundantly clear, the renewal application for an existing mine under ECL § 23-2711(11) is not a "new mine permit application," regardless of the processing times and procedures under the UPA that the DEC elects to employ in processing that application.

2. The MLRL Permitting Scheme is Consistent with SEQRA

The MLRL permitting regime, in which a permit is issued for the boundaries

of the property, ECL § 23-2705 (definition of permittee) and renewed absent repeated and willful violations of the permit, is consistent with SEQRA. The MLRL incorporates the DEC's life of mine construct for SEQRA review in the definition of mine, ECL § 23-2705. The Life of Mine Review Policy,

> . . .in substance requires a full SEQRA review of environmental effects during the entire estimated productive period of the mine, until the completion of reclamation, for (1) all applications for a new permit, and (2) renewal applications concerning mines which had not previously been subjected to such review. In essence, the policy will require one comprehensive examination of the long-term environmental effect of each mining operation subject to MLRL regulation.

Guptill Holding Corp. v. Williams, 140 A.D.2d 12, 17 (1988), *lv denied* 73 N.Y.2d 820 (1988). Upon the application for a permit to mine, the DEC reviews the potential environmental impacts over the anticipated life of the mine. With each renewal application, the DEC evaluates whether there is a material change that requires additional environmental review under SEQRA because it was not reviewed during the SEQRA review for the initial permit. See, [R 2737-2741 (DEC guidance memorandum, dated July 3, 1987] One of the issues DEC evaluates is whether additional hydrogeologic information is necessary. [R 2706 ¶ 12, 3372-3376 DEC memorandum regarding MLRL permit renewals and modifications] The DEC can deny the renewal of an MLRL permit based on the DEC's SEQRA findings. 6 N.Y.C.R.R. § 617.11(c).

The Appellate Division, Third Department's construction, and Town

Respondents' contention that ECL § 23-2703(3) expresses Legislative intent to eliminate property rights to nonconforming mining usage to protect the aquifer conflicts with the Legislature's codification of the Life of Mine Review policy codified in the same 1991MLRL amendments.

3. *Construing ECL § 23-2703(3) as eliminating constitutionally protected property rights is not consistent with the Sole Source Aquifer and Critical Environmental Area Designations*

The Town Respondents claimed below that the designation of the sole source aquifer and its listing as a CEA for purposes of SEQRA review, impliedly evinced a legislative desire to eliminate prior nonconforming mines by the enactment of ECL § 23-2703(3). There is no support for this position in the SPGA.

The Appellate Division, Second Department, rejected a similar claim that the SPGA is intended to affect property rights. *Detmer v. Acampora*, 207 A.D.2d 475, 476 (2d Dep't 1994). In that case, the plaintiff challenged a Town of Brookhaven enactment changing zoning. The Second Department held that the designation of the plaintiff's property as a sole source special protection area "did not affect the plaintiffs' property rights." *Id.* (citing ECL § 55-0117).

In 1992, this Court examined the SPGA and its legislative purpose. *In Long Island Pine Barrens Soc., Inc. v. Plan. Bd. of Town of Brookhaven*, 80 N.Y.2d 500, 514 (1992). The SPGA "contemplates the creation of a comprehensive management plan to govern development within the designated areas." *Id.* The SPGA applies

statewide, providing for nomination and designation of all such areas within the state. This Court found that the SPGA is the "centerpiece" of "merely a host of Federal, State and local statutes designating the region as an ecologically sensitive one and mandating the development of adequate land-use controls." This Court observed that planning was proceeding at "a leisurely pace [that] is clearly counterproductive." 80 N.Y.2d at 517. It called on the Legislature to create "sensible deadlines and mandating prompt action by the designated planning bodies to address this matter of urgent public concern." 80 N.Y.2d at 517, 518.

Prompted by this Court's decision in *In Long Island Pine Barrens Soc., Inc.,* the Legislature enacted the Long Island Pine Barrens Protection Act (L. 1993 ch. 262) ("PBPA"). *See* Michael R. Jung, *The Pine Barrens: A New Model of Land Use Control for New York*, 3 Buff. Envtl. L.J. 37, 57 (1995) (describing how this Court's decision prompted legislative action). The PBPA established the Central Pine Barrens Joint Planning and Policy Commission and required the creation of a comprehensive plan "designed to . . . . protect the quality of surface water and groundwater." ECL §§ 57-1119, 57-0115; *see also* ECL § 57-1021(3)(e) (plan for core preservation area shall also be designed to, among other things, protect the quality of surface water and groundwater).

The PBPA directs that for a defined "core preservation area" the plan may prohibit new development. Development is defined expressly to include the

commencement of mining, ECL § 57-0107(13)(c) while excluding "continuation of existing non-conforming uses" in the "compatible growth area," ECL § 57-0107(13)(f)(xii). The PBPA established a mechanism to compensate private property owners for takings resulting from the plan's implementation. See, *W.J.F. Realty Corp. v. State*, 176 Misc. 2d 763 (Sup. Ct. Suffolk Cnty 1998), aff'd, 267 A.D.2d 233 (1999) (describing compensation mechanism). It also provided indemnification for towns for such claims. ECL § 57-013(6) (indemnifying "in the event of legal actions or proceedings brought against any such municipalities . . . that may result from the municipal acquisition of land).

The SPGA and the MLRL do not address the same subject and the designation of an aquifer in the SPGA does not evidence legislative intent to eliminate property rights to nonconforming mining usage on Long Island.

E. The Order is contrary to how the 1991 MLRL amendments have been interpreted and applied, including by the Legislature, for the past thirty years

Since *Valley Realty Dev. Co. v. Jorling*, 217 A.D.2d 349 (4th Dep't 1995) was decided, the DEC has considered prior nonconforming use status in determining whether mining is prohibited by local law at the location of the proposed area to be mined. *See* Sovas, G., *Sustainable Development and Mining-Perspectives of New York's Mined Land Reclamation Law*. 4-SPG Alb. L. Envtl, Outlook at 3 n 29 (Spring 1999) (describing the impact of *Valley Realty* on DEC policy).

Like DEC, the Legislature post-enactment of the 1991 MLRL amendments has construed ECL § 23-2703(3) as not prohibiting the MLRL permitting of prior nonconforming mines. *See* N.Y. Legis. Assemb. A-10001. Reg. Sess. 2019-2020 (2011) (https://www.nyassembly.gov/leg/?bn=A10001&term=2020), *vetoed* December 15, 2020 (Veto 73 of 200). In 2020, the legislature passed, and the Governor vetoed, legislation to amend the MLRL. *Id*. If enacted, the legislation would have amended the MLRL to allow local governments in Suffolk and Nassau Counties to "terminat[e] . . . mining sites which are existing non-conforming uses under local zoning laws or ordinances where such termination is necessary for the protection of water quality and the public health" *Id*.

The amendment would have also prohibited the DEC from process[ing] and approv[ing] an application for a permit to mine" for "all applications for mining, including applications for new mining, expansion of mining on existing mining sites, and renewals of existing permits," if the local government prohibited mining "at the proposed mining site." *Id.* The 2020 Legislature did not consider the MLRL sufficient to accomplish the elimination of the property right to prior nonconforming mining usage without a wholesale rewrite of ECL § 23-2703. The Governor's Veto Memorandum states he did "not agree that this bill would provide any new or meaningful enhanced protection of water quality." [C-3] (Governor's Veto, Proposed Legislation to repeal and replace ECL § 23-2703 and amend ECL §§ 23-

2705, 23-2711, 23-2721, Veto 73 of 2020).

The Order errs in construing ECL§ 23-2703(3) in a manner inconsistent with the MLRL's defined terms, structure, and purpose. Absent an amendment such as the one proposed and vetoed by the Governor, ECL § 23-2703(3) should not be construed to the same effect as if the proposed 2020 amendment had not been vetoed.

CONCLUSION

Appellants Sand Land Corporation and Wainscot Sand and Gravel Corp. respectfully request that this Court issue a decision holding that ECL§ § 23-2703(3) and 23-2711(3) did not apply to the DEC's 2019 Renewal and 2019 Modification of Sand Land's MLRL permit and enter an order reversing so much of the Appellate Division, Third Department, Order as modified the Judgment of the Supreme Court

Dated: April 15, 2022
Syracuse, New York

RESPECTFULLY SUBMITTED,

BROWN DUKE & FOGEL, P.C.

BY: ___________________________

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 N.Y.C.R.R. 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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STATE OF NEW YORK	)		**AFFIDAVIT OF SERVICE BY OVERNIGHT EXPRESS MAIL**
	)	ss.:	
COUNTY OF NEW YORK	)		

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above,

On April 15, 2022

deponent served the within: **Brief for Respondents-Appellants**

upon:

SEE ATTACHED SERVICE RIDER

at the address(es) designated by said attorney(s) for that purpose by depositing **3** true copy(ies) of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Overnight Express Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of New York.

Sworn to before me on
April 15, 2022

MARIANA BRAYLOVSKIY
Notary Public State of New York
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Qualified in Richmond County
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ADDENDUM

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JUSTICE

June 8, 1994

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Re: In the Matter of the Application of Valley Realty Development Company, Inc. v. Thomas C. Jorling, Commissioner and the New York State Department of Environmental Conservation

Index No. 93-6046

Dear Counselors:

Petitioner purchased 392± acres in the Town of Tully in 1989 to continue a sand and gravel mining operation. According to Petitioner, the property had been continuously mined for more than thirty years prior to the purchase. The property was zoned "M-Mining" and mining was an expressly permitted use subject to issuance of a Town of Tully permit at the time of Petitioner's acquisition of the property.

The New York State Mined Land Reclamation Law (hereinafter "MLRL") is codified at Article 23, Title 27 of the Environmental Conservation Law (hereinafter "ECL"). The MLRL supersedes all local regulation of mining and requires that commercial mining operations obtain a state mining permit from the Department of Environmental Conservation (hereinafter "DEC") prior to mining. The DEC's processing of mining permit applications is governed by the Uniform Procedures Act (hereinafter "UPA"), codified at ECL Art. 70, which establishes review procedures for the MLRL. The procedural

requirements of the UPA supersede any inconsistent provisions of the ECL or any inconsistent regulations of the DEC.

Petitioner contends that on June 1, 1990, it applied to the DEC for a Mined Land Reclamation Permit. The application included a Mined Land Use Plan describing the mining and reclamation plans for the site throughout the life of the operation. The application also included an Organizational Report, a Mining Permit Application Form, Environmental Assessment Forms relating to the project, applications for air permits for mineral processing equipment and the required DEC application fees. On June 6, 1990, Petitioner also applied to the Town of Tully for a permit to mine the property pursuant to the Town's zoning ordinance.

On June 14, 1990, the DEC issued a Notice of Incomplete Application (hereinafter "NOIA") asking for more information from the Petitioner to complete the application. On July 9, 1990, the Town of Tully enacted the first of two local laws which attempted to eliminate mining as an expressly permitted use on Petitioner's property and ultimately to eliminate mining as a land use anywhere in the Town. Petitioner successfully challenged that local law. See Exhibit "G" to Petition (Volume I [DEIS]) at page 67.

On October 15, 1990, Petitioner responded to the DEC's NOIA. On October 30, 1990, the DEC issued a second NOIA requesting additional information. The DEC also issued a positive declaration of significance pursuant to the State Environmental Quality Review Act (hereinafter "SEQRA") on November 7, 1990 indicating a Draft Environmental Impact Statement (hereinafter "DEIS") was required for the site and identifying certain potential environmental concerns.

Thereafter, the Town of Tully enacted the second local law affecting mining. That local law was a zoning ordinance, effective April 25, 1991, prohibiting mining operations in the Town. Petitioner commenced an action pursuant to Article 78 to overturn the Town's ordinance. That Petition was dismissed by Justice Parker Stone by Decision dated July 30, 1991 and Order dated August 28, 1991.[1]

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[1]On November 18, 1992, the Appellate Division affirmed the decision of Justice Parker Stone upholding the ordinance. Valley Realty Development v. Town of Tully, 187 A.D.2d 963. On March 30, 1993, the Court of Appeals dismissed Petitioner's appeal and denied its motion for leave to appeal. Valley Realty Development v. Town of Tully, 81 N.Y.2d 880.

Laurel Eveleigh, Esq.
William J. Gilberti, Esq.
Michael Moore, Esq.
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On July 31, 1991, Petitioner filed a DEIS demonstrating that there would be no significant adverse environmental impact associated with Petitioner's mining operations. After twice requesting additional time in which to review the application, on October 1, 1991, the DEC informed Petitioner of alleged deficiencies in the DEIS in a third NOIA. In addition, the DEC informed Petitioner that, pursuant to the changes to the mining law effective September 1, 1991 an applicant is required to provide a statement from the local government where the mining is to occur certifying that there are no local prohibitions to mining at the proposed site.

Petitioner responded to the third NOIA on November 7, 1991 and advised the DEC that a statement from the applicant, not from the local government, was required that there was no prohibition on mining at the site. On March 10, 1992, Petitioner submitted a revised DEIS responding to the DEC's comments in its third NOIA. On March 24, 1992, the DEC informed Petitioner that the application would be incomplete until Petitioner provided a statement from the local government regarding mining as a permissible use on the site.

On April 17, 1992, the DEC issued a fourth NOIA indicating additional information was needed before the application would be considered complete. In response, on June 15, 1992, another volume to the DEIS was submitted to the DEC supplementing the data in the original DEIS. On July 21, 1992, the DEC transmitted a fifth NOIA identifying three requirements Petitioner had failed to meet. On August 5, 1992, Petitioner responded to the three issues. On September 4, 1992, the DEC issued a sixth NOIA seeking additional information. On March 10, 1993, Petitioner responded to the sixth NOIA. The fourth, fifth and sixth NOIA's did not mention the DEC's previous request regarding the local zoning issue.

On March 24, 1993, the DEC issued a seventh NOIA again contending that Petitioner failed to submit a statement from the Town of Tully that there was no local prohibition to mining on the site. The seventh NOIA stated that the application would remain incomplete until a judgment reversal of Matter of Valley Realty Development v. Tully[2] or an amendment to the local law indicating that mining is not prohibited.

Petitioner argues that the DEC's own published policy provides that local zoning considerations are not a proper

[2] 187 A.D.2d 963, lv to appeal denied, 81 N.Y.2d 880.

basis upon which to suspend, delay or prohibit processing permits to completion. Petitioner contends that the DEC's seventh NOIA is invalid because it fails to identify a specific, valid and legal basis upon which to suspend processing of Petitioner's permit. Petitioner alleges that its permit application and DEIS became complete by operation of law on May 9, 1993 pursuant to a UPA provision by which the DEC is required to mail a notice of completeness or incompleteness within sixty days of receipt of the application or receipt of additional information pursuant to a prior NOIA. If the DEC fails to do so, the applicant's permit is deemed complete by operation of law. A "complete application" includes full compliance with all mandates of SEQRA. A valid notice of incompleteness must identify a specific, valid and legal requirement that the applicant has failed to meet. Petitioner argues that at no time since the final submission on March 10, 1993 has the DEC advised Petitioner of the need for additional data, analysis or study.

The UPA authorizes Petitioner to notify the DEC Commissioner of the failure of the DEC to make a decision on the permit application within ninety days after the application is complete. By letter dated August 19, 1993, Petitioner so notified Respondent Commissioner Jorling. Pursuant to the UPA, the Commissioner has five business days to reply and issue the permit, deny the permit or issue the permit with conditions. In response to Petitioner's letter, the Commissioner advised that the application was "unapprovable" due to the existence of five concerns. Petitioner contends that each of these concerns had been previously addressed to the DEC's satisfaction.

By this Article 78 proceeding, Petitioner seeks an Order of this Court determining that the Commissioner's failure to exercise one of the three options is illegal, arbitrary and capricious, is an abuse of discretion, is without support in law and fact, constitutes acts in excess of and without jurisdiction, is affected by error of law, is in violation of lawful procedure and represents a failure to perform a duty enjoined by law. Petitioner requests that Judgment be granted annulling, vacating and setting aside the DEC's determination that Petitioner's application is "unapprovable", annulling vacating and setting aside the DEC's refusal to issue Petitioner's permit, declaring that Petitioner had satisfied all applicable statutory and regulatory requirements, declaring that the DEC lacked statutory or regulatory authority or discretion to suspend, delay or prohibit processing of

Petitioner's permit application to completion, and directing that a mining permit be issued to Petitioner forthwith.

Respondents have brought an application before this Court seeking dismissal of the Petition prior to answering the Petition. The dismissal motion is based upon objections in point of law as follows: (1) the action is barred by the four-month Statute of Limitations; (2) the action is barred by collateral estoppel; (3) the issues raised are academic, hypothetical and not justiciable; (4) Petitioner has failed to obtain personal jurisdiction over Respondents (the Notice of Petition fails to set forth the time and date of the requested hearing in violation of CPLR 403[a]) and (5) the papers failed to include affidavits, briefs or a memorandum of law in violation of 22 NYCRR 202.8[c] and 202.9.

As to the first ground for dismissal, the DEC contends that this proceeding was commenced on October 26, 1993, seven months after the DEC's March 1993 determination requiring Petitioner to provide a statement that there was no local prohibition to mining on the site. Accordingly, Respondent urges that this Court dismiss the Petition on Statute of Limitation grounds.

In response, Petitioner argues that this proceeding was timely because it was commenced within four months of the Commissioner's August 23, 1993 determination that the application was "unapprovable". The DEC staff's interim notices of incompleteness are not final determinations reviewable under the DEC's own statutory and regulatory schemes.

In reply, the DEC argues that when a petitioner receives a timely NOIA, that petitioner must resubmit its application or provide the DEC with additional information prior to seeking relief through an Article 78 proceeding. In this case, Petitioner has done neither. The DEC determined that the application was incomplete by its 7th NOIA. Until the issues in that NOIA were addressed, the applicant cannot avail itself of the five-day demand procedure. The DEC argues that the five-day demand letter was a contrived attempt to avoid an expired statute of limitations and has no legal significance.

This Court finds that this proceeding was timely brought. CPLR 217 provides that "a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner . . . or after the respondent's refusal, upon the demand of the petitioner . . . , to perform its duty . . . ."

In order to determine the event that triggered the running of the Statute of Limitations, this Court must first "ascertain what decision plaintiffs are actually seeking to have reviewed and then pinpoint when that decision became final and binding, thereby having an impact upon plaintiffs." Chase v. Board of Education of Roxbury Central School District, 188 A.D.2d 192, 194. Here, Petitioner is challenging the DEC's refusal to determine that its application is complete. That act took place on August 23, 1993. The action was commenced on October 26, 1993, and, thus, is within four months of the triggering event.[3]

As to the second ground for dismissal, the DEC argues that Petitioner had previously been given a full and fair opportunity to challenge the validity of the Town ordinance in the proceeding before Justice Stone. Accordingly, Petitioner is now estopped from denying that the Town of Tully has prohibited mining anywhere in the Town, including Petitioner's property.

In response, Petitioner contends that the issues raised in the instant Petition were not adjudicated in the Valley Realty v. Town of Tully case. In that case, Petitioner's challenge to the Town's enactment of the local law alleged the failure by the Town to conduct an appropriate environmental review pursuant to SEQRA. In this proceeding, Petitioner seeks to determine whether the DEC is statutorily empowered to cease processing an applicant's permit based upon (1) a local law prohibiting mining, (2) representations by a local government that the zoning ordinance does not permit mining, and (3) irrespective of the applicant's contrary representation that mining is permitted on his property.

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[3]Following the DEC's reasoning, until a final determination was made by the DEC, Petitioner could not commence an action. Under these facts, Petitioner would be forever prevented from appealing the DEC's refusal to process the application due to the failure of Petitioner to provide the local government's statement that mining is not prohibited.

Even if this Court were to find that the statute of limitations was violated, under the DEC's approach, Petitioner would only have to await the eventual issuance of the 8th NOIA and then commence its Article 78 proceeding. In the interest of judicial economy, this Court finds that the only recourse open to Petitioner was to take the steps it took.

This Court finds that this case is not barred by collateral estoppel. Justice Stone found in the Valley Realty v. Town of Tully case that "Petitioners' primary argument is that respondents failed to satisfy the requirements of . . . SEQRA." Justice Stone further stated "[t]he Court also rejects petitioners' argument that the amendment bore no reasonable relationship to the Town's police power . . . ." See Exhibit 3 to Affirmation of Michael J. Moore, Esq. dated November 9, 1993.

> Collateral estoppel permits the determination of an issue of fact or law raised in a subsequent action by reference to a previous judgment on a different cause of action in which the same issue was necessarily raised and decided. In addition to identity of issues - a factor not necessarily met here - the party seeking the benefit of collateral estoppel must show that the party to be estopped had a full and fair opportunity to contest the dispositive decision, or was in privity with one who did.

Continental Casualty Co. v. Rapid-American Corp., 80 N.Y.2d 640 (citations omitted). The issues in the action before Justice Stone and in the instant action are not sufficiently similar so as to be barred by collateral estoppel. In the action before Justice Stone, the issue was whether the Town of Tully followed the mandates of SEQRA whereas in this action, the issue is whether the DEC can cease processing an application based upon a failure by the applicant to provide a certain statement from the local municipality. It is clear that Justice Stone never resolved the issue that is before this Court. Accordingly, the DEC's motion to dismiss on this ground is denied.

The third ground for dismissal is based upon the DEC's belief that the issues raised are academic. The DEC argues that Petitioner would be prohibited from mining due to the Town ordinance even if the DEC granted Petitioner a mining permit.

Petitioner's response to this argument is that a landowner whose property has been rezoned possesses rights in existing land uses. There has been no determination that Petitioner could not mine its property if it were issued a DEC permit to mine. Petitioner maintains that it possesses vested rights to continue a mining use of the property. Petitioner also argues that the DEC's own policy, expressed in the DEC's Technical Guidance Memorandum (hereinafter "TGM") regarding Implementation of the New Mined Land Amendments in Regard to

Permit Processing dated May 4, 1992 states that the DEC is to continue to process an application to completeness even if the local government indicates that mining is prohibited. See Exhibit C to Affirmation of Laurel J. Eveleigh, Esq. dated March 10, 1994.

In reply, the DEC contends that where an appellate court has unanimously sustained the validity of a local ordinance prohibiting mining on the applicant's property, the TGM is inapplicable. The TGM states that the DEC is to remove itself from matters of dispute between the local government and the applicant and not decide or interpret local ordinances. In this case, the DEC alleges, there is no dispute between Petitioner and the Town; that dispute ended with the Appellate Division's decision in November of 1992 affirming the lower court's declaration that the Town's local law was validly and constitutionally enacted. The DEC points out that until the Appellate Division decision, the DEC continued to process the application, allowing Petitioner's dispute with the Town to be resolved.

This Court finds that the determination of Petitioner's alleged vested rights to mine its property in the Town of Tully is a decision that must be made by the Zoning Board of Appeals of the Town. It is contrary to the DEC's own policy to make this determination. The DEC's TGM states that "[i]n all cases if the local government indicates at any time before completeness that mining is prohibited, the Department will continue to process to completeness." Id. at page 2. If the local government provides a statement that mining is prohibited, the DEC is to "[p]roceed to permit issuance or denial solely based on the content of the application and all coordinated technical and environmental reviews." Id. at page 3. In light of this clear policy statement, the DEC cannot halt the processing of Petitioner's application due to the Town of Tully's validly and constitutionally enacted local law. "[A]bsent a contrary expression by the Legislature, local zoning decisions are distinct from and do not affect substantive determinations rendered by the DEC with respect to permit applications." Tayntor v. New York State Department of Environmental Conservation, 130 A.D.2d 571, 573; Matter of Town of Poughkeepsie v. Flacke, 84 A.D.2d 1, lv denied 57 N.Y.2d 602.

The fourth ground for dismissal was withdrawn. Regarding the fifth reason for dismissal, the DEC argues that it should not be required to answer the Petition until after service of Petitioner's memorandum of law. Ordinarily, this Court would

Laurel Eveleigh, Esq.
William J. Gilberti, Esq.
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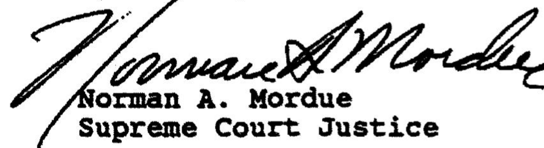
agree. However, all relevant issues have been briefed by both sides in their respective memoranda of law on the DEC's motion to dismiss. Accordingly, the Court has decided all issues at bar.

The Petition is granted to the extent that the DEC's determination that Petitioner's application is "unapprovable" is annulled, vacated and set aside. The Court declares that the DEC lacked statutory or regulatory authority or discretion to suspend, delay or prohibit processing of Petitioner's permit application to completion. The DEC is to continue to process Petitioner's application to completion without requiring a statement from the Town of Tully that mining is not a prohibited use. Petitioner is to provide those documents that were requested in the last NOIA that have not already been submitted to the DEC.

The Court denies that portion of the Petition seeking the annulling, vacating and setting aside of the DEC's refusal to issue Petitioner's permit, declaring that Petitioner had satisfied all applicable statutory and regulatory requirements, and directing that a mining permit be issued to Petitioner forthwith. That determination will be made by the DEC upon the successful completion of all other required submissions by Petitioner.

Petitioner is to submit a Judgment on notice.

Very truly yours,



Norman A. Mordue
Supreme Court Justice

NAM/gm
cc: Thomas Dadey, Esq.