To be argued by: Patrick Woods
10 minutes requested

Supreme Court of the State of New York
Appellate Division – Third Department

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

Appellants,

v.

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

Respondents,

No. 532083

BRIEF OF RESPONDENT NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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PRELIMINARY STATEMENT

This appeal is the most recent chapter in extended litigation by the Town of Southampton and the individual petitioners seeking to close a sand and gravel mine operated by co-respondents Sand Land Corporation and Wainscott Sand and Gravel Corp. (collectively "Sand Land"). Sand Land is one of several sand and gravel mines operating within the Town of Southampton. It is the only one, however, that is adjacent to high-value properties owned by several of the petitioners.

In this article 78 proceeding, petitioners challenge the Department of Environmental Conservation's ("DEC") June 2019 modification of Sand Land's mining permit and related determinations. The modification and related actions allow Sand Land to mine 40 feet deeper on its current acreage and included an additional 3.1-acre area (the "stump dump") that was mined out and then refilled prior to the enactment of the Mined Land Reclamation Law in 1975. After extensive litigation below, Supreme Court dismissed the petition, holding that DEC's determinations were appropriate and reflected a "considered balancing of DEC's policies of fostering an economically sound mining industry and ensuring sound environmental management practices."

DEC's determinations were well within the bounds of its authority and were not arbitrary and capricious. The objections to Supreme Court's judgment pressed by petitioners on appeal are meritless, unpreserved, or both. Specifically, Supreme Court correctly held (1) that Environmental Conservation Law § 23-2703(3) and § 23-2711(3) did not apply to DEC's actions here as they involved only a modification to deepen an already permitted mine within the mine's current footprint, (2) that DEC was not bound by an administrative law judge's (ALJ) preliminary conclusion to the contrary in a prior 2014 application to expand mining and process vegetative waste, (3) that in reviewing the rationality of DEC's actions it could consider an affidavit from DEC's Director of the Division of Mineral Resources, and (4) that DEC took the required "hard look" at the environmental impact of the modified permit required under the State Environmental Quality Review Act. Accordingly, Supreme Court's judgment should be affirmed.

QUESTIONS PRESENTED

1. Was DEC bound by the non-final ruling of an ALJ with respect to an earlier permit application that requested additional horizontal acreage and to continue the processing of vegetative waste?

Supreme Court answered this question "no."

2. Was DEC required by ECL § 23-2703(3) and § 23-2711(3) to consult with the Town of Southampton about the status of its zoning laws before it could issue a permit renewal or modification that only permitted the deepening of an existing mine within its current footprint?

Supreme Court answered this question "no."

3. Was it proper for Supreme Court to consider the affidavit of the supervisor of the DEC division that handled the challenged determinations and who stated she had personal knowledge of the determinations?

Supreme Court answered this question "yes."

4. Did DEC take a hard look at the environmental impacts of issuing the modified permit as required by the State Environmental Quality Review Act?

Supreme Court answered this question "yes."

STATEMENT OF THE CASE

A. The History of Mining at the Sand Land site and Regulatory Proceedings.

Sand Land, or its predecessors in interest, have mined on a portion of a 50-acre parcel located within the Town of Southampton for 60 years. Sand Land is one of six sand and gravel mines located within the Town of Southampton. (Record on Appeal ("R") 1407, 1418.)[1] In prior litigation, the Appellate Division, Second Department held that Sand Land's operation of a sand and gravel mine was a prior non-conforming use allowed under local zoning law. *See Matter of Sand Land Corp. v. Zoning Bd. of Appeals of Town of Southampton*, 137 A.D.3d 1289 (2d Dep't), *lv. denied,* 28 N.Y.3d 906 (2016); *Phair v. Sand Land Corp.*, 137 A.D.3d 1237 (2d Dep't 2016). In 2016, the Town of Southampton issued a certificate of occupancy in accordance with the Second Department's holding, which

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[1] While the Record on appeal is described as "a full reproduced joint record" by petitioners, DEC was not consulted about its contents and several items filed by DEC below are missing. The missing documents, however, do not appear to be critical to this Court's review and can be accessed via Supreme Court's NYSCEF docket. If necessary, the Court may take judicial notice of their contents. *See Williams v. Annucci*, 175 A.D.3d 1667, 1678 n.1 (3d Dep't 2019); *Caffrey v. North Arrow Abstract & Settlement Servs., Inc.*, 160 A.D.3d 121, 126-128 (2d Dep't 2018).

allowed "the operation of a sand mine, including the storage, sale and delivery of sand." (R2828.) The Town of Southampton's Chief Building Inspector had previously issued certificates of occupancy in 2011 and 2016 that also allowed "the operation of a sand mine" (R111) and "mining operation use" (R1158) in addition to other uses, such as "the receipt and processing of" vegetative materials for processing. The Town of Southampton acknowledged these pre-existing uses in a letter to DEC in 2015 and explained that "the use of the premises for the operation of a sand mine" pursuant to the certificate of occupancy "was not challenged" by neighboring land owners at that time. (R2815.)

Sand Land was first issued a mining permit by DEC in 1981. The permit was periodically renewed with some modification through November 2013, when DEC again renewed Sand Land's mining permit for a five-year period, until November 2018. (R1396.) The renewed permit, among other things, allowed Sand Land to process vegetative waste (i.e., create mulch from leaves and wood) within the facility in accordance with a registration obtained under DEC regulations. *See* 6 NYCRR part 360-16.1.

In 2014, Sand Land applied for a vertical and horizontal expansion of its mining operations, with no modification of its ability to continue processing vegetative waste. (R1397-98.) The requested horizontal expansion was for a total of 4.9 acres, of which 1.9 acres were located on previously unmined portions of the parcel. The other 3.1 acres consisted of the stump dump, which had not been expressly identified in earlier permits. That acreage was exempt from the Mined Land Reclamation Law (MLRL) because it had been mined out and then filled back in prior to the MLRL's enactment in 1975. (R1396-1397, 1400-1403.)

In April 2014, DEC issued a negative declaration under the State Environmental Quality Review Act (SEQRA) for the vertical and horizontal expansion with the continuation of vegetative waste processing, finding that the proposed modification would result in no significant adverse environmental impacts. (*See* R2786-2788.)

In 2015, DEC denied the horizontal and vertical modification application, on several grounds. (R1398). Among other things, after reviewing a report created by the Suffolk County Department of Health Services ("county health department report"), DEC was concerned that Sand Land's continued processing of vegetative waste could have a

negative impact on groundwater quality and that the negative SEQRA determination had not adequately considered that issue. (R2813.)

Sand Land requested a hearing to challenge the denial of the 2014 permit application. (R1398.) After a hearing on preliminary issues and related conferences resulted in a nonfinal January 2018 ruling, the ALJ stayed the matter. (R1398.) As part of the nonfinal ruling, the ALJ concluded that ECL § 23-2703(3) and § 23-2711(3) applied to the 2014 permit application to add additional virgin acreage to the mine and required DEC to inquire as to the status of the mine under the Town of Southampton's zoning laws. (R112-135.) The ALJ issued a subsequent decision denying Sand Land's motion to reargue. (R139-151.) On consent of the parties, that administrative proceeding has not been resolved and remains stayed to this day. (R1398.) The ALJ's recommendations have not been acted on by the Commissioner and so remain nonfinal.

In September 2018, premised on a mistaken conclusion that there were limited reserves of sand remaining on the site, DEC issued a notice of its intention to modify the 2013 permit such that all mining activity,

other than reclamation,[2] should cease. (R292-296.) Sand Land objected to the notice and requested a hearing. (R2711.) A month later, Sand Land applied to renew its 2013 mining permit and, in March 2019, while the renewal application remained pending, Sand Land applied to modify the existing permit to allow a 40-foot vertical expansion of the mine within the same horizontal footprint. (R2712.) Although the March 2019 application sought no horizontal expansion, DEC determined that the Life of Mine[3] under the prior and existing permits included the 3.1-acre stump dump that had not been correctly identified on the prior permits because of the pre-1975 mining of that location, even though that part of the mine had been mapped and inspected during the life of those permits. (R2715-2717.) In approving the permit renewal and permit modification, DEC corrected the calculation of the Life of Mine and expressly incorporated the stump dump area into the permit. By doing so, DEC made the stump dump a part of Sand Land's reclamation obligations.

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[2] Mine reclamation is the process by which land that has been mined is restored to a natural or economically useable state.

[3] "Life of Mine" is a term of art used by the DEC since 1987. It is defined as "the total area to be mined and the length of time to exhaust the minerals intended to be excavated from that area, generally shown in the Minded Land Use Plan." (R2706; *see also* R2737-2741.)

However, this incorporation of the stump dump into the permit did not authorize Sand Land to mine any material that Sand Land was not already allowed to remove because the area had been mined-out and refilled prior to the enactment of the MLRL.

Faced with multiple overlapping administrative proceedings, DEC determined that negotiations rather than litigation would achieve environmentally prudent results while meeting the statutory goal of fostering an economically sound and stable extractive mining industry. *See* ECL 23-2703(1). DEC then undertook extensive additional investigation, reviewed additional materials, and, as it regularly does on permit renewals, endeavored to resolve issues with the applicant. (R2713-2714.) In February 2019, DEC and Sand Land resolved the contested matters under an agreement whereby Sand Land agreed to:

- Surrender its Part 360 registration for solid waste and vegetative waste (*i.e.* mulching) and discontinue all related operations;

- Conduct groundwater testing at identified wells, grant DEC access to do its own groundwater testing at identified wells, and establish a protocol for long-term water quality monitoring;

- Substantially increase the amount of financial security it posted;

- Retain the services of an independent monitor;
- Cease mining permanently in eight years or fewer; and
- Completely reclaim the entire Life of Mine, including the stump dump, thereby returning the land to alternative productive uses within ten years. (R3252-3259.)

Under the settlement agreement, DEC revoked the 2018 notice of intent that required Sand Land to cease all operations, agreed to issue a permit renewal "for the 34.5 acre life of mine" at its prior depth of 160 feet above mean sea level (AMSL), and agreed to process a permit modification application that would lower the permitted mine floor to a depth of 120 AMSL. (R3256.)

The settlement agreement did not expand the acreage to be mined beyond the existing Life of Mine. Nor did it authorize vertical or horizontal expansion, or resolve Sand Land's pending application to modify its existing permit to do so. DEC did agree, however, that it would review the modified permit application based on the earlier 2014 negative SEQRA determination. (R3257.) DEC agreed to process the modification application under ordinary notice and public comment provisions. (R2719.) The settlement agreement also made clear that DEC had "reviewed the testimony and accompanying correspondence submitted to

[DEC] in connection with" the denied 2014 permit request, as well as the testimony received at the related administrative hearings. (R3258.)

In evaluating the modification application, DEC determined that the proposed 40-foot deepening of the mine within its existing footprint was not a material change under SEQRA. (R2720.) Accordingly, on March 15, 2019, DEC issued an amended negative declaration of significance explaining its decision. (R3385-86.) The Department found that the proposed deepening would not significantly impact groundwater quality because: (1) the proposed new floor of the mine will provide 90 feet of soil between the bottom of the mine and groundwater, providing filtering and buffering to protect the groundwater below the mine, and (2) groundwater monitoring wells had been installed at the site and additional ones would be added to periodically sample and test the groundwater quality on at least a quarterly basis.

The amended negative declaration also concluded that composting or past composting activities are not expected to have significant negative effects on groundwater quality. This was so because "[a]ll vegetative waste has been removed from the mine site," "all mulching and composting operations at the facility were terminated in 2018," and Sand

Land surrendered its part 360 registration, "agree[ing] not to accept any composted materials in the future." (R3385.) Also on March 15, 2019, DEC granted the renewal of Sand Land's prior permit as agreed in the settlement agreement. (R3379.)

In March 2019, DEC published a notice in the Environmental Notice Bulletin of the complete permit application for the modified permit. (R3391.) The notice set April 19, 2019 for closure of the public comment period. DEC extended the public comment notice period to May 15, 2019 (R2711.) DEC received and considered approximately 50 comments (R3400-3496, R3653-3662) and produced a publicly available summary response to comments before it approved Sand Land's application to modify its existing permit. DEC issued the modified mine permit on June 5, 2019 (R3506).

B. This Proceeding and Supreme Court's Judgment

This is one of several cases that petitioners have brought against Sand Land seeking to end mining on the property. The litigation and its companion cases have already been before the Appellate Division several times. *See 101Co., LLC v. Sand Land Corp.,* 2020 Slip Op. 07328 (2d Dep't Dec. 9, 2020); *Matter of 101CO, LLC v. N.Y.S. Dep't of Env.*

Conserv., 169 A.D.3d 1307 (3d Dep't 2019); *Matter of Sand Land Corp. v. Zoning Bd. of Appeals of Town of Southampton*, 137 A.D.3d 1289 (2d Dep't), *lv. denied*, 28 N.Y.3d 906 (2016); *Phair v. Sand Land Corp.*, 137 A.D.3d 1237 (2d Dep't 2016). And at least one other appeal related to this litigation is pending in this Court. *See Town of Southampton v. N.Y.S. Dep't of Env. Conserv.*, App. Div. No. 529380 (3d Dep't).

This article 78 proceeding was commenced in April 2019, while the final portions of the administrative proceedings described above were still underway. After DEC granted Sand Land's modification application in June 2019, petitioners were granted leave to amend their petition to challenge the modified permit. (R14.) The amended petition challenges the permit renewal, the approval of the settlement agreement, the adequacy of the amended negative SEQRA determination, and the issuance of the modified permit. (R668-677.)

In support of its answer, DEC submitted the administrative record (R2723-3517), as well as an affidavit from its Director of the Division of Mineral Resources, Catherine A. Dickert (R2703-2721). Thereafter, DEC supplemented the administrative return with additional communications between DEC and petitioners' counsel that had been

inadvertently omitted (R3651-4533) and explained how the omission occurred (R3648-3650, R3534-3536).

Oral argument was held in September 2019. Thereafter, petitioners moved to submit supplemental evidence, consisting of water testing obtained by petitioners via the Freedom of Information Law and other materials, such as an August 2019 Suffolk County Grand Jury Report, that were not before DEC at any time. (R4762.) DEC opposed this motion and submitted an affidavit from a geologist, who explained that the subsequent water test results were irrelevant, and that even more recent results had shown a decline in metals in the groundwater (R9249-9259.)

Supreme Court denied the amended petition in a comprehensive 41-page decision. (R4-45.) Addressing petitioners' procedural objections, Supreme Court first denied a motion to compel DEC to supplement the administrative return. Additional supplementation, the court reasoned, was unnecessary because the record and Dickert's affidavit provided an adequate basis for judicial review of DEC's determinations. (R26.) Second, Supreme Court held that DEC's reliance on the Dickert affidavit was proper, because she averred having sufficient personal involvement in the agency's decision-making process. (R27.) Third, Supreme Court

denied petitioners' motion to supplement the record. Because the information petitioners sought to add was not relied upon by DEC in making its determinations, and generally did not even exist at the time, Supreme Court concluded that the proposed new materials were not properly part of the record to be reviewed in this Article 78 proceeding. (R27-29.)

Supreme Court then denied the petition on the merits. The court rejected petitioners' challenges to the settlement agreement, including the claim the settlement had improperly expanded the acreage of the mine. The court held that there was a rational basis in the record for DEC's determination adjusting the Life of Mine, namely, that it should always have included the "stump dump" area but mistakenly had not because the portion had been mined out and refilled during the 1960s. (R30-34.)

Supreme Court also held that the record amply supported DEC's determination to withdraw the notice of intention to modify Sand Land's permit and close the mine. It also upheld DEC's issuance of a new, modified permit. In both cases, Supreme Court determined that DEC's earlier actions in issuing the notice of intention and denying the 2014

permit did not bind DEC. Specifically, as grounds for DEC to reach a different conclusion than it had initially, the court cited new evidence on the amount of mineable sand, the lack of evidence that sand mining has a negative impact on groundwater quality, and the fact that Sand Land had agreed to cease processing vegetative waste and implement a regular soil and groundwater testing program. (R34-37.)

Next, Supreme Court rejected petitioners' challenge to the renewal of Sand Land's permit. (R37-39.) In so doing, the court held that permit renewals do not trigger the requirements in ECL § 23-2703(3) or § 23-2711(3) and rejected petitioners' argument that DEC was bound by the ALJ's 2014 ruling to the contrary. Specifically, Supreme Court held that the permit renewal and new modification applications were sufficiently different from the 2014 application that the ALJ's nonfinal ruling was not binding on DEC.

Third, Supreme Court held that there were rational bases in the record for the issuance of both the amended negative declaration and the modified permit. (R39.) In doing so, Supreme Court explained that ECL § 23-2703(3) or § 23-2711(3) were not triggered where the modification sought was only for a vertical deepening within the same confines of an

already permitted mine. (R39-41.) The court also rejected petitioners' argument that DEC had failed to adequately consider environmental impacts, including threats to the groundwater. (R41-43.) In particular, the court noted that the county department of health report did not conclude that sand mining had an adverse environmental impact. Rather that report concluded only that the processing of vegetative waste had such an impact; consequently, those potential harms to the groundwater had been ameliorated by the settlement agreement. (R42-43.)

Petitioners then filed a notice of appeal from Supreme Court's judgment (NYCEF No. 1) and moved for a preliminary injunction. After briefing, this Court denied the motion and set an expedited briefing schedule. (NYSCEF No. 119.) Respondents moved for an eight-day extension of time to file their briefs which the Court has not acted on as of the time of the submission of this brief. (NYSCEF Nos. 142, 143.) Thereafter, three adjacent towns and the County of Suffolk (who had unsuccessfully moved to intervene below) moved for permission to submit a brief as amicus curiae. (NYSCEF No. 145.) The return date for that motion has not yet arrived at the time of this writing.

ARGUMENT

SUPREME COURT CORRECTLY CONFIRMED DEC'S DETERMINATIONS AND PROPERLY DENIED PETITIONERS' MOTIONS

Supreme Court correctly dismissed the petition and upheld DEC's determinations. "'In a proceeding seeking judicial review of an administrative action, the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious.'" *Matter of Beer v. N.Y.S. Dep't of Env. Conserv.*, 2020 N.Y. Slip Op. 07959 at 4 (3d Dep't, Dec. 24, 2020) (quoting *Flacke v. Onondaga Landfill Sys.*, 69 N.Y.2d 355, 363 (1987) (alteration marks omitted)). DEC's judgments that involve "'factual evaluations in the area of'" its expertise are entitled to "'great weight and judicial deference.'" *Id.* (quoting *Matter of Gracie Point Community Council v. N.Y.S. Dep't of Env. Conserv.*, 92 A.D.3d 123, 129 (3d Dep't 2011)).

A. Supreme Court Properly Held that The Administrative Law Judge's Non-Final Determinations are Not Binding on DEC

As a preliminary matter, petitioners overstate the significance of the ALJ's nonfinal rulings. (Br. at 12-20). While an agency must adhere to its own administrative precedent, *see Matter of Charles A. Field Delivery Serv.*, 66 N.Y.2d 516 (1985), that principle applies only when the prior agency determination is final and the facts of the current proceeding are sufficiently similar as to require the agency to either reach the same outcome or explain why it departed from its own precedent. *See Leggio v. Devine*, 34 N.Y.3d 448, 461-62 (2020); *Terrace Ct., LLC v. N.Y.S. Dep't of Hous. & Community Renewal*, 18 N.Y.3d 446, 453 (2012). When, as here, the determination is neither final nor factually identical to its prior determinations, administrative stare decisis does not apply. *Matter of Catskill Heritage Alliance, Inc. v. N.Y.S. Dep't of Env. Conserv.*, 161 A.D.3d 11, 17 (3d Dep't 2018).

Contrary to petitioners' assertion, the prior ALJ decisions in this case were not final DEC determinations entitled to administrative stare decisis. (Br. at 28-37.) Those ALJ rulings were themselves preliminary, nonfinal rulings, subject to change as part of further proceedings that are

presently stayed. Indeed, the related hearings before the ALJ were continued *without objection by the petitioners*. Because of the stay, the time to appeal those rulings has not even run.

Moreover, even if the proceedings before the ALJ had been concluded, an ALJ only makes *recommendations* to the Commissioner. 6 NYCRR § 622.18; *Matter of Catskill Heritage Alliance, Inc.,* 161 A.D.3d at 18. An ALJ does not make the final determination. And here the ALJ recommendations upon which petitioners rely have not been adopted by the Commissioner.

Second, even if the ALJ's recommendations were final determinations of DEC (they are not), administrative stare decisis would still not apply. As Supreme Court properly acknowledged, a prior agency ruling is not binding on a future agency action where the facts before the agency at the time of the subsequent determination are materially different. *See, e.g., Terrace Ct., LLC*, 18 N.Y.3d at 453 (prior agency determinations not binding because of different factual context); *Hempstead v. Public Employment Relations Bd.*, 137 A.D.2d 378, 383-84 (3d Dep't 1988) (same). As Supreme Court explained, there was a more than adequate basis for DEC to treat the 2014 application—which sought

to add virgin horizontal acreage to the mine and contemplated Sand Land's continued processing of vegetative waste materials on the site—differently from the 2018 settlement agreement and modified permit—which did not include such an expansion and required Sand Land to discontinue vegetative waste processing entirely.

Matter of Bull (Yansick Lbr. Co.-Sweeney), 235 A.D.2d 722, 724 (3d Dep't 1997), on which petitioners rely, is inapposite. That case stands for the proposition that an ALJ determination that is not timely appealed is generally final and binding on the same parties within the same proceeding under principles of *res judicata*. *Matter of Bull*, however, expressly rejected the proposition advanced here by petitioners, that an unappealed ALJ determination on a *different* application could bind the agency under principles of stare decisis. *Id*. at 723. Indeed, this Court has repeatedly rejected petitioners' argument in cases petitioners have failed to cite or discuss. *See, e.g., Matter of Harry's Nurses Registry, Inc.*, 171 A.D.3d 1410, 1412 (3d Dep't 2019); *Matter of Ingle*, 129 A.D.3d 1424, 1426 (3d Dep't 2015).

Finally, though well aware of it from the briefing below, petitioners fail to mention that there is a final, binding, DEC adjudication relevant

to sand and gravel mining that is contrary to their position. Specifically, in *Southern Dutchess County Sand & Gravel* (Comm., Dec. 19, 2006), http://www.dec.ny.gov/hearings/38191.html, the Commissioner adopted an ALJ's determination that permitted sand and gravel mining below the water table based, in part, on factual findings that doing so is a common practice for which "DEC knows of no instance when significant groundwater quality or quantity problems have occurred at mines in New York State," *Southern Dutchess County Sand & Gravel* (Issues Ruling, Apr. 20, 2005), http://www.dec.ny.gov/hearings/11846.html. Unlike the non-final ALJ determinations upon which petitioners so heavily rely, *Southern Dutchess County Sand & Gravel* was a final determination which DEC was required to respect or distinguish.

B. The Environmental Conservation Law Does Not Provide Petitioners, or Any Other Local Governmental Body, a Veto on the Issuance of Mining Permits

Petitioners assert that ECL §§ 23-2711(3) and 23-2703(3) required DEC to formally consult with the Town of Southampton before issuing the modified permit, but Supreme Court correctly rejected this contention. Those provisions only require DEC to consult with a municipality when the application sought a new permit or a substantial

modification to a prior permit. Neither situation was present here. In his nonfinal ruling, the ALJ was wrong to conclude those provisions required anything different and Supreme Court was correct to adopt a contrary interpretation of the statute.

ECL § 23-2711(3) provides that DEC must provide a copy of the application for a new mining permit to the locality and afford the locality an opportunity to provide DEC with information, including "whether mining is prohibited at that location." By its terms, § 23-2711(3) applies only "for a property not previously permitted pursuant to this title." Here, Sand Land's mine has been operating for 60 years at its current location and been permitted since the 1980s. Consequently, the permit modification sought was not a new permit.

Nor did the permit modification Sand Land sought constitute a substantial modification to a prior permit or, as petitioners erroneously describe it, a "major mine expansion." (Br. at 2, 16.) As Supreme Court properly held, the modification Sand Land sought would allow deeper mining within the same horizontal footprint of the mine. No mining of any previously unmined acreage was permitted.

Moreover, any removal of material from the previously mined "stump dump" would not constitute "mining" under the ECL in any case. "Mining" within the meaning of ECL § 23-2705(8) refers to the removal of "minerals" and "overburden." "Mineral" means "naturally formed, inorganic solid material," ECL § 23-2705(7), and "overburden" means "all of the earth, vegetation and other materials which lie above or alongside a mineral deposit." ECL § 23-2705(10). Thus, "mining" is limited to the removal of minerals and overburden from their original, naturally-occurring location. Accordingly, the removal of filler material—such as the filler in the stump dump—is not "mining" within the meaning of the ECL. Therefore, the permit did not request a material change in authorized activity that would require DEC to treat the modification as a new application.

Under DEC's reading of the statute, the deepening of an already existing mine within its previously permitted mining footprint does not trigger ECL § 23-2711(3). This is the most plausible reading of the statute. To hold otherwise would make virtually any permit modification subject to ECL § 23-2711(3), rendering superfluous the statutory language "for a property not previously permitted pursuant to this title."

Such a reading would violate basic canons of statutory construction requiring courts "to reconcile and give effect to all of the provisions of the subject legislation." *Carney v. Philippone*, 1 N.Y.3d 333, 339 (2004).

Indeed, the type of information that § 23-2711(3) requires DEC to obtain from a town is not information pertinent to an application to deepen an existing mine. In addition to asking "whether mining is prohibited at that location" § 23-2711(3) seeks information on "appropriate setbacks from property boundaries or public thoroughfare[s]," what "barriers designed to restrict access" might be needed to mine at the location, what dust control steps are warranted, and what hours of mining operation are appropriate. None of these items is implicated by how deep the mine goes within an existing footprint and, indeed, none were changed.

Similarly misplaced is petitioners' reliance on ECL § 23-2703(3). This section prohibits the processing of an "application for a permit to mine" in some locations where "local zoning laws or ordinances prohibit mining uses within the area proposed to be mined." As Supreme Court correctly held, this section applies to an application to mine a new location, not to deepen an existing mine within its existing footprint. Indeed, § 23-

2703(3) on its face does not require any notice or consultation with the municipality to process a mining application. Rather, it requires that DEC be aware of whether the relevant municipal zoning laws prohibit mining. *Matter of Valley Realty Dev. Co., v. Jorling*, 217 A.D.2d 349, 354 (4th Dep't 1995). It also creates an implied cause of action against DEC should DEC permit a new mine in violation of those local laws. *See Matter of Town of Riverhead v. N.Y.S. Dep't of Env. Conserv.*, 50 A.D.3d 811, 812 (2d Dep't 2008). Here, when reviewing Sand Land's application for a renewed permit, DEC was well aware of the legal status of the mine: The Town of Southampton had issued a certificate of occupancy for the mine in 2016 that permits sand and gravel mining. DEC also knew that the Second Department had held that Sand Land's "operation of a sand mine, including the storage and delivery of sand, constituted a preexisting nonconforming use." *Matter of Sand Land*, 137 A.D.3d at 1292. And DEC also knew that the Court of Appeals has held that grandfathered sand and gravel mines are exempt from abrupt changes to zoning laws that would prohibit mining deeper within the same parcel. *See Syracuse Aggregate Corp. v. Weiss*, 51 N.Y.2d 278, 285-87 (1980).

Petitioners cannot credibly argue that sand mining is categorically prohibited in town. In addition to Sand Land's mine, there are *six* other sand mines operating in town. Under these circumstances, even if consultation with the Town of Southampton was required by either statutory provision (it was not), the failure to do so was harmless error. Even if DEC had asked Southampton for the legal status of the mine and the Town had responded with information that contradicted the Second Department's ruling and its own certificate of occupancy, DEC would have been free to disregard that erroneous representation. *See* ECL § 23-2711(3). Indeed, in a case decided during the pendency of this appeal, Supreme Court, Suffolk County found no error in DEC issuing a permit modification where the Town of Southampton provided three different responses to an inquiry as to the legality of a different sand mine's operation in the town. *See, e.g., Town of Southampton v. N.Y.S. Dep't of Env. Conserv.*, Docket No. 3931/2019, NYSCEF No. 16 (Sup. Ct. Suffolk County Dec. 15, 2020).

Likewise erroneous is the proposed amici's reading of ECL § 23-2703(3). They contend that this section prohibits the issuance of all modification or renewal permits in an area where local ordinances have

prohibited new extractive mining generally, even if the mining use was a grandfathered pre-existing non-conforming use and the change to the permit was not a material alteration to what the mine was already doing. Under amici's reasoning, a municipality could effectively end preexisting mining by the simple expedient of adopting a new zoning ordinance prohibiting mining. But the Court of Appeals has already rejected such a device in the context of sand and gravel mining specifically. *See, e.g., Buffalo Crushed Stone, Inc., v. Town of Cheektowaga*, 13 N.Y.3d 88, 97 (2009) ("[P]rior nonconforming uses in existence when a zoning ordinance is adopted are, generally, constitutionally protected even though an ordinance may explicitly prohibit such activity."); *Syracuse Aggregate Corp. v. Weiss*, 51 N.Y.2d 278, 278 (1980) ("The town, however, may not prevent petitioner from doing that which it has a legal right to do by arbitrarily denying petitioner a permit to continue to use the land in conjunction with the previously engaged in quarrying operation.") Had the Legislature intended to enact such a dramatic change in the law, it would have said so explicitly in § 23-2703.

Nor does Supreme Court's interpretation of these statutory provisions vitiate the special protection intended for Long Island

residents. These provisions give the municipalities on Long Island the ability to regulate land use within their borders, including non-conforming uses. They simply must do so via their own laws, consistent with their Home Rule authority. N.Y. Const., art IX, § 2(c)(ii).

Contrary to the proposed amici's suggestions, *Matter of Frew Run Gravel Products, Inc. v. Carroll*, 71 N.Y.2d 126, (1987), does not hold otherwise. *Frew Run* holds that the Mined Land Reclamation Law does not totally preempt town zoning laws. If, for example, the Town of Southampton wanted to eliminate all sand mining (current and grandfathered) within its borders via local law, it could do so "provided that termination is accomplished in a reasonable fashion." *Syracuse Aggregate Corp. v. Weiss*, 51 N.Y.2d 278, 278 (1980). But, as the Second Department has already held, Sand Land's "operation of a sand mine, including the storage and delivery of sand, constituted a preexisting nonconforming use," *Matter of Sand Land*, 137 A.D.3d at 1292, and the Town has issued a certificate of occupancy saying the same thing. It does not impinge upon a municipality's right to Home Rule to hold it to the current state of its own law.

Recent legislative developments confirm the correctness of DEC's interpretation of ECL § 23-2711(3) and ECL § 23-2703(3). Earlier this year, the Legislature passed a bill (sponsored by petitioner Thiele) that would have amended ECL § 23-2703 to give local governments like the Town of Southampton the power to regulate mining in their jurisdictions.[4] That bill was vetoed by the Governor on December 15, 2020. *See "Cuomo vetoes bill that would have given local governments more control over sand mines,"* NEWSDAY, https://www.newsday.com/long-island/suffolk/sand-mines-veto-groundwater-governor-1.50093391 (Dec. 15, 2020). Such legislation would obviously have been unnecessary if the Town of Southampton and similar local governments already possessed the authority to regulate mining, as petitioners and amici argue.

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[4] *See* "*Provides for the regulation of the mining and reclamation of mines 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*," A10001 (2020), S08026 (2020), https://assembly.state.ny.us/leg/?bn=A10001&term=2019.

C. Supreme Court Properly Relied on the Affidavit of Division Director Dickert to Determine that the Ministerial Correction to the Life of Mine was Neither Arbitrary Nor Irrational

Contrary to petitioners' assertions, Supreme Court properly considered the affidavit of DEC official Catherine Dickert in reviewing DEC's determination to correct Sand Land's Life of Mine to include the stump dump. It is true that in a proceeding to review a quasi-judicial hearing determination, judicial review is limited to the hearing record before the administrative agency. But when, as here, an administrative agency acted in a quasi-legislative or administrative capacity, C.P.L.R. 7804(c) and (e) expressly allow the agency to submit affidavits to explain the rationale for its determination.

As this Court held in *Matter of Molloy v. N.Y.S. Workers' Compensation Bd.*, 146 A.D.3d 1133, 1134 (3d Dep't 2017), those affidavits may supplement the agency's rationale provided in the return. In *Molloy*, for example, the Court upheld a license revocation where "the Board's determination letter, standing alone, fail[ed] to 'contain sufficient information to permit this Court to both discern the rationale for the administrative action taken and undertake appellate review thereof,'" because the supporting affidavits "were sufficient to allow

judicial review." *Id.* (quoting *Matter of Office Bldg. Assoc., LLC v. Empire Zone Designation Bd.*, 95 A.D.3d 1402, 1405 (3d Dep't 2012)).

Dickert's affidavit shows that she was sufficiently familiar with DEC's decision-making process to support her explanations. To be considered in reviewing an agency's determination, the affiant need only be "an official with personal knowledge of the duly established procedures and information demonstrating a reasonable basis for" the agency's decision. *Matter of Kirmayer v. N.Y.S. Dep't of Civ. Serv.*, 24 A.D.3d 850, 852 (3d Dep't 2005). Dickert's affidavit easily meets this standard. Indeed, Ms. Dickert swore that she was "fully familiar with the facts, including DEC's official records regarding this matter" and that her opinions set forth in her affidavit "are based upon my personal knowledge, my review of the DEC record in this matter, my education, training, and professional experience, the relevant scientific literature and the application of methodologies commonly accepted as reliable in forming such opinions." (R1395.) Petitioners' have no support for their assertion that Dickert was a stranger to the challenged determinations. The contrary is true, as her affidavit demonstrates deep familiarity with the determinations, especially the ministerial correction to the Life of

Mine to include the "stump dump" area upon which Supreme Court primarily relied. (*See* R1395-1402.) Indeed, all aspects of the challenged determinations were overseen and processed through the Division of Mineral Resources, which Dickert oversees as its Director.

Petitioners did not show that Dickert lacked sufficient familiarity with DEC's decision-making process by pointing out that other agency officials were involved in the settlement process. Although the settlement agreement was signed by Thomas Berkman (R3259), for example, Berkman signed the agreement because only a Commissioner's Designee may enter into agreements that bind the agency. As General Counsel, Mr. Berkman is the executive staff member who often signs such agreements. Accordingly, this case is unlike *Matter of Menon v. New York State Dept. Of Health*, 140 A.D.3d 1428, 1431 (3d Dep't 2016), where the final decisions were made by persons in a separate division of the agency.

As Dickert explained in her affidavit, it has long been DEC policy to make such corrections to an existing Life of Mine during a renewal or modification application once an error was recognized. She explained that making corrections to a Life of Mine provides an important

environmental benefit: the area subject to the correction becomes part of the mine's reclamation obligations. (R2706-2707).

Here, DEC's action was particularly reasonable since the correction to include the 3.1-acre stump dump area within the Life of Mine did not authorize any new mining by Sand Land. As Dickert explained, that area had been mined to a depth below 120 AMSL decades ago; consequently, the entirety of the material located there could not have been regulated as "mining" under the ECL because it was not virgin material but rather was fill that had been pushed in later. (R2707-2709, R2715-2717.) Indeed, by including the additional 3.1 acres, DEC limited Sand Land's ability to remove material below the 120 AMSL level. (R2716.)

In sum, as Dickert explained, if DEC did not correct "the permit life of mine acreage, then at the end of the mining operations, the Stump Dump would not have been reclaimed, leaving a reclaimed 31.5-acre mining facility with a raised 'island' of three acres of unreclaimed, disturbed land." (R2716.) It was, accordingly, entirely reasonable for DEC to make the correction. Supreme Court thus correctly rejected petitioners' claim that the inclusion of the stump dump acreage in the

Life of Mine warranted annulment of the settlement agreement, the permit renewal, and the permit modification.

D. Supreme Court Properly Upheld DEC's Amended Negative Declaration

DEC undertook the proper consideration of the environmental impacts of the permit renewal and modification required by the State Environmental Quality Review Act (SEQRA). Supreme Court was right to affirm DEC's 2019 amended negative declaration of significance.

"Judicial review of a lead agency's SEQRA determination is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination 'was affected by an error of law or was arbitrary and capricious or an abuse of discretion.'" *Matter of Chinese Staff & Workers Assn. v. Burden*, 19 N.Y.3d 922, 924 (2012) (quoting *Akpan v. Koch*, 75 N.Y.2d 561, 570 (1990)). Substantive review is limited to "whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination." *Id.* (quoting *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 417 (1986)).

"Under this deferential standard of review, 'it is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA.'" *Matter of Town of Waterford v. N.Y.S. Dep't of Env. Conserv.*, 2020 N.Y. Slip Op. 06180 at 9 (3d Dep't Oct. 29, 2020) (quoting *Matter of Jackson*, 67 N.Y.2d at 417)). Moreover, "a lead agency need not investigate every conceivable environmental problem during the course of a SEQRA review, and generalized community objections or speculative environmental consequences are not sufficient to establish a SEQRA violation." *Matter of Heights of Lansing, LLC v. Village of Lansing*, 160 A.D.3d 1165, 1167 (3d Dep't 2018).

DEC's review and 2019 amended negative declaration easily meets this standard. (R3384-3387.) The record does not support petitioners' arguments that DEC failed to adequately consider the county health department report when assessing the safety of the groundwater.

Under the settlement agreement, DEC's review of Sand Land's modified permit application would "be processed based on the existing Negative Declaration and the multiple legislative hearings held regarding the prior, more expansive modification request, which also

contemplated the continued use of the Facility for the processing and storage of vegetative waste." (R3257.) DEC stated in the settlement agreement that it had "reviewed the testimony and accompanying correspondence submitted to [DEC] in connection with the two legislative hearings held on the prior, more expansive, modification proposal" and that the concessions required of Sand Land such as ceasing to process vegetative waste and to pay for groundwater monitoring "are specifically being required and implemented in direct response to the concerns in connection with those prior legislative hearings." (R3258.) DEC further "affirmatively stat[ed] that . . . any permit issued in accordance herewith will result in no adverse environmental impacts." (R3257.)

The 2019 amended negative declaration amended the 2014 negative declaration, which was unchallenged and fully in effect when the settlement agreement was executed. DEC issued the 2014 negative declaration after assessing the environmental impacts arising from Sand Lands' more extensive 2014 permit application. (*See* R2786-2788.) The 2014 negative declaration addressed not only the same request to deepen the mine, but also a request to "expand the dimensions of active mining areas" while Sand Land continued its processing of vegetative waste.

(R2777, 2786.) There, DEC concluded that "the proposed sand mine expansion will not substantially impact groundwater quality" based on the 90 feet of distance that would remain between the mine floor and the aquifer, as well as "groundwater sampling results . . . [that] show no contamination under the existing mine so it appears the mine is not generating or contributing contamination to groundwater and no significant impacts to the groundwater quality are expected." (R2787.) DEC also noted that the operation of the mine "does not introduce chemicals or contaminants to the soils." (R2787.)

When DEC denied the permit modification for which the 2014 negative declaration was initially prepared, it explained that it had reviewed "the environmental assessment form and supporting documents" as well as the county health department report. (R2811.) Of significance here, the denial letter specifically took issue with the 2014 negative declaration's failure to directly address the county health department report's findings that the processing of vegetative waste potentially impacted the groundwater. (R2813.) The letter also noted that the county health department had requested that any permit issued require routine groundwater sampling. (R2812.)

In the 2019 amended negative declaration, which followed the settlement agreement, DEC resolved these concerns and explained its reasoning for concluding that the deepening of Sand Land's existing mine would not have a substantial environmental impact. Specifically, the 2019 amended declaration concluded that groundwater would not be impacted because "all vegetative waste has been removed from the mine site" and that "[a]ll munching and composting operations at the facility were terminated in 2018 and the compost materials were removed from the site." (R3385.) The amended negative determination further concluded that the 90 feet of buffering would further protect the groundwater and, as the county health department had requested, "groundwater monitoring wells had been installed at the site and additional ones will be added periodically to test the groundwater on at least a quarterly basis." (R3385-86.) DEC again found that the mining "does not introduce chemicals or contaminants to the soils." (R3385.) As Dickert explained, there was no threat to the groundwater now that ongoing vegetative waste processing had permanently ceased; DEC made this finding after considering "the relevant scientific facts, including the

complete lack of data connecting sand mining on Long Island to groundwater contamination." (R2718.)

In determining that there was no threat to the groundwater, DEC considered not only the county health department report but also a report on the same topic prepared by Alpha Geoscience. (R3071-3155.) That report reviewed the same data relied upon by the county health department and concluded that the data did not show groundwater contamination caused by the mine.

In this regard, contrary to petitioners' misleading suggestions, the term "contamination" does not refer to any elevated presence of a material contained in the soil or groundwater, but rather refers to unacceptable levels as defined by DEC's regulations. *See* 6 NYCRR Part 375-6.8(b) (setting levels of soil particulates acceptable for all kinds of use). Thus, even though there are naturally occurring elevated levels of manganese (Mn) and iron (Fe) in the groundwater and soil in Suffolk County, those elevated levels are not "contamination."

DEC again addressed the local health department report in its response to public comment received in opposition to granting the modified permit. There, DEC again explained that the county health

department report only addressed the effect of processing of vegetative waste on groundwater, and "makes no mention of any adverse impacts associated with the mining activities." (R3506.) There, DEC again explained that because Sand Land had stopped processing vegetative waste at the mine, the concerns raised by the county health department report had been addressed.

Petitioners also contend that DEC acted arbitrarily and capriciously by not waiting for additional water testing results, and that Supreme Court erred in refusing to supplement the record to include those test results. These contentions do not withstand scrutiny. Because the settlement agreement required that Sand Land allow (and pay for) ongoing water testing, there would always be a new set of upcoming testing. DEC thus acted within its broad discretion in declining to await the new set of test results. After all, judicial review is limited to whether DEC had a rational basis for its determination *based on the materials it considered at the time*. There was ample information before DEC to support its amended negative determination at the time it made its determination.

In any event, these new test results would not change the outcome. As explained by a DEC geologist in an affidavit submitted in opposition to petitioners' motion to supplement the record, the subsequent water testing results did not show contamination or, indeed, anything inconsistent with DEC's determinations. (*See* R9251-9259.)[5]

Similarly misguided is petitioners' assertion that DEC improperly relied on future testing when issuing the amended negative declaration. DEC's determination primarily rested on Sand Land's cessation of the processing of vegetative waste and the resulting diminution in risk to the groundwater. The provision in the settlement agreement for future testing will provide *additional safeguards for the groundwater*. (R3385-3386.)

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[5] The submissions to this Court on petitioners' unsuccessful motion for a preliminary injunction include even more recent data on the state of the groundwater sampling. This water testing data, which was obtained during ongoing mining and after the cessation of vegetative waste processing, shows that the levels of metals in the groundwater around the mine do not show contamination and there is no expectation that they will start to do so. *See* Affidavit of Kristy Salafrio, NYSCEF No. 91 at 10. In short, petitioners' unsupported predictions that continued mining would result in contamination of the aquifer have, unsurprisingly, not come true.

E. Petitioners Remaining Arguments are Unpreserved

Petitioners argue that "strict compliance" with SEQRA required the completion and inclusion in the return of Parts 2 and 3 the Environmental Assessment Form. (Br. at 39-42.) This claim is raised for the first time on appeal and so is unpreserved for this Court's review. *See Marshall v. City of Albany*, 184 A.D.3d 1043, 1044 (3d Dep't 2020); *Jones v. Memorial Sloan Kettering Cancer Cntr.*, 186 A.D.3d 1851, 1852-53 (3d Dep't 2020). In any event, those arguments are without merit. Those sections were completed as part of the process of DEC's review of the 2014 negative declaration, which was amended by the 2019 amended negative declaration and review of which was required by the settlement agreement.

Petitioners also assert that they were denied an adjudicatory hearing (Br. at 36-37). This claim, however, was not pleaded in the petition or the amended petition and so is unpreserved (R668-677). The objection is meritless in any case. DEC regularly resolves disputes by means of settlement and there is no statutory or regulatory requirement that parties other than DEC and the permit applicant are entitled to participate in the settlement negotiations. *See, e.g.*, ECL § 3-0301(2)(b)

(the Commissioner has authority to "[e]nter into contracts with any person to do all things necessary or convenient to carry out the functions, powers and duties of the department"); 6 N.Y.C.R.R. § 621.9(c) (defining the appropriate parties to a formal settlement conference as "the applicant and appropriate department staff, and their representatives"). To the contrary, when a permit application is processed in a settlement, the public is given the opportunity to be heard during the notice-and-comment process provided for in DEC regulations. *See* 6 N.Y.C.R.R. §§ 621.7, 621.8. Indeed, even though petitioners submitted lengthy comments as part of the notice and comment process undertaken by DEC prior to issuing the modified permit contemplated in the settlement agreement, only one petitioner suggested that an additional hearing was "in the public interest." (R688; *compare with* R3653-3660.)

As DEC reasonably concluded in its response to public comment, petitioners were not entitled to a hearing in any case. (R3507; 3605.) Where, as here, the objections advanced as part of the notice and comment process had already been the subject of prior hearings, the consideration of which was expressly a part of the settlement agreement, there were no "substantive and significant issues relating to any findings

or determinations the department is required to make" that warranted a further hearing. 6 N.Y.C.R.R. § 621.8(b); *see Matter of Beer*, 2020 N.Y. Slip Op. 07959 at 5-6 (discussing the standard for when an adjudicatory hearing on a permit application should be held). Indeed, this Court has upheld DEC's denial of an adjudicatory hearing where prior proceedings on identical issues had already resulted in a hearing. *See Matter of Riverkeeper, Inc. v. N.Y.S. Dep't of Env. Conserv.*, 152 A.D.3d 1016, 1018 (3d Dep't 2017). Here, given the small number of total public comments, it was also reasonable for DEC to conclude a legislative hearing was unnecessary due to a lack of a "significant degree of public interest." 6 N.Y.C.R.R. § 621.8(c).

CONCLUSION

Supreme Court's judgment dismissing the petition should be affirmed.

Dated: Albany, New York
December 31, 2020

Respectfully submitted,

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