To be Argued by:
DAVID H. ARNTSEN
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division – Third Department

Appellate Case No.: 532083

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-Appellants,

ASSEMBLYMAN FRED W. THIELE, JR.,

Petitioner,

– against –

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

Respondents-Respondents.

BRIEF FOR PETITIONER-APPELLANT TOWN OF SOUTHAMPTON

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ISSUES PRESENTED

I. Whether Supreme Court erred in concluding that Environmental Conservation Law §§ 23-2703(3) and 23-2711 limiting New York State Department of Environmental Conservation's authority to grant mining permits in Long Island towns that do not permit mining under its zoning code do not apply to the mining permit renewal application and the modification application to expand an existing sand mine horizontally by three acres and vertically 40 feet closer to the sole source aquifer?

Answer: Supreme Court erroneously concluded that ECL §§ 23-2703(3) and 23-2711 did not apply to the subject horizontal and vertical expansions of mining beyond the limits of prior permits.

Petitioner-Appellant Town of Southampton joins in the Issues Presented and argument related thereto set forth in the Appellants Brief filed on behalf of Petitioners-Appellants 101Co, LLC; 102Co NY, LLC; BRRRubin, LLC; Bridgehampton Road Races, LLC; Citizens Campaign for the Environment; Group for the East End; Noyac Civic Council; Southampton Town Civic Coalition; Joseph Phair; Margot Gilman; and Amelia Doggwiler.

STATEMENT OF THE CASE

This appeal involves the denial of an Article 78 petition challenging a series of New York State Department of Environmental Conservation ("DEC" or

"Department") actions and decisions granting a major mine expansion over the sole source drinking water aquifer in Southampton, New York that is protected by State and local laws. It is impossible to reconcile the actions of the Department of Environmental Conservation in administratively nullifying provisions of the Environmental Conservation Law that uniquely restrict DEC's mining permit authority on Long Island, constraining that authority, acknowledging DEC's principal role as steward of the State's environment, and recognizing the towns as gatekeepers of Long Island's irreplaceable water source.

This Special Proceeding challenges a series of determinations and approvals by the DEC relating to a sand and gravel mine ("Mine" or "site") in Suffolk County, New York, owned and operated by Respondents Sand Land Corporation and Wainscott Sand and Gravel Corp.[1] [R. 52, ¶ 1; R. 55-56, ¶¶19-22][2]. Petitioner-Appellants ("Appellants") consist of the Town of Southampton (the "Town")[3] in

[1] Respondents Sand Land Corporation and Wainscott Sand and Gravel Corp. will be referred to collectively as "Sand Land."

[2] Citations to the Joint Record are cited as "[R. page number]". Where available, paragraph numbers used in the cited page have been included for the Court's convenience.

[3] This brief is submitted on behalf of Petitioner-Appellant Town of Southampton. The Non-municipal Appellants are filing a separate brief in this proceeding.

which the Mine is located, property owners located around the Mine, and local environmental and civic organizations. [R. 53-55, ¶¶ 4, 6-18].[4]

The Town joins the Statement of the Case as set forth in the brief submitted by Petitioner-Appellants 101Co, LLC; 102Co NY, LLC; BRRRubin, LLC; Bridgehampton Road Races, LLC; Citizens Campaign for the Environment; Group for the East End; Noyac Civic Council; Southampton Town Civic Coalition; Joseph Phair; Margot Gilman; and Amelia Doggwiler (the "Non-municipal Appellants").

ARGUMENT

Supreme Court erred in accepting the Department's more recent misreading of ECL § 23-2711 and § 23-2703.

The primary and perhaps self-evident mandate of New York State's Environmental Conservation Law is the protection and preservation of fragile natural resources. ECL §1-0101(1) unambiguously sets forth that policy:

> The quality of our environment is fundamental to our concern for the quality of life. It is hereby declared to be the policy of the State of New York to conserve, improve and protect its natural resources and environment and to prevent, abate and control water, land and air pollution, in order to enhance the health, safety and welfare of the people of the state and their overall economic and social well being.

[4] The local New York Assemblyman Fred W. Theile, Jr. was also a Petitioner in the proceedings below but is not an Appellant herein. [R. 53, ¶ 5]. Suffolk County sought amicus status in the proceedings before Supreme Court and is Appellant in the related appeal Town of Southampton, et al. v. New York State Department of Environmental Conservation, et al. (Appellate Docket No. 529380).

Section 23-2703(1) of the ECL, part of the State's Mined Land Reclamation Law ("MLRL"), contains the declaration of State policy for the management and administration of mineral mining operations in the New York State:

> 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.

Thus, while the Legislature acknowledged in the MLRL the need for an efficient and stable mineral mining industry, it nonetheless saw fit to reiterate the paramount importance of environmental conservation of precious resources, one of which is at the heart of the Proceeding now before this Court: Long Island's drinking water, the source of which is a sole source aquifer. The specific and redundant articulation of the need for environmental protection in the Chapter of the ECL governing mineral mining can only be construed as recognition by the Legislature of the potential threat to these resources by deleterious activities and contingencies that were manifest in both mining and collateral, non-mining operations undertaken (often in contravention of local law) at mineral mine sites.

The MLRL, in order to provide stability in the regulation of mineral mining and mined land reclamation in the State, entrusts permitting and other administrative powers to DEC over mineral mining and reclamation in the State. Indeed, the legislature incorporated a supersession clause into the statute whereby the ECL

supersedes "all other state and local laws relating to the extractive mining industry." ECL §23-2703(2). Of course, DEC is also the agency charged with the stewardship of the environment under the ECL. While it is easy to see a natural tension between the balancing that DEC must do in this regard, the principal and overarching purpose of the ECL is to protect and conserve the environmental resources of the state and, as particularly relevant herein, the sole source of Long Island's drinking water.

Perhaps because of that tension, the Legislature explicitly reserved to local governments several specific powers, amongst them the right to enact and enforce zoning laws and laws of general applicability, so long as such laws do not specifically regulate mining or reclamation activities. ECL §23-2703(2)(a) and (b). See also Patterson Materials Corp. v Town of Pawling, 264 A.D.2d 510 (2d Dept. 1999). DEC is required by statute to "cooperate with any other governmental entity to further the purposes of" the law. ECL §23-2709(g).

In its initial iteration, §23-2703 did not carve out any geographical distinctions regarding its application across the state, despite the varied and dissimilar geological features of New York's several regions. In 1991, however, in clear recognition of the particular need to protect Long Island's sole source aquifer and thus its drinking water supply, the Legislature amended §23-2703 to provide Long Island municipalities with a more particular gatekeeping obligation to protect this

irreplaceable resource.[5] The amendment affords municipalities, such as the Town herein, the power to employ through zoning a check on both the expansion of mineral mining uses and DEC's jurisdiction over mining application processing and permitting authority "if local zoning laws or ordinances prohibit mining uses within the area proposed to be mined."

In its entirety, §23-2703(3) provides that:

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

ECL §23-2703(3) (emphasis added). The language is not accidental; indeed, the statutory amendment to §23-2703 serves as a complement to other state, county and local statutory and/or regulatory schemes which collectively serve to preserve and protect the aquifer.

As noted previously, the Mine is located squarely within areas that are covered by these protective schemes. The Mine is located in the Country Residence (CR-200) zoning district within the hamlet of Noyac, in the Town. [R. 58, ¶ 33]. Mineral

[5] ECL §23-2703(3) applies to "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." Only Nassau and Suffolk counties meet these statutory requirements. [R. 1842, ¶ 50 n. 3].

Mining is not permitted in the CR-200 district. [R. 138]. The Mine is also within the Town's Aquifer Protection Overlay District, a Critical Environmental Area designated by Suffolk County, and Special Groundwater Protection Area designated in Article 55 of the Environmental Conservation Law. [R. 58-59, ¶¶ 33-34]. Notably, a Critical Environmental Area can be identified by "an inherent ecological, geological or hydrological sensitivity to change that may be adversely affected by any physical disturbance."[6] It is, of course, uncontroverted that mineral mining introduces a significant physical disturbance to the buffering sands and soils that sit atop the aquifer.

Although all of Long Island is recognized as being part of a sole source aquifer system (where drinking water is solely derived from groundwater), the Mine exists within a critically important "deep flow" hydrogeologic recharge zone within the larger sole source designation. [R. 59, ¶ 35]. Such deep flow areas provide for the greatest quantity and deepest volume of freshwater recharge into the subsurface aquifer from among the various hydrogeologic zones present on Long Island. [Id.]. In addition to their value in replenishing the region's largest stores of fresh water, such areas are also highly vulnerable to contamination from anthropogenic sources. [Id.]. The overarching policy objective inherent to the Special Groundwater

[6] See Department of Environmental Conservation, Critical Environmental Areas CEAs, available at https://www.dec.ny.gov/permits/6184.html.

Protection Area, Critical Environmental Area, and Aquifer Protection Overlay District designations is the protection of these groundwater reserves and providing for the continued recharge of clean water (from precipitation) into the aquifer system. Section 23-2703(3) is but another shield against the potential incursion of pollutants that mineral mining might introduce into this sensitive hydrological system should Long Island mines be permitted the unmitigated power to expand their extant boundaries without limitation, and thus enhance the risks of contamination as the mine floors get ever closer to the groundwater.

It is against this backdrop of unambiguous legislative policy, enshrined in New York's Environmental Conservation Law and in local law, designed to afford every protection to Long Island's sole source of drinking water, that the actions of DEC challenged by the Supplemental Petition must be adjudged arbitrary, capricious and made in clear error of law. Supreme Court thus erred by dismissing the Supplemental Petition.

A. DEC's original guidance for implementation of ECL § 23-2703(3).

In 1992, DEC promulgated Mined Land Reclamation Permit Processing Technical Guidance Memo MLR92-2 ("TGM")[7] providing for the implementation

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

of the amendment contemporaneous to its enactment. In pertinent part, the TGM provides as follows:

> 4. **Coordination, Long Island**
> In Region 1 the SEQR coordination letter will be accompanied by a statement that inquires whether local zoning or ordinances prohibit mining uses within the area proposed to be mined. This satisfies the requirement contained in the law (§23-2703.3) whereby no agency of the 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 draws its 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.
> In these instances, DEC accepts the determination of local prohibition only from the Chief Administrative Officer (CAO). For purposes of application completeness, the Department will rely exclusively on the local government CAO's determination concerning prohibition and will not involve itself in matters of dispute between local government and the applicant. Upon receipt of the statement of local prohibition, declare the application incomplete and notify the applicant that processing cannot go forward unless local prohibition is removed.[8]

In cases where a determination of completeness has been made, the Guidance provides, at ¶5(3), that "if, in the case of Region 1 (Long Island), a statement of local prohibition is contained within the comments to the notice of completeness, the Department will stop processing the application *based solely* on the determination

[8] As DEC's incorrect interpretation of §23-2703 invokes a "clear error of law" standard and thus a legal interpretation of statutory terms, this Court is not required to give deference to the Agency's guidance in any event. Toys R Us v Silva, 89 N.Y.2d 411 (1996).

that mining is prohibited" (emphasis added). Indeed, throughout the Guidance, reference is made to reliance "solely" or "exclusively" upon the determination by the local authority that mining is prohibited. See, e.g., Technical Guidance Memo MLR92-2, ¶¶ 1, 4, and 5. This exclusivity serves the purpose of enforcement of §23-2703(3)'s mandate to protect Long Island's sole source aquifer, and a recognition that the agency may not further consider or process an application if mining is not permitted in the area proposed to be mined *solely* on the CAO's determination.

DEC and Supreme Court payed little attention to the TGM. Indeed, DEC does not reference the Guidance at any time in its Administrative Return, instead making reference only to the 2019 Policy Memorandum referenced in the Dickert Affidavit, prepared long after the amendment to §23-2703(3) and, more conspicuously, after Sand Land's initial attempt at securing its expansion permit through the proper Administrative Processes was *denied* by DEC in 2015. Clearly, reliance upon the result oriented memorandum which materially contradicts the TGM demonstrates a degree of arbitrariness that requires reversal of DEC's challenged actions herein.

B. Procedural Mechanism for Inquiry of the CAO.

Section 23-2703(3), while providing a directive that the local legality of zoning in the area proposed to be mined must be assessed and ascertained from the Town's CAO before any additional processing of an application of a new mining

application[9] can be considered, does not itself provide for the mechanics of such an inquiry. Because the modification application at issue herein sought to expand the Mine over 34[10] acres to an increased depth of 120' AML (40' closer to the aquifer), the ECL and Uniform Procedures Act[11] mandate that the application be treated as a new mining application triggering the notification procedures under ECL §23-2711.[12]

ECL §23-2711(3) provides, in relevant part:

> Upon receipt of a complete application for a mining permit, for a property not previously permitted[13] pursuant to this title, a notice shall be sent by the department, by certified mail, to the

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[9] As will be demonstrated *infra*, Sand Land's application to mine significantly deeper in previously unpermitted areas invokes the statutory inquiry contemplated by §23-2703(3).

[10] As set forth in the Statement of Facts in the Appellants Brief filed on behalf of the Non-municipal Appellants, the original Life of Mine, before the challenged Settlement Agreement was entered into by Respondents, was at all times 31.5 acres.

[11] Where, as here, a modification application proposes mining beyond the previously approved mining boundary and deeper than previously approved and, therefore, involves a material change in permitted activities, the application is treated as one for a new permit under the UPA. See ECL §70-0115[2][b]; 6 NYCRR §621.11[h][1]. Treating a mining permit renewal as a new application triggers the notification procedures under ECL 23-2711, among other reviews. See R. 132.

[12] Id.

[13] The statute by its terms applies to a "property not previously permitted." This differs from the language in §23-2703(3) which directs inquiry regarding the "area proposed to be mined". Thus, while the mechanics of the inquiry are spelled out in §2711, the substance of the inquiry as to the legality of the area subject to the permitting inquiry must focus on the area proposed to be mined.

> chief administrative officer of the political subdivision in which the proposed mine is to be located (hereafter, "local government"). Such notice will be accompanied by copies of all documents which comprise the complete application and shall state whether the application is a major project, or a minor project as described in article seventy of this chapter. (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.

ECL §§23-2703(3) and 23-2711(3), read in conjunction, therefore require a full cessation of the processing of any pending application until the mandated inquiry, and response thereto, has been made. As noted previously herein, DEC did not make *any* inquiry, much less the mandated ECL inquiry, herein.

C. The applicability of the statutory framework to DEC's actions.

Appellants' arguments follow closely the aforementioned binding decisions of the Chief Administrative Law Judge James T. McClymonds ("the CALJ" or "CALJ McClymonds"). The CALJ's decisions were rendered upon consideration of Sand Land's appeal of the denial of a nearly identical modification application submitted in 2014. Regardless of whether the CALJ decisions are binding as set in the Brief of the Non-municipal Appellants, the legal analysis undertaken by the CALJ correctly reflects the legal import of Southampton Town's gatekeeping responsibility on matters of local zoning law when that law does not legally permit mining in the area proposed to be mined.

The CALJ undertook a comprehensive analysis for interpreting the statutory framework when DEC is faced with an application pertaining to mineral mining on Long Island, and indeed referenced the TGM. The CALJ noted that "[a]lthough the MLRL supersession clause prevents a municipality from regulating mining within its borders, it expressly preserves a municipality's authority to regulate permissible uses of land within the municipality." [R. 130 (citing Matter of Gernatt Asphalt Prods. v Town of Sardinia, 87 N.Y.2d 668, 682-83 (1996))]. Thus, the MLRL does not preempt a town's authority to determine that mining should not be a permitted use of land within the town, or to enact amendments to the local zoning ordinance in accordance with that determination. The CALJ ruled that that "applicant's expansion proposal triggered the inquiry required under ECL §§23-2711(3)" and that 2703(3) was applicable to the Modification Application. [R. 133]. Significantly, the CALJ held that the Town's authority "includes not only the power to prohibit the development of new mines, but the power to impose reasonable restrictions to limit the expansion of and eventually extinguish prior nonconforming mining uses within the [town]." [R. 133 (internal citations omitted)].

In his decision on reargument, the CALJ reiterated and emphasized several points of law, including that "ECL [§] 23-2703(3) applies to applications to modify existing permits where, as here, the application seeks to expand an existing mine beyond its previously approved boundaries" (R. 141); that ECL §23- 2711 required

an inquiry into whether an application for a new permit, or an application to renew or modify an existing permit, is authorized under local law (Id.); and that under the MLRL, the Uniform Procedures Act (ECL Art. 70), and Department Policy, "applications for permits to mine *outside any previously approved line-of-mine boundaries*-in this case outside the 31.5 acre area and below a depth of 60 feet below grade level-involve a material change in permitted activities and are treated as new applications triggering the requirements of ECL §23-2711" (R. 145 (emphasis added)).

Significantly, in his December 2018 decision, the CALJ also noted that "the term 'property not previously permitted' (as expressed in §23-2711) leads to the conclusion that it refers to property outside any previously approved line-of mine boundaries. Thus, Sand Land's application to mine 4.9 more acres to a depth of 40 feet below that previously approved is an application to mine 'property not previously permitted.'" [R. 145].

D. DEC improperly processed and considered Sand Land's 2019 Modification application in clear error of law.

On July 18, 2018, while the Administrative Appeal by Sand Land of its 2015 Permit denial was pending and suspended, the Town Supervisor, Southampton Town's CAO, issued a letter to DEC. [R. 137-138]. In the letter, the Supervisor, precisely tracking the language of §23-2703, stated that "Mineral mining is not a permitted use in any zoning category in the Town of Southampton. Therefore the

answer as to whether local zoning laws or ordinances prohibit mining uses in the area proposed to be mined is yes." [R. 138]. At the time the Supervisor issued his letter, the CALJ's January 2018 decision suspending that Proceeding had been issued and it would remain pending "until the applicant demonstrates that no valid local zoning law or ordinance that prohibits mining at the project site exists." [R. 131; R. 135]. Thus, all processing of Sand Land's pending appeal had, correctly, ceased.

Shortly thereafter, on September 11, 2018, DEC served upon Sand Land a Notice of Intent to Modify ("NIM") Sand Land's extant permit, directing the cessation of mining activities and the commencement of reclamation activities at the Mine. [R. 292-296]. DEC's modification was premised upon findings after investigation that reflected only *de minimus* amounts of sand left for mining "located predominantly in the area of the mine formerly used for the storing and processing of vegetative waste." [R. 293-294]. DEC also stated that future activities "in and around those areas where processing and storage of vegetative waste formerly occurred have the potential to allow the release of contaminants in that area which could impact the local groundwater." [R. 294].

Succinctly, DEC, as recently as September 11, 2018, concurred with Appellants herein that the risk of contamination of the groundwater at the Mine was too great to permit further mining activities to occur there. At that juncture, the

processing of the pending 2014 modification application had been properly suspended by the CALJ. When the Supervisor's letter was issued in July of 2018, all further modification applications concerning the same areas proposed to be mined should have been either deemed incomplete by DEC or, if they were already in process, suspended due to the fact that mining in the area proposed to be mined was not permissible under local zoning law or ordinance. See ECL §23-2703(3). Despite the clear statutory mandate and DEC's own TGM, DEC nonetheless proceeded to negotiate with Sand Land and, ultimately, enter into the Settlement Agreement. The Agreement allowed a major mining expansion in complete circumvention of the applicable statutory and regulatory processes that had resulted in the denial of a nearly identical permit modification application four years earlier. Moreover, the Agreement directly and without public explanation contradicted the NIM by affording Sand Land a mining expansion rather than the cessation contemplated by the NIM. The Agreement also permitted mining for an extended and open ended period of time, as by its terms its provisions were limited to the current life of mine only.

These actions, and those that followed by DEC, including the grant of a modification permit and amended negative declaration, all constituted the continued "processing" of Sand Land's modification applications, though denominated as "negotiations," which processing was precluded by §23-2703(3). It is respectfully

submitted that such processing was undertaken in clear error of law, was arbitrary and capricious in its "about face" from DEC's only months' old NIM to shut the Mine down, and which activities should have been annulled by the Court below in a grant of the Supplemental Petition.

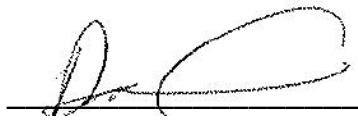
CONCLUSION

Respondents DEC and Sand Land, dissatisfied with the CALJ's rulings and the Department's own decisions to deny the 2014 Modification application and issue a NIM to cease mining, utilized a Settlement Agreement to circumvent and negate those decisions by approving an expansion of mining through a Renewal permit adding acreage and a Modification permit adding depth. The Administrative Return fails to identify a rational and proper basis for those determinations. Supreme Court erred by instead relying on an Affidavit supporting those determinations containing after-the-fact justifications without first-hand knowledge of the decision-making process. Supreme Court further erred in allowing DEC to ignore the CALJ's interpretations of ECL §23-2703 and §23-2711, and instead rely on an interpretation that moots the purpose of those provisions to provide towns on Long Island the authority to protect their groundwater. Finally, Supreme Court erred in sanctioning DEC's decision to ignore the procedural and substantive requirements of SEQRA, as well as the very groundwater testing results upon which the Amended Negative

Declaration of Significance was premised, when issuing the 2019 Modification Permit.

In entering into the Settlement Agreement, withdrawing the NIM, and issuing the Renewal and Modification Permits, DEC abandoned its obligation to enforce the State's policy "to conserve, improve and protect its natural resources" and ignored its own policies and prior determinations, the scientific evidence, and the law. The Court should reverse Supreme Court's denial of the Petition as Supplemented and nullify the Department's approval of the Settlement Agreement, Renewal Permit, and Modification Permit.

Dated: November 23, 2020



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