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.

REPLY BRIEF FOR PETITIONER-APPELLANT TOWN OF SOUTHAMPTON

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

Though it is submitted that the Court below misconstrued the applicable law and relevant facts in several respects[1], the principal error of law Appellant Town of Southampton ("the Town") addresses herein is Respondents' New York State Department of Environmental Conservation ("DEC") and Sand Land Corporation and Wainscott Sand and Gravel Corp. ("Sand Land") wrongful interpretation of §23-2703(3) of the New York State Environmental Conservation Law ("ECL"). The statute, enacted in 1991 specifically to permit local municipalities such as the Town to limit the expansion of mining activity in Nassau and Suffolk Counties through its zoning laws, prohibits the consideration of an application for a permit to mine as being complete, or from processing such an application for a permit to mine if local zoning laws or ordinances prohibit mining uses within the area proposed to be mined.

The statute, contrary to the contentions of Respondents in opposition, clearly and unequivocally mandates, rather than suggests, that DEC refrain from consideration and/or processing of an application for a permit to mine if the mining is prohibited in the area proposed to be mined by zoning law or ordinance. Indeed,

[1] Appellant Town joins and incorporates herein by reference the substantive arguments put forth in the Reply Brief submitted by the non-municipal Appellants, submitted concurrently herewith.

DEC's own guidance, set forth in Technical Guidance Memo MLR92-2[2] created contemporaneously with the addition of subsection (3) to §23-2703, reflects the same interpretation. Respondents conspicuously omit any reference to this DEC Guidance, instead relying, as averred by DEC Director of the Division of Mineral Resources Catherine A. Dickert, upon guidance created in 2018 (R. 1394-1410, ¶13), after Respondent DEC denied Sand Land's nearly identical mining expansion application in 2015 and contemporaneously with private discussions between Respondents which resulted in a Settlement Agreement (R. 346-353), one of the documents that Appellants challenge herein. Moreover, Respondents reference in their opposition the matter of *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). In that case, DEC conceded, through the affidavit of its Region One Deputy Permit Administrator, that modification applications are indeed subject to the Article 23 inquiry that DEC disavows herein.[3]

The Town's interpretation of §23-2703(3) does not, as Respondents appear to suggest, nullify mining activities in areas previously permitted by DEC, nor does it categorically prohibit existing, permitted mining activities at mine sites. Rather, it imposes the obligation on Respondent DEC to refrain from taking or continuing any

[2] https://www.dec.ny.gov/lands/5922.html
[3] See, Affidavit of John Weiland, Docket No. 3931/2019, NYSCEF No. 7.

action on applications made by Long Island applicants seeking to mine *beyond* currently permitted boundaries if local zoning law or ordinance prohibits mining in the area(s) proposed to be mined. The statute does not distinguish between horizontal or vertical boundaries[4], nor is it limited in applicability to applications seeking mining permits on properties that had not previously been mined, as Respondents imply herein. Indeed, it would appear to be self-evident that mine floors, particularly on Long Island, may be the most important boundaries of a "Life of Mine". It defies common sense to suggest that the depth limit or floor of a mine -- especially one over an irreplaceable aquifer -- is not a boundary, or that legislation specifically enacted to protect such an aquifer would exempt vertical expansion not sought in conjunction with a horizontal expansion. Indeed, it would have been quite simple for the legislature to limit the scope of §23-2703(3) by employing the word "properties", as it did in §23-2711, rather than "areas", as is contained within §23-2703(3), if its mandate was to be so broad. Needless to say, there is no such limitation.

Both Supreme Court and Respondents in Opposition wrongfully would impose such restrictions on the unambiguous statute which, as will be set forth in further detail below, would have the effect of completely eliminating any practical

[4] The absence of a horizontal expansion component was the principal fact relied upon by Supreme Court to distinguish otherwise fundamentally identical expansion applications submitted by Sand Land in 2014 and 2018.

application of §23-2703(3) to mining operations on Long Island, directly contrary to the very purpose for which the statute was enacted. This Court cannot endorse such a legally flawed interpretation of a proscriptive statute enacted solely for the benefit of the residents of Long Island, and particularly the Town of Southampton herein, which would neutralize the very purpose for which it was enacted.

Respondents in Opposition devote a great deal of attention to assailing the well-reasoned legal analysis concerning the applicability and import of §23-2703(3) by the Chief Administrative Law Judge ("CALJ")(R. 122-136, 139-151) in Sand Land's initial and, as noted, nearly identical application in 2014. Respondents argue first that the CALJ's decision is not binding upon them based upon the doctrine of administrative *stare decisis*.[5] Respondents also attack the substantive import of the CALJ's analysis and proffer an improper interpretation of the statutory framework, which was endorsed by Supreme Court. Respondents rely heavily upon the fact that the Sand Land property had received a Certificate of Occupancy for its mining use. The Town has never argued that a preexisting nonconforming mining use, as recognized by the Certificate of Occupancy, did not benefit Sand Land's property to the extent of ongoing, permitted operations. However, §23-2703(3) affords the Town the right to curtail the expansion of such operations if local zoning laws or

[5] Appellants herein address Respondents' administrative *stare decisis* argument in the Briefs of the non-municipal Appellants which the Town, as noted, incorporates *in toto* herein.

ordinances prohibit mining in the areas newly proposed to be mined. The analysis of the CALJ, largely incorporated into the arguments of the Town in this case, whether deemed by this Court to be procedurally binding upon DEC or not, in substance provides the correct interpretation of the import and scope of §23-2703(3); indeed, the only logical one if the statute is to have any practical meaning. Section 23-2703(3) mandates DEC's cessation of *all* activity on an application when that application proposes mining in an area where local zoning or ordinance would prohibit such mining.

Supreme Court has impermissibly allowed Respondents herein, in sustaining the challenged actions of DEC culminating in the grant of a mining expansion permit despite the unambiguous statement by the Chief Administrative Officer of the Town of Southampton that mining was not permitted in the area proposed to be mined under the zoning code in order to circumvent the statutory gatekeeping protections afforded to the Town and its vital water supply. As such, the denial of the Petition was occasioned by manifest error of law which must be reversed by this Court.

ARGUMENT

I. SUPREME COURT'S INTERPRETATION OF §23-2703(3) IS IMPROPER AND NECESSITATES A REVERSAL

While Supreme Court's Decision, Order and Judgment (R. 4-47) was over forty (40) pages in length, less than two (2) pages of that Decision address the ECL

statutory inquiry that is so critical to the determination of the legal issues present in this case. At page 5 of the Court's Decision, the Court correctly quoted from the CALJ's Decision in the 2015 Administrative proceeding, *to wit*, that ECL §§23-2703(3) and 23-2711(3) "apply to (Sand Land's) present MLRL Permit Modification Application, at least in so far as those statutory provisions require an inquiry into the status of applicant's proposal under local law and a bar on permit processing until that inquiry is completed in applicant's favor", and further that §23-2703(3) "prohibits (DEC) from further processing applicant's mining permit application until the legality of applicant's proposed mine expansion under Town law is definitively established by the appropriate local authority".[6] Supreme Court, however, went on to reject the application of the CALJ's holdings in the instant case based upon an immaterial distinction between the earlier and present applications.

Supreme Court held that it was "not persuaded" that DEC's grant of the renewal permit was arbitrary and capricious, because the Court incorrectly held that the 2014 application to modify the permit "differed substantially from its 2018

[6] Supreme Court's recitation of the underlying facts correctly reflects that, in accord with the terms of DEC and Sand Land's Settlement Agreement (R. 346-373), Sand Land would discontinue administrative proceedings regarding the 2014 application, which had been denied by the DEC, upon the grant of the modification permit challenged by Appellants herein. Respondents fail to inform this Court that Sand Land has *already breached* the terms of that Stipulation as it has not discontinued the administrative proceedings even though the permit has been granted. DEC has failed to provide any information as to how and why the it has chosen to ignore this breach.

renewal application" based principally on the fact that the earlier application included, in addition to the identical vertical mine expansion request, a horizontal "area of modification" and assumed the continued processing of vegetive organic waste material ("VOWM"). The Court incorrectly found that these "significant differences" justified the Department's departure from its earlier application of the statutory inquiry employed when addressing the 2014 permit application.[7]

In addressing the SEQR amended negative declaration challenged by Appellants, the Court initially conflated, as do Respondents, the provisions of §23-2703(3) and §23-2711(3). The latter, procedural statute sets forth certain steps to be followed upon DEC's receipt of an application, anywhere in New York State, to mine "*property* not previously permitted" (emphasis added). However, Supreme Court ignored the substantive import of §23-2703(3), the statute enacted to protect Long Island's drinking water, which pertains to *areas*, rather than *properties*, proposed to be mined. Supreme Court noted that "there was no indication in the record that DEC provided the notice required by ECL §23-2711(3) to the local government…" but improperly determined that the inquiry was unnecessary by

[7] As is addressed in more detail in the papers on appeal submitted by the nonmunicipal Appellants, the simple act of cessation of receipt of VOWM does not obviate the contamination risk present at this site based upon decades of receipt of such materials, and thus the cessation of receipt of such materials as a condition of settlement with DEC is of no moment in the comparison between the two applications for purposes of the statutory analysis.

distinguishing the two nearly identical applications by the simple inclusion of horizontal expansion component in the earlier application. By conflating the statutory terms Supreme Court, without setting forth any legal authority or precedent for its determination, held that applying §23-2703(3) to a vertical expansion beyond boundaries DEC previously permitted would be "nonsensical" without the inclusion of a request for a horizontal expansion.

The manifest error by the Court below, endorsed by Respondents in opposition, in creating an artificial distinction between horizontal and vertical mine expansions such as to exclude the latter from the protective umbrella of §23-2703(3) ignores the plain meaning of the statute, which does not explicitly or implicitly articulate such a distinction. By interpreting the statute in this fashion, Respondents essentially take the position that depth boundaries in mining permits have no meaning whatsoever; indeed it calls into question why DEC issues permits with depth boundaries at all. The logical import of Supreme Court's holding would be that a mining operation on Long Island could mine to the center of the earth with only a rubber stamp from DEC *unless* a horizontal expansion was also being sought. Such an interpretation neuters completely the statutory provision that the legislature bestowed upon Long Island municipalities, including the Town, which it deemed essential to the protection of Long Island's sole source of drinking water. This is an illogical, as well as environmentally dangerous interpretation of the statute, for

common sense dictates that increasing mining depth and thus encroaching closer to the water source would pose as great if not a greater risk to that water source.

II. RESPONDENTS' CONTENTIONS ARE WITHOUT MERIT

Respondents DEC and Sand Land seize upon the Lower Court's perfunctory analysis, and in their opposition embellish upon the Court's holding in this regard by offering several points which either incompletely or incorrectly assert factual and legal arguments.

A. Administrative *Stare Decisis*

Respondents first advance the argument that Administrative *Stare Decisis* does not apply herein because of the lack of finality of the Administrative Proceedings from which the CALJ's holdings emanate.[8] DEC's argument that the administrative proceedings are not final and therefore not binding, if in fact such an interpretation is to be afforded to the analysis by the Court, is the result of the DEC's own failure to enforce a specific term of its Settlement Agreement with Sand Land. The Settlement Agreement provides that, upon the Department's grant of the modified permit application, Sand Land agrees to withdraw any ongoing administrative proceedings regarding to the Department's denial of the previously

[8] As noted, the Administrative *Stare Decisis* arguments are addressed in substance in the Briefs of the non-municipal Appellants.

sought modification (R. 346 at Paragraph 11). As such, the continuing pendency of the administrative proceeding has been occasioned in direct violation of the Settlement Agreement. Both Sand Land and DEC are seeking to gain legal advantage herein by arguing that there is no finality to those proceedings such as would make the CALJ's holdings final and binding upon Respondents, when it was incumbent upon DEC, if not both Respondents, to effect compliance with that Stipulation such that the Administrative Proceeding is concluded.

B. Respondent Sand Land's Applications are Materially Identical

Respondents advocate for Supreme Court's incorrect finding of a material distinction between the 2014 and 2018 modification applications filed by Sand Land. DEC argues that the 2014 application's attempt to add both "virgin" horizontal acreage and "virgin" vertical acreage to the mine, as opposed to the singular request for "virgin" vertical acreage in the later application, renders Sand Land's two applications materially different for purposes of the statutory analysis. However, like Supreme Court, DEC does not make any substantive argument nor offer any legal authority for its conclusory position that applications solely for "virgin" vertical acreage are distinct from applications seeking both "virgin" horizontal and "virgin" vertical expansions, and why the former should be materially beyond the purview of §23-2703(3)'s protective mandate.

For its part, Sand Land adopts the flawed arguments set forth by DEC concerning administrative *stare decisis* and also argues in favor of the artificial distinction between a vertical expansion application alone and a vertical/horizontal expansion application made together. Neither Sand Land nor DEC offer any support for the argument that a proposed vertical expansion into an area not previously permitted should not trigger the application of 23-2703(3).[9] Indeed, there is no logical, legal nor factual support for such an argument. A statute intended to provide protection to Long Island's sole source aquifer would have no practical application if it could be ignored by applicants, and the agency charged with protecting the environment, seeking to encroach closer to that aquifer. Such a statutory construction is arbitrary, counterintuitive, and ultimately improper.

[9] DEC and Sand Land apparently disagree with respect to other distinctly material provisions in their Stipulation of Settlement which Petitioners challenge herein. DEC appears to believe that the Stipulation will require a complete cessation of mining on the property after an 8 year period of expansion, whereas Sand Land only agreed to an 8 year cessation of mining within the current life of mine boundaries. Specifically, paragraph "16" of the Stipulation of Settlement explicitly states that "it is also expressly agreed that any other permits or permit modifications are not governed by the 10 year time limitation (8 year limitation for mining and 2 year limitation for reclamation) set forth in Paragraph "7" hereof, which relate only to the existing 34.5 acre life of mine." DEC does not appear to understand the significant limitations upon the environmental protections it boasts that it achieved in the Stipulation of Settlement.

C. The Certificate of Occupancy and Mining Use on the Property Versus Expansions of Conforming Uses and the Application of 23-2703(3)

Sand Land and DEC argue that the Certificate of Occupancy issued for the Sand Land mining site stands for the proposition that they are entitled to an unfettered and limitless expansion of the mining operation, in direct contravention of the ECL statutory protections afforded to Long Island towns. Both Respondents rely on the Appellate Division, Second Department's holding in *Sand Land, et al., v. Zoning Board of Appeals, et al.*, 137 A.D.3rd 1289 (2d Dept. 2016), *lv. denied* 28 N.Y. 3d 906 (2016). Indeed, while the Second Department stated that the operation of a sand mine, including the storage and delivery of sand, constituted a preexisting non-conforming use, any reference in that decision to mining was *dictum* inasmuch as the only issues to be determined in Sand Land's Article 78 proceeding concerned the 2011 Certificate of Occupancy's designation of mulchmaking and other non-mining waste processing operations as pre-existing uses.[10] What the Second Department in fact held was that a use of a property that existed before the enactment of a zoning restriction that prohibits the use is a legal non-conforming use, *but the right to maintain a non-conforming use does not include the right to extend or enlarge that use*. 137 A.D.3rd 1291-1292 (emphasis added). The Second Department

[10] These and other non-mining uses reflect that Sand Land has never demonstrated a manifest intent to mine the entirety of its property but has instead devoted much of it to non-mining uses. See, *infra*.

went on to note that "because non-conforming uses are viewed as detrimental to zoning schemes, public policy favors their reasonable restriction and eventual elimination." 37 A.D.3rd 1292 (internal citations omitted), and that in keeping with the sound public policy of eventually extinguishing all non-confirming uses, "the Courts will enforce a municipality's reasonable circumscription of the right to expand the volume or intensity of a prior non-conforming use". 137 A.D.3rd 1292. As such, while Sand Land does possess a Certificate of Occupancy which permits it to operate a sand mine on its property, the Certificate of Occupancy does not in and of itself authorize the *expansion* of that non-conforming use; indeed, §23-2703(3)'s legislative circumscription of Sand Land's expansion of its non-conforming use is in direct accord with the Second Department's holdings in that case.

Supreme Court did not adopt Respondents' "pre-existing use" rationale when it held ECL §23-2703(3) did not prevent DEC from processing and granting the subject mining permits, although Respondents did urge it below. While it is submitted that Supreme Court's stated reasons for declining to apply the statute are untenable, its implicit rejection of the "pre-existing use" rationale was fully justified as a matter of statutory construction. Adopting Respondents' argument that mine permit applications for expanding pre-existing mining uses are exempt from ECL §23-2703(3) would substantially vitiate the statute to the lasting detriment of Long Island's sole source aquifer.

Section 23-2703(3) is explicit that the criterion for determining whether it prohibits processing an application for a permit in Suffolk County is whether local zoning laws or ordinances prohibit mining uses *within the area proposed to be mined*. That question is resolved definitively by reference to the local zoning map. Here, the Town's Chief Administrative Officer advised DEC that mining is prohibited by the Town's zoning code within the area proposed to be mined.

Quite obviously, any use tolerated as a nonconforming use is, by very definition, one *prohibited* by local zoning laws or ordinances in the area where the use is maintained. Thus, the Town Zoning Code §330-5 defines "nonconforming use" as "[a]ny use of a building, structure, lot or land or part thereof lawfully existing at the effective date of this chapter or any amendment thereto affecting such use, which does not conform to the use regulations of this chapter for the district in which it is situated."

Respondents may not, under the guise of statutory construction, ask this Court to judicially amend ECL §23-2703(3) to accommodate a mine operator's wish to expand its mining operations situated directly above Long Island's sole source aquifer, in derogation of that statute. "The courts in construing statutes should avoid judicial legislation; they do not sit in review of the discretion of the Legislature or determine the expediency, wisdom, or propriety of its action on matters within its powers," McKinney's Cons. Laws of NY, Statutes § 73. Thus,

> "[N]ew language cannot be imported into a statute to give it a meaning not otherwise found therein" (McKinney's Cons. Laws of NY, Book 1, Statutes § 94, at 190). Moreover, "a court cannot amend a statute by inserting words that are not there, nor will a court read into a statute a provision which the Legislature did not see fit to enact" (*id.,* § 363, at 525). Also, an "inference must be drawn that what is omitted or not included was intended to be omitted and excluded" (*id.,* § 240, at 412).

Matter of Chem. Specialties Mfrs. Ass'n v Jorling, 85 NY2d 382, 394 (1995).

Similarly,

> the failure of the legislature to include a term in a statute is a significant indication that its exclusion was intended (*see People v. Finnegan,* 85 N.Y.2d 53, 58 [1995] ["We have firmly held that the failure of the Legislature to include a substantive, significant prescription in a statute is a strong indication that its exclusion was intended"]; *Pajak v. Pajak,* 56 N.Y.2d 394, 397 [1982]

Commonwealth of N. Mariana Is. v Can. Imperial Bank of Commerce, 21 NY3d 55, 60-61 (2013).

Had the Legislature intended that a mining permit application otherwise disqualified from processing by application of §23-2703(3) should be exempted from the statutory prohibition due to the mining use's nonconforming use status, despite the risks such an exemption would present to the aquifer supply water to Suffolk County's residents, the Legislature could easily have said so. Neither DEC nor the courts should strain to find grounds to imply an exception the Legislature did not include, one that would substantially vitiate the special protections the statute affords to Long Island's water supply. No such loophole may be read into the statute

by judicial or agency fiat.

Moreover, Sand Land's discussion of matter of *Syracuse Aggregate Corp. v. Weise*, 51 N.Y.2nd 278 (1980) and *Buffalo Crushed Stone Inc. v. Town of Cheektowaga*, 13 N.Y.3rd 88 (2009), likewise do not provide legal authority for a mine operator to limitlessly expand its mining use. It is important to reiterate that the Town does not assert, as Sand Land alleges on page 48 of its Brief, that mining is categorically prohibited on Sand Land's property. Rather, by employment of the plain meaning of §23-2703(3) in accord with the analysis afforded to that statute by the CALJ, the Town has argued consistently throughout that mining in previously nonpermitted areas would not be permitted beyond previously permitted areas if local zoning law prohibited mining in the area proposed to be mined. As such, Sand Land's protestations, on the purported authority of *Matter of Syracuse Aggregate*, that the Town seeks to limit Sand Land's mining to "land actually excavated at the time of enactment of the restrictive ordinance" is misplaced. To the contrary, it is only the expansion mines beyond previously permitted areas with which §23-2703(3) concerns itself.

Moreover, *Matter of Syracuse Aggregate*, and *Buffalo Crushed Stone, Inc.,* do not contradict the Town's argument that the statutorily imposed conscription embedded within §23-2307(3) should be applicable herein. Sand Land omits a

critical part of the Court of Appeals holding in the *Matter of Syracuse Aggregate* that is particularly relevant to the issues before this Court. The Court held:

> "In conclusion, our holding in no sense affords (applicant) a *carte blanche* to engage in its mining operation. To the contrary, the Town can adopt measures reasonably regulating the manner in which the Petitioner uses its quarry and may even eliminate this non-conforming use provided that termination is accomplished in a reasonable fashion" 51 N.Y.2d 280-287.

Likewise, *Buffalo Crushed Stone, Inc.* does not afford to Respondent Sand Land the unfettered right to expand its non-conforming use beyond previously permitted boundaries. Indeed, the Town's authority within the statutory framework pertains to the expansion of non-conforming uses into previously non-permitted areas of the mine and reflects the salutary purpose of §23-2703(3).

Moreover, under the rule declared in *Syracuse Aggregate*, pre-existing use status for mining does not extend automatically to the boundaries of a lot simply because some limited portion has been quarried before the use was made illegal:

> where . . . the owner engages in substantial quarrying activities on a distinct parcel of land over a long period of time *and these activities clearly manifest an intent to appropriate the entire parcel to the particular business of quarrying*, the extent of protection afforded by the nonconforming use will extend to the boundaries of the parcel even though extensive excavation may have been limited to only a portion of the property.

Syracuse Aggregate Corp. v Weise, *supra*, at 286 (emphasis added).

Necessarily, the owner's requisite clear manifestation of intent to appropriate the entire parcel to quarrying must have occurred *before* mining became an nonconforming use under local zoning in order to extend pre-existing use protection beyond the actively quarried area; the requirement would be meaningless if such intent could be manifested years after the use became illegal. There has never been a showing that the owner of the site prior to its 1972 up zoning had manifested such intent. It is highly doubtful such a showing could be made, where each permit issued to Sand Land limited the size of the allowed mine area and set time limits for completing mining and reclamation. Regardless, Sand Land's activities at the site over the years (receipt and sale of concrete and debris for processing, mulchmaking, etc.) and reflects a multitude of non-mining uses that reflect its intent to undertake many such activities on its property that might otherwise have been dedicated to mining.[11]

[11]In *People v. Wainscott Sand and Gravel Corp.,* 62 Misc.3rd 16, 89 N.Y.S.3d 819 (S. Ct. App. Term 2018), Appellate Term found that Sand Land's business of "depositing, receiving, and processing of road construction debris, including concrete and asphalt… is not included in the definition of mining in the ECL 23-2705(8). Consequently, as the land use violations charged herein do not implicate the actual operation and process of (Sand Land's) mining operation under the Environmental Conservation Law, they are subject to local regulation and to enforcement by the Town of Southampton" 62 Misc.3rd 20. Sand Land has not demonstrated a manifest intent to use the property exclusively for mining purposes and this action is therefore distinguishable on the facts from *Matter of Syracuse Aggregate*.

Accordingly, the apparent contention by Respondents that the Certificate of Occupancy alone permits an unfettered expansion of mining into areas not previously permitted is not supported by the Court of Appeals in *Matter of Syracuse Aggregate* and *Buffalo Crushed Stone, Inc.* and is directly contradicted by §23-2703(3).

Respondents adopt Supreme Court's conflation of the substantive inquiry under §23-2703(3) with the procedural provisions of §23-2711(3). The latter statute applies to mining permit applications "for a property not previously permitted pursuant to this title". Had §23-2703(3) directed its inquiry towards "properties" as opposed to "areas", Respondents' arguments might be more convincing. Certainly, had the legislature intended to limit §23-2703(3) to "properties" it would have said so. Respondents would have this Court ignore the plain meaning of the conscription contained within §23-2703(3) and gratuitously substitute the language contained within §23-2711(3).

Sand Land, in turn, argues that the Town "specifically advised the Second Department that Sand Land could 'devote the entire 50 acre premises to mining' (in reference to the Matter of Syracuse Aggregate) (SL Brief, page 46). However, Sand Land neglects to advise this Court that the very nature of the proceeding before the Appellate Division from which that statement is quoted involved the ultimate determination by the Second Department that several activities "separate and apart

from mining activities" were ongoing at the site and therefore were not constitutionally protected preexisting uses. Therefore, any claim by Sand Land that they have a constitutionally protected and unfettered right to expand the mine to the entirety of their property is contradicted by the multitude of other, non-mining activities historically undertaken at the site. In any event, an argumentative assertion in a legal brief, especially one not necessary for determination of the issues before the court to which it is addressed, is neither evidentiary nor subsequently binding.

Both Respondents bring to the Court's attention the matter of *Town of Southampton v. Huntington Ready Mixed, Inc.* (Sand Land Brief on page 28-32 and the DEC Brief on page 27).[12] While it is true that the Supreme Court, Suffolk County denied the Town's Petition in *Huntington Ready Mixed* and dismissed the proceeding, that court and indeed the DEC therein also implicitly recognized and validated the essential statutory argument made by the Town herein and declared by the CALJ: that the subject ECL provisions apply to vertical and horizontal modifications of existing mines.[13] Supreme Court in *Huntington Ready Mixed* examined the record before it, particularly several letters sent by the Town in

[12] The Town has filed a Notice of Appeal of the denial of its Petition in Huntington Ready Mixed (ECF Docket #19).

[13] It is respectfully submitted to the Court that the *Huntington Ready Mixed* mine site is not similarly situated in materially factual ways to the Sand Land site and thus the details of the mining distinctions on the properties are not germane herein; the factual distinctions as to the physical attributes of the parcel, violations history, etc. do not alter the statutory analysis which applies to both.

response to the statutory inquiries made by DEC.[14] The Court went through the factual record, and made particular note of the questions asked by the DEC in accord with the statute, as well as several responses given by the Town to those inquiries.

Significantly, the Supreme Court held as follows:

> "Upon reviewing the record before the Court, as contained in the Motion papers and certified administrative record, the Court is satisfied that *the DEC made the required request for information from the Town of Southampton*… the DEC's decision was not issued in violation of lawful procedure or affected by an error of law. The DEC's determination to modify the mining permit was not arbitrary and capricious or an abuse of discretion *in that it made the appropriate requests for information from the Town Supervisor…"*(emphasis added).

Supreme Court, Suffolk County clearly acknowledged that the statutorily mandated inquiries were made. Such acknowledgement reflects the correct interpretation of the applicability of the statutory framework as asserted by the Town in that case and herein. Indeed, the DEC itself concurred with the Town's argument as to the mandate of §23-2703(3) in *Huntington Ready Mixed*.

In *Huntington Ready Mixed*, DEC served a Verified Answer to the Verified Petition (DE No. 7). Along with the Answer, DEC submitted the Affidavit of John Wieland, Deputy Permit Administrator in the Division of Environmental Permits of DEC's Region 1 office in Stony Brook, New York. (DE No.7) In his Affidavit,

[14] The Courts Decision is located at DE 16 on the Suffolk County Docket.

Wieland reflected his history with the DEC and indicated that his responsibilities included "guiding applicants through an integrated review process and serving as a liaison between the Department's technical review staff and the public, including in the processing and review of permit applications for mining and reclamation under the Mine Land Reclamation Law, Environmental Conservation Law (ECL), Art. 23, Tit. 27." (Wieland Affidavit, DE No.7, ¶2). Wieland indicated his familiarity with facts and circumstances of the *Huntington Ready Mixed* matter and, amongst other things, his responsibilities as Deputy Permit Administrator, his training and professional experience (DE No.7, ¶4).

Wieland went on to recite and analyze the legislature's amendment to the Mine Land Reclamation Law. Quoting from §23-2703(3), Weiland asserted that the DEC "may not consider an application for a permit to mine as complete or process such application… if local zoning laws or ordinances prohibit mining uses within the area proposed to be mined." (DE No.7, ¶7). Wieland went on to assert, significantly and unequivocally:

> "Thus, upon receipt of an application to mine any property or *portion of a property not previously permitted,* DEC must issue notice of such application to the Chief Administrative Officer of the applicable local government." (citing §§23-2703(3) and 23-2711(3) (emphasis added).

Wieland went on to quote from the aforementioned DEC Technical Guidance Memo MLR92-1 from 1992, which the Town quoted from extensively in its initial Brief in this appeal, stating as follows:

> "Pursuant to the guidance, when DEC receives an application for a new permit *or* for a permit modification to mine any property *or portion of a property on Long Island not previously permitted,* the Department inquires with the Chief Administrative Officer of the local government "whether local zoning or ordinances prohibit mining uses within the area proposed to be mined". (citing the Guidance Memo, Section 4)(DE No.7, at ¶8)(emphasis added).

Weiland asserted that DEC relies on the local government's determination concerning local prohibition and will not process a permit application for a Long Island mine "if it receives a 'Statement of Local Prohibition':

> a statement from the Chief Administrative Officer of the local government that mining is prohibited at the location proposed to be mined. (citing from Guidance Memo, Sections 4, 5(2)(3)).

This policy removes DEC from making decisions or interpretations of local government laws or ordinances." (DE No.7 at ¶8). DEC received such a statement from the Town Supervisor herein but continued to process Sand Land's application, disregarding its own guidance premised upon the enactment of subdivision 3 of §23-2703, issued contemporaneously therewith.

It is abundantly clear, therefore, that DEC, through its Region 1 Deputy Permit Administrator, *explicitly endorsed* the applicability of §23-2703(3) when dealing

with permit modification applications. Wieland then sets forth his compliance with the statutory requirement that he make inquiry with the Town Supervisor in the *Huntington Ready Mixed* matter.[15] [16]

As such, Supreme Court interpreted, and the Respondents herein advocate for an interpretation of the statute directly contradicted by DEC in *Huntington Ready Mixed*, which interpretation is premised upon DEC's own guidance as to §23-2703(3)'s mandate for handling modification permit applications on Long Island, including those made in the Town of Southampton.

CONCLUSION

Respondents in opposition argue that Supreme Court's incorrect interpretation as to the applicability of ECL §23-2703(3) to Respondent Sand Land's expansion modification should be sustained. Moreover, Respondents take a

[15] The Town takes issue (and has filed a Notice of Appeal) with the Decision of the Supreme Court in *Huntington Ready Mixed* in so far as the Court failed to recognize that DEC was required to stop processing the application upon receipt of the determination from the Chief Administrative Officer of the Town as to the zoning prohibition.

[16] While the ALJ in Sand Land's earlier permit proceeding applied §23-2711(3) to a mining modification application, and it is respectfully submitted that if it is proper to utilize that procedural statute to invoke the inquiry, care must be taken not to permit any reading of §23-2711(3) that would modify the specific *substantive* language as to the pertinent inquiry set forth in §23-2703(3). Such would be improper and would, in effect, neuter the sole purpose of §23-2703(3) which is to protect the environmentally sensitive aquifer which provides Town residents with their sole source of drinking water.

position that directly contradicts the position Respondent DEC took with regard to the applicability of §23-2703(3) to another Long Island expansion modification application, which interpretation was endorsed by the Supreme Court, Suffolk County. The illogical and environmentally dangerous interpretation of §23-2703(3) argued by Respondents and articulated by Supreme Court herein cannot be affirmed, and it is thus respectfully requested that this Court reverse Supreme Court and grant the Supplemental Petition in its entirety.

Dated: January 11, 2021

David H. Arntsen

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