To be Argued by:
BRIAN E. MATTHEWS
(*Time Requested: 15 Minutes*)

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

Docket No.: 529380

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, JOSEPH PHAIR, MARGOT GILMAN and AMELIS DOGGWILER,

Petitioners-Respondents,

- against -

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

Respondents-Respondents,

- and -

COUNTY OF SUFFOLK,

Proposed Intervenor-Appellant.

BRIEF FOR RESPONDENTS-RESPONDENTS SAND LAND CORPORATION AND WAINSCOTT SAND AND GRAVEL CORP.

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No. 529380

Petitioners,

v.

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

Respondents,

COUNTY OF SUFFOLK

Proposed Intervenor-Appellant

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PRELIMINARY STATEMENT

This Brief is respectfully submitted on behalf of the Respondents Sand Land Corporation and Wainscott Sand and Gravel Corp., (the "Respondents" or "Sand Land") in opposition to the instant appeal, and in support of affirming the lower court's September 9, 2019 Order (the "2019 Order"; Ferreira, J.; R. 4) and the lower court's February 11, 2020 Order (the "2020 Order"; Ferreira, J.; R. 600). In each of

those Orders, the lower court properly denied the County of Suffolk's motion to intervene finding that the County of Suffolk lacks the capacity to sue the New York State Department of Environmental Conservation ("NYDEC").[1]

The Record and the controlling law confirm that there is no factual or legal justification that would permit Appellant to intervene. As such, there is no factual or legal justification to disturb either of the Orders of the lower court.

In continuing to seek to intervention in this action, even after renewal before the lower court, Appellant is doing nothing more than frustrating the judicial process and attempting an end run around the well settled law. Instead of focusing its papers on legal standing and capacity, in making its motion to the lower court, in rearguing the denial of that motion to the lower court, and now in briefing its instant appeal, Appellant has repeatedly attempted to insert highly prejudicial and intentionally misleading statements with veiled references to "hazardous waste and superfund sites." (*See, e.g.*, R. 456; Barraga Reply Affirmation ¶ 7).

The Premises is neither a superfund nor a hazardous waste site.

This abuse of the judicial process is merely another tactic in the more than decade old campaign wherein the Town of Southampton and other individual petitioners have sought to shutter Respondents' lawfully preexisting nonconforming permitted business.

[1] All references to "R." are to the Record on Appeal.

For the reasons set forth herein and in the Record on Appeal, Respondents respectfully submit that this Court must deny the instant appeal in all respects.

COUNTERSTATEMENT OF FACTS

i. The Parties and Procedural History

Sand Land is the owner of a 50-acre property located at 585 Middle Line Highway, Noyac, New York (SCTM#: 900-23-1-1; the "Premises"). The Premises is a 50-acre parcel located within the Town of Southampton that has been used as a sand mine for approximately sixty (60) years. (R. 428).

In the underlying action of this matter, Petitioners challenged an administrative proceeding wherein the NYDEC, the agency responsible for processing mining permits and regulating mining operations within the State of New York, and Sand Land entered into a settlement agreement wherein (i) the NYDEC agreed to process Sand Land's modified permit application; (ii) the NYDEC agreed to withdraw the notice of intent, which purported to demand the cessation of mining operations; and (iii) the Premises received a negative SEQRA declaration in 2019.[2]

Even a cursory review of the history Sand Land's administrative proceedings before the NYDEC and the settlement by and between Sand Land and the NYDEC prove that those proceedings and their ultimate result were proper, the lower court

[2] As of the date of this Brief, the lower court denied Petitioner's Article 78 Petition in its entirety by a Decision, Order, and Judgment dated August 31, 2020.

and this Court need not, and should not, entertain any substantive argument from the Appellant. Indeed, given the denial of the Petitioner's Article 78 Petition, Appellant's appeal has also now been rendered moot.

In their Proposed Intervenor Petition, under the heading "Parties," Appellant alleges that it is a "municipal corporation, pursuant to section 119-n of the New York General Municipal Law and a County as defined in New York County Law section 3." Appellant further alleges that the "Suffolk County Department of Health Services (SCDHS) is an agency of the County." (R. 28; Proposed Intervenor Petition ¶ 4). The SCDHS is neither an original party to this special proceeding, nor are they a proposed party under the Proposed Intervenor Petition.

The lower court properly denied Appellant the ability to intervene based on its clear lack of capacity as the Appellant, a governmental subdivision of the State of New York, lacks legal capacity to sue the NYDEC, an executive agency of the State.

ARGUMENT

THE COUNTY LACKS CAPACITY TO SUE THE NYDEC

The lower court correctly denied Appellant's motion seeking to intervene in this special proceeding. Specifically, the lower court recognized the general rule that municipalities lack capacity to sue the state (R. 8 citing City of New York v. State of New York, 86, N.Y.2d 286, 295 (1995)), that Appellant had failed to show any

legislative intent to permit it to sue the state with respect to determinations regarding mining permits, and that the Appellant's claims did not fall within any of the limited exceptions to the general rule. (R. 8-9). Finally, the lower court correctly concluded that nothing in either ECL § 23-2703(3), or in the Second Department's holding in Town of Riverhead v. NYDEC, 50 A.D.3d 811 (2nd Dept., 2008), conferred capacity on Appellant to sue the state with respect to mining permits, as both that case and that statute dealt with local zoning laws. This matter, as the lower court correctly found, does not deal with any zoning laws enacted by Appellant itself. (R. 9).

As stated by the Court of Appeals, "[c]apacity to sue is a threshold matter…[that] concerns a litigant's power to appear and bring its grievance before the court." Silver v. Pataki, 96 N.Y.2d 532, 537 (2001). The issue of capacity often arises in suits brough by governmental entities since they are "artificial creatures of statute, [which] have neither an inherent nor a common-law right to sue." Graziano v. County of Albany, 3 N.Y.3d 475, 479 (2004). In order for a governmental entity to have the right to commence an action, "their right to sue, if it exists at all, must be derived from the relevant enabling legislation or some other concrete statutory predicate." Id. at 479, citing Community Bd. 7 of Borough of Manhattan v. Schaffer, 84 N.Y.2d 148, 155-156 (1994).

Appellant has attempted to argue that CPLR § 1012 and CPRL §1013 bestow Appellant with capacity to sue the NYDEC and undo the proceedings and settlement

by and between the NYDEC and Sand Land. Neither CPLR § 1012 nor CPRL §1013 provide the requisite capacity to Suffolk County.

As stated in Appellant's original motion papers, "CPLR § 1012 (a) confers the right to intervene when, as here, (1) the representation of the person's interest by the parties is or may be inadequate and the person may be bound by the judgment; or (2) when the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment. *See*, Wells Fargo Bank, Nat. Ass'n. v. McLean, 70 A.D.3d 676, 677 (2nd Dept., 2010). It has been held sufficient to permit intervention if the applicant's interests will be jeopardized by his absence and he is ultimately and really interested in the outcome of the litigation. Harrison v. Mary Bain Estates, 2 Misc. 2d 52, *affd*. 2 A.D.2d 670 (1st Dept., 1956)." (R. 16; Barraga Affirmation, ¶ 6).

However, in each of its bites at the apple, Appellant wholly failed to submit any testimony, evidence, or even passing allegation that Appellant's claims and interests, which are nothing more than a wholesale adoption and parroting of the claims interposed by the named Petitioners, are inadequately represented. Further, Appellant has negated its own argument all along by stating that its claims are "the very same claims" and "rest upon the same factual allegations," already put forth by the named Petitioners. (R. 6; Barraga Affirmation ¶ 6).

Inasmuch as Appellant clearly lacks capacity to sue under CPLR § 1012, Appellant turns to CPLR § 1013 but fails there as well.

Appellant asserts four (4) causes of action in its Proposed Intervenor Petition: (i) an Article 78 claim to nullify the NYDEC's renewal of Sand Land Mined Land Reclamation Permit; (ii) an Article 78 claim to nullify the NYDEC's approval of the settlement agreement entered into with Sand Land; (iii) an Article 78 claim to nullify the NYDEC's approval of the settlement agreement entered into with Sand Land; and (iv) an Article 78 claim to nullify the NYDEC's issuance of an Amended Negative Declaration regarding, and to enjoin the processing of, Sand Land's application to modify its Mined Land Reclamation Permit. (R. 27-60; Proposed Intervenor Petition).

It is settled law that the only exceptions to the general prohibition on a municipality suing the State of New York are the following limited circumstances: (i) the existence of an express statutory authorization to bring such a suit; (ii) where State legislation adversely affects a municipality's proprietary interest in a specific fund of moneys; (iii) where a State statute impinges upon "Home Rule" powers of a municipality constitutionally guaranteed under article IX of the State Constitution; and (iv) where "the municipal challengers assert that if they are obliged to comply with the State statute they will by that very compliance be forced to violate a constitutional proscription." City of New York v. State, 86 N.Y.2d 286 (1995).

The lower court agreed with Respondents that Appellant did not meet any of these four narrow exceptions. As such, there is no lawful reason within the CPLR or the settled caselaw to bestow Appellant with capacity to sue the NYDEC.

Further any and all of the specious "policy" arguments advanced by Appellant, (i) first and foremost, are misplaced as they do not fit into any of the four narrow exceptions; (ii) are a guise to flood the record with prejudicial and unfounded allegations and fearmongering; and (iii) are aimed at Sand Land when Appellant does not assert a single cause of action directly against Sand Land.

Based on the above, the lower court's Order and denial of Appellant' motion to intervene was correct and should be affirmed.

Based on the forgoing, Sand Land respectfully submits that the instant appeal should be denied.

CONCLUSION

Sand Land respectfully submits that the Record and the controlling law confirm that the lower court's denial of Appellant's motion to intervene was the proper and legally mandated result.

For these reasons, Sand Land respectfully submits that the instant appeal should be denied in its entirety and the Supreme Court's order should be affirmed.

Dated: December 10, 2020
East Hampton, New York

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