To be argued by:
Patrick Woods – 10 minutes

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

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,

v.

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

Respondents,

COUNTY OF SUFFOLK,

Proposed Intervenor-Appellant

No. 529380

BRIEF FOR STATE RESPONDENT

LETITIA JAMES
Attorney General
State of New York
Attorney for State Respondent
The Capitol
Albany, New York 12224
(518) 776-2020
patrick.woods@ag.ny.gov

VICTOR PALADINO
Senior Assistant Solicitor General
PATRICK A. WOODS
Assistant Solicitor General
of Counsel

Dated: November 20, 2020

Supreme Court, Albany County – Index No. 902239-19

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

TABLE OF AUTHORITIES

CASES **PAGE**

STATE CONSTITUTION

STATE STATUTES

STATE RULES AND REGULATIONS

MISCELLANEOUS

PRELIMINARY STATEMENT

This appeal is another chapter in ongoing and protracted litigation brought by the Town of Southampton and other individual petitioners against 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, located in Suffolk County, New York. This iteration challenges the Department of Environmental Conservation's (DEC) decisions to enter into a settlement agreement with Sand Land and to issue them a modified mined land reclamation permit. During the proceedings below, the County of Suffolk moved to intervene in support of the petitioners. Supreme Court denied the motion to intervene because the County, as a governmental subdivision of the State of New York, lacks legal capacity to sue the DEC, an executive agency of the State, to challenge the issuance of the modified mining permit. Because this ruling comports with settled law, Supreme Court's order denying intervention should be affirmed.

QUESTION PRESENTED

Does Suffolk County lack capacity to intervene in this Article 78 proceeding challenging DEC's issuance of a modified mining permit and its settlement with the mining company?

Supreme Court correctly 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. (*See* Dickert Aff. ¶ 25, NYCEF 262[1]; Exhibit 2). In prior litigation by the petitioners below against Sand Land, the Appellate Division, Second Department, recognized that Sand Land's operation of a sand and gravel mine was a prior non-conforming use allowed under

---

[1] References to NYSCEF are to entries in Supreme Court's docket which were omitted from the record on appeal. (R1 ("R" denotes pages in the record).) The Court may take judicial notice of the contents of Supreme Court's docket. *See, e.g., Williams v. Annucci,* 175 A.D.3d 1677, 1678 n.1 (3d Dep't 2019); *Caffrey v. North Arrow Abstract & Settlement Servs., Inc.*, 160 A.D.3d 121, 126-28 (2d Dep't 2018); CPLR 4511.

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 November 2013, DEC renewed Sand Land's mining permit for a five-year period, until November 2018. The renewed permit allowed Sand Land to, among other things, 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; (Dickert Aff ¶15).

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. The requested horizontal expansion encompassed a total of 4.9 acres, approximately 1.9 acres of which were located on previously unmined portions of the parcel. The other approximately 3.1 acres consisted of an area known as the stump dump, which had not been expressly identified in earlier permits because the location had been mined prior to the 1975 enactment of the Mined Land

Reclamation Law and filled back in with other materials thereafter. (Dickert Aff. ¶¶ 4, 6.)

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. But DEC denied the 2014 horizontal and vertical modification application in 2015, based on several concerns. (*See* Administrative Return ("S") at S83-85, NYSCEF No. 265). Sand Land requested a hearing to challenge that denial. The matter is pending before a DEC administrative law judge ("ALJ"), who issued recommended determinations in 2018. That administrative proceeding is presently stayed. The ALJ's recommendations have not been acted on by the Commissioner. The negative SEQRA declaration, however, is undisturbed and remains in full force and effect.

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. Sand Land objected to the notice and requested a hearing. 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.

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). 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 ground water 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;

---

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

- Substantially increase the amount of financial security it posted;

- Retain the services of an independent monitor that is to inspect the mine for environmental issues pursuant to DEC instructions;

- 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.

Under the agreement, DEC revoked the 2018 notice of intent that required Sand Land to cease all operations. The settlement agreement did not expand the acreage to be mined beyond the existing life-of-mine, did not authorize vertical or horizontal expansion, and did not resolve Sand Land's pending application to modify its existing permit to do so. Rather, the settlement required DEC to process the modification application, subject to ordinary notice and public comment provisions. (Dickert Aff ¶ 18.)

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. Accordingly, in March 2019, DEC issued an amended negative declaration explaining its decision. The Department found that the proposed deepening would not significantly

impact groundwater quality. (S644-S647, NYSCEF No. 267). In March 2019, DEC published a notice in the Environmental Notice Bulletin of the complete permit application. DEC considered approximately 50 comments and produced a publicly available summary response to comments before approving the application and issuing a modified mine permit on June 5, 2019.

B. The Proceedings Below

This article 78 proceeding was commenced in April 2019, while the final portions of the administrative proceedings described above were still underway. The original petition brought by the petitioners—not the County—sought to vacate (a) the settlement agreement between DEC and Sand Land under which DEC agreed to process Sand Land's modified permit application, (b) DEC's withdrawal of the notice of intent requiring the mine to cease operations, and (c) the 2019 amended negative SEQRA declaration. Petitioners also unsuccessfully sought to enjoin Sand Land from disturbing the stump dump and to enjoin DEC from processing Sand Land's application to modify its permit. Supreme Court preliminarily enjoined mining in the stump dump but refused to enjoin DEC's

continued processing of the permit modification. (Decision and Order, NYSCEF No. 130.)

While the motion for a preliminary injunction was pending, the County moved to intervene and submitted a proposed petition asserting the same legal claims as the original petition and seeking the same relief. (R27-52.) The County's petition alleged that it would be adversely affected by the deepening of the mine because of a supposed threat to the aquifer and that Environmental Conservation Law §§ 23-2711(3) and 23-2703(3) gave it authority over mine permitting. (R31-34.) DEC (R420-454) and Sand Land (R407-19) opposed the motion arguing, among other things, that the County lacked legal capacity to sue to challenge a DEC mining permit.

On June 5, 2019, after Supreme Court resolved the preliminary injunction motion but before it resolved the County's motion to intervene, DEC granted Sand Land's modification application. In response, petitioners were granted leave to amend their petition to challenge the modified permit. Supreme Court denied petitioners' related motion to prohibit Sand Land from mining within the additional 40 feet of depth allowed under the modified permit. (Order to Show Cause, June 18, 2019,

NYSCEF No. 161). The County then submitted a letter asking that its proposed petition be read to include the new challenges contained in the amended petition. (Letter, June 27, 2019, NYSCEF No. 179).

On September 13, 2019, Supreme Court denied the intervention motion on the basis that the County lacked capacity to sue. (R4-10.) The County appealed (R1) and sought to renew its motion to intervene based on the "new evidence" of a grand jury report that made no specific mention of Sand Land's mine. (*See* Renewal Motion, NYSCEF No. 343.) That motion was denied in a February 2020 order that has not been appealed and the time to do so has now elapsed. (*See* Order, Feb. 12, 2020, NYSCEF No. 414.)

Thereafter, on August 31, 2020, Supreme Court denied the amended petition in a comprehensive 42-page decision. (Decision, Order and Judgment, NYSCEF No. 414.) Petitioners have appealed from Supreme Court's judgment. (NYCEF No. 423.) That appeal is still pending and set down for this Court's February 2021 term. *See Town of Southampton v. N.Y.S. Dep't of Env. Conserv.*, App. Div. No. 532083, NYSCEF No. 119 (3d Dep't).

ARGUMENT

THE COUNTY LACKS CAPACITY TO SUE

Supreme Court correctly denied the County's motion to intervene on the basis that the County lacks legal capacity to sue DEC to prevent the issuance of a modified mining permit or to challenge the settlement agreement between DEC and Sand Land. Capacity to sue, which is analytically distinct from standing to sue, "concerns a litigant's power to appear and bring its grievance before the court." *Matter of Graziano v. County of Albany*, 3 N.Y.3d 475, 479 (2004) (internal quotation omitted). The fundamental precept governing municipal capacity to sue is that a municipality is merely a creation of the State, subject to the will of its creator. As the Court of Appeals explained in *City of New York v. State of New York*, 86 N.Y.2d 286 (1995), "[c]onstitutionally as well as a matter of historical fact, municipal corporate bodies—counties, towns and school districts—are merely subdivisions of the State, created by the State for the convenient carrying out of the State's governmental powers and responsibilities as its agents." *Id.* at 289-90. Thus, "[b]eing artificial creatures of statute, such entities have neither an inherent nor a

common-law right to sue." *Community Bd. 7 of Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148, 155-56 (1994).

Municipalities especially lack any general capacity to sue the State, their creator and principal, or state officials. *See City of New York*, 86 N.Y.2d at 290. This "lack of capacity of municipalities to sue the State is a necessary outgrowth of separation of powers doctrine: it expresses the extreme reluctance of courts to intrude in the political relationships between the Legislature, the State and its governmental subdivisions." *Id.* at 295-96.

The Court of Appeals has recognized only four narrow exceptions to the general rule that a municipality lacks capacity to sue the State or state officials. Those exceptions are: (1) "an express statutory authorization to bring such a suit"; (2) "where the State legislation adversely affects a municipality's proprietary interest in a specific fund of moneys"; (3) "where the State statute impinges upon 'Home Rule' powers of a municipality constitutionally guaranteed under article IX of the State Constitution"; and (4) "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*, 86 N.Y.2d at 291-92.

Supreme Court correctly held that the County's proposed petition falls within the general rule barring municipal capacity to sue the State or a state officer and does not satisfy any of the narrow exceptions to that rule. The County can point to no express statutory authorization to bring a suit against DEC to challenge the issuance of a modified mining permit. The issuance of the modified permit does not impinge on the County's New York State Constitution Article IX Home Rule power and the County does not claim otherwise. Nor does this case involve any specific monetary fund as to which the County claims a proprietary interest. And DEC's action does not require the County to take any action at all, let alone an action that would violate a constitutional proscription.

There is no merit to the County's assertion that municipalities only lack capacity to sue to challenge the legality of State laws, rather than regulatory activities such as DEC's actions in this case. (Br. 33-34.) Just the opposite is true: a municipality also generally lacks capacity to sue to challenge the actions of state agencies. *See, e.g.*, *Town of Riverhead v. N.Y. State Bd. of Real Prop. Servs.*, 5 N.Y.3d 36 (2005) (challenge to a

rate setting by the State Board of Real Property Services); *Matter of New York Blue Line Council, Inc v. Adirondack Park Agency*, 86 A.D.3d 765 (3d Dep't 2011) (challenge to regulations issued by the Adirondack Park Agency); *Matter of Bethpage Water Dist. v. Daines*, 67 A.D.3d 1088 (3d Dep't 2009), *lv. denied,* 14 N.Y.3d 707 (2010) (challenge to a determination of the Department of Health); *Matter of Seneca v. Eristoff*, 49 A.D.3d 950 (3d Dep't 2008) (challenge to the Department of Taxation and Finance's policy of non-collection of sales tax at businesses operated by Indian tribes).

Similarly misplaced is the County's suggestion that Suffolk County Charter § C16-2 confers capacity to sue the State. (Br. at 36-37.) That provision is a general authorization permitting the County Attorney to prosecute and defend litigation involving the County and its officers. Such general authorizations are "'insufficient to imply authority to bring suit against the state itself.'" *Matter of Bethpage Water Dist*, 67 A.D.3d at 1090-91 (quoting *Matter of Town of Riverhead v. N.Y. State Bd. of Real Prop. Servs.*, 7 A.D.3d 934 (3d Dep't 2004) *aff'd* 5 N.Y.3d 36 (2005)); *see also City of New York v. State of New York*, 86 N.Y.2d at 293 ("The fact that the Legislature has expressly conferred the power to sue upon the

City or the City School district in furtherance of their general statutory or municipal or educational responsibilities is clearly insufficient from which to imply authority to bring suit against the State itself.")

Attempting to establish capacity, the County argues that it has created an agency to protect its groundwater and enacted local laws regarding groundwater purity, and maintains that DEC's action may adversely affect County residents. These assertions, however, are not relevant to whether the Legislature has conferred upon the County capacity to sue the State to challenge the issuance of a mining permit. The test for capacity is not whether the residents of a municipality will be adversely affected by a State decision or whether a municipality and its subordinate agencies might have preferred the agency to take a different course. To the contrary, "[m]unicipal entities such as the [county] generally 'cannot contest the actions of the state which effect them in their governmental capacity or as representatives of their inhabitants'" even though the State's decision "is inextricably related to the health, safety and welfare of the community." *Matter of Bethpage Water Dist*, 67 A.D.3d at 1091 (quoting *County of Oswego v. Travis*, 16 A.D.3d 733, 735 (3d Dep't 2005)).

In fact, there are no enactments by the Legislature expressly or implicitly granting the County the authority to judicially challenge DEC's actions here. While DEC may take findings by the County into account when making its determinations, the County has no statutory or regulatory role in deciding whether to issue modified or renewed mining permits.

Nor do Environmental Conservation Law §§ 27-2711(3) and 23-2703(3) give the County such a role. First, to the extent that Environmental Conservation Law §§ 27-2711(3) and 23-2703(3) create capacity in a municipality to sue DEC regarding the issuance of a mining permit that contravenes local zoning laws, at most they empower only the municipality responsible for the issuance and enforcement of those zoning 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). That entity is the Town of Southampton not the County of Suffolk. *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).

Second, as Supreme Court properly held in its decision on the merits, those provisions only operate with respect to new or substantially

modified permit applications. Neither situation is the case here. 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." But by its terms ECL § 23-2711(3) applies only "for a property not previously permitted pursuant to this title" and does not require DEC to follow the municipality's representation as to the state of its law. Here, Sand Land's mine has been operating for 60 years at its current location and been permitted since the 1980s. Moreover, because the modification to the permit only allowed digging deeper rather than expanding the mine's footprint beyond the existing life of mine, it was not a substantial modification.

Similarly, ECL § 23-2703(3) 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 language applies to an application to mine a new location, not to deepen an existing mine within its existing footprint. Indeed, ECL § 23-2703(3) on its face does not provide a municipality with any authority over the process. Rather, it

merely requires that DEC be aware whether the relevant municipal zoning laws prohibit mining, *Valley Realty Dev. Co., v. Jorling*, 217 A.D.2d 349, 354 (4th Dep't 1995), and arguably creates an implied cause of action by the entity responsible for the zoning laws 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). And, as noted, DEC already knew the legal status of the mine without needing to ask because the relevant municipality, the Town of Southampton, had issued a Certificate of Occupancy for the mine in 2016 of which DEC was aware. Further, 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.

Accordingly, Supreme Court properly held that the County lacked capacity to sue DEC to challenge the issuance of a mining permit. The order denying the motion to intervene on that ground should be affirmed.

CONCLUSION

Supreme Court's order denying the County's motion to intervene should be affirmed.

Dated: Albany, New York
November 20, 2020

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
Attorney for Respondent DEC

By: _____
Patrick A. Woods
Assistant Solicitor General

The Capitol
Albany, New York 12224
(518) 776-2020
patrick.woods@ag.ny.gov

VICTOR PALADINO
Senior Assistant Solicitor General
PATRICK A. WOODS
Assistant Solicitor General of Counsel

PRINTING SPECIFICATIONS STATEMENT

Pursuant to the Uniform Practice Rules of the Appellate Division (22 N.Y.C.R.R.) § 1250.8(j), the foregoing brief was prepared on a computer (on a word processor). A proportionally spaced, serif typeface was used, as follows:

Typeface: Century Schoolbook
Point size: 14
Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 3,881.