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Appellate Division, Third Department Docket Nos. 529380 and 532083
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Court of Appeals

of the

State of New York

In the Matter of
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-Respondents,

– and –

ASSEMBLYMAN FRED W. THIELE, JR.,
Petitioner,

– against –

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
Respondent-Respondent,

– and –

SAND LAND CORPORATION and WAINSCOTT SAND AND GRAVEL CORP.,
Respondents-Appellants.

JOINT BRIEF FOR PETITIONERS-RESPONDENTS

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RULE 500.1(F) CORPORATE DISCLOSURE STATEMENT

Petitioners-Respondents 101Co, LLC; 102Co NY, LLC; BRRRubin, LLC; Bridgehampton Road Races, LLC, Citizens Campaign for the Environment; Group for the East End; and Noyac Civic Council are not publicly held corporations. They have no subsidiaries or affiliates that are publicly traded.

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PRELIMINARY STATEMENT

This case concerns the statutory construction of a clear state statute, Environmental Conservation Law ("ECL") § 23-2703(3), enacted in 1991 to protect Long Island's drinking water from exactly the type of threat posed by the Appellants', Sand Land Corporation and Wainscott Sand and Gravel Corp. (collectively "Sand Land"), massive vertical mine expansion toward the sole source aquifer. In ECL § 23-2703(3) the State Legislature utilized its police power to protect public health and safety by prohibiting the New York State Department of Environmental Conservation ("DEC") from processing mining expansion permit applications in only 2 of New York's 62 counties (Nassau and Suffolk), when Towns in those counties have enacted laws prohibiting mining over the sole source drinking water aquifer.

It appears unfathomable on Long Island, with its water shortages and decreasing supply, increasing costs and declining quality drinking water, already ranked the worst in the state,[1] that the operator of a mine that is already more than 125 feet deep,[2] located in a highly sensitive deep recharge zone, as well as a State,

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[1] Elizabeth Moran and Jana Bergere, *What's in My Water?*, NYPIRG, May 2019, at 12; Matthew Chayes, *Report: Long Island's Drinking Water Has Most Contaminants in State*, Newsday, June 5, 2019, at 1; Matthew McGrath, *Big Apple Has New York's Cleanest Water While Long Island Has the Worst: Report*, N.Y. Post, May 29, 2019, at 1; Desiree D'lorio, *Report: Long Island Has Most Contaminated Drinking Water In New York*, WSHU, May 30, 2019, at 1.

[2] Despite being in a residential zone and an aquifer protection district over the drinking water aquifer, Sand Land's mine, already in excess of 125 feet deep, will become the deepest mine on

County and Town designated Critical Environmental Area ("CEA"), and directly over the sole source aquifer that provides Long Island's drinking water, would be trying to pierce the long certified *final elevation* floor of the mine and expand even deeper towards the fragile drinking water supply.[3] Yet, Appellants now claim their mining operation has a constitutional right to mine beneath that floor to unlimited depths and remove every single grain of filtering and recharging sand that protects the aquifer, regardless of the potential risks to public health and safety. The loss of that filter and the protection of the aquifer below is what is at stake in this case.

Fortunately, the legislature recognized and reasonably addressed this precise threat of expanding mining operations towards Long Island's water supply by enacting § 23-2703 (3) and the Third Department correctly applied the clear language of the statute and annulled the permits granting a vertical expansion. Significantly, the Attorney General for the State of New York and DEC accepted the ruling and have not appealed. The mine, Sand Land, does appeal, but virtually concedes that the Appellate Division's holding is supported by the language of

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Long Island if their expansion permit is granted. NYDEC Mining Data Base https://www.dec.ny.gov/lands/5374.html; USGS Long Island Depth To Water Viewer https://ny.water.usgs.gov/maps/li-dtw/

[3] The depth elevation of this mine has long been established at 160 AMSL, and as recently as 2013, and again in 2018, Sand Land has reaffirmed and re-certified this elevation as the final elevation of its mine when it was attempting to obtain a permit renewal [R.94, 99; R. 298] Unfortunately, once Sand Land had their renewal permit in hand based on that certified depth limit, they immediately sought a massive 40 foot deep vertical expansion, reversing their commitment and certification that 160 would be the final elevation of the mine and the floor for reclamation.

ECL § 23-2703(3), criticizing the Appellate Division for "focusing solely on ECL § 23-2703(3)" [Brief for Respondents-Appellants 39 ("BFR")].

Sand Land advances many unpersuasive arguments in an attempt to re-write the statute so it does not apply to them - or indeed to anyone. Perhaps recognizing the fatal flaws of its statutory construction arguments, Sand Land then turns to an equally fallacious one: that it has a unique constitutional right to expand its mine infinitely downward. No such right, constitutional or otherwise, exists, and Sand Land provides no authority for this novel doctrine that the depth of its mine cannot be limited by a State Law enacted to protect the environment – the very same law from which the permits for such activities emanate – ECL § 23-2703.

Sand Land's apocalyptic mischaracterizations only serve to obfuscate and misdirect a proper legal analysis of this case and the statute. Environmental Conservation Law § 23-2703(3) protects millions of New Yorkers and their drinking water from the potentially dangerous impacts of mining, yet impacts only a minuscule fraction of New York's mines. The statute covers fewer than 1% of New York's mines, in only 2 of New York's 62 Counties. Indeed, it only covers a maximum of 23 of New York's 2835 permitted mines,[4] and actually impacts only the much smaller subset of those 23 Suffolk County mines that would attempt to

[4] https://www.dec.ny.gov/lands/5374.html

override their long-standing permit boundaries and expand towards the sole source drinking water aquifer.[5]

Despite Appellants' protestations to the contrary, ECL § 23-2703(3) does *not* summarily close a single mine, has *not* raised (and could not reasonably sustain) a "takings analysis", and does nothing to threaten New York's nonconforming use jurisprudence. Indeed, the only Constitutional right threatened in this case is New York residents' Constitutional Right to clean water (NYS Constitution Art. 1, Section 19) if Sand Land is allowed to remove the deep recharge filter and threaten that water.

What the Statute *does* do is protect Long Island's sole source aquifer and drinking water from Appellants' proposed and unchecked vertical expansion to remove over one and a half million tons (3 billion pounds) [R.106] of filtering and recharging sand. The statute reflects the Legislature's rational and reasonable efforts to protect the drinking water of Long Island from threats associated with mining operations, and constitutes a rational and reasonable use of their police power.

[5]https://www.dec.ny.gov/cfmx/extapps/MinedLand/standard/ml_summaries/index.cfm?DECRegion=1

The Third Department correctly annulled Sand Land's expansion permits and its ruling should be affirmed. The protection of Long Island's drinking water and the safety of its residents vitally depend on it.

COUNTER QUESTIONS PRESENTED

1. Does application of ECL § 23-2703(3) to prohibit a 40 foot vertical expansion of a nonconforming mine above the sole source aquifer in Suffolk County present a constitutional issue?
2. Did the Appellate Division properly annul the "renewal" of Sand Land's 2013 permit when said renewal was in actuality a modification permit granted in violation of the Department of Environmental Conservation's modification process?

COUNTER STATEMENT OF THE CASE

Two of this State's largest and most densely populated counties, Nassau and Suffolk, depend for their water supply on a single aquifer (an underground body of porous rock through which water passes). In 1991, the Legislature enacted ECL § 23-2703(3) to protect this precious resource from the threat posed by excavating mines. The statute requires the DEC, which grants mining permits, to defer to local zoning ordinances in Nassau and Suffolk that prohibit mining.

In this case, Sand Land, owners of a mine that pre-dates the statute, seek a vast deepening of that mine, bringing it forty feet closer to the aquifer and

removing forty feet of the sand that acts as the filtration system for that aquifer. This proposed expansion presents exactly the type of threat that ECL § 23-2703(3) was enacted to combat. The Appellate Division applied the statute in accordance with its plain meaning to forbid the expansion and invalidated the DEC permits authorizing it. Sand Land asks this Court to sanction an expansion of the mine that both endangers Long Island's drinking water and violates the clear terms of a statute designed to protect that resource.

Sand Land does not seriously dispute the Appellate Division's decision as supported by the text of the statute. Rather, Sand Land criticizes the Appellate Division for "focusing solely on ECL § 23-2703(3)" [BFR 39], and devotes the bulk of their Brief to attempting to support a novel and impractical reading of the statute, by which it would have no application to any activity within the boundaries of any existing mines.

On Sand Land's reading, ECL § 23-2703(3) cannot prevent *any* deepening of a mine already in operation, even to and through the aquifer, and presumably to the center of the earth. This interpretation is not only contrary to the statutory text and unsupported by any authority, it renders the statute pointless. It was the expansion of existing mines, not the opening of new mines, that posed the actual threat to the aquifer at the time ECL § 23-2703(3) was enacted, and Sand Land's

statutory interpretation arguments are without merit. The judgment of the Appellate Division is correct and should be affirmed.

Respondents will refrain from engaging in a point-by-point correction of all the myriad misstatements and mischaracterizations that suffuse Sand Land's brief, as doing so would distract attention from the core issues presented upon this appeal concerning the proper statutory construction and constitutional application of one particular statute in the case presented. Respondents will identify and address certain errors where vital for the proper disposition of the legal issues before this Court.

Background

This case is an Article 78 proceeding challenging a series of determinations and approvals by DEC that effectively permitted the expansion of Sand Land's mine. [R. 52, ¶ 1; R. 55-56, ¶¶19-22][6] Petitioners-Respondents ("Petitioners") are the Town, owners of property located near the mine, and local environmental and civic organizations. [R. 53-55, ¶¶ 4, 6-18][7] The petition named as respondents DEC and two affiliated entities, collectively referred to as "Sand Land," which own and operate the mine. [R. 55-56, ¶¶ 19-23]

[6] "R." refers to the Record on Appeal.
[7] Assemblyman Fred W. Theile, Jr. was a petitioner below, but is not a party to this appeal. [R. 53, ¶ 5]

The mine sits directly above the aquifer that is the sole source of the region's public drinking water. [R. 58, ¶ 33; R. 2116; R. 4078] The mine is located within the Town's Aquifer Protection Overlay District, and also in a Critical Environmental Area and Special Groundwater Protection Area, defined in the ECL as a "recharge watershed area … which is particularly important for the maintenance of large volumes of high-quality groundwater for long periods of time." ECL § 55-107(3). [R. 58-59, ¶ ¶ 33-34; R. 118] A "recharge area" functions not unlike a coffee or water filter, helping prevent contaminants from migrating into drinking water. [R. 2116] The deeper and thicker the filter the more protection it gives; Sand Land's mine is located over one of the deepest filters remaining in Suffolk County. [R. 2116; R. 706 ¶ 14]

Sand Land's Brief cites profusely from a hearsay affidavit that proffered alleged facts beyond the scope of the administrative record that was before DEC when it made the determinations challenged in the underlying Article 78 proceeding [*See* Affidavit if Catherine Dickert dated, July 26, 2019 R. 2703-21]. Among other things, the "Dickert Affidavit" is cited for its reference to various decades old "groundwater sampling results" from Suffolk County mine sites purportedly showing that there are no groundwater impacts from mining. [BFR 4] The Dickert Affidavit fails to mention that the June 29, 2018 Suffolk County Department of Health Services Report concluded that prior vegetative organic

waste management ("VOWM") activities at this site adversely impacted the groundwater, as demonstrated by increased levels of manganese and iron. [R. 2926] Moreover, on September 10, 2018, DEC informed Sand Land that future site activities in and around the areas where processing and storing of vegetative waste formerly occurred have the potential to allow the release of contaminants in that area which could impact the local groundwater. [R. 3174] This appeal concerns the very statute that, by its terms, embodies a never-challenged legislative determination made in 1991 that Long Island's sole source aquifer required heightened protection from sand and gravel mining.

Parts of the mine property have been used for sand and gravel mining and for waste dumping and burying since before 1972. [R.121] In 1972, the Town amended its zoning laws to prohibit nonresidential uses such as mining in the area where the mine is located, but the mine continued to operate as a nonconforming use. [*Id.*] In 2010, the Town precluded mining in all its zoning districts.

Sometime after 1972, as acknowledged in Sand Land's Brief, vegetative waste processing was introduced to the site. That industrial use, as well as mulch stockpiling and sales, and other industrial operations also prohibited under local zoning were also sited at the mine. These operations were found by the Appellate Division, Second Department in 2016 not to be entitled to nonconforming use protection *i.e.*, they never had been legal uses at the site. *Matter of Sand Land*

Corp. v. Zoning Bd. of Appeals of Town of Southampton, 137 A.D.3d 1289 (2d Dept 2016), *lv. denied* 28 N.Y.3d 906 (2016). However, Sand Land continued to operate its unlawful waste processing and related business at this porous, sandy site over the aquifer until shortly before entering into the settlement agreement with DEC in 2019 that gave rise to the subject permits and this proceeding.

The 2013 Permit

After the Legislature's enactment of the "Mined Land Reclamation Law" (NYS Environmental Conservation Law, Article 23; hereinafter "MLRL") gave DEC authority over mining permits in 1975, permits to mine were issued and renewed several times. Sand Land's Brief relates that, when the initial MLRL permit was first renewed in 1985, it was for a 31.5-acre area to be mined [BFR 8], omitting to mention that the 1985 permit does not reflect any intent by the applicant to mine lower than 60 feet below grade (170 AMSL). [R. 2734] This is consistent with the 1979 permit application for the first MLRL permit. [R. 2729-33] Mining was initially zoned out of this area in 1972, but mining was allowed to continue unpermitted as a prior nonconforming use until the MLRL was enacted in 1975. Since the subject 1991 MLRL amendment, Sand Land has been prohibited from expanding mining operations beyond the area described in its 1985 MLRP.

The last renewal before the events giving rise to this litigation was on November 5, 2013. The 2013 permit required that "[a]ll mining shall be done

according to the plans … stamped NYSDEC approved on 11/5/13." [R. 89] Those plans, submitted to DEC by Sand Land, specified that "[t]he lowest bottom elevation of the mine … will be at elevation 160" feet above sea level. [R. 94] That depth had been the mandated floor of the mine since DEC first granted the facility a mined land reclamation permit in 1985. [R. 2731-34] The 2013 permit, like six earlier permits, also limited mining on the site horizontally to 31.5 acres. [R. 89]

The Application to Expand the Mine

In January 2014, Sand Land submitted an application for a modification of its recently issued permit. [R. 89] The modification, Sand Land explained, "is for a *vertical expansion* of a currently permitted sand and gravel extraction operation." [R.102; emphasis added] Sand Land sought to increase the mine's depth to 120 feet above sea level. [*Id.*] It also sought to expand the mine's horizontal area from the 31.5 acres previously approved, to add another 4.9 acres. [R. 100, "Acreage included in this application, but not previously approved"]

The DEC initially denied Sand Land's application, relying on serious unaddressed environmental concerns, including "impacts from the composting and C&D processing facility on groundwater" and a number of other deficiencies. [R. 61, ¶ 46; R. 114-16] Sand Land challenged the denial administratively, leading to agency proceedings that lasted until 2019. During the proceedings, it was DEC's

position, stated by its Deputy Commissioner and confirmed by its Chief Administrative Law Judge ("CALJ"), that ECL § 23-2703(3) applied to Sand Land's application – meaning that the application could not be processed "if local zoning laws or ordinances prohibit mining uses within the area proposed to be mined." [R. 116; R. 141; R. 146; ECL § 23-2703(3)]

In a ruling dated January 26, 2018, the CALJ concluded that he could not resolve the section 23-2703(3) issue: "whether the applicant's proposed mine expansion is legal under the Town's zoning laws cannot be determined on the current record." [R. 133] He found that "[t]he Town's response does … raise reasonable doubt concerning whether applicant's proposed mine expansion is legal under the Town Code." [R. 133-34] Consequently, the CALJ indefinitely "suspended and adjourned" the hearing on whether to grant the permit application because the statute "prohibits the Department from further processing applicant's mining permit application until the legality of applicant's proposed mine expansion under Town law is definitively established." [R. 135]

On July 18, 2018 the Town Supervisor sent DEC a letter resolving this issue. [R. 137-138] The letter said:

> 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]

On September 11, 2018, DEC issued a notice that it intended to modify Sand Land's permit to "require the cessation of mining activities" within 15 days and to begin reclaiming the site. [R. 68, ¶ 72; R. 293-296] Five months later, however, after private settlement discussions with Sand Land, DEC reversed its position.

The DEC-Sand Land Settlement

On February 21, 2019, DEC and Sand Land entered into a Settlement Agreement. [R. 346-53] Under the agreement, DEC would ""timely process a permit application" for mining deeper "to a depth of 120-feet" above sea level. [R. 350, ¶ 9] Thus DEC agreed to allow the total 40-foot increase in the depth of the mine that Sand Land had sought. [R. 438] The settlement agreement made no mention of ECL § 23-2703(3).

The settlement also granted a "renewal" of the 2013 permit allowing Sand Land to increase the horizontal extent of its mining activity by three acres, to 34.5 acres. [R. 350, ¶ 9] The only reason presented for the three-acre horizontal expansion in a "renewal permit" was an assertion in a later cover letter from DEC that it corrected a "typographical error," which had seemingly gone unnoticed in seven earlier permits. [R. 3378] Sand Land's Brief fails to mention that the Schedule of Compliance for its November 10, 2016 Order on Consent required Sand Land to submit a revised MLUP and reclamation plan to include the five

acres affected by mining prior to 1975 for reclamation purposes in accordance with MLRL regulations [R. 2853-54; R. 436-37, ¶¶14,15] DEC had distinguished the Stump Dump from the permitted mining area when they declared that Sand Land's mulching operations had expanded beyond the Stump Dump and into the interior of the mine. [R. 2841]

Sand Land justifies the "settlement" as supported by its agreement to cease vegetative waste processing at the site, but omits to mention that such processes and other related uses with acknowledged adverse environmental effects had been declared illegal in the March, 2016, Appellate Division, Second Department decision. *Phair v. Sand Land Corp.*, 137 A.D.3d 1237 (2d Dept 2016) Rather, Sand Land obtained by "settlement agreement" mining permits that the Appellate Division, Third Department held DEC had no right to issue, by promising to discontinue environmentally threatening uses that the Appellate Division, Second Department had already held Sand Land had no right to operate.[8]

DEC issued permits in accordance with the settlement, and Petitioners brought this CPLR Article 78 proceeding to annul the settlement and the permits. [R. 3377] The petition was supplemented to include the vertical expansion permit

[8]The Second Department 2016 decision cited by Sand Land as having "upheld" a zoning board of appeals determination that Sand Land had a nonconforming use for mining (BFR 9) concerned Sand Land's non-mining activities only. Sand Land's Article 78 proceeding that was finally determined by that decision did not challenge the zoning board of appeals' determination except insofar as it annulled the certificate of occupancy for the major non-mining uses. Any reference the decision made to the mining use was superfluous dictum.

issued June 5, 2019 while the proceeding was pending. Sand Land relates that such approval was issued "[a]fter a public comment period" [BFR 13] but neglects to mention that DEC received approximately 100 pages of comments from citizens and others, all opposing the vertical expansion [R. 3400-97]

Supreme Court's Decision

After several rounds of motions over preliminary relief, Supreme Court, Albany County (Ferreira, J.) rendered a 41-page decision on August 31, 2020 denying all the relief sought in the petition. [R. 4-44] ECL § 23-2703(3) is discussed only briefly in Supreme Court's opinion.

As to the horizontal expansion – the additional three acres – the court accepted Sand Land's claim that those acres should always have been included in the permit, and the addition of them as part of the settlement was a mere "correction." [R. 38] Thus, the court ruled, the permit issued as part of the settlement was only a "renewal," not a modification, of the previous permit, and ECL § 23-2703(3) did not apply. [*Id.*]

The court's discussion of the application of ECL § 23-2703(3) to the deepening of the mine is as follows:

> [T]he Court discerns no violation of ECL 23-2703 (3) in the processing of the modification application. DEC determined that input from the Town as to the legality of the mining expansion was not required because the proposed modification was a vertical expansion within the current disturbance footprint. DEC's interpretation is

> consistent with the language of the statute which states that it applies to an "application for a permit to mine." In the Court's view, it would be nonsensical to interpret the statute to apply to modification applications such as this one which *only proposes mining deeper* within an existing disturbance footprint/area where mining is already otherwise authorized.

[R. 40-41; footnote and citation omitted; emphasis in original]

The court did not explain why it thought it "nonsensical" – in interpreting a statute enacted to protect groundwater – to treat "mining deeper," i.e., 40 feet closer to the aquifer, at least as seriously as a horizontal expansion.

The Appellate Division's Decision

On May 27, 2021, the Appellate Division reversed Supreme Court's judgment, finding the statute to be unambiguous and applying it as written. The court said:

> ECL § 23-2703 (3) clearly recognizes that the local laws of the municipality are determinative as to whether an application can be processed. Here, where it is unchallenged that the Town's laws prohibit zoning [*sic*: read "mining"], DEC cannot process the application, let alone issue the permit. It cannot do by fiat what is prohibited under the law. Therefore, the act of issuing the permits here, in contravention of ECL § 23-2703 (3), was arbitrary and capricious.

[R. 9620]

Sand Land's Brief asserts without record citation that the Appellate Division Order somehow "affirmed" Supreme Court's approval of DEC's SEQRA review in

connection with the depth modification [BFR 4], the adequacy of which Petitioners challenged below. However, the Appellate Division never reached the SEQRA issue upon finding the threshold statutory ground dispositive of the case.

Justice Pritzker, dissenting, objected to the majority's analysis on the ground that it "could render the law unconstitutional" if applied to eliminate permits based on prior nonconforming use. [R. 9622] Justice Pritzker's cursory analysis of the constitutional issue, is, at best, confusing. On the one hand, he declares, without basis, that "a 40-foot vertical increase … may be reasonably viewed as a constitutionally protected expansion." [*Id.*] He neither explained that suggestion nor cited any authority holding vertical expansions to be constitutionally protected. On the other hand, Justice Pritzker added that "this does not mean that the permit had to be approved" [*id.*] – admitting that denying the vertical expansion might not be constitutionally prohibited, but not explaining which reasonable legislative protections and permitting authority could justify denying the mine's vertical expansion toward the drinking water. In any event, the situation of concern for the dissent is not the situation present in this case, as it does not involve either elimination of the nonconforming use or a mere renewal of the terms of the previous permit.

DEC accepted the Appellate Division's decision, and did not seek leave to appeal from this Court. Sand Land did move for leave, and its motion was granted on February 15, 2022.

ARGUMENT

I.

ECL § 23-2703(3) BARS THE PROCESSING AND ISSUANCE OF A PERMIT FOR THE VERTICAL EXPANSION OF SAND LAND'S MINE

Sand Land's Brief argues first that ECL § 23-2703(3) cannot, for constitutional reasons, be read, as the Appellate Division read it, to prevent DEC from processing Sand Land's application to expand its mine downward. [BFR 19-23] Secondly, Sand Land tries to defend its reading of the statute as a matter of statutory interpretation. [*Id.* at 24-47] We think it is clearer to take the questions in the opposite order. This brief will first demonstrate that the statute plainly applies to Sand Land's proposed vertical expansion of its mine, and secondly that that application of the statute here presents no constitutional problem.

A. The Appellate Division Correctly Held ECL § 23-2703(3) Applicable to Sand Land's Application to Expand its Mine Vertically

1. The Statute's Plain Meaning Supports the Appellate Division's Holding

In criticizing the Appellate Division opinion for its "singular focus on ECL § 23-2703(3)," Sand Land virtually admits that the language of the statute supports the Appellate Division's ruling. [BFR 3] Indeed it does. The statute says that DEC

may not "consider an application for a permit to mine" in Nassau or Suffolk County "as complete or process such application … if local zoning laws or ordinances prohibit mining uses within the area proposed to be mined." All three prerequisites of the statute are met here. It is undisputed that (1) Sand Land submitted an application for a permit to mine (to a greater depth than allowed by its existing permit) (2) in Suffolk County where (3) local zoning laws prohibit mining. By the plain language of the statute, DEC was prohibited from considering the application as complete, or from processing it. The Appellate Division correctly so held.

2. Sand Land's Reading of the Statute is Flawed

Sand Land tries unsuccessfully to show that context and precedent require a reading of the statute contrary to its plain meaning – a reading that would apply the statute only to digging brand new mines on an entirely new property. Sand Land's reading would leave wholly untouched any application not only to renew but also to *modify* any permit for an existing mine, no matter how material the modification, so long as the mining was done on the same parcel of land. This interpretation of the statute would defeat its plain purpose. Sand Land's reading finds no support in the statutory language, its context, any precedent or anywhere else.

(a) Sand Land's Reading Would Render the Statute Completely Ineffective

Sand Land acknowledges that "[s]tripped of context, the interpretation of the MLRL § 23-2703(3) phrase 'prohibit mining uses within the area proposed to be mined 'as having the meaning ascribed to it by the Appellate Division has superficial appeal." [BFR 26] Sand Land then tries to show that the "context" of the statute compels a different meaning – that the statute "applies only to an entirely new mine or the further development of an existing mine beyond its property boundaries." [*Id.* at 27] Sand Land's interpretation would exclude from the statute not only renewals without substantial change, but modifications of existing permits which, incidentally, require additional review under SEQRA. 6 NYCRR 621.11(h)(1).

This proposed interpretation lacks merit for many reasons. Not only is it contrary to the statutory language; it also does not make sense. If ECL § 23-2703(3) applied only to new mines, it would have been useless from the day it was enacted in 1991, a result the legislature could never have intended.

Every locality in the state was free before 1991, as it is today, to pass zoning ordinances that prohibit new mines. Before 1991, The Court of Appeals had held, in *Matter of Frew Run Gravel Prods. v Town of Carroll*, 71 N.Y.2d 126 (1987), that a local zoning ordinance prohibiting new mines was a valid exercise of local authority, not affected by the preemption provision of the MLRL, ECL § 23-

2703(2). The Legislature amended the preemption provision in 1991, but did not broaden its preemptive force as interpreted in *Frew Run*. *See Gernatt Asphalt Prod., Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 682 (1996).

Thus ECL § 23-2703(2) was not necessary to enable localities in Nassau and Suffolk to prohibit new mines. New mines were not a practical possibility in Nassau and Suffolk Counties when ECL § 23-2703(3) was enacted. Even if new mines had been contemplated in the years up to and including 1991, it would not have made sense for the Legislature to deny DEC permitting authority to such mines while allowing DEC to authorize the unlimited expansion of existing mines. The only possible point of enacting ECL § 23-2703(3) was to give zoning authorities in Nassau and Suffolk authority to prohibit the material expansion of existing mining. If the new statute did not apply at least to the expansion of existing mines in Nassau and Suffolk, it left those counties on the same footing as all other counties, and accomplished nothing.

The threat that activities above the sole source aquifer posed to drinking water and other environmental values had long been evident, and mines (like landfills) in Nassau and Suffolk were being phased out. Indeed, Sand Land gives no example of a single new mine opening in the decade prior to the 1991 statute in either Nassau or Suffolk County. The threat to Long Island's drinking water being addressed by ECL § 23-2703(3) thus was not likely to come from new mines, but

rather from expanded mining at existing mines. Under Sand Land's reading, the statute would be completely ineffective to meet that threat.

On Sand Land's theory, ECL § 23-2703(3) would permit issuance of a modified permit allowing a mine operator to dig to any depth it liked on its property, once any previous permit for that property had been issued, without any limitation, regardless of any public health consequence or any other public concern. *See Goldblatt v. Town of Hempstead*, 369 U.S. 590, 591 (1962) ("Before the end of the first year the excavation had reached the water table leaving a waterfilled crater which has been widened and deepened to the point that it is now a 20-acre lake with an average depth of 25 feet.") It is unreasonable to think that the 1991 Legislature intended such a result.

(b) Sand Land's Arguments for its Reading Are Without Merit

Sand Land offers many arguments in support of its reading of the statute. None of those arguments is a good one.

Sand Land claims its interpretation is supported by the "context" of ECL § 23-2703(3). But the statutes it discusses only show, in substance, that the drafters of the Mined Land Reclamation Law contemplated renewals of existing permits. *See* ECL §§ 23-2705, 23-2711(11), 23-2713, discussed at BFR 27-30. There is not a word in these statutes supporting Sand Land's conclusion that ECL § 23-2703(3) "only applies to applications for the development of new mines." [BFR 30] Section

23-2703(3) contains no "new mines" limitation; it applies generally to any "permit to mine" – and a "permit" is specifically defined in the ECL to include any "department approval", "modification" or "renewal". ECL § 70-0105(4). If the Legislature had meant only a "permit for a new mine," it would have said so.

Sand Land's emphasis on the statutes authorizing renewal permits is irrelevant for another, even more basic reason: this is not merely a renewal case. This case concerns an application for a *modification* of Sand Land's permit, filed in January 2014. Sand Land itself characterized the modification as one "for a vertical expansion." [R. 102] At that time, Sand Land's existing permit, which had been renewed two months earlier was in effect and had almost five years to run. [R. 89] Sand Land did not need or want a mere renewal of its permit. It proposed to expand its mine to an area never previously permitted, bringing it 40 feet closer to the aquifer that is the sole source of Suffolk County's drinking water and allowing it to remove over a million tons of sand that serves as an essential recharging and filtering buffer for the aquifer. [R. 103, 106]

The difference between a renewal and modification is important because, as explained in Section IB below, we assume for the sake of argument that, to avoid constitutional problems, ECL § 23-2703(3) could be read as excluding mere *renewal* permits, which simply extend the duration of a previously permitted area of an established non-conforming use, even though the text of the statute makes no

such exclusion. But that has nothing to do with the question in this case. There is a world of difference between a renewal of a permit without substantial change and a substantial modification, let alone the massive expansion sought in this case. Nothing in Sand Land's analysis of the "context" of ECL § 23-2703(3) provides the slightest basis for thinking that a permit modification as significant as the one proposed here is outside the statute's scope.

Indeed, Sand Land's "vested right" argument, taken to its logical extreme, would prohibit even DEC's Permitting authority over *any* such proposed expansions; the unencumbered vested rights argument, contextually removed from the potential hazards to public safety such as those recognized by the Legislature by its enactment of ECL § 23-2703(3), was expressly rejected by this Court in *Goldblatt*.

Not all of Sand Land's remaining statutory interpretation arguments require discussion, and those that do can be dealt with briefly:

1. Sand Land engages in a hard-to-follow analysis of the statute's "prepositional phrase," "within the area proposed to be mind," concluding that, unless the statute is read as Sand Land reads it, either "the prepositional phrase is superfluous" or "the use of the word 'area 'is incongruous." [BFR 31-32] This conclusion is wrong. The statute says, in clear English, that it applies "if local zoning laws or ordinances prohibit mining uses within the area proposed to be

mined." The last seven words are obviously not superfluous; without them, the statute could be read as applicable if the zoning ordinance prohibited mining anywhere, even where the permit applicant is not proposing to mine. And there is nothing incongruous about using the word "area" to mean the part of the locality where the applicant seeks to conduct mining operations.

2. Sand Land analyzes at length a totally irrelevant case, *Valley Realty Dev. Co. v. Jorling*, 217 A.D.2d 349 (4th Dept 1995) [BFR 33-35]. The mine in *Valley Realty* was in Onondaga County, where ECL § 23-2703(3) does not apply. The court mentions ECL § 23-2703(3) once in passing, to contrast it to the statute actually involved in *Valley Realty*. 217 A.D.2d at 354. It is not clear why Sand Land thinks *Valley Realty* is helpful to its argument.

3. Sand Land argues that the Appellate Division's holding is contrary to the "preemptive effect" of ECL § 23-2703(2), enacted in 1974, as interpreted in *Matter of Frew Run Gravel Prods. v Town of Carroll*, 71 N.Y.2d 126 (1987). [BFR 36-37; Sand Land makes the same argument at BFR 24-26.] Even on the dubious assumption that that the zoning ordinance here would have been preempted under *Frew Run* – which, as mentioned above, held that a prohibitory zoning ordinance was *not* preempted – Sand Land's argument fails for an obvious reason: ECL § 2703(3) was enacted in 1991, *after Frew Run* was decided.

In requiring DEC to refrain from processing applications where local zoning laws in Nassau or Suffolk County prohibited mining, the Legislature, at the very least, carved out an exception to whatever pre-emptive force section 23-2703(2) might otherwise have had. Sand Land's statement that "the 1991 amendments codified this Court's holding in *Frew Run*" [BFR 37] is grossly misleading. The 1991 amendment to section 23-2703(2) may have codified *Frew Run* as applied to mining regulation in general, but the same 1991 Legislature, by adding subsection (3) to section 23-2703, made an exception, to the extent any exception is necessary, for Nassau and Suffolk Counties.

4. Astonishingly, Sand Land says: "there is no legislative history that supports that the 1991 Legislature perceived mining as a threat to groundwater that had to be addressed." [BFR 38] ECL § 23-2703(3), however, enacted by the 1991 Legislature, expressly restricts the processing of permits to mine in large counties "which draw their primary source of drinking water for a majority of county residents from a designated sole source aquifer." The clear purpose for such a statute is the protection of the aquifer and the filtering sand above it from the threat posed by mining.

5. Sand Land relies on the Uniform Procedures Act (ECL Article 70), and specifically on ECL § 70-0109(1)(b) and (3)(b), under which permit applications may be deemed granted if not processed timely. Sand Land says that "ECL § 23-

2703(3) cannot logically be read" to apply to permits that become effective by lapse of time. [BFR 41] But the subsections of ECL § 70-0109 on which Sand Land relies apply to new permits, not just renewals and modifications. In other words, by Sand Land's reasoning, ECL § 23-2703(3) cannot "logically be applied" to anything at all.

6. Sand Land relies on proposed legislation, passed in 2020 but vetoed by the Governor, that would have expressly included modification and renewal permits within the protections now afforded by ECL § 23-2703(3). [BFR 46-47] Sand Land says that, if renewals and modifications were already within the statute, this legislation would have been unnecessary. There are several possible responses to this argument. It is well established that the actions of a later Legislature are not a reliable guide to the intention of an earlier one. *Mowczan v. Bacon*, 92 N.Y.2d 281, 285-86 (1998); *Fumarelli v. Marsam Development, Inc.*, 92 N.Y.2d 298, 304-07 (1998). And of course, the 2020 Legislature may simply have wanted to clarify the law. But here, there is a still more glaring flaw in Sand Land's argument: according to the Governor's veto message, the new legislation *was* unnecessary. [Appellants' Compendium at C-3: "This bill would not lead to additional water quality protections…. I do not agree that this bill would provide any new or meaningful enhanced protection."] That is part of the reason the bill did not become law.

By including such a quantity of flimsy arguments (including the above and others to which no response is necessary), Sand Land has inadvertently confirmed Petitioners 'point: there is no good argument for Sand Land's reading of ECL § 23-2703(3) as being applicable only to new permits, and not to material modifications of existing ones, like the mine expansion at issue here.

B. The Application of ECL § 23-2703(3) to the Vertical Expansion of Sand Land's Mine Raises No Constitutional Problem

No doubt recognizing the weakness of its statutory interpretation theories, Sand Land now relies primarily on a constitutional argument – one it hardly mentioned in the courts below: that the statute cannot be applied to eliminate constitutionally protected non-conforming uses. [BFR 19-23]

This would be a better argument in a different case. Of course, the statute may not be read to require a violation of the State or federal constitutions, but neither should the statute be read so as to render it meaningless. The problem for Sand Land is that the Appellate Division's decision, the principal effect of which is to prohibit Sand Land from digging 40 feet closer to the aquifer in a highly environmentally-sensitive area, does not violate and cannot reasonably be thought to violate Sand Land's constitutional rights. A commonsense reading of the statute finds it both constitutional and meaningful.

As a general matter, this Court has long recognized the authority of the Legislature and municipalities to limit the use of property to protect the public

health and welfare. *See Wallach v. Town of Dryden*, 23 N.Y.3d 728, 754–55 (2014). In *Town of Islip v. Cuomo*, 64 N.Y.2d 50, 58 (1984), the Court upheld the Legislature's passage of the Long Island Landfill Law (ECL § 27-0704), which "sought to prevent contamination of the aquifer by prohibiting new or expanded landfills in Nassau and Suffolk Counties, and by phasing out existing landfills, strictly limiting their operation after 1990." *Soc'y of Plastics Indus., Inc. v. Cty. of Suffolk*, 77 N.Y.2d 761, 764 (1991). *See also, Dittmer v. County of Suffolk, New York*, 59 Fed. Appx 375, 378 (2d Cir. 2003) (upholding the Long Island Pine Barrens Maritime Reserve Act passed "to allow the state and local governments to protect, preserve and properly manage the unique natural resources of the Pine Barrens–Peconic Bay system" as rationally related to a legitimate state interest of "protecting the largest natural drinking water source in New York").

It is also true, of course, that the power to regulate the use of property is not unlimited, and that nonconforming uses of property may have constitutional protection. "[A] zoning ordinance cannot prohibit an existing use to which the property has been devoted at the time of the enactment of the ordinance." *Syracuse Aggregate Corp. v. Weise*, 51 N.Y.2d 278, 284 (1980). We will assume for present purposes that a constitutional problem could be raised if ECL § 23-2703(3) were read to require existing mines to shut down immediately. And, under *Syracuse Aggregate* and *Jones v. Town of Carroll*, 15 N.Y.3d 139, 142 (2010), a

landowner, upon showing certain facts (an issue not ruled upon in this case) may acquire a "vested right," free from the encumbrances of later enacted, restrictive local legislation, to excavate the whole of its parcel, even where it has in fact excavated, or obtained a DEC permit to excavate, only part of it, where "the nature of the incipient non-conforming use, in the light of the character and adaptability to such use of the entire parcel, manifestly implies an appropriation of the entirety to such use." *Syracuse Aggregate*, 51 N.Y.2d at 285, quoting earlier cases. Where an owner is engaged in quarrying or another use that treats land as a "diminishing asset," to limit the use to land that has already been used could be viewed as rendering the ownership illusory – the owner would be allowed to dig only where it had dug already. *Id.* at 285-86.

Thus, Petitioners assume for present purposes (though they do not concede) that to forbid the issuance of *any* permit for an already-existing mine – even a renewal without substantial change – could raise a constitutional problem. Thus, Petitioners presume that, in an appropriate case, an exception should be read into ECL § 23-2703(3) to avoid a constitutional issue. But that question is not presented here. The Town's zoning ordinance, to which DEC is required by ECL § 23-2703(3) to defer, is being applied only to limit the *depth* to which a landowner may dig. This could raise a constitutional problem only if Sand Land had a vested right to dig as deep as it likes. No such right exists.

That a limitation on the depth of an excavation is not an unconstitutional taking of an owner's property was established six decades ago by this Court and the United States Supreme Court in *Goldblatt v. Town of Hempstead*, 9 N.Y.2d 101 (1961), *affirmed* 369 U.S. 590 (1962). There, the owner of a sand and gravel mine challenged an ordinance that had been amended, as a safety measure, "to prohibit any excavating below the water table." 369 U.S. at 592. This Court upheld the prohibition, saying: "The minimal safety standards … required by the Town of Hempstead have not been demonstrated under the circumstances here to be an unreasonable means" to accomplish their end. 9 N.Y.2d at 105. The Supreme Court affirmed. It found that the evidence was "indecisive on the reasonableness" of the prohibition, but pointed out that the burden was on the landowner to show unreasonableness. 395 U.S. at 595-96.

This case is *a fortiori* from *Goldblatt*. Sand Land's Brief does not even assert, and nothing in the record shows, that ECL § 23-2703(3), as applied to limit the depth of Sand Land's mine, is an unreasonable means of protecting Long Island's drinking water. Sand Land merely claims, incorrectly, that it has a vested right under *Syracuse Aggregate* and *Jones* to dig on its parcel to any depth it chooses. Neither *Syracuse Aggregate* nor *Jones* suggest the existence of such a right.

Indeed, Sand Land's analogy to *Syracuse Aggregate* and *Jones* fails for several reasons, but most importantly because the *horizontal* expansions at issue in those cases are fundamentally unlike the *vertical* expansion at issue here. As mentioned above, assuming arguendo that a horizontal limitation on the use of land as a "diminishing asset" might present a constitutional problem under certain limited factual circumstances; a limitation on depth may lessen its value, but does not destroy it. *See Golden v. Plan. Bd. of Town of Ramapo*, 30 N.Y.2d 359, 381 (1972) ("that the ordinance limits the use of, and may depreciate the value of the property will not render it unconstitutional, however, unless it can be shown that the measure is either unreasonable in terms of necessity or the diminution in value is such as to be tantamount to a confiscation"). And the environmental interests at stake in a vertical-expansion case are very different from those in a horizontal-expansion case. Every foot of increased *depth* directly above a sole-source aquifer, removes more of the sand that serves to recharge the aquifer and potentially threatens that aquifer. That threat is *precisely* the one the Legislature acted to address by enacting ECL § 23-2703(3).

Horizontal and vertical expansions are inherently different. While a horizontal expansion must stop at the boundary of a property, the only identified fixed point at which a vertical expansion must stop is the elevation identified in the permit application, permit, Mined Land Use Plan and site plan. [*See* R. 90, 94, 99]

DEC, in permitting and regulating mines, establishes a *final elevation* in the initial mine permit, followed by regulatory inspection and protection to guarantee the mine floor has not been breached. [R. 90] The 2013 Permit continues a final mine floor of 160 AMSL and confirms "No Mining below Final Grade. There shall be no mining below the grades shown on the approved map and/or cross sections except the drainage depression. There shall be no backfilling in any mine floor area in order to achieve final grades. Every mining permit application and reclamation plan requires a site map submitted by the applicant that shows both current elevations and the final elevation of the mine." [See, R. 90, 94, 99]

Syracuse Aggregate is not, as Sand Land seems to assume, a golden ticket to use its land as it likes, regardless of State enacted environmental legislation to protect the sole source aquifer. The *Syracuse Aggregate* court itself warned:

> [O]ur holding in no sense affords petitioner a carte blanche to engage in its mining operation. To the contrary, the town can adopt measures reasonably regulating the manner in which petitioner uses its quarry (*Town of Hempstead v Goldblatt*, 9 NY2d 101, affd 369 US 590) and may even eliminate this nonconforming use provided that termination is accomplished in a reasonable fashion ….

51 N.Y.2d at 286-87.

Sand Land's argument disregards this limitation on the *Syracuse Aggregate* principle. Sand Land cites no authority holding that it has a vested right to the vertical expansion of its operations regardless of any impact on the public health

and welfare, and it ignores *Goldblatt*, which establishes that no such right exists. The canon of constitutional avoidance is not implicated in this case, and there is no reason not to apply ECL § 23-2703(3) as the Appellate Division did, according to its plain meaning.

The Legislature did not, by enacting ECL § 23-2703(3), deprive any mining interest of any constitutional right, and the Third Department did not construe the statute in a way that would result in such a deprivation. Rather, the statute, as construed by the Appellate Division, recognizes this Court's acknowledgment, articulated in *Goldblatt* and reiterated in *Syracuse Aggregate*, that the elimination of a nonconforming property use can be accomplished in a reasonable, non-arbitrary fashion such that it does not offend the Constituition, particularly where, as in this case and in *Goldblatt*, threats to the public safety are implicated.

In its decision in the *Goldblatt* case affirming the decision of this Court, the United States Supreme Court made the point explicit:

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a claration by the state that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. * * * The power which the states have of prohibiting such use by individuals of their property, as will be prejudicial to the health, the morals, or the safety of the public, is not, and, consistently with the existence and safety of organized society, cannot be, burdened with the condition

> that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.

369 U.S. at 593.

The Legislature, by enacting ECL § 23-2703(3) and limiting it specifically to permits for mines that sit atop and thus potentially threaten the natural resource upon which Long Island depends for its clean drinking water, empowered Long Island municipalities to do just what *Goldblatt* allows.

II.

THE APPELLATE DIVISION PROPERLY ANNULLED THE IMPROPER "RENEWAL" OF SAND LAND'S 2013 PERMIT

Following multiple failed attempts over four years to obtain a 4.9 acre mine expansion through the normal legal and administrative process [R. 114-117; R. 122; R. 139], and DEC's issuance of a Notice of Modification to close the mine within 15 days [R. 293-296], DEC and Sand Land entered into private settlement negotiations. In those negotiations Sand Land agreed to drop 1.8 acres of the requested expansion and DEC agreed to add 3.1 acres (of the previously sought 4.9 acres) to the mine as part of its "renewal" of its 31.4 acre 2013 permit, expanding the Life of Mine to 34.5 acres.

The "renewal" of the 2013 permit significantly increased the size of the mine, and thus was not a true renewal, but rather an expansion and modification, requiring submission of a proper modification permit application

and successful completion of the modification approval process. The explanation that adding the 3.1 acres was a "correction" [R. 34-39] of supposed mapping and typographical errors, apparently repeated over 30 years and six previous renewal permits, was a completely inadequate explanation for dispensing with the modification process. DEC "cannot do by fiat what is prohibited under law" [R. 9620].

The Third Department properly annulled the expanded "Renewal" of the 2013 Permit.

III.

ADDITIONAL ARGUMENTS NOT ADDRESSED BELOW

Sand Land appears to labor under the misconception that all issues not addressed by the Appellate Division were decided *sub silentio* in Sand Land's favor. Thus, Sand Land's Brief at page 4 refers to "the portion of the Supreme Court's Judgment on Petitioners-Respondents' "SEQRA claim" with the unsubstantiated comment "which the Appellate Division affirmed . . . ." The Appellate Division did nothing of the kind. In light of the Appellate Division's decision it was unnecessary for it to reach that and a number of other issues, including but not limited to whether Supreme Court erred in:

1. Relying upon an affidavit of DEC staff dehors the record that did not demonstrate first-hand knowledge of DEC's decisions to provide a rationale not contained in the administrative return;

2. Concluding that ECL § 23-2711 did not apply to the subject applications;

3. Holding that the DEC CALJ's decision prohibiting DEC from processing a 2014 application pursuant to ECL §§ 23-2703(3) and 23-2711 was not binding upon the 2019 renewal and modification applications that sought substantially the same approval;

4. Upholding DEC's amended negative declaration contradicting the agency's conclusions in the 2014 denial that further review under the State Quality Review Act was required.

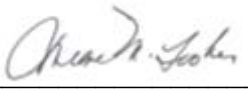
Accordingly, if the Appellate Division's decision annulling DEC's permits is not affirmed in its entirety, the matter should be remanded to the Appellate Division for determination of the issues not reached by that court.

CONCLUSION

The decision of the Appellate Division Third Department should be affirmed and the permits annulled.

Dated: June 30, 2022

Tooher & Barone, LLP



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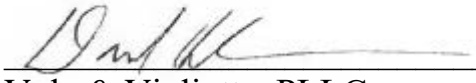

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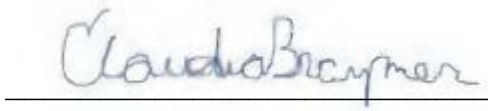

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NEW YORK STATE COURT OF APPEALS
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