To be Argued by:
GREGORY M. BROWN
(Time Requested: 20 Minutes)

APL-2022-00017
Appellate Division–Third Department Case Nos. 529380 and 532083
Albany County Clerk's Index No. 902239/19

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.

REPLY BRIEF FOR RESPONDENTS-APPELLANTS

FOGEL & BROWN, P.C.
Attorneys for Respondents-Appellants Sand Land Corporation and Wainscott Sand and Gravel Corp.
120 Madison Street
AXA Tower II, Suite 1620
Syracuse, New York 13202
Tel.: (315) 399-4343
Fax: (315) 472-6215
gbrown@fogelbrown.com

Date Completed: July 28, 2022

Rule 500.1(f) Corporate Disclosure Statement

Respondents-Appellants Sand Land Corporation and Wainscott Sand and Gravel Corp. are not publicly held corporations. They have no subsidiaries or affiliates that are publicly traded.

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PRELIMINARY STATEMENT

Appellants Sand Land Corporation and Wainscott Sand and Gravel Corp. (collectively, "Sand Land") respectfully submit this reply brief in further support of their appeal of the memorandum and order entered in this matter on May 27, 2021 ("Order"). [R 9613-9628][1]

At issue is the interpretation of ECL § 23-2703(3). By its terms, it only applies to "an application for a permit to mine." In the context of the MLRL, those are applications for property not previously permitted under the MLRL. It does not include renewals for MLRL permits for the same property. Petitioners follow the Appellate Division's lead, avoiding any reference to other provisions of the MLRL to construe the provision within the MLRL taken as a whole. Petitioners argue that it applies to all applications made after the 1991 MLRL amendments, without exception.

Likewise, Sand Land's main brief demonstrates that ECL § 23-2703(3)'s second limiting clause includes consideration of the zoning status of the property that is the subject of the application and thus extends to consideration of status as a prior nonconforming mining use. Ignoring the other provisions of the MLRL that aid in the interpretation of ECL § 23-2703(3) again, Petitioners argue the Appellant Division's interpretation properly disregards prior nonconforming mining use status.

[1] References to "R__" are to the Record on Appeal. References to "C__" are to the Appellant's Compendium. References to "Pet. Brief__" are to Petitioners' Brief.

Sand Land's main brief argues that this Court should reject the Appellate Division's interpretation of ECL § 23-2703(3) because it produces unconstitutional results. As explained in Sand Land's main brief, the Appellate Division's interpretation results in the swift termination of constitutionally protected rights to prior nonconforming mining usage, contrary to this Court's precedents. Given the Appellate Division's interpretation, Petitioners admit, as they must, that the Appellate Division's interpretation would result in unconstitutional outcomes in some cases.

The Order did not make much of an effort to excuse the unconstitutional outcomes. It merely points to the geographic location specified in ECL § 23-2703(3) and cites the general proposition regarding reasonable restrictions and eventual elimination of prior nonconforming uses. Acknowledging that this Court should not give ECL § 23-2703(3) an interpretation that results in constitutional infirmities, Petitioners attempt to backstop the Appellate Division's interpretation.

Petitioners argue that the property right to prior nonconforming mining use extends only to areas previously identified in the MLRL permit. Therefore, Petitioners argue, that the Appellate Division's interpretation does not eliminate constitutionally protected property rights, at least not in all cases. By this contrivance, Petitioners hope to make the Appellate Division's interpretation more constitutionally palatable to this Court. As demonstrated below, they fail miserably.

Petitioners devote nearly their entire brief to their effort to demonstrate that the Appellate Division's interpretation of ECL § 23-2703(3) results in unconstitutional outcomes only some of the time. However, the rule of statutory construction does not involve a tally of how many times the interpretation will produce unconstitutional results. It is enough that it will and has.

Citing material outside the record to argue the Order is of little consequence. Petitioners argue that the Appellate Division's interpretation does "not summarily close a single mine." [Pet. Brief 4] In fact, Sand Land can think of one on which it has had that effect, for which this Court's intervention was necessary to reopen. *See Town of Southampton v New York State Dep't of Envnt'l Conserv*., 38 N.Y.3d 972 (2022) (denying Petitioners' motion to vacate stay).

ECL 23-2703(3) was enacted in 1991 and for the past thirty years was never interpreted by any court, or the DEC, as in the Order.[2] In 1991, MLRL permits had a duration of one to three years and mines would have been closed summarily after whatever remained of their permit term, whether it be one day, or, for the fortunate, three years. MLRL permits issued for Long Island, absent the statute of limitations to challenge prior DEC issuances, are subject to invalidation according to

[2] Petitioners suggest knowing the minds of the New York State Attorney General and the Department of Environmental Conservation in this case. [Pet. Brief 2, 18] Mind reading is not necessary, the record is clear, the agency tasked with the interpretation of the statute has never interpreted ECL § 23-2703(3) as does the Order and argued in the Record on Appeal before this Court that the Appellate Division's interpretation is wrong. [R 9534-9535, 9619]

Petitioners, and that is how petitioners are proceeding based on the Order. As Petitioners brief makes clear, the interpretation results, in their words, "constitutional problems."

Sand Land respectfully submits that this Court should construe ECL § 23-2703(3) in the context of the MLRL as a whole, so as not to produce unconstitutional and unjust outcomes, and reverse the Appellate Division, Third Department, Order invalidating Sand Land's MLRL permits.

ARGUMENT

POINT I.

PETITIONERS UNSUCCESSFULLY ATTEMPT TO LIMIT SAND LAND'S RIGHTS TO PRIOR NONCONFORMING MINING USAGE TO SAVE THE APPELLATE DIVISION'S INTERPRETATION OF ECL § 23-2703(3) FROM ITS CONSTITUTIONAL INFIRMITY

Petitioners argue in opposition that the interpretation is only half-bad, producing unconstitutional results as to renewals of MLRL permits. Petitioners then argue that the extent of the right to prior nonconforming mine usage, contrary to this Court's precedent, is limited by the permit. By this argument, Petitioners attempt to convince this Court that the Appellate Division's interpretation of ECL § 23-2703(3) does not produce unconstitutional results all the time and not in this case. Sand Land respectfully submits the Court should adopt an interpretation without constitutional infirmities as explained in its main brief.

A. Petitioners Admit that the Appellate Division's Interpretation of ECL § 23-2703(3) Results in "Constitutional Problems" in Denying the Renewal of MLRL permits

In a case of statutory interpretation, "[w]here the language of a statute is susceptible of two constructions, the curts [sic] will adopt that which avoids injustice, hardship, constitutional doubts or other objectionable results." *H. Kauffman & Sons Saddlery Co. v. Miller*, 298 N.Y. 38, 44 (1948). In this case, Petitioners admit that the Appellate Division's interpretation of ECL § 23-2703(3) creates "constitutional problems." [Pet. Brief 23-24, 30]

Petitioners write that, under the Appellate Division's interpretation, renewal permits would be denied under ECL § 23-2703(3) because "the text of the statute makes no such exclusion." [Pet. Brief 23-24] Not without some irony, Petitioners assume for the sake of their argument "an exception should be read into ECL § 23-2703(3) to avoid a constitutional issue." [Pet. Brief 30] Petitioners offer no advice on the exception that "should be read into ECL § 23-2703(3)" that would fix the "constitutional problems" raised by the Appellate Division's plain language interpretation. Instead, Petitioners assert that is a question for another day. Why not adopt our constitutionally infirm plain language interpretation today, so the argument goes, when this Court can insert its plain language into the statute another day to fix the problems? [Pet. Brief 30]

The canon of statutory construction that statutes should not be interpreted to give rise to constitutional problems is not a 50/50 proposition. This Court should reject an interpretation that admittedly results in constitutional problems when there is an alternative interpretation construing ECL § 23-2703(3) in harmony with the rest of the MLRL and does not give rise to such problems.

B. Petitioners Posit that Mining Now in that Part of the Property that Was First Mined Decades Ago Is a "Horizontal Expansion" of the Prior Nonconforming Mining Usage

In this case, the Order invalidated the 2019 renewal of Sand Land's MLRL permit. [R 9628] Understandably, Petitioners do not want to concede the Order invalidating the 2019 permit renewal falls squarely within what they admit is a constitutional problem irreconcilable with their interpretation of ECL§ 23-2703(3). To that end, Petitioners point to the inclusion of the "stump dump" in the life of mine identified in the 2019 renewal of the permit. Petitioners claim the identification of the stump dump in the State Environmental Quality Review Act (ECL art 8) ("SEQRA") life of mine is a "horizontal expansion of a nonconforming use."[3] Therefore, Petitioners assert it is not unconstitutional to deny the renewal of the MLRL permit because prior nonconforming mining usage is not affected.

[3] DEC's Life of Mine Review Policy is described in Sand Land's main brief at p 7.

The 3.1-acre stump dump was the first part of the property mined on the 50-acre property, [R 2731-2733] before the enactment of the MLRL.[4] [R 3509] "A 1965 survey map submitted with the 1980 Mining Plan noted a proposed final grade of 120ft AMSL." [R 2756] Indeed, the depth of excavation in the stump dump part of the property is approximately 40 feet below where the mine has been operating in more recent times. [R 2733, 2766, 3499] The Town's 2011 certificate of occupancy for mining cites a 1961 mineral lease. [R 2753] So how can it be that the part of the property first mined is a "horizontal expansion" of the prior nonconforming mining usage? Petitioners define the prior nonconforming mining use as extending only to that part of the property identified as within the SEQRA life of mine in the MLRL permit. [Pet. Brief 35 ("expanding the Life of Mine")] The Petitioners' argument produces an absurd result by labeling the earliest mining use of the property a "horizontal expansion" of the prior nonconforming mining usage.

It is well-settled that a mining permit is not a prerequisite to establishing prior nonconforming mining usage. *Buffalo Crushed Stone Inc. v. Town of Cheektowaga*, 13 N.Y.3d 88, 101 (2009) ("claim that permits are a prerequisite to establishing prior nonconforming use rights is without authority"). Petitioners turn that precedent

[4] The mine became non-conforming under local zoning in 1972 [R 3541 n 3] Sand Land's main brief, at page 8, erroneously cited the year as 2010. In 2010 the Town eliminated mining in all districts and adopted Local Law No. 36 of 2010. [R 1100-1102] In that law, the Town acknowledges the DEC regulates mining activities and local regulation is preempted, inconsistent with Petitioners' argument that the Town is exempt from the MLRL supersession provision (ECL § 2703[2]) by virtue of the enactment of ECL§ 23-2703(3) in 1991.

upside down and restrict it further. Petitioners assert it is only prior nonconforming mining use if it is within the SEQRA life of mine identified in an MLRL permit. Indeed, MLRL permits do not convey property rights. Accordingly, they should not be used to eliminate them. Mine operators invest in reserves, not in permits. The substantial expenditure in obtaining and maintaining mining permits is strong evidence of intent to mine but does not define the extent of the property right to prior nonconforming mining usage. *Buffalo Crushed Stone Inc.*, 13 N.Y.3d at 102. As discussed below, Petitioners' error in limiting prior nonconforming use to the extent of the SEQRA review under DEC's Life of Mine Review Policy also infects their "vertical expansion of prior nonconforming use" argument.

The Order invalidated the 2019 renewal of Sand Land's MLRL permit based on an interpretation of ECL § 23-2703(3) that Petitioners admit has constitutional problems. Petitioners simply relabeling the area of the property that was first mined decades ago a "horizontal expansion" merely underscores those problems.

C. Petitioners' Vertical Expansion Construct of Prior Nonconforming Mining Usage Is Wrong Because the Extent of the Prior Nonconforming Use Is Not Defined by a Permit and Is Contrary to this Court's Precedent

In keeping with their proposition that a statutory interpretation that results in constitutional infirmities only half the time is good enough, Petitioners posit that the constitutional problems with the Appellate Division's interpretation as to MLRL permit renewals do not extend to modification of the MLRL permit. Petitioners

argue that mining deeper within the same footprint is an expansion of the prior nonconforming mining usage. The vertical expansion construct is factually incorrect, again erroneously defining the extent of the right to prior nonconforming mining usage by the SEQRA life of mine, and is contrary to this Court's precedent applying the diminishing asset doctrine to mining usage.

1. Petitioners' Vertical Expansion Construct Is Factually Incorrect

Petitioners incorrectly claim the elevation of the mine floor is at 160 AMSL and that it is an expansion to excavate to 120 AMSL. However, mining at the property long ago excavated to a depth of 120 AMSL. [R 2731-2733] The stump dump area of the property that was mined before the first MLRL permit was excavated to a 120 AMSL. *Id*.

2. The MLRL Does Not Define an "Application for a Permit to Mine" by the Depth of Excavation

If the property boundaries are expanded to include "property not previously permitted under the [MLRL]," then it is treated within the MLRL the same as a new permit application for that additional property. ECL § 23-2711(3). The distinction between a renewal of a permit and a new permit is not tied to the depth of excavation. Just as renewing the MLRL permit for another term of years, whether for five years or less (ECL § 23-2711[2]), does not limit the extent of the mineral reserves to be mined from within the boundaries of the property, neither does the planned mined depth during any particular term. *See* ECL § 23-2711(11) (updates to mined-land

use plans are part of renewals). The depth of excavation within a particular term does not alter the boundaries of the property to be mined under the MLRL permit. Rather, "[i]f mining under a renewal application entails a substantial change in operations, i.e., mining deeper than planned . . . , a Life of Mine Review and SEQRA review must be conducted."[5] [R 2739]

Petitioners fail to understand or choose to ignore that: (1) the extent of mineral reserves that underlie the surface of the property to be mined throughout the MLRL permit is not known with certainty; (2) MLRL permittees must project the market demand for those resources for each permit term (i.e., the land to be affected by mining during the permit term [ECL § 23-2705(2); ECL § 23-2711(11)(b)]; and (3) post financial security for reclamation consistent with the affected land (ECL § 23-2715[2]). As a practical and economic matter, mine operators will not seek to include the entire property's possible reserves under a single permit term.

A renewal of the MLRL permit wherein the projected depth increases to satisfy market demand is not "an application for a permit to mine" under ECL § 23-2703(3), it is an application to continue mining under the existing permit to mine. As the trial level court concluded, "it is nonsensical" to argue that Sand Land's 2019

[5] It may also be treated as new application for purposes of processing under the Uniform Procedures Act (ECL art 70). *See* 6 N.Y.C.R.R. § 621.11 (h) (defining when a renewal or modification can be treated as new application, including the DEC deeming an opportunity for public comment is necessary). However, that does not alter the distinction between a new MLRL permit and a renewal, which is defined by the MLRL. *Compare* ECL § 23-2711(3), *with* ECL § 23-2711(11).

renewal and subsequent permit modification is an "application for a permit to mine" because Sand Land already had an MLRL permit to mine the acreage covered by the renewal and modification. [R 41] Petitioners must resort to their tortured construct of prior nonconforming mining usage only because they ignore the provisions of the MLRL that make it clear that ECL § 23-2703(3) does not apply.

3. Controlling Precedent Extends the Prior Nonconforming Mining Usage to the Mineral Resources Beneath the Surface

New York has long recognized mineral rights as a distinct interest in real property. *See White v. Miller*, 200 N.Y. 29, 36 (1910) ("a grant of the minerals in land will include all such as are obtainable beneath the surface of the soil for the purpose of profit," absent a restriction in the grant). That interest includes "both title to the minerals and the right to use any reasonable means to extract them" *Frank v. Fortuna Energy, Inc*., 49 A.D.3d 1294, 1294 (4th Dep't 2008) (citing *Marvin v. Brewster Iron Mining Co.*, 55 N.Y. 538, 548-550 [1874]).

The application of the diminishing asset doctrine to mining defines the prior nonconforming usage as "the excavation and sale of the corpus of the land itself as a resource." *Syracuse Aggregate Corp. v. Weise*, 51 N.Y.2d 278, 285 (1980). Reserves are kept in place "as a matter of practicality as well as economic necessity." *Id*. The diminishing asset doctrine is not defined by the depth of excavation; none of the reserves need to have been excavated at all. *See Buffalo Crushed Stone Inc.,* 13 N.Y.3d at 103 (conferring prior nonconforming use rights to areas cleared, grubbed,

and stripped of topsoil before the restrictive ordinance was adopted).

Similarly, under this Court's precedent, a mining permit is not required to establish constitutionally protected prior nonconforming mining usage. *Id*. at 101-102. Petitioners' argument upends this precedent, defining the right to prior nonconforming usage by the MLRL permit itself.

In a distinction without a difference, Petitioners argue that this precedent is distinguishable because it didn't involve "vertical expansion." For a mine operator, vertical expansion means "the excavation and sale of the corpus of the land itself." *Syracuse Aggregate*, 51 N.Y.2d at 285. Most certainly the mine operator in *Buffalo Crushed Stone, Inc,* would consider this Court's holding conferring prior nonconforming use rights for certain parcels not yet excavated at all to have been a pyrrhic victory under Petitioners' interpretation. Petitioners' "vertical expansion" argument is without merit and contrary to decades of this Court's precedent on property rights.

Petitioners' attempts at rewriting this Court's precedent on the extent of prior nonconforming mining usage notwithstanding, the Appellate Division's interpretation that the 1991 enactment of ECL § 23-2703(3) as promptly terminating rights to prior nonconforming usage creates "constitutional problems" and should be rejected by this Court.

D. ECL § 23-2703(3) Is Not an Exception to the MLRL Supersession Clause (ECL § 23-2703[2]) to Allow Local Governments to Regulate Mining Operations

Petitioners argue that local governments on Long Island are not subject to the MLRL supersession provision and therefore they can regulate mining operations, including the depth of mining through local zoning ordinances. Petitioners declare that ECL § 23-2703(3) "carved out an exception to whatever pre-emptive force section 23-2703(2) might otherwise have had." [Pet. Brief 26] They argue that DEC is required by ECL § 23-2703(3) to defer to local zoning "to limit the depth to which a landowner may dig." [Pet. Brief 30] As a matter of statutory interpretation and precedent there is no basis for the Petitioners' argument.

Had the Legislature intended to exempt Long Island from the supersession provision it would have included the geographic limitation contained in ECL § 23-2703(3) in ECL § 23-2703(2). It did not. ECL § 23-2703(2) has no geographic limitation specified except as specified in subsection ECL § 23-2703(2)(d) (an amendment enacted by Session Laws of the 241st Legislature October 1, 2018) which addresses groundwater monitoring. Since 1991, the courts, including this Court, have had many occasions to address ECL § 23-2703(2). *See, e.g.*, *Town of Riverhead v. T.S. Haulers, Inc.*, 275 A.D.2d 774, 775 (2d Dep't 2000) (interpreting ECL § 23-2703[2] as applied to a mine on Long Island). Not surprisingly, Petitioners do not cite any legal authority for their argument. Similarly, as noted above, infra n

4, the Petitioner Town of Southampton enacted a local law in 2010 expressly recognizing it did not have the power to regulate mining activities. [R 1100-1102]

Petitioners declare exemption from the supersession provision to invoke the police powers limitation that can be applied to regulate prior nonconforming uses noted in *Syracuse Aggregate*, 51 N.Y. 2d at 286-287. Petitioners argue that it would be a constitutional regulation of those rights for local zoning to limit mine depth. The argument has no bearing on the interpretation of ECL § 23-2703(3) other than as an excuse for the Appellate Division's interpretation leading to the elimination of rights to prior nonconforming mining usage.

Petitioners rely almost exclusively on a 1962 pre-MLRL decision, *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), to argue that the Town has zoning power to limit "vertical expansion." The *Syracuse Aggregate* court cited *Goldblatt* for the proposition that the method of mining may be regulated by a local government under its police powers. 51 N.Y.2d at 286-287.

Wrongly excepting Long Island from ECL § 23-2703(2) aside, *Goldblatt* was an as-applied challenge to the constitutionality of an ordinance. There is no ordinance at issue in this case purporting to limit the depth of mining or an as-applied challenge. This is a case of statutory interpretation. Petitioners' so-called plain language interpretation results in an interpretation with "constitutional problems" for which Petitioners' response is merely to posit an "exception should be read into"

ECL § 23-2703(3) to fix the problems. A 1962 United States Supreme Court regulatory takings precedent has no bearing on the correct statutory interpretation of ECL § 23-2703(3).

The citation is more curious because *Goldblatt* undermines the Petitioners' analysis. Petitioners argue that local zoning power can regulate the depth of mining because it is a "vertical expansion" of a prior nonconforming use. In *Goldblatt*, "[t]he ordinance in question was passed as a safety measure" that regulated the depth of mining and that is how it was judged. 369 U.S. at 595. The *Goldblatt* Court specifically noted that a prior judgment on a zoning ordinance, was not undermined and irrelevant to the instant case based on a limitation imposed under the police power. *Id.* at 597; *see also*, *Town of Hempstead v Goldblatt*, 9 N.Y.2d 101, 107 (1961) (Voorhis, J dissenting, describing similarities of the zoning ordinance to the ordinance passed under police power), *aff'd sub nom*. *Goldblatt v Town of Hempstead, N. Y.*, 369 U.S. 590 (1962). In the prior judgment referred to by the Court in *Goldblatt*, the court held that the Town zoning ordinance imposing the depth limitation could not constitutionally be applied because of the prior nonconforming mining usage. *Town of Hempstead v. East Meadow Realty Corp et al.*, No. 7006/54, Slip Op. (Sup. Ct. Nassau Cnty March 8, 1956) (included as an addendum to this brief).

Petitioners' argument in support of their claim that the Appellate Division's interpretation of ECL § 23-2703(3) does not always result in constitutional problems is predicated upon overturning decades of this Court's precedent on prior nonconforming mining usage, ignoring the MLRL preemption provision (ECL § 23-2703[2]), pretending there is a local ordinance limiting mining depth, and then misapplying a 1962 United States Supreme Court regulatory takings precedent to a non-existent as-applied challenge to the pretend ordinance.

In the end, Petitioners' arguments merely confirm the Appellate Division's interpretation of ECL § 23-2703(3) is wrong and irreconcilable with this Court's precedent.

POINT II.

THE STATE'S POWER TO LIMIT THE DEPTH OF MINING EXCAVATION IS NOT EXERCISED THROUGH ECL § 23-2703(3).

Petitioners set out a strawman argument that Sand Land claims that the State cannot constitutionally prevent mining to the center of the earth no matter the impact on the sole source aquifer. [Pet. Brief 6] However, Sand Land's argument is not that the state is constitutionally powerless to regulate and limit mining. Rather, Sand Land's main brief establishes that the Appellate Division's interpretation violates the canon of statutory construction that a statute should not be construed as constitutionally infirm.

The State has police powers to regulate how mining is conducted, including the depth of excavation. However, the expression of that power is not through ECL § 23-2703(3) but through DEC's exclusive power to regulate mining operations under the MLRL (ECL § 23-2703[2]) and the application of SEQRA.

Under the MLRL, the DEC regulates setbacks from the property line and slopes to the mine floor. 6 N.Y.C.R.R. § 422.2(c)(3)(iii). As a matter of geometry, the property line, setbacks, and slopes determine the depth of excavation. Thus, the geometry of the property determines the ultimate depth of potentially accessible mineral reserves. The "area to be affected by mining" during a permit term is not limited to the surface. Part of the renewal process is to update plans to reflect changes in this area as mining progresses under the MLRL permit. *See* ECL § 23-2711(11)(b) (requiring renewal applicant to update mining plan to identify the area to be mined during the term).

Under SEQRA, the lead agency determines if adverse environmental impacts will result from approving an application, may impose mitigation to minimize the adverse impact to the maximum extent practicable, and ultimately may deny an application. 6 N.Y.C.R.R. § 617.11(c). Under the DEC's Life of Mine Policy, the DEC reviews, among other things, whether a lowering of the mine floor below that depth of excavation previously evaluated under SEQRA would adversely impact the aquifer. [R 3372-3376 DEC memorandum regarding MLRL permit renewals and

modifications]

Petitioners' contentions that Sand Land's interpretation of ECL § 23-2703(3) would leave mine operators to "dig to any depth it liked" and "prohibit DEC permitting authority over any such proposed expansion," are a red herring. Petitioners construct this straw man to avoid addressing that there is ample legal authority to restrict the depth of a mine if the excavation would adversely impact the aquifer, undermining their argument that ECL § 23-2703(3) was intended for that purpose.

In this case, the application of SEQRA to determine if excavating to a greater depth would adversely impact the aquifer appears in the record. [R 3384-3387] It "established that no threat to the groundwater was posed." *Id*.

The Petitioners suggest that the DEC failed to account for a 2018 Suffolk County Department of Health Services report regarding "vegetative waste," not mining ("SCDHS 2018 report"). [Pet. Brief 8] That is not correct. The SCDHS 2018 Report is in the administrative record. [R 2923-3068] They claim increased levels of manganese and iron, which are naturally occurring [R 1470 ¶ 13], were identified in the SCDHS 2018 showing that mulch handling at the site, not mining, adversely impacted the groundwater and imply DEC failed to consider it.[6] [Pet. Brief 8-9]

[6] Petitioners assert that Sand Land's main brief "cites profusely from a hearsay affidavit." [Pet. Brief 8]. The affidavit sworn to by DEC's Director of the Division of Mineral Resources, cited on three pages (4, 8, and 42) a total of five times in Sand Land's forty-seven page main brief,

DEC considered the SCDHS 2018 report "fatally flawed:" (i) "not based upon a methodology generally accepted by licensed professionals," (2) using sampling techniques "never witnessed" by DEC's expert in her "18+years' experience in the environmental industry on Long Island," (3) "creating unreliable data" [R 1470 ¶ 14] An investigation of the Sand Land property demonstrated it was not a source of elevated manganese and iron. [R 3072-3155]

Out of the 17-volume Record on Appeal, the Petitioners' lone citation as to why the 1991 Legislature would enact ECL § 23-2703(3) to prevent mining from harming the aquifer is the discredited SCDHS 2018 report. Without citation to any legislative history or the record pre-dating or contemporaneous with the 1991 MLRL amendments, they also assert the mineral reserves to be mined under the permit modification, that lie between 160 and 120 feet AMSL, must remain in place to act like a coffee filter for the public purpose of aquifer protection [Pet. Brief 8]. The legislature enacted the Long Island Pine Barrens Protection Act (ECL art 57), and not ECL § 27-2303(3), to regulate land use to protect the aquifer, which includes a compensation mechanism for taking land for that purpose.

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is discussed in Justice Prtizker dissenting opinion. [R 9625] It is cited because is summarizes, and cites to, the voluminous administrative record, which appears in the record after the affidavit. [R 2722-3517, 3651-4533] For example, it cites to DEC's response to comments which state that "DEC has approximately twenty years of sampling data from three mine sites in Suffolk County that are mining in the water table as well as from several other mine sites at varying elevations above the water table. . . [and] [t]hese data have not shown any impacts to groundwater quality associated with mining activities." [R 3506]

Based on the administrative record, which the Petitioners had full opportunity to participate in, and did extensively, the DEC made a SEQRA determination that excavating to a greater depth found no threat of adverse impact to groundwater from mining at the site to the MLRL permitted depths. [R 3384-3387] ¶

Petitioners' hyperbole to the effect that ECL § 23-2703(3) is all that stands in the way of "digging to the center of the earth" is a red herring.

POINT III.

ECL § 23-2703(3) SERVES THE PURPOSE OF AVOIDING ADMINISTRATIVE PROCEEDINGS FOR WHICH AN APPLICANT MAY NOT EVENTUALLY OBTAIN THE REQUIRED ZONING APPROVAL

Petitioners contend that Sand Land's proffered interpretation of ECL § 23-2703(3) would render ECL § 23-2703(3) ineffective to meet what they assert is its purpose – to prevent a threat to the sole source aquifer. The Petitioners' argument reaches this conclusion because they wrongly assume that ECL § 23-2703(3) was intended for that purpose.

ECL § 23-2703(3) addresses a well-known problem. The DEC adjudicates mining permits, not local zoning. A DEC determination to issue a permit has no bearing on whether the mine is authorized under local zoning. As *Valley Realty Dev. Co. v. Jorling*, 217 A.D.2d 349 (4th Dep't 1995) makes clear, DEC must process an application for a permit to mine even if the local law bans mining at the proposed mine property if there is a dispute as to whether the applicant has prior

nonconforming mining use rights at the subject property. DEC's processing of the permit "can place a great burden on localities and their residents." *See* 2 N.Y. Zoning Law & Prac. § 15:14, titled "The DEC's processing of MLRL applications in the absence of local approval of the project." "Many localities, and citizens within them, cannot afford such protracted and expensive administrative litigation" if they oppose the proposed mine. *Id*. The purpose of ECL § 23-2703(3) is to avoid this circumstance of protracted and expensive administrative litigation concerning applications for a permit to mine on Long Island.

Unwittingly, Petitioners describe the very circumstances that render ECL § 23-2703(3) particularly effective for this purpose on Long Island. Petitioners note that "[n]ew mines were not a practical possibility in Nassau and Suffolk Counties when ECL § 23-2703(3) was enacted." [Pet. Brief 21] They state, "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." *Id*. Given these circumstances, it was eminently reasonable for the 1991 Legislature to conclude that an applicant should first establish that it had zoning approval (e.g., by a change of zoning or determination of a right to prior nonconforming mining usage) before DEC started processing an application for a permit to mine on Long Island.

Petitioners' disaffection with ECL § 23-2703(3) not serving the purpose Petitioners would ascribe, stems from Petitioners assuming its purpose and then

attempting to interpret it to serve that purpose; instead of identifying the purpose from the MLRL construed as a whole in light of the circumstances under which it was enacted. As pointed out by Sand Land in its main brief, and confirmed by Petitioners in their opposition brief, Petitioners fail to identify any legislative history that shows the 1991 Legislature believed mining presented a threat to the sole source aquifer that needed to be addressed by legislation. In contrast, Petitioners succinctly describe why the 1991 Legislature would enact ECL § 23-2703(3) to avoid administrative litigation that might well prove to have been pointless.

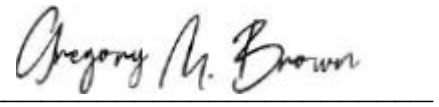
CONCLUSION

For the foregoing reasons and those stated in their main brief, the Order should be reversed, and Appellants Sand Land Corporation and Wainscot Sand and Gravel Corp. respectfully request that this Court issue a decision declaring that that ECL §§ 23-2703(3) and 23-2711(3) did not apply to DEC's processing and issuance of Sand Land's MLRL permits.

Dated: July 28, 2022
Syracuse, New York

RESPECTFULLY SUBMITTED,

FOGEL & BROWN, P.C.

BY: 

GREGORY M. BROWN, ESQ.
Attorneys for Respondents-Appellants Sand Land Corporation and Wainscott Sand and Gravel Corp.
120 Madison Street, Suite 1620
Syracuse, New York 13202
TEL.: (315) 399-4343
EMAIL: gbrown@fogelbrown.com

PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 N.Y.C.R.R. 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

Type. A proportionally spaced typeface was used, as follows:

Name of typeface:	Times New Roman
Point size:	14
Line spacing:	Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, and this Statement is 5,441.

ADDENDUM

Opinion in Prior Litigation

Dated March 8, 1956

TOWN OF HEMPSTEAD,

—v.—

EAST MEADOW REALTY CORP. and BUILDERS SAND AND GRAVEL CORP.

By this action plaintiff, Town of Hempstead, seeks an injunction restraining defendant from the operation of a sand and gravel business on premises described in the complaint as a violation of the town zoning ordinance. Defendants' counterclaim for a determination that the ordinance is invalid insofar as it restrains them from the operation of a sand and gravel business on the premises.

Defendants or their predecessors have owned and conducted a sand and gravel business on the 38 acre parcel described in the complaint since 1927. The first zoning ordinance of the town was adopted in 1930. I find that the defendants are now and have been since 1927 conducting a prior non-conforming use on the premises, and that they have made such a substantial investment in improvements in the business to warrant the continuance of this non-conforming use, see *People* v. *Miller,* 304 N. Y. 105; *Town of Somers* v. *Camarco,* 308 N. Y. 537.

I, further, find that there has been a substantial use of the entire premises to entitle defendants to continue their operations, *in futuro,* as to the entire premises.

The complaint is dismissed and the counterclaim granted insofar as it seeks a determination that the prior nonconforming use can be carried on on the entire premises with costs to defendants.

The foregoing constitutes the decision of the court pursuant to the provisions of the Civil Practice Act.

Settle Judgment.

HILL
J.S.C.

Judgment in Prior Litigation

At a Special Term, Part I thereof, of the Supreme Court of the State of New York, held in and for the County of Nassau, at the Nassau County Courthouse, Old Country Road, Mineola, New York, on the 5th day of April, 1956.

Present:

HON. L. BARRON HILL,

Justice.

7006/54

TOWN OF HEMPSTEAD,

Plaintiff,

—against—

EAST MEADOW REALTY CORP. and BUILDERS SAND AND GRAVEL CORP.,

Defendants.

The issues in this action having duly come on to be heard before this Court at a Special Term, Part I thereof, held at the Nassau County Courthouse, Mineola, New York, on the 14th and 15th days of February, 1956, and the plaintiff having appeared by John A. Morhous, Esq., by Edward M. Kolbell, Esq., of counsel, and the defendants having appeared by Edward M. Miller, Esq., and the allegations and proofs of the respective parties having been duly heard and considered, and the Court having made its decision

in writing, dated March 9, 1956, and having in its aforesaid decision directed the dismissal of the complaint and having granted judgment to the defendants on the counterclaim insofar as it sought a determination on the non-conforming use, with costs to the defendants, and the costs and disbursements of the defendants being the sum of $78.38, as taxed by the County Clerk of the County of Nassau, and on motion of Edward M. Miller, attorney for the defendants, it is

ORDERED, ADJUDGED AND DECREED, that the complaint herein be and the same hereby is dismissed; and it is further

ORDERED, ADJUDGED AND DECREED that the defendants have a prior non-conforming use in the conduct of a sand and gravel business which may be carried on on the entire premises described in the complaint, notwithstanding any Ordinances of the plaintiff; and it is further

ORDERED, ADJUDGED AND DECREED that the defendants, of Newbridge Avenue, East Meadow, New York, recover of the plaintiff, of Town Hall, Front Street, Hempstead, New York, the sum of $78.38, costs and disbursements, as taxed, and that the defendants have execution therefor.

Judgment this 5 day of April, 1956.

Enter

HILL
Justice Supreme Court

STATE OF NEW YORK)
) ss.:
COUNTY OF MONROE)

AFFIDAVIT OF SERVICE BY PRIORITY MAIL

I, **Jeremy Slyck** of Rochester, New York, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above.

On July 28, 2022

deponent served the within: **REPLY BRIEF FOR RESPONDENTS-APPELLANTS**

Upon:

VOLZ & VIGLIOTTA, PLLC
Attorneys for Petitioner-Respondent Town of Southampton
280 Smithtown Boulevard
Nesconset, New York 11767
Tel.: (631) 366-2700
Fax: (631) 256-1704
darntsen@volzvigliotta.com

TOOHER & BARONE, LLP
Attorneys for Petitioners-Respondents 101Co, LLC, 102Co NY, LLC, BRRRubin, LLC and Bridgehampton Road Races, LLC
313 Hamilton Street
Albany, New York 12210
Tel.: (518) 432-4100
Fax: (518) 432-4200
mtooher@tabllp.com

LAZER, APTHEKER, ROSELLA & YEDID, P.C.
Attorneys for Petitioners-Respondents Joseph Phair, Margot Gilman and Amelia Doggwiler
225 Old Country Road
Melville, New York 11747
Tel.: (631) 761-0860
Fax: (631) 761-0723
murdock@larypc.com

BRAYMER LAW, PLLC
Attorneys for Petitioners-Respondents Citizens Campaign for the Environment, Group for the East End, Noyac Civic Council and Southampton Town Civic Coalition
P.O. Box 2369
Glens Falls, New York 12801
Tel.: (518) 502-1213
Fax: N/A
claudia@braymerlaw.com

LETITIA JAMES
ATTORNEY GENERAL OF THE STATE OF NEW YORK
By: FREDERICK A. BRODIE
Attorneys for Respondent-Respondent New York State Department of Environmental Conservation
The Capitol
Albany, New York 12224
Tel.: (518) 776-2020
Fax: (518) 915-7723
frederick.brodie@ag.ny.gov

the address(es) designated by said attorney(s) for that purpose by depositing **three (3)** true copies of same, enclosed in a properly addressed wrapper, in a United States Postal Service Official Depository, within the State of New York.

Sworn to before me on July 28, 2022

Andrea P. Chamberlain
Notary Public, State of New York
No. 01CH6346502
Qualified in Monroe County
Commission Expires August 15, 2024

Jeremy Slyck

Job # 511477