New York Supreme Court
Appellate Division – Third Department

Case No.: 532083

TOWN OF SOUTHAMPTON; 101CO, LLC; 102CO NY, LLC; BRRRUBIN, LLC; BRIDGEHAMPTON ROAD RACES, LLC; CITIZENS CAMPAIGN FOR THE ENVIRONMENT; GROUP FOR THE EAST END; NOYAC CIVIC COUNCIL; SOUTHAMPTON TOWN CIVIC COALITION; JOSEPH PHAIR; MARGOT GILMAN; AND AMELIA DOGGWILER,

Petitioners-Appellants,

ASSEMBLYMAN FRED W. THIELE JR.,

Petitioner,

-against-

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

Respondents-Respondents.

BRIEF OF AMICI CURIAE TOWN OF EAST HAMPTON, TOWN OF RIVERHEAD, EDWARD P. ROMAINE AND COUNTY OF SUFFOLK

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PRELIMINARY STATEMENT

The Town of East Hampton, the Town of Riverhead, Edward P. Romaine[1] and the County of Suffolk ("East Hampton," "Riverhead," "Brookhaven" and "Suffolk County" respectively; collectively "*amici*"), as *amici curiae*, respectfully submit this brief to urge reversal of Supreme Court, Albany County's Decision and Order which threatens to dismantle the longstanding power of municipalities in Long Island—including East Hampton, Riverhead, and Petitioner-Appellant the Town of Southampton here—to enforce zoning provisions designed to regulate or prohibit mining uses within their borders that pose deleterious effects to Long Island's vulnerable drinking water supply.

The vast majority of residents in Nassau and Suffolk County in Long Island, New York – over 2.8 million people – depend on Long Island's sole-source aquifer system for their drinking water supply. That system supplies over 400 million gallons of freshwater per day to over 1,500 public-supply water wells located within Nassau and Suffolk Counties, which provide essentially all drinking water for residents.[2] This includes residents of *amici* as well as residents of the Town of Southampton.

Because the majority of the population of Long Island depends on this sole-

[1] Edward P. Romaine is the Supervisor of the Town of Brookhaven, also located within Suffolk County.

[2] *See* U.S. Geological Survey, Fact Sheet 2019-3052 prepared in cooperation with the New York State Department of Environmental Conservation, available at https://pubs.er.usgs.gov/publication/fs20193052 [last accessed December 16, 2020].

source aquifer system for its water supply, it has been given special protections at both the federal and state level. The United States Environmental Protection Agency recognized it as an area which, if contaminated, would create a significant hazard to public health (*see* 43 Fed. Reg. 2661). At the state level, Long Island's sole-source aquifer system also enjoys significant protection as a Special Groundwater Protection Area ("SPGA") under ECL § 55-0113 and a Critical Environmental Area ("CEA") under the New York State Environmental Quality Review Act ("SEQRA").

As relevant here, among the most robust state protections for Long Island's sole-source aquifer system exist in New York's Mined Land Reclamation Law ("MLRL") (ECL § 23-2701 *et seq.*). The MLRL contains certain provisions designed to protect Long Island's sole-source aquifer against threats of contamination posed by sand mining operations. Sand mines pose a unique threat to the aquifer system because they introduce a significant physical disturbance, often deep into the groundwater regime, to the sands and soils that sit atop the aquifer.

In interpreting the MLRL over three decades ago, the Court of Appeals clarified, in its landmark decision in *Matter of Frew Run Gravel Prods. v Town of Carroll* (71 NY2d 126 [1987]), that the statute preserves the fundamental right of a municipality to determine, through zoning, whether a mining operation is

permissible within its borders. In 1991, the Legislature codified the Court's holding in *Frew Run* by amending the MLRL, including the key provisions at issue in this case.

Most notable among the 1991 amendments was a modification to ECL § 23-2703(3). As modified, Section 23-2703(3) contains special protections for counties that depend on Long Island's sole-source aquifer system by prohibiting the consideration or processing of an application for a permit to mine in these counties "if local zoning laws or ordinances prohibit mining uses in the area proposed to be mined":

> *No agency of this state* shall *consider* an application for a permit to mine as complete or *process* such application for a permit to mine pursuant to this title, within counties with a population of one million or more which draw their primary source of drinking water for a majority of county residents from a designated sole source aquifer, *if local zoning laws or ordinances prohibit mining uses within the area proposed to be mined*.

(ECL § 23-2703(3) [emphasis added]). The only counties in the state that fit this description are Nassau and Suffolk Counties.

The legislative mandate of Section 23-2703(3) could not be any clearer. By its plain terms, Section 23-2703(3) prohibits any state agency – including, notably, Respondent-Respondent New York State Department of Environmental Conservation ("DEC") here – from considering or processing an "application for a permit to mine" located in Nassau or Suffolk County in the event a local zoning

ordinance prohibits mining in the "area proposed to be mined." Section 23-2703(3) applies, on its face, to all applications for mining permits in general, and does not narrow its reach to new applications only.

The manifest legislative purpose of Section 23-2703(3) is to preserve the municipal home rule authority of towns on Long Island, as guaranteed under the New York Constitution and Town Law § 261, to prohibit mining within their borders, just as they are permitted to do with any other land use that presents a hazard to public health. This power applies with equal force to zoning laws designed to limit the expansion or change to prior nonconforming mining sites. As this Court has repeatedly recognized, the overriding public policy of zoning in this state supports the restriction and eventual elimination of nonconforming uses. Although municipalities cannot exclude nonconforming uses entirely, they are certainly free to adopt provisions restricting changes or expansions to them as of right.

Consistent with this principle, in the years following the 1991 amendments, New York courts have repeatedly upheld a municipality's power to limit expansions or changes to pre-existing nonconforming mines (*see*, *e.g.*, *Matter of Gernatt Asphalt Products, Inc. v Town of Sardinia*, 87 NY2d 668, 683 [1996]; *O'Brien v Town of Fenton*, 236 AD2d 693, 695 [3d Dept 1997]; *Town of Washington v Dutchess Quarry & Supply Co., Inc.*, 250 AD2d 759, 761-62 [2d

Dept 1998]; *Matter of Sand Land Corp. v Zoning Bd. of Appeals of Town of Southampton*, 137 AD3d 1289, 1292 [2d Dept 2016]).

Under the MLRL's legislative framework and the cases decided thereunder, the Legislature clearly intended for municipalities in Nassau and Suffolk County to have a say over mining operations, including expansions of nonconforming sand mining operations, particularly given their impacts on drinking water supplies. Thus, if a municipality within these counties, such as the Town of Southampton or *amici*, restricts changes or expansions to nonconforming mining uses under local zoning laws, DEC is *not permitted* to even consider an application for a mining permit as complete that proposes such a change or expansion or even process that application. That is the result intended under the MLRL and the result that should have occurred in this case.

DEC's determination in this case, and Supreme Court's affirmance of it, however, vitiates the MLRL's statutory scheme and disregards the municipal home rule authority of towns in Suffolk and Nassau Counties to regulate nonconforming mining uses within their borders. When it granted Respondent-Respondent Sand Land Corporation and Wainscott Sand and Gravel Corp.'s ("Sand Land") application for a modification permit to vertically deepen a pre-existing mine to depths substantially closer to Suffolk County's sole-source aquifer system, DEC determined that it can circumvent the special protections afforded to Nassau and

Suffolk Counties. Specifically, DEC decided that when it receives a modification permit to expand or change a prior nonconforming mine in Nassau or Suffolk County, it is permitted to engage in an ad-hoc zoning determination as to whether the proposed modification would amount to a "material change" to a nonconforming land use. Under DEC's view, if it determines that the proposed modification would not affect such a material change, then it has no obligation to abide by ECL 23-2703(3) or 23-2711(3) and is free to continue considering and processing the mining permit, *even if the proposed expansion or change exists in the legislatively protected areas of Nassau and Suffolk Counties*.

Supreme Court stunningly adopted this flawed logic. According to Supreme Court, "[i]n the Court's view, it would be nonsensical to interpret [ECL 23-2703(3)] to apply to modification applications such as this one which *only proposes mining deeper* within an existing footprint/area where mining is already otherwise authorized" (R. 41 [emphasis added]). Under Supreme Court's holding, DEC can now go well beyond the bounds of its jurisdiction and interpret a town's zoning code to determine whether new activities proposed under a modified mining permit would amount to material changes to a nonconforming land use under local zoning laws.

If affirmed, Supreme Court's Decision would create dangerous precedent in this state. It would strip away the extra levels of protections the Legislature

provided in the MLRL to safeguard Long Island's sole-source aquifer in Suffolk and Nassau Counties from threats of contamination. It would likewise erode the constitutionally guaranteed power of a municipality to regulate nonconforming mining uses within its borders and give DEC power to interpret local zoning that does not exist in law. Worst of all, it would pose grave risk to a vulnerable drinking water supply that serves millions, including the residents within East Hampton.

For these reasons, and those set forth in greater detail below, *amici* respectfully request that this Court reverse Supreme Court's Decision and annuls DEC's approval of Sand Land's modification permit.

STATEMENT OF INTEREST

For a full recitation of *amici's* statement of interest in this proceeding, *amici* respectfully refer the Court to the Affidavit of Town of East Hampton Supervisor Peter Van Scoyoc, sworn to December 22, 2020 and the Affidavit of Andrew J. Rapiejko, sworn to December 23, 2020. An abbreviated summary of *amici's* interest in this proceeding follows.

Suffolk County, which is tasked with managing the County's sole-source aquifer system as a critical water resource, has a unique interest in the matters in dispute as one of only two counties in this state that are afforded special protections under ECL § 23-2703(3). East Hampton and Riverhead are likewise

particularly interested in this proceeding because they are among a small number of municipalities within Suffolk County that are the direct beneficiaries of these special protections, which are designed to mitigate any adverse impacts to the sole-source aquifer system that provides drinking water to *amici's* residents. Likewise, Mr. Romaine, who is the Supervisor of the Town of Brookhaven, located in Suffolk County shares a similar interest.

Specifically, East Hampton, Brookhaven and Riverhead are located within Suffolk County, Long Island, which has a population of one million or more which draws their primary source of drinking water for a majority of county residents from a designated sole source aquifer under. As a result, *amici*, like their neighbor Petitioner-Appellant the Town of Southampton, qualify for certain heightened protections under the MLRL – specifically, ECL § 23-2703(3) – that give effect to local zoning laws prohibiting or regulating mining uses in Nassau and Suffolk Counties.

These protections are in dispute and are in danger of being significantly impaired as a result of DEC's actions and Supreme Court, Albany County's underlying decision (the "Decision"). For the reasons described more fully below, if this Decision is upheld, it could have devastating impacts on the ability of a municipality in Nassau or Suffolk County – like *amici* or the Town of Southampton here – to exercise its local zoning power to regulate and prohibit

expansions or changes to nonconforming mining uses that could adversely affect the public's drinking water supply.

East Hampton also has a particular interest in the matters in dispute as it is in the process of litigating similar and related issues in a proceeding against DEC and the operator of a sand mine in East Hampton, entitled *Town of East Hampton et al. v New York State Department of Environmental Conservation et al.*, Sup. Ct., Suffolk County (Index No. 607907/2020). In that proceeding, East Hampton challenged DEC's determination to process and approve a modified mining permit that proposes to change and expand a nonconforming mine in a residential zoning district in violation of ECL § 23-2703(3), despite that DEC was aware that East Hampton's Zoning Law prohibits changes and expansions to nonconforming land uses absent a use variance. As a result of DEC's failure to abide by the legislative mandate in ECL § 23-2703(3), East Hampton was forced to simultaneously bring an enforcement action under Town Law § 268 against the applicant to enjoin its violations of East Hampton's Zoning Law. The proceeding remains pending before Supreme Court, Suffolk County. DEC, therefore, has shown a pattern of disregarding the ECL's special protections for other municipalities in Suffolk County, beyond the Town of Southampton.

In sum, the issues presented on this appeal are of substantial legal consequence and effect municipalities beyond the parties. Thus, Suffolk County,

East Hampton, Brookhaven and Riverhead seek amicus status to protect their sole-source aquifer and compel DEC to comply with the law intended to protect it.

ARGUMENT

POINT I

DEC'S DETERMINATION CONFLICTS WITH THE PLAIN LANGUAGE AND LEGISLATIVE INTENT OF SECTION 23-2703 OF THE MLRL, WHICH PROVIDES SPECIAL PROTECTION FOR THE AQUIFER SYSTEM IN SUFFOLK AND NASSAU COUNTIES

As this Court has recognized, "[t]he primary consideration in matters of statutory interpretation is to 'ascertain and give effect to the intention of the Legislature'" (*Matter of Norse Energy Corp. USA v Town of Dryden*, 108 AD3d 25, 31 [3d Dept 2013], *affd sub nom. Matter of Wallach v Town of Dryden*, 23 NY3d 728 [2014] [quoting *Riley v County of Broome,* 95 N.Y.2d 455, 463 [2000]]). To ascertain legislative intent, this Court must first start with the plain language employed by the Legislature (*see Balbuena v IDR Realty LLC*, 6 NY3d 338, 356 [2006]; *Matter of Theroux v Reilly*, 1 NY3d 232, 239 [2003] ["When interpreting a statute, we turn first to the text as the best evidence of the Legislature's intent."]; *Riley v County of Broome*, 95 NY2d 455, 463 [2000] ["Of course, the words of the statute are the best evidence of the Legislature's intent."]).

In 1991, the MLRL was amended with the express intent of preventing what occurred in this case (*see* L 1991, ch 166, § 228, amending ECL § 23-2703). As amended, the plain language of the MLRL, and specifically section 23-2703(3)

thereof, prohibits DEC from considering or processing applications for permits to mine in Nassau and Suffolk Counties where the municipality in which such mining is proposed has a local law prohibiting it (ECL § 23-2703(3)). On its face, this provision is intended to provide specific, heightened protections for the sole source-aquifer system that supports the vulnerable drinking water supply in Nassau and Suffolk Counties. DEC's determination granting the modified permit at issue in this case, and Supreme Court's affirmance of it, wholly disregards that statutorily intended heightened protection.

A. The Plain Language of The MLRL Demonstrates an Intent to Provide Special Protection for The Long Island Aquifer System In Nassau and Suffolk Counties.

The MLRL, as originally enacted, empowered DEC to regulate the mining industry in New York and expressly superseded "all other state and local laws relating to the extractive mining industry [except] local zoning ordinances or other local laws which impose stricter mined land reclamation standards of requirements than those found herein" (*Matter of Gernatt Asphalt Products, Inc. v Town of Sardinia*, 87 NY2d 668, 680 [1996] [citing ECL 23-2703 [former subsection (2)]). Thus, the MLRL's original intent was to replace the "existing patchwork of local regulatory ordinances" governing mining sites with uniform standards and regulations (*Id.*).

In 1987, in its landmark decision in *Matter of Frew Run Gravel Prods. v*

Town of Carroll (71 NY2d 126 [1987]), the New York Court of Appeals clarified an important point regarding the impact of the MLRL's original supersession clause on the power of localities to zone parcels to regulate or bar mining in its totality. In *Frew Run*, the Court of Appeals held that the MLRL was not intended to preclude a town – like *amici* or the Town of Southampton here – from deciding, by way of zoning regulations, "whether a mining operation—like other uses covered by a zoning ordinance—should be permitted or prohibited in a particular zoning district" (*Id.* at 133). Thus, *Frew Run* made clear that municipalities are free to zone out mining uses within their borders and that the MLRL was never intended to preempt or usurp that authority.

In 1991, the Legislature amended the MLRL to expressly codify the Court of Appeals' holding (*see* L 1991, ch 166, § 228). As a result of that amendment, localities are free to adopt local zoning laws of general applicability, including by "enacting or enforcing local zoning ordinances or laws which determine permissible uses in zoning districts" (*see* ECL § 23-2703(2)(a)(b)). The Legislature made clear that nothing within the MLRL is meant to preempt a "Town's authority to determine that mining should not be a permitted use of land within the Town, and to enact amendments to the local zoning ordinance in accordance with that determination" (*Matter of Gernatt*, 87 NY2d at 683).

As relevant here, the 1991 amendments to the MLRL took it a critical step

further by specifying that certain localities in the state with particularly vulnerable drinking water supplies are afforded special protection when it comes to prohibiting mining uses within their borders. As a result of the 1991 amendments, the Legislature modified the following provision to read as follows:

> No agency of this state shall *consider* an application for a permit to mine as complete or *process* such application for a permit to mine pursuant to this title, within counties with a population of one million or more which draw their primary source of drinking water for a majority of county residents from a designated sole source aquifer, if local zoning laws or ordinances prohibit mining uses *within the area proposed to be mined*.

(*see* ECL § 23-2703(3) [emphasis added]). The only counties in the state with a population of one million or more which draw their primary source of drinking water from designated sole source aquifers are Nassau and Suffolk Counties. It is evident from the statute's plain terms that the manifest purpose of Subdivision 3 of Section 23-2703 is to provide special protection for Nassau and Suffolk Counties' vulnerable drinking water supply by expressly preventing DEC from moving forward with applications for mining permits in those counties where zoning laws prohibit mining in the area proposed.

Critically, Section 23-2703(3) does *not* differentiate between new permit applications, modification applications or renewal applications. Instead, it applies generally to "permits to mine." The term "permit" is broadly defined in ECL

Article 70[3], as "*any permit"* or "*other form of department approval, modification, suspension, revocation, renewal*" (*see* ECL § 70-0105 [emphasis added]). Section 23-2703(3) also does not carve out previously permitted properties from its application. Thus, there is nothing on the face of Section 23-2703(3) that would suggest that it only applies to new mining permits or to new mining sites.

The analysis called for in Section 23-2703(3) is, therefore, straightforward and unambiguous:

1. Is there an application for a permit to mine?

2. Is the application submitted for a site within a county of one million or more which draws their primary source of drinking water for a majority of residents from a designated sole source aquifer?

3. Do local zoning laws or ordinances prohibit mining within the area proposed to be mined?

If the answer to the above three questions is *yes*, then the result is automatic and absolute: DEC cannot consider the application as complete or process it.

The 1991 amendments also added a separate provision to Section 23-2711 of the ECL that contains procedures for notifying local municipalities of applications for mining for the purpose of determining whether mining uses are permitted under local zoning laws. To ascertain whether a proposed mining use is prohibited under local zoning laws, NYSDEC is required, "upon receipt of a complete application

[3] Title 27 of the ECL, within which Section 23-2703 appears, states that it is subject to the rules and regulations of ECL Article 70 (*see* ECL § 23-711(13)).

for a mining permit, for a property not previously permitted" to send a notice by certified mail to the municipality's "chief administrative officer" ("CAO") with "copies of all documents which comprise the complete application and shall state whether the application is a major project or a minor project" (*see* ECL § 23-2711(3); *see also Anschutz Expl. Corp. v Town of Dryden*, 35 Misc 3d 450, 467 [Sup. Ct., Tompkins County 2012], *affd sub nom. Matter of Norse Energy Corp. USA v Town of Dryden*, 108 A.D.3d 25 (3d Dept 2013), *affd sub nom. Matter of Wallach v Town of Dryden*, 23 N.Y.3d 728 (2014) ("[t]o ensure that local concerns are considered [ECL 27–1113] require[s] advance notice to, and allow participation by, a municipality in which a proposed facility is to be located").

Section 23-2703(3) and Section 23-2711(3) of the MLRL contain certain key differences. Unlike Section 23-2703(3) of the MLRL, Section 23-2711(3) does not provide special protections for Nassau and Suffolk Counties. Section 23-2711(3) also appears to provide an exception for properties that are "previously permitted," whereas Section 23-2703(3) contains no such similar language. Critically, however, as DEC itself has previously determined, Section 23-2711(3) *does* in fact apply where a modification or renewal application for a previously permitted mine proposes a material change in permitted activities (*see In the Matter of the Sand Land Corporation, Applicant*, 2018 WL 679203, at *1 [Jan. 26, 2018]; *see also* R. 132). In such situations, the application is treated as one for a

new permit under the Uniform Procedures Act ("UPA") and thus subject to the notification and coordination provisions in Section 23-2711(3) (*see* ECL § 70-0115(2)(b)).[4]

These distinctions are critical and emphasize the extra levels of protection that the Legislature intended for Nassau and Suffolk Counties by way of Section 23-2703(3). In *Val. Realty Dev. Co., Inc. v Jorling*, 217 AD2d 349, 354 [4th Dept 1995], the Appellate Division, Fourth Department previously recognized that the clear intent of the Legislature in amending Section 23-2703(3) was to afford greater protections for certain municipalities in the processing of mining permits. In that case, the Fourth Department noted that DEC's own internal guidelines generally allow for the continued processing of a mining permit for counties that do not meet the standards for special protection – i.e. a population of one million or more, the majority of which depends on a sole-source aquifer – even if mining is prohibited by local zoning (*Id.* at 354). Notably, however, the Fourth Department recognized that the "*single exception to that rule* is found in ECL 23-2703 (3), which prohibits DEC from processing a mining application if a local zoning law prohibits mining within an area in counties having a population of one million or

[4] Appellants have argued that ECL § 23-2703(3) and ECL § 23-2711(3), when read in conjunction, "require a full cessation of the processing of any pending application until the mandated inquiry, and response thereto, has been made" (Town of Southampton Br., at 12). *Amici* do not disagree. However, *amici* limit the analysis in this brief to the requirements of ECL § 23-2703(3) given the special protections it affords to Nassau and Suffolk Counties, and respectfully submit that DEC and Supreme Court's disregard for this provision alone presents issues of grave public importance and constituted reversible error.

more and whose primary source of drinking water is from a designated sole source aquifer" (*Id.* [emphasis added]).

B. DEC And Supreme Court Erroneously Failed to Give Effect to the Special Protections Afforded to The Long Island Aquifer Under ECL § 23-2703(3).

In March 2019, Sand Land submitted a modification permit application to DEC to vertically deepen its mining operations to depths 40' closer to the sole-source aquifer system in Suffolk County (R. 71-72). By that point, DEC had already been apprised of the fact that mining was not a permitted use in *any* zone in the Town of Southampton and thus prohibited under local zoning (R. 137-138). Under the legislative framework set forth above, DEC was precluded from considering the application as complete or from processing it because:

1. Sand Land's modification permit application was an "application for a permit to mine" under ECL § 70-0105;

2. The application was submitted for a site in Suffolk County, whose sole source aquifer is protected by ECL § 23-2703(3); and

3. The Town of Southampton's zoning law prohibits mining uses in the area proposed to be mined.

DEC nevertheless continued to both consider and process the mining application, over and above the Town's objections, and ultimately issued the modification permit on June 5, 2019 (R. 1012). DEC claimed that this determination was rational "since the 2019 application was not for a new permit,

but to modify an existing permit within the current disturbance footprint and without material change, input from the Town was not required under ECL 23-2703 or 23-2711" (R. 2718, ¶ 38). In other words, DEC created its own, self-generated interpretation of ECL § 23-2703(3) that is contrary to its plain terms by reasoning that the provision only applies to new permits for new mining sites or modification permits for pre-existing sites that propose "material changes." Supreme Court adopted DEC's flawed logic, erroneously concluding "in the Court's view" that "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. 41).

DEC's determination and Supreme Court's adoption of it flatly contravened the plain language and manifest purpose of ECL § 23-2703(3). *Amici* are unaware of any authority, let alone applicable legislative intent or history, that DEC has identified that would support such a strained interpretation of the statute. Supreme Court, for its part, identified none. DEC cannot, under the guise of statutory construction, amend ECL § 23-2703(3) to accommodate a mine operator's wish to expand its mining operations situated *directly above* Long Island's sole source aquifer by deepening those operations to depths dangerously closer to the aquifer. Had the Legislature intended Section 23-2703(3) to apply only to applications for

new mines or to applications for modifications which DEC independently determines are "material" in nature, it surely could have said so. In fact, the Legislature *did* carve out a somewhat similar exception in other areas of the MLRL (*see, e.g.*, ECL § 23-2711(3)). But the Legislature did not do so here (*see, e.g.*, *Kuzmich v 50 Murray St. Acquisition LLC*, 34 NY3d 84, 93 [2019], *rearg denied*, 33 NY3d 1135 [2019], and *cert denied*, 140 S Ct 904 [2020] [declining to adopt defendant's construction of statute that was contrary to its plain terms, and holing that "if the legislature intended" to adopt defendant's construction, "it easily could have so stated"])

DEC "has no power to declare through administrative fiat that which was never contemplated or delegated by the Legislature" (*Matter of Campagna v Shaffer*, 73 NY2d 237, 242-43 [1989]). DEC simply cannot create its own implicit exception that the Legislature itself did not include, where that exception would substantially vitiate the special protections the statute affords to Nassau and Suffolk Counties' vulnerable drinking water supply. This Court should decline DEC's invitation to read such a loophole into the statute. Any contrary holding would, in effect, adopt an interpretation of the MLRL which would render the special protections in Section 23-2703(3) superfluous (*Matter of Mestecky v City of New York*, 30 NY3d 239, 243 [2017] ["[w]e have recognized that meaning and effect should be given to every word of a statute and that an interpretation that

renders words or clauses superfluous should be rejected"] [internal punctuation and citation omitted]).

POINT II

DEC'S DETERMINATION AND SUPREME COURT'S HOLDING WHOLLY DISREGARD A MUNICIPALITY'S CONSTITUTIONALLY GUARANTEED HOME RULE AUTHORITY TO REGULATE NONCONFORMING MINING USES

Accepting DEC's logic in this case would also require this Court to ignore the Court of Appeals' ruling in *Frew Run* and hold that ECL § 23-2703(3) preempts the municipal home rule authority of towns in Long Island to regulate nonconforming mining uses in their borders. Supreme Court's order, if affirmed, thus threatens to upend the longstanding constitutionally guaranteed municipal home rule authority of municipalities to limit expansions or changes to nonconforming land uses within their borders. That is a result this Court should avoid.

A. The Municipal Home Rule Authority of Towns To Regulate Nonconforming Uses Extends to Nonconforming Mining Uses.

The New York State Constitution provides that "every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law . . . except to the extent that the legislature shall restrict the adoption of such a local law" (NY Const, art IX, § 2[c][ii]; *see Greater N.Y. Taxi Assn. v State of New York*, 21 NY3d 289, 300-301

[2013] ["The Municipal Home Rule Clause grants local governments considerable independence relative to local concerns. Just as there are affairs that are exclusively those of the State, [t]here are some affairs intimately connected with the exercise by the city of its corporate functions, which are city affairs only" (internal quotation marks omitted)]). Implementing this express grant of authority to local governments, the Legislature enacted the Municipal Home Rule Law, which provides that a municipality may enact local laws for the "protection and enhancement of its physical and visual environment" and for the "government, protection, order, conduct, safety, health and well-being of persons or property therein" (Municipal Home Rule Law § 10[1][ii][a][11], [12]).

Most importantly, the Legislature delegated to the Town of Southampton and *amici*, as well as every other local government, the authority to regulate land use within their borders by defining zoning districts and determining what uses will be permitted or prohibited therein (*see* Town Law § 261 ["For the purpose of promoting the health, safety, morals, or the general welfare of the community, the town board is hereby empowered by local law or ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes."]).

As relevant here, in *Frew Run*, the Court of Appeals unequivocally concluded that the MLRL preserves a town's municipal home rule authority to regulate mining uses and was never intended to "preempt a town zoning ordinance prohibiting a mining operation in a given zone" (71 NY2d at 133). The Court noted,

> to read into ECL 23-2703(2) an intent to preempt a town zoning ordinance prohibiting a mining operation in a given zone, as petitioner would have us, would drastically curtail the town's power to adopt zoning regulations granted in subdivision (6) of section 10 of the Statute of Local Governments and in Town Law § 261. Such an interpretation would preclude the town board from deciding whether a mining operation—like other uses covered by a zoning ordinance—should be permitted or prohibited in a particular zoning district. In the absence of any indication that the statute had such purpose, *a construction of ECL 23-2703(2) which would give it that effect should be avoided*

(*id.* at 133-134 [emphasis added]).

In the years following *Frew Run* and the Legislature's 1991 amendments to codify its holding, New York courts have consistently recognized that it is well within a town's municipal home rule authority to enact enacting zoning laws that regulate nonconforming mining uses. "Because nonconforming uses are viewed as detrimental to zoning schemes, public policy favors their reasonable restriction and eventual elimination" (*550 Halstead Corp. v Zoning Bd. of Appeals of Town/Vil. of Harrison*, 1 NY3d 561, 562 [2003]). Accordingly, municipalities may exercise

their municipal home rule authority to regulate or even eliminate nonconforming mining uses in a reasonable fashion (*Matter of Gernatt Asphalt Products, Inc.*, 87 NY2d at 676 n.1 [upholding zoning code provisions in Town of Sardinia in limiting mining activity to nonconforming use status, subject to certain conditions).

For instance, in *O'Brien v Town of Fenton* (236 AD2d 693 [3d Dept 1997]), this Court determined that certain provisions in a town local law that were designed to "weed out" nonconforming mining sites via a "sunset provision" were permissible under the MLRL (*Id.* at 695). Similarly, in *Town of Washington v Dutchess Quarry & Supply Co., Inc.* (250 AD2d 759 [2d Dept 1998]), the Appellate Division, Second Department concluded that a town, "in the exercise of its police power through the enactment" of a zoning ordinance "properly limited the expansion of nonconforming mining uses within its jurisdiction" (*Id.* at 761-62). More recently, in *Matter of Sand Land Corp. v Zoning Bd. of Appeals of Town of Southampton* (137 AD3d 1289 [2d Dept 2016]), the Second Department upheld a ZBA's determination that concluded that the owner of a sand mine was prohibited under local zoning laws in the Town of Southampton from engaging in new mining activities that would extend or enlarge a prior nonconforming mine (*Id.* at 1292).

Critically, a determination with respect to whether proposed activities modifying a nonconforming land use constitute a prohibited change, expansion or

enlargement under local zoning laws is within the exclusive province of the municipality to make, most often through the judgment of a building inspector and subsequently the municipality's zoning board of appeals ("ZBA") (*see*, *e.g.*, *Steiert Enterprises, Inc. v City of Glen Cove*, 90 AD3d 764, 765-66 [2d Dept 2011]). Indeed, "[t]he issue of conformity with zoning regulations is within the primary jurisdiction of the Town Zoning Board" (*Matter of Ashley Homes of L.I., Inc. v O'Dea*, 51 AD3d 911, 912 (2d Dept 2008), quoting *Thurman v. Holahan*, 123 AD2d 687, 688 [2d Dept 1986]). In the event the municipality determines that a change or expansion to a nonconforming use is prohibited under local zoning laws, the landowner is not without recourse. It is free to apply for a variance, which is also within the discretion of the municipality to grant or deny (*Matter of Upper Delaware Ave. Ass'n of Delmar, Inc. v Fritts*, 124 AD2d 273, 274 [3d Dept 1986] [noting that expansion to nonconforming use required a use variance under local zoning]).

Thus, New York law recognizes that when a decision must be made with respect to the conformance of a nonconforming use with local zoning laws, that decision is left exclusively to the municipality, because it is uniquely suited to interpret its own zoning requirements. The path to conformance with local zoning laws regulating nonconforming land uses is through the municipality, via a landowner's application for necessary land use approvals to implement a

modification to a nonconforming use that would otherwise be prohibited under local zoning laws. As set forth below, Supreme Court's Decision improperly allows applicants for mining sites to effectively circumvent the municipal zoning process and instead seek approval to alter or modify a nonconforming mining use from DEC, a state agency that has no jurisdiction to make zoning determinations.

B. DEC's Determination and Supreme Court's Decision Dismantles the Municipal Home Rule Authority of Towns in Nassau and Suffolk County to Regulate Nonconforming Mining Uses Within their Borders.

In this case, DEC's reasoning proposes the precise result that *Frew Run* prohibits: "a construction of [the MLRL] which would give it" the effect of drastically curtailing the ability of a town, particularly in the protected Suffolk and Nassau Counties, to enforce zoning regulations under Town Law § 261 designed to regulate nonconforming mining uses (71 NY2d at 133-134). DEC has effectively decided that, under ECL § 23-2703, it is free to stand in the shoes of a municipality and make a zoning decision when it comes to nonconforming mines by analyzing, on an ad-hoc basis, whether new activities proposed under a modification permit would amount to "material changes" to a nonconforming land use. If DEC decides that no such material change is contemplated, then it may ignore local zoning laws in its entirety, even if those laws prohibit changes or expansions to nonconforming mines (R. R. 2718, ¶ 38). The end-result would be what the Legislature clearly sought to avoid in enacting the 1991 amendments to the ECL: preemption of local

zoning power.

DEC's determination and Supreme Court's affirmance of it thus threaten to upend the longstanding constitutionally guaranteed municipal home rule authority of towns to limit expansions or changes to nonconforming land uses within their borders. The extreme consequences that would ensue from such precedent cannot be overstated. Virtually all mining sites on Long Island are operated as prior nonconforming uses, including in East Hampton, Riverhead and Brookhaven, and many are operated in municipalities that enforce zoning laws regulating changes or expansions to nonconforming uses. For instance, East Hampton's Zoning Law prohibits changes or expansions to nonconforming land uses, including nonconforming mines, absent the grant of a use variance from East Hampton's ZBA (*see* East Hampton Zoning Law Sections 255-1-40 and 255-8-50(c)).[5] Riverhead's Zoning Law likewise prohibits expansions or changes to nonconforming uses in different respects and requires the grant of a special exception permit to undertake such expansions and changes in certain contexts (*see* Riverhead Zoning Law Section 301-222).[6] The Decision, if upheld, would vest DEC with virtually limitless power to ignore zoning provisions like *amici's* or any other similar town zoning law in Nassau or Suffolk County, in derogation of ECL

[5] These provisions of East Hampton's Zoning Law are available at https://ecode360.com/10413761 and https://ecode360.com/10415719 [last accessed December 20, 2020].

[6] Riverhead's Zoning Law and relevant provisions thereof are available at https://ecode360.com/27163889 [last accessed December 22, 2020].

23-2703(3).

The adverse ripple effects that are sure to result from an affirmance of Supreme Court's Decision are not difficult to imagine. In this case, the proposed change to Sand Land's mine was a drastic vertical expansion to depths substantially closer to Long Island's sole-source aquifer system. In another case, a modification permit might involve a vertical expansion and horizontal expansion, or a vertical expansion coupled with a fundamental change in a mined land reclamation plan (*i.e.* the plan required by the MLRL to restore a mining site to a usable condition after mining is completed). The modification permit might propose such activities in the middle of a residential neighborhood in Nassau or Suffolk County, where mining is considered a nonconforming use that cannot be expanded, enlarged or changed in any fashion under applicable local zoning laws. The municipality may very well have enacted such laws with an eye toward limiting the expansion of a particularly disruptive land use over its sole-source aquifer drinking water supply. In each of these situations, the issue of whether the proposed activities conform with local zoning regulations is within the primary jurisdiction *of the municipality* to make under New York law. But, under Supreme Court's holding, DEC is free to usurp local land use controls and decide whether the modification to the nonconforming mine is allowable under local zoning.

There is simply noting in the MLRL that provides for this result, which flies

in the face of the primary goal of ECL § 23-2703(3): to give effect to local laws restricting mining uses in towns where mining may threaten the water source upon which the majority of the population depends. Whether a proposed modification to a pre-existing, nonconforming mine is material is simply not a determination within DEC's jurisdiction to make.[7] It is a zoning determination within the exclusive province of the municipality to make. The MLRL has never usurped that authority. In fact, Section 23-2703(3), on its face, exists to preserve it.

This Court should, therefore, reject any such result as directly contrary to the manifest purpose of ECL § 23-2703(3) and the constitutionally guaranteed municipal home rule authority of towns to regulate land uses within their borders.

[7] Notably, Section 23-2711(3) of the MLRL sets forth an inquiry and notice mechanism to facilitate local participation of the municipalities in which mining activities are proposed. Thus, the MLRL already provides DEC with a path forward in ascertaining whether mining is prohibited or permitted in the area proposed to be mined, by coordinating with the local municipality best suited to make those zoning determinations. There is simply nothing within the MLRL that vests DEC with the authority to substitute itself for the municipality and make such a zoning decision on its own.

CONCLUSION

For all of the foregoing reasons, the Town of East Hampton, the Town of Riverhead, the Town of Brookhaven and Suffolk County, as *amici curiae*, urge this Court to reverse Supreme Court's Decision and annul DEC's approval of Sand Land's modification permit.

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CERTIFICATION PURSUANT TO RULE 500.13(C)(1)

Pursuant to Rule 500.13(c)(1) of the Rules of Practice of this Court (22 NYCRR § 500.13[c][1]), I hereby certify that this brief was prepared on a computer using Microsoft Word 2016 and complies with the word count requirement of Rule 500.13(c)(1) because the total word count for all printed text in the body of the brief is 6,692.

Dated: December 23, 2020

John J. Henry