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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Albany County Index No. 902239-19

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Regulations

Constitutional Provisions

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)).