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ZONING AND LAND USE PLAINNING

Battle Between State Rules and Local Zoning Laws Plays Out in Sand Case

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Mining has a long history in New York State, which is rich in minerals used in various industries and for construction. As the New York State Department of Environmental Conservation (DEC) points out, mining occurs in every county in New York (except in the five boroughs of New York City).

Metal ores and gem minerals, such as garnet, are mined chiefly in the state's mountainous regions. Salt is extracted from rich deposits in the central part of New York. Sand and gravel mines are found throughout the state. *See* https://www.dec.ny.gov/lands/5020.html.

> It remains to be seen whether Southampton's efforts to block the Sand Land mine will be successful. The Court's decision, however, has made it clear that the town has the authority to prohibit sand mining—at least to the extent those mines are not prior nonconforming uses.

In fact, the majority of the approximately 1,800 active mines statewide are sand and gravel mines, including nearly two dozen on Long Island. *See* https://www.dec.ny.gov/lands/123134.html#.

Mining plays an important role in the state's economy. The U.S. Geological Survey recently estimated the annual value of New York's mineral production at $1.87 billion. Over a decade ago, the economic impact from mining in New York was estimated at $4.98 billion; that value likely has risen since then. *See* https://www.dec.ny.gov/lands/92915.html.

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Mining, however, also has implications for the state's environment. Three decades ago, the Legislature sought to protect Long Island's groundwater, *see, e.g.*, https://assembly.state.ny.us/mem/Fred-W-Thiele-Jr/story/104954, by enacting Environmental Conservation Law (ECL) § 23-2703(3). Section 23-2703(3) provides:

> 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.

The only counties in the state that meet Section 23-2703(3)'s criteria are Nassau and Suffolk Counties, which are two of the state's largest and most densely populated counties.

Several months ago, in *Matter of Town of Southampton v. New York State Department of Environmental Conservation*, 39 N.Y.3d 201 (2023), the New York Court of Appeals considered the extent to which Section 23-2703(3) authorizes the DEC or Nassau and Suffolk's zoning authorities to regulate the sand mining industry on Long Island.

The Case

The case involved a sand and gravel mine owned and operated by Sand Land Corporation on a 50-acre parcel of property in the Town of Southampton. The mine has been operating continuously since the 1960s, at which time Southampton's zoning code allowed mining pursuant to a required permit. In 1972, the town rezoned the area where the mine is located to a residential district in which mining is prohibited. In 1981, Sand Land's predecessor in interest obtained a mined land reclamation permit (MLRP) from the DEC.

In 1998, the DEC renewed the MLRP and transferred it to Sand Land, authorizing mining on 31.5 acres to a depth of 160 feet above mean sea level (amsl). In 1998, Sand Land also began receiving and processing vegetative organic waste materials in a 3.1-acre portion of the property known as the "stump dump." The DEC renewed Sand Land's permit in 2003, 2008, and 2013.

In 2014, Sand Land applied to the DEC to modify its permit. The application sought to increase the depth of mining by 40 feet, from 160 feet amsl to 120 feet amsl. The application also proposed mining on an additional 4.9 acres that had not been approved under prior DEC permits, comprised of a 1.8-acre "area of modification" and the 3.1-acre stump dump.

The DEC initially denied the permit modification, and an administrative law judge (ALJ) rejected Sand Land's challenge to the denial. The ALJ determined that Sand Land's proposed expansion of its mine constituted a material change in permitted activities and, therefore, was a new application, which required an inquiry into whether the town's zoning laws prohibit mining at the site under Section 23-2703(3).

Prior to the ALJ's determination, the DEC issued a notice of intent to modify (NIM), advising Sand Land that it proposed to modify its permit "to require that mining activities at the facility cease and reclamation activities begin."

Around the same time, Sand Land submitted a renewal application to the DEC because its permit was set to expire. Sand Land and the DEC entered into negotiations to resolve all issues related to the NIM and the renewal application.

Pursuant to their settlement agreement, Sand Land agreed to "permanently cease the use of the facility for the receipt, storage, and processing of any volume of [vegetative organic waste materials]" and to conduct quarterly groundwater monitoring. The DEC agreed, among other things, to renew Sand Land's permit and to allow Sand Land to increase the extent of its mining activity by three acres, to cover a total of 34.5 acres, and to timely process a modification permit application for mining to be conducted to a depth of 120 feet amsl.

Sand Land subsequently submitted a second application to modify its permit. In March 2019, the DEC issued both a renewed permit to Sand Land permitting mining "on the 34.5 acres of the 50[-]acre site" and an amended negative declaration allowing an increase to the depth of mining. Among other things, the DEC found that the proposed sand mine deepening would not significantly impact groundwater quality, air quality, traffic, or solid waste production.

Southampton, several neighboring landowners, and civic and environmental organizations brought an Article 78 proceeding against Sand Land and the DEC. The petitioners sought annulment of the March 2019 renewal permit, the amended negative declaration, and the settlement agreement, and to enjoin the DEC from processing Sand Land's modification application.

In June 2019, while the litigation was pending, the DEC issued a modified permit authorizing mining within the 34.5-acre footprint to a depth of 120 feet amsl. The petitioners filed a supplemental petition seeking to annul the modified permit.

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The Supreme Court, Albany County, ruled against the petitioners, finding that Section 23-2703(3) did not apply. The petitioners appealed.

The Appellate Division, Third Department, decided that the DEC's issuance of the permits contravened Section 23-2703(3), and the dispute reached the Court of Appeals.

Court of Appeals Decision

In its decision, the court explained that the issue it had to resolve was whether Section 23-2703(3) bars the DEC from processing all applications for permits to mine in covered counties, including applications for renewal and modification permits, when "local zoning laws or ordinances prohibit mining uses within the area proposed to be mined," or whether Section 23-2703(3) applies only to new applications.

The court began its analysis by referencing the Mined Land Reclamation Law (MLRL) (*see* ECL §23-2701 *et seq.*), which grants the DEC broad authority to regulate the mining industry in New York. The law is intended to encourage a sound mining industry, provide for the management of depletable resources, and assure the reclamation of mined land (*see* ECL § 23-2703(1)).

The court noted that the Legislature sought to achieve these purposes through "the adoption of standard and uniform restrictions and regulations to replace the existing patchwork system of local ordinances." For that reason, the court continued, the MLRL contains a "supersession clause" providing that the state law supersedes all "local laws relating to the extractive mining industry" (ECL §23-2703(2)).

The court continued its discussion by pointing out that, in *Matter of Frew Run Gravel Products, Inc. v. Town of Carroll*, 71 N.Y.2d 126 (1987), it held that the MLRL's supersession clause does not prevent a municipality from prohibiting mining through its zoning ordinances.

In 1991, the court said, the Legislature incorporated this holding by amending the supersession provision in Section 23-2703 to expressly exempt local zoning ordinances that determine permissible uses. In addition, the Legislature added Section 23-2703(3) to the ECL.

At this point, the court turned to whether Section 23-2703(3) bars the DEC from processing all applications for permits to mine in covered counties, including applications for modification and renewal. The court held that the "plain language" of Section 23-2703(3) "evinces an intent that the provision should apply, not just to applications for new mining permits, but also to applications for modification and renewal."

The court reasoned that local laws in Nassau and Suffolk prohibited new mines as far back as 1972 and, therefore, that new mines were prohibited within those jurisdictions when Section 23-2703(3) was enacted. As such, the court stated, the addition of Section 23-2703(3) "reasonably appears to have been intended to address the threat to Nassau and Suffolk Counties' drinking water posed by the expansion of existing mines—not just the opening of new mines."

In closing, the court recognized one exception to its holding, relating to prior nonconforming mining operations that existed at the time a restrictive zoning ordinance was enacted. It reasoned that, because prior nonconforming land uses are constitutionally protected and permitted to continue, notwithstanding the contrary provisions of a zoning ordinance, local zoning regulations cannot prohibit prior nonconforming mining operations within the meaning of Section 23-2703(3).

After concluding that Section 23-2703(3) does not eliminate or alter non-conforming uses, but rather acts only as a protection against further expansion of those permissible mining activities, the court ruled that the DEC may process renewal and modification applications when such applications seek to mine land that falls within the scope of an undisputed prior nonconforming use. It then annulled the permits issued by the DEC and remitted the matter to the Supreme Court to remand to the DEC to ascertain from the town whether Sand Land's proposed use is within the scope of any prior nonconforming use.

Conclusion

It remains to be seen whether Southampton's efforts to block the Sand Land mine will be successful. The Court's decision, however, has made it clear that the town has the authority to prohibit sand mining—at least to the extent those mines are not prior nonconforming uses.

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