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ZONING AND LAND USE PLANNING

Court of Appeals To Focus on 'Prior Nonconforming Uses'

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A "prior nonconforming use" is a use of property that existed before the enactment of a local zoning restriction that prohibits the use. New York law has long made it clear that a prior nonconforming use in existence when a zoning ordinance is adopted generally is constitutionally protected even though the ordinance may explicitly ban the activity that is the subject of the prior nonconforming use. *See, e.g., People v. Miller*, 304 N.Y. 105 (1952).

Courts and legislators disfavor the broad application of the prior nonconforming use doctrine, as the law generally views nonconforming uses as detrimental to a zoning scheme, and the overriding public policy of zoning in New York is aimed at their reasonable restriction and eventual elimination. *See, e.g., Matter of Toys "R" Us v. Silva*, 89 N.Y.2d 411 (1996). Nevertheless, property owners engaging in a particular activity may have a vested right to use their land for that activity, and prior nonconforming uses generally are permitted to continue. *See, e.g., Matter of Rudolf Steiner Fellowship Found. v. De Luccia*, 90 N.Y.2d 453 (1997).

A case now before the New York Court of Appeals may determine the scope of the protection afforded to property owners by the prior nonconforming use doctrine.

Should the court affirm the decision by the Appellate Division, Third Department, in *Matter of Town of Southampton v. N.Y. State Dept. of Envtl. Conservation*, 194 A.D.3d 1310 (3d Dept. 2021), *appeal granted*, 2022 N.Y. Slip Op. 61775 (Feb. 15), property owners operating their businesses under prior nonconforming uses may face an onslaught of municipal efforts to close them down.

If, however, the court rejects the Third Department's conclusion, then property owners will be able to continue to rely on the longstanding doctrine to protect their property, their investments and their businesses.

Background

The case involves Sand Land Corporation, the owner of a sand and gravel mine located on an approximately 50-acre parcel of property in a residential zoning district in the Town of Southampton on Long Island.

In 2014, Sand Land applied to the New York State Department of Environmental Conservation (DEC) for a modification permit seeking a vertical and horizontal expansion of its mining operations. The proposed horizontal expansion consisted of 4.9 acres—1.9 acres of previously unmined land and three acres known as the "stump dump" (i.e., a landfill site consisting of wood waste, such as tree stumps). The vertical expansion sought to mine 40 feet deeper to a level of 120 feet above mean sea level.

The DEC denied the permit and

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Sand Land requested a hearing. The DEC and Sand Land thereafter entered into a global settlement agreement under which the DEC, among other things, agreed to issue permits to Sand Land, including one authorizing it to deepen the mine by 40 feet.

In April 2019, the town, several civic organizations and three neighboring landowners filed suit seeking to annul the DEC-Sand Land settlement agreement and the permits issued by the DEC. Among other things, they relied on the mining prohibition contained in the town's zoning code.

The Supreme Court, Albany County, dismissed the petition in September 2020, and the dispute reached the Third Department. A divided appellate court reversed.

The Third Department's Decision

The Third Department began its discussion of the substantive issues by pointing to the New York State Mined Land Reclamation Law, ECL 23-2701 et seq., and explaining that it grants the DEC "broad authority" to regulate the mining industry in the state. The appellate court observed that the law seeks to encourage a sound mining industry, provide for the management of depletable resources and assure the reclamation of mined land. In order to assure this uniformity, the appellate court continued, the law contains an express supersession clause that provides that the Mined Land Reclamation Law shall supersede all "local laws relating to the extractive mining industry" (ECL 23-2703(2)).

The Third Department then emphasized that the Mined Land Reclamation Law does not supersede every single local law but only those relating to the industry. In particular, it noted that the Court of Appeals, in *Matter of Frew Run Gravel Prods. v. Town of Carroll*, 71 N.Y.2d 126 (1987), clarified the applicability of the supersession clause and differentiated between local laws pertaining to the actual operation and process of mining, which are subject to the clause, and other local laws that fall outside its preemptive orbit. The Third Department added that, in determining that zoning ordinances are not subject to the clause, the court in *Frew Run* stated that to do otherwise would drastically curtail a town's power to adopt zoning regulations.

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The Third Department acknowledged that a mine such as Sand Land's generally is considered to be a legal prior nonconforming use and is "permitted to continue, notwithstanding the contrary provisions" of an ordinance. It then noted that "[c]rucially," ECL 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." This statute, the appellate court continued, is directed at a specific geographic area (e.g., Suffolk County, the location of the Sand Land mine, which is an area with a population of over one million that draws its primary drinking water from a sole source aquifer) and where the town's zoning laws prohibit mining (as is the situation in the Town of Southampton).

The Third Department rejected the contention that ECL 23-2703(3) applies only to new permits or permits seeking substantial modifications and ruled that it applies to all applications received from an area protected under ECL 23-2703(3). According to the Third Department, the statute "clearly recognizes that the local laws of the municipality are determinative as to whether an application can be processed." In this case, where the town's laws prohibit mining, the DEC "cannot process the application, let alone issue the permit," the appellate court ruled. Therefore, it concluded, the DEC's

issuance of the permits to Sand Land contravened ECL 23-2703(3) and its actions in doing so were arbitrary and capricious.

The Dissent

Justice Stan L. Pritzker strongly disagreed with the majority's ruling on the validity of the DEC's permits.

Justice Pritzker noted that, with respect to ECL 23-2703(3), the Town of Southampton is within the protected area and the town's zoning laws generally prohibit mining within its borders. However, Pritzker declared, Sand Land has a "constitutionally protected prior nonconforming use"—which has been recognized both by the Appellate Division, Second Department, in *Matter of Sand Land Corp. v. Zoning Board of Appeals of Town of Southampton*, 137 A.D.3d 1289 (2d Dept. 2016), and by the town itself by virtue of its issuance of nonconforming use certificates of occupancy in 2011 and 2016.

Therefore, Pritzker said, although the town prohibits new mining operations within its borders, it has both recognized and permitted mining within "the area proposed to be mined," as provided by ECL 23-2703(3), as a legitimate prior nonconforming use.

Pritzker reasoned that the majority's interpretation of ECL 23-2703(3) as applying to all permits was "too broad" and could render the law unconstitutional. Specifically, according to Pritzker, "if this statute applies to all mining permits, including those based on prior nonconforming uses, then a municipality within the statutorily protected areas could effectively zone out the active and permitted mines throughout covered areas by simply legislating that no mining is permitted."

In Pritzker's view, although a municipality could do so for new mines (and could even reasonably curtail and amortize prior nonconforming uses), "it cannot terminate these uses in a wholesale fashion without running afoul of the Takings Clause."

Pritzker reasoned that his interpretation of the law allowed it to achieve its remedial environmental goal while still recognizing and protecting vested constitutional rights. For example, he said, although the DEC would not be prohibited from processing a modification permit relative to a mine operating as a prior nonconforming use, it would be prohibited from processing a permit for a new mine, or one seeking to expand outside of a prior nonconforming use, within a protected area.

Pritzker concluded that the DEC's interpretation as to the statute's applicability was correct and the lower court's judgment should be affirmed.

Conclusion

That the Court of Appeals will be considering the law of prior nonconforming uses in a case involving a sand mine may complicate how it ultimately resolves the scope of the doctrine. On the one hand, the court has recognized the "unique" character of quarry mining over the years and has admitted that it "colors our analysis of vested rights and nonconforming use." *Glacial Aggregates LLC v. Town of Yorkshire*, 14 N.Y.3d 127 (2010); *see also Buffalo Crushed Stone, Inc. v. Town of Cheektowaga*, 13 N.Y.3d 88 (2009); *Matter of Syracuse Aggregate Corp. v. Weise*, 51 N.Y.2d 278 (1980).

On the other hand, some opponents of the Sand Land mine, seeking to base their objections on environmental concerns, argue that its continued operation threatens the groundwater by removing filtering layers of rock and soil—a complaint that many argue is without merit or that could be addressed without a complete prohibition of the mine's operation.

In any event, it would appear that the dispute over Sand Land's mine is a clear case for the court to reiterate the constitutional basis for the prior nonconforming use doctrine, as Justice Pritzker observed in his dissent. The state's multi-million dollar mining industry, and other businesses operating under the doctrine, deserve nothing less.