STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

MANITOU SAND & GRAVEL CO., INC., and WALTER F. PRZYBYCIEN, individually and as President of Manitou Sand & Gravel Co., Inc.,
1883 Manitou Road,
Spencerport, New York 14459,

Plaintiff,

v.

TOWN OF OGDEN, as a Municipal Corporation
409 South Union Street
Spencerport, New York 14559,

Defendant.

DECISION AND ORDER

Index # 2000/13181

This case, a declaratory judgment action addressed to challenged agreements the parties made in 1988 and 1990, involves plaintiffs' determined effort to conduct blasting at a mine in the Town of Ogden.[1] Manitou's property covers 240 acres and consists of four contiguous parcels: the June Farm, the Brower Farm, the Harter Farm and the Graf Farm. Currently, the mine is located only on the June Farm. Manitou has operated the mine on the June Farm since 1958, extracting rock and gravel by mechanical means. When Manitou took title to the property in

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[1] This statement of facts is drawn from the record in this case, the record and appeals in Index #96-11178, the record in Index #99-10120, and its appeal, and the undersigned's decision in Citizens To Save Ogden, Inc. v. NYS Dept. of Env. Consv., Manitou Sand & Gravel Co., Inc., and Dolomite Prod., Inc., Index #98-13061.

1958, it was located in a residential zoning district. Mining was permitted on the June Farm as a pre-existing, non-conforming use.

The dispute over blasting at the mine originated more than twenty-five years ago, when Manitou indicated a desire to use blasting as a means of extraction. It appears that Manitou may have done some limited blasting in 1978, but the record is unclear on that point. In any event, on December 27, 1979, the Ogden Town Board amended its zoning ordinance to prohibit blasting without a permit from the Town. On February 29, 1980, Manitou applied for such a permit, thereby prompting an environmental review pursuant to SEQRA. The SEQRA process lasted seven years. On February 18, 1987, after having issued a positive declaration under SEQRA, the Town Board denied Manitou's application.

In 1986, while its application was still pending before the Town, Manitou applied to the DEC for a blasting permit under the Mined Land Reclamation Law (ECL §§23-2701, et seq.) and for expansion of its mining area. A legislative public hearing and an issues conference were held by the DEC in April, 1986. Before an adjudication hearing was conducted, however, Manitou requested an adjournment from the DEC so that settlement negotiations could be pursued with the Town.

On July 1, 1988, Manitou reached a settlement with the Town

regarding blasting. In short, the Town agreed to rezone Manitou's property into a Special Industrial Use District (SID), where mining by mechanical means only would be permitted upon issuance of a special use permit, in return for which Manitou agreed not to blast and to execute a restrictive covenant to that effect. Manitou also agreed to discontinue its legal challenges to the Town's denial of a blasting permit under the zoning ordinance. It is this agreement that Manitou challenges in this action.

Thereafter, Manitou withdrew that part of its application to the DEC in which it sought a blasting permit, but went ahead with its request for an expansion of the mine from 140 acres to 152.6 acres. On January 13, 1993, the DEC granted that permit, referred to as the "Expansion" permit, and no party appealed.

Manitou then applied in April 1996 to transfer its mining rights to Shelby Crushed Stone Products, Inc., three years after the expansion permit was granted. Contemporaneous with Manitou's transfer application, Shelby applied to the DEC for a blasting permit, thereby prompting the Town to commence suit against Manitou for breach of the settlement agreement. Index #96-11178. The Town also alleged that Shelby's proposed blasting was unlawful under the zoning ordinance and violative of the restrictive covenants imposed pursuant to the settlement agreement.

Although the trial court agreed in part with the Town, the Appellate Division did not. See Town of Ogden v. Manitou Sand & Gravel, 252 A.D.2d 964, 676 N.Y.S.2d 819 (4th Dept. 1998). It ruled that the Town's zoning ordinance, which prohibited blasting without a permit from the Town, was superseded by the MLRL, and that, although the Town may prohibit mining in a zoning district, it cannot not distinguish between the means of mining. That is, it cannot permit mining by mechanical means and prohibit mining by blasting, which, the court ruled, is regulated by the DEC under the MLRL. Envir. Cons. Law §23-2708(1), (2). The Appellate Division "conclude[d] that the provision in the zoning ordinance that prohibits blasting within a district in which mining is a permissible use and that restricts mining to excavation by mechanical means only is invalid." Id. 252 A.D.2d at 965 (emphasis supplied). This ruling, however, only applied to the June farm which, the court held, the Towm must permit mining by Manitou without a permit from the Town as a non-conforming use.

A different determination was made concerning the other three parcels owned by Manitou. Inasmuch as Manitou did not establish a prior non-conforming use on these parcels, "Manitou is therefore required to apply for a special exception permit to mine on those parcels," but because "Manitou has failed to apply for that permit," Manitou was "enjoine[d] and restrain[ed] from

mining thereon until a special exception permit is granted by the ZBA." Id. 252 A.D.2d at 966.

Manitou, however, has refused to make the application, evidently because, if it was granted, the 1988 and 1990 agreements will be triggered and the executed restrictive covenants concerning blasting will be filed by the escrow agreement. The Appellate Division refused to grant the Town's application for a declaration that restrictive covenants held in escrow prevented Manitou (and for that matter Shelby or Dolomite as its agents) from applying to the DEC for a blasting permit under the MLRL. Because a pre-condition for the filing and enforcement of the restrictive covenants had not been met, i.e., application for and issuance aby the Town of a special exception permit to mine, the July 1988 agreement was declared "not a valid and enforceable contract" and Manitou was entitled to a judgment declaring "that the restrictive covenants are not in full force and effect." The Court of Appeals denied the Town's motion for leave to appeal. 92 N.Y.2d 819 (1999).

Thus, Shelby's application to the DEC for a blasting permit proceeded apace. The application also encompassed a request for a transfer of Manitou's mining rights to Shelby. In November 1998, the DEC rendered a negative declaration for SEQRA purposes and then granted the blasting permit, subject to 12 "special conditions." The conditions provide, among other things, that

Shelby shall be limited to three blasts per month, from April to November, during weekdays only between the hours of 10:00 a.m and 3:00 p.m. Shelby was directed to monitor its blasts with a seismograph and make its records available to the DEC upon request. Evidently in the face of multiple lawsuits to prevent the blasting, Shelby reconveyed its rights to Dolomite.

Manitou had previously, in December 1996, sought return of the unfiled but executed restrictive covenants by unilaterally declaring them terminated and demanding that the escrow agent, Nixon Hargrave Devans and Doyle (now Nixon Peabody), deliver them to Manitou. The escrow agent refused on the ground that the escrow agreement provided for the same only in the event the Town denied a special exception permit to conduct mining operations. Letter of Ronald G. Hull, Esq., dated December 30, 1996. After the Appellate Division rendered its decision, indeed after the DEC granted the blasting permit, Manitou moved, still in action #96-11178, for an order directing the Town to itself return, or release the escrow agent to return, the restrictive covenants. Manitou's theory was that the Appellate Division declared the July 1988 agreement unenforceable for all purposes. Justice Stander rejected that interpretation in a decision dated September 14, 1999, which was affirmed by the Appellate Division. Town of Ogden & Manitou Sand and Gravel Co., 272 A.D.2d 940(4th Dept. 2000).

The Town, in this action, contends that the validity of the July 1988 agreement and the subsequent implementing agreements were necessarily determined by Justice Stander in his September 1999 decision denying Manitou's motion for return of the covenants. This argument parrots the argument the Town made to the Appellate Division last year responding to Manitou's unsuccessful motion to reargue the two decisions described above. See Nixon Peabody's Memorandum of Law dated June 14, 2004, at 6 ("the trial court by necessity determined that the underlying Settlement Agreements were valid and would be enforceable subject to their conditions being met"). Justice Stander, however, specifically reserved on this issue. In his decision, Justice Stander acknowledged the "[t]he Appellate Division Decision does not reach the question of the enforceability of the letter agreement of July 1, 1988, the enforceability of the Declaration of the Restrictive Covenants, or the enforceability of the Escrow Agreement, in the event that there is full compliance with all of the provisions of the letter agreement of July 1, 1988." Decision at 4. Moreover, in his decision, Justice Stander declared that, because the relevant precondition for the filing of the restrictive covenants had not been satisfied by reason of Manitou's refusal to apply for the special exception permit, "[t]here has been no determination regarding the enforceability of the Escrow Agreement provisions." Thus Justice Stander, and

the Appellate Division which affirmed essentially on his opinion, did not purport to make the determination of enforceability the Town now ascribes to those decisions. In other words, the question Manitou now seeks to have addressed was not considered or decided within the context of #96-11178.

In 1999, Manitou commenced a misguided negligence and civil rights complaint against the Town, its supervisor, and the escrow agent. Index #99-10120. While it is true that, in the course of its complaint, Manitou made some of the same allegations it makes in this action concerning the lack of authority the Town had to enter into the July 1998 settlement agreement and the subsequent 1990 implementation agreements, the case did not turn on this issue. Manitou instead sought damages for a violation of its equal protection and due process rights, and for an unlawful taking without compensation. The civil rights claim under 42 U.S.C. §1983 was dismissed on statute of limitations grounds. The balance of the complaint against the Town was dismissed on both res judicata and collateral estoppel grounds. Justice Stander found that Manitou "clearly could have raised their damage claims" in the 1996 action and in a previous 1987 Article 78 proceeding against the Town contesting the denial of a blasting license under a then Town ordinance. Decision and Order dated November 3, 2000, at 8-10. The claims against the escrow agent were dismissed and an award of fees was made. Manitou

subsequently sought renewal of its motion on the ground inter alia that the 1988 agreement was never authorized under the Town Law, but the motion was denied in a decision dated May 30, 2001, and affirmed, 295 A.D.2d 907 (4th Dept. 2002). Notably, the issue of enforceability on state pre-emption grounds, reserved by the Appellate Division and Justice Stander in #96-11178, was not raised or decided by Justice Stander in #99-10120.

DISCUSSION

Although Manitou's claims concerning the Town's procedures in entering into the 1988 and 1990 agreements do not have merit, in view of the ratification of the same by a Town Board resolution in March 26, 1997, Seif v. City of Long Beach, 286 N.Y. 382 (1941); Town of Babylon v. Tully Construction, 242 A.D.2d 703 (2d Dept. 1997), the claim that these agreements violate the MLRL has merit. Just as in Philipstown Industrial Park, Inc. v. Town Board of Town of Philipstown, 247 A.D.2d 525 (2d Dept. 1998), the agreements here, "[b]y conditioning the grant of a special use permit on specific aspects of a mine's operation and reclamation [in this case on the execution and filing of a restrictive covenant], the Town Board has usurped the authority which, under the Environmental Conservation Law, has been delegated solely to the DEC." Id. 247 A.D.2d at 528. That the Philipstown Industrial Park case involved invalidation of a local law and not an agreement freely entered into by the parties

does not defeat Manitou's claim, because the Town cannot by agreement exact conditions for the exercise of zoning power, in this case granting a rezoning from a residential district to a Special Industrial District, in the form of restrictive covenants which exceed the zoning power of the Town to achieve by local law. Matter of Marcel St. Onge v. Donovan, 71 N.Y.2d 507 (1988). The "discretionary power to impose reasonable conditions in connection with a zoning decision, id. 71 N.Y.2d at 515, extends only to conditions imposed "consistent with the purposes of zoning." Id. 71 N.Y.2d at 516. A town "may not impose conditions which are unrelated to the purposes of zoning" nor may a town "impose a condition that seeks to regulate the details of the operation of an enterprise, rather than the use of the land on which the enterprise is located." Id. 71 N.Y.2d at 516.[2] A fortiori, a town cannot assume by contract a zoning power deprived of it by state statute, such as the MLRL. "While the towns of our state are municipal corporations, they have limited corporate powers, and can make no contract except as authorized by statute." Holroyd v. Town of Indian Lake, 180 N.Y. 318, 322 (1905). See Seaman v. Fedourich, 16 N.Y.2d 94, 101 (1965)("local governmental units are creations of, and exercise only those

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[2] The Marcel St. Onge case was cited by the Appellate Division, 252 A.D.2d at 965, to support the proposition that the Town's prior effort to zone in this area was unlawful as against public policy.

powers delegated to them by, the State"); Kelly v. Merry, 262 N.Y. 151, 157 (1933)("the municipality can do no act, make no contract, and incur no liability not permitted by legislative act"). The Town does not, on these cross-motions, assert that it can accomplish by contract what it could not by local law, resolution, ordinance, or zoning regulation. Accordingly, if properly presented, Manitou is entitled to summary judgment declaring the 1988 and 1990 agreements unlawful, invalid and unenforceable against the backdrop of the MLRL.

The Town contends, however, that this action is barred by res judicata. "Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter." Matter of Hunter, 4 N.Y.3d 260, 269 (2005). "The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior action." Id. "Additionally, under New York's transactional analysis approach to res judicata, 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy.'" Id. (quoting O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357 (1981)).

The 1996 action cannot serve as a basis of the Town's res judicata claim because it has never been "brought to a final

conclusion. O'Brien, 54 N.Y.2d at 357. See Santangelo v. Floor Const. Intern., Inc., 294 A.D.2d 903, 904 (4th Dept. 2002). The Appellate Division found issues of fact to be tried and the Town evidently has not pursued the matter as the party plaintiff. In any event, the 1996 action was one for a declaratory judgment and "an exception to this rule [res judicata] exists in declaratory judgment actions." Jefferson Towers, Inc., v. Public Service Mutual Ins. Co., 195 A.D.2d 311 (1st Dept. 1993). Separately, the 1987 Article 78 proceeding referred to by Justice Stander also cannot serve to bar this action because it was brought in connection with a wholly different transaction involving a manifestly invalid Town ordinance before the 1988 and 1990 agreements were entered into. Coliseum Towers Assocs. v. County of Nassau, 217 A.D.2d 387 (2d Dept. 1996).

That leaves the civil rights action for damages, which indeed was dismissed on the merits. That action, however, which was still pending when this action was commenced, involved a quite different prayer for relief and would have depended upon wholly distinct proof if the case was permitted to proceed. Melillo v. County of Nassau, 307 A.D.2d 356, 358 (2d Dept. 2003)("Even where successive proceedings arise out of essentially the same conduct, the doctrine of res judicata will not bar the later proceeding, where the evidence necessary for the requested relief in the two proceedings varies materially.")(citing

Studley, Inc. v. LeFrak, 48 N.Y.2d 954 (1979)). In Coliseum Towers Associates v. County of Nassau, supra, 217 A.D.2d 387, the court refused to bar an action which would not have 'form[ed] a convenient trial unit" of the prior action within the "parties' expectations." Id. 217 A.D.2d at 390-91 (quoting Smith v. Russell Sage College, 54 N.Y.2d 185, 192-93). The same situation is present here.

But an even more fundamental objection to the application of res judicata is present here. Precluding this meritorious claim that the 1988 and 1990 agreements violate the comprehensive regulatory scheme of the MLRL, on the ground that Manitou could have joined such a claim with the spurious claims made in the civil rights action, would leave the public policy of the state in regard to mining regulation wholly at variance with the circumstances erected by the parties in these agreements. Res judicata is a rule "made by judges to promote the public policy of the State. It should not be applied 'to frustrate the purpose of its laws or to thwart public policy.'" White v. Adler, 289 N.Y. 34, 44-45 (1942)(quoting United States v. Pan-American Petroleum Co., 55 F.2d 753, 776 (9th Cir. 1932)). To the same effect is Ackerman v. Steisel, 66 N.Y.2d 833, 835 (1985); Murphy v. Erie County, 28 N.Y.2d 80, 85-86 (1971); A.L.I., Restatement (Second) of Judgments §26(d)(1) & comment e (1982)(based on White v. Adler, supra). As in Hodes v. Axelrod, 70 N.Y.2d 364 (1987),

if this declaratory judgment action "were precluded by res judicata, . . . [the Town] would be left with a licence to . . . [regulate mining in a manner not permitted by the MLRL scheme] . . . despite the fact that other . . . [Towns could not similarly regulate mining activities]." Id. 70 N.Y.2d at 374. Thus, application of res judicata is not appropriate "because of the public importance of the issues involved." Id. 70 N.Y.2d at 373-74 (citing Restatement (Second) of Judgments §28(2), comment 6; §26(1)(d)).

For similar reasons, the Town's defense of laches, itself a judge made creature of public policy, cannot prevent implementation of the comprehensive MLRL regulation scheme. Matter of Wille, 61 Misc.2d 992, 1015 (Sup. Ct. N.Y. Co. 1968), ("Nor can public policy by thwarted by the application of the doctrines of estoppel, . . . or laches."), aff'd, 31 A.D.2d 721 (1st Dept. 1968), aff'd, 25 N.Y.2d 619 (1969), cert. denied, 399 U.S. 910 (1970). The Supreme Court has suggested that a municipality cannot assert laches to bar claims by private plaintiffs when to do so would be inconsistent with governmental policy on such claims. County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 244-45 n.16, 105 S. Ct. 1245, 1256-57 n.16 (1985). This is consistent with New York law. Murray v. Smith, 166 App. Div. 528, 537 (2d Dept. 1915)(laches not applied on ground of public policy)(citing Story, Equity Jurisprudence §298 (13th

ed.)),[3] modified, 224 N.Y. 40 (1918). The Town has not been prejudiced in the sense that plaintiff's delay in filing the action has made the relief sought either more burdensome or more likely to be granted, nor would the Town be in any different position had Manitou presented its request for declaratory relief earlier. Red Rover Copper Co. v. Industrial Commission of Arizona, 58 Ariz. 203, 214, 118 P.2d 1102, 1107 (1941)("No contractual consent, no statute of limitations, no laches nor estoppel can prevail against public policy, and any agreements made and any acts done in violation of it are necessarily void.") See also, City of Corpus Christi v. Taylor, 126 S.W.3d 712, 726 (Ct. App. Tex. 2004); Geel v. Valiquett, 292 Mich. 1, 18, 289 N.W. 306, 313 (1939)(where "the deed and land contract are void as against public policy[s] . . . [i]n such cases the doctrine of laches has no application"); Meech v. Lee, 82 Mich. 274, 293-94, 46 N.W. 383, 399-400 (1890).

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[3] The passage partially quoted by the Appellate Division from Story, Equity Jurisprudence §298 reads as follows: "But in cases where the agreements or other transactions are repudiated on account of their being against public policy, the circumstance that the relief is asked by a party who is particeps criminis is not, in equity, material. The reason is that the public interest requires that relief should be given, and it is given to the public through the party." In 2 Pomeroy's Equity Jurisprudence §941, it was stated: "Whenever public policy is considered as advanced by allowing either party to sue for relief against the transaction, then relief is given to him." Cf., Trainor v. John Hancock Mutual Life Ins. Co., 54 N.Y.2d 213, 218-19 (1981); Tannenbaum v. Provident Mutual Life Ins. Co., 41 N.Y.2d 1087, 1089 (1977).

The Town contends that this action is non-justiciable because the conditions outlined in the 1988 and 1990 agreements forcing the filing of the restrictive comments have not been met. According to the Town, Manitou cannot seek judicial review without first applying for and receiving a special exception permit. Because the agreements themselves involve Town action in violation of the MLRL and they depend upon contemplated conduct of the parties, "[t]he fact that the subject of the breach concerns future events does not render the controversy nonjusticable." Citzens to Save Minnewaska v. New Palz Central School Dist., 95 A.D.2d 532, 534 (3d Dept. 1983)(citing N.Y.P.I.R.G. v. Carey, 42 N.Y.2d 527, 530-31 (1977)). The future event claimed by the Town to render the matter non-justicable "is [not] beyond the control of the parties" nor is it one which "may never occur." N.Y.P.I.R.G. v. Casey, 42 N.Y.2d at 531. Compare Hunt Bros., Inc. v. Glennon, 81 N.Y.2d 906, 910 (1993). Accordingly, the Town's non-justicability defense, which is wholly at odds with its res judicata argument, is without merit. Hull Corp. v. Hartnett, 77 N.Y.2d 475, 479 (1991)("the matter is ripe for judicial review" when "[r]esolution of the disputed legal question will thus 'have an immediate practical effect on the conduct of the parties'")(quoting N.Y.P.I.R.G. v. Carey, 42 N.Y.2d at 530); M&A Oasis, Inc. v. MTM Associates, L.P., 307 A.D.2d 872 (1st Dept. 2003)(same); Custom Topsoil, Inc. v. Lot of

Buffalo, 12 A.D.3d 1168 (4th Dept. 2004); Stemore v. Bd. Assessors Town of Pompey, 97 A.D.2d 979 (4th Dept. 1983). "[R]esponsible parties who wish to comply with the law, in cases where the legal consequences of the contemplated action is uncertain, need it act at their peril." Matter of Storar, 52 N.Y.2d 363, 382 (1981).

CONCLUSION

Judgment may be entered declaring that the 1988 and 1990 agreements are contrary to the MLRL and therefore violate public policy. I agree that the individual plaintiff is not a proper party to this action and that the Town's liability in this declaratory judgment action does not extend to Przybycien individually. Accordingly, the motion to dismiss him as a party plaintiff is granted.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: June __, 2005
Rochester, New York