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COURT OF APPEALS

STATE OF NEW YORK

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TOWN OF SOUTHAMPTON,

Appellants,

-against-

NO. 1

NYS Department of Environmental  
Conservation,

Respondents.

-----

20 Eagle Street  
Albany, New York  
January 3, 2023

Before:

ACTING CHIEF JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE SHIRLEY TROUTMAN

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Xavier Austin Reyna  
Official Court Transcriber



1           ACTING CHIEF JUDGE CANNATARO: Good afternoon and  
2 happy new year.

3           Our first appeal on today's calendar is Number 1,  
4 Town of Southampton v. DEC.

5           Counsel?

6           MR. BROWN: Good afternoon, Your Honors.

7           If it please the Court. My name is Gregory  
8 Brown. I'm for appellants Sand Land Corporation and  
9 Wainscott Sand and Gravel Corp.

10          If I could reserve five minutes for rebuttal,  
11 please?

12          ACTING CHIEF JUDGE CANNATARO: You have five  
13 minutes.

14          MR. BROWN: Thank you, Your Honor.

15          Judge Pritz - - - Justice Pritzker had it right  
16 in his dissent when he said that a application for a permit  
17 to mine is not the same thing as any mining application. A  
18 mining application can be a renewal application, a  
19 modification application, but an application for a permit  
20 to mine is defined within the Mined Land Reclamation Law,  
21 and it was done so through the 1991 amendments. It had  
22 previously appeared as a term, but the 1991 amendments  
23 helped clarify exactly what that was. And the key to doing  
24 that - - -

25          ACTING CHIEF JUDGE CANNATARO: I - - - can I ask



1           you?

2                       MR. BROWN:    Sure.

3                       ACTING CHIEF JUDGE CANNATARO:  I believe Justice  
4           Pritzker's rationale or justification for that reading had  
5           to do with avoiding a constitutional defect in what he  
6           perceived as the major - - - or a perceived constitutional  
7           defect in the majority's reading of the section.  Is that  
8           the way you view it?

9                       MR. BROWN:  That's also the way I - - - yes.  
10          Justice Pritzker pointed out that it - - - by reading it  
11          that way would create a constitutional problem.

12                      However, the statute itself provides what is a  
13          permit to mine, which doesn't create any constitutional  
14          issue at all when it's applied according to its language.  
15          Because a permit to mine is defined within the - - - is  
16          defined by the various provisions that were adopted in  
17          1991.

18                      So, like the Mined Land Reclamation Law, that  
19          changed the definitions for what has to be included in the  
20          mining plan.  And so what has to be included in the mining  
21          plan is a graphic description, proposed mining operation,  
22          including the boundaries of the land controlled by the  
23          applicant.

24                      The definition of a permittee is the - - - was  
25          also modified in 1991.  A permittee - - -



1 JUDGE SINGAS: But under 70-0105, isn't the  
2 definition of permit, doesn't it include a modification or  
3 renewal?

4 MR. BROWN: The definition of a permit?

5 JUDGE SINGAS: Yes.

6 MR. BROWN: Yes, but the definition of a  
7 permittee - - - this is why it's so important, is because  
8 it's limited - - - it's - - - it specifically goes to the  
9 boundaries of the land identified in the mined land-use  
10 permit.

11 So when the permittee goes in - - - the - - -  
12 consider this a new permit. They go in with a new  
13 application. The mined land-use plan is a key document  
14 here. It defines the boundaries to mine site. In this  
15 case, it's been fifty acres for decades, but it - - -  
16 that's the property boundaries of the mine site. Once  
17 that's defined, then 2703(3) works well with 2711 because  
18 then a permit to mine is only when it's either establishing  
19 the new boundaries of a new mine, or it's a mining  
20 application from property not previously permitted.

21 In that way, a permit to mine, it captures both  
22 the property as it exists when it was first permitted and  
23 if there's a modification application to expand it to add  
24 additional properties.

25 ACTING CHIEF JUDGE CANNATARO: But not a renewal?



1 MR. BROWN: But not a renewal. Unle - - - just a  
2 straight renewal or any modification that didn't seek to  
3 change the property boundaries of the mine.

4 JUDGE GARCIA: So depth wouldn't be - - -

5 MR. BROWN: No, depth wouldn't have anything to -  
6 - - to do with it. It's - - -

7 JUDGE GARCIA: But isn't another way to get - - -  
8 avoid the constitutional problem just to factor in  
9 nonconforming use, right? So you have a preexisting  
10 nonconforming use. So - - -

11 MR. BROWN: Right.

12 JUDGE GARCIA: - - - the village says that. This  
13 seems, then, to be a fight over the scope of that  
14 preexisting - - -

15 MR. BROWN: Yes. Now he second part of the - - -  
16 you know, the language that was disputed was if the local  
17 zoning laws or ordinances prohibit mining uses within the  
18 area proposed to be mined. And the question was, well,  
19 yeah, also, we're including it within the zoning law, which  
20 I think you should. The parts of the zoning law say is  
21 nonconforming use is allowed, then you would also not reach  
22 a constitutional issue - - -

23 ACTING CHIEF JUDGE CANNATARO: So the problem  
24 there would be an overly restrictive reading of the - - -  
25 the term zoning law, either by DEC or the appellate



1 division in this case?

2 MR. BROWN: Yes, Your Honor. And I think it's  
3 also - - - it's just not reading the statute correctly,  
4 because the - - -

5 JUDGE GARCIA: Isn't the - - -

6 MR. BROWN: - - - statute says the area proposed  
7 - - -

8 JUDGE GARCIA: I'm sorry. Isn't the problem more  
9 of the scope of your preexisting nonconforming use? I  
10 mean, isn't that what you're then fighting about?

11 MR. BROWN: Well - - -

12 JUDGE GARCIA: Because you want to go to whatever  
13 feet - - -

14 MR. BROWN: Right.

15 JUDGE GARCIA: - - - down, and they're saying,  
16 no, you're only - - -

17 MR. BROWN: Yeah. Well - - -

18 JUDGE GARCIA: - - - allowed to go to a certain  
19 depth.

20 MR. BROWN: Yes, Your Honor. Yeah, I mean, this  
21 provision doesn't speak to prior nonconforming use. It  
22 doesn't con - - - speak to land use. This provision  
23 doesn't change anything with the local law. That's not - -  
24 - it's not about changing local law or enforcing local law.  
25 It's about what the agency - - - it's telling the agency,



1           you cannot proceed until some issue - - -

2                   JUDGE GARCIA: So what if the agency - - -

3                   MR. BROWN: - - - on the land use is determined.

4                   JUDGE GARCIA: - - - asks the town and the  
5           locality, all right, and they say, no, this is beyond the  
6           scope of their preexisting use? Then they don't process  
7           it. You go to the town, and you say, we don't agree with  
8           that. And you can appeal their zoning decision.

9                   MR. BROWN: Yeah. So that could happen a couple  
10          of ways, Your Honor.

11                   So it's like for upstate, where it's clearly - -  
12          - so the law applies any place where there's a sole source  
13          aquifer and a population of more than one million, okay?  
14          Well, there's quite a few sole source aquifers designated  
15          under the Safe Drinking Water Act in the state, but only  
16          two counties that have more than a million at this point -  
17          - - from upstate.

18                   So the statute could be applied to more than one  
19          area - - - more than one area of the state, but if you get  
20          to upstate, the way it's applied is, DEC has to still  
21          continue to process a permit. Because a permit doesn't  
22          change local zoning, it doesn't have any impact, the town  
23          can still enforce it, but that's - - - doesn't slow DEC  
24          from its UPA obligations, staff obligations, to process a  
25          permit.



1           So if it applies and it's in the county, then  
2           it'd be like the Valley situation - - - Valley Realty  
3           situation, where, say, it was a new permit, and there was  
4           an argument about prior nonconforming use. To consider  
5           that prior nonconforming use, then, DEC wouldn't be able to  
6           continue to process that permit; it would just have to be  
7           determined.

8           And the question is, well, DEC - - -

9           ACTING CHIEF JUDGE CANNATARO: So are you saying  
10          that DEC normally doesn't consider whether there's a  
11          preexisting nonconforming issue, or that they traditionally  
12          do?

13          MR. BROWN: Well, traditional - - - under - - -  
14          when they first adopted their guidance document, they  
15          weren't considering prior nonconforming use. They looked  
16          straight at, well, okay, what's the zoning district say?

17          ACTING CHIEF JUDGE CANNATARO: Um-hum.

18          MR. BROWN: And in the Valley case, they actually  
19          argued, we don't have to consider prior nonconforming use  
20          in whether to continue to move forward with an application  
21          when - - - where the permittee says, well, is it permitted  
22          at this location. Right? That was the - - - that's how it  
23          came up. And the court said, no, you have to also consider  
24          prior nonconforming use.

25          JUDGE GARCIA: So in another - - - in - - -





1 outside of Nassau and Suffolk, if these were the facts and  
2 there was this disagreement, but you get the permit.  
3 What's - - - what could the municipality do at that point?  
4 Now you have a permit, but they think this is a  
5 nonconforming use.

6 MR. BROWN: Then they could go ahead and bring  
7 enforcement action. It could be a ZBA action. I mean,  
8 there are other issues going with the site about other uses  
9 - - -

10 JUDGE GARCIA: But they have to go in and get you  
11 to stop doing what you're doing and - - - while they do  
12 that, right?

13 MR. BROWN: They would either have to stop, or  
14 there be a dispute. I mean, it could go to the zo - - - it  
15 could - - - we could ask for a ZBA determination.

16 It actually happened in the first part. In very  
17 early part of this case, in '62, the very first way it came  
18 up was that - - - was a code enforcement officer said, this  
19 district doesn't allow zoning. And there was a decision by  
20 the ZBA at that time that it did allow the zo - - - mining.

21 JUDGE GARCIA: But it seems to me like, if you  
22 say this applies here, this provision - - - that's the  
23 purpose of this was to make it the burden of the mining  
24 company, then, to straighten out that nonconforming use,  
25 and not the burden on the municipality to try to stop you



1 once you got a permit from DEC.

2 MR. BROWN: I think, to stop you from - - - stop  
3 them - - -

4 JUDGE GARCIA: From mining in a way that they  
5 think is - - - violates their zoning laws.

6 MR. BROWN: Right. Well, I think, it's more to  
7 stop them from having to participate in SEQR in the - - -  
8 in all the hearings, to go through that process, which  
9 requires experts, lawyers.

10 You know, and before a permit, they don't ever  
11 think they're going to ever allow.

12 ACTING CHIEF JUDGE CANNATARO: But the way this  
13 case was litigated, the way the supreme court sort of just  
14 said, renewals are not part of this process, and - - - and  
15 a completely contrary ruling at the appellate division  
16 removed that whole process.

17 The municipality and the mining company haven't  
18 had a chance to litigate the applicability of their  
19 preexisting nonconforming use. That process that we just -  
20 - - that you just discussed with Judge Garcia never took  
21 place here.

22 MR. BROWN: That process has taken place over  
23 years with the initial certificate - - - what - - -  
24 certificate of occupancy issue that made that  
25 determination, a ZBA determination, court cases going up to



1 the second - - -

2 ACTING CHIEF JUDGE CANNATARO: But those are on  
3 prior renewals; that's not on the latest permit. Because  
4 the latest permit was just issued as a result of a  
5 settlement negotiation.

6 MR. BROWN: Right. But you wouldn't determine  
7 prior nonconforming use every time you got a new mining  
8 permit. That's what the - - - that would be - - - because  
9 this - - - excuse me, my time - - -

10 JUDGE GARCIA: It is if you're changing the terms  
11 - - -

12 ACTING CHIEF JUDGE CANNATARO: But - - - yes.

13 JUDGE GARCIA: - - - of what you want to do.

14 ACTING CHIEF JUDGE CANNATARO: You have more  
15 horizontal area and deeper vertical. You're saying there's  
16 no opportunity in that scenario to talk about whether or  
17 not the prior nonconforming use permits that kind of  
18 change?

19 MR. BROWN: Not within the DEC permitting  
20 process. That's - - - that's a - - -

21 ACTING CHIEF JUDGE CANNATARO: No. I'm talking  
22 about litigating it at the town, at the municipality level,  
23 which didn't happen here.

24 MR. BROWN: The town actually has brought - - -  
25 there is enforcement action by the town. The town has



1 said, we're going to not pursue that as to the mining part  
2 until this decision is done.

3 But there is a - - - the town has plenty of  
4 opportunity to enforce this co - - - laws. The Mined Land  
5 Reclamation Law doesn't affect that; it doesn't prevent  
6 them from going forward with it in any way.

7 JUDGE WILSON: So the scope of a prior  
8 nonconforming use could be determined horizontally, right?  
9 That is, this many acres you can mine, right?

10 MR. BROWN: The - - - well, it wouldn't be a  
11 dispute within the Mined Land Reclamation Law. But the  
12 dispute as to - - - if the - - -

13 JUDGE WILSON: No, right, but if we - - -

14 MR. BROWN: What they're trying to say now - - -

15 JUDGE WILSON: If we're trying to determine - - -

16 MR. BROWN: - - - is the scope of nonconforming  
17 use is less than the property - - -

18 JUDGE WILSON: If we're trying to determine what  
19 the scope of your prior nonconforming use is, I mean, we  
20 have case law about this, right? It isn't necessarily what  
21 you've mined to date if you had a reasonable expectation of  
22 mining additional property going horizontally.

23 MR. BROWN: Right.

24 JUDGE WILSON: Right? That might be within the  
25 prior nonconforming use, right?



1 MR. BROWN: It - - - one would expect so, because  
2 - - -

3 JUDGE WILSON: And they're - - -

4 MR. BROWN: - - - that's how the - - -

5 JUDGE WILSON: It - - - but there might be the -  
6 - -

7 MR. BROWN: - - - mine is built originally.

8 JUDGE WILSON: But there might be - - - but there  
9 might be limits to that. That is, there might be property  
10 that's adjacent that you own but had no intention of  
11 mining. And if that's how the facts laid out, you would  
12 have a - - - you would not be able to claim that as a prior  
13 nonconforming use, horizontally.

14 MR. BROWN: Correct, Your Honor.

15 JUDGE WILSON: With me so far?

16 So why isn't there a similar kind of rule that  
17 would apply vertically? Let me put that differently.

18 Are you saying that if you were able to mine a  
19 particular acre, let's say, and that's prior nonconforming  
20 use, you can mine it as deep as you want regardless of what  
21 the facts show about your intent to mine at the time?

22 MR. BROWN: Well, it's - - - that's in - - - it's  
23 interesting, Your Honor, because the intent when people go  
24 to apply for mining permits, and it shows this in the  
25 record in the very first application, what they designated



1 they wanted was, you want those mineral reserves. There's  
2 sand, there's loam; that's what we're getting, the mineral  
3 reserves. That's what they acquired the property rights  
4 to.

5 They didn't say, we want only some of those  
6 mineral reserves; we only want part of those mineral  
7 reserves. We want the mineral reserves on that property,  
8 that's their inventory.

9 JUDGE WILSON: Well, no - - -

10 ACTING CHIEF JUDGE CANNATARO: Well, to Judge  
11 Wilson's question, though, wouldn't the SEQR process limit  
12 the - - - if the DEC had determined in this case that going  
13 to 120 feet above mean sea level would somehow negatively  
14 impact the aquifer, that would've - - - that would've  
15 impeded the permit, would it not?

16 MR. BROWN: Then that would've - - - then that  
17 would've - - - on the SEQR grounds - - -

18 ACTING CHIEF JUDGE CANNATARO: Yes.

19 MR. BROWN: On the basis of SEQR, they would've  
20 been able to condition the permits and say, no, you can't  
21 go there.

22 JUDGE WILSON: But they actually didn't want to  
23 get all the minerals in the fifty acres; they only wanted  
24 it on the thirty-one, or whatever it is, acres - - -  
25 thirty-four, right?



1 MR. BROWN: Well - - -

2 JUDGE WILSON: So there was a horizontal limit.  
3 They weren't saying, I want all the minerals on the  
4 property. It was limited horizontally, no?

5 MR. BROWN: Well, the - - - what determines the -  
6 - - the limit going down is actually the size of the  
7 property itself, because you need a setback from the  
8 property line - - -

9 JUDGE WILSON: Well, is it - - -

10 MR. BROWN: - - - and you main - - - they  
11 maintain certain slopes for safety. So you - - -

12 JUDGE WILSON: Is it - - -

13 MR. BROWN: - - - can only go so deep based on  
14 that - - -

15 JUDGE WILSON: So it's not a statement of what  
16 they intended to mine. That is, if they said, we intend to  
17 mine sixty feet below grade, that couldn't constrain - - -  
18 and it - - - let's say it's technically feasible, based on  
19 what you're saying, to go to 500 feet, or maybe all the way  
20 to China. That the - - - you know, it - - if they said,  
21 all we intend to get is sixty feet from grade level, that  
22 doesn't constrain them because it's technically feasible to  
23 go lower.

24 MR. BROWN: It's technically feasible to go  
25 lower.



1 JUDGE WILSON: And therefore, it doesn't matter  
2 what they said about their expectation at the time.

3 MR. BROWN: Well, when they apply for a mining  
4 permit, the mining permit itself isn't the definition of  
5 whether or not they have a prior nonconforming use on this  
6 court's precedent. You can establish a prior nonconforming  
7 use with a mining per - - - without actually obtaining a  
8 mining permit.

9 JUDGE WILSON: All right. So suppo - - - let me  
10 try a variation then. Suppose at the time they acquired  
11 the property, technology only allowed you to go down a  
12 hundred feet, and in the, whatever it is, eighty years  
13 since then, technology now allows you to go down 200 feet.  
14 Does the expectation at the time limit their property  
15 right?

16 MR. BROWN: Well, the expectation at the time is  
17 to take the minerals that they can get for that property.

18 JUDGE WILSON: At the time?

19 MR. BROWN: At the time they - - -

20 JUDGE WILSON: Or in the future? Or - - -

21 MR. BROWN: - - - acquired the prop - - -

22 JUDGE WILSON: Or in the future?

23 MR. BROWN: Or in the future. But you - - - it  
24 just - - - it's just the nature of mining. They - - - when  
25 they first started this mine, it was a three-acre mine.





1 JUDGE WILSON: Um-hum.

2 MR. BROWN: And they originally had a, we'd say -  
3 - - I think, the original application said, we're going to  
4 affect half-a-acre a year.

5 Then it became - - - the affected year, it became  
6 larger. That's the definition of affected area. It's  
7 expected to change over the course of the mine - - - over  
8 the course of the mine's development.

9 So there's nothing in the Mined Land Reclamation  
10 Law that says, you know - - - that determines prior  
11 nonconforming use. I mean, it is determined by the facts  
12 of the property intention.

13 JUDGE TROUTMAN: So it's an evolving type of  
14 thing, with respect to how far or what they can do?

15 MR. BROWN: Well, the court's precedent has been  
16 that once the property is voted to mining use, that the  
17 expectation is that the corporates in the land will be used  
18 up - - -

19 JUDGE TROUTMAN: So they can use it - - -

20 MR. BROWN: - - - for that use.

21 JUDGE TROUTMAN: - - - until they've maxim - - -  
22 the maximum potential of its useful life is over?

23 MR. BROWN: Con - - - yes, consistent with other  
24 restrictions on use, such as - - -

25 JUDGE TROUTMAN: Okay, so there can be other



1 restrictions still?

2 MR. BROWN: Sure. Yes. Like, the State  
3 Environmental Quality Review Acts, which requires for the  
4 impo - - - end up requiring restrictions and limitations on  
5 the mine.

6 ACTING CHIEF JUDGE CANNATARO: Thank you,  
7 Counsel.

8 MR. BROWN: Thank you, sir.

9 MR. ARNSTEN: Good afternoon, Your Honors.  
10 May it please the Court. My name is David  
11 Arnstein of the firm of Volz and Vigliotta. Excuse me. I  
12 represent the town of Southampton here this afternoon.

13 I think Your Honors have touched upon the issues  
14 that we think are determinative of this appeal already.

15 The State statute 23-2703(3) was clearly enacted  
16 by the legislature with a purpose in mind, which was to  
17 change the processing of permits from mine expansions,  
18 particularly on Long Island, and particularly because there  
19 is a sole source aquifer that provides clean drinking water  
20 for Long Island residents.

21 JUDGE WILSON: So when you say, expansions, what  
22 if it was simply renewal but without expansion?

23 MR. ARNSTEN: I think, Your Honor, the way that  
24 plays out, to answer your question, is in a renewal  
25 application that's a strict and straight renewal, as



1           happened on this property for several years. There were  
2           renewals on this property without any litigation or any  
3           contention going back to right about the time that the  
4           Mined Land Reclamation Law was amended.

5                       With a straight renewal, the way the guidance of  
6           the DEC at the time it was enacted - - - was written, was  
7           that the process would be DEC writes a letter indicating to  
8           the town they're going to be the lead agency for SEQR  
9           purposes. And in conjunction with that letter, a letter on  
10          Long Island goes to the chief administrative officer and  
11          asks if - - - where there is a local prohibition on mining  
12          in the area proposed to be mined. That comports  
13          specifically with the statute.

14                      Where Long Island differs from upstate, the other  
15          sixty counties, is that while the hashing out of whether  
16          there is a prohibition on mining under local law, DEC must  
17          stop the processing on Long Island.

18                      JUDGE GARCIA: But what's - - - to Judge Wilson's  
19          question, what's the answer to his question? I mean, is  
20          that okay or is that not okay? If it's the exact same  
21          renewal, the exact same terms for the renewal.

22                      MR. ARNSTEN: Yes, Your Honor. I think, if the  
23          question still must be asked, but the answer would be, it's  
24          a nonconforming use. It's the same land, it's the same  
25          sand.

1           ACTING CHIEF JUDGE CANNATARO: That doesn't seem  
2 to be what the appellate division said --

3           JUDGE GARCIA: But that doesn't seem to be what  
4 the appellate division said --

5           ACTING CHIEF JUDGE CANNATARO: Go ahead, Judge  
6 Garcia.

7           MR. ARNSTEN: Your Honor, I think, what the  
8 appellate division said, and it's towards the end of the  
9 decision, is that the application is to be put on hold.  
10 Any application, Your Honor, is subject to the process.

11          JUDGE WILSON: So let me ask you this. What  
12 would Southampton have said if this had been simply a  
13 renewal without any further expansion, or do you know?

14          MR. ARNSTEN: I don't know in this particular  
15 application what they would have said, although I can  
16 answer what I think they would have said.

17                 But I can answer that since 1991, there have been  
18 four or five renewals without any objection by the town.  
19 So I don't think as a matter of pract - - -

20          JUDGE WILSON: Do you know whether that is  
21 because the town believed that a renewal without expansion  
22 is a prior nonconforming use that is constitutionally  
23 protected?

24          MR. ARNSTEN: Your Honor, I suspect it's because  
25 the DEC never asked the question, and that the renewals

1 were just given.

2 But I also think that the municipality, the town,  
3 would have said, this is the same area that was previously  
4 permitted; the same reserves, the same boundaries. It's  
5 essentially a ministerial act. And I - - -

6 ACTING CHIEF JUDGE CANNATARO: Well, the Town did  
7 provide declaration, saying that they had allowed mining as  
8 a prior nonconforming use when - - - during previous permit  
9 renewals, hadn't they?

10 MR. ARNSTEN: Yes, Your Honor.

11 ACTING CHIEF JUDGE CANNATARO: So they - - - it's  
12 not exactly the same as saying they didn't challenge it.  
13 They acknowledged that there was a prior nonconforming  
14 issue in place, and the implication being that they  
15 understood that that would be permitted under the statutory  
16 regime at the time.

17 MR. ARNSTEN: I think, that's correct, Your  
18 Honor. But the question becomes, on the current  
19 application, the one that brought all the litigation, is  
20 this is no longer a straight renewal.

21 From the beginning, the mine sought a lateral  
22 expansion of four acres and a depth expansion over the  
23 thirty-one-and-a-half acres of forty feet, a severe  
24 modification of the existing permit.

25 JUDGE GARCIA: So let's say they disagree with



1 the town on that; they think this is within the scope of  
2 their prior nonconforming. What's their recourse?

3 MR. ARNSTEN: Their recourse, and they actually  
4 utilized it in this case, was to commence an Article 78,  
5 that's one option, against the town, saying that the town's  
6 declaration that mining was not in - - - in conformity with  
7 local zoning is an error.

8 ACTING CHIEF JUDGE CANNATARO: They did that?

9 MR. ARNSTEN: They filed an Article 78.

10 ACTING CHIEF JUDGE CANNATARO: They filed that  
11 Article 78?

12 MR. ARNSTEN: But at the time of the filing of  
13 that petition, the administrative matter was still pending,  
14 this case was still pending, the appellate division  
15 decision had been rendered, but the mot - - - this court  
16 had not yet decided it was going to take the case. And so  
17 it was dismissed by the trial court as being not right for  
18 review, because it could not be determined on that record  
19 if an actual injury had occurred based upon the town's  
20 position.

21 So there are remedies at law available.

22 In this particular instance, this statute  
23 provides a procedural guidepost for the DEC. What it is  
24 saying is, we recognize that sole source aquifer is  
25 critical to the drinking water; we want to put in place a



1 way to be sure - - - before DEC entangles itself with the  
2 process - - - that there are no local prohibitions.

3 And DEC understood this from the get-go because  
4 they would send, at least their guidance suggested they  
5 should send, letters to the chief administrative officer  
6 saying, are there local prohibitions? And DEC, at that  
7 point, if the answer was affirmative - - -

8 JUDGE TROUTMAN: But does that same argument make  
9 the same sense when you're talking about a renewal, as  
10 opposed to a new application?

11 MR. ARNSTEN: Your Honor, I think, when it comes  
12 to a renewal application, the presumption would be - - - if  
13 it is a pure renewal, and I - - - again, in this record,  
14 there was never a pure renewal application. But if it was  
15 a pure renewal application, it would be agreed upon by the  
16 municipality, presumptively, that this is no - - - this is  
17 just an extension of time. That's really what it is. It's  
18 extending the term, but it's not changing the mining.

19 JUDGE SINGAS: So would you agree if we agree  
20 with the third department, does all mining on Long Island  
21 stop?

22 MR. ARNSTEN: Absolutely not, Your Honor, because  
23 as the third department held, what happens is the  
24 application is put on hold. It's not stopped; it's put on  
25 hold until the local prohibition issue is addressed. And



1           there are - - - as we've said before, there are remedies to  
2           the mine and the municipality to figure it out.

3                         In fact, in this case - - -

4                         JUDGE TROUTMAN: So in that instance, they can't  
5           do what they were already doing before the application was  
6           submitted, the new application?

7                         MR. ARNSTEN: If there was a wrongful  
8           determination by the municipality and the applicant  
9           believed that determination was wrongful, then the  
10          applicant would have the right to immediately seek judicial  
11          review of that determination.

12                        Because if the municipality is wrong and they  
13          have the right, it's just a rubber stamp, and it's  
14          speculative to say why that might happen, but I suppose it  
15          could, Your Honor. Then in that case, the courts would be  
16          the remedy for that.

17                        But in this case, the initial application, even  
18          the revised one that arose as a result of the settlement,  
19          was not a renewal application. This case, they - - - the  
20          DEC styled the post-stipulation application as a renewal,  
21          but there were three extra acres added to that permit. And  
22          when questioned about it, DEC's position was, this is a  
23          ministerial error; it was a typo.

24                        JUDGE GARCIA: Let's say we had not granted leave  
25          to appeal; you have the appellate division decision. What





1 recourse would you have?

2 And I mean, I'm sorry. Let's say it goes the  
3 other way; you lose, the town loses. What recourse would  
4 the town have? Do they - - - they have this permit now.  
5 Can they go mine to whatever depth they are planning to - -  
6 -

7 MR. ARNSTEN: Well, Your Honor, on that subject,  
8 I would say that presupposition, which is what I think the  
9 appellants want this course to - - - this Court to endorse,  
10 is that it's presupposed, that with a mine, you have  
11 unlimited depth rights.

12 JUDGE GARCIA: No, no. My question is,  
13 procedurally, is there anything that the town,  
14 municipality, can do to stop the mining from going forward  
15 at that point? They have a permit, but your view is they  
16 don't have authority under the zoning laws to do what they  
17 want to do.

18 MR. ARNSTEN: If the town believes that the DEC's  
19 active permitting was done in error, as the town did in  
20 this case - - - they filed a petition, an Article 78,  
21 against the DEC, saying it was arbitrary and capricious of  
22 them to issue that permit in the face of a local - - -

23 ACTING CHIEF JUDGE CANNATARO: But to - - - to  
24 fre - - -

25 JUDGE GARCIA: I guess, but bottom-line question



1 is, once you have the permit, and let's say the permit is  
2 upheld, can they go mine, or does the town have any  
3 recourse in terms of enforcement of their zoning laws?

4 MR. ARNSTEN: I think, they would have recourse.  
5 And the reason for that is that the DEC permit is not a  
6 land use permit.

7 JUDGE WILSON: Right.

8 MR. ARNSTEN: It's an administrative permit.

9 If the town believed, rightfully, that they were  
10 superseding, going beyond their preexisting nonconforming  
11 use and, therefore, were in violation of the land use - - -  
12 the zoning laws, the town could bring in action to try to  
13 shut the mine down for being in violation of the zoning  
14 code.

15 JUDGE WILSON: Thank you.

16 ACTING CHIEF JUDGE CANNATARO: Thank you.

17 MR. ARNSTEN: Thank you, Your Honors.

18 MR. SMITH: Well, I think, maybe the main point I  
19 should make, although maybe it's already been made pretty  
20 adequately, is that the questions that imply that the  
21 central issue here is nonconfo - - - whether there's a  
22 nonconforming use or not. That is the ultimate issue that  
23 has to be resolved. Of course, that's right. Of course,  
24 if there is a constitutionally protected nonconforming use,  
25 this - - - neither this statute nor anything else can



1           override the constitution. Nobody's really disputing that.

2                       The - - - however, Sand Land has chosen to  
3 litigate this case not as a takings case. Indeed, they say  
4 in one of their briefs, this isn't a takings case, this is  
5 a statutory interpretation case. I think, the reason  
6 they're - - - my personal opinion is the reason they're  
7 saying that is they know they'd lose the takings case.

8                       But in any event, what they say is, no-no; this  
9 is a statutory interpretation case, and you have to  
10 interpret the statute in this funny way that it does not  
11 apply to anything except a completely new mine; it doesn't  
12 apply to a change of a permit on an existing mine whether  
13 it's constitutionally protected or not.

14                      That is a totally untenable view of this statute.  
15 It is - - - and perhaps, the best evidence of how untenable  
16 it is is the - - - well, apart from the text of the  
17 statute, there is also the obvious purpose of the statute,  
18 which Sand Land has such - - - has such great pains to  
19 avoid. Sand Land tells you three or four times in its  
20 briefs that there's no reason to think that the legislature  
21 had any concern with protecting the aquifer against mining.

22                      But if you read the text of the statute, the  
23 statute says that, "The DEC may not process a permit to  
24 mine where a local zoning or ordinance prohibits mining  
25 within counties with a population of a million or more



1 which draw their primary source of drinking water for the -  
2 - - for a majority of county residents from a designated  
3 sole source aquifer."

4 How is it even possible to think that they're  
5 messing with the aquifer?

6 ACTING CHIEF JUDGE CANNATARO: Counsel, it seems  
7 very obvious to me that the - - - that the legislative  
8 policy here was to protect the aquifer. I will not debate  
9 you on that.

10 The problem is, looking at the legislative  
11 history, they don't seem to be cognizant when they enacted  
12 this of any limitation that might be imposed by the - - -  
13 by the due process takings part, the preexisting  
14 nonconforming use.

15 MR. SMITH: Well, whether they expressed it or  
16 not, they certainly had to - - - they have to be deemed to  
17 be cognizant of it.

18 And you do have to read the statute exactly the  
19 way Judge Garcia suggested a few minutes ago. That's to  
20 say when if a local prohibition - - - if the local zoning  
21 prohibits mining, you have to read into that. The local -  
22 - - the local zoning - - - they can't prohibit mining where  
23 you've got a constitutionally protected use.

24 JUDGE GARCIA: So where do we - - - where do they  
25 litigate the scope of that prior nonconforming use?



1 MR. SMITH: Well, I think, I'm - - - well, I  
2 think Mr. Arnsten's right on that, that if there's a bona  
3 fide litigation, which I have some doubt there is here, but  
4 if there's a real bona fide dispute about nonconforming  
5 use, it does seem to be that the DEC doesn't have to decide  
6 that. The DEC doesn't want to decide it. It winds up in  
7 court.

8 Indeed, that's not just to what I say, not just  
9 what Mr. Ronson says, it's what Sand Land amicus says very  
10 clearly.

11 The mater - - - the materials - - - whatever  
12 their name is, materials manufacturing association of Long  
13 Island - - - I'm sorry. New York Construction Materials  
14 Association.

15 ACTING CHIEF JUDGE CANNATARO: That sounds right  
16 to me, but the problem at the end of the day is the  
17 Appellate Division decision here, which doesn't explicitly  
18 say so, but seems to very strongly imply that whether it's  
19 a renewal, a modification, or a new permit, if the local  
20 zoning for that district doesn't include mining, that's it.  
21 The question is over.

22 MR. SMITH: I - - - well, I guess, my answer is,  
23 I don't think that's what the appellate division intended  
24 to say. If they did, I think this is an opportunity for  
25 Your Honors to clarify it.



1           But in - - - but eith - - - but the result of the  
2 Appellate Division that was right here, the permit can't  
3 issue.

4           JUDGE GARCIA: So where - - - what is the venue  
5 for litigating the scope of the prior nonconforming use?  
6 Because there seems two options, right?

7           MR. SMITH: Yeah.

8           JUDGE GARCIA: The DEC can stop processing, and  
9 they can go and bring in action against the municipality,  
10 or the DEC can give them a permit, and then the  
11 municipality can try to stop them from mining.

12           So why would we do one or the other?

13           MR. SMITH: That depends what county you're in.  
14 If you're sixty counties of the state - - -

15           JUDGE GARCIA: Let's go in the county we're in  
16 now, in your county.

17           MR. SMITH: Alb - - - if you're in Albany - - -

18           JUDGE GARCIA: No, no, no. You're in the county  
19 in this case, Suffolk.

20           MR. SMITH: No, no, I mean, if you're in - - - if  
21 you're in - - - but if you're in - - - if you're in Suffolk  
22 County, that's what the statute says. The DEC stops, and  
23 you - - - and it's - - - the burden is on the mi - - - the  
24 mining company to try to get its permit.

25           JUDGE GARCIA: What if the county comes in and



1        says - - - and this is a straight renewal for the same  
2        terms as before, the prior nonconforming use, and the  
3        county says, no, but our zoning laws don't allow mining on  
4        - - - in - - - on - - - in Suffolk County and in our town.  
5        But they have a prior nonconforming use. So DEC has to  
6        stop that, and then they have to go back and litigate  
7        again?

8                MR. SMITH: I mean, you're putting an unlikely  
9        case that has never happened, but I think, probably, the  
10       correct reading is yes. That is, the DE - - - the - - -  
11       this is - - - you're talking about a case where the town  
12       makes the rather strange claim that "I have the right to  
13       completely shut down what they've been doing". You know,  
14       maybe they have a reason. If they have a reason - - -

15                JUDGE GARCIA: Maybe they read the appellate  
16       division decision.

17                MR. SMITH: Yeah. Well, I - - - yeah. Again, I  
18       read the Appellate Division decision a little more kindly  
19       than you do, but yeah. Yeah.

20                If the town takes an outrageous - - - you're  
21       saying what happens if the Town takes an outrageous  
22       position? They have no basis for saying that the - - -  
23       that they're entitled to shut it down, and they say, we are  
24       entitled to shut it down? Then the litigation happens  
25       fast, but I think, even there, the burden of bringing the



1 litigation is on the mining company.

2 And again, I do want to quote an amicus that they  
3 think is their amicus, but I think is my amicus. The New  
4 York Construction Materials Association. Quote, "For Long  
5 Island mines, if the municipality claims that their local  
6 land" lu - - - "use laws prohibit mining, DEC is prohibited  
7 from processing the mining application unless and until the  
8 local dispute is settled."

9 And that, if you assume generously that there's a  
10 bona fide dispute here about nonconforming use, that  
11 describes this case. And now, somehow, the amicus managed  
12 to put at the end of its brief and therefore, the order  
13 should be reversed, and Supreme Court reinstate it. I have  
14 no idea how they got there.

15 But the sentence I just read you said absolutely,  
16 unequivocally, and that's their amicus. Says, "The DEC is  
17 prohibited from processing the mining application." And  
18 that's all there is to it.

19 The - - - I think, the - - - one of the things  
20 that complicates this case, as I said at the beginning, is  
21 that the - - - this is really a disp - - - this should be a  
22 dispute about nonconforming use, and Sand Land doesn't want  
23 to have that argument because it doesn't win that argument.  
24 It wants to sell an interpretation of the statute based on  
25 the premise that the statute has nothing to do with





1 protecting the aquifer, which is a ridiculous premise.

2 ACTING CHIEF JUDGE CANNATARO: Can I offer you an  
3 alternative view? Because I don't want to prejudge the - -  
4 - the prior nonconforming use issue either, but in this  
5 case, when the ALJ said, we need to - - - we need to follow  
6 the process and refer the question to the town, the town  
7 responded, quite simply, that our locally zoning for this  
8 area does not permit mining. Period, and - - - and nothing  
9 else. And that is different than what they did during  
10 previous renewals, when they did advise that they had  
11 issued certificates permitting the mining because it was in  
12 nonconforming use.

13 And it seems to me, you spe - - - you postulated  
14 a moment ago that the Town wasn't really trying to stop  
15 them from just doing a simple renewal. But it seems to me  
16 that maybe they were because they didn't include that extra  
17 piece of information this time when the inquiry was made.

18 MR. SMITH: Honestly, I'm not not absolutely  
19 clear on your question.

20 The - - - as I understand it, all the previous  
21 straight renewals had just happened. It's not even clear  
22 to me that the - - - that the DEC asked the question,  
23 although they are supposed to ask the question.

24 ACTING CHIEF JUDGE CANNATARO: I think - - - I  
25 think, the town had previously set declarations that they



1 had given prior nonconforming use - - -

2 MR. SMITH: Yeah.

3 ACTING CHIEF JUDGE CANNATARO: - - - permission.

4 MR. SMITH: Yeah. They - - - they've never  
5 disputed there was a nonconforming use, as far as I know,  
6 and I don't - - -

7 ACTING CHIEF JUDGE CANNATARO: But this time,  
8 they didn't. They just said the local zoning ordinance  
9 doesn't allow it, and that's different.

10 MR. SMITH: Well, I think, they may have been  
11 asked - - - they may have been answering the question in  
12 literal terms, but the - - - again, I - - - I have to - - -  
13 well, I think you have to give Judge Garcia's gloss, even,  
14 on that when he said - - - when we say that our normal - -  
15 - our local zoning ordinance doesn't allow; parenthesis, we  
16 do allow nonconforming uses, but it doesn't allow mining  
17 when it's not a nonconforming use. And this isn't. Okay,  
18 they said - - -

19 ACTING CHIEF JUDGE CANNATARO: Okay. They didn't  
20 say that either.

21 MR. SMITH: They could've said - - - they  
22 could've said it more clearly.

23 JUDGE GARCIA: And they really tracked the  
24 statutory language, right? Local zoning laws prohibit  
25 this.



1 MR. SMITH: Yes. Well, and then - - - but as - -  
2 -

3 JUDGE GARCIA: And that's what the appellate  
4 division did.

5 MR. SMITH: But as I say, I think the statutory  
6 language has to be read with the constitutional caveat that  
7 Your Honor suggested earlier.

8 ACTING CHIEF JUDGE CANNATARO: Okay. Thank you.

9 MR. SMITH: Thank you.

10 ACTING CHIEF JUDGE CANNATARO: Counsel?

11 MR. BROWN: Both my adversaries have pointed to  
12 some suggestion of not wanting to have an argument about  
13 prior nonconforming use and avoiding that issue. I think,  
14 it's important to understand the record here of what is the  
15 expansion of the mine that is in - - - within that renewal.

16 It's an area of 3.1 acres that was mined prior to  
17 the very first permit - - - Mined Land Reclamation Law  
18 permit. It had already been mined to the same depth as  
19 what the proposed depth is that is under the modification  
20 of 110 feet.

21 JUDGE GARCIA: But let's say they claim this as a  
22 prior nonconforming use, and they respond that way - - - I  
23 know Judge Cannataro accurately said what was in the record  
24 here.

25 But is it really for DEC to determine what's the



1 prior scope of the prior nonconforming use? I mean, isn't  
2 that really a local zoning issue? So why would that go  
3 into this DEC process at all? Why isn't that a fight you  
4 have with him on the zoning basis?

5 MR. BROWN: Well, I think, there's other things  
6 that also are at play here, which is that the Uniformed  
7 Procedures Act and the Mined Land Reclamation Law both  
8 envision that people will go - - - be able to apply for  
9 permits for the orderly development of resources, and that  
10 there is time limits on the DEC processing notes permits  
11 and moving forward - - -

12 JUDGE GARCIA: But they changed for Nassau and  
13 Suffolk. I mean, they made them different for a reason.

14 And so it seems that this fight over the scope of  
15 a prior nonconforming use is misplaced to me in a way. Why  
16 isn't that a zoning issue? And then you can - - - you can  
17 litigate the zoning determination.

18 MR. BROWN: Well, I think that Your Honor is  
19 correct. It is a zoning issue. We could litigate that  
20 zoning issue. So could the town is - - - do that.

21 The question is - - - really, under this statute  
22 is, can we proceed with our permit? Will we be - - - like,  
23 for a renewal. Will we be able to continue mining, or do  
24 we get stopped because the Town says, no, that 3.1 acres  
25 that you mined prior - - - before getting a permit, that's



1 a not expansion of your prior nonconforming use, so you  
2 have to stop mining.

3 JUDGE WILSON: Well, you might want to lose that  
4 in court.

5 MR. BROWN: But that's certainly harmful to a  
6 business. They - - - we have to wait for that  
7 determination in order to get our renewal permit.

8 JUDGE WILSON: Well, what is it - - -

9 JUDGE GARCIA: Under the statute, could they give  
10 you permission - - - a permit to mine to the extent you're  
11 already mining while you litigate it? I don't know the  
12 answer to that. Is that possible?

13 MR. BROWN: Well, that's another oddity of it, is  
14 that under the statements for - - - Procedures Act, we can  
15 apply for a renewal. And you can operate under that  
16 renewal indefinitely, until such time as DEC processes the  
17 renewal.

18 So we can get a renewal even though DEC - - -  
19 under SAPA, even though DEC is not supposed to process or  
20 complete an application for renewal.

21 So DEC would then be in the odd position of not  
22 being able to actually look at the application and say, is  
23 this a sufficient application for - - - under SAPA?  
24 Because they would be processing the permit, right?

25 There's - - - the renewal just doesn't fit in the



1 statute, right? And the reason it doesn't fit is because  
2 the statute reuses defining terms in order to exclude  
3 certain types of permits, to only include those permits  
4 that expand the boundaries of the property; either  
5 initially define the boundaries of that property or expand  
6 the boundaries of that property.

7 With that, Your Honor, if there are no further  
8 questions?

9 ACTING CHIEF JUDGE CANNATARO: Thank you,  
10 Counsel.

11 MR. BROWN: Thank you.

12 ACTING CHIEF JUDGE CANNATARO: Thank you,  
13 everyone.

14 (Court is adjourned)

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C E R T I F I C A T I O N

I, Xavier Austin Reyna, certify that the foregoing transcript of proceedings in the Court of Appeals of Town of Southampton v. NYS Department of Environmental Conservation, No. 1 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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