

Matter of Cobleskill Stone Prods., Inc. v Town of Schoharie
2022 NY Slip Op 35232(U)
February 22, 2022
Supreme Court, Schoharie County
Docket Number: Index No. 2005-594
Judge: James H. Ferreira
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF SCHOHARIE

In the Matter of
COBLESKILL STONE PRODUCTS, INC.,
Plaintiff-Petitioner,

DECISION AND ORDER

Index No.: 2005-594
RJI No.: 47-5751-05
(Proceeding No. 1)

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules and
for a Declaratory Judgment

-against-

TOWN of SCHOHARIE and TOWN BOARD
of the TOWN OF SCHOHARIE,
Defendants-Respondents.

In the Matter of
COBLESKILL STONE PRODUCTS, INC.,
Plaintiff-Petitioner,

Index No.: 2016-185
RJI No.: 47-8884-16
(Proceeding No. 2)

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules and
for a Declaratory Judgment

-against-

TOWN of SCHOHARIE and TOWN BOARD
of the TOWN OF SCHOHARIE,
Defendants-Respondents.

(Supreme Court, Schoharie County, Motion Term)

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HON. JAMES H. FERREIRA, Acting Justice:

Presently pending before the Court in these consolidated matters is the motion of plaintiff-petitioner Cobleskill Stone Products, Inc. (hereinafter petitioner) for summary judgment on two declaratory judgment causes of action (Motion No. 1), as well as the cross motion of defendants-respondents (hereinafter respondents) for summary judgment dismissing the declaratory judgment causes of action (Motion No. 2). For the reasons that follow, both motions are denied.

These matters have a lengthy history and the relevant procedural and factual background can be summarized as follows. Petitioner operates a quarry in defendant-respondent Town of Schoharie, Schoharie County (hereinafter the Town), which has been in continuous service since the 1890s. Petitioner acquired the quarry from its predecessor, Cushing Stone Corporation (hereinafter Cushing Stone) in 1984 and owns several contiguous parcels of property. Petitioner operates pursuant to a Mined Land Reclamation Permit (hereinafter MLRP) issued by New York State Department of Environmental Conservation (hereinafter DEC). Petitioner owns approximately 69-acres of land adjacent to its current mining operations, which is separated from the active quarry by Rickard Hill Road (hereinafter the Southeastern Reserves) (see Griggs Affidavit in Support of Motion [Motion No. 1], Exhibit 3). There are two parcels on the Southeastern Reserves, one which was purchased by Cushing Stone in 1981 (as part of a larger parcel) and one which was purchased by petitioner in 2000. At the time petitioner acquired the Southeastern Reserves, there was a zoning ordinance in effect, dated 1975 (hereinafter the 1975 ordinance), which permitted commercial mining in the

district where the land is located upon receipt of a special permit from the Town. Petitioner did not apply for a special permit to mine the Southeastern Reserves under the 1975 ordinance.

In January 2005, petitioner submitted an application to DEC to amend its mining permit to include the Southeastern Reserves. Thereafter, while that application was pending, the Town enacted a new zoning ordinance (hereinafter the 2005 ordinance) prohibiting mining in the zone where petitioner's property is located. Petitioner thereafter commenced Proceeding No. 1, a hybrid CPLR article 78 proceeding and declaratory judgment action. Petitioner raised eight causes of action in its amended verified complaint and petition.¹ The first seven causes of action sought relief with respect to the 2005 ordinance. In its eighth cause of action, petitioner seeks a declaration that "it has secured vested rights to quarry the Southeastern Reserves at its Schoharie Quarry as a pre-existing non-conforming use under [the 2005 ordinance] and any subsequently enacted prohibitory zoning law amendment" (Affirmation in Support of Motion [Motion No. 1], Exhibit 1 ¶ 170).

While discovery was ongoing, petitioner moved in Proceeding No. 1 for partial summary judgment on its eighth cause of action. In a Decision and Order signed May 6, 2011, the Court (Devine, J.) granted petitioner's motion for partial summary judgment on its eighth cause of action, finding that petitioner had secured vested rights to quarry the Southeastern Reserves as a pre-existing non-conforming use. Respondents appealed, and the Appellate Division, Third Department, reversed, finding that questions of fact existed with respect to whether petitioner has a vested right to mine the subject property (Matter of Cobleskill Stone Prods., Inc. v Town of Schoharie, 95 AD3d 1636, 1639 [3d Dept 2012]). Specifically, the Court held that, even assuming that petitioner had met

¹ By Decision and Order signed October 2, 2009, the Court (Devine, J.) granted petitioner's motion to serve an amended complaint.

its burden on its motion, respondent had demonstrated that questions of fact existed; the Court observed:

“Although petitioner has done some work related to the amendment of its state mining permit, mining has never been conducted or permitted on the southern property, which remains largely undisturbed and has been used by petitioner and its predecessors in title for residential and agricultural purposes. Moreover, petitioner has not made the costly infrastructure improvements needed to mine the property, such as installing multiple ramps, a tunnel and a conveyor system” (*id.* at 1638).

The Court also noted that petitioner had failed to seek a special use permit from the Town to mine the Southeastern Reserves and that such a permit “arguably would not have been forthcoming given the property’s proximity to populated areas, historic sites and a park that would allegedly suffer significant economic and environmental impacts from the proposed expansion” (*id.*)

Upon remittal and following the completion of discovery,² respondents moved in Proceeding No. 1 for partial summary judgment dismissing the eighth cause of action. Respondents argued, among other things, that petitioner’s vested rights claim necessarily fails because petitioner did not seek or obtain a special use permit to mine the subject property as required pursuant to the 1975 ordinance. In a Decision and Order signed July 29, 2013, the Court agreed and granted respondents’ motion on that ground. While cross appeals from that Decision and Order were pending, the Court, in a Decision and Order signed February 19, 2014, partially granted the petition with respect to the sixth cause of action and adjudged the 2005 ordinance to be null and void. Respondents did not appeal from that Decision and Order. Meanwhile, the Appellate Division, Third Department, reversed the Court’s Decision and Order dismissing the eighth cause of action, finding that petitioner’s failure to obtain a special permit pursuant to the 1975 zoning ordinance “does not, as a matter of law, preclude it from establishing that it has a vested right to mine on its property

² Petitioner filed a Note of Issue and Certificate of Readiness in Proceeding No. 1 in June 2012.

notwithstanding a current or future prohibitive zoning ordinance” (Matter of Cobleskill Stone Prods., Inc. v Town of Schoharie, 126 AD3d 1094, 1095 [3d Dept 2015]). The Court also rejected, as speculative and nonjusticiable, respondents’ alternative argument that they were entitled to summary judgment dismissing the eighth cause of action because the Town would have had a rational basis to deny any special permit under its 1975 zoning ordinance (id. at 1096). This matter was transferred to the calendar of the undersigned in early 2015, and the Court scheduled a non-jury trial on the eighth cause of action in Proceeding No. 1.

Meanwhile, in December 2015, the Town enacted a new ordinance rezoning a large portion of petitioner’s reserves property to prohibit mining and commercial excavation (hereinafter the 2015 ordinance). Petitioner thereafter commenced Proceeding No. 2, a hybrid CPLR article 78 proceeding and declaratory judgment action. Petitioner raised six causes of action in its verified complaint and petition. Five of the causes of action seek relief with respect to the 2015 ordinance. In its third cause of action, petitioner seeks a declaration that “it has secured a vested and nonconforming use right to mine the Future Reserves Area at the Schoharie Quarry as a pre-existing nonconforming use under [the 2015 ordinance] and any subsequently enacted prohibitory zoning law or amendment” (Affirmation in Support of Motion [Motion No. 1], Exhibit 3 ¶ 189). By Decision and Order dated August 21, 2017, the Court granted the motion of petitioner, on consent, to join for trial and discovery the eighth cause of action in Proceeding No. 1 with the third cause of action in Proceeding No. 2.

The Court thereafter issued several decisions with respect to motions in limine filed by the parties. Specifically, by Decision and Order dated September 8, 2017, the Court partially granted

petitioner's motion, in Proceeding No. 1,³ seeking to exclude evidence relating to the environmental impacts of existing or proposed mining operations.⁴ The Court also granted petitioner's motion seeking to exclude testimony with respect to whether a special use permit to mine the expanded area would have been denied by the Town under the 1975 ordinance if petitioner had applied for one. In addition, the Court granted respondent's motion seeking to exclude evidence pertaining to efforts made or expenses incurred by petitioner after August 10, 2005, the date when the 2005 ordinance was issued. By Decision and Order dated December 12, 2017, the Court denied petitioner's motion for leave to reargue respondent's motion in limine. By Decision and Order dated April 20, 2018, the Court denied respondent's motion, in Proceeding No. 2, for an order excluding evidence of efforts made or expenses incurred by petitioner after August 10, 2005, the date when the Town first adopted the prohibitory zoning ordinance.

Petitioner appealed from the Court's Decision and Order dated September 8, 2017, and the Appellate Division, Third Department, reversed that part of the Decision and Order which granted respondents' motion in limine (see Matter of Cobleskill Stone Prods., Inc. v Town of Schoharie, 169 AD3d 1182, 1185-1187 [3d Dept 2019]). The Court found that the annulled 2005 ordinance "can

³ The motions addressed in the September 8, 2017 Decision and Order were filed before the matters were consolidated and were addressed only to Proceeding No. 1.

⁴ The Court found that it would exclude at trial all evidence and testimony relating to the draft environmental impact statement prepared by DEC (hereinafter DEIS), DEC's findings and analysis with respect to petitioner's permit application, the content of the testimony received at administrative hearings before the DEC and the adequacy or inadequacy of the DEC's environmental review. The Court ruled, however, that it would admit evidence "as to the fact that petitioner applied for a mining permit amendment, as well as the contents of petitioner's mining permit amendment application to the DEC and representations made by petitioners with respect to its application which are relevant to prove petitioner's intent" and would also "admit evidence as to the fact that the application is still being adjudicated at an administrative level" (Court's Decision and Order dated September 8, 2017, at 8). The Court also found that evidence as to alleged impacts of the proposed non-conforming use that are of a general, environmental nature "but only to determine if petitioner's property rights were inequitably burdened" (*id.* [internal citation and quotation marks omitted]).

have no lingering effect” and that “petitioner is entitled to have its nonconforming use rights evaluated as of the effective date of the 2015 ordinance, unless, of course, that ordinance is also annulled prior to any such determination” (*id.* at 1185). The Court further observed:

“Establishing a property right based upon a prior nonconforming use is not a question of equity and, instead, involves a limited inquiry – whether a party indeed used, or, in the unique case of mining, intended to use its real property for the nonconforming purpose at the time that the subject restrictive zoning ordinance became effective. In contrast, the doctrine of vested rights is partly grounded in equitable estoppel principles. . . . Analysis of vested rights claims routinely involve evaluation of factors such as the improvements and expenditures made to the property and the degree of loss that would be sustained if no vested right were found. Here, petitioner makes no claim that its rights stem from reliance on the Town’s actions, but, instead, alleges facts regarding its intent and efforts to expand its mining operations to the subject parcel. As such, the equitable balancing between petitioner and the Town urged by respondents has no place in the analysis” (*id.* at 1186-1187).

Discovery thereafter proceeded with respect to Proceeding No. 2 and petitioner filed a Note of Issue and Certificate of Readiness in June 2020. A non-jury trial on the consolidated claims was scheduled but has been adjourned without date. The Court heard oral argument with respect to these motions on December 15, 2021.

Summary judgment is a drastic remedy which should only be granted where there are no doubts as to the existence of a triable issue of fact (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Black v Kohl’s Dept. Stores, Inc.*, 80 AD3d 958, 959 [3d Dept 2011]). “[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Baird v Gormley*, 116 AD3d 1121, 1122 [3d Dept 2014]). If the proponent’s burden is met, “the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form

sufficient to establish the existence of material issues of fact which require a trial of the action” (Alvarez v Prospect Hosp., 68 NY2d at 324; Town of Kirkwood v Ritter, 80 AD3d 944, 945-946 [3d Dept 2011]).

“[N]onconforming uses or structures, in existence when a zoning ordinance is enacted, are, as a general rule, constitutionally protected and will be permitted to continue, notwithstanding the contrary provisions of the ordinance” (Glacial Aggregates LLC v Town of Yorkshire, 14 NY3d 127, 135 [2010] [internal citations and quotation marks omitted]). “Courts and municipal legislators have shown a grudging tolerance towards this doctrine, disfavoring its broad application, as the law . . . generally views nonconforming uses as detrimental to a zoning scheme, and the overriding public policy of zoning in New York State and elsewhere is aimed at their reasonable restriction and eventual elimination” (Buffalo Crushed Stone, Inc. v Town of Cheektowaga, 13 NY3d 88, 97, [2009] [internal citation, brackets and quotation marks omitted]). “A party advancing a prior nonconforming use exception to a zoning ordinance must establish specific actions constituting an overt manifestation of its intent to utilize the property for the ascribed purpose at the time the zoning ordinance became effective; a mere contemplation of purpose, lacking supportive evidence of undertakings to effectuate such intentions, will not suffice” (Buffalo Crushed Stone, Inc. v Town of Cheektowaga, 13 NY3d at 98). “The test most often employed in determining the extent of a nonconforming use is whether the nature of the incipient non conforming use, in the light of the character and adaptability to such use of the entire parcel, manifestly implies an appropriation of the entirety to such use prior to the adoption of the restrictive ordinance” (Matter of Syracuse Aggregate Corp. v Weise, 51 NY2d 278, 285 [1980] [internal quotation marks and citation omitted]). “Central to this standard is ‘an examination of the nature of the particular nonconforming use in issue as well as the activities engaged in by the landowner in effectuating that use prior to the adoption of the

restrictive ordinance' ” (Buffalo Crushed Stone, Inc. v Town of Cheektowaga, 13 NY3d at 98, quoting Matter of Syracuse Aggregate Corp. v Weise, 51 NY2d at 285).

With respect to the application of the nonconforming use doctrine to quarrying in particular, the Court of Appeals has observed:

“By its very nature, quarrying involves a unique use of land. As opposed to other nonconforming uses in which the land is merely incidental to the activities conducted upon it, quarrying contemplates the excavation and sale of the corpus of the land itself as a resource. Depending on customer needs, the land will be gradually excavated in order to supply the various grades of sand and gravel demanded. Thus, as a matter of practicality as well as economic necessity, a quarry operator will not excavate his entire parcel of land at once, but will leave areas in reserve, virtually untouched until they are actually needed. It is because of the unique realities of gravel mining that most courts which have addressed the particular issue involved herein have recognized that quarrying constitutes the use of land as a diminishing asset. Consequently, these courts have been nearly unanimous in holding that quarrying, as a nonconforming use, cannot be limited to the land actually excavated at the time of enactment of the restrictive ordinance because to do so would, in effect, deprive the landowner of his use of the property as a quarry. . . . This is not to say that a landowner, merely by preparing to engage in a gravel operation and undertaking a few self-serving acts of a very limited nature, will have thrown a protective mantle of nonconforming use over his entire parcel of land as against a later prohibitory zoning ordinance. Nor is it possible to extend the protection of a permitted nonconforming use established on one parcel of land to physically separate though adjoining parcels. But where . . . the owner engages in substantial quarrying activities on a distinct parcel of land over a long period of time and these activities clearly manifest an intent to appropriate the entire parcel to the particular business of quarrying, the extent of protection afforded by the nonconforming use will extend to the boundaries of the parcel even though extensive excavation may have been limited to only a portion of the property” (Syracuse Aggregate Corp. v. Weise, 51 NY2d at 285-286 [internal citations and quotation marks omitted]).

“[T]he mere fact that a roadway runs through a portion of a property, later classified as a subparcel by a town attempting to impose zoning restrictions on its usage, is not a per se barrier to the recognition of prior nonconforming use rights to that area. An easement, a roadway or any other narrow area does not necessarily create a physical separation of the land, divesting it of its character so as to prevent a vested right to use that land for its intended purpose[, and the] analysis must take

into account the nature of the easement [or roadway] and the character of the land in relation to the areas already quarried” (Buffalo Crushed Stone, Inc. v Town of Cheektowaga, 13 NY3d at 101).

In its present motion, petitioner argues that its evidence establishes that it has manifested its intent to mine the Southwestern Reserves and it is entitled to summary judgment on its declaratory judgment causes of action. As evidence of its manifest intent, petitioner points to evidence that, prior to the enactment of the 2015 ordinance, it investigated the extent of the mineral reserves located on the Southeastern Reserves, stockpiled material suitable for reclamation on a portion of the Southeastern Reserves, prepared maps and plans to extract those reserves, constructed approximately 3,000 feet of roads to facilitate site investigations, drilled auger holes, analyzed 500 feet of rock cores, installed monitoring wells, conducted an archaeological investigation, submitted an application to DEC to modify its permit, prepared a voluminous DEIS, participated in DEC legislative hearings, submitted a special use permit application to respondents⁵ and met with respondents to discuss the mining permit modification. Petitioner argues that it has exhibited the same indicia of quarrying activity and preparation to quarry as that found by the Court of Appeals in Buffalo Crushed Stone, Inc. v. Town of Cheektowaga to be sufficient to establish the mine’s entitlement to summary judgment on the issue of manifest intent.

In their present motion, respondents argue that they are entitled to summary judgment dismissing the declaratory judgment causes of action because the evidence establishes that Rickard Hill Road is a “significant public structure” which creates a physical barrier between petitioner’s existing mine and the adjacent Southeastern Reserves that “serves as an endpoint for any

⁵ The record reflects that, in March 2014, after the 2005 ordinance was annulled, petitioner applied to the Town of Schoharie Zoning Board of Appeals (hereinafter ZBA) for a special use permit to mine the Southeastern Reserves (Griggs Affidavit in Support of Motion [Motion No. 1] ¶ 86, Exhibit 25). However, after this application was submitted, respondents enacted a moratorium on land use approvals and then passed the 2015 ordinance; as such, the ZBA never acted on the application.

nonconforming use claim” by petitioner with respect to the Southeastern Reserves (Memorandum of Law in Support of Cross Motion [Motion No. 2], at 1). Respondents assert that Rickard Hill Road, which separates petitioner’s current mine from the proposed expansion, is a paved, 2-lane public road that is 33 feet wide and has a right of way that is greater than 100 feet, is owned and maintained by Schoharie County and is not used by petitioner in its current mining operations and has steep rock faces along its border which serve as a “blockade” to any expansion across the roadway (id. at 13). Respondents argue that the fact that petitioner has proposed significant improvements – including building a tunnel under the road – in order to expand its mining operation to the south side of the road supports a finding that the roadway is a physical barrier to the expansion. For these reasons, respondents contend that the facts in Buffalo Crushed Stone, Inc. v Town of Cheektowaga are distinguishable. Respondents posit that the proposed expansion area has historically been used for agricultural, residential and recreational use and is improved with a residential home and garage/barn, such that its nature and character is in stark contrast to industrial mining, which supports a finding that the Southeastern Reserves are physically separate and distinct from the current operation. Respondents also argue that petitioner’s motion must, in any event, be denied because the Appellate Division, Third Department, has already determined that factual issues exist for trial with respect to the issue of whether petitioner has manifested its intent to mine the Southeastern Reserves. Respondents also argue that petitioner has not made the substantial changes or improvements necessary to establish manifest intent and cannot establish manifest intent solely by relying on the fact that it filed a modification application with DEC and engaged in subsequent activities in pursuit of that permit.

Upon review, both motions are denied. As a preliminary matter, the Court notes that the instant motions are the second motions filed by both parties seeking summary judgment on the

declaratory judgment cause of action in Proceeding No. 1. “Generally, a court should not entertain a successive motion for summary judgment unless the ‘motion is based upon newly discovered evidence or the moving party can demonstrate other sufficient cause for granting the motion’ ” (Trimble v City of Albany, 169 AD3d 1293, 1294 [3d Dept 2019], quoting Green Harbour Homeowners Assn., Inc. v Ermiger, 128 AD3d 1142, 1143 [3d Dept 2015]; see Consolidated Mtge., LLC v Westport Golf Invs., LLC, 141 AD3d 923, 925 [3d Dept 2016], lv dismissed 28 NY3d 1102 [2016]). Moreover, “successive motions for summary judgment based upon facts which could have been set forth from the outset are not encouraged” (Wenger v Goodell, 288 AD2d 815, 816 [3d Dept 2001]).

Here, neither party has offered newly discovered evidence or demonstrated other sufficient cause for considering a second motion for summary judgment in Proceeding No. 1. On this point, petitioner argues that its second motion for summary judgment is appropriate because of all the developments that have occurred with respect to this matter since the filing of its first motion, including the annulment of the 2005 ordinance and the enactment of the 2015 ordinance, further actions taken by petitioner in 2014 in furtherance of its intent to mine the reserves parcel, the completion of discovery in both proceedings and the 2019 decision of the Appellate Division, Third Department, which “established the legal standard to be applied and made a finding as to the date before which [petitioner’s] actions may constitute evidence of intent to mine the Southeastern Reserves” (Memorandum of Law in Support of Motion [Motion No. 1] at 12 n 5). Petitioner also asserts that the Court has authorized dispositive motions with respect to this cause of action.⁶

⁶ The Court notes that, while the Court set a deadline for the filing of any dispositive motions, it did not specifically authorize either party to make a second summary judgment motion with respect to Proceeding No. 1 and did not relieve the movant on such a motion from demonstrating sufficient cause for the Court’s consideration of such.

Although petitioner is correct that a number of developments have occurred since the filing of its first motion, the fact remains that, as discussed above, the Appellate Division, Third Department, has ruled that issues of fact exist with respect to whether petitioner engaged in actions which are sufficient to constitute an overt manifestation of its intent to mine the Southeastern Reserves, which is the precise ground upon which petitioner now seeks summary judgment for a second time. The Court has reviewed the papers submitted by petitioner on its first motion and finds that this motion is, in effect, an attempt to reargue that motion with the submission of additional evidence. Even though petitioner has submitted evidence of actions that it has taken after its first motion was made and before the 2015 ordinance was enacted – including its filing of a special use permit application and the submission of a “downsized” application to the DEC – some of the evidence to which the Appellate Division pointed to in finding that issues of fact exist *has not changed*. Specifically, it remains the case that “mining has never been conducted or permitted on the southern property, which remains largely undisturbed and has been used by petitioner and its predecessors in title for residential and agricultural purposes” and that “petitioner has not made the costly infrastructure improvements needed to mine the property, such as installing multiple ramps, a tunnel and a conveyor system” (Matter of Cobleskill Stone Prods., Inc. v Town of Schoharie, 95 AD3d at 1638).⁷ Petitioner has not demonstrated that these facts are untrue, or that they are no longer relevant, or that there is some reason why they no longer present issues of fact as to petitioner’s intent to mine. The Court does not find that the additional facts presented by petitioner substantially change the landscape of this case and justify reconsideration of the issue (see Fenimore v County of Warren, 57 Misc 3d 1213 [A] [Sup Ct, Warren County 2017]). Under these

⁷ The Court disagrees with petitioner’s contention that the Appellate Division, in so finding, was considering the vested rights doctrine and not the non-conforming use doctrine.

circumstances, the Court declines to consider petitioner's motion as to Proceeding No. 1.

Although this is the first motion for summary judgment made by petitioner in Proceeding No. 2, the causes of action are identical and the Court finds, for the reasons stated above, that petitioner has failed to demonstrate its entitlement to judgment as a matter of law as to the issue of prior nonconforming use. The Appellate Division's decision as to the existence of triable issues of fact on this point applies equally to the declaratory judgment cause of action in Proceeding No. 2 and, in the absence of new evidence which paints a substantially different picture, precludes a finding otherwise by this Court on petitioner's motion for summary judgment. As such, petitioner's motion is denied in its entirety.

Respondent's motion does not fare much better. First, respondents have not even addressed the fact that their instant motion is the second motion for summary judgment on the declaratory judgment cause of action in Proceeding No. 1. The Court therefore declines to consider the motion as it relates to that proceeding.⁸ As to Proceeding No. 2, the Court finds that, even assuming, without deciding, that respondents have met their burden with respect to their motion, petitioner has proffered sufficient evidence demonstrating that an issue of fact exists for trial as to whether Rickart Hill Road creates a physical separation which prevents petitioner from obtaining nonconforming use rights with respect to the Southeastern Reserves. As noted above, the Court of Appeals has held that "[a]n easement, a roadway or any other narrow area does not necessarily create a physical separation of the land, divesting it of its character so as to prevent a vested right to use that land for its intended purpose[, and the] analysis must take into account the nature of the easement [or roadway] and the

⁸ The Court notes that its review of the file reflects that respondents raised the instant argument with respect to Rickart Hill Road in opposition to petitioner's first motion for summary judgment and the Court (Devine, J.) rejected that argument in its written decision. Respondents did not appeal from that determination and, after the appeal, sought summary judgment on a different ground.

character of the land in relation to the areas already quarried” (Buffalo Crushed Stone, Inc. v Town of Cheektowaga, 13 NY3d at 101). Here, petitioner has submitted evidence countering respondents’ evidence as to the nature of the roadway and character of the land in the Southeastern Reserves. This includes evidence that there are no rock faces adjacent to Rickard Hill Road in the area of the proposed tunnel, that petitioner can travel from one parcel to the other without impediment from rock cuts in other areas, that the proposed crossing and tunnel under the road is construction that is “typical and routine” in the mining industry and “not the engineering feat [respondents] would lead this Court to believe,” that petitioner has always intended to extend its mining operation to the other side of the roadway and that the character of the land in the active quarry as it was before mining is similar to the current character of the land in the Southeastern Reserves (Galasso Affidavit in Reply [Motion No. 1] and in Opposition [Motion No. 2] ¶ 8; Griggs Affidavit in Reply [Motion No. 1] and in Opposition [Motion No. 2] ¶¶ 18, 28, Exhibit I, L). Therefore, the Court denies respondents’ motion for summary judgment in its entirety.

Based upon the foregoing, it is

ORDERED that both motions are denied in their entirety; and it is further

ORDERED that **the Court has scheduled a conference in this matter for March 30, 2022 at 1:00 P.M., via Microsoft Teams teleconferencing technology.** Chambers will email counsel a link to the conference. The purpose of the conference will be to select a trial date.

The foregoing constitutes the Decision and Order of the Court.

SO ORDERED AND ADJUDGED

ENTER.

Dated: Albany, New York
February 22, 2022


James H. Ferreira
Acting Justice of the Supreme Court

Papers Considered:

1. Notice of Motion (Motion No. 1), dated December 16, 2020;
2. Memorandum of Law in Support by Michael A. Fogel, Esq., dated December 16, 2020;
3. Affirmation in Support by Michael A. Fogel, Esq., dated December 16, 2020, with attached exhibits;
4. Affidavit in Support by Paul H. Griggs, sworn to December 16, 2020, with attached exhibits;
5. Affidavit in Support by Emil J. Galasso, sworn to December 16, 2020, with attached exhibits;
6. Affidavit in Support by Peter D. Gray, sworn to December 15, 2020;
7. Affidavit in Support by David S. Hamling, sworn to December 11, 2020;
8. Notice of Cross Motion (Motion No. 2), dated March 25, 2021;
9. Memorandum of Law in Support by Kristin Carter Rowe, Esq., dated March 25, 2021;
10. Affirmation in Support by Kristin Carter Rowe, Esq., dated March 25, 2021, with attached exhibits;
11. Affidavit in Support by Andrew Rowles, sworn to March 23, 2021;
12. Affidavit in Support by Alan Tavenner, sworn to March 25, 2021, with attached exhibit;
13. Affidavit in Support by Robert J. Montione, sworn to March 18, 2021, with attached exhibit
14. Affidavit in Support by Mark P. Millspaugh, P.E., sworn to March 19, 2021, with attached exhibits;
15. Affidavit in Support by Stephen B. Le Fevre, P.G., C.P.G, sworn to March 22, 2021, with attached exhibits;
16. Affidavit in Support by John Conboy, sworn to March 18, 2021;
17. Memorandum of Law in Reply (Motion No. 1) and in Opposition (Motion No. 2) by Michael A. Fogel, Esq., dated July 13, 2021;
18. Reply Affirmation (Motion No. 1) by Michael A. Fogel, Esq., dated July 13, 2021, with attached exhibits;

19. Affidavit in Reply (Motion No. 1) and in Opposition (Motion No. 2) by Emil J. Galasso, sworn to July 9, 2021, with attached exhibit;
20. Affidavit in Reply (Motion No. 1) and in Opposition (Motion No. 2) by Paul H. Griggs, sworn to July 13, 2021, with attached exhibits;
21. Reply Memorandum of Law (Motion No. 2) by Kristin Carter Rowe, Esq., dated August 27, 2021; and
22. Reply Affirmation (Motion No. 2) by Kristin Carter Rowe, Esq., dated August 27, 2021, with attached exhibits.