

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
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In the Matter of a Request for a Declaratory  
Ruling by

JAMES M. GRAHAM

DECLARATORY  
RULING 23-01

AND

SYRAGAM REALTY CORP.

under §204 of the State Administrative Procedure  
Act.

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Petitioners James M. Graham and Syragam Realty Corp., owners of a 49 acre parcel of land located in the Town of Tully, Onondaga County, New York, have requested a Declaratory Ruling as to the applicability of the New York State Mined Land Reclamation Law, Title 27 of Article 23 of the Environmental Conservation Law, to activities they are undertaking on their 49 acre parcel of land.

The Petition, dated April 30, 1980, as further supplemented by a letter from James M. Graham, dated May 9, 1980 in response to General Counsel's letter of May 7, 1980 requesting additional information, set forth the facts upon which this Declaratory Ruling is made.

Petitioners claim that the activities being undertaken on their land to wit: the excavation and removal of shale and overburden consisting of dirt and stones are being conducted "solely in aid of on-site ... construction" and therefore exempt from the Mined Land Reclamation Law." (MLRL) Environmental Conservation Law §23-2705. Mining is defined in ECL §23-2705(8) as follows:

"Mining" means the extraction or removal of minerals from the ground or the breaking of the surface soil in order to facilitate or accomplish the extraction or removal of minerals, including any activities or processes or parts thereof for extraction or removal of minerals from their original location and the preparation, washing, cleaning or other processing of minerals at the mine location so as to make them suitable for commercial, industrial or construction use; but shall not include excavation or grading when conducted solely in aid of on-site farming or construction. Removal of limited amounts of overburden and mining of limited amounts of any minerals shall not be considered as mining when done only for the purpose of extracting samples or specimens for scientific purposes, or only for the purpose and to the extent necessary to determine the location, quantity or quality of any mineral deposit so long as no minerals removed during exploratory excavation are sold, processed for sale or consumed in the regular operation of a business. [emphasis supplied]

The regulations, 6 NYCRR 420.1(k), in further clarification of the statute provide in pertinent part:

"Mining ... shall not include excavation or grading when conducted solely in aid of on-site farming or construction. Excavation and removal of 1,000 tons or more of minerals incidental to farm improvements or construction projects shall not be considered to be excavation or grading conducted solely in aid of on-site farming or construction, if such minerals are removed for the purpose of sale, exchange, commercial, industrial or municipal use." [Emphasis supplied]

The petitioners' claim rests on essentially two arguments:

(1) their desire to create a "commercial development construction site" on the parcel and the fact that they receive no compensation for the minerals removed exempts them from the statutes' jurisdiction; and

(2) the activities of Frank Corl and the Town of Tully Highway Department in excavating and removing the shale and

overburden from the parcel do not constitute "mining" as defined in the statute and regulations.

The first argument asserted by the petitioners focuses on the stated purpose of the owners of the site to level the site for future construction of the shopping center. This goal can be expressed in the language of the regulations as their "land-use objective" 6 NYCRR 420.1(g). The petitioners maintain that their sole purpose is causing the excavation and removal of shale and the overburden is to "create a commercial development construction site", a land-use objective which legitimately can serve as the goal of a properly prepared mining and reclamation plan. They further maintain that the absence of any pecuniary return to them for allowing others to remove the minerals corroborates their stated purpose to create a construction site.

The petitioners, as owners of the site, understandably have taken a narrow view of the statute, viewing it from their own perspective. From that perspective, their purpose is merely to change the topography of the site without concern for what ultimate use is made of the mined materials. To that end they have permitted Frank Corl and the Town of Tully Highway Department to excavate and remove the materials on their behalf free of charge. The petitioners have based their Petition on the assertion that sale or exchange of the minerals are "key elements in determining whether a mining permit is required", and that no sale or exchange takes place. The statutory definition of

mining only uses the term sale in the context of eliminating the exemption for scientific exploration if the material excavated is sold. The regulations utilize the phrase, "for the purpose of sale, exchange, commercial, industrial or municipal use," [6 NYCRR 420.1(k)] in explaining the exemption for "excavation and grading solely in aid of on-site ... construction." For purposes of this Declaratory Ruling, we accept the petitioners' statement that no "sale" of the minerals occurred. However, the petitioners ignore the benefit they are receiving by way of exchanging [6 NYCRR 420.1(k)] the value of the materials (shale and overburden) for the excavation and removal efforts of Frank Corl and the Town of Tully Highway Department. This type of exchange is specifically recognized by the regulations as one of the grounds for jurisdiction over the mining activities on the site.

The second part of petitioners' first argument relates to their plans for the site itself, i.e., the construction that is "planned" for the site to which the excavation and removal of materials is ancillary.

The petitioners' plan to create a commercial development construction site is but an interim step in their plans for the site. A small shopping center is also planned for which necessary permits under "SEQR, zoning, health and all requirements will be applied for and met". [Exhibit E to the Petition]. Construction of the site and removal of shale and materials constituting the overburden are anticipated to be completed by 1980 or 1981

[paragraph 7, page 2 of Petition]. Construction of the shopping center will be in stages as tenants are obtained and is anticipated to be commenced within twelve to eighteen months following completion of the site.

Apparently, petitioners have not yet applied for nor received any approvals for achieving their proposed plan for the site. Therefore, the basis for which they are claiming an exemption is speculative at best. Absent any evidence that their proposed construction can take place, neither they nor their agents can legitimately be conducting their mining activities solely in aid of such construction.

The MLRL does not allow exemptions from the law on faith. Some objective evidence must be presented to justify an exemption from the statute; particularly where there is no assurance that the construction planned can proceed to fruition.

The fact that the petitioners have a land-use objective in mind for their site, following the removal of the minerals in situ, goes more to their ability to meet the statutory requirements for obtaining a mining permit than their entitlement to an exemption from the statute.

The regulatory scheme envisioned by the statute is broader than merely ensuring that the land affected by mining will be reclaimed or that a land-use objective will be achieved. The MLRL and the regulations adopted pursuant to it require that the methods employed in the on-going mining activity minimize erosion,

sedimentation, dust, noise, water pollution and visual intrusions. Moreover, to achieve this result they require that reclamation of the land affected by mining take place concurrently with the mining activities to the extent practicable.

Lastly, the MLRL requires that a bond be posted to ensure that the reclamation plan for the affected land will be faithfully adhered to. None of these concerns are addressed when the exemption created by the statute is viewed from the perspective urged by the petitioners.

The petitioners second argument concerning the excavation and removal of the shale and overburden by Frank Corl and the Town of Tully Highway Department, although peripherally related to their request for an exemption, is equally unpersuasive. Again they seek to separate out the individual activities from the context in which they take place, an approach which tends to defeat the intent of the MLRL. The petitioners' argument that the shale is not being mined since they receive no money or exchange for it, fails to take into account the benefit by way of exchange they are directly receiving by its removal from the site. Moreover, their argument that the purpose of removing the shale does not encompass a commercial, industrial or municipal use fails to account for the obvious commercial activities of Frank D. Corl, who apparently operates a loading and delivery service with respect to the shale being mined.

The petitioners' argument with respect to the overburden being removed is equally unfounded, since the overburden consists

of materials which are in themselves minerals as defined in the statutes and regulations. Materials constituting overburden are only characterized as such when an operator is in the act of mining a mineral, that is overlain by such overburden. The reference to overburden in the definition of minerals in the regulations, 6 NYCRR 420.1(j), to wit: "Overburden shall be considered a mineral whenever it is removed from the affected land for sale, exchange or use in the regular operations of a business", assumes that mining for a specific mineral is taking place. This definition is intended to clarify the scope of the statute's coverage of mining, not to limit it, as urged by the petitioners. Moreover, the activities of the Town of Tully Highway Department in removing the dirt and stones that constitute the overburden for their landfill, clearly falls within a municipal or commercial use of the materials as described in 6 NYCRR 420.1(k). Furthermore, whether materials being used from the site constitute a "mineral" as defined in ECL §23-2705(7) and 6 NYCRR 420.1(j) or "overburden" as defined in ECL §23-2705(10) and 6 NYCRR 420.1(n) is basically irrelevant to the jurisdictional question of an exemption for the petitioners based on viewing the activity as being conducted "solely in aid of on-site ... construction".

The Petition fails to state the nature of the petitioners' relationship to or degree of supervision they exercise over Frank D. Corl or the Town of Tully Highway Department, the persons actually excavating and removing the minerals. It may be that

both Frank Corl and the Town of Tully Highway Department, rather than the petitioners are the proper parties to apply for a mining permit since the excavation and removal of the minerals benefit them as well as the petitioners. Absent evidence of a lease or contract to remove the materials, it must be assumed that they are removing the minerals under the supervision of the petitioners based on limited information contained in the Petition.

The allegations in the Petition concerning DEC's knowledge and express or tacit approval of the mining activity are unsubstantiated and irrelevant to the Petition for Declaratory Ruling.

Conclusion:

The activities being conducted by the petitioners, the Town of Tully Highway Department and Frank D. Corl must be viewed as a whole and should not be viewed from the narrow perspective urged by the petitioners. To do so would defeat the intent of the MLRL to regulate mining by objectively viewing the mining activity in the context in which it arises.

From a broader perspective, it is clear that a mine is being operated on the site owned by the petitioners. Since there is no assurance that construction as proposed by the petitioners can take place, the mining activities they are engaged in cannot be viewed as being conducted solely in aid of on-site construction. From the information provided, it appears that petitioners are

exercising sufficient control over the activities being undertaken on the site to require that they seek a mining permit from the Department.

DATED: Albany, New York  
June 17, 1980

  
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Richard A. Persico  
Deputy Commissioner/General Counsel