STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Petition of

TOWN OF SMITHTOWN

For a Declaratory Ruling

Declaratory Ruling
23-03

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Since 1947, the Town of Smithtown on Long Island has regulated gravel mining to require regrading and excavating permits which protect public safety and safeguard the environment from harmful water diversions, erosion or flooding. Under Smithtown's General Excavating and Regrading Ordinance, finished and graded areas are to be rehabilitated as fertile soils and reseeded. Smithtown has codified its authority as Chapter 30 of its Town Code, and has revised its ordinance periodically as the Town Board has found necessary; the most recent amendments date from August 24, 1982.

Smithtown now petitions for a Declaratory Ruling under Section 204 of the State Administrative Procedure Act and the rules of the Department of Environmental Conservation, 6 NYCRR Part 619, to set forth and explain the applicability of the New York State Mined Land Reclamation Law, L. 1974, c. 1093, codified as Title 27 of Article 23 of the Environmental Conservation Law, to Smithtown's Regrading and Excavating Ordinance. In particular, Smithtown inquires whether Section 23-2703(2) of the Mined Land Law has the effect of superceding its own Regrading and Excavating Ordinance. Since there are no reported court cases construing the

concurrent authority of the State and a town over mined land reclamation, both the sound administration of government and the furtherance of New York's mined land reclamation program are served by granting this Petition for a declaratory ruling.

The Mined Land Reclamation Law recites that it "shall supercede all other state and local laws relating to the extractive mining industry; provided however, that nothing in this title shall be construed to prevent any local government from enacting local zoning ordinances or other local laws which impose stricter mined land reclamation standards or requirements than those found herein." Section 23-2703(2), Environmental Conservation Law. The express purpose of this provision is to establish a minimum statewide standard for mined land reclamation. New York's Legislature established a policy to provide reclamation which includes, without restriction, the planting of forests, crops, seeding of grasses, protection of wildlife and aquatic resources, rehabilitation of mined land sites for recreational, residential, commercial and industrial reuse, and other purposes. The Legislature sought, inter alia, "to prevent pollution" and "to protect the health, safety and general welfare of the people, as well as the material beauty and aesthetic values in the affected areas of the state." Section 23-2703(1), Environmental Conservation Law.

To achieve these ends, New York requires a mined land reclamation permit, specifying a mined land use plan under Environmental Conservation Law §23-2713; the plan encompasses controls for aesthetic intrusion, minimizing dust, and planned drainage and

water control. Under Environmental Conservation Law §23-2715, a reclamation plan for the site mined must specify revegetation, grading, water impoundments, and other matters. The Department of Environmental Conservation has implemented these statutory provisions in regulations at 6 NYCRR Part 422.

New York's Mined Land Reclamation Act applies to operations from which minerals in excess of one thousand tons are removed within any successive twelve month period. Section 23-2711(1), Environmental Conservation Law. This direct state regulation supplements the Legislature's longstanding authorization to local townships to enact ordinances for the purposes of regulating "sand pits, quarries, top soil and other excavations." Section 130(23), Town Law. This legislative delegation of authority to Smithtown is in furtherance of Article 9, §2, of the New York Constitution, which mandates that "every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to...the protection, order, conduct, safety, health and well-being of persons or property thereon. Article 9, Section 2(c)(ii)(10).

Thus, Smithtown has express authority under the Constitution and the Town Law to regulate regrading and excavating, <u>unless</u> its local laws are less strict than the mined land reclamation standards or requirements of the State's Mined Land Reclamation Law. As the Court observed in <u>Envirogas, Inc., v. Town of Kiantone</u>, 112 Misc. 2d 432, 447 NYS 2d 221 (Sup. Ct., Erie Co., 1982):

> "The mere fact that a state regulates a certain area of business does not automatically pre-empt all local legislation

> which applies to that enterprise (Landfill v. Caledonia, 51 N.Y.2d 679, 683, 435 N.Y.S.2d 966, 417 N.E.2d 78). But where a state law expressly states that its purpose is to supersede all local ordinances then the local government is precluded from legislating on the same subject matter unless it has received 'clear and explicit' authority to the contrary. (Robin v. Inc. Vil. of Hempstead, 30 N.Y.2d 347, 350-351, 334 N.Y.S.2d 129, 285 N.E.2d 285). This is so, as the Court of Appeals recently observed, because 'the fount of the police power is the sovereign state, (and) such power can be exercised...only when and to the degree it has been delegated such lawmaking authority' (citations omitted) (People v. De Jesus, 54 N.Y.2d 465, 446 N.Y.S.2d 207, 430 N.E.2d 1260)."

In order to determine whether the Mined Land Reclamation Law ousts Smithtown from authority to regulate excavating and grading, it is necessary to determine if the provisions of Article 30 of Smithtown's Town Code are at least as strict as the requirements of Title 27 of the New York Environmental Conservation Law's Article 23. This test initially requires a review of the purposes of the statute and its terms, since "where local government is otherwise authorized to act, it will be prohibited from legislating only if the State pre-empts the field through legislation evidencing a State purpose to exclude the possibility of varying local legislation...." Monroe-Livingston Sanitary Landfill, Inc., v. Town of Caledonia, 51 N.Y.2d 677 at 683, 435 N.Y.S.2d 966, 417 N.E.2d 78 (1980).

Here, as in the Monroe-Livingston case, the statute speaks specifically of inclusion of local government, so long as they regulate in a way consistent with at least the minimum applicable

state requirements. The Department of Environmental Conservation anticipates a role for local governments in applying stricter mined land reclamation standards or requirements by permitting applicants for state permits to submit information, documents and bonds supplied in fulfillment of local governmental reclamation requirements to the Department "for consideration as satisfaction of the State requirements." 6 NYCRR §422.2(d). The details of such standards and requirements have been specified in Chapter IV, Subchapter D, of 6 NYCRR and "no local government shall be prevented from enacting or enforcing new or existing local zoning laws or ordinances or other local laws or ordinances which impose stricter mined land reclamation standards or requirements than those found in Title 27 or this subchapter." 6 NYCRR §420.2(c).

Having determined that there is a role for local government within the State's statutory framework, the next test is to carefully compare the provisions of the local ordinance to the Mined Land Reclamation Law. Close reading of Smithtown's Ordinance with New York's Mined Land Reclamation Law establishes that any lack of congruity between the municipal provisions and the state statutory sections is superficial. Smithtown regulates "top soil, sand, gravel <u>and</u> other minerals." Town Code §30-2. The State regulates such minerals, but not expressly top soil. Section 23-2705, Environmental Conservation Law. Smithtown regulates all "excavation" while the State regulates "mining" for commercial use or sale of a one thousand ton volume. Smithtown regulates "any person" while the State regulates an operator and applicant; in particular, Smithtown controls a contractor, agent

or subdivider of property or property owner under Town Code §30-3(c), while the State controls an owner, lessee or other person who operates, controls or supervises the extraction of minerals, under §23-2703(2), Environmental Conservation Law. Both jurisdictions are subject, as a matter of law, to the same State Environmental Qulaity Act ("SEQRA"), Article 8, Environmental Conservation Law. Substantially the same sort of submissions and undertakings are required for the Smithtown excavating plan, Town Code §30-5, as are necessary for the State Mined Land Use Plan, 6 NYCRR Part 422, only Smithtown is stricter in several respects. The same is true of Smithtown's finished grading and general rehabilitation §§30-5(D), 30-6, 30-7, 30-9 and the reclamation provisions of the State Law, 6 NYCRR §422.3(v), (vi) and 6 NYCRR Part 423.

While Smithtown's ordinance is generally either in accord with the Mined Land Reclamation Law or stricter than it, Smithtown's Code does have one provision which recites that "exceptions or waiver of requirements established by the General Excavating and Regrading Ordinance may be approved by the Town Board upon recommendation by the Town Engineer." Town Code §30-12(B). There is no authority for the Town making any exceptions to the minimum state-wide provisions of the Mined Land Reclamation Act; insofar as this exemption conceivably might be applied to vary the State minima, in any such event the Department of Environmental Conservation's regulations "shall supercede" Smithtown's local laws. 6 NYCRR §420.2(c). In like vein, while there is no requirement that Smithtown's provisions be exactly

congruent with the State statute, if Smithtown ever fell below the State minima, by operation of law the applicable state standards or requirements would govern to the exclusion of Smithtown.

Accordingly, the substance of Smithtown's ordinance is stricter than or at least as strict as the New York Mined Land Reclamation Act. In such circumstances, both Smithtown and the Department of Environmental Conservation have concurrent jurisdiction over excavations involving 1,000 tons of extractions per annum and Smithtown has exclusive jurisdiction over excavations of lesser extractions. The constitutionality of Smithtown's police power exercise in this instance is established. See, e.g. Lizza & Sons v. Town of Hempstead, 69 N.Y.S.2d 296, aff'd 272 A.D. 921 (1946), and Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

New York's state statute for mined land reclamation and its encouragement of stricter local reclamation laws lead the nation. Congress only enacted a comparable Surface Mining Control and Reclamation Act, 30 USC §1201, in 1977. The U. S. Supreme Court has adjudicated the constitutionality of the analogous federal scheme in Hodell v. Virginia Surface Mining & Reclamation Association, 452 U.S. 264 (1981), and in Hodell v. Indiana, 101 U.S. 2376 (1981). Ample basis exists in fact and in law for Smithtown to participate in this emerging nation-wide regulatory pattern for controlling mined lands and accomplishing their reclamation. The townships led the State in enacting controls on gravel pits and

excavating, just as the State led the nation. New York's Legislature sanctioned the very sort of responsible municipal leadership here evidenced by Smithtown's Town Board.

Article 30 of the Smithtown Town Code is valid and not superceded by the New York State Mined Land Reclamation Law.

Nicholas A. Robinson
Deputy Commissioner & General Counsel

Dated: Albany, New York
October 18, 1983