

STATE OF NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of
the Petition of

WINER, NEUBURGER
AND SIVE, P.C.

For a Declaratory Ruling

In the Matter of
the Petition of the

IRVINGTON UNION FREE
SCHOOL DISTRICT

For a Declaratory Ruling

DECLARATORY RULING
DEC 23-04

Certain residents of the Village of Irvington, New York, living near the Dow's Lane Elementary School, through their counsel Winer, Neuburger and Sive, P.C., seek a Declaratory Ruling, pursuant to Section 204 of the State Administrative Procedure Act and 6 NYCRR Part 619 as to the applicability of the "Mined Land Reclamation Law", L.1974, Ch.1043, codified as Article 23, Title 27 of the Environmental Conservation Law ("ECL") to certain activities proposed by the Irvington Union Free School District ("School District"). The School District, represented by Plunkett & Jaffee, P.C., subsequently requested a Declaratory Ruling on the same questions as have the Irvington Village residents. Both Petitioners have consented to my ruling on their respective applications.* I consolidate the petitions and rule on both concurrently.

* Although I have previously served as Counsel to the law firm of Winer, Neuburger & Sive, I never had any involvement in the matter that is the subject of this Declaratory Ruling. Similarly, although while a Trustee of the Union Free School District of the Tarrytowns, the School Board and I in my official capacity were represented by the law firm of Plunkett & Jaffee, this relationship is no way involved the matters at hand.

(note continued p.2)

The School District proposes to reconstruct an existing playing field at the Dow's Lane Elementary School, using the excess soil and rock removed from this construction project to improve a field and create another field at the Irvington High School. The School District has prepared an Environmental Assessment Form ("EAF") dated November 16, 1983, pursuant to the State Environmental Quality Review Act ("SEQRA"), ECL Article 8. The EAF recites that the proposed project involves "excavation that would remove more than 1,000 tons of natural material (i.e., rock or soil) per year", specifically the removal of 9,000 cubic yards of such material. See EAF Part II, at 5, Part I, at 3. After removing topsoil from the Dow's Lane playing field which will be stored at the field, the School District intends to drop the level of the field by approximately five feet by removing earth from under the field. This material will be replaced on the same field for expansion and regrading with the excess (approximately 6,000 cubic yards) to be utilized to improve two fields at the Irvington High School. The predominant soil type at the Dow's Lane field is described in the EAF as "sandy loam".

The question raised by the cross petitions here is whether the removal by a school district of over 1,000 tons of top soil

Footnote Continued

Nonetheless, in order to avoid the appearance of any conflict of interest, I offered to recuse myself and requested that a DEC Staff attorney ask each party if there were objections to my rendering the Rulings requested on this matter. By letter dated December 21, 1983, Joel H. Sachs, Esq. of Plunkett & Jaffe, Counsel for the School District stated that there were no such objections. Consent was also given by Winer, Neuburger & Sive on behalf of its clients by letter of Mark Chertok, Esq., dated January 3, 1984.

and subsoil at one of its schools, to re-construct a field at such school and to improve fields at another school constitutes the "mining" of "minerals" obligating the School District to obtain a permit pursuant to ECL §23-2711. Since there have been neither Declaratory Rulings nor reported court decisions rendered on this issue arising under the Mined Land Reclamation Law, it is in the public interest to entertain the instant petition. For the following reasons, I conclude that the activities proposed by the School District are excluded from the statutory definition of "mining", ECL §23-2705(8), as clarified in the regulations, 6 NYCRR §420.1(k), promulgated by the Department pursuant to the Mined Land Reclamation Law, and therefore the School District is not required to obtain a mining permit pursuant to ECL §23-2711.

The Mined Land Reclamation Act applies to all mines from which more than one thousand tons of minerals are to be removed from the earth within twelve successive calendar months; in order to operate such mines a permit must be obtained from the Department of Environmental Conservation ("Department"). ECL §23-2711(1). Applications for Department mining permits must contain a "mined land-use plan" which includes, inter alia, a "reclamation plan" specifying the method of reclaiming affected land. ECL §§23-2711(3), 23-2713, 23-2715. As a condition precedent to the issuance of such permit, the Department may require that an applicant furnish a reclamation bond or appropriate substitute conditioned upon the performance of the applicant's reclamation responsibilities with respect to the mine and naming the State as beneficiary. ECL §23-2717(1).

Contrary to the assertions of the School District, the proposed project clearly involves the extraction or removal of "minerals" within the jurisdictional amount (i.e., in excess of one thousand tons per year); the School District does not disavow its own EAF showing that the amount of material to be removed from the Dow's Lane field to the Irvington High School exceeds one thousand tons. The term "mineral" is defined in the Mined Land Reclamation Law broadly to mean "aggregate, cement, rock, clay, coal, curbing, dimension stone, dolostone, emery, flagstone, garnet, gem stones, gravel, gypsum, iron, lead, limestone, marble, marl, metallic ore, paving blocks, peat, riprap, roadstone, salt, sand, sandstone, shale, silver, slate, stone, tack, titanium, trap rock, wollastonite, zinc or any other solid material or substance of commercial value found in natural deposits in or on the earth. ECL §23-2705(7), 6 NYCRR 420.1(c) (emphasis added). The petitioning residents assert that the materials to be excavated from the Dow's Lane field include "gravel and sand", which are specifically listed as "minerals" in ECL §23-2705(7). Disputing this characterization of the materials, the School District maintains that it intends to remove "topsoil and sandy loam soil" and argues that these materials are not encompassed within the statutory definition of "mineral".

The School District's assertion is incorrect. Topsoil and sandy loam subsoil as "solid material or substance of commercial value found in or on the earth" are within the statutory definition of "mineral" set forth in ECL §23-2705(7). Although

the School District does not contemplate a commercial sale of the materials removed under the proposed project, topsoil and subsoil generally do have commercial value* and, as such, are "minerals" for purposes of the Mined Land Reclamation Law. Further, sandy loam** soil consists in part of sand and clay, which are specifically defined as minerals in ECL §23-2705(7) and 6 NYCRR §420.1(i). Finally, given the geology of Irvington on the banks of the Hudson, elements of rock are likely to be included in the excavation and fill, as the School District's own bidding specifications recognize;*** such rocks are also within the definition of "minerals" of the Mined Land Reclamation Law.

Despite the fact that the School District will excavate more than one thousand tons of minerals the School District's proposed activities, nonetheless, do not constitute "mining" as that term is defined in ECL §23-2705(8) and 6 NYCRR §420.1(k). "Mining" is defined in ECL §23-2705(8) as

... 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

* See, e.g., definition of "topsoil" in Glossary of Geology, American Geological Institute 745, (1972) as "a presumably fertile soil used to cover areas of special planting". Topsoil is commonly sold commercially.

** "Sandy loam" is defined, Id., at 629, as a "soil containing 43-85% sand, 0-50% silt, and 0-20% clay and having the percentage of silt plus twice the percentage of clay exceeding 30, or a soil containing 43-52% sand, less than 50% silt and less than 7% clay."

*** Paragraph 7(e), Section 7 "Rough Grading", at 26 of Specifications for Construction of Play Areas, Irvington High School and Dow's Lane School, Irvington, N.Y., submitted by Winer, Neuburger & Sive.

parts thereof for extraction or removal of minerals from their original locations 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 added).

Thus, the statute excludes from the definition of "mining" certain mining activities which are conducted in connection with on-site construction projects.

The regulations promulgated pursuant to the Mined Land Reclamation Law, ECL §23-2721(1), clarify the scope of this statutory exclusion:

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 purposes of sale, exchange, commercial, industrial or municipal use. 6 NYCRR §420.1(k) (emphasis added).

This explanatory regulatory language interprets the on-site construction project exclusion and reserves the exclusion for on-site construction activities which do not result in an economic transaction involving parties other than the site owner. The clarifying language of the regulations is in accord with the statutory definition of "mine" which also indicates that the applicability of the Mined Land Reclamation Law requires the

involvement of some economic transaction. ECL §23-2705(5) defines a "mine" as "any pits or underground workings from which any mineral is produced for sale, exchange, commercial or municipal use..." (emphasis added).

This regulatory language reflects the legislative intent in enacting the Mined Land Reclamation Law. The Legislature addressed primarily "substantial, commercial mining operations", as indicated by the Legislative Memorandum in Support submitted by the State's Executive Chamber. See, McKinney's 1974 Session Laws, 2047-2048. The Memorandum explains that "since the bill is aimed at the regulation of substantial, commercial mining operations, it includes specific provisions exempting non-commercial and relatively minor operators. Accordingly, the proposal does not affect excavation or grading when conducted solely in aid of on-site farming or construction." Id. at 2048. Consistent with this legislative intent, the terms "sale" and "exchange" and "industrial or municipal use" contained in the mining regulations, represent examples of commercial mining operations; "municipal use" in this context involves the operation by municipalities of mines, e.g., sand pits, largely for highway and landfill needs. The Legislature determined that the State's environmental protection interests required that local governments be subject to the same standards as commercial excavators.

The identity of the persons undertaking the proposed construction activity, whether a business corporation or a municipality, is not alone determinative in applying the statutory

exclusion; rather, the purpose and actual facts of the proposed activity are the principal element which must be scrutinized to assure that "construction" is not an artifice designed to permit a person to avoid the requirements of the Mined Land Reclamation Law while actually operating a commercial mine. To guide this scrutiny, the regulations at 6 NYCRR §420.1(k) utilize an economic transaction test which examines the purpose of the removal of the minerals, i.e., sale, exchange, commercial, industrial or municipal use.

Applying these statutory and regulatory tests to the School District's conduct, I cannot follow the arguments made by the petitioning residents. They argue that the proposed removal of minerals at the Dow's Lane School will not be conducted solely in aid of on-site construction because the project involves construction at two locations and constitutes "municipal" use. For these reasons, the residents argue that the School District is not within the statutory exclusion for "on-site" construction.

The "on-site" aspect of the exclusion is intended to avoid the operation of a commercial grade mine at one location serving construction projects located elsewhere. Where construction is undertaken at the actual location of the mineral extraction, the exclusion applies. The exclusion also applies when an amount of minerals in excess of the jurisdictional limit is removed from such construction project and utilized by the site owner at another site owned by the same person, so long as the use of the removed minerals does not involve a transaction of sale or exchange, or an industrial or municipal use. Thus, the term

"solely" assures that a spurious construction project will not be undertaken in order to benefit economically from the use of the excess excavation materials.

As demonstrated by the information supplied by Petitioners, the proposed project is indeed aimed "solely" at bona fide construction at two schools in the School District. This use by a School District is not "municipal" since it involves an educational purpose and not a function of local government. A school district is not a municipal corporation. See §2 General Municipal Law; Central School District 1 v. State, 18 A.D.2d 943, 237 N.Y.S.2d 682, aff'd 13 N.Y.2d 1031, 245 N.Y.S.2d 602 (1963), cert. den. 376 U.S. 943 (1964); and Title II, Education Law, §1501 et seq. It is manifestly not industrial or commercial. Id. A school district's on-site construction therefore can qualify for the on-site construction exemption.

The Dow's Lane School field will not be "mined" to serve as a source of construction fill in the nature of a commercial venture or to serve municipal needs for mineral resources. As described by both the petitioning residents and the School District, the proposed project will not result in an economic transaction with respect to the minerals so removed or extracted; the project entails the removal of minerals at a school field by a School District to reconstruct that same field and other fields at another school in the District. The School District will not be selling or exchanging the materials; its proposed construction activities are for recreational and physical education purposes.

Theoretically the proposed project could involve some avoided cost for the School District since the District need not pay to dump excavated fill from one field and has no need to pay to buy new fill for its other field. This limited kind of benefit does not deny the School District's project the statutory exclusion for on-site construction activities contemplated. The fact that materials removed from the Dow's Lane Elementary School playing field will be used to improve and construct fields at the District's Irvington High School does not remove the project from the exclusion for on-site construction activities. In this case, both construction areas are owned and operated by the same entity and are located within the same school district serving the same function. No economic transaction is involved as the Mined Land Reclamation Law reflects that term, and the project will result in the same productive use of the land for improved school playing fields at both locations.

Moreover, the School District's project accomplishes the basic statutory environmental conservation objectives of the Mined Land Reclamation Act without requiring mining permits. The Act seeks to use reclamation plans to return mined land to productive use and protect the environment. See ECL §§23-2703(1), 23-2711, 23-2713. The primary purpose of the Legislature in establishing the Mined Land Reclamation Law was expressed by the Governor upon approval as "assuring that land damaged by mining operations is restored to a reasonably useful and attractive condition. To accomplish this goal, the bill will prohibit the initiation or continuation of major mining activity

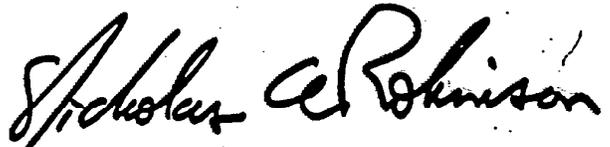
within the State after April 1, 1975 until the operator of the mine secures a permit from the Department of Environmental Conservation." Governor's Approval Memorandum for L.1974, Ch.1043 dated June 15, 1974, McKinney's 1974 Session Laws, 2133. Construction projects necessarily are undertaken in order to achieve productive use of the land under construction, thereby obviating the need for a mining permit with its attendant reclamation plan; the School District's construction project inherently "reclaims" any excavated lands. As described in the Commissioner's Order In the Matter of Chaffee Landfill, Inc., Respondent, February 29, 1984, "a fair reading of the statutory exemptions is that the farming or construction activity associated with with the excavation must serve the reclamation objectives of the law." Chaffee Order at 3. Unlike the factual situation present in the Chaffee case, the School District's proposed construction activities, which involve full reclamation of the field under construction clearly serve the statute's reclamation purposes.

The petitioning residents have ample opportunity in the course of the construction to address their concerns that the project will create conditions with safety risks to students such as vertical elevation drops at one playing field. Such concerns as these are germane to the Education Law, and not properly a subject of the Mined Land Reclamation Act. Certainly the Irvington School Board shares the residents' concerns for students safety and can be expected to reflect those concerns in the design, construction and operation of its playing fields.

The residents' environmental issues are properly addressed in the School District's evaluations required pursuant to the State Environmental Quality Review Act (SEQRA) and not in the question presented for this Declaratory Ruling.

Accordingly, the School District is not required to secure a mining permit from the Department for the construction project at the Dow's Lane Elementary School.

DATED: Albany, New York
March 23, 1984



Nicholas A. Robinson
Deputy Commissioner and
General Counsel