

state court precedents." Petition of Northeast Mines at 2. For the following reasons, Petitioners' arguments are without merit. The Department of Environmental Conservation ("Department") has found the Smithtown Ordinance to be consistent with and not superseded by the Mined Land Reclamation Law, and Petitioners' legal arguments afford no basis for revising that prior ruling.

The provision of the Mined Land Reclamation Law under consideration here is ECL §23-2703(2):

For the purposes stated herein, this title shall supersede 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. (emphasis added).

The basic issue presented by Petitioners is whether the Mined Land Reclamation Law by operation of ECL §23-2703(2) preempts local mining laws. The plain language of the Mined Land Reclamation Law, the legislative purpose in enacting the statute, and the relevant case law demonstrate that local mining laws are valid unless such local laws are less strict than the provisions of ECL Article 23, Title 27 and the statute's implementing regulations, 6 NYCRR Parts 420-426.

Principles of statutory construction instruct that a statute or legislative act is to be construed as a whole and that all sections of a law are to be read and construed together to determine the legislative intent. McKinney's Statutes, §§97, 130. Subdivision 2 of ECL §23-2703 must be read as a whole and

with the context of the entire Title 27. Read in connection with the "provided however" clause in subdivision (2) of ECL §23-2703, the phrase "this title shall supersede all other state and local laws relating to the extractive mining industry" simply indicates the Legislature's intent to establish minimum statewide standards to govern where local governments fail to legislate and to establish a basic regulatory framework below which local governments may not legislate more permissively. The second clause of subdivision (2) expressly allows local governments to impose stricter standards or requirements. Read properly in its entirety, ECL §23-2703(2) authorizes local governments to enact ordinances that are at least as strict as, but not inconsistent with, ECL Article 23, Title 27. This provision structures the home rule powers of the Town consistent with the New York State Constitution, Article IX, §2. Unlike Consolidated Edison of New York v. Town of Red Hook, 60 N.Y.2d 99, 105 (1983), where the legislative intent to preempt local home rule completely was evident, here home rule is preserved.

ECL §23-2711 corroborates this interpretation in the context of mining permits; in subdivision (10), ECL §23-2711 provides that "[N]othing in this title [Title 27] shall be construed as exempting any person from the provisions of any other law or regulation requiring a permit" (emphasis added). The broad language of this section of the Mined Land Reclamation Law further shows that the Legislature contemplated and intended that local governments could require mining or other permits of State

regulated mining operations. All sections of the Mined Land Reclamation Law, including ECL §23-2703(2) and §23-2711(10), must be read together to determine meaning, purpose and intent, in pari materia. Read together these sections manifest the Legislature's intent to allow local governments a role in the regulation of mining.

The regulatory scheme created by ECL Article 27, Title 23 is intended to achieve the reclamation of mined lands and to mitigate the environmental impacts of mining. See ECL §23-2703(1). The Legislature's primary purpose in enacting the Mined Land Reclamation Law was to assure the restoration of lands damaged by mining operations. See Governor's Approval Memorandum, McKinney's 1974 Session Laws, 2133; Legislative Memorandum in Support, Id. at 2047-48. Hence ECL §23-2703(2) utilizes the term mined land reclamation standards and requirements, which are the major components of Title 27, in its authorization of local regulation. The use of the term "reclamation" serves then to underscore the concurrent nature of State and local jurisdiction.

Throughout their petition, Petitioners emphasize strongly the use of the word "supersede" in ECL §23-0705(2) as evidence of statutory purpose to preempt all local authority to regulate regrading and excavating. Petitioners' focus on a single word, taken out of context, is contrary to the fundamental principles of statutory construction discussed above. To adopt Petitioners'

garbled construction would distort the meaning and purpose of the Mined Land Reclamation Law.

Similarly, Petitioners misconstrue the importance, noted above, of the "provided however" language in the second clause of ECL §23-2703(2) to the meaning of the entire subdivision.

Petitioners' denomination of the clause as a "proviso" under McKinney's Statutes §212 is not talismatic, and ignores the teaching of §212 to avoid such mechanistic labelling.

Petitioners argue that ECL §23-2703(2) limits the area of permissible local regulation only to mined land reclamation thereby preempting all local regulation of mining itself. Again, Petitioners' narrow focus on one word in ECL §23-2703(2) ignores the legislative intent evinced by other portions of the provision. That the Legislature, in enacting ECL §23-2703(2), intended a wide range of local regulation is evidenced by the use of the terms reclamation "standards" and "requirements". These broad terms contemplate comprehensive local regulation, including, inter alia, permit requirements. Moreover, the regulation of reclamation necessarily reaches certain aspects of mining operations which, as indicated by the State regulations, can affect or relate to the efficacy of the ultimate reclamation of the mined land. See, e.g., 6 NYCRR §422.2(c)(3). Therefore, the regulation of "reclamation" cannot be construed so narrowly, as Petitioners urge, to ignore the statutory language and purpose to allow local regulation consistent with State requirements.

Contrary to Petitioners' argument, the Department's prior ruling, In the Matter of the Town of Smithtown, accords with the leading cases on the subject of preemption. Petitioners agree that the test established by the leading cases, as cited in the Smithtown Ruling at 3-4, is that "[w]here 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." Envirogas, Inc. v. Town of Kiantone, 112 Misc.2d 432, 447 N.Y.S.2d 221 (Sup.Ct., Erie Co., 1982), aff'd 454 N.Y.S.2d 964 (4th Dept., 1982). Petition of Northeast Mines at 17.

Here, the Town of Smithtown has received express statutory authority to legislate on the same subject matter as that which DEC regulates.

Without substantial explanation or argument, Petitioners place great reliance on the recent case of Consolidated Edison Company of New York v. Town of Red Hook, 60 N.Y.2d 99 (1983). See submission dated December 5, 1983. The Court in Consolidated Edison found the Town's local law to be invalid for two reasons: first, it imposed local regulation in an area where the Legislature evidenced its intent to preempt the field of regulation; second, it was inconsistent with Article VIII of the Public Service Law, a general law. 60 N.Y.S.2d at 105. The Court explains that "[w]hile these two infirmities are often interrelated, each is in itself a sufficient basis for

invalidating a local law...." Id. Neither infirmity, however, is present with respect to the Town of Smithtown's local mined land ordinance.

The Court found in Consolidated Edison that the history, scope, and comprehensive regulatory scheme of Public Service Law, Article VIII evidenced the Legislature's desire to preempt further regulation. 60 N.Y.2d at 106. In contrast, the history, scope and regulatory scheme of the ECL Article 23, Title 27, evidence a legislative intent to include local regulation which comports with minimum State requirements. As explained by the Court in Consolidated Edison, Article VIII of the Public Service Law was intended to provide for the resolution of all matters concerning the location of major stream electric generating facilities in a single proceeding replacing an uncoordinated welter of state and local approvals, procedures and agencies. Id. Unlike Article VIII, the Mined Land Reclamation Law expressly authorizes regulation by local government and specifically allows for local permit requirements. ECL §23-2703(2), §23-2711(10).

With respect to inconsistency, the second basis for finding local regulation to be invalid, Petitioners make no showing beyond their bald assertion, that the Town Ordinance is inconsistent with Title 27 and the statute's implementing regulations, 6 NYCRR Parts 420 through 426. The Smithtown Ruling closely compares the provisions of the local ordinance to those of the Mined Land Reclamation Law and rules that the Ordinance is

in accord with the State statute or stricter than it. Smithtown Ruling at 5-6. Petitioners simply state that the "standards contained in §30-5 of the Ordinance overlap and in certain instances conflict with the standards set forth in 6 NYCRR §422.2(c)(3)(iii)-(vi) and (4)." Petition at 11. For the reasons set forth in the prior Smithtown ruling, close comparison of the cited provisions of the local ordinance and state regulations demonstrates that there is no "conflict" or inconsistency by which Smithtown's ordinance is less strict than the statute. The local ordinance, while drafted in different words, is either essentially the same or stricter than State requirements. As noted in the Smithtown Ruling, the local law need not be identical to State law, so long as State minima are met.

Finally, Petitioners argue that "[p]erhaps the clearest indication -- aside from the express use of the word 'supersede' -- is the fact that municipalities are themselves now under the jurisdiction of DEC and are too required to obtain a state mining permit." Petition at 11. The fact that municipalities are required to obtain a mining permit does not represent any indication of preemption; rather, such requirement corresponds to similar requirements for local governments to obtain permits found under the solid waste and air resources statutory schemes, ECL Articles 27 and 19, which Petitioners admit clearly allow local regulation. See Petition at 14-16. In light of this similarity, the fact that the mining permit

requirement is applicable to local government further indicates that local governments are not preempted from regulating mining.

Accordingly, the Town of Smithtown Excavating and Regrading Ordinance, Article 30 is considered to be consistent with and not superseded by the provisions of the State Mined Land Reclamation Law.



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