STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Application for Modification of the Mined Land Reclamation Permit Issued Pursuant to Title 27 of Environmental Conservation Law (ECL) article 23 for the Wainscott Sand and Gravel Mine

- by -

SAND LAND CORPORATION,

Applicant.

RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON MOTION TO RENEW AND REARGUE AND ON REQUEST FOR CLARIFICATION

DEC Permit Application ID No. 1-4736-00851/00003

December 10, 2018

Appearances:

-- Thomas S. Berkman, Deputy Commissioner and General Counsel (David Rubinton, Assistant Regional Attorney, of counsel), for staff of the Department of Environmental Conservation.

-- Matthews, Kirst & Cooley, PLLC (Brian E. Matthews of counsel), for applicant Sand Land Corporation.

-- New York State Assemblyman Fred W. Thiele, Jr., on his own behalf (no submission).

-- Devitt Spellman Barrett LLP (David H. Arntsen of counsel), for the Town of Southampton.

-- Tooher & Barone, LLP (Maeve M. Tooher of counsel), for Bridgehampton Road Races, LLC.

-- Jeffrey L. Bragman, P.C. (Jeffrey L. Bragman of counsel), for Group for the East End and Citizens Campaign for the Environment (no submission).

-- Lazer, Aptheker, Rosella & Yedid, P.C. (Zachary Murdock of counsel), for Joseph Phair, Margot Gilman, and Amelia Doggwiler.

-- Andrea Spilka, for Southampton Town Civic Coalition (no submission).

-- Elena M. Loreto, for Noyac Civic Council, Inc. (no submission).

RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON MOTION TO RENEW AND REARGUE AND ON REQUEST FOR CLARIFICATION

By ruling dated January 26, 2018, I suspended permit hearing proceedings under 6 NYCRR part 624 (Part 624) on applicant Sand Land Corporation's application for modification of its mined land reclamation permit for its Wainscott Sand and Gravel mine. The proceedings were suspended and adjourned without date pursuant to ECL 23-2703(3) pending submission of proof that applicant's proposed mine expansion is allowed under the Town Code of the Town of Southampton. Presently before me is applicant's motion seeking renewal and reargument of the January 26, 2018 ruling. Also before me is a request by staff of the Department of Environmental Conservation (Department or DEC) seeking clarification of the ruling. For the reasons that follow, applicant's motion to renew and reargue is denied, and Department staff's request for clarification is granted.

I. PROCEEDINGS

The complete factual and procedural background of this proceeding is detailed in the January 26, 2018 ruling and will not be repeated here. In summary, applicant Sand Land Corporation (Sand Land or applicant) currently mines an approximately 50-acre site it owns at 585 Middle Line Highway, Bridgehampton, Town of Southampton, Suffolk County (site). The facility, known as Wainscott Sand and Gravel, was authorized pursuant to a Mined Land Reclamation Law (MLRL) permit issued by the Department to mine sand and gravel from 31.5 acres of the 50-acre site to a depth of 160 feet above mean sea level, or 60 feet below grade (see Permit, effective Nov. 5, 2013, NYSDEC OHMS Document No. 201569946-00003.D[1]; see also Revised Mined Land Use Plan, received Nov. 1, 2013, OHMS Doc. No. 00029.PP).[2]

In January 2014, applicant filed with the Department an application to modify its current permit to allow for a vertical expansion of its sand and gravel operation (see Mining Permit Application, dated Jan. 15, 2014, OHMS Doc. No. 00003.E). Applicant sought to mine 4.9 more acres than previously approved, and to excavate the floor of the mine from the previously approved depth of 160 feet above mean sea level to 120 feet above mean sea level

[1] Each document is marked "NYSDEC OHMS Document No. 201569946" followed by a hyphen and a five-digit number (see Exhibit List, attached to Matter of Sand Land Corp., Ruling of the Chief ALJ on Threshold Procedural Issue, Jan. 26, 2018 [Ruling]). Here after, documents will be referenced as "OHMS Doc. No." followed by the five-digit number.

[2] Applicant's most recent permit has an expiration date of November 4, 2018 (see Permit, OHMS Doc. No. 00003.D). On September 11, 2018, Department staff issued to applicant a September 10, 2018 notice of intent to modify applicant's current permit (see Letter from Daniel Whitehead, Director, Division of Environmental Permits, to John Title, Sand Land Corp., dated September 11, 2018). In the notice of intent to modify, the Department seeks modification of the permit to require the cessation of mining activities and the initiation of steps to reclaim the mine (see id.). By letter dated September 21, 2018, applicant requested a hearing on the proposed permit modification (see Letter from Brian E. Matthews, Esq., dated Sept. 21, 2018). During an October 19, 2018, conference call with representatives of staff and applicant, the parties confirmed to the undersigned ALJ that the permit modification proceeding is adjourned pending settlement discussions.

(see Modification Summary, id.: see also Site Plan, revised Feb. 10, 2014, OHMS Doc. No. 00003.G). According to the application materials, after lowering the mine floor by 40 feet, the depth to groundwater would be 100 feet (see Modification Summary, id.).

On April 3, 2015, Executive Deputy Commissioner Marc S. Gerstman issued a notice of permit denial (see OHMS Doc. No. 00002).[3] Applicant requested a hearing on the permit denial, and the matter was referred to the Department's Office of Hearings and Mediation Services for permit hearing proceedings pursuant to Part 624 before the undersigned Chief Administrative Law Judge (ALJ). After issuance and publication of a July 31, 2015 notice of deadline for petitions for party status, public legislative hearing, and issues conference, petitions for full party and amicus party status were filed in this matter, and a public legislative hearing and pre-adjudicatory hearing issues conference were convened. Thereafter, the issues conference record was compiled and made available to the parties, and the parties engaged in post-issues conference briefing.

On January 26, 2018, I issued the ruling on the threshold procedural issue (see Matter of Sand Land Corp., Ruling of the Chief ALJ on Threshold Procedural Issue, Jan. 26, 2018 [Ruling]). In the Ruling, I held that ECL 23-2703(3) prohibits the Department from processing mining permits for mines located in towns such as the Town of Southampton, Suffolk County, where the county, with a population of over one million people, draws its primary drinking water for a majority of its residents from a designated sole source aquifer, and the town has a local law prohibiting mining in the town. I further held that ECL 23-2703(3) applies to applications to modify existing permits where, as here, the application seeks to expand an existing mine beyond its previously approved boundaries. I also concluded that ECL 23-2711 required an inquiry into whether an application for a new permit, or an application to renew or modify an existing permit, is authorized under local law. In this case, however, the response provided by the Town of Southampton to the Department's ECL 23-2711 inquiry raised doubts about whether applicant's proposed mine expansion constituted the mere continuation of a prior non-conforming use, or an enlargement or extension of a non-conforming use prohibited by the Town Code. Accordingly, pursuant to ECL 23-2703(3), the permit hearing proceeding was suspended and adjourned without date pending submission of a definitive determination by the appropriate municipal authority that applicant's proposed mine expansion is authorized under local law.[4]

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[3] Subsequent to issuing the notice of permit denial, Executive Deputy Commissioner Gerstman became Acting Commissioner. Accordingly, Acting Commissioner Gerstman delegated the Commissioner's decision making authority in this Part 624 permit hearing proceeding to Assistant Commissioner Jared Snyder by memorandum dated October 16, 2015. The memorandum delegating decision making authority to Assistant Commissioner Snyder was forwarded to the parties to this proceeding under cover of a memorandum dated October 20, 2015, from Assistant Commissioner Louis A. Alexander to the service list. The titles of both Mr. Snyder and Mr. Alexander have since been changed to Deputy Commissioner.

[4] The Ruling also established a schedule for the filing of appeals and replies to the Commissioner from the Ruling. Upon the request of applicant, the appeal schedule was adjourned pending decision on applicant's motion to renew and reargue.

Applicant subsequently served and filed a notice of motion dated February 23, 2018, seeking renewal and reargument of the Ruling. In support of the motion, applicant filed an affirmation in support (see Affirmation of Brian E. Matthews, Esq., with Exhibits A through J attached). Affirmations in opposition to applicant's motion were filed by full-party petitioners Town of Southampton (Town) (see Affirmation of David H. Arntsen, Esq., with Exhibit A), Bridgehampton Road Races, LLC (BHRR) (see Affirmation of Meave M. Tooher, Esq.), and Joseph Phair, Margot Gilman, and Amelia Doggwiler (Neighbors) (see Affirmation of Zachary Murdock, Esq.), all dated March 26, 2018. Upon the request of applicant, I authorized applicant to file a reply affirmation, which applicant filed dated April 4, 2018 (see Reply Affirmation of Brian E. Matthews, Esq.).

Meanwhile, by email dated March 5, 2018, Department staff requested clarification whether the Ruling directed staff to make additional inquiries to the Town at this time. Correspondence received in response to Department staff's request include two emails from the Town, a letter and an email from the Neighbors, three emails from applicant, and a letter from BHRR, all dated March 12, 2018.

Finally, I received a copy of a letter dated July 18, 2018 from Jay Schneiderman, Supervisor, Town of Southampton, to Roger Evans, Regional Permit Administrator, clarifying the Town's position regarding applicant's pending application. Sand Land provided a copy of its July 27, 2018 letter to Mr. Evans responding to the Town's July 18, 2018 letter.

II. DISCUSSION

A. Motion to Renew and Reargue

Although motions to renew or reargue are not expressly authorized in permit hearing proceedings under Part 624, motions seeking that relief filed pursuant to 6 NYCRR 624.6(c) are analyzed applying the standards governing those motions under CPLR 2221 (see Matter of Kingston Oil Supply Co., Ruling of the Commissioner on Motions for ALJ's Recusal and Reconsideration, Jan. 20, 1995, at 3).[5]

Pursuant to CPLR 2221(d), motions for leave to reargue must be identified as such, and must be based upon matters of fact or law allegedly overlooked or misapprehended by the tribunal in determining the prior motion (see CPLR 2221[d][1], [2]). Motions to reargue are decided based upon the papers submitted on the original motion, and must not include any

[5] The Town and BHRR argue that applicant's motion is improper because it is not seeking to renew or reargue a prior motion. However, applicant is seeking to renew and reargue issues raised at the issues conference, which is a regulatory step under Part 624 akin to a summary judgment proceeding (see Matter of Terry Hill South Field, First Interim Decision of the Commissioner, Dec. 21, 2009, at 9). At the issues conference, the parties essentially seek summary judgment on factual and legal issues raised by the Department's permit application determination and in the petitions for party status (see 6 NYCRR 624.4[b][2]). Accordingly, applicant's motion is essentially seeking renewal and reargument of applications to accept or reject legal and factual issues made at the issues conference and in post-issues conference briefing.

matters of fact not offered on the prior motion (see CPLR 2221[d][2]; Matter of 2526 Valentine, LLC, Ruling of the ALJ on Motion for Reconsideration, March 10, 2010, at 3 [citing Phillips v Village of Oriskany, 57 AD2d 110, 113 [4th Dept 1977]). Thus, a motion for reargument is not a vehicle for raising new facts or legal issues not raised on the prior motion (see Matter of Grout, Ruling of the Chief ALJ on Motion for Leave to Reargue, Aug. 14, 2015, at 5 [citing Simpson v Loehmann, 21 NY2d 990, 990 (1968)]). Nor is it "designed to afford an unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted" (id. [quoting Matter of Mayer v National Arts Club, 192 AD2d 863, 865 (3d Dept 1993)]; see also Rodriguez v Gutierrez, 138 AD3d 964 [2d Dept 2016]).

Pursuant to CPLR 2221(e), motions for leave to renew must be identified as such, and must be based on new facts not offered on the prior motion that would change the prior determination or must demonstrate that there has been change in the law that would change the prior determination (see CPLR 2221[e][1], [2]). In addition, the motion must contain reasonable justification for the failure to present the new facts on the prior motion (see CPLR 2221[e][3]).

In support of its motion for reargument, applicant asserts that the Ruling overlooked or misapprehended controlling facts and law with respect to applicant's right to expand the area to be mined to the boundaries of its 50-acre parcel without the need for any further permit or approval from the Town. With respect to the controlling law, applicant asserts that its right to use the entire 50 acres of its premises for its prior non-conforming mining use is established. Citing Matter of Syracuse Aggregate Corp. v Weise (51 NY2d 278 [1980]) and Buffalo Crushed Stone, Inc. v Town of Cheektowaga (13 NY3d 88 [2009]), applicant contends that its right to expand a pre-existing non-conforming mine is not limited to the land actually excavated at the time it became non-conforming, but that it may expand mining to areas not previously mined without any further approval from the Town. As noted by petitioners opposing applicant's motion, this presumably includes excavating down to Long Island's sole-source aquifer and beyond without limitation.

To the extent applicant contends that settled law gives it an unfettered right to expand its pre-existing non-conforming mining use to the lateral boundaries of its 50-acre premises and, presumably, to unlimited depths within those 50 acres, it is applicant and not the Ruling that misapprehends controlling law. Applicant is correct that under Syracuse Aggregate, a local zoning ordinance may not limit a pre-existing non-conforming mining use to land actually excavated at the time of the ordinance's adoption (see Syracuse Aggregate, 51 NY2d at 286). Moreover, depending on evidence of the landowner's intent, the prior non-conforming mining use may be determined to extend to areas not previously excavated, up to and including the entire parcel (see id. at 286; Buffalo Crushed Stone, 13 NY3d at 98-99).

However, what applicant fails to recognize is that under the same controlling law cited by applicant, the circumstance that an entire parcel of property might be subject to a prior non-conforming mining use does not provide the landowner the unfettered right to mine to the boundaries of the parcel without regard to local zoning. The Court of Appeals in Syracuse Aggregate expressly cautioned that its holding "in no sense affords petitioner a carte blanche to

engage in its mining operation. To the contrary, the town can adopt measures reasonably regulating the matter in which petitioners uses its quarry . . . and may even eliminate this nonconforming use provided that termination is accomplished in a reasonable fashion" (51 NY2d at 286-287 [citations omitted]).

This principle was reaffirmed by the Court in Buffalo Crushed Stone, in which the Court noted that "Syracuse Aggregate does not afford quarrying companies 'carte blanche' to engage in future excavation of their lands contrary to zoning regulations" (13 NY3d at 99 [quoting Syracuse Aggregate]). The Court further noted that 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" (id. at 97 [citations and internal quotation marks omitted]). Thus, "[a]lthough nonconforming uses are 'generally permitted to continue, they may not be enlarged as a matter of right'" (id. [citations omitted]).

The principle that a municipality has the authority through local zoning to restrict the expansion of and to eventually eliminate non-conforming mining uses was articulated by the Appellate Division in the CPLR article 78 litigation concerning the non-mining uses identified in applicant's 2011 certificate of occupancy (see Matter of Sand Land Corp. v Zoning Bd. of Appeals of Town of Southampton, 137 AD3d 1289 [2d Dept], lv denied 28 NY2d 906 [2016]). In Sand Land, the Second Department held:

> "A use of property that existed before the enactment of a zoning restriction that restricts the use is a legal nonconforming use, but the right to maintain a nonconforming use does not include the right to extend or enlarge that use . . . . Indeed, because nonconforming uses are viewed as detrimental to zoning schemes, public policy favors their reasonable restriction and eventual elimination . . . . Further, in keeping with the sound public policy of eventually extinguishing all nonconforming uses, the courts will enforce a municipality's reasonable circumscription of the right to expand the volume or intensity of a prior nonconforming use"

(id. at 1291-1292 [citations and internal quotation marks omitted]).

Thus, contrary to applicant's assertion, the circumstance that an entire parcel of property may be subject to a prior non-conforming mining use does not end the inquiry. To the contrary, as noted in the Ruling, under settled New York law, a town has the authority through local zoning not only to prohibit the development of new mines, but to impose reasonable restrictions limiting the expansion of and eventually extinguishing prior non-conforming mining uses within the town (see Ruling at 8, 11 [citing Syracuse Aggregate at 287]). Moreover, as concluded in the Ruling, the preservation of a municipality's authority to limit and eventually extinguish prior non-conforming mining uses was a manifest purpose of the supersession clause of the Mined Land Reclamation Law (MLRL) (see Ruling at 7-8, 10-11 [citing ECL 23-2703[2][b]). Applicant makes no compelling argument that this controlling law was overlooked or misapprehended and, thus, does not provide a basis for reargument.

Applicant's argument that controlling provisions of the ECL were misapprehended is similarly unavailing. Applicant contends that the Ruling erred in holding that the inquiry under ECL 23-2711(3) applied to applicant's mine expansion proposal. Citing the statutory language requiring an inquiry of the local government "[u]pon receipt of a complete application for a mining permit, for a property not previously permitted pursuant to" the MLRL, applicant argues that because it has a MLRL permit for the mine, ECL 23-2711 does not apply to its current permit modification application.

Applicant, however, misreads the governing statute. The term "property not previously permitted" is not defined in the MLRL. However, as explained in the Ruling, under the MLRL, the Uniform Procedures Act (ECL art 70), and Department policy, applications for permits to mine outside any previously approved line-of-mine boundaries – in this case, property outside the 31.5-acre area and below a depth of 60 feet below grade – involve a material change in permitted activities and are treated as new applications triggering the requirements of ECL 23-2711 (see Ruling at 9, 10). Given the statutory and policy background, and in particular, the MLRL's legislative intent to preserve a local government's authority to regulate mining uses within the municipality, a fair interpretation of the term "property not previously permitted" leads to the conclusion that it refers to property outside any previously approved line-of-mine boundaries. Thus, Sand Land's application to mine 4.9 more acres to a depth 40 feet below that previously approved is an application to mine "property not previously permitted." To accept applicant's reading of the term – that having a permit to mine a portion of a parcel insulates an application to mine beyond the previously approved portion from an inquiry into the legality of such an expansion under local law – runs counter not only to the express language and legislative intent regarding the preservation of local authority under the MLRL, but to the principles enunciated in Syracuse Aggregate and Buffalo Crushed Stone cautioning against the belief that a prior non-conforming mining use may be extended or enlarged without regard to local law. Thus, applicant fails to show that the controlling statutes and Department policy were misapprehended and, thus, fails to raise a basis for reargument.

Applicant also asserts that the Ruling overlooks or misapprehends controlling facts. Applicant contends that the Town, through the 2011 certificate of occupancy, and the Appellate Division, through the Sand Land litigation, has definitively determined that applicant's entire 50-acre parcel is subject to the pre-existing non-conforming mining use. To the extent applicant cites the 2011 certificate of occupancy as constituting a determination that sand mining is a legal pre-existing non-conforming use at the site, the Ruling recognized the Town's determination and its affirmance by the Appellate Division (see Ruling at 3 n 2). However, to the extent applicant claims this non-conforming use determination alone entitles it to expand its mine without further approval from the Town, as discussed above, such a position is contrary to controlling law. Moreover, as noted in the Ruling, nothing in the issues conference record, or raised by applicant on its present motion, indicates that applicant's proposed mine expansion was presented to the Town Building Inspector or Zoning Board of Appeals (ZBA) for approval at the time the 2011 certificate of occupancy was issued (see Ruling at 12). Accordingly, no factual basis exists for concluding that the 2011 certificate of occupancy, and its confirmation by the

Appellate Division in the Sand Land litigation, constitutes a determination by the Town that applicant's proposed expansion is allowed under local law. Thus, applicant fails to establish a misapprehension of the factual significance of the certificate of occupancy and, therefore, fails to raise a basis for reargument.

Applicant goes on the criticize the Ruling for allegedly confusing the requirements applicable to permit modifications treated as "new applications," and an application seeking a permit for a "new mine." Applicant's argument is again overstated. A fair reading of the Ruling reveals no confusion about the law and procedures applicable to applications, such as applicant's, seeking approval to expand an existing mine beyond previously approved life-of-mine boundaries (see Ruling at 7-11). Those requirements include the ECL 23-2711 inquiry to the relevant municipality for a determination whether such a mine expansion is authorized under local law and, in the case of municipalities in Nassau and Suffolk Counties that ban mining uses, a suspension of permit review proceedings until a definitive determination that the expansion is authorized under local law is received by the Department (see ECL 23-2703[3]). The Ruling only references "new mines" when describing the Town planner's response to the ECL 23-2711 inquiry made by staff in this proceeding, or when responding to applicant's own arguments (see Ruling at 5, 12). A fair reading of the Ruling reveals no confusion about whether applicant was seeking a permit for a mine expansion versus a "new" mine and, thus, no basis exists for reargument.

Applicant makes several arguments concerning whether the Town's zoning laws allow, prohibit, or require a variance for applicant's proposed mine expansion. However, as noted in the Ruling, interpretation of local law is beyond the jurisdiction of the Department in a Part 624 permit hearing proceeding (see Ruling at 13). The Ruling examined the local law provisions governing the expansion or enlargement of non-conforming uses to determine whether the Town planner's response to the Department's ECL 23-2711 inquiry evinced a clear determination by the Town regarding the legality of applicant's proposed mine expansion under the Town's local law (see id. at 11-12). That examination revealed that reasonable questions remained concerning whether applicant's proposal – roughly the equivalent of adding an additional four stories to an existing six-story structure devoted to a pre-existing non-conforming use – constitutes a mere continuation of a non-conforming use, or an extension or expansion of a non-conforming use that requires Town ZBA approval (see id.). In its response to applicant's present motion, the Town confirms the potential applicability of the various provisions of local law to applicant's expansion proposal reviewed in the Ruling. Once it was concluded that the Town Planner's response failed to demonstrate a definitive determination that applicant's proposed mine expansion is authorized under the Town Code, however, jurisdictional limitations prevent any further analysis of the legality of applicant's proposed expansion under local law in these proceedings. Accordingly, applicant's arguments concerning its interpretation of the Town Code are not a basis for reargument and, instead, should be raised to the Town in the appropriate local forum with jurisdiction to interpret the Town Code.

In support of its motion for renewal, applicant argues that the issue whether the entire 50-acre site may be used for mining or whether a variance is required from the Town to

expand beyond the acreage and depth previously permitted by existing permits was raised for the first time in the Ruling. Accordingly, applicant argues it is entitled to renewal and reversal based upon "the full set of facts," and offers several documents not previously submitted for the issues conference record. These records include an updated certificate of occupancy dated April 26, 2016, and documents related to the Sand Land CPLR article 78 proceeding, including the Town's brief filed with the Appellate Division. Based on these documents, applicant argues that the Town admitted before the Appellate Division that applicant's entire 50-acre site could be devoting to mining, and that the Town is judicially estopped from taking a contrary position in these proceedings.

Applicant's initial assertion that the Ruling raised the issue of the legality of its expansion proposal under local law for the first time is, again, overstated. In the Executive Deputy Commissioner's April 3, 2015 notice of permit denial, the Executive Deputy Commissioner noted that the notice to the Town required by ECL 23-2703(3) and ECL 23-2711 had not been provided, and directed the required notice be given to the Town (see Ruling at 11 n 6). The response by the Town planner to that notice raised the possibility that applicant's proposed mine expansion was not authorized under the Town Code. At the issues conference, both the Town and the Neighbors raised the issue of the applicability of ECL 23-2703(3) as a bar to further review of applicant's proposal. Thus, the issue was noted by the Executive Deputy Commissioner, and raised by the parties throughout these proceedings prior to the issuance of the Ruling. The circumstance that a full analysis of the applicable law and policy of the Department, and the implications of that law and policy for applicant's mine expansion application, was not articulated until the Ruling does not mean that the issue was raised in the Ruling sua sponte. Thus, applicant's assertion does not provide a basis for renewal.

With respect to the documents offered on renewal that pre-date the issues conference briefing in this matter, applicant offers no explanation for why the documents were not offered earlier. Accordingly, those documents are not properly entertained on applicant's motion for renewal.

In any event, review of the documents related to the Sand Land CPLR article 78 litigation do not reveal an admission by the Town that applicant's proposed mine expansion is authorized under local law. To the contrary, the documents confirm that the issue of applicant's proposed mine expansion was not presented to either the Town ZBA or the Appellate Division. Thus, applicant's newly minted arguments concerning judicial estoppel and res judicata lack merit. At most, the Town's submissions reveal a recognition that the subject parcel is subject to a pre-existing non-conforming use. However, as noted above, whether a parcel is subject to a non-conforming use begs the question whether the expansion of such a use is legal under local law.

In further support of its motion for renewal, applicant offers several documents related to an application by Huntington Ready Mix Concrete, Inc. to expand its sand and gravel mine, also located in the Town. Applicant argues that the principle of stare decisis prevents the Town, which indicated in a letter to the Department in response to an ECL 23-2711 inquiry that

mining on the Huntington site was allowed as a pre-existing non-conforming use, from taking a contrary position in this proceeding. Even assuming without deciding that applicant's submissions are properly entertained on a motion for renewal, any documents concerning a separate and distinct application and mine expansion are irrelevant to Sand Land's application. Accordingly, applicant provides no basis for renewal.

In sum, applicant's motion for reargument and renewal provides no basis for revisiting the Ruling. To the contrary, applicant essentially seeks to once again argue issues previously decided against it. Accordingly, applicant's motion to renew and reargue should be denied.

B. Request for Clarification

In its March 5, 2018 email, Department staff requests clarification whether the Ruling directed staff to make an additional ECL 23-2711 inquiry of the Town at this time. In support of the clarification request, staff attached a March 1, 2018 letter from applicant to the DEC Region 1 Director requesting that the Department immediately provide notice to the Town under ECL 23-2711 and, thereby, trigger the Town's obligation to provide a written response supported with appropriate documentation. In addition, applicant's letter makes recommendations concerning the wording of the inquiry to the Town. Noting that the Department has already issued an inquiry on April 21, 2015, to which the Town had responded, staff understands that the Ruling provided no direction to staff to take any further action in this matter, and that the permit hearing proceeding is the appropriate vehicle through which any such issues should be addressed. Accordingly, staff seeks clarification on this point.

In an email dated March 12, 2018, the Town takes no position regarding whether staff should be directed to renew its ECL 23-2711 inquiry. However, the Town objects to applicant's proposed wording of any inquiry in the event that one is directed. In a letter dated March 12, 2018, BHRR also takes no position with respect to staff's clarification request or applicant's request that an ECL 23-2711 inquiry be directed. However, BHRR proposes its own wording in the event an inquiry is directed. By letter of the same date, the Neighbors agree with applicant that an ECL 23-2711 inquiry should be directed at this time, but they also take issue with the inquiry language proposed by applicant.

Also in an email dated March 12, 2018, applicant agrees that the Ruling contained no directive expressly requiring any party to take any particular action. However, applicant requests that an ECL 23-2711 inquiry be made either by staff or the ALJ. In a further email dated March 12, 2018, the Town objects to any inquiry from the ALJ as being unauthorized.

Finally, my office received a copy of a July 18, 2018 letter from the Town Supervisor to the Regional Permit Administrator responding to applicant's March 1, 2018 letter to the Region 1 Director (Town Supervisor Letter). In the letter, the Town Supervisor stated that:

> "Mineral mining is not a permitted use in any zoning category in the Town of Southampton. Therefore, the answer as to whether local zoning laws or ordinances prohibit mining uses within the area proposed to be mined is 'yes'"

(Town Supervisor Letter at unnumbered second page). Subsequently, my office received a copy of applicant's July 27, 2018 letter to the Regional Permit Administrator responding to the Town Supervisor's letter objecting that the Supervisor failed to answer whether mining is prohibited at the premises and failed to provide documentation supporting the Supervisor's determination.

To provide guidance to the parties concerning how to proceed, Department staff's request for clarification is granted. As noted by Department staff and applicant, the Ruling did not intend to direct staff to take any particular action at this time. Upon issuance of the Department's April 21, 2015 letter to the Town, and receipt of the Town's May 20, 2015 response, Department staff satisfied the procedural requirements imposed by ECL 23-2711 and Departmental guidance (see Technical Guidance Memorandum MLR92-2, Implementation of the New Mined Land Amendments in Regard to Permit Processing, May 4, 1992 [MLR92-2], ¶ 4). The circumstance that the May 2015 letter from the Town planner raised serious doubts about the legality of applicant's proposed mine expansion under local law required that this permit hearing proceeding be suspended pursuant to ECL 23-2702(3) until the legality of applicant's proposed mine expansion under Town law is definitively established by the appropriate local authorities (see Ruling at 9, 11-13; see also Matter of Seaboard Contracting & Materials, Inc., Supplemental Decision of the Commissioner, July 22, 1992, at 2-3). In this circumstance, neither the statute, nor Department guidance, however, requires the Department to make successive inquiries to resolve any potential ambiguities in the Town's response.

Nevertheless, nothing in the statute or guidance would prevent staff from making additional inquiries should it desire to, and submit the results of those inquiries for the issues conference record. In the alternative, as the party with the burden of proof in this permit hearing proceeding (see 6 NYCRR 624.9[b][1]), applicant may submit for the record a Town Supervisor's determination together with supporting documentation holding that applicant's proposed mine expansion is authorized under the Town Code.

I am mindful that in his July 18, 2018 letter, the Town Supervisor has determined that applicant's proposed mine expansion is prohibited by the Town Code. As a matter of policy, the Department relies on the local government's chief administrative officer's (CAO) determination to avoid involving itself in matters of dispute between the local government and the applicant (see MLR92-2 ¶ 4). However, ECL 23-2711 does not transfer jurisdiction to determine the legality of a project under local law away from the municipal authority vested with that authority under local law to the CAO. Rather, ECL 23-2711 contemplates that the CAO's determination will be accompanied by supporting documentation from the appropriate municipal authority vested with the authority to make the determination (see ECL 23-2711[3][a]). In this case, the Town ZBA appears to be the ultimate municipal authority vested with jurisdiction to determine whether applicant's proposed mine expansion is authorized under the Town Code

without any further Town approval, or whether a variance is required before the expansion is allowed (see Town Code §§ 330-165, 330-166, 330-167B).

Thus, as an alternative to submission of a determination of the Town Supervisor with supporting documentation approving applicant's mine expansion, applicant may submit for the record documentation from the appropriate local authority that its proposed mine expansion is authorized under the Town Code (see Seaboard at 2-3). If applicant takes this approach, it must be cautioned not to continue to rely on the 2011 certificate of occupancy and the arguments rejected in the Ruling and this ruling. Rather, the record will require a clear determination from the appropriate local authority that applicant's proposed mine expansion – that is, to mine an additional 4.9 acres and to excavate 40 feet deeper than previously approved, thereby increasing the volume of the mine by more than two-thirds – is either a continuation of applicant's pre-existing non-conforming use that does not require any further approval from the Town, or is authorized pursuant to a duly-issued variance.

III. CONCLUSION AND RULING

Based upon the foregoing, applicant's motion to renew and reargue is denied.

Department staff's request for clarification is granted, and the Ruling is clarified as provided herein.

IV. APPEALS

Pursuant to 6 NYCRR 624.8(d)(2), a ruling on the merits of any legal issue made as part of an issues ruling is appealable to the Commissioner as of right. The appeal schedule provided for in the Ruling was adjourned pending decision on applicant's motion. Accordingly, the schedule for appeals from the Ruling and that portion of this ruling granting staff's request for clarification is as follows: any appeals are due by 4:00 PM on Wednesday, January 9, 2019. Replies are authorized and are due by 4:00 PM on Wednesday, January 23, 2019.

The original and two copies of each appeal and reply thereto must be filed with Deputy Commissioner Jared Snyder (Attention: Louis A. Alexander, Deputy Commissioner for Hearings and Mediation Services), at the New York State Department of Environmental Conservation, 625 Broadway (14th Floor), Albany, New York 12233-1010. In addition, one copy of each submittal must be sent to the undersigned, Department staff and applicant at the same time and in the same manner as the submittals are sent to the Deputy Commissioner. Service of papers on the Deputy Commissioner, Department staff, applicant, and the undersigned by electronic mail is permitted provided conforming hard copies are sent by regular mail and post marked by the due date. Service of papers by facsimile transmission (FAX) is not permitted, and any such service will not be accepted.

All papers shall be served upon the remaining parties on the service list by methods agreed to by the parties.

_____/s/_____
James T. McClymonds
Chief Administrative Law Judge

Dated: December 10, 2018
Albany, New York

Cc: Louis A. Alexander, Deputy Commissioner for Hearings and Mediation Services
Scott Crisafulli, Deputy Counsel

To: Attached Service List