State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: June 20, 2019 526788

In the Matter of COBLESKILL
STONE PRODUCTS, INC.,
Appellant,
v MEMORANDUM AND ORDER

TOWN OF SCHOHARIE et al.,
Respondents.

Calendar Date: May 2, 2019

Before: Garry, P.J., Mulvey, Aarons, Rumsey and Pritzker, JJ.

Stack Law Office, Syracuse (Rosemary Stack of counsel), for appellant.

Young/Sommer LLC, Albany (Kristin Carter Rowe of counsel), for respondents.

Rumsey, J.

Appeal from an order of the Supreme Court (Ferreira, J.), entered May 2, 2018 in Schoharie County, which, in a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment, granted respondents' motion in limine.

The underlying facts of this case are fully set forth in our prior decisions (Matter of Cobleskill Stone Prods., Inc. v Town of Schoharie, 169 AD3d 1182 [2019]; Matter of Cobleskill Stone Prods., Inc. v Town of Schoharie, 126 AD3d 1094 [2015]; Matter of Cobleskill Stone Prods., Inc. v Town of Schoharie, 112 AD3d 1024 [2013]; Matter of Cobleskill Stone Prods., Inc. v Town

of Schoharie, 95 AD3d 1636 [2012]). As relevant here, petitioner operates a quarry in the Town of Schoharie, Schoharie County, which has been in operation since the 1890s. Pursuant to respondent Town of Schoharie's 1975 zoning ordinance, "[c]ommercial [e]xcavation or [m]ining" was a permitted use upon receipt of a special permit from the Town. In 2000, while this ordinance was in effect, petitioner purchased an additional parcel of real property to the south of the areas that it was then actively mining (hereinafter the southern property). Petitioner did not apply for a special use permit for the southern property; however, in January 2005, it submitted an application to amend its Department of Environmental Conservation mining permit to include the southern property and other adjacent property that it owned which, at that time, was unmined and unpermitted. While that application was pending, the Town adopted a new zoning ordinance, Local Law No. 2 (2005) of the Town of Schoharie (hereinafter Local Law No. 2), which, among other things, prohibited mining within the zoning district in which the southern property is located. Petitioner then commenced a combined CPLR article 78 proceeding and declaratory judgment action asserting eight causes of action, the first seven seeking relief pursuant to CPLR article 78 with respect to the enactment of Local Law No. 2 and the eighth seeking a judgment declaring that petitioner has a vested right to quarry the southern property as a preexisting nonconforming use under Local Law No. 2 and any subsequently-enacted prohibitory zoning amendment.

In February 2014, while an appeal to this Court was pending, Supreme Court (Devine, J.) adjudged Local Law No. 2 to be null and void for noncompliance with certain procedural requirements of the State Environmental Quality Review Act (see ECL art 8). Accordingly, by operation of law, the 1975 ordinance was revived (Matter of Cobleskill Stone Prods., Inc. v Town of Schoharie, 126 AD3d at 1095 n 1). Petitioner subsequently applied for a special use permit pursuant to the 1975 ordinance; however, the Town had enacted a moratorium on special permits for mining. The Town thereafter enacted Local Law No. 3 (2015) of the Town of Schoharie (hereinafter Local Law No. 3), which again placed large portions of petitioner's

property within a zoning district wherein mining and commercial excavation are prohibited. Petitioner then commenced this combined CPLR article 78 proceeding and declaratory judgment action. Inasmuch as petitioner sought, in relevant part, the same declaration in both hybrid proceedings, Supreme Court (Ferreira, J.) granted petitioner's motion, on consent, to join the third cause of action from this proceeding with the eighth cause of action from the first proceeding for purposes of trial and discovery.

Such matters were scheduled for trial but, prior to the trial date, the parties filed motions in limine within the context of the first proceeding/action. As relevant here, respondents moved to exclude from trial any evidence that related to efforts undertaken, or expenses incurred, by petitioner subsequent to the date on which the Town adopted Local Law No. 2, contending that petitioner was required to prove that it manifested an intent to mine the southern property prior to the adoption of that ordinance. Petitioner opposed the motion, arguing that the adoption date of Local Law No. 2 should not govern for evidentiary purposes at trial because it was declared null and void. In a September 2017 order, Supreme Court granted respondents' motion, from which petitioner appealed. During the pendency of that appeal, respondents filed a nearly identical motion in limine within the context of this proceeding, which petitioner again opposed. In a May 2018 order, Supreme Court granted respondents' motion on the same basis as its September 2017 order, prompting this appeal.[1]

During the pendency of this appeal, we modified Supreme Court's September 2017 order by reversing so much thereof as granted respondents' motion in limine, concluding that, "inasmuch as an annulled law can have no lingering effect,

[1] Although "an order ruling on a motion in limine is generally not appealable as of right or by permission," this order is appealable because it "limits the scope of issues to be tried, affecting the merits of the controversy or the substantial rights of a party" (Calabrese Bakeries, Inc. v Rockland Bakery, Inc., 139 AD3d 1192, 1193-1194 [2016] [internal quotation marks and citation omitted]).

petitioner is entitled to have its nonconforming use rights evaluated as of the effective date of the 2015 ordinance" (Matter of Cobleskill Stone Prods., Inc. v Town of Schoharie, 169 AD3d at 1185). On the instant appeal, petitioner contends, for the second time before our Court, that Supreme Court erroneously found that the adoption date of the now null and void Local Law No. 2 controls for the purpose of evaluating its prior nonconforming use rights. Our prior decision makes clear that evidence regarding petitioner's intent postdating the enactment of Local Law No. 2 may not be categorically precluded from the joint trial. Inasmuch as petitioner has now obtained its sought-after relief by virtue of our February 2019 decision, the instant appeal has been rendered moot and, as the narrow exception to the mootness doctrine does not apply, must be dismissed (see Matter of Feltz v State of New York, 108 AD3d 950, 951 [2013]; Matter of Christopher GG. v Missy HH., 14 AD3d 959, 960 [2005]; see generally Matter of Hearst Corp. v Clyne, 50 NY2d 707, 714-715 [1980]).

Garry, P.J., Mulvey, Aarons and Pritzker, JJ., concur.

ORDERED that the appeal is dismissed, as moot, without costs.

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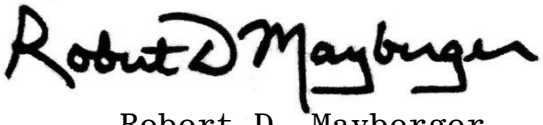

Robert D. Mayberger
Clerk of the Court