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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF RANCO SAND AND STONE CORP.,

Appellant,

-against-

No. 43

VECCHIO,

Respondent.

20 Eagle Street
Albany, New York 12207
February 18, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Next on the calendar
2 is number 43, Matter of Ranco Sand and Stone Corp. V.
3 Vecchio.

4 Counsel.

5 MR. SHORE: Yes, good afternoon. My name
6 is Leonard Shore, I'm here on behalf of the
7 petitioner-appellant Ranco Sand and Stone Corp. I'd
8 like to reserve two minutes for rebuttal.

9 CHIEF JUDGE DIFIORE: You have two minutes,
10 sir.

11 MR. SHORE: Thank you very much.

12 Today we're here asking for a reversal of the
13 decision below and the court declaring that this matter
14 was ripe for judicial intervention at the time we brought
15 the action.

16 JUDGE STEIN: Are you saying that any time
17 there is a positive declaration requiring someone to
18 spend money, to prepare a draft EIS, that we should
19 find that to be ripe?

20 MR. SHORE: Absolutely not.

21 JUDGE STEIN: Okay, so - - -

22 MR. SHORE: Furthest from the truth.

23 JUDGE STEIN: - - - what is the rule that
24 you are asking us to - - -

25 MR. SHORE: The rule - - - the rule, as

1 this court established in Gordon V. Rush, with - - -
2 you know, in 2003, was that there were three basic
3 tenets for matter to be ripe. First, that it be a
4 final action; second, that it'd inflict concrete
5 injury on a party; and third, that there would be
6 really no way to ameliorate the injury by subsequent
7 action. Actually - - -

8 JUDGE RIVERA: Those are the - - - but
9 doesn't requiring a DEIS fit this definition?

10 MR. SHORE: No, no, and I'll explain why,
11 I've explained it in my papers, I'll certainly, you
12 know, explain it to the court again. Just as a
13 matter of course, the third - - - the Second
14 Department, in its decision below, indicated that
15 there was no way to ameliorate the injury. So we
16 really need to look at what's considered a final
17 action.

18 Again, we are relying heavily on the Third
19 Department case of Center of Deposit, the 2011 case,
20 at 90 A.D.3d 1450. And there, basically, the court
21 added a third criteria of a weighing test to
22 determine the benefits to the town of having an EIS
23 prepared, versus the injury to the landowner. And in
24 that case, the court was look - - -

25 JUDGE STEIN: That case didn't involve any

1 kind of a zoning change, or use change, or anything
2 like that, did it?

3 MR. SHORE: Well, it - - -

4 JUDGE STEIN: It was essentially - - - I'm
5 very familiar with that case - - - essentially, it
6 was - - - it was one parcel of land, it had two
7 buildings on it, and the owner wanted to divide that
8 parcel keeping everything, all the zoning, everything
9 else exactly the same, just divide that parcel down,
10 you know, maybe not in half, so that there was one
11 building on each parcel.

12 MR. SHORE: Correct. Absolutely correct.

13 JUDGE STEIN: There was no question of any
14 change of any - - -

15 MR. SHORE: And in this case, there's no
16 question of any change either.

17 JUDGE STEIN: Yes, but if you succeed, that
18 means that you can then use the land for things that
19 you couldn't previously use it for - - -

20 MR. SHORE: Correct.

21 JUDGE STEIN: - - - legally, right?

22 MR. SHORE: Correct.

23 JUDGE STEIN: Okay.

24 MR. SHORE: You're - - - you're right, Your
25 Honor, but again - - -

1 JUDGE STEIN: That is - - - that is a
2 change, it may not be an immediate change in use, but
3 it is a - - - certainly a change in potential use.

4 JUDGE FAHEY: And I thought that - - -

5 MR. SHORE: And that was what the court, in
6 Center of Deposit - - -

7 JUDGE FAHEY: Slow down, slow down.

8 MR. SHORE: I'm sorry.

9 JUDGE FAHEY: I - - - I thought that the -
10 - - by the way, Judge Stein wrote the - - - the case
11 - - -

12 MR. SHORE: I - - - I know.

13 JUDGE FAHEY: So we should note that, but -
14 - -

15 MR. SHORE: A well-written decision.

16 JUDGE FAHEY: There you go.

17 JUDGE STEIN: We'll find out, won't we?

18 JUDGE FAHEY: Well, I thought it was well
19 written, but - - - in that case, it was a simple
20 subdivision of property and would have no enviro - -
21 - I think fairly ruled that there would be no
22 environmental impact whatsoever in the simple
23 subdivision of property, and that's not really what
24 we have here.

25 MR. SHORE: Under the facts as they've

1 developed in this case, it really is what we have
2 here.

3 JUDGE FAHEY: So you're saying it's a
4 subdivision because the 152 and 154, the two parcels
5 of property, you're saying it's - - - it's that
6 simple?

7 MR. SHORE: Well, I'm - - - I'm saying the
8 conduct of the town over the last twenty years or
9 more has really backed my client into a corner. 152
10 was purchased first, there was a decision from
11 Justice Oliver, Supreme Court justice in Riverhead,
12 who, in 1999 actually paid a site visit, viewed both
13 parcels being used as a single parcel and based - - -

14 JUDGE ABDUS-SALAAM: But counsel, has
15 something changed in the surrounding area then?

16 MR. SHORE: Not drastically in the last
17 fifteen years.

18 JUDGE ABDUS-SALAAM: So yeah, that's what
19 I'm trying to understand, because 152 existed and
20 then you got 154, but it seems that 154 may be closer
21 to residential areas, or something, than 152?

22 MR. SHORE: That was at least written into
23 the planning director's report; there's a four-lane
24 state parkway in between, there's some elevation
25 differences, but the areas between the parkway - - -

1 and there's the town line between Smithtown and
2 Huntington about another 700 yards to the west; that
3 area has always been heavy industrial. At least
4 since 1999, there was a big sand mine right next
5 door, it's indicated as Antenucchi (ph.) on the tax
6 map on page 68 of the record; there's a large
7 excavation across the street that's now a compost
8 facility; this area here has been - - - while it's
9 zoned residential, has traditionally for the last
10 twenty years been used for uses that are only
11 permitted in heavy industrial zones.

12 JUDGE STEIN: So are you saying that the
13 municipality should be equitably estopped from now?

14 MR. SHORE: It's not really an equitable
15 estoppel, I think - - -

16 JUDGE STEIN: Signing this request?

17 MR. SHORE: I - - - I'd think their own
18 conduct has - - - to the extent that that's an
19 equitable estoppel, yes.

20 JUDGE STEIN: That's an equitable estoppel
21 language to me, and - - -

22 MR. SHORE: But - - - but again - - -

23 JUDGE STEIN: - - - haven't we held that
24 that's not - - - you can't do that?

25 MR. SHORE: Equitable estoppel against

1 municipality is - - - is not something that the
2 courts look lightly upon. But - - -

3 JUDGE STEIN: When you changed - - - when
4 you changed the zoning of the other parcel, you tried
5 to change the zoning of this parcel as well, and they
6 said, no, we - - - we don't want to do that. So it
7 sounds to me like you're saying, yeah, but you let us
8 - - - you lulled us along all these years, so now you
9 can't prevent us from doing what we want to do;
10 that's - - - that's what your argument sounds like.

11 MR. SHORE: Well, but - - - but the town
12 not only has done that, they've actually prevented us
13 from moving ahead. As soon as the prior piece was
14 rezoned in 2002, we filed the change of zone petition
15 for this parcel. It took the town planning board and
16 the town board two years to hold hearings, again, if
17 - - -

18 JUDGE STEIN: Did you do anything to try to
19 - - -

20 MR. SHORE: Force them?

21 JUDGE STEIN: - - - push them forward?

22 MR. SHORE: We didn't have to, we were
23 using the property the way we wanted to since prior
24 to '99; we weren't getting tickets, we weren't doing
25 anything that the town was objecting to, they just,

1 basically, for whatever reason they sought - - -
2 sought not to move the zoning petition ahead.

3 JUDGE RIVERA: If the court is unpersuaded
4 by your argument, does your client have any other
5 recourse?

6 MR. SHORE: They have to spend 120 or
7 150,000 dollars on an EIS for a piece of property
8 that, with the other piece of property, is only
9 returning 80,000 dollars a year in rent so - - -

10 JUDGE RIVERA: There's no other - - -

11 MR. SHORE: - - - economically - - -
12 actually, yes; economically, no; they don't have any
13 other recourse; this is the end of the road for them.

14 JUDGE FAHEY: That's - - - one of the
15 problems I have with the argument is that would
16 effectively make every draft EIS the final action
17 under the SEQRA law, if your argument prevails,
18 because every time someone has to spend the money on
19 a - - - a draft EIS, they're going to be in the same
20 position that you are in, no matter what; they're
21 going to be economically damaged by the amount of
22 money they have to spend. So whether it's 75,000 or
23 150,000, or whatever the number is, in point of fact,
24 they will suffer some actual impact.

25 And I read Rush, which talked about the

1 actual injury case, as a more fact-specific outcome,
2 and the court seemed to say that then because in
3 Rush, you had the DEC give a negative declaration,
4 and then the town of South Hampton give a positive
5 declaration, going in the other direction; we don't
6 have that kind of confluence of circumstances here we
7 that we had - - -

8 MR. SHORE: I agree that, you know, just
9 under Rush, the facts don't do it, but under the well
10 written decision of Center of Deposit, I think that
11 weighing test is in there and the conduct of the town
12 over twenty years, even the planning reports that
13 said there's a potential for injury - - -

14 JUDGE FAHEY: So you do - - - so slow down,
15 slow down, slow down - - - so you do think, then,
16 that it's case specific.

17 MR. SHORE: It can be case specific, but I
18 think here, this court adopting some type of weighing
19 test would clearly not allow the floodgates to open -
20 - -

21 JUDGE FAHEY: I see.

22 MR. SHORE: - - - purely because a pos dec
23 is being issued.

24 JUDGE FAHEY: Thank you.

25 MR. SHORE: Thank you.

1 CHIEF JUDGE DIFIORE: Thank you, sir.
2 Counsel.

3 MR. DENBY: May it please the court. My
4 name is John Denby, I'm appearing for the respondent,
5 Town of Smithtown.

6 The positive declaration issued by the town in
7 this case was a preliminary step in the environmental
8 review process. It was not a final determination, the
9 application wasn't denied, the application wasn't
10 accepted. It's - - - it was not a final determination; it
11 remains under review by the town board, and so - - -

12 JUDGE RIVERA: If - - - if we disagree, has
13 he got any other recourse?

14 MR. DENBY: If - - - if we - - -

15 JUDGE RIVERA: Or rather if we agree with
16 you, I'm sorry, does he have any other recourse?

17 MR. DENBY: If you agree with them, and you
18 say it's ripe, and we litigate all of these issues
19 that he's talking about - - -

20 JUDGE RIVERA: I'm sorry, if we agree with
21 you, has he got any other recourse?

22 MR. DENBY: He can go forward with the
23 application, he can do the - - - he can do the DEIS,
24 he could go forward with the application, and he
25 continue in the proper scheme of things.

1 JUDGE RIVERA: So his only - - - I just
2 want to clarify; it seems you're both agreeing to
3 this. His only option is to seek a rezoning of - - -
4 for purpose of the use for this property to that
5 higher industrial use, or he's got some other option?

6 MR. DENBY: He - - - I think he's got other
7 options.

8 JUDGE RIVERA: Okay. I think you - - -

9 MR. DENBY: Withdraw that application and
10 he can seek a certificate of existing use.

11 JUDGE RIVERA: Uh-huh.

12 MR. DENBY: Probably going to have to do a
13 - - - he's probably going to get a positive
14 declaration; he's probably going to have to go
15 through the SEQRA process for that as well - - -

16 JUDGE RIVERA: Uh-huh.

17 MR. DENBY: - - - so we're - - - he's back
18 to where he was before. I think that's a less
19 intrusive option for him. The rezoning is a serious
20 intrusion; it totally distinguishes this case from
21 the Center of Deposit case.

22 JUDGE RIVERA: I'm sorry, it's less
23 intrusive to do it the alternative way because it's
24 going to cost him less or it's - - -

25 MR. DENBY: No, it's - - - it's less - - -

1 it's less intrusive environmentally because the
2 rezoning would permit other - - - other uses.

3 JUDGE RIVERA: You mean the likelihood of
4 him being successful; is that what you are referring
5 to?

6 MR. DENBY: Yes, yes, yes, yes, yes.

7 JUDGE RIVERA: I see.

8 JUDGE PIGOTT: The town doesn't seem to be
9 particularly energetic in its zoning.

10 MR. DENBY: Well, that does appear - - -
11 that does appear from the record, it also - - - it
12 also shows that the petitioner's not particularly
13 energetic as well. So the petitioner did absolutely
14 nothing to accelerate this process.

15 JUDGE FAHEY: What - - -

16 JUDGE ABDUS-SALAAM: But then that makes
17 sense, because they said they were using the property
18 the way that they had - - - they were allowed to use
19 the property that by - - -

20 MR. DENBY: Well, that completely
21 eviscerates his due process argument. He's arguing
22 that - - - that the town's delay somehow resulted in
23 the violation of due process, but he's gotten 100,000
24 dollars a year in rent all the time that he's been
25 able to violate the town code. He's - - - there's

1 been no deprivation of property, and they've really
2 benefit - - - benefited from the fact that the
3 application has been delayed. So I - - - I don't
4 really know where he's going with that.

5 JUDGE PIGOTT: Well, in theory - - - in
6 theory, are they in violation of your - - - of your
7 zoning ordinances?

8 MR. DENBY: Absolutely, yes.

9 JUDGE PIGOTT: And what have you done about
10 that?

11 MR. DENBY: There have been - - - we have -
12 - - we have permitted them to do so - - -

13 JUDGE PIGOTT: That's what I mean, I just -
14 - -

15 MR. DENBY: Well, I think there is an
16 evaluation of the entire area going on.

17 JUDGE PIGOTT: It's sort of like they want
18 to straighten this out, and you're saying, ah, now
19 we've got you because, you know, if you'd kept your
20 mouth shut and just kept violating the zoning
21 ordinance, we wouldn't have done anything, but now
22 that you want to change it, we're going to do
23 something.

24 MR. DENBY: Well, I don't know that that's
25 the case, I think that - - - I think that they're

1 envi - - - they are evaluating the entire area within
2 the context of - - - and this application as well.

3 JUDGE FAHEY: You say evaluating, you mean
4 because of changes in the area, residential changes;
5 what are you - - -

6 MR. DENBY: Well, I think because - - - I
7 think there's - - - I think there's a lot of
8 violations of the code here; there's mining going on
9 - - -

10 JUDGE FAHEY: Uh-huh.

11 MR. DENBY: - - - there's a lot of - - - of
12 - - - of a violative activities going on, and I think
13 they want to see how this fits in. None of this fits
14 in with the town's comprehensive plan; that's
15 articulated in the record.

16 JUDGE ABDUS-SALAAM: By the way, those
17 other uses that you said are going on that also
18 apparently violate the zoning code, have those owners
19 also filed - - -

20 MR. DENBY: I'm not - - - I don't know if
21 they have or not - - -

22 JUDGE ABDUS-SALAAM: - - - for variances?

23 MR. DENBY: - - - there is some indication
24 in the record that - - - that those uses are being
25 evaluated, but it's very, very sketchy; this record

1 is really sparse. You have only the petition here,
2 you don't have any opposition papers to our motion,
3 much - - - many of the arguments that are raised by
4 the petitioner are not preserved for review,
5 particularly the due-process argument.

6 In this case, to contrast it with the
7 Gordon case, you do not have a prior coordinated
8 review, you do not have a prior negative declaration
9 that was actually reversed by the town who first
10 identified the DEC as the lead agency, so that in
11 Gordon - - -

12 JUDGE STEIN: But you agree that there's a
13 concrete injury here; would you agree with that?

14 MR. DENBY: Well, as was said before, the -
15 - - the injury is economic.

16 JUDGE STEIN: Right.

17 MR. DENBY: The injury is always going to
18 be in every - - -

19 JUDGE STEIN: It's economic - - - it's
20 always going to be economic.

21 MR. DENBY: It's always going to be there;
22 it's always going to be there.

23 JUDGE RIVERA: Okay, so let's try it this
24 way. What - - - what, in your reading of Gordon,
25 does Gordon require? What's the test that Gordon

1 sets up?

2 MR. DENBY: Well, Gordon - - - Gordon is a
3 - - - is a - - - articulates a case-by-case analysis.
4 And the reason that they found that - - - that this
5 court found that the determination was final is
6 because the requirement of the DES - - - DEIS - - -

7 JUDGE RIVERA: No, no, before we get that,
8 what's the standard that Gordon sets up? Are you
9 saying there's no standard post Gordon?

10 MR. DENBY: No, it's - - - it's a standard
11 that - - - it's the finality standard that this court
12 has always articulated. The - - - in order - - - in
13 order to render a determination ripe, it has to be
14 final, it has to be - - - it has to not be subject to
15 further review by the agency such that those - - -
16 that any injury can be corrected.

17 JUDGE STEIN: So you - - - so you say that
18 really Gordon stands all on its own, and - - - and
19 you're never - - - you're really never going to get
20 there with a positive declaration.

21 MR. DENBY: I - - - I think so; I don't
22 think - - -

23 JUDGE STEIN: If - - - if we disagree with
24 you, do - - - do we decide whether the - - - the
25 determination was arbitrary and capricious or do we

1 send it back?

2 MR. DENBY: I think you have to send it
3 back; I don't think under the CPO, under Article 78,
4 that this court can do that, and I don't think that
5 this court can engage in that type of a fact-specific
6 analysis.

7 I think the significance of Gordon, as it
8 applies to the Center of Deposit case, was that the
9 monies that were expended on the DEIS were completely
10 unauthorized because in - - - in the Gordon case, you
11 have the town of South Hampton essentially overruling
12 the DEC, who they first asked to be the lead agency
13 and - - - essentially acting as an Appellate Court,
14 in overruling a prior negative determination - - -

15 JUDGE STEIN: So you read the Center of
16 Deposit as also being an absolute - - - a completely
17 - - - in your words, completely unauthorized
18 requirement; is - - - is that - - -

19 MR. DENBY: That's - - - it's the
20 unauthorized - - - in Center of Deposit, the court
21 said - - - you said that under the circumstances of
22 just the subdivision of property, you don't need - -
23 - it's not subject to SEQRA. So that requiring the
24 petitioner to spend money to do a DEIS is
25 unauthorized; that's the same thing in Gordon. Those

1 monies - - - the expander of - - - the expenditure of
2 those monies in Gordon was unauthorized.

3 In this case, it's totally authorized; it's
4 conceded that rezoning is subject to SEQRA. It's - -
5 - it's absolutely authorized. So Gordon really does
6 not dictate a result that would require reversal in
7 this case.

8 The res judicata argument here, I think, is
9 really off base. The town is not - - -

10 JUDGE RIVERA: Before - - - before you get
11 to that, let me just - - - just to clarify what - - -
12 what you're suggesting is the proper construction of
13 Gordon.

14 So I'm looking at the language by Judge
15 Ciparick, on behalf of the court, and she sets out
16 exactly what you've already stated regarding, right,
17 the - - - "First, the action must impose an
18 obligation, deny a right or fix some legal
19 relationship as a consummation of the administrative
20 process", and then it says, "A pragmatic evaluation
21 must be made of whether the decision maker has
22 arrived at a definitive position", that's what you
23 call the finality - - -

24 MR. DENBY: Correct.

25 JUDGE RIVERA: Right, and then, "there must

1 be a finding that there is apparent harm inflicted by
2 the action", right, that can't otherwise be
3 prevented. But then it goes on to address what, in
4 that case, was the board's request for a bright-line
5 rule that had been adopted before Gordon in the
6 intermediate appellate courts.

7 And all the court says at that point is,
8 "Here, the Board issued its own positive declaration
9 for the project after the DEC had previously
10 conducted a coordinated review resulting in a
11 negative declaration, in which the Board had an
12 opportunity but failed to participate. Certainly, in
13 this circumstance, a bright-line rule advanced by the
14 Board would be inappropriate."

15 Do you understand that to mean that the Court of
16 Appeals rejected a bright-line rule, period, or just the
17 board suggested that in this case, a bright-line rule
18 should be adopted?

19 MR. DENBY: I - - - I think that the court
20 in that case said that there should be no bright-line
21 rule.

22 JUDGE RIVERA: Period.

23 MR. DENBY: Period.

24 JUDGE RIVERA: They've rejected of bright-
25 line rule - - -

1 MR. DENBY: Correct.

2 JUDGE RIVERA: - - - in these kinds of
3 cases.

4 MR. DENBY: Correct. That - - - that you
5 analyze the facts specifically for each one. And I
6 think what my - - - my adversary is arguing is that
7 there should be a bright-line rule. That whenever
8 there is a positive declaration, that this court
9 should declare that it's ripe. That's clearly what -
10 - - what is not required under Gordon v. Rush. I
11 think - - - I think the lower courts got it right, I
12 think that - - - that this case is not ripe and the
13 lower courts - - -

14 JUDGE RIVERA: Again, I'm sorry, it's just
15 I'm unsatisfied; let me put it that way.

16 MR. DENBY: All right.

17 JUDGE RIVERA: With that - - - with that -
18 - - that's not necessarily because of you - - - the
19 way we're talking about Gordon, because I'm trying to
20 glean - - - I understand what you are suggesting is
21 the way to deal with Gordon and Center of Deposit.
22 But I guess I'm not seeing where I can find what
23 you've described in this case, with the fact that all
24 that the court says, is the board issued this after
25 the DEC had done that, and therefore it's not

1 appropriate in this case. So I'm not sure I get - -
2 - what did you call it - - -

3 MR. DENBY: I - - - I don't know that - - -

4 JUDGE RIVERA: - - - whether the DEIS is
5 unauthorized; I don't know that I would say - - -

6 MR. DENBY: She - - -

7 JUDGE RIVERA: - - - what went on here was
8 unauthorized.

9 MR. DENBY: Judge Ciparick refers to the
10 expenses - - -

11 JUDGE RIVERA: Yes.

12 MR. DENBY: - - - for a DEIS under the
13 circumstances of that case as being unnecessary and
14 unauthorized. That's, I think, is key.

15 JUDGE RIVERA: Okay, I'm sorry, where is
16 that?

17 MR. DENBY: Okay.

18 JUDGE RIVERA: Your time is up. That's - -
19 - I'll find it.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 MR. DENBY: Thank you.

22 JUDGE RIVERA: Thank you.

23 CHIEF JUDGE DIFIORE: Counsel.

24 MR. SHORE: Yes. Just a couple of quick
25 points; one, on the suggestion as made here and in

1 the previous papers that we get a certificate of
2 existing use; that would be impossible under these
3 circumstances. To get a certificate of existing use,
4 we would have to go back to that time the zoning laws
5 were enacted. My client obtained this property in
6 1992, prior to that there was a residence that was
7 used as a residence, the remainder of the property
8 was used as a tree farm, so we cannot prove legal
9 nonconforming use back to the day of the zoning code.
10 So that alternative, while it may have been useful on
11 their other facts, is not applicable here.

12 JUDGE ABDUS-SALAAM: Counsel, but I just -
13 - - I'd just like to understand, your position here
14 is that because of the use that you put the property
15 to over a period of time, and the town didn't do
16 anything about that, that absolves you from having to
17 do the SEQRA review, right; whether or not - - -

18 MR. SHORE: I'm not - - - I'm not saying
19 necessarily that I don't have to do the SEQRA review.
20 I think it's brought up, the question is if this
21 court finds ripeness, do you remand back to the
22 courts who have then determined the propriety of the
23 SEQRA review - - -

24 JUDGE ABDUS-SALAAM: And we can find - - -

25 MR. SHORE: The extent of the SEQRA review.

1 JUDGE ABDUS-SALAAM: You think we can find
2 ripeness just based on the DEIS, the draft EIS
3 statement?

4 MR. SHORE: I think you can find ripeness
5 based upon the overall actions of the town, the
6 failure to adopt the SEQRA declaration until seven
7 years, the fact that in keeping with Center of
8 Deposit, the SEQRA resolution only talks about the
9 proposal has the potential to result in a change,
10 that there is nothing definitive going to happen as a
11 result of the zoning change. Clearly any change in
12 use down the road would require another application
13 to the town, could trigger its own, much more
14 specific, SEQRA kind of declaration.

15 JUDGE FAHEY: The problem is, what - - -
16 what actual concrete injury are you suffering from,
17 other than the imposition of the cost of the DEIS?

18 MR. SHORE: Concrete, none.

19 JUDGE FAHEY: I see. That's - - - that's
20 kind of a linchpin here, I think.

21 MR. SHORE: But, that's the linchpin, but
22 the problem is they're asking for as broad a possible
23 - - -

24 JUDGE FAHEY: I know, but that's - - - the
25 problem - - -

1 MR. SHORE: - - - without a rationale
2 behind it - - -

3 JUDGE FAHEY: Take a step back and think,
4 we're the Court of Appeals, we have to set a policy
5 for the state, and we don't want to set a policy that
6 says every time someone orders a DEIS, there's no
7 environmental review. So we - - - that's why I'm
8 asking, from your point of view, what actual concrete
9 injuries you can point to, or have us look at, to
10 sustain that argument.

11 MR. SHORE: Well, I think the same argument
12 and the same thing that was decided in Center of
13 Deposit, which is, is there any benefit to the
14 municipality for making somebody jump through the
15 hoops.

16 JUDGE FAHEY: I see. So you say we should
17 go to a weighing as to the overall process, should it
18 have been done in this case.

19 MR. SHORE: Should it have been done, and
20 is the - - - is the municipality going to benefit
21 from it.

22 Thank you very much.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 (Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Ranco Sand and Stone Corp. v. Vecchio, No. 43 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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