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Municipal Powers Under SEQRA

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By Michael B. Gerrard

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The State Environmental Quality Review Act (SEQRA)¹ confers considerable powers on New York State municipalities. In fact, most municipalities are probably unaware of the full scope of authority they are given by this statute.

Powers

SEQRA's most important mandate is the preparation of environmental impact statements (EISs) for the discretionary actions of state or local agencies that may have a significant effect on the environment. One of the first steps in the SEQRA process is the designation of a "lead agency," which must be one of the agencies that has approval power over the project. Once designated, the lead agency has almost total control over the SEQRA process.

The lead agency determines:

- * whether an EIS is needed;
- * the scope of the EIS;
- * whether a draft EIS (typically prepared by the applicant's consultants) is acceptable.
- * whether and when to have public hearings;
- * how comments from the public should be responded to; and
- * the contents of the final EIS.

Every EIS must consider alternatives to the proposed action. One important element in determining the scope of an EIS is which alternatives should be considered. The lead agency has a free rein in requiring consideration of projects of a different size, design or purpose than that envisioned by the applicant.

Once the final EIS is complete, the lead agency and every other involved agency must make their own decisions about whether, and upon what terms, to approve the project. Each agency's decisions must be accompanied by a findings statement. As the statute provides:

When an agency decides to carry out or approve an action which has been the subject of an environmental impact statement, it shall make an explicit finding that the requirements of the section have been met and that consistent with social, economic and other essential

considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided.²

This provision empowers agencies to impose conditions on applicants or, in many instances, to deny applications. The leading case interpreting these powers is *Town of Henrietta v. New York State Department of Environmental Conservation*,³ in which the court upheld DEC's decision to require a shopping center developer to institute energy conservation and wetlands protection measures as a condition of receiving a water pollution permit. DEC's regulations under SEQRA codify this requirement.

SEQR does not change the existing jurisdiction of agencies nor the jurisdiction between or among state and local agencies. SEQR provides all involved agencies with the authority, following the filing of a final EIS and written findings statement, or pursuant to subdivision 617.7(d) of this Part [concerning conditioned negative declarations] to impose substantive conditions upon an action to ensure that the requirements of this Part have been satisfied. The conditions imposed must be practicable and reasonably related to impacts identified in the EIS or the conditioned negative declaration.⁴

This authority to impose conditions is clear for agencies that have broad jurisdiction, such as town boards and planning boards. The state zoning enabling laws also empower such bodies to impose conditions on the issuance of site plan approvals,⁵ special permits,⁶ and variances.⁷ It is less clear, as a matter of law, whether a special-purpose entity (such as a wetlands commission) has the authority to impose conditions unrelated to its special purpose.

The authority under SEQRA to impose conditions is a sword that is much more readily wielded *by* agencies than *against* them. Courts have upheld agency decisions (challenged by developers) to impose conditions on developers;⁸ few cases have overruled agency decisions (challenged by environmental and citizen groups) *notto* impose conditions.⁹

Thus SEQRA leaves agencies with the discretion whether to give precedence to environmental or economic considerations. Provided that other binding standards are not violated, an agency may approve a project that will be environmentally destructive, if the agency has followed all necessary procedures and made a formal finding as to the reasons for its decision. Similarly, the agency may also disapprove such a project and find that the economic benefits do not warrant the environmental destruction.

This broad discretion reflects the legislative compromise reached

in 1975 when SEQRA was enacted. Environmentalists wanted SEQRA to mandate pro-environmental outcomes; buildings and labor unions were opposed to any statute at all. The State Legislature chose a middle ground under which agencies could, but were not compelled to, choose the environment over the economy where the two were in conflict.

Thus a broad range of decisions will survive judicial challenge. Agencies *may* do a great deal under SEQRA; they must follow the required procedures, but having done that they have few constraints in the decisions they make.

Constraints

There are two principal constraints on agency discretion under SEQRA: a set of paperwork requirements called the "HOMES Test," and the takings doctrine.

HOMES Test- This test, named after the decision in *H.O.M.E.S. v. New York State Urban Development Corp.*,¹⁰ is the principal way that courts determine that agencies have followed SEQRA and not acted arbitrarily and capriciously in their decision-making. This test involves three questions:

- I. Did the agency identify the relevant areas of environmental concern?
- II. Did the agency take a 'hard look' at those areas?
- III. Did the agency make a 'reasoned elaboration' of the basis for its determination?

Where courts have struck down agency actions under SEQRA, it has most often been because the agencies flunked the HOMES Test by failing to document their decision-making process. Good intentions will not suffice if the paper record is inadequate.

Once it has been approved by the lead agency, the final EIS becomes the authoritative statement of the project's impacts. If an impact is not acknowledged in the final EIS, an agency will have great difficulty disapproving or conditioning a project because of that impact. A frequent problem has arisen when agencies have uncritically accepted a developer's EIS, and then attempted to act in a way inconsistent with that approved EIS.¹¹ It is essential for the lead agency to revise the EIS so that it accurately portrays current conditions and anticipated impacts *before* it becomes a final approved document. The SEQRA regulations provide that a lead agency may charge the applicant for the costs of hiring the agency's own consultants to review, or even prepare, the EIS.¹²

A municipality may not, however, simply sit on an application and refuse to process it. A developer may not be entitled to any particular decision, but he or she is entitled to *some* decision. An unjustified delay in processing the application may lead to a ruling that the application should be deemed granted.¹³

It is common for municipalities to wish to prevent

environmentally destructive projects from being built in their borders. It is almost as common for municipalities to flounder about and, by failing to follow the necessary procedures, lose their opportunity to stop these projects. Several 1996 cases illustrate how various towns have approached this process correctly and incorrectly.

In three decisions, municipalities got it right -- or right enough. They became the lead agencies; required the preparation of EISs; ensured that these EISs fully disclosed the projects' adverse environmental impacts; and, after the completion of the FEISs, exercised their power to disapprove the projects, citing specific provisions of the FEISs. Despite finding some minor procedural irregularities, the courts upheld all three of these disapprovals.¹⁴

In four other decisions, however, municipalities made such serious errors that they lost their chances to stop undertakings they opposed. In two of these, municipalities seemed to sit passively while DEC considered and approved applications for these projects; by the time the towns work up, their chance to participate meaningfully in the SEQRA process had passed them by.¹⁵In a third, the town issued a negative declaration for a project, but then disapproved the project; the court annulled this disapproval, noting the logical inconsistency between declaring a project would not hurt the environment, and disapproving the project on environmental grounds.¹⁶In the fourth, the town declared itself lead agency, but never decided whether to issue a negative or a positive declaration; instead, without obtaining more information, it simply denied the application. This, the court unsurprisingly found, was arbitrary and capricious.¹⁷

Takings-- The Takings Clause of the U.S. Constitution prevents the federal, state and local governments from taking private property without just compensation. The law of takings is in considerable flux, but there are two basic circumstances when a court will find a taking to have occurred:

- A. the government action denies the owner *any* economically viable use of property (not just the most profitable use); or
- B. the action does not substantially advance a legitimate governmental interest.

A series of U.S. Supreme Court decisions have established that a taking occurs if there is not a close enough nexus between the land use restriction and the goal it seeks to achieve,¹⁸or if there is not at least a "rough proportionality" between the restriction and the goal.¹⁹ A rule of general applicability (such as a change in the municipal-wide zoning code) has a considerably easier time in court than a site-specific restriction.

An example of where a municipality failed to act properly, and had to pay dearly as a result, was *Town of Orangetown v. Magee*.²⁰ A

town sued a developer to force it to remove a temporary building, the building permit for which had been revoked by the building inspector. The developer counterclaimed and convinced the court that the permit revocation had been ordered by the town supervisor for political reasons, without a sound factual basis. The town was required to pay the developer \$5.1 million.

The New York Court of Appeals on February 18, 1997 issued four decisions that clarified the application of takings law in New York State. These decisions considerably strengthen the hand of municipalities in regulating land use.²¹ Together, these decisions establish:

* There is no taking if a rationally-based land use restriction very substantially reduces the value of the property but still leaves some residual economic value.

* If a land use restriction is imposed, and the property is subsequently sold, the new owner has acquired land that is burdened by the land use restriction, and cannot claim a taking regardless of how onerous is the burden.

In one of these decisions (*Gazza*), the plaintiff bought his land for \$100,000, and said that after development it would be worth \$396,000. A wetlands restriction reduced the property's value to \$80,000, and a neighbor had offered \$50,000 for it. The Court of Appeals found that enough value remained in the property to defeat a takings claim.

Trends

Over the past decade or so, the trend in the law has been to increase the discretion vested with municipalities over use of land, provided that the municipalities adequately articulate the reasons for their decisions.

Though the courts still say they require "strict compliance" with SEQRA, in fact many of them now forgive minor procedural irregularities.²² The courts are very slow to second-guess a substantive land use or environmental decision made by a municipality, provided that the decision could find adequate support in the record; in fact, environmentalists challenging such actions have not won a SEQRA case in the New York Court of Appeals since 1989.

The recent suite of Court of Appeals decisions on the takings doctrine make it clear that very few land use restrictions will be found to be takings requiring compensation. A 1992 statute penalizes developers and others who bring "SLAPP Suits" ("Strategic Lawsuits Against Public Participation"),²⁴ and since then no such suits in New York State seem to have succeeded.

Thus municipalities that properly document their decisions now have very broad discretion to protect their environment.

NOTES

- 1 N.Y. Environmental Conservation Law ("ECL") Art. 8.
- 2 2 ECL Sec. 8-0109.8.
- 3 76 A.D. 2d 215, 430 N.Y.S. 2d 440 (4th Dep't 1980).
- 4 6 N.Y.C.R.R. 617.3(b).
- 5 Village Law 7-725-a(4), Town Law 274-a(4), General City Law 27-a(4).
- 6 Village Law 7-725-b(4), Town Law 274-b(4), General City Law 27-b(4).
- 7 Village Law 7-712-b(4), Town Law 267-b(4), General City Law 81-b(5).
- 8 E.g., Town of Henrietta, *supra*.
- 9 But see *Save the Pine Bush, Inc. v. City of Albany*, 141 A.D. 2d 949, 530 N.Y.S. 2d 295 (3d Dep't), leave to app. den., 73 N.Y. 2d 701, 536 N.Y.S. 2d 60 (1988).
- 10 69 A.D. 2d 222, 418 N.Y.S. 2d 827 (4th Dep't 1979).
- 11 E.g., *WEOK Broadcasting Corp. v. Planning Board of Lloyd*, 79 N.Y. 2d 373, 583 N.Y.S. 2d 170 (1992).
- 12 6 N.Y.C.R.R. 617.13(a).
- 13 E.g., *Figgie International, Inc. v. Town of Huntington*, 203 A.D. 2d 416, 610 N.Y.S. 2d 563 (2d Dep't 1994).
- 14 *North Greenbush Development Corp. v. Fragomeni*, 226 A.D. 2d 854, 640 N.Y.S. 2d 911 (3d Dep't 1996); *Fawn Builders Inc. v. Planning Board of the Town of Lewisboro*, 223 A.D. 2d 996, 636 N.Y.S. 2d 873 (3d Dep't 1996); *East Coast Development Co. v. Kay*, Index No. 95-1232 (Sup. Ct. Tompkins County, March 4, 1996) (J. Relihan).
- 15 *Friedenburg v. Korman*, 232 A.D. 2d 414, 648 N.Y.S. 2d 157 (2d Dep't 1996); *Envirotech of America, Inc. v. Dadey*, 168 Misc. 2d 661, 639 N.Y.S. 2d 890 (Sup. Ct. Onondaga County 1996), modified and aff'd, 234 A.D. 2d 968, 651 N.Y.S. 2d 778 (4th Dep't 1996).
- 16 *Ramus v. Funt* (Sup. Ct. Suffolk County), *New York Law Journal*, September 30, 1996 at 25.
- 17 *Rockefeller v. Planning Board of the Town of Mount Pleasant* (Sup. Ct. Westchester County), *New York Law Journal*, May 1, 1996, at 25.
- 18 *Nollan v. California Coastal Commission* 483 U.S. 825, 107 S. Ct. 3141 (1987).
- 19 *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994).
- 20 88 N.Y. 2d 41, 643 N.Y.S. 2d
- 21 (1996). 21 *Anello v. Zoning Board of Appeals of the Village of Dobbs Ferry*, 89 N.Y. 2d 535, 656 N.Y.S. 2d 184 (1997), cert. den. 138 L. Ed. 2d 1036 (1997); *Basile v. Town of Southampton*, 89 N.Y. 2d 974, 655 N.Y.S. 2d 877 (1997), cert. den. 1997 U.S. Lexis 6007 (1997); *Gazza v. DEC*, 89 N.Y. 2d 603, 657 N.Y.S. 2d 555 (1997), cert. den. 1997 U.S. Lexis 4662 (1997); *Kim v. City of New York*, 90 N.Y. 2d 1, 659 N.Y.S. 2d 145 (1997).
- 22 E.g., *Webster Associates v. Town of Webster*, 59 N.Y. 2d 220, 464 N.Y.S. 2d 431 (1983); *Save the Audubon Coalition v. City of New York*, 180 A.D. 2d 348, 586 N.Y.S. 2d 569 (1st Dep't 1992), app.

denied, 81 N.Y. 2d 702 (1993).

23 The last was Village of Westbury v. Department of Transportation, 75 N.Y. 2d 62, 550 N.Y.S. 2d 604 (1989). But see Kahn v. Pasnik, 1997 N.Y. Lexis 3234 (October 30, 1997).

24 Civil Rights Law 76-a(1)(A).

People



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