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Recommended Citation

Michael B. Gerrard & Edward McTiernan, *Survey of 2022 Cases Under State Environmental Quality Review Act*, N.Y.L.J., JULY 13, 2023 (2023).
Available at: https://scholarship.law.columbia.edu/faculty_scholarship/4018

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New York Law Journal

ENVIRONMENTAL LAW

Survey of 2022 Cases Under State Environmental Quality Review Act

Thursday, July 13, 2023

By **Michael B. Gerrard**

And **Edward McTiernan**

The courts in New York issued 43 opinions in 2022 under the State Environmental Quality Review Act (SEQRA). Of these, the largest number—27—upheld agency decisions not to prepare an environmental impact statement (EIS), and eight overturned such decisions. Six cases upheld actions that had been the subject of an EIS; none overturned such actions. Two cases can't be classified in this fashion.

These numbers are in line with the longstanding pattern that a project's greatest litigation vulnerability under SEQRA is the failure to prepare an EIS; if an EIS has been prepared, very rarely will the approvals be annulled on SEQRA grounds.

The most important SEQRA developments in the past year, by far, were the statutory amendments that required much more detailed baseline and cumulative impact analyses, and banned the construction of some new facilities that would add to the pollution burden in disadvantaged communities. We discussed these amendments in detail in our column of May 10, 2023, "New York Adopts Nation's Strongest Environmental Justice Law," and we will not repeat that here. There are not yet any judicial decisions under these amendments.

The balance of this column will discuss the most important 2022 cases. All the cases will be included in the forthcoming annual update to Environmental Impact Review in New York (Michael B. Gerrard, Daniel A. Ruzow and Philip Weinberg, eds.).

SEQRA as Delay Tactic

One unusual decision was *Verizon Wireless of the East LP v. Town of Wappinger*, 2022 U.S. Dist. LEXIS 17003 (S.D.N.Y. Jan. 31, 2022). The plaintiff applied to the town planning board for a

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permit to erect a cell tower. The planning board discussed the project at several meetings and did not raise major objections. The town planner circulated a draft negative declaration (a finding that no EIS is needed) that explained why the proposed cell tower "will not have a significant adverse environmental impact on any scenic or aesthetic resources." After several hearings at which some neighbors raised strong objections, primarily based on visual impacts, the planning board issued a positive declaration (a decision to require an EIS).

Approval of cell towers is governed by the federal Telecommunications Act of 1996 (TCA), which was intended, in the words of the congressional conference committee, "to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services." The TCA provided that state and local governments must act on applications to build cell towers "within a reasonable period of time." The Federal Communications Commission (FCC) issued regulations providing that a "reasonable period of time" to process a cell tower application was 150 days.

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About 330 days had already elapsed between Verizon Wireless's application and the town's positive declaration, and preparation of an EIS would take many months more. Verizon Wireless sued the town in federal court, as allowed by the TCA. The court found that "the town was presumptively unreasonable" in the time it was taking to act on the application, and that the positive declaration "was done merely to delay the permitting process in contravention of the federal statute and the FCC order," and was a "delaying tactic." The court ordered the town to make a final decision on the application within 60 days. This deadline would make it impossible to complete the EIS process.

This venue and outcome were made possible by the TCA. Only telecommunications equipment enjoys this statutorily mandated expedited procedure, though it has been suggested that Congress should provide a similar procedure for renewable energy facilities, in view of the need for a massive number of them to address the climate crisis and the growing number of local ordinances that impede them.

Another decision did not turn out so well for a cell tower developer. In *Gondolfo v. Town of Carmel,* 76 Misc. 3d 521, 174 N.Y.S.3d 197 (Sup. Ct. Putnam Co. 2022), the town had denied approvals for a cell tower. The cellphone company sued in federal court under the TCA. The town board and the cellphone company entered into a settlement that allowed the construction of two towers. However, separate approvals for these towers would ordinarily be required from the town's planning board and its zoning board of appeals. Neighbors sued in state court, alleging that these other approvals were required and were subject to SEQRA. The town said that the judicially approved settlement made the towers exempt from SEQRA. The Supreme Court disagreed, finding that this exemption did not apply

and that the town board had overstepped its authority in agreeing to the towers' construction without the approval of the other local boards.

Appellate Reversals

Only two of the decisions involved appellate reversals of lower court decisions. Both of these were from the Appellate Division; the Court of Appeals decided no SEQRA cases in 2022. In both, the appellate courts found that the lower courts had erred in ruling for plaintiffs.

Arntzen v. City of New York concerned the proliferation of sidewalk cafes in New York City after the onset of the COVID pandemic. Mayor Bill de Blasio issued an order setting up a program to allow greater use of sidewalk, curb, and street space for these cafes, and the city issued a negative declaration. A suit was brought alleging that the cafes increased vermin, noise and garbage. The city moved to dismiss, saying that the petition was not yet ripe as the city council might consider the issue. The Supreme Court found the suit to be ripe and denied a motion to dismiss and subsequently annulled the negative declaration. 2022 N.Y. Misc. LEXIS 461 (Sup. Ct. N.Y. Co. Feb. 1, 2022); 2022 N.Y. Misc. LEXIS 1478 (Sup. Ct. N.Y. Co. Mar. 23, 2022). In a brief opinion the First Department reversed, declaring, "Given the remaining legislative and administrative steps that must be taken by the city before the permanent outdoor dining program is finalized and implemented in place of the presently operating temporary program, the city's issuance of the SEQRA negative declaration was not an act that itself inflicts actual, concrete injury," and the petition should have been dismissed as not ripe. 209 A.D.3d 404, 174 N.Y.S.3d 585 (1st Dep't 2022).

The court found that the SEQRA review of the agreement must consider all the other approvals necessary for the landfill to continue to operate, including its air pollution permit, and that the other agencies whose approvals are needed must be treated as "involved" agencies under SEQRA; to do otherwise would be impermissible segmentation.

Boyd v. Cumbo involved a rezoning to allow the construction of two buildings in Crown Heights, Brooklyn. The Department of City Planning issued a negative declaration, and the city council amended the zoning map to allow the construction. The Supreme Court annulled the approvals, finding that City Planning had failed to satisfy its SEQRA obligation to take a hard look at the impacts on water and sewer infrastructure. 69 Misc. 3d 1222(A) (Sup. Ct. Kings Co. 2020). The Second Department reversed, finding that the size of the buildings was below the threshold established by City Environmental Quality Review (CEQR) Technical Manual for closer review of such infrastructure impacts. 210 A.D.3d 762, 177 N.Y.S.3d 712 (2d Dep't 2022).

Another case also turned on thresholds in the CEQR Technical Manual. *Elizabeth St. Garden v. City of New York,* 2022 N.Y. Misc. Lexis 6664 (Sup. Ct. N.Y. Co. 2022) concerned a proposed mixed-use building in the Nolita (for North of Little Italy) neighborhood in Manhattan. The court annulled the negative declaration because the open space in the area was below the ratios that the Manual indicates are sufficient to avoid an EIS that would consider open space impacts.

The First Department recently reversed, finding that the agency "rationally applied the qualitative factors identified in the manual" in making its determination. 2023 N.Y. App. Div. LEXIS 3442 (1st Dep't June 27, 2023).

Catastrophic Impacts Analysis

Another decision in the shadow of the pandemic was *301 E. 66th St. Condominium v. City of New York*, 2022 N.Y. Misc. LEXIS 5910 (Sup. Ct. N.Y. Co. 2022). The city had approved a new building for the New York Blood Center to replace its aging facility. Neighbors sued, alleging that "the EIS did not properly consider the reasonably foreseeable catastrophic impacts" of a release of harmful substances from the blood laboratory. The court rejected the suit, finding that "an analysis of how the new facility might handle an accidental release of a dangerous substance is not reasonably foreseeable and did not have to be included in the EIS." The court noted that "there are numerous federal, state and local regulations that govern laboratories," and that "the lab has been there, is there now, and would be there whether the larger building was approved or not."

Segmentation

Two negative declarations were overturned on the grounds of segmentation.

In *Evans v. City of Saratoga Springs,* 202 A.D.3d 1318 (3d Dep't 2022), the city approved a rezoning that allowed development of parcels of land owned by Saratoga Hospital, and issued a negative declaration. No specific development proposals for one of the parcels had been presented to the city. However, the court found that rezoning of that parcel was the first step in eventually developing it, and the potential development of the parcel "was not so attenuated from the zoning map amendment that reviewing an expansion of the hospital constituted permissible segmentation," and the city was "obligated to consider the impacts to be expected from such future development at the time of rezoning, even absent a specific site plan for the project proposal."

Fresh Air for the Eastside v. Town of Perinton, Index No. E2021008617 (Sup. Ct. Monroe Co. Dec. 21, 2022), concerned the existing High Acres Landfill & Recycling Center in Perinton, New York. (We previously discussed another aspect of this decision—its holdings on the new environmental rights provision of the New York Constitution—in our column on that provision on March 8, 2023.) The town had entered into a new "host community agreement" for the landfill. The court found that the SEQRA review of the agreement must consider all the other approvals necessary for the landfill to continue to operate, including its air pollution permit, and that the other agencies whose approvals are needed must be treated as "involved" agencies under SEQRA; to do otherwise would be impermissible segmentation.

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