New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
Web address: http://www.nylj.com
VOLUME 239—NO. 60 FRIDAY, MARCH 28, 2008 ALM

ENVIRONMENTAL LAW

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Survey of SEQRA Cases From 2007

The courts issued 58 decisions under the New York State Environmental Quality Review Act (SEQRA) in 2007.[1]

Typically, plaintiffs have a much greater chance of success in SEQRA cases when no environmental impact statement (EIS) has been prepared: on average, in the cases from 1990 (when this column's annual survey began) through 2006, plaintiffs won 15.9 percent of the cases where there is an EIS, and 38.6 percent of the cases without an EIS.

But in 2007 the ratio was much different. In the 22 cases with an EIS, plaintiffs won seven, or 31.8 percent. In the 27 cases without an EIS, plaintiffs won five, or 18.5 percent. (The remaining nine cases were unclassifiable.)

The 31.8 percent plaintiffs' victory rate in cases with an EIS is the second-highest in the 18 years of this survey; the highest was 54 percent in 2001, and now the third-highest was 28 percent in 1995.

The two most common issues in the 2007 decisions were whether a supplemental EIS is needed, and whether there had been improper segmentation. On both issues, the decisions were fairly evenly split. There were also several decisions on whether the challenges were timely; whether the plaintiffs had standing to sue; and whether the subject actions were exempt from SEQRA.

Supplementation

Seven of the 2007 decisions concerned whether supplemental review was needed. In four, such review was found to be needed; in the other three, it was found to be unnecessary.

One of the cases in the latter category was the only Court of Appeals case under SEQRA in 2007, *Riverkeeper v. Planning Board of the Town of Southeast*.[2] An application to build the subject residential project had been filed back in 1988. An EIS was prepared,

followed by a supplemental EIS in 1991. The project appeared to languish, but it received its conditional final approval in 2002. Opponents sued on the grounds that a second supplemental EIS was needed because of various new developments, including, among others, expansion of the delineated wetlands area on the site by the Army Corps of Engineers; then-Governor George Pataki's designation of the Croton Watershed as a "Critical Resource Water"; the flagging of additional water courses; and the increase in the number of storm water basins. The trial court remanded to the Planning Board to determine whether a second supplemental EIS was needed. On remand, the Planning Board kept to its original decision not to require a supplemental EIS. The trial court found that was permissible, but the Appellate Division reversed.

The Court of Appeals reversed the Appellate Division and found that no supplemental EIS was needed. It described the decision whether to require a supplemental EIS as a "fact-intensive determination [where] the lead agency has the discretion to weigh and evaluate the credibility of the reports and comments submitted to it and must assess environmental concerns in conjunction with other economic and social planning goals.... It is not the province of the courts to second-guess thoughtful agency decision-making." Moreover, the Court held, "The lead agency, after all, has the responsibility to comb through reports, analyses and other documents before making a determination; it is not for a reviewing court to duplicate these efforts."

One important question in the case was whether the lead agency should have waited for other agencies to complete their permitting processes. The Court declared that "[a] lead agency improperly defers its duties when it abdicates its SEQRA responsibilities to another agency or insulates itself from environmental decision-making," but that had not occurred here. Indeed, "[p]rovided that a lead agency sufficiently considers the environmental concerns addressed by particular permits, the lead agency need not await another agency's permitting decision before exercising its independent judgment on that issue."

Citing *Riverkeeper,* the Appellate Division, Third Department, subsequently upheld a town's imposition of conditions on a proposed project, including other state and federal requirements. "Rather than an improper deferral of its independent judgment, as alleged by [plaintiff], the board's imposition of conditions reflects a proper effort to mitigate concerns identified during the review process," the court held.[3]

Segmentation

Segmentation was another hot topic under SEQRA in 2007. Three cases found there was improper segmentation; four found there was not.

In *AC I Shore Road LLC v. Inc. Village of Great Neck*,[4] the Second Department considered a plan for the redevelopment of the waterfront along Manhasset Bay. The plan included residential and mixed-use projects. At the same time, the village was considering a plan to decommission its sewage treatment plants and divert the sewage, by pipe, from the north shore of Long Island to another treatment plant on the south shore. An EIS was prepared for the proposed development but it did not analyze the potential environmental impacts of the sewage diversion plan. The court found this to be improper segmentation, as "[t]he record belies the appellants' contention that the sewage diversion plan was speculative, hypothetical, and not part of a larger unified plan."

Under somewhat similar facts, a court invalidated an EIS on a comprehensive zoning plan because it did not consider the associated construction of a sewage treatment plant.[5]

Impermissible segmentation was also found where a multi-use project called the Stanford Crossings Project was considered separately from an adult home. The court found that "the construction of

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the Stanford Crossings Project and the adult home are complimentary components of the same project in that they were planned together, are financially interrelated and neither could proceed in the absence of the other."[6]

The Third Department found a cumulative impact analysis to be adequate, notwithstanding a contrary view by the trial court.[7]

Timing

Confusion persists on when SEQRA lawsuits can or must be brought. Following the commonly accepted rule, one court found that a challenge to the issuance of a positive declaration (a decision requiring that an EIS be prepared) was not yet ripe.[8] However, a different court agreed to review a positive declaration because it "will require petitioner to expend substantial time and money participating in a scoping session, preparing a DEIS [Draft Environmental Impact Statement], and completing the remainder of the SEQRA review process, and those expenditures cannot be recouped even if the petitioner ultimately obtains the right to complete the project." Thereupon the court found that the lead agency had not sufficiently explained why it was issuing a positive declaration, and remanded to the agency for additional factual findings.[9]

Standing

Three suits were dismissed because the petitioners lacked standing to sue. In one, the petition alleged that the individual petitioners either reside or own properties located at specific addresses alleged to be across the street, adjacent to or in close proximity to the subject district, but "the allegations are not supported by competent evidence."[10] This decision suggests that petitioners must submit affidavits or similar documentation of their proximity with their petitions, something that is certainly not universal practice. The two other decisions involved petitioners who indisputably live about a mile from the subject site, which in both cases the court found was too far.[11]

Four villages were found to have standing to challenge a rezoning action in an adjoining town. The Second Department declared that "[t]he power to define the community character is a unique prerogative of a municipality acting in its governmental capacity," and that "the right to continue to exercise that authority …in the face of the potential threat posed by the Town's action with respect to the property along the villages' borders" is a basis for standing under SEQRA because "[s]ubstantial development in an adjoining municipality can have a significant detrimental impact on the character of a community."[12]

No SEQRA decision in 2007 dismissed a suit because the petitioners had not shown that they would be affected by the project in a different way than the public at large, the controversial requirement imposed by the Court of Appeals in *Society of the Plastics Industry v. Suffolk County*.[13]

Developers' Challenges

Project developers prevailed in all four SEQRA cases they brought that were decided in 2007. In *Lowe's Home Centers Inc. v. Venditto*,[14] the court directed a town to make a written determination with respect to the adequacy of petitioner's draft EIS within 30 days of the service of the court order. The town had delayed nine months in making its determination up until the time the applicant formally requested it, even though the SEQRA regulations contemplate that such a determination will be made within 45 days of the receipt of the draft EIS.

In the second case, the town rezoned certain property, allegedly rendering it undevelopable. The court agreed with the property owner that the town had not made a reasoned factual elaboration of the reasons for its decision, and the court annulled the rezoning.[15]

In the third case, the court found that a village "failed to provide a reasoned elaboration of the basis for its statement of findings" under SEQRA when it imposed apparently onerous conditions on the development, "and instead based the statement of findings on generalized, speculative comments and opinions of local residents."[16]

The other victory by developers came where the town board had denied the petitioner's application for site-plan approval without providing any reasoning for the denial. The court found the town board must explain its decision.[17]

Exemptions From SEQRA

In the four challenges to assertions that certain actions were exempt from SEQRA, the exemptions prevailed in three. These were cases finding that SEQRA did not apply to the refinancing of existing debt;[18] the issuance of a demolition permit, even if the demolition would affect a historic property;[19] and an action subject to the Adirondack Park Act.[20] A claim of exemption was rejected for a local law that opened routes traversing forest lands for use by all-terrain vehicles.[21]

Socioeconomic Impacts

In a case concerning the controversial Atlantic Yards project in Brooklyn, the Second Department upheld a condemnation action in the face of claims that the EIS had inadequately addressed the project's socioeconomic and displacement impacts.[22]

Fatal Procedural Flaws

Three actions were annulled where, notwithstanding adequate compliance with SEQRA, there were other fatal procedural flaws. In the first case, an EIS was upheld, but the town's action was annulled because it involved a change in a prior town determination without any explanation for the switch.[23]

In the second, an EIS was upheld but the project approval was annulled because the town had not sent the final EIS to the County Planning Board, as required by the General Municipal Law.[24]

The final case involved a remarkably indiscrete letter from a certain planning board chair. A rezoning to allow development of a multifamily housing project received a negative declaration. The Fourth Department upheld the negative declaration but struck down the Planning Board's ensuing site-plan approval. As the court wrote, "the Planning Board's chairperson manifested actual bias when she wrote a letter to the mayor supporting both the rezoning and the project, noting therein that she 'would really like to see new housing available to [her] should [she] decide to sell [her] home and move into something maintenance free'….We conclude that the appearance of bias and actual bias in this case require annulment of the Planning Board's site-plan approval."[25]

1. All of these decisions will be included in the forthcoming 2008 update to Michael B. Gerrard, Daniel A. Ruzow and Philip Weinberg, "Environmental Impact Review in New York" (Matthew Bender).
2. 9 NY3d 219, 851 NYS2d 76 (2007).
3. *Basha Kill Area Ass'n v. Planning Bd. of Town of Mamakating*, 46 AD3d 1309, 849 NYS2d 112 (3d Dept. 2007).
4. 43 AD2d 439, 841 NYS2d 344 (2d Dept. 2007).
5. *MYC New York Marina, LLC v. Town Board of Town of East Hampton*, 17 Misc3d 751, 842 NYS2d 899 (Sup. Ct. Suffolk Co. 2007).
6. *Friends of the Stanford Home v. Town of Niskayuna*, Index No. 2006-1282 (Sup. Ct. Schenectady Co., Sept. 17, 2007) at 6.
7. *Saratoga Lake Protection and Improvement District v. Dep't of Public Works of the City of Saratoga Springs*, 46 AD3d 979, 846 NYS2d 786 (3d Dept. 2007).
8. *Denop LLC v. Village of Sag Harbor Planning Board*, Index No. 9157-2006 (Sup. Ct. Suffolk Co. Jan. 30, 2007).
9. *Delvecchio v. City of Cortland Planning Commission*, Index No. 40913/07 (Sup. Ct. Cortland Co., Dec. 28, 2007), slip op. at 2.
10. *Bloodgood v. Town of Huntington*, Index No. 23516/06 (Sup. Ct. Suffolk Co. April 30, 2007).
11. *Bolton v. Town of South Bristol Planning Board*, 38 AD3d 1307, 832 NYS2d 729 (4th Dept. 2007); *Powers v. De Groodt*, 43 AD3d 509, 841 NYS2d 163 (3d Dept. 2007).
12. *Chestnut Ridge v. Town of Ramapo*, 45 AD3d 74, 94, 841 NYS2d 321 (2d Dept. 2007).
13. 76 NY2d 705, 559 NYS2d 984 (1990).
14. 15 Misc3d 1108(A), 836 NYS2d 500 (Sup. Ct. Nassau Co. 2007).
15. *R&K Precision Autoworks Inc. v. Town of Riverhead*, Index No. 5243/05 (Sup. Ct. Suffolk Co. Sept. 12, 2007).
16. *Chase Partners, LLC v. Inc. Village of Rockville Centre*, 43 AD3d 1053, 843 NYS2d 114 (2d Dept. 2007). See also *Chase Partners, LLC v. Inc. Village of Rockville Centre*, 43 AD3d 1049, 843 NYS2d 116 (2d Dept. 2007).
17. *South Blossom Ventures, LLC v. Town of Elma*, 46 AD3d 1337, 848 NYS2d 806 (4th Dept. 2007).
18. *Gunthrope-Hardee v. Dormitory Authority*, 41 AD3d 144, 835 NYS2d 898 (1st Dept. 2007), leave to app. denied, 9 NY3d 810, 844 NYS2d 786 (2007).
19. *Ziemba v. City of Troy*, 37 AD3d 68, 827 NYS2d 322 (3d Dept. 2006), leave to app. denied, 8 NY3d 806, 832 NYS2d 488 (2007).
20. *Ass'n for Protection of the Adirondacks Inc. v. Town Board of the Town of Tupper Lake*, 17 Misc3d 1122(A), 851 NYS2d 67 (Sup. Ct. Franklin Co. 2007).
21. *State of New York v. Town of Horicon*, 46 AD3d 1287, 848 NYS2d 770 (3d Dept. 2007).
22. *Anderson v. New York State Urban Development Corp.*, 45 AD3d 583, 846 NYS2d 218 (2d Dept. 2007).
23. *East End Property Co. #1 v. Town Board of Town of Brookhaven*, 15 Misc3d 1138(A), 841 NYS2d 819 (Sup. Ct. Suffolk Co. 2007).
24. *Seyferth v. Town Board of Town of Woodbury*, Index No. 8723/05 (Sup. Ct. Orange Co. March 6, 2007).
25. *Schweichler v. Village of Caledonia*, 45 AD3d 1281, 845 NYS2d 901 (4th Dept. 2007).