New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
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An incisivemedia publication
VOLUME 241—NO. 96
FRIDAY, MAY 22, 2009

ENVIRONMENTAL LAW

Expert Analysis

Standing, Delay and Other Issues In Survey of 2008 SEQRA Cases

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The courts decided 62 cases under the State Environmental Quality Review Act (SEQRA) in 2008. Of the 10 cases in which an environmental impact statement (EIS) had been prepared, plaintiffs won two (20 percent). Of the 35 cases without an EIS, plaintiffs won seven (also 20 percent). The remaining cases could not be classified this way.

This annual survey reviews the decisions. There were no Court of Appeals decisions under SEQRA during 2008 (nor, so far, during 2009). The most important SEQRA development in the past 18 months was the release by the State Department of Environmental Conservation (DEC) on March 11, 2009, of a draft policy, "Assessing Energy Use and Greenhouse Gas Emissions in Environmental Impact Statements" (discussed in this column on March 27, 2009). The final policy is now awaited, as are DEC's proposed revisions to the environmental assessment form.

Standing

The most hotly contested issue under SEQRA during 2008 was standing to sue. Most interesting were a pair of decisions concerning development in the Pine Bush area in and near Albany, which is noted as the habitat of the Karner Blue Butterfly, an endangered species. Both decisions were issued by the Appellate Division, Third Department, and written by Justice E. Michael Kavanagh, but they came to opposite conclusions.

In the first, *Save the Pine Bush v. Planning Board of the Town of Clifton Park*,[1] petitioner alleged its members enjoy observing the butterflies. The case was dismissed because "petitioner has not established that any of its individual members will sustain an injury that is different from that of the public at large as a result of the development of this property or that any of its members resides in close proximity to the proposed site." This is a standard application of the landmark—and controversial—SEQRA standing decision *Society of Plastics Industry v. County of Suffolk*.[2] That decision has led to the dismissal of many suits; a bill intended to overturn it legislatively has passed the Assembly and is now pending in the Senate (A.3423/S.1635).

In the second decision, *Save the Pine Bush v. Common Council of the City of Albany*,[3] standing was granted. In *Clifton Park*, the affected habitat was all private property that could only be viewed from a nearby road, and no Karner Blue butterflies had been seen there since 2001. But in *City of Albany*, the affected habitat was publicly owned, petitioners could lawfully go there, at least one of them lived nearby, and there were many more butterflies there. The court also noted that "Save the Pine Bush and its membership have a long and distinguished history of involvement" with preserving the habitat. However, not all the judges agreed that standing had been established; the Third Department split 3-2 in *City of Albany*. This gave the city a right of appeal; the Court of Appeals will hear oral argument on Sept. 15, 2009.

Society of Plastics was also the basis for the dismissal of a third case.[4] Three other cases were dismissed on the separate standing grounds that the petitioners were asserting economic rather than environmental interests, and thus were outside the zone of interests of SEQRA.[5]

Suits Over Delay

In three separate cases, project applicants prevailed in claims that government agencies were unduly dragging out the SEQRA process to prevent or delay the developments. In *Oyster Bay Associates Limited Partnership v. Town Board of the Town of Oyster Bay*,[6] the court was so fed up with years of delay in the approval of a shopping mall that, in a rather caustic decision, it accused the town's counsel of "sanctionable" conduct, ordered the town to issue the special use permit for the mall, and directed all parties to appear before the court every 90 days to report on the progress made in complying with the orders. The Supreme Court in Suffolk County declared, "The purpose of SEQRA was never intended to be a weapon, indiscriminately used to frustrate legitimate applications by property owners for reasonable development of the property for which they pay taxes."

In *Kaywood Properties Ltd. v. Forte*,[7] the Suffolk County Supreme Court agreed with petitioners that over the course of four years, officials of the Town of Brookhaven "deliberately delayed petitioners' [subdivision] application and concocted reasons to deny it as a pretext in order to enable the Town to complete its condemnation proceeding and acquire the property at a bargain price." The court directed the planning board to approve the application.

A similar outcome occurred in *Downey Farms Dev. Corp. v. Town of Cornwall Planning Bd.*,[8] where the town was found to have delayed the application so that it could rezone the property. After hearing expert testimony that other similar projects were processed much more swiftly, and receiving evidence of improper motivations for the delay, the Supreme Court in Orange County found that the applicant's rights to build its subdivision had vested.

Supplemental EIS

A recurring claim in 2008 was that projects had changed since their initial environmental reviews such that supplemental EISs were needed. In two cases, such claims were rejected, and supplemental EISs were found to be unnecessary.[9] In a third, a supplemental EIS had been prepared and was found to be sufficient.[10]

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However, one decision found that a supplemental EIS was necessary. It concerned a proposed public school complex to be built on a site in the Bronx that was formerly occupied by a railroad yard, a manufactured gas plant, and a laundry facility. The New York City School Construction Authority (SCA) prepared an EIS that discussed the potential for soil and groundwater contamination. However, the Bronx County Supreme Court found that the EIS could not be complete without a long-term maintenance and monitoring plan that would ensure the occupants of the school would not be exposed to hazardous materials. The court directed the preparation of a supplemental EIS "to ensure the public participation and/or comment which the SCA contends it is willing to afford the community following the implementation of its long term maintenance program."[11]

Segmentation

Four cases concerned segmentation—dividing related actions into separate environmental review. Two found no impermissible segmentation. One of these involved unusual circumstances. Ingersoll Adult Home Inc. operates an adult residential facility in a historic mansion on State Street in the Town of Niskayuna. Ingersoll contracted to sell the property to Highbridge Development BR, LLC, conditioned upon Highbridge building a new adult home facility on Consaul Road. Meanwhile, Highbridge sought to tear down the mansion and build a commercial/retail complex at the State Street site. Opponents sued on the grounds that the State Street development and the Consaul Road development were so interconnected that they should be reviewed together under SEQRA.

The Third Department disagreed. It found that "[t]he contractual contingencies, standing alone, do not create a geographic or environmental interrelationship between the two projects. Rather, they accommodate a practical consideration which would have applied to the transaction no matter where the new facility was to be constructed." The court added that the two projects "have entirely different and separate purposes, they are located approximately one mile apart and they are not part of a common design.... In short, the contractual link between these otherwise independent actions is not sufficient to establish that they are part of an overall plan of development that would require cumulative review."[12]

On the other hand, impermissible segmentation was found where a property owner sought to subdivide a 193-acre tract into 10 lots. It turned out that Lots #9 and #10 would be 88 and 58 acres in size, respectively, and would likely be subdivided further. The court in the Supreme Court, Warren County, found that the contemplated development of the entire 193 acres should be considered as part of a single SEQRA review, unless the planning board could supply a good reason to proceed otherwise.[13]

Segmentation was acknowledged to be present, but permissible, in a case involving the construction by the Seneca Nation of a gaming casino in Buffalo, and the execution of an agreement between the Seneca Nation and the City of Buffalo covering a variety of matters, including the casino. The Erie County Supreme Court approved the parties' use of a little-known provision of DEC's SEQRA regulations that allows segmentation when it is fully explained and justified in advance. Thus the casino project and the agreement could be considered separately under SEQRA.[14]

Endangered Species

Endangered species figured prominently in several cases. One environmental review was found insufficient where the applicant obtained letters indicating that DEC was not aware of any endangered or threatened species on the property, but did not perform an on-site wildlife survey.[15] In *Save the Pine Bush v. Common Council of the City of Albany*, discussed above, an EIS was rejected because, while the Karner Blue Butterfly was studied, the possible presence of other rare plant and animal species was not.

A pair of decisions addressing standing concerned development in an area in and near Albany, which is noted as the habitat of the Karner Blue Butterfly.

In another case discussed above, *Kaywood Properties Ltd. v. Forte*, the planning board was found to have no basis in the record for stating that the proposed subdivision could adversely affect the endangered tiger salamander.

Five Small Surprises

Finally, five decisions contained somewhat surprising holdings.

- The New York State Division of Housing and Community Renewal can be sued for not undertaking environmental review in considering an application to evict tenants in order to demolish a building and erect a new one.[16]
- The environmental impact statement for a solid waste marine transfer station did not have to examine operations at maximum capacity, because that capacity "would be reached only under rare circumstances."[17]
- The construction of a foie gras production facility with state financial assistance is exempt from SEQRA as a Type II agricultural farm management practice.[18]
- A subdivision application can be denied because of potential drainage and flooding problems, even though the SEQRA determination found no significant adverse effects associated with drainage and flooding.[19]
- A county may contract to buy property for the construction of a correctional facility without performing SEQRA review, if the contract is conditioned on subsequent environmental review.[20]

1. 50 AD3d 1296, 856 NYS2d 687 (3d Dept. 2008).
2. 77 NY2d 761, 570 NYS2d 778 (1991).
3. 56 AD3d 32, 865 NYS2d 365 (3d Dept. 2008).
4. *Shelter Island Association v. Zoning Board of Appeals of Town of Shelter Island*, 57 AD3d 907, 869 NYS2d 615 (2d Dept. 2008).
5. *Widewaters Route 11 Potsdam Co., LLC v. Town of Potsdam*, 51 AD3d 1292, 858 NYS2d 820 (3d Dept. 2008); *Construction Trucking Assn. v. Metropolitan Transp. Auth.*, 2008 WL 2233866 (Sup. Ct. NY Co., May 21, 2008); *Sutherland v. N.Y.C. Housing Dev. Corp.*, 20 Misc.3d 1115(A), 867 NYS2d 378 (Sup. Ct. NY Co. 2008).
6. 19 Misc3d 1145(A), 867 NYS2d 18 (Sup. Ct. Suffolk Co. 2008).
7. 19 Misc3d 1143(A), 867 NYS2d 17 (Sup. Ct. Suffolk Co. 2008).
8. 20 Misc3d 566, 858 NYS2d 542 (Sup. Ct. Orange Co. 2008).
9. *Muir v. Town of Newburgh*, 49 AD3d 744, 854 NYS2d 727 (2d Dept. 2008); related case, *Muir v. Town of Newburgh Planning Board*, 49 AD3d 742, 854 NYS2d 896 (2d Dept. 2008); *Eadie v. Town Board of Town of North Greenbush*, 47 AD3d 1021, 850 NYS2d 240 (3d Dept. 2008).
10. *Croton Watershed Clean Water Coalition Inc. v. New York City Dept. of Envir. Prot.*, Index No. 2076/07 (Sup. Ct. Putnam Co., Jan. 18, 2008).
11. *Bronx Committee for Toxic Free Schools v. New York City School Construction Authority*, Index No. 13800/07 (Sup. Ct. Bronx Co., Oct. 16, 2008).
12. *Friends of the Stanford Home v. Town of Niskayuna*, 50 AD3d 1289, 857 NYS2d 249 (3d Dept. 2008). The other decision finding no impermissible segmentation was *Town of Babylon v. New York State Dept. of Transp.*, 47 AD3d 721, 849 NYS2d 611 (2d Dept. 2008).
13. *Fund for Lake George Inc. v. Planning Board of the Town of Lake George*, Index No. 48003/07 (Sup. Ct. Warren Co., June 27, 2008).
14. *Scott v. City of Buffalo*, 20 Misc3d 1135(A), 872 NYS2d 693 (Sup. Ct. Erie Co. 2008).
15. *Kittredge v. Planning Board of the Town of Liberty*, 57 AD3d 1336, 870 NYS2d 582 (3d Dept. 2008).
16. *220 CPS "Save Our Homes" Association v. N.Y.S. Div. of Housing and Community Renewal*, 20 Misc3d 1113(A), 867 NYS2d 379 (Sup. Ct. N.Y. Co. 2008).
17. *Association for Community Reform Now v. Bloomberg*, 52 AD3d 426, 861 NYS2d 325 (1st Dept. 2008).
18. *Humane Society of the United States v. Empire State Development Corp.*, 53 AD3d 1013, 863 NYS2d 107 (3d Dept. 2008).
19. *MLB, LLC v. Schmidt*, 50 AD3d 1433, 856 NYS2d 296 (3d Dept. 2008).
20. *Palczynski v. County of Herkimer*, 55 AD3d 1242, 865 NYS2d 418 (4th Dept. 2008).