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Expert Analysis

Annual Survey of SEQRA Cases: Bad for Plaintiffs, But Important Bill Pending

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This past year was the worst ever for parties bringing cases under the State Environmental Quality Review Act (SEQRA). Of the 40 decisions in 2021, plaintiffs won only two, with another two surviving motions to dismiss. Moreover, three plaintiffs' victories in prior years were reversed on appeal.

However, the most important SEQRA development by far will come if Governor Kathy Hochul signs a bill that would amend the statute by requiring far more baseline and cumulative impact review, and barring the issuance and renewal of permits that would have disproportionate impacts.

This annual SEQRA review first examines the pending bill, and then describes the most noteworthy decisions.

Cumulative Impacts Bill

S.8830/A.2103D passed the Senate on April 25 by a vote of 62 to 0, and the Assembly on April 27 by a vote of 141 to 4. Governor Hochul has 30 days to sign or veto the bill, but the clock does not start until the Legislature formally sends it to her; customarily that does not happen until the governor is ready. If she takes no action by the end of the year, that counts as a veto.

The bill provides that every environmental impact statement (EIS) prepared under SEQRA must discuss the "effects … on disadvantaged communities, including whether the action may cause or increase a disproportionate or inequitable … pollution burden on a disadvantaged community."

For every project requiring a permit from the Department of Environmental Conservation (DEC), "an existing burden report" must be prepared with "baseline monitoring data collected in the affected disadvantaged community within two years of the application," with data about, among other things, existing pollution sources; ambient air pollution levels; traffic, noise and odor levels; and a description of how the proposed project would add to existing cumulative "pollution burdens."

Most significantly, the bill provides that "[n]o permit shall be approved or renewed by [DEC] if it may cause or contribute to, either directly or indirectly, a disproportionate or inequitable … pollution burden on a disadvantaged community." This substantive provision goes beyond any other environmental justice law in the United States. The governor is being pressed by both supporters and opponents of the bill.

Statistics

Of the 40 cases decided in 2021, the courts upheld agency decisions not to prepare an EIS in 22, and overturned such decisions in two. In five cases, EISs were upheld; no cases found EISs to be deficient. In four cases, the project approval was upheld but the court did not indicate whether

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an EIS was prepared. Seven cases could not be classified in this manner, typically because the decision was on a preliminary procedural matter.

Six of the cases were brought in federal rather than state court. Two of these enjoyed some success in that they were allowed to proceed (the *Lubavitch of Old Westbury* and *WG Woodmere* cases discussed below); in most of the rest, the federal court found the case belonged in state court.

As usual, all the cases will be included in this year's update to *Environmental Impact Review in New York* (Gerrard, Ruzow & Weinberg).

Appellate Reversals

In three cases, plaintiffs had won at the trial level, only to be reversed on appeal.

Hart v. Town of Guilderland concerned the development of five apartment buildings and a Costco retail store near the Crossgates Mall in a suburb of Albany. The lengthy Supreme Court decision was highly critical of the EIS and declared, "On scrutiny, the record herein is replete with conclusory self-serving and equally troubling representations made by the project sponsor, without the support of empirical data, which, unfortunately, the Planning Board relied on." Index No. 906179-20 (Sup. Ct. Albany Co. 2020). However, the Appellate Division reversed, finding that the EIS had adequately examined the project's impacts on avian populations, views from an historic district, and community character. The appellate court found "that the Planning Board's review was proper and thorough and that the mitigation measures that [the developer] was required to implement were appropriate." 160 A.D.3d 900 (3d Dept. 2021).

The Third Department subsequently affirmed dismissal of a separate lawsuit challenging the same SEQRA review of this project. *Save the Pine Bush v. Town of Guilderland*, ___ A.D.3d ___, 2022 N.Y. App. Div. LEXIS 2979 (3d Dept. May 5, 2022).

Neighbors United Below Canal v. De Blasio, 2020 N.Y. Misc. Lexis 9837 (Sup. Ct. N.Y. Co. Sept. 21, 2020), was a challenge to the construction of a new jail in Manhattan as part of the City of New York's plan to shut down and replace the Rikers Island complex. The City initially selected 80 Centre Street as the site, and prepared a draft scoping statement on that basis. After the public comment period on the draft scoping statement expired, the City decided instead to use a site three blocks away, 124-125 White Street. Draft and final EISs analyzed the White Street site. Neighbors of that site sued.

In 2020, the Supreme Court found that the City should have undertaken a new scoping process focused on the White Street site, and that "the FEIS effectively ignores both the short- and long-term consequences of demolition, excavation, and construction activities on the health of the public in the neighborhood adjacent to the project." The court also found that the City "deferred and delayed a full and complete consideration of vehicular traffic and congestion-related impacts inasmuch as those impacts are design specific." The court annulled the project's approvals.

The Appellate Division, First Department, reversed. In a brief opinion, it found that the scoping process did not have to be redone; that the environmental review considered a reasonable range of alternatives; and the EIS "took the requisite hard look at impacts on public health, traffic, and parking." 192 A.D.3d 642 (1st Dept. 2021) (citations omitted).

The third appellate reversal actually came in two cases, both decided the same day by the same panel. *Mutual Aid Ass'n of the Paid Fire Dept. of the City of Yonkers v. City of Yonkers Zoning Bd. of Appeals*, 199 A.D.3d 800 (2d Dept. 2021), and *Mutual Aid Ass'n of the Paid Fire Dept. of the City of Yonkers v. City of Yonkers*, 199 A.D.3d 815 (2d Dept. 2021). Both cases involved the Ridge Hill development in Yonkers. It had been the subject of an EIS. The plaintiff in both cases, a union representing active firefighters, alleged that the SEQRA findings statements had called for the construction of a new firehouse, and that the city had violated its obligations by not building the firehouse. The lower court had held that the plaintiff might be correct and its claims could proceed. The Appellate Division reversed both decisions and found that the city had no such obligation; while a new firehouse might be desirable, it was not mandatory.

Suits Over Excessive Delays

Two separate lawsuits in federal court, both arising in Nassau County, involved allegations that local governments were excessively dragging out the environmental and land use review processes for buildings plaintiffs wanted to erect. Both cases alleged various constitutional violations, including religious discrimination.

Lubavitch of Old Westbury v. Incorporated Village of Old Westbury, 2021 U.S. Dist. LEXIS 188915 (E.D.N.Y. Sept. 30, 2021), concerned buildings for worship and religious education. By the time of the decision, the plaintiffs had been attempting to get village approvals for 25 years and had prepared a draft EIS. The plaintiffs and the Village had long had a contentious relationship. When plaintiffs sued, the Village said the suit would not be ripe until the Village had made a final determination on the land use applications; plaintiffs said this process was futile and would only lead to further delays. The court found that the case was ripe for adjudication, and allowed the litigation to proceed.

WG Woodmere v. Town of Hempstead, 2021 U.S. Dist. LEXIS 160290 (E.D.N.Y. Aug. 23, 2021), concerned the proposed conversion of a golf course to a subdivision with 284 single-family homes. Plaintiffs prepared a draft EIS at a cost of approximately $2 million, but no final SEQRA determination had been made. Here too the process dragged out for years and underwent numerous twists and turns. According to the U.S. Magistrate Judge, "Plaintiffs allege that the unfair treatment of the Property can be traced at least in part to an anti-Semitic animus," and that the latest zoning restrictions are "a part of a years-long scheme aimed at depriving Plaintiffs of their economic rights to develop their land." The magistrate judge found that plaintiffs' allegations were sufficient to state claims for violation of the Equal Protection Clause, the Takings Clause, and substantive and procedural due process. Part of the procedural due process claim was alleged abuse of the SEQRA process, though violation of SEQRA itself was not found. The defendants have objected to the magistrate judge's report and recommendations, and the district court has not yet issued its decision.

Negative Declarations Struck Down

In two cases, the courts struck down negative declarations—decisions by an agency not to require an EIS.

In *Gabe Realty v. City of White Plains Urban Renewal Agency*, 195 A.D.3d 1020 (2d Dept. 2021), the defendant was taking property by eminent domain as part of an urban renewal project, but apparently did not specify how it would then use the property. The court found that the defendant had violated SEQRA because "it failed to identify the relevant areas of environmental concern and take a hard look at them," and had also violated the Eminent Domain Procedure Law because it did not "identify some public purpose other than the purported remediation of blight."

In *Village of Islandia v. Ball*, Index No. 906725-20 (Sup. Ct. Albany Co., April 28, 2021), the Suffolk County Legislature issued a negative declaration for inclusion of several parcels of land in an agricultural district. That would have legalized an existing use, Pal-O-Mine Equestrian, which was in an area zoned residential. Pal-O-Mine prepared an environmental assessment form, which was reviewed by the County Council on Environmental Quality. The form misrepresented the zoning status of the land. The County Legislature then adopted the environmental assessment form, issued the negative declaration, and approved the subject action. The court found that "it is manifest that the Legislature," with no substantive discussion or comments, "insulated itself from environmental decision making and effectively acted as a 'rubber stamp' for the staff recommendation, thus improperly delegating its SEQRA duties" (citations omitted).