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ZONING AND LAND USE PLANNING

Court Limits Judicial Review Of SEQRA Positive Declaration

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On March 31, the New York Court of Appeals issued its decision in *Ranco Sand and Stone Corp v. Vecchio*.[1] In *Ranco*, the court restricted its prior holding in *Matter of Gordon v. Rush*,[2] which zoning practitioners and the courts[3] had interpreted as holding that the issuance of a "positive declaration"[4] by a "lead agency"[5] reviewing a proposed project that mandates the preparation of a draft environmental impact statement (DEIS)[6] pursuant to the State Environmental Quality Review Act (SEQRA)[7] may be immediately challengeable in court as arbitrary and capricious.

As a practical matter, the ability to immediately mount a court challenge to a decision requiring a DEIS meant that developers and other property owners faced with such a requirement could weigh the costs (i.e., money and delay) associated with a lawsuit, on the one hand, against the likelihood of overturning the agency ruling and being able to proceed with the project without the need to prepare a DEIS, on the other. Indeed, decisions requiring the preparation of a DEIS have been challenged in court—and some have been overturned.[8]

The court's Ranco decision significantly limits when an aggrieved party can commence an immediate challenge to the issuance of a positive declaration. Given the very large financial expense, the great amount of work involved, and the considerable amount of time needed to prepare a DEIS, the court's ruling is likely to mean, in many instances, that an agency's decision requiring preparation of a DEIS will doom a project—developers simply will decide that it is better to walk away and pursue a new project, rather than go forward with the proposed development. This is not a good result for local governments, communities, property owners, construction workers, or a project's potential employees who otherwise would benefit from the DEIS-laden project coming to fruition.[9]

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Background

Ranco Sand and Stone Corporation owns two parcels of contiguous property in an area zoned for residential use in Smithtown, in Suffolk County, New York. In 1997, Ranco leased one parcel to a private school bus company that used it as a bus yard and trucking station. In 2002, Ranco applied to rezone that parcel from residential to heavy industrial use.

In preparation for a public hearing on the application, the director of the town's Planning and Community Development Department prepared a report that addressed various planning considerations, stressed the potential environmental impact of the proposed rezoning, and recommended approval of the application, if made subject to certain land use conditions. The report characterized Ranco's zoning application as "a request for a significant amendment" to the town's comprehensive plan.

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In 2004, after the public hearing, the town's planning board recommended approval of the application. No further action was taken on the application for another five years, when the town board, acting as the lead agency under SEQRA, adopted a resolution issuing a positive declaration that rezoning the parcel "may have a significant effect on the environment" and required Ranco to prepare a DEIS.

Ranco commenced an Article 78 proceeding against the town and the members of the town board, seeking to annul the positive declaration as "arbitrary, capricious, and unauthorized" and requesting mandamus relief directing the town to process the rezoning application without a DEIS. In support of its petition, Ranco asserted that the declaration imposed a hardship on the company because it would force it to incur between $75,000 and $150,000 in expenses in completing the DEIS—an actual and real financial injury.

Ranco also argued that a DEIS was unnecessary, as demonstrated by the prior rezoning for heavy industrial use of Ranco's contiguous parcel, which was done without a DEIS. In that regard, Ranco claimed that the court should treat the town's prior rezoning of its second parcel as res judicata and binding on the town with respect to its application on the first parcel.

The town and board members moved to dismiss the petition for failure to state a cause of action. The Supreme Court, Suffolk County, granted the motion, finding that the matter was not ripe for judicial review. The Appellate Division, Second Department, affirmed, concluding that the positive SEQRA declaration requiring Ranco to prepare a DEIS was the initial step in the decision-making process rather than a final administrative determination ripe for judicial review and, therefore, that it did not give rise to a justiciable controversy.[10]

The Court of Appeals granted leave to appeal.

Court of Appeals Decision

In its decision, the Ranco court referenced its 2003 ruling in Matter of *Gordon v. Rush*,[11] which also involved a challenge to a town board's positive declaration of potential significant environmental effects concerning proposed land use permit applications and the board's requirement that the property owners prepare a DEIS. In *Gordon*, the court concluded that the challenged board action was ripe for judicial review because the board's SEQRA declaration imposed an obligation on the petitioners to prepare and submit a DEIS after they "had already been through the coordinated review process and a negative declaration had been issued by the [Department of Environmental Conservation] as lead agency."

The court in *Gordon* explained that a positive declaration was ripe for judicial review when two requirements were satisfied. First, the agency's action had to "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." This threshold requirement, the Gordon court said, consisted of "a pragmatic evaluation…of whether the decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury."

The second requirement the court cited in Gordon was that there had to be a finding that the apparent harm inflicted by the action "may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party."

After reviewing this history, the court agreed with Ranco that the town's positive declaration imposed an obligation on Ranco that satisfied the first requirement of the ripeness-for-review test. It then took pains to distinguish *Gordon*.

The court, however, said that it was not persuaded by Ranco's argument that the town board's declaration met the second requirement because, even assuming that its rezoning application was approved, it could not recoup the costs incurred and time spent creating the DEIS. The court ruled that that argument was "insufficient, without more, to distinguish Ranco's case from any other preliminary administrative action." Adopting Ranco's position, the court reasoned, "would lead to convergence of the two

requirements" set forth in *Gordon* by "reducing the analysis to whether a petitioner will incur unrecoverable costs."

The court then specifically limited *Gordon*, stating that it stood for the proposition that where a positive declaration appeared unauthorized, "it may be ripe for judicial review, as, for example, when the administrative agency is not empowered to serve as lead agency…, when the proposed action is not subject to SEQRA…, or when a prior negative declaration by an appropriate lead agency appears to obviate the need for a DEIS suggesting that further action is improper."

Accordingly, the court concluded that because Ranco had not claimed that the declaration had not been authorized or that the property was not subject to SEQRA, and because Ranco had not presented any other basis to find that the town board had acted outside the scope of its authority, its petition was not ripe for judicial review.

Conclusion

Before *Ranco*, *Gordon* essentially was seen as an endorsement by the court of the ability to challenge an agency's declaration requiring preparation of a DEIS before a final determination on the underlying application was made. In fact, the court affirmed the Second Department's conclusion in *Gordon* that the proceeding brought by the property owners in that case was ripe for review.

Moreover, the court in *Gordon* was unwilling to accept the board's argument that the court should adopt a "bright-line rule" that a positive declaration requiring a DEIS was "merely a step in the agency decisionmaking process" and, as such, was not final or ripe for review. It said that adopting this "bright-line rule" would be "inappropriate."

> The court's ruling in 'Ranco' is likely to mean that an agency's decision requiring preparation of a DEIS will doom a project which is not a good result for local governments and communities, who otherwise would benefit from the DEIS-laden project coming to fruition.

In practice, however, *Ranco* now has effectively adopted that bright-line rule.

Unfortunately, the court's decision in *Ranco* does not appear to be based on the same "pragmatic evaluation" of the facts and circumstances that led it to determine in *Gordon* that the considerable time and expense associated with the preparation of a DEIS imposed a justiciable injury that could be immediately challenged in court. The court's Ranco decision not only results in a significant change in practice for developers, property owners, and land use practitioners, but affords yet another opportunity for the SEQRA process to be manipulated by those who are opposed to a development project.

1. *Ranco Sand and Stone Corp. v. Vecchio*, 2016 N.Y. Slip Op. 02477 (March 31, 2016).

2. *Matter of Gordon v. Rush*, 100 N.Y.2d 236 (2003).

3. See, e.g., *Matter of Center of Deposit, Inc. v. Village of Deposit*, 90 A.D.3d 1450 (3d Dept. 2011) (property owner's challenge to positive declaration found ripe for judicial review).

4. A "positive declaration" is a written statement prepared by the lead agency indicating that implementation of the action as proposed may have a significant adverse impact on the environment and that an environmental impact statement will be required. 6 NYCRR 617.2(ac).

5 A "lead agency" under SEQRA is "principally responsible for undertaking, funding or approving an action, and therefore responsible for determining whether an environmental impact statement is required in connection with the action, and for the preparation and filing of the statement if one is required." 6 NYCRR 617.2(u).

6. A DEIS is an initial statement describing possible "significant adverse environmental impacts" that may be caused by the proposed action. A DEIS includes alternatives and mitigation measures and is circulated for review and comment to assist the lead agency in determining the environmental consequences of the proposed action. See, 6 NYCRR 617.2(n).

7. Environmental Conservation Law (ECL) §8-0101; 6 NYCRR Part 617.

8. See, e.g., *Matter of Gordon v. Rush*, supra.

9. For further background on the issues, see Anthony S. Guardino, "Ripeness Ruling Defies Rationale of Court's Decision," NYLJ (Jan. 28, 2015).

10. To challenge an administrative determination, an agency action must be "final and binding upon the petitioner." *Walton v. New York State Dept. of Correctional Servs.*, 8 N.Y.3d 186, 194 (2007), quoting CPLR 217(1).

11. 100 N.Y.2d 236 (2003).