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ZONING AND LAND USE PLANNING

Ripeness Ruling Defies Rationale of Court's Decision

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When a developer or other property owner has a project that must be reviewed by a local government agency under the New York State Environmental Quality Review Act (SEQRA),[1] the agency assesses its environmental significance. If the agency determines that the project does not pose significant adverse environmental impacts, it issues a "negative declaration." If, however, the agency determines that the project has potentially significant adverse environmental consequences, it issues a "positive declaration" requiring preparation of a draft environmental impact statement (DEIS) before it will consider giving the project the necessary approvals.

Preparation of a DEIS can be quite costly and time consuming and, as a practical matter, an agency's finding that a DEIS is required often can doom a project.

Given the severe consequences of a positive declaration, land use practitioners have long understood that an agency's insistence on the preparation of a DEIS can immediately be challenged in court as arbitrary or capricious.[2] Indeed, the ability to challenge a positive declaration before a final determination on the underlying application is made was endorsed by the New York Court of Appeals in *Matter of Gordon v. Rush*.[3]

Now, the Appellate Division, Second Department, has issued a decision that has thrown the validity of this practice into doubt. The Second Department, in *Matter of Ranco Sand & Stone Corp. v. Vecchio*,[4] held in late November that a positive declaration under SEQRA did not constitute a matter ripe for judicial review but, rather, was merely a preliminary step in the decision-making process.

Unless the Second Department itself, or the Court of Appeals, rejects *Ranco*, court challenges to positive declarations will be allowed in the future only in very limited circumstances. That unfortunate result would add a great deal of delay and costs to the development process throughout New York.

The 'Rush' Ruling

The Rush case arose after storms during the winter of 1992-1993 caused substantial erosion to the beaches in Bridgehampton, in the Long Island town of Southampton. As a result, in March 1993, a group of oceanfront property owners requested permission from the town to install shore-hardening structures, steel bulkheads, on the seaward toe of the primary dune to prevent further erosion. The property owners asked that this project be undertaken as an emergency measure.

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The town, acting under its Coastal Erosion Hazard Area Law (CEHA),[5] notified the property owners that the proposed projects would not be eligible for emergency status and that they would have to proceed through the standard permitting process. The property owners then submitted permit applications to install the structures to the town and to the New York State Department of Environmental Conservation (DEC), which also had jurisdiction over the proposal because the bulkheads were proposed to be built within tidal wetlands.

The DEC, as the lead agency for coordinated SEQRA review purposes, notified the property owners that, based on a preliminary review, a positive declaration probably would be issued. The DEC further indicated that there also was the possibility of a negative declaration if any of three proposed mitigation measures was implemented. The property owners adopted the third suggestion and submitted modified applications.

In August 1993, the DEC issued negative declarations for the proposed activities, finding that an environmental impact statement did not have to be prepared because there would not be a significant impact on the environment. The property owners then submitted the amended applications to the town, which denied certain necessary permits that would have allowed the property owners to proceed. They appealed to the town board.

After a public hearing, the board issued a resolution stating that it would assume jurisdiction to conduct de novo SEQRA review of the variance applications, would take steps to establish a lead agency, and would make a determination of significance.

The property owners went to court to challenge the board's decision. The court, among other things, found insufficient facts and evidence in the record to support the board's determination that it had the authority to conduct a new SEQRA review. On remand, the board conducted further public hearings and, in January 1995, issued a resolution declaring itself lead agency to conduct its own SEQRA review and a positive declaration, finding that the proposed structures could have significant effects on the environment and requiring the property owners to prepare a DEIS.

The property owners went back to court. The trial court found that the proceeding was ripe for review and annulled the board's resolution, noting that the DEC had strictly complied with SEQRA when it had conducted the coordinated review. The Second Department affirmed, agreeing that the issue was a justiciable controversy ripe for review. The dispute reached the Court of Appeals.

In its unanimous decision, written by then-

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Judge Carmen Beauchamp Ciparick, the court ruled that the proceeding challenging the board's Jan. 19, 1995 issuance of a positive declaration was "ripe for judicial review." It explained that whether an agency action was ripe for review depended on several considerations. First, the action had to "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." In other words, the court continued, a "pragmatic evaluation" had to be made of whether the decisionmaker had arrived at a "definitive position on the issue" that inflicted "an actual, concrete injury." The court added that there also had to be a finding that the apparent harm inflicted by the action could not be "prevented or significantly ameliorated by further administrative action or by steps available to the complaining party."

Applying this test, the court found that the board's decision "clearly" imposed an obligation on the property owners because the issuance of the positive declaration required them "to prepare and submit a DEIS." The court added that the obligation to prepare a DEIS imposed "an actual injury" on the property owners as the process might "require considerable time and expense."

The court specifically rejected the board's argument that it should adopt a "bright-line rule" that a positive declaration requiring a DEIS was "merely a step in the agency decision-making process" and, as such, was not final or ripe for review. The court pointed out that the board had issued its own positive declaration for the project after the DEC had previously conducted a coordinated review resulting in a negative declaration, in which the board had an opportunity to participate but had not done so. "Certainly in this circumstance," the court declared, "the bright-line rule" proposed by the board "would be inappropriate."

Finally, the court found that further proceedings would not improve the situation or lessen the injury to the property owners, explaining that even if the board ultimately granted the variances, the property owners "would have already spent the time and money to prepare the DEIS and would have no available remedy for the unnecessary and unauthorized expenditures."

The court concluded that the harm in this case was the "issuance of the positive declaration" directing the property owners to prepare a DEIS, involving the expenditure of time and resources, after they already had been through the coordinated review process and a negative declaration had been issued by the DEC as lead agency.

The court's decision in *Rush* stood as an endorsement of the ability of property owners to challenge a positive SEQRA declaration requiring the preparation of a DEIS – at least until the Second Department's recent ruling in *Ranco*.

'Ranco'

The key facts of *Ranco* are strikingly similar to those in *Rush*.

The Ranco case involved real property in Kings Park, in the Long Island town of Smithtown, owned by Ranco Sand and Stone Corporation that was leased to third parties for use primarily as a bus yard and trucking station. In 2002, Ranco filed an application with the town to rezone the property from R-43 (residential) to HI (heavy industrial). In March 2004, the town planning board voted to recommend the approval of the application.

More than five years later, in August 2009, the town board adopted a resolution issuing a positive declaration pursuant to SEQRA after concluding that the proposed rezoning "may have a significant effect on the environment and that preparation of a draft environmental impact statement will be required." Among the stated reasons for requiring this level of environmental review was that the proposed use of the subject parcel would be incompatible with existing residential land uses in the vicinity.

Despite the Appellate Division's attempts to distinguish the two cases, the Ranco decision seems to fly in the face of the Court of Appeals' rationale in 'Rush.'

Ranco went to court to challenge the town board's decision on the ground that it was arbitrary and capricious. In support of its petition, Ranco relied on the fact that an adjacent parcel had been rezoned after litigation from residential to heavy industrial without any formal environmental review; that the adjacent parcel and the property for which it sought a rezoning had been used as if they were a single parcel; and that it was not seeking to change the manner in which the property was used, but merely was seeking to change the zoning classification to comport with the actual nature of its decades-long uses. Ranco also asserted that the requirement that it prepare a DEIS would cause it injury because it would be forced to expend substantial sums of money to retain experts to prepare the DEIS and to pay the town to review it.

The town board and the other respondents moved to dismiss the petition on the ground that the matter was not yet ripe for judicial review. They contended that the town board's issuance of a positive declaration did not constitute the final action that it would take on the matter and that it inflicted no immediate, concrete harm on Ranco.

The Supreme Court, Suffolk County, concluded that the matter was not ripe for judicial review and dismissed the proceeding. Ranco appealed.

In its decision, the Second Department recognized that the Court of Appeals had concluded in *Rush* that the requirement imposed on the property owners in that case to prepare and circulate a DEIS was likely to demand "considerable time and expense" and that it imposed "actual, concrete harm" on them. The Second Department then found, similarly, that requiring Ranco to prepare and circulate a DEIS would cause it to "incur considerable time and expense" that, in other words, would "impose an obligation" on Ranco and that might "inflict an actual, concrete injury" on the company.

As the Court of Appeals determined in *Rush*, the Second Department next decided that it did not appear that the harm to be inflicted on Ranco by the town board's requirement that it prepare and circulate a DEIS could be "prevented or significantly ameliorated by further administrative action or by steps available to Ranco."

Then, however, the Second Department attempted to distinguish *Ranco* from *Rush*. It noted that there were two different parcels involved in *Ranco*; that Ranco had not already been subject to a review process coordinated by "multiple governmental agencies"; that a SEQRA negative declaration had not previously been issued in connection with Ranco's rezoning proposal; and that there had not been a prior determination that a DEIS was not warranted. These differences were so significant to the Second Department that it then stated, "The circumstances in *Rush* would seem to present the exception rather than the rule." It concluded that, "[u]nder the circumstances of this case, the expense to be incurred in the preparation and circulation of a DEIS, substantial though it may be, is not sufficient, in and of itself, to require us to conclude that the matter is ripe for judicial review."

Conclusion

Despite the Appellate Division's attempts to distinguish the two cases, the Ranco decision seems to fly in the face of the Court of Appeals' rationale in *Rush*. The Ranco decision does not appear to be based on the same "pragmatic evaluation" of the facts and circumstances that led the Court of Appeals to determine that the considerable time and expense associated with the preparation of a DEIS imposes a justiciable injury. If it stands, *Ranco* would appear to be a game changer in the context of a positive declaration requiring preparation of a DEIS. Property owners, local government officials, and land use practitioners should pay careful attention to this decision and its aftermath.

1. See Environmental Conservation Law (ECL) §8-0101 et seq.; 6 NYCRR Part 617.
2. 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).
3. 100 N.Y.2d 236 (2003).
4. 2014 N.Y. Slip Op. 08338 (2d Dept. Nov. 26, 2014).
5. Code of Town of Southampton §138-3(E).