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ALM

Climate Change And SEQRA

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Over the years, developers, property owners, lenders and local governments on Long Island typically have given special attention to the island's groundwater when proposing or evaluating projects requiring permits or other approvals. That makes considerable sense, of course. As the New York Court of Appeals observed in the *Pine Barrens* case 15 years ago,¹ "the sole natural source of drinking water for much of Long Island is its aquifer system."

Things could soon begin to change, however. Concerns about global warming, greenhouse gases² and worldwide climate change may start to affect Long Island land use decisions as well as permit and other applications and agency—and court—decisions under the State Environmental Quality Review Act (SEQRA).³

As a result, air emissions—which generally have been given short shrift in the past except in connection with projects that emit large quantities of air emissions, such as power plants requiring Title V air permits—will no longer be relegated to the second-tier status of environmental concerns for Long Island-based projects. Rather, air emissions will be a major component

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of environmental assessments for most projects. Moreover, other climate-related concerns, including energy efficiency, may also be impacted by this process.

One of the most significant environmental issues now facing Long Islanders, and others across the nation and globe, is climate change. It has become clear that development and buildings and their residents consume electricity and contribute air emissions into the environment that are altering the environment and climate around the world. A Google search earlier this month for the term "climate change" resulted in more than 91 million hits. Some believe that low-lying areas such as the South Shore of Long Island will be most affected by global warming; as ocean levels rise, the shoreline may become submerged, with salt water entering both estuaries and basements.⁴ A warmer environment also might affect everything from the island's susceptibility to damaging hurricanes to the flora and fauna that grow and live here.

Local and statewide government officials are paying particular attention to climate change. In May, New York City hosted a climate change conference known as the "C40 Large Cities Climate Summit." Among the panels were ones focusing on land use issues, including a panel that examined how cities can encourage high-performance energy efficient building in new and existing commercial and residential construction to change the face of city-built environments and another that focused on how cities and the private sector can transform waste into energy and use recycling systems to reduce waste streams.

Also in May, Silda Wall Spitzer, New York's first lady, announced a "Greening the Mansion" program for the governor's mansion in Albany. That program seeks to cut the mansion's electric use and greenhouse emissions in half. Solar panels will be installed in the mansion's parking lot not only to provide a source of power, but also to act as carports to shade the vehicles using the lot. In addition, older, less energy-efficient equipment will be replaced with modern energy-saving models.

The Regional Greenhouse Gas Initiative (RGGI), a cooperative effort by New York state and other Northeast and Mid-Atlantic states, is an attempt to control emissions of greenhouse gases. The various practical effects of the RGGI are likely to include improved building energy codes and emission cap and trade programs. Other initiatives include the Sierra Club's Cool Cities

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program. Suffolk County and other municipal governments on Long Island have joined that program and have pledged to lessen emissions and reduce dependence on fossil fuels. All of these programs will affect SEQRA and land use decisions.

The government's focus on greenhouse gas emissions also is clear from the New York State Department of Environmental Conservation's proposal to adopt a rule regulating greenhouse gas emissions from automobiles delivered for sale and sold in New York. The DEC's proposed rule seeks to adopt California's vehicle emission control regulatory provisions. Without a doubt, the time for considering climate change by government officials has arrived.

SEQRA Standard

Perhaps as a consequence, the focus on global warming may reach into land use and SEQRA decisions on Long Island. For one thing, it is well established that the purpose of SEQRA is to incorporate the consideration of "environmental factors" into the existing planning, review and decision-making processes of state, regional, and local government agencies at the earliest possible time. To accomplish this goal, SEQRA requires that all agencies determine whether the actions they directly undertake, fund or approve may have a "significant impact on the environment," and, if it is determined that an action may have a significant adverse impact, prepare or request an environmental impact statement.⁵

Substantively, SEQRA and its implementing regulations require an agency undertaking an action to identify "all potential adverse environmental impacts" that may result from the action and "thoroughly

analyze the relevant impacts" of the action, among other things.⁶

SEQRA does not have specific provisions regarding judicial review, and the Court of Appeals has observed that agencies have "considerable latitude" in evaluating environmental effects and choosing among alternatives. Moreover, nothing in the law requires an agency to reach a particular result on any issue or permits courts to second-guess an agency's choice, which is subject to being reversed only if arbitrary, capricious, or unsupported by substantial evidence.⁷

Still, one must ask whether SEQRA can be interpreted to require that global warming or climate change matters be assessed—and even mitigated—in new projects. The answer may be yes, at least if developments in California, which has an environmental review statute of its own known as the California Environmental Quality Act (CEQA),⁸ presage a change in this area.

For example, a public interest group and the state of California in April both filed separate complaints against San Bernardino County asserting that the county had violated CEQA by failing to explore how new development under an updated comprehensive plan would affect the climate.⁹ Decisions in these matters can have nationwide repercussions, and certainly can affect Long Island development.

Conclusion

Government officials throughout New York are enacting initiatives that recognize the need to address greenhouse gas emissions. Whether these steps will involve formal regulatory action, result in a new basis to challenge SEQRA determinations, or simply recognize and promote innovative "green

buildings" is yet to be known. But the trend is clear, and local land use decisions and SEQRA analysis will likely have to deal more extensively with air emissions issues than in the past, as heightened focus is put on air emissions and climate change and their impact on Long Island.



1. In *The Matter of Long Island Pine Barrens Society, Inc. v. Planning Board of the Town Of Brookhaven*, 80 N.Y.2d 500 (1992).

2. Greenhouse gases include carbon dioxide, methane, nitrous oxide, perfluorocarbons, and hydrofluorocarbons.

3. See Environmental Conservation Law (ECL) §§8-0101 - 8-0117.

4. See <http://newyork.sierraclub.org/longisland/Energy-GlobalWarming.html>.

5. 6 NYCRR §617.1(c).

6. 6 NYCRR §617.7(b).

7. See *Matter of Jackson v. N.Y.S. Urban Develop. Corp.*, 67 N.Y.2d 400 (1986).

8. See Cal. Pub. Res. Code §§21000, et seq.

9. *Center for Biological Diversity v. San Bernardino Co.* (San Bernardino Co. Super. Ct., filed April 11, 2007); *California v. San Bernardino Co.* (San Bernardino Co. Super. Ct., filed April 13, 2007).