Several years after the State Environmental Quality Review Act (SEQRA) was enacted in 1975, Rye’s town board granted a permit to a property owner to construct an office building on close to 18 acres of town land. The board acted despite the fact that the town had not prepared an environmental impact statement (EIS) as described in SEQRA. On several occasions when considering the property owner’s application, however, the town had carefully examined environmental factors such as traffic volume, parking capacity, drainage, soil, vegetation, noise, and aesthetics.

A number of community members challenged the town board’s decision, seeking to have the construction permit set aside. They argued that the town had failed to adhere to the mandates of SEQRA. The trial court dismissed their petition, concluding that “substantial, not strict compliance with SEQRA” was required and observing that the town had “closely examined the environmental impact factors” even without an EIS.

The Appellate Division, Second Department, reversed in Matter of Rye Town/King Civic Association v. Town of Rye, 82 A.D.2d 474 (2d Dept. 1981), where the court ruled that the town had not discharged its duties under SEQRA because it failed “to adhere to the literal requirements” of the statute, notwithstanding that it carried out extensive environmental review procedures in harmony with the spirit of the law.

According to the Second Department, substantial compliance with the “spirit” of SEQRA did not constitute adherence to its policies “to the fullest extent possible,” as provided by SEQRA itself in Environmental Conservation Law (ECL) 8-0103(6). The law, and the accompanying regulations, the court emphasized, required “literal compliance.”

That courts have reached the same conclusion many times since the Second Department’s decision in Town of Rye may seem surprising, given that the “literal compliance” standard is clear and well accepted. Yet local governments all too often fail to literally abide by SEQRA’s requirements, at the risk of having their decisions overturned.

This column explains the essential features of SEQRA, reviews a recent case that illustrates the risks of failing to strictly comply with SEQRA’s requirements, and concludes by reiterating the importance of literal compliance with this law.

SEQRA’s Rules

As many courts have observed, SEQRA represents an attempt by the New York State Legislature to strike a balance between social and economic goals and concerns about the environment. See, e.g., Matter of Jackson v. New York State Urban Development Corp., 67 N.Y.2d 400 (1986). SEQRA’s primary purpose is to inject environmental considerations directly into governmental planning and decision making at the
earliest possible time, so that social, economic, and environmental factors are considered together when reaching decisions on proposed activities that may have a significant effect on the environment. See, e.g., Matter of Neville v. Koch, 79 N.Y.2d 416 (1992).

To promote the Legislature’s goals and to assist agency officials in their assessment of environmental factors, SEQRA requires that an EIS be prepared for such government-sponsored or government-approved projects or actions. ECL 8-0109(2). Described by the New York Court of Appeals as the “heart of SEQRA,” Matter of Jackson, supra, the EIS is a detailed statement setting forth, among other things, a description of the proposed action and its environmental setting; the environmental impacts of the proposed action, including both long-term and short-term effects; any adverse environmental impacts that cannot be avoided if the action is implemented; alternatives to the proposed action; and mitigation measures proposed to minimize the environmental impact.

SEQRA groups the “actions” subject to review into three distinct categories: “Type I,” “Type II,” and “Unlisted.” Type I actions are those projects directly undertaken, funded, or approved by a government agency that are considered likely to require the preparation of an EIS. Type II actions are activities that the New York State Department of Environmental Conservation (DEC) has determined will not have a significant impact on the environment or are otherwise precluded from environmental review by the ECL and, therefore, are not subject to SEQRA review. Unlisted actions are all actions not identified as Type I or Type II.

The initial step for a government agency that receives an application for approval or funding, or that proposes to directly undertake an action, is to determine whether the proposed action falls within the scope of SEQRA. The statute and regulations mandate that as early as possible in an agency’s formulation of an action it seeks to undertake, or as soon as an agency receives an application for funding or for approval of an action, the agency must determine whether the proposed action qualifies as a Type I, a Type II, or an unlisted action for purposes of SEQRA review.

If a proposed project is classified as a Type II action, the agency has no further responsibilities under SEQRA. If not, the agency must make a preliminary classification of the action as either Type I or Unlisted, and begin the process of environmental review by determining, among other things, whether an environmental assessment form (EAF) or a draft EIS should be prepared and, if more than one agency is involved, which agency should act as the lead agency.

The lead agency then must determine the environmental significance of the proposed action by comparing the information contained in the EAF or draft EIS with criteria established by the DEC as indicators of significant adverse impacts on the environment. The lead agency may determine either that the proposed action will not have any adverse environmental impacts or that the identified adverse environmental impacts will not be significant, or that the action “may include the potential for at least one significant adverse environmental impact.”

A written determination by the lead agency that a proposed action will not have a significant adverse impact on the environment, known as a “negative declaration,” ends the SEQRA process. Conversely, if the lead agency determines that the proposed action may have a significant environmental impact, it must issue a “positive declaration” and direct the preparation of an EIS.

A local government’s failure to literally comply with SEQRA can happen at any stage of this process, as illustrated by Pickerell v. Town of Huntington, 45 Misc.3d 1208(A) (Sup.Ct. Suffolk Co. 2014).

‘Pickerell’

The case arose after 7-Eleven, Inc., sought a special use permit and an area variance for a proposed demo-
A local government’s failure to literally comply with SEQRA can happen at any stage of this process, as illustrated by ‘Pickerell v. Town of Huntington.’

A traffic impact study, an engineering report, a planning study, and an appraisal report on impact on real property values of the convenience store it proposed.

At the opening of the hearing, the chair entered into evidence a “Convenience Store Study” prepared by the town’s Department of Planning and Environment.

The ZBA held 7-Eleven’s application open for comment, and it retained an engineering firm to review the proposed project. In addition to a report prepared by that firm, the ZBA received numerous supplemental reports, expert affidavits, and other documents from 7-Eleven.

The ZBA classified the project as a Type I action and voted in favor of issuing a negative declaration. After it granted 7-Eleven’s application, community members and a local civic association challenged the decision in court. The petitioners maintained that the ZBA had failed to literally comply with SEQRA’s requirements in determining that the proposed project, a Type I action, would not have any significant adverse effects on the environment and by failing to require the preparation of an EIS.

The court agreed with the petitioners, holding that the ZBA failed to meet procedural and substantive obligations under SEQRA when ruling on 7-Eleven’s application. In particular, the court ruled that the ZBA violated SEQRA by failing to promptly make its own preliminary classification of the proposed project as a Type I, Type II, or Unlisted action, and by failing to verify the accuracy of the information 7-Eleven provided in Part I of the EAF. The court added that the ZBA also failed to have 7-Eleven, the project sponsor, complete Part I of a full EAF, which is required for Type I actions.

Although the negative declaration stated that the ZBA had conducted a coordinated SEQRA review of the proposed project, the court found “no evidence in the record” that any of the involved or interested agencies were notified that the proposed project had been classified as a Type I action. The court also ruled that the ZBA’s decision to classify the project as a Type I action and issue a negative declaration was made “without a deliberative consideration of the various environmental issues.”

The court concluded that the ZBA failed to meet the obligations SEQRA imposed on a lead agency, and it annulled the ZBA’s decision granting 7-Eleven the special use permit and area variance it sought.

Conclusion

Other courts also have recently rejected local government land use decisions upon finding that the municipality failed to literally or strictly comply with SEQRA. See, e.g., Matter of Dawley v. Whitetail 414, LLC, 130 A.D.3d 1570 (4th Dept. 2015) (“SEQRA’s procedural mechanisms mandate strict compliance”); Matter of Healy v. Town of Hempstead Board of Appeals, No. 3214/2017 (Sup.Ct. Nassau Co. Aug. 28, 2018) (board’s decision was “fatally flawed” as it failed to “strictly follow” SEQRA requirements).

The lesson is clear: local governments that fail to strictly comply with SEQRA risk having their decisions overturned, even if they considered environmental and other issues and reached the result that they would have reached if they had complied with SEQRA. Since the failure to comply with SEQRA can doom a municipality’s zoning and land use decisions, both the project sponsor and the reviewing agency should meticulously comply with their respective obligations under SEQRA.