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ZONING AND LAND USE PLANNING

Obligations May Continue Even After SEQRA Approval

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The requirements of the New York State Environmental Quality Review Act (SEQRA)[1] as they relate to a particular project are among the most important considerations that developers, property owners, and local governments have to keep in mind. In many instances, SEQRA mandates preparation of a draft environmental impact statement (DEIS) and, then, a final environmental w statement (FEIS).

Importantly, however, even an FEIS may not be the end of the environmental review process under the statute. Project changes, the discovery of new information, a change of circumstances, or a wide variety of unexpected matters may lead to the need to supplement an FEIS. Regulations of the New York Department of Environmental Conservation (DEC) and a number of important court decisions help to determine when a supplemental environmental impact statement (SEIS) may or may not be required.

Consider, for example, the recent decision by the Supreme Court, Rockland County, in *Green Earth Farms Rockland v. Town of Haverstraw Planning Board*,[2] which involved the development of a 53.3-acre site accessible off Route 202 and the Palisades Interstate Parkway in Rockland County, New York, known as Minisceongo Park.

A Changed Site Plan

As the court explained, when the project first came to fruition in 2004, the original developer, Davies Farm, LLC, proposed a mixed-use residential and commercial project. The initial plans, primarily residential in nature, called for the construction of 279 dwelling units. Specifically, the proposal was for construction of 164 townhomes on the Town of Haverstraw portion of the site, and 115 residential units and two commercial buildings (7,000 square feet and 4,200 square feet, respectively) on the Town of Ramapo portion of the site. With the consent of the Town of Ramapo Planning Board, the Haverstraw Planning Board appointed itself as the lead agency of the project for SEQRA purposes.[3]

Project changes, the discovery of new information, a change of circumstances, or a wide variety of unexpected matters may lead to the need to supplement a final environmental impact statement.

In December 2004, Davies Farm completed part one of the full environmental assessment form (EAF) pursuant to SEQRA. The proposed site plan set forth in the EAF called for 173 townhomes with a pool and clubhouse on the Town of Haverstraw portion of the site and 72 multi-family units, 24 townhomes, and two commercial pads on the Town of Ramapo portion of site. The Haverstraw Planning Board issued a positive declaration and the scoping process[4] and the preparation of a DEIS began.

After preparation of a final scoping document, the board passed a resolution declaring that the DEIS, dated Nov. 8, 2006, was complete for the purpose of commencing formal review under SEQRA.

The board received comments, Davies Farm submitted a revised plan, and in January 2007 the board passed a resolution finding that Davies Farm had to prepare an FEIS. By December 2007, a draft FEIS had been prepared for a proposed development that called for 225 townhouse units and 28,800 square feet of commercial space, as well as a pool and a clubhouse.

Then, a few months later, Davies Farm submitted a new site plan for the same site—but it had gone from being primarily residential in nature to mostly commercial. The board voted to have Davies Farm prepare a draft SEIS, and an SEIS dated Feb. 6, 2009 was prepared and submitted to the board.

In December 2009, the board passed a resolution declaring the final SEIS complete for the purposes of SEQRA and it passed a resolution accepting the findings of the final SEIS.

Over a year later, a new developer for the project, Mt. Ivy Partners, indicated that site plans would be submitted that would include a 7,000 square foot QuickChek (a convenience store and gasoline filling station) and a 4,000 square foot Provident Bank. In early 2012, Mt. Ivy submitted an application for preliminary site plan approval. It contended that none of the changes that it had made was significant enough to warrant a "new look" under SEQRA.

In late November 2012, the board granted final site plan approval to Mt. Ivy for its site plan. Property owners near the Minesceongo site went to court to challenge that resolution. Among other things, they argued that, prior to granting final site plan approval, the board should have required that Mt. Ivy prepare an SEIS.

The Rockland Supreme Court agreed with the petitioners and found that the board's determination granting final site plan approval was arbitrary and capricious for failing to require an SEIS.

In its decision, the court explained that SEQRA regulations provide for the filing of an SEIS to address "specific adverse environ-

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mental impacts not addressed or inadequately addressed in the EIS due to: (a) changes in the project, (b) newly discovered information, or (c) a change in circumstances."[5] It then pointed out that the site plan that was the subject of the December 2009 board resolution was "not the same site plan" for which the board had granted final site plan approval in November 2012. The most notable difference between the two site plans, the court said, was a change from a 1,500 square foot deli/coffee shop to a 7,000 square foot convenience store with gasoline and diesel fuel sales for motor vehicles (specifically identified as a QuickChek). The court disagreed with the board that, despite the change to a gas station, no additional environmental impact statements were necessary.

The court ruled that although SEQRA and its regulations did not define "substantial change," a change from a 1,500 deli/coffee shop to a 7,000 square foot convenience store with gasoline and diesel sales was "a substantial change in the plan." It pointed out that the storage of petroleum, quite often in underground storage tanks, can have "an enormous negative impact on the environment" and that there were "numerous statutes and regulations to prevent the contamination of natural resources due to the storage of petroleum."[6]

Accordingly, the court concluded that the gas station in this "environmentally sensitive site with substantial and significant wetlands" had to be separately studied in an SEIS, and the board's decision to grant final site plan approval without first obtaining an SEIS was arbitrary and capricious.

Remedial Measures

In 2012, in *Bronx Committee for Toxic Free Schools v. N.Y. City School Construction Auth.*,[7] the New York Court of Appeals interpreted the SEQRA regulations to find another reason to require preparation of an SEIS. The court held that an SEIS had to be prepared to describe remedial measures where important decisions about mitigation of environmental harm only could be made after those remedial measures were completed.

In this case, the New York City School Construction Authority approved construction of a campus including four public schools in the Mott Haven area of the Bronx on a site that had been a railroad yard. The soil and ground water were significantly contaminated and the authority successfully applied to participate in the Brownfield Cleanup Program[8] before it prepared the EIS required by SEQRA.

The EIS, however, did not discuss the long-term maintenance and monitoring protocol that the authority said that it would use to prevent or mitigate environmental harm. The authority contended that it did not need to prepare an SEIS including this information, but the Supreme Court, Bronx County, and the Appellate Division, First Department, disagreed.

The Court of Appeals disagreed with the authority as well. In its decision, it pointed out that the authority had not disputed that the maintenance and monitoring measures were "essential" to protecting the site's occupants from dangerous contaminants but, rather, that the authority argued that an SEIS was not required because it reasonably had chosen not to decide on those measures before it had filed the EIS and it adequately described them in the site management plan approved by the DEC as part of the Brownfield Program.

The court assumed that the authority had acted reasonably in postponing a detailed consideration of its long-term maintenance and monitoring measures until after it had completed cleanup work at the site and after its EIS had been filed. The court ruled, however, that that did not mean that mitigation measures of "undisputed importance" could "escape the SEQRA process." It noted that DEC regulations provided for the filing of an SEIS to address subjects "not addressed or inadequately addressed in the EIS," arising from "changes proposed for the project," from newly discovered information or from changed circumstances.[9] The court then held that where important decisions about mitigation only could be made after the initial remedial measures were complete, an SEIS "may be called for, as it is here."

Conclusion

Not every post-FEIS change to a project requires preparation of an SEIS. SEQRA's focus is on environmental issues. Thus, in *Application of Municipal Art Society of New York v. N.Y.S. Convention Center Development Corp.*,[10] the Supreme Court, New York County, rejected the argument that an SEIS was required by a change in a project that conceivably raised security issues. The court pointed out that SEQRA's fundamental policy was "to inject environmental considerations directly into governmental decision making" but that nothing in the applicable regulations indicated that SEQRA required an analysis of security concerns.

Nevertheless, where environmental concerns are at issue, a lead agency may have the responsibility under SEQRA to examine changes to a project after it has issued its findings.[11] That may not necessarily require preparation of an SEIS,[12] but courts have shown a willingness to demand an SEIS in a wide range of instances. This can lead to unavoidable delay, and significant cost, but may be necessary.

1. See Environmental Conservation Law (E.C.L.) §8-0101 et seq.; 6 NYCRR Part 617.

2. 45 Misc. 3d 1209(A) (Sup.Ct. Rockland Co. 2014).

3. See 6 NYCRR §§617.2(u), 617.6(b)(2).

4. The purpose of a scoping document is to focus the EIS on potentially significant adverse impacts and to eliminate consideration of those impacts that are irrelevant or nonsignificant. See 6 NYCRR §617.8(a).

5. See 6 NYCRR §617.9(a)(7).

6. See, e.g., E.C.L. §17-1001, et seq.; NY Nav. Law Article 12 (Oil Spill Prevention, Control and Compensation).

7. 20 N.Y.3d 148 (2012).

8. See E.C.L. §27-1401 et seq.

9. See n. 4, supra.

10. 15 Misc. 3d 1138(A) (Sup.Ct. N.Y. Co. 2007).

11. See, e.g., *Committee for Environmentally Sound Development, Inc. v. City of New York*, 190 Misc. 2d 359 (Sup.Ct. N.Y. Co. 2001).

12. See, e.g., *County of Orange v. Village of Kiryas Joel*, 44 A.D.3d 765 (2d Dept. 2007) (court orders preparation of amended FEIS rather than an SEIS where "inadequacies" arose from deficiencies in initial FEIS).