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Expert Analysis

Casinos Prompt SEQRA Challenges

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A few years ago, the New York State constitution was amended to permit casino gambling in the state "at no more than seven facilities as authorized and prescribed by the legislature."[1] The Upstate New York Gaming Economic Development Act of 2013, which went into effect on Jan. 1, 2014, authorized the creation of four destination resort casinos in upstate New York and established a process for selecting the locations for these casinos.[2]

This law was hailed by many communities that have been seeking legislative approval of casino gambling for decades. Several locales submitted proposals hoping to be selected as one of the four sites, believing that a casino would trigger economic revitalization of the area.

Casinos are not universally welcomed, however, and, as with many other types of proposed developments and construction projects, opponents of this type of development are resorting to court, where they are asserting failure to comply with the New York State Environmental Quality Review Act (SEQRA)[3] as the method to try to stop casinos. SEQRA has been used in recent litigation to challenge the proposed del Lago Resort & Casino in Tyre, Seneca County, in New York's Finger Lakes region,[4] a "video lottery terminal" casino in Suffolk County,[5] a planned recreational development including a casino at the former Concord Hotel site in Sullivan County,[6] and a casino authorized for the Seneca Nation in Erie County.[7]

Casino siting is a natural for SEQRA actions as courts have made it clear that SEQRA applies to these projects. In one case that was commenced more than a decade ago, the Supreme Court, Erie County, in *Matter of Concern v. Pataki*, ruled that actions of then-Governor George Pataki in executing a "Compact" and agreeing with the Seneca Nation's choice of specific property as the site for a casino under the Compact triggered the application of SEQRA.[8]

A few weeks ago, the Supreme Court, Seneca County, in *Casino Free Tyre v. Town Board of Tyre,* issued a decision in the case involving the proposed del Lago Resort & Casino in Tyre that highlights the various issues and positions the parties take in these situations, and the factors that courts examine when determining whether actions by local governments under SEQRA comply with the statute and applicable regulations.[9]

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The SEQRA Process

SEQRA was enacted in 1975 to assure that "discretionary governmental" decisions on proposed development activities considered "social, economic and environmental factors"[10] at "the earliest possible time"[11] to minimize adverse environmental impacts. The term "environment" is broadly interpreted under SEQRA to include not only the more traditional meanings of the word (natural resources, land, air, water, and the impact of human activity on these areas, such as traffic, sewage, or waste),[12] but also the "overall economic and social well being" of people.

SEQRA seeks to promote "patterns of development…which minimize adverse impacts on the environment" without risk to health and safety and "other undesirable or unintended consequences"[13] and encourages "productive and enjoyable harmony" between humans and their environment.[14] SEQRA essentially "is a balancing act between environmental concerns and socio-economic goals."[15]

The court in the Concord Associates case described the SEQRA process as an "elaborate statutory and regulatory scheme" that requires a "comprehensive environmental impact statement (EIS) when any action 'may' have a significant impact on the environment."[16] SEQRA requires governmental agencies to make "explicit findings" that "to the maximum extent practicable" adverse impacts presented in the EIS will be avoided or minimized.[17]

The SEQRA process begins when an applicant requires a government approval for a project that may have an environmental impact.[18] Generally, this takes the shape of an application for a building permit, variance, or site plan approval. First, the agency determines what kind of action it is (Type I, Type II, or Unlisted). Casinos, involving large tracts of land, typically are going to be Type I actions. If the agency concludes that adverse environmental impacts may reasonably be expected, and "at least one potentially significant environmental impact exists which cannot be eliminated,"[19] the EIS process commences. This involves completion of a full Environmental Assessment Form, establishment of a "lead agency" to direct a SEQRA-compliant process, a public "scoping" document, a preliminary or draft EIS, public hearings, and the publication of a final EIS (FEIS).[20] Upon acceptance of the FEIS, there follows public notice and a 10-day "cooling off period," and then the agency is free to take action on the request, subject to a timely Article 78 challenge.

Although the threshold is low to trigger a full EIS process, it is not necessarily required for every Type I action. If the agency determines a Type I action would not entail significant environmental impacts, it can issue a negative declaration, which includes a written "reasoned

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elaboration" for its decision.[21] That would end the agency's SEQRA review of the project.

The Tyre Case

Petitioners in *Tyre*, an Article 78 action, sought a court order annulling the negative declaration issued on Oct. 1, 2015, by the town board of the town of Tyre in connection with the proposal for the del Lago Resort & Casino project. Petitioners wanted the court to order the preparation of an EIS regarding the project before approvals could be issued or other action could be taken with respect to the project.

Petitioners asserted the town failed in many different ways to comply with the ECL and SEQRA regulations in issuing the Oct. 1, 2015, negative declaration for this Type I action. They contended the town exceeded its lawful authority and jurisdiction, violated lawful procedure, and made an error of law. They also contended the town's determination to issue the negative declaration was arbitrary, capricious, and an abuse of discretion.

For its part, the town and the other respondents asserted the town had complied with SEQRA and asked the court to deny the petition.

This actually was the second Article 78 action regarding the SEQRA process for this proposed casino project. In the first action, the trial court upheld the town's SEQRA determination to issue a negative declaration for this Type 1 action, but that ruling was overturned by the Appellate Division, Fourth Department.[22] The Fourth Department concluded the town had erred in failing to make a written reasoned elaboration in issuing its first negative declaration.

Thereafter, the town decided that, instead of simply providing the written reasoned elaboration the Fourth Department found was missing, it would undertake a second "full-scale" SEQRA review. The Oct. 1, 2015, negative declaration followed, and the second Article 78 proceeding followed that. The court's January 2016 decision analyzed each of petitioners' causes of action, and found them all insufficient.

First, the court rejected petitioners' contention that town board members issued the negative declaration due to their bias toward the casino project. It decided petitioners had failed to show "any action" on the part of the town board members that "would provide a basis for setting aside the action of the town board," stating that public statements, correspondence during the SEQRA process, and the speed by which the second SEQRA process had been completed did "not amount to" prohibited bias.

Next, the court rejected petitioners' contention that the scope and magnitude of the project made an EIS mandatory. The court conceded that there was a "very low threshold to require an EIS in a Type I action," but declared that there was "no hard line rule requiring an EIS for a certain sized project."

The court also was not persuaded by petitioners' assertion that the town had applied the wrong legal standard in its SEQRA analysis because the town had considered whether the casino "will" have a significant adverse impact instead of whether it "may" have such an impact. The court reasoned that SEQRA required a "may" standard if the agency determined that an EIS was required, and a "will" or "will not" standard if the agency determined that an EIS was not required.

Similarly, in one of the most important portions of the court's decision, the court disagreed with petitioners that the town had failed to take the requisite "hard look" at the mitigation measures that were to be incorporated into the project, including off-site road improvements, sewer system upgrades, and water upgrades.

The court found that the town, in undertaking its "full-scale" SEQRA review in 2015, identified the potential project impacts that could be moderate to large. These included land impacts (construction more than one year); surface water impacts; agricultural resources impacts (to soil and increased pressure to redevelop farmland); transportation impacts (increased traffic exceeding capacity of current roads, construction of 500 or more parking spaces, changes to existing patterns of movement of people or goods); energy impacts (the casino would use more than 2,500 megawatt hours per year of electricity); odor and light impacts; community plan impacts (density changes not supported by existing infrastructure); and community character impacts (demand for additional community services, inconsistency with existing architectural scale and neighborhood character).[23]

The Tyre court, in confirming the Oct. 1, 2015, negative declaration issued by the town, concluded that the town had not acted arbitrarily and capriciously and had not abused its discretion in its SEQRA review regarding the project's environmental impact.

The court said the town properly assessed each impact it identified as moderate or large and each element of the proposed action. In the court's view, the town "was required to, and did consider project design changes" that were developed in response to questions and concerns raised in the SEQRA process by involved agencies and interested parties including petitioners.

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Conclusion

Because of the high visibility of casino projects, SEQRA review is carefully studied by projects' opponents and, as a result, must be carefully conducted by local governments and developers in order to withstand a court challenge. The procedural and substantive rules must be followed precisely or a project may face inordinate delays or, even, fail to be completed.

1. N.Y. Const. Art. I, §9.
2. See, Racing, Pari-Mutuel Wagering and Breeding Law §§1300, 1311(1), 1320.
3. Environmental Conservation Law (ECL) §§8-0101 et seq.
4. *Casino Free Tyre v. Town Board of Tyre*, 2016 N.Y. Slip Op. 26031 (Sup. Ct. Seneca Co. Jan. 29, 2016).
5. *Application of Affiliated Brookhaven Civic Organizations v. Suffolk Regional Off Track Betting Corp*., 2016 N.Y. Slip Op. 30014(U) (Sup. Ct. N.Y. Co. Jan. 7, 2016).
6. *Concord Associates v. Town of Thompson*, 41 Misc.3d 1208(A) (Sup. Ct. Sullivan Co. 2013).
7. *Scott v. City of Buffalo*, 20 Misc.3d 1135(A) (Sup. Ct. Erie Co. 2008); *Matter of Concern v. Pataki*, 7 Misc.3d 1030(A) (Sup. Ct. Erie Co. 2005).
8. *Matter of Concern*, supra.
9. 6 NYCRR Part 617.
10. ECL §8-0103(7).
11. 6 NYCRR 617.1(c).
12. ECL §15-0101 to §15-2913.
13. ECL §§1-0101(1), (3)(b), (3)(c).
14. ECL §8-0101(1a).
15. *Spitzer v. Farrell*, 100 N.Y.2d 186 (2003).
16. *Concord Associates v. Town of Thompson*, supra.
17. ECL §8-0109(8).
18. 6 NYCRR 617.6(a)(1).
19. 6 NYCRR 617.2(h), 617.7(d).
20. 6 NYCRR 617.6(a)(2), 617.7(a)(1).
21. 6 NYCRR 617.2(y), 617.7.
22. *Dawley v. Whitetail 414*, 130 A.D.3d 1570 (4th Dept. 2015).
23. It is worth noting that, in *Scott*, supra, environmental concerns considered by the local municipality were similarly broad. They included potential impacts to land use; water resources; wetlands; noise, dust and odors from construction activities; bedrock; the city's water and sewer systems; vegetation and wildlife; agricultural resources; aesthetics; cultural resources; open space and/or conservation areas; recreation, park land, and scenic views; critical environmental areas; traffic impacts; energy usage; public health and safety; community resources and services; and consistency with the city's comprehensive plan.