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State Environmental Regulation

Expert Analysis

Court Ruling Is Road Map For Approval of Solar Energy Farms

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As this column has previously observed,[1] the State of New York's executive and legislative branches as well as state regulators are promoting the use of solar energy through a variety of laws, regulations and incentives. Consider, for example, that the New York State Energy Research and Development Authority, the Long Island Power Authority (LIPA), PSEG Long Island (PSEG-LI) and the New York Power Authority, together, are seeking to add more than three gigawatts of installed solar capacity in the state by 2023.[2]

Now, the state's judicial branch has weighed in on an important solar energy subject. Last month, on Aug. 3, the Supreme Court, Suffolk County, in *Shoreham Wading River Advocates for Justice v. Town of Brookhaven Planning Board*,[3] issued a decision that is likely to be used as a road map under the New York State Environmental Quality Review Act (SEQRA)[4] for entities interested in creating solar energy farms in New York.

Background

In July 2002, the Long Island town of Brookhaven completed a planning and land use study concerning the hamlet of Shoreham. The town subsequently expanded the study and examined four adjoining hamlets across a major east-west thoroughfare, Route 25A: Mount Sinai, Rocky Point, Shoreham and Wading River.

In 2010, the Brookhaven town board adopted the Draft Route 25A Mount Sinai to Wading River Land Use Plan (LUP) and adopted a draft generic environmental impact statement pursuant to SEQRA. The town board adopted the final generic environmental impact statement in August 2012. In September 2012, the town board adopted both a findings statement for the LUP and the LUP itself. The LUP included a Planned Conservation Overlay District (PCOD).

The opinion in 'Shoreham' appears to be the first reported decision by a New York court examining—and upholding—the process of obtaining approvals for a solar farm in this state.

The LUP and PCOD referenced a specific parcel of property on Route 25A in Shoreham owned by Ted Land Holding, indicating that the preferred future use and development of the property was either to up-zone the property or to conserve it. If that was not feasible, then the plan was to preserve large portions in their natural state and scenic vistas from Route 25A, and help minimize impacts to the school district.

The underlying residential zoning did not permit high technology uses. The plan, however, provided for certain high technology green uses that would be allowable by special permit, including solar farms as another alternative to single-family residential development for existing sod farm sites in Shoreham and Miller Place.[5]

On Oct. 23, 2012, the town board amended the town's zoning code and adopted the PCOD, and it became effective on Nov. 7, 2012. The code indicated that the town's planning board was empowered to authorize special permits.[6]

On April 28, 2014, the town's planning division received a land use application for the property on Route 25A in Shoreham for a site plan, special permit and land division (into two parcels) to construct a solar energy production facility, also known as a "solar farm." The town's planning board was designated the lead agency for SEQRA purposes.

The town's board of zoning appeals (BZA) was involved in the project as certain variances were needed to construct and operate the solar farm on the property. The BZA held a hearing in July 2014. It determined that the variances requested from it were Type II actions for SEQRA purposes, which required no further review under that statute, and it approved the application for a variance to construct and operate the solar farm on the property. This decision was filed with the town clerk in August 2014.

The town planning board heard the matter on Sept. 8 and 22, 2014. It rendered its findings and conclusions on Oct. 20, 2014, and the decision was filed with the town clerk on Oct. 27, 2014.

The town planning board issued a "negative declaration" of environmental significance under SEQRA with respect to the proposed solar farm project. This meant it was not necessary to prepare and approve an environmental impact statement for the project. The planning board also approved the subdivision, site plan and special permit for the solar farm project.

Individual adjoining landowners as well as an unincorporated association of persons who opposed the construction of a solar energy production facility at the property went to court to challenge the decisions by Brookhaven's planning board and BZA.

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The plaintiffs' first claim for relief sought to annul the BZA determination granting variances for setback relaxation, fence height and landscaping. The plaintiffs alleged violation of SEQRA requirements as to the environmental review for the project. They contended that the BZA as a coordinating agency was required to participate with the planning board, which was the lead agency, in the environmental review of all actions taken in connection with the various town approvals concerning the construction of the solar farm.

The plaintiffs' also sought to annul the planning board's determination to grant the applications for a division of the property into two parcels, site plan approval and the special permit. The plaintiffs' alleged justification for the annulment included both procedural and substantive allegations of non-compliance with various requirements of SEQRA.

The plaintiffs also asserted claims against LIPA and PSEG-LI, seeking to annul a power purchase agreement between LIPA and the solar farm, claiming it violated SEQRA.

The Court's Decision

The court rejected the plaintiffs' arguments and upheld the decisions by the planning board and BZA. It also determined that SEQRA did not apply to the power purchase agreement.

The court first evaluated whether the plaintiffs had standing under SEQRA. It explained that parties seeking to challenge a determination under SEQRA must establish that they live in close proximity to the project or will suffer more than generalized harm. It determined that only a few of the individual plaintiffs had standing to bring their action solely based on their proximity to the property.[7] It also found that the unincorporated association did not have standing. It then analyzed the claims against the BZA, the planning board and LIPA.

The court ruled that, at the time the variances were sought, the BZA's actions were de minimis with respect to the application for the solar farm project. It pointed out that the BZA had approved a setback relaxation allowing an existing 44-foot frontage setback where a 50-foot setback was required. It observed that that only was a six-foot relaxation, or 12 percent.

In addition, the court ruled that the increase from a six-foot maximum fence height to permit a proposed eight-foot fence height was not environmentally significant at the time. Moreover, as noted by the court, the variance was rendered moot later in the process when the applicant agreed to a six-foot fence height to conform with the adjoining property owners' already existing six-foot fence height for aesthetic reasons.

Similarly, the court ruled that the proposed landscaping plan, which included planting evergreens on portions of the perimeter of the property and a departure from the front yard percentage of planting requirements, was "insignificant in terms of SEQRA requirements."

Therefore, the BZA's decision to classify its actions as "Type II" under SEQRA was appropriate, in the court's view.

Moreover, the court decided, there was "no need" for the BZA to have aggregated its findings with the review to be undertaken by the planning board. Simply put, the court found, SEQRA did not require "any further environmental assessment or review on the part of the BZA." In addition, because the plaintiffs had not challenged the BZA decision within 30 days of its filing with the town clerk, the challenge to the BZA determination was untimely.

The court determined that the planning board had taken a 'hard look' at the relevant areas of environmental concern and had provided a 'reasoned elaboration' of the basis for its negative declaration in the resolution it adopted on Oct. 20, 2014.

The court also was not persuaded by the plaintiffs' claims with respect to the planning board.

As the court explained, the planning board undertook and assumed lead agency status under SEQRA for the solar farm project application and, given the size and implications of the project, classified the actions concerning the land division, site plan application and special permit application as "Type I" actions under SEQRA, which meant the application had to be reviewed further to determine the potential for significant adverse environmental impacts. This was the "appropriate and proper classification" and the planning board was the proper lead agency, the court said.

The court next upheld the planning board's negative declaration. As the court explained, the planning board had considered all of the local zoning code's criteria for the issuance of a special permit for a solar energy production facility and found that the application complied with all of the requirements. In the court's view, the record contained a "very clear statement" of the actions taken by the planning division and its staff in investigating, analyzing and reporting their findings and conclusions, which were "appropriately contained within the records reviewed and the consideration given to the issues" by the planning board.

The court determined that the planning board had taken a "hard look" at the relevant areas of environmental concern and had provided a "reasoned elaboration" of the basis for its negative declaration in the resolution it adopted on Oct. 20, 2014. Therefore, the court concluded, the planning board's actions were appropriate under the circumstances.

As to LIPA and PSEG-LI, the court determined that the power purchase agreement was not subject to SEQRA and was not a discretionary act of a quasi-governmental agency. It noted that LIPA approval was not required for approval or construction of the solar farm.

Conclusion

The Vermont Supreme Court[8] and a Massachusetts land court[9] are among the courts that have issued decisions in cases involving challenges to solar energy farms. The opinion in *Shoreham* appears to be the first reported decision by a New York court examining—and upholding—the process of obtaining approvals for a solar farm in this state. The steps taken by the town and the applicants, and the court's rationale, are likely to be relied on in the future by local governments, developers and property owners facing requests for the creation of solar farms in New York.

1. Charlotte A. Biblow, "Laws, Regulations and Incentives Power Solar Energy's Growth," NYLJ, July 24, 2014.
2. See NY-Sun Fact Sheet, available at www.ny-sun.ny.gov/-/media/NYSun/files/NYSUN-Fact-Sheet.pdf.
3. *Shoreham Wading River Advocates for Justice v. Town of Brookhaven Planning Board*, 2015 N.Y. Slip Op. 31444(U) (Sup. Ct. Suffolk Co. Aug. 3, 2015).
4. Environmental Conservation Law Article 8.
5. See PCOD, Section 13.3 at page 72 (emphasis added).
6. See former Brookhaven Town Code §85-538, now §85-708.
7. The court's extensive critique of the affidavits submitted by the plaintiffs should be read by practitioners. It is a road map of how to avoid dismissal on standing grounds.
8. See *Petition of Cross Pollination*, 47 A.3d 1285 (Vt. 2012).
9. See *Briggs v. Zoning Board of Appeals of Marion*, 13 Misc. 477257 (Mass. Land Ct. Feb. 6, 2014).