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Environmental Review

Annexation Request Will Likely Trigger State Act

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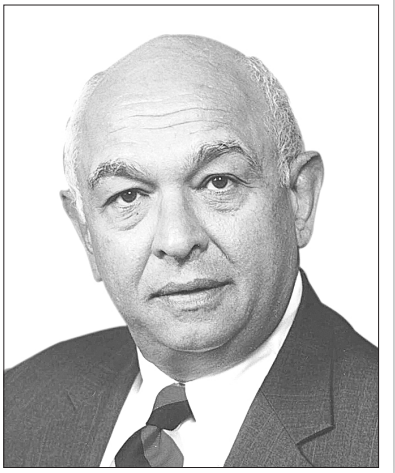
PLANNING AND ZONING



ONCE again, in *Matter of City Council of the City of Watervliet v. Town Board of the Town of Colonie*,[1] the New York State Court of Appeals has taken a very strict view of the application of the State Environmental Quality Review Act (SEQRA)[2] and has emphasized that land use transactions must strictly comply with SEQRA's requirements. There no longer can be any doubt but that the Court will apply the narrowest interpretation of SEQRA, no matter the cost, to situations that come before it.

The Court's decision in *Watervliet* arose in the context of an "annexation," the process used by a municipality seeking to acquire territory that lies within the boundaries of an adjacent municipality.[3] Article 17 of the General Municipal Law, adopted by the New York State Legislature more than 40 years ago[4] and known as the Municipal Annexation Law, sets forth the public interest concerns that must be weighed and the requisite procedural steps that must be followed in this situation. Generally speaking, a proposed annexation is initiated by a petition signed by either 20 percent of the persons residing within the territory who are qualified to vote or by the owners of a majority of the assessed valuation of land in the area proposed to be transferred.[5] Upon notice to the public and affected residents, the governing boards of the affected municipalities then are obligated to conduct a joint public hearing to decide whether the annexation is in the overall public interest.[6] Within 90 days after the hearing, each locality must adopt a resolution and issue a written order regarding whether annexation is in the overall public interest.[7] If the municipalities agree, their determination is "final and conclusive."[8] In the event the local governments disagree, application may be made to the appropriate Appellate Division department to determine whether the proposed annexation is in the overall public interest.[9]

Annexations can be an important land use planning tool and, at times, can be the first step toward the development of real property. Over the years, on a number of occasions, local governments, property owners and New York courts have had to consider whether an annexation implicates SEQRA, especially given that SEQRA's primary purpose is to inject environmental considerations directly into governmental decision making.

In these cases, some have argued that SEQRA should not be a part of the annexation process, for reasons including that (i) Article 17 does not incorporate SEQRA explicitly and thus provides the exclusive process for annexations; (ii) General Municipal Law §718(5) indicates that the provisions of Article 17 "shall be controlling notwithstanding any inconsistent act of the legislature to the contrary," and therefore Article 17 exempts annexations from SEQRA; and (iii) annexation, in and of itself, is not an "action" that triggers SEQRA's requirements. The Court of Appeals considered these arguments in the *Watervliet* case and held that SEQRA requirements apply to all Article 17 annexations — even though an annexation essentially amounts only to a change in the government entity with jurisdiction over the particular parcel of property.

Petition Filed

The *Watervliet* case arose after the East-West Realty Corporation, which owned about 37 acres of vacant property in the Town of Colonie that was adjacent to the City of Watervliet, asked the town about the possibility of constructing a senior citizen assisted-living development at the site. Believing that the informal response from the town was unfavorable, East-West then filed a petition with the Colonie town board and the Watervliet city council seeking to have its 37 acres transferred by annexation to Watervliet in accordance with Article 17.

Colonie and Watervliet held a joint public hearing on the petition. East-West did not present a formal development plan, but indicated "the property is proposed to be developed as potentially assisted living senior apartments." Watervliet subsequently passed a resolution approving the annexation and declaring the transfer of realty to be in the overall public interest. Colonie meanwhile adopted a resolution denying the petition on the ground that annexation was not in the overall public interest. Colonie took the position that review of potential environmental impact under SEQRA was necessary to fully assess whether annexation was in the public interest.

Faced with conflicting municipal resolutions, Watervliet commenced a proceeding in the Appellate Division, and East-West intervened as a petitioner. In its answer and by motion to dismiss the amended petition, Colonie asserted that Watervliet had failed to comply with SEQRA requirements prior to approving the proposed annexation. The Appellate Division dismissed the petition and agreed with Colonie to the extent it held that "an appropriate form of SEQRA review of an annexation 'action' is required" before either municipality could adopt a resolution regarding the annexation. The dispute reached the Court of Appeals.

In its opinion, the Court first rejected the argument that Article 17 provides the

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exclusive process for annexations. The Court pointed out that SEQRA "is a law of general applicability." It also noted that the Legislature has declared that, "to the fullest extent possible," statutes should be administered by the state and its political subdivisions in accordance with the policies set forth in SEQRA, and that environmental factors should be considered in reaching decisions on proposed projects.[10] The Court then observed that Article 17's "overriding goal" is to assess whether a proposed annexation is in the best interest of the public, and that SEQRA's objective is to determine whether or not a project or activity should be approved or undertaken in the best over-all interests of the people of the state.[11] After finding that SEQRA was "neither inconsistent with nor contrary to" Article 17's procedures and, in fact, that it "promotes, rather than undermines," Article 17's public interest purposes, the Court ruled that General Municipal Law §718(5) also did not exempt the annexation process from SEQRA review.

Annexations

The Court next rejected the argument that a proposed annexation must be accompanied by a specific development plan before SEQRA is triggered, and that because East-West had no definite plans for the site and had not filed any formal application for development of its property, SEQRA analysis was premature.

As the Court noted, SEQRA creates procedural and substantive requirements for governmental entities to follow when reviewing the environmental consequences of proposed projects or "actions." The term "action," the Court continued, is broadly defined in the statute[12] and in regulations promulgated by the New York State Department of Environmental Conservation (DEC).[13] Indeed, the Court pointed out, DEC regulations[14] clarify that the annexation of 100 or more contiguous acres constitutes a Type I action.[15] In the court's view, that amounted to an implicit determination by the DEC that an annexation of less than 100 acres is an "unlisted action."[16] Moreover, it found, the DEC's regulation was neither unreasonable, given that one of SEQRA's principal goals is to incorporate environmental considerations into the decisionmaking process at the earliest opportunity, nor irrational, given SEQRA's broad definition of "action."

After holding that SEQRA applies to municipal annexations in general, the Court had to address the appropriate extent or level of environmental review applicable in this situation.

DEC's regulations contemplate two types of environmental review: the environmental assessment form and the environmental impact statement. All "actions" subject to SEQRA (i.e., Type I and unlisted actions) initially require the preparation of an assessment form, the purpose of which is to aid an agency "in determining the environmental significance or nonsignificance of actions."[17] After reviewing the form, if the lead agency, such as a designated municipality, determines that the action may include the potential for at least one significant adverse environmental impact, a positive declaration must be issued and completion of an impact statement becomes necessary.[18] The statement is a more comprehensive evaluation of environmental impact.[19] Conversely, an impact statement will not be required and the agency may issue a negative declaration where it concludes that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant.[20]

In the *Watervliet* case, the Court of Appeals ruled that, because the proposed annexation of approximately 43 acres was an unlisted action, an environmental assessment form was appropriate and had to be completed before Watervliet or Colonie acted to adopt or reject the petition for annexation. It further explained that because the annexation proposal lacked a specific project plan that had been officially submitted or a rezoning proposal that changed the use for which the property could be utilized, the form would necessarily be limited to the annexation itself and its effects.

Conclusion

Although the Court's decision clarified the law, as a practical matter its ruling is likely to impose higher expenses — and, conceivably, lengthy delays — on yet another aspect of the development process. That is because the Court's ruling requires SEQRA review even if both municipalities ultimately reject an annexation petition. Indeed, there may be situations where an extensive SEQRA review — beyond an environmental assessment form — may be required before the municipalities are able to consider an annexation request; for instance, where an annexation is premised upon a formal project plan, environmental review will be more extensive and must address the specific use of the property in evaluating the related environmental effects. It is difficult to imagine why, if consideration is being given to a transfer of jurisdiction over a parcel from one governing body to another, the presumed "receiving" government would want to do an SEQRA review before it even had jurisdiction over the property; to say the least, it would seem to be premature. Yet the Court was quite steadfast in saying that a SEQRA review would have to be conducted even on a "conceptual basis," although it did not reveal which municipality would have to conduct it on a conceptual basis, or whether both would have to do so. It is not clear whether the Court is suggesting that the "sending" municipality could deny the annexation if it does not approve of a possible zoning change next door.

Taking the decision at face value, it becomes clear that SEQRA will apply to even the most insignificant subdivisions, to lot line changes, and to any action, in fact, irrespective of how minor it may appear. In other words, one can only be secure in omitting SEQRA in a situation that falls squarely within the Type II list established by the DEC in its rules and regulations. Any other attempt to avoid even a short form environmental assessment is likely to be met unfavorably in the courts.

1. 2004 NY Int. 143 (Dec. 2, 2004).
2. See ECL 8-0101-8-0117; see also 6 NYCRR Part 617.
3. "Annexation" is defined in Section 701 (1) of the General Municipal Law as "[a]n alteration of the boundaries of a county, city, town or village which has the effect of adding territory to it. Such term shall not include the creation or dissolution of a county, city, town or village, or the consolidation of two or more counties, two or more cities, two or more towns or two or more villages, respectively, or the diminution of the area of a village pursuant to section 18-1804 of the village law."
4. See L 1963 ch 844.
5. See General Municipal Law §703.
6. See General Municipal Law §§704, 705.
7. See General Municipal Law §711.
8. General Municipal Law §711(4).
9. See General Municipal Law §712.
10. See ECL 8-0103(6).
11. See *Matter of WEOK Broadcasting Corp. v. Planning Bd. of Town of Lloyd*, 79 NY2d 373 (1992).
12. ECL 8-0105(4) provides that "action" includes:

    (i) projects or activities directly undertaken by any agency; or projects or activities supported in whole or part through contracts, grants, subsidies, loans, or other forms of funding assistance from one or more agencies; or projects or activities involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use or permission to act by one or more agencies; [and]

    (ii) policy, regulations, and procedure-making.
13. See, e.g., 6 NYCRR (3), which provides that "actions" include "agency planning and policy making activities that may affect the environment and commit the agency to a definite course of future decisions" and the "adoption of agency rules, regulations and procedures, including local laws, codes, ordinances, executive orders and resolutions that may affect the environment."
14. See 6 NYCRR 617.4(b)(4).
15. The DEC apparently promulgated these regulations in response to *Matter of Connell v. Town Bd. of Town of Wilmington*, 113 A.D.2d 359 (1985), aff'd 67 N.Y.2d 896 (1986), where the Appellate Division held that a municipality's adoption of a resolution approving an annexation "was not an 'action' as defined by SEQRA" and therefore SEQRA review was unnecessary. The Court of Appeals affirmed on the narrow ground that the proceeding was untimely.
16. DEC regulations classify actions as Type I, Type II or unlisted depending on the potential effects on the environment. A Type I action "carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an [environmental impact statement]," 6 NYCRR (1). A Type II action is not subject to SEQRA review because it has "been determined [by DEC] not to have a significant impact on the environment or [is] otherwise precluded from environmental review under [SEQRA]," 6 NYCRR 617.5(a). All remaining actions are classified as "unlisted" actions, 6 NYCRR 617.2(ak). Type I and unlisted actions are subject to SEQRA review.
17. See 6 NYCRR 617.2(m); 617.6(a)(2),(3). Type I actions require the preparation of a "full" EAF whereas unlisted actions may use either the "full" or "short" environmental assessment form, 6 NYCRR 617.6(a)(2),(3). The lead agency may waive the requirement of the form if a draft impact statement is submitted instead, 6 NYCRR 617.6(a)(4).
18. See 6 NYCRR 617.7(a)(1); ECL 8-0109(2).
19. If a lead agency decides that an impact statement is necessary, a draft must be prepared. After the agency accepts the draft, it must be filed with DEC and copies made available to members of the public on request, ECL 8-0109(4); 6 NYCRR 617.12(b). The agency can also conduct a public hearing on notice, 6 NYCRR 617.9(a)(4). Unless the agency withdraws the proposed action or determines that it "will not have a significant adverse impact on the environment," the agency must prepare a final impact statement 45 days after any hearing or 60 days after the filing of the draft, whichever occurs later, 6 NYCRR 617.9(a)(5). Before issuing final approval, the agency must consider the final impact statement and make written findings that the requirements of SEQRA have been met, 6 NYCRR 617.11.
20. See 6 NYCRR 617.7(a)(2).