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SEQRA Mitigation

Act's Mandate Extends Beyond Mere Disclosure

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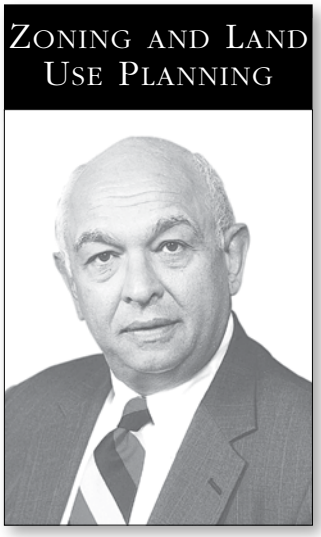
Property owners, lenders, and local governments involved in developing or reviewing the proposed development of real property must consider a large number, and a wide variety, of both state and federal environmental statutes during the process. These laws often have unique goals, such as protecting wetlands and regulating development within acceptable environmental standards, while others are intended to ensure that proper procedures are strictly followed.

A significant requirement of one of the most frequently discussed and applied environmental statutes, the New York State Environmental Quality Review Act ("SEQRA"),[1] is that "alternatives" be considered that avoid environmental impacts to the maximum extent practicable. In fact, the Department of Environmental Conservation has referred to this mitigation requirement as "one of the fundamental objectives" of SEQRA.[2]

Under SEQRA, mitigation is an on-going process in any major development and is considered from the beginning of the development process until its conclusion. A review of SEQRA's philosophy, background, and statutory scheme helps to explain the significance of mitigation in this law.

Background

SEQRA, originally enacted in 1975, represented an attempt to strike a balance between social and economic goals and concerns about the environment. It makes environmental protection a concern of every agency, and, in proposing action, an agency must give consideration not only to social and economic factors but also to protection and enhancement of the environment, which



is expansively defined. SEQRA requires that agency decision makers identify and focus attention on any environmental impact of the proposed action, balance those consequences against other relevant social and economic considerations, minimize adverse environmental effects to the maximum extent practicable, and articulate the bases for their choices. In other words, unlike its federal counterpart and model, the National Environmental Policy Act ("NEPA"),[3] SEQRA is not simply a disclosure statute. It contains significantly more substantive requirements for New York agencies than NEPA requires of federal regulators.[4] This is a statute that empowers the lead agency to actively participate in imposing conditions to mitigate environmental concerns that are discovered by means of the SEQRA process.

The heart of SEQRA is the Environmental Impact Statement ("EIS") process. Under SEQRA, an EIS must be prepared regarding any action that "may have a significant effect on the environment,"[5] and the DEC has adopted regulations governing the process.[6] SEQRA prescribes both the procedure for formulating an EIS and its content.

Procedurally, once an agency determines that an EIS is required, it must prepare or cause to be prepared a Draft EIS ("DEIS"). This procedure will ferret out the various environmental impacts of the proposed action and set the stage for reasonable mitigation of said impacts. A DEIS accepted by the lead agency must then be filed with the commissioner of environmental conservation, and copies must be made available to interested persons on request. If the lead agency determines that there is sufficient interest and that it would aid decision-making or provide an efficient forum for public comment, it will hold a public hearing on notice. Whether or not a hearing is held, the lead agency must provide for a comment period on the DEIS of at least 30 days. Unless the agency withdraws the proposed action or determines that it will not have a significant effect on the environment, the agency must prepare a Final EIS ("FEIS") 45 days after the close of any hearing or 60 days after the filing of the DEIS, whichever occurs later, with filing and distribution in the same manner as a DEIS and at least 10 days for public consideration. Finally, before approving an action that has been the subject of an FEIS, an agency must consider the FEIS, make written findings that the requirements of SEQRA have been met, and prepare a written statement of the facts and conclusions relied on in the FEIS or comments. It is at this stage, after all the above has been complied with—especially the public hearings—that mitigation measures are imposed.

Substantively, SEQRA and the applicable regulations list general categories of information that must be analyzed in an EIS: an EIS must set forth a description of the proposed action, including an environmental impact and any unavoidable adverse environmental effects and alternatives to the proposed action, including a "no-action alternative." Meaningful mitigation measures must then be proposed to minimize the environmental impact. In addition, SEQRA requires agencies to "act and choose

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alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects."[7] Indeed, an agency may not approve an action unless it makes an explicit finding that SEQRA's requirements have been met and that the adverse environmental effects revealed in the EIS process will be minimized or avoided "by incorporating as conditions to the decision those mitigative measures which were identified as practicable."[8]

There is no provision in SEQRA regarding judicial review. However, the New York Court of Appeals has observed that courts should review agency procedures to determine whether they were lawful and review the record to determine whether the agency identified the relevant areas of environmental concern, took a "hard look" at them, and made a reasoned elaboration of the basis for its determination.[9] It should be emphasized that the Court of Appeals also has stated that under SEQRA, agencies have "considerable latitude" in evaluating environmental effects and choosing among alternatives, and that nothing in the law requires an agency to reach a particular result on any issue or permits courts to second-guess an agency's choice, which is subject to being reversed only if arbitrary, capricious, or unsupported by substantial evidence.[10] Any mitigation measures that are imposed will have to be supported by substantial evidence and be reasonably related to the environmental goal to be served, i.e., there must be a nexus between the measure and the goal.[11]

Mitigation in Action

A leading decision from the Appellate Division, Fourth Department, a number of years ago illustrates the SEQRA process and its focus on mitigation.

The case, *Matter of Town of Henrietta v. Dept. of Env. Cons.*,[12] arose from a decision of the upstate town of Henrietta to grant site approval to Miracle Mile Associates to develop a regional shopping center and to rezone the property for that purpose. The developer submitted a DEIS that contained a discussion and analysis of the project's total environmental setting, cumulative environmental and socioeconomic impacts expected to result from the project, and various mitigating measures proposed by the developer to minimize adverse environmental effects. The proposed mitigation measures included ecosystem and wetland considerations, drainage and flooding abatement measures, and air pollution and noise pollution abatement measures, as well as abatement measures to mitigate aesthetic impacts, traffic impacts, and interference with community activities.

After a public hearing, the DEC, as lead agency, granted the necessary permits—but subject to a number of conditions. According to the DEC, the majority of these conditions were intended to assure that the developer actually complied with the specific standards set for the permits. The remaining conditions were intended to fulfill what the DEC saw as its obligation under SEQRA as an approving agency to insure that all of the project's adverse environmental effects as revealed in the EIS were mitigated or avoided. The developer went to court to annul the conditions imposed on the approvals granted by the DEC, contending that SEQRA did not authorize the DEC to attach conditions to a permit or approval where such conditions had no relevance to the permit or approval sought.

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After easily finding that the DEC had authority to attach conditions to the permits it issued, the court scrutinized the record to determine whether substantial evidence supported the DEC's findings and whether the findings supported its decision. It first stated that one of the conditions—leaving "area A" undeveloped—was "pivotal" and intended to mitigate the development's impact on wildlife habitat. The court then ruled that requiring that area to remain undeveloped had a "rational basis in the record," as did a condition prohibiting extension of a water line to service this portion of the site and a condition requiring approval of perimeter landscaping, which was intended to insure maximum wildlife use of the mall site's undeveloped areas.

The court next examined the DEC's requirement that the mall submit an energy conservation plan. The court found that to be a "relevant concern under SEQRA" and that the DEC had not improperly interjected itself into the exclusive domain of what was then known as the state energy commissioner because this condition fulfilled the DEC's obligation to analyze the project's effect on "the use and conservation of energy resources, where applicable and significant" and to ensure that the project fulfilled the objectives of the state's energy policy. It also upheld a condition setting forth the number of parking spaces, finding that "directly related to air quality, definitely a valid concern for DEC under SEQRA."

It should be noted that the court rejected the DEC's requirement that the developer submit a plan to monitor carbon monoxide at the site, noting that there were "too many unquantifiable variables present" that made it unreasonable to determine how much traffic near the mall was generated solely on account of the mall; that condition, the court concluded, therefore was arbitrary and unreasonable.

In another leading case,[13] the Appellate Division, Second Department, upheld a reduction of the units of a proposed project from 650 to 450 as a mitigation measure and a further mitigation that the developer deposit $300,000 into a fund that would be used to supply water to the village if its water supply was adversely affected by the project. As this decision suggests, mitigation measures can directly affect the size and scope of a project, provided, of course, that the mitigation is based on substantial evidence.

Conclusion

Mitigation must be considered throughout the whole SEQRA process, from the EIS stage through agency actions and, of course, judicial review. Moreover, substantive mitigation measures generally are expected, though in appropriate cases an agency may decide not to require mitigation. Simply put, mitigation must be considered by all parties to a proposed development so that responsible public officials may mitigate environmental impacts before they have reached environmental points of no return.

1. See Environmental Conservation Law ("ECL") §§8-0101–8-0117.
2. In *re Pyramid Crossgates Co.* (DEC Comm'r Decision, Sept. 18, 1981).
3. 42 USC §§4321–4361.
4. See Gitlen, Substantive Impact of the SEQRA, 46 Alb. L. Rev. 1241.
5. ECL §8-0109(2).
6. See 6 NYCRR 617.11–617.13.
7. ECL §8-0109(1).
8. 6 NYCRR 617.9(c)(2)(ii).
9. See *Matter of Jackson v. N.Y.S. Urban Develop. Corp.*, 67 N.Y.2d 400 (1986).
10. Id.
11. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 687 (1994).
12. 76 A.D.2d 215 (4th Dept. 1980).
13. *Matter of Village of Harriman v. Town Board of Town of Monroe*, 153 A.D.2d 633 (2d Dept. 1989).