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Environmental Impact

Ruling Offers Road Map to Supplemental Statements

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More than 30 years ago, the New York State Legislature enacted the State Environmental Quality Review Act ("SEQRA")[1] in order to strike a balance between social and economic goals and concerns about the environment.[2] SEQRA makes environmental protection a concern of every governmental agency and requires that in proposing an action, an agency must give consideration to protection of the environment.[3] A key element of SEQRA is the environmental impact statement ("EIS"), which must be prepared if an agency's action "may have a significant effect on the environment."[4] The agency undertaking the proposed action and responsible for determining whether an EIS is required is known as the "lead agency."[5] If, after taking a "hard look" at the action, the lead agency determines that an EIS is required, it must prepare a Draft EIS ("DEIS") followed by a period of public hearings or public comment.[6]

Unless the lead agency withdraws the proposed action or concludes that it will not have a significant effect on the environment, it must prepare a Final EIS ("FEIS") followed by written findings that the requirements of SEQRA have been met.[7] The FEIS must contain a description of the proposed action, including its environmental impact and any unavoidable adverse environmental effects, alternatives to the proposed action, and mitigation measures proposed to minimize the environmental impact.[8] An agency may not approve an action unless it makes "an explicit finding that the requirements of [SEQRA] have been met and that consistent with social, economic and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided" by incorporating as conditions to the decision those mitigative measures that were identified as practicable.[9]

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ZONING AND LAND USE PLANNING

Although referred to as a "final" EIS, an FEIS is not necessarily the "final" EIS. That's because when changes are proposed for a project or new information is discovered, the lead agency is required to take a "hard look" at the changes or new information and may have to supplement its environmental review by preparing a Supplemental EIS ("SEIS").[10] An SEIS permits the lead agency to account for new information bearing on matters of environmental concern not available at the time of the original environmental review.[11]

Over the years, there has been some question as to when an SEIS must be prepared. Courts have made it clear that a lead agency's determination whether to require an SEIS is discretionary. The relevant SEQRA regulations provide that, "[t]he lead agency may require a supplemental EIS, limited to the specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS that arise from: (a) changes proposed for the project; (b) newly discovered information; or (c) a change in circumstances related to the project."[12] The decision to prepare an SEIS as a result of newly discovered information "must be based upon…(a) the importance and relevance of the information; and (b) the present state of the information in the EIS."[13] In making this fact-intensive determination, the lead agency has the discretion to weigh and evaluate the credibility of the reports and comments submitted to it and must assess environmental concerns in conjunction with other economic and social planning goals.[14] The discretion to require an SEIS is distinguished from regulations regarding the preparation of a DEIS or FEIS, which a lead agency must itself prepare or require the applicant to prepare.[15]

Recently, the New York Court of Appeals issued a decision in *Matter of Riverkeeper Inc. v. Planning Board of Town of Southeast*[16] that sets forth a road map for local governments, developers, and property owners for determining when an SEIS should be prepared. This is an important issue, given the delays that are all too common in development and the changes that are made to projects over time in order for them to get constructed— indeed, the question in *Riverkeeper* was whether a second SEIS was necessary. The Court's decision makes it clear that something other than delay in completing a development is necessary before a lead agency will be required to prepare an SEIS.

Background

Riverkeeper involved a residential development that had been in the planning and review stages for nearly 20 years. In 1988, Glickenhaus Brewster Development Inc.,

submitted an application to the Planning Board of the Town of Southeast in Putnam County seeking subdivision approval for a residential development called the Meadows at Deans Corners. The site spanned approximately 309 acres and, in its final form, proposed a cluster development of 104 homes.

After declaring itself lead agency, the planning board issued a positive declaration, which determined that the project would likely have a significant impact on the environment, and required the preparation of a DEIS. Between 1988 and 1991, Glickenhaus submitted a DEIS, an FEIS, a Draft SEIS ("DSEIS"), and a Final SEIS ("FSEIS"). On Feb. 25, 1991, the planning board issued an SEQRA Findings Statement determining that SEQRA's requirements had been met and that the project "minimized or avoid[ed] adverse environmental effects to the maximum extent practicable…."

Following the commencement of an Article 78 proceeding, Supreme Court, Westchester County, annulled the conditional final approval because of the planning board's failure to take a hard look at certain areas of environmental concern. The court remitted the matter to the planning board to determine whether a second SEIS was necessary in light of subsequent developments, namely the Army Corps of Engineers' ("ACOE") expansion of the delineated wetlands acreage on the site; the tightened phosphorous regulations for the Muscoot Reservoir; the designation of the Croton Watershed as a "Critical Resource Water"; the flagging of additional watercourses by the New York City Department of Environmental Protection ("NYCDEP") not previously shown on the site plan; the realignment of various roadways; the increase of storm water basins from nine to 20; the additional traffic development near the site; and flooding caused by Hurricane Floyd.

After remittal, the chairman of the planning board re-examined the file and various permit applications and reports and the planning board's own environmental and planning consultant circulated a draft resolution for the planning board to review. The planning board thereafter adopted a resolution that a second SEIS was not necessary because "any modifications to the project and any changes [to the regulations]…[were] not significant and will not result in any significant adverse environmental impacts…." Final conditional approval was granted, for a second time, and that determination also was challenged in an Article 78 proceeding.

The Supreme Court found that the planning board had taken the requisite "hard look" at the areas of concern and had made a reasoned elaboration of its decision not to require a second SEIS. The Appellate Division, Second Department, reversed, determining that the planning board "could not have met its obligation under SEQRA without requiring a second SEIS to analyze the current subdivision plat in light of the change in circumstances since 1991." The dispute reached the Court of Appeals.

As the Court's decision in 'Riverkeeper' makes clear, merely because a project has changed does not necessarily give rise to the need for the preparation of an SEIS. An SEIS is required only if environmentally significant modifications are made after the issuance of an EIS.

The Court's Decision

In a unanimous decision by Chief Judge Kaye, the Court found that the planning board had taken a "hard look" at the areas of environmental concern and had made a reasoned elaboration of the basis for its conclusion that a second SEIS was not necessary. The Court found that the planning board had considered all of the regulatory and planning changes when it determined that a second SEIS was not required. It pointed out that the planning board had relied on the material already in its file, including the DEIS, FEIS, and initial SEIS, supplemental reports by the town's wetlands consultant and the developer's engineering consultant, as well as its own environmental and planning consultant. The planning board's determination that the changes did not present significant adverse environmental impacts and did not require the preparation of a second SEIS "was not arbitrary or capricious" and was "supported by the evidence."

The Court also rejected the assertion that the planning board had improperly deferred its SEQRA responsibilities by making the SEIS determination prior to the completion of various permitting processes. It stated that although the SEQRA process and individual agency permitting processes are intertwined, "they are two distinct avenues of environmental review." Provided that a lead agency sufficiently considers the environmental concerns addressed by particular permits, the lead agency "need not await another agency's permitting decision before exercising its independent judgment on that issue," the Court held. It then ruled that the planning board here had access to the relevant permit applications, made independent decisions, and was not required to wait for agency permitting decisions before determining whether to require a second SEIS.

The Court concluded that the planning board's involvement in the project spanned almost 15 years at the time of the SEIS determination and that it opened public comment periods when it reviewed the DEIS, FEIS, and initial SEIS. In the Court's view, the planning board had taken into account expert reports finding that the changes in the project and the regulations posed no significant adverse environmental impact. Accordingly, it upheld the planning board's decision not to require a second SEIS.

Conclusion

Under SEQRA, a lead agency has a continuing duty to evaluate new information relevant to the environmental impact of its actions so that important new information will not be ignored by the decision maker.[17] As the Court's decision in *Riverkeeper* makes clear, however, merely because a project has changed does not necessarily give rise to the need for the preparation of an SEIS. An SEIS is required only if environmentally significant modifications are made after the issuance of an EIS.

1. ECL Article 8.
2. See ECL 8-0103(7); 6 NYCRR 617.1(d).
3. See ECL 8-0103(7), (8); 6 NYCRR 617.1(b), (d).
4. ECL 8-0109(2); *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400 (1986).
5. 6 NYCRR 617.2(u); 617.6.
6. See ECL 8-0109; *H.O.M.E.S. v. New York State Urban Dev. Corp.*, 69 A.D.2d 222 (4th Dept 1979).
7. See 6 NYCRR 617.9, 617.11.
8. See ECL 8-0109(2); 6 NYCRR 617.9(b).
9. See ECL 8-0109(8); 6 NYCRR 617.11(d)(5).
10. See 6 NYCRR 617.9(a)(7).
11. *Municipal Art Society of New York Inc. v. New York State Convention Center Development Corp.*, 15 Misc.3d 1138A (Sup. Ct., New York Co. 2007).
12. 6 NYCRR 617.9(a)(7)(i).
13. 6 NYCRR 617.9(a)(7)(ii).
14. See 6 NYCRR 617.1(d).
15. See 6 NYCRR 617.9(a)(1), (a)(5).
16. 9 N.Y.3d 219 (2007).
17. See, e.g., *Glen Head-Glenwood Landing Civic Council Inc. v. Town of Oyster Bay*, 88 A.D.2d 484 (2d Dept. 1982).

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