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ZONING AND LAND USE

Proceeding With Caution After Negative Declarations

The basic purpose of the State Environmental Quality Review Act, or SEQRA, is to incorporate the consideration of environmental factors into the planning, review, and decision-making processes of state, regional, and local government agencies at the earliest possible time. To accomplish this, SEQRA requires that all agencies determine whether the actions they directly undertake, fund, or approve have a significant impact on the environment.

Under the procedures set forth in SEQRA's implementing regulations, when a developer first submits a proposal for a particular project, the lead agency must determine whether the project is classified as a Type I, Type II, or Unlisted action for purposes of SEQRA review.[1] Type I actions are those actions that meet or exceed certain thresholds contained in the SEQRA regulations and carry the presumption that they are likely to have a significant adverse impact on the environment.[2] Conversely, Type II actions are those that have been determined not to have a significant impact on the environment, or are precluded from environmental review under SEQRA.[3] Unlisted actions (i.e., those not listed as Type I or Type II) require a determination of significance and may require further processing under SEQRA.

For Type I and Unlisted actions, the developer must submit an Environmental Assessment Form, or EAF, which is used to determine the significance of such actions.[4]

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A properly completed EAF must contain enough information to describe the proposed action, its location, its purpose, and its potential impacts on the environment.[5]

If an agency determines that an action "may have a significant effect on the environment," the agency must prepare or request an environmental impact statement, or EIS.[6] As the SEQRA regulations make clear, an EIS is required if the proposed project "may include the potential for at least one significant adverse environmental impact."[7] Although the regulations recognize that Type I actions are more likely to require the preparation of an EIS than Unlisted actions,[8] not all Type I actions require an EIS. Developers generally seek to avoid the EIS process because it is burdensome and costly, and it often delays the lead agency's final decision on a project by many months.

However, not all development projects are subject to the EIS process. If, after the conclusion of the review process, the lead agency determines that the proposed action will not have a significant effect on the environment, it issues a negative declaration that effectively ends the SEQRA process.[9] An agency may issue such a declaration after it has identified the relevant areas of environmental concern, taken a "hard look" at them, and made a "reasoned elaboration of the basis for its determination."[10]

When an applicant seeking a negative declaration actually receives one, it typically rejoices. However, a recent decision by Supreme Court, Suffolk County, which was affirmed by the Appellate Division, Second Department, and for which the New York State Court of Appeals recently denied a motion for leave to appeal, suggests that there are certain significant risks that parties take when they proceed to develop a property after a negative declaration has been issued. Indeed, in this case, *Coppola v. Good Samaritan Hospital Medical Center*,[11] the court enjoined the operation of a hospital's emergency room after it had already opened in its new location.

Planning Board Approval

The *Coppola* case involved the Good Samaritan Hospital Medical Center in West Islip, which sought a building permit from the Town of Islip to build an addition to one of its buildings so that it could relocate its emergency room there. The hospital submitted a Short Environmental Assessment Form for Unlisted Actions (SEAF), an application, and site plans to the town planning board, which considered the application seven days later.

The planning board unanimously approved the application for the building permit, although it expressly conditioned the permit on approval of the site plan

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modification. About three months later — after the application had already been approved by the planning board — the town's assistant site plan reviewer examined the SEAF and found no significant environmental effects resulting from the proposed relocation.

A number of neighboring property owners commenced a CPLR article 78 proceeding seeking an order directing the hospital and the town's planning board to comply with SEQRA. Significantly, they also sought a preliminary injunction restraining and enjoining the hospital from operating the new emergency room. The petitioners asserted that the relocation of the emergency room constituted an "unlisted" action as defined in the regulations promulgated under SEQRA and that the town had failed to undertake a full environmental review, or any appropriate environmental review.

The petitioners alleged, among other things, the lack of proper public notice and public hearing of the application, the issuance of a negative declaration of environmental significance without conducting a proper review, a review that did not identify significant adverse traffic impacts and avoided consideration of some significant impacts by postponing review of them until after construction was begun, and a review that failed to comply with the procedural and substantive requirements of SEQRA.

Court Ruling

The Supreme Court ruled in favor of the petitioners, finding that the town had violated SEQRA. The court seemed troubled that the analysis undertaken by the assistant site plan reviewer for the town occurred three months after the planning board had already approved the site plan application. The court further objected to the planning board's deferred consideration of what the court characterized as "the one obvious environmental impact, that is, traffic," to a future public hearing to consider mitigation necessary to alleviate any problems resulting from the relocation of the emergency room facility.

The court declared that the planning board and the town had not taken the mandatory "hard look" at the potential traffic implications of the relocation of the emergency room. Simply put, the court found that although the planning board had acknowledged a traffic and noise concern at the prior location and that the relocation of the emergency room away from there would make the people living near it "very happy," the planning board and the town had not adequately addressed the impact to the residents near the new location for the emergency room.

The court then enjoined the operation of the emergency room, and its decision was affirmed by the Second Department. On Jan. 14, the Court of Appeals refused to hear the hospital's appeal.

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Projects Blocked

It is important to keep in mind that the *Coppola* case is not unique. Over the years, the failure to abide by the procedural and substantive requirements of New York State's environmental laws and concomitant regulations, coupled with an agency's declaration of no significant environmental impact, has stymied the completion of other projects, including some enormous projects on Long Island. For example, in *Matter of Village of Westbury v. Department of Transportation of the State of New York*,[12] the Second Department enjoined construction on the Northern State Parkway/Meadowbrook State Parkway Interchange Reconstruction Project after ruling that the New York State Department of Transportation had failed to consider the cumulative impact prior to issuance of a negative declaration, violating its obligation to take a "hard look" under SEQRA.

In another case, *Riverhead Business Improvement District Management Ass'n, Inc., v. Stark*,[13] the Second Department overturned the creation of a "Destination Commercial Planned Development Overlay District," in which a developer sought to build a shopping center.[14]

The bottom line is that an EIS is required if the proposed project "may include the potential for at least one significant adverse environmental impact,"[15] which the courts have characterized as a relatively low threshold.[16] Of course, this is not to say that negative declarations are not possible, or that such determinations will never withstand judicial scrutiny. What is clear, though, is that to avoid an interruption in the work on a project, or a court order to dismantle a project, property owners and local governments should make every effort to be certain that all applicable rules and regulations have been complied with before they issue and then act on a negative declaration. As Good Samaritan Hospital discovered, the costs for failing to do so can be quite high.

(1) 6 NYCRR §617.6(a)(41)(iv).
(2) 6 NYCRR §617.4(a)(1).
(3) 6 NYCRR §617.5(a).
(4) 6 NYCRR §617.6(a).
(5) 6 NYCRR §617.2(m).
(6) ECL §8-0109(2).
(7) 6 NYCRR §617.7(a)(1).
(8) 6 NYCRR §617.4(a).
(9) See, e.g., *Matter of Merson v. McNally*, 90 N.Y.2d 742 (1997).
(10) *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400 (1986).
(11) NYLJ Nov. 6, 2002 (Sup. Ct. Suffolk Co.), aff'd, 309 A.D.2d 862 (2d Dept. 2003), appeal denied, 2004 N.Y. Lexis 63 (Jan. 12, 2004).
(12) 146 A.D.2d 578 (2d Dept. 1989).
(13) 253 A.D.2d 752 (2d Dept. 1998).
(14) See, also, *Matter of Syrop v. City Council of City of Yonkers*, 282 A.D.2d 466 (2d Dept. 2001) (construction of large supermarket blocked).
(15) 6 NYCRR §617.7(a)(1).
(16) See, e.g., *Matter of Omni Partners v. County of Nassau*, 237 A.D.2d 440 (2d Dept. 1997).