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ZONING AND LAND USE PLANNING

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Improper Segmentation May Doom Municipality's Environmental Review

The Appellate Division, Second Department, recently rendered two interesting decisions involving claims of "segmentation" under the State Environmental Quality Review Act (SEQRA or SEQR)[1] — one arising from a proposed development in Eastern Suffolk County and the other from a proposed development in Western Nassau. Under SEQRA and its implementing regulations,[2] segmentation occurs when a governmental agency's environmental review of a single action is broken down into smaller stages or activities, addressed as though they are independent and unrelated, requiring individual determinations of significance.[3]

As the Second Department's decisions make clear, developers may not seek to distort or evade the SEQRA review process by presenting their projects piecemeal in an effort to minimize the adverse environmental impacts. However, the fact that a developer presents a project in stages does not necessarily require a finding of improper segmentation, so long as the individual elements of a project, and the project as a whole, are the subject of a full SEQRA review.

Requirements

SEQRA imposes substantive duties on governmental agencies to protect the quality of the environment for the benefit of all New Yorkers.[4] The act's basic mandate is to ensure that agencies evaluate, at the earliest possible time, the environmental consequences of actions they approve, fund or undertake, and that they take steps to avoid or mitigate adverse environmental effects.[5] SEQRA's regulations make clear that "[n]o agency involved in an action may undertake, fund or approve the action until it has complied with the provisions of SEQR."[6]

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SEQRA requires agencies to prepare or cause to be prepared an environmental impact statement (EIS) "on any action they propose or approve which may have a significant effect on the environment."[7] It also recognizes that actions may consist of several related components or activities that, together, must be considered the overall action.[8]

Segmentation is contrary to the intent of SEQRA and, therefore, generally is prohibited, except in special circumstances. If a lead agency believes that circumstances warrant a segmented review, it must clearly state the reasons therefor in its determination of significance and demonstrate that such review is no less protective of the environment.[9]

The prohibition on segmentation is designed to guard against the distortion of the environmental review process by preventing a project with potentially significant environmental effects from being split into two or more smaller projects, each falling below the threshold requiring full-blown environmental review.[10] It also prohibits a project sponsor from wrongly excluding certain activities from the definition of the project to minimize its environmentally harmful consequences and make it more palatable to the reviewing agency and community.[11]

Although a judicial finding that segmentation has occurred often will result in the invalidation of the lead agency's final determination on a project, the fact that a completed project ultimately is made up of several related development components or phases will not necessarily lead to a finding that segmentation has occurred. Development components and phases that are functionally independent of the original

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project and were not intended to be part of an overall plan of development, or that were speculative and hypothetical when the earlier portions of the project were being considered, may be reviewed separately under SEQRA.[12] Yet, where the facts reveal that a known and integral part of a development project was purposely excluded from discussion in an EIS, a finding of improper segmentation is likely.

Pine Barrens Decision

In one recent case, *Long Island Pine Barrens Society, Inc. v. Town Board of Town of Riverhead*,[13] the Second Department overturned the Riverhead Town Board's approval of a 300-acre golf course project in Baiting Hollow upon a finding that the town improperly had segmented the SEQRA review process. In this case, the landowners requested that the Town Board rezone their property to permit a "residential golf" development.

The proposed development consisted of an 18-hole golf course and up to 333 residential units. Although the developer contemplated a mixed use development, the EIS submitted in connection with the proposed rezoning and accepted by the Town Board discussed the environmental impacts anticipated from the golf course, but did not specify the number or locations of the proposed homes. Nevertheless, the Town Board approved the zoning amendment, and that decision was challenged by the Long Island Pine Barrens Society in an Article 78 proceeding.

The Supreme Court dismissed the petition,[14] but the Second Department reversed, concluding among other things that the Town Board improperly had segmented the environmental review process mandated by SEQRA. The appellate court noted that, although the rezoning was an integral part of the development, the EIS, which did not specify the number or location of the proposed houses, addressed only the potential impacts of the development's golf course.

As a result, the court found that the Town Board could not have considered the potential environmental impacts of the project's contemplated residential component. The court held that the Town Board was obligated to consider the potential environmental impacts of the entire development project at the time it considered the rezoning application, and its failure to do so violated SEQRA.

The same court reached the opposite result in *Maidman v. Incorporated Village of Sands Point*,[15] an Article 78 proceeding that sought to annul the Village Board's approval of amendments to a master plan for expansion and improvement of a village-owned recreational facility on the basis that the Board improperly had segmented its SEQRA review.

In 1999, the Village Board approved a master plan for the expansion and improvement of the recreational facility. At that time, the master plan did not provide for any change in the use of an existing driveway on Astor Lane, which traditionally had been used for emergency access only. Approximately one year later, the Village Board sought to amend the master plan by creating an additional access road on Thayer Lane and providing an unrestricted exit to Astor Lane. Following the issuance of a positive declaration, the village engaged in a comprehensive environmental review of traffic circulation and ingress and egress to the facility, which culminated in the adoption of a resolution amending the 1999 master plan to incorporate the proposed modified access. Several neighbors then commenced a proceeding to annul the Board's determination. The Supreme Court rejected the petitioners' claims and dismissed the petition.[16]

In affirming, the Appellate Division also rejected the petitioners' argument that the Village Board improperly had segmented its SEQRA review by failing to consider the new access driveway and unrestricted use of the Astor Lane exit when it conducted its original SEQRA review prior to adopting the 1999 master plan. The court noted that the regulations that prohibit segmentation are designed to prevent the distortion of the approval process by allowing elements of a project to avoid the detailed environmental review mandated by SEQRA. It then concluded that improper segmentation had not occurred because the board's decision to change the access points to the facility ultimately was subject to a full SEQRA review.

Claims of improper segmentation often are asserted by opponents of controversial development projects. To limit the risk that a SEQRA decision may be overturned on improper segmentation grounds, parties and their consultants must demonstrate, to the extent possible, valid reasons for having a project reviewed in stages, such as that the project evolved over time, and that all portions of the project have been subjected to a full review under SEQRA.

(1) ECL § 8-101, et seq.

(2) 6 NYCRR § 617.1, et seq.

(3) *Teich v. Buchheit*, 221 AD2d 452 (2nd Dept. 1995).

(4) *King v. Saratoga County Board of Supervisors*, 89 NY2d 341 (1996).

(5) See, 6 NYCRR §617.1(c).

(6) 6 NYCRR §617.3(a).

(7) ECL §8-0109(2).

(8) 6 NYCRR §617.3(g).

(9) See, 6 NYCRR §617.3(g)(1).

(10) *Long Island Pine Barrens Society, Inc. v. Planning Board of the Town of Brookhaven*, 204 AD2d 548 (2nd Dept. 1994).

(11) Id.; *Schultz v. Jorling*, 164 AD2d 252 (3rd Dept. 1990).

(12) See, *Village of Tarrytown v. Planning Board of Village of Sleepy Hollow*, 741 NYS2d 44 (2nd Dept. 2002); *City of Buffalo v. New York State Department of Environmental Conservation*, 184 Misc.2d 243 (Sup. Ct., Erie Co. 2000).

(13) 290 A.D.2d 448 (2nd Dept. 2002).

(14) *Long Island Pine Barrens Society, Inc. v. Town Board of Town of Riverhead*, n.o.r. (Sup. Ct., Suffolk Co., September 12, 2000 (Gerard, J.)).

(15) 738 N.Y.S.2d 362 (2nd Dept. 2002).

(16) *Maidman v. Incorporated Village of Sands Point*, n.o.r. (Sup. Ct., Nassau Co., August 10, 2000 (Franco, J.)).

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