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STATE ENVIRONMENTAL REGULATION

Expert Analysis

Regulating the Regulators: The Court's Role

New York's environmental regulatory scheme serves numerous purposes. For instance, the Legislature's goal in adopting the State Environmental Quality Review Act (SEQRA)[1] was to incorporate environmental factors into the planning, review and decision-making processes of state and local government agencies at the earliest possible time.[2] The new "Electronic Equipment Recycling and Reuse Act"[3] seeks to cut the volume of discarded electronics entering the solid waste stream.[4]

Enforcement of regulations at the municipal level, however, has been the topic of court challenges. In some instances, applicants might believe they are in the equivalent of an "administrative purgatory," with municipal decision-makers using environmental regulations to avoid making decisions on controversial applications or to punitively stop a project.

In one recent case, for example, a property owner argued that a Long Island town failed to timely address its construction proposal and brought an action over the delay. The court, in *East End Resources, LLC v. Town of Southold Planning Board*,[5] rejected the property owner's arguments and dismissed its state law claims. In another case, *Bower Associates v. Town of Pleasant Valley*,[6] a developer obtained a court order directing approval of its subdivision plan when the court concluded that the planning board's actions were arbitrary and not based on environmental concerns unique to the subdivision but were driven largely by community pressure.

The cases that reach the courts make it clear that although local officials have some leeway, they have to be careful that extensive delays are based upon rational reasons and they need to be cognizant of their obligation to treat applicants similarly. Otherwise, not only may their decisions be annulled, they may also be found to be liable for damages for violating an applicant's civil rights. The flip side is that an applicant needs to diligently document delays and questionable tactics used by governmental officials. Nothing illustrates these rules more than the recent 206-page decision by the U.S. District Court for the Southern District of New York in *Fortress Bible Church v. Feiner*.[7] The town has appealed the ruling.

By **Charlotte A. Biblow**

Background

The facts of this case are explained in great detail by the district court. Essentially, Fortress Bible Church, a Pentecostal church in Mount Vernon established in the early 1940s, determined that its church and school facilities were inadequate to accommodate its activities and expanding membership. The church therefore purchased land in the Town of Greenburgh where it proposed to construct a single building to house the church and school. The proposed structure and uses were permitted, as of right, within the town's R-10 zoning district, where the property was located.

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In November 1998, the church submitted its application to the town board for site plan approval, together with an Environmental Assessment Form (EAF), as required by SEQRA. In January 1999, the church asked that its application be placed on the town board agenda for SEQRA lead agency determination and for referral to the planning board. Contrary to the town board's usual practice, the town board did not do so. In April 1999, the town's planning commissioner advised the church that it needed a use variance because the town code restricted development to one principal use per lot in a single family residential zone, and the church was proposing two principal uses for the property: a church and a school. He also stated that the church needed a special permit because of the school. In fact, the district court later found, neither a use variance nor a special permit was required.

In January 2000, the church submitted a revised site plan, together with a full EAF, that addressed traffic and drainage issues and included architectural renderings, floor plans, watershed maps, site sections and photographs. It again asked that the town board refer its application to the planning board for review, but the town board did not do so. In April 2000, the town attorney stated that the church's application would be on the town board's May 9, 2000, agenda for referral to the planning board. The application, however, was not addressed at that meeting.

The district court found that at a town board work session in July 2000, the town's supervisor stated that "50 percent" of the problem with the church's application was traffic and the other "50 percent" was the church's tax-exempt status. In fact, the district court found that it was "apparent" that the church's status as a tax-exempt religious organization was a source of consternation for some members of the town board. It pointed out, for example, that one board member stated that she did not want "another church" in that area of Greenburgh. During that work session, the town supervisor asked the church to donate a fire truck to the fire district or make some other payment in lieu of taxes (PILOT) to the town. The church refused to do either option.

Thereafter, the town issued a "positive declaration," i.e., a finding that the project might have a significant impact on the environment, which required that an Environmental Impact Statement (EIS) be completed. The district court, however, found that a positive declaration was unwarranted because the church had mitigated all identified potential adverse impacts, and found that the town should have issued a negative declaration.

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The district court ruled that the town used the SEQRA process and the issuance of the positive declaration "punitively" because of the church's refusal to donate the fire track or make a PILOT payment and because of certain town board members' desire to delay the project and increase the expense of the SEQRA process for the church. Simply put, the district court ruled the town board's positive declaration under SEQRA "was not fully justified" and "was capricious."

In addition, the district court found that the town's adoption of a broad scope for the draft EIS (DEIS) was aimed at delaying the project. The town accepted the DEIS on Oct. 24, 2001—more than two and one half years after the church filed its initial application and six and one half months after the church submitted the DEIS. The district court also noted that the town further delayed the project by impermissibly suspending the SEQRA review when a dispute arose over reimbursement of the town's SEQRA review fees.[8] The district court found that the town board's "disregard for their obligation under the SEQRA Regulations, 6 N.Y.C.R.R. §617, was knowing and calculated."

The district court also found that in February 2003, the town board took over preparation of the final EIS (FEIS), and that the town's FEIS was "replete with errors, gratuitous comments and revisions intended to cast the project in the worst light possible." The court also found that the town's April 2004 Findings Statement denying the church's application "contained certain of the same errors as set forth in the FEIS."

The Court's Conclusions

The facts as set forth by the district court were devastating; its conclusions were no less so. It found that the majority of town employees and consultants called to testify at trial had "significant credibility issues" and gave inconsistent and implausible testimony. The district court also found that the town board and a councilwoman "destroyed evidence" and "completely disregarded discovery obligations," warranting the imposition of sanctions.

The district court also pointed out numerous examples of how the town treated the church's application differently from other comparable applications. The district court agreed with the church that the town violated the Religious Land Use and Institutionalized Persons Act (RLUIPA),[9] a federal law that protects religious institutions against "subtle forms of discrimination when, as in the case of the grant or denial of zoning variances, a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards."[10] In particular, the district court found that what it characterized as the town's intentional delays, hostility and bias toward the church's application in effect coerced the church to continue its religious practice in inadequate facilities, thereby impeding its religious exercise.

The district court found that the town acted to "kill the project" and that the defendants failed to demonstrate any compelling governmental interests sufficient to justify the town's denial of the church's SEQRA application. To the contrary, it ruled that the evidence presented at trial established that the defendants' purported concerns "were contrived for the sole purpose" of rationalizing the town's denial of the SEQRA application.

The district court did not limit its decision to RLUIPA—and thus its opinion should not be viewed as limited to religious institutions that can assert claims under that statute. The district court also found that the town violated the civil rights of the church. It ruled that the town, through the town board, acted as the final decision-maker in processing the church's SEQRA application under New York and Town of Greenburgh laws; the town designated itself lead agency and possessed final authority regarding various decisions throughout the SEQRA review process including, ultimately, whether to grant or deny the church's application. Thus, the town, town board, and town board members (including the supervisor) sued in their official capacities "may be held liable under 42 U.S.C. §1983."

The district court found that the town's SEQRA determination was not supported by substantial evidence and, therefore, annulled the positive declaration and FEIS issued by the town board, and the Findings Statement adopted by the town board.

Significantly, the district court also found that the town imposed land use restrictions that violated New York law. The district court explained that judicial review of a lead agency's SEQRA determination was limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination "was affected by an error of law or was arbitrary and capricious or an abuse of discretion."

Substantively, the role of the court was to determine whether the agency had taken a "hard look" at the proposed project and made a "reasoned elaboration" of the basis for its determination. As the district court noted, where an agency failed to take the requisite hard look and make a reasoned elaboration, where its determination was affected by an error of law, or where its decision was not rational, was arbitrary and capricious or was not supported by substantial evidence, the agency's determination could be annulled.

It then explained that it had already found, in evaluating the church's RLUIPA claims, that the reasons the town said it denied the church's application were "unsupported, if not wholly fabricated." The district court then said that, for the same reasons that those concerns did not constitute compelling governmental interests under RLUIPA, neither were they supported by substantial evidence under New York law.

Accordingly, the district court found that the town's SEQRA determination was not supported by substantial evidence and, therefore, annulled the positive declaration and FEIS issued by the town board, and the Findings Statement adopted by the town board. It also ordered the January 2000 site plan application deemed approved for purposes of SEQRA and ordered that the town and its boards not conduct any further SEQRA review. Finally, it ordered compensatory damages payable to the church under §1983 (in an amount to be decided) and it sanctioned the defendants $10,000 for discovery abuses.

Conclusion

The decision in *Fortress Bible Church* is reminiscent of *Oyster Bar Associates Limited Partnership v. Town Board of the Town of Oyster Bay*,[11] which had similarly strong language and findings. In the *Oyster Bay* case, the trial court stated that the purpose of SEQRA "was never intended to be a weapon, indiscriminately used to frustrate legitimate applications" and it found that the record demonstrated that the local officials "failed to make a reasoned elaboration for the basis of its determination, causing all of their Findings to be annulled because they are arbitrary, capricious or unsupported by evidence," that they attempted to "stonewall" the application "instead of trying to identify legitimate, significant environmental concerns that require mitigation," and that "every basis" for the government's decision was "invalid" and possessed "absolutely no validity." That decision, however, was reversed by the Appellate Division, Second Department.

The town appealed the *Fortress Bible Church* ruling on Sept. 8, 2010. Whether it will be affirmed or reversed by the U.S. Court of Appeals for the Second Circuit remains to be seen. But the decision serves as a beacon to local government officials of the importance of carefully following all applicable environmental regulations (and any applicable federal law), following their usual practices and treating similarly situated applicants consistently, and the risks they face when court intervention is sought to review their actions.

1. N.Y. Environmental Conservation Law (ECL) Art. 8.
2. See 6 NYCRR Part §617.1(c), available at http://www.dec.ny.gov/regs/4490.html.
3. N.Y. ECL Art. 27.
4. See Charlotte A. Biblow, "Mandatory Electronic Equipment Recycling Takes Hold in New York," NYLJ, July 29, 2010 at 3.
5. 2009 NY Slip Op 32408(U) (Sup. Ct. Suffolk Co. Oct. 8, 2009).
6. *Bower Associates v. Town of Pleasant Valley*, 2 N.Y.3d 617 (2004).
7. 03 Civ. 4235 (SCR) (S.D.N.Y. Aug. 11, 2010, amended Aug. 18, 2010).
8. See 6 N.Y.C.R.R. §617.13(f).
9. 42 U.S.C. §2000cc et seq.
10. *Sts. Constantine and Helen Greek Orthodox Church Inc. v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005) (Posner, J.) (citations omitted).
11. 19 Misc.3d 1145A (Sup. Ct. Suffolk Co. 2008), rev'd 2009 N.Y. App. Div. LEXIS 496 (2d Dept. 2009).