New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 250 —NO. 18
THURSDAY, JULY 25, 2013

Expert Analysis

STATE ENVIRONMENTAL REGULATION

When Community Groups Oppose Government Development Decisions

After state and local governments give the necessary approvals to allow real estate projects to move forward, developers and project proponents justifiably may rejoice. Their pleasure, however, is likely to be somewhat tempered because, as they undoubtedly know from past experience, litigation may ensue in which community members seek to challenge these governmental approvals.

While the principal state law often used in these challenges is the New York State Environmental Quality Review Act (SEQRA),[1] two recent court decisions highlight a number of other arguments that may be asserted by community groups to overturn these approvals.

By **Charlotte A. Biblow**

Fresh Direct

At the end of May, the Supreme Court, Bronx County, issued a decision[2] rejecting a challenge by community members and organizations from the neighborhood surrounding the 96-acre Harlem River Yard in the Bronx to government approvals for a project intended to result in Fresh Direct LLC, an online food and grocery retailer operating in New York and New Jersey, relocating its operations from Long Island City, Queens, to the Harlem River Yard. The "lead agency" under SEQRA, the New York City Industrial Development Agency (IDA), had issued a negative declaration for the project, indicating that it would not have significant adverse environmental impacts and did not require a supplemental environmental impact statement to be prepared.

The petitioners argued that the IDA had violated SEQRA by failing to take a "hard look" at the environmental impacts of the project or to provide a "reasoned elaboration" of the basis for its determination that the Fresh Direct project would have no significant environmental impacts. The petitioners also asserted somewhat unusual claims and sought, pursuant to State Finance Law §123-b and Article VII, §8 of the New York State Constitution, to annul and set aside the lease of the Harlem River Yard between the New York State Department of Transportation as lessor, and Harlem River Yard Ventures Inc., as lessee, arguing that the lease was unconstitutional as a gift or loan of public land for a private benefit. They also sought to set aside the sublease between Harlem River Yard Ventures, as sublessor, and Fresh Direct, as sublessee, as an unconstitutional gift of public land.

In its decision, the Supreme Court rather easily dismissed the petitioners' SEQRA objection, rejecting their contention that the IDA had failed to take a "hard look" or had failed to supply a "reasoned elaboration" for its determination, or that the respondents' environmental assessment of air quality or noise levels had been arbitrary, capricious, or otherwise deficient.

The court then considered the petitioners' other three causes of action. The court ruled that the petitioners' claim to invalidate the lease between the Transportation Department and Harlem River Yard Ventures under the State Finance Law was barred by the four-month statute of limitations, as the lease had been executed in August 1991.

The court next turned to the claim about the sublease. As the court explained, under State Finance Law §123-b, a citizen taxpayer—regardless of whether he or she was personally aggrieved—could bring suit to prevent the unlawful expenditure of state funds or state property by an officer or employee of the state, in the course of his or her duties. The expenditures, the court continued, must be "clearly traced" to identifiable state funds to allow a plaintiff standing to pursue such an action.

The court found that a lease or sublease could qualify as an alleged expenditure of "state property." Yet because the third cause of action did not assert claims against an officer or employee of the state, who, in the course of his or her state duties is causing or is about to cause the wrongful expenditures of state funds, the court held that the petitioners did not have standing to bring the claim. Rather, the court noted that the third cause of action involved the sublease between Harlem River Yard Ventures and Fresh Direct, neither of which were state agencies, and that the Transportation Department, a state agency, was not a party to that sublease.

The court determined that since the third cause of action did not adequately assert a claim for mismanagement of state funds or property by a state actor, it had to be dismissed. The court further ruled that it would not allow the petitioners to amend their petition to add the Transportation Department commissioner as a party as the claim about the sublease would still be deficient.

> An applicant can win the SEQRA battle and still have its project derailed by a community group.

The court reached the same conclusion with respect to the petitioners' fourth cause of action, which also was based on State Finance Law §123-b. This claim sought to annul the decision of the Empire State Development Corporation to accept Fresh Direct into the "Excelsior Jobs" program, which made Fresh Direct eligible for up to $18.9 million worth of tax credits. The court ruled that this cause of action had to be dismissed for lack of standing because the petitioners had failed to name an officer or employee of the state as a party respondent and because it sought review of the management and operation of a public enterprise more in the nature of a "broad policy complaint" rather than a specific expenditure of state funds. Moreover, the court added, there was no authority to support the petitioners' proposition that the conditional grant of tax credits or abatements constituted the expenditure of state funds. It rejected the petitioners' request to amend the petition to add the commissioner of the New York State Department of Economic Development or the director of the Excelsior Jobs Program, finding that the claim still would be deficient.

'Matter of Frigault'

The second recent notable decision[3]—*Matter of Frigault v. Town of Richfield Planning Board*—

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arose after Monticello Hills Wind, LLC, applied to the Town of Richfield Planning Board for a special use permit in connection with a project involving the proposed construction of six wind turbines and associated facilities on 1,190 acres of land in Richfield, in upstate Otsego County. After designating itself as the lead agency for purposes of SEQRA, the board retained an outside consulting firm, held a public hearing on Sept. 12, 2011, conducted multiple meetings, and considered public comments both in support of, and in opposition to, the project. At a Nov. 22, 2011, meeting, the board reviewed the full environmental assessment form (EAF), issued a negative declaration of significance under SEQRA, and granted the applicant a special use permit contingent on its entering into a host community agreement with the town, the purpose of which was to address the applicant's ongoing obligations and responsibilities with respect to the project.

Thereafter, a group of local citizens and property owners in the town sought a judgment annulling the board's determinations. The petitioners asserted that the board had failed to comply with SEQRA and also asserted that the board had violated the Open Meetings Law and the Town Law.[4]

The Supreme Court, Madison County, rejected the petitioners' challenge to the board's SEQRA review. It found, however, that the board had violated the Open Meetings Law, in the manner in which it had conducted the Nov. 22, 2011, meeting, and the Town Law, in failing to comply with mandatory procedural steps applicable to special use permits. As a result, the court annulled the negative declaration and special use permit. The dispute then reached the Third Department.

In its decision, the appellate court first upheld the lower court's decision that the board's negative declaration had been issued in compliance with SEQRA, deciding that the board had issued a "thorough and reasoned analysis" addressing the areas of relevant environmental concern (land, water, air, plants and animals, agricultural land resources, aesthetic resources, historic and archeological resources, open space and recreation, noise and odor, among others), which, in its view, demonstrated that the board had taken the requisite "hard look" at those concerns.

The Third Department, however, disagreed with the Supreme Court's determination that a violation of the Open Meetings Law warranted annulment of the resolutions passed by the board at its Nov. 22, 2011, meeting. The appellate court found that the board initially had provided proper notice that a board meeting was scheduled to take place at the town hall at 7 p.m. on that date and that the project would be the focus of the meeting.[5] As the court observed, as a result of the large public turnout at that meeting, the room in the town hall was filled in excess of the maximum occupancy limit and the town attorney announced to those in attendance that the meeting would be relocated to a community room located approximately two blocks away. A note was placed on the door of the town hall to inform late attendees of the move, and the meeting commenced at the alternate location approximately one hour after it was scheduled to begin.

The Third Department disagreed with the Supreme Court's finding that the board should have anticipated the large crowd at the meeting and should have made appropriate arrangements to accommodate its size, and that the board had violated the Open Meetings Law by relocating the meeting without proper notice. As the court pointed out, the Open Meetings Law provides that "[e]very meeting of a public body shall be open to the general public."[6] In addition, the court continued, a public body must "make or cause to be made all reasonable efforts to ensure that meetings are held in an appropriate facility which can adequately accommodate members of the public who wish to attend such meetings."[7]

In 'Frigault,' the Supreme Court, Madison County, rejected the petitioners' challenge to the board's SEQRA review. It found, however, that the board had violated the Open Meetings Law, in the manner in which it had conducted the Nov. 22, 2011, meeting, and the Town Law, in failing to comply with mandatory procedural steps applicable to special use permits.

In this case, the appellate court explained, when it became clear that the space in the town hall was not large enough for the number of people who wished to attend the meeting, the board notified everyone present—including the media—that the meeting was being relocated, and took steps to make certain that anyone arriving late would be aware of the change. In the court's opinion, the board's efforts in relocating the meeting "were aimed at accommodating the large crowd and ensuring public access, and were entirely reasonable under the circumstances."

In any event, it continued, even if the relocation of the meeting had represented a technical violation of the Open Meetings Law, the resolutions issued by the board at the meeting were not void but, rather, were voidable upon good cause shown. It then ruled that because the board had "clearly changed the location of the meeting not to frustrate, but to ensure, the public's attendance at the meeting," and because the board's actions were consistent with the purpose of the Open Meetings Law, the petitioners had not shown good cause for a declaration that the actions taken by the board at the Nov. 22 meeting should be voided. Thus, it ruled, neither the special use permit nor the negative declaration should have been annulled on the basis of any claimed violation of the Open Meetings Law.

It is important to note that the project did not receive the Third Department's complete approval. In fact, the court ruled that the Supreme Court had properly annulled the special use permit. It explained that, under the Town Law, the board was required to hold a public hearing on the permit application[8] and was required to provide the Otsego County Planning Department with at least 10 days written notice of the hearing, "accompanied by a full statement of such proposed action,"[9] consisting of "all materials required by and submitted to the [board] as an application on [the] proposed action, including a completed [EAF] and all other materials required by [the board] in order to make its determination of significance pursuant to [SEQRA]."[10]

The Third Department explained that the "only public hearing" held by the board in connection with the project occurred in September 2011, before the negative declaration was issued—but the county Planning Department had not been provided with written notice of that public hearing and there was no indication that it had received all of the materials on which the board relied in reaching its negative declaration. In fact, the court found, the record did not reflect that the Planning Department had been provided with a full statement of the proposed action until November 2011, just days before the board issued its resolution granting the special use permit. Accordingly, the Third Department held, the board's failure to abide by the requirements of Town Law §274-b required nullification of the special use permit.[11]

In summary, the Third Department upheld the board's resolution granting the negative declaration under SEQRA, rejected the petitioners' Open Meeting Law claim, but ended up annulling the board's approval on the ground that the special use permit had not been properly issued.

Conclusion

The rules and regulations that must be complied with, and the requirements that must be met, before a project is approved go well beyond SEQRA. As these two cases make clear, an applicant can win the SEQRA battle and still have its project derailed by a community group asserting causes of action under other statutes, such as the Town Law or its counterpart in the Village Law, or, under the right facts, a cause of action under the State Finance Law or Open Meetings Law.

1. Environmental Conservation Law (ECL) §§8-1-1, et seq., 6 NYCRR §§617 et seq.
2. *South Bronx Unite! v. New York City Industrial Develop. Agency,* No. 260462/2012 (Sup. Ct. Bronx Co. May 31, 2013).
3. *Matter of Frigault v. Town of Richfield Planning Board,* No. 515528 (3d Dept. June 27, 2013).
4. See Public Officers Law Article 7.
5. See Public Officers Law Article 7, Sections 104(1), (2).
6. Public Officers Law Article 7, Section 103(a).
7. Public Officers Law Article 7, Section 103(d).
8. See Town Law §274-b(6).
9. Town Law §274-b(7).
10. General Municipal Law §239-m(1)(c).
11. As an alternative ground for this result, the Third Department found that the special use permit had to be annulled because the board had failed to comply with the Town of Richfield Land Use and Building Management Ordinance.