SEQRA CASE LAW UPDATE 2013-14

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I. STANDING/RIPENESS ISSUES UNDER SEQRA

1. Matter of Tuxedo Land Trust, Inc., et al. v. Town Bd. of Town of Tuxedo,et. al., 2013 N.Y. Slip Op. 08255 (2d Dept., Dec. 11, 2013)

Tuxedo Reserve Owner, LLC owned a parcel of approximately 2,400 acres of land in the Town of Tuxedo. In 2004, following review pursuant to the SEQRA, the Town Board of the Town of Tuxedo granted the owner a special permit and preliminary plat approval permitting a mixed use development of more than 1,000 dwelling units and nonresidential development. In 2007 certain amendments to the application were granted thereafter in a hybrid proceeding and action, the petitioners/plaintiffs challenged the granting in 2010 of a third application for amendments, after a SEQRA review of the amendments was conducted.

The Supreme Court granted the motions of the respondents/defendants which were to dismiss alleged violations of SEQRA, on the ground that the petitioners/plaintiffs lacked standing to assert those causes of action. On appeal the Second Department affirmed.

To establish standing under SEQRA, a petitioner must show: (1) an environmental injury or "injury in fact" that is in some way different from that of the public at large, and (2) that the alleged injury falls within the zone of interests sought to be protected or promoted by SEQRA. An "injury in fact" may be inferred from a showing of close proximity of the petitioner's property to the proposed development.

The Second Department held that the Supreme Court properly granted respondents/defendants motions to dismiss for lack of standing since the critical distance to establish standing is the distance between the individual petitioners/plaintiffs' property and the proposed development itself, not merely the distance between the petitioners' properties and the property line of the site. Here, the individual petitioners' properties were not located in sufficient proximity to the proposed development to give rise to standing. The Court determined that on this basis the petitioner/plaintiff organizations also lacked standing.

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2. Matter of Riverhead Neighborhood Preservation Coalition Inc., et al. v. Town of Riverhead Town Board, et al., 2013 N.Y. Slip Op. 08640 (2d Dept., December 26, 2013)

The petitioners (individuals who are members of the Suffolk County Neighborhood Preservation Coalition) challenged the proposed construction of a regional shopping mall. The individual petitioners resided at distances ranging from approximately 1,300 feet to approximately 2,000 feet away from the site of the proposed mall. They alleged that they would be harmed by the construction of the proposed mall primarily because a road which provides access to their neighborhood community was located directly across from the main entrance to the proposed mall. Petitioners brought an Article 78 petition challenging the Town's site plan approval of the mall.

Respondents moved to dismiss the petition on the ground that the petitioners lacked standing. The Supreme Court granted the motion to dismiss.

In affirming the lower court's dismissal of the proceeding, the Second Department relied on the rule that for standing purposes in land use matters petitioners must demonstrate injury that is in some way different from that of members of the public at large. Such direct harm was not demonstrated since "the individual petitioners, none of whom allege that the site of the proposed mall is visible from their homes, do not live close enough to the site to be afforded a presumption of injury-in-fact based on proximity alone" and "the individual petitioners' allegations are insufficient to demonstrate that the construction of the proposed mall would cause them to suffer an environmental injury different from that of members of the public at large." As a result, petitioner Riverhead Neighborhood Preservation Coalition, Inc. also lacked standing.

3. Matter of O'Brien v. New York State Commissioner of Education, 2013 N.Y. Slip Op. 07223 (3d Dept., November 7, 2013), 2014 N.Y. Slip Op. 64143 (Court of Appeals, February 20, 2014) (appeal dismissed)

Petitioner commenced an Article 78 proceeding to appeal an administrative determination by the Commissioner of Education (that sustained a school district's determination on existing debt pertaining to a facility repurposing project and the school district's issuance of a negative declaration for the project, a Type I action pursuant to SEQRA). The lower court upheld the Commissioner's determination and dismissed the SEQRA challenge for lack of standing. The Third Department affirmed and with regard to SEQRA, determined petitioner lacked standing to challenge the SEQRA determination and process. According to the Court, standing, even to raise environmental challenges, is not automatic and must be alleged and, when disputed, proven. Here petitioner alleged that he lived two blocks from the property in question. Respondents offered a specific distance of over 1,000 feet as the distance, a fact which was not disputed in the proceeding.

First, the Court held petitioner's reliance on the proximity of his property to one of the buildings scheduled for repurposing did not raise an inference of injury sufficient to confer standing and a distance of over 1,000 feet "is not close enough to give rise to

the presumption that the neighbor is or will be adversely affected by the proposed project."

Further, the Court concluded petitioner had no standing since petitioner failed to allege or identify any actual injury or direct harm that he would suffer, environmental or otherwise, if the facilities project was undertaken that was distinct from the harm experienced by the general public. Moreover, even assuming that the site in issue could be deemed a "natural resource," petitioner's allegations that he visited and used the property did not establish repeated rather than isolated use, and was insufficient to demonstrate that he would suffer direct environmental harm and damages distinguishable from those that might be experienced by the public generally.

4. Matter of Patel v. Board of Trustees of the Inc. Village of Muttontown, 115 A.D.3d 162 (2d Dept. 2014)

The Second Department determined that a challenge to an approved findings statement pursuant to the SEQRA was not ripe for adjudication.

The Jewish Congregation of Brookville applied to the Board of Trustees of the Incorporated Village of Muttontown ("Board") for a special use permit and site plan approval in connection with a development project. After the Board determined that the project would have a significant impact on the environment, and pursuant to the Board's obligations under SEQRA, the Board required an Environmental Impact Statement. The Board circulated a Final Environment Impact Statement ("FEIS") and ultimately adopted the findings statement and approved the FEIS. Prior to the Board's determination as to whether the special use permit should be issued and the proposed site plan approved, Petitioners brought an Article 78 proceeding challenging the adoption of the SEQRA findings.

The Court found that an action taken by an agency pursuant to SEQRA may be challenged only when such action is final. Here, the issuance of a SEQRA findings statement did not inflict injury "in the absence of an actual determination of the subject applications for a special use permit and site-plan approval, and thus, the challenge to the adoption of the findings statement is not ripe for adjudication." Matter of Patel v. Board of Trustees of the Inc. Village of Muttontown, 115 A.D.3d 162, 163.

II. IMPERMISSIBLE SEGMENTATION

1. Matter of Town of Blooming Grove v. County of Orange, 103 A.D.3d 655 (2d Dept. 2013)

In February 2007, Orange County purchased approximately 258 acres of property located in the Town of Blooming Grove, the Town of Chester, and the Village of Chester (former site of Camp LaGuardia) from the City of New York. In April 2009, the County entered into a purchase and sale agreement with a private development firm. The developer agreed to construct residential, commercial, and retail facilities on the subject property. Among the contingencies of the agreement was one which required

the County to guarantee adequate sewer capacity; if this contingency was not met within a specified inspection period, the developer could unilaterally cancel the contract. Matter of Town of Blooming Grove v. County of Orange, 103 A.D.3d 655, 656 (2d Dept. 2013).

The Town Board of the Town of Chester and the Town of Blooming Grove Planning Board declared themselves co-lead agencies for the purposes of SEQRA, designated the project a Type I action, and issued a positive declaration. A final scoping document was later adopted. Id.

Ultimately neither the Town of Blooming Grove nor the Town or Village of Chester would guarantee adequate sewer capacity. The County then began to consider a plan to extend the county sewer district to include the property and adopted a resolution declaring itself lead agency for the purpose of conducting an environmental review pursuant to SEQRA of the sewer extension. The County then classified the action as "unlisted" and subsequently issued a negative declaration. In August 2010, after holding a public hearing, the County Legislature adopted a resolution enacting the sewer extension. The Town of Blooming Grove and the current provider of sewer service to the property, commenced an Article 78 proceeding and the Supreme Court granted the petition, annulling the County resolutions. Id. at 656-57.

In affirming the lower court, the Second Department determined petitioners have standing because they established "a demonstrated interest in the potential environmental impacts of the project." Id. at 657. Further, the County had improperly segmented the SEQRA review of the sewer district extension because the redevelopment project and sewer district extension "are part of an integrated and cumulative development plan sharing a common purpose" and "[s]ince the Town of Chester and the Planning Board of the Town of Blooming Grove, as co-lead agencies of the Mountco project, had already issued a positive declaration, the County was prohibited from issuing a subsequent determination." Id.

2. Matter of Saratoga Preservation Foundation v. Boff, 110 A.D.3d 1326 (3d Dept. 2013)

Respondent Boff purchased certain property, which included the Winans-Crippen House, in the City's historic Franklin Square District, listed on the National Register of Historic Places and included on the City's list of landmarks and historic districts. He then sought to demolish the house as an unsafe structure pursuant to the City Code. The City's Design Review Commission ("DRC") declared itself the lead agency for environmental review under SEQRA, ruled that the proposed demolition was a Type I action, issued a positive declaration and thereafter a DEIS/FEIS were prepared and deemed complete. Matter of Saratoga Preservation Foundation v. Boff, 110 A.D.3d 1326 (3d Dept. 2013).

During the SEQRA review process, Mr. Boff indicated that he had no immediate intention of developing the property following demolition. Specifically, the DRC determined the structure was unsafe, considered respondent's plan of keeping the property clean and fenced and documented its reasons for not requiring the submission of additional post-demolition plans. Moreover, any future construction plans would

require DRC review and, therefore, the environment would not be less protected. Id. at 1327-28.

Petitioners challenged the DRC's SEQRA determination and sought an order enjoining the demolition of the structure. Shortly thereafter, the DRC voted to approve Boff's application for a demolition permit and petitioners subsequently filed an amended petition adding a cause of action challenging that determination. The Supreme Court dismissed the amended petition. Id. at 1327.

According to the Court, impermissible segmentation occurs "when the environmental review of an action is divided into smaller stages in order to avoid the detailed review called for under SEQRA" while conversely segmentation is permissible "when the agency conducting environmental review clearly sets forth the reasons supporting segmentation and demonstrate[s] that such review is clearly no less protective of the environment." Id. at 1328.

The Third Department affirmed the lower court, finding that issuance of the demolition permit for an historic structure, where there was no specific proposal for a redevelopment plan, did not result in impermissible segmentation. The Court found that the DRC's reliance on the conclusions by a building official that the house was unsafe, despite contrary expert evidence submitted by the Petitioner, was not arbitrary. The Court also concluded DRC's determination of good cause to demolish the structure to be a balanced reasonable analysis and supported by the record.

III. REQUISITE HARD LOOK AND SEQRA RECORD

1. Matter of Frigault, et. al. v. Town of Richfield Planning Board, et. al., 107 A.D.3d 1347 (3d Dept. 2013**)**

Respondent applicant sought to construct six wind turbines and associated facilities on 1,190 acres of land and applied for a special permit. The planning board designated itself as the lead agency for purposes of the State Environmental Quality Review Act, retained an outside consulting firm, conducted multiple meetings and considered public comments, reviewed the full environmental assessment form, issued a negative declaration under SEQRA and granted the special use permit.

Petitioners, local citizens and property owners, then commenced a hybrid CPLR Article 78 proceeding/declaratory judgment action seeking to annul the Board's determinations and alleging that the Board failed to comply with SEQRA, the Open Meetings Law, the Town Law and the Town's special use permit ordinance. The Supreme Court rejected petitioners' challenge to the Board's SEQRA review, but found that the board violated the Open Meetings Law and as a result annulled the negative declaration and special use permit, and respondents appealed.

The Third Department concurred with the lower court's conclusion that the Board fulfilled its obligations under SEQRA and that although the instant Type I action "carries with it the presumption that it is likely to have a significant adverse impact on the environment," if a lead agency "'determine[s] either that there will be no adverse

environmental impacts or that the identified adverse environmental impacts will not be significant,'" it may issue a negative declaration. Matter of Frigault, et. al. v. Town of Richfield Planning Board, et. al. 107 A.D.3d 1347, 1349 (3d Dept. 2013**).**

Finding that the board had not violated the Open Meetings Law, the Third Department reinstated the SEQRA determination. The Court acknowledged that judicial review of a negative declaration is still limited to whether "the [lead] agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination" and that "an agency decision should be annulled only if it is arbitrary, capricious or unsupported by the evidence." Here, the Court rationalized that the "hard look" standard had been satisfied by carefully considering the SEQRA record:

> The Board engaged in a lengthy SEQRA review process, which included hiring an outside consulting firm and conducting no less than 11 Board meetings between the time the permit application was filed in March 2011 and the issuance of the negative declaration in November 2011. The full EAF was replete with studies on environmental issues, including the project's impact on bats and birds, "shadow flicker," noise, cultural resources and visual effect, and the Board afforded members of the public an opportunity to voice their concerns with respect to the project. In addition, the Board received input as to the project's environmental impacts from various state agencies, including the Office of Parks, Recreation and Historic Preservation, the Department of Environmental Conservation, the Department of Transportation, and the Department of Agriculture and Markets. At the conclusion of the environmental review process, the Board 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 our view, demonstrates that the Board took the requisite hard look at those concerns [citations omitted].

Id. at 1350-51.

Although the Court concluded the negative declaration must be reinstated, it also determined the resolution granting the special use permit was properly annulled by the lower court for other reasons.

2. Matter of Magat v. Village of Bronxville Planning Board, Index No.: 0444/2013 (Sup. Ct. West. Cnty., February 25, 2014)

In Matter of Magat v. Village of Bronxville Planning Board, the Environmental Claims Part of the Supreme Court, Westchester County dismissed a petition brought to challenge the Bronxville Planning Board's site plan and special permit approval for a two story expansion of a local hospital to create a center for the care of cancer patients.

Petitioners claimed, among other things, that the Planning Board ("Board") failed to take a hard look at environmental issues, as mandated by SEQRA, due to the failure to require the preparation of a Draft Environmental Impact Statement ("DEIS") in light of the Board's issuance a negative declaration for the project. However, the Court noted the level of study, the public participation in the process and the fact that the plan was modified as a result of input from the Village's boards, as well as the public (including the petitioners) demonstrating that the required "hard look" was applied, which negated the need for a DEIS.

Petitioners further claimed that since the site plan included a foundation that could support a structure of more than two stories in the future, it constituted an improper segmentation of the SEQRA review. The Court found that there was no evidence that the hospital had any plan to construct additional floors and cited a communication from the hospital stating this fact. The Board found, and the Court agreed, that the project was a whole action and not of any long range plan and that any future applications for such expansion constituted a speculative or hypothetical plan at the time. Thus, the Board's failure to consider the potentially environmental impacts from the construction of additional floors did not constitute impermissible segmentation.

The Court also rejected several other claims of Petitioners and dismissed the petition.

3. In Re: South Bronx Unite, et. al. v. New York City Industrial Development Agency, et. al., 2014 N.Y. Slip Op. 02132 (1st Dept., March 27, 2014).

Petitioner brought this hybrid Article 78/declaratory judgment action challenging the New York City Industrial Development Agency's ("IDA") decision to provide tax subsidies and financial assistance to Fresh Direct LLC for the purposes of relocating its operation to the Harlem River Yards ("HRY") in the Bronx without requiring a supplemental environmental impact statement ("SEIS"), which the underlying court dismissed. The Appellate Division modified the underlying holding to the extent of declaring that the IDA's issuance of a negative declaration did not violate the New York State Environmental Review Act ("SEQRA"), was not arbitrary and capricious, and was not an abuse of discretion.

In January 2012, Fresh Direct submitted an application to the IDA for financial incentives to enable a relocation to HRY. Fresh Direct proposed the construction of a new facility. To facilitate the IDA's SEQRA review of the proposal, Fresh Direct submitted an Environmental Assessment Form ("EAF"). The EAF concluded that the project was similar to other uses proposed at the HRY, would generate less vehicular traffic, and did not have the potential to have new, additional or increased significant adverse environmental impacts. After a public hearing, the IDA issued a negative declaration stating that this Type I action would not have significant environmental impacts under SEQRA or require further environmental review. The IDA also adopted a resolution involving direct and indirect city tax subsidies and other financial assistance to Fresh Direct.

Petitioners challenged the IDA's issuance of the negative declaration, but the First Department found that the IDA satisfied its obligations under SEQRA. The Court stated that the IDA identified the relevant areas of environmental concerns related to the proposed action, took the requisite "hard look" at them, and in its negative declaration, set forth a reasoned elaboration for the basis for its determination that a SEIS was not required. Thus the IDA's issuance of the negative declaration did not violate SEQRA, was not arbitrary and capricious, and was not an abuse of discretion. In Re: South Bronx Unite, et. al. v. New York City Industrial Development Agency, et. al., 2014 N.Y. Slip Op. 02132*4 (1st Dept., March 27, 2014).

4. In the Matter of Robert Gabrielli et. al. v. Town of New Paltz et. al., 2014 N.Y. Slip Op. 02826 (3d Dept., April 24, 2014)

The Appellate Division, Third Department, reversed an underlying Supreme Court decision which annulled the Town Board of New Paltz's ("Board") enactment of a 2011 Local Law pertaining to the prevention and despoliation and destruction of wetlands, waterbodies and watercourses (unconstitutionally vague) and negative declaration pursuant to SEQRA. In the Matter of Robert Gabrielli et. al. v. Town of New Paltz et. al., 2014 N.Y. Slip Op. 02826 (3d Dept., April 24, 2014).

In 2011 the Board, as lead agency, reviewed a full environmental assessment form ("EAF") that had been prepared by the Town Engineer in connection with the proposed local law, and after review the Board issued a negative declaration under SEQRA. An Article 78 was commenced by owners of real property challenging the negative declaration. The Supreme Court annulled the negative declaration upon finding that respondents failed to comply with SEQRA's "hard look" requirement.

In contrast, the Third Department concluded that the Board satisfied its obligations under SEQRA. First, the EAF was very detailed, with the section 3 of the EAF being completed, even though this section did not need to be completed as there were no potentially large environmental impacts identified. There were also written responses to public comments and a list of properties to be impacted by the proposed law. Further, the negative declaration included detailed descriptions of the action to be taken, reasons for supporting the Board's determination, and an evaluation of the areas of relevant environmental concern, which incorporated the EAF and the reports and information considered.

Contrary to the findings of the Supreme Court, the Third Department found that the methodology employed by the Town satisfied SEQRA. Employing the "rule of reason," the Court stated "any agency's obligation under SEQRA must be viewed in light of a rule of reason, realizing that not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before the substantive dictates of SEQRA are ratified." The Court found that the Board took the required "hard look" at all relevant environmental concerns and made a reasoned and detailed elaboration of the basis for its determination. Thus, the Court found the Supreme Court erred in annulling the 2011 local law and negative declaration.

IV. SUPPLEMENTAL EIS

1. Matter of Bronx Committee for Toxic Free Schools v. New York City School Construction Authority, 20 N.Y.3d 148 (2012).

The issue before the Court of Appeals in Matter of Bronx Committee for Toxic Free Schools v. New York City School Construction Authority, 20 N.Y.3d 148 (2012), was whether the New York City School Construction Authority ("Authority") violated SEQRA by failing to discuss in an Environmental Impact Statement ("EIS") the methods it adopted for long-term maintenance and monitoring of the controls it used to prevent or mitigate environmental harm.

The Authority planned to construct a school campus on a heavily contaminated former railroad yard in the Mott Haven neighborhood of the Bronx. The most contaminated portion of the project site was accepted by the Department of Environmental Conservation ("DEC") into the state's Brownfields Cleanup Program ("BCP"), a program through which the state offers inducements for the cleanup of contaminated sites. As required by the BCP, the Authority submitted a Remedial Action Work Plan ("RAWP"), which described how the Authority proposed to remedy the contamination on the site. The RAWP must include engineering controls, which includes a description of the operation, maintenance and motoring requirements, including the mechanisms that will be used to continually implement, maintain, monitor and enforce the engineering controls. The Authority's RAWP did not describe its plans for long-term maintenance and monitoring of the site, because the Authority believed that it was better to choose maintenance and monitoring methods for the site after the cleanup was finished so it could assesses the post-cleanup soil and groundwater conditions. Id. at 153-54.

After obtaining the DEC's conditional approval of the RAWP, but before preparing the site management plan that the DEC required, the Authority went through the SEQRA process. The Authority prepared a draft Environmental Impact Statement ("EIS") and made it available for public comment and made revisions thereto. The final EIS was filed without any "long-term maintenance" and monitoring procedures to be used and the detailed findings concluded that beneficial impacts of the construction of the proposed new school facility far outweighed any adverse environmental impacts and that those impacts could be largely mitigated by measures identified in the final EIS. Id. at 154.

The Bronx Committee for Toxic Free Schools brought an Article 78 proceeding challenging the Authority's SEQRA compliance, alleging that the EIS was flawed because it failed to include any proposed long-term maintenance and protocol, among other issues.

When the issue reached the Court of Appeals, the Court held that the Authority was required under SEQRA to supplement its EIS to describe such long-term measures because they were undisputedly "essential" to protecting the site's occupants from dangerous contaminants. The Court found that the "the methods chosen by the

Authority for long-term maintenance and monitoring of its engineering controls were too important not to be described in an EIS." Id. at 155-56. Although the Authority deemed it premature to describe the long-term maintenance and monitoring procedures at issue prior to the completion of the initial remedial measures, the Court held that the mitigation measures of "undisputed importance" may not escape the SEQRA process and ordered the preparation of a supplemental EIS. Id. at 157.

A concurring opinion was also filed and is worth mentioning. The concurring opinion highlights the uncertainly that lead agencies and developers face when a project is reviewable under SEQRA and is sited on land accepted in whole or in part into the BCP, in that certain properties accepted into the BCP are exempt from SEQRA. In any event, in the Court's opinion, the intersection of BCP and SEQRA is unclear, and the Court opines that that perhaps the DEC will clarify this issue in the context of its proposed SEQRA amendments. Id. at 157-60.

2. Kellner et. al. v. City of New York Department of Sanitation et. al., 2012 N.Y. Slip Op. 32771(U) (Sup. Ct. New York Cnty., Nov. 8, 2012).

Assemblyman Micah Z. Kellner, among other parties, brought this Article 78 proceeding challenging the New York State Department of Environmental Conservation's ("DEC") decision to accept a "compliance report" from the City of New York Department of Sanitation ("City") regarding the proposed construction of the 91st Street Marine Transfer Station ("MTS") in Manhattan. The proposed MTS was to being work in 2007, however it was delayed to 2012. The City submitted a report to the DEC relating to the delay, and the DEC accepted it as a "compliance report" which left the project on track to commence.

Petitioners sued on the ground that the DEC should have required a modification to the 2006 Solid Waste Management Plan ("SWMP") instead of accepting the compliance report. In the original plan, the City planned to distribute waste to three new Marine Transfer Stations: the 91st Street Station near Asphalt Green, Gansevoort in the West Village, and another at 59th Street. Because the latter two projects were about 10 years from construction, Kellner said the MTS will ultimately and likely be required to enlarge its anticipated use, and exceed the environmental impacts previously analyzed and approved. Petitioners claimed that a "modification" to the SWMP, which could include a new SEQRA determination or a supplemental Environmental Impact Statement ("EIS"), was required.

The Court found that the DEC's acceptance of the compliance report, rather than a modification, was not an abuse of the agency's discretion and the court upheld the determination. The Court noted that the City took a "hard look" at the environmental concerns, analyzed specific updates to the community, found that they would not result in any specific significant adverse environmental impacts that were not addressed in the final EIS, and that a memorandum was prepared that evaluated and took into consideration the potential changes and any potential impacts resulting from the delay. Also any expansion of the MTS would be considered upon permit renewal in 2014 and any enlargement of the permit would be subject to SEQRA review. Taken together, the Court found that the requisite hard look at the environmental concerns had been taken,

and the acceptance of the compliance report instead of a complete modification of the SWMP was an appropriate exercise of its discretion. The Article 78 petition was denied.

Kellner et. al. v. City of New York Department of Sanitation et. al., 107 A.D.3d 529 (1st Dept. 2013).

The First Department, upheld the underlying decision in Kellner v. City of New York Department of Sanitation, (see supra) holding that respondents took the requisite "hard look" at the potential impacts the delay in implementation of the MTS would entail, and made a reasoned determination that a Supplemental EIS was not required.

V. CLASSIFICATION OF ACTION

Black Car Assistance Corporation, et. al. v. The City of New York, et. al., 2013 N.Y. Slip Op. 30824(U) (Sup. Ct. New York Cnty., April 23, 2013)

Petitioners, who were entities that represented or had financial interests in businesses that operated vehicles known as "black cars" or livery or for-hire cars, brought this Article 78 proceeding seeking to enjoin the implementation of a proposed "e-hail" pilot program for medallion taxis ("Program"). The Program would enable passengers who have an app on their smartphone to communicate with a medallion taxi to request a pickup. Petitioners claimed, among their many causes of action, that the Program violates SEQRA and CEQR because the respondents failed to classify the type of environmental action and to review of the Program's potential environmental impacts, such as increased traffic.

The Court first determined that the Program was an "action" under SEQRA so compliance was required. The Court then concluded that petitioners' expert affidavits were not persuasive and that since the Program was not a Type I or an unlisted action, the Program must fall within Type II actions which are not subject to SEQRA review. In light of this, petitioners were not entitled to injunctive relief and the Article 78 proceeding was dismissed.

Black Car Assistance Corporation, et. al. v. The City of New York, et. al. 110 AD3d 618 (1st Dept. 2013).

The First Department unanimously upheld the Supreme Court's ruling in Black Car Assistance Corporation, et. al. v. The City of New York, et. al. (see supra) and further held the Program was not in violation of SEQRA.

VI. DEFAULT APPROVAL

Matter of Center of Deposit, Inc. v. Village of Deposit, 108 A.D.3d 851 (3d Dept. 2013)

In a prior related proceeding, a planning board's (lead agency) issuance of a positive declaration under SEQRA was challenged that pertained to the proposed subdivision and development of three acres of land into two lots. That litigation resulted in the Court annulling the positive declaration that had been adopted by the lead agency.

The planning board issued a negative declaration on remand but also denied the subdivision application.

In Matter of Center of Deposit, Inc. v. Village of Deposit, 108 A.D.3d 851 (3d Dept. 2013), petitioner challenged the denial of his subdivision application by arguing that he had obtained default approval under Village Law §7-728. Thus, the resulting issue to be addressed by the Third Department was -- if a SEQRA determination is annulled when does the statutory timeframe for a default subdivision approval pursuant to Village Law §7-728 commence to run? Petitioner argued that the Court's earlier decision annulling the positive declaration effectively resulted in a negative declaration that would have started the 62-day clock to run for default approval under Village Law §7-728. Petitioner also relied on the fact that the planning board previously held a public hearing on the application and argued that the board lacked authority to conduct additional hearings.

The Third Department analyzed the language of Village Law §7-728 pertaining to default approval of subdivision applications, as follows:

> Petitioner contends that, because the Board held a public hearing on the application in October, 2009, it lacked any authority to conduct additional hearings, and the time within which the Board was required to issue a determination on a subdivision application began to run when this court set aside the initial positive declaration. We do not agree. Pursuant to Village Law §7-728(6)(c), a public hearing on the subdivision application must follow the filing of a negative declaration under SEQRA [citations omitted]. Thus, the public hearing held in October, 2009 – prior to the issuance of the negative declaration – could not satisfy the hearing requirement under the Village Law and the Board had 62 days after the issuance of the negative declaration in March, 2012 to hold a public hearing, and an additional 62 days after the hearing to render a decision on the application. Inasmuch as the Board met those deadlines, petitioner was not entitled to a default approval of its application [citation omitted].

Matter of Center of Deposit, 108 A.D.3d at 852-53.

Thus, an affirmative act of the planning board was required to commence the statutory clock and that occurred when the planning board issued a negative declaration in March 2012. The planning board had 62 days after the negative declaration was issued to hold a public hearing and then it had 62 days thereafter to decide the application. Because the planning board acted within those statutory deadlines, a default approval of the application could not result. Further, the Court did not disturb the planning board's resolution denying subdivision approval finding that it provided a rational basis to support denial of petitioner's application.

VII. SEQRA AND "LAND USE REGULATIONS" UNDER RLUIPA

Fortress Bible Church, et al. v. Feiner, et al., 694 F.3d 208 (2012)

The Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") bars states from implementing or imposing a "land use regulation" in a manner that imposes a substantial burden on a person or institution's religious exercise unless it is the least restrictive means of furthering a compelling state interest. 42 U.S.C. §2000cc(a)(1). RLUIPA defines a "land use regulation" as a "zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land." 42 U.S.C. §2000cc-5(5).

Plaintiff-appellee Fortress Bible Church ("Church") sued defendant-appellant Town of Greenburgh, New York, including its Town Board ("Board") (collectively "Town") over the Church's stalled plan to build a sanctuary and religious school on land that it owned within the Town. In federal district court the Church alleged violations of RLUIPA, as well as of its constitutional Free Exercise and Equal Protection rights, and sought judicial review under Article 78 of New York's Civil Procedure Law. After a trial, the district court entered judgment for the Church on all counts and (1) annulled the Town's positive declaration and SEQRA findings, (2) ordered the 2000 site plan approved for SEQRA purposes and enjoined further SEQRA review, (3) ordered the Board to grant a waiver from landscaped parking island requirements, (4) ordered the Town's Zoning Board to issue the required variance, (5) ordered the Town to issue a building permit, and (6) enjoined the Town from taking any action that would unreasonably interfere with the project. The court imposed $10,000 in sanctions for spoliation of evidence. The parties were directed to submit additional information for a determination of compensatory damages. On September 24, 2012, the Second Circuit affirmed. See Fortress Bible Church, et al. v. Feiner, et al., 694 F.3d 208, 215 (2012).

On appeal to the Second Circuit, the Town argued that: (1) RLUIPA is by its terms inapplicable to the environmental quality review process employed by the Town to reject the proposal, (2) there was insufficient evidence that the defendants had imposed a substantial burden on plaintiffs' religious exercise under RLUIPA, (3) the Church's class-of-one Equal Protection claim is not viable because they failed to allege a single comparator similarly situated in all respects, (4) the Church's Free Exercise rights were not violated, (5) the Town did not violate Article 78, and (6) the district court lacked the authority to order the Town's Zoning Board, a non-party, to take any action with regard to the Church.

The Church, with approximately 175 members located in Mount Vernon, purchased a 6.53 acre property in the Town of Greenburgh for the purpose of constructing a sanctuary and religious school for its growing congregation in a single building that would accommodate up to 500 people and 150 students along with on-site parking situated on approximately 1.45 acres of the property. The Church required land use approvals from the Town including: (1) site plan approval, (2) a waiver of a landscaped parking island requirement, and (3) a side yard setback variance from the

Zoning Board. Since these approvals were discretionary in nature SEQRA review was required. Fortress Bible Church, 694 F.3d at 217.

The following is a brief summary of the Town's review process based on the district court's factual findings, beginning in 1998:

1998 -The Church submitted its initial proposal on or about November 24, 1998.

1999-In late January, the Church and its consultants appeared at a Board work session to discuss the proposal. The Board requested that the Church examine the project's impact on local traffic and access to the property. In response, the Church hired consultants to perform a traffic study of the area. It also sought feedback from the New York State Department of Transportation ("NYSDOT") and nearby residents.

2000-In January the Church submitted a revised proposal which included a comprehensive traffic study and additional information about potential environmental impacts. After reviewing the proposal, the Town's Planning Commissioner, believed that the Church had adequately mitigated the Town's traffic concerns and advised the Board that it could issue a conditioned negative declaration. In July, Church representatives attended a work session with the Board. At the meeting, there was concern expressed with regard to the Church's tax-exempt status and the Church was asked it to donate a fire truck or make some other payment in lieu of taxes. Some Board members commented to the effect that they did not want the property to be used as a church. The Church declined to donate a fire truck or make any other payment in lieu of taxes. Then on July 19, 2000, the Board issued a positive declaration, triggering the full SEQRA review process.

2001-2002- Over the next several years, the Church provided the information required by the SEQRA process. In May 2001, the Church asked what it could do to move the process along, and the Town responded that the Church could agree to make yearly financial contributions to the local fire department. The Church produced a scoping document followed by a DEIS, which the Town accepted as complete on October 24, 2001. The Town held hearings on the proposal in December and January 2002. During this comment period, NYDOT submitted comments indicating its approval of the Church's traffic study. In early 2002, the Town replaced the Planning Commissioner and retained new consultants to analyze the Church's proposal. In April 2002, after further consultation with Town officials, the Church submitted a proposed FEIS. The Town refused to discuss the project with the Church and refused to move forward with the review process. Despite having accepted the DEIS and scoping document as complete, the Town began to request new information and raise new issues for the Church to address. The Church provided the requested information and attempted to meet the Town's demands. During the summer of 2002, the Town stopped the review process altogether due to the Church's refusal to reimburse it for certain disputed fees the Town had incurred during the review process.

2003- In early 2003, the Church sent a letter to the Town summarizing its view that the Town had inappropriately delayed its building application despite its consistent efforts to meet the Town's requests. In February, the Town took over preparation of the

FEIS. It did not notify the Church immediately that it had done so. The Town edited the FEIS to include a number of additional issues with the proposal, and failed to consider the Church's input addressing those issues. Then on June 11, 2003, the Church instituted a lawsuit, alleging violations of RLUIPA and its rights under the First and Fourteenth Amendments, as well as New York law, and sought an order compelling the Town to complete SEQRA review and approve the project.

2004- The Town initially attempted to adopt a findings statement in January, but the district court declared that statement void because it violated New York's Open Meetings Law. Then in April the Town denied the Church's application. In its findings statement the Town stated its primary reasons for rejecting the application as: (1) violation of a recently enacted "steep slope" zoning ordinance; (2) stress on the police and fire departments; (3) retaining walls that constituted an attractive nuisance; and (4) traffic and parking problems.

Id. at 213-15.

In its decision to affirm, the Second Circuit did not conclude that SEQRA was a zoning law subject to RLUIPA claims, but instead that under certain circumstances it could be implicated. Specifically, "when a statutorily mandated environmental quality review process serves as a vehicle to resolve zoning and land use issues, the decision issued constitutes the imposition of a land use regulation as that term is defined in RLUIPA." Id. at 218. The Court applied the following analysis determining that the Town's SEQRA review process constituted the imposition of a land use regulation under RLUIPA: (1) the SEQRA review process was triggered because discretionary land use approvals were required, (2) the SEQRA process was intertwined with the municipality's zoning regulations, (3) during the SEQRA review process, the focus was on zoning issues rather than traditional environmental issues, and (4) that "to hold that RLUIPA is inapplicable to what amounts to zoning actions taken in the context of a statutorily mandated environmental quality review would allow towns to insulate zoning decisions from RLUIPA review." Id. at 217-18.

The Town's efforts to stop a proposed religious land use project from moving forward that "amounted to a complete denial of the Church's ability to construct an adequate facility" were critical to the Second Circuit's conclusion that the Church's religious exercise was substantially burdened under RLUIPA including the "arbitrary, capricious and discriminatory nature of the Town's actions, taken in bad faith." Further, the district court's numerous findings that were affirmed by the Court demonstrated that the Town's "compelling interests were disingenuous" and motivated by hostility toward the Church. Id. at 219-20. Finding ample support in the record to conclude that the Town violated the Church's rights under RLUIPA, the Second Circuit affirmed.

In December 2013, the Town agreed to pay the Church 6.5 million dollars to settle these claims.