Westchester Women's Bar Association CLE * October 30, 2014

STATE ENVIRONMENTAL QUALITY REVIEW ACT
CASE LAW UPDATE AND WHEN TO LITIGATE (RIPENESS)

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I. CASE LAW UPDATE

A. STANDING (SEQRA AND LAND USE CASES)

1. Matter of Sierra Club, et al. v. Village of Painted Post, et al. 115 A.D.3d 1310 (4th Dept. 2014)

In article 78 proceeding, petitioners challenged SEQRA review associated with authorization of the sale and export of excess water from the municipal water supply and the construction of a transloading facility to load the water onto trains that would then transport the water. The lower court concluded that petitioner Marvin was the only petitioner who had standing to bring the proceeding based on his "proximity and [his] complaint of train noise newly introduced into his neighborhood." The Court refused to dismiss the petition with respect to the remaining petitioners despite their lack of standing.

On appeal, the Fourth Department reversed and held that Marvin lacked standing, and that the petition should be dismissed in its entirety. Although Marvin contended that his house was one-half block from the rail line, that he heard train noises frequently and that the noise was allegedly so loud that it woke him up, he raised no complaints concerning noise from the transloading facility itself. Respondents demonstrated the rail line ran through the entire village, along a main thoroughfare with many houses which were situated closer to the rail line than Marvin's residence, and that noise from the moving trains affected many village residents.

The Court relied on Society of Plastics Indus. v. County of Suffolk, 77 N.Y.2d 761 (1991) holding that although noise falls within the zone of interests sought to be protected by SEQRA, Marvin did not sustain an injury that was different from that of the public at large and that "standing cannot be based on the claim that a project would indirectly affect . . . noise levels . . . throughout a wide area." Here, because no individual petitioners alleged a unique, direct environmental injury, none of the organizational petitioners could be found to have standing.

2. Matter of Long Island Pine Barrens Society, Inc., et al. v Central Pine Barrens Joint Planning & Policy Commission, 113 A.D.3d 853 (2d Dept. 2014).

The Society (a not-for-profit corporation with a mission to support research of the Pine Barrens, to disseminate information to the general public regarding the Pine Barrens, and to support its preservation) and its Executive Director in both his professional and individual capacities commenced an Article 78 proceeding to review the Central Pine Barrens' Joint

Planning & Policy Commission's determination granting a hardship waiver to sanction the commercial use of property located in the residentially-zoned Pine Barrens. The Executive Director provided tours of the Pine Barren's core preservation area to promote an understanding of its significance and originally advocated for legislation to protect the area. The lower court denied the CPLR article 78 petition on the ground that petitioners lacked standing to maintain the proceeding.

On appeal, the Second Department held that the lower court erred in holding that the petitioners lacked standing and applied the three-pronged test set forth in Society of Plastics Indus. v County of Suffolk, 77 N.Y.2d 761 (1991). Here, the first prong of that test required that the organization demonstrate that "one or more of its members would have standing to sue" as an individual and an individual has standing where he or she "would suffer direct harm, injury that is in some way different from that of the public at large" and "the in-fact injury of which [he or she] complains . . . falls within the zone of interests, or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted." Citing In Matter of Save the Pine Bush, Inc. v Common Council of City of Albany, 13 N.Y.3d 297, 301 (2009), the Court held that in land-use and environmental cases, "a person who can prove that he or she uses and enjoys a natural resource more than most other members of the public has standing . . . to challenge government actions that threaten that resource."

Petitioners demonstrated that the Executive Director in both his individual and professional capacities, used and enjoyed the Pine Barrens to a greater degree than most other members of the public and that he lived a considerable distance from the property in question was of no consequence. Further, petitioners established that the threatened injury to the Executive Director caused by development within the core preservation area of the Pine Barrens fell within the zone of interests sought to be protected by the Long Island Pine Barrens Protection Act. As a result, the Executive Director had standing to sue individually, and his standing satisfied the first prong of the test for the Society's organizational standing. The Society met the second and third prongs of the organizational standing test, specifically that its interests in the instant proceeding were "germane to its purposes," and that "neither the asserted claim nor the appropriate relief requires the participation of the individual members." Although the Court held petitioners had standing to challenge the Commission's determination, the petition was ultimately denied.

3. Matter of Tuxedo Land Trust, Inc., et al. v. Town Bd. of Town of Tuxedo, et. al., 112 A.D.3d 726 (2d Dept. 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.

4. Matter of Riverhead Neighborhood Preservation Coalition Inc., et al. v. Town of Riverhead Town Board, et al., 112 A.D.3d 944 (2d Dept. 2013)

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.

5. Matter of O'Brien v. New York State Commissioner of Education, 112 A.D.3d 188 (3d Dept. 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.

B. 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.

C. 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).[1]

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.

[1] Also see discussion in this outline, Part II (B)

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., 115 A.D.3d 607 (1st Dept. 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., 115 A.D.3d 607 (1st Dept. 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), **Mo. No. 2014-600 (Court of Appeals, Sept. 4, 2014) (motion for leave to appeal denied)**

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.

D. SUPPLEMENTAL EIS

1. 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, a solid waste transportation facility in Manhattan ("MTS"). 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.

1. 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.

2. Residents for Sane Trash Solutions, Inc. v. U.S. Army Corps of Engineers, No. 12-CIV-8456, 2014 WL 3377096 (S.D.N.Y. July 10, 2014).

More recently, New York City residents and Assemblyman Kellner commenced an action in federal court against the U.S. Army Corps of Engineers, New York City, and New York City Department of Sanitation ("DSNY") challenging a Clean Water Act ("CWA") § 404 permit issued for the 91st Street Marine Transfer Station. Prompted by the aftermath of Hurricane Sandy, Plaintiffs were concerned about the possibility the facility could be flooded. Residents claimed that Defendants did not follow the requirements of NEPA (the Corps) and SEQRA (the City and DSNY) when issuing and approving the permit, because they failed to take a hard look at the environmental consequences and possible alternatives.

The District Court upheld the Corps' finding of no significant impact and found that the impact of the truck traffic and the issues with the city's siting regulations were outside the scope of the CWA permit. The Corps reviewed all portions of the project that it had authority over, responded to comments from other federal agencies on the project, and properly deferred to the environmental assessment of the DEC. The Court's review of an agency's actions is "limited to whether the 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." Id. at *19. Once the agency takes a hard look, its "decision regarding the need for a Supplemental EIS is entitled to judicial deference." Id. at *19.

The Court further held that the DSNY took a hard look at the environmental concerns, specifically the possibility of flooding, and "made a reasoned elaboration" on its determination.

The selection of the site was rational and would not have a significant or dramatic impact on the neighborhood. Therefore, DSNY was not required to prepare a supplemental EIS under SEQRA. To meet the requirements of SEQRA, not every conceivable environmental impact must be included; the rule of reason has to be applied. Id. at *8. The Court found the city's mitigation measures were acceptable. Id. at *8 (the mitigation measures included the following: the facility would be at pier level, six inches above 100-year flood elevations, the garbage would be placed into containers at a location fourteen feet above pier level, the facility would stop accepting waste during severe storms, and city actually implemented additional flood-proofing).

E. CLASSIFICATION OF ACTION

1. 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.

2. 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.

F. DEFAULT APPROVAL

1. 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.

II. WHEN TO LITIGATE (RIPENESS)

A. BACKGROUND

Rule:

A SEQRA claim is only ripe for judicial review when the agency arrives at "definitive position on the issues that inflict an actual, concrete injury" (see Essex Cnty. v. Zagata, 91 N.Y.2d 447, 453, 695 N.E. 232, 672 N.Y.S.2d 281, 284 (1998)) The Essex Court explained that "a determination will not be deemed final because it stands as the agency's last word on a discrete legal issue that arises during an administrative proceeding," but rather, "[t]here must additionally be a finding that the injury purportedly inflicted by the agency may not be 'prevented or significantly ameliorated by further administrative action or by steps available to the complaining party.'"[2]

What is the final decision inflicting an actual, concrete injury – the SEQRA determination or the land use approval?

1. Stop the Barge v Cahill, 1 N.Y.3d 218, 803 N.E.2d 361, 771 N.Y.S.2d 40 (2003)

Court of Appeals ruled that the statute of limitations ran from the final conditional negative declaration (i.e. the SEQRA determination).

Facts: The New York City Department of Environmental Protection (DEP) as lead agency issued an original and two revised conditional negative declarations with the last one issued on January 10, 1999, which became final on February 18, 2000.[3] When the applicant modified its proposal in 1999, it simultaneously applied to the New York State Department of Environmental Conservation (DEC) for an air permit, which was issued by the DEC on December 18, 2000. On February 20, 2001 – one year after the DEP's conditional negative declaration became final and approximately two months after the DEC's issuance of the air permit – petitioners commenced an Article 78 proceeding contending the DEP's issuance of the conditional negative declaration and the DEC's issuance of the air permit were arbitrary and capricious and violated SEQRA.

Ruling The issue before the Court of Appeals was what action triggered the statute of limitations for a SEQRA challenge[4] and the Stop the Barge Court ruled that "[t]he issuance of the CND [conditional negative declaration] resulted in actual concrete injury to petitioners because the declaration gave the developer the ability to proceed with the project without the need to prepare an environmental impact statement."[5] The Court found that CND "was a final agency action for purposes of judicial review of petitioners' SEQRA claims"[6] and rejected

[2] *Essex Cnty. v. Zagata*, 91 N.Y.2d 447, 453, 695 N.E.2d 232, 672 N.Y.S.2d 281 (1998)
[3] In accordance for the SEQRA regulations governing conditional negative declarations (6 NYCRR 617.7(d)(1)(iv)), the conditional negative declaration was published for the required 30-day public comment on January 19, 2000 and the declaration became final on February 18, 2000...
[4] *Stop the Barge v. Cahill*, 1 N.Y.3d 218, 223, 803 N.E.2d 361, 771 N.Y.S.2d 40 (2003).
[5] *Id*. at 223-224.
[6] *Id*.

petitioners' claim that the CND "was merely a preliminary step in the decision making process and that no sufficient predicate for judicial review existed until a permit or approval was issued for the project."[7] The Court noted that: "[g]iven these circumstances, commencing the period of limitations from the finality of the CND is consistent with the policy of resolving environmental issues and determining whether an environmental impact statement will be required at the early stages of project planning."[8] The Court of Appeals ruled that the timeframe to bring a SEQRA challenge was within four months of February 18, 2000 (when the conditional negative declaration became final).[9]

2. In Matter of Eadie v. Town of North Greenbush, 7 N.Y.3d 306 (2006)

Court of Appeals ruled that the statute of limitations ran from the Town Board's rezoning amendment not from the SEQRA determination.

Facts: The town rezoned a large area of land to permit retail development, following the adoption of a final generic environmental impact statement (GEIS). The town completed the SEQRA process and adopted a Findings Statement on April 28, 2004, and thereafter enacted the zoning change on May 4, 2004. The petitioners brought an Article 78 proceeding on September 10, 2004 against the town, more than four months after the adoption of the Findings Statement, but less than four months after the town's adoption of the rezoning.

Ruling: Notwithstanding the petitioners allegations of two specific SEQRA violations, including failure to mitigate adverse effects on traffic, the Court of Appeals determined that the petitioners had not suffered a concrete injury until the subsequent zoning change was enacted, which was "when the petitioner has suffered a concrete injury not amenable to further administrative review and corrective action," and thus, the Court found that the proceeding had been timely filed within four months of the enactment of the rezoning.

Be careful: When the statute of limitation is NOT four months

3. 92 MM Motel, Inc. v. Zoning Board of Appeals of the Town of Newburgh, 90 A.D. 3d 663, 933 N.Y.S.2d 881 (2d Dep't 2011)

The Second Department re-established that "a proceeding challenging a determination based on alleged violations of SEQRA is to be commenced with the applicable 30-day limitations period following 'a decision that renders final the consideration of SEQRA issues.'"[10]

Facts: On May 27, 2010, the zoning board granted the area variances and issued its SEQRA determination (that the action was a Type II action not subject to further review under SEQRA). The zoning board's minutes (in which each members vote was duly recorded) was filed on June 10, 2010 and a written decision was filed with the Town Clerk on June 29, 2010.

[7] *Id*.
[8] *Id.* at 224.
[9] *Id.* at 223-224.
[10] *92 MM Motel, Inc. v. Zoning Bd. of Appeals of the Town of Newburgh*, 90 A.D. 3d 663, 664, 933 N.Y.S.2d 881, 882 (2d Dep't 2011), *quoting*, *Save the Pine Bush Inc. v. Zoning Board of Appeals of the Town of Guilderland*, 220 A.D.2d 90, 643 N.Y.S.2d 689 (3d Dep't 1996).

On July 26, 2010, Petitioners (who owned homes and businesses in close proximity to Petitioners' property) brought an Article 78 proceeding challenging the zoning board's approval on July 26, 2010. Both the zoning board and NOWAB made a pre-answer motion under CPLR § 3211(a)(5) to dismiss the proceeding as time-barred.

Ruling: The Second Department affirmed the proceeding was time-barred.[11] The Court found that New York's Town Law § 267-c(1) (identical to New York's Village Law § 7-712-c(1))[12] mandates a 30-day time period to challenge a zoning board action and this time-period began running on the date the zoning board's minutes were filed (and not when the written decision was filed).[13] The Second Department further ruled that the 30-day limitations period also applied to any SEQRA challenge when the underlying action has a 30-day statute of limitations.

4. Crepeau v. Zoning Board of Appeals of the Village of Cambridge, 195 A.D.2d 919, 600 N.Y.S.2d 821 (2d Dep't 1993)

Like the Second Department, the Third Department ruled that "[a] challenge based upon alleged noncompliance with SEQRA must be instituted within the proscribed time limit following a decision that renders final the consideration of SEQRA issues."[14] Finding that the shorter statute of limitations to challenge a zoning board determination governed, the Court ruled that "[t]his 30-day time limitation commenced when the zoning board's determination was filed with the Village Clerk, at which time the determination became binding, aggrieved petitioners **and committed the ZBA to a course of action which could affect the environmen**t."[15] Thus, the Court ruled that the SEQRA challenge was time-barred as petitioners failed to challenge the determination within 30-days.

Note: 30-day statute of limitations to challenge: (i) ZBA determinations (New York's Village Law § 7-712-c(1), Town Law § 267-c(1) and Gen. City Law § 81-c(1)); (ii) site plan determinations (New York's Village Law § 7-725-a(11); Town Law § 274-a(11) and Gen. City Law § 27-a(11)); (iii) special use permit determinations (New York's Village Law § 7-725-b(9); Town Law § 274-b(9) and Gen. City Law § 27-b(9)); and (iv) planning board's decisions concerning subdivision plats or changing of zoning regulations (New York's Village Law § 7-740; Town Law § 282 and Gen. City Law § 38).

What about when you have multiple land use approvals – what land use approval is the trigger?

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[11] *Id.*at 664

[12] New York's Village Law § 7-712-c(1) provides: "Any person or persons, jointly or severally aggrieved by any decision of the board of appeals or any officer, department, board or bureau of the village, may apply to the supreme court for review by a proceeding under article seventy-eight of the civil practice law and rules. Such proceeding shall be instituted within **thirty days** after the filing of a decision of the board in the office of the village clerk." (*emphasis added*).

[13] *Id.*

[14] *Id.*

[15] *Id.*

5. Long Island Pine Barrens Society v. Planning Board, 78 N.Y.2d 608, 585 N.E.2d 778, 578 N.Y.S.2d 466 (1991)

Court of Appeals ruled that is was not the Planning Board's "final" decision that (the final subdivision plat approval filed on January 10, 1990) that triggered accrual of the SEQRA claim, but its prior approval (the preliminary plat approval filed approximately six month prior, on June 7, 1989) that finalized the Planning Board's SEQRA determination (issued on May 15, 1989) and started the 30-day time period to bring SEQRA claims.

6. Preservation Collective v. Town of Monroe, 32 A.D.3d 396, 818 N.Y.S.2d 780 (2d Dep't 2006)

Second Department ruled that the 30-day limitation for SEQRA claims accrued when the Planning Board's approval was filed granting conditional preliminary subdivision.

B. RECENT CASES

1. Patel v. Board of Trustees of Inc. Village of Muttontown, 115 A.D.3d 862, 982 N.Y.S.2d 142 (2d Dep't 2014)

The Second Department ruled that an Article 78 proceeding challenging the Village board's SEQRA findings statement brought by petitioners-neighbors who lived close to the proposed development was not ripe for adjudication as the SEQRA findings statement "did not inflict injury **in the absence of an actual determination of the subject actions for special use and site plan approval** . . . ."[16] 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 862, 863.

2. Gedney Association v. City of White Plains (Supreme Westchester, Environmental Claims Part, Index No. 1139-14 Decision and Order dated June 16, 2014)

[16] *Patel* at 144, relying upon, *Wallkill Cemetery Assn., Inc. v. Town of Wallkill Planning Bd.*, 73 A.D.3d 1189, 1190, 905 N.Y.S.2d 609 (2d Dep't 2010).

Environmental Claims Part determined that SEQRA challenge was not ripe for review.

Facts: In 2011, the French American School of New York ("FASNY") applied for a special permit and site plan approval to develop a school at a 130-acre site of the former Ridgeway golf course. The City of White Plains Common Council declared itself lead agency under SEQRA and determined that a draft environmental impact statement should be prepared. After a review that included submission of three draft environmental impact statements (DEIS) and a final environmental impact statement (FEIS), the Common Council issued its SEQRA findings statement on December 19, 2013. Petitioners commenced a proceeding/action seeking to annul and vacate the SEQRA determination on the basis that the City Council allegedly failed to comply with the substantive and procedural requirements of SEQRA. The City moved to dismiss the Petition.

Ruling: With the exception of one claim relating to the Open Meetings Law, the Court dismissed all the remaining claims on the basis that the causes of action are "nonjusticiable" as the claims were not ripe for review. In reliance upon *Patel*, the Supreme Court ruled that "[w]here, as here, a SEQRA review is conducted upon the filing of applications for a special permit and site plan approvals, the issuance of a findings statement at the conclusion of such process inflicts no concrete injury, and a challenge thereto is not ripe for adjudication, unless and until there is an actual determination of the subject applications." The Court ruled that as FASNY's applications for site plan and special permit approval had not been determined, petitioners' challenge to the SEQRA findings statement was not ripe for review.

3. Magat v. Village of Bronxville Planning Board (Supreme Westchester, Environmental Claims Part, Index No. 444/2013)

Although the Environmental Claims Part ultimately rejected Petitioners' SEQRA challenge in an Amended Decision, Order and Judgment filed and entered on March 18, 2014 (see discussion in this outline, Point I(C)(2)), the Court declined to grant the motions to dismiss filed by the Village and the Hospital asserting that the SEQRA challenge was time-barred (see Decision and Order filed and entered on July 9, 2013).

Facts: In December 2010, Lawrence Hospital submitted an application for site plan and special permit approval to construct an addition for a new cancer center and operating rooms. On July 11, 2012, the Planning Board issued a negative declaration. On October 23, 2012, the Village of Bronxville Zoning Board of Appeals ("ZBA") granting variances and on December 12, 2012, the Planning Board granted the Hospital's special use permit and site plan approvals. Petitioners commenced their Article 78 proceeding seeking to annul and vacate the Negative Declaration and challenging the Planning Board's site plan and special permit approvals within 30 days of the of the Planning Board's approvals but more than 30 days from the filing of the ZBA's determination to grant variances. The Hospital and the Village moved to dismiss the SEQRA claims on the basis that they were time-barred.

Holding: Although the Hospital and Village argued that the ZBA's variance grant fixed the size of the addition's footprint and setbacks and therefore, inflicted injury as it enabled the

Hospital to construct an addition of that size, the Court ruled that "the site plan approval – and not the Neg Dec or the intervening ZBA Decision – constituted a concrete injury triggering the limitations period within which petitioners had to challenge the [Planning] Board's SEQRA determination." Thus, the Court ruled that the proceeding was timely commenced.