

Is There Room For Common Sense in SEQRA ?

When the Department of Environmental Conservation (DEC) issued revised regulations addressing the State Environmental Quality Review Act (SEQRA), in January of 1996, it did so with the intention of streamlining and simplifying that review process. However, in reality, the SEQRA process is still being used to delay and intimidate both applicants and municipalities by the threat of an Article 78 filing based on strict adherence to a narrow interpretation of SEQRA procedures. As a result, the perception of many lead agencies is that the only way to be reasonably sure of successfully defending their actions against an Article 78 lawsuit is to require an environmental impact statement for any type 1, or unlisted action, that is presented to them.

This issue of 'procedural compliance' is addressed in an interesting decision by the State Court of Appeals released in October, 1997, *Merson v. McNally*. The court acknowledges the fact that a project will normally be changed as it proceeds through any review and approval process: *"This case illustrates the practical reality that a project, especially a large undertaking such as a Type 1 action, usually undergoes modifications from its initial specifications. Modifications made to a project during the review process should not be characterized as impermissible 'conditions.' Indeed, the SEQRA regulations themselves help to show that the purpose of identifying 'potentially large' environmental impacts in the midst of the EAF process is to allow a developer the opportunity to address those potential impacts in the project proposal."*

This case concerns a project that was clearly a Type 1 action and that had "several potentially large environmental impacts" associated with it. The applicant submitted plans and a draft Environmental Assessment Form (EAF) which was used by the Planning Board, as lead agency, to review and discuss the projects' impacts with other agencies and the public, through open hearings and meetings. The applicant responded to the environmental concerns that were identified during this process by revising the plans to address those concerns. The applicant then formally submitted the revised plans, with a completed EAF, to the Planning Board, which, after receiving favorable comments from other agencies, issued a negative declaration and granted a temporary special use permit (the permit being subject to Town Board approval).

A citizens group filed an article 78 petition against the Planning Board for approving the revised plans and issuing what they described as a conditioned negative declaration, which is not permitted for Type 1 actions. State Supreme Court upheld the neg dec, the Appellate Division reversed and annulled the Planning Boards' action. The Court of Appeals then reviewed the case and found *"...under certain circumstances, a negative declaration may be issued under the State Environmental Quality Review Act (SEQRA) even where the project - a Type 1 action - has been modified during the initial review process to accommodate environmental concerns of the lead agency and other interested parties."* The Court stated that the Planning Board acted properly in its' review and reached its' determination after an open and public hearing process: *"...the modifications here were not conditions unilaterally imposed by the lead agency, but essentially were adjustments proposed by the project sponsor to mitigate the concerns identified by the public and the reviewing agencies, with only minor variations requested by the lead agency during the review process. Of distinguishing positive import here is that the modifications were examined openly and with input from all parties involved. This process comports with the overriding purposes of SEQRA"*.

The Court essentially determined that in the normal course of a review and approval process a project proposal will be revised in response to the comments and concerns that are expressed. As long as there are open meetings with sufficient discussion on the potential environmental impacts associated with that project and the solutions, or mitigating measures, as proposed by the applicant are found to be adequate, then the intent of the SEQRA regulations can be met. The Court also states that the *"mitigating measures will not obviate the need for an EIS unless they clearly negate the continued potentiality of the adverse effects of the proposed action."* In addition, if there are *"numerous and significant environmental impacts identified at the outset, the greater the possibility that mitigation measures would not suffice"* then an environmental impact statement would be necessary.

This decision does not remove the burden on the lead agency to take the requisite "hard look" at the significant environmental impacts and to then make a reasonable determination based on the facts as submitted. It does open the door for a breath of reality to enter the process by allowing a project to be modified to respond to environmental concerns as part of the *"legitimate maturation of a development project in accordance with the goals of environmental regulation"*. It would also appear to reinforce the issue

of concurrent hearings being held during the review of a project. SEQRA regulations, along with state statutes addressing subdivision and site plan reviews, encourage concurrent hearings for environmental and planning considerations. This allows the planning board/lead agency to consolidate the process and reduce the time required to obtain an approval.

As usual, any procedural questions pertaining to a specific project should be directed to an attorney experienced in land use law and a consultant familiar with the laws, regulations and procedures.

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