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Proposed Revision of New York CPLR 5519 (a)(1) to Assure Consistency with SEQRA

Proposed Revision of New York CPLR § 5519 (a)(1) to Assure Consistency with SEQRA*

I. Introduction

Judicial review of compliance by administrative agencies with their statutory duty to examine the environmental impact of their actions has been critical to the successful implementation of the environmental impact statement (EIS) process.[1] Certain case law developments in New York evince an inconsistency between the State's EIS process and one aspect

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* This Article constitutes the edited text of a report prepared by the Committee on Environmental Law of the Association of the Bar of the City of New York, approved on September 6, 1976. Since the report was approved, it continues to be timely as no amendment to the CPLR has been considered to remedy the problem evaluated here. The Committee members who approved the report are:

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1. The environmental impact statement (EIS) is required by N.Y. Envtl. Conserv. Law § 8-0109(2) (McKinney Supp. 1982-1983), see infra note 3.

of its civil procedures governing judicial review of administrative action. In order to avoid unanticipated environmental injury in actions by government agencies, a small but critical revision to New York's Civil Practice Law and Rules (CPLR) is necessary.

II. Background

A. *SEQRA*

On September 1, 1976, the State Environmental Quality Review Act became effective.[2] The Act, known by its acronym "SEQRA," is directed to assuring that state and local agencies consider the environmental consequences of their actions. SEQRA requires that "all agencies . . . shall prepare or cause to be prepared . . . an environmental impact statement on any action they propose or approve which may have a significant effect on the environment."[3]

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2. N.Y. Envtl. Conserv. Law §§ 8-0101 to 8-0117, (McKinney Supp. 1982-83).
3. Id. at § 8-0109(2):
   2. All agencies (or applicant as hereinafter provided) shall prepare, cause to be prepared by contract or otherwise an environmental impact statement on any action they propose or approve which may have a significant effect on the environment. Such a statement shall include a detailed statement setting forth the following:
      (a) a description of the proposed action and its environmental setting;
      (b) the environmental impact of the proposed action including short-term and long-term effects;
      (c) any adverse environmental effects which cannot be avoided should the proposal be implemented;
      (d) alternatives to the proposed action;
      (e) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented;
      (f) mitigation measures proposed to minimize the environmental impact;
      (g) the growth-inducing aspects of the proposed action, where applicable and significant;
      (h) effects of the proposed action on the use and conservation of energy resources, where applicable and significant; and
      (i) such other information consistent with the purposes of this article as may be prescribed in guidelines issued by the commissioner pursuant to section 8-0113 of this chapter.

B. *Section 5519(a)(1): The Automatic Stay*

In *County of Franklin v. Connelie,*[4] an early case involving the interpretation and application of SEQRA, the Superintendent of the New York State Police and other defendants were temporarily and then preliminarily enjoined[5] from proceeding with the construction of a troop headquarters building in the Adirondack Park, partly because of their failure to comply with SEQRA. The defendants served a notice of appeal and invoked CPLR section 5519(a)(1), which provides for an automatic stay of enforcement of any judgment or order appealed by a state or local agency. Construction of the building continued. The Appellate Division, Third Department, in an unpublished *per curiam* order, refused to vacate the stay of the preliminary injunction, giving no explanation for its refusal.[6] When the Supreme Court, Franklin County, finally granted summary judgment, holding that defendants had failed to comply with SEQRA and enjoining the project again, construction was well under way.[7] Notwithstanding the final injunction, construction continued because the Attorney General once again invoked section 5519(a)(1).

Construction proceeded despite three injunctions, because in each case the Attorney General invoked the automatic stay provided under section 5519(a)(1). When the

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Such a statement shall also include copies or a summary of the substantive comments received by the agency pursuant to subdivision four of this section, and the agency response to such comments. The purpose of an environmental impact statement is to provide detailed information about the effect which a proposed action is likely to have on the environment, to list ways in which any adverse effects of such an action might be minimized, and to suggest alternatives to such an action so as to form the basis for a decision whether or not to undertake or approve such action. Such statement should be clearly written in a concise manner capable of being read and understood by the public, should deal with the specific significant environmental impacts which can be reasonably anticipated and should not contain more detail than is appropriate considering the nature and magnitude of the proposed action and significance of its potential impacts.

4. 95 Misc.2d 189, 408 N.Y.S.2d 174 (Sup. Ct. Essex County 1978).
5. Id. at 195-96.
6. Id.
7. Id. at 196.

County of Franklin finally obtained an Appellate Division review of its summary judgment and injunction on March 29, 1979, a year and two days after the action was commenced, the Appellate Division reversed Special Term on narrow grounds holding that plaintiffs lacked standing.[8] The court never construed section 5519(a)(1) in the context of an injunction ordering compliance with SEQRA.

SEQRA's remedial purpose is to assure that government officials evaluate the potential environmental harm in proposed actions before undertaking the actions, and avoid that harm where possible. The Act contemplates judicial enforcement of its review requirements. In *County of Franklin v. Connelie,* three different justices, in three sessions of Special Term, independently ruled that the requirements of SEQRA had to be observed, and thrice the mere filing of a notice of appeal under section 5519(a)(1) automatically excused compliance. This application of section 5519(a)(1) has been criticized for being an abuse of a procedural right originally accorded to government agencies in contexts quite foreign to judicial review of actions under SEQRA.[9] Rather than amend SEQRA, a statute which does not specifically provide for injunctions, the Committee on Environmental Law of the Association of the Bar of the City of New York (Committee) proposes that section 5519(a)(1) be amended.

III. Proposal to Amend Section 5519(a)(1):

County of Franklin v. Connelie reveals a fatal conflict between section 5519(a)(1) and SEQRA, as well as the potential for similar difficulties in cases outside the field of environmental law. The Committee recommends that section 5519(a)(1) be amended by the addition of the following language (underlined), thereby making the section inapplicable to cases in which an injunction has been granted:

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8. County of Franklin v. Connelie, 68 A.D.2d 1000, 415 N.Y.S.2d 110 (3d Dept. 1979).

9. See, e.g., N. A. Robinson, Environmental Law: Society—SEQRA—Justice? A Balancing Act, 180 N.Y.L.J., July 25, 1978, at 1, col. 1.

> (a) Stay without court order. Service upon the adverse party of a notice of appeal or an affidavit of intention to move for permission to appeal stays all proceedings to enforce the judgment or order appealed from pending the appeal or determination on the motion for permission to appeal where:
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> 1. the judgment or order directs either the payment of a sum of money, the assignment or delivery of personal property, the conveyance of real property, or the grant or restoration of a license or permit, and the appellant or moving party is the state or any political subdivision of the state or any officer or agency of the state or of any political subdivision of the state; . . . .

This amendment will preserve the purpose of section 5519(a)(1), which is to maintain the *status quo* during the appellate process.[10] This purpose is consistent with SEQRA.

The proposed amendment will return the law to the procedure which controlled automatic stays prior to changes made in the CPLR in 1965. The amendment will cure situations in which government authorities may permanently frustrate compliance with, and judicial orders under SEQRA, merely by serving a notice of appeal or intent to appeal, even if the appeal is not perfected.

IV. Section 5519(a)(1): Origins, Purpose, and SEQRA

A. *Origins of Section 5519(a)(1)*

The Code of Civil Procedure, section 1314, and its successor, the Civil Practice Act, section 571, each provided for automatic stays of "execution and judgment or order" upon appeal by a municipal corporation. These statutes were interpreted as providing that government authorities were entitled to an automatic stay of proceedings where a court had

10. See 7 Weinstein, Korn & Miller, New York Civil Practice § 5519.01 (1981).

ordered a prohibitory injunction.[11] The New York Court of Appeals enunciated the following rationale for this holding under the Code of Civil Procedure:

> It would seem to be preposterous that a party could, by the mere order of the court staying his hands from a judgment not yet executed, be deprived of the whole fruit of the judgment by the lawless act of the defeated party pending an appeal, without remedy, that he must stand by and without possibility of redress, see the subject matter of the litigation destroyed, so that if he succeeds in affirming the judgment it will be a barren victory.[12]

When the CPLR was enacted in 1962, section 5519(a)(1) contained the language which the Committee now proposes be reinstated, namely, the limitation of the automatic stay to situations where "the judgment or order directs either the payment of a sum of money, the assignment or delivery of personal property, or the conveyance of real property."

B. *Purpose of Section 5519(a)(1)*

In 1965, the CPLR was amended at the request of the Attorney General's office to permit government authorities to obtain a stay, even where an injunction has been ordered.[13] This amendment was accomplished by deleting the phrase which this Committee recommends be reinserted in the statute. In addition, the Committee recommends that the phrase "or the grant or restoration of a license or permit" be included in the statute. This is also consistent with prior law. Section 571 of the Civil Practice Act had been construed as providing

11. See, e.g., Sixth Avenue R.R. Co. v. Gilbert El. R.R. Co., 71 N.Y. 430 (1877); New York Mail & Newspaper Transp. Co. v. Shea, 30 A. D. 374 (2d Dept. 1898) (Code of Civil Procedure); City of Buffalo v. Kissinger, 40 N.Y.S. 2d 188 (Erie Co. Ct. 1943) (Civil Practice Act).

12. Sixth Avenue R.R. Co. v. Gilbert El. R.R. Co., 71 N.Y. 430, 433 (1877).

13. See 7 Weinstein, Korn & Miller, New York Civil Practice §5519.03 (1981).

an automatic stay of proceedings in a case where the lower court ordered the issuance of a building permit.[14]

The reason for the change in the CPLR in 1965 is unclear. The Memorandum of the State Department of Education[15] indicates that the bill's supporters mistakenly believed that practice under the Civil Practice Act was consistent with the recommended change. Also, the Department of Education believed that state and local governments would have less paper work if stays were automatic. In particular, the Department seems to have focused on cases involving professional licensing, the operation of school districts, and similar matters.

The Committee's proposed amendment recognizes the public interest in providing for automatic stays in situations involving zoning changes and the issuance of professional licenses. However, the Committee believes that the reasons expressed by the Department are not persuasive when applied to injunctions to enforce compliance with SEQRA.

C. *Section 5519(a)(1) and SEQRA*

In the intervening years since the amendment to section 5519(a)(1), various branches of government, as well as the public, have begun to consider the importance, as well as the fragility, of the environment. Indeed, section 8-0103 of SEQRA contains nine points of legislative findings and declarations regarding the importance of the environment and its "limited capacity." It seems fair to say that in 1965 no one anticipated that the current version of section 5519(a)(1) would frustrate the public and the courts in the manner exemplified by *County of Franklin*, where construction of the State Police barracks continued in the face of injunctive relief granted pending environmental impact review. Similarly, it

14. In re Wuttke, 202 Misc. 550, 115 N.Y.S.2d 852 (Sup. Ct. Nassau County 1952).

15. New York State Legislative Annual 1965, pp. 169-70. Similar reasons were expressed in the Memorandum of the City of New York, prepared by Peter E. Bragden, Assistant to the Mayor. Id. at 36-37.

is also appropriate to suggest that the Legislature did not intend SEQRA to be vitiated in such a way, particularly where the result may be irreversible damage to the environment.

Further, the 1965 amendment to section 5519(a)(1) unnecessarily complicates matters when it is invoked in litigation between two state agencies, or between a state agency and a political subdivision of the state. The effect of section 5519(a)(1) is unclear when two government parties seek judicial review of actions each might have taken affecting the same project under separate statutory authorizations. For example, when the Freshwater Wetlands Appeals Board reversed a decision of the Commissioner of Environmental Conservation and allowed the Meadow Run Development Corporation to extend a parking lot in a marshy area near the Northway,[16] on judicial review instituted by the Commissioner, the Supreme Court in Special Term upheld the Board.[17] Nonetheless, the Commissioner sought to negate both the Board's ruling and the court's decision simply by filing a notice of appeal. The Commissioner might stay the court's dismissal, but he probably could not alter the Board's underlying ruling. Even so, the Commissioner, through the Attorney General, directed that the Meadow Run Development Corporation not proceed, arguing that the stay had such an effect. In this case, the expeditious and inexpensive administrative review of Title 11 of the Freshwater Wetlands Act was the equivalent of SEQRA. The Legislature's creation of this procedure was complicated and frustrated by section 5519(a)(1).

The Committee is also not persuaded that section 5519(c), which provides that "the court from or to which an appeal is taken or the court of original instance . . . may vacate, limit or

16. Meadow Run Development Corp. v. Flacke, N.Y. Freshwater Wetlands Appeals Board #1979-1 (Apr. 20, 1979).

17. Flacke v. Freshwater Wetlands Appeals Board, 100 Misc.2d 393, 418 N.Y.S.2d 986 (Sup. Ct. Essex County 1979), modified, 77 A.D.2d 66, 432 N.Y.S.2d 645 (3d Dept. 1980); rev'd on other grounds, 53 N.Y.2d 537, 444 N.Y.S.2d 48, 428 N.E.2d 380; aff'd on remand, 87 A.D.2d 898, 449 N.Y.S.2d 361 (3d Dept. 1982).

modify any stay imposed by subdivision (a)," eliminates the need for the proposed amendment. This subsection of section 5519 puts the burden on the entity seeking to assure compliance with SEQRA. Compliance with SEQRA ensures that such agencies carefully consider and report on the environmental impact of their actions, which impact, unlike a money judgment, may be irreversible. Moreover, the proposed amendment would not prevent the state or local agency from applying for a stay pursuant to section 5519(c), which also provides that a court may grant stays of proceedings to enforce a judgment or order appealed from in cases not provided for in subsections (a) and (b).

Logically, if the government party has not prevailed in Special Term, and still wishes to assert grounds for a stay, it should raise those grounds by application rather than by invoking an automatic stay. The reason for the stay may then be given appropriate judicial scrutiny by the Appellate Division. Only by such means does civil procedure respect the dedication of judicial time and consideration by the justices of Special Term. Where Special Term finds an agency is violating a state statute, that ruling is entitled to substantial respect. Section 5519(a)(1) denies both the opinion of Special Term and the mandate of the Legislature the deference due them.

V. Conclusion

The proposed amendment to section 5519(a)(1) would limit the circumstances for which an automatic stay could be invoked, but would still permit a state or local agency to seek a stay under section 5519(c). The amendment would merely shift the burden of obtaining a stay onto the state or local agency, in a manner consistent with legislative intent concerning environmental protection. The pre-1965 rule in this regard is sound and should be reinstituted.