Pace Environmental Law Review

Volume 5
Issue 1 *Fall 1987*

Article 9

September 1987

# Jackson v. New York State Urban Development Corporation: Standard of Review for Sufficiency of Environmental Impact Statements

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# *Jackson v. New York State Urban Development Corporation*: Standard of Review for Sufficiency of Environmental Impact Statements

## I. Introduction

The New York State Environmental Quality Review Act (SEQRA)[1] requires that an environmental impact statement (EIS) be prepared for any action which may have a significant effect on the environment.[2] The EIS provides detailed information which is utilized by the reviewing agency in forming the basis for an informed decision on whether or not to undertake or approve an action.[3]

Judicial review in determining whether an EIS is sufficiently substantive involves a two part process. First, the appropriate standard of judicial review is established. Second, the EIS is reviewed against the applicable judicial standard to determine whether the provided information is sufficient to justify the agency's determination.

In *Jackson v. New York State Urban Development Corp.*,[4] the New York Court of Appeals used the "arbitrary and capricious"[5] standard of review, and found that the specificity of the environmental quality data presented in the EIS for the Times Square area development project was sufficient because it had allowed public comment and consideration. This note will review the supreme court's, the appellate division's, and the court of appeal's determination of the appropriate standard of review, and the three courts' determination of the sufficiency of the EIS based on this standard.

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1. N.Y. Envtl. Conserv. Law §§ 8-0101 to -0117 (McKinney 1984 & Supp. 1988).
2. *Id.* § 8-0109(2).
3. *Id.*
4. 67 N.Y.2d 400, 494 N.E.2d 429, 503 N.Y.S.2d 298 (1986).
5. N.Y. Civ. Prac. L. & R. § 7803(3) (McKinney 1981).

## II. Background

SEQRA was enacted in 1975 in an effort to balance the social and economic goals of an action[6] proposed by a state or local agency against its environmental costs. In accordance with SEQRA, an EIS must be prepared by the applicant or the reviewing agency for any action that may have a significant effect on the environment.[7] If the responsible agency makes an initial determination that the action may significantly affect the environment, it prepares a draft environmental impact statement (DEIS).[8] The purpose of a DEIS is "to relate environmental considerations to the inception of the planning process, to inform the public and other public agencies as early as possible about the proposed actions that may significantly affect the quality of the environment, and to solicit comments which will assist the agency in the decision making process."[9] The final environmental impact statement (FEIS), which reflects the public comments, is subsequently prepared by the agency.[10]

SEQRA requires the preparer of each EIS to include, in part, a detailed statement setting forth the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, and alternatives to the proposed action.[11] The EIS should be recognized as "not merely a disclosure statement but rather as an aid in an agency's decision making process to evaluate and

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6. N.Y. Envtl. Conserv. Law § 8-0105(4) (McKinney 1984). Actions are defined to include:

> (i) projects or activities directly undertaken by any [state or local] agency; or projects or activities supported in whole or part through contracts, grants, subsidies, loans, or other forms of funding assistance from one or more agencies; or projects or activities involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use or permission to act by one or more agencies; (ii) policy, regulations, and procedure-making.

*Id.*

7. *Id.* § 8-0109(2).

8. *Id.* § 8-0109(4).

9. *Id.*

10. *Id.* § 8-0109(5).

11. *Id.* § 8-0109(2).

balance the competing factors."[12] To facilitate the decision making process, the "EIS's shall be clearly and concisely written in plain language that can be read and understood by the public."[13] The EIS should be analytical but not encyclopedic.[14] Highly technical material should be summarized.[15] The degree to which an environmental impact must be presented will vary with the circumstances and nature of each proposal.[16] The extent of detail required must necessarily be related to the complexity of the environmental problems created by the project.[17] The rule of reasonableness and balance is to be utilized in determining the sufficiency of the degree to which an environmental impact has been discussed.[18]

The New York State Administrative Procedure Act dictates that judicial reviews of agency determinations will be conducted in the manner provided by Article 78 of the New York Civil Practice Law and Rules (CPLR).[19] In reviewing an administrative agency's actions, the court will overturn a determination only if it is found to be arbitrary and capricious or unsupported by substantial evidence.[20] The agency's record must show that it identified the relevant areas of environmental concern, took a "hard look" at the environmental consequences, and made a reasonable elaboration of the basis for

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12. Town of Henrietta v. Department of Envtl. Conservation, 76 A.D.2d 215, 222, 430 N.Y.S.2d 440, 446 (4th Dep't 1980).

13. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.14(c) (1987).

14. *Id.* § 617.14(b).

15. *Id.* § 617.14(c).

16. Webster Assoc. v. Town of Webster, 59 N.Y.2d 220, 228, 464 N.Y.S.2d 431, 434 (1983).

17. Town of Henrietta v. Department of Envtl. Conservation, 76 A.D.2d 215, 224, 430 N.Y.S.2d 440, 448 (4th Dep't 1980) (citing Iowa Citizens for Envtl. Quality v. Volpe, 487 F.2d 849, 52 (8th Cir. 1973)).

18. Coalition Against Lincoln West, Inc. v. City of New York, 94 A.D.2d 483, 491, 465 N.Y.S.2d 170, 176 (1st Dep't 1983).

19. N.Y. A.P.A. § 204(1) (McKinney Supp. 1988).

> On petition of any person, an agency may issue a declaratory ruling with respect to (i) the applicability to any person, property, or state of facts of any rule or statute enforceable by it . . . A declaratory ruling shall be subject to review in the manner provided for in article seventy-eight of civil practice law and rules.

*Id.*

20. N.Y. Civ. Prac. L. & R. § 7803 (McKinney 1981).

its determination.[21] The court will not substitute its judgment for that of the agency.[22] The agency's determination is accorded great weight, especially where the determination involves specialized, scientific knowledge.[23]

## III. *Jackson v. New York State Urban Development Corp.*

### A. *The Facts and the New York Supreme Court Decision*

The New York State Urban Development Corporation (UDC)[24] is the co-sponsor and lead agency for the Times Square area development project.[25] The goals of the UDC development plan are the elimination of area blight, revitalization of the area as an entertainment center, and the development of commercial potential.[26] In an effort to achieve these goals, the UDC prepared a DEIS supporting the development of four office towers, a hotel, theaters, retail and restaurant space and a wholesale mart in the project area.[27] In February 1984, the UDC circulated the DEIS to agencies having an interest in the proposed action and made it available for public

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21. H.O.M.E.S. v. New York State Urban Dev. Corp., 69 A.D.2d 222, 232, 418 N.Y.S.2d 827, 832 (4th Dep't 1979) (citing Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976)). The only role for a court is to insure that the agency has taken a "hard look" at environmental consequences; it cannot interject itself within the area of discretion of the executive as to the choice of action taken. Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972).

22. New York Water Serv. Corp. v. Water Power & Control Comm'n, 257 A.D. 590, 594, 13 N.Y.S.2d 760, 764 (3d Dep't 1939).

23. Town of Hempstead v. Flacke, 82 A.D.2d 183, 187-88, 441 N.Y.S.2d 487, 490 (2d Dep't 1981).

24. N.Y. Unconsol. Law § 6252 (McKinney 1984). In 1968, the New York State Urban Development Corporation Act was enacted for the express purposes of promoting a vigorous and growing economy, ameliorating blighted and deteriorating areas throughout New York, and supplying adequate and safe dwelling accommodations for families of low income. To achieve these purposes, the UDC, a corporate governmental agency, was created. *Id.*

25. Jackson v. New York State Urban Dev. Corp., N.Y.L.J., June 28, 1985, at 13, col. 2 (N.Y. Sup. Ct., N.Y. County). The portion of the Times Square area of Manhattan within the scope of the development plan encompasses 41*st* Street to 43*rd* Street, from Eighth Avenue to Broadway. *Id.*

26. Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 411, 494 N.E.2d 429, 432, 503 N.Y.S.2d 298, 301 (1986).

27. *Id.* at 412, 494 N.E.2d at 432, 503 N.Y.S.2d at 301-02.

comment.[28] Pursuant to SEQRA,[29] the UDC conducted public hearings on the environmental impacts of the proposed development project on March 26, 1984 and April 9, 1984.[30] After reviewing the comments raised during the public hearings, the UDC issued the FEIS on August 23, 1984.[31]

*Jackson* is a consolidation of four proceedings brought against the UDC in December 1984 and early 1985 by two groups of petitioners.[32] The Rosenthal petitioners include entities which own or rent Times Square area buildings that are slated to be acquired by the UDC and demolished, and people who work or own businesses in the project area.[33] The Rosenthal petitioners claim, in part, that the FEIS did not adequately address the impact of the project on the area's traffic and air quality.[34]

The majority of the Rosenthal petitioners' complaints concerned a perceived decline in air quality that they alleged would result from an increase in area vehicular traffic attributable to the development project.[35] The petitioners contended that unless sufficient mitigating measures were undertaken, the resulting carbon monoxide levels would exceed the maximum level permitted by the federal Clean Air Act.[36] The mitigating measures proposed by the UDC included adding an additional "lay-by" lane to Eighth Avenue where it passes through the project, the construction of a pedestrian walkway leading to the Port Authority bus terminal, relocating a taxi stand, and creating no-standing areas.[37] The UDC stated that

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28. *Id.* at 412, 494 N.E.2d at 433, 503 N.Y.S.2d at 302.

29. N.Y. Envtl. Conserv. Law § 8-0109(5) (McKinney 1984).

30. *Jackson*, 67 N.Y.2d at 412, 494 N.E.2d at 433, 503 N.Y.S.2d at 302.

31. *Id.*

32. *Id.* at 413, 494 N.E.2d at 433, 503 N.Y.S.2d at 302.

33. *Id.* at 413, 494 N.E.2d at 434, 503 N.Y.S.2d at 303.

34. Jackson v. New York State Urban Dev. Corp., N.Y.L.J., Jun. 28, 1985, at 13, col. 4 (N.Y. Sup. Ct., N.Y. County).

35. *Id.*

36. *Id.* The Court of Appeals decision that the UDC had proposed mitigating measures to meet the Clean Air Act standard for acceptable carbon monoxide levels, foreclosed the petitioners from litigating the same claim under a Clean Air Act citizens suit. Wilder v. Thomas, 659 F. Supp. 1500, 1509 (S.D.N.Y. 1987).

37. *Jackson*, N.Y. L. J., June 28, 1985, at 13, col. 4.

these mitigating measures would speed the course of traffic and thereby reduce the carbon monoxide concentration in the area.[38] The petitioners challenged the EIS on the ground that insufficient attention was given to the project's impact on traffic congestion and air quality,[39] and that certain background data underlying the UDC conclusions regarding air pollution and traffic congestion were not disclosed.[40]

The New York supreme court stated that its scope of review was circumscribed by the provisions of CPLR Article 78.[41] Citing *Save the Pine Bush, Inc. v. Planning Board*,[42] the supreme court defined this scope of review as requiring merely to determine (1) whether UDC identified the relevant areas of environmental concern, (2) took a "hard look" at them, and (3) made a "reasoned" elaboration of the basis for its determination.[43] However, the court, citing precedent, broadened its scope of review to require compliance not only with the letter but also with the spirit of SEQRA.[44]

The court observed that the UDC's "roseate optimism" with respect to the effect of the proposed mitigating measures appeared to be largely misplaced.[45] It based this observation on the fact that the implementation of the proposed mitigating measures depended largely upon governmental agencies which the UDC does not control.[46] However, the court concluded that it was in no position to substitute its judgment for the UDC's judgment regarding the effectiveness of the mitigating measures.[47] The court found that since the dispute over the type of model used in assessing traffic impact was a dispute among experts, the court must defer to the UDC's judg-

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38. *Id.*

39. Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 426, 494 N.E.2d 429, 442, 503 N.Y.S.2d 298, 311 (1986).

40. *Id.* at 422, 494 N.E.2d at 439, 503 N.Y.S.2d 308.

41. *Jackson*, N.Y.L.J., June 28, 1985, at 13, col. 3.

42. 96 A.D.2d 986, 466 N.Y.S.2d 828 (3d Dep't 1983).

43. *Jackson*, N.Y.L.J., June 28, 1985, at 13, col. 3.

44. *Id.* (citing Town of Henrietta v. Department of Envtl. Conservation, 76 A.D.2d 215, 430 N.Y.S.2d 440 (4th Dep't 1980)).

45. *Id.* at col. 4.

46. *Id.* at cols. 4-5.

47. *Id.* at col. 5.

ment that the measures were adequate.[48] Based on this deference to the UDC, the court dismissed the Rosenthal petitioners' claims concerning the impact of the project on the area's traffic and air quality.[49]

The Rosenthal petitioners also complained that the UDC failed to disclose certain background data underlying its conclusions regarding air pollution and traffic congestion.[50] The court summarily stated that if the petitioners' expert had requested copies of documents and had not received them, the proper forum for that dispute would be in a Freedom of Information Law[51] proceeding.[52]

### B. *The Appellate Division Affirms*

In establishing the applicable judicial standard of review, the Appellate Division, Second Department, recognized that as the instant proceedings were pursuant to CPLR Article 78,[53] the UDC's determinations could only be overturned if they were found to be arbitrary and capricious or unsupported by substantial evidence.[54] The court noted that this standard of review is based upon the general rule that courts should defer to the exercise of reasonable discretion by administrative agencies. Thus, the court is not permitted to determine the merits of the project.[55] The appellate division applied the same standard of review utilized by the supreme court. It found that the court must determine whether the agency has complied with the applicable law, identified the relevant areas of environmental concern, taken a "hard look" at them, and made a reasonable elaboration of the basis for its

48. *Id.*

49. *Id.*

50. Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 422, 494 N.E.2d 429, 439, 503 N.Y.S.2d 298, 308 (1986).

51. N.Y. Pub. Off. Law § 87 (McKinney 1988).

52. *Jackson*, N.Y.L.J., June 28, 1985, at 13, col. 4.

53. N.Y. Civ. Prac. L. & R. § 7803 (McKinney 1981).

54. Jackson v. New York State Urban Dev. Corp., 110 A.D.2d 304, 307, 494 N.Y.S.2d 700, 702 (1st Dep't 1985).

55. *Id.* at 307, 494 N.Y.S.2d at 702-03.

determination.[56]

The appellate division affirmed the dismissal of the Rosenthal petitioners' claims regarding the level of attention given to the project's impact on traffic congestion and air quality.[57] In its review of the record, the court found that the UDC had adopted a "worst case" analysis to develop a very conservative model for traffic analysis and air quality assessment.[58] In spite of the Rosenthal petitioners' claims to the contrary, the court found that the computer model utilized by the UDC to calculate automobile emissions was the most appropriate model available at that time.[59] The court stated that the UDC had studied the expected adverse impacts and then proposed a multitude of mitigative measures which would not only place the area within federal and city guidelines on carbon monoxide levels, but which might produce lower carbon monoxide concentrations than currently exist.[60] Therefore, the appellate division concluded that the supreme court had correctly deferred to the UDC's judgment on this issue because, in the view of the appellate division, the UDC had identified the adverse traffic and air quality impacts, taken a hard analytical look at them, and proposed mitigative measures which, it had a reasonable basis to conclude, would in fact minimize those adverse effects.[61]

In reviewing the supreme court's dismissal of the petitioners' claim that the UDC had withheld background data, the appellate division stated that the FEIS contained detailed explanations of the methodology used to analyze the impacts on traffic and air quality, and that no relevant materials were hidden from the public's view.[62]

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56. *Id.* at 307-08, 494 N.Y.S.2d at 703.
57. *Id.* at 310, 494 N.Y.S.2d at 704.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 310-11, 494 N.Y.S.2d at 704.
62. *Id.* at 310, 494 N.Y.S.2d at 704.

C. *The Court of Appeals Also Affirms*

The New York Court of Appeals affirmed the lower courts' decisions regarding the Rosenthal petitioners' claim that insufficient attention was given to the project's impact on traffic congestion and air quality.[63] The court of appeals stated its agreement with the lower courts' conclusions that "UDC identified the adverse traffic and air quality impacts, took a hard analytical look at them and proposed mitigating measures which, it had reasonable basis to conclude, would in fact minimize those adverse effects."[64]

The court of appeals gave considerable attention to the Rosenthal petitioners' claim that the UDC failed to disclose certain background data underlying its conclusions regarding air pollution and traffic congestion. The court recognized that although SEQRA does not explicitly address the extent to which raw data must be disclosed, the regulations and the statutory purposes provide guidance for the determination of this issue.[65] The regulations intend to limit the detail of the EIS to no more than is appropriate for the proposed action.[66] On the other hand, the primary purpose of the EIS is the dissemination of information to the public and other public agencies of the proposed action,[67] and this purpose is best served by broad disclosure.[68] After balancing these conflicting considerations, the court of appeals concluded that the specificity of the EIS regarding the UDC calculations of traffic and air quality impacts was sufficient because it had allowed informed consideration and comment on the issues.[69]

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63. Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 426, 494 N.E.2d 429, 442, 503 N.Y.S.2d 298, 311 (1986).

64. *Id.* (citing Jackson v. New York State Urban Dev. Corp., 110 A.D.2d 304, 311, 494 N.Y.S. 700, 704 (1st Dep't 1985)).

65. *Id.* at 422, 494 N.E.2d at 439, 503 N.Y.S.2d at 308.

66. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.14(c) (1987).

67. N.Y. Envtl. Conserv. Law § 8-0109(4) (McKinney 1984).

68. *Jackson*, 67 N.Y.2d at 422, 494 N.E.2d at 439, 503 N.Y.S.2d at 308.

69. *Id.* at 423, 494 N.E.2d at 439, 503 N.Y.S.2d at 308.

## IV. Analysis of Court Decisions

### A. *The Applicable Standard of Review*

Both the supreme court and the appellate division recognized that the applicable standard of review is that standard of review prescribed by the CPLR Article 78.[70] The appellate division interpreted this standard of review as precluding a court from overturning an agency's determination unless the determination is found to be arbitrary and capricious or unsupported by substantial evidence.[71] In evaluating the petitioners' challenges to this standard of review, the appellate division used the "arbitrary and capricious" standard and the "substantial evidence" standard almost interchangeably. However, these standards are distinguishable and are to be applied according to the type of regulatory action that resulted in the agency determination.[72]

When an agency determination is challenged pursuant to CPLR Article 78, the applicable standard of judicial review depends on the manner by which the agency reached its determination. If a determination was made as a result of a hearing at which evidence was taken, it must be on the entire record, supported by substantial evidence.[73] If an agency determination results from a quasi-judicial hearing, the substantial evidence standard should be used by a court.[74] However, where the agency determination is made without a hearing, or where the hearing is discretionary or informational, as opposed to adjudicatory and evidentiary, the standard of review is the arbitrary and capricious standard.[75]

The substantial evidence standard requires a more probing review of an agency's determination which results from a

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70. N.Y. Civ. Prac. L. & R. § 7803 (McKinney 1981).

71. Jackson v. New York State Urban Dev. Corp., 110 A.D.2d 304, 307, 494 N.Y.S.2d 700, 702 (1st Dep't 1985).

72. N.Y. Civ. Prac. L. & R. § 7803 (McKinney 1981).

73. *Id.* § 7803(4).

74. Older v. Board of Education, 27 N.Y.2d 333, 337, 266 N.E.2d 812, 814, 318 N.Y.S.2d 129, 131 (1971).

75. Department of Envtl. Protection v. Department of Envtl. Conservation, 120 A.D.2d 166, 169, 508 N.Y.S.2d 643, 645 (3d Dep't 1986).

quasi-judicial proceeding because the court has a more complete record before it.[76] Therefore, when the law requires a hearing, it may be inferred that there is less latitude in the exercise of discretion by the agency and the agency decision must be more carefully justified by factual findings.[77] When the agency determination does not involve a hearing, the arbitrary and capricious standard serves as a judicial restraint on the exercise of agency discretion.[78]

The key element in determining the proper standard of judicial review is whether or not an agency hearing is required. SEQRA provides that after the DEIS is filed, the agency shall determine whether or not to conduct a public hearing on the environmental impact of the proposed action.[79] In determining whether or not to hold a hearing, the agency shall consider:

> the degree of interest in the action shown by the public or involved agencies; whether substantive or significant environmental issues have been raised; the adequacy of the mitigation measures proposed and the consideration of alternatives; and the extent to which a public hearing can aid the agency decisionmaking process by providing a forum for, or an efficient mechanism for the collection, of public comment.[80]

While SEQRA requires the agency to make a determination, the actual decision of whether or not to hold a hearing is purely discretionary with the agency. Furthermore, when an agency has determined that a hearing is necessary because of the significant environmental impact posed by the proposed action, the hearing conducted is not adjudicatory or quasi-judicial, but informational.[81] Therefore, judicial review of agency determinations resulting from hearings pursuant to

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76. *Older*, 27 N.Y.2d at 337, 266 N.E.2d at 814, 318 N.Y.S.2d at 131.

77. Comment, *Judicial Review*, 52 St. John's L. Rev. 361, 371 (1978).

78. *Id.*

79. N.Y. Envtl. Conserv. Law § 8-0109(5) (McKinney 1984).

80. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.8(d) (1987).

81. Department of Envtl. Protection v. Department of Envtl. Conservation, 120 A.D.2d 166, 169, 508 N.Y.S.2d 643, 645 (3d Dep't 1986).

SEQRA should utilize the arbitrary and capricious standard rather than the substantial evidence standard.

In *Jackson*, the supreme court stated that the scope of its review was merely to determine (1) whether UDC identified the relevant areas of environmental concern, (2) took a "hard look" at them, and (3) made a "reasoned" elaboration of the basis for its determination.[82] The establishment of this scope of review can be traced to *H.O.M.E.S. v. New York Urban Development Corp.*[83] Based on this scope of review, the *H.O.M.E.S.* court found the discretionary issuance of a negative declaration[84] by the UDC for the inclusion of a proposed domed sports facility in an existing planned institutional district was arbitrary and capricious.[85] Since the UDC determinations being challenged in the *Jackson* case resulted from discretionary hearings, the appropriate standard of review is the arbitrary and capricious standard. As both *Jackson* and *H.O.M.E.S.* involved the judicial review of actions within the UDC's discretion, the scope of review utilized by the *Jackson* court was appropriate to determine whether or not the UDC's actions complied with SEQRA.

The appellate division, on the other hand, failed to distinguish between the arbitrary and capricious standard and the substantial evidence standard in stating that the courts will overturn an agency's determination only when it was arbitrary and capricious *or* unsupported by substantial evidence.[86] This failure to distinguish between the standards of review is further evidenced by the court's conclusion that the Rosenthal petitioners have failed to demonstrate that the UDC has acted arbitrarily and capriciously or that the UDC has failed to substantiate its conclusions on any of the issues challenged.[87]

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82. Jackson v. New York State Urban Dev. Corp., N.Y.L.J., June 28, 1985, at 13, col. 3 (N.Y. Sup. Ct., N.Y. County).

83. 69 A.D.2d 222, 232, 418 N.Y.S.2d 827, 832 (4th Dep't 1979).

84. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.10(a) (1987). Negative declaration is a written determination by a lead agency that the proposed action will not result in any significant environmental effects. *Id.* § 617.2(y).

85. *H.O.M.E.S.*, 69 A.D.2d at 233, 418 N.Y.S.2d at 833.

86. Jackson v. New York Urban Dev. Corp., 110 A.D.2d 304, 307, 494 N.Y.S.2d 700, 708 (1st Dep't 1985).

87. *Id.* at 311, 494 N.Y.S.2d at 705.

## B. *The Courts' Factual Findings*

In its decision, the supreme court detailed the UDC's proposed measures to mitigate the traffic congestion and air quality impacts and observed that the UDC's "roseate optimism" with respect to the effect of the proposed mitigating measures appeared to be largely misplaced.[88] Nevertheless, the court upheld the UDC's determination that the proposed mitigating measures would be effective. It held that deference to an agency's determination resolving a dispute among experts was appropriate under the arbitrary and capricious standard.[89]

Deference to an agency should not be granted to such an extent that an agency's determination is upheld without the support of factual evidence. Deference to an agency's determination resolving a dispute among experts is predicated upon each side of the dispute being supported by a factual basis. An agency's action is arbitrary when it is "without sound basis in reason and is generally taken without regard to the facts."[90] The supreme court's observation, that the UDC's optimism regarding the proposed mitigating measures was largely misplaced, raises a presumption that the UDC's determination was not supported by factual evidence. The court's decision does not otherwise discuss how the UDC's determination was supported by the necessary factual evidence. In light of this omission, the supreme court's deference to the UDC's determination seems to be misplaced.

The appellate division recognized that while deference should be accorded to the reasonable discretion of administrative agencies, the court is obliged to determine whether the agency has complied with the applicable law, identified the relevant areas of environmental concern, taken a "hard look" at them, and made a reasoned elaboration of the basis for its determination.[91] A court will not overturn or overrule an

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88. Jackson v. New York State Urban Dev. Corp., N.Y.L.J., June 28, 1985, at 13, col. 4 (N.Y. Sup. Ct., N.Y. County).

89. *Id.* at col. 5.

90. Pell v. Board of Education, 34 N.Y.2d 222, 231, 356 N.Y.S.2d 833, 839 (1974).

91. Jackson v. New York State Urban Dev. Corp., 110 A.D.2d 304, 307-08, 494 N.Y.S.2d 700, 703 (1st Dep't 1985).

agency decision provided that the agency has taken this "hard look."[92] In applying this standard of review, the appellate division concluded that the UDC had performed the "hard look" analysis of the environmental impact and arrived at a well reasoned conclusion in approving the project.[93] Based on its review of the record, the appellate division described the mitigating measures as extensive and numerous.[94] This characterization of the mitigating measures is inconsistent with the supreme court's description of the proposed mitigating measures, and that court's observation that the UDC's "roseate optimism" with respect to the effect of the proposed mitigating measures appears largely misplaced.[95] Nonetheless, the appellate division held that the supreme court correctly deferred to the judgment of the UDC.[96] With respect to this issue, the court of appeals agreed with the conclusions of the lower courts.[97]

These decisions seem contrary to the policy behind SEQRA. The purpose of an EIS is to provide detailed information as a basis for a decision on whether or not to undertake or approve an action.[98] The supreme court's observations regarding the proposed mitigating measures, based on its review of the UDC EIS, indicates a belief by the court that the UDC's decision was without a sound basis in reason. An agency action that is taken "without sound basis in reason and is generally taken without regard to the facts" is arbitrary.[99]

In reviewing the Rosenthal petitioners' claim that UDC failed to disclose certain background data underlying its conclusions regarding air pollution and traffic congestion, the su-

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92. *Id.* at 308, 494 N.Y.S.2d at 703 (citing National Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972)).

93. *Id.*

94. *Id.* at 310, 494 N.Y.S.2d at 704.

95. Jackson v. New York State Urban Dev. Corp., N.Y.L.J., June 28, 1985, at 13, col.4 (N.Y. Sup. Ct., N.Y. County).

96. *Jackson*, 110 A.D.2d at 311, 494 N.Y.S.2d at 704.

97. Jackson v. New York State Urban Dev. Corp. 67 N.Y.2d 400, 426, 494 N.E.2d 429, 442, 503 N.Y.S.2d 298, 311 (1986).

98. N.Y. Envtl. Conserv. Law § 8-0109(2) (McKinney 1984).

99. Pell v. Board of Education, 34 N.Y.2d 222, 231, 356 N.Y.S.2d 833, 839 (1974).

preme court held that the proper forum for the resolution of this issue was a Freedom of Information Law proceeding.[100] The court's decision, without any supporting reasoning, indicates that the supreme court failed to recognize that the primary purpose of the DEIS is the dissemination of the information regarding the proposed action to the public and other public agencies.[101] The court of appeals, on the other hand, recognized that this purpose is arguably best served by broad disclosure.[102] However, the regulations provide that the EIS should not contain more detail than is appropriate to the proposed action and that highly technical material should be summarized.[103] Therefore, these limitations on the scope of an EIS can be viewed as furthering the purpose of involving the general public in the decision-making process. While not recognized by the court of appeals, excessive information or highly technical material may dull the response of the general public to the point of withdrawal from the process.

After balancing these conflicting considerations, the court of appeals correctly concluded that the specificity of the EIS regarding the UDC calculations of traffic and air quality impacts was sufficient because it allowed informed consideration and public comment on these issues.[104] The court notes that this conclusion is reinforced by a review of the comments on the EIS actually received and the petitioners' claims on the substantive issues of traffic congestion and air quality impacts.[105] As the primary purpose of an EIS is to disseminate information regarding the proposed action, the fact that the Rosenthal petitioners were able to extensively criticize the UDC treatment of traffic and air quality, justifies the court of appeals' conclusion that the EIS was sufficient.

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100. *Jackson*, N.Y.L.J., June 28, 1985, at 13, col.4.
101. N.Y. Envtl. Conserv. Law § 8-0109(4) (McKinney 1984).
102. *Jackson*, 67 N.Y.2d at 422, 494 N.E.2d at 439, 503 N.Y.S.2d at 308.
103. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.14(c) (1987).
104. *Jackson*, 67 N.Y.2d at 423, 494 N.E.2d at 439, 503 N.Y.S.2d at 308.
105. *Id.* at 423, 494 N.E.2d at 440, 503 N.Y.S.2d at 309.

## V. Conclusion

The purpose of an EIS is to provide detailed information which forms the basis for a decision on whether or not to undertake or approve an action.[106] Therefore, in order to determine if an agency's decision is proper, the EIS will be reviewed to determine if there is a sufficient basis for the agency decision. Judicial review of the sufficiency of an EIS involves a two part process. First, the appropriate standard of review must be established. Second, the EIS must be reviewed against the applicable judicial standard to determine whether the provided information is sufficient to justify the agency's determination.

Since the decision to hold a public hearing on the EIS is discretionary with the lead agency and informational rather than adjudicative, the applicable judicial standard of review is the arbitrary and capricious standard.[107] The court of appeals used this standard in finding that the specificity of the EIS regarding the UDC calculations of traffic and air quality impacts was sufficient because it allowed informed consideration and public comment on these issues.[108] Since the primary purpose of an EIS is the dissemination of information regarding the proposed action,[109] a sound basis for determining the sufficiency of an EIS is whether the EIS has allowed informed consideration and public comment on the proposed project.

The fact that the DEIS was sufficiently informative to allow the public to extensively criticize the UDC's treatment of traffic and air quality was controlling in the *Jackson* court's decision that the EIS was sufficient.[110] As recognized in *Jackson*, a determination of whether or not the EIS has allowed informed consideration and public comment involves a consideration of the circumstances surrounding the review pro-

106. N.Y. Envtl. Conserv. Law § 8-0109(2) (McKinney 1984).

107. N.Y. Civ. Prac. L. & R. § 7803(3) (1981).

108. *Jackson*, 67 N.Y.2d at 423, 494 N.E.2d at 339, 503 N.Y.S.2d at 309.

109. N.Y. Envtl. Conserv. Law § 8-0109(4) (McKinney 1984).

110. *Jackson*, 67 N.Y.2d at 423, 494 N.E.2d at 339, 503 N.Y.S.2d at 309.

cess. Therefore, the sufficiency of an EIS must be determined on a case by case basis.

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