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## Smart Growth: Resolving Home Rule Conflicts and Settling Border Wars

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**Abstract:** Municipalities battle over the use of adjacent lands as land use border wars erupt all over New York. The results of these battles rarely equate to a satisfying solution for both parties. This column delves into flaws of New York law, including the insufficiencies of the State Environmental Quality Review Act (SEQRA), and also documents several cases where municipalities fail to come up with cooperative solutions. However, recent solutions, such as co-lead agencies and joint municipal review boards are beginning to make use of the cooperative authority provided to municipalities by state law, and could be a sign of hope for the future.

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On September 26<sup>th</sup>, Justice Barone of the Westchester Supreme Court vacated the determination by the planning board of the Village of Sleepy Hollow that a proposed subdivision was not likely to have an adverse impact on the environment. (Village of Tarrytown v. Planning Board of Sleepy Hollow, Supreme Court, Westchester Co., September 26, 2000) Under the State Environmental Quality Review Act (SEQRA), the planning board's approval of a subdivision application is an action which requires that the agency take a hard look at the environmental impacts of the proposed development project. The application it reviewed involved the construction of eleven single-family homes on 12 acres on the village's border with its neighbor to the south, the village of Tarrytown.

The developer of the proposed subdivision also owns 48 acres in Tarrytown, mostly contiguous with the land in Sleepy Hollow. Although the developer had engaged in some discussions with the village about the development of the lots in Tarrytown, he had made no formal proposal. While the Village of Sleepy Hollow's planning board was reviewing the eleven unit subdivision proposed for its jurisdiction, there was a moratorium on all such development in Tarrytown. The moratorium was needed to allow that village time to consider rezoning several large undeveloped parcels, including the developer's land in the village. During the moratorium, no formal proposal for the development of the 48 acres in Tarrytown had been made.

The decision of the Supreme Court found that these circumstances required that a cumulative assessment of the development on both sides of the border be completed before Sleepy Hollow decided that the proposal would not have a significant adverse

impact on the environment. The court found that the review of the development in both villages should not be segmented. Based on these findings, the court vacated the determination by the Sleepy Hollow Planning Board that an Environmental Impact Statement was not required.

### Not Unique

As unique at this situation sounds, it mirrors disputes arising at a rapid rate between neighboring municipalities. In recent years, several border wars have been fought in Westchester County alone. The Town of Greenburgh and the City of Yonkers waged a battle over the city's approval of a large Stew Leonard's store on its border with the town. The Village of Pelham is struggling to influence the development of a big box retail store on its doorstep that is subject to the land use jurisdiction of the City of Mount Vernon. The Town of Mamaroneck objects to plans to approve a large IKEA retail store directly on its border with the City of New Rochelle. The City of Rye and the Village of Port Chester litigated for years over a proposed Home Depot on their border that was finally approved by the village. The Town/Village of Scarsdale is considering the approval of a large assisted-living project on its border with the City of White Plains.

There is very little productive history in New York that makes available to these communities a mechanism to use to resolve their border wars. In not one of these instances have the contestant municipalities worked closely together to plan the developments that affect their mutual interests.

### Home Rule's "First Concerns"

One of the state's first controversial border wars also occurred in Westchester County. In 1969, the Village of Mount Kisco rezoned a 7.68 acre parcel from single-family residential to a multi-family, high rise use. The property was isolated from the village by the Saw Mill River Parkway. It was bounded on three sides by the Town of Bedford, by land exclusively zoned for single-family residential uses, and accessible only by Bedford roads. The town challenged the rezoning of land that was characterized by the supreme court as "an island within the Town of Bedford." Bedford's challenge was based primarily on the negative impacts it would suffer from the development and the failure of the village to take those impacts into consideration in its rezoning decision. It also showed that the multi-family rezoning was not in conformance with the village's 1958 comprehensive plan, which it argued violated the requirement that zoning must conform to the locality's plan.

The Court of Appeals disagreed, pointing to six findings made by the village board all of which dealt with changes within the village since the 1958 plan was adopted and which detailed the benefits to the village of the rezoning. Bedford v. Mount Kisco, 33 N.Y.2d 178 (1973) These findings were sufficient to constitute a de facto amendment of the comprehensive plan, in the court's opinion. Nothing in the opinion indicates that the village considered, measured, or was influenced by the alleged negative impacts on the town. The court noted that "the [village] Board of Trustees considered the welfare

and economic stability of Mount Kisco as its first concern.... Bedford understandably differed from the conclusion reached, but that difference must be regarded as the necessary result of conflicting zoning policies that are confronted at the edge of every municipality.”

Justice Breitel dissented, citing a New Jersey case where the court deemed it to be a legal requirement that zoning restrictions take “reasonable consideration” of the character of neighboring municipalities. Breitel referenced his dissent in Golden v. Town of Ramapo, 30 N.Y 2d 359 (1972), stating that “only at the regional level can the pitfall of idiosyncratic municipal action be avoided.” On that point, Breitel did not disagree with the majority in Golden which made the strongest argument for regional planning in New York judicial history. The majority in Golden called for a system of “state-wide or regional control of land use planning” to “insure that interests broader than that of the municipality underlie various land use policies.” It went on to say that “zoning enabling legislation is burdened by the largely antiquated notion which deigns that the regulation of land use and development is uniquely a function of local government....” It found that this system suffers from “pronounced insularism” and that “questions of broader public interest have commonly been ignored” by it.

Nearly 30 years ago, the majority of the Court of Appeals disagreed with Breitel in the Bedford v. Mount Kisco case and it remains the law of the state of New York that local interests remain the “first concerns” in land use decision-making. The complexities of the border war disputes in Westchester indicate that this vigorous debate continues.

## SEQRA and the Environment

In most border wars, serious environmental impacts are involved. Where this is so, matters of state-wide concern are implicated. SEQRA is intended to maintain “a quality environment for the people of the state;” the state legislature found that all agencies, including local planning boards, should “conduct their affairs with the awareness that they ... have an obligation to protect the environment for the use and enjoyment of this and all future generations.” ECL § 8-0103. Consistent with this boundary-less view of the environment are provisions in SEQRA’s regulations that provide for the review of the cumulative impacts of various projects and that discourage the segmented review of projects. These regulations are found at 6 NYCRR Part 617. In § 617.3(g). The regulations state that “Actions commonly consist of a set of activities or steps. The entire set of activities or steps must be considered the action, whether the agency decision-making process relates to the action as a whole or to only a part of it.” §617.3(g)(1) goes on to say that “considering only a part or segment of an action is contrary to the intent of SEQR. “

The action that is subject to environmental review under SEQRA is defined as “projects...that...require one or more...approvals from an agency.” §617.2(b). From the perspective of the Sleepy Hollow Planning Board, the action it was considering was the action at hand - an eleven unit subdivision. Under the Bedford v. Mount Kisco case its review was limited to land within its jurisdiction. Cases under SEQRA involving the

issue of segmentation typically involve the issue of whether an agency improperly segmented an activity or step involved in a project wholly within its jurisdiction. In this respect, the Sleepy Hollow v. Tarrytown decision involves a matter of first impression in the state. It accentuates the conflict between the state's interest in comprehensive protection of the environment and the realities of local land use jurisdiction which stops at the border.

Justice Barone also found that the construction in both villages "created sufficient circumstances to require a cumulative assessment before Sleepy Hollow" determined whether the project would have a significant adverse impact on the environment. SEQRA regulations do require that an agency considering an immediate action consider cumulative impacts, including those of other subsequent actions which are included in any long-range plan affecting the immediate action, which are likely to be undertaken as a result of the immediate action, or which are dependent on the immediate action. §617.7(c)(2). SEQRA cases have required cumulative impact studies in the past where one phase of a project is part of an integrated project or where there is an adopted long-range plan under which the actions are taken.

In New York, most land use planning takes place on a local basis. The Village of Sleepy Hollow has recently completed an extensive Local Waterfront Revitalization Plan. Tarrytown does not have a formally adopted comprehensive plan but did considerable planning regarding the disappearance of open space during the recent moratorium. These are local plans that stop at the border. In this context, there is no long-range plan to provide an intermunicipal context to the required cumulative review process.

The twelve-acre Sleepy Hollow subdivision was deemed by the supreme court to be part of a 60 acre development plan that should not be segmented for environmental review purposes. This requires the Sleepy Hollow planning board to review the impacts of development that will occur on the 48 acres in the village of Tarrytown under the land use regulations of that jurisdiction. Ideally, the developer would submit preliminary plans for the parcels on both sides of the border to a joint municipal review board or other mechanism created to coordinate the two villages' review of the integrated project. In the absence of such a submission, the Sleepy Hollow planning board's task is enigmatic.

Smart Growth – a Flaw in the System.

Not knowing how to complete an environmental review of major developments on municipal borders exposes a major flaw in land use practice in New York. Local practice does not allow the interests of towns like Bedford to be considered by villages like Mount Kisco, which are encouraged to concentrate on their first concerns. There is no provision for state-wide or regional planning of the sort called for by the Court of Appeals in the 1972 Golden decision. There are no regularly used inter-municipal mechanisms through which these border wars can be resolved.

The state legislature, however, has given localities the authority to create their own border war resolution mechanisms. It has empowered local governments to enter into intermunicipal agreements that arbitrate intermunicipal interests and establish collaborative implementation strategies. New York leads the nation in granting authority to municipal corporations to contract with one another to cooperate fully regarding land use matters. In 1992, the legislature enacted statutes that make it clear that local governments have the authority to create intermunicipal planning boards, adopt consistent comprehensive plans and land use regulations, and create joint programs for land use administration and enforcement. (N.Y. GEN. CITY LAW § 20-g, N.Y. TOWN LAW § 284, and N.Y. VILLAGE LAW §7-741)

### Co-lead Agencies and Joint Municipal Review Boards

Some communities are paying attention. In January, 1997, the Towns of New Castle, Bedford, and North Castle in Westchester entered into an agreement under which they established a co-lead agency to review a development proposed on 213 acres, some of which is located in all three communities. Absent this agreement, the developer would have to pursue separate approvals in all three towns and be subjected to three separate environmental reviews. One of the purposes of the agreement is to “avoid duplication of effort and expense on behalf of all parties concerned....”

They agreed to appoint five representatives from each community to constitute a co-lead agency which is empowered to handle all aspects of the state-mandated environmental review process. The agreement notes that it “does not supersede or preempt any authority or jurisdiction” of any of the agencies within the three towns. If any matter that comes before the co-lead agency is not agreed upon by a majority of the members, it is subject to a second vote. If not resolved by this vote, the matter is referred to an arbitrator for a binding determination. The agreement is signed by the developer and the authorized member of each of the three local agencies involved in reviewing the proposal.

The Town of Greenburgh has called for the creation of joint municipal review boards with three of its neighbors to plan developments that will be taking place in the town and that will affect the neighboring localities. A joint municipal review board may be created by an intermunicipal agreement and fully empowered to plan all aspects of a proposed development, not just to review its environmental impacts.

These isolated examples are hopeful signs of intelligent life in an otherwise worrisome planning universe. Unfortunately, they are not evolving as rapidly as border wars are proliferating. They are, however, direct evidence that there are mechanisms available to local officials who wish to deal competently with the complexities of local land use decisions with immediate intermunicipal impacts.