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Impact Statements: Regulations Leave Room for Delays in SEQRA Proceedings

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Abstract: SEQRA, the New York State Environmental Quality Review Act, creates a process whereby public actions are reviewed with the intent to mitigate adverse environmental impacts. The SEQRA process has several flexible time constraints, which through negotiation, may be extended. Issues often arise due to the discrepancies between SEQRA's imposed time limits and the time limits imposed on land use boards to make determinations about proposed projects. The question of which time limits apply was determined in *Sun Beach Real Estate Corp. v. Anderson Beach*. In that case, the court held that decisions, such as site plan approval deadlines, do not apply until the proper portion of the SEQRA process is completed. The rationale for this decision was founded on idea that the protection and use of the environment for future generations outweighed the rights of developers to attain swift responses to their project proposals.

The State Environmental Quality Review Act (SEQRA) requires local administrative bodies to consider and mitigate the environmental impacts of proposals for land development that project sponsors submit for their review and approval. In addition to giving these administrative agencies substantive authority to impose conditions on such projects, SEQRA and regulations issued by the Commissioner of the Department of Environmental Protection prescribe certain procedural steps these agencies must take and establish time frames within which these steps are to be taken. Under SEQRA, the administrative agency with principal authority for approving a private landowner's project is called the lead agency.

When the lead agency has determined that a proposed project may have a significant adverse impact on the environment, an Environmental Impact Statement (EIS) must be prepared, usually by the project sponsor. The Commissioner's regulations, found in Part 617 of the New York Code of Rules and Regulations, require lead agencies to make a determination as to whether a draft Environmental Impact Statement (DEIS) submitted by a project sponsor is adequate within 45 days of its receipt. This deadline, and several others like it in

the regulations, give the initial impression that the movement of a project proposal through the SEQRA review process is regimented and predictable.

A closer examination of the SEQRA regulations leads to a different conclusion. NYCRR § 617.3, for example, states that "time periods in this Part may be extended by mutual agreement between a project sponsor and the lead agency." In addition, the lead agency can decide that a DEIS has failed to adequately address a particular environmental issue. This has the effect of suspending all deadlines and time frames until the project sponsor has adequately studied and addressed this issue. A search of the regulations reveals no guidelines for determining the adequacy of a DEIS or for evaluating the appropriateness of a lead agency's finding that a DEIS is not adequate.

When a project sponsor's application for a local administrative approval is required to go through the full environmental review process, the regulations require that at least 20 separate steps be followed. The time frames for the completion of these steps, when aggregated, require at least 230 days, approximately eight months, for a project to move from the date of application to the filing of a Final Environmental Impact Statement (FEIS). There are countless examples of project proposals that have taken from one to three years to complete the process. This reality reveals the considerable elasticity built into the SEQRA review process.

When SEQRA was first implemented, the considerable time required to move through the local environmental review process came as a great surprise to project sponsors. Prior to its enactment in 1975, state statutes required local land use agencies such as planning and zoning boards to review projects and come to a decision on them within a few months. If the application was for the approval of the subdivision of land to allow the development and sale of residential lots, the local agency had to hold a public hearing within 45 days of receiving the project sponsor's subdivision application and make its determination on the project within 45 days of the public hearing. A local board's failure to decide within the time allowed enabled the sponsor to proceed with the project as proposed.

The obvious conflict between these preexisting statutory time frames and those established under SEQRA was considered in *Sun Beach Real Estate Development Corp. v. Anderson*, 469 N.Y.S.2d 964 (2d Dep't 1983), *aff'd*, 62 N.Y.2d 965 (1984). The court held that an application for preliminary approval of a subdivision plat was not complete until the procedural steps required under SEQRA have been taken. It accorded priority to environmental review deadlines over subdivision approval deadlines "because the legislative declaration of purpose in [SEQRA] makes it obvious that protection of the environment for the use and enjoyment of this and all future generations far overshadows the rights of developers to obtain prompt action on their proposals."

The statutory deadlines for subdivision approval were added to the law in 1966 because the state legislature believed that applications were being subjected to unreasonable bureaucratic delay. Similar delays in the SEQRA review process have given rise to proposals from some quarters that fixed time periods be established for the steps required in performing environmental reviews. In fact, the *Sun Beach* court recognized the need to consider such action. In its 1983 decision, the court wrote, "in reaching our conclusion, we are quite aware that SEQRA and its regulations have set no time limits within which a planning board must accept a proposed DEIS. The danger, of course, is that planning boards may utilize the absence of SEQRA time limitations to resume the type of bureaucratic delay that resulted in the enactment of the 45 day time limitation in 1966. If such consequences are to be avoided, the Legislature and the Commissioner of Environmental Conservation should turn their attention to the problem."

Curiously, any problems regarding the time frames required for local environmental review arise almost exclusively from the Commissioner's regulations rather than the SEQRA statute itself which contains only one reference to a procedural deadline. The statute, found at §§ 8-0101 - 8-0117 of the Environmental Conservation Law, in fact, mandates that environmental reviews be conducted as expeditiously as possible. It states that lead agencies "shall carry out [SEQRA's] terms with minimum procedural and administrative delay, shall avoid unnecessary duplication of reporting and review requirements by providing, where feasible, for combined and consolidated proceedings, and shall expedite all proceedings hereunder in the interests of prompt review."

The regulations, on the other hand, are replete with time frames and discretionary power to extend or suspend them. A sampling of these provisions follows:

- There is the blanket provision contained in § 617.3 that allows all time periods to be extended by mutual agreement between the project sponsor and the lead agency. Some argue that, since SEQRA provides significant discretionary authority to lead agencies to impose conditions on or deny applications for agency approval of proposed projects, few project sponsors will refuse an agency request to extend a deadline.

- Section 617.6(b) states that the lead agency must determine the environmental significance of a proposal within 20 days of its receipt of the project sponsor's application which normally will include an Environmental Assessment Form (EAF) or a DEIS. It further stipulates, however, that the 20-day period may begin when the lead agency receives "any additional information reasonably necessary to make that determination." This allows a lead agency to require sponsors to submit any additional information deemed "reasonable" by the lead agency and to suspend the running of the 20-day period until such information is submitted. The statute and regulations define the "environment" that may be impacted by a

project to include "resources of agricultural, archeological, historic and aesthetic significance, existing patterns of population concentration, distribution of growth, existing community or neighborhood character, and human health" in addition to "land, air, water, minerals, flora, fauna, and noise." The breadth of this definition gives lead agencies great latitude to decide that the information contained in the sponsor's application is insufficient to enable it to make a determination as to the "environmental significance" of the proposed project.

- Section 617.6(b) also requires that a lead agency must be established before a determination of significance can be made. The regulations allow 30 days for a lead agency to be established. Where more than one agency is involved in funding, undertaking or approving a proposal, which happens often when significant projects are involved, it is possible that they will not agree which one of them should be the lead agency. In such a case, § 617(b)5 allows them to submit this dispute to the DEC Commissioner to determine which agency should be the lead agency. The Commissioner is given 20 days from the receipt of such a request and supporting documentation to determine the lead agency. Here again the regulations contain a suspension clause allowing the Commissioner to request more information if needed to make the determination. The 20-day decision period runs from the date the Commissioner receives "any supplemental information" needed.

- Under § 617.8, the lead agency may decide to develop a scope of the DEIS which begins with the project sponsor submitting a draft of that scope. There is no time period established for the lead agency to determine that "scoping" will be done or for the sponsor to prepare and submit a draft scope. This allows for another suspension of the overall SEQRA review schedule. After a draft scope is submitted, the lead agency must provide an opportunity for public input and the comments of other involved agencies. A final written scope of the DEIS must be prepared by the lead agency within 60 days of its receipt of the draft scope from the sponsor. Any agency or person who fails to raise an issue that should be considered by the DEIS during this 60 day period may raise it later, however. The regulations require that agency or person to explain the relevance of that issue and why it was not identified during scoping and why it should be included in the environmental study at the later date. To insure that such later issues do not arise and cause delays further along in the process, the project sponsor will likely agree to any extension of the 60 day scope preparation period needed to allow all interested agencies and persons sufficient time to raise their issues and fix the scope of the study.

- Section 617.9(a) allows the lead agency 45 days from the receipt of the DEIS to determine whether it is adequate with respect to its scope and content. If the DEIS is not adequate, as measured against the content of the scope prepared or the extensive standards contained in nearly five pages of the regulations, the lead agency must notify the sponsor in writing of the inadequacies. Here, again, a suspension in the schedule occurs while the sponsor amends the DEIS in

accordance with this notice. When an amended DEIS is submitted, the lead agency has 30 days to determine whether it is adequate. There is nothing that prohibits subsequent findings of inadequacy and repetitive amendments of a DEIS.

- This same section further stipulates that following a finding that a DEIS is adequate and a filing of notice of completion of the DEIS, a "minimum public comment period" of 30 days must be provided. The use of the word "minimum" implies that a longer public review period can be established in the agency's discretion.

Section 617.9(a) also allows the lead agency to hold a public hearing on the DEIS if that will "aid the agency decision-making process." Where a public hearing is to be held, it must be conducted within 60 days of the filing of the notice of completion of the DEIS. New York law allows public hearings to be continued at the next regularly scheduled meeting of the agency when necessary to give interested parties adequate time to comment. The more controversial a project, the more likely the public hearing is to be held over for one or more subsequent meetings of the agency. Public comments may be received by the lead agency for ten days following the close of the public hearing.

- Section 617.9(a) also requires that a Final Environmental Impact Statement (FEIS) must be prepared within 45 days after the close of the public hearing. It further stipulates, however, that "the last date for preparation and filing of the FEIS may be extended: (a) if it is determined that additional time is necessary to prepare the statement adequately, or (b) if problems with the proposed action requiring material reconsideration or modification have been identified." In addition, a Supplemental Environmental Impact Statement (SEIS) can be required of the sponsor at this time addressing significant adverse environmental impacts not addressed adequately in the EIS that arise from "newly discovered information or a change in circumstances related to the project."

- Section 617.14 of the regulations recognizes the authority that local governments have to adopt stricter environmental review procedures and standards, "no less protective of environmental values." It states that a local agency may "vary the time periods established in this Part for the preparation and review of SEQR documents, for the conduct of public hearings, in order to coordinate the SEQR environmental review process with other procedures relating to the review and approval of actions." Any additional procedures or time periods established under local agency regulations of this type must also be followed.

- Once an FEIS is prepared and filed, under § 617.11, the lead agency has 30 days to file its written findings statement and decide whether or not to approve the action. Because of the many provisions that allow for the suspension,

extension, and rolling over of time periods, several years could pass from the date of initial application to the date of this final decision.