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John R. Nolon

Elisabeth Haub School of Law at Pace University

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Community Involvement: Facilitation Adds Flexibility to Land Use Decision Making

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John R. Nolon

[Professor Nolon is a Professor at Pace University School of Law and the Director of its Land Use Law Center.]

Abstract: SEQRA, the New York State Environmental Quality Review Act, creates a process whereby public actions are reviewed with the intent to mitigate the adverse environmental impacts of those actions. Recently decided New York case law has created flexibility in the SEQRA process by allowing developers, among others, to revamp proposed projects early in the application process in order to expedite SEQRA and save substantial amounts of money. A New York court held that using public meetings to garner information and negotiate different aspects of a proposed project, and a determination of a negative declaration (the proposed project will have no significant adverse environmental impact) was a proper decision under SEQRA. Professional facilitators have become an important tool to help guide the SEQRA process into being more efficient and cost effective.

Responsibilities of Local Land Use Agencies Under the Act

The State Environmental Quality Review Act (SEQRA) became effective in 1975. (Article 8 of the Environmental Conservation Law.) Its purpose is to avoid or minimize the adverse environmental effects of public actions that affect the environment. Local agencies that approve development and land use proposals are required to take a hard look at such proposals to determine whether they have a significant adverse impact on the environment. If no such impact is discerned, a negative declaration is made and the environmental impact review process ceases.

When one or more adverse impacts are found, an Environmental Impact Statement (EIS) must be prepared, methods of mitigating those impacts identified, and the agency must act to minimize or avoid adverse environmental effects to the maximum extent practicable, consistent with social, economic and other essential considerations. One means of discharging this obligation is to impose conditions on the agency's approval of the proposal that mitigate the identified negative impacts.

Negotiating the Proposal in the Early Stage of SEQRA

In a somewhat controversial decision, the Court of Appeals breathed significant flexibility into the SEQRA review process. (*Merson v. McNally*, 90 NY2d742 (1997)). The issue in that case was whether a project which, as originally proposed, involved several potentially large environmental impacts could be redesigned in the early SEQRA process to avoid having such negative impacts. If so, this would end the environmental review process and save the time and cost involved in preparing and reviewing an Environmental Impact Statement.

The agency involved in the *Merson* case was the Planning Board in the Town of Philipstown. The owner of a mining site submitted a full Environmental Assessment Form as required by SEQRA along with its application to the Board for a special permit to conduct mining operations. In an unusual move, the Planning Board conducted a series of open meetings with the project sponsor, other involved agencies and the public. As a direct result of the input received at these meetings, the applicant revised the project to avoid any significant negative impacts. The Planning Board then issued a negative declaration, finding that the project, as now configured, would not negatively affect the environment. The plaintiffs, a group of community residents, claimed that the Board's action constituted a conditional negative declaration which, under SEQRA regulations, cannot be issued for the type of action involved here to avoid going the next step and preparing an Environmental Impact Statement.

The Court of Appeals disagreed finding that the Planning Board had conducted an "open and deliberative process" characterized by significant "give and take." It described the Planning Board's actions as "an open process that also involved other interested agencies and the public" rather than "a bilateral negotiation between a developer and lead agency." It found that the changes made in the proposal were not the result of conditions imposed by the Planning Board but, instead, "adjustments incorporated by the project sponsor to mitigate the concerns identified by the public and the reviewing agencies" As one source of authority for this degree of flexibility in the early environmental review process, the Court pointed to the SEQRA regulations that describe the purpose of requiring an applicant to file a full Environmental Assessment Form: "[The form is] intended to provide a method whereby applicants and agencies can be assured that the determination process has been orderly, comprehensive in nature, yet flexible enough to allow introduction of information to fit a project or action." (6 NYCRR 617.20, appendix A.)

In *Merson*, the Planning Board's declaration that the revised mining project involved no significant negative impacts on the environment saved the applicant the expense of preparing an Environmental Impact Statement (EIS) which can expand the project review process by a year or more. The EIS stage of the environmental review process has been criticized generally as requiring

sponsors to prepare costly studies and reports that examine issues not truly relevant to the impacts of the project and for not involving the affected public in an early and meaningful way in determining what the EIS should address and how it should be prepared. The critics suggest that these two problems are related: if members of the public are not effectively involved when the scope of the EIS is designed, they will raise issues and demand more and better studies when they do become involved later in the process.

In 1996, the Department of Environmental Conservation revised its SEQRA regulations, in part to respond to these criticisms. The revised regulations contain a process for developing a scope of the EIS to eliminate the study of irrelevant or nonsignificant impacts and to involve the public in developing this scope. (6 NYCRR 617.8.) Scoping, that is the preparation of a scope and methodology for preparing an EIS, is done early in the SEQRA process. When an agency makes a positive declaration that a proposal will involve significant adverse environmental impacts, the next step is to prepare a scope of the required EIS.

The scoping process is an optional step under the regulations. When it is done, the lead agency “must include an opportunity for public participation.” The revised regulations allow agencies to secure public input through the use of meetings, exchanges of written materials, or other means. The revised regulations caution that “all relevant issues should be raised before the issuance of the final written scope.” They then provide that any person raising issues after that time must provide to the lead agency a written statement that explains why the information requested was not identified during scoping and why it should be included at some later stage of the review.

This attempt to discourage delayed requests to revise the scope of an EIS is important because it allows the EIS to be conducted in a more cost-effective and timely manner and to avoid delays later on when new issues may be raised by an interested public. If the scoping process is done correctly and all interested parties are involved and given a meaningful opportunity to influence the scope, then the likelihood of significant issues being raised in the later stages of the review period is reduced greatly. Here, again, volunteer boards, like the Philipstown Planning Board, are challenged to create a comprehensive, open, and deliberate decision-making process.

The Philipstown Planning Board is somewhat typical of the volunteer boards in New York that are charged with environmental review responsibility as they consider applications for subdivision and site plan approval and for the issuance of special permits and variances. There are approximately 25,000 volunteer board members in the state. As the *Merson v. McNally* case illustrates, they are the ones who must design and conduct the orderly, “open and deliberative process” that was essential to the Court’s decision to uphold the negative declaration issued by the Planning Board in that matter. They, too, are

required to develop scoping processes that are open, inclusive and effective means of involving the correct parties in a meaningful way.

Various technical terms are used to describe this process. The Court found that it was not a “bilateral negotiation.” Nor was it mediation. Mediation involves a trained, neutral outsider who manages a bilateral or multilateral process of negotiating the interests of the parties involved in a controversy. What the members of the Philipstown Planning Board did in the *Merson* case is more properly called facilitation of a community decision-making process.

Facilitating the Land Use Decision-Making Process

Facilitation is a technique that may be used to manage the community decision-making process so that controversies are avoided. Facilitation uses the same strategic approach as mediation. It involves the identification of all the parties who have an important interest in the matter, convening these parties, and holding discussions among them that identify their true interests, leading to decisions that are based on those interests and secure their support.

This process is extremely flexible and can be led or guided by any number of participants in the normal land use process. The impetus for proper facilitation can come from the chair of a land use agency, one of its members, an applicant, a locally elected leader or staff member, or any number of potential opponents of the matter before the board. Because of its broad applicability, particularly to the critical SEQRA review process, it is important that facilitation be properly understood and conducted.

Facilitation Explained

A facilitator supplements the traditional leadership roles played by the volunteer members of local land use bodies such as planning boards and zoning boards of appeals. Facilitators are process experts who collaborate with board chairs and members to design and implement effective procedures that enable those affected by a pending decision to become productively involved, to express their true interests and to see decisions made that consider those interests. This frees the decision maker to focus on the substantive issues under discussion and to maintain the broader perspective needed for effective community leadership. It also insures that processes meet the standards used by the Court of Appeals in *Merson* to determine whether the process was sufficiently comprehensive, inclusive, deliberate, and open.

Experience indicates that training is integral to a facilitator’s success. Facilitators need to know how effective decision-making processes are conducted, the roles of the facilitator, decision maker, and other participants, and how the facilitator confronts and solves the problems that arise. They must learn how to prepare for meetings, begin a meeting, set agendas, express interests,

define problems, generate optional solutions, assess solutions, reach agreements, and implement and monitor agreements.

It helps the facilitator to play an effective role in the decision-making process if the facilitator has a neutral relationship with the participants and an impartial attitude toward the issues under discussion. This makes it more difficult, though by no means impossible, for an elected or appointed official to play the facilitator's role. In addition, the facilitator should complement the decision maker's role in the process, a fact that further complicates an involved board member being the process facilitator.

To fulfill the role effectively, a facilitator should have several discrete attitudes and skills. Chief among these are a respect for the participants and their interests, an ability to listen to statements and help participants state their true interests clearly, understanding how to synthesize discussions and summarize conclusions, an openness to new ideas and patience with dissenters.

The establishment of a formal approach to facilitated land use decision-making faces a number of obstacles. Facilitators must be identified and prepared for service in some fashion. The community must be educated regarding the benefits of this new and different approach to decision-making. There is a general lack of awareness of, and support for, collaborative processes of this kind. If a facilitator is an established community leader, her objectivity may be questioned, and, if not, her credibility may be suspect. The job of identifying and involving credible representatives of all involved interest groups in the community is a difficult one because of the varying states of organization and effectiveness of these groups.

Conclusion

The development of a comprehensive plan, amendments to the zoning ordinance or the adoption of significant new land use regulations are the types of actions that call for broad community participation. Decisions on applications for subdivision, site plan and special permit approval can raise significant land use issues that affect numerous interests groups who need to be involved in the process. In all of these cases, elected or appointed leaders of the community are required to design processes, establish agendas, respond to questions, run meetings and follow-up on those meetings. Calling on a facilitator to assist with this process can improve that process and ease the pressures on the ultimate decision makers freeing them to concentrate on the substantive outcome rather than the process itself.

There are many recent examples of effective facilitation, from variance procedures being facilitated regularly by the chair of a zoning board of appeals to a member of a conservation advisory board facilitating an entire community planning process to revitalize the village's waterfront. The Planning Board in

Philipstown met the Court of Appeal's due process concerns by the way in which it involved the public and other agencies in its environmental review. These are encouraging signs that there is hope for an improved approach to environmental and land use decision making in New York.