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Village of Ossining v. The Planning Board of the Town of Ossining: When SEQRA Leaves No Alternative But to Study the Alternative

Jane P. Builder

A recent New York decision underscores the importance of the consideration of alternatives in an environmental impact statement (EIS). The author explores the significance of this decision for land use decision makers and for environmental protection of watershed lands in New York State.

I. Introduction

Following the example set by the federal government's National Environmental Policy Act, fourteen states, the Commonwealth of Puerto Rico, and the District of Columbia have enacted wide-ranging environmental impact assessment¹ statutes to address the problems associated with unbridled development and the destruction of natural resources.² These stat-

1. "Environmental impact assessment" is defined as "the identification and evaluation of the environmental consequences of a proposed development and of the measures intended to minimize adverse effects." *DICTIONARY OF THE ENVIRONMENT* 142 (3d ed. 1989).

2. The federal government enacted the National Environmental Policy Review Act (NEPA), 42 U.S.C. §§ 4321-4370a, in 1969. The state statutes are as follows: California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000-21177 (West 1986 & Supp. 1991); Connecticut Environmental Protection Act of 1971, CONN. GEN. STAT. ANN. §§ 22a-1 to -27 (West 1985 & Supp. 1990); Hawaii has enacted, HAW. REV. STAT. §§ 343-1 to -8 (1985 & Supp. 1989); Indiana Environmental Policy Act, IND. CODE ANN. §§ 13-1-10-1 to -8 (Burns 1990); Maryland Environmental Policy Act, MD. NAT. RES. CODE ANN. §§ 1-301 to -305 (1989 & Supp. 1990); Massachusetts Environmental Policy Act, MASS. GEN. LAWS ANN; ch. 30, §§ 61-62H (West 1979 & Supp. 1990); Minnesota Environmental Policy Act, MINN. STAT. ANN. §§ 116D.01 to -07 (1978 & Supp. 1989); Montana Environmental Policy Act, MONT. CODE ANN. §§ 75-1-101 to -324 (1989); New York State Environmental Quality Review Act, N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to -0117 (McKinney 1984 & Supp. 1991); North Carolina Environmental Policy Act of 1971, N.C. GEN. STAT. §§ 113A-1 to -10 (1971); South Dakota Envi-

utes typically require the preparation of an environmental impact statement (EIS).³ Of these statutes, those of New York⁴ and California⁵ mandate that less environmentally harmful alternatives to a proposal, less likely to harm the environment, be detailed in the EIS and, if feasible, pursued as the alternate course of action. Other states requiring the inclusion of alternatives in an EIS, follow the federal government and merely require that alternatives be discussed in an EIS and considered by the approving agency.⁶

The New York State Environmental Quality Review Act (SEQRA)⁷ requires that an agency⁸ prepare an EIS⁹ for any agency action¹⁰ which may have a significant effect on the environment.¹¹ The EIS¹² must contain a detailed statement set-

ronmental Policy Act, S.D. CODIFIED LAWS ANN. §§ 34A-9-1 to -13 (1986 & Supp. 1990); Virginia Environmental Quality Act, VA. CODE ANN. §§ 10.1-1200 to -1221 (1989 & Supp. 1990); Washington State Environmental Policy Act of 1971, WASH. REV. CODE ANN. §§ 43.21C.010 to .21c910 (1983 & Supp. 1991); Wisconsin Environmental Policy Act, WIS. STAT. ANN. § 1.11 (West 1986 & Supp. 1990); Puerto Rico, Public Policy Environmental Act, P.R. LAWS ANN. tit. 12, §§ 1121-1142 (1978 & Supp. 1988). The District of Columbia has recently enacted the District of Columbia Environmental Policy Act of 1989, D.C. CODE ANN. §§ 6-981 to -990 (1989 & Supp. 1990). See also Robinson, *SEQRA's Siblings: Precedents from Little NEPAs in the Sister States*, 46 ALB. L. REV. 1155 (1982).

3. "Environmental impact statements" are defined as "[d]ocuments which are required by federal and state laws to accompany proposals for major projects and programs that will likely have an impact on the surrounding environment." BLACK'S LAW DICTIONARY 534 (6th ed. 1990).

4. N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to -0117 (McKinney 1984 & Supp. 1991). Agencies are required to "act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects . . ." *Id.* § 8-0109(1). See *infra* notes 40-45 and accompanying text.

5. CAL. PUB. RES. CODE §§ 21000-21177 (West 1986 & Supp. 1991). "[I]t is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects . . ." *Id.* § 21002.

6. See, e.g., NEPA 42 U.S.C. § 4332(C) (1988); HAW. REV. STAT. §§ 343-5; MINN. STAT. ANN. § 116D.04; MONT. CODE ANN. § 75-1-2-01.

7. N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to -0117.

8. See *infra* note 29 for the definition of "agency."

9. N.Y. ENVTL. CONSERV. LAW § 8-0105(7).

10. See *infra* note 30.

11. See *infra* note 27.

12. See *supra* note 3.

ting forth and describing possible alternatives to the proposed action.¹³ The description of alternatives enables an agency to make an informed choice among the original proposal and the alternatives presented. The choice made must be the one that is the least damaging to the environment while consistent with economic and social factors.¹⁴ An agency's failure to consider the alternatives in an EIS, or failure to consider alternatives in sufficient detail, defeats SEQRA's purpose "to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources. . . ."¹⁵ Such a failure may cost the applicant its agency approval if subject to judicial review, as it did in *Village of Ossining v. Planning Board*.¹⁶

Ossining involved a developer's proposed subdivision of property adjoining the fifteen-acre Indian Brook Reservoir. The reservoir furnishes drinking water to 30,000 people living in both the Town and the Village of Ossining.¹⁷ The developer's preliminary plat¹⁸ drawing was approved by the Planning Board of the Town of Ossining¹⁹ ("the Board") despite the fact that seventeen of the fifty-five²⁰ proposed lots were located within the watershed.²¹ The Village of Ossining, concerned about its water supply, sought to have this approval vacated on the grounds that the Board had failed to consider alternatives²² to the proposal, as required by SEQRA.²³ The

13. N.Y. ENVTL. CONSERV. LAW § 8-0109(2)(d). See *infra* note 37.

14. N.Y. ENVTL. CONSERV. LAW § 8-0109(1). "Agencies shall . . . act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects, including effects revealed in the environmental impact process." *Id.*

15. *Id.* § 8-0101.

16. No. 88-16248 (N.Y. Sup. Ct. Aug. 10, 1989).

17. *Id.* at 1.

18. The term "plat" is defined as "[a] map of a town, section, or subdivision showing the location and boundaries of individual parcels of land subdivided into lots, . . . usually drawn to scale." BLACK'S LAW DICTIONARY 1036 (5th ed. 1979).

19. *Ossining*, No. 88-16248 at 1.

20. *Id.* at 2.

21. The term "watershed" is defined as "[t]he whole region or area contributing to the supply of a river or lake; drainage area; catchment area or basin." 94 C.J.S. *Watershed* 464 (1956 & Supp. 1990).

22. See *infra* note 37.

New York Supreme Court annulled the preliminary plat approval, because the Board, in its appraisal of the EIS, had not weighed an alternative layout which completely avoided the watershed, and thus the Board had not lived up to its SEQRA obligations.²⁴

Ossining is significant for two reasons. It represents the first time in New York State that an EIS was struck down on the issue of alternatives. It also represents the first time an applicant was required to study a specific alternative to a proposed action in sufficient detail.²⁵ Thus, *Ossining* serves as an example of the substantive role SEQRA plays in land use decisions. The results of this decision may ultimately afford a higher level of protection to watershed lands in New York State.²⁶

Part II of this note will discuss the general requirements of SEQRA and focus on the "discussion of alternatives" requirement in an EIS. Part III will set forth the facts and holding of *Ossining*; and Part IV will analyze the substantive impact that *Ossining* may have on both decision makers, and the future development of watershed lands in New York State.

23. *Ossining*, No. 88-16248 at 7.

24. *Id.* at 11.

25. *Ossining*, No. 88-16248 at 10-12. See *infra* notes 52-77 and accompanying text.

26. New York State has approximately 70,000 miles of rivers and streams and more than 4,000 freshwater lakes and ponds. These supply an average of over 50 billion gallons of freshwater per day. Much of this surface water finds its way into municipal drinking water supplies serving millions of people. R. Hennigan, Final Report Water Supply Source Protection Rules and Regulations Project 28 (March 1981) (prepared by State University of New York College of Environmental Science and Forestry). In the past, these sources were located in isolated and pristine areas. However, the landscape has changed dramatically. Watersheds are now under siege by booming suburbs and cities. In some instances this has resulted in a deterioration of water quality. A striking example is to be found in the New York City Croton Reservoir System which is New York City's oldest reservoir system. It has a storage capacity of 86.6 billion gallons in a drainage area of 375 square miles. Iwan, *Drinking Water Quality Concerns of New York City, Past and Present*, 502 ANNALS OF THE NEW YORK ACADEMY OF SCIENCES at 184 (1987). "Relatively high primary productivity associated with occasional taste and odor effects and zooplankton population peaks are believed to be related to drainage characteristics and the associated effects of a growing population and real estate development of the surrounding counties." *Id.*

II. SEQRA Background

The aim of SEQRA is to prevent damage to the environment²⁷ by promoting environmentally conscious decision making²⁸ by agencies.²⁹ When an agency considers any action which may have a significant effect on the environment,³⁰ it is required to assess and balance environmental impacts along with economic and social factors, before choosing the proposal or the alternative that causes the least harm to the environment.³¹ By incorporating environmental factors into the decision making process at the earliest possible time, the legislature created an early warning system that will "sound off" before an agency approves, and an applicant embarks upon, a course of action which results in damage to the environment.³²

27. SEQRA defines "environment" broadly as "the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character." N.Y. ENVTL. CONSERV. LAW § 8-0105(6).

28. *Id.* § 8-0103(8). "It is the intent of the Legislature that all agencies conduct their affairs with an awareness that they are stewards of the air, water, land and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and future generations." *Id.*

29. SEQRA defines "agency" as "any state or local agency." *Id.* § 8-0105(3). A "state agency" is defined as "any state department, agency, board, public benefit corporation, public authority or commission." *Id.* § 8-0105(1). A "local agency" is defined as "any local agency, board, district, commission or governing body, including any city, county, and other political subdivision of the state." *Id.* § 8-0105(2).

30. SEQRA defines "action" to include:

(i) projects or activities directly undertaken by any 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. § 8-0105(4).

31. See *supra* note 14. For a discussion of the social and economic factors to be examined in the SEQRA balancing process, see Ulasewicz, *The Department of Environmental Conservation and SEQRA: Upholding its mandates and charting parameters for the elusive socio-economic assessment*, 46 ALB. L. REV. 1255-84 (1982).

32. See *Matter of Town of Henrietta v. Department of Env'tl. Conservation*, 76 A.D.2d 215, 430 N.Y.S.2d 440 (1980). "The EIS . . . is meant to be more than a simple disclosure statement . . . it is to be viewed as an environmental alarm bell whose purpose is to alert responsible public officials to environmental changes before they have reached ecological points of no return." *Id.* at 220, 430 N.Y.S.2d at 445.

The assessment of environmental impacts, the balancing of factors, and the subsequent decisions mitigating adverse effects are all made on the basis of an EIS.³³

A SEQRA EIS must contain the following: a detailed statement setting forth a description of the proposed action,³⁴ an identification of the environment to be affected,³⁵ a list of unavoidable adverse environmental impacts,³⁶ and a detailed description of alternatives to the proposal³⁷ (including a no-action alternative).³⁸ When the agency is ready to approve or disapprove the proposal, it must make an explicit finding that the procedural requirements of SEQRA have been met, the appropriate balancing has occurred, and the adverse effects will be minimized or avoided.³⁹

The SEQRA EIS is not solely a procedural requirement.⁴⁰ Unlike the EIS requirement in the National Environmental Policy Act (NEPA),⁴¹ the SEQRA EIS plays an important substantive role, since the agency's final choices with respect to particular proposals are shaped by the EIS process.⁴² SEQRA requires agencies to "*act and choose alternatives* which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects including effects re-

33. N.Y. ENTLV. CONSERV. LAW § 8-0109(8).

34. *Id.* § 8-0109(2)(a).

35. *Id.*

36. *Id.* § 8-0109(2)(c).

37. *Id.* § 8-0109(2)(d).

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 . . . 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.

Id. § 8-0109(2).

38. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.14(f)(5) (1986).

39. N.Y. ENVTL. CONSERV. LAW § 8-0109(8).

40. See *infra* notes 42-44 and accompanying text.

41. 42 U.S.C. §§ 4321-4370a (1988).

42. NEPA only requires agencies to consider alternatives in the preparation of the environmental impact statements and not necessarily to act upon them as is required by SEQRA. 42 U.S.C. § 4332 (1988). See generally Council of Environmental Quality, Executive Office of the President, Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 40 C.F.R. § 1502.14 (1990).

vealed in the environmental impacts statement process.”⁴³ SEQRA thus imposes “action forcing” requirements on state and local agencies⁴⁴ and goes beyond its progenitor, NEPA.⁴⁵

The central part of the evaluation process is the analysis of alternatives. This effort joins together the requirements of the SEQRA EIS and allows a comparative assessment by the agency. The analysis of alternatives makes the agency’s decision meaningful in that it grounds the choice in an assessment of environmental tradeoffs. A description of alternatives is critical because without it an agency’s decision and conclusions appear “detached from and unrelated to environmental concerns.”⁴⁶ For this reason, the discussion of alternatives in an EIS has been called the “linchpin” of the EIS process.⁴⁷

The consideration of alternatives in a SEQRA EIS and the range of alternatives that must be examined comprise the most frequently litigated component of the SEQRA EIS process.⁴⁸ Regulations promulgated by the New York State Department of Environmental Conservation⁴⁹ provide only general guidelines as to the contents and level of detail required in a discussion of alternatives.⁵⁰ They require that the level of detail in the description and evaluation “be . . . sufficient to permit a comparative assessment of the alternatives discussed.”⁵¹ Thus, due to the broad nature of the regulations,

43. N.Y. ENVTL. CONSERV. LAW § 8-0109(1) (emphasis added).

44. Gitlen, *The Substantive Impact of the SEQRA*, 46 ALB. L. REV. 1241, 1248 (1982).

45. *See supra*, note 42.

46. *Monroe County Conserv. Council, Inc. v. Volpe*, 472 F.2d 693, 698 (2d Cir. 1972) (Secretary of U.S. Dep’t. of Transportation enjoined from highway funding approval until alternatives were discussed in the EIS, as required by NEPA).

47. *Id.* at 697-98.

48. Bowers, *New York’s SEQRA in the Courts*, 5 PACE ENVTL. L. REV. 25, 33 (1987).

49. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.14(f)(2). SEQRA authorizes the Department of Environmental Conservation to provide the regulatory framework for the statute. *Id.* §§ 617.1-617.21.

50. *Id.* Section 617.14(f)(5) provides for “a description and evaluation of the range of reasonable alternatives to the action which are feasible, considering the objectives and capabilities of the project sponsor” *Id.* “EIS’s should be analytical and not encyclopedic.” *Id.* § 617.14(b).

51. *Id.* § 617.14(f)(5).

the adequacy of a discussion of alternatives has proven to be controversial.⁵² Courts interpreting the sufficiency of a discussion of alternatives in a SEQRA EIS have so far set forth only general guiding principles.⁵³

In *Webster Associates v. Town of Webster*,⁵⁴ a competing developer challenged agency approval which had been granted to a rival for the construction of a shopping mall. The challenge was based on the fact that the competitor's plan had not been included in the EIS as one of the alternatives to the proposal.⁵⁵ The New York Court of Appeals held that the omission was not fatal even though the plan excluded from the EIS was an obvious alternative to the proposed action.⁵⁶ Noting that the competing proposal had been debated extensively by both the general public and public officials during the approval process,⁵⁷ the court found the final assessment to be based on "an awareness of all reasonable options other than the proposed action" and that a decision based on such an awareness fulfilled the purpose of SEQRA.⁵⁸

In *Aldrich v. Pattison*,⁵⁹ where a challenge to an environmental impact statement for a resource recovery plant was rejected, the Appellate Division, Second Department stated "not every conceivable environmental impact, mitigating mea-

52. See, e.g., *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 494 N.E.2d 429, 503 N.Y.S.2d 298 (1986); *Webster Assoc. v. Town of Webster*, 59 N.Y.2d 220, 451 N.E.2d 189, 464 N.Y.S.2d 431 (1983); *Bronfman v. Flacke*, 127 A.D.2d 833, 512 N.Y.S.2d 255, *appeal denied*, 70 N.Y.2d 601, 512 N.E.2d 549, 518 N.Y.S.2d 1023 (1987); *Aldrich v. Pattison*, 107 A.D.2d 258, 486 N.Y.S.2d 23 (1985); *Horn v. IBM*, 110 A.D.2d 87, 493 N.Y.S.2d 184 (1985), *appeal denied*, 67 N.Y.2d 602, 490 N.E.2d 556, 499 N.Y.S.2d 1027 (1986); *Coalition Against Lincoln West, Inc. v. City of New York*, 94 A.D.2d 483, 465 N.Y.S.2d 170, *aff'd*, 60 N.Y.2d 805, 457 N.E.2d 795, 469 N.Y.S.2d 689.

53. See, e.g., *Jackson*, 67 N.Y.2d 400, 494 N.E.2d 429, 503 N.Y.S.2d 298; *Webster*, 59 N.Y.2d 220, 451 N.E.2d 189, 464 N.Y.S.2d 431; *Bronfman*, 127 A.D.2d 833, 512 N.Y.S.2d 225; *Aldrich*, 107 A.D.2d 258, 486 N.Y.S.2d 23; *Horn*, 110 A.D.2d 87, 493 N.Y.S.2d 184; *Lincoln West*, 94 A.D.2d 483, 465 N.Y.S.2d 170.

54. 59 N.Y.2d 220, 451 N.E.2d 189, 464 N.Y.S.2d 431 (1983).

55. *Id.* at 227, 451 N.E.2d at 191, 464 N.Y.S.2d at 433.

56. *Id.* at 228, 451 N.E.2d at 192, 464 N.Y.S.2d at 433.

57. *Id.* at 228, 451 N.E.2d at 192, 464 N.Y.S.2d at 434.

58. *Id.*

59. 107 A.D.2d 258, 486 N.Y.S.2d 23 (1985).

sure or alternative must be identified and addressed”⁶⁰ The court held that if the EIS considers a “continuum of options” similar to one raised by those seeking to challenge the EIS, then the EIS will have met the requirement of SEQRA.⁶¹

Further clarification of what constitutes the range of reasonable alternatives occurred in *Coalition Against Lincoln West, Inc. v. City of New York*.⁶² In response to a challenge of the New York City Board of Estimate’s approval of an EIS for a large scale residential and commercial development on the city’s upper west side, the Appellate Division, First Department stated that “. . . [T]he rule is one of reasonableness and balance.”⁶³ [T]he only information that must be considered is that which permits “a reasoned conclusion.”⁶⁴

A factor which must be considered in delineating the range of reasonable alternatives, is whether the applicant is a public or private entity.⁶⁵ In *Horn v. IBM*,⁶⁶ a private developer was not required to discuss alternative sites in the EIS, as long as the developer examined alternative uses.⁶⁷ The Appellate Division, Second Department determined that requiring the developer to purchase other sites for consideration would require a commitment of resources beyond the average developer’s range.⁶⁸ Based on this decision, requirements placed on government applicants to investigate alternatives are much broader than those required of private applicants.

60. *Id.* at 266, 486 N.Y.S.2d at 29.

61. *Id.* at 266, 486 N.Y.S.2d at 30.

62. 94 A.D.2d 483, 465 N.Y.S.2d 170, *aff’d*, 60 N.Y.2d 805, 469 N.Y.S.2d 689, 457 N.E.2d 795 (1983).

63. *Id.* at 491-92, 465 N.Y.S.2d at 176.

64. *Id.* at 492, 465 N.Y.S.2d at 177.

65. *See infra* note 70.

66. 110 A.D.2d 87, 493 N.Y.S.2d 184 (1985), *appeal denied*, 67 N.Y.2d 602, 490 N.E.2d 556, 499 N.Y.S.2d 1027 (1986).

67. *Id.* at 95-96, 493 N.Y.S.2d at 191. “The . . . EIS submitted by IBM contained an analysis of alternative uses . . . [i.e.]: . . . maintaining the site in its present use, developing the parcel for single family housing, . . . multi-family housing . . . and general office development.” *Id.* at 94, 493 N.Y.S.2d at 190.

68. *Id.* “[I]t would be an illogical and unwarranted extension of SEQRA to require every private developer to address in its EIS the possible development of other sites over which it has no control, which might not be for sale, or which are not economically feasible.” *Id.*

The *Horn* decision states that it is unreasonable to require the private sector to meet the same standards as government agencies.⁶⁹ The rationale for applying different standards stems from the fact that the government possesses the power of eminent domain and therefore has a broader range of alternative sites to choose from.⁷⁰

The EIS “. . . [s]hould not contain more detail than is appropriate considering the nature and magnitude of the proposed action and the significance of its potential impacts”.⁷¹ While the degree of detail with which each alternative must be discussed varies with the circumstances,⁷² such detail must enable the agency to compare and assess the alternatives discussed with the original proposal.⁷³ For example, in *Bronfman v. Flacke*, the Appellate Division, Second Department found a discussion adequate where there was detailed comparative numerical and descriptive data in chart form with supporting documents.⁷⁴

In choosing among alternatives, the legislature has given the agencies latitude.⁷⁵ When an agency decides to approve an action it must “make an explicit finding that the requirements of SEQRA have been met and that consistent with social, economic, and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided.”⁷⁶ As a result of the deference afforded governmental agencies, courts do not require a particular result

69. *Id.*

70. *Id.* at 95, 493 N.Y.S.2d at 190-91. The critical factor in determining whether a discussion of alternatives in an environmental impact statement is sufficient is whether the applicant is a private developer or a government agency. *Id.* A requirement that a private developer purchase several sites in order that the agency may select the one with the least impact, would be too burdensome. *Id.*

71. N.Y. ENVTL. CONSERV. LAW § 8-0109(2).

72. *Webster Assoc. v. Town of Webster*, 59 N.Y.2d 220, 228, 451 N.E.2d 189, 192, 464 N.Y.S.2d 431, 434 (1986).

73. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.14(f)(5).

74. 127 A.D.2d 833, 835, 512 N.Y.S.2d 225, 228, *appeal denied*, 70 N.Y.2d 601, 512 N.E.2d 549, 518 N.Y.S.2d 1023 (1987). See generally *Bowers*, *supra* note 48.

75. *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 417, 494 N.E.2d 429, 436, 503 N.Y.S.2d 298, 305 (1986).

76. N.Y. ENVTL. CONSERV. LAW § 8-0109(8).

in particular instances.⁷⁷ The only requirement is that an agency take a "hard look," using reasonableness and balance in its decision making.⁷⁸

III. Village of Ossining v. Town of Ossining

A. *The Controversy*

The residential subdivision proposed by the developer concerned 53.5 acres located in the Town of Ossining, New York.⁷⁹ Thirteen of those acres comprised part of the watershed of the Indian Brook Reservoir which supplies water to both the Town and the Village of Ossining.⁸⁰ The developer's plan placed seventeen of fifty-five lots on the watershed.⁸¹ The village, as owner of the reservoir and out of concern over the future integrity of its water supply, urged the developer to locate the homes on the 40.5 acres of non-watershed land.⁸² Nevertheless, the Board approved the developer's plan which dispersed homes throughout the entire parcel.⁸³ A channel or a swale⁸⁴ to divert surface water runoff and a curtain drain⁸⁵

77. *Jackson*, 67 N.Y.2d at 417, 494 N.E.2d at 436, 503 N.Y.S.2d at 305. "Nothing in the law requires an agency to reach a particular result on any issue, or permits the courts to second-guess the agency's choice . . ." *Id.*

78. *H.O.M.E.S. v. New York State Urban Dev. Corp.*, 69 A.D.2d 222, 418 N.Y.S.2d 827 (1979). When there is a challenge to the sufficiency of an EIS for its scope or lack of coverage of specific environmental concerns, mitigating measures or project alternatives, the court should apply the "hard look" standard developed by the federal courts. The court should scrutinize the record to see that the agency identified the relevant areas of environmental concern, took a "hard look" at them and made a "reasoned elaboration" of the basis for its determination. *Id.* at 232, 418 N.Y.S.2d at 832.

79. No. 88-16248 at 1 (N.Y. Sup. Ct. Aug. 10, 1989).

80. *Id.* at 2.

81. *Id.*

82. *Id.*

83. *Id.*

84. The term "swale" is defined as "an elongated depression in land that is at least seasonally wet or marshy, is usually heavily vegetated, and is normally without flowing water". WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2305 (1976).

85. A "curtain drain" is "a type of drain consisting of an excavated trench filled with pervious material, such as clean gravel or crushed stone, surrounding a perforated pipe, through whose voids water percolates through and into the pipe, which then flows to an outlet." WESTCHESTER COUNTY DIV. OF WATER QUALITY, BEST MANAGEMENT PRACTICE MANUAL SERIES, STANDARDS AND SPECIFICATIONS FOR CONSTR.

to prevent pollutants from entering the reservoir via groundwater were also approved as part of the plan.⁸⁶ The village sought to have the approvals vacated on the grounds that the Board had failed to consider reasonable alternatives as required by SEQRA.⁸⁷

The draft environmental impact statement (DEIS),⁸⁸ approved by the Board in 1987, concluded that there would be no significant adverse impacts on the reservoir from chemicals applied by homeowners, or from surface runoff, or groundwater.⁸⁹ The DEIS contained comments from the Village Superintendent of Public Works, the county planning board, and two independent consultants retained by the Board.⁹⁰ These comments reflected concern over the effect the project might have on water quality and public health.⁹¹ Although the consultants retained by the Board urged consideration of an alternative plan which would cluster the houses on non-watershed lots, no alternatives were proposed or discussed in the DEIS.⁹²

A final environmental impact statement (FEIS)⁹³ was submitted for fifty-five lots which were to be located throughout the parcel.⁹⁴ The impact statement proposed a swale for some lots and grass filter strips for those lots not protected by the swale.⁹⁵ Comments on the FEIS were made by consultants who advised the Board to prohibit development on those lots

RELATED ACTIVITIES (Nov. 1979).

86. *Ossining*, No. 88-16248 at 2.

87. *Id.* at 7. See also note 50 and accompanying text.

88. N.Y. ENVTL. CONSERV. LAW § 8-0105(8). A "[d]raft environmental impact statement means a preliminary statement pursuant to section 8-0109" *Id.* After a DEIS is filed with an agency, the agency then determines whether it will conduct a public hearing. *Id.* § 8-0109(5). A final Environmental Impact Statement (FEIS) must be prepared within 45 days after the close of any hearing or within 60 days after the filing of the DEIS, whichever occurs last. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.8(e) (1987).

89. *Ossining*, No. 88-16248 at 2.

90. *Id.* at 2-3.

91. *Id.* at 3.

92. *Id.* at 4.

93. See *supra* note 88.

94. *Ossining*, No. 88-16248 at 2-4.

95. *Id.* at 4.

which contribute surface or groundwater to the reservoir. Comments were also made by the village, supporting the consultants' contention and recommending that the town prohibit construction on the watershed.⁹⁶ A revised FEIS was submitted which eliminated the grass filter strips and located the proposed swale on all lots but the one closest to the reservoir.⁹⁷ No alternatives to the proposal were considered within this FEIS.⁹⁸

In August 1988, the Board adopted its SEQRA findings and made no mention of any alternatives to the proposal.⁹⁹ The preliminary plat approval was granted in September 1988.¹⁰⁰ Mitigation of negative environmental effects was to be accomplished by prohibiting construction within 100 feet of the reservoir, by special restrictions on the lot closest to the reservoir, and by requiring homeowners to maintain the swale themselves.¹⁰¹

The village sought a ruling vacating both the preliminary plat approval and the SEQRA findings on the ground that the Board failed to evaluate the alternative of clustering homes in the 40.5 acres outside the reservoir's watershed.¹⁰² The Board maintained: (1) that the challenge to the preliminary plat was premature since the approval was not a final determination on mitigation measures, and (2) that it had satisfied all objections to the DEIS and FEIS and had taken all required "hard looks."¹⁰³

B. *Decision of The Court*

The Appellate Division first addressed and rejected the

96. *Id.*

97. *Id.* at 4-5.

98. *Id.* at 5.

99. *Id.* at 6. The Board did, however, make the assertion that "from among the reasonable alternatives thereto, the Planning Board believes that the Project . . . is one which minimizes or avoids adverse environmental effects to the maximum extent practicable" *Id.* (citation omitted).

100. *Id.* at 6.

101. *Id.* at 7.

102. *Id.*

103. *Id.*

Board's contention that a preliminary plat approval was not a final determination, holding that unless the preliminary plat had been ordered modified by the board, the layout of the proposed subdivision was finally established by the approval.¹⁰⁴ Furthermore, the court held that since preliminary plat approval had been granted, the SEQRA proceedings must have been completed;¹⁰⁵ hence, the approval was properly the subject of an Article 78 proceeding and reviewable by the court.¹⁰⁶

Next, the court dealt with the issue of whether the Board had failed to weigh alternative lot layouts and had failed to explain why it chose a layout partly inside the reservoirs' watershed.¹⁰⁷ The court pointed to two decisions by the Appellate Division, Second Department, as illustrative of what has been considered an adequate discussion of alternatives.¹⁰⁸ The

104. *Id.* at 8.

105. *Id.* at 9.

106. *Id.* New York Civil Practice Law and Rules § 7801 states that:

Except where otherwise provided by law, a proceeding under this article shall not be used to challenge a determination:

1. which is not final or can be adequately reviewed by appeal to a court or to some other body or officer or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application unless the determination to be reviewed was made upon a rehearing, or a rehearing has been denied, or the time within which the petitioner can procure a rehearing has elapsed

N.Y. CIV. PRAC. L. & R. § 7801 (McKinney 1981 & Supp. 1991).

The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or
2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or
3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or
4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

Id. § 7803.

107. *Ossining*, No. 88-16248 at 10-11.

108. *Id.* at 10.

first was *Horn v. IBM*,¹⁰⁹ where a private developer discussed several alternative uses as well as the no-action alternative but was not required to discuss alternative sites. The second was *Bronfman v. Flacke*, where the discussion of alternatives contained detailed comparative numerical data.¹¹⁰ The court criticized the Board for ignoring any particular alternative and for failing to justify its choice and make findings as to why a layout inside the watershed would have less adverse effects than one outside the watershed.¹¹¹ The court found that since the Board had made no "explicit choice of this layout in preference to any other," it had not met its SEQRA obligations.¹¹²

Under the circumstances presented, the court found that the board had failed to take the required "hard look."¹¹³ The court stated that the Board did not understand that its duties under SEQRA are much broader than to simply determine if there is proper mitigation of adverse effects to the reservoir.¹¹⁴ Without the consideration of alternatives, the court stated there was no "weighing process" which would justify the selection of the least harmful alternative.¹¹⁵

IV. Analysis

Ossining adds two precedents under SEQRA. First, the court demanded that the agency give full and equal consideration to a particular alternative. In so doing, the court has upheld the role of all agencies' as ". . . stewards of the air, water, land, and living resources. . . ."¹¹⁶ Second, the decision stakes out watershed lands as deserving and requiring greater con-

109. 110 A.D.2d 87, 493 N.Y.S.2d 184 (1985), *appeal denied*, 67 N.Y.2d 602, 490 N.E.2d 556, 499 N.Y.S.2d 1027 (1986).

110. 127 A.D.2d 833, 512 N.Y.S.2d 255, *appeal denied*, 70 N.Y.2d 601, 512 N.E.2d 549, 518 N.Y.S.2d 1023 (1987).

111. *Ossining*, No. 88-16248 at 10-11.

112. *Id.*

113. *Id.* "The Board had put blinders on and restricted its vision to the layout it approved. Any look at a non-watershed layout alternative, let alone any 'hard look', was shut out of its sight." *Id.* at 11.

114. *Id.*

115. *Ossining*, No. 88-16248 at 11.

116. N.Y. ENVTL. CONSERV. LAW § 8-0103(8).

sideration under SEQRA, with a non-watershed layout to be considered a reasonable alternative.

SEQRA's action forcing mandate requires more than a perfunctory description of alternatives in an EIS. Once the procedural requirement is met, the critical phase begins. The information furnished must facilitate an in depth analysis of the environmental consequences. Then the agency must "act and choose from among the reasonable alternatives that course of action which is the least damaging to the environment."¹¹⁷

Ossining provides that an agency, as the decision making body, must insist on a review of reasonable alternatives, even if the applicant has omitted them. The mere fact that they have surfaced in the procedural phase is enough. Without the ability to weigh reasonable alternatives against the original proposal, the EIS is just an academic exercise, and the agency's decision an empty one.

The specific alternative of a non-watershed layout was not explored by the agency, even though the EIS contained many comments suggesting that it be explored. Comments on the EIS made by the Village Superintendent of Public Works, the Westchester County Planning Board and two independent consultants retained by the Town of Ossining, were ignored by the approving agency. The court held that without the consideration of this particular alternative, the EIS was inadequate and the SEQRA process was incomplete.

Since the alternative to be studied and discussed further entails development completely avoiding the watershed, *Ossining* creates a precedent for any such development in New York State where there exists the possibility of situating the homes on the non-watershed part of the parcel. Protection of a water supply by a non-watershed layout is now to be considered a reasonable alternative which must be explored in an EIS.

Ossining thus serves as an example of the substantive role SEQRA plays in land use decisions. The procedural man-

117. *Id.* § 8-0109(1).

date requiring the study of less harmful alternatives may lead to its selection by the agency. If this happens, SEQRA will have succeeded in shaping the landscape. Whether this particular alternative is selected or not, the results of this decision may ultimately afford a higher level of protection to watershed lands in New York State. Armed with the reasonable standards provided by SEQRA,¹¹⁸ proponents of watershed protection can urge decision makers to fully explore the alternatives to development on the watershed.

After *Ossining*, no agency can ignore reasonable alternatives if they may yield a superior course of action for the environment. All such alternatives must be weighed against the one ultimately chosen, and an explicit finding must be made to justify the choice. Thus, the court has moved the judicial interpretation of SEQRA one step further in providing that environmental issues be given equal consideration with economic and social factors.

V. Conclusion

The court in *Ossining* held that the Town of Ossining Planning Board had to study a specific alternative to constructing a housing development on a reservoir's watershed. The court used SEQRA's procedural requirements to help accomplish the act's goal of environmental protection by holding that the key provision requiring consideration of alternatives must be complied with. Alternatives which may better achieve the goal of environmental protection must be considered and evaluated. That is an agency's obligation.

118. N.Y. COMP. CODES R. & REGS. tit. 6 § 617.14(f)(5) (1986).