NYSBA WINTER 2006 | VOL. 26 | NO. 1

The New York Environmental Lawyer

A publication of the Environmental Law Section
of the New York State Bar Association

A Message from the Chair

Reports and studies make it clear that environmental law, and we, as environmental lawyers, have made quite a significant difference with respect to the environment over the last few decades. Air pollution has dropped; rivers, streams, and lakes have become cleaner; and many species formerly listed as endangered have recovered. The days when a river could catch fire—as did the Cuyahoga River outside of Cleveland in 1969—seem well past.

The proof is in the pudding. For instance, as the EPA recently reported, decreases in emissions of ozone-forming nitrogen oxides signal that air quality throughout the eastern United States is improving. New York and eight other northeastern states recently came to a preliminary agreement to freeze carbon dioxide emissions from power plants at their current levels—and to reduce them by 10 percent over the next 15 years. Three western states—California, Washington, and Oregon—are contemplating a similar accord.

There are positive developments, as well, on the local level. For example, on Long Island, where I live and work, nitrogen discharges into Long Island Sound and Jamaica Bay should be reduced following a court decision requiring upgrades to five large sewage treatment plants. And, in an example of an action that has become almost commonplace by now, the New York Attorney General and the state's Department of Environmental Conservation obtained the cleanup of a solid waste site in Nassau County's Oceanside that they contended had been operating in violation of the law.

New Hurdles

Despite all the successes and advances, the battle is far from over. We are faced with new environmental protection concerns as decaying municipal sewage systems fail to keep up with demands of increasing population density, and water quality is impaired by everything from agricultural production and construction activities to sewer overflows and urban runoff. Mercury contamination is still present in lakes, rivers, and even New York City's reservoirs. The debate over the state's broad soil vapor intrusion programs—investigating the potential impact of contaminants in soil or groundwater on indoor air quality and contemplating steps to mitigate the harm—continues.

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In addition, as the world suffers the consequences of climate change our job as environmental lawyers becomes more complex and, globally, more significant. The death and injuries—the horror—from Hurricane Katrina, arguably a result of global warming, still are not, even at this writing, clearly understood. But, what also cannot be underestimated are the environmental consequences of the disaster, which are likely to affect us for years to come. The 150,000 or so homes that were flooded held contaminants such as fuel, cleaning products and pesticides. It was reported that more than 200 sewage treatment plants were affected. Many small manufacturers as well as large industrial and chemical plants were housed in this area of the country. Their chemical and fuel storage tanks are feared to have leaked into the floodwaters. What will be the effect of pumping that floodwater and the accompanying raw sewage, bacteria, petroleum, heavy metals, pesticides, and toxic chemicals, back into Lake Pontchartrain? How will the lake life and habitat be affected? Will they recover or will there be permanent damage to the ecosystem? What can we as environmental lawyers do to help?

Our Role

Now, as much as ever, members of the bar—environmental lawyers from the public sector, private sector, not-for-profits, and academia—are being called upon to comment, give guidance, and help address these issues. The concept of all of us in our profession working together is what the New York State Bar Association is about. And that is what this Section is all about.

As we have done in the past, and as other environmental lawyers across the country have done, we must continue to devote ourselves to environmental concerns. Together, our efforts will result in further improvements to the environment and the world in which we live for the benefit of future generations.

Miriam E. Villani

From the Editor

The Environmental Law Section's Fall Meeting at The Sagamore on Lake George was a spectacular success. As always, the programs were informative and timely. One of the programs addressed the Supreme Court's recent *Kelo* decision and the general subject of a local government's exercise of the power of eminent domain. Attendees benefited from the panelists' very different interpretations of the decision and whether it portended new legal trends; John Nolon, in particular, argued that it was based on long-established precedent. Panelists also provided valuable perspectives on how much leeway *Kelo*, a federal constitutional law decision, will actually afford local governments, especially if states restrict eminent domain exercised on behalf of private interests by state constitutional law. The discussion was timely, not only because of the intense interest generated by the sharply split *Kelo* decision, and its potential ramifications, but also because of state and local laws that may arise in response to it. Possible legislation is under discussion in New York. The New York State Bar Association is convening a special committee to address the subject. Phil Weinberg, one of the panelists at the Fall Meeting, has been asked to join.

I would be remiss if I failed to mention that more than just business occurred during the Fall Meeting. An outdoor reception and dinner was held on Friday night which benefited from wonderful weather and wonderful company. The Saturday night dinner was well attended and benefited from a case study, organized by Nick Robinson, involving a Tarrytown clean-up and re-development project near the Hudson River. The Section leadership also continued the tradition of making the Fall weekend family-friendly—a policy that no doubt facilitates attendance by many busy parents. My own family joined others on a hike through a nature preserve overlooking Lake George that turned out to be magical. Carl Howard had brought along field guides for birds, mushrooms and other flora and fauna, which became not only a great educational tool for kids and adults alike, but also provided the means for great fun as we all engaged in bird watching and, surprisingly, fungi-spotting.

Harking back for a moment to last spring, the Section welcomed Acting DEC commissioner Denise Sheehan. Lou Alexander, DEC's Assistant Commissioner for Hearings, includes a summary of her remarks and some background information about her in his article. Jordan O'Brien, of St. John's Law School, was a finalist in the Section's Environmental Essay competition. His article addresses the environmental and financial concerns of the proposed redevelopment of the Hudson Yards in New York City—the controversial "stadium" proposal. The *Journal* has traditionally published articles by our finalists. Although the project, at least as proposed by the Bloomberg Administration, may have become moot, thus rendering aspects of this article academic, academic discussions have their value. The article includes a fine discussion of the SEQRA and New York City ULURP processes, a backward glance at the landmark *Westway* litigation in which some of our members were especially prominent, and an analysis of some of the financial aspects of the recently proposed West Side redevelopment. The discussion, in the aggregate, makes for useful reading notwithstanding the demise of the project—a demise rooted in political maneuvering rather than as a result of litigation. Hence, the legal discussion remains pertinent.

Drayton Grant includes an article that addresses "community character." The phrase is ostensibly a standard relevant to SEQRA review, yet, as Drayton notes, it's a bit hard to nail down a precise meaning. One might recall that much New York City environmental litigation during the 1980s-era heyday of large scale development incorporated the standard, and court decisions, which sometimes halted proposed development, took it seriously. New York City, after all, has traditionally been appreciated as a network of neighborhoods which often comprised very distinct communities. One might also observe that recent litigation involving New York City projects seems to relegate a consideration of community character to the margins of environmental concern. The Court of Appeals in recent years also seems willing to abdicate judicial review of the decisions of local planning boards, which, one might worry, bodes ill for challenges to changed land uses that compromise local values and aesthetics. However, the standard is increasingly important for rural areas such as the Catskills and Adirondacks regions. These regions, until recently, enjoyed protections from unwise development by virtue of their relative isolation. Of course, as we all know, sprawl is reaching hitherto distant enclaves. Hence, the general topic is, so to speak, topical. Drayton provides a valuable discussion.

Thomas Hoff Prol, of Whiteman Osterman & Hanna, submitted the Administrative Update. Jim Deniston submitted the case summaries that were prepared by students in the Environmental Law Society of St. John's Law School.

I close this column by reminding committees, yet again, of the value of advertising your efforts and goals in the *Journal* by means of submitting articles and committee reports. The Section has so many active committees, and is the repository of so much accumulated experience and technical expertise, in a field that is noted for its complexity, that it benefits the readership and even prospective members to publish this information. It also benefits all of our members to know who the specialists are in the various sub-fields of environmental law, to know who to call with a difficult problem, or to whom a referral will benefit a client. Hence, committee articles provide pedagogical, but also professional and business, benefits.

Kevin Anthony Reilly

Government Attorneys' Luncheon

April 13, 2005
Program Speaker

Denise M. Sheehan

The Environmental Law Section was pleased to have Denise M. Sheehan, the Acting Commissioner of the New York State Department of Environmental Conservation, as the program speaker for this year's Government Attorneys' luncheon. About 100 governmental attorneys attended the luncheon, which immediately followed the Section's Legislative Forum.

Governor George Pataki named Denise Sheehan as Acting Commissioner effective February 2, 2005. Previously, from January 2002 to February 2, 2005, Ms. Sheehan served as Executive Deputy Commissioner for the Department. In that position, she was responsible for providing policy direction to the Department's executive staff and for overseeing the Department's day-to-day operations.

Ms. Sheehan first joined DEC in April 1998 as a Special Assistant in the Clean Water/Clean Air Bond Act Office. In March of 2001, she was appointed Assistant Commissioner for Administration, and was responsible for the Divisions of Operations, Management and Budget, Information Services, Environmental Permits, and Public Affairs and Education. Prior to joining DEC, Ms. Sheehan worked at the New York State Division of the Budget for nearly 11 years, where she was responsible for overseeing the budgets of the state's environmental, recreational, and energy agencies. In that capacity, she also worked on legislation to establish the Clean Water/Clean Air Bond Act and the Environmental Protection Fund.

Sheehan, in her luncheon remarks, emphasized two primary goals of the Department: (1) to remain a leader in environmental quality by implementing programs to improve our state's air and water quality and protect our land resources; and (2) to be stewards of our natural resources.

She discussed several key initiatives to further these goals. Recognizing the fact that the increase in greenhouse gas emissions is one of the most pressing environmental issues confronting the world, the Department is pursuing a Regional Greenhouse Gas Initiative (RGGI), originally advanced by Governor Pataki in 2003. Pursuant to that initiative, a regional collaborative effort has been established with the goal of organizing carbon dioxide emissions through a cap-and-trade program for power plants. In addition, as part of New York's strategy to combat greenhouse gases, the Department is developing greenhouse gas regulations to reduce climate changing emissions from light- and medium-duty passenger vehicles beginning in model year 2009 (the notice of the proposed rulemaking subsequently appeared in the May 18, 2005, issue of the Environmental Notice Bulletin).

Ms. Sheehan also referenced the negative impacts of acid rain on New York's natural resources. She noted that the Department has adopted emergency rules to ensure that the steep emission reductions in sulfur dioxide and nitrogen oxide called for in the Acid Deposition Reduction Program were implemented without delay. In addition to taking action to reduce the precursors of acid rain, Sheehan detailed the Department's efforts to monitor and reduce the levels of ozone and $PM_{2.5}$ particulates.

With respect to mercury emissions, she underscored that the Department supported strong Maximum Achievable Control Technology (MACT) Standards, rather than the Cap-and-Trade Program proposed at the federal level.

Sheehan discussed other top Department priorities, including:

- implementing New York's new State Superfund and Brownfields programs;
- continuing efforts to improve our state's waterbodies. She noted that the Department is continuing to focus on protections for the New York City watershed; implementing the stormwater Phase 2 program; and restoring the Hudson River in light of the "swimmable" goal in 2009. Sheehan also described the Department's work in implementing the priorities established by the management plan for Long Island Sound;
- continuing preservation of open space, and the efforts in meeting the Governor's goal of preserving one million acres; and
- increasing wetland protection. Sheehan referred to the Governor's budget proposal which included language to enhance the Department's ability to protect sensitive wetlands (the Governor's wet-

land proposal was the topic of the morning's Legislative Forum); and

- fostering renewable energy initiatives.

Ms. Sheehan then reviewed aspects of the 2005-2006 budget, noting in particular the agreement between the Governor and the State Legislature on monies for the Environmental Protection Fund.

It was emphasized that the Department will continue to be at the forefront in developing and implementing programs to ensure environmental progress. Sheehan expressed her appreciation for being invited to speak at the Government Attorneys' luncheon. She also thanked the Environmental Law Section for its involvement and welcomed continued input from the Section on Department programs and initiatives.

Louis A. Alexander

The Specter of Westway: Environmental and Financial Concerns with the Proposed Hudson Yards Redevelopment and Rezoning Project and New York Sports and Convention Center

By Jordan O'Brien

Introduction and Brief History of the Subject Matter

The subject of this article is the "No. 7 Subway Extension—Hudson Yards Rezoning and Development Program" (hereinafter the "Project"), which, if implemented, will leave New York City with an expanded convention center, millions of square feet of new office and residential space, an extended No. 7 Subway line, several acres of park and open air areas, and a new Jets Stadium.[1] The Hudson Yards area has been the subject of repeated attempts at rezoning and redevelopment throughout the past thirty years.[2] The current plan of transformation is based on a "preferred direction" of the area, as envisioned by the New York City Department of City Planning (DCP), and was initially proposed in its current form by the Far West Midtown Framework for Development in 2001 and the DCP and Economic Development Corporation in 2003.[3] This "preferred direction" identifies the Hudson Yards area as an ideal location to encourage development and expand the Midtown Central Business District, and identifies four key public sector actions that would be necessary to attract private development to the area: extending subway service; establishing a new "open space network"; zoning for appropriate densities and uses; and creating a "convention corridor" throughout the Project zone.[4] This "preferred direction" for the Hudson Yards did not initially include plans for a stadium, at least explicitly; this developed as a marriage of convenience between the City and the New York Jets football club, and as an endeavor counts a long line of failed projects and proposals as its predecessors. In recent history, the on-again, off-again efforts to build a sports complex in the area began in 1987 when Gulf and Western, Inc., at that time owners of the Madison Square Garden, the New York Knicks and New York Rangers, and Olympia & York, then the largest real estate developer in New York State, proposed to buy a 12-block chunk of land from Pennsylvania Station, build a "mammoth" office and entertainment center, and move Madison Square Garden to the new development, which would continue to house the Knicks and Rangers.[5] Ultimately, Gulf and Western abandoned the program, and agreed with Mayor Koch to remain in New York in exchange for tax breaks that today total more than $125 million for the current owners of the Garden.[6]

The next attempt to bring a stadium to the West Side occurred in 1993 when New York State Governor Mario Cuomo floated a proposal to keep the New York Yankees from moving to New Jersey, which was then vigorously courting professional sports teams located in New York, not without some success.[7] Also in 1993, the current effort to bring either the 2008 or the 2012 Olympics to New York City began.[8] The proponents of the City's 2012 bid and those proposing a new stadium for the Yankees on the West Side were natural allies, as the proposed stadium could double as a ballpark and the seat of the 2012 Summer Olympics. In 1996, New York City Mayor Rudolph Guiliani married these two concepts, proposing a West Side Yankee Stadium that would serve as the 2012 Summer Olympics stadium.[9] However, Guiliani's bid for the stadium ran up against a Javits Center expansion plan, backed by Governor Pataki,[10] as well as high-profile litigation and opposition to his attempt to use a New York City Charter amendment to circumvent a contentious voter referendum on the stadium.[11] In 1998, in the face of this combined opposition from Governor Pataki's office[12] and public interest groups, the proposal for a new Yankee stadium on the West Side was abandoned.[13] Almost immediately after retreating from the West Side Yankee Stadium proposal, Mayor Guiliani and proponents of the city's bid for the 2012 Olympics shifted their efforts to wooing the New York Jets football club to enter into a partnership with the city and state to build a new football stadium on the West Side.[14] When Robert Wood Johnson, IV, became the new owner of the Jets in 2000,[15] the Jets organization became receptive and, soon, partners to the Program plan.[16]

Part I of this article provides a brief overview of the Project, including its goals, projections, and predicted completion dates. Part II gives a general description of the national, state, and New York City environmental laws and procedures and the Project's efforts to comply with these to date, a review of the issues and holding in *Hell's Kitchen Neighborhood v. New York City Department of City Planning*—the first and, for now, only—litigation regarding the Project, and a general discussion of the standard of judicial review normally applied to chal-

lenged governmental agency actions. Part III recounts the failed Westway project, the litigation concerning it, and the lessons to be gleaned from its defeat. Finally, Part IV introduces environmental and financial concerns and criticisms that have been leveled at the current Project and the environmental impact statement submitted by the agencies in charge of it, and offers a word of advice to the Project's proponents if the Project is going to survive where Westway did not. Finally, Part V offers a conclusion to this article.

I. The Project

The Project is a major real estate development and construction endeavor that spans West 27th Street to West 43rd Street between Eighth and Eleventh Avenues on Manhattan's far West Side.[17] This area has been designated, for purposes of the Project, the Hudson Yards Redevelopment Area ("Hudson Yards").[18] It involves an overhaul of the current zoning in the Hudson Yards area, which will facilitate the creation of a new mixed-use community featuring approximately 28 million square feet of office space, 12 million square feet of residential space (approximately 12,600 residential units), 1.5 million square feet of hotel space and 700,000 square feet of retail space.[19] The zoning overhaul will also provide for an open space network and a new mid-block boulevard between Tenth and Eleventh Avenues requiring condemnation of some existing property.[20] The Project will extend the 7 subway line west and south, constructing a new station at West 41st Street and Tenth Avenue, and ending in a new terminus at West 34th Street and Eleventh Avenue.[21] The Program also will expand the Jacob K. Javits Convention Center northward from its current convention area of 760,000 square feet, spanning from West 34th Street to West 39th Street, to 1,300,000 contiguous square feet, to West 41st Street, and erect a new 1,500-room convention center hotel on West 42nd Street.[22] Finally, the Program promises a new football stadium and convention facility, referred to as the New York Sports and Convention Center ("Stadium"), which will feature a seating capacity of 75,000 attendees during sporting events and be able to provide an additional 180,000 square feet of exhibition space during expositions at the Javits Center.[23] The Stadium will be built on a platform covering what is now the New York Metropolitan Transit Authority's West and East Rail Yards.[24]

New York City Mayor Michael Bloomberg's administration ("Bloomberg Administration") predicts that the Subway Extension, the Convention Center Expansion, and the Stadium will be completed by 2012,[25] and will be available for use as the site of the World Olympic Games of that year if New York is selected as their host city.[26] The concurrent commercial and residential development envisioned by the Project will finish at a slower rate, and will be, to a large extent, based on market forces. The Bloomberg Administration predicts that up to 2.2 million square feet of office space and 91,500 square feet of retail space will be built in the Hudson Yards area by the year 2010, and up to 29 million square feet of office space and 1.1 million square feet of retail space will be built by 2025.[27]

II. SEQRA and *Hell's Kitchen Neighborhood v. New York City Department of City Planning*

1. Procedure Under SEQRA

In 1975, the State Environmental Quality Review Act (SEQRA) was proposed by the New York Legislature to adopt the National Environmental Policy Act's (NEPA) policies and procedures for New York State.[28] SEQRA, codified in the New York State Environmental Conservation Law,[29] provides its legislative intent to be "that all agencies which regulate activities of individuals, corporations, and public agencies which are found to affect the quality of the environment shall regulate such activities so that due consideration is given to preventing environmental damage."[30] At the heart of SEQRA and NEPA is the environmental impact statement (EIS) procedure.[31] Any New York City or state agency that proposes or approves any action must first determine whether the action may have a significant impact on the environment.[32] If so, it must prepare an environmental impact statement describing the proposed action and its environmental setting;[33] the environmental impact of the proposed action, including short- and long-term effects; [34] any unavoidable adverse environmental effects occurring should the proposal be implemented;[35] alternatives to the proposed action;[36] mitigation measures proposed to minimize the environmental impact;[37] the growth-inducing aspects of the proposed action;[38] effects of the proposed action on the use and conservation of energy resources;[39] and any other information consistent with the stated purpose of the statute.[40] For each of these factors that must be addressed in the DEIS, the degree of detail with which each one must be addressed will vary according to the project's particular nature and circumstances.[41] The Draft Environmental Impact Statement (DEIS) addresses these issues, and is the first public statement that the project's applicant, or the lead agency overseeing a construction project or other activity that may affect the environment, prepares and circulates for review and comment.[42]

The Metropolitan Transit Authority (MTA) and the City of New York City Planning Commission (CPC), the designated co-lead agencies of the Project, issued a Positive Declaration, finding that the Project has the potential for a significant adverse environmental impact and signaling their intent to prepare a DEIS, on April 21,

2003.[43] On June 21, 2004, the MTA and CPC jointly issued a "Notice of Completion" that the DEIS was ready for public review, and a public hearing on the DEIS was scheduled for September 23, 2004.[44]

2. *Hell's Kitchen Neighborhood v. New York City Department of City Planning*

In response to the co-lead agencies' issuance of Positive Declaration, the Hell's Kitchen Neighborhood Alliance ("Neighborhood Alliance") and Madison Square Garden moved for an order preliminarily enjoining DCP from holding public hearings, including the hearing scheduled to be held on September 23, 2004, pursuant to the Uniform Land Use Review Procedure (ULURP),[45] SEQRA, and CEQR, citing deficiencies in the DEIS that would, in effect, preclude any meaningful discussion of the environmental concerns raised by the Project at the September 23 hearing, and claiming irreparable harm in that the DEIS postponed the disclosure of critical analyses and mitigation measures regarding many of the environmental impacts important to the Neighborhood Alliance and the public by several months.[46]

Writing for the New York Supreme Court, New York County, Justice Herman Cahn denied the motion for a preliminary injunction on the grounds that the suit was unripe because the challenged action was not final in terms of its allegedly harmful effect and the petitioners had failed to exhaust administrative remedies available through SEQRA and CEQR.[47] First, Justice Cahn noted that the co-lead agencies had not issued final approval permitting construction to proceed, as was the case in *In re Stop-The-Barge v. Cahill*,[48] where a challenge pursuant to SEQRA to a negative declaration issued by the co-lead agency was ruled to be ripe and upheld.[49] Second, the court disagreed with the petitioners that the alleged lack of information available to them at the hearing constituted actual, concrete injury.[50] Thirdly, the court noted that the petitioners would have ample opportunity to present their comments and reservations regarding the DEIS to the co-lead agencies at the September 23 hearing, and by failing to exhaust this administrative remedy, could not yet bring suit against the co-lead agencies.[51] Finally, the court did provide that if, after the public's concerns about the potentially adverse environmental impacts that the Project could pose to the area were voiced at the September 23 hearing, the co-lead agencies did not adequately address such issues in the Final Environmental Impact Statement, the petitioners could then seek relief from the court, as questions of ripeness and the exhaustion of administrative remedy would then be resolved.[52]

The holding in *Hell's Kitchen* provides that the ripeness issue will not be an obstacle to suit should the FEIS fail to address concerns raised by the public through comments submitted to the co-lead agencies and suit is brought complaining of such deficiencies. What if the DEIS was so deficient that the public did not have enough information to even recognize some of the environmental risks posed by the Project, and so did not call the co-lead agencies' attention to the matter? The Council on Environmental Quality serves to issue regulations regarding environmental impact statements completed in compliance with NEPA;[53] one of these regulations provides in relevant part:

> NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA . . .[54]

The regulation goes on to prescribe the contents and scope of the DEIS:

> It shall provide full and fair discussion of significant environmental impacts and shall inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment . . . Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.[55]

Although the above excerpts pertain only to federal NEPA legislation, New York State and City have strove to adopt and implement the procedures and purpose of NEPA in their SEQRA and CEQR statutes, respectively, which should allow challengers of an agency action a cause of action not only in the event that the FEIS is deficient in addressing areas of concern for potential adverse environmental impacts stemming from the Project, but also if the DEIS is, as the petitioners in *Hell's Kitchen Neighborhood* alleged, informationally deficient to such an extent that any meaningful chance to review and submit comments and concerns about the potential adverse environmental impacts is denied the public.[56]

On November 8, 2004, the DCP issued a notice of completion of the Program FEIS;[57] however, it has not been released to the public as of this article.

3. Standard of Judicial Review of Agency Action under Environmental Law

As provided in the case above, the petitioners in *Hell's Kitchen* could bring suit against the MTA and DCP if the FEIS was deficient in addressing one or more areas of adverse environmental impact caused by the Project;[58] however, a lead agency's determinations contained in a FEIS are given a great deal of judicial deference when challenged on environmental grounds, and are usually only set aside when a showing has been made that the agency acted in an "arbitrary and capricious" manner.[59] Federal judicial review of an EIS under NEPA is limited to a determination of whether the acting agency took a "hard look" at environmental consequences, and courts are reluctant to interject themselves into an area recognized to be an essentially political process, and within an agency's discretionary judgment.[60] New York State and City courts apply the same standard, determining only whether the agency acted in an "arbitrary and capricious" manner or the action constituted an "abuse of discretion."[61] Importantly, this means that courts will refrain from inquiring into the merits of an agency's action, limiting review to the decision-making process itself; [62] this serves the purpose of ensuring that the EIS was completed in good faith and that stubborn problems or serious criticisms have not been "swept under the rug."[63] Despite the discretion accorded governmental agencies' actions when reviewed by courts under NEPA, SEQRA, and CEQR, this does not mean that agency actions are in practice immune from judicial review; as discussed in the next portion of this article, agency actions in New York sate, and the West Side of Manhattan in particular, have encountered serious, and often fatal, resistance from courts using even this limited form of review prescribed by NEPA, SEQRA, and CEQR.

III. The Westway Fiasco

1. Background

The "West Side Highway Project" ("Westway") began in 1974 as an agreement between New York State Governor-elect Hugh Carey and New York City Mayor Abraham Beame, and was initially planned by the New York State Department of Transportation (NYSDOT).[64] Westway was intended to be an interstate highway construction and urban renewal project that envisioned replacing the old West Side Highway with a new six-lane highway that would be built underground, tunneled through 200 square acres of landfill dumped along the West Side waterfront area stretching from West 34th Street to Battery Park City.[65] Substantial commercial and residential development, as well as parkland along the Hudson River, was planned for the area as well.[66] The co-lead agencies for the project, NYSDOT and the Federal Highway Administration (FHWA),[67] issued a DEIS in 1974 and a FEIS in 1977 in accordance with NEPA, describing the project area of the Hudson river as a "biological wasteland," deciding that the project would have little to no impact on the surrounding aquatic environment.[68] However, almost immediately upon its receipt of the landfill permit application, the U.S. Army Corps of Engineers ("Corps") received strong objections from the National Marine Fisheries Service (NMFS), the Fish and Wildlife Service (FWS), and the Environmental Protection Agency (EPA).[69] New information gathered by these agencies indicated that the project area was actually an important "wintering" habitat for juvenile striped bass, and the sample study performed by the co-lead agencies that formed the basis of the FEIS had been performed at a time of year that did not reflect the importance of this habitat.[70] Westway then attracted instant and energetic opposition from civic and environmental groups,[71] resulting in a bitterly fought, decade-long legal struggle over the fate of the program.[72]

2. Litigation over Westway

Litigation regarding Westway began promptly in 1974, with *Action for Rational Transit v. West Side Highway Project* (hereinafter "*Action for Rational Transit I*"),[73] brought by neighborhood and environmental groups citing deficiencies in the EIS with regard to the projected amount of vehicle traffic and effect on air quality that the project would create.[74] The first year of litigation in this case resulted in an agreement that certain parts of the material in the DEIS would be reanalyzed.[75] During this time, the suit lay dormant while the project was debated by the political authorities and administrative procedures were taken by the co-lead agencies to apply for the necessary governmental approvals for the project.[76] While *Action for Rational Transit I* languished in the courts, *Sierra Club v. U.S. Army Corp of Engineers* (hereinafter "*Sierra Club I*")[77] was brought in 1979, alleging that the Corps was violating several federal environmental statutes by refusing to consider data provided by the NMFS, FWS and EPA and indicating that the conclusion of the DEIS that the project area was a "biological wasteland" was erroneous, and that the area was in fact an important habitat for juvenile striped bass.[78] However, *Sierra Club I* was dismissed as premature on account of lack of ripeness, since the Corps had not yet acted with such finality as to justify judicial intervention.[79] In 1981, the Corps issued the landfill permit to the co-lead agencies.[80] The *Sierra Club I* plaintiffs immediately brought suit, this time unhindered by any lack of ripeness, and a series of three cases before U.S. District Judge Thomas Griesa resulted in the utter defeat of Westway.[81]

In the first of the three cases, *Action for Rational Transit II*, Judge Griesa invalidated the landfill permit issued to the Westway project, on the grounds that the Corps had failed to make public disclosure of important

new information about the project's probable impacts on the Hudson River fisheries' resources, as required by NEPA, and had failed to give adequate consideration to this impact on its own review of the issue.[82] In the second case of the series, again dubbed *Sierra Club v. U.S. Army Corps of Engineers* (hereinafter "*Sierra Club II*"),[83] Judge Griesa ruled that: (1) FHWA had an obligation under NEPA to issue a supplemental EIS making a true and adequate presentation of the project's impact on fisheries and correcting the erroneous 1977 FEIS;[84] (2) FHWA fully knew about the serious nature of the new information and willfully failed to meet its obligation, and instead had collaborated with NYSDOT in derogation of its duties;[85] and (3) FHWA's representations to the Corps regarding the project's impact on fisheries was "simply fraudulent."[86] Judge Griesa declared the actions taken by FHWA approving the design, location and funding for the Westway project to be null and void, remanded the case to the FHWA; and enjoined the payment of federal funds for the project.[87] In its holding, the District Court emphasized that the decision had been reached utilizing the deferential standard of review accorded to governmental agencies' actions, and that the court was not substituting its judgment for that of the defendants.[88]

In accordance with the *Sierra Club II* judgment, the Corps and FHWA performed another sampling test of the aquatic life in the project area, and prepared both draft (DSEIS) and final (FSEIS) supplemental environmental impact statements, and on January 24, 1985, again issued the landfill permanent to Westway's co-lead agencies.[89] In the third companion case of the series, *Sierra Club v. U.S. Army Corps of Engineers* (hereinafter "*Sierra Club III*"),[90] Judge Griesa again invalidated the Corps landfill permit and the FHWA approvals for violations of the NEPA and Clean Water Act,[91] concluding that the SEIS violated NEPA and the *Sierra Club II* judgments in that there was an inexplicable and "incredible" difference between the DSEIS,[92] which found that the project area represented a significant portion of the striped bass habitat, and that its loss would have a significant adverse effect on the Hudson River stock of that species,[93] and the FSEIS, issued only six months later in November 1984,[94] which concluded that impacts of the project on the striped bass population would be "minor" and "inconsequential", "difficult to notice" or "difficult to discern," "too small to noticeably affect commercial and recreational fishing", "insufficient to significantly impact", and "not a critical (or even minor) threat" to the well being of the striped bass stock.[95] This analysis, the court added, was unsupported by existing data,[96] arbitrary, and in violation of NEPA.[97] The court took further umbrage with the fact that the FSEIS defined Westway primarily as a transportation project, and not a development project, as had been elucidated at trial,[98] that the FSEIS had failed to adequately identify and discuss alternate plans to the proposed project,[99] and ruled that this conduct also violated NEPA. As the Corps' decision to grant the landfill permit, and FHWA's approval of project funding were based on an inadequate FSEIS, these actions were declared arbitrary and invalidated.[100]

3. The Defeat of Westway

On September 11, 1985, the Court of Appeals for the Second Circuit affirmed the vacating of the landfill permit and the FHWA funding.[101] The same day, the U.S. House of Representatives voted to remove funding for Westway from the following year's budget,[102] and shortly thereafter, the federal funds earmarked for the Westway proposal were "traded in" for a package of transit and other transportation funds from FHWA.[103] Although Westway ultimately died an ignominious death on the steps of the New York Court of Appeals, its legacy continues to cast a long shadow over all major redevelopment proposals in New York City,[104] and at the same time, the developers' dreams of someday redeveloping the West Side continue to the present day.

An interesting aspect of *Sierra Club III* is that the co-lead agencies' actions this time seem to have been accorded less deference than what is normally given them by the standard of review established in the APA, despite language in the holding claiming no departure from the deferential usual standard.[105] When an agency decision is based upon conclusions in an environmental impact statement that are not arrived at in good faith or in a rational and reasoned manner, that decision is necessarily arbitrary;[106] however, in pronouncing that the agency had not acted in a rational and reasonable manner, the court cited procedure followed by the co-lead agencies that would normally insulate them from further scrutiny.[107] The dicta in *Sierra Club III* chastising the agencies for advertising the project as primarily a transportation project, as opposed to a development project, as the court found it to be, and the discussion of the difference between how much a transportation-only project would cost ($50 million) as opposed to Westway (over $2 billion, the court found), smacked more of the court's judgment and opinion regarding the project than a deferential analysis of whether the agencies followed correct procedure and protocol.[108] The same criticism could be leveled at the court's conclusion that the FSEIS was not based on factual background;[109] and at what point is the court's judgment concerning the quality and/or quantum of evidence, and whether the agency action was justified by such evidence, or lack thereof, substituted for the agency's discretion, where the decision properly lies?[110]

The Second Circuit, in reviewing *Sierra Club III*,[111] unequivocally decided that the District Court had done just that when it disregarded testimony provided by the

agencies' expert witnesses and accorded the testimony given by other experts at the trial greater weight, and when the District Court ruled the Corps' four-month sampling of striped bass in the project area inadequate.[112] However, Second Circuit nonetheless upheld the judgment in *Sierra Club III* vacating of the Corps' landfill permit and injunction against funding for the project.[113] Fatal to the agencies' defense of their conduct, and condemned by both the District Court and the Second Circuit, was again the "incredible" change, in just six months, from the findings of the DSEIS of significant adverse impact, and the unexplained, completely contradictory findings contained in the FSEIS.[114] The Second Circuit actually went farther than the District Court in criticizing the agencies' findings, characterizing them as "false."[115] This lack of transparency, the stated goal of NEPA and its related state counterparts,[116] doomed Westway in spite of the normally reversible error committed by the District Court in substituting its judgment for that of the agencies.[117] Much of the same criticism that ultimately ground the Westway project to a halt has been leveled at the proposed Hudson Yards and Jets Stadium Project, and unless the Project's proponents can learn from the lessons provided by Westway, the result could be the same.

IV. Environmental and Financial Concerns and Criticisms Regarding the Project

1. Environmental Issues

The Program DEIS, made available in May 2004 by the Program's co-lead agencies, consists of seven volumes and over 4,000 pages.[118] Notwithstanding this quantum of information, the comments to the DEIS submitted by the public on the DEIS have been varied and in some cases, unsurprisingly, highly critical of the DEIS' treatment of a number of environmental issues,[119] including traffic and transit; noise levels; waste generation and disposal; socioeconomic conditions, displacement and condemnation; density levels; air quality and hazardous materials; alternatives to the Project; and financing.

Traffic and transit is acknowledged by the DEIS to be an unavoidable effect of the Program;[120] the issue is how adverse the effect will be. The Citizens Guide to the Hudson Yards Draft Environmental Impact Statement (hereinafter "Citizens Guide") comments that, while assuming that nearly a quarter of the workers for the Project will come from New Jersey, the DEIS fails to acknowledge that NJ TRANSIT capacity into Penn Station is projected to be full by 2009.[121] The Citizens Guide also argues against the traffic and transit portion of the DEIS in that it fails to show how a small change in its assumptions will impact its conclusions;[122] considering the extreme levels of congestion already present in the Project area.[123] The Citizens Guide also notes that, although the DEIS acknowledges that noise from the Project will cause significant adverse impacts during the construction period, it does not introduce any mitigation measures to reduce these impacts.[124]

Addressing the Project's projected waste generation and disposal, the Citizen Guide notes that the DEIS predicts that on a peak day in 2025, the Far West Side will generate approximately 8.6 million gallons of waste water, compared to 1.1 million gallons per day in 2003,[125] and does not reveal how many more sewage overflows will occur as the result of the redevelopment, where the overflows will occur, how much sewage will be released, or the impacts of this sewage on the area of the Hudson River into which it flows.[126] The Citizens Guide's reservations are repeated in a news release from the New Jersey Office of the Attorney General,[127] claiming that there is no doubt that effects from the Project will have a negative environmental impact on the State of New Jersey, citing the probability that the amount of raw sewage currently being discharged into the Hudson River by New York City will greatly increase, threatening New Jersey's beaches, coastal ecosystems and fishing industry, and predicting that air quality will be impaired as a result of the significant increase in traffic concomitant with the Project.[128] Concerns regarding the Project's waste generation and its effects on water resources are shared by Riverkeeper,[129] claiming that the DEIS' finding that impacts resulting from the increased waste discharge into the Hudson River will be minimal is erroneous, and citing that the DEIS makes no provision for the treatment of waste on-site, meaning that waste will be conveyed to storm water drains. These storm drains currently flood up to 70 times per year, discharging approximately 27 billion gallons of combined untreated raw sewage and polluted storm water runoff per year.[130] The Citizens Guide also complains that, in terms of the Project's effects on air quality, the DEIS failed to consider the cumulative impacts of simultaneous heavy construction in Lower Manhattan and on the Far West Side, and that the DEIS notes that, although there are potential adverse impacts on air quality posed by the Project, further study will show that these impacts are insignificant; without these studies, the Citizens Guide argues, it will be difficult for the public and elected officials to understand the true impact of the proposed redevelopment.[131] The failure of the DEIS to identify and consider any alternatives to the Stadium plan within the Project was also cited as a deficiency.[132]

The Project's proponents, including its co-lead agencies, would do well to heed the criticism that has been leveled at the Project and the DEIS through the public's comments. It must be remembered that the standard of judicial review in the Second Circuit remains one of considerable deference to a challenged agency action; the more intrusive standard applied in *Sierra Club III* was ruled impermissible, and only

upheld in that case because the agencies couldn't offer any evidence suggesting that the sea change evident between the FSEIS and the DSEIS was supported by any data.[133] The analysis remains relatively simple: whether the agencies made proper investigations into the possible effects of an action, and whether proper disclosures to the public were given regarding these effects.[134] The co-lead agencies must do just that, and, in spite of Westway, this is perhaps just as easy as it sounds. The FEIS should address every realistic and pertinent area of concern voiced by submitted comments and criticisms of the public. The co-lead agencies should keep records detailing their identifying and addressing of the public's comments, not to prove that the action taken will be right, but only to show that deliberation did occur, and the agencies did weigh the comments in making its decision, and thus did not act arbitrarily.[135] As long as there is the transparency evident that is the goal of NEPA and related legislation, the agency action should be insulated against challenge.

2. Financial Concerns

The long-term plan proposed by the Bloomberg Administration circumvents the usual mechanism of the city's capital budget; instead the newly-created Hudson Yards Infrastructure Corporation will sell long-term bonds backed by a variety of revenues that are expected to be generated as a result of the Project.[136] This approach is called "value capture": use of property tax revenue and proceeds from the sale of new development rights that result from public investment in infrastructure to pay for the infrastructure itself.[137] Because the Project is not expected to generate enough revenue in the early years to cover debt service on the long-term bonds, the Bloomberg Administration plans to use commercial paper—short-term promissory notes with maturities of up to 270 days—to pay the debt service on the long-term bonds during the early years.[138] The proposed financing scheme for the Project has come under fire for being an expensive way to bypass a city council vote on the land use proposals associated with it.[139] Expensive it is: the New York City Independent Budget Office (IBO) estimates that the financing mechanism proposed by the Bloomerberg Administration will cost $1.3 billion more than if the city simply borrowed the funds through its regular capital plan.[140] Besides the perceived evasiveness of the proposed financing scheme, critics have voiced concern that the city did not conduct its own independent financial analysis of the Stadium proposal, instead relying on an estimate from an analysis conducted for the New York Jets by Ernst & Young.[141] Two IBO studies[142] on the economic impacts of the new Jets Stadium have drawn very different conclusions than the Jets' estimates: under IBO's most optimistic scenario, the facility would create 3,586 jobs—barely half the 6,971 claimed by the project's proponents—and generate $28.4 million in new city tax revenue annually, $6.7 million less than what the project's supporters expect.[143] Although this figure is still sufficient to cover the roughly $21 million in annual debt service payments on the financing scheme, the IBO's optimistic scenario is self-described as highly dependent upon initial conditions; any fluctuation in one of the business projections could have drastic effects on the overall revenue figure;[144] the IBO's low estimate scenario predicts only $22.9 million in city revenues, again, all other things being equal.[145] Overall, the IBO estimates that the annual direct economic output—the value of the goods and services purchased by visitors at the facility and elsewhere in the city during their stay—would be $306 million, as opposed to the New York Jets' estimate of $411 million.[146] The discrepancies between the Jets' predictions and those of the IBO should be a source of concern, and the Jets and Project proponents should take very seriously the mounting concern regarding the financing of the Project and questions about the ultimate economic benefits to the city versus the negatives, environmental and otherwise, and should make utmost efforts to address some of the uncertainties regarding their projections' assumptions. At the very least, lingering concerns could galvanize further opposition to the program from sectors of the public currently undecided on it, and at the worst, could generate sufficient legislation to stall or end the Project itself.

V. Conclusion

The Hudson Yards Rezoning and Redevelopment Project represents a great opportunity for New York City. Some of the potential benefits, such as jobs created, the financial boon to the city from the expanded convention center, and the expected commercial development within the area, will be very quantifiable. Other benefits of the Project will have a much less tangible, but nonetheless apparent, benefit to the city, such as the civic pride associated with the proposed Jets Stadium. "Bring the Jets back home!" has been a dream for millions of Jets fans since the team left for the Meadowlands 20 years ago. This more amorphous benefit to the city, not any less actual, should not be taken lightly.

On the other hand, serious issues and problems associated with the Project remain that have not been addressed adequately by either the DEIS or the proponents of the Program. Although the Project represents a tremendous opportunity for the City, it also presents significant risks of serious environmental harms regarding waste management and water quality, air and noise pollution, and traffic and transit complications in an already traffic-snarled area of the City. The co-lead agencies and the Project proponents, including the Bloomberg Administration, must identify and address these issues in depth and with candor if the opportunity presented by the Project is not to be lost. The specter

of Westway looms, and if the lessons afforded by the Sierra Club line of cases are not learned and applied, this Project will go the way of its predecessor.

Endnotes

1. *See* Project Description, *infra*.
2. *See* Westway discussion, *infra*.
3. *See* HUDSON YARDS: OVERVIEW, NEW YORK CITY DEPARTMENT OF PLANNING, *available at* http://www.nyc.gov/html/dcp/html/hyards/hymain.html.
4. *See* Michael Cooper, *City Has Idea (Think Office Buildings) to Stretch Midtown to Far West Side*, N.Y. TIMES, Dec. 13, 2001.
5. *See* Albert Scardino, *12-Block Office-Entertainment Center Planned on West Side*, N.Y. TIMES, April 6, 1987.
6. *See* Charles V. Bagli, *Move Possible for Garden (But Where?)*, N.Y. TIMES, Dec. 16, 2000.
7. *See* Richard Sandomir, *State Unveils Its Plan for Yanks in Manhattan*, N.Y. TIMES, Oct. 1, 1993. In 1976, the New York Giants football club moved to the Meadowlands in New Jersey, and in 1984, the New York Jets followed them there, where they continue to share the stadium at the Meadowlands. Also, in 1982, New Jersey successfully wooed the New York Nets to their current home, also in the Meadowlands.
8. *See* Jere Longman, New York Olympics? Talk is Cheap But Plentiful, N.Y. TIMES, Oct. 28, 1993. *See also* NewYorkGames.org, *available at* http://www.newyorkgames.org/news/archives/000164.html.
9. *See* Leonard Wasserman, *SYMPOSIUM: Panel I: Stadium Finance, Naming Rights & Team Relocation*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 291, 333 (2002).
10. *See* Charles V. Bagli, *Bid to Expand Javits Center Loses Ground*, N.Y. TIMES, June 10, 1998.
11. *See* Daniel Wise, *Stadium Referendum Banished from Ballot: Unanimous Reversal by Appellate Division*, October 19, 1998, N.Y.L.J.
12. *See* Charles V. Bagli, *New York Olympic Stadium Plan Masks Shaky Political Coalition*, N.Y. TIMES, Oct. 2, 2000; *see also* Charles V. Bagli, *Support for Development, but Maybe Not a Stadium*, N.Y. TIMES, May 14, 2001.
13. *See* Charles V. Bagli, *New York Olympic Stadium Plan Masks Shaky Political Coalition*, *supra*.

    Obviously, the Yankees never left Yankee Stadium for New Jersey, despite the threats and complaints regarding the current structure voiced by Yankees owner George Steinbrenner. They are now looking to build a new, self-financed stadium for the ball club across the street from the venerable Yankee Stadium. *See generally*, Charles V. Bagli, *Yankees Propose New Stadium, and Would Pay*, N.Y. TIMES, July 7, 2004.
14. *See* Thomas J. Lueck, *Guiliani Has a New Formula for the Financing of Stadiums*, N.Y. TIMES, Sept. 29, 2000; *see also* Andrew Jacobs, *A Stadium, Shops, Condos and Calamari; Development Fantasies for Hell's Kitchen South*, N.Y. TIMES, Dec. 17, 2000.
15. *See* Amy Barrett, *Can Woody Johnson Make It in New York?*, BUSINESS WEEK MAGAZINE, Aug. 16, 2004.
16. *See* Michael R. Blood, *Jets Aiming for Stadium on West Side*, DAILY NEWS (New York), Sept. 20, 2000; *see also* Rich Camini, *Jets Eye West Side Dome*, DAILY NEWS (New York), Nov. 24, 2000. The Jets have committed to invest $800 million of the $1.4 billion total to be spent on the Project. The Jets and the Javits Center would also be responsible for the costs of subleasing the airspace above the Hudson Yards, currently owned by the New York Metropolitan Transport Authority and which will be leased by the Empire State Development Corporation. *See* CITIZENS UNION & CITIZENS UNION FOUNDATION, "Hudson Yards Redevelopment Area Proposal Analysis," 2004, p. 8.
17. *See* Theresa J. Devine, *Fiscal Brief: West Side Financing's Complex, $1.3 Billion Story*, p.1, NEW YORK CITY INDEPENDENT BUDGET OFFICE, August 2004.
18. *Id.*
19. *See* HUDSON YARDS: OVERVIEW, NEW YORK CITY DEPARTMENT OF PLANNING, *available at* http://www.nyc.gov/html/dcp/html/hyards/hymain.html; s*ee also* CITIZENS UNION OF THE CITY OF NEW YORK, THE NATURAL RESOURCES DEFENSE COUNCIL (NDRC), THE NEW YORK PUBLIC INTEREST RESEARCH GROUP (NYPIRG), AND THE REGIONAL PLAN ASSOCIATION (RPA), A CITIZENS GUIDE TO THE HUDSON YARDS DRAFT ENVIRONMENTAL IMPACT STATEMENT," *available at* http://www.rpa.org/pdf/citizensEIS.pdf (hereinafter "Citizens Guide"). The approximations on the space vary; The Citizens Union and Citizens Union Foundation, in the "Hudson Yards Redevelopment Area Proposal Analysis," estimate 25-35 million square feet of high-density commercial and office space and the creation of approximately 12,000 units.

    One interesting issue regarding the Project's expected commercial development that is whether there will be sufficient demand for it; *see* Theresa J. Devine, "Background Paper, Supply & Demand: City and State May Be Planning Too Much Office Space," New York City Independent Budget Office, August 2004 (warning that, between the World Trade Center site, the Hudson Yards Project and Downtown Brooklyn efforts, 42.5 million square feet of new office space will have been built alone).
20. *See* Theresa J. Devine, *Fiscal Brief: West Side Financing's Complex, $1.3 Billion Story*, *supra*. The area of the open space has been estimated at 20 acres. *See* CITIZENS UNION & CITIZENS UNION FOUNDATION, "Hudson Yards Redevelopment Area Proposal Analysis," 2004 at 8.
21. *Id*.
22. *See* HUDSON YARDS: OVERVIEW, NEW YORK CITY DEPARTMENT OF PLANNING, *supra.*
23. *See* CITIZENS GUIDE, *supra*; *see also* David Belkin and Rachelle Celebrezze, *Background Paper: Estimating the Economic and Fiscal Impacts of the New York Sports and Convention Center*, NEW YORK CITY INDEPENDENT BUDGET OFFICE, July 2004.
24. *See* Tom Angotti, *The West Side Stadium: No Arena for Good Planning*, GothamGazette.com, November 2003, *available at* http://www.gothamgazette.com/article/20031120/12/720.
25. *See* Charles V. Bagli, *Grand Vision for Remaking the West Side Javits Center*, N.Y. TIMES, Feb. 10, 2001.
26. Currently, New York City is competing with Paris, London, Madrid, and Moscow to host the 2012 Olympic Summer Games. The proposed Stadium has been touted by its supporters as a necessary centerpiece to the New York City plan to host the 2012 Olympics; however, others view the West Side Stadium as not only unnecessary to the city's Olympic bid, but a hindrance. *See* Editorial, WESTERN QUEENS GAZETTE, Apr. 7, 2004, *available at* http://www.qgazette.com/news/2004/0407/Editorial_pages/001.html; *see also* Brian Heyman, *New York issues final Olympics proposal*, THE JOURNAL NEWS, Nov. 12, 2004.
27. *See* MTA and the City of New York Planning Commission, Final Scoping Document: No. 7 Subway Extension—Hudson Yards Rezoning and Development Program. *Draft Generic Environmental Impact Statement*, CEQR No. 03DCP031M, Chapter 2—Description of the Proposed Action, p. 2-22.
28. *See* Paul Bray, *Discussion: The Historical Root of SEQRA*, 65 Alb. L. Rev. 323, 326 (2001); *see also* National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as

amended at 42 U.S.C. 4321-4370d (1994 & Supp. II 1995-1997)), interpretive notes and interpretations #2, "Purpose of National Environmental Policy Act as clearly expressed in 42 U.S.C.S. § 4321 is to commit vast resources of federal government to encourage productive and enjoyable harmony between man and his environment, and to this end Act provides that there are to be careful co-operative efforts among all appropriate federal, state, and local agencies of government in order to assure that environmental consequences are clearly perceived and evaluated."

29. N.Y. CLS ECL §§ 8-0101–8-0117.

30. N.Y. CLS ECL § 8-0103(9).

31. *See In re Fannie Mae v. New York Sate Urban Development Corporation*, 67 NY 2d 400, 435 (1986); *see also In re Town of Henrietta v. Department of Environmental Conservation*, 76 A.D.2d 215, 220 (1980).

    42 U.S.C. § 4332(2)(C) provides:

    (2) all agencies of the Federal Government shall –

    …

    (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on –

    (i) the environmental impact of the proposed action,

    (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

    (iii) alternatives to the proposed action,

    (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

    (v) any irreversible and irretrievable commitments of resources should it be implemented.

32. Determined by completing an Environmental Assessment Statement (EAS) and Environmental Assessment Form (EAF) in compliance with SEQRA and the City Environmental Quality Review (CEQR); the latter was promulgated to implement SEQRA for actions within New York City, and is tailored to the special circumstances of the City.

33. N.Y. CLS ECL § 8-0109(2)(a).

34. N.Y. CLS ECL § 8-0109(2)(b).

35. N.Y. CLS ECL § 8-0109(2)(c).

36. N.Y. CLS ECL § 8-0109(2)(d).

37. N.Y. CLS ECL § 8-0109(2)(e).

38. N.Y. CLS ECL § 8-0109(2)(g).

39. N.Y. CLS ECL § 8-0109(2)(h).

40. N.Y. CLS ECL § 8-0109(2)(j).

41. *See Webster Associates v. Webster*, 59 N.Y.2d 220, 228 (1983); *see also Adrich v. Pattison*, 107 A.D.2d 258, 265 (1985).

42. *See* 6 N.Y.C.R.R. § 617.2(n).

43. *See* CITY ENVIRONMENTAL QUALITY REVIEW/STATE ENVIRONMENTAL QUALITY REVIEW ACT POSITIVE DECLARATION/NOTICE OF INTENT TO PREPARE A DRAFT ENVIRONMENTAL IMPACT STATEMENT, Apr. 21, 2003, *available at* http://www.nyc.gov/html/dcp/pdf/hyards/hy_positive_declaration.pdf.

44. *See Hell's Kitchen Neighborhood v. New York Department of City Planning*, N.Y.L.J., Sept. 27, 2004 (hereinafter "*Hell's Kitchen*").

45. *See* § 197-c(a) of the New York City Charter, which provides, "applications by any person or agency respecting the use, development, or improvement of real property subject to city regulation shall be reviewed pursuant to a uniform review procedure." ULURP is New York City's procedure for handling land use and zoning matters. It mandates review of any action affecting these matters by the affected community boards, the borough president, the City Planning Commission and City Council. *See also* Tom Angotti, *Three Alternatives to an Independent Authority for Lower Manhattan*, Gotham Gazette.com, November 2001, *available at* http://www.gothamgazette.com/landuse/nov.01.shtml.

46. *See* Helen Peterson, *Judge Gives OK on West Side Subway Hearing*, DAILY NEWS (New York), Sept. 22, 2004.

47. *See Hell's Kitchen* at p. 5.

48. 1 N.Y.3d 218 (2003).

49. *See Hell's Kitchen* at p. 5.

50. *See id*.; *see also In re Wal-Mart Stores v. Campbell*, 238 A.D.2d 831, 832-33 (3d Dep't 1997) (providing that, without actual, concrete harm, the petitioners did not have standing).

51. *Hell's Kitchen* at p. 7. Exhaustion of administrative remedies is a prerequisite to a showing of harm, and thus establishing ripeness; s*ee In re Essex County v. Zagata*, 91 N.Y.2d 447, 453 (1998); *In re Gordon v. Rush*, 100 N.Y.2d 236, 242 (2003).

52. *Hell's Kitchen* at p. 7.

53. The Council on Environmental Quality was established under § 202 of NEPA, 42 U.S.C. § 4342, "to appraise programs and activities of the Federal Government in the light of the policy set forth in title I of this Act; to be conscious of and responsive to the scientific, economic, social, aesthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment."

54. 40 C.F.R. § 1500.1(b).

55. 40 C.F.R. § 1502.1.

56. This was claimed in connection with an EIS submitted by the U.S. Army Corps of Engineers for the Westway Project, discussed in detail below. The Environmental Protection Agency (EPA), in submitting comments to the EIS, complained that the DEIS "discussion of the project's impact on water resources is deficient such that an opinion as to the project's impact in this respect cannot be rendered." *See Sierra Club v. U.S. Army Corp of Engineers*, 701 F.2d 1011 (2d Cir. 1983).

57. Rachaele Raynoff, *Bloomberg Administration Unveils Incentives to Increase Affordable Housing Throughout the Hudson Yards Area*, NEW YORK CITY DEPARTMENT OF CITY PLANNING PRESS RELEASE Nov. 8, 2004, *available at* http://www.nyc.gov/html/dcp/html/about/pr110804.html.

58. *Hell's Kitchen*, p. 7.

59. *See* Administrative Procedure Act, 5 U.S.C.S. §706(2)(A), addressing the scope of judicial review of when reviewing governmental agency action. S*ee also Sierra Club v. U.S. Army Corp of Engineers*, 701 F.2d 1011, 1032 (2d Cir. 1983).

60. *See Kleppe v. Sierra Club*, 427 U.S. 390, 410, n.21 (1976) (quoting *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972)).

61. *See In re City of Schenectady v. Flacke*, 100 A.D.2d 349, 353 (1984); *In re Environmental Defense Fund v. Flacke*, 96 A.D.2d 862 (1983); *see also H.O.M.E.S. v. New York State Urban Development Corp.*, 69 A.D.2d 222, 231 (1979) (adopting the same standard of review under SEQRA as the federal courts apply for suits brought under NEPA).

62. *See Jackson v. New York State Urban Dev. Corp*., 67 N.Y.2d 400, 417 (1986) (citing *Adrich v. Pattison*, 107 A.D.2d 258, 265 (1985)); *see*

also Life of Land v. Brinegar, 485 F.2d 460, 473 (1973) (providing that the EIS "need not achieve scientific unanimity on the desirability on proceeding with the proposed action").

63. *See Sierra Club v. U.S. Army Corp of Engineers*, 701 F.2d 1011, 1029 (2d Cir. 1983).

64. *See The Westway Project: Its History and Future*, NEW YORK TIMES, Aug. 1, 1981; *see also* Stephen L. Kass and Jean M. McCarroll, "Westway Redux?," N.Y.L.J., June 23, 2000.

65. *See Action for Rational Transit v. West Side Highway Project*, 536 F. Supp. 1225, 1229-30 (S.D.N.Y. 1982).

66. *See Action for Rational Transit v. West Side Highway Project*, 536 F. Supp. 1225, 1229-30 (S.D.N.Y. 1982); *see also* Ari Golman, *News Analysis: A Koch Plan and Westway*, NEW YORK TIMES, Dec. 22, 1980.

67. Because the Westway project involved building an interstate highway, it would mostly (90%) be funded through federal highway funds disbursed by the FHWA. *See* Stephen L. Kass and Jean M. McCarroll, "Westway Redux?," N.Y.L.J., June 23, 2000.

68. *Sierra Club v. U.S. Army Corps of Engineers*, 541 F. Supp. 1367, 1371 (S.D.N.Y. 1982).

69. *See* Stephen L. Kass and Jean M. McCarroll, Westway Redux?, N.Y.L.J., June 23, 2000.

70. *Sierra Club v. U.S. Army Corps of Engineers*, 541 F. Supp. 1367, 1372-23 (S.D.N.Y. 1982).

71. *See* Irvin Molotsky, *Federal Report Heats Up Fight Over Westway*, NEW YORK TIMES Sept. 27, 1980; *see also* Richard Gottfried, *'Guerrilla Attacks' on a Westway Hurdle*, NEW YORK TIMES, Nov. 12, 1983.

72. Sam Roberts, *Battle of a Westway: Bitter 10-Year Saga of a Vision on Hold*, NEW YORK TIMES, June 4, 1984.

73. 517 F. Supp. 1342 (S.D.N.Y. 1981).

74. *See id*. at 1342-43.

75. *See Action for Rational Transit II*, 536 F. Supp. at 1231.

76. *See Action for Rational Transit I*, 517 F. Supp. at 1343.

77. 481 F. Supp. 397 (S.D.N.Y. 1979).

78. *See generally* Stephen L. Kass and Jean M. McCarroll, "Westway Redux?," N.Y.L.J., p.3, June 23, 2000. The plaintiffs brought suit in this case *See*king an injunction against the U.S. Army Corps of Engineers' issuing a permit to the co-lead agencies for the 200-acre landfill which is needed pursuant to the Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. § 403(10) and the Clean Water Act, 33 U.S.C. 1344(404). Under 40 C.F.R. pt. 230.1(c), in order to obtain a landfill permit, an applicant must demonstrate that the landfill will not have an unacceptable adverse impact in ways stated in the subsection and further defined in other parts of the guidelines. Denial of a landfill permit is required when the landfill will cause or contribute to significant degradation of the waters of the United States. 40 C.F.R. § 230.10(c). Such degradation of the waters includes significantly adverse effects of the landfill on the fishery. 40 C.F.R. § 230.10(c)(3).

79. 481 F. Supp. at 399.

80. 536 F. Supp. at 531.

81. *See generally* Stephen L. Kass and Jean M. McCarroll, "Westway Redux?," June 23, 2000, N.Y.L.J.

82. *Action for Rational Transit II*, 536 F. Supp. at 1228.

83. 541 F. Supp. 1367 (S.D.N.Y. 1982).

84. 541 F. Supp. at 1382-83; the court cited 40 C.F.R. §1520.9 which provides:

> (c) Agencies
>
> (1) Shall prepare supplements to either draft or final environmental impact statements if:
>
> …
>
> (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.
>
> *See also Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1024 (9th Cir. 1980).

85. *Id*. at 1383.

86. *Id*. at 1379.

87. *Id*.

88. *Id*.

89. 614 F. Supp. at 1478.

90. 614 F. Supp. 1475 (S.D.N.Y. 1985).

91. 614 F. Supp. at 1516-17. The plaintiffs' claim that the Corps had violated § 10 of the Rivers and Harbors Act of 1899 was vacated on appeal because the statute did not provide a private right of action. *See Sierra Club v. U.S. Army Corp of Engineers*, 701 F.2d 1011, 1033 (2d Cir. 1983).

92. Dated May 14, 1984. 614 F. Supp. at 1490.

93. 614 F. Supp. at 1495.

94. 614 F. Supp. at 1496.

95. 614 F. Supp. at 1496.

96. 614 F. Supp. at 1480.

97. *Id*.

98. 614 F. Supp. at 1479-80. The court this time stopped short of accusing the agencies of being misleading, but stated that the SEIS should have stated that Westway was not needed for transportation purposes; that transportation needs could be satisfied by the existing roadway improved at a cost of $50 million, and that the reason for the Westway landfill project, estimated to cost $2 billion, was primarily redevelopment.

99. 614 F. Supp. at 1479-80.

100. 614 F. Supp. at 1480.

101. *Sierra Club v. U.S. Army Corps of Engineers*, 772 F.2d 1043 (2d Cir. 1985).

102. *See* Michael Oreskes, *House Votes by Big Margin to Bar Funds for Westway*, NEW YORK TIMES, Sept. 12, 1985.

103. *See* Sam Roberts, *Complications Over Trade-In for Westway*, NEW YORK TIMES, Sept. 19, 1985.

104. Westway may still be effectively invoked almost talismanically by opponents of many major New York City construction and/or development projects; *See* Stephen L. Kass and Jean M. McCarroll, "Westway Redux?," N.Y.L.J., June 23, 2000; *see also* John B. Oakes, *'Daughter' of Westway: A New Fiasco?*, NEW YORK TIMES, July 9, 1988.

105. 614 F. Supp. at 1515-16.

106. *See* 614 F. Supp. at 1516; *see also* Sierra Club, 701 F.2d at 1032 (citing the district court's findings of fact as supported by the record that the Corps' review process of the landfill permit application were "woefully inadequate" at "every level," the decision "was made without having any reliable fishery information whatever," based on so little information that it could "only be explained as resulting from an almost fixed predetermination to grant the Westway landfill permit," and basically amounted to a "rubber stamp.").

107. *See* 614 F. Supp. at 1488-90. In 1984, the Corps had conducted a further study of striped bass populations and migration patterns, as required by the 1982 judgments, during the time when the juvenile striped bass were "wintering" in the project area.

108. *See* 614 F. Supp. at 1479.

109. 614 F. Supp. at 1480.

110. The line is certainly not clear. *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989) (providing that whether an agency decision was "arbitrary or capricious," the reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."); under the standard invoked repeatedly in *Sierra Club II* and *Sierra Club III*, a clear error of judgment would not seem to be reversible by a reviewing court.

111. 772 F.2d 1043.

112. 772 F.2d at 1054-55.

113. *Id*. at 1055-56.

114. *See Id*. at 1055, 1053 (referring to the District Court's impermissible substitution of its judgment for that of the Corps, "in some respects the Corps brought this on itself"); 614 F. Supp. 1496-97.

115. 772 F.2d at 1053.

116. *See* Cabinet Committee on the Environment and Citizens' Advisory Committee on Environmental Quality. Ex. Or. No. 11472 of May 29, 1969, 34 Fed. Reg. 8693, as amended by Ex. Or. No. 11514 of Mar. 5, 1970, 35 Fed. Reg. 4247, Ex. Or. No. 12007 of Aug. 22, 1977, § 2(b), 42 Fed. Reg. 42839.

117. 772 F.2d at 1052.

118. MTA and the City of New York Planning Commission (2004). Final Scoping Document: No. 7 Subway Extension—Hudson Yards Rezoning and Development Program. *Draft Generic Environmental Impact Statement*, CEQR No. 03DCP031M. The Program DEIS is available in its entirety at http://www.nyc.gov/html/dcp/html/hyards/eis.html.

119. Some of the public interest groups that have submitted comments have made them public, either on their particular webpage or in press releases. These groups include the State of New Jersey's Office of the Attorney General; and Manhattan Community Board No. 4, covering the neighborhoods of Chelsea, Clinton, and Hell's Kitchen.

120. *See* DEIS, Chapter 19, p. 19-1.

121. Citizens Guide, p. 7.

122. *Id*.

123. *Id*. at 6.

124. *Id*. at 8.

125. *Id*. at 9.

126. *Id*.

127. *See News Release: Attorney General Harvey Demands Analysis of Environmental Impact of New York City's Hudson Yards Project on New Jersey*, Oct. 4, 2004, New Jersey Office of the Attorney General, New Jersey Department of Law and Public Safety, *available at* http://nj.gov/lps/newsreleases04/pr20041005a.html.

128. *Id*.

129. Self-described as an independent, not-for-profit environmental group concerned with protecting the ecological, commercial, and recreational integrity of the Hudson River and its tributaries, and safeguarding the drinking water supply for New York City and Westchester County.

130. *See* Reed Super, *Re: Draft Generic Environmental Impact Statement (DGEIS) for the Hudson Yards Rezoning and Development Program*, Oct. 4, 2004, *available at* http://riverkeeper.org/document.php/328/Riverkeeper_Com.pdf; *see also* Walter Mankoff, *Response to the No. 7 Subway Extension—Hudson Yards Rezoning and Redevelopment Program Draft Generic Environmental Impact Statement*, Oct. 4, 2004, *available at* http://www.manhattancb4.org/HKHY/docs/HY%20DGEIS%20comments.pdf.

131. Citizens Guide, p. 11.

132. *Id*. at 12.

133. *See Sierra Club v. US Army Corps of Engineers*, 772 F.2d at 1053, 1055.

134. *See Id*. at 1016.

135. *See also Sierra Club III*, 614 F. Supp. at 1476.

136. Theresa J. Devine, *Fiscal Brief: West Side Financing's Complex, $1.3 Billion Story*, NEW YORK CITY INDEPENDENT BUDGET OFFICE, p.1., August 2004.

137. *See Id*. at p. 6.

138. *See Id*. at p. 2.

139. *See* Anne Michaud, *Work Behind the Scenes to Give $600 Million; Approach Raises Questions*, CRAINE'S NEW YORK BUSINESS JOURNAL, Feb. 2, 2004 (quoting New York City Councilwoman Christine Quinn, an outspoken and energetic opponent of the Project); Theresa J. Devine, *Fiscal Brief: West Side Financing's Complex, $1.3 Billion Story*, NEW YORK CITY INDEPENDENT BUDGET OFFICE, p.1., August 2004 ("By keeping the borrowing out the capital plan . . . legislators will not have their usual role in helping to decide if Hudson Yards should be a capital priority.").

140. *See Id*.

141. *See* CITIZENS UNION & CITIZENS UNION FOUNDATION, *Hudson Yards Redevelopment Area Proposal Analysis*, 2004, at 21.

142. *Compare* David Belkin and Rachelle Celebrezze, *Background Paper: Estimating the Economic and Fiscal Impacts of the New York Sports and Convention Center*, NEW YORK INDEPENDENT BUDGET OFFICE. July 2004; *with* George Sweeting, *Inside the Budget: West Side Stadium: Touchdown for the City?*, NEW YORK CITY INDEPENDENT BUDGET OFFICE, July 1, 2004.

143. *See Id*. at p. 1.

144. *Id*.

145. *Id*. at p. 2.

146. *Id.*

Jordan O'Brien tied for second place in the 2005 Environmental Law Section Essay contest.

What Is "Community Character?"

By Drayton Grant

Synopsis

Under SEQRA, "community character" is part of the definition of "environment." But what is "community character?" Although SEQRA was enacted in 1975 and countless environmental reviewers have applied this term, it is surprisingly hard to find a tidy definition to cite here, perhaps because the term is inherently inclusive.[1] Even if we cannot distill a simple definition, this article will review state court and administrative decisions that address "community character" to improve the reader's understanding of the phrase.

Community character may be derived from both formal, adopted local, regional, state and national plans and designations in and around the site of the project, and also from the findings of professional studies of the area that may be affected by the project. It is a broad term used to address the totality of human social, economic and aesthetic experience in the project area. The specific elements that have been studied under this concern have varied from project to project, apparently depending on the type of impact that the specific project may have on the particular community.

Since it is a broad term, in a coordinated review where the Planning Board is not lead agency, how could excluding community character as an issue by the lead agency affect the Planning Board's later review of the project?

Where the project is the subject of coordinated review under SEQRA, if the lead agency excludes discussion of community character from its record, the Planning Board will be limited to the record on the issue as developed by the lead agency. It may supplement the record in its own review for site plan, special permit and subdivision approval where a standard is clearly set out in the local law that the Planning Board must apply.

How could a project opponent or proponent use the issue of community character in the lead agency hearing?

"Community character" may be raised and argued in hearings and in the courts both by local governments where the projects are sited, and by others. Project opponents will set forth evidence of a contrast between, on the one hand, the adopted plans for the area or the current condition of the area where the project is to be sited and, on the other, the possible impacts the projects may have on the area. Conversely, project proponents will seek to establish that the project will be consistent with or have a negligible effect upon those same adopted plans or current conditions. If the lead agency determines during scoping that "community character" is an issue, all those who are parties will be free to present information on the issue.

Discussion

What is "community character" under SEQRA?

"Community character" is part of the definition of "environment" in the SEQRA statute, repeated in the SEQRA regulations:

> "Environment" means 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.*[2]

SEQRA regulations also state that "creation of a material conflict with a community's current plans or goals as officially approved or adopted" or "the impairment . . . of community . . . character" are significant adverse effects in the context of a significance determination.[3]

The court cases and DEC decisions tend to assume the phrase explains itself. Here are the leading cases and what they say.

Chinese Staff

This 1986 Court of Appeals decision was the first to discuss the term. Community residents brought the case challenging the approval of the construction of a high-rise luxury condominium in Chinatown in New York City, arguing that it created gentrification pressure on local residents and businesses. The city argued that, "any impacts that are not either directly related to a primary physical impact or will not impinge upon the physical environment in a significant manner are outside the scope of the definition of 'environment,' and that the lead agenc[y was] therefore not required to investigate the potential effects."[4]

The Court said:

> The impact that a project may have on population patterns or existing community character, with or without a separate impact on the physical environment, is a relevant concern in an environmental analysis since the statute

> includes these concerns as elements of the environment. That these factors might generally be regarded as social or economic is irrelevant in view of this explicit definition. By [its] express terms, therefore, . . . SEQRA . . . require[s] a lead agency to consider more than impacts upon the physical environment in determining whether to require the preparation of an EIS. In sum, population patterns and neighborhood character are physical conditions of the environment under SEQRA . . . regardless of whether there is any impact on the physical.[5]

The Court ruled that:

> [T]he potential displacement of local residents and businesses is an effect on population patterns and neighborhood character which must be considered in determining whether the requirement for an EIS is triggered.[6]

The Court continued:

> The potential acceleration of the displacement of local residents and businesses is a secondary long-term effect on population patterns, community goals and neighborhood character such that [SEQRA] requires these impacts on the environment to be considered in an environmental analysis. The fact that the actual construction on the proposed site will not cause the displacement of any residents or businesses is not dispositive for displacement can occur in the community surrounding a project as well as on the site of a project.[7]

While this decision sounds as if it dealt with a very large impact on the area of Chinatown, it was a case about "one high-rise apartment—to be constructed on a vacant lot—which adds no more than 400 persons to an existing area population of approximately 40,000."[8]

East Coast Development Company

In 1996, the Supreme Court in Tompkins County reviewed a Planning Board decision in the City of Ithaca where the planners appeared to be trying to use SEQRA as a direct tool for economic planning. The Court set an outside limit to SEQRA as a tool for economic regulations, explaining that:

> SEQRA does not authorize governmental agencies, under the guise of environmental protection, to manipulate the flow of private investment in order to advance their own economic master plan. . . . We conclude that the Board decision cannot be sustained if based solely upon the anticipation that a Wal-Mart store would adversely affect the existing downtown retail market place.[9]

Walmart v. Planning Board of Town of North Elba

Walmart was also the developer before the Appellate Division, Third Department, in another recent case which discussed community character. It held that community character was an appropriate concern under SEQRA that allowed the Planning Board to decide whether to issue its approvals based in part on:

> the economic effect the proposed store would be expected to have upon other local businesses . . . in the context of assessing the probability and extent of the change it would work upon the overall character of the community, as a result of an increased vacancy rate among commercial properties in the downtown area—an entirely proper avenue of inquiry, even within SEQRA.[10]

Palumbo Block

The DEC Commissioner made clear how many separate concerns can be considered as part of community character in *In re Palumbo Block Co.*[11] The ALJ had ruled that community character "impacts 'relate largely to the issues of noise and visual impacts, and to the importance of tourism, recreational and agricultural activities in the economy and social fabric of the area surrounding the proposed mine.'" The Commissioner decided that "parsing out community character by addressing only potential visual and noise impacts unduly excludes a thorough review of the proposed mine impacts on the community setting."

She also reviewed the many different concerns that had been raised under "community character."

> Impacts to community character can include neighborhood gentrification (*Chinese Staff*), a proposed development that would quadruple a town's present population (*In re Tuxedo Conservation and Taxpayers Assoc. v. Town Bd. of Tuxedo*, 69 A.D.2d 320 [2d Dept. 1979]), traffic and parking problems for a neighborhood arising from a proposed sports stadium *(In re H.O.M.E.S. v. New York State Urban Dev. Corp.*, 69 A.D.2d 222 [4th Dept. 1979]), and lower property values and less future commercial development emanating from a pro-

posed transfer station *(In re Meschi v. New York State Dep't of Environmental Conservation*, 114 Misc. 2d 877 [Sup. Ct., Albany Co. 1982]).

She showed the complexity of the term in SEQRA cases:

> [T]he issue of community character may intertwine and overlap with issues such as noise, aesthetics, traffic and cultural resources, and a commissioner's final determination may 'necessarily involve a judgment that integrates all of the relevant facts with respect to all of those issues. . . . the issue cannot necessarily be viewed in isolation and may include a myriad of diverse components' (citing *In re Whibco Inc*., 1998 WL 389014, 3 [Interim Decision, June 15, 1998] [community character, noise, visual impacts and traffic tend to overlap; final determination 'will necessarily involve a judgment that integrates all of the relevant facts with respect to all of those issues']); *In re Lane Construction Co.*, 1998 WL 389019, *2 (Decision, June 26, 1998) (project's impacts on the historic and scenic character of community, including visual and other impacts, could not be mitigated and were unacceptable). Accordingly, the issue of 'community character' cannot necessarily be viewed in isolation and may include a myriad of diverse components.

How could the exclusion of community character by a lead agency impact the Planning Board review of a project?

A Planning Board is required to make a written findings statement before it can approve or disapprove a project.[12]

The project will only come to the Planning Board once the lead agency has filed its written findings statement, and generally only after the applicant has received the lead agency's permits.

Assuming the Planning Board disagrees with some finding that the lead agency has made, the Planning Board will proceed to sort through the record from the environmental impact statement to find facts that will support the findings the Planning Board needs to make.

Should there be some facts that have not been included, the Planning Board will not be free to supplement the record, except where it needs information directly related to the standards it must apply in making its own Zoning Law findings. For instance, the Town may have a very specific noise performance standard. If the record from the EIS does not address noise adequately for the Planning Board to be able to determine whether the noise standard has been met, the Planning Board will not only be free to inquire about noise, but required to do so. However, since "community character" is such a wide aperture for viewing a project, there may well be areas of inquiry related to the topic that are not considered in the local zoning and subdivision laws. On those topics, the Planning Board will not have the authority to delve further.[13]

How can a project opponent argue the issue of community character in the lead agency's hearing?

St. Lawrence Cement

An instructive decision came in the DEC ALJ's initial rulings on party status and issues in *In re St. Lawrence Cement*, 2001 WL 1587361, a large and controversial project which was proposed to be sited largely in the Town of Greenport, Columbia County.

Arguments to curtail community character as an issue were raised successfully in the St. Lawrence case. The applicant sought to argue that community character was a local concern and that the local governments affected agreed that the project was consistent with local community character, but the ALJ disagreed. However, the ALJ found, "we have concluded that, in this case, any impacts to community character will be adequately addressed in conjunction with other identified environmental impacts (for example, visual and air pollution)."

The Town of Greenport supported the proposed project. It submitted a brief withdrawing its petition for full party status, and instead sought amicus status with respect to the community character issue. The Town stated that, given the mixed uses presently found in Greenport, the proposed project would be consistent with the Town's character. The Town maintained that the Town's character was defined by its Comprehensive Land Use Plan, as well as existing and prior uses, and concluded that the proposed facility would not conflict with that character.

The St. Lawrence Cement Company argued that community character could not be adjudicated in the case because none of the affected municipalities had found the project would negatively affect the existing and prospective character of their communities, and the project complied with all applicable zoning and land use plans. The company also argued that community character should be the province of local government, through its legislative function, and that since SEQRA does not alter the jurisdiction between or among state or local agencies, purely local concerns are not adjudicable by the DEC under the statute. The company fur-

ther argued (1) that community character cannot be considered as a "stand alone" issue, but must be tied to some other environmental impact in order to be judicable; and (2) that the affected municipalities, whose intent is evidenced by local zoning ordinances, land use plans, and prior uses, are the only participants who may raise the issue of community character for adjudication.

The project opponents argued that the community was a far larger geographic area, namely the mid-Hudson Valley, and that the size and intensity of the proposed cement plant would in fact be inconsistent with a number of other national, state and regional designations, plans and uses. The expert for the project opponents argued that the communities in the region had been moving away from traditional industry for the last 25 years, toward a more diversified economy in which tourism and second home purchases play a larger role. He argued that communities near the site rely upon the visual appeal of the area, its historic fabric and texture, its pastoral setting, attractions such as historic homes, and the general quality of life, a community character which would be jeopardized by the plant. He also argued that the project would jeopardize smaller investments and investments in historic preservation in favor of one large undertaking.

The ALJ ruled that community character was not an issue that only local government could raise or consider, noting that the leading case, *Chinese Staff*, was brought by a not-for-profit corporation consisting of restauranteurs and garment workers who lived and worked in Chinatown. Nonetheless, community character was dropped as a separate issue for review.

This case makes plain that the project opponent, as well as the project proponent and any other parties to the hearing, could certainly argue their vision of community's character.

In re Crossroads Ventures

Most recently, a DEC ALJ wrestled with this issue in *In re Crossroads Ventures, LLC*, Ruling 3, decided September 7, 2005, which ruled on Issues and Party Status. The Ruling is set out at http://www.dec.state.ny.us/website/ohms/decis/crossroadsr3.html. The positions in this matter are similar to those in *St. Lawrence*. The planning expert for the Catskill Park Coalition, which is seeking to curtail the scale of the project, noted:

> 'The Catskill region is famous for its clean air, clean water, forest, mountains, villages and hamlets, people, lifestyles, recreation activities and aesthetic values. These are the features that give the Catskill region its sense of place and community character.' The proposed project . . . would adversely affect elements contributing to that community character such as fly fishing, which has only begun to be reestablished after flooding in 1996, hiking, backpacking, and the sense of solitude engendered by the Catskill forests . . . . CPC asserts that, unlike times past, when the local economy depended on the presence of large hotels, economic growth today is in the hamlets of the region. . . . 'While the large hotels did not survive, the hamlets did, and in fact have begun to once again prosper, growing organically based upon the natural resources in a sustainable fashion based upon the natural resources, instead of being dependent upon a handful of large employers in a proverbial 'company town' scenario.

The CPC contrasted the community character, as they defined it, with the proposal:

> 'Through the introduction of exclusive gated residential communities and the unprecedented large scale development of two hotels, two golf courses, and an attendant "city," the project will overwhelm the architecture, hamlets and natural resources including the solitude and scenic vistas currently viewed as integral to the communities' character.' CPC argues that any deference to local zoning must also be tempered by the proposed project's proximity to the constitutionally protected Catskill Park, the environmental resources of which are 'placed at risk by [the proposed project] are intimately linked to this area's sense of place; its community character.'

Both the DEC staff and the project proponents argued that the community character was already adequately addressed by the local zoning laws and the regional development plan for the Route 28 highway corridor.

The ALJ decided that community character should be further developed because the CPC had raised substantive and significant issues regarding the impact the project will have on the community character of the hamlets and villages in the area . . . . their resolution is essential before any determination may be made pursuant to 6 N.Y.C.R.R. 617.11(d)(2) and (5).[14]

> First, the community character of the area is defined by the hamlets and villages in their unique environmental set-

ting surrounded by the Catskill Forest Preserve. Second, preserving and enhancing the quality of life enjoyed by those hamlets and villages is of paramount concern. Third, the development of a resort facility within the area is compatible with the community vision articulated in the economic development studies which have been undertaken. Fourth, major tourist facilities should not be developed within the hamlets and villages themselves. Fifth, the development of a four-season tourist market should inure to the mutual benefit of the hamlets and villages and any resort facility proposed. . . .

This analysis, however, for the purpose of SEQRA review, leads to a fundamental question of balance, which must be the subject of further inquiry through the adjudicatory process. In particular, at this point, certain questions remain unanswered, including:

1. Will the project, if developed as proposed, overwhelm the existing hamlets and villages to the significant detriment of their present quality of life?

2. If such significant detriment to the quality of life of the hamlets and villages would result, should the proposed resort be reduced in scale or its elements be reconfigured in a manner so as to avoid this consequence?

3. What, if any, alternative configuration of the proposed resort can be achieved that would still provide the critical economic mass necessary for the resort's success and drive the economic revitalization of the hamlets and villages?

Such questions of balance as they concern impacts to community character are clearly within the purview of SEQRA review and appropriate for adjudication. Indeed, such an inquiry reflects the legislature's intent in the enactment of SEQRA. ECL 8-0103(7) states:

It is the intent of the legislature that the protection and enhancement of the environment, human and community resources shall be given appropriate weight with social and economic considerations in public policy. Social, economic, and environmental factors shall be considered together in reaching decisions on proposed activities.

This ALJ Ruling is currently being appealed within the DEC. A decision is not expected until next year.

To conclude, from all these decisions, it is clear that community character, nebulous and seemingly innocuous as it may sound, can be a potent issue in environmental review.

Endnotes

1. For instance, a 2002 Power Point presentation by the DEC Division of Environmental Permits to the Suffolk County Planning Federation entitled, "SEQR and Community Character," described "community character" as a "combination of traits and values," namely:
   - Aesthetic/visual resources,
   - Existing land use, including population and settlement patterns and recreation and open space,
   - Historic or archeological resources, and
   - Health and safety.
2. ECL 8-0105(6); 6 N.Y.C.R.R. 617.2(l).
3. 6 N.Y.C.R.R. §§ 617.7(c)(l)(iv), (v).
4. *Chinese Staff and Workers Assn. v. City of New York*, 68 N.Y.2d 359, 365 (1986).
5. *Id.* at 366.
6. *Id.*
7. *Id.* at 367.
8. *Id.* at 370.
9. *East Coast Development Company v. Kay*, 174 M2d 430, 432 (Sup. Ct., Tompkins Co. 1996).
10. *Walmart v. Planning Board of Town of North Elba*, 238 A.D.2d 93, 98 (1998).
11. 2001 WL 651613 (Interim Decision, June 4, 2001).
12. 6 N.Y.C.R.R. 617.11(c).
13. *Gordon v. Rush*, 100 N.Y.2d 236 (2003); 6 N.Y.C.R.R. 617.3(i), 617.6(b)(3)(iii).
14. 6 N.Y.C.R.R. § 617.11(d) "Findings must:

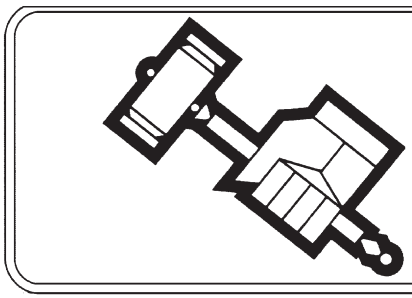
    . . .

    (2) weigh and balance relevant environmental impacts with social, economic and other considerations;

    . . .

    (5) certify that consistent with social, economic and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable."

Drayton Grant is a partner with Grant & Lyons, LLP, Rhinebeck and New York City.



Administrative Decisions Update

Prepared by Thomas Hoff Prol

In re the Application for a Section 401 Water Quality Certification for the School Street Project.

- by -

ERIE BOULEVARD HYDROPOWER L.P., Applicant

Interim Decision of the Deputy Commissioner

September 22, 2005

By leave of the Deputy Commissioner,[1] applicant Erie Boulevard Hydropower L.P. ("Applicant") filed an expedited appeal from an oral ruling of ALJ Kevin J. Casutto during an issues conference on April 14, 2005. In that ruling, ALJ Casutto held that the version of 6 N.Y.C.R.R. Part 624 ("Former Part 624"), which was in effect from August 3, 1981, through January 8, 1994, was to be applied in its entirety to the instant water quality certification application proceeding.

Deputy Commissioner Carl Johnson, while finding the ALJ's ruling to be a correct application of the regulations, exercised DEC's enforcement discretion to reverse the ALJ's ruling.

Background

In 1991, Niagara Mohawk Power Corporation ("Niagara Mohawk") applied to the Department of Environmental Conservation ("Department") for water quality certifications ("WQCs"), pursuant to section 401 of the federal Clean Water Act, for nine hydroelectric generating projects including the School Street project located in the City of Cohoes, New York.

On November 19, 1992, DEC denied the applications for all nine WQCs and, on December 16, 1992, Niagara Mohawk requested an administrative adjudicatory hearing pursuant to 6 N.Y.C.R.R. section 621.7. An administrative permit hearing was noticed and ALJ Andrew S. Pearlstein convened a combined legislative hearing and issues conference on August 5, 1993, for the nine WQC applications. After the issues conference was adjourned, but prior to the ALJ's issues ruling, the Former Part 624 was repealed and the current version of Part 624 ("Current Part 624") was effective January 9, 1994.

ALJ Pearlstein subsequently issued a ruling determining several issues concerning the scope of New York State's authority under the Clean Water Act section 401. While administrative appeals to ALJ Pearlstein's ruling were pending, the U.S. Supreme Court issued *Jefferson County v Washington Dept. of Ecology*, 511 U.S. 700 (1994) and then-Commissioner Langdon Marsh remanded the matter back to the ALJ while directing Department staff to revise the draft permits in light of the Supreme Court's decision.

In the ensuing time, after transfer to ALJ Casutto, a new applicant, Erie Boulevard Hydropower, L.P., replaced Niagara Mohawk as the applicant for the WQC for the School Street project. The parties were able to reach settlements on all of the nine WQC applications except the School Street WQC. Settlement discussions on the School Street project produced a new draft WQC and, on March 7, 2005, a supplemental notice of public comment period, complete application and reconvening of public hearing was issued that scheduled a supplemental legislative hearing and issues conference, and established filing deadlines for additional petitions for party status.

Before the supplemental issues conference, Erie Boulevard and DEC each moved before ALJ Casutto for a determination of applicable regulations. Applicant and the DEC argued, among other things, that because issues for adjudication have not been identified, no "determination to hold an adjudicatory hearing" has been made yet (6 N.Y.C.R.R. Current 624.1(d)). Accordingly, Applicant and DEC argued that because the identification of adjudicable issues occurred after the effective date of the current regulation, the Current Part 624 applies to these proceedings. ALJ Casutto held that the referral of the matter to the Office of Hearings and Mediation Services ("Office of Hearings") and the opening of the hearing record in August 1993 were the triggering events that determined which version of Part 624 applied and thus applied Former Part 624 to the proceedings.

Erie Boulevard filed an appeal and Deputy Commissioner Johnson retained the appeal and authorized Applicant to supplement its filing. Party-status petitioner Green Island Power Authority ("GIPA") filed opposition to Applicant's appeal and DEC staff filed a reply supporting Applicant's appeal.

Deputy Commissioner's Interim Decision

The Deputy Commissioner found that, "[a]s a technical matter, ALJ Casutto's conclusion that former Part 624 applies to these proceedings is correct." Interim Decision at 6. The transition provision of the Current Part 624 provides that, "[t]he provisions of this Part apply to those proceedings in which the determination to hold an adjudicatory hearing was made on or after the effective date of these regulations." 6 N.Y.C.R.R. Current 624.1(d). The effective date of the Current Part 624 was January 9, 1994.

The Deputy Commissioner reviewed the regulatory drafter's intent in crafting the term "determination to hold an adjudicatory hearing" (*see* 6 N.Y.C.R.R. Current section 624.1(a)) as this analysis gives rise to determining the applicable version of the regulation. The Deputy Commissioner determined that the drafters of the Current Part 624 did not intend that participants in DEC permit proceedings should wait until the middle of the hearing process to learn which version of the regulations applied. Rather, he indicated that the drafters "clearly intended a bright-line triggering event that occurred before a matter was referred to the Office of Hearings and, certainly, before any permit hearing proceedings began." Interim Decision at 8. For the instant proceeding, the triggering event was the December 1992 request by Niagara Mohawk for a hearing on the denial of its application for a WQC for the School Street project which occurred before the effective date of the Current Part 624.

The Deputy Commissioner stated that, "[n]otwithstanding ALJ Casutto's correct application of section 624.1(d), . . . I am exercising my discretion and directing that all further proceedings in this matter be conducted pursuant to the current Part 624." *Id*.

First, neither the applicant nor the proposed intervenors (who filed the objection to the application of the Current version) showed either would be prejudiced by application of the Current Part 624. Indeed, the hearing process had not progressed so far that application of the Current version of the regulations would disrupt the proceedings.

Second, since the Current Part 624 has been in effect for over ten years, and, in addition to the parties and the court being more familiar with the Current version, the Deputy Commissioner found that, "very little purpose would be served by continuing to apply the prior version to this proceeding. . . . No real benefit would be gained, and considerable inefficiency might result, if questions concerning interpretation of the former regulations have to be addressed throughout these proceeding." *Id*. at 9. The use of the former version would also have no precedential or adjudicatory value outside of the instant hearing.

Third, the transition provisions of the Current Part 624 were intended to address matters presently under Departmental review at the time the new regulations were adopted. Presumably, he noted, "it was beyond the expectation of the regulation's drafters that former Part 624 would be applied over a decade later to a project that returned to the Office of Hearings after such a long hiatus." *Id*. at 11.

In re an Application to Construct and Operate a Solid Waste Management Facility pursuant to Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 N.Y.C.R.R.) Part 360 in the Town of Clay, Onondaga County.

- by -

EVERGREEN RECYCLING, LLC, Applicant

Interim Decision of the Deputy Commissioner

July 28, 2005

Background

In a permit hearing proceeding conducted pursuant to 6 N.Y.C.R.R. Part 624, intervenors Town of Clay, Madison County, and Onondaga appealed, by leave of the Commissioner, from two rulings of ALJ Daniel P. O'Connell: (1) a November 18, 2003, ruling adjourning the proceeding until the merits of the applicant, Evergreen Recycling, LLC's ("Evergreen") notice of claim against various municipal and county intervenors was resolved; and (2) a December 4, 2003, ruling resuming proceedings as a result of applicant's withdrawal without prejudice of its notice of claim.

The Deputy Commissioner, Lynette M. Stark, reversed the ALJ's December 4, 2003, ruling, affirmed the November 18, 2003, ruling, and adjourned the proceeding until applicant's Notice of Claim against various entities, including the municipality, is resolved on the merits.

Facts and Procedural History

Applicant submitted an application to NYSDEC for a 6 N.Y.C.R.R. Part 360 permit to construct and operate a solid waste transfer station. As originally proposed, the transfer station would accept construction and demolition debris (C&D Material or "Type 13 Waste") from building and demolition contractors, municipalities, and local haulers, and commercial municipal solid waste from private haulers and businesses. The proposed facility would use an existing building located in the Town of Clay, Onondaga County, New York.

DEC staff deemed the application complete as of August 15, 2002. By submission dated May 28, 2003, applicant also applied for an air facility registration. Staff determined, however, that based upon Evergreen's analysis of hazardous air pollutant emissions from alternative fuel processing, applicant did not qualify for registration. Rather, applicant was required to apply for a state facility permit to address its air emissions.

On January 9, 2003, pursuant to 6 N.Y.C.R.R. Part 621, a legislative public hearing was held and written comments were received until January 17, 2003. After reviewing the public comments, in a letter dated May 5, 2003, Department staff requested additional technical information from applicant. By letter dated May 28, 2003, applicant provided some information, but "otherwise indicated that no further information would be provided, and demanded that the Department [NYSDEC] make a final determination on the permit application within ten working days." Interim Decision at 2.

On July 16, 2003, the Department's Region 7 staff wrote to Evergreen, informing it that the permit application was denied based upon its failure to fully respond to the prior request for information as well as an alleged failure to meet the specific requirements of 6 N.Y.C.R.R. Parts 201, 212, and 360. On the same date, Evergreen requested an adjudicatory hearing with respect to the permit application denial, and the matter was referred to the Department's Office of Hearings and Mediation Services.

ALJ O'Connell held an issues conference on September 8, 2003, and accepted petitions for full party status filed by Madison County, Informed Clay Residents Against the Transfer Station ("I C RATS"), Town of Camillus, Onondaga County, Town of Clay, and the Oneida-Herkimer Solid Waste Management Authority ("Oneida-Herkimer SWMA"). As well, a petition for *amicus curiae* status was filed by the Onondaga County Resource Recovery Agency ("OCRRA") (collectively "Intervenors").

Applicant's July 16, 2003, Notice of Claim

Through its petition for *amicus* status, OCRRA informed the ALJ that on July 16, 2003, Evergreen had served a Notice of Claim under the General Municipal Law section 50-e against all municipalities and public corporations that participated in the January 9, 2003, legislative hearing. Those parties included OCCRA and many of the Intervenors.

The Notice of Claim contained a variety of tort and contract claims under at least nine theories arising out of "'individual and combined improper efforts of [the named parties] to prevent claimants from obtaining a permit from the [Department] to construct and operate a solid waste management facility.'" The date of claim accrual was specified as July 16, 2003, the date NYSDEC denied Evergreen's application for a permit to operate a solid waste management facility." *Id*. at 4. A supplemental claim dated July 31, 2003, indicated that the parties were "'jointly and severally liable' for over $6 million in damages for lease payments, lost revenues, engineering fees, and additional legal fees." *Id*.

Issues Conference and November 18, 2003, Ruling

The Intervenors argued that the filing of the Notice of Claim had an improper chilling effect on public participation at the hearing and undermined the integrity of the hearing process. Intervenors were concerned that participation in the process would expose them to additional claims and at least one municipality stated it would not file petition for party status because of the notice of claim. OCCRA suggested that it filed as *amicus*, as opposed to party status, because of the Notice of Claim.

The ALJ ruled that the Notice of Claim had adversely impacted public participation in the hearing process and concluded that the best course of action was to adjourn the administrative proceeding until applicant's claims were resolved on the merits by a court or the Notice of Claim was withdrawn. Evergreen withdrew its Notice of Claim *without* prejudice on November 26, 2003.

December 4, 2003, "Clarification" Ruling

Intervenors argued that to be effective, the withdrawal of the Notice of Claim had to be "with prejudice" in order for the issues conference to continue. Evergreen argued against both a withdrawal with and without prejudice being a condition precedent to restarting the hearing and specifically stated that the Notice of Claim was not intended to chill public discourse. On December 4, 2003, the ALJ issued a second ruling, wherein he indicated that he had not intended to condition the withdrawal of Notice of Claim in the

manner urged by Intervenors. Thus, the ALJ accepted the withdrawal *without* prejudice and would not require dismissal *with* prejudice prior to restarting the hearings.

The DEC Commissioner granted motions for leave to appeal filed by the Town of Clay, Madison County, and Onondaga County. A joint appeal brief was filed by the Town of Clay and Madison County. Onondaga County filed a separate appeal brief. Reply briefs were filed by applicant and Department staff. An *amicus* brief was filed by OCCRA supporting appellants.

Interim Decision of the Deputy Commissioner

First, the Deputy Commissioner noted that, "[p]ublic participation in the administrative review of permit applications is a central feature of New York's environmental policy." *Id*. at 13. She referred to Legislative intent underlying ECL article 70 was meant, "'to encourage public participation in government review and decision-making processes and to promote public understanding of all government activities" (*Id.* quoting ECL 70-0103(4)). Likewise, public involvement in the review process "expressly recognizes the role of members of the public and 'other state agencies or units of government' in permit hearing proceedings. ECL 70-0119(1).

Second, in addition to questioning ripeness of the claims, the Deputy Commissioner suggested that review of the record "strongly supports" the Intervenors' contentions that Evergreen's Notice of Claim is frivolous and filed for the sole purpose of chilling public participation in these proceedings:

> [t]he factual allegations of the claim lack specificity, raising justifiable doubt about their validity . . . [and it] contains a "kitchen sink" litany of vague tort and constitutional claims that lacks any discernable factual allegations that would support such claims. Moreover, given the basis for staff's denial of the permit (i.e., applicant's failure to provide requested technical information), the allegation of an illegal conspiracy effecting permit denial appears specious. Not only is staff's denial on the asserted ground not inherently illegal, it is authorized by statute and regulation. Interim Decision at 15.

As a result, the Deputy Commissioner agreed with the ALJ that the proceedings must be adjourned until resolution on the merits of the Evergreen tort and contract claims, but disagreed that withdrawal without prejudice was sufficient to thaw the concern among the *amici* and Intervenors that may have dissuaded their full participation in the permit hearing process.

In re the Causing, Engaging in or Maintaining a Condition or Activity which Presents an Imminent Danger to the Health or Welfare of the People of New York State or which Is Likely to Result in Irreversible or Irreparable Damage to the Natural Resources of the State, Pursuant to Section 71-0301 of the Environmental Conservation Law.

- by -

RICHARD MURTAUGH, GAIL MURTAUGH, CROSBY HILL AUTO RECYCLING, and MURTAUGH RECYCLING CORP., Respondents

Decision and Order of the Acting Commissioner

August 26, 2005

Background

Respondents Richard Murtaugh, Gail Murtaugh, Crosby Hill Auto Recycling, and Murtaugh Recycling Corp. (together "Respondents") are alleged to have operated or allowed the operation of auto processing activities at 174-180 Flood Drive, Town of Volney, Oswego County, New York (the "site").

On December 15, 2003, and pursuant to ECL section 71-0301, DEC Commissioner Erin M. Crotty issued a summary abatement order ("SAO"), directing that Respondents immediately stop all auto processing activities at the site. In addition, the SAO directed Respondents to prepare restoration and remediation plans at the site and undertake removal, remediation, and other environmental cleanup-related activities.

In an affidavit dated December 1, 2003, Richard Brazell, DEC Region 7 Spill Engineer stated that operations at the site represented continuing violations of the New York Navigation Law and various articles of the ECL as well as continuing episodes on natural resource damages. These allegations were supplemented by statements submitted by other DEC professionals.

Administrative Hearing

Pursuant to 6 N.Y.C.R.R. Part 620, a hearing was conducted before ALJ Molly T. McBride in the matter and her hearing report ("Hearing Report") included testimony by DEC investigators and rebuttal by the Respondents. DEC testimony also addressed alleged illegal fill being discharged into federal wetlands on the site, and solid waste having been disposed at the site in alleged violation of state environmental standards. However, prior to the hearing, Respondents, first moved to vacate and/or modify the SAO, arguing deficiencies in service and failure of the DEC to meet statutory criteria for issuance of an SAO. In the alternative,

Respondents argued that the SAO should be modified to eliminate the requirement for site investigation, the requirement of a federal wetland delineation, investigation or remediation, and the prohibition on automobile processing at the site as long as certain conditions were met.

At the conclusion of the initial motion, ALJ McBride denied Respondents' request in its entirety and, in her hearing report, recommended that the SAO continue without modification, until each provision has been met by the Respondents.

Acting Commissioner's Decision and Order

The Acting Commissioner found:

> [t]he record, including but not limited to videotape of the auto processing activities and photographs of environmental conditions at the site, clearly demonstrates that large amounts of petroleum product and other contaminants and pollutants were regularly released to the environment as a result of respondents' dismantling and crushing of automobiles at the site. Vehicles were dismantled and crushed in a manner that allowed gasoline, radiator fluid and other liquids to spill out on the ground, with no effort made to collect the fluids or otherwise prevent their release to the environment. Furthermore, these discharges were not isolated events but reflected the customary practice of this operation. Decision and Order at 3.

The Acting Commissioner adopted and fully incorporated the ALJ's Findings of Fact, Conclusions of Law and Recommendation subject to certain additional comments.

Specifically, the Acting Commissioner found Respondents in violation of: (1) ECL article 17 which prohibits discharge of pollutants to the waters of the state from any outlet or point source without a state pollutant discharge elimination system permit (*see* ECL section 17-0803) as Respondents had no permit authorizing the alleged discharges; (2) ECL article 37 which provides that no person shall release to the environment substances that are hazardous or acutely hazardous to public health, safety or the environment in contravention of the rules and regulations promulgated by the Department (*see* ECL section 37-0107). Respondents were found to not hold any permit authorizing the releases entered upon the record; and, (3) ECL article 27 which addresses handling of solid wastes (as well as the regulations promulgated pursuant to 6 N.Y.C.R.R. Part 360). Respondents were likewise found to be lacking the necessary permit for alleged operation of a solid waste management facility.

The matter was remanded to the ALJ for further proceedings consistent with the Decision and Order.

In re the Alleged Violations of Article 27 of the Environmental Conservation Law of the State of New York.

- by -

HELEN AGRAMONTE and PENELOPE AGRAMONTE, Respondents

Decision and Order of the Acting Commissioner

July 19, 2005

Background

New York State Department of Environmental Conservation ("DEC") staff alleged that between March 1, 2001, and June 25, 2002, Respondents violated article 27 (Collection, Treatment and Disposal of Refuse and Other Solid Waste) of the Environmental Conservation Law ("ECL") and 6 N.Y.C.R.R. section 360-13.1(b) by storing without a permit approximately 90,000 waste tires at a site they own in the Town of Wright, Schoharie County ("site").[2] The DEC staff sought a Commissioner's Order imposing a civil penalty of $8,000 and directing removal of all solid waste from the site and its proper disposal at a permitted facility.

On October 16, 2003, Administrative Law Judge ("ALJ") Maria E. Villa granted DEC's motion for hearing in lieu of complaint, holding Respondents liable for committing the alleged violations. However, the ALJ determined that a hearing should be convened pursuant to 6 N.Y.C.R.R. section 622.12(f) to determine penalties to be recommended to the Commissioner.

Penalty Calculation

The DEC staff advocated that, pursuant to the Commissioner's Civil Penalty Policy, issued June 20, 1990 (the "Policy"), the initial penalty is to be a computation of potential statutory maximum for all provable violations, beginning with the first provable violation and continuing until compliance was achieved. The penalty assessed under the Policy is to be no less than the amount of economic benefit (the delayed and avoided costs) that accrued to the violator as a result of noncompliance. The DEC's penalty calculation also includes a "gravity component," which serves to increase the economic benefit amount.

The gravity component is included where, in the DEC's view, violators must be deterred beyond simply recovering the economic benefit, and where the statutory scheme and its integrity are impacted. Once the preliminary gravity component is developed, the Policy allows that it may be adjusted based on several factors including: (1) Respondent's culpability; (2) level of cooperation evidenced by the Respondent; (3) Respondent's history of any past violations; (4) ability to pay; and (5) other, unique factors considered at the Department's discretion.

ECL section 71-2703(1)(a) provides that any person who violates articles 3 or 7 of article 27, or any rule or regulation promulgated pursuant to that article, shall be subject to penalties of up to $5,000 for each violation, and an additional penalty of not more than $1,000 per day for each day of continuing violation.[3]

Commissioner's Decision and Order

Acting Commissioner Denise M. Sheehan adopted and incorporated the ALJ's opinion as to liability assessed against the Respondents. On penalty calculation, after initial exchanges of correspondence and materials, it was determined that Respondents had not submitted information and materials to satisfactorily establish a reduction in penalty under the Policy.

During the pendency of the matter, then-DEC Commissioner Erin M. Crotty determined that Respondents should be given another opportunity to furnish financial information, according to the Decision, "for consideration to ensure a more complete record for her decision and in recognition of the unique circumstances and equities in the matter." After the Respondents provided information including a completed financial disclosure form, the record was reopened. It was determined that hardship and other factors, including that one Respondent resided in a nursing home and that the property was sold to a new owner who agreed to accept responsibility for removal of the tires, warranted a mitigation of the fine to $5,000 and suspension of same if the tires were removed in an expedient manner.

In re the Alleged Violation of Article 17 of the Environmental Conservation Law and Parts 612 and 613 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

-by -

PETER J. SCHREIBER, Respondent

Decision and Order of the Acting Commissioner

July 12, 2005

Background

Pursuant to a notice of hearing and complaint dated March 28, 2003, staff of the New York State Department of Environmental Conservation ("Department") commenced an administrative enforcement proceeding against Peter J. Schreiber ("Respondent").

Department staff's complaint alleged that respondent violated 6 N.Y.C.R.R. section 612.2 by failing to renew the registration for a petroleum bulk storage facility ("facility") that he owns and which is located at 286 East Main Street, Amsterdam, New York ("site"). In addition, the complaint alleged that, in violation of 6 N.Y.C.R.R. sections 613.5(a)(1) and 613.5(a)(4), respectively, Respondent failed to timely test two underground storage tanks at the site and failed to submit the testing reports to the Department.

Following service of the notice of hearing and complaint upon Respondent, Respondent submitted an answer dated April 18, 2003. The matter was assigned to ALJ Susan J. DuBois. Following motions and unfruitful settlement efforts between the parties, a hearing took place between January 18, 2005, and February 11, 2005, and the ALJ issued a hearing report dated April 1, 2005 ("Hearing Report").

Decision and Order of the Acting Commissioner

Acting Commissioner Denise M. Sheehan adopted the ALJ's Hearing Report as her decision in this matter, subject to additional comments. The ALJ had recommended that a civil penalty of $15,000 be imposed for Respondent's failure to test the two underground petroleum bulk storage tanks at the site, but suggested waiver of the penalty for late renewal of the facility's petroleum bulk storage registration.

Endnotes

1. Acting Commissioner Denise M. Sheehan delegated decision-making authority to Deputy Commissioner Carl Johnson by memorandum dated February 25, 2005.
2. The tires were allegedly placed on the site by Richard Agramonte (deceased 1993), respondent Helen Agramonte's son and respondent Penelope Agramonte's husband.
3. After the motion was made, that provision was amended to provide for penalties of up to $7,500 per violation, and additional penalties of not more than $1,500 for each day of continuing violation.

Thomas Hoff Prol is an associate with the environmental regulatory practice group at Whiteman Osterman & Hanna, LLP, in Albany, NY, and a former enforcement officer and environmental scientist with USEPA Region 2.

Recent Decisions in Environmental Law

Student Editor: James Denniston

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***Coalition Against Lincoln West, Inc. v. Weinshall*,** 799 N.Y.S.2d 205 (1st Dep't 2005), 2005 N.Y. App. Div. LEXIS 7820.

Facts

Respondent, Hudson Waterfront Associates ("Hudson"), sought to close the 72nd Street exit ramp along the West Side Highway/Henry Hudson Parkway in connection with the construction of an extension to Riverside Drive. The Riverside Drive extension is part of a massive construction project to develop 74 acres of property on Manhattan's west side, particularly between 59th and 72nd Streets. The project began in the early 1990s under a predecessor developer named Lincoln West, but has since been undertaken by Hudson.

In February 2003, Hudson formally petitioned respondent, New York City Department of Transportation (DOT), to authorize the closure of the 72nd Street ramp. As part of the petition, Hudson drew upon the project's Final Environmental Impact Statement (FEIS). The FEIS was published in 1992 pursuant to the State Environmental Quality Review Act (SEQRA). It analyzed the entire project's environmental ramifications, including the environmental repercussions involved with closing the 72nd Street ramp and extending Riverside Drive. Hudson indicated to DOT that if DOT found any significant environmental impacts not addressed in the FEIS, it would provide a Supplemental Environmental Impact Statement (SEIS). Hudson also stated that it would provide a new traffic study outlining the agreed-upon mitigation measures associated with the 72nd Street closure, a proposition demanded by the FEIS.

In May 2003, Hudson submitted to DOT a Technical Memorandum outlining the environmental impacts pertaining to air quality, traffic patterns and noise quality not addressed in the FEIS. The study also reiterated that the ramp's closure was necessary to complete the Riverside Drive extension. Lastly, Hudson determined in the study that no other alternative was feasible.

In January 2004, DOT released a findings statement in response to Hudson's petition. The findings statement declared that DOT: 1) considered all relevant SEQRA and City Environmental Quality Review (CEQR) requirements in conjunction with the 72nd Street closure; 2) reviewed any alternatives to closing the ramp; and 3) determined whether any new developments had arisen environmentally since the release of the FEIS. As to the validity of the FEIS, the findings statement declared that it 1) sufficiently addressed the environmental concerns discovered by DOT, and 2) satisfied the requirements under SEQRA and CEQR. DOT thereafter authorized the closure of the 72nd Street ramp.

Petitioners, a conglomerate of residents and organizations of residents called the Coalition Against Lincoln West, Inc. ("Petitioners"), argued that DOT's review of the FEIS was insufficient, stating that either a new EIS or a formal SEIS should have been provided specifically covering the 72nd Street ramp closure. The Supreme Court, New York County, granted summary judgment for Petitioners, holding that: 1) DOT's findings statement was inadequate to validate the FEIS; 2) the Technical Memorandum was insufficient to remedy the FEIS; and 3) a new EIS specifically targeting the 72nd Street closure was required.

Issue

The main issue in the case at bar is whether Hudson was required to supplement the 1992 FEIS with a SEIS, or in the alternative, to draft a completely new EIS for the 72nd Street closure. In determining the main issue, the Appellate Division, First Department, addressed two sub-issues: 1) whether the FEIS properly addressed the relevant environmental concerns associated with closing the 72nd Street ramp; and 2) whether DOT implemented the proper process in declaring the FEIS sufficient.

Reasoning

In determining whether Hudson was required to provide a new EIS or a SEIS, the court began by looking at whether the FEIS sufficiently addressed the relevant environmental impacts surrounding the 72nd Street closure, and whether such a statement was adequate pursuant to SEQRA.

The court first addressed Petitioners' argument that a separate SEQRA process was required for the 72nd Street closure, specifically addressing the environmental concerns surrounding the closure. The court disagreed with Petitioners, stating that a segmented FEIS contradicted the legislative goal of SEQRA. Citing 6 N.Y.C.R.R. § 617.1, the court stated that the legislative goal of SEQRA was to foster "early comprehensive public involvement, prompt agency action and timely review." The court believed that this goal allowed the interested parties to settle design issues quickly, which in turn enabled them to finalize a reliable approval early on in the project. As for whether the 72nd Street closure required a separate FEIS, the court cited to *Vil. of Westbury v. Department of Transp. of State of New York*,[1] holding that such a separate report was impermissible and inconsistent with the purpose of SEQRA.

After determining that the FEIS was consistent with the purpose of SEQRA, the court turned its attention to whether the FEIS took a "hard look" at the 72nd Street closure—that is, whether the FEIS addressed all relevant environmental concerns. The court first pointed out that the FEIS included an analysis of both the 72nd Street exit ramp and the Riverside Drive extension in relation to the West Side project. The court then pointed out that although the FEIS was devised to cover the entire project (and not specifically the 72nd Street closure), the statement repeatedly referred back to the 72nd Street closure and the Riverside Drive extension, even going so far as saying that the 72nd Street closure was an integral part of the entire construction process.

As for the actual environmental data concerning the 72nd Street closure, the court noted that the FEIS addressed traffic patterns, noise pollution and air quality in relation to the 72nd Street closure, along with any mitigation measures in conjunction with the aforementioned topics. The court thereafter acknowledged that DOT continued to analyze the environmental issues in its January 2004 findings statement, taking into account the updated study set forth in Hudson's Technical Memorandum. At the end of the court's assessment, it held that the 1992 FEIS adequately addressed the 72nd Street closure pursuant to SEQRA, declaring that the FEIS took a "hard look" at the proposal.

The second sub-issue the court tackled was whether DOT adequately reviewed the 1992 FEIS pursuant to the requirements under SEQRA. The court first quoted *Akpan v. Koch*,[2] stating that judicial review of a lead agency's SEQRA determination (such as DOT's determination regarding the 1992 FEIS) is premised on whether the determination was made in accordance with lawful procedure, and whether the determination was substantially affected by an error of law that was either "arbitrary and capricious" or "an abuse of discretion." The court next cited to *Fisher v. Giuliani*,[3] pointing out that judicial review of a lead agency's decision should not involve weighing the merits of the proposed decision, choosing among alternatives, resolving disagreements among experts, or even substituting its own ruling in place of the agency's determination. Third, the court cited to *Jackson v. New York State Urban Dev. Corp.*,[4] promulgating that judicial review of a SEQRA decision involves identifying relevant areas of environmental concern, determining whether the lead agency took a "hard look" at those concerns, and whether the lead agency provided a reasonable explanation for its conclusion.

By applying the aforementioned factors, the court concluded that DOT identified the environmental concerns, took a hard look at the adequacy of the FEIS, and set forth the reasoning for its determination. The court further held that DOT properly applied the SEQRA requirements for determining that a SEIS was unnecessary, adding that such a determination is entitled to judicial deference. The court also noted that Hudson's Technical Memorandum did not serve to fill any gaps in the FEIS, and that DOT was not required to consider alternatives that were infeasible.

Conclusion

The First Department concluded that the 1992 FEIS took a "hard look" at the environmental concerns surrounding the 72nd Street closure, thereby obviating the need for a new EIS or SEIS. The court then held that DOT's procedure in determining the validity of the FEIS was adequate pursuant to SEQRA. As a result of these forgoing factors, the court concluded that DOT's decision to authorize the closure of the 72nd Street exit ramp should have been affirmed. The court reversed the trial court's decision and ruled in favor of the respondents, Hudson and DOT.

Jon V. Finelli '07

Endnotes

1. 75 N.Y.2d 62, 69, 550 N.Y.S.2d 604 (1989).
2. 75 N.Y.2d 561, 570, 555 N.Y.S.2d 16 (1990).
3. 280 A.D.2d 13, 19-20, 720 N.Y.S.2d 50 (1st Dep't 2001).
4. 67 N.Y.2d 400, 503 N.Y.S.2d 298 (1986).

* * *

South Road Associates, LLC v. International Business Machines Corporation, 4 N.Y.3d 272, 826 N.E.2d 806, 793 N.Y.S.2d 835, 2005 N.Y. Slip Op. 02414.

Facts

Defendant IBM, pursuant to a 1981 agreement, leased the subject property from Plaintiff South Road Associates. The parcel included two buildings and their surrounding grounds. IBM had been leasing and using the property since the 1950s, and during that time it had conducted manufacturing operations at the site. As part of its manufacturing operations, IBM had buried an underground chemical waste storage tank on the property. A subsequent leak in the storage tank resulted in contamination of the site's groundwater and soil. IBM independently attempted to clean the site by removing the storage tank and contaminated soil. As part of a later 1994 agreement IBM agreed to "abate" the pollution "to the satisfaction of all requisite governmental agencies,"[1] and restore the land to its previous condition. IBM later petitioned the Department of Environmental Conservation requesting that the site be reclassified from a Type 4 environmental hazard to a Type 2 environmental hazard.

Plaintiff South Road brought a breach of contract claim against IBM. South Road claimed that IBM breached lease article seven, which stated:

> [T]he Tenant will remove its goods and effects . . . and will (a) peaceably yield up to the Landlord *the premises* in good order and condition, excepting ordinary wear and tear, repairs required to be made the Landlord, or damage, destruction or loss by fire or other casualty for any cause . . . and (b) repair all damage to the premises and the fixtures, appurtenances and equipment of the Landlord therein, and to the building, caused by the Tenant's removal of its furniture, fixtures, equipment, machinery and the like and the removal of any improvements or alterations.[2]

Issue

The main environmental issue was whether the language "the premises" in the lease agreement referred to both the real property and the buildings, or alternatively, whether "the premises" referred simply to the interior spaces of the buildings.

If "the premises" referred only to interior spaces, then the defendant's contamination of the surrounding soil and groundwater would not constitute a breach of article seven of the lease.

Reasoning

The Court held that the contractual language "the premises" referred only to the interior spaces of the building. The Court relied on basic contract principles, which hold that when construing a contract it is important to read the document as a whole, to ensure that excessive emphasis is not placed upon particular words or phrases.

Because the lease repeatedly referred to the "premises" separately from other terms such as water tower, appurtenances, land, parking lot and building, the Court determined that if "premises" was an all-encompassing term, the use of such other terms would be superfluous.

Additionally, the Court highlighted specific language in the lease which stated that "the premises" is the space shown on the floor plan, consisting of a certain number of square feet in two buildings.

Conclusion

The court determined that under the provisions of this lease agreement, the "good order and condition" provision applied only to the interior space of the two leased buildings in question.

Because there were no allegations that IBM returned the interior space in less than good order and condition, the Court determined that no provisions of the lease were breached; and therefore the Court held that summary judgment dismissing the complaint was properly granted to IBM.

Daniel DeCicco '06

Endnotes

1. *South Road Associates, LLC v. International Business Machines Corporation*, 4 N.Y.3d 272, 276, 826 N.E.2d 806, 793 N.Y.S.2d 835, 837.
2. *Id. (emphasis added).*

* * *

Susette Kelo, et al., Petitioners v. City of New London, Connecticut, et al., 125 S. Ct. 2655.

Facts

Respondent, New London Development Corporation (NLDC), a private non-profit entity established by the city of New London, crafted an economic development plan, approved by the city of New London, to create jobs, generate tax revenue, and make New London more attractive through economic revitalization. The economic development plan was aimed at revitalizing the city, which had been declared a distressed municipality by a state agency in 1990 and had an unemploy-

ment rate twice that of the state in 1998—two years after the federal government closed the Naval Undersea Warfare Center located in the Fort Trumbull area of the City.

These conditions impelled state and local officials to target New London for economic reconstruction. The economic development plan consisted of seven parcels in the Fort Trumbull area and included, but was not limited to, the development of a high-rise hotel, a small urban village with restaurants and shopping, approximately 80 new residences, a pedestrian riverwalk, a new US Coast Guard Museum, parking lots, and commercial office space. The City Council of New London gave initial approval to the economic development plan two months after the pharmaceutical giant Pfizer, Inc., announced they would build a $300 million global research facility immediately adjacent to Fort Trumbull. The city approved the plan in January 2000, placing the NLDC in charge of implementation and authorizing the NLDC to purchase property or acquire property by exercising eminent domain.

Petitioner Susette Kelo along with eight others, owned 15 properties in the Fort Trumbull area: four in parcel 3, slated to be office space, and ten in parcel 4A, slated to be park or marina support. None of these properties was blighted or in poor condition.

In a bench trial, the Superior Court granted a permanent restraining order against taking properties in parcel 4A, but denied petitioners relief for properties located in parcel 3. On appeal from both petitioners and respondents, the Supreme Court of Connecticut held that all of the proposed takings were valid under the state's municipal statute and constituted valid public use under the Federal and State Constitutions.

Issue

The Supreme Court of the United States granted a writ of certiorari to determine whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment.

Reasoning

The Court distinguishes the case at hand from a case that clearly violates the Fifth Amendment "public use" clause ("the taking of property from *A* for the sole purpose of transferring it to another private party *B*") and a case that clearly falls within the "public use" clause (the taking of land for a railroad with common carrier duties). In the case at hand, "the City's development plan was not adopted 'to benefit a particular class of individuals,'" nor was the property taken on "the mere pretext of a public purpose."[1]

In distinguishing the case at hand the court noted that, although the development plan and corresponding takings were not entirely for "use by the general public," such a narrow reading of the Constitution was rejected long ago. Rather, for over a century the Court has broadly construed the "public use" clause to mean "public purpose," so as to allow deference to state and local legislative judgment on what constitutes "public use." Therefore, according to the Court the question under review largely turned on whether the development plan served a "public purpose," thereby satisfying the Fifth Amendment "public use" clause.

The Court relied heavily on two precedents in reaching it conclusion. First, in *Berman v. Parker*[2] the Court held that the condemnation of all property in a blighted area of Washington D.C., for redevelopment and reconstruction, including sale of land to private parties, constituted a "public purpose," even though specific property within the blighted area was not itself blighted. In *Berman* the Court noted, "community redevelopment programs . . . need not . . . be on a piecemeal basis—lot by lot, building by building."[3] Furthermore, the Court emphasized that "the taking's purpose, and not its mechanics matters in determining public use."[4] Second, in *Midkiff* the Court upheld a statute aimed at breaking up a land oligopoly by transferring plots of land to private individuals because the oligopoly was "skewing the State's fee simple market, inflating land prices, and injuring the public tranquility and welfare."[5]

Combining the holdings in *Midkiff* and *Berman*[6] with the strong theme of "Federalism" expressed in rulings such as *Hairston v. Danville & Western R. Co.*,[7] the Court declared, "For more than a century our public use jurisprudence has widely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."

In applying these rules, the Court found that, since the intention of the city's economic plan was to create jobs, increase tax revenue, and revitalize the economy, the plan constituted a "public purpose," even though private parties were likely to benefit from the economic development plan. The Court described the plan as "carefully formulated" to form a "whole greater than the sum of its parts" that, like in *Berman*, could not be carried out on a piece-meal basis.

The Court in reaching its conclusion dismissed contentions expressed by petitioners and in Justice Thomas and Justice O'Connor's dissenting opinions. In refuting these claims the Court found that "government's pursuit of public purpose will often benefit individual private parties," and, therefore, takings that benefit private parties cannot be ruled unconstitutional simply on that basis. The Court also refused to entertain the suggestion

of a "new bright-line rule that economic development does not qualify as public use," emphasizing that such a view runs counter to the Court's "traditionally broad understanding of public purpose." Nor did the Court agree that takings of the kind in question should require "reasonable certainty" that benefits, such as increased tax revenue and creation of jobs, will accrue. Nor is a heightened standard of review for such takings within the Court's authority. Finally, the Court reserved their rebuttal of O'Connor's argument that the case at hand is distinguished from *Midkiff* and *Berman* insofar as the clear detriment to the public in those cases, blight and oligopoly, did not exist in the case at hand, for a footnote in which they mention recent precedent that runs counter to her view and state that her argument "confuses the *purpose* of the taking with its *mechanics*."

Conclusion

In affirming the ruling of the Supreme Court of Connecticut the Court held that the city's proposed takings of private property were part of a comprehensive economic development plan that had a "public purpose" and, therefore, the takings satisfied the "public use" requirement in the Fifth Amendment, notwithstanding just compensation.

Matthew A. Ford '08

Endnotes

1. *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229 (1984) at 245.
2. 348 U.S. 26 (1954).
3. *Id.* at 35.
4. *Id.* at 244.
5. *Midkiff,* 467 U.S. at 232.
6. The Court also relies on *Rackelshaus v. Monsanto, Co.,* 467 U.S. 986 (1984) in reaching this conclusion.
7. 208 U.S. 598 (1908).

Section Committees and Chairs

The Environmental Law Section encourages members to participate in its programs and to contact the Section Officers or Committee Chairs for information.

Adirondacks, Catskills, Forest Preserve and Natural Resource Management Committee
Carl R. Howard
290 Broadway
New York, NY 10007
(212) 637-3216
E-Mail:howard.carl@epa.gov

Thomas A. Ulasewicz
358 Broadway, Suite 307
Saratoga Springs, NY 12866
(518) 581-9797
E-Mail:phu@global2000.net

Agriculture and Rural Issues Committee
David L. Cook
1300 Clinton Square
Rochester, NY 14603
(585) 263-1381
E-mail:dcook@nixonpeabody.com

Peter G. Ruppar
1800 Main Place Tower
Buffalo, NY 14202
(716) 855-1111
E-Mail:pruppar@dhyplaw.com

Air Quality Committee
Flaire Hope Mills
290 Broadway
New York, NY 10007
(212) 637-3198
E-Mail:mills.flaire@epa.gov

Robert R. Tyson
One Lincoln Center
Syracuse, NY 13202
(315) 218-8221
E-Mail:rtyson@bsk.com

Biotechnology and the Environment Committee
David W. Quist
P.O. Box 2272
Albany, NY 12220
(518) 473-4632
E-Mail:davidquist@earthlink.net

Vernon G. Rail
70 Suffolk Lane
East Islip, NY 11730
(631) 444-0260
E-mail:railx@att.global.net

Coastal and Wetland Resources Committee
Terresa M. Bakner
One Commerce Plaza
Albany, NY 12260
(518) 487-7615
E-Mail:tbakner@woh.com

Drayton Grant
149 Wurtemburg Road
Rhinebeck, NY 12572
(845) 876-2800
E-Mail:grantlyons@aol.com

Continuing Legal Education Committee
Robert H. Feller
111 Washington Avenue
Albany, NY 12210
(518) 533-3222
E-Mail:rfeller@bsk.com

Maureen F. Leary
The Capital
Albany, NY 12224
(518) 474-7154
E-Mail:maureen.leary@
oag.state.ny.us

Kimberlee S. Parker
111 Washington Avenue
Albany, NY 12210
(518) 462-7421
E-Mail:kparker@bsk.com

James P. Rigano
1393 Veterans Memorial Highway
Suite 301S
Hauppauge, NY 11788
(631) 979-3000
E-Mail:jrigano@certilmanbalin.com

Corporate Counsel Committee
Robert M. Hallman
80 Pine Street
New York, NY 10005
(212) 701-3680
E-mail:rhallman@cahill.com

Edward J. Malley
1430 Broadway, 10th Floor
New York, NY 10018
(212) 221-7822
E-mail:emalley@trcsolutions.com

George A. Rusk
368 Pleasantview Drive
Lancaster, NY 14086
(716) 684-8060
E-Mail:grusk@ene.com

Energy Committee
Kevin M. Bernstein
One Lincoln Center
Syracuse, NY 13202
(315) 218-8329
E-Mail:kbernstein@bsk.com

Jennifer L. Hairie
625 Broadway, 14th Floor
Albany, NY 12233
(518) 402-9188
E-Mail:jlhairie@gw.dec.state.ny.us

William S. Helmer
30 S. Pearl Street, 10th Floor
Albany, NY 12207
(518) 433-6723
E-Mail:helmer.b@nypa.gov

Enforcement and Compliance Committee
George F. Bradlau
P.O. Box 541
18 Washington Street, 2nd Floor
Morristown, NJ 07963
(973) 656-1800
E-Mail:gbradlau@
thebradlaugroup.com

Dean S. Sommer
Executive Woods
5 Palisades Drive
Albany, NY 12205
(518) 438-9907, x236
E-Mail:dsommer@youngsommer.com

Environmental Business Transactions Committee
Louis A. Evans
900 Third Avenue
New York, NY 10022
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Joshua M. Fine
101 Hudson Street, 31st Floor
Jersey City, NY 07302
(718) 595-5650

Jeffrey B. Gracer
237 Park Avenue
New York, NY 10017
(212) 880-6262
E-Mail:jgracer@torys.com

Environmental Impact Assessment Committee
Mark A. Chertok
460 Park Avenue, 10th Floor
New York, NY 10022
(212) 421-2150
E-Mail:mchertok@sprlaw.com

Kevin G. Ryan
10 Circle Avenue
Larchmont, NY 10538
(914) 833-8378
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Environmental Insurance Committee
Gerard P. Cavaluzzi
104 Corporate Park Drive
P.O. Box 751
White Plains, NY 10602
(914) 641-2950
E-Mail:gcavaluzzi@pirnie.com

Daniel W. Morrison, III
One North Lexington Avenue
White Plains, NY 10601
(914) 287-6177
E-Mail:dwm@bpslaw.com

Environmental Justice Committee
Peter M. Casper
200 Southern Boulevard
P.O. Box 189
Albany, NY 12201
(518) 436-3188
E-Mail:peter_casper@thruway.state.ny.us

Luis Guarionex Martinez
40 West 20th Street, 11th Floor
New York, NY 10011
(212) 727-4550
E-Mail:lmartinez@nrdc.org

Jean M. McCarroll
2 Wall Street
New York, NY 10005
(212) 238-8828
E-Mail:mccarroll@clm.com

***Journal* Committee**
Kevin Anthony Reilly
Appellate Division, 1st Dept.
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New York, NY 10010
(212) 340-0404

Global Climate Change Committee
Antonia Levine Bryson
475 Park Avenue South, 16th Floor
New York, NY 10016
(212) 483-9120
E-Mail:abryson@earthlink.net

J. Kevin Healy
1290 Avenue of the Americas
New York, NY 10104
(212) 541-1078
E-Mail:jkhealy@bryancave.com

Hazardous Waste/Site Remediation Committee
David J. Freeman
75 East 55th Street
New York, NY 10022
(212) 318-6555
E-Mail:davidfreeman@paulhastings.com

Lawrence P. Schnapf
55 East 87th Street, Suite 8B
New York, NY 10128
(212) 756-2205
E-Mail:lschnapf@aol.com

Historic Preservation, Parks and Recreation Committee
Jeffrey S. Baker
5 Palisades Drive
Albany, NY 12205
(518) 438-9907, x227
E-Mail:jbaker@youngsommer.com

Dorothy M. Miner
400 Riverside Drive
New York, NY 10025
(212) 866-4912

International Environmental Law Committee
John French, III
33 East 70th Street, Suite 6-E
New York, NY 10021
(212) 585-3123
E-Mail:tudorassoc@aol.com

Constantine Sidamon-Eristoff
750 Lexington Avenue, 4th Floor
New York, NY 10022
(212) 872-1500
E-Mail:cseristoff@lltlaw.com

Internet Coordinating Committee
Alan J. Knauf
2 State Street, Suite 1125
Rochester, NY 14614
(585) 546-8430, x104
E-Mail:aknauf@nyenvlaw.com

Robert S. McLaughlin
One Lincoln Center
Syracuse, NY 13202
(315) 218-8179
E-Mail:mclaugr@bsk.com

Land Use Committee
Rosemary Nichols
1241 Nineteenth Street
Watervliet, NY 12189
(518) 810-3438
E-Mail:rosemarynicholslaw@nycap.rr.com

Michael D. Zarin
81 Main Street, Suite 415
White Plains, NY 10601
(914) 682-7800
E-Mail:mzarin@zarin-steinmetz.net

Legislation Committee
Philip H. Dixon
One Commerce Plaza
Albany, NY 12260
(518) 487-7726
E-Mail:pdixon@woh.com

Michael J. Lesser
625 Broadway
Albany, NY 12233
(518) 402-9535
E-Mail:mjlesser@gw.dec.state.ny.us

Membership Committee
David R. Everett
One Commerce Plaza
Albany, NY 12260
(518) 487-7600
E-Mail:dre@woh.com

Mining and Oil and Gas Exploration
Dominic R. Cordisco
One Corwin Court
P.O. Box 1479
Newburgh, NY 12550
(845) 569-4329
E-Mail:dcordisco@yahoo.com

Thomas S. West
99 Washington Avenue, Suite 2020
Albany, NY 12210
(518) 626-9000
E-mail:twest@llgm.com

Pesticides Committee
Telisport W. Putsavage
1990 Old Bridge Road, Suite 202
Lake Ridge, VA 22192
(703) 492-0738
E-Mail:putsavage@chemlaw.com

Pollution Prevention Committee
Dominic R. Cordisco
One Corwin Court
P.O. Box 1479
Newburgh, NY 12550
(845) 569-4329
E-Mail:dcordisco@yahoo.com

Shannon Martin LaFrance
35 Main Street, Suite 541
Poughkeepsie, NY 12601
(845) 473-7766
E-Mail:slafrance@rapportmeyers.com

Public Participation, Intervention and Alternative Dispute Resolution Committee
Jan S. Kublick
500 South Salina Street, Suite 816
Syracuse, NY 13202
(315) 424-1105
E-Mail:jsk@mkms.com

Terrence O. McDonald
18 Washington Street, 2nd Floor
Morristown, NJ 07963
(973) 656-1800
E-Mail:tmcdonald@thebradlaugroup.com

Solid Waste Committee
John Francis Lyons
149 Wurtemburg Road
Rhinebeck, NY 12572
(845) 876-2800
E-Mail:grantlyons@aol.com

Michael G. Sterthous
One Commerce Plaza, Suite 1900
Albany, NY 12260
(518) 487-7620
E-Mail:mgs@woh.com

Toxic Torts Committee
Stanley Norman Alpert
85 Fourth Avenue
New York, NY 10003
(212) 558-5802

Cheryl P. Vollweiler
150 East 42nd Street, 23rd Floor
New York, NY 10017
(212) 490-3000, ext. 2674
e-mail:vollweilerc@wemed.com

Transportation Committee
William C. Fahey
3 Gannett Drive, Suite 400
White Plains, NY 10604
(914) 323-7000, x4183
E-Mail:faheyw@wemed.com

Prof. Philip Weinberg
8000 Utopia Parkway
Jamaica, NY 11439
(718) 990-6628
E-Mail:weinberp@stjohns.edu

Water Quality Committee
Michael J. Altieri
625 Broadway, 14th Floor
Albany, NY 12233
(518) 402-9187
E-Mail:mjaltier@gw.dec.state.ny.us

George A. Rodenhausen
35 Main Street, Suite 541
Poughkeepsie, NY 12601
(845) 473-7766
E-Mail:grodenhausen@rapportmeyers.com

Task Force on Legal Ethics
Roger Raimond
1345 Avenue of the Americas
31st Floor
New York, NY 10105
(212) 586-4050
E-Mail:rar@robinsonbrog.com

Marla B. Rubin
P.O. Box 71
Mohegan Lake, NY 10547
(914) 736-0541
E-Mail:mbrbold@mindspring.com

Task Force on Petroleum Spills
Gary S. Bowitch
744 Broadway
Albany, NY 12207
(518) 434-0327
E-Mail:bowitchlaw@earthlink.net

Wendy A. Marsh
1500 Mony Tower I
P.O. Box 4976
Syracuse, NY 13221
(315) 471-3151, ext. 251
E-mail:wmarsh@hancocklaw.com

Douglas H. Zamelis
One Lincoln Center
110 W. Fayette Street, Suite 900
Syracuse, NY 13202
(315) 422-1391
E-Mail:dzamelis@greenseifter.com

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Publication Submission Deadlines: On or before the 1st of March, June, September and December each year.

Kevin Anthony Reilly
Editor

Student Editorial Assistance
St. John's University, School of Law

Editor: James Denniston

Contributors:
Daniel DeCicco
Jon V. Finelli
Matthew A. Ford

THE NEW YORK ENVIRONMENTAL LAWYER

This publication is published for members of the Environmental Law Section of the New York State Bar Association. Members of the Section receive a subscription to the publication without charge. The views expressed in articles in this publication represent only the authors' viewpoints and not necessarily the views of the Editor or the Environmental Law Section.

ISSN 1088-9752

Environmental Law Section
New York State Bar Association
One Elk Street
Albany, NY 12207-1002

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