

ENVIRONMENTAL LAW

Expert Analysis

## Review of 2020 Cases Under SEQRA

The courts decided 47 cases under the New York State Environmental Quality Review Act (SEQRA) in 2020. Of these, in the great majority—31—the courts upheld, or at least left alone, agencies’ decisions that a particular action did not require the preparation of a full environmental impact statement (EIS); in seven the courts rejected such decisions; and in eight the courts upheld EISs that had been prepared. (One case was unclassifiable.) The Court of Appeals issued no SEQRA decisions in 2020.

This article marks the 30th anniversary of this column’s first annual SEQRA review. As usual, all the cases will be included in this year’s update to Environmental Impact Review in New York (Gerrard, Ruzow & Weinberg). The 2020 cases continued the familiar pattern that the safest way for a controversial project to withstand attack in court is to prepare a full EIS.

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That is not to say that projects with EISs will always enjoy a smooth path. Indeed, the 2020 cases involved three where the Supreme Court had found the EIS deficient and annulled the approvals, but the Appellate Division then reversed, all by unanimous decisions of the panel. Since those cases are especially notable, we start with them.

### Appellate Reversals Of Rejection of EISs

*Hart v. Town of Guilderland*, Index No. 906179-20 (Sup. Ct. Albany Co. 2020), concerned the development of five apartment buildings and a Costco retail store near the Crossgates Mall in a suburb of Albany. In its 77-page decision, the Supreme Court was unsparing in its review of the EIS and other elements of the record, declaring, “On scrutiny, the record herein is replete with conclusory self-serving

and equally troubling representations made by the project sponsor, without the support of empirical data, which, unfortunately, the Planning Board relied on. That is not the stuff that the SEQRA hard look test is made of.”

The Appellate Division, Third Department took a contrary view. 2021 N.Y. App. Div. Lexis 4367 (3d Dept. July 8, 2021). It found that the EIS had adequately examined the project’s impacts on avian populations, views from an historic district, and community char-

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acter, and had considered a reasonable range of alternatives. In sum, the appellate court found “that the Planning Board’s review was proper and thorough and that the mitigation measures that [the developer] was required to implement were appropriate.”

The same plaintiffs also challenged this project in federal court. Their motion for a preliminary injunction was denied, as the court found that plaintiffs had failed to establish likelihood of

success on the merits, or irreparable harm absent injunctive relief, and subsequently dismissed the lawsuit. *Hart v. Town of Guilderland*, 2020 U.S. Dist. Lexis 95240 (N.D.N.Y. June 1, 2020); 2020 U.S. Dist. LEXIS 139496 (N.D.N.Y. Aug. 5, 2020).

*Neighbors United Below Canal v. De Blasio*, 2020 N.Y. Misc. Lexis 9837 (Sup. Ct. N.Y. Co. Sept. 21, 2020), was a challenge to the construction of a new jail in Manhattan as part of the City of New York's plan to shut down and replace the Rikers Island facility. The City initially selected 80 Centre Street as the site, and prepared a draft scoping statement on that basis. After the public comment period on the draft scoping statement expired, the City decided instead to use a site three blocks away, 124-125 White Street. Draft and final EISs analyzed the White Street site. Neighbors of that site sued.

The Supreme Court found that the City should have undertaken a new scoping process focused on the White Street site, and that "the FEIS effectively ignores both the short- and long-term consequences of demolition, excavation, and construction activities on the health of the public in the neighborhood adjacent to the project." The court also found that the city "deferred and delayed a full and complete consideration of vehicular traffic and congestion-related impacts inasmuch as those impacts are design-specific." The court annulled the project's approvals.

The Appellate Division, First Department reversed. In a brief opinion, it found that the scoping process did not have to be redone; that the environmental review considered a reasonable range of alternatives; and the EIS "took the requisite hard look at impacts on public health, traffic, and parking." 192 A.D.3d 642 (1st Dept. 2021) (citations omitted).

The third decision in which the Supreme Court's rejection of an EIS was reversed was *Northern Manhattan Is Not for Sale v. City of New York*, 2019 N.Y. Misc. Lexis 6755 (Sup. Ct. N.Y. Co. Dec. 16, 2019). It concerned the rezoning of the Inwood neighborhood. A community group sued, asserting that the review process "failed to take a hard look at the socio-economic consequences of the proposed rezoning," particularly "the impact of the rezoning on preferential rents and on fostering or increasing residential displacement; the racial impact of rezoning/residential displacement," and other factors. The petitioners argued the City should have considered various issues (such as emergency response times) that were not required to be considered by the *CEQR Technical Manual*, which contains detailed guidance from the Mayor's Office of Environmental Coordination specifying what analysis should be conducted under City Environmental Quality Review (CEQR), which is the City's implementation of SEQRA. The Supreme Court agreed with petitioners, and found the City failed to

take a hard look at certain potential impacts identified by the public but should have done so, even if some analyses are not required by the *Manual*.

Here again, the First Department reversed. 185 A.D.3d 515, 128 N.Y.S.3d 483 (1st Dept. 2020). It found that "it was not unreasonable for the City to determine that [various issues] were beyond the scope of SEQRA/CEQR review pursuant to the *CEQR Technical Manual*, did not result in a significant adverse impact, or were based on speculation and hypotheticals and therefore did not warrant further review."

### Overturing Negative Declarations

As stated above, in seven of the 2020 cases, the courts overturned an agency's decision not to prepare an EIS. Five of these cases are of special note.

The baseline for analysis was a central issue in *Neeman v. Town of Warwick*, 184 A.D.3d 567 (2d Dept. 2020). Back in 1965 the Town had approved a site plan permitting the operation of 74 campsites on property owned by Black Bear Family Campground, Inc. Over the years, Black Bear increased the number of campsites from 74 to 154 without obtaining the required approvals. The Town eventually took enforcement action, and later reached a settlement agreement under which the 154 campsites could remain, and the Town agreed to amend its zoning code to accommodate the

campground in various ways. The Town issued a negative declaration (a determination that no EIS is necessary), largely based on its finding that the campground had been operating 154 campsites—albeit illegally—for many years. The owners of an adjacent property sued. The Supreme Court, Orange County, dismissed the suit. The Appellate Division, Second Department reversed, finding that the Town should have reviewed the impacts of expanding the campground from 74 campsites (what had been approved) to 154 campsites (the present reality). The appellate court also found that the development agreement between the Town Board and Black Bear constituted illegal contract zoning.

The genesis of *Roger Realty Co. v. New York State Department of Environmental Conservation* (DEC), 2020 N.Y. Misc. Lexis 10234 (Sup. Ct. Albany Co. Nov. 30, 2020) was the abandonment of a construction and demolition debris facility in the Town of Hempstead. Inwood Realty Associates acquired the facility and entered into a consent order with DEC to clean it up and remove the material by barge. The foreshore area was owned by the Town, which needed to approve the construction of the barge facility. After removing the waste, Inwood's plan was for the barge facility to be used to grind up and transport fill material that would be sold to others in an ongoing business. This business went far beyond the purpose of the DEC consent order (cleaning up the site),

and the court found that it should have undergone SEQRA review.

The negative declaration issued by the New York City Planning Commission for the rezoning of the Franklin Avenue area of Brooklyn was struck down because “there are discrepancies throughout the application and the [environmental assessment] which call into question whether the decision of [the Department of City Planning] was rational and based on the required hard look.” *Boyd v. Cumbo*, 69 Misc.3d 1222(A) (Sup. Ct. Kings Co. 2020).

In a case concerning a mixed-use project, the environmental assess-

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ment (a short form document used to determine whether an EIS is needed) identified at least nine areas of potential significant environmental impact; nevertheless, the lead agency issued a negative declaration. The court found this to be impermissible and vacated the approval of the project. Moreover, though the village's board of trustees established itself as lead agency for the SEQRA review, in fact

it delegated the lead agency authority to the planning board. The court found that this, too, violated SEQRA. *Augustinian Recollects of N.J. v. Planning Bd. of the Vill. of Montebello*, 2020 66 Misc.3d 1214(A) (Sup. Ct. Rockland Co. 2020).

The issue of improper delegation of lead agency duties also came up in *Village of Islandia v. Ball*, 2020 N.Y. Misc. Lexis 10242 (Sup. Ct. Albany Co. Aug. 21, 2020), concerning the designation of certain agricultural lands. The Suffolk County Legislature was designated as lead agency and issued a negative declaration. However, the court found that “the Legislature gave lip service to its SEQRA obligation, and utterly failed to meet its procedural and substantive SEQRA mandate to take a hard look.” Instead, the Legislature delegated its duties to planning staff. The court found that “the record is unclear if the Legislators were even aware of or ever evaluated the negative declaration language.”