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A Prolegomenon to Understanding the Developer's True Statutory Responsibilities under SEQRA

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A PROLEGOMENON TO UNDERSTANDING THE DEVELOPER'S TRUE STATUTORY RESPONSIBILITES UNDER SEQRA

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INTRODUCTION

Environmental laws are but the most recent manifestation of governmental restrictions on land development.[1] Before environmental laws affecting land development were enacted, a developer (or, one

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1. *See* N. ROBINSON, ENVIRONMENTAL REGULATION OF REAL PROPERTY § 1.01 (1982).

or more experts retained by the developer) had to become versed in the arcania of zoning ordinances and building codes as well as in the community's health and safety regulations.[2] Thus, to give some examples, there are codes and ordinances that not only dictate location of uses, bulk of structures, and ancillary amenities (such as parking, landscaping, and open space requirements), but also codes and regulations that dictate types of material, extent of ventilation, and size of rooms or common areas.

The land use type of environmental laws which are the subject of this essay are different in kind from earlier statutory and regulatory restrictions, but can be seen as an evolutionary step toward truly comprehensive planning.[3] Pre-environmental laws, ordinances, codes, and regulations had as their purpose, among other things, to distribute mass spatially, divide the community into use zones, achieve health and safety goals, and avoid "undue concentration of population."[4]

One easy way to understand the overriding difference under current environmental laws is to imagine a successful developer who options or purchases a piece of property which has at least the following known and desirable characteristics: preeminently, it is well-located and properly zoned; theoretically, inherent in every parcel of real property is a potential maximum of developable rights which can be calculated by referring to the community's zoning ordinance. Under the environmental laws, however, it is not necessarily the case that the developer will be permitted to utilize the potential maximum of the property that it owns.

While zoning ordinances ordinarily establish a maximum that a developer could achieve "as of right" for a particular property, envi-

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2. More than sixty years ago, in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the United States Supreme Court dealt with the constitutional right of government, under its exercise of police powers, to regulate the development of real property. The developer, Ambler Realty, argued that the zoning of its land as residential, rather than industrial, resulted in a reduction in value and constituted an unconstitutional taking of property. The Supreme Court rejected this argument, holding that the zoning ordinance was an appropriate exercise of police power "asserted for the public welfare." *Id.* at 387.

3. *See* Damsky, *SEQRA and Zoning Law's Requirement of a Comprehensive Plan*, 46 ALB. L. REV. 1292, 1292-97 (1982).

4. N.Y. TOWN LAW § 263 (McKinney 1987); N.Y. VILLAGE LAW § 7-704 (McKinney Supp. 1989). Both laws provide that:

> [s]uch regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, floods and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population.

Id.

ronmental laws dictate a "wait and see" posture. Property may only be developed to the maximum if the developer can prove that the proposed action will not be unnecessarily harmful to the environment.

Statutory restrictions on development reflect the competition of interests and, inevitably, the tensions within the community as to the amount of control that is prudently to be exercised over land development. That developers around the country are now compelled by law to concern themselves with the environmental consequences of their projects is, when viewed retrospectively, the inevitable result of the earlier and now discredited laissez-faire attitude toward land development. The advent of environmental regulation has resulted in a decisive shift in the balance of power.[5]

Environmental laws do not simply impose greater burdens on the developer, they demand that the developer comprehensively consider, identify, and disclose to the public all significant impacts of the proposed projects. In addition, a developer must participate in the process of creating an environmentally sound project by mitigating,[6] to the maximum extent practicable, all adverse effects disclosed during the environmental review process.

In the interplay between comprehensive environmental laws and zoning ordinances or building codes, the former has precedence. Decisions are made in favor of protecting the environment, regardless of the potential maximum for the property as defined by zoning. If the lead agency[7] perceives that the proposed action may adversely affect the environment, then it is authorized to attach conditions that may limit the magnitude of the action regardless of what the zoning may ostensibly permit "as of right."[8] Thus, to the extent that zoning ordinances provided a degree of certainty, environmental laws introduce a degree of uncertainty and unpredictability.

The uncertainty is heightened by the inclusive definition of "environment." The term "environment" is not limited to physical na-

5. *See* Goldberger, *Robert Moses: Patron Saint of Public Places*, N.Y. Times, Dec. 18, 1988, § 2 (Arts and Leisure), at 38, col. 1. Goldberger observes that "[i]t is no exaggeration to say that the balance of power in development has moved dramatically away from those who build . . . toward those who oppose building, or at least oppose the virtual carte blanche that Mr. Moses was known for." *Id.*

6. *See infra* note 113.

7. The lead agency is "an involved agency." An involved agency is "an agency that has jurisdiction by law to fund, approve or directly undertake an action." N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(t) (1987).

8. *See infra* text accompanying notes 111-125.

ture.[9] Environment refers to that which is found in the biosphere as well as that which is created by man. Under New York City's local environmental law, for example, the urban environment includes "the character or quality of . . . existing community or neighborhood character."[10] Thus, the developer must also consider certain non-quantifiable elements and community values which bear on the relationship between people, the physical environment they inhabit, and the cultural environment they have created.

Environmental laws reflect the community's belief that resources are limited, increasingly threatened, and vulnerable. Legislative declarations typically provide that the public policy is both to prevent or eliminate damage to the environment and to enhance human and community resources.[11] The application of environmental laws is not simply an added hurdle in the development of property. It is a condition precedent the developer has to satisfy before any other approval may properly be granted. Environmental laws charge the project sponsor — the developer — with a solemn responsibility. The developer is called upon to choose among *alternative* approaches, sites, magnitudes, and techniques for achieving its action. Prior to approval, the developer's entire project is examined, sometimes in microscopic detail, by the agencies who must review it as well as the public who must live with it.[12]

This essay examines the burdens and responsibilities imposed on the developer by the New York State Environmental Quality Review Act (SEQRA).[13] It is the developer's burden to persuade the decision-maker that its proposed project complies with the law. This is an educative process. Foremost among the developer's responsibilities is the full and fair disclosure of the project's likely consequences

9. Federal regulations promulgated by the Council on Environmental Quality define the term "human environment" as including "the natural and physical environment and the relationship of people with that environment." 40 C.F.R. § 1508.14 (1988).

10. Exec. Order No. 91, § 6(a)(5), Aug. 24, 1977, *City Environmental Quality Review*, Office of the Mayor, City of New York; *see also infra* note 30 and accompanying text.

11. *See, e.g.*, 42 U.S.C. § 4321 (1982); Washington State Envtl. Policy Act of 1971 (SEPA) (WASH. REV. CODE §§ 43.21C.010-914 (1983)); California Envtl. Quality Act of 1970 (CEQA) (CAL. PUB. RES. CODE §§ 21000-21177 (West 1986)); New York State Envtl. Quality Review Act of 1975 (SEQRA) (N.Y. ENVTL. CONSERV. LAW §§ 8-0101-0117 (McKinney 1984 & Supp. 1989)).

12. If the proposed action is approved, the developer must then obtain all other required governmental approvals, for example, excavation, demolition, and foundation permits, before construction begins, and certificates of occupancy or public assembly permits after construction ends.

13. N.Y. ENVTL. CONSERV. LAW §§ 8-0101-0117 (McKinney 1984 & Supp. 1989). Sometimes referred to simply as SEQR, the authors prefer, and use throughout this article, the more common SEQRA to refer to this statute.

on the environment[14] and explication of the ways in which these consequences can be mitigated.[15] The community's expectations for environmental protection is well established. The courts have now unequivocally held that there must be "literal compliance" with environmental laws[16] and they are to be strictly applied in favor of the environment.

While it is true that an understanding of governmental expectations must be sought in statutes and regulations, the potential of a law becomes apparent only as it is applied by agencies and construed by the courts. It is critically important that the developer recognizes the standards which courts have adopted in applying SEQRA and appreciates the practical importance of this knowledge in the preparation of its approval applications. A developer cannot afford to ignore the community's expectations for protection of the environment. This essay discusses both the agency application and judicial construction of New York's environmental law.

I. THE LEGISLATIVE RESPONSE TO THE NEED FOR GREATER ENVIRONMENTAL PROTECTION

A. Competing Interests at the Inception of the Enactment of New York's Environmental Law

Participants in the environmental review process have now had almost twenty years of experience with the National Environmental Policy Act (NEPA)[17] and fourteen years of experience with SEQRA, so that much can be said about the demands and expectations of these environmental laws.

NEPA was enacted in 1969 and signed into law on January 1, 1970.[18] For actions undertaken by federal agencies, it established a comprehensive policy for protection of the environment and engen-

14. Analytically, a developer's requirement to disclose under SEQRA is comparable to the sponsor's requirement to disclose material facts in connection with a public offering of securities under Rule 10b-5, promulgated under section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b). Each must, at its peril, pay attention equally to the facts it discloses and to those it omits. *See infra* notes 74-93 and accompanying text.

15. *See infra* note 113 and accompanying text.

16. Rye Town/King Civic Ass'n v. Town of Rye, 82 A.D.2d 474, 442 N.Y.S.2d 67 (2d Dep't 1981), *appeal dismissed*, 56 N.Y.2d 508, 439 N.E.2d 401, 453 N.Y.S.2d 1027 (1982); *see infra* note 69 and accompanying text.

17. 42 U.S.C. §§ 4321-4361 (1982).

18. *Id.* For a comparison of NEPA and the New York State Environmental Quality Review Act see Orloff, *SEQRA: New York's Reformation of NEPA*, 46 ALB. L. REV. 1128 (1982).

dered the enactment in many states of similar legislation known as "little NEPA" statutes.[19]

New York was not among the pioneering states to enact environmental laws to regulate land development, even though the need was early expressed. The New York Legislature passed its first bill in 1972, but it was vetoed by Governor Rockefeller.[20]

New York's own "little NEPA" statute, SEQRA, was not finally enacted until 1975.[21] The 1972 environmental bill, which, unlike the later-enacted SEQRA, had been limited solely to public actions, was vetoed by Governor Rockefeller on the grounds that it would be wasteful, duplicative, administratively uncertain, and costly.[22] In the 1973 and 1974 legislative sessions, several reformulated environmental bills were introduced but lacked support for passage.[23]

The bill that evolved into SEQRA was introduced in the 1975 legislative session and was signed into law by Governor Hugh L. Carey on August 1, 1975.[24]

As with the earlier legislative efforts, there was substantial and vigorous opposition to the bill, both from interested and ostensibly disinterested organizations, associations, and individuals, as well as local governments. Echoing the language used three years earlier by Governor Rockefeller, opponents of the 1975 bill argued that the bill would 1) create immeasurable damage to the construction industry; 2) significantly increase the cost of construction in the public and

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19. *See* 2 F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 9.08 (1988).

20. Governor's Memorandum, *reprinted in* 1972 N.Y. LEG. ANN. 403-04. In contrast, California enacted a "little NEPA" statute in 1970 which was substantially revised in 1972. CAL. PUB. RES. CODE §§ 21000-21176 (West 1976); *see* Hagman, *NEPA's Progeny Inherit the States—Were the Genes Defective?*, 7 URB. L. ANN. 3 (1974); Robinson, *SEQRA's Siblings: Precedents From Little NEPA's in the Sister States*, 46 ALB. L. REV. 1155 (1982).

21. N.Y. ENVTL. CONSERV. LAW §§ 8-0101-0117 (McKinney 1984 & Supp. 1989). By 1975, when SEQRA was enacted in New York, roughly half the states had legislation based generally on NEPA. *See* 2 F. GRAD, *supra* note 19, at § 9.07; Nichols & Robinson, *A Primer on New York's Revolutionized Environmental Laws: Part I*, 49 N.Y. ST. B. J. 41 (Jan. 1977); Nichols & Robinson, *A Primer on New York's Revolutionized Environmental Laws: Part II*, 49 N.Y. ST. B. J. 111 (Feb. 1977).

22. Governor's Memorandum, *supra* note 20.

23. For a critical exegesis of the controversy surrounding the legislative passage of SEQRA, see Stevenson, *Early Legislative Attempts at Requiring Environmental Assessment and SEQRA's Legislative History*, 46 ALB. L. REV. 1114 (1982), and, for a briefer discussion, Sandler, *State Environmental Quality Review Act*, 49 N.Y. ST. B. J. 110 (Feb. 1977).

24. 1975 N.Y. LAWS 612 (codified, as amended, at N.Y. ENVTL. CONSERV. LAW §§ 8-0101-0117 (McKinney 1984 & Supp. 1989)). Governor Carey noted in his approval memorandum that the bill was modeled after NEPA. Governor's Memorandum, *reprinted in* 1975 N.Y. LAWS 1761-62.

private sectors; and 3) slow down, or possibly halt, housing and other development.[25]

In contrast, the New York State Department of Environmental Conservation (Department) took the position in its supporting memorandum that the times made it necessary for a balanced approach to land development in which government, private enterprise, and the public worked together to "ensure sound and thoughtful decisions which do not sacrifice long-term social . . . economic and environmental objectives for short-term temporary gains."[26] Implicit in the Department's memorandum was the view that the balance at that time favored short-term private gains which were detrimental to the public interest. It urged realigning the balance in favor of the public by compelling the developer, on pain of having its proposal rejected, to give greater consideration to the adverse consequences of its proposal and, from that vantage, to plan its project more prudently.

Although SEQRA makes life more difficult for developers, its purpose is not anti-development, but informed development. In an effort to reassure the construction industry, Assemblyman Koppell, one of the sponsors of the 1975 bill, stated that, "[w]hile the statute does require that adverse environmental effects must be minimized, it does not mandate that any project must be abandoned because of potential harm to the environment."[27] Theoretically, Assemblyman Koppell is correct. A project does not have to be abandoned because of potential harm to the environment. Nevertheless, a project potentially harmful to the environment will not be permitted to proceed unless, and until, the developer has demonstrated how it will mitigate or eliminate, to the greatest extent practicable, the adverse consequences.[28]

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25. *See* Bill Jacket, ch. 612, 198th Sess. (1975). The legislative jacket for SEQRA contains voluminous correspondence from municipalities, unions, construction industry associations, bar associations, and individual contractors urging Governor Carey to veto SEQRA.

26. Recommendation on Assembly Bill 4533-A, 5 (July 30, 1975), a copy of which is contained in the legislative jacket. *See* N.Y. ENVTL. CONSERV. LAW § 8-0103.2 (McKinney 1984) ("Every citizen has a responsibility to contribute to the preservation and enhancement of the quality of the environment.").

27. N.Y.L.J., May 6, 1976, at 1, col. 2. This statement was published on the eve of the date SEQRA became effective.

28. *See* Tuxedo Conservation and Taxpayers Ass'n v. Town Bd. of Tuxedo, 69 A.D.2d 320, 341, 418 N.Y.S.2d 638, 651 (2d Dep't 1979) (Suozzi, J., dissenting). Justice Suozzi argued that "SEQRA was designed to supplement, not supplant, the zoning ordinances and regulations." He further reasoned that "SEQRA [could] not be legitimately construed, applied or invoked as a legal device to prohibit that which the zoning legislation permits or to frustrate

B. SEQRA's Policies and Goals

Comprehensive master plans and zoning regulations concern themselves with the issue of coherence — the location of uses and the organization of masses to achieve certain beneficial purposes in the community. Environmental laws concern themselves with impact, using as a measure a range of criteria, including change in existing ground or surface water quality, existing community or neighborhood character, concentrations of population, and the creation of a material demand for other actions which may become necessary as a result of the proposed project.

SEQRA is a deceptively simple statute.[29] It contains just nine comparatively short sections of which two, "severability" and "phased implementation," are either pro forma or not of any present impact or effect.[30] The statute consists of two parts: a preamble of ideals, in which the Legislature sets forth policies and goals,[31] and a prescriptive part, which establishes a framework to be applied to all actions that may have a significant effect on the environment.[32]

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and unduly delay private endeavors which are consistent with a municipality's duly enacted zoning ordinance and regulations." *Id.* at 340, 418 N.Y.S.2d at 650.

This view has not found favor. Indeed, the observation could be made that SEQRA does what it purports not to do, that is, causes one agency to trespass on the jurisdiction of another. *See* N.Y. COMP. CODES R. & REGS. tit. 6, § 617.3(b) (1987).

29. For a section by section review of SEQRA and the New York Code, Rules and Regulations, title 6, part 617, *see* NEW YORK ENVIRONMENTAL LAW HANDBOOK (N. Robinson ed. 1988).

30. N.Y. ENVTL. LAW §§ 8-0115, 8-0117 (McKinney 1984).

31. *Id.* § 8-0101 (Purpose); § 8-0103 (Legislative findings and declarations). This preamble of ideals is adapted from NEPA. *See* 42 U.S.C. § 4331 (1982).

32. N.Y. ENVTL. CONSERV. LAW §§ 8-0105-0117 (McKinney 1984 & Supp. 1989). Since the enactment of SEQRA and, pursuant to the broad mandate, *see id.* § 8-0113, the Department has promulgated four versions of its regulations (Regulations). Each successive version has become increasingly detailed as to the procedural requirements and the participants' responsibilities in the review process.

The first version of the Regulations was effective from June 1, 1976 through January 23, 1978. The second version (a substantial rewriting of the first) was only in effect for a few months. The third version was adopted on September 1, 1978, and remained in effect through June 1, 1987. Over the years, it did undergo a number of periodic amendments to many of its sections. The most recent amendment was adopted March 6, 1987, and became effective on June 1, 1987. It contains extensive additions, many based on case law. *Id.*

In the Commissioner's Certification of Findings dated March 5, 1987, he stated that the findings indicate that "[t]he revisions have clarified, by wording changes or addition of new material, issues and procedures on which confusion or lack of direction previously existed." N.Y.S.D.E.C., SEQR FINDINGS STATEMENT, PROMULGATION OF REVISIONS TO 6 NYCRR PART 617 IMPLEMENTING THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQR), March 5, 1987.

In the preamble to SEQRA, the Legislature emphasizes the urgency of the environmental issues and notes that the protection of the environment is not only a desirable concern of government but also a moral imperative.[33] Thus, it declares that "[e]very citizen has a responsibility to contribute to the preservation and enhancement of the quality of the environment"[34] and that government has an "obligation to protect the environment for the use and enjoyment of this and all future generations."[35] "Every citizen" includes developers.[36]

Although SEQRA imposes duties that are broadly procedural, in that it requires compliance with a set of prescriptive rules, it is more than a procedural statute.[37] The idealistic expectations contained in the policies and goals sections of the statute are inextricably part of the law and not merely hortatory statements contained in secondary materials.

Thus, SEQRA insists that decision-making be the end result of an educative process in which the consequences of a proposed action are rigorously examined and the ameliorative solutions thoughtfully considered. Courts have made it clear that they will not tolerate a lackadaisical attitude by the developer or the approving agency.[38] While the aspirational preamble of SEQRA may appear to be innocuous,[39] its language may more aptly be regarded as the catalyst that under-

33. N.Y. ENVTL. CONSERV. LAW § 8-0103.1 (McKinney 1984). "[M]aintenance of a quality environment" is a matter of "statewide concern." *Id.* The Legislature recognizes that at all times the environment must be "healthful and pleasing to the senses and intellect of man now and in the future." *Id.* The Legislature emphasizes the urgency of environmental issues by its turn of phrase and by choosing such words as "responsibility" and "obligation." *Id.* §§ 8-0103.2, .8. The meaning of the term "environment" has always included physical conditions such as existing community or neighborhood character which will be affected by a proposed action. However, in the present revised Regulations, the meaning of the term has been expanded for the first time to include "human health" as a new category of the physical conditions to be protected. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(l) (1987); *see also* Chinese Staff and Workers Ass'n v. City of New York, 68 N.Y.2d 359, 367-68, 502 N.E.2d 176, 180-81, 509 N.Y.S.2d 499, 504 (1986) (holding that under both SEQRA and CEQR, the potential displacement of local residents and businesses is an effect on population patterns and neighborhood character that must be considered in determining whether the requirement for an EIS is triggered).

34. N.Y. ENVTL. CONSERV. LAW § 8-0103.2.

35. *Id.* § 8-0103.8.

36. The term "[a]pplicant means any person making an application to an agency . . . to grant an approval in connection with a proposed action." N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(d) (1987). The term "[p]erson means any agency, individual, corporation, governmental entity, partnership, association, trustee or other legal entity." *Id.* § 617.2(z).

37. *See* Orloff, *supra* note 18.

38. *See* Madden, *Case Law Developments Under New York's State Environmental Quality Review Act*, 56 N.Y. ST. B. J. 16 (Apr. 1984).

39. N.Y. ENVTL. CONSERV. LAW § 8-0101 (Practice Commentary) (McKinney 1984).

lies the law's "prodigious strength" and supports and encourages the court's attitude toward the law's enforcement.[40]

One early case noted, in glossing SEQRA, that, while the statute does not compel any particular substantive result, it "does, however, make environmental protection a part of the mandate of every state agency and department."[41] SEQRA is an action-forcing statute. This means simply that it compels affirmative action. The developer must do something about the unchecked consequences of a proposed action. It has an affirmative burden to demonstrate that its proposed mitigative measures, incorporated into the project, are adequate to achieve the desired policy goals.

The courts, in concluding that the statute makes demands on the developer and is action-forcing, have accepted the principle that the procedural requirements are inseparable from the idealistic policies and goals expressed by the New York Legislature.[42] Undoubtedly, this conclusion was aided by analysis of federal court decisions determining issues arising under NEPA and sister-state court decisions determining issues arising under their own "little-NEPA" statutes.[43]

In a variety of circumstances, the courts have made it clear that there is a low threshold for triggering application of a full environmental review — that is, one that includes the preparation of an environmental impact statement ("EIS"). The benefit of any doubt favors protection of the environment rather than permitting the developer to proceed before the consequences are understood and mitigation measures considered.[44]

The participants each make a significant contribution to the environmental review process. Court decisions emphatically instruct the land development industry and approving agencies that their respective burdens and responsibilities must be taken seriously.[45] The de-

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40. *Id.*; *see also* Eastlake Community Council v. Roanoke Assocs., 82 Wash. 2d 475, 490, 513 P.2d 36, 46 (1973) ("The maintenance, enhancement and restoration of our environment is the pronounced policy of this state, deserving faithful judicial interpretation.").

41. Town of Henrietta v. Department of Envtl. Conservation, 76 A.D.2d 215, 430 N.Y.S.2d 440 (4th Dep't 1980).

42. *Id.* at 222, 430 N.Y.S.2d at 446.

43. *Id.* at 220-21, 430 N.Y.S.2d at 445-46.

44. *See* Wedinger v. Goldberger, 71 N.Y.2d 428, 522 N.E.2d 25, 527 N.Y.S.2d 180 (challenge to a cease and desist order issued by the State Dep't of Envtl. Conserv. in connection with the application of the Freshwater Wetlands Act, Envtl. Conserv. Law art. 24), *cert. denied*, 109 S. Ct. 132 (1988); Orchards Assocs. v. Planning Bd. of North Salem, 114 A.D.2d 850, 494 N.Y.S.2d 760 (2d Dep't 1985) (project can be denied based upon the SEQRA finding).

45. *See* Williamsville S.E. Amherst Homeowners Ass'n v. Sharpe, 110 A.D.2d 1074, 488 N.Y.S.2d 931 (4th Dep't 1985); Kirk-Astor Drive Ass'n v. Town Bd. of Pittsford, 106 A.D.2d

veloper must initially prepare and file a completed checklist of environmental impacts, an environmental assessment form ("EAF"), in which it is expected to fully and fairly disclose the environmental consequences of its proposed project.[46] The regulations require that the approving agency come to some early conclusion about the proposed project and make a finding, either that, as proposed, the project "may" have a significant effect (in which event an EIS will be required) or, conversely, that the project, as proposed, definitely "will not" have any significant environmental impact.[47]

It is important to underscore the interplay between the "will" and "may" formulations contained in the Regulations. A simple negative declaration is appropriate only in those cases in which the developer is able to demonstrate that there definitely "will be no environmental effect or that the identified environmental effects will not be significant."[48] If the lead agency determines that the proposed action "may include the potential for at least one significant environmental effect" then, unless permitted to issue a conditioned negative declaration, an EIS must be prepared.[49] Depending upon this threshold determination, the agency must either issue a declaration of nonsignificance[50] or a declaration of significance.[51] Upon receipt of an application, the lead agency must determine the status of the proposed action,[52] i.e., whether it is exempt, Type I, Type II, or unlisted.[53] A Type I determination (those actions likely to have a significant impact on the environment) is made by comparing the

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868, 483 N.Y.S.2d 526 (4th Dep't 1984), *appeal dismissed*, 66 N.Y.2d 896, 489 N.E.2d 760, 498 N.Y.S.2d 791 (1985).

46. The EAF contains a comprehensive list of questions. Its purpose is to determine initially if the action may have a significant effect on the environment. N.Y. COMP. CODES R. & REGS. tit. 6, §§ 617.6, .7 (1987). If a proposed action meets certain thresholds, *id.* § 617.12, it is classified as a Type I action and is deemed likely to require the filing of a more detailed report, the environmental impact statement. The threshold for requiring an EIS is relatively low and the standard for compliance is strict. *See* Schenectady Chemicals v. Flacke, 83 A.D.2d 460, 446 N.Y.S.2d 418 (3d Dep't 1981); Town of Henrietta v. Department of Envtl. Conservation, 76 A.D.2d 215, 430 N.Y.S.2d 440 (4th Dep't 1980).

47. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.6(a) (1987). The determination of significance must be made within 20 calendar days of the agency's receipt of the application. *Id.*

48. *Id.* § 617.6(g)(1)(ii).

49. *Id.* § 617.6(g)(1)(i). A conditioned negative declaration is unavailable for a Type I action. *See id.* § 617.6(h).

50. *Id.* § 617.6. The lead agency is authorized to issue a "negative declaration" or, under certain circumstances, i.e., unlisted actions, a "conditioned negative declaration." *Id.* §§ 617.6(g), (h).

51. *Id.* § 617.6(g)(2)(iv).

52. *Id.* §§ 617.5(a)(1), (4).

53. *Id.* §§ 617.2(q), (ii), (jj), (kk).

impacts that are reasonably expected to result from the proposed action with the regulatory criteria, which are "considered indicators of significant effects on the environment."[54]

If the project is an exempt or Type II action, then the review terminates.[55] Obversely, if the reasonably expected results are contained on the criteria list, then it is presumed that the proposed action "may" have a significant effect on the environment, and, accordingly, the action will be classified Type I.[56] Should a careful analysis of a Type I or unlisted action reveal that the project definitely will have no significant environmental effect, then the SEQRA review will also terminate, but with a declaration of non-significance.[57] If the impact may be significant, then the developer must go forward with the review, by preparing and submitting to the agency an EIS in which it describes the proposed action, the reasonably related short-term and long-term, cumulative, and secondary effects, and its purpose and benefits, including social and economic considerations.[58]

II. ESTABLISHMENT OF STANDARDS

Environmental laws operate under different principles than many regulatory restrictions. Rather than establishing compliance by inspection after the developer has substantially completed work, which is generally the case with health and safety regulations, under environmental laws, proof precedes work. SEQRA's demands upon participants[59] are evidenced across a spectrum of statutory and regulatory requirements. For example, a developer must fairly and fully disclose the nature of its project and resulting significant adverse effects on the environment. An approving agency must take a hard look[60] at the consequences of a proposed project and determine whether, and upon what conditions, a project may go forward.

SEQRA contemplates that the process by which an action gains approval is to be a shared enterprise in which each of the partici-

54. *Id.* § 617.11(a).

55. *Id.* § 617.5(a)(1).

56. *See id.* § 617.11.

57. *See* Snider & Levine, *SEQRA: Declaration of Nonsignificance and Issuing a Negative Declaration*, 58 N.Y. ST. B. J. 42 (July 1986).

58. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.14(f) (1987).

59. *See* Levine, *The New York State Environmental Quality Review Act of 1975: An Analysis of the Parties' Responsibilities in the Review/Permit Request Process*, 12 FORDHAM URB. L.J. 1 (1983-84).

60. *See infra* notes 84-93 and accompanying text.

pants has a role and concomitant responsibilities. The purpose of the enterprise is to thoroughly expose and candidly review the probable impact of a proposed action.[61]

The statutory/regulatory standards and their enforcement will be briefly discussed from three perspectives. Section A will discuss substantial versus literal compliance, which applies to both developers and agencies alike. Section B will discuss the EIS, which is the principle means of disclosing the nature and full extent of the proposed action.[62] Section C will discuss the standard by which an agency's judgment is measured.[63]

A. SEQRA Requires Literal Compliance

Just how the shared enterprise was to be conducted and what the respective responsibilities were to be under SEQRA were neither immediately appreciated nor early understood.[64] This was true for cases arising under NEPA as well as for those arising under sister-state "little-NEPAs."[65] However, two points were quickly underscored, even if reluctantly accepted. First, the identification of any potentially large impact was sufficient to trigger the requirement for an EIS. Second, uncertainty as to whether the impact threshold had been reached would be resolved against the developer who would be required to proceed with the draft EIS.[66]

The first series of court tests in New York centered on the standards that lead agencies[67] had to apply in considering applications for land development. Initially, developers, approving agencies, and trial courts tended to regard SEQRA as a mere extension of existing

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61. Town of Henrietta v. Department of Envtl. Conservation, 76 A.D.2d 215, 221-22, 430 N.Y.S.2d 440, 446-47 (4th Dep't 1980).

62. The preparation of a draft EIS is a developer's burden. The final EIS is prepared by the agency. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.8 (1987).

63. While this standard applies to involved agencies, nevertheless it behooves a developer to take note of what courts expect, especially since a mistake with the need to repeat the process with its attendant delay may be prejudicial and, surely, quite costly.

64. *See* Ruzow, *SEQRA in the Courts*, 46 ALB. L. REV. 1177 (1982).

65. Calvert Cliffs' Coordinating Comm., Inc., v. United States Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971); Swift v. Island County, 87 Wash. 2d 348, 552 P.2d 175 (1976) (determination of county planning director that proposed subdivision would have no environmental impact, and that, therefore, no environmental impact statement was required, was clearly erroneous in face of recommendations made by United States Fish and Wildlife Service and State Departments of Game, Ecology and Parks and Recreation, all maintaining that subdivision would significantly affect the environment for both humans and animals).

66. *See infra* notes 74-83 and accompanying text.

67. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(t) (1987); *see supra* note 7.

regulations and codes whose application could be varied.[68] It took time to recognize the potential of SEQRA and the fact that it was intended to take precedence over all existing zoning requirements. Thus, it was initially believed that SEQRA could be satisfied by substantial compliance. However, appellate courts, led by the Second Department, made it clear that to satisfy SEQRA's purposes only "literal compliance" would do,[69] since literal compliance renders "environmental review more objective, standardized, and consistent."[70]

Subsequent decisions approved and expanded upon this requirement for "literal compliance."[71] Unless an agency complies with SEQRA "literally" and "strictly," its action will be held unauthorized and, therefore, void.[72] The lesson to the developer is obvious. Notwithstanding the developer's wish to accelerate the commencement date of its project, it must first assure itself that the record it creates will support the approval it seeks. A substantial compliance standard would have reduced the developer's burden and created a loophole by granting the developer, in problematical situations, the benefit of the doubt. In contrast, strict and literal compliance with SEQRA increases the developer's burden by requiring it to exercise a greater degree of judgment and be more exacting in its proof.

A developer is entitled to approval of its project when it complies with the procedural requisites and establishes persuasively that its project satisfies the policy goals of the law. These policy goals are satisfied when the developer demonstrates either that the project, in both the short-term and long-term, will have no significant adverse effect on the environment, or, should there be any significant adverse effect, that appropriate mitigation measures are proposed for incor-

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68. *See, e.g.*, Tri-County Taxpayers Ass'n v. Town Bd. of Queensbury, 79 A.D.2d 337, 437 N.Y.S.2d 981 (3d Dep't 1981), *modified*, 55 N.Y.2d 41, 432 N.E.2d 592, 447 N.Y.S.2d 699 (1982); Tuxedo Conservation and Taxpayers Ass'n v. Town Bd. of Tuxedo, 69 A.D.2d 320, 418 N.Y.S.2d 638 (2d Dep't 1979).

69. Rye Town/King Civic Ass'n v. Town of Rye, 82 A.D.2d 474, 442 N.Y.S.2d 67 (2d Dep't 1981), *appeal dismissed*, 56 N.Y.2d 508, 439 N.E.2d 401, 453 N.Y.S.2d 1027 (1982). The town board argued that it had substantially complied with SEQRA. Special Term concurred. The Appellate Division disagreed and remanded. The court held that "mere substantial compliance with SEQRA does not suffice to discharge an agency's responsibility." *Id.* at 481, 442 N.Y.S.2d at 71.

70. *Id.* at 481, 442 N.Y.S.2d at 71.

71. *See, e.g.*, Schenectady Chemicals v. Flacke, 83 A.D.2d 460, 463, 446 N.Y.S.2d 418, 420 (3d Dep't 1981).

72. E.F.S. Ventures Corp. v. Foster, 71 N.Y.2d 359, 371, 520 N.E.2d 1345, 1351, 526 N.Y.S.2d 56, 62 (1988). Statutory environmental review requirements of SEQRA must be met. "[I]f they are not the governmental action is void and, in a real sense, unauthorized." *Id.*

poration into the project design to minimize "to the maximum extent practicable" the foreseeable consequences.[73]

B. *The EIS is Not a Mere Disclosure Device*

The purpose of the EIS is similar in many respects to a public offering plan for the sale of securities.[74] Both documents are intended to inform and educate and both are directed to persons who will use the information to make critical decisions. Whether the document is persuasive (not simply in a merchandising sense, but in light of all the circumstances is true and accurate) depends largely on the choices the developer makes, which, in turn, depend on the developer's consciousness of its statutory responsibilities and its willingness to discharge those responsibilities.

The Regulations specifically prescribe the issues a developer must address in the EIS. They also prescribe the way the material is to be presented.[75] Nevertheless, it is content rather than form that is most important.

In the pre-SEQRA period, regulatory requirements compelled only limited disclosure of the proposed action to comply with local health and safety regulations, building codes, and zoning ordinances. One of the significant features of SEQRA, in contrast, is that it imposes on the developer, who has actually formulated and proposed a project, the need to focus on the future.[76]

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73. N.Y. ENVTL. CONSERV. LAW §§ 8-0109.1, .2(b), (f) (McKinney 1984).

74. The duty of a developer in preparing an EIS is analytically similar to that of a sponsor preparing a public offering under the Securities Acts of 1933 and 1934. The developer, like the securities sponsor, is required to disclose fully and fairly the material facts of its proposed action. *See supra* note 14. A material fact is one which, were it omitted, would make the statements, in the light of the circumstances under which they were made, misleading. A sponsor's failure to disclose carries with it a peril of damages and judicial rescission of the sale. A developer's failure to disclose carries with it an equal peril, rescission of governmental approvals predicated on omitted material facts.

75. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.14(f) (1987).

76. *See* Marsh, *Commentary-Unresolved Issues*, 46 ALB. L. REV. 1298 (1982). Mr. Marsh notes, with reference to the environmental impact statement prepared by the developer, some of its problems:

> Unless guided by municipal officials, the developer can only guess what issues will be of greatest significance. Worse, the developer has to address policies of community-wide significance, which in many cases may run counter to the developer's own proposal. Even the most public-spirited developer can hardly be expected to examine all the issues dispassionately.

Id. at 1304.

SEQRA is not necessarily applicable to a conceptual scheme that a developer may be promoting, but is otherwise uncrystallized.[77] Where a project has taken concrete shape, it must be so designed that, to the maximum extent practicable, the developer can make it free of harmful consequences to the environment. Assuming that a project is classified as Type I and the lead agency makes a positive declaration, SEQRA requires the preparation of a detailed EIS with all of its attendant disclosure requirements.[78] To win approval under SEQRA, the developer has the additional task of making its proposed action consistent with the idealist policies and goals expressed by the Legislature.[79] The design must assure that the potential adverse consequences identified in the EIS will either not occur or can demonstrably be mitigated to the maximum extent practicable by incorporating into the design measures acceptable to the decisionmaker. Thus, long-range planning and design to meet environmental criteria and the techniques necessary to achieve this result are elevated in importance.

In consequence, developers have found that they must often engage in lengthy pre-application discussions with officials from involved or concerned agencies that include substantial negotiations affecting the proposal. Therefore, proposals will often undergo an evolution as the developer strives to satisfy governmental requirements.

SEQRA makes disclosure of environmental consequences a central tenet of the law, not for its own sake, "but rather as an aid in an agency's decision-making process to evaluate and balance the competing factors."[80] This was emphasized by Governor Carey in his Memorandum approving the bill.[81] The Governor explained that the

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77. Programming and Sys., Inc. v. New York State Urban Dev. Corp., 61 N.Y.2d 738, 739, 460 N.E.2d 1347, 1348, 472 N.Y.S.2d 912, 913 (1984).

78. N.Y. ENVTL. CONSERV. LAW §§ 8-0109.2, .4, .6 (McKinney 1984); N.Y. COMP. CODES R. & REGS. tit. 6, §§ 617.8, .14 (1987).

79. *See supra* text accompanying notes 17-58.

80. Town of Henrietta v. Department of Envtl. Conservation, 76 A.D.2d 215, 222, 430 N.Y.S.2d 440, 446 (4th Dep't 1980). The court held that, "[s]ince SEQRA requires an approving agency to act affirmatively upon the adverse environmental impacts revealed in an EIS, an EIS filed pursuant to SEQRA must . . . be recognized" as more than just a disclosure statement. *Id.* (citing N.Y. ENVTL. LAW §§ 8-0109.1, .8).

81. In his Message, Governor Carey stated:

> The information provided by the impact statement will allow state and local officials to intelligently assess and weigh environmental factors, along with social, economic and other relevant considerations in determining whether or not a project or activity should be approved or undertaken. With the information which will be provided by these impact statements, state and local officials will be in a better position to make decisions which are in the best interest of the people of the State.

Governor's Memorandum on Bills Approved, *reprinted in* 1975 N.Y. LEG. ANN 438.

principal procedural device for achieving the substantive policies and goals of SEQRA was the preparation of both a draft and final EIS.[82] The disclosure mechanism was intended to bring planning into the open. At the initial stage, it requires the developer to factor into its planning the amelioration of foreseeable consequences and to do something about the anticipated results of its action.

The developer's application, the method of presentation, and the contents of the offering — in essence, the EIS process — are critically important because, as a matter of law, the developer has the burden of proof. The EIS contains a review of the proof that the proposed project will not result in any significant impact on the environment. If the consequences are significant, then the EIS must state how and with what design or technology the developer proposes to mitigate impact so that it is reasonable to conclude that, to the maximum extent practicable, the project, as finally designed, will have no significant unnecessary adverse effect on the environment.[83]

C. Agency Must Take a Hard Look

Before a lead agency determines whether an action may have a significant effect on the environment, it must identify the relevant areas of environmental concern, take a "hard look" at them, and make a "reasoned elaboration" of the basis for its determination.[84]

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82. *Id.*

83. The purpose of the regulations is to compel the developer and the approving agency to examine the entire action in depth. At the same time, it challenges the approving agency to consider the developer's choices from among the alternatives and how they may mitigate any of the environmental problems that have been identified in the EIS. Mitigative measures from among the alternatives proposed must be incorporated into the action, and they must be precise and capable of verification.

The earliest version of the regulations contained no reference at all to an alternatives requirement. Subsequent versions required the developer to describe and evaluate reasonable alternatives to the action which would achieve the same or similar objectives. The developer was also required to discuss the "no-action" alternative. The revised, present version of the regulations is more insistent and prescriptive with regard to this requirement.

In addition to the "no-action" alternative, the present regulations suggest that the developer may include, as appropriate: alternatives to the site, technology, scale or magnitude, design, timing, and use. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.14(d)(5) (1987).

84. *See* H.O.M.E.S. v. New York State Urban Dev. Corp., 69 A.D.2d 222, 232, 418 N.Y.S.2d 827, 832 (4th Dep't 1979). In Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973), the court suggested that, in "grey areas," lead agencies should "obtain impact statements rather than . . . risk the delay and expense of protracted litigation." *Id.* at 832.

Under this "hard look" test, the lead agency is not in compliance where it merely adopts the developer's conclusory statements,[85] relies solely on the developer's submissions,[86] acts without reference to the anticipated adverse environmental consequences,[87] or rests its negative declaration on an incomplete record.[88] However, a determination will not be disturbed if the agency has complied with the "hard look" standard, even if the court, as an original proposition, believed a contrary conclusion may have been warranted.[89]

Thus, in order for an agency to discharge its responsibilities, it must reach an independent conclusion concerning the effects that a proposed action "may" (or, alternatively, will not) have on the environment.[90] In analyzing the environmental review undertaken by an agency, courts pay particular attention to the quality of the analysis and the reliability of the information upon which a decision is based.[91]

The potency of SEQRA resides in its distribution of burdens and responsibilities. For the developer, the burden is equivalent to the burden of proof that the proponent of a position must bear at trial. The developer persuades through full and fair disclosure of all material facts. The agency's burden is to assimilate the facts and render a sufficiently informed judgment[92] to satisfy the "hard look" standard. The standard applies equally whether the lead agency terminates the environmental review by issuing a negative or conditioned negative

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85. Kravetz v. Plenge, 102 Misc. 2d 622, 631, 424 N.Y.S.2d 312, 317 (Sup. Ct. Monroe County 1979).

86. Kanaley v. Brennan, 119 Misc. 2d 1003, 1009, 465 N.Y.S.2d 130, 134 (Sup. Ct. Onondaga County 1983), *aff'd*, 120 A.D.2d 974, 502 N.Y.S.2d 880 (4th Dep't 1986).

87. *See* Center Square Ass'n v. Corning, 105 Misc. 2d 6, 12, 430 N.Y.S.2d 953, 957-58 (Sup. Ct. Albany County 1980).

88. Save the Pine Bush, Inc. v. Planning Bd. of Albany, 96 A.D.2d 986, 466 N.Y.S.2d 828 (3d Dep't), *appeal dismissed*, 61 N.Y.2d 668, 460 N.E.2d 230, 472 N.Y.S.2d 89 (1983).

89. Inland Vale Farm v. Stergianopoulos, 65 N.Y.2d 718, 720, 481 N.E.2d 547, 548, 492 N.Y.S.2d 7, 8 (1985) ("[t]he planning board issued a negative declaration instead of directing the preparation of an EIS, although they noted several respects in which the proposed project might adversely affect nearby water supplies and sewage disposal systems"); Jaffee v. RCI Corp., 119 A.D.2d 854, 855, 500 N.Y.S.2d 427, 429 (3d Dep't), *appeal denied*, 68 N.Y.2d 607, 498 N.E.2d 434, 506 N.Y.S.2d 1032 (1986). Since a decision-maker acts on information that has been disclosed, a developer's failure to disclose would preclude the taking of a "hard look" and justify an appellate court remanding to the approving agency.

90. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.1(c) (1987).

91. *See* Ruzow, *supra* note 64. In *H.O.M.E.S.*, the court was offended by the manner in which the lead agency had acted and its obtuseness in failing to satisfy its legal responsibility. H.O.M.E.S. v. New York State Urban Dev. Corp., 69 A.D.2d 222, 232-33, 418 N.Y.S.2d 827, 832-33 (4th Dep't 1979).

92. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(c) (1987).

declaration, or makes a positive determination that the proposed action may have a significant adverse environmental effect.[93]

III. ACHIEVING SUBSTANTIVE RESULTS

A. Analysis of Cumulative Impacts and Secondary Effects

The judiciary's determination that the environmental laws shall not be circumvented by varying the procedures or relaxing the statutory requirements in any manner[94] is reflected in the court's insistence that strict and literal compliance with SEQRA applies to both procedural and substantive issues. An agency's approval of a project without having first adequately considered the likely impacts is *ipso facto* a violation of lawful procedure.[95] Obversely, an agency's determination will not be disturbed where it has taken the requisite "hard look" required by law and has concluded that the applicant is not entitled to approval.[96]

While an understanding of the statutory requirements for self-contained projects is clear, rarely does a proposed action occur in a vacuum. Under SEQRA, a true understanding of the requirements for a project must be seen as possibly: A) having a wider impact on the community; B) being one part of a proposed larger action; or, C) being one among a number of other self-contained projects proposed for a particular community. These possibilities raise areas of concern: cumulative impact and segmentation.

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93. N.Y. ENVTL. CONSERV. LAW § 8-0109.1 (McKinney 1984).

> Agencies shall use all practicable means to realize the policies and goals set forth in this article, and shall act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects, including effects revealed in the environmental impact statement process.

Id.

94. Save the Pine Bush v. Planning Bd. of Albany, 96 A.D.2d 986, 987, 466 N.Y.S.2d 828, 831 (3d Dep't) (the standard is intended to prevent SEQRA from becoming one more step in a "bureaucratic maze" wherein the fundamental requirements are circumvented), *appeal dismissed*, 61 N.Y.2d 668, 460 N.E.2d 230, 472 N.Y.S.2d 89 (1983); Schenectady Chemicals v. Flacke, 83 A.D.2d 460, 463, 446 N.Y.S.2d 418, 420 (3d Dep't 1981).

95. Tri-County Taxpayers Ass'n v. Town Bd. of Queensbury, 79 A.D.2d 337, 437 N.Y.S.2d 981 (3d Dep't 1981), *modified*, 55 N.Y.2d 41, 432 N.E.2d 592, 447 N.Y.S.2d 699 (1982).

96. *See supra* notes 84-93 and accompanying text; *see also* New City Office Park v. Planning Bd. of Clarkstown, 144 A.D.2d 348, 533 N.Y.S.2d 786 (2d Dep't 1988) (Though a non-environmental case, it aptly illustrates the point. The proposed development was to be located in a one hundred year floodplain. The developer could not provide for the requisite retention of floodwaters and the planning board denied site approval. The planning board determination was affirmed.).

In its original version, the Regulations did not refer to potential cumulative effects of separate projects or independent actions. The issue, however, was frontally raised in the *Pine Bush* cases. The question before the court in *Save the Pine Bush v. City of Albany*[97] was whether the potential cumulative impact of several other pending projects (over which the developer-applicant had no control) constituted a relevant area of environmental concern under SEQRA. The court's answer was that "cumulative impact can, in appropriate cases, be a relevant area of environmental concern."[98] This finding is now incorporated in the revised Regulations.[99]

The emphasis on secondary impacts and cumulative effects evidences two different kinds of concern: first, that a single developer may attempt to avoid the rigors of SEQRA by offering only phase one of a contemplated larger action; or, second, that a number of developers may each propose an action in an area which requires considering all the separate actions as one aspect of a whole.[100]

While it was clear that development of the Albany Pine Bush required the approving agency to exercise a greater degree of sensitivity and coordination because of the area's unique characteristics, it is less clear whether the same degree of sensitivity would be equally necessary for the redevelopment of an urban area, for which different criteria may apply.[101] If the action is part of a larger coherent scheme of development (even if parts are being separately pursued by independent, unrelated developers), then compliance necessarily requires disclosing the whole and considering the cumulative impact of the whole.[102]

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97. 117 A.D.2d 267, 502 N.Y.S.2d 540 (3d Dep't 1986), *modified*, 70 N.Y.2d 193, 512 N.E.2d 526, 518 N.Y.S.2d 526 (1987).

98. *Id.* at 271, 502 N.Y.S.2d at 543.

99. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.11(b) (1987).

100. *Save the Pine Bush*, 117 A.D.2d at 271, 502 N.Y.S.2d at 543; *see also* Orinda Ass'n v. Board of Supervisors, 182 Cal. App. 3d 1145, 1171-72, 227 Cal. Rptr. 688, 705-06 (1st Dist. 1986) (projects may not be subdivided to avoid "environmental impact of the project as a whole").

101. *See* Coalition Against Lincoln West v. City of New York, 94 A.D.2d 483, 465 N.Y.S.2d 170 (1st Dep't), *aff'd*, 60 N.Y.2d 805, 457 N.E.2d 795, 469 N.Y.S.2d 489 (1983). The record showed that the developer discussed housing density, water quality, sewage, private and public transportation, parking, air quality, and the construction impact on noise and dust. *Id.* at 493, 465 N.Y.S.2d at 177. The Appellate Division reversed the lower court's judgment, setting aside the lead agency's affirmative SEQRA finding and issuance of permits, and dismissed the petition. *Id.*

102. Village of Westbury v. Department of Transp., 146 A.D.2d 578, 579, 536 N.Y.S.2d 502, 504 (2d Dep't 1989); Onondaga Landfill Sys. v. Flacke, 81 A.D.2d 1022, 440 N.Y.S.2d 788 (4th Dep't 1981) (actions under SEQRA must be viewed in their entirety).

Segmentation of an action is ordinarily proscribed.[103] What constitutes segmentation, however, may not always be clear. For example, is it segmentation where A) a single applicant proposes a limited action that covers only part of a larger tract which it owns or has an option to purchase — with as yet no definite or concrete plans for the balance; or, B) one of several applicants is applying for approval to develop a limited action on a larger tract. Put another way, at what point in time does a project concept or idea become sufficiently concrete as to constitute an action that requires full compliance with SEQRA?[104] The term "action" commonly consists of a series of steps, such as planning, design, contracting, demolition, construction, and operation.[105]

For purposes of the environmental review, the developer must present, and the agency must consider, the entire series of steps at the earliest possible time before committing to any part of an action.[106] Although understandable, this requirement is often difficult for the developer who is proposing one of several projects which is not part of a coordinated whole. Under the "hard look" standard, the agency must consider the consequence of many single actions, even where the impact of any one proposal standing by itself may be minimal.[107] This assumes, however, that other actions are contemplated and have reached a certain level of coherence.[108]

The revised Regulations expressly provide that ordinarily segmentation is impermissible. "[C]onsidering only a part or segment of an

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103. The term "segmentation means the division . . . of an action such that various activities or stages are addressed under this Part as though they were independent, unrelated activities, needing individual determinations of significance." N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(gg) (1987).

104. *See* Schodack Concerned Citizens v. Town Bd. of Schodack, 142 Misc. 2d 590, 537 N.Y.S.2d 1015 (Sup. Ct. Rensselaer County 1989).

105. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.3(k) (1987).

106. *Id.* § 617.15(e).

> [A]gencies should address not only the site specific impacts of the individual project under consideration, but also, in more general or conceptual terms, the cumulative effects on the environment and the existing natural resource base of subsequent phases of a larger project or series of projects that may be developed in the future.

Id.

107. Save the Pine Bush v. City of Albany, 117 A.D.2d 267, 271, 502 N.Y.S.2d 540, 543 (3d Dep't 1986), *modified*, 70 N.Y.2d 193, 512 N.E.2d 526, 518 N.Y.S.2d 526 (1987).

108. Programming and Sys., Inc. v. New York State Urban Dev. Corp., 61 N.Y.2d 738, 739, 460 N.E.2d 1347, 1348, 472 N.Y.S.2d 912, 913 (1984); *see also In re* Northwest Pasco Annexation, 100 Wash. 2d 864, 868, 676 P.2d 425, 428 (1984) ("[e]nvironmental considerations would best be served by waiting until a specific proposal had been made").

action is contrary to the intent of SEQRA."[109] It is the entire set of related activities that constitutes the action.[110] Thus, a developer may not hold back on incremental additions to a proposed action.

B. Imposition of Mitigative Conditions

A developer must disclose all environmental impacts[111] and must incorporate into the project proposal all such measures it believes will mitigate, to the maximum extent practicable, the identified impacts.[112] However, the lead agency is not limited to the mitigation proposals proffered by the developer. It has the statutory and regulatory authority to determine whether specific alternative or additional mitigation measures are more appropriate or necessary.[113] If the lead

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109. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.3(k)(1) (1987). An earlier draft of this subsection provided that segmentation may be warranted where "information on future project phase(s) is yet unknown; future phase(s) may not occur; future phase(s) are functionally independent of current phase(s); and the lead agency, involved with future phases, commits the applicant to the preparation of an EIS, should approval of future phase(s) be sought." DRAFT REVISIONS TO 6 NYCRR PART 617 SEQR, at 8, effective Nov. 1, 1978 (on file at Touro Law Review). This language was *not* adopted in the final version of the revised Regulations. The reason it was not adopted is explained in the Department's Final Generic Environmental Impact Statement. N.Y.S.D.E.C., FINAL GENERIC ENVIRONMENTAL IMPACT STATEMENT (FGEIS) FOR REVISIONS TO 6 NYCRR PART 617, accepted Feb. 18, 1987.

> 617.3(k) incorporates language (from the SEQRA Handbook) that places the burden on the agency to demonstrate, with supporting reasons, why a segmented review is warranted and is no less protective of the environment. The regulations do not provide criteria or other description of circumstances in which segmentation may be warranted. By clarifying the primary intent of SEQR to review the whole action, the burden of justifying segmentation is placed squarely on the agency. It must also be recognized that there may be certain speculative or independent activities involved in some projects which DEIS's may only refer to in a general and conceptual way. In such instances, generic environmental impact statements may be used or the agency may retain the right to require an EIS in the future for any activities which may later occur.

Id. at 10.

In discussing the reason for not adopting the language that would have permitted segmentation in "unusual" circumstances, the Department stated that: "Many comments expressed a misperception that the draft language, in effect, sanctioned or condoned the use of segmentation; that the criteria provided to explain the limited circumstances would be used as a 'green light' to avoid the intent of SEQR to review the whole action." *Id.*

110. *See* Abrams v. Love Canal Area Revitilization Agency, 132 Misc. 2d 232, 503 N.Y.S.2d 507 (Sup. Ct. Niagara County 1986), *aff'd*, 134 A.D.2d 885, 522 N.Y.S.2d 53 (4th Dep't 1987).

111. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.21 (1987) (Appendix A, Part 2) (model forms).

112. *See In re* Wilmorite, Inc.: Rotterdam Square, N.Y. State Dep't of Envtl. Conservation Dec. 4 (Oct. 7, 1981) (interim decision). Where mitigation or avoidance of adverse environmental impact is possible and practicable, SEQRA requires that it be incorporated into the project "regardless of the source of such proof." *Id.* at 7.

113. SEQRA does not define the term "mitigation." Federal regulations state:

> "Mitigation" includes:

agency makes such a determination, it has the authority, subject to certain limitations,[114] to impose conditions upon approval of the project regardless of any inconsistency with other so-called "as of right" zoning ordinance or building code provisions.[115]

The power of an involved agency to impose mitigative conditions was not addressed in the Regulations until the most recent amendment which became effective on June 1, 1987. The issue, however, was squarely raised in a 1980 SEQRA decision. The developer challenged the agency's imposition of conditions and sought judgment to annul the conditions. The court concluded, in *Henrietta v. The Department of Environmental Conservation*,[116] that the lead agency may impose conditions with the sole proviso that any such conditions must be reasonably related to the adverse impacts identified in the final EIS [FEIS].[117] SEQRA imposes far more action-forcing or substantive requirements on state and local decision-makers than does NEPA.[118]

The *Henrietta* holding has been expressly incorporated into the Regulations. All involved agencies, including the approving agency,[119] are expressly granted the authority to impose substantive conditions upon an action to ensure statutory compliance. This applies where the agency either has approved the action following a full environmental review of the proposed action[120] or has approved the action subject to the incorporation of substantive conditions in a "conditioned negative declaration."[121]

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.
(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
(e) Compensating for the impact by replacing or providing substitute resources or environments.

40 C.F.R. § 1508.20 (1988).

114. *See infra* notes 128-33 and accompanying text.

115. It could be argued that this authority conflicts with the regulatory provision that "SEQRA does not change the existing jurisdiction of agencies." N.Y. COMP. CODES R. & REGS. tit. 6, § 617.3(b) (1987).

116. 76 A.D.2d 215, 430 N.Y.S.2d 440 (4th Dep't 1980).

117. *Id.* at 226-27, 430 N.Y.S.2d at 449.

118. Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 415, 494 N.E.2d 429, 434, 503 N.Y.S.2d 298, 303 (1986) (citing Gitlin, *The Substantive Impact of SEQRA*, 46 ALB. L. REV. 1241, 1248 (1982)).

119. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(t) (1987).

120. *Id.* § 617.3(b).

121. *Id.* § 617.6(h)(1)(iii).

The developer must systematically consider appropriate mitigation measures in the EIS as a corollary to its evaluation of the environmental impacts which would result if the proposed action were permitted to be implemented.[122] If this requirement is not satisfied, or if the developer fails to propose specific verifiable mitigation measures that are acceptable to the approving agency, the developer's application may be denied entirely[123] or the approving agency will impose conditions it believes reasonable and necessary to achieve the goals of SEQRA, including reducing the magnitude of the project.[124] Similarly, if proposed mitigative measures are speculative, require an action by a third party whose performance can only be secured by contract and no contract has been negotiated, or the mitigative measures simply are not feasible, then the approving agency may deny the application or impose conditions to insure that proposed measures are realized.[125]

While agency and court decisions have significantly influenced the conduct of both developers and agencies, the full range of potential mitigative proposals and agency-imposed conditions is not exhausted simply by examining agency and judicial decisions. Actions which require SEQRA review do not spring fully grown from the mind of the developer. There is a dynamic relationship between the developer and involved agencies. In fact, if the case law on the subject post-*Henrietta* is sparse, it is because developers and involved agencies have learned to engage in substantial pre-application/pre-approval negotiations.

In reality, by the time the developer files its formal application, the proposed action will already be in an advanced (and hopefully mitigated) form. The developer will have incorporated agency suggestions that otherwise might not have been incorporated at all, might have been incorporated tardily, or would have been imposed subsequently as conditions to the action. This procedure of pre-application negotiation is not without its tribulations for the developer, who may, in good faith, have negotiated a reduction in the proposed action for mitigation purposes prior to filing, only to discover after

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122. *Id.* §§ 617.14(a), (f).

123. *See In re* Wilmorite, Inc.: Rotterdam Square, N.Y. State Dep't of Envtl. Conservation Dec. 4 (Oct. 7, 1981) (interim decision) (where mitigation is not possible, the hardship to the environment "may warrant denial of permits").

124. *See* Town of Henrietta v. Department of Envtl. Conservation, 76 A.D.2d 215, 430 N.Y.S.2d 440 (4th Dep't 1980).

125. *See* Orchards Assocs. v. Planning Bd. of North Salem, 114 A.D.2d 850, 852, 494 N.Y.S.2d 760, 761 (2d Dep't 1985), *appeal dismissed*, 68 N.Y.2d 808, 499 N.E.2d 874, 507 N.Y.S.2d 1025 (1986).

the completion of the SEQRA review that the approval is conditioned upon further restrictions that may make the proposed action so costly as to be discouraging from an economic standpoint.

IV. AGENCY POWERS TO CORRECT OVERSIGHTS AND COMPEL CHANGES BEFORE SUBSTANTIAL COMPLETION

The present Regulations expressly provide for rescission of a negative declaration or a conditioned negative declaration.[126] This is clearly a recognition that an agency might erroneously make a threshold determination that a proposal will have no significant adverse effect and must not be precluded from re-examining the issues, provided that it does so prior to its making a final decision.[127]

Otherwise an agency may only correct oversights within limits.[128] A supplement to the FEIS is authorized where, for example, the agency receives new information about significant adverse effects which were not previously addressed, or the developer proposes significant changes which may result in adverse environmental effects, or there is a change in circumstances which may result in a signifi-

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126. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.6(i) (1987).

> At any time prior to its decision to undertake, fund or approve an action, a lead agency must rescind a negative declaration if it determines that a significant environmental effect may result from a project modification or that there exists a change of circumstances which was not previously addressed.

Id.

127. The following comments and responses are contained in the FGEIS FOR REVISIONS TO 6 NYCRR PART 617:

> *Comment:* Rescission undermines finality of a decision.
>
> *Response:* The adopted revisions actually add finality to the process because they allow an agency to correct an oversight only until it makes a final decision to act. If agencies exercise their SEQR responsibilities in a reasonably thorough manner, rescission should not need to occur often, nor should it be a decision undertaken lightly.
>
> *Comment:* Rescission should be triggered only by sponsor-caused changes.
>
> *Response:* Agencies have a continuing responsibility under Article 8 to consider significant environmental impacts. New information or changes concerning significant adverse impacts, from whatever source, must be considered.

Id. at 21-22.

128. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.8(g) (1987); *see* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978):

> [A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that "ought to be" considered and then, after failing to do more than bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters "forcefully presented."

Id. at 553-54; *see* Lazard Realty v. New York State Urban Dev. Corp., 142 Misc. 2d 463, 537 N.Y.S.2d 950 (Sup. Ct. New York County 1989).

cant adverse environmental effect.[129] The supplement, however, is limited in scope to specific issues not addressed in the draft or final EIS, or inadequately addressed in light of new information, proposed project change, or new circumstances.[130]

Once a proposed action has been approved and substantial work has proceeded in reliance on the permits, the developer cannot be compelled to modify or dismantle the project absent the pendency of litigation.[131] Thus, the New York Court of Appeals has held that a rule which permits the lead agency to exercise broad review powers in considering the effect of the entire development on the environment is appropriate when construction has not commenced but "is not always reasonable when development has been substantially completed."[132] This suggests that an agency can correct decisions by adding conditions after a final approval, as long as the developer has not vested its right by committing significant resources. However, an agency may not impose additional burdens where the developer has completed part of a project, if the new burdens are intended to satisfy perceived environmental problems which arise upon later review of a subsequent phase of the project and which should have been recognized earlier.[133]

In *E.F.S. Ventures Corp. v. Foster*,[134] the developer appeared before the planning board on an application for a site plan modification, seeking permission to proceed with a subsequent phase of its project. The first phase of the project was already completed. The modification was granted on condition that the developer make significant changes in the completed phase of the project. The developer argued in its Article 78 petition that such a condition was arbitrary and capricious. The trial court disagreed and dismissed the petition and the judgment was affirmed on appeal, with one justice dissenting. The New York Court of Appeals, however, saw the matter differently. It held that the board was not authorized to condition approval of the modification on the developer's compliance with remedial measures "unless those remedial measures have some demonstrable connection with the environmental impact of the pro-

129. *See* Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 429-30, 494 N.E.2d 429, 444, 503 N.Y.S.2d 298, 313 (1986).

130. *Lazard Realty*, 142 Misc. 2d at 470-73, 537 N.Y.S.2d at 955-57.

131. *See infra* notes 137-45 and accompanying text.

132. E.F.S. Ventures Corp. v. Foster, 71 N.Y.2d 359, 373, 520 N.E.2d 1345, 1352-53, 526 N.Y.S.2d 56, 63-64 (1988).

133. *Id.*

134. 71 N.Y.2d 359, 520 N.E.2d 1345, 526 N.Y.S.2d 56 (1988).

posed modification."[135] Thus, *ex post facto* determinations are impermissible.

V. DEVELOPER PROCEEDS AT ITS OWN RISK IF THERE ARE ANY SUBSEQUENT LEGAL CHALLENGES

Approval may be granted and permits may be issued as early as ten days after the lead agency has filed the final EIS (or immediately after the developer has obtained a negative declaration or a conditioned negative declaration).[136] Theoretically, the developer may proceed immediately upon the receipt of its permits. However, where timely court proceedings have been instituted against the lead agency to vacate the approval based on the standards set forth in Article 78 of the Civil Practice Law and Rules, the developer, were it to proceed, would do so at its own risk.[137]

Whether or not the petitioner in such a proceeding seeks a preliminary injunction, the developer is faced with a problematic situation not unlike Ulysses having to navigate between Scylla and Charybdis. On one hand, most permits require construction to commence, and completion to occur, within certain specified periods of time or they lapse. Thus, the developer needs to proceed without undue delay. Construction financing commitments or obligations to future tenants, for example, can be equally compelling reasons why a developer wishes to proceed immediately. On the other hand, even where the party challenging the SEQRA proceedings is denied a preliminary injunction, the developer who decides to commence or continue construction of its proposed action does so at its own peril. Thus, the uncertainty of the environmental review process may constrain the developer even after approval of an application and issuance of permits.

"Vested right" is a familiar principle in the building industry. Under certain circumstances, a developer may be entitled to secure building rights that would otherwise expire where it has completed its foundation work. However, a developer does not have a vested right to build upon property simply by obtaining an agency approval

135. *Id.* at 373, 520 N.E.2d at 1352-53, 526 N.Y.S.2d at 63-64.

136. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(b) (1987).

137. *See* Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 416, 494 N.E.2d 429, 435, 503 N.Y.S.2d 298, 304 (1986). The standards applicable to judicial review of a determination made pursuant to SEQRA are those applicable to administrative proceedings generally, i.e., "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." *Id.* (quoting N.Y. CIV. PRAC. L. & R. 7803(3) (McKinney 1981)).

and merely receiving an excavation, demolition, or building permit. It may have a right to proceed, but not without risk. This is illustrated by the holding in a landmark case decided by the Supreme Court of Washington, *Eastlake Community Council v. Roanoke Associates Inc.*,[138] which involved a proposed action conceived prior to the promulgation of Washington State's environmental law. The developer had already completed some foundation work and made a significant financial investment by the time the issue reached the highest court. The developer emphasized that its significant investment warranted a finding of a vested right.[139]

The court, in disagreement, noted: "We have not been persuaded in the past that because a financial investment is in jeopardy, the public interest should suffer."[140] In holding that the developer had no vested right, it stated: "to do otherwise would be to not only ignore precedents already established but to also ignore the unusually vigorous statement of legislative purpose contained in this act to consider the total environmental and ecological factors to the fullest in deciding major matters."[141]

Recent cases in New York indicate that the result would not be different when applying SEQRA. The consequence of proceeding in the belief that rights may vest if only the developer acts quickly enough is corrected by the reasoning in a somewhat related land use/zoning case, *Shumaker v. Cortlandt*,[142] which would be a likely precedent if a developer wished to test the principle.[143] *Shumaker* consolidated an Article 78 proceeding brought by citizens of the community and a plenary action by a builder. The builder had purchased the property after it had been rezoned to permit the manufacture of asphalt and after the Appellate Division had affirmed Special Term's dismissal of a proceeding to annul the resolution adopting the rezoning to permit that use. The citizens brought the action against the town to enjoin construction or operation of an asphalt plant and to compel the builder to remove the plant and restore the property. The citizens' application for an injunction was

138. 82 Wash. 2d 475, 513 P.2d 36 (1976).

139. *Id.* at 480-81, 513 P.2d at 40-41.

140. *Id.* at 485, 513 P.2d at 43 (citation omitted).

141. *Id.* at 487, 513 P.2d at 44.

142. 124 A.D.2d 129, 511 N.Y.S.2d 351 (2d Dep't), *appeal dismissed*, 69 N.Y.2d 984, 516 N.Y.S.2d 1026 (1987).

143. *See also* Parkview Assocs. v. City of New York, 71 N.Y.2d 274, 519 N.E.2d 1372, 525 N.Y.S.2d 176 (1988) (no vested rights when building permit issued in error).

denied and their petition dismissed, which dismissal was affirmed by the Appellate Division.[144]

Rather than waiting for a final resolution by the New York Court of Appeals, which the builder knew would be forthcoming shortly, the builder, in the words of the Appellate Division, "engaged in a reckless effort to complete the plant before the Court of Appeals decision and then attempted to hide behind the shield of 'vested rights'. This behavior cannot be condoned."[145] Thus, the builder's application for a mandatory injunction to compel the building department to issue a certificate of occupancy was denied, with obvious consequences. The building was completed but useless for its intended purpose.[146] The lesson of *Shumaker* is disconcerting. It tells the builder/developer that it will suffer the harshest consequences if it fails to heed the warning and proceeds with the construction of the proposed action before a court has finally determined the issues presented. At the same time, the builder/developer is painfully aware that, unless the issue is quickly resolved, its permits will lapse.

Suggestions for dealing with this seemingly irreconcilable conflict are beyond the scope of this article; however, the authors intend to revisit this and related subjects in a future article.

CONCLUSION

For the contemporary developer, participation in the review process means assuming responsibilities and organizing resources to a substantially greater degree than was required of its predecessors. The approval process has become increasingly public, and, hence, political.[147] As a result, in formulating a strategy, the developer must recognize that the details of proposed actions are likely to be transformed in the approval process.[148] Given this reality, there is a virtue to flexibility and accommodation if the developer wishes to successfully obtain approval for its proposed action.

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144. Augenblick v. Town of Cortlandt, 104 A.D.2d 806, 480 N.Y.S.2d 232 (2d Dep't 1984), *rev'd*, 66 N.Y.2d 775, 488 N.E.2d 109, 497 N.Y.S.2d 363 (1985).

145. Shumaker v. Town of Cortlandt, 124 A.D.2d 129, 138, 511 N.Y.S.2d 351, 357 (2d Dep't), *appeal dismissed*, 69 N.Y.2d 984, 509 N.E.2d 361, 516 N.Y.S.2d 1026 (1987).

146. *Shumaker*, 124 A.D.2d at 134-35, 511 N.Y.S.2d at 354-55.

147. New York courts have specifically criticized agency actions based upon public pressure. *See* Old Court Int'l, Inc. v. Gulotta, 123 A.D.2d 634, 507 N.Y.S.2d 22 (2d Dep't 1986); Pleasant Valley Home Constr. v. Alson Van Wagner, 41 N.Y.2d 1028, 363 N.E.2d 1376, 395 N.Y.S.2d 631 (1977).

148. *See In re* Wilmorite Inc.: Rotterdam Square, N.Y. State Dep't of Envtl. Conservation Dec. 4 (Oct. 7, 1981) (interim decision). The Commissioner stated that the "process attempts to expose a project's potential for adverse environmental harm and establish measures which will avoid or minimize such harm." *Id.* at 7.

Under SEQRA, the developer must consider the law's policies and objectives. These are: to promote efforts to prevent or eliminate damage to the environment; to enhance human and community resources; and to enrich the understanding of the ecological systems upon which a healthy environment depends.[149] The Legislature envisioned that these purposes would be "achieved by the imposition of both procedural and substantive requirements upon agency decision-making."[150]

Federal and state environmental statutes are typically written in two parts: the first part usually comprises an aspirational preamble and the second part consists of procedural requirements. This dual organization has encouraged the development of an environmental common law.[151] The result is that, while compliance with environmental requirements has become increasingly detailed, developers, at least to the extent they can internalize the agenda, also have a greater degree of certainty in the outcome. This is appropriate, since the procedure is intended, in significant part, to protect the developer's constitutional right of due process.

Optimally, participants learn from experience, then apply the experience learned to the task at hand. In essence, the environmental review is an educative process. The developer's task in this process is to inform the public fully and fairly about its proposed action and demonstrate that the proposed action will not be unnecessarily harmful to the environment.

A developer's strategy must be, not to sand against the grain, but to demonstrate to the decision-maker how the problem can be solved. The public's concern — that anything less than rigorous investigation is tantamount to mortgaging the future — must be accepted as a given. There are basically two camps of opposition: the intractable and the reasonable. The intractable wish to defeat the project under any circumstances. The reasonable are willing to accept the project if the developer cannot only mitigate to the maximum extent practicable the adverse impacts identified, but also satisfy the concerns expressed in the environmental review.

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149. N.Y. ENVTL. CONSERV. LAW §§ 8-0101-0103 (McKinney 1984).

150. Town of Henrietta v. Department of Envtl. Conservation, 76 A.D.2d 215, 220, 430 N.Y.S.2d 440, 445 (4th Dep't 1980).

151. *See* Kleppe v. Sierra Club, 427 U.S. 390 (1976). "[T]his vaguely worded statute seems designed to serve as no more than a catalyst for development of a 'common law' . . . . Indeed, that development is the source of NEPA's success." *Id.* at 421 (citation omitted) (Marshall, J., concurring in part and dissenting in part).

Thus, the developer must assimilate the various concerns expressed during the environmental review process, even if that involves bargaining and compromises, to ultimately achieve a project that is acceptable and capable of approval. A developer will surely be disappointed in its own expectations if it fails to understand the expectations of the community.