Pace Environmental Law Review

Volume 11
Issue 2 *Spring 1994*

Article 10

April 1994

Land Use Law in New York State: Playing "Hide & SEQRA" with the Elusive Comprehensive Plan

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PACE ENVIRONMENTAL LAW REVIEW

Volume 11 Spring 1994 Number 2

COMMENT

Land Use Law in New York State: Playing "Hide & SEQRA" with the Elusive Comprehensive Plan

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In this comment, the author discusses comprehensive planning and land-use regulation in New York, and SEQRA's role and influence in the planning and land-use decision making process. In addition to discussing SEQRA's positive influence in bringing environmental issues into the forefront, the author focuses on the potential use of SEQRA's procedural devices as a substitute for formal comprehensive planning, and the possible dangers which may result. The author suggests how SEQRA would best serve the planning process and proposes that mandatory planning be required from local to regional levels.

* This article is dedicated to Brian and Barbara, with special thanks to Lisa Rosen Ellrodt, Professor John D. Nolon and Janet Morris Jones.

I. Introduction

The New York State legislature enacted the State Environmental Quality Review Act (SEQRA)[1] in 1975 requiring the early consideration of all environmental factors in government and private sector land-use decisions. SEQRA is a pervasive aspect of land-use regulation, providing a broad framework for the mandatory consideration of environmental impacts within the traditional areas of land-use regulation which include comprehensive planning, zoning and building codes.

SEQRA encourages long-term planning efforts,[2] and was enacted amid the growing recognition of the importance of comprehensive planning, the realization of the critical nature of many environmental issues, and the increasing appreciation and understanding of the regional nature and interaction of all of these issues. New York, though, has no statutory or common law authority mandating formal comprehensive planning. The practical difficulties associated with planning, and the concomitant political and legal conflicts have, in many ways, discouraged long-term planning in New York in favor of case-by-case, ad hoc planning.

This Comment discusses comprehensive planning in New York and SEQRA's positive and negative roles in the planning process. The Comment emphasizes the importance of formal comprehensive planning.[3] Part II briefly discusses various aspects of planning and introduces the statutory background of land-use planning in New York. Part III explores, in more detail, specific aspects of land-use regulation in New York. Part IV introduces various aspects of SEQRA that relate to long-term planning. Part V discusses SEQRA's positive influence in bringing environmental issues into the

1. N.Y. ENVTL. CONSERV. LAW §§ 8-0101-0117 (McKinney 1984 & Supp. 1994).

2. *Id.* § 8-0101.

3. There are many forms and functions of comprehensive planning. *See infra* part II.B. This article will not attempt to propose the "correct" form of comprehensive planning; however, the analysis within this article is premised on the importance of some type of formalized comprehensive planning process for the beneficial development of all types of communities.

planning process. Part V also discusses how SEQRA is further intertwined with the planning process because of the conceptual vagueness of, as well as the absence of mandated, comprehensive planning. Focus is placed on the potential use of SEQRA's procedural devices (particularly the Generic Environmental Impact Statement) as a substitute for formal comprehensive planning, and the possible dangers of such use, including the imposition of the high costs of planning on the private sector. The article concludes by highlighting the importance of long-term environmental planning, discussing how SEQRA can best serve this process, and proposing that mandatory planning from local to regional levels should be the ultimate goal of the New York legislature.

II. Planning

A. Introduction

The planning process allows public and private planners, private developers, and members of the community to work toward the common goals of controlled growth, economic prosperity, and environmental protection. "The function of land regulation is to implement a plan for the future development of the community."[4] If successful, planning can help reduce the seemingly inherent adversarial relationship between planners seeking to control and organize growth, and developers seeking to maximize growth and development. The two most prevalent approaches to environmental land-use planning are formal comprehensive planning[5] and ad hoc, or mission-oriented planning for specific projects.[6]

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4. Asian Americans For Equality v. Koch, 72 N.Y.2d 121, 131, 527 N.E.2d 265, 270, 531 N.Y.S.2d 782, 787 (1988), citing Berenson v. Town of New Castle, 38 N.Y.2d 102, 109, 341 N.E.2d 236, 241, 378 N.Y.S.2d 672, 680 (1975).

5. Comprehensive plan is also referred to as master plan, long-term plan, well-considered plan, comprehensive master plan and plan. The terms are often used interchangeably which adds to the confusion already associated with this term. *See infra* part II.B.

6. 2 FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW §§ 10.01, at 10-6 to 10-7 (1992) (acknowledging environmental protection and de-ghettoization of cities as specific examples of mission-oriented planning).

B. Comprehensive Planning

Comprehensive planning[7] is a means for a community to pave its way into the future. Its goals are to project the diversified needs of the community and lay out a long-range scheme to control and direct development in accordance with stated objectives. It can be used as a static blueprint for the community to follow for many years,[8] or the starting point in a continuous planning process that is periodically updated and shaped to meet changing and unanticipated requirements.[9]

The contemplated result of skillfully implemented comprehensive planning is a steadily growing community which provides and maintains necessary services while protecting the environment. Although such a goal is usually sought by all concerned parties, there is disagreement over whether the employment of this method of planning can successfully achieve the desired objective.[10] There is also a great deal of controversy over whether the planning process should be mandatory or advisory.[11]

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7. The statutory origin of comprehensive planning is found in The Standard City Planning Enabling Act, promulgated in 1928. The stated purpose for long-term plans (language retained in many modern statutes) is to "guid[e] and accomplish[ ] a coordinated, adjusted, and harmonious development of the municipality and its environs which will . . . best promote health, safety, morals, order, convenience, prosperity, and general welfare, as well as efficiency and economy in the process of development." ADVISORY COMM'N ON CITY PLANNING AND ZONING, U.S. DEP'T OF CONGRESS, A STANDARD CITY PLANNING ENABLING ACT (1928) *quoted in* ROBERT R. WRIGHT & MORTON GITELMAN, LAND USE CASES AND MATERIALS 271 n.3 (4th. ed. 1991).

8. Even without a formalized planning process, zoning amendments, subdivision approvals, and similar actions change the community's land-use. Such actions can, cumulatively be perceived as evolving a "plan." *See infra* part III.B. It is important to focus on whether there is purposeful action aimed at achieving specified long-term goals.

9. *See generally*, Haar, *In Accordance With a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955)(discussing general background on the importance of comprehensive planning); Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROB. 353 (1955).

10. *See* GRAD, *supra* note 6, § 10.01, at 10-8.

11. *See id.* Some reasons stated for opposing a formalized planning process are: the inability of planners to foresee the future needs of the community and incorporate them into a usable formal document, the potentially high costs which are immediately borne by the community, and political controversy in-

C. Ad Hoc Planning

Ad hoc planning is probably the more prevalent form of planning because it is easier and less expensive to implement and it addresses specific and pressing issues. However, it has been widely criticized because of its inability to accomplish the broader objectives sought by comprehensive planning "that take into account human and environmental values."[12]

Proponents of ad hoc planning believe that long-range planning has been ineffective, and maintain that planners should focus on short-term projects to accomplish specific objectives.[13]

D. The Model Land Development Code

The Model Land Development Code (Code)[14] differs in form and concept from the original Standard Planning Enabling Act.[15] It attempts to combine the objectives and procedures of both comprehensive and ad hoc planning. The Code also combines the traditional physical approach to planning[16] with newer concepts of determining future development which consider social and economic values and objectives. It provides for long-term goal setting expressed in flexible rather than static terms. Thus, the Code serves as a

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volved in defining long-term objectives and mediating differing agendas. Frank P. Grad characterized this view of master planning as an "audacious attempt to impose the view of a few experts on future developments, with regard to population growth, population movement, development of transportation patterns, development of industrial patterns, the development of new inventions and new industries, the import of economic factors and the like." *Id.*

12. *Id.* at 10-12 to 10-13. Grad discusses how the enactment of the National Environmental Policy Act of 1969 (NEPA) was largely in response to the exclusion of the consideration of long-term impacts and alternatives on land-use in ad hoc planning. *Id.* at 10-12 n.1.

13. WRIGHT & GITELMAN, *supra* note 7, at 308, 309.

14. AMERICAN LAND INSTITUTE MODEL LAND DEVELOPMENT CODE, ART. 3, LOCAL LAND DEVELOPMENT PLANNING, COMMENTARY ON ART. 3, § 141 *et seq.*, *reprinted in* WRIGHT & GITELMAN, *supra* note 7, at 306-12. The Code has not been adopted by any state, but portions have been used by some states to regulate critical areas. *Id.* at 306 n.1.

15. ADVISORY COMM'N ON CITY PLANNING AND ZONING, *supra* note 7.

16. The physical approach to planning attempts to determine patterns and characteristics of physical development based on design and appearance alone. *See* GRAD *supra* note 6, § 10.01, at 10-6.

broad framework which facilitates focused, specific, short-term actions.[17]

E. Conclusion

Although there are many forms and functions of comprehensive planning, formalized long-term planning of some sort will arguably benefit the development of all types of communities. Recently, comprehensive planning has become favored as a means of incorporating environmental protection in land-use management decisions.[18] Many states have enacted laws mandating enacting master plans[19] and/or mandating consistency between a comprehensive plan and land-use regulation.[20]

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17. MODEL LAND DEVELOPMENT CODE, COMMENTARY ON ART. 3, *supra* note 14, *reprinted in* WRIGHT & GITELMAN, at 306-12.

18. GRAD, *supra* note 6, at 10-11. For an interesting recount of a New Jersey community which had the foresight to realize that, without a formal long-term plan, it would become a victim of the urban sprawl that had consumed its neighbors and has consumed much of rural America, *see* ARTHUR E. PALMER, TOWARD EDEN (1981). Palmer describes the mayor of Medford's realization of the impending uncontrolled growth crisis, and the fact that traditional methods of planning and zoning had not prevented the destruction of its neighbors and would not protect Medford either.

The reader follows as the town commissioned an ecological planning survey by Professor Ian McHarg entitled the Medford Report, through the long and arduous legislative process involved in incorporating the recommendations contained in the Report into a workable long-term plan. The plan encompassed a consciousness change of both the public and private sectors and created a new way of doing business involving common goals and a partnership between all members of the community. The plan focused on environmental factors upon which economic, social and political aspects of the community were overlaid, and created a scheme where "growth through diversified residential and other development could be accommodated with preservation of critical environmental resources, natural amenities, open space and recreational values." *Id.* at 79.

19. *See, e.g.*, Alaska Stat. § 29.40.030 (1990 Supp.); Cal. Gov't Code Ann. § 65300 (West 1990 Supp.); Colo. Rev. Stat. § 31-23-206 (1990 Supp.); D.C. Code Ann. § 1-2003 (1990 Supp.); Fla. Stat. Ann. § 163.3167 (West 1990 Supp); Idaho Code §§ 67-6503, 6504, 6508 (1990 Supp.); Me. Rev. Stat. Ann. Title 30A § 4321 (1989 Supp.); Neb. Rev. Stat. § 19-901, 903 (1987); Or. Rev. Stat. § 191.175(2)(a) (1990 Supp.); Wash. Rev. Code Ann. § 35.63.020 (1990 Supp.), *compiled in* Patricia E. Salkin, Comprehensive Plan & Comprehensive Planning (Prepared for the Legislative Commission on Rural Resources, Land Use Advisory Committee, Albany, N.Y.) (Draft 1990), Attach. A.

20. *See, e.g.*, Ariz. Rev. Stat. Ann. § 9-462.01E (1990 Supp.); Cal. Gov't Code Ann. § 65860 (West 1990 Supp.); D.C. Code Ann. § 5-414 (1990 Supp.); Fla.

Numerous approaches are available to implement some form of mandatory comprehensive planning on the local and regional levels. For example, the state legislature can enumerate strict procedural requirements including a format and review period for any proposed plan, or, the legislature can mandate broad requirements establishing a framework for local and regional government action. Each level of government and each state and municipality requires unique approaches or mechanisms to implement comprehensive planning. On a local level, a suggested approach would require periodic updating or review of the Master Plan. Failure to do so could cause the revocation of all development approvals during the previous period. This would encourage the involvement of private developers in the planning process, and help to remove the adversarial nature of the relationship between planners and developers, since the developers' interests will be directly affected if the community fails to plan.

Systems such as those in Vermont and Oregon illustrate schemes mandating regional and/or statewide planning while facilitating and encouraging the involvement of local governments. Vermont passed the Growth Management Act of 1988 ("Act 200")[21] to supplement the Land Use Development Law ("Act 250").[22] Act 200 establishes twelve regional planning commissions to coordinate planning and assure consistency

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Stat. Ann. § 163.3194 (West 1990 Supp.); Haw. Rev. Stat. Ch. 226 § 1 (1990 Supp.); Ky. Rev. Stat. § 100.213 (1990 Supp.); Me. Rev. Stat. Ann. Title 30A § 4352(a) (1989 Supp.); Nev. Rev. Stat. § 278.150 (1979); Or. Rev. Stat. § 197.010(3) (1989 Supp.); S.D. Compiled Laws Ann. §§ 11-6-2, -14 (1990 Supp.); Vt. Stat. Ann. title 24 §§ 4321, 4341, 4347 (1980 Supp.), *compiled in* Salkin, *supra* note 19, Attach. A.

21. Salkin, *supra* note 19, Attach. C, at 17.

22. Act 250, which was passed in 1970, divides the State into seven environmental districts which are overseen by a statewide board appointed by the governor. The Act establishes criteria and a permitting process for large developments and subdivisions which must conform to statewide development policies. An Act 250 permit is granted to proposed developments if they conform to the municipal and regional land-use plans. The Act was not as successful as it was hoped for, however, since many municipalities had insufficient plans, and many projects were not large enough to fall under the Act. Vt. Stat. Ann. title 10, Ch. 151 (Supp. 1993); DONALD L. CONNORS, ET. AL., CHOATE, HALL & STEWART, *State and Regional Planning: An Emerging Trend*, (1990), *reprinted in* Salkin, *supra* note 19, Attach. C.

among its municipalities. The Act incorporates thirty-two stated goals ranging from expanding affordable housing to identifying and preserving critical environmental areas. Even though participation by municipalities remains voluntary, Act 200 provides powerful incentives to motivate municipalities to plan in order to remedy the problems of Act 250. These include funding and technical guidance for planning and the right to participate in binding regional planning decisions. Municipalities remain the most important component of Vermont's planning process.[23]

Oregon's Comprehensive Land Use Planning Coordination Act[24] mandates local comprehensive planning and zoning and requires consistency with goals and objectives established by a statewide planning commission which must approve each plan. The commission acts as a liaison with the state legislature. An important aspect of the Act is that it provides the commission with enforcement authority to facilitate bringing local government, state agency or special district comprehensive plans, land-use regulations or land-use decisions into compliance with the commission's goals.[25]

Formal comprehensive planning remains optional in New York.[26] In 1993, the New York State Legislature amended significant portions of the Town Law.[27] Previously, authority to draft a master plan was vested solely in the planning board even though there was no requirement to establish a planning board. This was a potential source of conflict because the town board could effectively lose control of the planning process by creating a planning board.[28] The new

23. *Id.*

24. Or. Rev. Stat. Ch. 197 (1993).

25. CONNORS ET AL., *supra* note 22.

26. N.Y. TOWN LAW § 272-a (McKinney 1990 & Supp. 1994) (effective July 1, 1994). Only sections of the Town Law will be cited since, for the purposes of this article, the enabling legislation for villages and municipalities is similar or substantially similar.

27. *See, e.g.*, N.Y. TOWN LAW §§ 263, 272, 272-a (McKinney 1990 & Supp. 1994), *amended by* §§ 263, 272, 272-a (Supp. 1994).

28. "If a town establishes a planning board the town no longer has jurisdiction to perform any of the functions which are assigned to a planing board by state statute even though without the creation of the planning board the town board itself might have had authority to act in that field . . . ." 1979 Op. Att'y.

law, effective July 1, 1994, vests the town board with the authority to draft a comprehensive plan. Thus, the legislature controls both long-term planning and zoning, eliminating a source of conflict in the planning process. This is a positive step for planning in New York. However, the new law still does not mandate or provide compelling incentives for local and regional governments to draft a comprehensive plan.[29] Again, the legislature stopped short of requiring formalized long-term planning.

The new law suggests a number of topics which may be included in the comprehensive plan;[30] many are concepts which indicate the legislature's awareness of the need for, and positive aspects of, broad-based long-term regional planning and consideration of educational, environmental, and recreational needs of the community throughout the planning process. Despite this awareness, the absence of mandates or

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Gen. 147-48 (1979). *See* N.Y. TOWN LAW § 272-a (McKinney 1990 & Supp. 1994), *amended by* § 272-a (Supp. 1994).

29. *See, e.g., supra* notes 21 - 25 and accompanying text.

30. The comprehensive plan may include: (a) General statements of goals, objectives, principles, policies, and standards upon which proposals for the immediate and long-range enhancement, growth and development of the town are based.

> (b) Consideration of regional needs and the official plans of other government units and agencies within the region. . . .
> (d) Consideration of agricultural uses, historic and cultural resources, coastal and natural resources and sensitive environmental areas.
> (e) Consideration of population, demographic and socio-economic trends and future projections. . . .
> (g) Existing and proposed general location of public and private utilities and infrastructure.
> (h) Existing housing resources and future housing needs, including affordable housing.
> (i) The present and future general location of educational and cultural facilities, historic sites, health facilities and facilities for emergency services. . . .
> (m) Proposed measures, programs, devices, and instruments to implement the goals and objectives of the various topics within the comprehensive plan. . . .
> (o) Any and all other items which are consistent with the orderly growth and development of the town. . . .

N.Y. TOWN LAW § 272-a(4) (McKinney 1990 & Supp. 1994) (effective July 1, 1994).

incentives to draft a comprehensive plan in the amended laws has, for practical purposes, left the planning process unchanged.

III. Zoning and the Comprehensive Plan in New York

A. Background

Zoning has been the most widely used method of land-use regulation in this country since the 1920s[31] when its constitutionality was upheld in the landmark case of *Village of Euclid v. Ambler Realty Co.*[32] The original purpose of zoning, and still the predominant reason for its use, was to protect property values by dividing the entire municipality into districts and regulating the uses permitted within them.[33] The purpose and use of zoning has expanded to such areas as providing for the social welfare, environmental protection and aesthetic values.[34] Modern zoning techniques, radically different from traditional "Euclidean" zoning,[35] have evolved which attempt to overcome the faults of this rigid process.[36]

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31. Its statutory origins derive from THE ADVISORY COMMITTEE ON ZONING, U.S. DEP'T OF COMMERCE, *A Standard State Zoning Enabling Act Under Which Municipalities May Adopt Zoning Regulations* (rev. ed. 1926), which has been adopted in one form or another by all 50 states. WRIGHT & GITELMAN, *supra* note 7, at 780.

32. 272 U.S. 365 (1926).

33. *See* Asian Americans For Equality v. Koch, 72 N.Y.2d 121, 128-29, 527 N.E.2d 265, 268-69, 531 N.Y.S.2d 782, 785-86 (1988); GRAD, *supra* note 6, § 10.01, at 10-7.

34. *See* GRAD, *supra* note 6, § 10.01; Clune v. Walker, 10 Misc.2d 858 (1958), *aff'd* 7 A.D.2d 651 (1958) (zoning ordinances are enacted to promote the health, safety and welfare of the community at large, to protect property values against depreciation and to preserve the character of the community).

35. *See Euclid*, 272 U.S. 365 (1926) ("Euclidean" refers to the earliest form of zoning, which was approved by the United States Supreme Court in Village of Euclid v. Ambler Realty Co. "Euclidean" zoning divides municipalities into individual districts based on use.).

36. These include the planned unit development (PUD) which provides increased flexibility in residential construction by allowing the builder to cluster the buildings into higher density areas, thereby decreasing costs while preserving open space for the community. WRIGHT & GITELMAN, *supra* note 6, at 759-760. Another technique is the special purpose district, where private developers are given incentives and bonuses in return for their providing certain amenities and uneconomic benefits for the community. It is used often to protect social or cultural uses within an area. *Id.* at 760. A special purpose district was

B. Conformance With A Comprehensive Plan

Section 263 of the Town Law states that zoning regulations "shall be made in accordance with a comprehensive plan . . . ."[37] The plain language of the statute suggests that the legislature was referring to a formalized comprehensive plan. However, it is evident that there was no such intention.[38] Anderson speculated "that the legislature expected and required that the plan be implicit in the zoning regulations as a whole and that amendments be consistent with such plan."[39] The requirement of a plan is based on "the premise that zoning is a means rather than an end . . . and . . . the function of a zoning regulation is to implement a plan for the future development of the community."[40] The validity of "[z]oning legislation is tested not by whether it defines a well-considered plan but by whether it accords with a well-considered plan for the development of the community . . . [The validity is determined by] whether the . . . amendment is calculated to benefit the community as a whole as opposed to benefiting individu-

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employed through a system of bonus points in New York City where the Manhattan Bridge District was created to protect a deteriorated part of Chinatown. *Asian Americans* at 128. The developer was allowed greater floor density than the normal zoning ordinance allowed in exchange for constructing uneconomic projects such as low-income housing, slum rehabilitation, and community facilities. *Id.* at 128.

37. N.Y. TOWN LAW § 263 (McKinney 1990 & Supp. 1994); *but see* Weinstein Enterprises v. Town of Kent, 135 A.D.2d 625, 626, 522 N.Y.S.2d 204, 205 (App. Div. 1987) ("[A] town has authority pursuant to MUNICIPAL HOME RULE LAW § 10, subds. 1(ii)(a)(14), 1(ii)(d)(3) to enact local laws which supersede the provisions of the Town Law, including the mandate that zoning regulations conform to a comprehensive plan of the town").

38. ROBERT M. ANDERSON, NEW YORK ZONING LAW AND PRACTICE, § 5.02, at 131 (2d ed. 1973 & Supp. 1992) (consistent with this interpretation is the fact that few municipalities had formal plans when the law was promulgated, and relatively few have since enacted such plans).

39. *Id.* at 132.

40. Asian Americans For Equality v. Koch, 72 N.Y.2d 121, 131, 527 N.E.2d 265, 270, 531 N.Y.S.2d 782, 787 (1988); *see also* Connell v. Town of Granby, 12 A.D.2d 177, 209 N.Y.S.2d 379 (1961).

als or a group of individuals."[41] Logically, then, valid zoning legislation must follow *some* planning efforts.[42]

C. What Is The Comprehensive Plan?

The courts and scholars have repeatedly attempted to concretely define the "comprehensive plan"[43] before and since the New York Court of Appeals' decision over 25 years ago in *Udell v. Haas*[44] upholding the statutory requirement that zoning must conform to the comprehensive plan.[45] It has been noted that it is easier to state what the "comprehensive plan" *is not* than to actually define what the "comprehensive plan" *is*.[46] Clearly, no formal written document is required, and the decisions generally indicate that even a formal planning *process* is not mandated as long as the court can discern cohesive objectives or direction from the cumulative actions of the legislature.[47] In 1993, the New York State legislature

41. *Asian Americans*, 72 N.Y.2d at 131, 527 N.E.2d at 270, 531 N.Y.S.2d at 787.

42. ANDERSON, § 5.02, at 131. The case law strongly supports this requirement; *see, e.g.*, Los-Green, Inc. v. Weber, 548 N.Y.S.2d 832, 156 A.D.2d 984 (App. Div. 2d Dep't 1989) ("[i]t is clear that some planning must precede rezoning; that the Board must give some forethought to the community's land use problems, and that the amendment must be consistent with, and further, a specific comprehensive plan."). Thus, even though zoning ordinances carry the strong presumption of constitutionality awarded to legislative acts, the courts will strike them if the legislature does not offer any evidence of a plan or planning process. Old Court Int'l v. Gulotta, 507 N.Y.S.2d 22, 23, 123 A.D.2d 634, 635 (App. Div. 1986). *See also* Randolph v. Town of Brookhaven, 37 N.Y.2d 544, 547, 337 N.E.2d 763, 764, 375 N.Y.S.2d 315, 317; Bedford v. Town of Mt. Kisco, 33 N.Y.2d 178, 187-88, 306 N.E.2d 155, 159, 351 N.Y.S.2d 129, 136, *reh'g denied* 311 N.E.2d 655, 34 N.Y.2d 668 ; Walus v. Millington, 49 Misc. 2d 104, 108-09, 266 N.Y.S.2d 833, 839, *aff'd sub nom.* Walus v. Gordon Realty Corp., 31 A.D.2d 777, 297 N.Y.S.2d 894 (App. Div. 1969).

43. *See infra* note 47.

44. 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d. 888 (1968).

45. N.Y. TOWN LAW § 263 (McKinney 1990 & Supp. 1994).

46. ANDERSON, § 5.02, at 131 (citing *Comment, Spot Zoning and the Comprehensive Plan*, 10 SYRACUSE L. REV. 303, 304 (1959)) (emphasis added).

47. *See Udell*, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888.

> [T]he 'comprehensive plan' requires that rezoning should not conflict with the fundamental land use policies and development plans of the community . . . . These policies may be garnered *from any available source*, most especially the master plan of the community, if one has been adopted, the zoning ordinance and its zoning map.

formally defined the town comprehensive plan, codifying the language of *Udell v. Haas*[48], by stating that the comprehensive plan must "serve as a basis for land use regulation . . . ."[49] Despite good intention, the broadness of the definition and lack of specificity leaves planners and the courts with no greater understanding of this concept than before the legislature defined it.

D. Conclusion

The Town Law[50] does not require the type of long-term comprehensive planning that was earlier discussed as the more desirable means for a community to intelligently plan for its future.[51] In effect, the courts' broad construction of the "comprehensive plan" defines ad hoc planning by allowing individual legislative decisions made in response to specific iso-

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Id. at 472 (emphasis added); *see also*, Bedford v. Town of Mt. Kisco, 33 N.Y.2d 178, 188, 306 N.E.2d 155, 159, 351 N.Y.S.2d 129, 136 (1973) ("What is mandated is that there be comprehensiveness of planning, rather than special interest, irrational *ad hocery*. The obligation is support of comprehensive planning, not slavish servitude to any particular comprehensive plan. Indeed sound planning inherently calls for recognition of the dynamics of change."); Osiecki v. Town of Huntington, 170 A.D.2d 490, 490-91, 565 N.Y.S.2d 564, 565 (App. Div. 1991) ("A comprehensive plan is a compilation of land use policies that may be found in any number of ordinances, resolutions, and policy statements of the Town."); Asian Americans For Equality v. Koch, 72 N.Y.2d 121, 131, 527 N.E.2d 265, 531 N.Y.S.2d 782 (1988) ("An amendment which has been carefully studied, prepared and considered meets the general requirement for a well-considered plan and satisfies the statutory requirement."); Neville v. Koch, 173 A.D.2d 323, 575 N.Y.S.2d 463 (1991), *aff'd by* Neville v. Koch, 79 N.Y.2d 416, 593 N.E.2d 256, 583 N.Y.S.2d 802 (1992) ("A well-considered plan need not be contained in a single document, or even reduced to writing, as long as there is a reasoned elaboration, according to the traditional substantive due process analysis between the ends sought to be achieved by the rezoning and the means used to achieve the end."). *But see generally* Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955) (arguing that rezoning should demonstrate concordance with the master plan in order to produce legitimized legislative enactments).

48. 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888.

49. N.Y. TOWN LAW § 272-a(3) (McKinney 1990 & Supp. 1994) (effective July 1, 1994).

50. N.Y. TOWN LAW § 263 (McKinney 1990 & Supp. 1994).

51. *See supra* part II.B.

lated projects or issues to cumulatively result in a "plan."[52] The 1993 amendments will do very little to change this.

In enacting zoning ordinances or amendments, the legislature must satisfy a due process analysis. The legislation must achieve a legitimate government purpose for the good of the entire community, and must not represent an arbitrary decision benefiting only a few individuals (i.e., there must be a reasonable relationship between the legitimate ends sought and the means used).[53] There is no statutory or judicial authority to motivate communities to enact long-term comprehensive plans. There is actually a disincentive to plan because of the high costs of planning (especially considering current fiscal problems), and the practical difficulties associated with developing a workable plan, including the political reality that a single long-term plan can never satisfy all short-term interests. These are all additional factors working against motivating a community to undertake the difficult process of long-term planning.[54]

52. *See supra* part II.C. It should be noted this mission-oriented planning can result in very successful and beneficial projects when implemented by a government agency. *See, e.g.*, Asian Americans For Equality v. Koch, 72 N.Y.2d 121, 527 N.E.2d 265, 531 N.Y.S.2d 782 (1988) (the creation of the Special Manhattan Zoning District to rehabilitate portions of Chinatown); Jackson v. N.Y. State Urban Dev. Corp., 67 N.Y.2d 400, 494 N.E.2d 429, 503 N.Y.S.2d 298 (1986) (the creation of the Times Square District to revitalize the 42nd Street, Times Square area). Even though these projects were not specifically laid out in New York City's Plan, they were clearly part of the City's formally stated objective to revitalize troubled areas of the City. Perhaps this kind of "general plan" is the maximum level of planning that can be practically followed in large, developed and over-developed communities. This debate is beyond the scope of this Comment, however.

53. Asian Americans For Equality v. Koch, 72 N.Y.2d 121, 131-32, 527 N.E.2d 265, 270, 531 N.Y.S.2d 782, 787 (1988).

54. *See supra* part II.B.

IV. The New York State Environmental Quality Review Act (SEQRA)

A. SEQRA Overview

The New York State Environmental Quality Review Act (SEQRA)[55] was adopted in 1975 as the state's broader counterpart to the National Environmental Policy Act of 1969 (NEPA).[56] It was enacted as a result of the legislature's awareness of the unseverability of environmental factors, with social and economic actions, as well as the legislature's recognition of the importance of long-term planning.[57]

The purpose of SEQRA is:

> to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state.[58]

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55. N.Y. ENVTL. CONSERV. LAW §§ 8-0101 - 8-0117 (McKinney 1984 & Supp. 1994).

56. 42 U.S.C. §§ 4321-4361 (1982). *See* Orloff, *SEQRA: New York's Reformation of NEPA*, 46 ALB. L. REV. 1128 (1982). One of the biggest differences is that SEQRA mandates the consideration of alternatives to an action and, thus, it is a substantive, as well as a procedural statute. N.Y. ENVTL. CONSERV. LAW § 8-0109(d); *see also* STEVEN A. TASHER, ET AL., NEW YORK ENVIRONMENTAL LAW HANDBOOK, 10-12 (1988).

57. N.Y. ENVTL. CONSERV. LAW § 8-0103 (McKinney 1984 & Supp. 1994). The legislative findings state in part:

> [I]t is the intent of the legislature that the protection and enhancement of the environment, human and community resources shall be given appropriate weight with social and economic considerations in public policy. Social, economic, and environmental factors shall be considered together in reaching decisions on proposed activities. It is the intent of the legislature that all agencies conduct their affairs with an awareness that they are the stewards of the air, water, land, and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations.

Id. at (7) & (8).

58. N.Y ENVTL. CONSERV. LAW § 8-0101.

SEQRA is implemented through regulations (Regulations) promulgated by the New York State Department of Environmental Conservation (DEC) which provide a framework for state and local agencies to implement the statute.[59] The DEC recognizes the legislature's intent to mandate the consideration of environmental factors *at the earliest possible time* by all levels of government and in every government action.[60]

SEQRA requires "all agencies to determine whether the actions[61] they undertake, fund or approve may have a significant effect on the environment,[62] and if it is determined that the action may have a significant effect, prepare or request an Environmental Impact Statement (EIS)."[63] A "negative

59. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.1 - 617.21 (1987).

60. *Id.* § 617.1(c).

61. "Actions" include:

> (1) projects or physical activities, such as construction or other activities that may affect the environment by changing the use, appearance or condition of any natural resource or structure, that:
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> (i) are directly undertaken by an agency; or
>
> (ii) involve funding by an agency; or
>
> (iii) require one or more new or modified approvals from an agency or agencies;
>
> (2) agency planning and policy making activities that may effect the environment and commit the agency to a definite course of future decisions;
>
> (3) adoption of agency rules, regulations and procedures, including local laws, codes, ordinances, executive orders and resolutions that may affect the environment;
>
> (4) any combination of the above.

6 N.Y.C.R.R. § 617.2(b)(1)-(4).

62. "Environment" is defined as: "the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, resources of agriculture, archeological, historic or aesthetic significance, existing patterns of population concentration, distribution or growth, existing community or neighborhood character, and human health." N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(l). It is important to note the breadth of this definition since it incorporates not only the "traditional" environmental factors, but also the concepts embodied in comprehensive planning upheld by the Court of Appeals in Chinese Staff & Worker's Assn. v. City of New York, 68 N.Y.2d 359, 365, 502 N.E.2d 176, 179, 509 N.Y.S.2d 499, 503 (1986) (potential effect on the neighborhood invokes SEQRA analysis). *See infra* note 131.

63. An EIS is an informational document to help form the basis for whether to approve an action which describes the potential effects of an action on the environment, discusses mitigation measures and suggests alternatives. TASHER, *supra* note 56, at 12, 13; N.Y. ENVTL. CONSERV. LAW § 8-0109(2).

declaration"[64] exempts the action from further review under SEQRA.[65] In judicially reviewing whether a lead agency[66] has complied with the procedural and substantive requirements of SEQRA, the court assures that lawful procedures were followed and applies a "rule of reason," deferring substantively to the agency's decision as long as it is not "arbitrary, capricious or not supported by substantial evidence."[67] Substantial evidence is "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact."[68] The limited issue for review is "whether the decision makers identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for their determination."[69]

The DEC has defined most of the planning devices earlier discussed as "Type I" actions such as:[70]

> (1) the adoption of a municipality's land-use plan, the adoption by an agency of a comprehensive resource management plan or the initial adoption of a municipality's comprehensive zoning regulations;
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> (2) the adoption of changes of allowable uses within any zoning district, affecting 25 or more acres of the district; (and)

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64. A "negative declaration" means a written determination . . . that implementation of the action as proposed will not result in any significant environmental effects. N.Y. COMP. CODES R.& REGS. tit. 6, § 617.2(y).

65. *Id.* § 617.6(g)(1)(ii).

66. "Lead agency" is defined as: "[A]n involved agency principally responsible for carrying out, funding or approving an action, and therefore responsible for determining whether an EIS is required in connection with an action, and for the preparation and filing of the statement if one is required." *Id.* § 617.2(v).

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

68. WEOK Broadcasting Corp. v. Planning Board of the Town of Lloyd, 79 N.Y.2d 373, 383, 592 N.E.2d 778, 783, 583 N.Y.S.2d 170, 175 (1992) (quoting 300 Gramatan Ave. Assocs. v. State Div. of Human Rights, 45 N.Y.2d 176, 180, 379 N.E.2d 1183, 1186, 408 N.Y.S.2d 54, 56 (1978)).

69. *Jackson*, 67 N.Y.2d at 417, 494 N.E.2d at 436, 503 N.Y.S.2d at 305.

70. A "Type I" action presumptively has a significant effect on the environment and is more likely to require an EIS than an action not on the list. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.12(a)(1).

> (3) the granting of a zoning change, at the request of an applicant for an action that meets or exceeds one or more of the thresholds given elsewhere in this list; . . . .[71]

SEQRA governs discretionary agency actions but specifically exempts "official acts of a ministerial nature, involving no exercise of discretion."[72] An important issue relating to SEQRA's interaction with development and land-use issues is whether the issuance of a building permit is a ministerial action exempted from SEQRA.[73] The rationale behind allowing a project to proceed without an EIS is that, presumably, any adverse environmental effects such a project could have, were already examined in the SEQRA analysis for the zoning or municipal code changes allowing the project. Thus, permitted projects are presumed to have less severe adverse effects than the alternatives that should have been considered during the planning stage when the zoning was changed. Whether issuance of a building permit is ministerial may depend on the authority granted the building inspector by the building code.[74] For example, if the building inspector has authority to alter or condition plans, the issuance of a building permit will likely be deemed discretionary and, therefore, subject to SEQRA.[75]

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71. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.12(b)(1)-(3).

72. *Id.* § 617.2(q)(2); N.Y. ENVTL. CONSERV. LAW § 8-0105(5) (McKinney 1984 & Supp. 1994).

73. The positive result of exempting such actions is that developers have advance notice of the absence of SEQRA's procedural burdens (which will reduce the cost and time to complete permitted projects). This allows the developer to plan more efficiently, lowering his costs and, therefore, lowering the cost to the consumer. The significance of requiring SEQRA compliance is easily appreciated; if all deadlines are met without delay (an unlikely event), it would take approximately 230 days to pass through all of the procedural steps. Almost every step allows for extensions, however, which can *significantly* delay the approval of an application. Also, the cost of drafting the EIS can be very high. *See,* FREDERICK P. CLARK ASSOCIATES, SEQRA PROCESS FLOWCHART (1987).

74. TREATISE ON NEW YORK ENVIRONMENTAL LAW § 5.02(a)(3), at 391 (Nicholas Robinson, Editor-In-Chief, 2d ed. 1992) [hereinafter TREATISE].

75. Pius v. Bletsch, 70 N.Y.2d 920, 519 N.E.2d 306, 524 N.Y.S.2d 395 (1987) (where the New York Court of Appeals upheld authority of the Town of Huntington's director of engineering, building and housing to make case-by-case judgments for site-plan design and construction materials as well as require an

In *Neville v. Koch*,[76] the New York Court of Appeals reviewed a challenge by private citizens to a change in the 1974 Zoning Resolution by the Board of Estimates of property within the Special Clinton District in Manhattan. The plaintiffs claimed that the City was violating SEQRA by allowing "as-of-right" development[77] within the rezoned district when actual projects differ from those studied in the zoning analysis (within a range of parameters). The court, in denying the claim that the ordinance was too open-ended, discussed the thoroughness of the agency's EIS for the zoning change which included a range of ten "worst-case" hypotheticals, including "full-build" scenarios. It also discussed the benefits of allowing "as-of-right" uses in land-use regulation.[78] The court also noted that the open-endedness of the zoning ordinance created by "as-of-right" uses was an evolution of the traditional use of zoning amendments, resulting from the "novel intersection of zoning concerns and environmental concerns."[79]

B. Imposition of Fees Authorized by SEQRA

SEQRA authorizes the lead agency to charge an applicant for the costs involved in preparing or reviewing the

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Environmental Impact Statement under SEQRA (ECL Art. 8-0109(4)) prior to issuing a building permit).

76. 79 N.Y.2d 416, 593 N.E.2d 256, 583 N.Y.S.2d 802 (1992).

77. "As-of-right" development allows the developer to build to the fullest extent permitted by the zoning ordinance after seeking approval only from the Building Department and without requiring SEQRA analysis. *See* MICHAEL B. GERRARD, ET AL., ENVIRONMENTAL IMPACT REVIEW IN NEW YORK § 5.14(2)(b) (Supp. 1992); *see also, id.* § 3.01(3)(f); *Neville*, 79 N.Y.2d at 422 n.4., 593 N.E.2d at 258 n.4, 583 N.Y.S.2d at 804 n.4 (1992).

78. "The advantage of as-of-right development is predictability: [D]evelopment can proceed 'in accordance with pre-set regulation, rather than with case-by-case exercise of discretion by officials.'" Neville v. Koch, 79 N.Y.2d 416, 426, 593 N.E.2d 256, 260, 583 N.Y.S.2d 802, 806 (1992) (quoting Marcus, *"Neville v. Koch", Worst Case Analysis Zoning: A Farewell to "As-of-Right"?* N.Y. L.J., March 6, 1991, at 1). The court classified the issuance of a building permit for an as-of-right use as a ministerial act exempted from SEQRA even though the specific project was not studied as a hypothetical. *Neville*, 79 N.Y.2d at 426, 593 N.E.2d at 261, 583 N.Y.S.2d at 807; *see* TREATISE, *supra* note 74.

79. *Neville*, 79 N.Y.2d at 425, 593 N.E.2d at 260, 583 N.Y.S.2d at 806.

Draft EIS.[80] Up to two percent (2%) of the projected total cost can be charged for residential projects, and a private applicant can be charged one-half of one percent (0.5%) of the projected cost for non-residential projects.[81] This is a critical aspect of SEQRA's role in land-use planning as it allows the imposition of the costs of planning on a few individuals in the private sector (albeit, the individuals who will profit most by the development).[82]

C. The Generic Environmental Impact Statement

1. Background

The Regulations authorize using a Generic Environmental Impact Statement (Generic EIS)[83] to analyze the environmental effects of a complex project which is conceptually or temporally broad in scope, and which has so many uncertainties that the use of a site-specific or project-specific EIS would be inappropriate.[84] The circumstances for which DEC recommends the use of a Generic EIS are:

> (1) A number of separate actions in a given geographic area which, if considered singly, may have minor effects, but, if considered together, may have significant effects.[85]
> (2) A sequence of actions contemplated by a single agency or individual.[86]

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80. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.17(a). The applicant cannot be charged a separate fee for both preparing *and* reviewing the Draft EIS.

81. *Id.* § 617.17(b)-(c).

82. *See infra* parts IV.D. and V.

83. N.Y. COMP. CODES R. & REGS. tit. 6 § 617.15. The Regulations do not mandate the use of a Generic EIS, but suggest situations where an agency has discretion to use it rather than a site- or project-specific EIS. *See infra* note 85; GERRARD, *supra* note 77, § 5.03(1), at 5-20, 5-21; *but see Save the Pine Bush v. City of Albany*, 70 N.Y.2d 193, 512 N.E.2d 526, 518 N.Y.S.2d 943 (1987).

84. GERRARD, *supra* note 77, § 5.03(1), at 5-20, 5-21.

85. *See, e.g.*, *Save the Pine Bush*, 70 N.Y.2d 193, 512 N.E.2d 526, 518 N.Y.S.2d 943 (the Court of Appeals ordered the City's Planning Board to use a Generic EIS to assess the cumulative effects of a zoning change in a critical environmental area).

86. GERRARD, *supra* note 77, § 5.03(1), at 5-20, 5-21; *See also, e.g.*, Southern Clarkstown Civic Assn. v. Holbrook, No. 4813/89 at 3 (Sup. Ct. Westchester Co. Dec. 11, 1989), *aff'd mem.*, 166 A.D.2d 651, 560 N.Y.S.2d 976 (1990), *appeal denied*, 77 N.Y.2d 806, 571 N.E.2d 83, 568 N.Y.S.2d 913 (1991); Horn v. Inter-

(3) Separate actions having generic or common impacts.[87]
(4) An entire program or plan having wide application or restricting the range of future alternative policies or projects.[88]

The Generic EIS is similar in many ways to a site-specific or project-specific EIS.[89] However, its purpose and scope is broader and the description of the rationale for the proposed project as well as the analysis of the environmental effects is more conceptual. It is well-suited for use in government-sponsored actions to develop guidelines for later application to more specific projects as they occur.[90]

The Regulations allow agencies to "prepare generic EIS's on new, existing or significant changes to existing land-use plans, development plans and zoning regulations so that individual actions carried out in conformance with these plans or regulations may require only supplemental EIS's . . . ."[91] A Supplemental EIS may be required if the subsequent site-specific action involves one or more significant environmental effects and was inadequately analyzed in the Generic EIS.[92]

Public hearings are not required for SEQRA compliance, but DEC has stated that "hearings normally should be regarded as an essential part of the Generic EIS process."[93] This is because a Generic EIS is normally used to assess

national Business Machines, Inc., 110 A.D.2d 87, 493 N.Y.S.2d 184 (App. Div. 2d Dep't 1985), *appeal denied*, 67 N.Y.2d 602, 490 N.E.2d 556, 499 N.Y.S.2d 1027 (1986).

87. *See, e.g.*, Long Island Pine Barrens Soc'y v. Planning Board of Brookhaven, 80 N.Y.2d 500, 606 N.E.2d 1373, 591 N.Y.S.2d 982 (1992).

88. GERRARD, *supra* note 77, § 5.03(1), at 5-21; *see also, e.g.*, Alamit Properties, Co. v. Planning Board of Harrison, 159 A.D.2d 703, 553 N.Y.S.2d 440 (App. Div. 2d Dep't 1990).

89. TREATISE, *supra* note 74, § 5.02(b)(3), at 426-27.

90. *Id.* A Generic EIS "may be broader, and more general than a site or project specific EISs and should discuss the logic and rationale for the choices advanced . . . . [It] . . . may present and analyze in general terms a few hypothetical scenarios that could and are likely to occur." N.Y. COMP. CODES R. & REGS. tit. 6, § 617.15(d).

91. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.15(d) (1993).

92. *Id.* § 617.15(c)(3).

93. GERRARD, *supra* note 77, § 3.10(1), at 3-146 (quoting NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, THE SEQRA HANDBOOK at B-42 (1983)).

projects affecting a large number of people and a wide geographic area and "[t]he public is the primary source of identifying the community service and human resource impacts of a generic action."[94]

2. Comparison of the Comprehensive Plan with the Generic EIS

The Generic EIS shares many of the characteristics embodied in the concept of comprehensive planning.[95] However, the goals and means used to achieve each of these devices are quite different. The comprehensive plan is "goal-driven" in that it attempts to chart a path by setting specific goals and objective standards aimed at attaining a general blueprint of the future community.[96]

On the other hand, the Generic EIS is "results-driven"; its main objective is to avoid adverse consequences resulting from change.[97] The Generic EIS explores alternatives to mitigate adverse effects of specific plans, while the comprehensive plan normally contains a single path which represents, hopefully, the planner's ultimate choice of the least harmful alternative. Thus, the Generic EIS is well-suited for use in *adopting* a comprehensive plan and can be an excellent tool for charting a course from "the present to the master plan."[98]

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94. *Id.*

95. ROBERT LAMBE, *Generic Environment Impact Statements: Municipal Master Plans of the 1990's?*, 55 PLANNING NEWS, No. 3, 1, 4 (1991). Lambe lists the important common characteristics of master plans and Generic EIS's:

> 1) In both cases, the process is intended to improve the future for a municipality; 2) Both address the pattern of future land uses and level of municipal services to be provided; 3) Both processes attempt to balance a multitude of complex technical issues; 4) Although at different stages, both . . . require a great deal of public input to be successful; 5) Both processes involve the same decision-makers at a municipal level.

Id. Lambe's final point is not always correct since a master plan is enacted by the Town Board while a different "lead agency" may conduct the Generic EIS. The lead agency *could* be the Town Board if the Generic EIS is being used to analyze a new master plan or to change an existing plan, but it could also be another appropriate agency. *See supra* parts II.B. and IV.C.1.

96. LAMBE, *supra* note 95.

97. *Id.*

98. *Id.*

However, the Generic EIS is not intended, nor is it equipped, to serve as a substitute for formal comprehensive planning.

V. SEQRA's Interaction with Planning in New York

A. Introduction

Environmental planning is best implemented through comprehensive planning because environmental planning requires setting broad, long-term objectives and integrating all aspects of a community's growth and development with environmental concerns. In this way, thoughtful consideration is given to the environmental impacts of the various actions implementing the master plan, and alternatives and mitigation measures are considered in advance of any environmental harm and economic expense.[99] Many states have enacted legislation requiring that environmental considerations play an important role in the planning process. With the growing appreciation of the regional nature of both environmental and traditional land-use issues, some states have implemented regional and statewide planning programs.[100] This is an area where much change is occurring.[101]

B. Cases Illustrating the Use of the Generic EIS

A brief examination of recent case law involving Generic EIS's illustrates the utility of this procedural device. It also reveals the potential for Generic EIS's to negatively effect formal comprehensive planning including its substitution for such planning. Cases illustrating the four circumstances recommended by DEC for using Generic EIS's will be discussed.[102]

The first circumstance when a "generic EIS may be used [is] to assess the environmental effects of an entire program

99. *See* PALMER, *supra* note 18.

100. *See*, Salkin, *supra* note 19, Attach. B.

101. *See, e.g., id.* New York is currently examining various aspects of regional and statewide planning.

102. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.15(a); *see supra* notes 83-88 and accompanying text. Note that the use of a Generic EIS is not mandatory under any circumstance.

or plan having wide application or restricting the range of future alternative policies or projects."[103] The development of a community's comprehensive plan[104] or of a resource management plan[105] are examples of this category. These are examples of SEQRA's procedural devices facilitating long-term planning. In *Alamit Properties, Co. v. Planning Board of Harrison*,[106] the Planning Board used a Generic EIS to update its master plan, thereby allowing the town to adjust the plan according to the changing needs of the community while simultaneously examining any possible environmental effects caused by the changes.[107]

Schultz v. Jorling[108] illustrates how the Generic EIS can be used by a governmental agency (here the DEC) to initiate a large project (the development of a nature preserve in Sullivan County along the Neversink River) without conducting studies on specific sites.[109]

In *Schultz*, the plaintiff claimed that DEC improperly segmented its SEQRA review by postponing the consideration of potential environmental impacts to a later time and on a smaller scale.[110] The court upheld DEC's assertion that it could not develop site-specific management plans until finalization of the purchasing plans, after which site-specific EIS's could be implemented.[111] *Schultz* illustrates how the Generic EIS can be an excellent device to examine broad projects with unknown elements.[112] An important benefit to this use is that, in such situations, since the government agency conducts the analysis, the costs of planning are distributed evenly to the taxpayers.

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103. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.15(a)(4).

104. *See* Alamit Properties, Co. v. Planning Board of Harrison, 159 A.D.2d 703, 553 N.Y.S.2d 440 (App. Div. 1990).

105. *See* Schultz v. Jorling, 164 A.D.2d 252, 563 N.Y.S.2d 876 (App. Div. 1990).

106. 159 A.D.2d 703, 553 N.Y.S.2d 440 (App. Div. 1990).

107. 159 A.D.2d at 704, 553 N.Y.S.2d at 441.

108. 164 A.D.2d 252, 563 N.Y.S.2d 876 (App. Div. 1990).

109. *See generally* Schultz v. Jorling, 164 A.D.2d 252, 563 N.Y.S.2d 876 (App. Div. 1990).

110. *See* GERRARD, *supra* note 77, §§ 3.01(3)(c), 5.02(1)-(4).

111. *Schultz*, 164 A.D.2d at 254, 563 N.Y.S.2d at 878.

112. *See* LAMBE, *supra* note 95.

Another circumstance where use of a Generic EIS is appropriate is to examine the environmental effects of "a sequence of actions, contemplated by a single agency or individual . . . ."[113] A Generic EIS can be used to assess multi-stage projects where the ultimate objective is inextricably related to events which must precede it, such as a zoning amendment to allow constructing a shopping mall,[114] or, infrastructure improvement to allow building a large research center.[115] The developer uses a Generic EIS in such situations, even though there is already a fairly detailed plan for the proposed project, because the "project remains relatively conceptual and subject to change" until site-plan approval is sought.[116]

In *IBM*, the applicant corporation submitted a Generic EIS to assess the impact of the construction of a large research center.[117] Although the project required amending the zoning law, it was consistent with the town's master plan and, therefore, the required zoning change was in conformance with a comprehensive plan.[118] Despite conformance with the plan, SEQRA's procedures required the applicant to incur the cost and delay of a full environmental assessment. Thus, using a Generic EIS enabled the town to accomplish more extensive planning at the applicant's expense even though the project already conformed with the existing master plan.

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113. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.15(a)(2) (1987).

114. *See* Southern Clarkstown Civic Ass'n. v. Holbrook, No. 4813/89 (Sup. Ct. Westchester Co. Dec. 11, 1989), *aff'd mem.*, 166 A.D.2d 651, 560 N.Y.S.2d 976 (App. Div. 2d Dep't 1990), *appeal denied*, 77 N.Y.2d 806, 571 N.E.2d 83, 568 N.Y.S.2d 913 (1991).

115. GERRARD, *supra* note 77, § 5.03(1), at 5-21. *See also* Residents for a More Beautiful Port Washington v. Town of North Hempstead, 155 A.D.2d 521, 545 N.Y.S.2d 297 (App. Div. 2d Dep't 1989) ("tiered" approach using Generic EIS was used to develop and implement new means of solid waste disposal); *see also* Horn v. International Business Machines, Inc., 110 A.D.2d 87, 493 N.Y.S.2d 184 (App. Div. 1985), *appeal denied*, 67 N.Y.2d 602, 490 N.E.2d 556, 499 N.Y.S.2d 1027 (1986) [hereinafter IBM].

116. *Southern Clarkstown*, No. 4813/89 at 3.

117. *IBM*, 110 A.D.2d at 88, 493 N.Y.S.2d at 186.

118. *IBM*, 110 A.D.2d at 100, 493 N.Y.S.2d at 194; *see* N.Y. TOWN LAW § 263 (McKinney 1990 & Supp. 1994) for a list of goals furthered by zoning in accordance with a comprehensive plan; *see also supra* part II.

Many of the issues which IBM analyzed (like the zoning change or road improvements) would have been addressed in the original planning process if the town had used a Generic EIS to draft or update its master plan. Thus, the applicant's costs could have been significantly lower had it been required to submit only a Supplemental EIS for aspects not adequately examined in an original comprehensive assessment.[119]

Southern Clarkstown[120] illustrates another potentially negative use of the Generic EIS. The case arose out of a controversy over the rezoning of the applicant's property to construct a shopping center. The town required a Generic EIS to assess the environmental impacts and the Town Board granted the zoning change even though the proposed use was inconsistent with the master plan. In upholding the rezoning, the court stated that the Town Board's findings statement in the Generic EIS

> makes clear that the rezoning of Pyramid's [applicant's] property does not represent a significant departure from the master plan developed by the Town. The Town Board has concluded that hopes for LID [light industrialized development] development of this site are unrealistic, and has found that the site represents only 10% of the land available for LID development in the Town.[121]

The court construed the Town Board's SEQRA analysis and findings as sufficient evidence of planning to satisfy the requirement that "some planning must precede zoning"[122] without an amendment to the master plan by the Planning Board.[123] Thus, the town substituted a Generic EIS for its

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119. *See* N.Y. COMP. CODES R. & REGS. tit. 6, § 617.15(c)(2) (1987). It is unclear whether *updating* a master plan is an "action" mandating SEQRA analysis. *See supra* notes 61-63, 91 and accompanying text.

120. Southern Clarkstown Civic Ass'n v. Holbrook, No. 4813/89 (Sup. Ct. Westchester Co. Dec. 11, 1989), *aff'd mem.*, 166 A.D.2d 651, 560 N.Y.S.2d 297 (App. Div. 2d Dep't 1990), *appeal denied*, 77 N.Y.2d 806, 571 N.E.2d 83, 568 N.Y.S.2d 913 (1991).

121. *Southern Clarkstown*, No. 4813/89 at 11.

122. Los-Green, Inc. v. Weber, 156 A.D.2d 994, 548 N.Y.S.2d 832, (App. Div. 4th Dep't 1989).

123. *Southern Clarkstown*, No. 4813/89 at 11. The Master Plan is amended by the Planning Board annually or semi-annually. Information obtained by a

normal planning process, thereby imposing the imposition of the costs of this ad hoc planning on the developer.[124]

Save the Pine Bush v. City of Albany[125] is an example of using the Generic EIS in cumulative impact analyses in critical environmental areas. The Regulations recommend using a Generic EIS to assess the environmental impacts on an area when a number of separate, unrelated actions that would have a minimal impact when considered alone, might have a larger impact when considered together.[126] *Save the Pine Bush* involved an attempt by the city of Albany to open an inland area of pine barrens, called the Pine Bush, to private development, and an attempt by private citizens to prevent the city from implementing its plan without first considering the potential cumulative impacts.[127]

The Court of Appeals held that Sections 617.11(a) and (b)[128] of the Regulations required that the city consider the cumulative effects of a number of separately-owned development proposals before approving any project, since these actions were not separate, but related to a specific geographical area.[129] "Where a government body announces a policy to reach a balance between conflicting environmental goals — here, commercial development and maintenance of ecological

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phone conversation with a Clarkstown Planning Board office employee, Jan. 6, 1993.

124. *See* N.Y. COMP. CODES R. & REGS. tit. 6, § 617.17; *see supra* notes 80-82 and accompanying text.

125. 70 N.Y.2d 193, 512 N.E.2d 526, 518 N.Y.S.2d 943 (1987); *See* Scott A. Thornton, *Cumulative Impacts in Environmental Review: The New York Standpoint*, 9 PACE ENVTL. L. REV. 253 (1991) (for a discussion of *Save the Pine Bush* and a general discussion of cumulative impact analysis); *see also* GERRARD, *supra* note 77, § 5.10(4)(c), at 5-53 to 5-54.

126. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.15(a)(1); *see supra* note 85 and accompanying text.

127. *Save the Pine Bush*, 70 N.Y.2d at 200, 201, 512 N.E.2d at 528, 518 N.Y.S.2d at 945.

128. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.11(a) & (b) (1987). Section 617.11(a) gives a nonexhaustive list of criteria for determining whether an action may have a significant effect on the environment. Section 617.11(b) mandates cumulative impact analysis of actions contained in, likely to result from, or dependent upon, long-range plans.

129. *Save the Pine Bush*, 70 N.Y.2d at 205-06, 512 N.E.2d at 531, 518 N.Y.S.2d at 948.

integrity — in such a significant area, assessment of the cumulative impact of other proposed or pending development is necessarily implicated in the achievement of the desired result."[130] The court nullified the zoning change as a violation of SEQRA since the city failed to consider the cumulative effects of its action. In a footnote, the court cited Section 617.15(a)(1) indicating its support for using a Generic EIS in situations similar to this.[131]

The holding in *Save the Pine Bush* indicates that the court will permit, even mandate, using the Generic EIS as a comprehensive environmental planning device, as long as there is already a "general plan" linking the area and projects together. However, the court did not say whether this "general plan" must be a formal master plan, the comprehensive plan required by Section 263 of the Town Law for zoning amendments, or whether the court was creating a new concept of planning applicable only to situations such as in the *Pine Bush* case.

The court elaborated on the type of general plan that invokes SEQRA's mandatory cumulative impact analysis in *Long Island Pine Barrens Soc'y v. Planning Board of the Town of Brookhaven.*[132] In *Pine Barrens*, the Court of Appeals reversed an appellate division decision[133] mandating cumulative impact analysis of 224 separate development projects in the Central Pine Barrens region of Long Island.[134]

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130. *Id.*

131. *Id.* at n.3. The court cited from Chinese Staff & Workers Ass'n v. City of New York, 509 N.Y.2d 499, 502 N.E.2d 176, 68 N.Y.S.2d 359 (1986), to explain the requirements of the plan necessary to invoke SEQRA's cumulative impact analysis. In *Chinese Staff*, the court required the City to consider the cumulative impact of seven luxury apartment buildings in the Special Manhattan Bridge District because "they were all part of a plan designed to add to the City's housing stock while preserving the scale and character of the Chinatown community." *Save the Pine Bush*, 70 N.Y.2d at 206, 518 N.Y.S.2d at 948, 512 N.E.2d at 531.

132. 80 N.Y.2d 500, 606 N.E.2d 1373, 591 N.Y.S.2d 982 (1992).

133. Long Island Pine Barrens Soc'y v. Planning Board of the Town of Brookhaven, 178 A.D.2d 18, 581 N.Y.S.2d 803 (App. Div. 2d Dep't 1992).

134. The Central Pine Barrens is an area of over 100,000 acres which is part of three large towns and is the sole natural source of drinking water for 2.5 million people. *See* John D. Nolon, *Land Use Law Reform Imperative Restated in 'Pine Barrens' Ruling*, N.Y. L.J., Dec. 9, 1992, at 1, 6. It is one of nine Special

The appellate court designated the Suffolk County Health Department as lead agency and mandated the use of a Generic EIS. Citing the New York Court of Appeals in *Save the Pine Bush* and *Chinese Staff*, the appellate court, in a 3-2 decision, held that the Sole Source Aquifer Protection Law,[135] which required preparation of a comprehensive or general management plan by the Long Island Regional Planning Board (a non-profit, non-authoritative body) was evidence of the plan contemplated by the Court of Appeals which would invoke mandatory cumulative analysis.[136] The appellate court determined that the comprehensive management plan was sufficient to require cumulative analysis even though the plan was not yet completed.[137] This interpretation would have prevented all development until completion of the analysis, and, since the court mandated using a Generic EIS in the cumulative analysis, this would have allowed imposition of "the considerable costs of such an undertaking on the *applicants* for zoning, subdivision and site-plan approval"[138] without any formal comprehensive planning in the region or by the individual communities.

The Court of Appeals unanimously reversed the appellate court's decision, reinstating the trial court's judgment, thereby "closing this back door route to regional land-use planning."[139] The court distinguished the *Save the Pine Bush* and *Chinese Staff* decisions from the present case because in both situations the municipalities had actual municipal development plans which inexorably linked the discrete projects and thus, invoked Section 617.11 cumulative analysis.[140] "[T]he decisive factor in both *Chinese Staff* and *Save the Pine*

Groundwater Protection Areas designated by the Sole Source Aquifer Protection Law, N.Y. ENVTL. CONSERV. LAW §§ 55-0101 to 0103 (McKinney 1990 & Supp. 1994).

135. N.Y. ENVTL. CONSERV. LAW §§ 55-0101 to 0103 (McKinney 1990 & Supp. 1994).

136. Long Island Pine Barrens Soc'y v. Planning Board of the Town of Brookhaven, 178 A.D.2d at 26, 581 N.Y.S.2d at 808.

137. *Id.* at 28, 581 N.Y.S.2d at 809.

138. Nolon, *supra* note 134 (emphasis added).

139. *Id.*

140. *Pine Barrens*, 80 N.Y.2d at 513-14, 606 N.E.2d at 1378-79, 591 N.Y.S.2d at 987-88; N.Y. COMP. CODES R. & REGS. tit. 6, § 617.11(a) & (b) (1987).

Bush was the existence of a 'larger plan' for development . . . not the proposed projects' common geographical base or the existence of a generally stated governmental policy to protect the region from unbridled development."[141] The court added that, in the current situation, there is no such plan analogous to those involved in *Chinese Staff* and *Save the Pine Bush*.

> Rather, there is merely a host of federal, state and local statutes designating the region as an ecologically sensitive one and mandating the development of adequate land-use controls. Consequently, there is no cohesive framework for relating the 224 projects in issue to each other . . . . [T]heir common placement . . . is an insufficient predicate under the present set of administrative regulations for mandating cumulative analysis as a precondition to a myriad of . . . determinations.[142]

The Court did not address whether cumulative analysis would be required once a concrete plan was finalized.

C. Conclusion

A new "comprehensive plan" has emerged with the *Save the Pine Bush* and *Pine Barrens* decisions. In addition to the "formal comprehensive plan" earlier discussed as a traditional long-term planning tool,[143] and the "statutory plan" that zoning must conform to,[144] the Court of Appeals identified a new "comprehensive" or "general plan" which would invoke SEQRA's cumulative impact analysis. Interestingly, the "general plan" requiring SEQRA's cumulative impact analysis contemplated by the Court of Appeals in *Save the Pine Bush*, differs from the "statutory plan,"[145] although it can fulfill the requirements of the "statutory plan". However, the "general plan" does not satisfy the stricter requirements of

141. *Pine Barrens*, 80 N.Y.2d at 514, 606 N.E.2d at 1379, 591 N.Y.S.2d at 988.

142. *Id.* at 514-15, 606 N.E.2d at 1379, 591 N.Y.S.2d at 988.

143. *See supra* part II.B.

144. N.Y. TOWN LAW § 263 (McKinney 1990 & Supp. 1994); *see supra* part III.B.

145. N.Y. TOWN LAW § 263 (McKinney 1990 & Supp. 1994); *see supra* part III.B.

the "formal comprehensive plan,"[146] which contains specific environmental analysis along with development objectives for identified areas. The "general plan" seems to require only some type of formal development plan linking an area together.[147]

The New York Court of Appeals clearly recognizes the need for comprehensive regional and local planning.[148] At least for regional planning, however, the court stated in *Pine Barrens* that it will not allow SEQRA's procedural devices to be used as a substitute for legislatively-mandated planning, a substitute which would impose the costs of regional planning on private developers.

> The cumulative impact assessment that petitioner's envision would be, in essence, a vehicle for the many involved "lead agencies" to engage in comprehensive and long-range planning for the development of this vast area of land . . . . While such an exhaustive and thorough approach to evaluating projects affecting this region is *unquestionably desirable*, and indeed, *may well be essential to its preservation*, petitioner's suggestion that it can be accomplished through the process mandated by SEQRA is inconsistent with the very legislation on which petitioner's rely.[149]

As it did over 20 years ago in *Udell v. Haas*,[150] the court has signalled to the legislature that the existing land-use law in New York cannot adequately address the needs of its communities.[151] At least for regional issues, the court will not allow SEQRA's procedural devices to substitute for such comprehensive legislation.[152]

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146. *See* N.Y. TOWN LAW § 272-a (McKinney 1990 & Supp. 1994), *amended by* § 272-a (Supp. 1994); *see also supra* part II.B.

147. *Pine Barrens*, 80 N.Y.2d at 514, 606 N.E.2d at 1379, 591 N.Y.S.2d at 988; *Save the Pine Bush*, 70 N.Y.2d at 206, 512 N.E.2d 526, 518 N.Y.S.2d 943.

148. *Pine Barrens*, 80 N.Y.2d at 515, 606 N.E.2d at 1379, 591 N.Y.S.2d at 988.

149. *Id.* (emphasis added).

150. 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968).

151. Nolon, *supra* note 134.

152. However, it is quite possible that, if there is a formal regional development plan (recall that the plan for the Pine Barrens was not yet completed), the court could extend its decisions in *Chinese Staff* and *Save the Pine Bush* to man-

However, for local issues, the courts have allowed, and even mandated the use of Generic EIS's to comply with SEQRA's substantive requirement for cumulative impact analysis.[153] Also, the Generic EIS has served to satisfy the broad requirements of the "comprehensive plan"[154] needed to validate zoning amendments. This has enabled communities to impose the costs of planning on the private sector[155] while accomplishing the desirable goal of mandating environmental consideration in land-use planning.

VI. Conclusion

Formal comprehensive planning is a means for a community to pave its way into the future with thoughtful consideration of environmental and traditional land-use concepts. New York does not mandate comprehensive planning, yet, zoning regulations must be in accordance with a comprehensive plan. The "comprehensive plan" contemplated by the legislature and interpreted by the courts is not necessarily the formal comprehensive plan defined in the amended Section 272-a,[156] and can be derived from the overall land-use actions of the community. The New York courts have stated that at least "some planning must precede rezoning,"[157] but have refused to impose mandatory planning without a statu-

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date using a Generic EIS to evaluate the cumulative impact of environmental effects even if the regional plan does not formally address environmental issues.

153. *See* Chinese Staff & Workers Ass'n v. City of New York, 68 N.Y.2d 359, 502 N.E.2d 176, 509 N.Y.S.2d 499 (1986); Save the Pine Bush v. City of Albany, 70 N.Y.2d 193, 512 N.E.2d 526, 518 N.Y.S.2d 943 (1987).

154. *See supra* parts III.B. and IV.D.; *see also* N.Y. TOWN LAW § 263 (McKinney 1990 & Supp. 1994). Recall *Asian Americans for Equality v. Koch*, 72 N.Y.2d 121, 527 N.E.2d 265, 531 N.Y.S.2d 782 (1988), where the court stated that "[a]n amendment which has been carefully studied, prepared and considered meets the general requirements for a well-considered plan and satisfies the statutory requirements." *Id.* at 132, 527 N.E.2d at 270-71, 531 N.Y.S.2d at 788. The court's decisions have, in effect, said that a Generic EIS can satisfy these parameters. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.15 (1987).

155. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.17 (1987).

156. N.Y. TOWN LAW § 272-a (McKinney 1990 & Supp. 1994)(effective July 1, 1994).

157. *See* Los-Green, Inc. v. Weber, 156 A.D.2d 984, 548 N.Y.S.2d. 832 (App. Div. 4th Dep't 1989).

tory context for doing so. The amendments to the Town Law indicate the legislature's cognizance of the importance of long-term planning and consideration of regional and environmental issues early in the planning process, but the legislature has still not taken the step to mandate formalized long-term planning.

With SEQRA's enactment, the New York legislature created a framework for considering environmental factors at the "earliest possible time."[158] However, since long-term planning is discretionary, SEQRA's procedural requirements can be satisfied by an environmental analysis during the planning of an individual project. This project-specific environmental analysis has been construed by the courts as sufficient evidence of planning to validate zoning amendments.[159] Thus, SEQRA has provided a procedural tool that facilitates ad hoc planning.

The Generic EIS has also been used as a substitute for long-term planning for projects having too large a scope for project-specific analysis. Its use has been mandated by the courts once there is evidence of the "comprehensive plan" which invokes SEQRA's Section 617.11 cumulative impact analysis.[160] Communities have used this procedural device in a number of circumstances to make critical environmental decisions on an ad hoc basis without the benefits of long-term planning.[161]

From the environmentalist's standpoint, perhaps such ad hoc planning is better than no consideration of environmental impacts. The Court of Appeals has, thus far, not mandated the use of the Generic EIS for cumulative impact analysis for regional issues without a "comprehensive plan," and it is unclear how strictly the court will interpret the requirements

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

159. *See* Southern Clarkstown Civic Ass'n. v. Holbrook, No. 4813/89 (Sup. Ct. Westchester Co. Dec. 11, 1989), *aff'd mem.*, 166 A.D.2d 651, 560 N.Y.S.2d 976 (App. Div. 1990), *appeal denied*, 77 N.Y.2d 602, 571 N.E.2d 83, 568 N.Y.S.2d 913 (1991).

160. *See* Save the Pine Bush v. City of Albany, 70 N.Y.2d 193, 512 N.E.2d 526, 518 N.Y.S.2d 943 (1987).

161. *See, e.g., Save the Pine Bush*, 70 N.Y.2d. 193, 512 N.E.2d 526, 518 N.Y.S.2d 943; *Southern Clarkstown*, No. 4813/89.

for this "plan" in order to invoke cumulative analysis. The possibility exists, therefore, that circumstances may occur where SEQRA's cumulative analysis will be mandated and where a Generic EIS may be used to conduct the analysis, rather than drafting a comprehensive master plan. Again, in the absence of formal comprehensive planning, this analysis may be "better than nothing" for environmentalists.

SEQRA does not prevent comprehensive planning, but communities can use it to avoid long-term planning, a process that is expensive and logistically and politically difficult. In addition, SEQRA provides monetary incentives for communities not to plan by permitting communities, through its procedural devices, to pass on the costs of ad hoc planning to the private sector.

Sound environmental planning benefits the entire community, and there is growing appreciation of its importance, especially for regional issues. SEQRA is the first step toward achieving this goal. Certainly, project-specific planning costs should be borne by the individuals who will profit from them, but the general costs of planning should be borne by the entire community. SEQRA should not be used to avoid the long term planning process, nor to direct the costs of planning to the private sector.

The solution is a system of mandatory local, regional and statewide planning and a mechanism for integrating the different levels. A number of states are examining many different schemes with varying degrees of success. Certainly, there is no quintessential system because each state has different goals, existing planning legislation and varying relationships among the levels of government. New York is no exception, and its strong tradition of Home Rule will play a significant role in the design of a workable strategy. However, it is clear that mandatory planning would free SEQRA to operate as it was intended, to *supplement* the planning process by requiring the consideration of environmental issues, rather than as a substitute for formalized planning.