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I. Introduction

The New York State Environmental Quality Review Act (SEQRA),[1] and regulations published by the New York State Department of Environmental Conservation (DEC),[2] require state and local agencies to adopt "any additional procedures which may be necessary for them to implement"[3] the requirements of the Act. According to the regulations, these individual agency procedures "shall be no less protective of environmental values, public participation and agency and judicial review" than the state procedures.[4]

Pursuant to this authority, Mayor Abraham D. Beame issued Executive Order 91 on August 24, 1977, establishing the City Environmental Quality Review (CEQR) process of the City of New York.[5] This Executive Order appointed the New York City Department of Environmental Protection (DEP) and the Department of City Planning (DCP) as co-lead agencies for the implementation of the state and city environmental review process by the city.

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1. N.Y. Envtl. Conserv. Law §§ 8-0101 to -0117 (McKinney 1982).
2. N.Y. Comp. Codes R. & Regs. tit. 6, §§ 617.1-.21 (1987).
3. *Id.* § 617.4.
4. *Id.*
5. N.Y. City Exec. Order 91 (1977).

The basic substantive requirements imposed under CEQR and the procedures followed by the co-lead agencies reflect the mandates of state law. A detailed environmental analysis must be completed prior to any non-discretionary city action which might have a significant effect on the environment. An application for a discretionary act on the part of any city agency to fund, undertake, or approve a project must be supported by a preliminary assessment of its environmental impact (referred to under CEQR as a Project Data Statement (PDS)).[6] The co-lead agencies circulate the PDS to other interested agencies for comment, and conduct a preliminary review to determine whether the action might have a significant effect on the environment. If a significant effect is found, the agencies prepare and publish a positive declaration[7] and require that a draft environmental impact statement (DEIS) be prepared, submitted and considered at a public hearing. Finally, a notice of completion will be published,[8] and any agency decision will be accompanied by certain findings based upon the information contained in the final environmental impact statement (FEIS).[9]

The basics are, therefore, the same under state and local law. However, the procedures developed over the last several years by the co-lead agencies under CEQR are necessarily more complex than those followed by other agencies under the statewide SEQRA process, since they must satisfy the environmental review requirements imposed by both state and city mandates within the intricate administrative and regulatory structure established by the New York City Administrative Code[10] and the New York City Charter.[11] In addition, the criteria these agencies have developed for the environmental assessment of discretionary actions are unique, since such criteria reflect the peculiar environmental problems which exist in the densely populated, traffic congested metropolitan area.

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6. *Id.* § 5.
7. *Id.* § 7(a)(3).
8. *Id.* § 10.
9. *Id.* § 11.
10. N.Y. City Admin. Code (1986).
11. N.Y. City Charter (1986).

II. The City's Governmental Structure

The CEQR process must be examined in light of the provisions of the City Charter,[12] the document which establishes the governmental structure of the City of New York. The City Charter assigns substantive regulatory and service-delivery responsibilities to a number of mayoral agencies. These agencies include the Department of Environmental Protection which operates the water supply and sewer system, and regulates air, noise and water pollution in the city;[13] the Department of City Planning which administers the Zoning Resolution of the City of New York;[14] the Department of Transportation which controls the streets and regulates traffic;[15] the Department of Sanitation which has responsibility for the cleanliness of the city;[16] and the Department of Ports, International Trade and Commerce which controls development activities taking place along the waterfront.[17]

Other mayoral agencies are empowered to take a wide variety of actions, some ministerial, others discretionary, under a comprehensive regulatory system established by the City Charter and the Administrative Code. The City Charter also creates other entities with the power to take discretionary acts, such as the Board of Standards and Appeals which issues variances from the requirements imposed by the Zoning Resolution, the Building Code, and the Fire Code;[18] the City Planning Commission (CPC) which has authority to amend the Zoning Resolution, grant special permits, and approve Urban Renewal Plans;[19] the Landmarks Preservation Commission which controls activities which might affect historic structures;[20] and the Board of Estimate, perhaps the most powerful (albeit troubled) governmental entity within the City of New

12. *Id.*
13. *Id.* §§ 1401-04.
14. *Id.* §§ 51-55.
15. *Id.* §§ 2901-06.
16. *Id.* §§ 751-55.
17. *Id.* §§ 701-05.
18. *Id.* §§ 659-69.
19. *Id.* §§ 191-202.
20. *Id.* § 534.

York.

The Board of Estimate[21] consists of the Mayor, the five borough presidents, the Comptroller and the City Council President.[22] It has jurisdiction under the City Charter to grant leases and concessions for the use of city property; control the development, disposal and improvement of city land; authorize capital projects;[23] and approve all significant contracts entered into by the city which are not publicly bid.[24]

III. The CEQR Process

A. *Overall City Approval Processes*

The CEQR process is superimposed upon the administrative procedures followed by each of these entities in taking the discretionary actions assigned to them by the Administrative Code and the City Charter. These non-CEQR procedures involve public review as a matter of course, since the City Charter, Administrative Code and agency regulations almost invariably incorporate public notice and hearings into agency discretionary decision-making. In fact, the provisions of the City Charter seek to establish a "town meeting" type of approval process for many significant city actions, which involves multiple hearings over the course of several months.

Under the provisions of the City Charter, the City of New

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21. In Morris v. Board of Estimate, 647 F. Supp. 1463, 1470-71 (E.D.N.Y. 1986), *aff'd*, 831 F.2d 384 (2d Cir. 1987), the voting structure of the board was found to violate the "one person, one vote rule" and therefore was held unconstitutional. In response to this decision, the Charter Revision Commission was directed to study the issue and to make recommendations as to how the Board might be restructured, or as to how its powers might be changed or redistributed to other governmental bodies in order to address any existing constitutional deficiencies. However, before the work of the Charter Revision Commission was completed, the U.S. Supreme Court noted probable jurisdiction in *Morris v. Board of Estimate*, 56 U.S.L.W. 3682 (U.S. April 4, 1988)(No. 87-1022), and a related case, *Ponterio v. Morris*, 56 U.S.L.W. 3682 (U.S. April 4, 1988)(No. 87-1112). The activities of the Commission in connection with the Board of Estimate were suspended pending a decision by the Court on the issues presented. It is highly possible that these events might result in sweeping changes in the way the city government operates over the course of the next few years.

22. N.Y. City Charter § 61 (1986).

23. *Id.* § 67.

24. *Id.* § 349.

York has been divided into fifty-nine more manageable geographic areas known as Community Districts.[25] Each such district is represented by a Community Board, consisting of not more than fifty persons.[26] This board acts as a liaison between the community it represents and the City government.[27] Section 197-c of the City Charter requires "proposals and applications by any person or agency [r]especting the use, development or improvement of real property subject to city regulation"[28] to be considered under a Uniform Land Use Review Procedure (ULURP) administered by the City Planning Commission (CPC). Any action falling under the requirements of ULURP must undergo public scrutiny, ordinarily involving a series of hearings before the Community Board representing the district within which the affected real property lies, then before the CPC, and finally before the Board of Estimate, in an approval process designed to take place over a period of no more than six months.[29] Moreover, the City Charter requires the Board of Standards and Appeals (BSA) to hold its own hearing on any application coming before it, and to refer any application for a zoning variance to the appropriate Community Board.[30]

B. *The CEQR Process*

As a practical matter, most discretionary city actions having a significant effect on the environment will involve BSA or ULURP approvals. Pursuant to the mandate set forth in section 617.4 of the SEQRA regulations, the co-lead agencies have integrated CEQR requirements into the ULURP and BSA processes. They have also created a system whereby all interested agencies have the opportunity to review a PDS submitted under CEQR, and to comment upon any EIS required in its preliminary draft form prior to formal commencement

25. *Id.* § 2700.
26. *Id.* § 2705.
27. *Id.* § 197-a.
28. *Id.* § 197-c.
29. *Id.* § 668.
30. *Id.*

of the combined CEQR/ULURP and CEQR/BSA public reviews.[31] All ULURP and BSA applications are also submitted to the co-lead agencies for preliminary review. If, after review, the agencies find that the action involved is either a Type I[32] or an unlisted action,[33] a PDS is required.

Section 3(b) of Executive Order 91 establishes a mandatory state-city coordination process where the co-lead agencies find, upon their review of a PDS, that a state action requiring compliance with SEQRA is involved in a project coming before them.[34] The co-lead agencies are directed to apply certain criteria in determining whether the state or the city should take the lead in such cases, considering: (1) which agencies will act first on the proposed action; (2) which have the most responsibility for supervising or approving the action; (3) which have more general governmental powers; (4) which have the greatest capacity for providing a thorough environmental assessment; and (5) whether the anticipated impacts of the action are of primarily statewide, regional or local concern.[35] Section 3(b) provides that where a determination of lead status cannot be made within 30 days of the submittal of an application, the Commissioner of the DEC shall be requested to appoint the lead agency.[36]

In addition, where the PDS presents an action falling within the Type I list established by section 617.12 of the SEQRA regulations or section 15 of CEQR, and agencies other than city agencies are involved in the action, the co-lead agencies must undertake the coordinated preliminary review procedures mandated by section 617.6. The PDS will be circulated among the agencies, and if possible, the agencies will

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31. N.Y. City Exec. Order 91 § 5 (1977).

32. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.12 (1987); N.Y. City Exec. Order 91 § 15 (1977). The purpose of the list of Type I actions is to identify those actions and projects more likely to require the preparation of an EIS than unlisted actions.

33. Unlisted actions are those which do not appear on either the Type I List or the Type II List established by N.Y. Comp. Codes R. & Regs. tit. 6, § 617.13 (1987). The Type II list includes actions which have been determined not to have a significant environmental effect. *Id.*

34. N.Y. City Exec. Order 91 § 3(b) (1977).

35. *Id.*

36. *Id.*

agree upon which will take the lead. If such an agreement cannot be reached, the agencies will, pursuant to the formal process set out in section 617.6, petition the Commissioner of the DEC to select the lead agency. In doing so, he will apply criteria similar to those set out in section 3(b) of Executive Order 91.[37]

In those cases where the PDS sets forth an unlisted action, and does not indicate the discretionary involvement of a state agency, the co-lead agencies may, under section 7(2) of CEQR, "[c]onsult with, and shall receive the cooperation of any other agency before making their determination."[38] In these cases, the co-lead agencies will routinely send the PDS to other agencies which might have some interest in the project, requesting their views as to the issue of significance.

The DEP and the DCP have divided the work involved in seeking these comments, and in assessing the impacts of projects between them. The DEP is responsible for air, noise, water quality and infrastructure issues, and the DCP is involved with issues such as land use, project design, zoning, population density, relocation, traffic, transportation and landmarks. As a result of the intricacy of the regulatory structure existing in New York City, the procedural steps involved in developing an assessment of the significance of even an unlisted action involving only city jurisdiction can be quite complex under CEQR. The DEP's CEQR staff will, for example, often consult on an informal basis with the City Department of Health, the State Department of Environmental Conservation, and several bureaus within the DEP, including the bureaus of Water Pollution Control, Sewers, Water Supply, Noise Abatement, and Science and Technology. DCP will also seek the views of several offices under its jurisdiction, the City Department of Transportation, the Landmarks Preservation Commission, the Department of Housing Preservation and Development, the Parks Department, Police, Fire, the Transit Authority and various other agencies.

The co-lead agencies, taking into account the views ex-

37. *Id.*
38. *Id.* § 7(2).

pressed by each of these entities, will then consult each other and apply the criteria established by SEQRA and CEQR to determine the impact of the project. If they conclude that no significant effect will result from the action, they will issue, circulate, and publish a negative declaration,[39] and the CEQR process will be complete.

They might also find that no significant effect will occur if the applicant incorporates certain mitigating measures into his plans for the project. Under section 7(b) of Executive Order 91, the co-lead agencies may, in such event, issue a "conditional negative declaration," requiring the applicant to modify its proposal "[i]n accordance with conditions or alternatives designed to avoid adverse environmental impacts."[40] If agreed to in writing by the applicant, the conditional negative declaration will obviate the need for preparation of an EIS. However, the SEQRA regulations, as revised on June 1, 1987, restrict the issuance of conditioned negative declarations to circumstances involving unlisted actions. In addition, they require that conditioned negative declarations be issued according to a formal process including a coordinated interagency preliminary review, publication of notice in the Environmental Notice Bulletin issued by DEC, and a 30-day public comment period.[41]

If, on the other hand, the co-lead agencies find that a project might have a significant effect, they will issue a positive declaration[42] and require the applicant to prepare a draft EIS. A formal scoping session, while not required under CEQR procedures, is often held, so that applicants can meet with all city agencies having some interest in the project to determine the content of the document he must produce.

A preliminary draft EIS is then prepared and submitted to the co-lead agencies for review. Again, they circulate the document throughout the bureaucracy, and request substan-

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39. *Id.* § 7(b)(1). A negative declaration is a statement that the action will not have a significant effect on the environment which sets forth the reasons supporting the lead agencies' determination. *Id.*

40. *Id.* § 7(b)(2).

41. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.6(h) (1987).

42. N.Y. City Exec. Order 91 § 7(a)(3) (1977).

tive written comments from each of the agencies on the adequacy of the preliminary draft and the issues it raises. These comments are consolidated and passed along with those of the co-lead agencies to the applicant, who will revise the document accordingly. Upon their subsequent review, if the co-lead agencies find that the draft EIS meets the substantive requirements of SEQRA and CEQR, and has responded satisfactorily to the comments made upon the preliminary document, the agencies will certify the draft as complete.[43]

Thus, the CEQR process differs from that followed by state lead agencies under SEQRA procedures in that the city undertakes a detailed substantive interagency review of the project at the preliminary draft EIS stage. While in the ordinary case, the state will defer substantive interagency review until the draft EIS has been issued, the city co-lead agencies will not issue the draft or allow the hearing process to begin until such a review has been completed and the applicant has addressed the issues raised by the agencies in their comments on the preliminary statement.

After certification of the draft EIS and issuance of a notice of completion under section 10(A) of CEQR, the CEQR/ULURP or CEQR/BSA public hearings can be held.[44] If the application comes under the jurisdiction of the BSA, the Board will publish the necessary notice and hold a hearing in satisfaction of both CEQR and its basic charter mandates.

Thereafter, the applicant will revise the draft EIS to address the comments received, and submit a final EIS to the co-lead agencies.[45] If they find this document reflects "[a] revision and updating of the matters contained in the draft EIS in the light of further review . . . comments received and the record of the public hearing,"[46] the agencies will then issue a notice of completion, and the BSA can endorse the SEQRA "findings" of the co-lead agencies and render a decision after

43. *Id.* § 10(a).
44. *Id.*
45. *Id.* § 11(a)(2).
46. *Id.*

the ten day period required by SEQRA and CEQR.[47]

If the application supported by the draft EIS falls under the requirements of ULURP, a more complicated hearing process will ensue. First, the CPC will, at a formal meeting open to the public, certify the action to the appropriate Community Board for review. If it elects to do so, the Board will hold a hearing and submit its recommendation on the project back to the CPC. After public notice, the Commission will convene its own hearing on whether it should issue a positive ULURP recommendation to the Board of Estimate.

Section 10(4) of Executive Order 91 provides that "[w]here a proposed action is simultaneously subject to ULURP, a public hearing conducted by the appropriate community or borough board and/or the City Planning Commission . . . shall satisfy the hearing requirements of . . . [CEQR]. Where more than one hearing is conducted by the aforementioned bodies, whichever hearing last occurs shall be deemed the hearing for the purpose of this Executive Order."[48] In the ordinary case a notice of hearing under section 10(3) of CEQR is published at least ten days prior to the CPC hearing, and the Commission will, at such hearing, also consider issues raised by the public as to the adequacy of the draft EIS. Thereafter, the applicant will prepare the final EIS and the co-lead agencies will, upon their review and approval, issue a Notice of Completion. No less than ten days thereafter, the CPC will endorse the findings of the co-lead agencies and vote on the proposal. The Board of Estimate will then consider the project in a third public session.

The procedural requirements of SEQRA are, therefore, satisfied in the City of New York by a more difficult, time consuming and complex process than that followed under statewide procedures. Under CEQR, the project sponsor must address the substantive requirements of several agencies having some regulatory interest in the impacts of the project,

47. N.Y. Comp. Codes R. & Regs. tit 6, § 617.9 (1987). Executive Order 91 requires a decision be made within thirty days of the filing of a final EIS. N.Y. City Exec. Order 91 § 12(a)(1) (1977).

48. N.Y. City Exec. Order 91 § 10(4) (1977).

prior to certification of the draft EIS. In addition, most discretionary city actions must undergo the multiple public hearings required under ULURP, which is the "other shoe" dropped by the city whenever the action involves real property subject to city regulation.

The substantive issues which must be addressed under the CEQR process are also often difficult because of the unique environmental problems existing in the city and the complex technical standards which have been developed to deal with these problems.

C. *The Substance of CEQR*

1. *Determination of Significance Under CEQR*

The co-lead agencies assess the significance of an action described in a PDS by applying the substantive criteria set forth in both section 617.11 of the SEQRA regulations and section 6 of Executive Order 91. They do so, taking into account the Type I list contained in section 617.12 of the SEQRA requirements, as expanded and interpreted by section 15 of CEQR, and considering the SEQRA Type II list in light of the peculiar urban conditions existing in the City of New York.

The co-lead agencies administer the Type I and Type II list conservatively under CEQR. They take the position that a virtually irrebuttable presumption of significance has been established for Type I actions by the language of section 15 of Executive Order 91, which provides that "Type I actions . . . are likely to, but will not necessarily, require the preparation of an EIS because they will in almost every instance significantly affect the environment."[49] In addition, the city has made the Type I list more specific, by establishing threshold criteria for certain categories of projects, such as construction of detention centers, sanitation facilities and major office developments.[50]

The city has not reached agreement with the DEC on the

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49. *Id.* § 15.
50. *Id.*

development of its own Type II list, so it applies the list set forth in section 617.13 of the SEQRA regulations to the projects coming under CEQR review. However, the co-lead agencies interpret the provisions contained in the SEQRA Type II list quite strictly, and treat non-Type I actions as unlisted whenever possible.

The criteria of significance set forth in section 617.11 of SEQRA and section 6 of CEQR for the assessment of unlisted actions are quite similar to each other.[51] However, the co-lead agencies, drawing upon their own expertise and that of other city, state, and federal agencies, have developed specific city criteria in their efforts to apply these more general provisions.

In particular, the city has established its own standards for the application of section 617.11(a)(1) of SEQRA and section 6(1) of CEQR, which require an EIS when an action might reasonably be expected to lead to a "substantial adverse change to ambient air or ground or surface water quality . . . traffic or noise levels."[52] It has also developed guidelines for the application of the land use criteria established by section 617.11(a) of SEQRA and Section 6(8) of CEQR.

Some of these specific standards incorporate well developed regulatory criteria adopted under other statutory authority by federal, state and local agencies. Others are merely informal guidelines which have come to constitute an unwritten body of law applied by the co-lead agencies in their administration of the environmental review process in the City of New York. These city-applied criteria of significance are used by the agencies both for determining whether a Type I or an unlisted action merits a positive declaration, and for deciding whether an impact disclosed in a preliminary draft or a final EIS requires the implementation of mitigating measures.

2. *Substantive City Standards Under CEQR*

Water quality issues assessed in the course of the city environmental review process are framed by the standards set

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51. *Id.* § 6; N.Y. Comp. Codes R. & Regs. tit. 6, § 617.11 (1987).
52. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.11(a)(1) (1987).

by federal and state authorities under the Clean Water Act[53] and Article 17 of the Environmental Conservation Law. Air impacts are measured against the National Ambient Air Quality Standards (NAAQS) established by U.S. Environmental Protection Agency (EPA) under the Clean Air Act.[54] In fact, the State Implementation Plan (SIP)[55] developed by the State of New York under sections 171 and 172 of the Act,[56] identifies the CEQR process as the "eyes and ears" of the SIP. The plan provides:

> to further ensure that the carbon monoxide standard is attained in New York City, if an EIS for a project identifies a violation or exacerbation of the standard, then the city assures that mitigating measures will be implemented by the project sponsor or the city so as to provide for attainment of the standard by December 1, 1987 and maintenance of it thereafter.[57]

In addition, impacts on air from stationary sources are reviewed in light of the detailed emission standards established by the New York City Air Code,[58] the Prevention of Significant Deterioration (PSD) regulations,[59] and other provisions of state and federal law. Similarly, noise impacts are assessed against clearly defined regulatory criteria, including emission standards set by the EPA under the Noise Control Act,[60] and quantitative ambient noise standards established by the Zon-

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53. Federal Water Pollution Prevention and Control Act Amendments of 1977, 33 U.S.C. §§ 1251-1376 (1982 & Supp. III 1985).

54. Clean Air Act Amendments of 1977, 42 U.S.C. §§ 7401-7642 (1982 & Supp. III 1985).

55. N.Y. State Implementation Plan, 40 C.F.R. §§ 52.1670-.1689 (1987). *See also* N.Y. Comp. Codes R. & Regs. tit. 6, §§ 200.1-.16 (1987).

56. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, §§ 171, 172, 91 Stat. 746 (1977)(codified at 42 U.S.C. §§ 7501, 7502 (1982 & Supp. III 1985)).

57. This language was interpreted in Wilder v. Thomas, 659 F. Supp. 1500 (S.D.N.Y. 1987), and was found by the court to constitute a firm commitment on the part of the city to mitigate air quality violations identified in the course of the CEQR process. The meaning and effect of this language are also being considered by the courts in a number of pending cases. *Id.* at 1509.

58. N.Y. City Admin. Code § 24-101 (1986).

59. 40 C.F.R. § 52.01 (1987).

60. Noise Control Act of 1972, 42 U.S.C. §§ 4901-18 (1982 & Supp. III 1985).

ing Resolution[61] and the Administrative Code.[62]

Even where such formal standards exist, some unwritten law comes into play in their application. For example, the DEP has developed a guideline establishing an increase of 0.5 parts per million in the ambient concentration of carbon monoxide as the standard of significance under CEQR for carbon monoxide impacts in areas where the NAAQS is being violated. In other areas, the DEP will find significance if more than half of the increment existing between the standard and air quality without the project is consumed.

Formally adopted regulatory standards are unavailable to the DCP and the Department of Transportation for their analyses of the traffic and pedestrian impacts presented by the projects they review. They have, however, developed informal but quantitative criteria, based upon the volume/capacity ratios and level of service analyses utilized by traffic engineers to assess the traffic-handling capabilities of intersections and streets. These agencies enjoy a great deal of discretion in their application of these criteria, and they exercise such discretion to tightly control the traffic impacts which a project may have. For example, whenever a project is found to exacerbate conditions at an intersection with a volume/capacity ratio of greater than 0.85 (indicating a flowing, but congested roadway), measures necessary to mitigate such impacts are required.

Other issues coming under the jurisdiction of the DCP are less suited to quantitative evaluation. Matters relating to landmarks, land use, and socio-economic issues are particularly elusive, so that the assessment of impacts relating to these issues has tended to become more of an art than a science. Nevertheless, the city planning staff has, wherever possible, attempted to establish at least somewhat quantitative criteria. Thus, they have developed various quantitative methods for analyzing the impacts of a project upon the open space of the city, establishing a rule of thumb (under one such method) which requires, generally, 2.5 acres of recreational

61. N.Y. City Zoning Resolution § 42-213, -214 (1987).
62. N.Y. City Admin. Code § 24-231 (1986).

space for every one thousand persons in the area affected by the project.

Guidelines such as these have been developed primarily because the city staff, understanding that their decisions under CEQR will often be tested in court, try to rely on something other than the *ad hoc* application of their best professional judgment in making decisions. Nevertheless, the agencies exercise wide discretion in applying the rules of thumb they have developed to measure impacts upon such soft environmental issues, so their decisions on these matters have been, and will continue to be, somewhat unpredictable and variable.

3. *Content of an EIS Under CEQR*

Executive Order 91 establishes requirements for the contents of any EIS prepared under CEQR which, with minor variations, reflect those set forth in section 617.14 of the SEQRA regulations.[63] As is the case with state agencies under SEQRA, the co-lead agencies can act with some latitude in the administration and interpretation of these requirements. In fact, no standards other than the general guidance provided by the regulations, the courts, informal agency precedents, and reason exist to control decision-making on the several issues which arise in the development of an EIS.

D. *Litigation Under CEQR*

Since projects requiring discretionary city actions are often controversial, the decisions of the co-lead agencies under CEQR are frequently subject to judicial challenge. Until recently, the courts, applying the principles developed under several cases interpreting the requirements of SEQRA, have routinely upheld the judgments made by the city agencies almost as a matter of routine. For example, the court in *Coalition Against Lincoln West, Inc. v. City of New York*,[64] under-

63. N.Y. City Exec. Order 91 § 9 (1977).

64. 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 689 (1983).

scored the discretion enjoyed by the agencies in determining what must be considered in an EIS. Citing *Town of Henrietta v. Department of Environmental Conservation*,[65] the court said: "[T]he general substantive policy of the act is a flexible one. It leaves room for a reasonable exercise of discretion and does not require particular substantive results in particular problematic circumstances."[66] So long as the agencies have identified the relevant areas of environmental concern and taken the "hard look" required by *H.O.M.E.S. v. New York State Urban Development Corp.*,[67] the courts have upheld their decisions.

Some recent cases, however, have shaken up the environmental review process in the City of New York. In *Chinese Staff and Workers Association v. City of New York*,[68] the plaintiffs challenged the city's issuance of a conditional negative declaration in connection with the construction of a luxury housing unit on a vacant lot in Chinatown. They argued that the co-lead agencies failed to consider the gentrifying effect the building would have in reaching their conclusion that no significant environmental impact would be caused by the project. Specifically, they alleged that the city's environmental review was arbitrary and capricious in that the co-lead agencies did not consider whether "introduction of luxury housing into the Chinatown community would accelerate the displacement of local low income residents and businesses or alter the character of the community."[69]

The Court of Appeals agreed, noting that the statutory definition of the term "environment" expressly includes "[e]xisting patterns of population concentration, distribution, or growth, and existing community or neighborhood character."[70] The court found that the long and short term, primary and secondary impacts of a project on these socio-economic conditions must be taken into account when the co-lead agen-

65. 76 A.D.2d 215, 430 N.Y.S.2d 440 (4th Dep't 1980).
66. *See supra* note 61.
67. 69 A.D.2d 222, 231-32, 418 N.Y.S.2d 827 (4th Dep't 1979).
68. 68 N.Y.2d 359, 502 N.E.2d 176, 509 N.Y.S.2d 499 (1986).
69. *Id.* at 363, 1, 502 N.E.2d at 501, 509 N.Y.S.2d at 178.
70. *Id.* at 365, 502 N.E.2d at 179, 509 N.Y.S.2d at 502.

cies consider the environmental significance of a project, stating that "the potential acceleration of the displacement of local residents and businesses is a secondary long term effect on population patterns, community goals and neighborhood character such that CEQR requires these impacts . . . be considered in an environmental analysis."[71] This decision will complicate the preliminary screening of projects under CEQR by bringing a particularly difficult and amorphous issue into the analysis.

In *Coca Cola Bottling Co. of New York, Inc. v. Board of Estimate*,[72] the court addressed a much more fundamental issue. There, the court invalidated a conditional negative declaration issued by the co-lead agencies concerning a Board of Estimate resolution which amended an Urban Renewal Plan to allow the sale of city-owned land for development as a recycling plant. The court found that neither the DEP nor the DCP were "principally responsible for carrying out, funding or approving an action"[73] and that neither agency should be the responsible decision-maker for the purpose of determining whether an EIS need be prepared. Thus, the court found that they could not act as co-lead agencies under the state regulations.

Stating that "it is clear from a reading of the statutes and regulations that the designation of a nonresponsible agency is contrary to both the letter and spirit of SEQRA," the court brought into question the validity of the permanent co-lead agency structure created by Executive Order 91. However, by its terms, the decision was limited to the factual situation in which the co-lead agencies decide that an EIS is not required. The city's appeal of this decision is pending as of this writing.

The co-lead agency structure was also challenged in *Akpan v. Koch*,[74] a case where an EIS had been prepared. While acknowledging that the DEP and DCP are not the ultimate "decision-making authorities" in the city, Justice Saxe,

71. *Id.* at 367, 502 N.E.2d at 181, 509 N.Y.S.2d at 504.

72. No. 29646/85, slip op. (N.Y. Sup. Ct., Sept. 4, 1986).

73. *Id.* at 4.

74. N.Y.L.J., Mar. 28, 1988, at 15, col. 2 (N.Y. Sup. Ct., N.Y. County).

nevertheless endorsed their role under Executive Order 91.[75] The court considered the co-lead agencies "the investigative arms for the decision-making agencies" with the expertise necessary to prepare a DEIS and FEIS.[76] The court found that the co-lead agencies could properly function as experts for the Board of Estimate and CPC, supervising on their behalf the details of the environmental review process in the city.[77]

For the time being, the co-lead agencies continue to direct the CEQR process in the City of New York. However, the city has adjusted its procedures to some extent in response to the *Coca-Cola* decision, so that now the Board of Estimate and the CPC must concur in the CEQR findings made by the agencies at the time they take action on a project.

IV. Conclusion

The co-lead agencies must make a wide variety of discretionary judgments throughout the EIS process. Subjective decisions are required on matters such as the geographic areas which must be studied in an EIS, the amount and quality of the data which must be generated, the alternatives which must be analyzed and the mitigation which must be employed. Decisions on these issues are often negotiated among the co-lead agencies, other mayoral agencies and the applicant, in the scoping session or in subsequent meetings and dealings taking place as the EIS is prepared.

Since negotiations take time, the work devoted to the development of each EIS required under CEQR by the applicant, his professional consultants and the city agencies' staff will often be substantial. The procedural and substantive complexity of CEQR, in combination with the high volume of projects coming before the co-lead agencies for review, make the administration of the environmental review process in New York City an especially difficult task. The city has attempted to finance a program capable of meeting this burden

75. *Id.* at col. 4.
76. *Id.*
77. *Id.*

by adopting a fee schedule for CEQR which imposes fees amounting to as much as $27,500 for large projects. The development community has not challenged this fee structure, apparently in recognition of the need for, and the benefit of, ample resources for the administration of the program.

Nevertheless, the CEQR staff must carry an enormous workload, which they have attempted to bring under control by imposing several quality control requirements on applicants. Under internal review procedures issued by the co-lead agencies on August 29, 1986, CEQR applications are addressed on a first come, first served basis. All CEQR submissions undergo an initial acceptance review, and, if a submission is found to be unacceptable, a Notice of Incomplete Submission is issued. The co-lead agencies will not review piecemeal submissions. In addition, according to the internal review procedures, no review will begin on any submission found to be incomplete. Applicants are required to provide a complete set of technical assumptions and methodologies prior to the commencement of the review process, and cannot submit documents with detailed discussions of impacts deemed by the CEQR staff to be less than significant. The co-lead agencies have established timetables for the internal review of CEQR submissions, in which they have committed to providing comments within specified periods.

According to the agencies, the program staffing is based upon the yearly average of preliminary EIS submissions, so there is no capacity to respond to special priorities. However, since projects invariably arise which are of exceptional importance to the city, the CEQR staff is consistently stretched to its limits. Even so, administrative, legal, and technical systems have been established in New York City under CEQR which meet the basic SEQRA mandates. They do so in a manner which, although complex, is certainly no less protective of environmental values and public participation than the state procedures, and complies with section 617.4 of the SEQRA regulations.