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TAKING A HARD(ER) LOOK AT SEQRA

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I. INTRODUCTION

In the 40 years since its enactment the State Environmental Quality Review Act ("SEQRA")[1] has spawned an extensive body of case law, administrative decisions and guidance, treatises and articles. Nonetheless, numerous issues remain regarding the substantive analysis under and the procedural requirements of SEQRA for which there are neither satisfactory nor consistent answers. The principles putatively governing such topics are, of course, still evolving, but the fact remains that as to a number of significant issues case law and administrative guidance leave the practitioner with no clear answers, provide rules which have logical flaws or that contribute to expense and inefficiency of the environmental review process or establish procedures that are contrary to the manner in which SEQRA is typically applied by governmental agencies. This article attempts to discuss but a handful of these topics—a selection of those subjects which the authors have found to arise on a regular basis or to be either particularly vexing or intriguing, with liberal citation to recent case law where appropriate. It concludes with a brief discussion of select recent decisions.

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II. IS THERE JUSTIFICATION FOR INCONSISTENCY BETWEEN AN AGENCY'S NEGATIVE DECLARATION AND ITS DENIAL OF A PERMIT ON ENVIRONMENTAL GROUNDS?

The implications of a negative declaration under SEQRA on subsequent permit decisions present both logically and legally vexing questions. Can a lead agency find that an action has no potential for significant environmental impacts and then deny an approval based on environmental criteria set forth in the underlying permitting scheme? The logical answer would seem to be "no," but logic and law do not always coincide.

Of course, to issue a negative declaration under SEQRA - that is, a determination that no Environmental Impact Statement ("EIS") is required - a lead agency must determine that an action will result in no environmental effects or that the identified environmental effects will not be significant.[2] Conversely, an EIS must be prepared under SEQRA when an action "*may* have a significant effect on the environment."[3] Based on this statutory and regulatory language and the policies underlying SEQRA, controlling authority makes clear that there is a low threshold for requiring preparation of an EIS.[4]

Notwithstanding such authority, courts have upheld the denial of a substantive approval on environmental grounds following the issuance of a negative declaration in connection with review of the application for that approval. A prime example of such an approach is *MLB, LLC v. Schmidt.*[5] Therein, the Appellate Division, Third Department, considered the issuance of a negative declaration by a planning board in connection with review of an application for subdivision approval and that board's subsequent denial of that application solely on environmental grounds.

The application at issue in *MLB, LLC* sought to subdivide the petitioner's property into three residential lots. At a public hearing on the application, the applicant's engineer testified that any drainage impacts could be mitigated through the use of dry wells and the village's engineer, with caveats, generally agreed. Members of the public objected to the subdivision based on their alleged personal observation of the existing poor drainage conditions in the neighborhood and contended that the application should be denied because the proposed development would exacerbate the existing problem.[6] The planning board, as lead agency, issued a negative declaration, which, as noted above, equates to a determination that the subdivision would not have any significant environmental impacts.[7] Nonetheless, the planning board denied final approval based on the seemingly contrary conclusion that the subdivision would exacerbate already bad drainage conditions in the neighborhood.[8]

In the litigation, the applicant attacked the denial by relying on the opinion of its engineer before the planning board that any drainage impacts of the proposed action could be mitigated, the village engineer's general concurrence in that view[9] and, most significantly, the planning board's negative declaration, to establish that the board's action was arbitrary and capricious. The Third Department held that the issuance of the negative declaration, at least on the facts before it, did not preclude denial of the underlying application on environmental impact grounds. It reasoned as follows:

> we note that the Board's issuance of a negative declaration is not wholly inconsistent with its denial of petitioner's application. In its SEQRA determination, the Board acknowledged the potential adverse effects associated with drainage and flooding problems, yet simply did not find them to be so significant in their impact as to require a positive declaration. *Thus, since the Board's SEQRA determination was that no significant adverse impacts would result from the proposed subdivision, but that there could be adverse effects associated with the drainage and flooding problems, we do not find the Board's SEQRA determination to be incompatible with its subsequent denial of petitioner's application for approval of the subdivision.*[10]

In response to the petitioner's related claims that the

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denial was improper because it was based on generalized community opposition, the court held that the testimony of the neighboring property owners did not constitute "generalized community objections," but rather found the concerns of the neighbors to be "specific and based upon personal experience and observations."[11] In reaching its conclusion, the decision did note that the record presented a close case where evidence could have supported a contrary outcome, but that as there was a rational basis for the board's determination it had to be upheld.[12]

It is submitted that an agency should not be allowed to deny an approval on environmental grounds where it has found that all environmental impacts would be insignificant by issuing a negative declaration. However, the Third Department is not alone in sanctioning what at least on its face would appear to be inconsistency between a negative declaration and an associated land use denial. For example, in *Chadwick Gardens Associates, LLC v. City of Newburgh Zoning Board of Appeals,*[13] which is arguably more illogical than *MLB, LLC*, the Second Department upheld the denial of an area variance. The court stated: "contrary to the appellant's contention, a negative declaration under [SEQRA] with respect to a proposed development is not dispositive of the issue of that development's impact on a neighborhood and the ZBA may deny an area variance on other grounds. . . ."[14] The authors contend that while the latter statement is true, the former—that a negative declaration can be consistent with a finding that there is an unacceptable impact on a neighborhood—is wrong and ignores the fact that the term "environment" under SEQRA is quite broad. As defined in the SEQRA statute and regulations, it includes not only what one would intuitively consider to be the environment, such as water, air, wildlife and vegetation, but encompasses "existing patterns of population concentration, distribution or growth, [and] *existing community or neighborhood character*. . ."[15] Accordingly, it is difficult to understand how a finding that an action will have a negative impact on a neighborhood can be consistent with a SEQRA conclusion that an action will generate no significant environmental effects.

Notably, when it has suited the court, the Appellate Division, Second Department, has relied on a negative declaration to annul denial of a site plan approval. In *SCI Funeral Services of New York, Inc., v. Planning Board of the Town of Babylon*,[16] the court decided that denial of an application for site plan approval, based on traffic grounds, was arbitrary and capricious in light of two traffic studies in the record and the planning board's own negative declaration which was consistent with such studies.[17] The court stated: "the Planning Board acted in an arbitrary and capricious manner when it ignored its own SEQRA finding and denied the application due to traffic considerations."[18]

Finally, the *SEQRA Handbook*, The New York State Department of Environmental Conservation (3d Edition 2010) (the "*SEQRA Handbook*"), also addresses the necessity of consistency between a negative declaration and subsequent permit decisions by posing the following question: "Can a project be denied after a negative declaration?" and providing the following straight-forward response:

> Yes, but the basis for denial must be based on the failure of the project to meet specified technical or numerical standards not relating to the environmental significance of the project, or for reasons other than general environmental impacts.[19]

Unfortunately, the New York State Department of Environmental Conservation ("DEC") muddies what should be a clear principle (perhaps relying on *MLB, LLC*), by immediately thereafter presenting as an example of appropriate regulatory behavior the issuance of a negative declaration by a zoning board of appeals followed by denial of an area variance under the statutory criteria precisely because of environmental impacts—e.g., transient traffic, impact on the residential nature of the neighborhood, and probability for litter and more noise degrading the neighborhood.[20]

III. IMPACT OF A NEGATIVE DECLARATION BY A LEAD AGENCY ON PERMITTING DECISIONS OF INVOLVED AGENCIES

A different, although less troubling, issue is presented when a lead agency adopts a negative declaration and an involved agency subsequently denies a permit on environmental grounds. Of course, if the lead agency in a coordinated review issues a negative declaration it is binding on all involved agencies in that it ends the SEQRA review of the proposed action.[21] Some of the same conceptual difficulty that applies when an agency deviates from its own negative declaration in a permitting decision exists when an involved agency makes a foray into environmental analysis after the lead agency has issued one. A major difference is that as SEQRA does not change the existing jurisdiction between or among state and local agencies,[22] each involved agency is entitled to rule on its own permit or approval and, consequently, the courts have held that an involved agency is not constrained by the lead agency's negative declaration

in its analysis of environmentally-related permit criteria. An example of this principle is provided by *Albany-Greene Sanitation, Inc. v. Town of New Baltimore Zoning Board of Appeals.*[23] Therein the Appellate Division reversed the lower court's annulment of a special permit. It held that issuance of a permit and negative declaration by the DEC for a solid waste transfer station did not control a local zoning board's consideration of an application for a special use permit for that use. The court stated the following:

> petitioner relies exclusively upon findings of DEC, the Department of Transportation and the Department of Parks, Recreation and Historic Preservation, which were made in connection with the SEQRA review and the issuance of the solid waste management facility permit, and the continued applicability of government regulatory controls as assurance that the project will not be injurious to the district. Because local land use matters are within the exclusive responsibility of the Zoning Board, however, DEC's negative declaration was in no way binding on the Zoning Board's determination . . . Indeed, SEQRA requirements do not change the existing jurisdiction between or among State and local agencies (*see,* ECL 8-0103 [6]; 6 NYCRR 617.3[b]).[24]

IV. THE IMPLICATIONS OF A LEAD AGENCY'S FINDINGS STATEMENT ON INVOLVED AGENCIES' SUBSTANTIVE DETERMINATIONS AND PROCEDURES

When the lead agency undertakes a full EIS review and issues a favorable findings statement in connection with granting approval, it prevents further SEQRA review by involved agencies, although each involved agency is required to issue its own findings statement.[25] An involved agency should have greater leeway to deviate from conclusions in the lead agency's findings than from a lead agency's negative declaration, because unlike a negative declaration, favorable findings are not required to determine that no significant environmental impacts will be generated, but rather are to include a balancing of relevant environmental, social, economic and other considerations.[26] Not surprisingly, case law provides that the involved agency's own permitting decision may be inconsistent with the findings of the lead agency; however, a very recent decision may severely circumscribe the information an involved agency can consider in making its determination.

In *Troy Sand & Gravel Co., Inc. v. Town of Nassau,*[27] ("*Troy Sand & Gravel I*") the court, in a long running dispute which has spawned numerous judicial decisions, held that DEC's statement of findings, adopted in connection with its issuance of a mined land reclamation permit, prevented the town board, as an involved agency, from undertaking "its own or any de novo SEQRA review,"[28] but did not control the outcome of that board's review of a special use permit for the quarry. The decision reads as follows:

> DEC's SEQRA determination did not. . . predetermine the Town's decision on plaintiff's permit application. Likewise, the SEQRA findings did not bind the Town to issue the requested special use permit or preclude it from employing the procedures—and considering the standards—in its own local zoning regulations, including the environmental and neighborhood impacts of the project . . .
>
> Thus, while the SEQRA process is concluded and the Town is bound by DEC's SEQRA determination, the Town remains entitled to independently review plaintiff's application for the special use permit in accord with the standards contained in its zoning regulations, . . . *The Town, in its review of, among other things, the environmental impact of the proposed quarry under its zoning regulations, will necessarily take into consideration and abide by DEC's SEQRA determination and mining permit approval, but these DEC determinations do not displace local special use permit review.*[29]

Interestingly, while the decision made clear that the involved agency retained its full permitting jurisdiction, the italicized portion of the quoted language could be read to suggest that lead agency findings constitute a greater constraint on an involved agency's freedom to draw conclusions under SEQRA than might be gleaned from the regulations.

Troy Sand & Gravel's judicial odyssey continued in another appeal which strengthened the potential constraints on the involved agency's actions posed by a lead agency's SEQRA review. In 2015, in *Troy Sand & Gravel Company, Inc. v. Town of Nassau*[30] ("*Troy Sand & Gravel II*"), the Third Department reviewed the denial of the special permit for quarrying following remittal to the town board from its decision in *Troy Sand & Gravel I.* The court reconfirmed that the town: (1) was not bound by DEC's SEQRA findings; (2) was required to make its own SEQRA findings; and (3) may make an independent review of the special permit application under the standards and criteria of the local zoning ordinance. However, the decision circumscribed the involved agency's ability to gather or rely on additional environmental information in issuing SEQRA findings and acting on the substantive permit. After noting that the local special permit regulations allowed the town to consider issues including environmental impacts, the Third Department limited the town's ability to do so in the following passage:

> we did not say [in *Troy Sand & Gravel I*] that the Town's independent review includes the ability to now gather additional environmental impact information beyond the full SEQRA record. Rather, in conducting its own jurisdictional review of the environmental impact of the project, the Town is required by the overall policy goals of SEQRA and the specific regulations governing findings made by "involved agencies" to rely on the fully developed SEQRA record in making the findings that will provide a rationale for its zoning determinations.[31]

In *Troy Sand & Gravel II,* the town contended that even though it was bound by the EIS record compiled by the lead agency in making its own SEQRA findings, it nonetheless was free to gather new information or conduct its own analysis regarding environmental concerns relevant to its permitting decision. The Appellate Division dismissed that position, justifying its conclusion based on SEQRA's policies requiring consideration of environmental factors "at the earliest time possible" and making sure the review is "carried out as efficiently as possible." [32] It stated that allowing the town to gather additional information regarding environmental issues in the face of the full SEQRA record, covering thousands of pages. . ."would vitiate the efficiency and coordination goals of SEQRA . . ."[33] The decision reads as follows:

> Although the Town is entitled to conduct an independent review whereby it applies the standards and criteria found in its zoning regulations, its review of the environmental impact of the project is necessarily based on the EIS record because its zoning determinations must find a rationale in its SEQRA findings (*see* 6 NYCRR 617.11[d][3]). . .
>
> In short, the EIS "fully evaluates the potential environmental effects, assesses mitigation measures, and considers alternatives to the proposed action" . . . While the Town maintains its jurisdiction over the zoning determinations and, as we have previously held, its SEQRA findings may differ from DEC's findings . . . *the Town "must rely upon the [final EIS] as the basis for [its] review of the environmental impacts that [it is] required to consider in connection with subsequent permit applications".* . . .[34]

The court's conclusion in *Troy Sand & Gravel II* means that involved agencies should attempt to become actively engaged in the EIS process as early as possible if they want to maximize the probability that environmental issues encompassed by the criteria of the permit(s) or approval(s) over which they have jurisdiction are analyzed to their satisfaction.

V. TREATMENT OF A TYPE II ACTION THAT IS PART OF A LARGER PROJECT

When a Type II Action, one requiring no environmental review,[35] is part of or associated with a larger project that is undergoing SEQRA review, does the completion of the SEQRA review for the whole action have to take place before the Type II activity may proceed? The prototypical hypothetical which this question contemplates is demolition of an existing structure in anticipation of a larger project which is undergoing SEQRA review, where issuance of the demolition permit itself is strictly ministerial and, consequently, a Type II action.[36] Of course, one of SEQRA's strictures disfavors and, in most instances proscribes, segmentation[37] of an action into smaller component parts.[38] So the inquiry with respect to the example remains: if the municipality issues the landowner the demolition permit and/or landowner destroys the structure prior to completion of the SEQRA review of the development, has impermissible segmentation occurred? The answer is "probably not."

The majority of case law provides that authorizing a Type II activity separately from and in advance of completion of the SEQRA review of the remainder of the proposed action is either not segmentation or constitutes permissible segmentation. For example, *Rodgers v. City of North Tonawanda,*[39] addressed whether demolition of a boathouse, which was required for a project that included the replacement of a storm sewer and construction of a park and building complex, was impermissible prior to SEQRA review of the entire set of activities. The Fourth Department found it was not, reasoning as follows:

> We reject petitioner's contention that the court erred in segmenting the storm sewer outlet replacement project from the other aspects of the Gateway Point Park Project. The storm sewer outlet replacement project is specifically exempted from review under SEQRA as a Type II action (see 6 NYCRR 617.5[a], [c][2] . . . Thus, that project was properly segmented from the remainder of the Gateway Point Park Project that is subject to SEQRA review.[40]

In *Settco, LLC v. New York State Urban Development Corporation,*[41] a landowner challenged the utilization of eminent domain to acquire its property for use as a convention center, based on a claim that the sale of the former convention center to serve as the site of an Indian Casino was impermissibly segmented from that acquisition. The Fourth Department determined that the casino project was exempt from environmental review under SEQRA, among other things, as a ministerial action[42] and as an act of the Legislature and Governor of the State of New York.[43] It held that "[g]iven the exemption of the casino project from environmental review under SEQRA, the respondents properly considered the impacts of the acquisition of the

subject property and the relocation of the convention center activities apart from the impacts of the casino project." [44] Other courts have also held that evaluation of a Type II action separately from the environmental review of a broader action of which it is a part does not constitute improper segmentation.[45]

DEC, however, does not appear to subscribe to the prevailing judicial interpretation of SEQRA with respect to independent treatment of the Type II ministerial acts which are associated with a larger project. Specifically, the *SEQRA Handbook* makes a distinction between the issuance of a permit for a Type II segment of a larger action and the ability of the project sponsor to proceed in accordance with that permit. The *SEQRA Handbook* reads as follows:

> A ministerial permit can be issued while the SEQR review is ongoing if the permit can otherwise be issued. However, the activity allowed in the permit may not be undertaken because the SEQR regulations [6 NYCRR 617.3(a)] state that no physical alteration related to an action shall be commenced by a project sponsor until the provisions of SEQR have been complied with. The issuing official should notify the project sponsor of this prohibition. This would be particularly applicable to the issuance of demolition permits associated with a subsequent development action subject to review under SEQRA.[46]

VI. WHEN DOES A SEQRA CLAIM BECOME RIPE FOR JUDICIAL REVIEW?

Neither the text of SEQRA, nor its implementing regulations specify when a cause of action claiming errors in the environmental review process is ripe for judicial review. To fill this void, the courts have uniformly adopted a rule of ripeness that is articulated with ease, but often applied with difficulty. A SEQRA claim is ripe for judicial review when the decision-making body has adopted a definite position that inflicts a concrete injury on the petitioner and that injury may not be prevented by further administrative action.[47] Because fulfilling SEQRA's mandates is often a preliminary step in the land use approval process, challenges to SEQRA determinations, even determinations with significant ramifications for an applicant (financial, temporal or otherwise), are typically not ripe for judicial review until a decision is made on the underlying action. However, the courts stress that there is no "bright-line rule" of ripeness, and that in the right circumstances challenges to SEQRA determinations may be ripe before the underlying action is decided.[48]

The vast majority of cases addressing the topic have found that interlocutory challenges to SEQRA determinations are premature and that judicial review of such determinations must await a decision on the underlying substantive application. The rationale for the principle is that until a determination on the action is made, further administrative steps could prevent the perceived injury to the petitioner and that policy considerations favor allowing the permit review process to proceed unrestrained by interlocutory judicial review, which would delay the already lengthy process. *See, e.g., Guido v. Town of Ulster Town Board*[49] (dismissing the petition of adjoining land owners to invalidate the EIS and the lead agency's findings regarding applications for approval of a residential subdivision, holding that it was premature, because the respondents had not yet made a determination on the substance of the land use applications); *Patel v Bd. of Trustees of Inc. Vil. of Muttontown*[50] ("issuance of a SEQRA findings statement did not inflict injury in the absence of an actual determination of the subject applications for a special use permit and site-plan approval and, thus, the challenge to the adoption of the findings statement is not ripe for adjudication"); *Town of Coeymans v. City of Albany* [51] (DEC's designation of itself as lead agency in an environmental review was not ripe for review since it was a preliminary step in the decision-making process); *Sour Mountain Realty, Inc. v. New York State Department of Environmental Conservation* [52] (DEC's decision to require a supplemental EIS was not ripe for review since it constituted a preliminary SEQRA step); *Rochester Telephone Mobile Communications v. Ober* [53] (adoption of a positive declaration is not ripe for review); *Young v. Board of Trustees of Village of Blasdell* [54] (adoption of negative declaration is not ripe for review); *Southwest Ogden Neighborhood Ass'n v Town of Ogden Planning Bd.* [55] (challenge to negative declaration was not ripe for review); *Air Energy TCI, Inc. v County of Cortland*[56] (challenge to a determination that DEIS was incomplete was not ripe for review).

Unremarkably, in late 2014 in *Ranco Sand and Stone Corp. v Vecchio*,[57] the Second Department followed the trend, holding that a challenge to a positive declaration issued in connection with a rezoning petition was premature until the decision-making process was complete. The court expressly acknowledged that a positive declaration mandating an EIS requires the expenditure of considerable time and expense and, therefore, imposes an obligation, which, in some cases might inflict an actual concrete injury, but stated that the Court of Appeals suggested that "the need to expend time and money in preparing and circulating a DEIS, *standing alone*, is not determinative."[58] It specifically stated

that there is no bright-line rule that makes every attack on a SEQRA determination premature. While neither the analysis embodied by nor the holding of *Ranco Sand and Stone, Corp.* is unusual, its potential importance is that the Court of Appeals has granted leave to appeal and a decision from that court may very well impact the ripeness rules regarding interlocutory SEQRA claims.

To the extent uncertainty exists with respect to SEQRA ripeness jurisprudence, it was initiated in large measure by Third Department decisions in the 1990s and early 2000s which held SEQRA claims to be ripe notwithstanding that they were brought prior to the issuance of any substantive decision on the underlying approval. *See, e.g., Ziemba v. City of Troy*[59] (adoption of negative declaration ripe for review); *Cathedral Church of St. John the Devine v. Dormitory Authority of State of New York*[60] (adoption of negative declaration ripe for review); *McNeill v. Town Board of the Town of Ithaca.*[61] This trend gained further momentum in 2003 when the Court of Appeals decided *Gordon v. Rush,*[62] and *Stop-the-Barge v. Cahill*,[63] both holding that interlocutory SEQRA determinations were ripe for review.

In *Gordon v. Rush,* the Court of Appeals held that an involved agency's adoption of a positive declaration was ripe for judicial review, because that determination of significance was contrary to the negative declaration adopted by the lead agency during a coordinated review of the action. The Court reasoned that the claim was ripe because even if petitioners were successful on their application, they would not be able to recoup the time, effort and expense to prepare an EIS which was required by an involved agency lacking jurisdiction to do so under SEQRA. In *Gordon* oceanfront property owners who wanted to install certain measures to prevent dune erosion applied to the Administrator of the Town's Coastal Erosion Hazard Area Law (the "Administrator") and to the DEC for the necessary permits. The Administrator advised the DEC that it did not wish to be lead agency in the coordinated review of the action. The DEC, acting as lead agency, ultimately adopted a negative declaration and issued a tidal wetlands permit.[64]

Following DEC's approval, the Administrator denied petitioners an amended application. The petitioners appealed the Administrator's determination to the Town's Coastal Erosion Hazard Board of Review (the "Board"). The Board, claiming that it did not have an adequate opportunity to participate in the DEC's environmental review, asserted jurisdiction to conduct a new SEQRA review and ultimately adopted a positive declaration.[65] In the Article 78 proceeding challenging the Board's actions, the Court of Appeals rejected the argument that the petitioners' claims were premature since no decision had yet been made on the permit application. Its decision reads as follows:

> Here, the decision of the Board clearly imposes an obligation on petitioners because the issuance of the positive declaration requires them to prepare and submit a DEIS. Conducting a "pragmatic evaluation" of these facts and circumstances, the obligation to prepare a DEIS imposes an actual injury on petitioners as the process may require considerable time and expense. . . . Here, the Board issued its own positive declaration for the project after the DEC had conducted a coordinated review resulting in a negative declaration, in which the Board had an opportunity but failed to participate. . . . In addition, further proceedings would not improve the situation or lessen the injury to petitioners. Even if the Board ultimately granted the variances, petitioners would have already spent the time and money to prepare the DEIS and would have no available remedy for the unnecessary and unauthorized expenditures. [66]

In *Stop-the-Barge,* the Court was asked to determine the timeliness of a challenge to the New York City Department of Environmental Protection's ("DEP") review of a proposal to install a power generator on a floating barge in Brooklyn. The DEP, as lead agency, adopted a conditioned negative declaration which became final on February 18, 2000 (the "CND"). Exactly ten months later, the DEC granted the applicant an air permit for the power facility. On February 20, 2001 - one year after the CND became final and two months and two days after the air permit was issued - the petitioners commenced an Article 78 proceeding claiming that the DEP's issuance of the CND and the DEC's issuance of the air permit were arbitrary and capricious and issued in violation of SEQRA. The Court held that the CND was a final action and thus any SEQRA challenge was time barred under the four month statute of limitations which began to run on February 18, 2000, not on December 18, 2000 when the air permit was issued by DEC. Accordingly the petition was dismissed as untimely.[67]

The ramifications of *Stop-the-Barge* were unclear and left practitioners unsure of when SEQRA claims became ripe for review. Perhaps recognizing this unintended consequence of *Stop-the-Barge*, the Court of Appeals addressed the question again in 2006 in *Eadie v. Town Board of the Town of North Greenbush.*[68] In *Eadie,* the Town Board, at the culmination of its Generic EIS review of a rezoning, adopted findings on April 28, 2004. On May 13, 2004 it adopted the underlying rezoning. On September 10, 2004 - more than four months after the issuance of the SEQRA findings, but less than four months after the rezoning was

enacted—the petitioners commenced the Article 78 proceeding challenging, among other things, the adequacy of the SEQRA review of the rezoning.[69] The respondents argued that petitioners' claims were time barred, citing *Stop-the-Barge* for the proposition that that the statute of limitations for challenging the SEQRA findings commenced upon their adoption, not when the rezoning legislation was approved.[70]

The Court disagreed, finding that *Stop-the-Barge* did not create a bright-line rule of ripeness and reconfirmed the holding in an earlier case, *Save the Pine Bush v. City of Albany,*[71] that the statute of limitations for challenging the SEQRA review of legislation is four months from the date that the legislation is enacted, *unless other specific considerations apply*. It distinguished *Stop-the-Barge* by virtue of the fact that the CND was essentially the DEP's last approval of the action therein and, thus, not subject to correction by that agency. It also distinguished *Stop-the-Barge* because it involved the SEQRA review of an administrative permit and not the adoption of legislation (although the court does not explain why the type of underlying action should have any bearing on when a challenge to the SEQRA review of the action becomes ripe). Additionally, in distinguishing the holding in *Stop-the-Barge*, the Court took great care to eschew a bright-line rule of ripeness. Rather, it recognized that under some sets of facts, not before it, an intermediate SEQRA determination could cause harm to the petitioner that cannot be corrected by further administrative action, which, as a consequence, would render the interim decision ripe for review.[72]

At least some "post-*Eadie*" decisions have found challenges to intermediate SEQRA determinations to be ripe for review, particularly those in which the reviewing agency exceeded its authority under SEQRA. For example, in *Center of Deposit, Inc. v. Village of Deposit,*[73] the Third Department held, among other things, that the petitioner's challenge to a planning board's positive declaration was not premature because the positive declaration was devoid of a reasoned elaboration. Therein the planning board considered an application for subdivision approval, essentially to bisect the property to place two existing buildings on their own separate lots. The planning board, as lead agency, adopted a positive declaration under SEQRA, which, of course, required the petitioner to engage in a full environmental review process, that, in turn, would significantly increase the time and expense of processing its application.[74] To support its positive declaration the planning board found that the application had potential to, among other things, impact water quality and air quality negatively.[75] The Third Department held that the lead agency failed to provide a reasoned elaboration as to how the proposed action—the legal division of the lot into two lots entailing no development or other physical alteration to the property—had the potential to cause the enumerated environmental impacts. Consequently, the court annulled the positive declaration and remitted the application to the Planning Board.[76]

Similarly, in 2015 the Supreme Court, Westchester County, held that a petitioner's challenge to a positive declaration, which required a supplemental EIS to study an environmental impact that had already been addressed as part of a completed environmental review of a related action, was not premature. In *Toll Land V Limited Partnership v. Planning Board of the Village of Tarrytown,*[77] the petitioner was seeking site plan approval to develop a lot in a recently approved subdivision. A condition of final subdivision approval was that the owner of each lot would be required to obtain site plan approval before developing the lot. The lot which was the subject of the litigation was improved with what was characterized as an architecturally-significant stone house dating back to the early 20th century. As described by the court, the historical and archeological nature of the stone house and the subdivision's impacts thereon were addressed as a part of the environmental and substantive review of the subdivision itself, and the removal of the house was approved.[78] Nonetheless, during the site plan review process for the salient lot various parties urged the planning board to reconsider the impacts to the stone house and to take steps to preserve it. Purportedly in response to these concerns, the planning board adopted a positive declaration and directed the petitioner to prepare a supplemental EIS.[79] Rather than preparing the SEIS, the petitioner sued to set aside the positive declaration. The court denied the planning board's motion to dismiss the petition and held that the petitioner's SEQRA claim was ripe for review, reasoning that the planning board was impermissibly trying to "reopen" the already-completed SEQRA review of the subdivision. Thus, it found that the time and expense of preparing and processing a supplemental EIS constituted concrete harm to the petitioner sufficient to render the claim ripe.[80]

Although the law is not settled on this topic, it appears that the pattern emerging from the cases is that courts will find claims challenging intermediate SEQRA determinations ripe for review only in circumstances in which the reviewing agency has overstepped its authority or is without jurisdiction under SEQRA. Nonetheless, in the absence of a

concrete rule, practitioners should be wary and should err on the side of caution, risking a dismissal for prematurity, rather than untimeliness, in bringing SEQRA claims, even when facts suggest that an intermediate SEQRA determination has caused a party real injury that cannot be mitigated by further agency action.

VII. THE TROUBLING INTERACTION BETWEEN THE "COMPLETE APPLICATION" AND THE TIMING OF HEARINGS AND DEFAULT APPROVAL

Authority applying the Town Law and/or SEQRA in arguably the literally correct fashion to determine when an application for a land use approval is "complete" and when the public hearing can move forward, presents practical problems in the subdivision approval process and requires a sequence of events during SEQRA review that is contrary to common practice. In the authors' experience, most local land use boards open the requisite public hearing on applications for approval prior to issuing a negative declaration. *Kittredge v. Planning Board of the Town of Liberty*[81] and other authority indicate that such an approach is wrong and renders invalid an approval that has been granted without adherence to the order of steps required by SEQRA and the Town Law.

In *Kittredge*, the Third Department held, among other things, that when a planning board acts as lead agency under SEQRA in reviewing an application for subdivision approval it cannot hold the public hearing on the preliminary plat before adopting the negative declaration. The landowner in *Kittredge* sought to subdivide a 143.2-arce property into 27 lots for single-family homes. Before issuing a determination of significance under SEQRA, the planning board held a public hearing on the preliminary plat, during which the public commented regarding environmental issues. In response to the comments, and even after the public hearing was closed, the planning board required the applicant to prepare studies and continued to review the subdivision. Ultimately, the planning board adopted a negative declaration. One month later, without holding another public hearing, it granted preliminary plat approval.

The Appellate Division began its analysis of the approval's validity by relying on Town Law § 276(5)(d)(i), which reads, in pertinent part, as follows:

> The time within which the planning board shall hold a public hearing on the preliminary plat shall be coordinated with any hearings the planning board may schedule pursuant to [SEQRA], as follows:
>
> (1) If such board determines that the preparation of an environmental impact statement on the preliminary plat is not required, the public hearing on such plat shall be held within sixty-two days *after the* receipt of a complete preliminary plat by the clerk of the planning board.[82]

The court stated that the central issue was whether the quoted provision requires that the public hearing be held only *after* receipt of a complete preliminary plat or merely constitutes a deadline allowing the public hearing to proceed at any time prior to the end of 62 days, regardless of whether the hearing occurs before or after the application is complete. The decision reasoned that while in isolation the provision might be viewed as simply providing a deadline, when read with the other salient provisions of the Town Law and SEQRA, the mandated conclusion is that the hearing must occur only after the application is complete. It relied on section 276(5)(c)[83] of the Town Law stating:

> In circumstances where no draft environmental impact statement (hereinafter EIS) is required, Town Law § 276(5)(c) provides that "[t]he time periods for review of a preliminary plat shall begin upon filing of [a] negative declaration." Common sense dictates that a hearing not be held on the preliminary plat until the plat is deemed complete, which occurs when a negative declaration is filed (*see* Town Law § 276[5][c]). Notably, where, unlike here, a planning board has determined that an EIS is required, any public hearing on the draft EIS must be held jointly with the required public hearing on the preliminary plat (*see* Town Law § 276[5][d][i][2]), and the notice period for the public hearing on the preliminary plat depends upon whether a hearing will also be held on an EIS (*see* Town Law § 276[5][d] [ii])—all of which necessarily implies that the planning board must make an initial SEQRA determination before the public hearing is held.[84]

Employing a similar approach, the Appellate Division also found support in the facts that: (1) under SEQRA public hearings are not contemplated until after the determination has been made that a draft EIS is complete[85] and, therefore, are not part of the initial phase of SEQRA review; and (2) the purposes of public hearings under SEQRA are different than those of a public hearing on subdivision approval—the former is intended to address solely environmental concerns (*see generally* ECL 8-0101) while the latter "is intended to ensure that individual lots . . . are properly and safely laid out and sufficiently improved with necessary facilities and amenities." [86]

The court concluded that because the law requires that a public hearing on preliminary approval be held *after a* lead agency has completed its initial review pursuant to SEQRA,

the public hearing which the planning board held prior to the negative decision was never legally held and the approval was invalid.

In a procedurally convoluted context, *Center of Deposit, Inc. v. Village of Deposit* ("*Center of Deposit, Inc. II*"),[87] utilized the same principle to reject an argument that the applicant for subdivision of its approximately 3-acre parcel into two lots was entitled to default subdivision approval under Village Law § 7-728(6)(d). The planning board held a public hearing on the preliminary plat in October, 2009, *prior* to making a determination of significance under SEQRA. Thereafter, the planning board issued a positive declaration, which was annulled by the Appellate Division in 2011.[88] On remittal from the Third Department's earlier decision, the planning board issued a negative declaration in March 2012, held a further public hearing and denied the application. On the second appeal, from the denial, the applicant argued that as 62 days had passed since the October 2009 public hearing and after the Appellate Division's previous invalidation of the positive declaration, it was entitled to approval. In its 2013 opinion the court disagreed in the following analysis:

> Petitioner contends that, because the Board held a public hearing on the application in October 2009, it lacked any authority to conduct additional hearings, and the time within which the Board was required to issue a determination on the subdivision application began to run when this Court set aside the initial positive declaration. We do not agree. Pursuant to Village Law § 7-728(6)(c), *a public hearing on the subdivision application must follow the filing of the negative declaration under SEQRA . . . Thus, the hearing held in October 2009—prior to the issuance of the negative declaration—could not satisfy the hearing requirement under the Village Law,* and the Board had 62 days after the issuance of the negative declaration in March 2012 to hold a public hearing, and an additional 62 days after the hearing to render a decision on the application. . . .[89]

It held that as the board acted within the required time frame after the March 2012 negative declaration, the petitioner was not entitled to default approval.

Early in 2015, *Lucente v. Terwilliger*[90] again used the approach embodied by *Kittredge*, in perhaps a more troubling manner, to deny an application. The court found that because the version of the subdivision for which the negative declaration had been issued evolved, the final iteration of the plat could not obtain default approval. In *Lucente*, the Town of Ithaca Planning Board issued a negative declaration in 2006 and granted preliminary subdivision approval one month later. Once the applicant applied for final subdivision approval, the Town enacted a moratorium which inhibited further processing of the application for in excess of two years. The final plat, the processing of which was allowed to proceed after the expiration of the moratorium, ultimately employed a different stormwater management control plan with an associated change in the shape and size of three lots. Nearly five years following the expiration of the moratorium, with the planning board having failed to act, the applicant demanded default approval from the Town Clerk under Section 276(8) of the Town Law. That provision provides among other things: "in the event a planning board fails to take action on a preliminary plat or a final plat within the time prescribed therefor after completion of all requirements under the state environmental quality review act . . . such preliminary or final plat shall be deemed granted approval." The court held that the 62-day default period never started to run because the final plat differed from the one for which the negative declaration had been issued and the SEQRA review of the final plat required by the modifications to the subdivision was not completed—that is, there was no valid negative declaration and, consequently, never a complete application for the final plat.

Lucente was a case in which the changes between preliminary and final plat were substantial and the applicant appears to have conceded that the changes to the subdivision triggered the need for further SEQRA review. It, however, may raise questions in instances where the changes in the subdivision plat are more modest, as to whether an earlier SEQRA determination has implicitly been reopened by the modification, thereby requiring a new SEQRA determination.

Importantly, it is not just the state enabling legislation for subdivision approval that presents the issue of when an application can move forward through the hearing process. The SEQRA regulations themselves provide the following:

> (c) An application for agency funding or approval of a Type I or Unlisted action will not be complete until:
>
> (1) a negative declaration has been issued; or
>
> (2) until a draft EIS has been accepted by the lead agency as satisfactory with respect to scope, content and adequacy. When the draft EIS is accepted, the SEQR process will run concurrently with other procedures relating to the review and approval of the action, if reasonable time is provided for preparation, review and public hearings with respect to the draft EIS.[91]

DEC has at least recognized the conflict between the actual practice of land use boards (and perhaps common sense) regarding complete applications and the opening of public hearings before the issuance of the determination of

significance and what the regulations appear to require. The *SEQRA Handbook* addresses the question in the following manner:

> Historically, municipal boards used the public hearing forum to do fact finding on whether to require a draft EIS. At the same time, the public hearing ordinarily follows the determination that an application is complete. Because no application is complete until a negative declaration has been issued or the municipal board has accepted a draft EIS, where necessary, municipal boards can hold a separate public hearing on whether to require a draft EIS or accept public comment on its determination to require or not require a draft EIS at the hearing held subsequent to determining that the application is complete. If public input reveals new information or indicates errors in the characterization of the action that call the issuance of a negative declaration into question, the negative declaration can be rescinded and an EIS required.[92]

It is submitted that employing remedy prescribed by the SEQRA Handbook would hinder the policy of integrating SEQRA into the underlying approval process by in one instance suggesting addition of an added set of hearings or alternatively, encouraging municipal boards to retreat from previously issued negative declarations in the face of public pressure. In contrast, the traditional approach of allowing public comment at a hearing prior to the issuance of a negative declaration would further the interests of allowing public participation in and integrating SEQRA into the process at the earliest practicable time, as well as rendering the process more efficient. Perhaps one way to accommodate the technicalities of the holdings in the cited cases and the SEQRA regulations themselves, is to open the hearing on, for example, preliminary subdivision approval, but to make sure that it remains open for at least one full session following the negative declaration (or in the case of an EIS process, following the acceptance of the DEIS).

One other item of note regarding the "complete application" principles under SEQRA is brought into focus by the same section of the *SEQRA Handbook* cited above. The section states that the complete application rule and associated consequences do not apply to adoption of local laws and ordinances "since neither involves an 'application.' "[93] The distinction advanced by DEC is troubling in that the private applicant needs to reach a significant stage in the SEQRA process before public review even begins, whereas a governmental entity can theoretically complete the hearing process on a zoning enactment and release the EAF and issue a negative declaration thereafter, immediately before taking its substantive vote. It also begs the question of what rule applies where the zoning amendment results from a petition by a landowner or is initiated in connection with a specific project. In such instances it would seem there is an "application" within the meaning of SEQRA that needs to be complete before the hearing process commences.

VIII. SELECT RECENT CASES

Many of the recent SEQRA cases of interest are discussed in the earlier segments of this article in the context of the legal principles being addressed. Below are brief summaries of a few other recent decisions.

A. REQUIREMENT FOR WRITTEN REASONED ELABORATION

Dawley v. Whitetail[94] may be the most interesting of the cases decided in the last year that has not already been discussed above, although it did not yield a particularly surprising outcome. While *Dawley* is a brief decision, it spawned both a concurrence and dissent. In *Dawley*, the town board issued a negative declaration at its meeting of June 12, 2014. The town attorney subsequently prepared a document to be attached to Part 3 of the EAF which was titled: "Reasons Supporting the Determination of Significance . . .," which, in turn, was intended to explain the rationale for the negative declaration. Although the document was ultimately presented to the board, it was never formally approved. The Appellate Division held that the town board had failed to produce the required written reasoned elaboration, and that the after-the-fact attachment to the EAF did not rescue what was otherwise an inadequate determination. The court's explanation was set forth as follows:

> Here, 6 NYCRR 617.7 (b) (4) requires that, in making the determination of significance, the lead agency—in this case the Town Board—must "set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation." We conclude that the intent of the regulation is to focus and facilitate judicial review and, of no lesser importance, to provide affected landowners and residents with a clear, written explanation of the lead agency's reasoning at the time the negative declaration is made. We reject respondents' contention that we should search the entire record to discern the Town Board's reasoning as of June 12, 2014 in making the determination to issue the negative declaration. "A record evincing an extensive legislative process . . . is neither a substitute for strict compliance with SEQRA's [written] reasoned elaboration requirement nor sufficient to prevent annulment"[95]

Justice Centra's concurrence agreed with the majority on the facts before the court. However, he advanced the view

that a transcript of a hearing may, in certain circumstances, satisfy the requirement for a written reasoned elaboration of the basis for the agency's determination of significance, but that in the case under review the board members' discussion of certain environmental issues included "equivocal responses." The dissent would have held that both the transcript, reflecting the board's discussion of environmental issues at its hearing, and documents prepared in advance thereof, constituted the required reasoned elaboration that addressed the same issues "in much the same language" as the document which was later-prepared to provide an explanation of the board's decision.

Lemmon v Seneca Meadows, Inc.[96] took a little more friendly approach to the requirement for a written reasoned elaboration than *Dawley*. It held that the involved agencies, a town board and town planning board which approved a special permit and site plan approval for a clay mine, respectively, fulfilled the requirement to adopt a written reasoned elaboration simply by incorporating by reference (as a paragraph in their resolutions of approval) the SEQRA findings of the lead agency, DEC.

B. DEVIATION OF SEQRA FINDINGS FROM FEIS

In *Falcon Group Limited Liability Company v. Town/Village of Harrison Planning Board*,[97] the Appellate Division, Second Department, addressed the need for consistency between the FEIS and the subsequent statement of findings adopted by the lead agency. As a starting point, it is clear that an FEIS constitutes the lead agency's own analysis which has the potential to impose constraints on the subsequent findings it issues. The SEQRA regulations provide that the lead agency is responsible the adequacy and accuracy of the FEIS, regardless of who prepares it."[98] The *SEQRA Handbook* confirms the importance of the lead agency's development and adoption of the FEIS as follows: "[t]*he lead agency must review a sponsor's proposed Final EIS, and modify it however necessary to ensure that the final EIS represents the lead agency's assessment of the proposed project.*[99]

It follows, then, that the findings statement should not deviate from the FEIS on explicit conclusions contained within the latter. A leading SEQRA expert, Professor Michael Gerrard, has cautioned municipalities against deviating from the FEIS in the following passage:

> Once it has been approved by the lead agency, the final EIS becomes the authoritative statement of the project's impacts. If an impact is not acknowledged in the final EIS, an agency will have great difficulty disapproving or conditioning a project because of that impact. A frequent problem has arisen when agencies have uncritically accepted a developer's EIS, and then attempted to act in a way inconsistent with that approved EIS. It is essential for the lead agency to revise the EIS so that it accurately portrays current conditions and anticipated impacts before it becomes a final approved document.[100]

In *Falcon Group*, the court was faced with reviewing the issuance of a planning board's statement of findings after a more than seven-year review process for a 14-lot subdivision. The findings contained overwhelmingly negative conclusions regarding the impacts of the subdivision and the alternatives thereto that were analyzed in the EIS process. Moreover, on most topics the findings contradicted both the conclusions and studies in the FEIS. In annulling the findings, the Supreme Court, Westchester County, recognized and relied on this inconsistency, stating:

> The conclusions in the Findings Statement, regarding among other things, zoning and land use, visual impacts, vegetation and wildlife, wetlands and hydrology, topography and soils, stormwater management, and flooding all contradict the analysis and conclusions in the FEIS. The Findings Statement is bereft of any explanation for the deviation from the findings in the FEIS, and the Planning Board has failed to identify, what if any, post-FEIS submissions support the deviation . . . it appears that the Findings Statement was impermissibly based, in part, upon generalized community objections which were uncorroborated by any empirical data . . . [101]

The Appellate Division affirmed. While noting the deference required to be afforded to an agency's determination under SEQRA and stating that an EIS does not require a public agency to act in any particular manner, the Second Department specified that the EIS constitutes evidence which must be considered along with other evidence. It then annulled the SEQRA findings, in large measure, based on the inconsistency between that findings statement and the FEIS. The Court stated the following:

> the Supreme Court properly annulled the Board's findings statement as unsupported by the evidence. The Board was required to render its conclusions regarding the sufficiency of mitigation measures, the propriety of permit approvals, and a balancing of considerations, based on the evidence contained in the environmental review. *The Board's conclusions in the findings statement were based, at least in part, on factual findings which were contradicted by the scientific and technical analyses included in the FEIS and not otherwise supported by empirical evidence in the record . . . .*[102]

C. CONTRACTUAL AGREEMENT HELD NOT TO BE AN "ACTION"

In *Rappaport v. Village of Saltaire*,[103] the court reviewed,

among other things, the SEQRA implications of an agreement to release restrictions on municipally-owned land. The land had been gifted to the village subject a restriction that in the event the property was not maintained in its natural state its ownership would revert to the grantor. The Second Department held that approval by a village board of an agreement with the successor to the donor of the property to eliminate the reversionary interest and, hence, the requirement that the land be maintained in its natural state, did not fall within the definition of an "action" requiring review under SEQRA, citing ECL 8-0105(4) and 6 N.Y.C.R.R. 617.2(b). In the alternative, the court held that the determination by the village board that the entry into the agreement would have no significant environmental impacts was not arbitrary and capricious.

ENDNOTES:

[1]"SEQRA" collectively refers to Article 8 of the Environmental Conservation Law and 6 N.Y.C.R.R. Part 617.

[2]6 N.Y.C.R.R. 617.7(a)(2).

[3]Environmental Conservation Law ("E.C.L.") § 8-0109(2) (emphasis added).

[4]*See, e.g., Prand Corp. v. Town Bd. of Town of East Hampton*, 78 A.D.3d 1057, 1059-1060, 911 N.Y.S.2d 468, 470 (2d Dep't 2010); *S.P.A.C.E. v. Hurley*, 291 A.D.2d 563, 564, 739 N.Y.S.2d 164 (2d Dep't 2002)("Because the operative word for triggering an EIS is 'may,' there is a relatively low threshold for the preparation of an EIS."). In fact, a lead agency *must* prepare an environmental impact statement if there is the potential for even a single significant environmental impact. *Omni Partners, L.P. v. County of Nassau*, 237 A.D.2d 440, 442, 654 N.Y.S.2d 824, 826 (2d Dep't 1997).

[5]*MLB, LLC v. Schmidt*, 50 A.D.3d 1433, 856 N.Y.S.2d 296 (3d Dep't 2008).

[6]*MLB, LLC*, 50 A.D.3d at 1434, 856 N.Y.S.2d at 297.

[7]*MLB, LLC*, 50 A.D.3d at 1434, 856 N.Y.S.2d at 297.

[8]*MLB, LLC*, 50 A.D.3d at 1434, 856 N.Y.S.2d at 297.

[9]While the village engineer agreed with the proposition that the proposed dry wells would mitigate stormwater flow, he noted that any drywells can be overstressed and flood in certain conditions. *MLB, LLC,* 50 A.D.3d at 1436, 856 N.Y.S.2d at 298.

[10]*MLB, LLC*, 50 A.D.3d at 1434-1435, 856 N.Y.S.2d at 297-298 (emphasis added).

[11]*MLB, LLC*, 50 A.D.3d at 1435, 856 N.Y.S.2d at 298; *but see*, the subsequent case of *Kinderhook Development, LLC v. City of Gloversville Planning Bd.*, 88 A.D.3d 1207, 931 N.Y.S.2d 447 (3d Dep't 2011), where the same court annulled a planning board's denial of a special permit based on purported concerns over stormwater runoff following that board's issuance of a negative declaration. The court's analysis is reflected in the following passage:

> the engineering evidence submitted established that the project would reduce the preexisting runoff problems and, indeed, respondent relied upon that evidence in issuing its negative declaration for purposes of SEQRA. Even assuming, as respondent argues, that its own negative declaration was not binding upon it in rendering its ultimate determination, the fact remains that the only evidence respondent thereafter received on the runoff issue consisted of the conclusory opinions of neighbors opposed to the project. Moreover, it is apparent that respondent relied upon those concerns in denying petitioner's application, with one of respondent's members flatly stating that "people living in a particular neighborhood know more about the physical conditions of where they live than any experts brought in by an applicant." Inasmuch as respondent thus relied upon "generalized community objections" rather than the unchallenged empirical evidence in denying petitioner's application, we agree with Supreme Court that the determination was not supported by substantial evidence.

Kinderhook Development, LLC, 88 A.D.3d at 1208, 931 N.Y.S.2d at 449.

[12]*MLB, LLC*, 50 A.D.3d at 1435, 856 N.Y.S.2d at 298.

[13]*Chadwick Gardens Associates, L.L.C. v. City of Newburgh Zoning Bd. of Appeals*, 273 A.D.2d 232, 709 N.Y.S.2d 450 (2d Dep't 2000).

[14]*Chadwick Gardens Associates, LLC,* 273 A.D.2d at 232, 709 N.Y.S.2d at 450.

[15]E.C.L. § 8-0105; 6 N.Y.C.R.R. 617.2(l) (emphasis added); *see Chinese Staff and Workers Ass'n v. City of New York*, 68 N.Y.2d 359, 509 N.Y.S.2d 499, 502 N.E.2d 176 (1986).

[16]277 A.D.2d 319, 715 N.Y.S.2d 744 (2d Dep't 2000).

[17]In *Colohan v. Cummings*, 2006 WL 6647631 (N.Y. Sup 2006), the court invalidated [constructive] denial of subdivision approval as arbitrary and capricious and split the proverbial baby by citing *Chadwick Gardens Associates*, and *SCI Funeral Services*, for the proposition that while a lead agency's "SEQRA determination is not dispositive . . . it is a factor to be considered . . ." in reviewing that agency's substantive action.

[18]SCI Funeral Services, 277 A.D.2d at 320, 715 N.Y.S.2d at 744.

[19]*SEQRA Handbook*, p.86.

[20]*SEQRA Handbook*, p.86.

[21]6 N.Y.C.R.R. 617.6(b)(3)(iii); *see Gordon v. Rush*, 100 N.Y.2d 236, 244, 762 N.Y.S.2d 18, 23, 792 N.E.2d 168 (2003).

[22]6 N.Y.C.R.R. 617.3[b].

[23]*Albany-Greene Sanitation Inc. v. Town of New Baltimore Zoning Bd. of Appeals*, 263 A.D.2d 644, 692 N.Y.S.2d 831 (3d Dep't 1999).

[24]*Albany-Greene Sanitation, Inc.,* 263 A.D.2d at 646, 692 N.Y.S.2d at 832 (citations omitted).

[25]6 N.Y.C.R.R. 617.11(c).

[26]*See* 6 N.Y.C.R.R. 617.11(d)(2) and (4).

[27]101 *Troy Sand & Gravel Co., Inc. v. Town of Nassau*, 101 A.D.3d 1505, 957 N.Y.S.2d 444 (3d Dep't 2012).

[28]*Troy Sand & Gravel Co.,* 101 A.D.3d at 1507, 957 N.Y.S.2d at 447.

[29]*Troy Sand & Gravel*, 101 A.D.3d at 1508, 957 N.Y.S.2d 447-448 (citations omitted; emphasis added).

[30]*Troy Sand & Gravel Co., Inc. v. Town of Nassau*, 125 A.D.3d 1170, 4 N.Y.S.3d 613 (3d Dep't 2015).

[31]*Troy Sand & Gravel II*, 125A.D.3d at 1172, 4 N.Y.S.3d at 615-616.

[32]*Troy Sand & Gravel II*, 125A.D.3d at 1172, 4 N.Y.S.3d at 616.

[33]*Troy Sand & Gravel II*, 125A.D.3d at 1173, 4 N.Y.S.3d at 616.

[34]*Troy Sand & Gravel II*, 125 A.D.2d at 1173, 4 N.Y.S.2d at 616-617 (citations omitted; emphasis added); *see also Guido v. Town of Ulster Town Bd.*, 74 A.D.3d 1536, 1537, 902 N.Y.S.2d 710, 713 (3d Dep't 2010) ("all involved agencies must rely upon the FEIS as the basis for their review of the environmental impacts that they are required to consider in connection with subsequent permit applications (*see* 6 NYCRR 617.6[b][3][iii])").

[35]*See* 6 N.Y.C.R.R. 617.3(f); 617.5(a).

[36]*See* 6 N.Y.C.R.R. 617.5(c)(19).

[37]Under SEQRA, segmentation is defined as "the division of the environmental review of an action such that various activities or stages are addressed under this Part as though they were independent, unrelated activities, needing individual determinations of significance." 6 N.Y.C.R.R. 617.2(ag).

[38]*See* 6 N.Y.C.R.R. 617.3(g).

[39]*Rodgers v. City of North Tonawanda*, 60 A.D.3d 1379, 875 N.Y.S.2d 409 (4th Dep't 2009).

[40]*Rodgers*, 60 A.D.3d at 1379-1380, 875 N.Y.S.2d at 410 (citations omitted).

[41]*Settco, LLC v. New York State Urban Development Corp.*, 305 A.D.2d 1026, 759 N.Y.S.2d 833 (4th Dep't 2003).

[42]6 N.Y.C.R.R. 617.5(c)(19).

[43]6 N.Y.C.R.R. 617.59(c)(37).

[44]*Settco, LLC*, 305 A.D.2d at 1027, 759 N.Y.S.2d at 835.

[45]*See also New York City Coalition For Preservation of Gardens v. Giuliani*,175 Misc.2d 644, 670 N.Y.S.2d 654 (Sup. Ct. N.Y.Co 1997) aff'd, 246 N.Y.S.2d 398, 666 N.Y.S.2d 918 (1st Dep't 1998) (rejecting a claim of segmentation in the context of proposed development at 27 sites as part of a program entailing the construction of affordable homes on city-owned property because the developments individually were Type II actions—the replacement or reconstruction of a structure or facility, in kind, on the same site under 6 N.Y.C.R.R. 617.5(c)(2)—and recognizing that while in reviewing Type I and unlisted actions an agency cannot ignore the combined impact of a development with closely related multiple phases or deliberate division of developments into smaller parts, the "rule seems to apply only to non-Type II actions."); *Beekman Delameter Properties LLC v. Village of Rhinebeck Zoning Board of Appeal*,44 Misc.2d 1227, 998 N.Y.S.2d 305 (Sup. Ct. Dutchess Co. 2014) (holding that as the grant of individual setback variances in connection with a proposed spa and hotel project is a Type II action under 6 N.Y.C.R.R. 617.5(c)(12), the variances were properly considered separately from the remainder of the approvals for the project); *Booth v. Planning Board of Village of Perry*, 2013 WL 1401264 (Sup. Ct. Wyoming Co. 2013) ("generally, determinations on 'type II actions' may properly be segmented from review of other actions . . .").

[46]*SEQRA Handbook*, p. 170.

[47]*See Gordon v. Rush*, 100 N.Y.2d 236, 762 N.Y.S.2d 18, 792 N.E.2d 168 (2003) (*citing Essex County v. Zagata*, 91 N.Y.2d 447, 672 N.Y.S.2d 281, 695 N.E.2d 232 (1998)).

[48]*See Gordon, supra.*

[49]*Guido v. Town of Ulster Town Bd.*, 74 A.D.3d 1536, 902 N.Y.S.2d 710, *supra.*

[50]*Patel v. Board of Trustees of Inc. Village of Muttontown*, 115 A.D.3d 862, 864, 982 N.Y.S.2d 142, 144 (2d Dep't 2014).

[51]*Town of Coeymans v. City of Albany*, 237 A.D.2d 856, 655 N.Y.S.2d 172 (3d Dep't 1997).

[52]*Sour Mountain Realty Inc. v. New York State Dept. of Environmental Conservation*, 260 A.D.2d 920, 688 N.Y.S.2d 842 (3d Dep't 1999).

[53]251 A.D.2d 1053, 674 N.Y.S.2d 189 (4th Dep't 1998).

[54]*Young v. Board of Trustees of Village of Blasdell*, 221 A.D.2d 975, 634 N.Y.S.2d 605 (4th Dep't 1995), order aff'd, 89 N.Y.2d 846, 652 N.Y.S.2d 729, 675 N.E.2d 464 (1996).

[55]*Southwest Ogden Neighborhood Ass'n v. Town of Ogden Planning Bd.*, 43 A.D.3d 1374, 844 N.Y.S.2d 530 (4th Dep't 2007).

[56]*Air Energy TCI, Inc. v. County of Cortland*, 39 Misc. 3d 234, 955 N.Y.S.2d 769 (Sup. Ct. Cortland Co. 2012).

[57]*Ranco Sand and Stone Corp. v. Vecchio*, 124 A.D.3d 73, 87, 998 N.Y.S.2d 68 (2d Dep't 2014), leave to appeal granted, 25 N.Y.3d 902, 7 N.Y.S.3d 274 (2015).

[58]*Ranco Sand and Stone Corp.*, 124 A.D.3d at 84, 998 N.Y.S.2d at 77 (emphasis added).

[59]*Ziemba v. City of Troy*, 295 A.D.2d 693, 743 N.Y.S.2d 199 (3d Dep't 2002).

[60]*Cathedral Church of St. John the Divine v. Dormitory Authority of State of N.Y.*, 224 A.D.2d 95, 645 N.Y.S.2d 637 (3d Dep't 1996).

[61]*McNeill v. Town Bd. of Town of Ithaca*, 260 A.D.2d 829, 688 N.Y.S.2d 747 (3d Dep't 1999).

[62]*Gordon v. Rush*, 100 N.Y.2d 236, 762 N.Y.S.2d 18, 792 N.E.2d 168 (2003) *supra.*

[63] *Stop-The-Barge ex rel. Gilrain v. Cahill*, 1 N.Y.3d 218, 771 N.Y.S.2d 40.

[64]*Gordon*, 100 N.Y.2d at 239-241, 762 N.Y.S.2d at 18.

[65]*Gordon*, 100 N.Y.2d at 241-242, 762 N.Y.S.2d at 21.

[66]*Gordon*, 100 N.Y.2d at 242-43, 762 N.Y.S.2d at 22.

[67]*Stop-the-Barge*, 1 N.Y.3d at 223, 771 N.Y.S.2d at 42.

[68]*Eadie v. Town Bd. of Town of North Greenbush*, 7

N.Y.3d 306, 821 N.Y.S.2d 142, 854 N.E.2d 464 (2006).

[69]*Eadie,* 7 N.Y.3d at 312-313, 821 N.Y.S.2d at 144-145.

[70]*Eadie,* 7 N.Y.3d at 317, 821 N.Y.S.2d at 147.

[71]*Save Pine Bush, Inc. v. City of Albany*, 70 N.Y.2d 193, 518 N.Y.S.2d 943, 512 N.E.2d 526 (1987).

[72]*Eadie,* 7 N.Y.3d at 315-318, 821 N.Y.S.2d at 146-148.

[73]*Center of Deposit, Inc. v. Village of Deposit*, 90 A.D.3d 1450, 936 N.Y.S.2d 709 (3d Dep't 2011).

[74]*Center of Deposit, Inc.*, 90 A.D.3d at 1451, 936 N.Y.S.2d at 711.

[75]*Center of Deposit, Inc.*, 90 A.D.3d at 1452, 936 N.Y.S.2d at 712.

[76]*Center of Deposit, Inc.*, 90 A.D.3d at 1453-1454, 936 N.Y.S.2d at 713.

[77]*Toll Land V Ltd. Partnership v. Planning Bd. of Village of Tarrytown*, 49 Misc. 3d 662, 12 N.Y.S.3d 874 (Sup. Ct. Westchester Co. 2015).

[78]*Toll Land V Limited Partnership,* 12 N.Y.S.3d at 876-877.

[79]*Toll Land V Limited Partnership,* 12 N.Y.S.3d at 877-878.

[80]*Toll Land V Limited Partnership,* 12 N.Y.S.3d at 879-880.

[81]57 A.D.2d 1336, 870 N.Y.S.2d 582 (3d Dep't 2008).

[82]Town Law § 276(5)(d)(i) (emphasis added and in court decision).

[83]In its entirety the subsection, which would seem to provide straightforward grounds to support the outcome of the case, reads as follows:

> A preliminary plat shall not be considered complete until a negative declaration has been filed or until a notice of completion of the draft environmental impact statement has been filed in accordance with the provisions of the state environmental quality review act. The time periods for review of a preliminary plat shall begin upon filing of such negative declaration or such notice of completion.

See also corresponding provisions of the Village Law (Section 7-728(5)(c)) and the General City Law (Section 32 (5)(c)).

[84]*Kittredge*, 57 A.D.3d at 340, 870 N.Y.S.2d at 586.

[85]*See* E.C.L. 8-0109 (5); 6 NYCRR 617.6 617.7; 6 NYCRR 617.9 (a)(3), (4).

[86]*Kittredge*, 57 A.D.3d at 1341, 870 N.Y.S.2d at 586.

[87]*Center of Deposit, Inc. v. Village of Deposit*, 108 A.D.3d 851, 968 N.Y.S.2d 731 (3d Dep't 2013).

[88]*Center of Deposit, Inc. v. Village of Deposit*, 90 A.D.3d 1450, 936 N.Y.S.2d 709 (3d Dep't 2011) (discussed above).

[89]*Center of Deposit, Inc. II*, 108 A.D.3d at 852-853, 968 N.Y.S.2d at 733 (citations omitted; emphasis added).

[90]*Lucente v. Terwilliger*, 46 Misc. 3d 1217(A), 9 N.Y.S.3d 593 (Sup. Ct. Tompkins Co. 2015).

[91]6 N.Y.C.R.R. 617.3(c); *See also* ECL § 8-0109; *Sun Beach Real Estate Development Corp. v. Anderson*, 98 A.D.2d 367, 469 N.Y.S.2d 964 (2d Dep't 1983), *aff'd*, 62 N.Y.2d 965, 479 N.Y.S.2d 341 (1984).

[92]*SEQRA Handbook*, p.167.

[93]*SEQRA Handbook*, pp.167-168.

[94]*Dawley v. Whitetail 414, LLC*, 130 A.D.3d 1570, 14 N.Y.S.3d 854 (4th Dep't 2015).

[95]*Dawley*, 130 A.D.3d at 1571, 14 N.Y.S.3d at

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[96]46 Misc.3d 1215 (Sup. Ct. Seneca Co. 2015).

[97]*Falcon Group Limited Liability Co. v. Town/Village of Harrison Planning Bd.*, 131 A.D.3d 1237, 17 N.Y.S.3d 469 (2d Dep't 2015). The authors represented the Petitioner in *Falcon Group.*

[98]6 N.Y.C.R.R. 617.9(b)(8); *see* ECL § 8-109(3) ("Notwithstanding any use of outside resources or work, agencies shall make their own independent judgment of the scope, contents and adequacy of the environmental impact statement").

[99]*SEQRA Handbook*, p.95.

[100]Gerrard, Municipal Powers Under SEQRA, 69 Dec. N.Y.S. Bar Journal 6 (Dec. 1997)(emphasis added; footnote omitted).

[101]*Falcon Group Limited Liability Company v. Town/Village of Harrison Planning Board,* Index No. 2115/12 (Sup. Ct. Westchester Co. 2015).

[102]*Falcon Group,* 131 A.D.3d at 1240 (emphasis added).

[103]*Rappaport v. Village of Saltaire*, 130 A.D.3d 930, 14 N.Y.S.3d 107 (2d Dep't 2015), leave to appeal denied, 26 N.Y.3d 912, 22 N.Y.S.3d 164 (2015).

