

PUBLIC WORKS & CAPITAL PROJECTS

RESOLUTION NO. 2015130

RE: AUTHORIZING ACQUISITION IN FEE OF REAL PROPERTY FROM  
KATIE R. BOGDANFFY FOR THE PROJECT IDENTIFIED AS BRIDGE  
RH-18 REPLACEMENT – LINDEN AVENUE (CR 79) OVER SAW  
KILL, TOWN OF RED HOOK

Legislators HUTCHINGS, SAGLIANO, STRAWINSKI, and FARLEY  
offer the following and move its adoption:

WHEREAS, the Department of Public Works has proposed the rehabilitation of  
Bridge RH-18 Linden Avenue (CR 79) over Saw Kill, Town of Red Hook which project includes  
the acquisition of portions of certain properties, and

WHEREAS, the Department of Public Works has determined that the  
improvement project (1) constitutes a Type II Action pursuant to Article 8 of the Environmental  
Conservation Law and Part 617 of the NYCRR (“SEQR”) and (2) will not have a significant  
effect on the environment, and

WHEREAS, the Department of Public Works has made a determination that in  
order to improve said bridge, it is necessary to acquire in fee a portion of property presently  
owned by Katie R. Bogdanffy, and

WHEREAS, the acquisition in fee is a portion of parcel number 134889-6273-00-  
194131-0000, described as 306.77± square feet more or less as shown on Map No. 1, Parcel No.  
1, copy is annexed hereto, and

WHEREAS, the Agreement to Purchase Real Property (Fee Acquisition) for the  
necessary real property is attached hereto, and

WHEREAS, the Commissioner of Public Works has recommended that the  
subject property, Fee Acquisition, be purchased for the sum of up to \$2,000.00 plus up to  
\$1,000.00 for related expenses and that the terms and conditions of the Agreement be carried  
forth, now, therefore, be it

RESOLVED, that the County Executive or his designee is authorized to execute  
the Agreement to Purchase Real Property (Fee Acquisition) in substantially the form annexed  
hereto and all documents in connection with this acquisition, and be it further

RESOLVED, that on the submission by the property owner of deed to the  
aforementioned land, which shall include the terms and conditions of the Agreement to Purchase  
Real Property, and such other documents as may be necessary to convey free and clear title to  
the County of Dutchess, that payment be made to the property owner in the sum of up to

\$2,000.00 for Fee Acquisition in accordance with the agreement to purchase, that the County will pay for fees associated with the Release of Mortgage application, if any, and pay all necessary transfer tax and filing fees, and be it further

RESOLVED, that the terms and conditions of the aforementioned Agreement to Purchase Real Property (Fee Acquisition) be carried out by the Dutchess County Department of Public Works.

CA-090-15

CAB/sc

R-0949-B

4/13/15

Fiscal Impact: See attached statement

STATE OF NEW YORK

ss:

COUNTY OF DUTCHESS

This is to certify that I, the undersigned Clerk of the Legislature of the County of Dutchess have compared the foregoing resolution with the original resolution now on file in the office of said clerk, and which was adopted by said Legislature on the 11<sup>th</sup> day of May 2015, and that the same is a true and correct transcript of said original resolution and of the whole thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of said Legislature this 11<sup>th</sup> day of May 2015.

CAROLYN MORRIS, CLERK OF THE LEGISLATURE

## FISCAL IMPACT STATEMENT

NO FISCAL IMPACT PROJECTED

### APPROPRIATION RESOLUTIONS (To be completed by requesting department)

Total Current Year Cost \$ 3,000

Total Current Year Revenue \$ \_\_\_\_\_  
and Source

Source of County Funds (check one):  Existing Appropriations,  Contingency,  
 Transfer of Existing Appropriations,  Additional Appropriations,  Other (explain).

Identify Line Items(s):

Related Expenses: Amount \$ 1,000

Nature/Reason:  
Anticipated Administrative Costs and Fees.

Anticipated Savings to County: \_\_\_\_\_

Net County Cost (this year): \$3,000  
Over Five Years: \_\_\_\_\_

#### Additional Comments/Explanation:

This fiscal impact statement pertains to the accompanying resolution request for authorization to acquire in fee a 306.77 +/- Square Foot parcel from Katie Bogdanffy, in consideration of payment of appraised value not to exceed \$2,000.00, in connection with the project identified as Bridge RH-18 Replacement, Linden Avenue (CR 79) Over Saw Kill, Town of Red Hook, Dutchess County

Related expenses in the amount of \$1,000 are included in the Total Current Year Costs.

Prepared by: Matthew W. Davis

EX. 2929

**'EXHIBIT A'**  
**COUNTY OF DUTCHESS**  
**DEPARTMENT OF PUBLIC WORKS**



COUNTY ROUTE 79  
 LINDEN AVENUE  
 OVER THE SAWKILL

B.L.N. 3343730

MAP NO. 1  
 PARCEL NOS. 1 & 2  
 SHEET 1 OF 2

Originals of this map (sheets 1 & 2) are on file at the offices of the Dutchess County Department of Public Works.

KATIE R. BOGDANFFY  
 (REPUTED OWNER)  
 DOCUMENT#02-2014-4693

Town of Red Hook  
 County of Dutchess  
 State of New York

ACQUISITION DESCRIPTION:  
 Type: FEE, TE  
 Portion of Real Property Tax  
 Parcel ID No.  
 134889-6273-00-194131-0000

REPUTED OWNER:  
 KATIE R. BOGDANFFY  
 110 Linden Avenue  
 Red Hook, NY 12571

**KATIE R. BOGDANFFY**  
 (REPUTED OWNER)

110 LINDEN AVENUE  
 3,341.25 SQ. FT

STA. 16+05.61  
 30.6±FT  
 90.0±FT  
 S 13°49'09" W  
 106.6±FT  
 N 16°10'51" W

STA. 16+78.84  
 83.0±FT

18.9±FT  
 S 12°32'07" E

STA. 16+97.47  
 86.0±FT

40.0±FT  
 S 62°02'51" E

**ROBERT RABIN AND  
 BARBARA W. RABIN**  
 (REPUTED OWNERS)

78 LINDEN AVE.

STA. 17+27.94  
 60.1±FT

0.7±FT  
 N 62°02'51" W

STA. 17+28.47  
 59.7±FT

23.7±FT  
 N 62°02'51" W

STA. 17+11.67  
 40.9±FT

25.1±FT  
 N 27°57'09" E

35.0±FT  
 S 16°10'51" E

STA. 17+46.55  
 44.3±FT

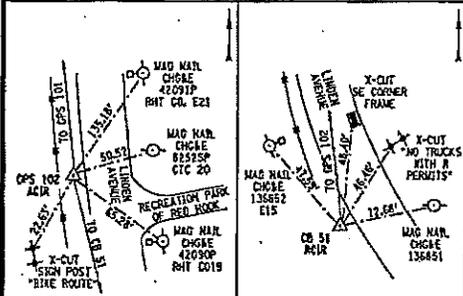
**KATIE R. BOGDANFFY**  
 (REPUTED OWNER)

110 LINDEN AVENUE  
 306.77 SQ. FT  
 OF WHICH 16.74 SQ. FT±  
 IS UNDERWATER

20 0 20 40 FT

SCALE 1"=20'

MAP NUMBER \_\_\_\_\_  
 REVISED DATE \_\_\_\_\_  
 DATE PREPARED \_\_\_\_\_



THIS NOT TO SCALE B STA. 15+13.53 GPS-102 ACIR NYSPCS EAST ZONE NAD 83/2011 N 1156743.1795 E 6605985.2442 NAVD 88 EL: 181.37'	THIS NOT TO SCALE B STA. 19+98.67 CB-51 RCIR NYSPCS EAST ZONE NAD 83/2011 N 1155282.5138 E 660764.8434 NAVD 88 EL: 179.83'
---	--

FILE NAME: C:\DWG\2015 Linden Avenue Dutchess County\02014-4693.dwg



COUNTY ROUTE 79  
(LINDEN AVENUE)  
OVER THE SAWKILL

'EXHIBIT A'  
COUNTY OF DUTCHESS  
DEPARTMENT OF PUBLIC WORKS

B.I.N. 3343730

MAP NO. 1  
PARCEL NOS. 1 & 2  
SHEET 2 OF 2

Map of property which the Commissioner of Public Works deems necessary to be acquired in the name of the People of the County of Dutchess in fee acquisition and temporary easement acquisition, for purposes connected with the highway system of the County of Dutchess, pursuant to Section 118 of the Highway Law and the Eminent Domain Procedure Law.

PARCEL NO. 1, A FEE ACQUISITION TO BE EXERCISED FOR THE PURPOSE OF THE WIDENING OF COUNTY ROUTE 79 LINDEN AVENUE, BUT NOT LIMITED TO THE FOLLOWING: THE SHOULDER OF COUNTY ROUTE 79 LINDEN AVENUE WILL BE WIDENED AND THE ADJACENT SIDE SLOPE WILL BE GRADED TO MEET WITH THE EXISTING GROUND AND SEEDED TO RE-ESTABLISH A GRASS SURFACE, AND PLACEMENT OF TEMPORARY EROSION AND SEDIMENT CONTROL MEASURES FOR THE DURATION OF THIS PROJECT, DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT ON THE WESTERLY BOUNDARY OF COUNTY ROUTE 79 LINDEN AVENUE, AT THE INTERSECTION OF SAID BOUNDARY WITH THE DIVISION LINE BETWEEN THE PROPERTY OF ROBERT RABIN AND BARBARA W. RABIN (REPUTED OWNERS) ON THE SOUTH AND THE PROPERTY OF KATIE R. BOGDANFFY (REPUTED OWNER) ON THE NORTH, SAID POINT BEING 59.7± FT DISTANT WESTERLY MEASURED AT RIGHT ANGLES FROM STATION 17+28.47± OF THE HEREINAFTER DESCRIBED SURVEY BASELINE FOR THE COUNTY ROUTE 79 LINDEN AVENUE OVER THE SAWKILL PROJECT; THENCE NORTH 62°-02'-51" WEST ALONG SAID DIVISION LINE 0.7± FT TO A POINT 60.1± FT DISTANT WESTERLY MEASURED AT RIGHT ANGLES FROM STATION 17+27.94± OF SAID BASELINE; THENCE NORTH 27°-57'-09" EAST THROUGH THE PROPERTY OF KATIE R. BOGDANFFY (REPUTED OWNER) 25.1± FT, TO A POINT ON THE FIRST MENTIONED WESTERLY BOUNDARY OF COUNTY ROUTE 79 LINDEN AVENUE, THE LAST MENTIONED POINT BEING 40.9± FT DISTANT WESTERLY MEASURED AT RIGHT ANGLES FROM STATION 17+11.67± OF SAID BASELINE; THENCE ALONG SAID WESTERLY BOUNDARY OF COUNTY ROUTE 79 LINDEN AVENUE THE FOLLOWING TWO (2) COURSES AND DISTANCES: (1) SOUTH 16°-10'-51" EAST 35.0± FT TO A POINT 44.3± FT DISTANT WESTERLY MEASURED AT RIGHT ANGLES FROM STATION 17+46.55± OF SAID BASELINE; AND (2) NORTH 62°-02'-51" WEST 23.7± FT TO THE POINT OF BEGINNING, SAID PARCEL BEING 306.77± SQUARE FEET MORE OR LESS, OF WHICH 16.74± SQUARE FEET IS UNDERWATER.

PARCEL NO. 2, A TEMPORARY EASEMENT TO BE EXERCISED FOR THE PURPOSE OF A WORK AREA IN CONNECTION WITH THE REHABILITATION OF COUNTY ROUTE 79 LINDEN AVENUE TO GRADE THE SIDE SLOPES TO MEET THE EXISTING GROUND, SEEDING TO RE-ESTABLISH A GRASS SURFACE, AND PLACEMENT OF TEMPORARY EROSION AND SEDIMENT CONTROL MEASURES FOR THE DURATION OF THIS PROJECT, DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT ON THE WESTERLY BOUNDARY OF COUNTY ROUTE 79 LINDEN AVENUE, AT THE INTERSECTION OF SAID BOUNDARY WITH THE DIVISION LINE BETWEEN THE PROPERTY OF ROBERT RABIN AND BARBARA W. RABIN (REPUTED OWNERS) ON THE SOUTH AND THE PROPERTY OF KATIE R. BOGDANFFY (REPUTED OWNER) ON THE NORTH, SAID POINT BEING 60.1± FT DISTANT WESTERLY MEASURED AT RIGHT ANGLES FROM STATION 17+27.94± OF THE HEREINAFTER DESCRIBED SURVEY BASELINE FOR THE COUNTY ROUTE 79 LINDEN AVENUE OVER THE SAWKILL PROJECT; THENCE NORTH 27°-57'-09" EAST THROUGH THE PROPERTY OF KATIE R. BOGDANFFY (REPUTED OWNER) 25.1± FT TO A POINT ON THE WESTERLY BOUNDARY OF COUNTY ROUTE 79 LINDEN AVENUE, THE LAST MENTIONED POINT BEING 40.9± FT DISTANT WESTERLY MEASURED AT RIGHT ANGLES FROM STATION 17+11.67± OF SAID BASELINE; THENCE NORTH 16°-10'-51" WEST ALONG SAID WESTERLY BOUNDARY OF COUNTY ROUTE 79 LINDEN AVENUE 106.6± FT TO A POINT 30.6± FT DISTANT WESTERLY MEASURED AT RIGHT ANGLES FROM STATION 16+05.61± OF SAID BASELINE; THENCE THROUGH THE PROPERTY OF KATIE R. BOGDANFFY (REPUTED OWNER) THE FOLLOWING TWO (2) COURSES AND DISTANCES: (1) SOUTH 13°-49'-09" WEST 90.0± FT TO A POINT 83.0± FT DISTANT WESTERLY MEASURED AT RIGHT ANGLES FROM STATION 16+78.84± OF SAID BASELINE; AND (2) SOUTH 12°-32'-07" EAST 18.9± FT TO A POINT ON THE FIRST MENTIONED DIVISION LINE, THE LAST MENTIONED POINT BEING 86.0± FT DISTANT WESTERLY MEASURED AT RIGHT ANGLES FROM STATION 16+97.47± OF SAID BASELINE; THENCE SOUTH 62°-02'-51" EAST ALONG SAID DIVISION LINE 40.0± FT TO THE POINT OF BEGINNING, SAID PARCEL BEING 3,341.25± SQUARE FEET MORE OR LESS.

RESERVING, HOWEVER, TO THE OWNER OF ANY RIGHT, TITLE, OR INTEREST IN AND TO THE PROPERTY ABOVE DELINEATED ABOVE AS PARCEL NO. 2, AND SUCH OWNER'S SUCCESSORS OR ASSIGNS, THE RIGHT OF ACCESS AND THE RIGHT OF USING SAID PROPERTY AND SUCH USE SHALL NOT BE FURTHER LIMITED OR RESTRICTED UNDER THIS EASEMENT BEYOND THAT WHICH IS NECESSARY TO EFFECTUATE ITS PURPOSES FOR, AND AS ESTABLISHED BY, THE CONSTRUCTION AND AS SO CONSTRUCTED, THE MAINTENANCE, OF THE HEREIN IDENTIFIED PROJECT.

THE ABOVE MENTIONED SURVEY BASELINE IS A PORTION OF THE 2014 SURVEY BASELINE FOR THE RE-CONSTRUCTION OF COUNTY ROUTE 79 LINDEN AVENUE OVER SAWKILL PROJECT, AND IS DESCRIBED AS FOLLOWS:

BEGINNING AT STATION 15+13.53; THENCE SOUTH 21°-43'-42" EAST TO STATION 19+98.67.

ALL BEARINGS REFERRED TO TRUE NORTH AT THE 74°-30' MERIDIAN OF WEST LONGITUDE.

I hereby certify that the property mapped above is necessary for this project, and the acquisition thereof is recommended.

Date \_\_\_\_\_ 2015

Noel H. S. Knille, AIA, ASLA  
Commissioner of Public Works

Recommended by:

Date \_\_\_\_\_ 2015

Robert H. Bokkind, P.E.  
Deputy Commissioner

Unauthorized alteration of a survey map bearing a licensed land surveyor's seal is a violation of the New York State Education Law.

I hereby certify that this map is an accurate description and map made from an accurate survey, prepared under my direction.

Date \_\_\_\_\_ 2015

Joseph G. Molinowski - Land Surveyor  
P.L.S. License No. 050314

M.J. Engineering and Land Surveying, P.C.  
1533 Crescent Road  
Clifton Park, NY 12065

MAP NUMBER \_\_\_\_\_  
REVISED DATE \_\_\_\_\_  
DATE PREPARED \_\_\_\_\_

McKinney's Consolidated Laws of New York Annotated  
Environmental Conservation Law (Refs & Annos)  
Chapter 43-B. Of the Consolidated Laws (Refs & Annos)  
Article 8. Environmental Quality Review (Refs & Annos)

McKinney's ECL § 8-0105

§ 8-0105. Definitions

Currentness

Unless the context otherwise requires, the definitions in this section shall govern the construction of the following terms as used in this article:

1. "State agency" means any state department, agency, board, public benefit corporation, public authority or commission.
2. "Local agency" means any local agency, board, district, commission or governing body, including any city, county, and other political subdivision of the state.
3. "Agency" means any state or local agency.
4. "Actions" include:
  - (i) projects or activities directly undertaken by any agency; or projects or activities supported in whole or part through contracts, grants, subsidies, loans, or other forms of funding assistance from one or more agencies; or projects or activities involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use or permission to act by one or more agencies;
  - (ii) policy, regulations, and procedure-making.
5. "Actions" do not include:
  - (i) enforcement proceedings or the exercise of prosecutorial discretion in determining whether or not to institute such proceedings;
  - (ii) official acts of a ministerial nature, involving no exercise of discretion;
  - (iii) maintenance or repair involving no substantial changes in existing structure or facility.

6. “Environment” means the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character.

7. “Environmental impact statement” means a detailed statement setting forth the matters specified in section 8-0109 of this article. It includes any comments on a draft environmental statement which are received pursuant to section 8-0109 of this article, and the agency’s response to such comments, to the extent that such comments raise issues not adequately resolved in the draft environmental statement.

8. “Draft environmental impact statement” means a preliminary statement prepared pursuant to section 8-0109 of this article.

#### Credits

(Added L.1975, c. 612, § 1. Amended L.1976, c. 228, § 1; L.1977, c. 252, § 2.)

#### Editors' Notes

### SUPPLEMENTARY PRACTICE COMMENTARIES

by Kevin A. Reilly

2014

#### 8-0105. Definitions

“Arbitrary and capricious” is not technically an ECL definition (the term establishes the standard for judicial review under CPLR Article 78), yet its application is ubiquitous in SEQRA review and elsewhere in ECL litigation. Although the dualism is routinely employed in SEQRA challenges, finding a succinct, serviceable, definition of the standard used in reviewing agency determinations may prove to be an elusive, and time-consuming, search. Recent decisions may prove to be helpful. In *Matter of Ward v City of Long Beach*, 20 NY3d 1042, 962 NYS2d 587, 985 NE2d 898 (2013), the court described “arbitrary action [as] without sound basis in reason and generally taken without regard to the facts... [The issue] is whether the determination has a rational basis.” In *Concord Associates L.P. v Town Board of the Town of Thompson*, 41 Misc.3d 1208(A), 980 NYS2d 275 (S.Ct. Sullivan Co. 2013), the court, citing to prior caselaw, held that “capricious action in a legal sense is established when an administrative agency on identical facts decides differently ... or when those similarly situated receive different treatment... While the agency does not have the obligation of articulating all of its reasons for its decision, the absence of [a] rational basis to distinguish one decision of the agency from the other gives rise to suspicions of capricious behavior” [internal citations omitted]. This court also defined “substantial evidence in the record” to mean an “ample amount” in support of an administrative or municipal decision, and noted that rationality, rather than the amount of the evidence, is the relevant test.

#### Agency

“Agency” is defined to include a public benefit corporation, but that is for SEQRA purposes. Would the definition apply to other statutes which, however, are applied in a SEQRA context? It depends. In the long litigated case, *Develop Don't Destroy Brooklyn, Inc., v Empire State Development Corporation, et.al.*, amply discussed in several

areas of this commentary over the past few years, the petitioners recently sought the recovery of attorneys fees from the respondent Empire State Development Corporation under the Equal Access to Justice Act. In its latest decision, at 41 Misc.3d 779, 971 NYS2d 682 (S.Ct. N.Y. Co. 2013), the court first had to analyze whether the respondent, a public benefit corporation devised to avoid some of the encumbrances burdening state actors, was a state agency for purposes of the EAJA. Characterizing the issue as one of first impression under that statute, and cautioning that the status of public benefit corporations under the EAJA must be determined on a case by case basis, the court noted that the ESDC had acted as a SEQRA lead agency rather than in a strictly financial capacity. In its SEQRA capacity, the respondent was thus exercising a governmental function as a decision maker, and comported with the status of state agency under the EAJA. Hence, having crossed this hurdle, the petitioners could qualify for the recovery of attorneys fees if they also qualified as a prevailing party. On this latter issue, see the discussion in this year's commentary in C8-0109:3 (**The environmental impact statement: when needed; Supplemental EIS**) and C8-0109:6 (**Judicial Review; Attorneys' fees**).

**Actions: Ministerial nature.**

Although “ministerial” suggests a minor approval or an approval of a minor project that is consistent with zoning requirements, that was not the case in *Westwater v. New York City Board of Standards and Appeals*, \_\_\_ Misc.3d \_\_\_, 2013 N.Y. Slip Op 32515(U) (S.Ct. N.Y. Co. 2013), where the earlier development, subject to a 1982 variance, that consisted of relatively low scale buildings and open space and recreational space but had never been rebuilt to the extent allowed, was proposed to be replaced by a 25 story building containing a floor area of 195,000 square feet, reaching a height of 289 feet, which eliminated the open space. The New York City Department of Buildings rejected the developer's claim that the development could proceed as of right and required an amendment to the site plan. Upon review, the New York City Board of Standards and Appeals categorized the proposal as a minor site plan amendment and classified it as a Type II action, not requiring an EIS. The petitioners, including a neighboring art gallery contending that the light that was important for its displays would be blocked, argued that shadows would be cast on a nearby park and that these impacts along with the elimination of open space required an EIS. Denying the need for an EIS, respondent BSA claimed the SEQRA exemption for ministerial actions. In upholding that determination and dismissing the CPLR Article 78 proceeding, the court found that the project had already been authorized by the 1982 variance, which had not required open space, instead requiring specified setbacks as the building heights rose with which the new proposed project would comply. The court found that prior owners had not developed to the full extent of the 1982 variance because of the neighborhood's adverse economic conditions during the interim period, among other factors. Effectively, BSA was only acting on what had already been approved three decades before, making the action ministerial, and thus exempt from SEQRA pursuant to 6 NYCRR 617.4 (c)(19). This case is also discussed in this year's commentary at C8-0109:3, **Land use and zoning**.

2012

**Ministerial Actions**

In a decision of some factual brevity, the Fourth Department relied on the definition of “actions” in ECL 8-0105(4) and (5) to conclude that a town board, albeit being designated as the lead agency for the project by various state agencies which upon the developer's applications had granted permits, lacked jurisdiction to act in that role. In *Mulligan, et al., v. Diamond Dreams at Cooperstown Ltd., et al.*, 92 A.D.3d 1235, 938 N.Y.S.2d 711 (4th Dept. 2012), the town board was not, itself, granting or denying any approvals, except for issuing building permits on the basis that the developer complied with the local building code. This was an exercise of only ministerial, rather than discretionary, authority. Hence, since the town board took no “action” within the meaning of the statute, it had no basis to act as a lead agency and its SEQRA determinations were annulled.

2011

**Agency**

Although the statute defines “agency” broadly, the regulations (6 NYCRR 617.2[s]) provide additional specificity in terms of the role to be played by agencies. Hence, an “involved agency” which must be included in environmental decision making is one “that has jurisdiction by law to fund, approve or directly undertake an action.” However, merely because an agency might be tangentially involved in an action or project does not put that agency onto center stage. Which agency or agencies must be “involved” will turn on the nature of the action and how central the agency is to its accomplishment. Hence, a city declared itself to be the lead agency for the construction of a performing arts center in *Camardo v. City of Auburn, New York*, 31 Misc.3d 1034, 925 N.Y.S.2d 323 (S.Ct. Cayuga Co. 2011), because the nature of the action required, inter alia, demolition and construction, even if, less directly, the Department of Health and Department of Labor might have some regulatory control over aspects of the project. However, that regulatory authority, even if necessary in some respects to the progress of the project, did not convert those agencies into involved agencies which had to be consulted as part of the environmental review. Rejecting that challenge, the court upheld the City Council's negative declaration.

**Emergency Actions**

In the Main commentary, Professor Weinberg cited to 6 NYCRR 617.5(b)(33), restricting the SEQRA exemption for emergency actions involving historic structures to those which cause the least disturbance, and he described decisions favoring repairing rather than razing structures as “a welcome generous construction ... in keeping with SEQRA's purposes.” More recent decisions have been less generous with respect to neglected historic structures. When a town board claimed a SEQRA exemption to allow the demolition of a house built in 1840 and listed on both the National and the State Register of Historic Places, razing rather than repair won out. The elderly owner could neither repair nor maintain the building, and the town engineer found it to be structurally unsafe. Apparently, funding for the structural repairs was not otherwise available, and there was at least the suggestion that the adjacent neighbor, who happened to be on the town board, wanted to purchase the property. The ungenerous court in *Plum v. The Town of Callicoon*, 31 Misc.3d 1204(A), 2011 N.Y. Slip Op. 50490 (S.Ct. Sullivan Co. 2011) held that a town is not required to conduct an environmental review for the demolition of an unsafe historic building.

2010

**C8-0105: Definitions**

**Ministerial acts.**

The First Department issued a curious alternative holding in *Fisher v. the New York City Board of Standards and Appeals* (71 A.D.3d 487, 896 N.Y.S2d 340 [1<sup>st</sup> Dept. 2010]), after correctly finding that BSA had properly deemed a 1963 variance amended to accommodate the merger of adjacent lots, that the determination evaded SEQRA review because it was only ministerial in nature. The brief memorandum decision does not explain why granting a variance, even a minor one, by a zoning board, is only ministerial.

by Kevin A. Reilly

2009

## **C8-0105: Definitions**

### **Ministerial Acts**

The 2006 Practice commentary to this section parsed the difference between “ministerial” acts, where the agency enjoys no discretion and, hence, an EIS would have no consequence, and acts where some measure of discretion is exercised by the agency, thereby invoking the informational purposes of SEQRA. A Third Department decision returned to the distinction, and the underlying purpose of an EIS, in 2009 in *Island Park LLC v. New York State Department of Transportation*, 61 A.D.3d 1023, 876 N.Y.S.2d 203 [3d Dept. 2009], also discussed in C8-0109:3. There, the DOT exercised its authority under the Railroad Law to close the plaintiff-farmer's private crossing over a railroad line, after finding it to constitute a hazard to public safety. The finding was made after a public hearing and under the auspices of the pertinent statutory standards. Once that finding was made, the court found, the agency lacked discretion to allow the crossing to remain open and the closure order became ministerial. Hence, although the plaintiff, challenging the decision under SEQRA since an EIS had not been prepared as a preliminary to the agency's action, might have a cognizable property claim, it lacked a cognizable SEQRA claim. An EIS would not have affected the outcome of a proceeding which was compelled by the relevant provisions of the Railroad Law.

by Philip Weinberg

## **2008**

### **Environment**

The court in *Village of Chestnut Ridge v. Town of Ramapo*, discussed in this year's Commentary to ECL § 8-0109 at C8-0109:6 under Standing to Sue, reminds us that community character is specifically made part of “environment” under this statute, so that four villages have standing to challenge a town's alleged non-compliance with SEQRA when adopting a local law allowing substantial development that might alter the community's character.

## **2007**

### **State Agency**

The courts have held, following the *Settco* decision in the 2005 Commentary, that authorization of an Indian-operated casino by the Governor and Legislature is beyond SEQRA review. See *Scott v. City of Buffalo*, described in this year's Commentary to ECL § 8-0109 at C8-0109:3 under Segmentation.

### **Action**

The court in *Town of Hempstead v. State*, 42 A.D.3d 527, 840 N.Y.S.2d 123 (2d Dept. 2007), held local zoning preempted where a cell tower is to be built on State property. (SEQRA review aspects of the decision are discussed in this year's Commentary to ECL § 8-0109 at C8-0109:3 under Land Use and Zoning.) The court followed *Crown Communication N.Y., Inc. v. Department of Transportation*, 4 N.Y.3d 159, 791 N.Y.S.2d 494, 824 N.E.2d 934 (2005), in ruling a private company may assert the State's immunity from zoning where its project benefits the public and those benefits outweigh any adverse impacts on local residents.

### **Ministerial Actions**

The Appellate Division has ruled a demolition permit not subject to SEQRA review. *Ziamba v. City of Troy*, 37 A.D.3d 68, 827 N.Y.S.2d 322 (3d Dept. 2006), leave to appeal denied, 8 N.Y.3d 806, 832 N.Y.S.2d 488, 864 N.E.2d 618 (2007), involved an abandoned bakery and clubhouse that the owner sought to tear down. Reversing the lower court (see the 2006 Commentary hereto), this court found issuance of a demolition permit to be “predicated on ‘an applicant’s compliance with predetermined statutory criteria,’ ” citing *Gavalas*, described in the Main Commentary, which had held a building permit similarly ministerial. While the city code literally clothes the director of code enforcement with some “discretion,” the court ruled that discretion is limited to safety and related concerns, like the narrow discretion in issuing a certificate to alter a historic structure in *Citineighbors*, also described in the Main Commentary--“a narrow set of criteria ... unrelated to the environmental concerns that would be raised in an EIS[.]” In short, raising these issues need not precede razing the buildings.

### Environment

The court in *White Plains Downtown District Management Ass'n v. Spano*, discussed at C8-0109:6 under Standing, ruled the Act’s definition of the environment encompasses concerns of community character impacted by a homeless shelter in a major business and shopping district. In contrast, the court in *Municipal Art Society v. New York State Convention Center Dev. Corp.*, described at C8-0109:4, held security issues (a truck yard atop the Lincoln Tunnel) outside the ambit of SEQRA.

### 2006

### Agency

Following the *Shinnecock Nation* decision described in the Main Commentary, the court revisited an issue left unresolved there and ruled the Shinnecock is an Indian tribe recognized by the State. In *State v. Shinnecock Indian Nation*, 400 F.Supp.2d 486 (E.D.N.Y. 2005), it found the Shinnecock, who occupy a Long Island enclave on which they seek to build a casino, have been recognized by New York since enactment of a 1792 statute, bolstered by subsequent laws, court decisions and the like. That they are not a federally recognized tribe is immaterial, the court held. But as to whether the Shinnecoaks have title to their land, either originally or by adverse possessions, the court found issues of fact precluding summary judgment. It therefore again did not reach whether SEQRA applied to the planned casino.

### Ministerial Actions

Unlike a building permit, issuance of a demolition permit has been held not ministerial in nature since it entails governmental discretion. In *Ziamba v. City of Troy*, 10 Misc. 3d 581, 802 N.Y.S. 2d 586 (Sup. Ct. Rensselaer Co. 2005), the court sensibly so held in a suit to enjoin the destruction of two historic structures. Noting that to rule the demolition permits ministerial would enable municipalities to circumvent SEQRA, the court enjoined the buildings’ destruction until SEQRA review is completed. A permit to demolish surely requires the municipality to exercise discretion.

### Emergency Actions

A court has approved, as an allowed emergency action, the demolition of deteriorated, vacant buildings on the site of a massive Brooklyn development project. *Develop Don’t Destroy Brooklyn v. Empire State Dev. Corp.*, 31 Misc.3d 144, 816 N.Y.S.2d 424 (Sup. Ct. N.Y. Co.), aff’d (as to this order) 31 A.D.3d 144, 816 N.Y.S.2d 424 (1<sup>st</sup> Dept. 2006), ruled the lead agency, charged with approving the Atlantic Yards Arena and Redevelopment Project,

acted reasonably in authorizing the private developer to tear down the structures as posing a risk to public safety. The court noted that the buildings would be demolished in any event under the proposal, and ruled the “hard look” required in determining environmental significance under SEQRA (see the Main Commentary to ECL § 8-0109 at C8-0109:3) inapplicable to decisions under the emergency exception. Other aspects of this case are discussed under ECL § 8-0109 at C8-0109:4.

## 2005

### State Agency

Distinguishing *West Village Committee v. Zagata*, described in the Main Commentary, which ruled the Governor not a state agency under this section, a court has suggested that the Governor is a state agency under SEQRA where a compact with an Indian nation vests the power to execute it in that official. In *Concern, Inc. v. Pataki*, 7 Misc.3d 1030(A), 801 N.Y.S.2d 232, 2005 WL 1310478 (Sup. Ct. Erie Co. 2005), the petitioners challenged the lack of SEQRA review of state approval of a casino site pursuant to such a compact. The compact with the Seneca Nation requires approval of casino sites by the State Gaming Officials of the New York State Wagering Board--surely a “state agency.” The Governor’s execution of the compact seems immaterial.

The court also distinguished *Settco, LLC v. New York State Urban Dev. Corp.*, 305 A.D.2d 1026, 759 N.Y.S.2d 833 (4<sup>th</sup> Dept.), leave to appeal denied, 100 N.Y.2d 508, 764 N.Y.S.2d 385, 796 N.E.2d 477 (2003), holding approval of a convention center an action “of the Legislature and the Governor,” pointing out that the “Empire State Development Corporation, and not the Governor, ... transferred fee title to the Nation” here.

### Action

The court in *Concern, Inc. v. Pataki*, described in this year’s Commentary hereto under State Agency, ruled the plan for a casino project to be built pursuant to a compact between the Governor and the Seneca Nation is an “action” requiring compliance with SEQRA. The town board, which passed a resolution supporting the casino, contended that was not an action under SEQRA since construction depends on a contract with the private developer and Interior Department approval under the Indian Gaming Regulatory Act, 25 U.S.C.A. §§ 2701-2721 and 18 U.S.C.A. §§ 1166-1168. But the court held an action under SEQRA need not await those events.

## PRACTICE COMMENTARIES

by Philip Weinberg

### State Agency

The broad, inclusive definitions of “state agency” and “local agency” reveal the clear intent to encompass every governmental entity within SEQRA, including authorities and public benefit corporations, historically immune from much public disclosure of their activities. SEQRA’s mandate that agencies stop, look and listen before risking environmental impact plainly includes those bodies as well. See *H.O.M.E.S. v. New York State Urban Development Corp.*, 69 A.D.2d 222, 418 N.Y.S.2d 827 (4<sup>th</sup> Dept. 1979).

The governor is not a “state agency” as defined in this section (subd. 1). A trial court ruled that Governor Cuomo was, in *Hudson River Sloop Clearwater, Inc. v. Cuomo*, \_\_\_ Misc.2d \_\_\_, \_\_\_ N.Y.S.2d \_\_\_ (Sup.Ct. N.Y. Co.), reversed on other gds. 222 A.D.2d 386, 635 N.Y.S.2d 637 (1<sup>st</sup> Dept. 1995), leave to appeal denied 88 N.Y.2d 806, 646

N.Y.S.2d 986, 670 N.E.2d 227 (1996). The petitioners there claimed an EIS was needed before the Governor could enter into a memorandum of understanding with the Mayor of New York creating a Hudson River Park Conservancy to create parks along Manhattan's unused piers. The lower court agreed, but the Appellate Division reversed, holding "the EIS requirement had not yet been triggered" since "no action had been taken which would commit any agency to a definite course of future decisions." This result is explored in Commentary C8-0109:3 to § 8-0109, *infra*. The Appellate Division did not discuss whether the governor was an "agency." A federal court has suggested, however, that the President is not an agency as defined in the National Environmental Policy Act. *Public Citizen v. United States Trade Representative*, 5 F.3d 549 (D.C. Cir. 1993), certiorari denied 114 S.Ct. 685, 510 U.S.1041, 126 L.Ed.2d 652 (1994) (no EIS needed prior to signing of North American Free Trade Agreement).

The 1995 amendments to DEC's Part 617 regulations implementing SEQRA explicitly provide that actions of the governor are Type II actions, not subject to review under SEQRA. 6 NYCRR § 617.5(c)(37).

*West Village Committee, Inc. v. Zagata*, 242 A.D.2d 91, 669 N.Y.S.2d 674 (3<sup>rd</sup> Dept. 1998), lv. appeal denied 92 N.Y.2d 802, 677 N.Y.S.2d 72, 699 N.E.2d 432 (1998), confirmed this result. Noting that federal courts have ruled the President not to be an "agency" subject to the Administrative Procedure Act, or the National Environmental Policy Act, on which SEQRA is modeled, as in *Public Citizen*, the court held the governor similarly not subject to SEQRA. As it noted, "virtually any conceivable act of the Governor would have to be executed by a State agency and thus fall within SEQRA." Other aspects of this decision are dealt with in the Commentary to § 8-0113.

#### Agency

An Indian tribe was found to be an agency required to comply with SEQRA in *New York v. Shinnecock Indian Nation*, 280 F.Supp.2d 1 (E.D.N.Y. 2003), where the court preliminarily enjoined the Shinnecock Nation from building a gambling casino in Hampton Bays on Long Island. The defendants claim the parcel, though not part of the State-recognized Shinnecock Indian Reservation, is "tribal land historically controlled" by them. The State and town contend the casino will require a waste water treatment plant, necessitating a DEC permit and SEQRA review, for which the defendants have not applied. As the State argued here, the Clean Water Act applies to Indian tribes, 33 U.S.C.A. § 1362(4). And since New York enforces the Clean Water Act (see the Commentary to § 17-0801), it has permit jurisdiction over Indian-owned lands, except "Indian lands under the jurisdiction of the United States," see 6 NYCRR § 750-1(b), which this parcel arguably is not. The court will have to resolve whether the Shinnecock Nation is federally recognized, and even if it is, whether this parcel is part of its historically-controlled lands. As for SEQRA, perhaps DEC and not the Shinnecocks is the lead agency with responsibility to comply. It is likewise unclear whether any of this renders an Indian tribe an "agency" under SEQRA, or whether sewage treatment plants require an EIS -- they appear to be "unlisted" actions, neither Type I nor Type II under the DEC rules (see 6 NYCRR §§ 617.4, 617.5).

#### Action

"Actions" triggering the provisions of SEQRA are, like "state agency," broadly defined. As under NEPA, the Act applies to any activity performed, funded or licensed by the agencies it covers, as well as "policy, regulations and procedure-making" by agencies.

Consonant with the broad, remedial purpose of the Act, the courts have properly defined "action" to include more than just the predictable highways and large-scale developments. In *Tri-County Taxpayers Ass'n, Inc. v. Town Board of Queensbury*, 55 N.Y.2d 41, 447 N.Y.S.2d 699, 432 N.E.2d 592 (1982), the court held a town board resolution and special election to create a sewer district constituted "action" mandating preparation of an environmental impact statement. So is the amendment of a zoning ordinance. *Kravetz v. Plenge*, 102 Misc.2d 622, 424 N.Y.S.2d 312 (Sup.Ct., Monroe Co., 1979).

In a decision limiting *Tri-County Taxpayers*, a court has ruled that a town board's resolution consenting to the siting of the State's disposal site for low-level radioactive waste within the town did not constitute an action under SEQRA. *Mayerat v. Town Bd. of Town of Ashford*, 185 A.D.2d 699, 585 N.Y.S.2d 928 (4<sup>th</sup> Dept. 1992). The State's Odyssey in trying to locate a site for this waste is described in the Commentaries to article 29 of the ECL. The resolution called for the repeal of a 1986 State law prohibiting a nuclear waste site in Ashford, where an earlier disposal site had been closed, and for enactment of pending legislation to place the new site in the town. The DEC Part 617 regulations implementing SEQRA define "action" to include "agency planning and policy making activities that may affect the environment and commit the agency to a definite course of future decisions." 6 NYCRR § 617.2(b)(2). As the trial court noted, the resolution "constituted not only an open invitation but a formal consent to the state to pursue its proposed opening of the door of prohibited action which had been ... bolted by the 1986 Act of the legislature." *Mayerat v. Town Bd. of Town of Ashford*, 152 Misc.2d 196, 575 N.Y.S.2d 765 (Sup.Ct. Cattaraugus Co. 1991). As such it was an "action" under SEQRA, requiring an EIS. Just as in *Tri-County*, the absence of an EIS allowed the town to act in ignorance of the impacts of its vote.

But the Appellate Division reversed, ruling the town board's resolution agreeing to a nuclear waste facility "was merely a consent by the Town to the enactment of proposed State legislation that would permit siting" of the facility. Since the proposed State law explicitly mandates an environmental assessment of the site, see ECL § 29-0503, the court held the town need not itself prepare an EIS, unlike the case in *Tri-County* where no other agency would weigh environmental impacts.

The Appellate Division has held that the practice of the City of New York of referring homeless families to hotels in Manhattan's Midtown South area, absent proof of concerted steering of such families to that neighborhood, is not an "action" at all within the meaning of SEQRA. *Midtown South Preservation and Development Committee v. City of New York*, 130 A.D.2d 385, 515 N.Y.S.2d 248 (1<sup>st</sup> Dept. 1987). The court relied on the lack of city rules or procedures governing such referrals. It seems ironic that the absence of orderly procedures should exempt an agency from complying with an Act designed to foster planning and consideration of consequences in advance of actions, or orderly procedures.

"Actions" are defined to include the adoption of agency regulations (subd. 4[ii]) but to exempt enforcement proceedings, ministerial acts and routine maintenance and repairs (subd. 5).

In *Schiff v. Board of Estimate of City of N.Y.*, 122 A.D.2d 57, 504 N.Y.S.2d 215 (2<sup>nd</sup> Dept. 1986), the court held a City of New York Board of Estimate resolution recommending that its Department of Sanitation "immediately undertake further study of certain waste disposal projects ... and initiate such further steps as are necessary to implement such projects" did not require an environmental impact statement. The court found the resolution to be not an "action" under this section but "merely a recommendation," which, in the wording of the SEQRA regulations, 6 NYCRR § 617.2(b)(2), did not "commit the agency to a definite course of future decisions." Whether or not, in Hamlet's words, the native hue of this resolution was sicklied o'er with the pale cast of thought, the court held it lost the name of action.

See, to similar effect, *Nassau/Suffolk Neighborhood Network v. Town of Oyster Bay*, 134 Misc.2d 979, 513 N.Y.S.2d 921 (Sup.Ct. Nassau Co. 1987), holding a town's final request for proposals for a resource-recovery facility to dispose of solid waste not to amount to an "action" requiring an EIS. However, the court noted acceptance of a proposal would constitute an action triggering SEQRA, since that would commit the town to a particular site and type of facility.

One court has ruled that the designation of a building as a historic landmark is not an "action" under SEQRA, since designation simply requires the owner to maintain and preserve the existing structure. *Shubert Organization v. New York City Landmarks Preservation Comm'n.* (N.Y. Law Journal, Dec. 11, 1989, p. 25, col. 5) (Sup.Ct. N.Y. Co.). The Part 617 DEC rules implementing SEQRA now so provide. See § 617.5(b) (32), and see also *Citineighbors*, discussed later in this Commentary under Ministerial Action.

SEQRA was held to furnish protection to Long Island's water supply and the pine barrens that safeguard it in *Long Island Pine Barrens Society, Inc. v. Central Pine Barrens Joint Planning and Policy Commission*, N.Y.L.J. June 15, 1998, p. 33, col. 6 (Sup.Ct. Suffolk Co.). The Pine Barrens Commission was created under ECL article 57 (see the Commentary to § 57-0101) in 1993, itself largely in response to a suit under SEQRA, described there. The Commission controls land use in this region vital to the aquifer on which Long Islanders depend. It permitted a private sports group to lease 30 acres of undeveloped pine barrens in the core preservation area to be accorded maximum protection under the statute. In order to justify the lease the Commission had to, and did, rule it to be "non-development" as defined in ECL § 57-0107(13)(vii). But in fact the Commission was authorizing baseball, football and soccer fields, which required the 30 acres to be cleared of trees. The court annulled the Commission's lease both because it violated article 57, as discussed in the Commentary thereto, and because it constituted an "action" under SEQRA. It rejected the Commission's view that it need not comply with SEQRA because its resolution approving the lease was not an "action." Of course, it was as much an "action" mandating compliance with SEQRA as the resolution establishing the sewer district in *Tri-County Taxpayers*, discussed earlier. Enterprises of great pith and moment may sometimes, as Hamlet noted, lose the name of action -- but not this one.

A federal court held in *Lucas v. Planning Board of Town of LaGrange*, 7 F.Supp.2d 310 (S.D.N.Y. 1998), that a town's need to comply with SEQRA in granting permits to build cellular telecommunications towers is preempted by federal statute. The Telecommunications Act of 1996, 47 U.S.C.A. § 332(c)(7)(B)(11), bars municipalities from "prohibiting the provision of personal wireless services," and requires local governments to act on such permit applications within a reasonable time. Although the federal act expressly allows localities to retain authority "over decisions regarding the placement, construction and modification of personal wireless service facilities," as long as they do not "prohibit" them, the court nonetheless concluded the act preempted claims that the town failed to comply with SEQRA procedures since to allow such claims "would ... allow every locality in New York to rely on SEQRA" to thwart "the mandates of the Telecommunications Act." This overbroad reading of the federal law seems incorrect. SEQRA is not designed to "prohibit" cell towers, or any other activity -- but rather to ensure that agencies weigh environmental concerns and values in deciding whether to permit them. SEQRA therefore ought not to conflict with the federal statute.

The court then examined the town's alleged failure to meet the substantive mandate of SEQRA, as described in the Commentary at C8-0109:2, and found the town was exempt because it had entered into a consent judgment that was a court action exempted from SEQRA. This aspect of the case is discussed below under "Court Proceedings."

A more sensible view of the relationship between the Telecommunications Act and SEQRA was taken in *Sprint Spectrum L.P. v. Willoth*, 996 F.Supp. 253 (W.D.N.Y. 1998), affirmed 176 F.3d 630 (2d Cir. 1999), where the court found the federal law did not preempt SEQRA. As it noted, "the Act reserves zoning authority to local governments[.]" The court upheld a town's ruling that one cell tower would suffice instead of the three the applicant sought, and went on to find the town had properly complied with SEQRA in reaching its determination.

As in *Sprint Spectrum*, the court in *New York SMSA Ltd. Partnership v. Village of Mineola*, \_\_\_ F.Supp.2d \_\_\_ (E.D.N.Y. 2003), ruled the Telecommunications Act of 1996 bars localities from denying permission to construct cell towers "on the basis of the environmental effects of radio frequency emissions," 47 U.S.C.A. § 332(c)(7)(B)(iv). It overturned a permit denial based in large measure on SEQRA findings as to those effects. It should be noted that the federal statute does authorize localities to decide on the siting of cell towers based on other criteria, such as esthetics.

Another federal court held a town board's positive declaration requiring an EIS did not so delay consideration of an application to construct a cell tower as to violate the Telecommunications Act's mandate that local governments act "within a reasonable period of time." In *New York SMSA Ltd. Partnership v. Town of Riverhead Town Bd.*, 118 F.Supp.2d 333 (E.D.N.Y. 2000), the court sensibly found issuance of a positive declaration to be an integral part of the

SEQRA process diligently pursued by the town board. Thus there was no unreasonable delay; any “delay ... is inherent in the SEQRA process[.]” The court went on to reject the applicant's related claim that the positive declaration was “ ‘tantamount’ to a denial.” It distinguished *Lucas v. Planning Bd. of Town of LaGrange*, described earlier, where the town had suspended all cell tower applications irrespective of their merit, and properly criticized the *LaGrange* court's conclusion that the federal law preempted SEQRA.

A federal court has held the Airport and Airway Improvement Act, 49 U.S.C.A. §§ 47101-47131, requiring airports that receive federal grants to adopt noise-control measures, does not preempt a town board from reviewing improvements at a town-operated airport under SEQRA. In *East Hampton Airport Property Owners Ass'n, Inc. v. Town Bd. of Town of East Hampton*, 72 F.Supp.2d 139 (E.D.N.Y. 1999), the court found no Congressional intent to preempt state or local land-use regulation, and no conflict between SEQRA and the federal law. It therefore dismissed a suit contending the town board's SEQRA review of a local law limiting the use of its airport in order to reduce aircraft noise was somehow preempted by federal law. The courts have consistently upheld local governments' power, as proprietors of municipal airports, to adopt noise controls, and found them not preempted by federal statutes regulating aviation. See, e.g., *British Airways Bd v. Port Authority of N.Y.*, 558 F.2d 75 (2d. Cir. 1977); *National Aviation v. City of Hayward*, 418 F.Supp. 417 (N.D. Cal. 1976).

A proposed annexation of territory by a municipality was ruled an “action” subject to SEQRA review in *City Council of City of Watervliet v. Town Bd. of Town of Colonie*, 309 A.D.2d 1114, 766 N.Y.S.2d 395 (3<sup>rd</sup> Dept. 2003), affirmed 3 N.Y.3d 508, 789 N.Y.S.2d 88, 822 N.E.2d 339 (2004). The annexing of 43 acres was done to facilitate a residential project the surrounding town was deemed unlikely to approve. Though a 1986 case had found annexation not an “action” under SEQRA, as this court noted, the relevant DEC regulations, amended after that decision, now provide that annexations of 100 or more contiguous acres are Type I (likely to mandate an EIS). See 6 NYCRR § 617.4 (b) (4). So, the court held, smaller annexations are “implicitly” unlisted actions, and thus within SEQRA. It went on to rule the regulation not unreasonable or irrational, sensibly pointing out that “[t]o hold otherwise would in effect allow rezoning of a parcel without any environmental review” as it was reshuffled from one jurisdiction to another. Affirming, the Court of Appeals noted that “SEQRA promotes, rather than undermines, the public interest purposes of article 17 of the General Municipal Law,” governing annexations.

The state's takeover of the Long Island Lighting Co. (LILCO) and transfer of many of that utility's assets to the Long Island Power Authority was likewise found exempt from SEQRA challenge. In *Suffolk County v. Long Island Power Auth.*, 177 Misc.2d 208, 673 N.Y.S.2d 545 (Sup.Ct. Nassau Co. 1998), the court ruled Public Authorities Law § 1020-s(2), a section of the Long Island Power Authority Act, explicitly providing that the acquisition of LILCO's assets “shall be deemed not to be ‘state action’ within the meaning of” SEQRA, obviated the need to comply with SEQRA. This decision dovetails with *Citizens for an Orderly Energy Policy v. Cuomo*, described below under Ministerial Actions, holding the State's acquisition of the Shoreham nuclear plant from LILCO similarly exempt from SEQRA.

An opinion issued by the State Commissioner of Agriculture and Markets was also held not an “action” requiring SEQRA review. The Commissioner's opinion, following that agency's investigation of a hog farm, was that its storage and application of manure as fertilizer to crop land was a “sound practice.” Under Agric. & Mkts. Law § 308(3), this finding protects the farm in question from a nuisance action regarding the farm's activities. In *Pure Air & Water Inc. of Chemung Co. v. Davidsen*, 246 A.D.2d 786, 668 N.Y.S.2d 248 (3<sup>rd</sup> Dept.), appeal dismissed 91 N.Y.S.2d 955, 671 N.Y.S.2d 716, 694 N.E.2d 885, leave to appeal denied 92 N.Y.2d 807, 678 N.Y.S.2d 593, 700 N.E.2d 1229 (1998), the court found the Commissioner's opinion not an “action” -- “merely an assessment of an agricultural practice.” In any event, the court noted that the DEC regulations exempt “farm management practices” from SEQRA review. See 6 NYCRR § 617.5(c)(3). It is surely arguable that the Commissioner's opinion was not itself a farm management practice, and that its practical effect was to bar nuisance actions against the hog farm -- more like a permit than a mere “assessment of an agricultural practice.” Why, then, should the Commissioner's act licensing, in effect, this farm be immune from SEQRA review?

## Ministerial Actions

The first significant decision defining “acts of a ministerial nature,” exempt from SEQRA under subd. 5(ii), gave that phrase a broad construction. In *Citizens for an Orderly Energy Policy, Inc. v. Cuomo*, 78 N.Y.2d 398, 576 N.Y.S.2d 185, 582 N.E.2d 568 (1991), the Court of Appeals held the decommissioning, or closure, of the Shoreham nuclear plant by the Long Island Power Authority (LIPA), a State agency, was exempt from SEQRA as a ministerial act. The statute creating LIPA authorized it to acquire Shoreham from its owner, a private utility, and expressly provided that SEQRA “shall not be applicable in any respect to such acquisition” (Pub. Auth. Law § 1020-s[2]). Closure was mandated by the statute “forthwith” (*id.* § 1020-h[9]) once LIPA acquired the plant. Therefore the Legislature, the court ruled, “judged for itself the propriety of closure and decommissioning and mandated such action,” leaving no discretion to LIPA. In short, the Legislature followed the adage attributed to a Hollywood producer. “When I want your opinion I’ll give it to you.”

This ruling is consistent with federal decisions under the National Environmental Policy Act (NEPA), on which SEQRA is based. (See the Commentary to § 8-0103.) See *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir. 1981) (listing of endangered species ministerial); *State of Kansas ex. rel. Stephan v. Adams*, 608 F.2d 861 (10th Cir. 1979), certiorari denied *sub nom. Spannaus v. Goldschmidt*, 100 S.Ct. 1651, 445 U.S. 963, 64 L.Ed.2d 238 (Congress determined certain Amtrak rail routes, so agency’s role ministerial).

The Court of Appeals has held that a village’s authority to issue a building permit is “ministerial” and thus not an action as defined in this section (subd. 5[ii]). *Incorporated Village of Atlantic Beach v. Gavalas*, 81 N.Y.2d 322, 599 N.Y.S.2d 218, 615 N.E.2d 608 (1993). In this the court followed several lower court decisions to that effect. A 1987 Court of Appeals ruling, *Pius v. Bletsch*, 70 N.Y.2d 920, 524 N.Y.S.2d 395, 519 N.E.2d 306 (1987), had held to the contrary based on the “specifically delegated site plan approval powers” of the town director of engineering, building and housing and that worthy’s “authority to make certain case-by-case judgments on site plan design and construction materials,” powers that in Atlantic Beach, and in most municipalities, do not inhere in the authority to issue a building permit -- too slim a lever to activate SEQRA’s EIS requirements.

Where a federal statute mandates action by a state agency on pain of losing federal funding, is that action ministerial and therefore exempt from SEQRA under subsection 5(ii) of this section? No, the court held in *Golden v. Metropolitan Transp. Authority*, 126 A.D.2d 128, 512 N.Y.S.2d 710 (2<sup>nd</sup> Dept. 1987). The court concluded that although the State would forfeit one percent of its federal highway aid under the statute if the MTA failed to switch to one-way toll collection on the Verrazano-Narrows Bridge, the MTA “retained the discretion lawfully to refuse to implement the one-way toll system, and, therefore, [its] action was not purely ministerial ...”

Projects of the Metropolitan Transportation Authority on property already used for transportation or on an insubstantial addition to such property, which do not materially change the character of that use, are expressly exempted from SEQRA under Public Authorities Law § 1266(11). The Appellate Division has held the raising of platforms and enlarging of parking lots on land mostly already railroad property come within that exemption. But where the railroad proposes to acquire ten or more additional acres, the addition is substantial and the action is within SEQRA. *Martin v. Koppelman*, 124 A.D.2d 24, 510 N.Y.S.2d 881 (2<sup>nd</sup> Dept. 1987).

A court has ruled a city planning commission’s approval of an application to modify topography and remove trees in a special natural area district was ministerial and thus exempt from SEQRA review. In *Lighthouse Hill Civic Ass’n v. City of New York*, 275 A.D.2d 322, 712 N.Y.S.2d 558 (2<sup>nd</sup> Dept. 2000), the court analogized this request, part of a plan to build a three-story rehabilitation center and parking garage in a statutorily protected wooded area in Staten Island, to cases like *Incorporated Village of Atlantic Beach v. Gavalas* (discussed earlier). This seems an unduly broad reading of “ministerial action” -- typically defined as one not involving the exercise of significant discretion. In fact,

the Zoning Resolution's "special review provisions" for special natural area districts (§§ 105-40 to 105-43) require findings by the City Planning Commission "that development is not feasible without ... modification" (§ 105-421[a]) and that "such modification of topography has minimal impact on the existing natural topography" (§ 105-421[c]) -- hardly ministerial decisions.

A certificate of appropriateness issued by the New York City Landmarks Preservation Commission, allowing a new building in a historic district, is not an "action" under SEQRA, the court ruled in *Citineighbors Coalition of Historic Carnegie Hill v. New York City Landmarks Preservation Commission*, 306 A.D.2d 113, 762 N.Y.S.2d 59 (1<sup>st</sup> Dept. 2003), appeal dismissed as moot, 2 N.Y.3d 727, 778 N.Y.S.2d 740, 811 N.E.2d 2 (2004). Since the agency's decision is "narrowly circumscribed by the architectural, esthetic, historical and other criteria specifically set forth in the Landmarks Law," the court held its action to be ministerial like the building permit involved in *Gavalas*.

The Court of Appeals' dismissal of the appeal as moot is discussed in the Commentary to § 8-0109 at C8-0109:6 under Mootness.

### Emergency Actions

The Part 617 rules also exempt "emergency actions ... immediately necessary on a limited and temporary basis for the protection or preservation of life, health, property or natural resources." Section 617.5(b)(33). This has led to considerable controversy. The regulation implies that actions taken after an emergency has ended are subject to SEQRA. But some acts taken on an emergency basis have irreversible environmental effects. See *Board of Visitors -- Marcy Psychiatric Center v. Coughlin*, 60 N.Y.2d 14, 466 N.Y.S.2d 668, 453 N.E.2d 1085 (1983) (converting much of mental hospital into prison exempt from immediate SEQRA review as "emergency action," though SEQRA requires EIS later).

The Appellate Division has held the temporary mooring of a prison barge at a Manhattan pier to alleviate jail overcrowding was likewise exempt under the emergency provision of the regulations (as well as the companion City of New York Environmental Quality Review [CEQR] regulations). *Silver v. Koch*, 137 A.D.2d 467, 525 N.Y.S.2d 186 (1<sup>st</sup> Dept., 1988), appeal dismissed, 71 N.Y.2d 889, 527 N.Y.S.2d 771, 552 N.E.2d 1069; amended 73 N.Y.2d 702, 536 N.Y.S.2d 743, 533 N.E.2d 673. In *Marcy* the State conceded it was subject to SEQRA and agreed to prepare an EIS prior to completion of the alteration. The only steps it took under the emergency exemption were painting, restoring masonry and the like -- not, the Court of Appeals found, irrevocable steps. See *Marcy*, 60 N.Y.2d at 22, 466 N.Y.S.2d at 672, 453 N.E.2d at 1089. But in *Silver* the court allowed the mooring of the prison barge as a *fait accompli*, seemingly totally exempt from SEQRA. Both the goals of SEQRA and the *Marcy* holding appear to require compliance with the Act before the city allows the emergency use of the barge to ripen into a permanent arrangement -- the thousand "men who came to dinner."

The exemption from SEQRA for emergency actions was later broadened to exempt the conversion of a hotel to a shelter for homeless families. *Spring-Gar Community Civic Ass'n, Inc. v. Homes for the Homeless, Inc.*, 149 A.D.2d 581, 540 N.Y.S.2d 453 (2<sup>nd</sup> Dept. 1989). While all would agree that the plight of the homeless in the City of New York is severe, and indeed has been found to be an "emergency," *McCain v. Koch*, 70 N.Y.2d 109, 517 N.Y.S.2d 918, 511 N.E.2d 62 (1987), the proper remedy is to require compliance with SEQRA during and following the conversion of the structure, as was directed by the Court of Appeals in *Marcy*.

The Department itself has defined emergency actions as typified by responses to fires, floods and chemical spills. *The SEQRA Handbook* (DEC 1983), B-11. Some courts seem bent on legislating away all SEQRA protection in any case involving prison overcrowding or relief for the homeless.

More sensibly, the Appellate Division in *East Thirteenth Street Community Ass'n v. New York State Urban Development Corp.*, 189 A.D.2d 352, 595 N.Y.S.2d 961 (1<sup>st</sup> Dept. 1993), held construction of a high-rise residence for homeless persons not exempt. As the court stated, building “a 14-story housing project can hardly be said to fall into the category of an action taken on a ‘limited and temporary basis.’ ” It distinguished *Marcy* and *Silver* where no major permanent construction was involved. The *East Thirteenth Street* court went on, however, to uphold the state's negative declaration that the project would have no significant environmental impact on the surrounding Union Square area in Lower Manhattan, finding the lead agency, the State Housing Finance Agency, took the required “hard look.”

The Court of Appeals affirmed, 84 N.Y.2d 287, 617 N.Y.S.2d 706, 641 N.E.2d 1368 (1994), but on a different ground — the petitioners' lack of standing. This decision is discussed in the Commentary at C8-0109:6 following § 8-0109 under Standing to Sue. The petitioners then sued once again, contending the Housing Finance Agency should have prepared an EIS, but lost once again, even though the court recognized that the scope of review is broader in an article 78 proceeding than in the previous Eminent Domain Procedure Law challenge. *East Thirteenth St. Community Ass'n v. New York State Housing Fin. Agency*, 218 A.D.2d 512, 630 N.Y.S.2d 517 (1<sup>st</sup> Dept. 1995), appeal dismissed 86 N.Y.2d 885, 635 N.Y.S.2d 949, 659 N.E.2d 772, leave to appeal denied 87 N.Y.2d 808, 641 N.Y.S.2d 830, 664 N.E.2d 896 (1996) (also discussed in C8-0109:6) under Scope of Review. But, it ruled, “based upon our analysis in the prior proceeding[, the] Agency's ‘negative declaration’ ... was adequately supported by the record[.]”

In keeping with *East Thirteenth Street*, another court has ruled that converting a residence for college students into one for homeless families was a Type II action, so that a negative declaration was properly issued. (See the Practice Commentary at C8-0109:3.) In *Community Planning Bd. No. 4 (Manhattan) v. Homes for the Homeless*, 158 Misc.2d 184, 600 N.Y.S.2d 619 (Sup.Ct. N.Y. Co. 1993), the court wisely so held without discussing the emergency exemption which, as noted earlier in this Commentary, should not exclude projects of this nature *in toto* from SEQRA review.

A court sensibly declined to construe SEQRA's exemption for emergency actions so broadly as to encompass a rule permitting vans and livery vehicles to pick up passengers at New York's airports. The rule, adopted by the New York City Taxi and Limousine Commission, was styled an emergency measure, based on a mayoral declaration of “emergency.” But the “emergency” stemmed from a peaceful work stoppage by taxi drivers protesting related rules increasing penalties for traffic offenses by taxis. The court in *Metropolitan Taxicab Bd. of Trade, Inc. v. City of New York*, N.Y.L.J. July 6, 1998, p. 26, col. 4 (Sup.Ct. N.Y.Co. 1998), held the city's finding of “potential unsafe crowd conditions at airports” is simply “not on the same level as emergencies created by prisoner overcrowding” or the like, as in *Silver v. Koch*. The court found it “clear that respondents [Mayor and Commissioner] enacted New Rule 14 to retaliate for the taxicab drivers' peaceful work stoppage and protest ... and to deter them from engaging in further peaceful protest in violation of their constitutional rights.”

However, broadly construing the statute's limited exemption for emergency actions, the court in *No Spray Coalition, Inc. v. City of New York*, \_\_\_ F.Supp.2d \_\_\_, 2000 WL 1401458 (S.D.N.Y. 2000), aff'd 252 F.3d 148 (2d Cir. 2001), vacated on other grounds 351 F.3d 602 (2d Cir. 2003), upheld the City's spraying of pesticides to control mosquitoes bearing the West Nile virus. That court dismissed a suit alleging inter alia that the City prepared no EIS, holding the spraying fell within the emergency provision. Unlike the situations in *Spring-Gar* and *Silver*, this court noted with favor that the City was in fact proceeding with the SEQRA process. The emergency exemption surely does not excuse agencies from complying with SEQRA altogether. (The Second Circuit vacated this ruling on the ground that the Clean Water Act authorized a citizen suit to compel compliance with that statute on these facts. See the 2005 Commentary to §§ 17-0801 and 33-1004).

In contrast, a court has sensibly held the exemption for emergency actions is not so broad as to automatically warrant the destruction of a historic landmark building. In *Historic Albany Foundation v. Breslin*, 296 A.D.2d 813, 745 N.Y.S.2d 331 (3<sup>rd</sup> Dept. 2002), the court ruled the appropriate emergency action consistent with SEQRA was to stabilize the façade of a county-owned historic structure, rather than razing it entirely. Emergency actions are

exempt from SEQRA only if “performed to cause the least ... disturbance, practicable under the circumstances, to the environment,” 6 NYCRR § 617.5(b)(33). Since expert testimony showed stabilizing the façade to be practicable, the court directed it. This is a welcome generous construction of the statute and regulations, in keeping with SEQRA's purposes.

### Enforcement Proceedings

Is an action required by a Department consent order exempt from SEQRA under the exception for enforcement proceedings in subd. 5? Yes, answered the Court of Appeals in *New York Public Interest Research Group, Inc. by Wathen v. Town of Islip*, 71 N.Y.2d 292, 525 N.Y.S.2d 798, 520 N.E.2d 517 (1988). DEC and the town had entered into an order on consent allowing the town to increase the height of its landfill. The petitioners contended this was not exempt as an enforcement proceeding since the order, which amended an earlier order on consent, authorized expansion of the landfill. But the court upheld as reasonable the Department's exercise of its discretion in ruling the amended order exempt from SEQRA as a modification of the earlier order entered in the course of an administrative enforcement proceeding. The solid waste issues in this case are discussed in the Practice Commentary to § 27-0704.

In *Abate v. City of Yonkers*, 264 A.D.2d 517, 694 N.Y.S.2d 724 (2<sup>nd</sup> Dept.), appeal dismissed 94 N.Y.2d 834, 703 N.Y.S.2d 66, 724 N.E.2d 761 (1999), the court rejected the argument that a stipulation settling a suit to enjoin a shopping center on SEQRA grounds was court action that exempted the action from SEQRA review entirely under the Department's rules (§ 617.5[c][37]). The court sensibly ruled that to so hold would allow the lead agency to “‘rubber-stamp’ a decision which has already been made.”

Likewise, in *Doremus v. Town of Oyster Bay*, 274 A.D.2d 390, 711 N.Y.S.2d 443 (2<sup>nd</sup> Dept. 2000), the court noted that a consent order settling a suit by a developer is not exempt from SEQRA review “since the exemption for court actions does not apply to ‘Type I’ actions” likely to require an EIS. Although neither the statute nor the relevant DEC rule (6 NYCRR § 617.5 [c][37]) expressly so state, the court relied on *Abate v. City of Yonkers*. *Doremus* is further discussed in the Commentary to § 8-0109 at C8-0109:4.

In contrast, in *Lucas v. Planning Bd. of Town of LaGrange*, discussed earlier under “Action,” the court ruled a consent judgment between an applicant for permission to build a cellular telephone tower and the town barred a later claim by opponents of the tower -- not parties to the consent judgment -- that the town violated SEQRA. The court cited DEC's regulations, which provide that an “action ... of any court” is exempt from SEQRA as a Type II action, see § 617.5(c)(37). This exemption has been applied to condemnation proceedings, as in *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855 (2d Cir.1988), certiorari denied, 489 U.S. 1077, 109 S.Ct. 1527, 103 L.Ed.2d 833 (1989). But here the consent judgment was, it appears, used as a “bootstrap ... for escaping SEQRA's mandates,” as in *Doremus v. Town of Oyster Bay*, described earlier, a decision the *Lucas* court shrugged off as not “controlling.” The court conceded as much by essentially equating the consent judgment with compliance with SEQRA's substantive mandate to minimize impacts, which seems at odds with the legislative intent. *Lucas* is further discussed in the Commentary to § 8-0109 at C8-0109:2.

### Environment

Note the expansive definition of “environment” in subdivision 6. Taking its cue from the decisions construing NEPA (the National Environmental Policy Act), see *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), cert. denied, 93 S.Ct. 2290, 412 U.S. 908, 36 L.Ed.2d 974 (1973), the Legislature expressed its intent that agencies consider not only air and water quality but land use, historically or esthetically significant buildings or other objects, population patterns and community character. Since SEQRA has a substantive mandate, *Town of Henrietta v. Department of Environmental Conservation of the State of New York*, 76 A.D.2d 215, 430 N.Y.S.2d 440 (4<sup>th</sup> Dept. 1980) (see the Practice Commentary to § 8-0103), this imposes on state and municipal agencies the duty to consider this wide range

of factors, and not to lightly run afoul of any. See for example *H.O.M.E.S. v. New York State Urban Development Corp.*, 69 A.D.2d 222, 418 N.Y.S.2d 827 (4<sup>th</sup> Dept. 1979) (increased traffic through residential neighborhood); *Tuxedo Conservation and Taxpayers Ass'n v. Town Board of Tuxedo*, 69 A.D.2d 320, 418 N.Y.S.2d 638 (2<sup>nd</sup> Dept. 1979) (impact of large-scale development on bucolic area).

In *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), the Court of Appeals held gentrification -- the displacing of moderate-income urban residents by a high-rise luxury development -- must be considered in an environmental impact statement prepared under the City's Environmental Quality Review (CEQR) provisions. The decision is discussed in detail in Commentary C8-0109:3 following § 8-0109. It is adverted to here because the court explicitly criticized the City's "limited view of the parameters of the term 'environment' [as] contrary to the plain meaning of SEQRA." 68 N.Y.2d at 365, 509 N.Y.S.2d at 502-03, 502 N.E.2d at 179. "Environment" includes "community" or "neighborhood character" and therefore encompasses gentrification.

A more recent court decision has underscored SEQRA's applicability to esthetic impacts, in keeping with the definition of "environment" in this section (subd. 6). *Lane Construction Corp. v. Cahill*, 270 A.D.2d 609, 704 N.Y.S.2d 687 (3<sup>rd</sup> Dept. 2000), sustained DEC's denial of a mining permit after SEQRA review showed it would level off a hilltop in a scenic and historically significant area. Similarly, community character is within this section's definition of "environment" and must be considered in an application for a mining permit, the Department ruled in *In re Palumbo Block Co.* (DEC Commissioner, June 4, 2001).

Notes of Decisions (74)

McKinney's E. C. L. § 8-0105, NY ENVIR CONSER § 8-0105  
Current through L.2015, chapters 1 to 13, 50 to 54, 61.

---

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.