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Common Mistakes in the SEQRA/Land Use Process

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Overview

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SEQRA's First Principles

- **Protection of New York's Environment**
- **Social, Economic and Environmental Factors shall be considered *together* in reaching decisions**
- **Effective public participation and awareness**
- **Timely and integrated proceedings and minimization of delay**

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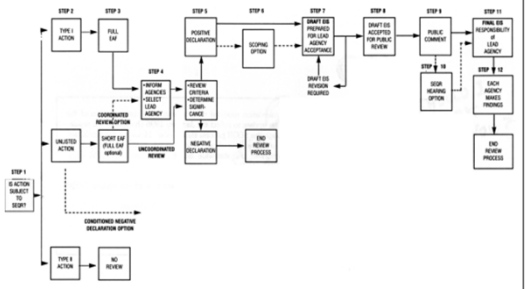
SEQRA's "Rule of Reason"

- **SEQRA must be construed in the "light of reason"**
- **"Not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before a FEIS will satisfy the substantive requirements of SEQRA"**
- **"The degree of detail with which each factor must be discussed will vary with the circumstances and nature of the proposal"**

SEQRA's "Rule of Reason"

- An agency "need not investigate every conceivable environmental problem; it may within reasonable limits, use its discretion in selecting which ones are relevant." *Jackson v UDC*
- A "rule of reason…is applicable …to its decisions about which matters require investigation." *Save the Pine Bush v Albany*

SEQRA Process



SEQRA PROCESS

1. Is the Action Subject to SEQRA?
2. Classify the Action.
3. Prepare Environmental Assessment Form (EAF) Part 1.
4. Select Lead Agency.
5. Complete EAF.
6. Render Determination of Significance
   - Positive Declaration (Prepare EIS)
   - Negative Declaration (Ends SEQRA process)

Step One

Identifying Actions

Actions

Agencies must assess the environmental significance of all actions they have discretion to approve, fund or directly undertake.

The SEQR process must be applied whenever an action is
- directly undertaken by an agency;
- involves funding by an agency; or
- requires one or more new or modified discretionary approvals from an agency or agencies.

Step Two

Classifying Actions

Type 1 Actions
6 NYCRR § 617.4 (More likely to have significant adverse environmental impacts.)

Type 2 Actions
6 NYCRR § 617.5 (Certain actions that have been determined not to have a significant adverse environmental impact.)

Unlisted Actions
Not Type 1 or 2 Action (Everything else.)

Overlooked Type I Actions

Typical Type I Actions Overlooked by Boards Include:

- Actions involving replacement, rehabilitation or reconstruction … that also exceed a Type I threshold.
- Actions occurring wholly or partially within Agricultural Districts and exceeding 25% of Type I thresholds.
  - No need for there to be an actual farm use.
- Actions occurring wholly or partially within, or "substantially contiguous" to historic resources listed (or proposed) on the National or State Registers of Historic Places.

Overlooked Type 1 Actions

Typical Type 1 Actions Overlooked by Boards Include:

- Actions occurring wholly or partially within or "substantially contiguous" to publicly owned or operated parkland, recreation area, designated open space including any site on the Register of National Natural Landmarks and exceeding 25% of Type 1 thresholds.
  - Note: The National Register of Historic Places and the Register of National Natural Landmarks are different not the same!

Example of a Type 1 Threshold

construction of new residential units that meet or exceed the following thresholds:

(i) 10 units in municipalities that have not adopted zoning or subdivision regulations;

(ii) 50 units not to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works;

(iii) in a city, town or village having a population of less than 150,000, 250 units to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works;

(iv) in a city, town or village having a population of greater than 150,000 but less than 1,000,000, 1,000 units to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works; or

(v) in a city or town having a population of greater than 1,000,000, 2,500 units to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works;

Substantially Contiguous?

SEQRA Handbook:

Is intended to cover situations where a proposed activity is not directly adjacent to a sensitive resource, but is in close enough proximity that it could potentially have an impact.

The phrase cannot be specifically defined. It's a judgment call. Note however, at this point, you are only classifying the action, not determining its significance.

Any doubt? Treat as Type 1.

Examples of "Substantially Contiguous"

Construction of a structure across a residential or downtown two to four-lane street from a building listed on the National Register of Historic Places would be substantially contiguous. However, if the street were a six lane limited access highway with a 100 foot median it would not be substantially contiguous.

Construction of a structure on a site that is separated from a City Park by a 50 foot right-of-way would be substantially contiguous.

Examples of "Substantially Contiguous"

Construction of a residential development overlooking a historically designated bay would be substantially contiguous.

Construction of a structure on a site that is separated from a City Park by a 50 foot right-of-way would be substantially contiguous.

Construction of a boat launch ramp 100 feet away from a prehistoric Native American encampment site proposed for designation on the National Register of Historic places would be substantially contiguous.

Special Considerations for Type I Actions

A Full EAF is required.

A coordinated review is required when there are other involved agencies.

Type I negative declarations must be noticed, filed and published. 6 NYCRR Part 617.12.

Overlooked Type 2 Actions

Actions typically improperly subjected to SEQRA review include:

- construction or expansion of a primary or accessory/appurtenant, nonresidential structure or facility involving less than 4,000 square feet of **gross floor area** and not involving a change in zoning or a use variance and consistent with local land use controls, but not radio communication or microwave transmission facilities;

Overlooked Type 2 Actions

Definition of Gross Floor Area:

The SEQRA Handbook offers the following:

The first place to look for a specific definition of gross floor area is your local code book (town/city/village). If these local codes have no definition, DEC provides this clarification: cellar or basement space not used for the main purpose of a non-residential facility is not considered part of the gross square foot area of the facility. However, a basement used as a sales floor, or for office space would be included as part of the gross floor area. The same logic also applies to attic space. Unless explicitly included by local codes, the footprints of structures such as gas pumps and canopies are not included in the definition of gross floor area. The calculations are for the floor area of the building itself.

Overlooked Type 2 Actions

Actions typically improperly subjected to SEQRA review include:

- construction, expansion or placement of minor accessory/appurtenant residential structures, including garages, carports, patios, decks, swimming pools, tennis courts, satellite dishes, fences, barns, storage sheds or other buildings not changing land use or density;
- granting of individual setback and lot line variances;
- granting of an area variance(s) for a single-family, two-family or three-family residence. BUT, commercial area variances are either Type 1 or Unlisted actions.

Type II Considerations

Be sure to consider all of the language in Type II descriptions:

For example:
replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site, including upgrading buildings to meet building or fire codes, unless such action meets or exceeds any of the thresholds in section 617.4 of this Part.

construction or expansion of a single-family, a two-family or a three-family residence on an approved lot including provision of necessary utility connections as provided in paragraph (11) of this subdivision and the installation, maintenance and/or upgrade of a drinking water well and a septic system.

- Only applies if lot has already been approved.

Type II Considerations

extension of utility distribution facilities, including gas, electric, telephone, cable, water and sewer connections to render service in approved subdivisions or in connection with any action on this list

- Only applies if the underlying action is a Type II action, it does not apply if a new subdivision is undergoing review.
- If utility extension is not reviewed in connection with an action that is otherwise a Type I or Unlisted action, segmentation would result.

granting of individual setback and lot line variances

- Does not include use or other area variances

Type 2 Considerations

Type 2 actions do not require preparation of an EAF, a negative or positive declaration or an EIS.

Make sure all aspects of the action are included when determining that an action is a Type 2. While there is no documentation requirement related to Type 2 actions, it is good practice to memorialize the determination indicating the action to be Type 2.

Step Three
Environmental Assessment Forms

Environmental Assessment Forms

1. **Full EAF – All Type I actions and unlisted action if the short EAF is not sufficient.**
   - **Part 1 – Project Sponsor Responsibility**
   - **Parts 2 and 3 - Lead Agency Responsibility**
2. **Short EAF – Unlisted actions.**

Environmental Assessment Forms

- The EAF is a tool to assist the lead agency in evaluating potential environmental impacts:
  - should not be used in a mechanical way without careful thought about environmental impacts;
  - is designed to make the lead agency sensitive to potential environmental effects of a wide variety of activities;
  - can never be substituted for the lead agency's deliberate evaluation of specific environmental impacts

Environmental Assessment Forms

Legal Risks

- Failing to adequately and carefully complete the EAF can result in a court annulling the lead agency's approval of the project.
- If the lead agency ignores potentially important issues or facts in the EAF, its actions may be annulled by a court.

Environmental Assessment Forms

2013 Form Revisions

First element of the effort to modernize SEQRA, together with current proposed regulatory changes and the integration of web-based geographic information systems.

New forms issued in part because the previous forms were no longer reflective of the issues and questions that routinely arise in environmental reviews.

Also introduced a host of electronic features.

Environmental Assessment Forms

Completing Part 1

- As a matter of good practice, boards should have applicants utilize the electronic features.
  - Use the EAF Mapper to generate partially filled-in EAFs
    - http://www.dec.ny.gov/eafmapper/
  - Consult EAF Workbook for questions
    - https://www.dec.ny.gov/permits/90125.html

Step Four

Lead Agency

- SEQRA regulations require that upon receipt of an application for approval of a discretionary action that SEQRA's applicability be determined, including whether other agencies are involved (6 NYCRR §617.6(a)). If your board is the first to receive an application, a preliminary decision should be made whether your board would like to become the lead agency.
- Factors to Consider:
  - Review of EAF Part 1
  - Identification of likely environmental & community issues
  - Staffing & consultant needs
  - Availability of time and funding
  - Motivation & interest of other involved agencies

Step Four

Lead Agency

- The agency undertaking the direct action or the first agency to receive a request for funding or approval should circulate a letter of intent to act as lead agency, along with the Part I of the EAF and a copy of the application to other potentially involved agencies.
- After 30 days, if no objections by other involved or interested agencies, then the lead agency can be formally established.

Lead Agency Dispute

In the event that two or more agencies cannot agree on which agency should become the lead agency, the SEQRA regulations, 6 NYCRR §617.6(b) (5), detail the process by which the Commissioner of NYSDEC will designate the lead agency.

Lead Agency Dispute

Steps in the Lead Agency Dispute Process:

- Exchange of correspondence between involved agencies (30 days)
- Request to NYS DEC Commissioner to designate the Lead Agency with copies to other involved agencies
- Request should (or in response) :
  - demonstrate the likely important environmental effects of the project & whether effects are local
  - demonstrate the extent and breadth of the board's jurisdiction
  - demonstrate the board's understanding of the SEQRA process & capacity to evaluate environmental factors and availability of expert staff or consultants
- Decision by NYSDEC Commissioner
  - Local Lead Agency designations
    - Only local impacts
    - Broad jurisdiction over action by Town or Planning Board

Later Involved Agencies

It is not unusual for an involved agency to be identified well after the coordinated review for selecting a lead agency. This may happen due to project modifications, identification of new funding sources, or technical requirements discovered later in the application review process.

Later Involved Agencies

Generally, courts do not require a *de novo* SEQRA review. Where an EIS has been prepared, many cases hold that failure to notify an "involved agency" is "inconsequential." Typically these holdings hinge on a few things:

- Environmental review has already taken place and requisite "hard look" has been taken at potential environmental issues
- Agency that should have been involved was aware of SEQRA review and had same opportunities for input as an involved agency
- Agency's importance to review was minimal (or indirect)

Later Involved Agencies

***Matter of Congdon v. Washington County* - 130 A.D.2d 27 (3rd Dept. 1987)**

- Solid waste incinerator project in Hudson Falls – petitioners sought to declare final EIS null and void on the ground that lead agency was improperly designated
- Adirondack Park Agency (APA) and Town of Moreau were not notified, but all other involved agencies were – 3rd Dept. noted that Moreau (a later involved agency) was not eligible to be lead agency and both had more indirect connections to the project than the other involved agencies
- Court held that even assuming that Moreau and APA should have been notified, this noncompliance with SEQRA is inconsequential

Later Involved Agencies

***Residents of Bergen Believe in Envt. & Democracy v. County of Monroe* -159 A.D.2d 81 (4th Dept. 1990)**

- DEC and County of Monroe agreed County would be lead agency for County landfill project
- Article 78 proceeding challenging County designation as lead agency on the grounds that County improperly identified itself and DEC as the only involved agencies
- 4th Dept. held that "subsequently identified involved agencies cannot force the SEQRA process to begin anew"
- There is no regulation which allows an agency to compel a review begin again and it would be contrary to the purposes of SEQRA to start over as it would allow a "never-ending return to square one should further modifications be made and additional agencies be identified"
- Since County took "hard look" at environmental impact of the project, the SEQRA review would not be disturbed

Later Involved Agencies

***Matter of Friedenburg v. Korman* - 232 A.D.2d 414 (2nd Dept. 1996)**

- DEC gave notice to involved and interested agencies that it was conducting coordinated SEQRA review
- Zoning Board was "interested agency", not "involved agency" at that time – Zoning Board refrained from participating in review or showing desire to participate (despite being informed) until 2 years later (court implies that Zoning Board became involved agency at this time due to passage of a wetlands law)
- 2nd Dept. held that Zoning Board had no authority to "force SEQRA process to begin anew" – would create "unnecessary duplication of reporting and review requirements"

Later Involved Agencies

***Ferrari v. Town of Penfield Planning Bd* - 181 AD 2d 149 (4th Dept. 1992)**

- Negative declaration by Planning Board – Planning Board had failed to notify DEC (whom it conceded was an "involved agency")
- Planning Board relied on Bergen case to argue that failure to notify DEC was inconsequential
- 4th Dept. held that failure to notify DEC was not inconsequential – DEC had "greatest expertise" regarding the environmental issues raised at the outset and its participation would have been meaningful
- 4th Dept. ordered Planning Board to conduct a de novo lead agency designation process

Later Involved Agencies

***King v. County of Monroe* - 255 A.D.2d 1003 (4th Dept. 1998)**

- Article 78 proceeding to annul negative declaration by County of Monroe
- County of Monroe should have identified Town of Brighton as involved agency, but failure to do so was not fatal
- Town did not participate in designation of County as lead, but still received virtually same notification and opportunity to participate as an involved agency
- Record supported finding that County identified all relevant areas of environmental concern and took required hard look

Later Involved Agencies

***Scenic Hudson Inc. v. Town of Fishkill Town Bd* - 266 A.D.2d 462 (2nd Dept. 1999)**

- DEC was not designated as an involved agency but was treated as an interested agency by Town Board – given opportunity to comment on the drafts of Environmental Impact Statements
- Therefore any failure to designate DEC as involved agency was inconsequential

Later Involved Agencies

***Incorporated Village of Poquott v. Cahill* -11 A.D.3d 536 (2nd Dept. 2004)**

- Long Island Power Authority (LIPA) sought to install natural gas-powered combustion turbines at 5 sites to meet increased energy demand
- LIPA notified other involved agencies and designated itself as lead ultimately making a negative declaration which the Village challenged
- 2nd Dept. held that where a lead agency "exercises due diligence in identifying all other involved agencies and provides written notice to them of its determination as to the significance of any environmental impacts, the review procedure comes to an end, and no involved agency may later require a second determination in connection with the action, such as completion of a new environmental assessment form, the issuance of a second negative declaration, or the preparation of a full environmental impact statement."

Step Five
Determination of Significance

Environmental Assessment Forms
Completing Parts 2 and 3

- Identifying that a "moderate to large impact may occur" does not mean that it is also necessarily significant.
- Any "moderate to large impact" must be evaluated in Part 3 to determine significance….

Part 3 provides the reasons in support of the determination of significance. The lead agency must complete Part 3 for every question in Part 2 where the impact has been identified as potentially moderate to large or where there is a need to explain why a particular element of the proposed action will not, or may, result in a significant adverse environmental impact.

Based on the analysis in Part 3, the lead agency must decide whether to require an environmental impact statement to further assess the proposed action or whether available information is sufficient for the lead agency to conclude that the proposed action will not have a significant adverse environmental impact.

Determination of Significance

- Identify and consider the whole action
- Review EAF and other information to identify environmental concerns
- Analyze concerns and take a "hard look"
- Determine significance and provide written "reasoned elaboration" of the basis for the decision
- SEQRA regulations require the lead agency decision within 20 days of receipt of information it "reasonably" needs for the decision. 617.6((b)(3)(ii)

Determination of Significance

- The underlying application remains incomplete pending the issuance of a negative declaration ("Neg Dec") or acceptance of a DEIS as complete. Neg Dec must be in writing.
- It is the lead agency's prerogative to decide whether or not and how to allow public comment
- *Kittredge* case provides insight and implications of public comment opportunities
- SEQRA requires timely decisions with a minimum of administrative delay

Determination of Significance

- It is the lead agency's judgment on which environmental issues are important and likely to pose the potential for significant adverse effects---*Coca-Cola Bottling*
- It is the lead agency's responsibility to develop the administrative record to support its decision-making---*H.O.M.E.S., Merson, Kittredge*

Determination of Significance

***Friends of P.S. 163, Inc. v. Jewish Home Lifecare* – 30 N.Y.3d 416 (2017)**

- Petitioner filed an application to construct a 20-story nursing home facility in Manhattan
- The New York Department of Health ("DOH") prepared a FEIS considering issues of noise mitigation and off-site migration of lead-bearing dust associated with the proposed project
- DOH considered arguments that window air conditioning units should be replaced by a central air system for noise reduction, and provided a rough cost estimate for such work. DOH also required installation of new acoustical windows as an alternative basis for noise reduction.
- DOH imposed protective measures to keep lead levels in soil samples surrounding the project below the threshold for child play areas set by the National Ambient Air Quality Standards.

Determination of Significance

***Friends of P.S. 163, Inc. v. Jewish Home Lifecare* – 30 N.Y.3d 416 (2017)**

Issue: Did DOH take an appropriate "hard look" at the environmental impacts?

Holding:

- DOH took the appropriate "hard look" at both noise reduction and the containment of hazardous dust.
- It was not necessary to provide a detailed study on the feasibility of a central air conditioning system. DOH's rough estimate to determine that it was not feasible was sufficient.
- While the proposed noise mitigation did not completely eliminate disruptive noise levels, the combination of air conditioning replacement and acoustical windows was consistent the requirement to impose mitigation measures "to the maximum extent possible."
- DOH was not required to completely eliminate hazardous dust migration, and the mitigation of such dust to below established federal standards was sufficient.

Step Six
Scoping

Scoping

- The optional process (might become required if proposed DEC regulations are adopted) by which the lead agency identifies the potentially significant adverse impacts related to the proposed action that are to be addressed in the DEIS, including:
  - The content and level of detail of the analysis;
  - The range of alternatives;
  - The mitigation measures needed; and
  - The identification of non-relevant issues.

Scoping

- The primary goals of scoping are to focus the EIS on potentially significant adverse impacts and to eliminate consideration of those impacts that are irrelevant or nonsignificant.
- Scoping may be initiated by the lead agency or the project sponsor.

Scoping

An EIS must assemble relevant and material facts upon which an agency's decision is to be made. It must analyze the significant adverse impacts and evaluate all reasonable alternatives. EISs must be analytical and not encyclopedic.

617.9(b)(1)

Scoping

- EISs must be clearly and concisely written in plain language that can be read and understood by the public
- EISs should address only those potential significant adverse environmental impacts that can be reasonably anticipated and/or have been identified in the scoping process
- EISs should not contain more detail than is appropriate considering the nature and magnitude of the proposed action and the significance of its potential impacts.

617.9(b)(2)

Scoping

The *Final GEIS for the SEQRA Regulations Amendments (1995)* advises:

"the primary goal of scoping …is to produce a draft EIS that concisely and effectively discusses the potential significant adverse impacts from a proposed project."

Scoping

"…lead agencies often open the discussion of all potential impacts for inclusion in the EIS regardless of significance or relevance. Impacts which were determined to be non-significant in the assessment phase of the process should not be brought back into the analysis. EISs should not be bloated with information irrelevant to the decision-making process."

Scoping

- Lead agencies must take command and manage the scoping process
- An opportunity for public participation is required; blind acceptance of suggested issues for analysis is not
- Critical analysis of environmental concerns, mitigating measures and alternatives is required for effective scoping

Steps Seven - Ten
DEIS

DEIS Completeness

The lead agency will use the final written scope, if any, and the standards set forth in 617.9 (b) to determine whether to accept the draft EIS as adequate with respect to its scope and content for the purpose of commencing public review. This determination must be made within 45 days of receipt of the draft EIS.

DEIS Completeness

- The lead agency must manage its responsibilities in the DEIS completeness review
- Consider receiving and reviewing DEIS in sections to ease the burden on staff, consultants and board members
- Distinguish completeness of the studies and methods of analysis from conclusions about specific impacts

DEIS Completeness

- Hold special meetings or separate work sessions to review the DEIS
- Set a schedule for receipt and review of the DEIS with realistic timeframes for review by staff, consultants and board members
- Obtain the applicant's agreement for extension of review periods where necessary.

Step Eleven
FEIS

FEIS Contents

- Copies and/or summaries substantive public comments
- Responses to the substantive public comments
- The DEIS (incorporate by reference)
- Revisions to the DEIS (including addenda or supplemental information)

FEIS Completeness

- The lead agency is responsible for the adequacy and accuracy of the final EIS, regardless of who prepares it; the response to public comments can be drafted by an applicant, the agency staff or consultants.
- The FEIS can present competing perspectives on complex issues of concern- "scientific unanimity" is not required. *EDF vs Flacke*

FEIS Completeness

- Timeframe- 60 days from DEIS completeness or 45 days from a DEIS hearing!
- Obtain an extension of time from the applicant and map out a schedule for preparation and issuance of the FEIS that is reasonable and fair.

Step Twelve
SEQRA Findings

SEQRA Findings

When an agency decides to carry out or approve an action which has been the subject of an environmental impact statement, it shall make an explicit finding that the requirements of this section have been met and that consistent with social, economic and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided.

ECL 8-0109.8

SEQRA Findings

No involved agency may make a final decision to undertake, fund, approve or disapprove an action that has been the subject of a final EIS, until the time period (10 calendar days) provided in subdivision 617.11(a) has passed and the agency has made a written findings statement.

617.11(c)

SEQRA Findings

Section 617.11(d) provides that Findings must:

- (1) consider the relevant environmental impacts, facts and conclusions disclosed in the final EIS
- (2) weigh and balance relevant environmental impacts with social, economic and other considerations
- (3) provide a rationale for the agency's decision
- (4) certify that the requirements of this Part have been met
- (5) certify that consistent with social, economic and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable.

SEQRA Findings

New York Courts have long recognized and respected the discretion SEQRA provides to involved agencies when making SEQRA decisions.

" SEQRA …requires a decision maker to balance the benefits of a proposed project against its unavoidable environmental risks in determining whether to approve the project. While an [EIS] does not require an agency to act in a particular manner, it constitutes evidence which must be considered by the public agency along with other evidence which may be presented to such agency…."

SEQRA Findings

"Thus the general substantive policy of the act is a flexible one. It leaves room for a responsible exercise of discretion and does not require particular substantive results in particular problematic instances."- *Town of Henrietta (1979)*

But,

Courts have repeatedly held that the SEQRA Lead Agency should not defer analysis of project impacts to planning professionals or involved agencies.

Brander v. Town Bd. of the Town of Warren, 18 Misc.3d 477 (Onondaga Co. 2007)

Civility in Meetings

Or

Managing Bad Behavior

Is this a new Phenomena?

November 5, 1984

How Have Times Changed?

2007 Association of Towns Questionnaire

A survey questionnaire was distributed at AOT training schools during 2007 and printed in AOT magazine "Talk of the Towns" in May/June 2007 issue. There were 182 Responses. While this was not a "scientific" poll, the results revealed the existence of a general behavior problem.

1. Have any of the elected or appointed boards of your town experienced incivility or rudeness by members of the public commenting on a matter pending before a board?
   - 135 YES (75%); 46 NO

1a. If yes, has any board member become engaged in an undesirable "exchange" of words with a member of the public?
   - 34 YES (76%); 11 NO

2. Have any public meetings or hearings been disrupted by shouting or "cat calls" from the public?
   - 113 YES (62%); 69 NO

3. Have any agenda items been postponed or withdrawn when a matter is the subject of incivility or rudeness by members of the public?
   - 40 YES (24%); 124 NO

4. When public hearings are scheduled has any board chair asked for the attendance of State, county or local police or constabulary?
   - 59 YES (34%); 113 NO

5. Do you believe the town has the legal authority to cut off a public speaker who is being rude or uncivil in his/her remarks?
   - 171 YES (97%); 6 NO

5a. If so, has your authority ever been questioned?
   - 31 YES (23%); 101 NO

6. Do you believe you have the legal authority to impose time limits on the presentation of verbal comments?
   - 147 YES (96%); 6 NO

6a. If so, has your authority ever been questioned?
   - 27 YES (19%); 113 NO

What is Civility?

- Courteous behavior, politeness
- A courteous act or utterance
- The act of showing regard for others
- Lack of civility makes it almost impossible to find common ground
- "The politics of warring factions"

What is disruptive behavior?

- Use of slurs, derogatory comments, or any other conduct, whether physical, verbal or written directed at another person or based upon another person's race, color, origin, sex, religion, sexual orientation, disability or age.
- Shouting, unruly behavior, repeatedly raising non-agenda items, distracting side conversations, or speaking out when another person is talking.
- Defamation, intimidation, profanity, or threats of violence.
- Audible use of phones, pagers, radios, computers or other electronic equipment.
- Booing, hissing, foot stomping, parading, singing or other similar behavior that impedes or disrupts the orderly conduct of the meeting.

Analysis: What do local boards need?

- Thorough, clear agendas.
- Well-written notification and materials for the public.
- A reasonable level of tolerance.
- An enforceable behavior policy and the consistent will and means to enforce it.

Dealing with Bad Behavior as it is Occurring

- Must you allow public comment at regular board meetings?
- Is limiting public comment a violation of Free Speech?
- Cutting off Long-Winded Speakers
- Pontificators on any and every subject, whether or not related to the purpose of the meeting/hearing.
- Keeping the Record Open Due process?

Dealing with Bad Behavior as it is Occurring

- Recognize the concern
- Indicate when/if they will be able to speak
- Ask them to stop, inform of consequences
- Ask them to leave the room/building
- If they don't, call for a peace officer
- Sometimes, you may just need to take a recess to let people cool down – including you!

Legal Issues

- Ability to call for a police or peace officer
  - Authorized by Penal Law §240.20
  - Addresses disorderly conduct
- Disorderly conduct:
  - Intent to cause public inconvenience, annoyance or alarm or recklessly creating a risk
  - Actions include:
    - Unreasonable noise
    - Use of abusive or obscene language or gestures in a public place
    - Disturbance of an assembly or meeting
    - Creates a hazardous or physically offensive condition by an act which serves no legitimate purpose.

Setting up for Success

Setting up for Success

- Be clear about the purpose of the public meeting.
  - Is it to inform, to consult, or to involve the public?
- Anticipate the reaction.
- Will the room size be appropriate?
- Will someone need to meet the media and direct them to a location to set up?
- Propose ground rules for how the meeting will be conducted.
- Advise people of the ground rules
- Request that speakers identify themselves
- Recognize conflict
- Don't ignore the elephant in the room

Setting up for Success

- The audience takes its lead from the dais
- Listen Actively. When others are speaking, stay engaged.
- Speak Respectfully. At points of conflict, stay away from personalities, and stay focused on the possible solutions.
- Ask questions. If someone isn't being clear, they'll be glad you gave them a chance to clarify themselves.

The Gatekeepers

- Part of running a successful, orderly meeting is ensuring that applications presented to the board are complete and ready to proceed.
- Code Enforcement Officers and Board Clerks should be well versed in application requirements and review. Have them maintain checklists.

General Municipal Law §239 Referrals Policy

The intent of Sections 239-l, 239-m and 239-n is to "bring pertinent intercommunity and countywide planning, zoning, site plan and subdivision considerations to the attention of neighboring municipalities and agencies having jurisdiction." Gen. Mun. Law § 239-l(2)

General Municipal Law §239 Referrals

Required For:
- Comprehensive plans
- Zoning laws
- Special use permits
- Site plans
- Use or area variances

Within 500' of:
- Municipal boundary
- State/County park
- State/County highway
- County stream/drainage channel
- Farm operation in State Ag. District

Agreements on referrals

General Municipal Law §239 Referrals

- **"Full Statement"** – all materials required by referring body as an application including complete EAF, Part 1; all materials required by referring agency to make its determination of significance under SEQRA; and complete text of any proposed local laws/ordinances
- *Batavia First v. Town of Batavia*, 26 A.D.3d 840 (4th Dep't 2006) (referring agency required to provide only EAF, Part 1 to County)
- *Frigault v. Town of Richfield Planning Board*, 107 A.D.3d 1347 (3d Dep't 2013) (referring agency required to provide 10 days written notice of the public hearing to County)

General Municipal Law §239 Referrals

Re-Referral:

If there are substantial changes to a proposed action, the action must be re-referred to the county planning agency.

If the county planning agency recommends disapproval or modification, a supermajority vote of the referring board is required to override the agency's recommendation, and supporting reasons, which must be set forth expressly in writing, must be filed with the county planning agency.

County has 30 days to report recommendation.

General Municipal Law §239 Referrals

Miscellaneous:

If the project is within 500' of farm operation located in an Agricultural District, under Agriculture and Markets Law 305-a, an Agricultural Data Statement must be referred to the county planning agency as well.

Variance Standards

Use and Area Variance Local Laws Preempted

- Local laws and resolutions which purport to change or vary the use and area variance criteria set forth under NYS Town Law, Village Law and General City Law are null and void.
- Use and Area Variances must be decided upon the criteria set forth by state statute.

Cohen v. Bd of Appeals of Village of Saddle Rock, 100 N.Y.2d 395 (2003)

ZBA Re-Hearing

- A motion for the zoning board of appeals to hold a rehearing to review any order, decision or determination of the board not previously reheard may be made by any member of the board. A unanimous vote of all members of the board then present is required for such rehearing to occur.
- The same notice requirements apply as an original hearing.
- Upon a rehearing the ZBA can reverse, modify or annul its original decision by unanimous vote

NYS Town Law § 267-a(12), NYS Village Law § 7-712-a(12), NYS General City Law § 81-a(12)

ZBA Re-Hearing

- Rehearings typically occur based on new facts.

Ireland v. Zoning Bd. of Appeals of the Town of Queensbury, 195 A.D.2d 155, 159 (3d Dept. 1994). Court held that new facts are not necessary for ZBA to rehear the matter.

NYS Town Law § 267-b, NYS Village Law § 7-712-a(4), NYS General City Law § 81-a(4).

ZBA Jurisdiction

A Zoning Board's jurisdiction is appellate only.

The board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, interpretation or determination appealed from and shall make such order, requirement, decision, interpretation or determination as in its opinion ought to have been made in the matter by the administrative official charged with the enforcement of such ordinance or local law and to that end shall have all the powers of the administrative official from whose order, requirement, decision, interpretation or determination the appeal is taken.

NYS Town Law § 267-b, NYS Village Law § 7-712-a(4), NYS General City Law § 81-a(4)

Default Denial

In exercising its appellate jurisdiction only, if an affirmative vote of a majority of all members of the board is not attained on a motion or resolution to grant a variance or reverse any order, requirement, decision or determination of the enforcement official within sixty-two days after the public hearing, the appeal is denied.

NYS Town Law § 267-a(13)(b), NYS Village Law § 7-712-a(13)(b), NYS General City Law § 81-a(13)(b).

HOWEVER, the board may amend the failed motion or resolution and vote on the amended motion or resolution within the time allowed (usually 62 days after the public hearing) without being subject to the rehearing process as set forth in subdivision twelve of this section.

Tall Trees Construction Corp. v. Zoning Board of Appeals of the Town of Huntington, 97 N.Y.2d 86 (2001)

Agricultural Data Statements

Any application for a special use permit, site plan approval, use variance, or subdivision approval that would occur on property within an agricultural district containing a farm operation or on property with boundaries within five hundred feet of a farm operation located in an agricultural district, shall include an Agricultural Data Statement.

The board must mail written notice of such application to the owners of land as identified by the applicant in the Agricultural Data Statement. Such notice shall include a description of the proposed project and its location, and may be sent in conjunction with any other notice required by state or local law, ordinance, rule or regulation for the said project.

The Agricultural Data Statement and application must also be referred to the county planning agency as required under General Municipal Law § 239-m.

Agricultural Data Statements are not required for area variances.

NYS Agriculture and Markets Law § 305-a, NYS Town Law § 283-a and NYS Village Law § 7-739

Deference and Delegation

Ignoring Technical Consultant Reports

Van Euclid Co. v. Barr, 97 A.D.2d 913 (3d Dep't 1983). The Court annulled a planning board's denial of a subdivision application based upon traffic volume counts by residents which were unsupported by expert proof. The Court noted that the Board ignored a professionally prepared traffic study from the applicant which showed that the traffic impacts would be relatively minor.

SCI Funeral Services of New York, Inc. v. Planning Board of the Town of Babylon, 277 A.D.2d 319 (2d Dep't 2000). The Court annulled a board's denial of a site plan based upon traffic impacts. The Court noted that the board ignored overwhelming evidence, including two professional traffic studies, which showed that the funeral home would operate without any significant traffic impacts.

Delegating SEQRA review to Planning Consultants and Involved Agencies shall not be deferred by Lead Agency.

Consistency with Comprehensive Plan

Zoning regulations and laws must be consistent with the Comprehensive Plan.

NYS Town Law § 263, NYS Village Law § 7-723(11) and NYS General City Law § 28-a(12)

Administrative Boards Acting in a Legislative Capacity

- Administrative boards have only those powers delegated to them by legislative boards.
- Planning and Zoning Boards are constrained to administrative function and cannot exercise legislative authority.
- Example: Planning Board denies site plan because it doesn't like the zoning which allows the site plan.

Zoning Immunity

- Absolute Immunity From Local Zoning:
  - Federal Agencies, State Agencies
- Limited Immunity From Local Zoning:
  - Towns, Villages, Cities, Counties, Public Libraries, Fire Departments, Public Schools
- How to Determine Who is Immune:
  - County of Monroe v. City of Rochester, 72 N.Y.2d 338 (1988) (inter-governmental land use disputes are resolved using 9-factor balancing of public interest approach).

Zoning Immunity

Unless exempt by law, encroaching government is presumed to be subject to local zoning of host community.

Host community considers 9 factors to determine if encroaching government must comply with local zoning.

9-Factor Test applies to municipalities developing in their own jurisdiction or developing in another jurisdiction.

Zoning Immunity

9 Factor Test

1. Nature and scope of agency seeking immunity.
2. Encroaching government's legislative grant.
3. Kind of function or land use involved.
4. Effect of local zoning on the proposed project.
5. Alternate locations for the facility in less restrictive zoning districts.
6. Impact on legitimate local interests.
7. Alternate methods of providing the project.
8. Public interests to be served by the project
9. Inter-governmental participation in the project.

Who determines immunity?

How is immunity granted?

Statute of Limitations

5 Business Days to File, 30 Days to Sue

An Article 78 proceeding to review a site plan determination, special use permit approval, subdivision approval or variance must be commenced within 30 days after the decision is filed with Town Clerk.

Executive Sessions

NYS Open Meetings Law § 103

Every meeting of a public body shall be open to the general public, except for an executive session under Section 105 of the NYS Open Meetings Law.

Executive Sessions

NYS Open Meetings Law § 105
Executive Session can only be held if:

Majority vote of board to go into executive session:

- Vote to go into executive session must be taken in an open meeting
- Identify subject of executive session – proposed, pending or current litigation
- Cannot go into executive session to deliberate

Meeting Minutes

Boards frequently wait until minutes are "approved".

BUT, must be available within two weeks. There is no requirement to approve minutes.

Open Meeting Law §106:

1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.

3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Legislative Equivalency

- Local Laws amend Local Laws
- Ordinances amend Ordinances
- Resolutions amend Resolutions

Naftal Associates v. Town of Brookhaven, 221 A.D.2d 423 (2d Dept. 1995) (amendment to zoning law could not be completed by resolution).

Boards Have No Authority to Enforce Private Land Use Agreements

The New York State Court of Appeals has held:

"The use that may be made of land under a zoning ordinance and the use of the same land under an easement or restrictive covenant are, as a general rule, separate and distinct matters, the ordinance being a legislative enactment and the easement or covenant a matter of private agreement…Thus, a particular use of land may be enjoined as in violation of a restrictive covenant, although the use is permissible under the zoning ordinance…, and the issuance of a permit for a use allowed by a zoning ordinance may not be denied because the proposed use would be in violation of a restrictive covenant." Friends of Shawangunks v. Knowlton, 64 N.Y.2d 387 (1985)

Boards May Not Exceed the Authority Granted to Them

- Code requirements contain the limits of board authority.
- Boards may not usurp a legislative role: i.e. if code allows a particular use of dimensional requirement and a conforming application is submitted, more stringent requirements cannot be imposed.
- Boards are evaluating the applicant's compliance with the Code, not its business model.
- Cannot apply personal preferences where Code dictates otherwise.

Hours of Operation

Courts have held that municipalities are prohibited from using land use approvals/conditions to regulate internal operations of a business – including hours of operation – unless substantial evidence shows hours of operation impact surrounding neighborhood.

Limited exceptions:

Twin Town Little League, Inc. v. Town of Poestenkill, 249 A.D.2d 811 (3d Dept. 1998) (site plan conditions restricting hours of operation necessary to mitigate noise, traffic and lighting).

Milt-Nik Land Corp v. City of Yonkers, 24 A.D.3d 446 (2d Dept. 2005) (ZBA condition limiting pizzeria's hours of operation necessary to protect nearby residential property from traffic congestion, noise and parking problems).

Discrimination

Boards may not take into consideration the economic status of potential residents in a proposed project.

Codes must be applied even handedly.

Posting Agency Records on Website Before Meetings

Open Meetings Law § 103(e)

"Agency records available to the public pursuant to article six of this chapter, as well as any proposed resolution, law, rule, regulation, policy or any amendment thereto, that is scheduled to be the subject of discussion by a public body during an open meeting shall be made available, upon request therefor, to the extent practicable as determined by the agency or the department, prior to or at the meeting during which the records will be discussed. Copies of such records may be made available for a reasonable fee, determined in the same manner as provided therefor in article six of this chapter. If the agency in which a public body functions maintains a regularly and routinely updated website and utilizes a high speed internet connection, such records shall be posted on the website to the extent practicable as determined by the agency or the department, prior to the meeting. An agency may, but shall not be required to, expend additional moneys to implement the provisions of this subdivision."

Posting Agency Records on Website Before Meetings (cont'd.)

(1) If possible, records should be posted on website before board meetings for public review.

(2) Agency has broad discretion to determine if posting on website is practicable.

(3) Agency does not have to spend extra money to post records on website.

Training

As of 2007, Planning board and zoning board of appeals members are required by state statute to obtain four hours of training a year.

The governing body of each town, village, city or county determines what courses, training providers, and training formats are acceptable.

Training

Training hours in excess of four can be carried over.

Municipalities can adopt a requirement that exceeds the state requirements.

Municipalities may want to require board members to submit to the municipal clerk the attendance slips for each course they attend, or they may require board members to file annual statements of compliance. Individual members should track their attendance.

Training

If the requirement is not satisfied, the board member is not be eligible for reappointment. Municipal governing boards can also adopt a local law or ordinance that provides for removal of members, prior to the expiration of their terms, for failure to meet local training requirements. Removal should be preceded by a written notification of non-compliance and an offer of a hearing.

Comments or Questions?

Contact:

Dave Everett DEverett@woh.com
Rob Stout RStout@woh.com

Whiteman Osterman & Hanna LLP
One Commerce Plaza, Suite 1900
Albany, N.Y. 12260
518-487-7600
www.woh.com