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LAND USE LAW UPDATE

May 15, 2019

2018 SEQRA Amendments: Are they having an impact?

By: Jennifer L. Gray, Esq.

I. The Basics

a. Purpose: The purpose of the New York State Environmental Quality Review Act ("SEQRA") is to identify and consider environmental impacts of an action to determine whether actions must be modified to avoid or mitigate adverse environmental impacts. It is not the intent of SEQRA that environmental factors be the sole consideration in reviewing an action. Rather, SEQRA requires that environmental factors be balanced with social and economic considerations.

   i. An agency "need not investigate every conceivable environmental problem; it may within reasonable limits use its discretion in selecting which ones are relevant." *Save the Pine Bush, Inc. v. Common Council of the City of Albany,* 13 N.Y.3d 297 (2009).

   ii. A "rule of reason…is applicable…to its decisions about which matters require investigation." *Id.*

b. Key Documents and Resources:

   i. SEQRA Regulations – 6 NYCRR Part 617

   ii. SEQRA Handbook

   iii. Full Environmental Assessment Form (included in materials)

   iv. Short Environmental Assessment Form (included in materials)

   v. EAF Workbooks

   vi. SEQRA Cookbook

   vii. SEQRA Flowchart and Timeframes (included in materials)

viii. Documents related to 2018 Amendments - https://www.dec.ny.gov/permits/83389.html

1. Final Express Terms (included in materials)

2. Summary of Changes (included in materials)

c. Procedural Compliance: Strict compliance required.

d. Substantive Compliance: Courts will review a board's substantive SEQRA review to determine whether the board identified the relevant areas of environmental concern, took a "hard look" at those areas, and made a reasoned elaboration of the basis for its determination.

e. 7 Key Steps in SEQRA Review:

i. **STEP 1: Classify the Proposed Action.** SEQRA requires the action to be classified as Type I, Type II, or Unlisted. Type I actions are those that are specifically listed in the regulations as those that are more likely to require the preparation of an Environmental Impact Statement ("EIS"). Type II actions are those that are specifically identified as ineligible for environmental review because DEC has determined they will not have a significant adverse impact on the environment. If an action is classified as Type II, no environmental review is required and the SEQRA process concludes. Unlisted actions are literally just that - actions which are not listed in the regulations as Type I or Type II. When an agency classifies an action as Unlisted there is no presumption that the action will or will not require an EIS. Rather, the lead agency must review the relevant environmental considerations to determine whether or not the action will have a significant impact upon the environment.

ii. **STEP 2: Determine Lead Agency.** Once the action is classified as either Type I or Unlisted, it must be determined which board or agency will be the "Lead Agency." The Lead Agency is responsible for undertaking the environmental review of the project. The Lead Agency can be any agency that has jurisdiction to fund or approve part of the project. Alternatively, Unlisted applications may proceed with an uncoordinated review wherein each agency undertakes its own SEQRA review.

iii. **STEP 3: Determine Significance.** After the Lead Agency is established, the Lead Agency must determine whether the action includes the potential for at least one significant adverse environmental impact. If there are no potential adverse environmental impacts, the Lead Agency will adopt a "Negative Declaration." If there is the potential for a significant adverse environmental impact, the Lead Agency will adopt a "Positive Declaration" which triggers the requirement for the preparation of an EIS.

iv. **STEP 4: Scoping.** Scoping is the process of creating a written document that outlines all issues to be studied in the EIS. The purpose of scoping is to narrow the issues to be studied in the EIS to focus only on those that are potentially significant and eliminate consideration of impacts that are not irrelevant or insignificant.

Scoping begins when the applicant submits a draft scope for review. The Lead Agency then circulates the draft scope to all involved agencies (all other boards and agencies that have jurisdiction to fund or approve any part of the project) and solicits public comment either through a public hearing or submission of written comments. Within 60 days of the applicant's submission of the draft scope, the Lead Agency must approve a final scope, unless the 60-day period is extended by mutual consent. The final scope then becomes the basis on which the EIS is prepared by the applicant.

v. **STEP 5: Preparation of the Draft Environmental Impact Statement.** The applicant will prepare a DEIS which examines the nature and extent of all potentially significant adverse environmental impacts, as well as alternatives and mitigation measures to avoid or minimize such impacts. Within 45 days after submission of a DEIS, the Lead Agency must review it to determine whether it is complete. If it is complete, the Lead Agency will schedule a public hearing on the DEIS.

vi. **STEP 6: Preparation of the Final Environmental Impact Statement.** After the DEIS public hearing, the applicant will prepare an FEIS which responds to every substantive comment raised during the public hearing. The Lead Agency is responsible for the adequacy and accuracy of the FEIS, but more often than not the Lead Agency requires the applicant to prepare the FEIS. The Lead Agency must review the FEIS, particularly the responses to comments, to determine whether the responses accurately state the Lead Agency's position and assessment. No public hearing is required on an FEIS, although at least a 10-day written comment period is required.

vii. **STEP 7: Adoption of a Findings Statement.** Within 30 days after the FEIS is accepted by the Lead Agency as complete and adequate, the Lead Agency must adopt a Findings Statement. The Findings Statement is the culmination of environmental review. Generally, it must provide a rationale for the agency's decision and certify that the action 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 mitigation measures

II. 2018 SEQRA Amendments

a. Background. On June 28, 2018, NYS Department of Environmental Conservation (DEC) adopted amendments to SEQRA. The amendments had been under review by DEC for several years and are the first major amendments to SEQRA in more than 20 years. They became effective January 1, 2019 for any application for which a determination of significance had not been made by that date.

b. Type I List

i. Lowered numeric thresholds for new residential units that would trigger a Type I classification (Sections 617.4(b)(5)(iii)-(v)):

1. From 250 to 200 units (population of 150,000 or less)

2. From 1,000 to 500 units (population of 150,001 to 999,999)

3. From 2,500 to 1,000 units (population of 1,000,000 or greater)

ii. Amended rule added threshold for number of parking spaces that will trigger Type I classification in smaller communities (existing rule applied a threshold of 1,000 parking spaces regardless of the size of the community):

1. 500 or more parking spaces (population of 150,000 or less)

2. 1,000 or more parking spaces (population of 150,001 or more)

iii. Created threshold for when an Unlisted Action that is located "wholly or partially within or substantially contiguous to" an historic resource will become a Type I Action (Section 617.4(b)(9)):

1. Any Unlisted Action that exceeds 25% of any Type I threshold which is located wholly or partially within or substantially contiguous to an historic resource is elevated to a Type I Action.

iv. Added provision that historic resources determined to be *eligible* for inclusion on the State Register of Historic Sites are to be considered in the context of this category (existing rule required the resource to be already listed to receive special consideration) (Section 617.4(b)(9)):

1. Historic resources that contribute to triggering an elevated review status are: "any historic building, structure, facility, site or district or prehistoric site that is listed on the National Register of Historic Places…or that has been determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places…"

c. Type II List

i. Upgrading buildings to meet energy codes (existing rule included building and fire codes, but not energy codes) (Section 617.5(c)(2))

ii. Retrofit of an existing structure and its appurtenant areas to incorporate green infrastructure (Section 617.5(c)(3))

1. "Green infrastructure" is narrowly defined and limited to stormwater management:

"…practices that manage storm water through infiltration, evapo-transpiration and reuse including only the following: the use of permeable pavement; bio-retention; green roofs and green walls; tree pits and urban forestry; storm water planters; rain gardens; vegetated swales; downspout disconnection; or storm water harvesting and reuse." (Section 617.2)

iii. Installation of telecommunication cables in existing highway or utility rights of way utilizing trenchless burial or aerial placement on existing poles (Section 617.5(c)(7)).

1. Common trenchless burial methods include horizontal directional drilling, "jack and bores," and "impact moling."

iv. Conveyances of land in connection with a single-family, two-family or three-family residence on an approved lot (Section 617.5(c)(11)).

v. Installation of solar energy arrays where such installation involves 25 acres or less of physical alteration on certain categories of sites, such as closed landfills, brownfields sites, Superfund sites, disturbed areas at publically-owned wastewater treatment facilities, disturbed sites in industrial zoning districts, parking lots or garages (Section 617.5(c)(14)).

vi. Installation of solar energy arrays on an existing structure provided the structure is not historically sensitive as described in the regulations (Section 617.5(c)(15)).

vii. Lot line adjustments (Section 617.5(c)(16)).

1. This category is limited to adjustments of existing lot lines and does not include minor subdivisions such as a 2- or 3-lot subdivision where new lots are created.

viii. Reuse of a residential or commercial structure, or of a structure containing mixed residential and commercial uses, where the residential or commercial use is a permitted use under the applicable zoning law or ordinance,

including permitted by special use permit, and the action does not meet or exceeds any of the Type I thresholds (Section 617.5(c)(18)).

1. Intended to encourage reuse of vacant structures, but its applicability is not limited to structures that are vacant. This category includes projects involving a change of use provided the use is permitted in the applicable zoning district.

ix. County recommendations pursuant to General Municipal Law §239-m or 239-n (Section 617.5(c)(19)).

x. Acquisition and dedication of 25 acres or less of land for parkland, or dedication of land for parkland that was previously acquired, or acquisition of a conservation easement (Section 617.5(c)(39).

xi. Sale and conveyance of real property by public action pursuant to Article 11 of the Real Property Tax Law (in rem) (Section 617.5(c)(40).

xii. Construction and operation of an anaerobic digester, within currently disturbed areas at an operating publically-owned landfill, provided the digester has a feedstock capacity of less than 150 wet tons per day, and only produces Class A digestate…that can be beneficially used or biogas to generate electricity or to make vehicle fuel, or both (Section 617.5(c)(41)).

d. Procedural/Miscellaneous Amendments:

i. EIS Scoping

1. Scoping is now required for all Environmental Impact Statements, except for Supplemental EISs (under existing rule scoping was discretionary) (Section 617.8(a))

a. A Scoping Document is intended to outline the topics and analyses of potential environmental impacts of a Proposed Action that will be addressed in a draft environmental impact statement (DEIS). The Scope should include the level of detail, method and extent of the studies that will be conduced for the DEIS. It will also include a range of alternatives to be studied.

b. The purpose of scoping is to narrow issues so the DEIS will be a concise, accurate, and complete document that is adequate for public review. The scoping process is intended to ensure public participation in the EIS development process, allow open discussion of issues of public concern, and permit

inclusion of relevant, substantive public issues in the final written Scope.

2. New process for late-filed comments on the Scope: Comments on the Scope that are submitted after the issuance of the final written Scope, which identify the nature of the information, the importance and relevance of the information to a potential significant impact, and the reason why the information was not identified during the scoping process and why it should be included at this later stage of review, must be incorporated into the DEIS or attached in an appendix of the DEIS (existing rule made consideration of such late-filed comments discretionary by the project sponsor) (Sections 617.8(f) and (g)).

ii. DEIS Completeness Review

1. A DEIS is adequate with respect to scope and content for the purpose of commencing public review if it meets the requirements of the final written scope, Sections 617.8(g) and 617.9(b), and provides the public and involved agencies with the necessary information to evaluate project impacts, alternatives, and mitigation measures (Section 617.9(a)(2)).

    a. This section is intended to clarify the point at which a Lead Agency should deem a DEIS complete and adequate to commence the public review process. NYSDEC stressed its in rulemaking documents that if the project sponsor produces a DEIS that is consistent with the scope it should be presumed the DEIS is adequate for public review. Here, NYSDEC intended to balance the goals of expediting SEQRA proceedings while also insuring all relevant, significant issues are examined.

2. The determination of adequacy of a resubmitted DEIS must be based solely on the written list of deficiencies provided by the lead agency following the previous review, unless changes are proposed for the project, there is newly discovered information, or there is a change in circumstances related to the project (Section 617.9(a)(2)(ii)).

    a. This section is intended to discourage a Lead Agency from moving the goal post during completeness review and encourage an efficient and fair SEQRA review process.

iii. DEIS Content

1. Added a requirement that a DEIS include, where relevant, the following: measures to avoid or reduce both an action's impacts on climate change and associated impacts due to the effects of climate change such as sea level rise and flooding (Section 617.9(b)(5)(iv)).

    a. Where relevant to the proposed action, the DEIS must now include a discussion on the impacts of the action on climate change, and also the effect that climate change may have on the proposed action.

iv. Notices and Publication

1. Added a requirement for notice of Type I draft and final scopes to be published in the NYSDEC Environmental Notice Bulletin (existing rule was limited to notices of a Type I negative declaration, conditioned negative declaration, positive declaration and completion of an EIS) (Section 617.12(c)(1)).

2. Added a requirement for the publication of the draft and final scopes and the draft and final EIS on a publicly accessible website that is free of charge. One year after all federal, state and local permits have been issued or after the action has been funded or undertaken, whichever is later, the website can be discontinued. Printed filings and notices must indicate the website address where the filing is posted. (note: publication of EIS on website was already a statutory requirement) (Section 617.12(c)(5)).

v. SEQRA Fees

1. Clarification that project sponsor may request an estimate of the costs for either preparing or reviewing the DEIS. The applicant may also request copies of invoices for work prepared by a consultant in connection with services rendered in preparing or reviewing an EIS. (Section 617.13(e)).

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APPENDIX

Full Environmental Assessment Form
Part 1 - Project and Setting

Instructions for Completing Part 1

Part 1 is to be completed by the applicant or project sponsor. Responses become part of the application for approval or funding, are subject to public review, and may be subject to further verification.

Complete Part 1 based on information currently available. If additional research or investigation would be needed to fully respond to any item, please answer as thoroughly as possible based on current information; indicate whether missing information does not exist, or is not reasonably available to the sponsor; and, when possible, generally describe work or studies which would be necessary to update or fully develop that information.

Applicants/sponsors must complete all items in Sections A & B. In Sections C, D & E, most items contain an initial question that must be answered either "Yes" or "No". If the answer to the initial question is "Yes", complete the sub-questions that follow. If the answer to the initial question is "No", proceed to the next question. Section F allows the project sponsor to identify and attach any additional information. Section G requires the name and signature of the applicant or project sponsor to verify that the information contained in Part 1is accurate and complete.

A. Project and Applicant/Sponsor Information.

Name of Action or Project:		
Project Location (describe, and attach a general location map):		
Brief Description of Proposed Action (include purpose or need):		
Name of Applicant/Sponsor:	Telephone:	
	E-Mail:	
Address:		
City/PO:	State:	Zip Code:
Project Contact (if not same as sponsor; give name and title/role):	Telephone:	
	E-Mail:	
Address:		
City/PO:	State:	Zip Code:
Property Owner (if not same as sponsor):	Telephone:	
	E-Mail:	
Address:		
City/PO:	State:	Zip Code:

B. Government Approvals

B. Government Approvals, Funding, or Sponsorship. ("Funding" includes grants, loans, tax relief, and any other forms of financial assistance.)

Government Entity	If Yes: Identify Agency and Approval(s) Required	Application Date (Actual or projected)
a. City Counsel, Town Board, or Village Board of Trustees ☐ Yes ☐ No		
b. City, Town or Village Planning Board or Commission ☐ Yes ☐ No		
c. City, Town or Village Zoning Board of Appeals ☐ Yes ☐ No		
d. Other local agencies ☐ Yes ☐ No		
e. County agencies ☐ Yes ☐ No		
f. Regional agencies ☐ Yes ☐ No		
g. State agencies ☐ Yes ☐ No		
h. Federal agencies ☐ Yes ☐ No		

i. Coastal Resources.

i. Is the project site within a Coastal Area, or the waterfront area of a Designated Inland Waterway? ☐ Yes ☐ No

ii. Is the project site located in a community with an approved Local Waterfront Revitalization Program? ☐ Yes ☐ No

iii. Is the project site within a Coastal Erosion Hazard Area? ☐ Yes ☐ No

C. Planning and Zoning

C.1. Planning and zoning actions.

Will administrative or legislative adoption, or amendment of a plan, local law, ordinance, rule or regulation be the only approval(s) which must be granted to enable the proposed action to proceed? ☐ Yes ☐ No

- **If Yes,** complete sections C, F and G.
- **If No,** proceed to question C.2 and complete all remaining sections and questions in Part 1

C.2. Adopted land use plans.

a. Do any municipally- adopted (city, town, village or county) comprehensive land use plan(s) include the site where the proposed action would be located? ☐ Yes ☐ No

If Yes, does the comprehensive plan include specific recommendations for the site where the proposed action would be located? ☐ Yes ☐ No

b. Is the site of the proposed action within any local or regional special planning district (for example: Greenway; Brownfield Opportunity Area (BOA); designated State or Federal heritage area; watershed management plan; or other?) ☐ Yes ☐ No

If Yes, identify the plan(s):

_____

_____

_____

c. Is the proposed action located wholly or partially within an area listed in an adopted municipal open space plan, or an adopted municipal farmland protection plan? ☐ Yes ☐ No

If Yes, identify the plan(s):

_____

_____

_____

C.3. Zoning

a. Is the site of the proposed action located in a municipality with an adopted zoning law or ordinance. ☐ Yes ☐ No
If Yes, what is the zoning classification(s) including any applicable overlay district?

_____
_____

b. Is the use permitted or allowed by a special or conditional use permit? ☐ Yes ☐ No

c. Is a zoning change requested as part of the proposed action? ☐ Yes ☐ No
If Yes,
i. What is the proposed new zoning for the site? _____

C.4. Existing community services.

a. In what school district is the project site located? _____

b. What police or other public protection forces serve the project site?

_____

c. Which fire protection and emergency medical services serve the project site?

_____

d. What parks serve the project site?

_____
_____

D. Project Details

D.1. Proposed and Potential Development

a. What is the general nature of the proposed action (e.g., residential, industrial, commercial, recreational; if mixed, include all components)?

_____

b. a. Total acreage of the site of the proposed action? _____ acres
b. Total acreage to be physically disturbed? _____ acres
c. Total acreage (project site and any contiguous properties) owned or controlled by the applicant or project sponsor? _____ acres

c. Is the proposed action an expansion of an existing project or use? ☐ Yes ☐ No
i. If Yes, what is the approximate percentage of the proposed expansion and identify the units (e.g., acres, miles, housing units, square feet)? % _____ Units: _____

d. Is the proposed action a subdivision, or does it include a subdivision? ☐ Yes ☐ No
If Yes,
i. Purpose or type of subdivision? (e.g., residential, industrial, commercial; if mixed, specify types)

_____
ii. Is a cluster/conservation layout proposed? ☐ Yes ☐ No
iii. Number of lots proposed? _____
iv. Minimum and maximum proposed lot sizes? Minimum _____ Maximum _____

e. Will the proposed action be constructed in multiple phases? ☐ Yes ☐ No
i. If No, anticipated period of construction: _____ months
ii. If Yes:
- Total number of phases anticipated _____
- Anticipated commencement date of phase 1 (including demolition) _____ month _____ year
- Anticipated completion date of final phase _____ month _____year
- Generally describe connections or relationships among phases, including any contingencies where progress of one phase may determine timing or duration of future phases: _____

_____
_____

f. Does the project include new residential uses? ☐ Yes ☐ No
If Yes, show numbers of units proposed.

	One Family	Two Family	Three Family	Multiple Family (four or more)
Initial Phase	_____	_____	_____	_____
At completion of all phases	_____	_____	_____	_____

g. Does the proposed action include new non-residential construction (including expansions)? ☐ Yes ☐ No
If Yes,
i. Total number of structures _____
ii. Dimensions (in feet) of largest proposed structure: _____height; _____width; and _____ length
iii. Approximate extent of building space to be heated or cooled: _____ square feet

h. Does the proposed action include construction or other activities that will result in the impoundment of any liquids, such as creation of a water supply, reservoir, pond, lake, waste lagoon or other storage? ☐ Yes ☐ No
If Yes,
i. Purpose of the impoundment: _____
ii. If a water impoundment, the principal source of the water: ☐ Ground water ☐ Surface water streams ☐ Other specify:
_____
iii. If other than water, identify the type of impounded/contained liquids and their source.
_____
iv. Approximate size of the proposed impoundment. Volume: _____ million gallons; surface area: _____ acres
v. Dimensions of the proposed dam or impounding structure: _____ height; _____ length
vi. Construction method/materials for the proposed dam or impounding structure (e.g., earth fill, rock, wood, concrete):
_____

D.2. Project Operations

a. Does the proposed action include any excavation, mining, or dredging, during construction, operations, or both? (Not including general site preparation, grading or installation of utilities or foundations where all excavated materials will remain onsite) ☐ Yes ☐ No
If Yes:
i .What is the purpose of the excavation or dredging? _____
ii. How much material (including rock, earth, sediments, etc.) is proposed to be removed from the site?
- Volume (specify tons or cubic yards): _____
- Over what duration of time? _____

iii. Describe nature and characteristics of materials to be excavated or dredged, and plans to use, manage or dispose of them.
_____
_____
i*v.* Will there be onsite dewatering or processing of excavated materials? ☐ Yes ☐ No
If yes, describe. _____
_____
v. What is the total area to be dredged or excavated? _____acres
vi. What is the maximum area to be worked at any one time? _____ acres
vii. What would be the maximum depth of excavation or dredging? _____ feet
viii. Will the excavation require blasting? ☐ Yes ☐ No
ix. Summarize site reclamation goals and plan: _____
_____
_____

b. Would the proposed action cause or result in alteration of, increase or decrease in size of, or encroachment into any existing wetland, waterbody, shoreline, beach or adjacent area? ☐ Yes ☐ No
If Yes:
i. Identify the wetland or waterbody which would be affected (by name, water index number, wetland map number or geographic description): _____
_____

ii. Describe how the proposed action would affect that waterbody or wetland, e.g. excavation, fill, placement of structures, or alteration of channels, banks and shorelines. Indicate extent of activities, alterations and additions in square feet or acres:

_____

_____

_____

_____

iii. Will the proposed action cause or result in disturbance to bottom sediments? Yes ☐ No

If Yes, describe: _____

iv. Will the proposed action cause or result in the destruction or removal of aquatic vegetation? ☐ Yes ☐ No

If Yes:

- acres of aquatic vegetation proposed to be removed: _____
- expected acreage of aquatic vegetation remaining after project completion:_____
- purpose of proposed removal (e.g. beach clearing, invasive species control, boat access): _____

_____

- proposed method of plant removal: _____
- if chemical/herbicide treatment will be used, specify product(s): _____

v. Describe any proposed reclamation/mitigation following disturbance: _____

_____

c. Will the proposed action use, or create a new demand for water? ☐ Yes ☐ No

If Yes:

i. Total anticipated water usage/demand per day: _____ gallons/day

ii. Will the proposed action obtain water from an existing public water supply? ☐ Yes ☐ No

If Yes:

- Name of district or service area: _____
- Does the existing public water supply have capacity to serve the proposal? ☐ Yes ☐ No
- Is the project site in the existing district? ☐ Yes ☐ No
- Is expansion of the district needed? ☐ Yes ☐ No
- Do existing lines serve the project site? ☐ Yes ☐ No

iii. Will line extension within an existing district be necessary to supply the project? ☐ Yes ☐ No

If Yes:

- Describe extensions or capacity expansions proposed to serve this project: _____

_____

- Source(s) of supply for the district: _____

iv. Is a new water supply district or service area proposed to be formed to serve the project site? ☐ Yes ☐ No

If, Yes:

- Applicant/sponsor for new district: _____
- Date application submitted or anticipated: _____
- Proposed source(s) of supply for new district: _____

v. If a public water supply will not be used, describe plans to provide water supply for the project: _____

_____

vi. If water supply will be from wells (public or private), what is the maximum pumping capacity: _____ gallons/minute.

d. Will the proposed action generate liquid wastes? ☐ Yes ☐ No

If Yes:

i. Total anticipated liquid waste generation per day: _____ gallons/day

ii. Nature of liquid wastes to be generated (e.g., sanitary wastewater, industrial; if combination, describe all components and approximate volumes or proportions of each): _____

_____

_____

iii. Will the proposed action use any existing public wastewater treatment facilities? ☐ Yes ☐ No

If Yes:

- Name of wastewater treatment plant to be used: _____
- Name of district: _____
- Does the existing wastewater treatment plant have capacity to serve the project? ☐ Yes ☐ No
- Is the project site in the existing district? ☐ Yes ☐ No
- Is expansion of the district needed? ☐ Yes ☐ No

- Do existing sewer lines serve the project site? ☐ Yes ☐ No
- Will a line extension within an existing district be necessary to serve the project? ☐ Yes ☐ No

  If Yes:
  - Describe extensions or capacity expansions proposed to serve this project: _____

  _____

  _____

iv. Will a new wastewater (sewage) treatment district be formed to serve the project site? ☐ Yes ☐ No

If Yes:
- Applicant/sponsor for new district: _____
- Date application submitted or anticipated: _____
- What is the receiving water for the wastewater discharge? _____

v. If public facilities will not be used, describe plans to provide wastewater treatment for the project, including specifying proposed receiving water (name and classification if surface discharge or describe subsurface disposal plans):

_____

_____

vi. Describe any plans or designs to capture, recycle or reuse liquid waste: _____

_____

_____

e. Will the proposed action disturb more than one acre and create stormwater runoff, either from new point sources (i.e. ditches, pipes, swales, curbs, gutters or other concentrated flows of stormwater) or non-point source (i.e. sheet flow) during construction or post construction? ☐ Yes ☐ No

If Yes:

i. How much impervious surface will the project create in relation to total size of project parcel?

_____ Square feet or _____ acres (impervious surface)

_____ Square feet or _____ acres (parcel size)

ii. Describe types of new point sources. _____

_____

iii. Where will the stormwater runoff be directed (i.e. on-site stormwater management facility/structures, adjacent properties, groundwater, on-site surface water or off-site surface waters)?

_____

_____

- If to surface waters, identify receiving water bodies or wetlands: _____

  _____

  _____
- Will stormwater runoff flow to adjacent properties? ☐ Yes ☐ No

iv. Does the proposed plan minimize impervious surfaces, use pervious materials or collect and re-use stormwater? ☐ Yes ☐ No

f. Does the proposed action include, or will it use on-site, one or more sources of air emissions, including fuel combustion, waste incineration, or other processes or operations? ☐ Yes ☐ No

If Yes, identify:

i. Mobile sources during project operations (e.g., heavy equipment, fleet or delivery vehicles)

_____

ii. Stationary sources during construction (e.g., power generation, structural heating, batch plant, crushers)

_____

iii. Stationary sources during operations (e.g., process emissions, large boilers, electric generation)

_____

g. Will any air emission sources named in D.2.f (above), require a NY State Air Registration, Air Facility Permit, or Federal Clean Air Act Title IV or Title V Permit? ☐ Yes ☐ No

If Yes:

i. Is the project site located in an Air quality non-attainment area? (Area routinely or periodically fails to meet ambient air quality standards for all or some parts of the year) ☐ Yes ☐ No

ii. In addition to emissions as calculated in the application, the project will generate:
- _____Tons/year (short tons) of Carbon Dioxide (CO_2)
- _____Tons/year (short tons) of Nitrous Oxide (N_2O)
- _____Tons/year (short tons) of Perfluorocarbons (PFCs)
- _____Tons/year (short tons) of Sulfur Hexafluoride (SF_6)
- _____Tons/year (short tons) of Carbon Dioxide equivalent of Hydroflourocarbons (HFCs)
- _____Tons/year (short tons) of Hazardous Air Pollutants (HAPs)

h. Will the proposed action generate or emit methane (including, but not limited to, sewage treatment plants, landfills, composting facilities)? ☐ Yes ☐ No

If Yes:

i. Estimate methane generation in tons/year (metric): _____

ii. Describe any methane capture, control or elimination measures included in project design (e.g., combustion to generate heat or electricity, flaring): _____

_____

i. Will the proposed action result in the release of air pollutants from open-air operations or processes, such as quarry or landfill operations? ☐ Yes ☐ No

If Yes: Describe operations and nature of emissions (e.g., diesel exhaust, rock particulates/dust):

_____

_____

j. Will the proposed action result in a substantial increase in traffic above present levels or generate substantial new demand for transportation facilities or services? ☐ Yes ☐ No

If Yes:

i. When is the peak traffic expected (Check all that apply): ☐ Morning ☐ Evening ☐Weekend

☐ Randomly between hours of _____ to _____.

ii. For commercial activities only, projected number of truck trips/day and type (e.g., semi trailers and dump trucks): _____

_____

iii. Parking spaces: Existing _____ Proposed _____ Net increase/decrease _____

iv. Does the proposed action include any shared use parking? Yes No

v. If the proposed action includes any modification of existing roads, creation of new roads or change in existing access, describe:

_____

vi. Are public/private transportation service(s) or facilities available within ½ mile of the proposed site? ☐ Yes ☐ No

vii Will the proposed action include access to public transportation or accommodations for use of hybrid, electric or other alternative fueled vehicles? ☐ Yes ☐ No

viii. Will the proposed action include plans for pedestrian or bicycle accommodations for connections to existing pedestrian or bicycle routes? ☐ Yes ☐ No

k. Will the proposed action (for commercial or industrial projects only) generate new or additional demand for energy? ☐ Yes ☐ No

If Yes:

i. Estimate annual electricity demand during operation of the proposed action: _____

_____

ii. Anticipated sources/suppliers of electricity for the project (e.g., on-site combustion, on-site renewable, via grid/local utility, or other):

_____

iii. Will the proposed action require a new, or an upgrade, to an existing substation? ☐ Yes ☐ No

l. Hours of operation. Answer all items which apply.

i. During Construction:

- Monday - Friday: _____
- Saturday: _____
- Sunday: _____
- Holidays: _____

ii. During Operations:

- Monday - Friday: _____
- Saturday: _____
- Sunday: _____
- Holidays: _____

m. Will the proposed action produce noise that will exceed existing ambient noise levels during construction, operation, or both? ☐ Yes ☐ No

If yes:

i. Provide details including sources, time of day and duration:

_____

_____

ii. Will the proposed action remove existing natural barriers that could act as a noise barrier or screen? ☐ Yes ☐ No

Describe: _____

_____

n. Will the proposed action have outdoor lighting? ☐ Yes ☐ No

If yes:

i. Describe source(s), location(s), height of fixture(s), direction/aim, and proximity to nearest occupied structures:

_____

_____

ii. Will proposed action remove existing natural barriers that could act as a light barrier or screen? ☐ Yes ☐ No

Describe: _____

_____

o. Does the proposed action have the potential to produce odors for more than one hour per day? ☐ Yes ☐ No

If Yes, describe possible sources, potential frequency and duration of odor emissions, and proximity to nearest occupied structures: _____

_____

_____

p. Will the proposed action include any bulk storage of petroleum (combined capacity of over 1,100 gallons) or chemical products 185 gallons in above ground storage or any amount in underground storage? ☐ Yes ☐ No

If Yes:

i. Product(s) to be stored _____

ii. Volume(s) _____ per unit time _____ (e.g., month, year)

iii. Generally, describe the proposed storage facilities:_____

_____

q. Will the proposed action (commercial, industrial and recreational projects only) use pesticides (i.e., herbicides, insecticides) during construction or operation? ☐ Yes ☐ No

If Yes:

i. Describe proposed treatment(s):

_____

_____

_____

_____

ii. Will the proposed action use Integrated Pest Management Practices? ☐ Yes ☐ No

r. Will the proposed action (commercial or industrial projects only) involve or require the management or disposal of solid waste (excluding hazardous materials)? ☐ Yes ☐ No

If Yes:

i. Describe any solid waste(s) to be generated during construction or operation of the facility:

- Construction: _____ tons per _____ (unit of time)
- Operation : _____ tons per _____ (unit of time)

ii. Describe any proposals for on-site minimization, recycling or reuse of materials to avoid disposal as solid waste:

- Construction: _____

  _____
- Operation: _____

  _____

iii. Proposed disposal methods/facilities for solid waste generated on-site:

- Construction: _____

  _____
- Operation: _____

  _____

s. Does the proposed action include construction or modification of a solid waste management facility? ☐ Yes ☐ No

If Yes:

i. Type of management or handling of waste proposed for the site (e.g., recycling or transfer station, composting, landfill, or other disposal activities): _____

ii. Anticipated rate of disposal/processing:

- _____ Tons/month, if transfer or other non-combustion/thermal treatment, or
- _____ Tons/hour, if combustion or thermal treatment

iii. If landfill, anticipated site life: _____ years

t. Will the proposed action at the site involve the commercial generation, treatment, storage, or disposal of hazardous waste? ☐ Yes ☐ No

If Yes:

i. Name(s) of all hazardous wastes or constituents to be generated, handled or managed at facility: _____

_____

_____

ii. Generally describe processes or activities involving hazardous wastes or constituents: _____

_____

_____

iii. Specify amount to be handled or generated _____ tons/month

iv. Describe any proposals for on-site minimization, recycling or reuse of hazardous constituents: _____

_____

_____

v. Will any hazardous wastes be disposed at an existing offsite hazardous waste facility? ☐ Yes ☐ No

If Yes: provide name and location of facility: _____

_____

If No: describe proposed management of any hazardous wastes which will not be sent to a hazardous waste facility:

_____

_____

E. Site and Setting of Proposed Action

E.1. Land uses on and surrounding the project site

a. Existing land uses.

i. Check all uses that occur on, adjoining and near the project site.

☐ Urban ☐ Industrial ☐ Commercial ☐ Residential (suburban) ☐ Rural (non-farm)

☐ Forest ☐ Agriculture ☐ Aquatic ☐ Other (specify): _____

ii. If mix of uses, generally describe:

_____

_____

b. Land uses and covertypes on the project site.

Land use or Covertype	Current Acreage	Acreage After Project Completion	Change (Acres +/-)
• Roads, buildings, and other paved or impervious surfaces			
• Forested			
• Meadows, grasslands or brushlands (non-agricultural, including abandoned agricultural)			
• Agricultural (includes active orchards, field, greenhouse etc.)			
• Surface water features (lakes, ponds, streams, rivers, etc.)			
• Wetlands (freshwater or tidal)			
• Non-vegetated (bare rock, earth or fill)			
• Other Describe: _____ _____			

c. Is the project site presently used by members of the community for public recreation? ☐ Yes ☐ No

i. If Yes: explain: _____

d. Are there any facilities serving children, the elderly, people with disabilities (e.g., schools, hospitals, licensed day care centers, or group homes) within 1500 feet of the project site? ☐ Yes ☐ No

If Yes,

i. Identify Facilities:

_____

_____

e. Does the project site contain an existing dam? ☐ Yes ☐ No

If Yes:

i. Dimensions of the dam and impoundment:

- Dam height: _____ feet
- Dam length: _____ feet
- Surface area: _____ acres
- Volume impounded: _____ gallons OR acre-feet

ii. Dam's existing hazard classification: _____

iii. Provide date and summarize results of last inspection:

_____

_____

f. Has the project site ever been used as a municipal, commercial or industrial solid waste management facility, or does the project site adjoin property which is now, or was at one time, used as a solid waste management facility? ☐ Yes ☐ No

If Yes:

i. Has the facility been formally closed? ☐ Yes ☐ No

- If yes, cite sources/documentation: _____

ii. Describe the location of the project site relative to the boundaries of the solid waste management facility:

_____

_____

iii. Describe any development constraints due to the prior solid waste activities: _____

_____

g. Have hazardous wastes been generated, treated and/or disposed of at the site, or does the project site adjoin property which is now or was at one time used to commercially treat, store and/or dispose of hazardous waste? ☐ Yes ☐ No

If Yes:

i. Describe waste(s) handled and waste management activities, including approximate time when activities occurred:

_____

_____

h. Potential contamination history. Has there been a reported spill at the proposed project site, or have any remedial actions been conducted at or adjacent to the proposed site? ☐ Yes ☐ No

If Yes:

i. Is any portion of the site listed on the NYSDEC Spills Incidents database or Environmental Site Remediation database? Check all that apply: ☐ Yes ☐ No

☐ Yes – Spills Incidents database Provide DEC ID number(s): _____

☐ Yes – Environmental Site Remediation database Provide DEC ID number(s): _____

☐ Neither database

ii. If site has been subject of RCRA corrective activities, describe control measures:_____

_____

_____

iii. Is the project within 2000 feet of any site in the NYSDEC Environmental Site Remediation database? ☐ Yes ☐ No

If yes, provide DEC ID number(s): _____

iv. If yes to (i), (ii) or (iii) above, describe current status of site(s):

_____

_____

v. Is the project site subject to an institutional control limiting property uses? ☐ Yes ☐ No

- If yes, DEC site ID number: _____
- Describe the type of institutional control (e.g., deed restriction or easement): _____
- Describe any use limitations: _____
- Describe any engineering controls: _____
- Will the project affect the institutional or engineering controls in place? ☐ Yes ☐ No
- Explain: _____

E.2. Natural Resources On or Near Project Site

a. What is the average depth to bedrock on the project site? _____ feet

b. Are there bedrock outcroppings on the project site? ☐ Yes ☐ No
If Yes, what proportion of the site is comprised of bedrock outcroppings? _____%

c. Predominant soil type(s) present on project site: _____ _____%
_____ _____%
_____ _____%

d. What is the average depth to the water table on the project site? Average: _____ feet

e. Drainage status of project site soils: ☐ Well Drained: _____% of site
☐ Moderately Well Drained: _____% of site
☐ Poorly Drained _____% of site

f. Approximate proportion of proposed action site with slopes: ☐ 0-10%: _____% of site
☐ 10-15%: _____% of site
☐ 15% or greater: _____% of site

g. Are there any unique geologic features on the project site? ☐ Yes ☐ No
If Yes, describe: _____

h. Surface water features.

i. Does any portion of the project site contain wetlands or other waterbodies (including streams, rivers, ponds or lakes)? ☐ Yes ☐ No

ii. Do any wetlands or other waterbodies adjoin the project site? ☐ Yes ☐ No

If Yes to either *i* or *ii*, continue. If No, skip to E.2.i.

iii. Are any of the wetlands or waterbodies within or adjoining the project site regulated by any federal, state or local agency? ☐ Yes ☐ No

iv. For each identified regulated wetland and waterbody on the project site, provide the following information:

- Streams: Name _____ Classification _____
- Lakes or Ponds: Name _____ Classification _____
- Wetlands: Name _____ Approximate Size _____
- Wetland No. (if regulated by DEC) _____

v. Are any of the above water bodies listed in the most recent compilation of NYS water quality-impaired waterbodies? ☐ Yes ☐ No

If yes, name of impaired water body/bodies and basis for listing as impaired: _____

i. Is the project site in a designated Floodway? ☐ Yes ☐ No

j. Is the project site in the 100-year Floodplain? ☐ Yes ☐ No

k. Is the project site in the 500-year Floodplain? ☐ Yes ☐ No

l. Is the project site located over, or immediately adjoining, a primary, principal or sole source aquifer? ☐ Yes ☐ No
If Yes:

i. Name of aquifer: _____

m. Identify the predominant wildlife species that occupy or use the project site: _____

_____ _____ _____

_____ _____ _____

n. Does the project site contain a designated significant natural community? ☐ Yes ☐ No

If Yes:

i. Describe the habitat/community (composition, function, and basis for designation): _____

_____

ii. Source(s) of description or evaluation: _____

iii. Extent of community/habitat:

- Currently: _____ acres
- Following completion of project as proposed: _____ acres
- Gain or loss (indicate + or -): _____ acres

o. Does project site contain any species of plant or animal that is listed by the federal government or NYS as endangered or threatened, or does it contain any areas identified as habitat for an endangered or threatened species? ☐ Yes ☐ No

If Yes:

i. Species and listing (endangered or threatened):_____

_____

_____

p. Does the project site contain any species of plant or animal that is listed by NYS as rare, or as a species of special concern? ☐ Yes ☐ No

If Yes:

i. Species and listing:_____

_____

q. Is the project site or adjoining area currently used for hunting, trapping, fishing or shell fishing? ☐ Yes ☐ No

If yes, give a brief description of how the proposed action may affect that use: _____

_____

E.3. Designated Public Resources On or Near Project Site

a. Is the project site, or any portion of it, located in a designated agricultural district certified pursuant to Agriculture and Markets Law, Article 25-AA, Section 303 and 304? ☐ Yes ☐ No

If Yes, provide county plus district name/number: _____

b. Are agricultural lands consisting of highly productive soils present? ☐ Yes ☐ No

i. If Yes: acreage(s) on project site? _____

ii. Source(s) of soil rating(s): _____

c. Does the project site contain all or part of, or is it substantially contiguous to, a registered National Natural Landmark? ☐ Yes ☐ No

If Yes:

i. Nature of the natural landmark: ☐ Biological Community ☐ Geological Feature

ii. Provide brief description of landmark, including values behind designation and approximate size/extent: _____

_____

_____

d. Is the project site located in or does it adjoin a state listed Critical Environmental Area? ☐ Yes ☐ No

If Yes:

i. CEA name: _____

ii. Basis for designation: _____

iii. Designating agency and date: _____

e. Does the project site contain, or is it substantially contiguous to, a building, archaeological site, or district which is listed on the National or State Register of Historic Places, or that has been determined by the Commissioner of the NYS Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places? ☐ Yes ☐ No

If Yes:

i. Nature of historic/archaeological resource: ☐ Archaeological Site ☐ Historic Building or District

ii. Name: _____

iii. Brief description of attributes on which listing is based:

_____

f. Is the project site, or any portion of it, located in or adjacent to an area designated as sensitive for archaeological sites on the NY State Historic Preservation Office (SHPO) archaeological site inventory? ☐ Yes ☐ No

g. Have additional archaeological or historic site(s) or resources been identified on the project site? ☐ Yes ☐ No

If Yes:

i. Describe possible resource(s): _____

ii. Basis for identification: _____

h. Is the project site within fives miles of any officially designated and publicly accessible federal, state, or local scenic or aesthetic resource? ☐ Yes ☐ No

If Yes:

i. Identify resource: _____

ii. Nature of, or basis for, designation (e.g., established highway overlook, state or local park, state historic trail or scenic byway, etc.): _____

iii. Distance between project and resource: _____ miles.

i. Is the project site located within a designated river corridor under the Wild, Scenic and Recreational Rivers Program 6 NYCRR 666? ☐ Yes ☐ No

If Yes:

i. Identify the name of the river and its designation: _____

ii. Is the activity consistent with development restrictions contained in 6NYCRR Part 666? ☐ Yes ☐ No

F. Additional Information

Attach any additional information which may be needed to clarify your project.

If you have identified any adverse impacts which could be associated with your proposal, please describe those impacts plus any measures which you propose to avoid or minimize them.

G. Verification

I certify that the information provided is true to the best of my knowledge.

Applicant/Sponsor Name _____ Date_____

Signature_____ Title_____

Full Environmental Assessment Form
Part 2 - Identification of Potential Project Impacts

Project :
Date :

Part 2 is to be completed by the lead agency. Part 2 is designed to help the lead agency inventory all potential resources that could be affected by a proposed project or action. We recognize that the lead agency's reviewer(s) will not necessarily be environmental professionals. So, the questions are designed to walk a reviewer through the assessment process by providing a series of questions that can be answered using the information found in Part 1. To further assist the lead agency in completing Part 2, the form identifies the most relevant questions in Part 1 that will provide the information needed to answer the Part 2 question. When Part 2 is completed, the lead agency will have identified the relevant environmental areas that may be impacted by the proposed activity.

If the lead agency is a state agency **and** the action is in any Coastal Area, complete the Coastal Assessment Form before proceeding with this assessment.

Tips for completing Part 2:

- Review all of the information provided in Part 1.
- Review any application, maps, supporting materials and the Full EAF Workbook.
- Answer each of the 18 questions in Part 2.
- If you answer "**Yes"** to a numbered question, please complete all the questions that follow in that section.
- If you answer "**No"** to a numbered question, move on to the next numbered question.
- Check appropriate column to indicate the anticipated size of the impact.
- Proposed projects that would exceed a numeric threshold contained in a question should result in the reviewing agency checking the box "Moderate to large impact may occur."
- The reviewer is not expected to be an expert in environmental analysis.
- If you are not sure or undecided about the size of an impact, it may help to review the sub-questions for the general question and consult the workbook.
- When answering a question consider all components of the proposed activity, that is, the "whole action".
- Consider the possibility for long-term and cumulative impacts as well as direct impacts.
- Answer the question in a reasonable manner considering the scale and context of the project.

1. Impact on Land
Proposed action may involve construction on, or physical alteration of, the land surface of the proposed site. (See Part 1. D.1) ☐ NO ☐ YES
If "Yes", answer questions a - j. If "No", move on to Section 2.

	Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
a. The proposed action may involve construction on land where depth to water table is less than 3 feet.	E2d	☐	☐
b. The proposed action may involve construction on slopes of 15% or greater.	E2f	☐	☐
c. The proposed action may involve construction on land where bedrock is exposed, or generally within 5 feet of existing ground surface.	E2a	☐	☐
d. The proposed action may involve the excavation and removal of more than 1,000 tons of natural material.	D2a	☐	☐
e. The proposed action may involve construction that continues for more than one year or in multiple phases.	D1e	☐	☐
f. The proposed action may result in increased erosion, whether from physical disturbance or vegetation removal (including from treatment by herbicides).	D2e, D2q	☐	☐
g. The proposed action is, or may be, located within a Coastal Erosion hazard area.	B1i	☐	☐
h. Other impacts: _____ _____		☐	☐

2. Impact on Geological Features

The proposed action may result in the modification or destruction of, or inhibit access to, any unique or unusual land forms on the site (e.g., cliffs, dunes, minerals, fossils, caves). (See Part 1. E.2.g) ☐ NO ☐ YES

If "Yes", answer questions a - c. If "No", move on to Section 3.

	Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
a. Identify the specific land form(s) attached: _____ _____	E2g	☐	☐
b. The proposed action may affect or is adjacent to a geological feature listed as a registered National Natural Landmark. Specific feature: _____	E3c	☐	☐
c. Other impacts: _____ _____		☐	☐

3. Impacts on Surface Water

The proposed action may affect one or more wetlands or other surface water bodies (e.g., streams, rivers, ponds or lakes). (See Part 1. D.2, E.2.h) ☐ NO ☐ YES

If "Yes", answer questions a - l. If "No", move on to Section 4.

	Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
a. The proposed action may create a new water body.	D2b, D1h	☐	☐
b. The proposed action may result in an increase or decrease of over 10% or more than a 10 acre increase or decrease in the surface area of any body of water.	D2b	☐	☐
c. The proposed action may involve dredging more than 100 cubic yards of material from a wetland or water body.	D2a	☐	☐
d. The proposed action may involve construction within or adjoining a freshwater or tidal wetland, or in the bed or banks of any other water body.	E2h	☐	☐
e. The proposed action may create turbidity in a waterbody, either from upland erosion, runoff or by disturbing bottom sediments.	D2a, D2h	☐	☐
f. The proposed action may include construction of one or more intake(s) for withdrawal of water from surface water.	D2c	☐	☐
g. The proposed action may include construction of one or more outfall(s) for discharge of wastewater to surface water(s).	D2d	☐	☐
h. The proposed action may cause soil erosion, or otherwise create a source of stormwater discharge that may lead to siltation or other degradation of receiving water bodies.	D2e	☐	☐
i. The proposed action may affect the water quality of any water bodies within or downstream of the site of the proposed action.	E2h	☐	☐
j. The proposed action may involve the application of pesticides or herbicides in or around any water body.	D2q, E2h	☐	☐
k. The proposed action may require the construction of new, or expansion of existing, wastewater treatment facilities.	D1a, D2d	☐	☐

l. Other impacts: _____ _____		□	□

4. Impact on groundwater

The proposed action may result in new or additional use of ground water, or may have the potential to introduce contaminants to ground water or an aquifer. (See Part 1. D.2.a, D.2.c, D.2.d, D.2.p, D.2.q, D.2.t) ☐ NO ☐ YES

If "Yes", answer questions a - h. If "No", move on to Section 5.

	Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
a. The proposed action may require new water supply wells, or create additional demand on supplies from existing water supply wells.	D2c	□	□
b. Water supply demand from the proposed action may exceed safe and sustainable withdrawal capacity rate of the local supply or aquifer. Cite Source: _____	D2c	□	□
c. The proposed action may allow or result in residential uses in areas without water and sewer services.	D1a, D2c	□	□
d. The proposed action may include or require wastewater discharged to groundwater.	D2d, E2l	□	□
e. The proposed action may result in the construction of water supply wells in locations where groundwater is, or is suspected to be, contaminated.	D2c, E1f, E1g, E1h	□	□
f. The proposed action may require the bulk storage of petroleum or chemical products over ground water or an aquifer.	D2p, E2l	□	□
g. The proposed action may involve the commercial application of pesticides within 100 feet of potable drinking water or irrigation sources.	E2h, D2q, E2l, D2c	□	□
h. Other impacts: _____ _____		□	□

5. Impact on Flooding

The proposed action may result in development on lands subject to flooding. (See Part 1. E.2) ☐ NO ☐ YES

If "Yes", answer questions a - g. If "No", move on to Section 6.

	Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
a. The proposed action may result in development in a designated floodway.	E2i	□	□
b. The proposed action may result in development within a 100 year floodplain.	E2j	□	□
c. The proposed action may result in development within a 500 year floodplain.	E2k	□	□
d. The proposed action may result in, or require, modification of existing drainage patterns.	D2b, D2e	□	□
e. The proposed action may change flood water flows that contribute to flooding.	D2b, E2i, E2j, E2k	□	□
f. If there is a dam located on the site of the proposed action, is the dam in need of repair, or upgrade?	E1e	□	□

g. Other impacts: _____ _____		☐	☐

6. Impacts on Air

The proposed action may include a state regulated air emission source. (See Part 1. D.2.f., D.2.h, D.2.g) ☐ NO ☐ YES

If "Yes", answer questions a - f. If "No", move on to Section 7.

	Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
a. If the proposed action requires federal or state air emission permits, the action may also emit one or more greenhouse gases at or above the following levels:			
i. More than 1000 tons/year of carbon dioxide (CO_2)	D2g	☐	☐
ii. More than 3.5 tons/year of nitrous oxide (N_2O)	D2g	☐	☐
iii. More than 1000 tons/year of carbon equivalent of perfluorocarbons (PFCs)	D2g	☐	☐
iv. More than .045 tons/year of sulfur hexafluoride (SF_6)	D2g	☐	☐
v. More than 1000 tons/year of carbon dioxide equivalent of hydrochloroflourocarbons (HFCs) emissions	D2g	☐	☐
vi. 43 tons/year or more of methane	D2h	☐	☐
b. The proposed action may generate 10 tons/year or more of any one designated hazardous air pollutant, or 25 tons/year or more of any combination of such hazardous air pollutants.	D2g	☐	☐
c. The proposed action may require a state air registration, or may produce an emissions rate of total contaminants that may exceed 5 lbs. per hour, or may include a heat source capable of producing more than 10 million BTU's per hour.	D2f, D2g	☐	☐
d. The proposed action may reach 50% of any of the thresholds in "a" through "c", above.	D2g	☐	☐
e. The proposed action may result in the combustion or thermal treatment of more than 1 ton of refuse per hour.	D2s	☐	☐
f. Other impacts: _____ _____		☐	☐

7. Impact on Plants and Animals

The proposed action may result in a loss of flora or fauna. (See Part 1. E.2. m.-q.) ☐ NO ☐ YES

If "Yes", answer questions a - j. If "No", move on to Section 8.

	Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
a. The proposed action may cause reduction in population or loss of individuals of any threatened or endangered species, as listed by New York State or the Federal government, that use the site, or are found on, over, or near the site.	E2o	☐	☐
b. The proposed action may result in a reduction or degradation of any habitat used by any rare, threatened or endangered species, as listed by New York State or the federal government.	E2o	☐	☐
c. The proposed action may cause reduction in population, or loss of individuals, of any species of special concern or conservation need, as listed by New York State or the Federal government, that use the site, or are found on, over, or near the site.	E2p	☐	☐
d. The proposed action may result in a reduction or degradation of any habitat used by any species of special concern and conservation need, as listed by New York State or the Federal government.	E2p	☐	☐

e. The proposed action may diminish the capacity of a registered National Natural Landmark to support the biological community it was established to protect.	E3c	□	□
f. The proposed action may result in the removal of, or ground disturbance in, any portion of a designated significant natural community. Source: _____	E2n	□	□
g. The proposed action may substantially interfere with nesting/breeding, foraging, or over-wintering habitat for the predominant species that occupy or use the project site.	E2m	□	□
h. The proposed action requires the conversion of more than 10 acres of forest, grassland or any other regionally or locally important habitat. Habitat type & information source: _____ _____	E1b	□	□
i. Proposed action (commercial, industrial or recreational projects, only) involves use of herbicides or pesticides.	D2q	□	□
j. Other impacts: _____ _____		□	□

8. Impact on Agricultural Resources

The proposed action may impact agricultural resources. (See Part 1. E.3.a. and b.) ☐ NO ☐ YES

If "Yes", answer questions a - h. If "No", move on to Section 9.

	Relevant Part I Question(s)	**No, or small impact may occur**	**Moderate to large impact may occur**
a. The proposed action may impact soil classified within soil group 1 through 4 of the NYS Land Classification System.	E2c, E3b	□	□
b. The proposed action may sever, cross or otherwise limit access to agricultural land (includes cropland, hayfields, pasture, vineyard, orchard, etc).	E1a, Elb	□	□
c. The proposed action may result in the excavation or compaction of the soil profile of active agricultural land.	E3b	□	□
d. The proposed action may irreversibly convert agricultural land to non-agricultural uses, either more than 2.5 acres if located in an Agricultural District, or more than 10 acres if not within an Agricultural District.	E1b, E3a	□	□
e. The proposed action may disrupt or prevent installation of an agricultural land management system.	El a, E1b	□	□
f. The proposed action may result, directly or indirectly, in increased development potential or pressure on farmland.	C2c, C3, D2c, D2d	□	□
g. The proposed project is not consistent with the adopted municipal Farmland Protection Plan.	C2c	□	□
h. Other impacts: _____		□	□

9. Impact on Aesthetic Resources

The land use of the proposed action are obviously different from, or are in sharp contrast to, current land use patterns between the proposed project and a scenic or aesthetic resource. (Part 1. E.1.a, E.1.b, E.3.h.) ☐ NO ☐ YES

If "Yes", answer questions a - g. If "No", go to Section 10.

	Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
a. Proposed action may be visible from any officially designated federal, state, or local scenic or aesthetic resource.	E3h	☐	☐
b. The proposed action may result in the obstruction, elimination or significant screening of one or more officially designated scenic views.	E3h, C2b	☐	☐
c. The proposed action may be visible from publicly accessible vantage points: i. Seasonally (e.g., screened by summer foliage, but visible during other seasons) ii. Year round	E3h	☐ ☐	☐ ☐
d. The situation or activity in which viewers are engaged while viewing the proposed action is: i. Routine travel by residents, including travel to and from work ii. Recreational or tourism based activities	E3h E2q, E1c	☐ ☐	☐ ☐
e. The proposed action may cause a diminishment of the public enjoyment and appreciation of the designated aesthetic resource.	E3h	☐	☐
f. There are similar projects visible within the following distance of the proposed project: 0-1/2 mile ½ -3 mile 3-5 mile 5+ mile	D1a, E1a, D1f, D1g	☐	☐
g. Other impacts: _____ _____		☐	☐

10. Impact on Historic and Archeological Resources

The proposed action may occur in or adjacent to a historic or archaeological resource. (Part 1. E.3.e, f. and g.) ☐ NO ☐ YES

If "Yes", answer questions a - e. If "No", go to Section 11.

	Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
a. The proposed action may occur wholly or partially within, or substantially contiguous to, any buildings, archaeological site or district which is listed on the National or State Register of Historical Places, or that has been determined by the Commissioner of the NYS Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places.	E3e	☐	☐
b. The proposed action may occur wholly or partially within, or substantially contiguous to, an area designated as sensitive for archaeological sites on the NY State Historic Preservation Office (SHPO) archaeological site inventory.	E3f	☐	☐
c. The proposed action may occur wholly or partially within, or substantially contiguous to, an archaeological site not included on the NY SHPO inventory. Source: _____	E3g	☐	☐

d. Other impacts: _____ _____		□	□
e. If any of the above (a-d) are answered "Moderate to large impact may occur", continue with the following questions to help support conclusions in Part 3:			
i. The proposed action may result in the destruction or alteration of all or part of the site or property.	E3e, E3g, E3f	□	□
ii. The proposed action may result in the alteration of the property's setting or integrity.	E3e, E3f, E3g, E1a, E1b	□	□
iii. The proposed action may result in the introduction of visual elements which are out of character with the site or property, or may alter its setting.	E3e, E3f, E3g, E3h, C2, C3	□	□

11. Impact on Open Space and Recreation

The proposed action may result in a loss of recreational opportunities or a reduction of an open space resource as designated in any adopted municipal open space plan. (See Part 1. C.2.c, E.1.c., E.2.q.)

☐ NO ☐ YES

If "Yes", answer questions a - e. If "No", go to Section 12.

	Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
a. The proposed action may result in an impairment of natural functions, or "ecosystem services", provided by an undeveloped area, including but not limited to stormwater storage, nutrient cycling, wildlife habitat.	D2e, E1b E2h, E2m, E2o, E2n, E2p	□	□
b. The proposed action may result in the loss of a current or future recreational resource.	C2a, E1c, C2c, E2q	□	□
c. The proposed action may eliminate open space or recreational resource in an area with few such resources.	C2a, C2c E1c, E2q	□	□
d. The proposed action may result in loss of an area now used informally by the community as an open space resource.	C2c, E1c	□	□
e. Other impacts: _____ _____		□	□

12. Impact on Critical Environmental Areas

The proposed action may be located within or adjacent to a critical environmental area (CEA). (See Part 1. E.3.d)

☐ NO ☐ YES

If "Yes", answer questions a - c. If "No", go to Section 13.

	Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
a. The proposed action may result in a reduction in the quantity of the resource or characteristic which was the basis for designation of the CEA.	E3d	□	□
b. The proposed action may result in a reduction in the quality of the resource or characteristic which was the basis for designation of the CEA.	E3d	□	□
c. Other impacts: _____ _____		□	□

13. Impact on Transportation

The proposed action may result in a change to existing transportation systems. ☐ NO ☐ YES
(See Part 1. D.2.j)
If "Yes", answer questions a - f. If "No", go to Section 14.

	Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
a. Projected traffic increase may exceed capacity of existing road network.	D2j	☐	☐
b. The proposed action may result in the construction of paved parking area for 500 or more vehicles.	D2j	☐	☐
c. The proposed action will degrade existing transit access.	D2j	☐	☐
d. The proposed action will degrade existing pedestrian or bicycle accommodations.	D2j	☐	☐
e. The proposed action may alter the present pattern of movement of people or goods.	D2j	☐	☐
f. Other impacts: _____ _____		☐	☐

14. Impact on Energy

The proposed action may cause an increase in the use of any form of energy. ☐ NO ☐ YES
(See Part 1. D.2.k)
If "Yes", answer questions a - e. If "No", go to Section 15.

	Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
a. The proposed action will require a new, or an upgrade to an existing, substation.	D2k	☐	☐
b. The proposed action will require the creation or extension of an energy transmission or supply system to serve more than 50 single or two-family residences or to serve a commercial or industrial use.	D1f, D1q, D2k	☐	☐
c. The proposed action may utilize more than 2,500 MWhrs per year of electricity.	D2k	☐	☐
d. The proposed action may involve heating and/or cooling of more than 100,000 square feet of building area when completed.	D1g	☐	☐
e. Other Impacts: _____ _____			

15. Impact on Noise, Odor, and Light

The proposed action may result in an increase in noise, odors, or outdoor lighting. ☐ NO ☐ YES
(See Part 1. D.2.m., n., and o.)
If "Yes", answer questions a - f. If "No", go to Section 16.

	Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
a. The proposed action may produce sound above noise levels established by local regulation.	D2m	☐	☐
b. The proposed action may result in blasting within 1,500 feet of any residence, hospital, school, licensed day care center, or nursing home.	D2m, E1d	☐	☐
c. The proposed action may result in routine odors for more than one hour per day.	D2o	☐	☐

d. The proposed action may result in light shining onto adjoining properties.	D2n	□	□
e. The proposed action may result in lighting creating sky-glow brighter than existing area conditions.	D2n, E1a	□	□
f. Other impacts: _____ _____		□	□

16. Impact on Human Health

The proposed action may have an impact on human health from exposure to new or existing sources of contaminants. (See Part 1.D.2.q., E.1. d. f. g. and h.) ☐ NO ☐ YES

If "Yes", answer questions a - m. If "No", go to Section 17.

	Relevant Part I Question(s)	No,or small impact may cccur	Moderate to large impact may occur
a. The proposed action is located within 1500 feet of a school, hospital, licensed day care center, group home, nursing home or retirement community.	E1d	□	□
b. The site of the proposed action is currently undergoing remediation.	E1g, E1h	□	□
c. There is a completed emergency spill remediation, or a completed environmental site remediation on, or adjacent to, the site of the proposed action.	E1g, E1h	□	□
d. The site of the action is subject to an institutional control limiting the use of the property (e.g., easement or deed restriction).	E1g, E1h	□	□
e. The proposed action may affect institutional control measures that were put in place to ensure that the site remains protective of the environment and human health.	E1g, E1h	□	□
f. The proposed action has adequate control measures in place to ensure that future generation, treatment and/or disposal of hazardous wastes will be protective of the environment and human health.	D2t	□	□
g. The proposed action involves construction or modification of a solid waste management facility.	D2q, E1f	□	□
h. The proposed action may result in the unearthing of solid or hazardous waste.	D2q, E1f	□	□
i. The proposed action may result in an increase in the rate of disposal, or processing, of solid waste.	D2r, D2s	□	□
j. The proposed action may result in excavation or other disturbance within 2000 feet of a site used for the disposal of solid or hazardous waste.	E1f, E1g E1h	□	□
k. The proposed action may result in the migration of explosive gases from a landfill site to adjacent off site structures.	E1f, E1g	□	□
l. The proposed action may result in the release of contaminated leachate from the project site.	D2s, E1f, D2r	□	□
m. Other impacts: _____ _____			

17. Consistency with Community Plans

The proposed action is not consistent with adopted land use plans. ☐ NO ☐ YES
(See Part 1. C.1, C.2. and C.3.)
If "Yes", answer questions a - h. If "No", go to Section 18.

	Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
a. The proposed action's land use components may be different from, or in sharp contrast to, current surrounding land use pattern(s).	C2, C3, D1a E1a, E1b	☐	☐
b. The proposed action will cause the permanent population of the city, town or village in which the project is located to grow by more than 5%.	C2	☐	☐
c. The proposed action is inconsistent with local land use plans or zoning regulations.	C2, C2, C3	☐	☐
d. The proposed action is inconsistent with any County plans, or other regional land use plans.	C2, C2	☐	☐
e. The proposed action may cause a change in the density of development that is not supported by existing infrastructure or is distant from existing infrastructure.	C3, D1c, D1d, D1f, D1d, Elb	☐	☐
f. The proposed action is located in an area characterized by low density development that will require new or expanded public infrastructure.	C4, D2c, D2d D2j	☐	☐
g. The proposed action may induce secondary development impacts (e.g., residential or commercial development not included in the proposed action)	C2a	☐	☐
h. Other: _____ _____		☐	☐

18. Consistency with Community Character

The proposed project is inconsistent with the existing community character. ☐ NO ☐ YES
(See Part 1. C.2, C.3, D.2, E.3)
If "Yes", answer questions a - g. If "No", proceed to Part 3.

	Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
a. The proposed action may replace or eliminate existing facilities, structures, or areas of historic importance to the community.	E3e, E3f, E3g	☐	☐
b. The proposed action may create a demand for additional community services (e.g. schools, police and fire)	C4	☐	☐
c. The proposed action may displace affordable or low-income housing in an area where there is a shortage of such housing.	C2, C3, D1f D1g, E1a	☐	☐
d. The proposed action may interfere with the use or enjoyment of officially recognized or designated public resources.	C2, E3	☐	☐
e. The proposed action is inconsistent with the predominant architectural scale and character.	C2, C3	☐	☐
f. Proposed action is inconsistent with the character of the existing natural landscape.	C2, C3 E1a, E1b E2g, E2h	☐	☐
g. Other impacts: _____ _____		☐	☐

Full Environmental Assessment Form
Part 3 - Evaluation of the Magnitude and Importance of Project Impacts
and
Determination of 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. By completing the certification on the next page, the lead agency can complete its determination of significance.

Reasons Supporting This Determination:
To complete this section:

- Identify the impact based on the Part 2 responses and describe its magnitude. Magnitude considers factors such as severity, size or extent of an impact.
- Assess the importance of the impact. Importance relates to the geographic scope, duration, probability of the impact occurring, number of people affected by the impact and any additional environmental consequences if the impact were to occur.
- The assessment should take into consideration any design element or project changes.
- Repeat this process for each Part 2 question 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.
- Provide the reason(s) why the impact may, or will not, result in a significant adverse environmental impact
- For Conditional Negative Declarations identify the specific condition(s) imposed that will modify the proposed action so that no significant adverse environmental impacts will result.
- Attach additional sheets, as needed.

Determination of Significance - Type 1 and Unlisted Actions

SEQR Status: ☐ Type 1 ☐ Unlisted

Identify portions of EAF completed for this Project: ☐ Part 1 ☐ Part 2 ☐ Part 3

Upon review of the information recorded on this EAF, as noted, plus this additional support information

_____

_____

_____

and considering both the magnitude and importance of each identified potential impact, it is the conclusion of the _____ as lead agency that:

☐ A. This project will result in no significant adverse impacts on the environment, and, therefore, an environmental impact statement need not be prepared. Accordingly, this negative declaration is issued.

☐ B. Although this project could have a significant adverse impact on the environment, that impact will be avoided or substantially mitigated because of the following conditions which will be required by the lead agency:

_____

_____

_____

_____

There will, therefore, be no significant adverse impacts from the project as conditioned, and, therefore, this conditioned negative declaration is issued. A conditioned negative declaration may be used only for UNLISTED actions (see 6 NYCRR 617.7(d)).

☐ C. This Project may result in one or more significant adverse impacts on the environment, and an environmental impact statement must be prepared to further assess the impact(s) and possible mitigation and to explore alternatives to avoid or reduce those impacts. Accordingly, this positive declaration is issued.

Name of Action:
Name of Lead Agency:
Name of Responsible Officer in Lead Agency:
Title of Responsible Officer:
Signature of Responsible Officer in Lead Agency: Date:
Signature of Preparer (if different from Responsible Officer) Date:

For Further Information:

Contact Person:

Address:

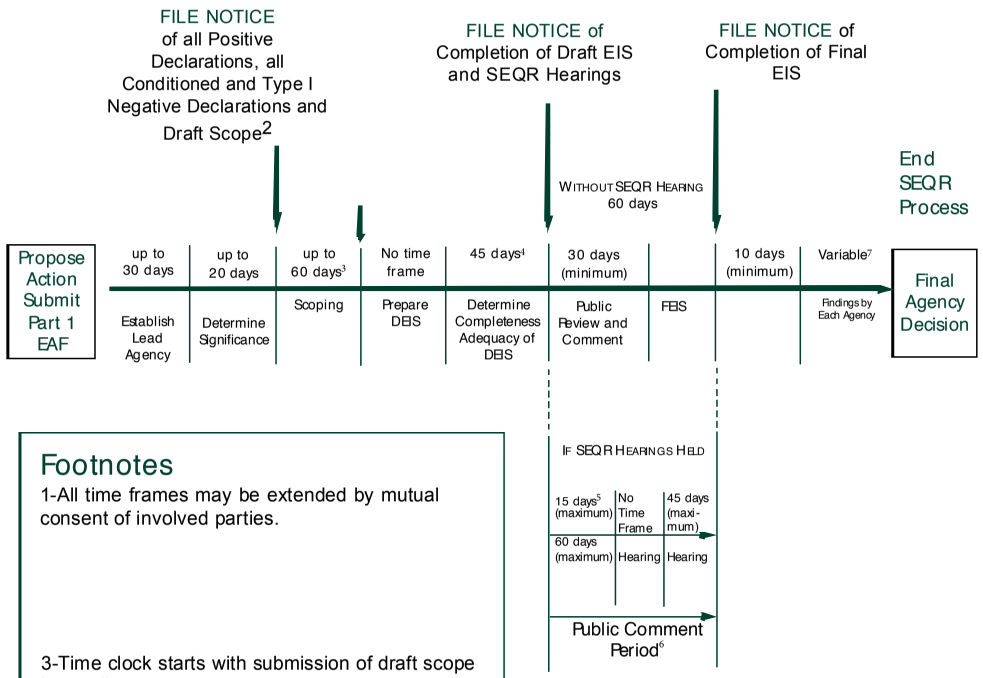
Telephone Number:

E-mail:

For Type 1 Actions and Conditioned Negative Declarations, a copy of this Notice is sent to:

Chief Executive Officer of the political subdivision in which the action will be principally located (e.g., Town / City / Village of)
Other involved agencies (if any)
Applicant (if any)
Environmental Notice Bulletin: http://www.dec.ny.gov/enb/enb.html

SEQR TIME FRAMES [1]



Footnotes

1-All time frames may be extended by mutual consent of involved parties.

3-Time clock starts with submission of draft scope by applicant

4-Thirty days resubmitted DEIS

5-Publish hearing in general circulation newspaper at least 14 days before a public hearing. The hearing may commence on the 15th day.

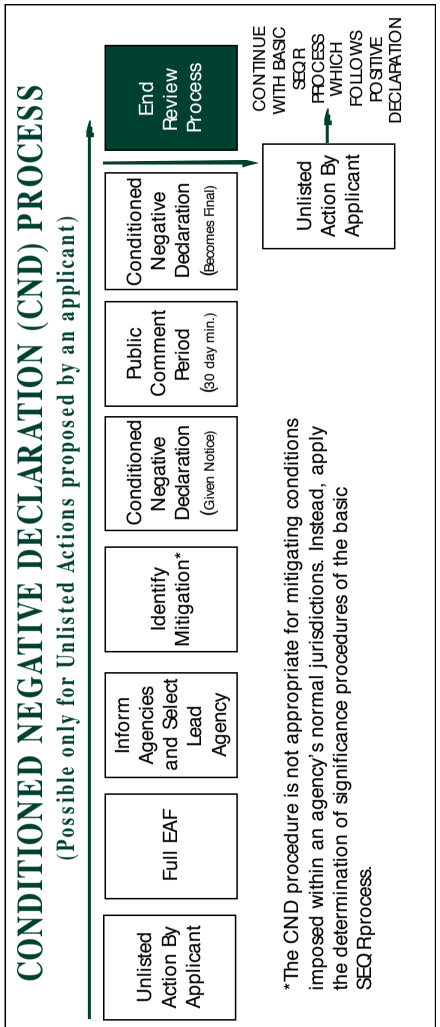
6-Public comment must remain open until 10 days after the close of hearing.

7-When applicant is involved, lead agency findings and decisions must be made within 30 days of filing the FEIS; otherwise, findings not required until an agency must make a decision on final action.

SEQR FLOW CHART 2019

CONDITIONED NEGATIVE DECLARATION (CND) PROCESS

(Possible only for Unlisted Actions proposed by an applicant)



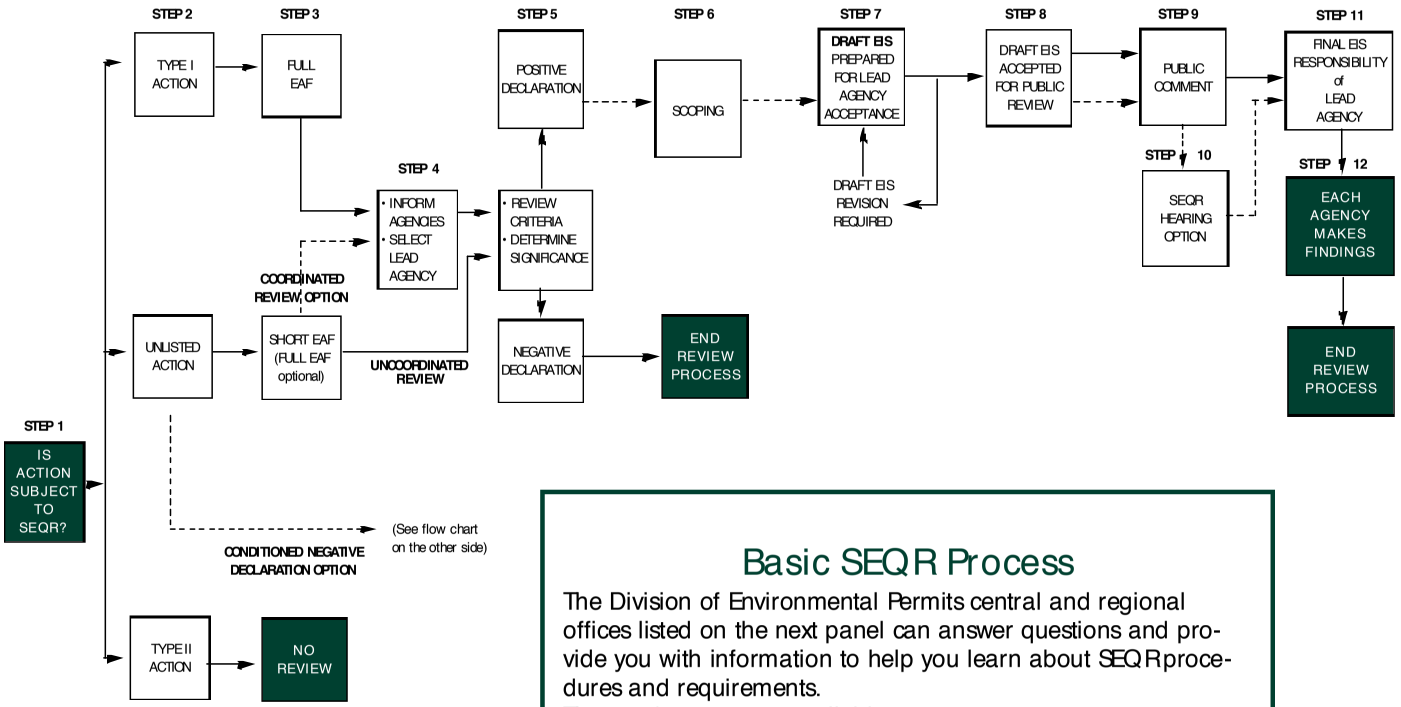
*The CND procedure is not appropriate for mitigating conditions imposed within an agency's normal jurisdictions. Instead, apply the determination of significance procedures of the basic SEQRprocess.

New York State

DEC

SEQR FLOW CHART AND TIME FRAMES

New York State
Department of Environmental Conservation
Division of Environmental Permits



Basic SEQR Process

The Division of Environmental Permits central and regional offices listed on the next panel can answer questions and provide you with information to help you learn about SEQR procedures and requirements.

These references are available:

- The statewide SEQR regulations, 6 NYCRR Part 617 (the latest revision effective January 1, 2019)
- The SEQR Cookbook—a step-by-step discussion of the basic SEQR process
- SEQR **Handbook**—https://www.dec.ny.gov/permits/6188.html
- **SEQR EAF Workbooks** - https://www.dec.ny.gov/permits/90125.html
- Citizen's Guide to SEQR
- Local Official's Guide to SEQR
- DEC SEQR website: https://www.dec.ny.gov/permits/357.html

Region 1 (Nassau, Suffolk counties)
50 Circle Road, Stony Brook, NY 11790
(631) 444-0355

Region 2 (all of New York City)
One Hunters Point Plaza, 47-40 21st Street
Long Island City, NY 11101
(718) 482-4997

Region 3 (Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster, Westchester counties)
21 South Putt Corners Road, New Paltz, NY 12561
(845) 256-3054

Region 4 (Albany, Columbia, Delaware, Greene, Montgomery, Otsego, Rensselaer, Schenectady, Schoharie counties)
1150 North Westcott Road, Schenectady, NY 12306
(518) 357-2069

Region 5 (Clinton, Essex, Franklin, Fulton, Hamilton, Saratoga, Warren, Washington counties)
1115 Route 86, PO Box 296, Ray Brook, NY 12977
(518) 897-1234

Region 6 (Herkimer, Jefferson, Lewis, Oneida, St. Lawrence counties)
State Office Building, 317 Washington Street
Watertown, NY 13601
(315) 785-2245

Region 7 (Broome, Cayuga, Chenango, Cortland, Madison, Onondaga, Oswego, Tioga, Tompkins counties)
615 Erie Boulevard ,West Syracuse, NY 13204
(315) 426-7438

Region 8 (Chemung, Genesee, Livingston, Monroe, Ontario, Orleans, Schuyler, Seneca, Steuben, Wayne, Yates counties)
6274 East Avon-Lima Road, Avon, NY 14414
(585) 226-2466

Region 9 (Allegany, Cattaraugus, Chautauqua, Erie, Niagara, Wyoming counties)
270 Michigan Avenue, Buffalo, NY 14203
(716) 851-7165

Central Office, Environmental Permits
625 Broadway 4th Floor, Albany, NY 12233
(518) 402-9167

Express Terms

§ 617.1 Authority, intent and purpose

(a) This Part is adopted pursuant to sections 3-0301(1)(b), (2)(m) and 8-0113 of the Environmental Conservation Law to implement the provisions of the State Environmental Quality Review Act (SEQR).

(b) In adopting SEQR, it was the Legislature's intention that all agencies conduct their affairs with an awareness that they are stewards of the air, water, land and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations.

(c) The basic purpose of SEQR is to incorporate the consideration of environmental factors into the existing planning, review and decision-making processes of state, regional and local government agencies at the earliest possible time. To accomplish this goal, SEQR requires that all agencies determine whether the actions they directly undertake, fund or approve may have a significant impact on the environment, and, if it is determined that the action may have a significant adverse impact, prepare or request an environmental impact statement.

(d) It was the intention of the Legislature that the protection and enhancement of the environment, human and community resources should be given appropriate weight with social and economic considerations in determining public policy, and that those factors be considered together in reaching decisions on proposed activities. Accordingly, it is the intention of this Part that a suitable balance of social, economic and environmental factors be incorporated into the planning and decision-making processes of state, regional and local agencies. It is not the intention of SEQR that environmental factors be the sole consideration in decision-making.

(e) This Part is intended to provide a statewide regulatory framework for the implementation of SEQR by all state and local agencies. It includes:

(1) procedural requirements for compliance with the law;

(2) provisions for coordinating multiple agency environmental reviews through a single lead agency (section 617.6 of this Part);

(3) criteria to determine whether a proposed action may have a significant adverse impact on the environment (section 617.7 of this Part);

(4) model environmental assessment forms to aid in determining whether an action may have a significant adverse impact on the environment (Appendices A [,] and B [and C] of section 617.20 of this Part); and (5) examples of actions and classes of actions which are likely to require an EIS (section 617.4 of this Part), and those which will not require an EIS (section 617.5 of this Part).

(5) examples of actions and classes of actions which are likely to require an EIS (section 617.4 of this Part), and those which will not require an EIS (section 617.5 of this Part).

§ 617.2 Definitions

As used in this Part, unless the context otherwise requires:

(a) "Act" means article 8 of the Environmental Conservation Law (SEQR).

(b) "Actions" include:

(1) projects or physical activities, such as construction or other activities that may affect the environment by changing the use, appearance or condition of any natural resource or structure, that:

(i) are directly undertaken by an agency; or

(ii) involve funding by an agency; or

(iii) require one or more new or modified approvals from an agency or agencies;

(2) agency planning and policy making activities that may affect the environment and commit the agency to a definite course of future decisions;

(3) adoption of agency rules, regulations and procedures, including local laws, codes, ordinances, executive orders and resolutions that may affect the environment; and

(4) any combinations of the above.

(c) "Agency" means a state or local agency.

(d) "Applicant" means any person making an application or other request to an agency to provide funding or to grant an approval in connection with a proposed action.

(e) "Approval" means a discretionary decision by an agency to issue a permit, certificate, license, lease or other entitlement or to otherwise authorize a proposed project or activity.

(f) "Coastal area" means the state's coastal waters and the adjacent shorelands, as defined in article 42 of the Executive Law, the specific boundaries of which are shown on the coastal area map on file in the Office of the Secretary of State, as required by section 914(2) of the Executive Law.

(g) "Commissioner" means the Commissioner of the New York State Department of Environmental Conservation.

(h) "Conditioned negative declaration" (CND) means a negative declaration issued by a lead agency for an Unlisted action, involving an applicant, in which the action as initially proposed may result in one or more significant adverse environmental impacts; however, mitigation measures identified and required by the lead agency, pursuant to

the procedures in section 617.7(d) of this Part, will modify the proposed action so that no significant adverse environmental impacts will result.

(i) "Critical environmental area" (CEA) means a specific geographic area having exceptional or unique environmental characteristics that has been designated by a state or local agency pursuant to section 617.14 of this part [having exceptional or unique environmental characteristics].

(j) "Department" means the New York State Department of Environmental Conservation.

(k) "Direct action" or "directly undertaken action" means an action planned and proposed for implementation by an agency. "Direct actions" include but are not limited to capital projects, promulgation of agency rules, regulations, laws, codes, ordinances or executive orders and policy making that commit an agency to a course of action that may affect the environment.

(l) "Environment" means the physical conditions that will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, resources of agricultural, archeological, historic or aesthetic significance, existing patterns of population concentration, distribution or growth, existing community or neighborhood character, and human health.

(m) "Environmental assessment form" (EAF) means a form used by an agency to assist it in determining the environmental significance [or nonsignificance] of actions. A properly completed EAF must contain enough information to describe the proposed action, its location, its purpose and its potential impacts on the environment. The model full and short EAFs contained in Appendices A and B [C] of section 617.20 of this Part may be modified by an agency to better serve it in implementing SEQR, provided the scope of the modified form is as comprehensive as the model.

(n) "Environmental impact statement" (EIS) means a written "draft" or "final" document prepared in accordance with sections 617.9 and 617.10 of this Part. An EIS provides a means for agencies, project sponsors and the public to systematically consider significant adverse environmental impacts, alternatives and mitigation. An EIS facilitates the weighing of social, economic and environmental factors early in the planning and decision-making process. A draft EIS is the initial statement prepared by

either the project sponsor or the lead agency and circulated for review and comment. An EIS may also be a "generic" in accordance with section 617.10 of this Part, a "supplemental" in accordance with paragraph 617.9(a)(7) of this Part or a "Federal" document in accordance with section 617.15 of this Part.

(o) "Environmental Notice Bulletin" (ENB) means the weekly publication of the department published pursuant to section 3-0306 of the Environmental Conservation Law [, and accessible on the department's internet web site at 'http://www.dec.state.ny.us'].

(p) "Findings statement" means a written statement prepared by each involved agency, in accordance with section 617.11 of this Part, after a final EIS has been filed, that considers the relevant environmental impacts presented in an EIS, weighs and balances them with social, economic and other essential considerations, provides a rationale for the agency's decision and certifies that the SEQR requirements have been met.

(q) "Funding" means any financial support given by an agency, including contracts, grants, subsidies, loans or other forms of direct or indirect financial assistance, in connection with a proposed action.

(r) “Green infrastructure” means practices that manage storm water through infiltration, evapo-transpiration and reuse including only the following: the use of permeable pavement; bio-retention; green roofs and green walls; tree pits and urban forestry; storm water planters; rain gardens; vegetated swales; downspout disconnection; or storm water harvesting and reuse.

[r] (s) "Impact" means to change or have an effect on any aspect(s) of the environment.

[s] (t) "Involved agency" means an agency that has jurisdiction by law to fund, approve or directly undertake an action. If an agency will ultimately make a discretionary decision to fund, approve or undertake an action, then it is an "involved agency" notwithstanding that it has not received an application for funding or approval at the time the SEQR process is commenced. The lead agency is also an "involved agency".

[t] (u) "Interested agency" means an agency that lacks the jurisdiction to fund, approve or directly undertake an action but wishes to participate in the review process because

of its specific expertise or concern about the proposed action. An "interested agency" has the same ability to participate in the review process as a member of the public.

[u] (v) "Lead agency" means an involved agency principally responsible for undertaking, funding or approving an action, and therefore responsible for determining whether an environmental impact statement is required in connection with the action, and for the preparation and filing of the statement if one is required.

[v] (w) "Local agency" means any local agency, board, authority, district, commission or governing body, including any city, county and other political subdivision of the state.

[w] (x) "Ministerial act" means an action performed upon a given state of facts in a prescribed manner imposed by law without the exercise of any judgment or discretion as to the propriety of the act, such as the granting of a hunting or fishing license.

[x] (y) "Mitigation" means a way to avoid or minimize adverse environmental impacts.

[(y)] (z) "Negative declaration" means a written determination by a lead agency that the implementation of the action as proposed will not result in any significant adverse environmental impacts. A negative declaration may also be a conditioned negative declaration as defined in subdivision (h) of this section. Negative declarations must be prepared, filed and published in accordance with sections 617.7 and 617.12 of this Part.

[z] (aa) "Person" means any agency, individual, corporation, governmental entity, partnership, association, trustee or other legal entity.

[aa] (ab) "Permit" means a permit, lease, license, certificate or other entitlement for use or permission to act that may be granted or issued by an agency.

[ab] (ac) "Physical alteration" includes, but is not limited to, the following activities: vegetation removal, demolition, stockpiling materials, grading and other forms of earthwork, dumping, filling or depositing, discharges to air or water, excavation or trenching, application of pesticides, herbicides, or other chemicals, application of sewage sludge, dredging, flooding, draining or dewatering, paving, construction of buildings, structures or facilities, and extraction, injection or recharge of resources below ground.

[ac] (ad) "Positive declaration" means a written [statement prepared] determination by the lead agency indicating that implementation of the action as proposed may have a

significant adverse impact on the environment and that an environmental impact statement will be required. Positive declarations must be prepared, filed and published in accordance with sections 617.7 and 617.12 of this Part.

[ad] (ae) "Project sponsor" means any applicant or agency primarily responsible for undertaking an action.

[ae] (af) "Residential" means any facility used for permanent or seasonal habitation, including but not limited to: realty subdivisions, apartments, mobile home parks, and campsites offering any utility hookups for recreational vehicles. It does not include such facilities as hotels, hospitals, nursing homes, dormitories or prisons.

[af] (ag) "Scoping" means the process by which the lead agency identifies the potentially significant adverse impacts related to the proposed action that are to be addressed in the draft EIS including the content and level of detail of the analysis, the range of alternatives, the mitigation measures needed and the identification of [nonrelevant] irrelevant issues. Scoping, which is not limited to the analysis of potentially significant issues identified in the EAF, provides a project sponsor with [guidance on] a written outline of [matters] topics [which] that must be considered and provides an opportunity for early participation by involved agencies and the public in the review of the proposal.

[ag] (ah) "Segmentation" means the division of the environmental review of an action such that various activities or stages are addressed under this Part as though they were independent, unrelated activities, needing individual determinations of significance.

[ah] (ai) "State agency" means any state department, agency, board, public benefit corporation, public authority or commission.

[ai] (aj) "Type I action" means an action or class of actions identified in section 617.4 of this Part, or in any involved agency's procedures adopted pursuant to section 617.14 of this Part.

[aj] (ak) "Type II action" means an action or class of actions identified in section 617.5 of this Part. When the term is applied in reference to an individual agency's authority to review or approve a particular proposed project or action, it shall also mean an action or class of actions identified as Type II actions in that agency's own procedures to implement SEQR adopted pursuant to section 617.14 of this Part. [The fact that an

action is identified as a Type II action in any agency's procedures does not mean that it must be treated as a Type II action by any other involved agency not identifying it as a Type II action in its procedures.]

[ak] (al) "Unlisted action" means all actions not identified as a Type I or Type II action in this Part, or, in the case of a particular agency action, not identified as Type I or Type II action in the agency's own SEQR procedures.

§ 617.3 General rules

(a) No agency involved in an action may undertake, fund or approve the action until it has complied with the provisions of SEQR. A project sponsor may not commence any physical alteration related to an action until the provisions of SEQR have been complied with. The only exception to this is provided under section 617.5(c) [(18), (21), and (28)] (24), (27), and (34) of this Part. An involved agency may not issue its findings and decision on an action if it knows any other involved agency has determined that the action may have a significant adverse impact on the environment, until a final EIS has been filed. The only exception to this is provided under section 617.9(a) (5)(i) of this Part.

(b) SEQR does not change the existing jurisdiction of agencies nor the jurisdiction between or among state and local agencies. SEQR provides all involved agencies with the authority, following the filing of a final EIS and written findings statement, or pursuant to section 617.7(d) of this Part to impose substantive conditions upon an action to ensure that the requirements of this Part have been satisfied. The conditions imposed must be practicable and reasonably related to impacts identified in the EIS or the conditioned negative declaration.

(c) An application for agency funding or approval of a Type I or Unlisted action will not be complete until:

(1) a negative declaration has been issued; or

(2) until a draft EIS has been accepted by the lead agency as satisfactory with respect to scope, content and adequacy. When the draft EIS is accepted the SEQR process will run concurrently with other procedures relating to the review and approval of the action, if reasonable time is provided for preparation, review and public hearings with respect to the draft EIS.

(d) The lead agency will make every reasonable effort to involve project sponsors, other agencies and the public in the SEQR process. Early consultations initiated by agencies can serve to narrow issues of significance and to identify areas of controversy relating to environmental issues, thereby focusing on the impacts and alternatives requiring in-depth analysis in an EIS.

(e) Each agency involved in a proposed action has the responsibility to provide the lead agency with information it may have that may assist the lead agency in making its determination of significance, to identify potentially significant adverse impacts in the scoping process, to comment in a timely manner on the EIS if it has concerns which need to be addressed and to participate as may be needed, in any public hearing. Interested agencies are strongly encouraged to make known their views on the action, particularly with respect to their areas of expertise and jurisdiction.

(f) No SEQR determination of significance, EIS or findings statement is required for actions which are Type II.

(g) Actions commonly consist of a set of activities or steps. The entire set of activities or steps must be considered the action, whether the agency decision-making relates to the action as a whole or to only a part of it.

(1) Considering only a part or segment of an action is contrary to the intent of SEQR. If a lead agency believes that circumstances warrant a segmented review, it must clearly state in its determination of significance, and any subsequent EIS, the supporting reasons and must demonstrate that such review is clearly no less protective of the environment. Related actions should be identified and discussed to the fullest extent possible.

(2) If it is determined that an EIS is necessary for an action consisting of a set of activities or steps, only one draft and one final EIS need be prepared on the action provided that the statement addresses each part of the action at a level of detail sufficient for an adequate analysis of the significant adverse environmental impacts. Except for a supplement to a generic environmental impact statement (see section 617.10(d) of this Part), a supplement to a draft or final EIS will only be required in the circumstances prescribed in section 617.9(a)(7) of this Part.

(h) Agencies must carry out the terms and requirements of this Part with minimum procedural and administrative delay, must avoid unnecessary duplication of reporting and review requirements by providing, where feasible, for combined or consolidated proceedings, and must expedite all SEQR proceedings in the interest of prompt review.

(i) Time periods in this Part may be extended by mutual agreement between a project sponsor and the lead agency, with notice to all other involved agencies by the lead agency.

§ 617.4 Type I actions

(a) The purpose of the list of Type I actions in this section is to identify, for agencies, project sponsors and the public, those actions and projects that are more likely to require the preparation of an EIS than Unlisted actions. All agencies are subject to this Type I list.

(1) This Type I list is not exhaustive of those actions that an agency determines may have a significant adverse impact on the environment and requires the preparation of an EIS. However, the fact that an action or project has been listed as a Type I action carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS. For all individual actions which are Type I or Unlisted, the determination of significance must be made by comparing the impacts which may be reasonably expected to result from the proposed action with the criteria listed in section 617.7(c) of this Part.

(2) Agencies may adopt their own lists of additional Type I actions, may adjust the thresholds to make them more inclusive, and may continue to use previously adopted lists of Type I actions to complement those contained in this section. Designation of a Type I action by one involved agency requires coordinated review by all involved agencies. An agency may not designate as Type I any action identified as Type II in section 617.5 of this Part.

(b) The following actions are Type I if they are to be directly undertaken, funded or approved by an agency:

(1) the adoption of a municipality's land use plan, the adoption by any agency of a comprehensive resource management plan or the initial adoption of a municipality's comprehensive zoning regulations;

(2) the adoption of changes in the allowable uses within any zoning district, affecting 25 or more acres of the district;

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

(4) the acquisition, sale, lease, annexation or other transfer of 100 or more contiguous acres of land by a state or local agency;

(5) 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 persons or less, [250] 200 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 persons but less than 1,000,000 persons, [1,000] 500 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 or more persons, [2,500] 1000 units to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works;

(6) activities, other than the construction of residential facilities, that meet or exceed any of the following thresholds; or the expansion of existing nonresidential facilities by more than 50 percent of any of the following thresholds:

(i) a project or action that involves the physical alteration of 10 acres;

(ii) a project or action that would use ground or surface water in excess of 2,000,000 gallons per day;

(iii) parking for 500 vehicles in a city, town or village having a population of 150,000 persons or less;

[iii] (iv) parking for 1,000 vehicles in a city, town or village having a population of more than 150,000 persons;

[iv] (v) in a city, town or village having a population of 150,000 persons or less, a facility with more than 100,000 square feet of gross floor area;

[v] (vi) in a city, town or village having a population of more than 150,000 persons, a facility with more than 240,000 square feet of gross floor area;

(7) any structure exceeding 100 feet above original ground level in a locality without any zoning regulation pertaining to height;

(8) any Unlisted action that includes a nonagricultural use occurring wholly or partially within an agricultural district (certified pursuant to Agriculture and Markets Law, article 25-AA, sections 303 and 304) and exceeds 25 percent of any threshold established in this section;

(9) any Unlisted action (unless the action is designed for the preservation of the facility or site), that exceeds 25 percent of any threshold established in this section, occurring wholly or partially within, or substantially contiguous to, any historic building, structure, facility, site or district or prehistoric site that is listed on the National Register of Historic Places (Volume 36 of the Code of Federal Regulations, parts 60 and 63, which is incorporated by reference pursuant to section 617.17 of this Part), or that [has been proposed by the New York State Board on Historic Preservation for a recommendation to the State Historic Preservation Officer for nomination for inclusion in the National Register, or that] is listed on the State Register of Historic Places or that has been determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places pursuant to sections 14.07 or 14.09 of the Parks, Recreation and Historic Preservation Law [(The National Register of Historic Places is established by 36 Code of Federal Regulations (CFR) Parts 60 and 63 , 1994 (see section 617.17 of this Part))];

(10) any Unlisted action, that exceeds 25 percent of any threshold in this section, occurring wholly or partially within or substantially contiguous to any publicly owned or operated parkland, recreation area or designated open space, including any site on the Register of National Natural Landmarks pursuant to 36 CFR part 62[, 1994] ([see] which is incorporated by reference pursuant to section 617.17 of this Part); or

(11) any Unlisted action that exceeds a Type I threshold established by an involved agency pursuant to section 617.14 of this Part.

§ 617.5 Type II Actions

(a) Actions or classes of actions identified in subdivision (c) of this section are not subject to review under this Part, except as otherwise provided in this section. These actions have been determined not to have a significant impact on the environment or are otherwise precluded from environmental review under Environmental Conservation Law, article 8. The actions identified in subdivision (c) of this section apply to all agencies.

(b) Each agency may adopt its own list of Type II actions to supplement the actions in subdivision (c) of this section. No agency is bound by an action on another agency's Type II list. The fact that an action is identified as a Type II action in an agency's procedures does not mean that it must be treated as a Type II action by any other involved agency not identifying it as a Type II action in its procedures.

An agency that identifies an action as not requiring any determination or procedure under this Part is not an involved agency. Each of the actions on an agency Type II list must:

(1) in no case, have a significant adverse impact on the environment based on the criteria contained in section 617.7(c) of this Part; and

(2) not be a Type I action as defined in section 617.4 of this Part.

(c) The following actions are not subject to review under this Part:

(1) maintenance or repair involving no substantial changes in an existing structure or facility;

(2) replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site, including upgrading buildings to meet building, energy, or fire codes unless such action meets or exceeds any of the thresholds in section 617.4 of this Part;

(3) retrofit of an existing structure and its appurtenant areas to incorporate green infrastructure;

[3] (4) agricultural farm management practices, including construction, maintenance and repair of farm buildings and structures, and land use changes consistent with generally accepted principles of farming;

[4] (5) repaving of existing highways not involving the addition of new travel lanes;

[5] (6) street openings and right-of-way openings for the purpose of repair or maintenance of existing utility facilities;

(7) installation of telecommunication cables in existing highway or utility rights of way utilizing trenchless burial or aerial placement on existing poles;

[6] (8) maintenance of existing landscaping or natural growth;

[7] (9) construction or expansion of a primary or accessory/appurtenant, non-residential 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;

[8] (10) routine activities of educational institutions, including expansion of existing facilities by less than 10,000 square feet of gross floor area and school closings, but not changes in use related to such closings;

[9] (11) 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)] (13) of this subdivision and the installation, maintenance [and/] or upgrade of a drinking water well [and] or a septic system, or both, and conveyances of land in connection therewith;

[10] (12) 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;

[11] (13) 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;

(14) installation of solar energy arrays where such installation involves 25 acres or less of physical alteration on the following sites:

(i) closed landfills;

(ii) brownfield sites that have received a Brownfield Cleanup Program certificate of completion (“COC”) pursuant to ECL § 27-1419 and 6 NYCRR § 375-3.9 or Environmental Restoration Project sites that have received a COC pursuant to 6 NYCRR § 375-4.9, where the COC under either program for a particular site has

an allowable use of commercial or industrial, provided that the change of use requirements in 6 NYCRR § 375-1.11(d) are complied with;

(iii) sites that have received an inactive hazardous waste disposal site full liability release or a COC pursuant to 6 NYCRR § 375-2.9, where the Department has determined an allowable use for a particular site is commercial or industrial, provided that the change of use requirements in 6 NYCRR § 375-1.11(d) are complied with;

(iv) currently disturbed areas at publicly-owned wastewater treatment facilities;

(v) currently disturbed areas at sites zoned for industrial use; and

(vi) parking lots or parking garages;

(15) installation of solar energy arrays on an existing structure provided the structure is not:

(i) listed on the National or State Register of Historic Places;

(ii) located within a district listed in the National or State Register of Historic Places;

(iii) been determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places pursuant to sections 14.07 or 14.09 of the Parks, Recreation and Historic Preservation Law; or

(iv) within a district that has been determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places pursuant to sections 14.07 or 14.09 of the Parks, Recreation and Historic Preservation Law;

[12] (16) granting of individual setback and lot line variances and adjustments;

[13] (17) granting of an area variance[s] for a single-family, two-family or three-family residence;

(18) reuse of a residential or commercial structure, or of a structure containing mixed residential and commercial uses, where the residential or commercial use is a permitted use under the applicable zoning law or ordinance, including permitted by special use permit, and the action does not meet or exceeds any of the thresholds in section 617.4 of this Part;

(19) the recommendations of a county or regional planning board or agency pursuant to General Municipal Law sections 239-m or 239-n;

[14] (20) public or private best forest management ([silvicultural] silviculture) practices on less than 10 acres of land, but not including waste disposal, land clearing not directly related to forest management, clear-cutting or the application of herbicides or pesticides;

[15] (21) minor temporary uses of land having negligible or no permanent impact on the environment;

[16] (22) installation of traffic control devices on existing streets, roads and highways;

[17] (23) mapping of existing roads, streets, highways, natural resources, land uses and ownership patterns;

[18] (24) information collection including basic data collection and research, water quality and pollution studies, traffic counts, engineering studies, surveys, subsurface investigations and soils studies that do not commit the agency to undertake, fund or approve any Type I or Unlisted action;

[19] (25) official acts of a ministerial nature involving no exercise of discretion, including building permits and historic preservation permits where issuance is predicated solely on the applicant's compliance or noncompliance with the relevant local building or preservation code(s);

[20] (26) routine or continuing agency administration and management, not including new programs or major reordering of priorities that may affect the environment;

[21] (27) conducting concurrent environmental, engineering, economic, feasibility and other studies and preliminary planning and budgetary processes necessary to the formulation of a proposal for action, provided those activities do not commit the agency to commence, engage in or approve such action;

[22] (28) collective bargaining activities;

[23] (29) investments by or on behalf of agencies or pension or retirement systems, or refinancing existing debt;

[24] (30) inspections and licensing activities relating to the qualifications of individuals or businesses to engage in their business or profession;

[25] (31) purchase or sale of furnishings, equipment or supplies, including surplus government property, other than the following: land, radioactive material, pesticides, herbicides, or other hazardous materials;

[26] (32) license, lease and permit renewals, or transfers of ownership thereof, where there will be no material change in permit conditions or the scope of permitted activities;

[27] (33) adoption of regulations, policies, procedures and local legislative decisions in connection with any action on this list;

[28] (34) engaging in review of any part of an application to determine compliance with technical requirements, provided that no such determination entitles or permits the project sponsor to commence the action unless and until all requirements of this Part have been fulfilled;

[29] (35) civil or criminal enforcement proceedings, whether administrative or judicial, including a particular course of action specifically required to be undertaken pursuant to a judgment or order, or the exercise of prosecutorial discretion;

[30] (36) adoption of a moratorium on land development or construction;

[31 interpreting] (37) interpretation of an existing code, rule or regulation;

[32] (38) designation of local landmarks or their inclusion within historic districts;

(39) an agency's acquisition and dedication of 25 acres or less of land for parkland, or dedication of land for parkland that was previously acquired, or acquisition of a conservation easement;

(40) sale and conveyance of real property by public auction pursuant to article 11 of the Real Property Tax Law;

(41) construction and operation of an anaerobic digester, within currently disturbed areas at an operating publicly-owned landfill, provided the digester has a feedstock capacity of less than 150 wet tons per day, and only produces Class A digestate (as defined in 6 NYCRR § 361-3.7) that can be beneficially used or biogas to generate electricity or to make vehicle fuel, or both;

[33] (42) emergency actions that are immediately necessary on a limited and temporary basis for the protection or preservation of life, health, property or natural resources, provided that such actions are directly related to the emergency and are performed to cause the least change or disturbance, practicable under the

circumstances, to the environment. Any decision to fund, approve or directly undertake other activities after the emergency has expired is fully subject to the review procedures of this Part;

[34] (43) actions undertaken, funded or approved prior to the effective dates set forth in SEQR (see chapters 228 of the Laws of 1976, 253 of the Laws of 1977 and 460 of the Laws of 1978), except in the case of an action where it is still practicable either to modify the action in such a way as to mitigate potentially adverse environmental impacts, or to choose a feasible or less environmentally damaging alternative, the commissioner may, at the request of any person, or on his own motion, require the preparation of an environmental impact statement; or, in the case of an action where the responsible agency proposed a modification of the action and the modification may result in a significant adverse impact on the environment, an environmental impact statement must be prepared with respect to such modification;

[35] (44) actions requiring a certificate of environmental compatibility and public need under articles VII, VIII, [or] X or 10 of the Public Service Law and the consideration of, granting or denial of any such certificate;

[36] (45) actions subject to the class A or class B regional project jurisdiction of the Adirondack Park Agency or a local government pursuant to sections 807, 808 and 809 of the Executive Law, except class B regional projects subject to review by local government pursuant to section 807 of the Executive Law located within the Lake George Park as defined by subdivision one of section 43-0103 of the Environmental Conservation Law; and

[37] (46) actions of the Legislature and the Governor of the State of New York or of any court, but not actions of local legislative bodies except those local legislative decisions such as rezoning where the local legislative body determines the action will not be entertained.

§ 617.6 Initial review of actions and establishing lead agency

(a) Initial review of actions.

(1) As early as possible in an agency's formulation of an action it proposes to undertake, or as soon as an agency receives an application for funding or for approval of an action, it must do the following:

(i) Determine whether the action is subject to SEQR. If the action is a Type II action, the agency has no further responsibilities under this Part;

(ii) Determine whether the action involves a federal agency. If the action involves a federal agency, the provisions of section 617.15 of this Part apply;

(iii) Determine whether the action may involve one or more other agencies; and

(iv) Make a preliminary classification of an action as Type I or Unlisted, using the information available and comparing it with the thresholds set forth in section 617.4 of this Part. Such preliminary classification will assist in determining whether a full EAF and coordinated review is necessary.

(2) For Type I actions, a full EAF (see section 617.20, Appendix A, of this Part) must be used to determine the significance of such actions. The project sponsor must complete Part 1 of the full EAF, including a list of all other involved agencies that the project sponsor has been able to identify, exercising all due diligence. The lead agency is responsible for preparing [Parts] parts 2 and [, as needed, Part] 3.

(3) For Unlisted actions, the short EAF (see section 617.20, Appendix [C] B, of this Part) must be used to determine the significance of such actions. However, an agency may instead use the full EAF for Unlisted actions if the short EAF would not provide the lead agency with sufficient information on which to base its determination of significance. The lead agency may require other information necessary to determine significance.

[(4) An agency may waive the requirement for an EAF if a draft EIS is prepared or submitted. The draft EIS may be treated as an EAF for the purpose of determining significance.]

[(5)] (4) For state agencies only, determine whether the action is located in the coastal area. If the action is either Type I or Unlisted and is in the coastal area, the provisions of 19 NYCRR 600 also apply. This provision applies to all state agencies, whether acting as a lead or involved agency.

[(6)] (5) Determine whether the Type I or Unlisted action is located in an agricultural district and comply with the provisions of subdivision (4) of section 305 of article 25-AA of the Agriculture and Markets Law, if applicable.

(b) Establishing lead agency. (1) When a single agency is involved, that agency will be the lead agency when it proposes to undertake, fund or approve a Type I or Unlisted action that does not involve another agency.

(i) If the agency is directly undertaking the action, it must determine the significance of the action as early as possible in the design or formulation of the action.

(ii) If the agency has received an application for funding or approval of the action, it must determine the significance of the action within 20 calendar days of its receipt of the application, an EAF, or any additional information reasonably necessary to make that determination, whichever is later.

(2) When more than one agency is involved:

(i) For all Type I actions and for coordinated review of Unlisted actions involving more than one agency, a lead agency must be established prior to a determination of significance. For Unlisted actions where there will be no coordinated review, the procedures in paragraph (4) of this subdivision must be followed.

(ii) When an agency has been established as the lead agency for an action involving an applicant and has determined that an EIS is required, it must, in accordance with section 617.12(b) of this Part, promptly notify the applicant and all other involved agencies, in writing, that it is the lead agency, that an EIS is required and whether that scoping will be conducted.

(iii) The lead agency will continue in that role until it files either a negative declaration or a findings statement or a lead agency is re-established in accordance with paragraph (6) of this subdivision.

(3) Coordinated review.

(i) When an agency proposes to directly undertake, fund or approve a Type I action or an Unlisted action undergoing coordinated review with other involved agencies, it must, as soon as possible, transmit Part 1 of the EAF completed by the project sponsor, or a draft EIS and a copy of any application it has received to all involved agencies and notify them that a lead agency must be agreed upon within 30 calendar days of the date

the EAF or draft EIS was transmitted to them. For the purposes of this Part, and unless otherwise specified by the department, all coordination and filings with the department as an involved agency must be with the appropriate regional office of the department.
(ii) The lead agency must determine the significance of the action within 20 calendar days of its establishment as lead agency, or within 20 calendar days of its receipt of all information it may reasonably need to make the determination of significance, whichever occurs later, and must immediately prepare, file and publish the determination in accordance with section 617.12 of this Part.
(iii) If a lead agency exercises due diligence in identifying all other involved agencies and provides written notice of its determination of significance to the identified involved agencies, then no involved agency may later require the preparation of an EAF, a negative declaration or an EIS in connection with the action. The determination of significance issued by the lead agency following coordinated review is binding on all other involved agencies.
(4) Uncoordinated review for Unlisted actions involving more than one agency. (i) An agency conducting an uncoordinated review may proceed as if it were the only involved agency pursuant to subdivision (a) of this section unless and until it determines that an action may have a significant adverse impact on the environment.
(ii) If an agency determines that the action may have a significant adverse impact on the environment, it must then coordinate with other involved agencies.
(iii) At any time prior to its final decision an agency may have its negative declaration superseded by a positive declaration by any other involved agency.
(5) Actions for which lead agency cannot be agreed upon:
(i) If, within the 30 calendar days allotted for establishment of lead agency, the involved agencies are unable to agree upon which agency will be the lead agency, any involved agency or the project sponsor may request, by certified mail or other form of receipted delivery to the commissioner, that a lead agency be designated. Simultaneously, copies of the request must be sent by certified mail or other form of receipted delivery to all involved agencies and the project sponsor. Any agency raising a dispute must be ready to assume the lead agency functions if such agency is designated by the commissioner.

(ii) The request must identify each involved agency's jurisdiction over the action, and all relevant information necessary for the commissioner to apply the criteria in subparagraph (v) of this paragraph, and state that all comments must be submitted to the commissioner within 10 calendar days after receipt of the request.
(iii) Within 10 calendar days of the date a copy of the request is received by them, involved agencies and the project sponsor may submit to the commissioner any comments they may have on the action. Such comments must contain the information indicated in subparagraph (ii) of this paragraph.
(iv) The commissioner must designate a lead agency within 20 calendar days of the date the request or any supplemental information the commissioner has required is received, based on a review of the facts, the criteria below, and any comments received.
(v) The commissioner will use the following criteria, in order of importance, to designate lead agency:
(a) whether the anticipated impacts of the action being considered are primarily of statewide, regional, or local significance (i.e., if such impacts are of primarily local significance, all other considerations being equal, the local agency involved will be lead agency);
(b) which agency has the broadest governmental powers for investigation of the impact(s) of the proposed action; and
(c) which agency has the greatest capability for providing the most thorough environmental assessment of the proposed action.
(vi) Notice of the commissioner's designation of lead agency will be mailed to all involved agencies and the project sponsor.
(6) Re-establishment of lead agency.
(i) Re-establishment of lead agency may occur by agreement of all involved agencies in the following circumstances:
(a) for a supplement to a final EIS or generic EIS;
(b) upon failure of the lead agency's basis of jurisdiction; or
(c) upon agreement of the project sponsor, prior to the acceptance of a draft EIS.

(ii) Disputes concerning re-establishment of lead agency for a supplement to a final EIS or generic EIS are subject to the designation procedures contained in paragraph (b)(5) of this section.
(iii) Notice of re-establishment of lead agency must be given by the new lead agency to the project sponsor within 10 days of its establishment.

§ 617.7 remains the same.

§ 617.8 Scoping

(a) 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 not significant [or nonsignificant]. Scoping is [not] required for all EISs (except for supplemental EISs), and [. Scoping] may be initiated by the lead agency or the project sponsor.

(b) [If scoping is conducted,] The [the] project sponsor must submit a draft scope that contains the items identified in paragraphs [(f)] (e) (1) through (5) of this section to the lead agency. The lead agency must provide a copy of the draft scope to all involved agencies, and make it available to any individual or interested agency that has expressed an interest in writing to the lead agency.

[(c) If scoping is not conducted, the project sponsor may prepare a draft EIS for submission to the lead agency.]

[(d)] (c) Involved agencies should provide written comments reflecting their concerns, jurisdictions and [information] needs for environmental analysis sufficient to ensure that the EIS will be adequate to support their SEQR findings. The lead agency must include such informational needs in the final scope provided they are reasonable. Failure of an involved agency to participate in the scoping process will not delay completion of the final written scope.

[(e)] (d) Scoping must include an opportunity for public participation. The lead agency may either provide a period of time for the public to review and provide written comments on a draft scope or provide for public input through the use of meetings, exchanges of written material, or other means.

[(f)] (e) The lead agency must provide a final written scope to the project sponsor, all involved agencies and any individual that has expressed an interest in writing to the lead agency within 60 days of its receipt of a draft scope. The final written scope should include:

(1) a brief description of the proposed action;

(2) the potentially significant adverse impacts identified both in Part 3 of the environmental assessment form [the positive declaration] and as a result of consultation

with the other involved agencies and the public, including an identification of those particular aspect(s) of the environmental setting that may be impacted;

(3) the extent and quality of information needed for the preparer to adequately address each impact, including an identification of relevant existing information, and required new information, including the required methodology(ies) for obtaining new information;

(4) an initial identification of mitigation measures;

(5) the reasonable alternatives to be considered;

(6) an identification of the information [/] or data that should be included in an appendix rather than the body of the draft EIS; and

(7) a brief description of the [those] prominent issues that were considered in the review of the environmental assessment form or raised during scoping, or both, and determined to be [not] neither relevant nor [or not] environmentally significant or that have been adequately addressed in a prior environmental review and the reasons why those issues were not included in the final scope.

[(g)] (f) All relevant issues should be raised before the issuance of a final written scope. Any agency or person raising issues after that time must provide to the lead agency and project sponsor a written statement that identifies:

(1) the nature of the information;

(2) the importance and relevance of the information to a potential significant impact;

(3) the reason(s) why the information was not identified during scoping and why it should be included at this stage of the review.

[(h)] (g) The project sponsor [may] must incorporate information submitted consistent with subdivision [(g)] (f) of this section into the draft EIS [at its discretion] or attach such comments into an appendix of the draft EIS. [Any substantive information not incorporated into the draft EIS must be considered as public comment on the draft EIS.]

[(i)] (h) If the lead agency fails to provide a final written scope within 60 calendar days of its receipt of a draft scope, the project sponsor may prepare and submit a draft EIS consistent with the submitted draft scope.

§ 617.9 Preparation and content of environmental impact statements

(a) Environmental impact statement procedures.

(1) The project sponsor or the lead agency, at the project sponsor's option, will prepare the draft EIS. If the project sponsor does not exercise the option to prepare the draft EIS, the lead agency will prepare it, cause it to be prepared or terminate its review of the action. A fee may be charged by the lead agency for preparation or review of an EIS pursuant to section 617.13 of this Part. [When the project sponsor prepares the draft EIS, the document must be submitted to the lead agency.]

(2) The lead agency will use the final written scope [, if any,] and the standards contained in this section 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 in accordance with the standards in this section within 45 days of receipt of the draft EIS. A draft EIS is adequate with respect to scope and content for the purpose of commencing public review if it meets the requirements of the final written scope, sections 617.8 (g) and 617.9 (b) of this Part, and provides the public and involved agencies with the necessary information to evaluate project impacts, alternatives, and mitigation measures.

(i) If the draft EIS is determined to be inadequate, the lead agency must identify in writing the deficiencies and provide this information to the project sponsor.

(ii) The lead agency must determine whether to accept the resubmitted draft EIS within 30 days of its receipt. The determination of adequacy of a resubmitted draft EIS must be based solely on the written list of deficiencies provided by the lead agency following the previous review, unless changes are proposed for the project, there is newly discovered information, or there is a change in circumstances related to the project.

(3) When the lead agency has completed a draft EIS or when it has determined that a draft EIS prepared by a project sponsor is adequate for public review, the lead agency must prepare, file and publish a notice of completion of the draft EIS and file copies of the draft EIS in accordance with the requirements set forth in section 617.12 of this Part.

The minimum public comment period on the draft EIS is 30 days. The comment period begins with the first filing and circulation of the notice of completion.

(4) When the lead agency has completed a draft EIS or when it has determined that a draft EIS prepared by a project sponsor is adequate for public review, the lead agency will determine whether or not to conduct a public hearing concerning the action. In determining whether or not to hold a SEQR hearing, the lead agency will consider: the degree of interest in the action shown by the public or involved agencies; whether substantive or significant adverse environmental impacts have been identified; the adequacy of the mitigation measures and alternatives proposed; and the extent to which a public hearing can aid the agency decision-making processes by providing a forum for, or an efficient mechanism for the collection of, public comment. If a hearing is to be held:

(i) the lead agency must prepare and file a notice of hearing in accordance with section 617.12(a) and (b) of this Part. Such notice may be contained in the notice of completion of the draft EIS. The notice of hearing must be published, at least 14 calendar days in advance of the public hearing, in a newspaper of general circulation in the area of the potential impacts of the action. For state agency actions that apply statewide, this requirement can be satisfied by publishing the hearing notice in the ENB and the State Register;

(ii) the hearing will commence no less than 15 calendar days or no more than 60 calendar days after the filing of the notice of completion of the draft EIS by the lead agency pursuant to section 617.12(b) of this Part. When a SEQR hearing is to be held, it should be conducted with other public hearings on the proposed action, whenever practicable; and

(iii) comments will be received and considered by the lead agency for no less than 30 calendar days from the first filing and circulation of the notice of completion, or no less than 10 calendar days following a public hearing at which the environmental impacts of the proposed action are considered, whichever is later.

(5) Except as provided in subparagraph (i) of this paragraph, the lead agency must prepare or cause to be prepared, and must file a final EIS, within 45 calendar days after

the close of any hearing or within 60 calendar days after the filing of the draft EIS, whichever occurs later.

(i) No final EIS need be prepared if:

(a) the proposed action has been withdrawn or;

(b) on the basis of the draft EIS, and comments made thereon, the lead agency has determined that the action will not have a significant adverse impact on the environment. A negative declaration must then be prepared, filed and published in accordance with section 617.12 of this Part.

(ii) The last date for preparation and filing of the final EIS may be extended under the following circumstances:

(a) if it is determined that additional time is necessary to prepare the statement adequately; or

(b) if problems with the proposed action requiring material reconsideration or modification have been identified.

(6) When the lead agency has completed a final EIS, it must prepare, file and publish a notice of completion of the final EIS and file copies of the final EIS in accordance with section 617.12 of this Part.

(7) Supplemental EISs.

(i) The lead agency may require a supplemental EIS, limited to the specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS that arise from:

(a) changes proposed for the project;

(b) newly discovered information; or

(c) a change in circumstances related to the project.

(ii) The decision to require preparation of a supplemental EIS, in the case of newly discovered information, must be based upon the following criteria:

(a) the importance and relevance of the information; and

(b) the present state of the information in the EIS.

(iii) If a supplement is required, it will be subject to the full [procedures] procedural requirements of section 617.9 (a) of this Part except that scoping is not required.

(b) Environmental impact statement content.

(1) 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. The lead agency and other involved agencies must cooperate with project sponsors who are preparing EISs by making available to them information contained in their files relevant to the EIS.

(2) EISs must be clearly and concisely written in plain language that can be read and understood by the public. Within the framework presented in paragraph (5) of this subdivision, EISs should address only those potential significant adverse environmental impacts that can be reasonably anticipated and [/or] that 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. Highly technical material should be summarized and, if it must be included in its entirety, should be referenced in the statement and included in an appendix.

(3) All draft and final EISs must be preceded by a cover sheet stating:

(i) whether it is a draft or final EIS;

(ii) the name or descriptive title of the action;

(iii) the location (county and town, village or city) and street address, if applicable, of the action;

(iv) the name and address of the lead agency and the contact information [name and telephone number] of a person at the agency who can provide further information;

(v) the names of individuals or organizations that prepared any portion of the statement;

(vi) the date of its acceptance by the lead agency; and

(vii) in the case of a draft EIS, the date by which comments must be submitted.

(4) A draft or final EIS must have a table of contents following the cover sheet and a precise summary which adequately and accurately summarizes the statement.

(5) The format of the draft EIS may be flexible; however, all draft EISs must include the following elements:

(i) a concise description of the proposed action, its purpose, public need and benefits, including social and economic considerations;

(ii) a concise description of the environmental setting of the areas to be affected, sufficient to understand the impacts of the proposed action and alternatives;

(iii) a statement and evaluation of the potential significant adverse environmental impacts at a level of detail that reflects the severity of the impacts and the reasonable likelihood of their occurrence. The draft EIS should identify and discuss the following impacts only where [applicable] they are relevant and significant:

(a) reasonably related short-term and long-term impacts, cumulative impacts and other associated environmental impacts;

(b) those adverse environmental impacts that cannot be avoided or adequately mitigated if the proposed action is implemented;

(c) any irreversible and irretrievable commitments of environmental resources that would be associated with the proposed action should it be implemented;

(d) any growth-inducing aspects of the proposed action;

(e) impacts of the proposed action on the use and conservation of energy (for an electric generating facility, the statement must include a demonstration that the facility will satisfy electric generating capacity needs or other electric systems needs in a manner reasonably consistent with the most recent state energy plan);

(f) impacts of the proposed action on solid waste management and its consistency with the state or locally adopted solid waste management plan;

(g) impacts of public acquisitions of land or interests in land or funding for non-farm development on lands used in agricultural production and unique and irreplaceable agricultural lands within agricultural districts pursuant to subdivision (4) of section 305 of article 25-AA of the Agriculture and Markets
Law; [and]

(h) if the proposed action is in or involves resources in Nassau or Suffolk Counties, impacts of the proposed action on, and its consistency with, the comprehensive management plan for the special groundwater protection area program as implemented pursuant to article 55 or any plan subsequently ratified and adopted pursuant to article 57 of the Environmental Conservation Law for Nassau and Suffolk counties; and

(i) measures to avoid or reduce both an action's impacts on climate change and associated impacts due to the effects of climate change such as sea level rise and flooding.

(iv) a description of the mitigation measures;

(v) a description and evaluation of the range of reasonable alternatives to the action that are feasible, considering the objectives and capabilities of the project sponsor. The description and evaluation of each alternative should be at a level of detail sufficient to permit a comparative assessment of the alternatives discussed. The range of alternatives must include the no action alternative. The no action alternative discussion should evaluate the adverse or beneficial site changes that are likely to occur in the reasonably foreseeable future, in the absence of the proposed action. The range of alternatives may also include, as appropriate, alternative:

(a) sites;

(b) technology;

(c) scale or magnitude;

(d) design;

(e) timing;

(f) use; and

(g) types of action.

For private project sponsors, any alternative for which no discretionary approvals are needed may be described. Site alternatives may be limited to parcels owned by, or under option to, a private project sponsor;

(vi) for a state agency action in the coastal area the action's consistency: with the applicable coastal policies contained in 19 NYCRR 600.5; or when the action is in an approved local waterfront revitalization program area, with the local program policies;

(vii) for a state agency action within a heritage area or urban cultural park, the action's consistency with the approved heritage area management plan or the approved urban cultural park management plan;

(viii) a list of any underlying studies, reports, EISs and other information obtained and considered in preparing the statement including the final written scope.

(6) In addition to the analysis of significant adverse impacts required in subparagraph (b)(5)(iii) of this section, if information about reasonably foreseeable catastrophic impacts to the environment is unavailable because the cost to obtain it is exorbitant, or the means to obtain it are unknown, or there is uncertainty about its validity, and such information is essential to an agency's SEQR findings, the EIS must:

(i) identify the nature and relevance of unavailable or uncertain information;

(ii) provide a summary of existing credible scientific evidence, if available; and

(iii) assess the likelihood of occurrence, even if the probability of occurrence is low, and the consequences of the potential impact, using theoretical approaches or research methods generally accepted in the scientific community.

This analysis would likely occur in the review of such actions as an oil supertanker port, a liquid propane gas/liquid natural gas facility, or the siting of a hazardous waste treatment facility. It does not apply in the review of such actions as shopping malls, residential subdivisions or office facilities.

(7) A draft or final EIS may incorporate by reference all or portions of other documents, including EISs that contain information relevant to the statement. The referenced documents must be made available for inspection by the public within the time period for public comment in the same places where the agency makes available copies of the EIS. When an EIS incorporates by reference, the referenced document must be briefly described, its applicable findings summarized, and the date of its preparation provided.

(8) A final EIS must consist of the following: the draft EIS, including any revisions or supplements to it; copies or a summary of the substantive comments received and their source (whether or not the comments were received in the context of a hearing); and the lead agency's responses to all substantive comments. The draft EIS may be directly incorporated into the final EIS or may be incorporated by reference. The lead agency is responsible for the adequacy and accuracy of the final EIS, regardless of who prepares it. All substantive revisions and supplements to the draft EIS must be specifically indicated and identified as such in the final EIS.

§ 617.10 remains the same.

§ 617.11 remains the same.

§ 617.12 Document preparation, filing, publication and distribution

The following SEQR documents must be prepared, filed, published and made available as prescribed in this section.

(a) Preparation of documents.

(1) Each negative declaration, positive declaration, notice of completion of an EIS, notice of hearing and findings must [state that it has been prepared in accordance with article 8 of the Environmental Conservation Law and must] contain the following: the name and address of the lead agency; the name, address and telephone number of a person who can provide additional information; a brief description of the action; the SEQR classification; and, the location of the action.

(2) In addition to the information contained in paragraph (1) of this subdivision:

(i) A negative declaration must meet the requirements of section 617.7(b) of this Part. A conditioned negative declaration must also identify the specific conditions being imposed that have eliminated or adequately mitigated all significant adverse environmental impacts and the period, not less than 30 calendar days, during which comments will be accepted by the lead agency.

(ii) A positive declaration must identify the potential significant adverse environmental impacts that require the preparation of an EIS and state [whether] how and when scoping will be conducted.

(iii) A notice of completion must identify the type of EIS (draft, final, supplemental, generic) and state where copies of the document can be obtained. For a draft EIS the notice must include the period (not less than 30 calendar days from the date of filing or not less than 10 calendar days following a public hearing on the draft EIS) during which comments will be accepted by the lead agency.

(iv) A notice of hearing must include the time, date, place and purpose of the hearing and contain a summary of the information contained in the notice of completion. The notice of hearing may be combined with the notice of completion of the draft EIS.

(v) Findings must contain the information required by section 617.11(d) and (e) of this Part.

(b) Filing and distribution of documents.
(1) A Type I negative declaration, conditioned negative declaration, positive declaration, notice of completion of an EIS, EIS, notice of hearing and findings must be filed with:
(i) the chief executive officer of the political subdivision in which the action will be principally located;
(ii) the lead agency;
(iii) all involved agencies (see also section 617.6(b)(3)) of this Part;
(iv) any person who has requested a copy; and
(v) if the action involves an applicant, with the applicant.
(2) A negative declaration prepared on an Unlisted action must be filed with the lead agency.
(3) All SEQR documents and notices, including but not limited to, EAFs, negative declarations, positive declarations, scopes, notices of completion of an EIS, EISs, notices of hearing and findings must be maintained in files that are readily accessible to the public and made available on request.
(4) The lead agency may charge a fee to persons requesting documents to recover its copying costs.
(5) If sufficient copies of the EIS are not available to meet public interest, the lead agency must provide an additional copy, in electronic or printed format, of the documents to the local public library.
(6) A copy, in electronic or printed format, of the EIS must be sent to the Department of Environmental Conservation, Division of Environmental Permits, 625 Broadway, Albany, NY 12233-1750.
(7) For state agency actions in the coastal area a copy of the EIS must be provided to the Secretary of State.
(c) Publication of notices:
(1) Notice of a Type I negative declaration, conditioned negative declaration, positive declaration, draft and final scopes and completion of an EIS must be published in the Environmental Notice Bulletin (ENB) in a manner prescribed by the department. Notices [Notice] must be submitted [provided] by the lead agency [directly] to the Environmental Notice Bulletin [, Room 538,.] by e-mail to the address listed on the ENB's webpage or

to the following address: Environmental Notice Bulletin, 625 Broadway, Albany, NY 12233-1750. The ENB is accessible on the department's [internet] web site [at 'http://www.dec.state.ny.us.'].

(2) A notice of hearing must be published, at least 14 days in advance of the hearing date, in a newspaper of general circulation in the area of the potential impacts of the action. For state agency actions that apply statewide this requirement can be satisfied by publishing the hearing notice in the ENB and the State Register.

(3) Agencies may provide for additional public notice by posting on sign boards or by other appropriate means.

(4) Notice of a negative declaration must be incorporated once into any other subsequent notice required by law. This requirement can be satisfied by indicating the SEQR classification of the action and the agency's determination of significance.

(5) The lead agency shall publish or cause to be published on a publicly available website (that is free of charge) the draft and then final scopes and the draft and final EISs. The website posting of such scopes and statements may be discontinued one year after all necessary federal, state and local permits have been issued or after the action is funded or undertaken, whichever is later. Printed filings and public notices shall clearly indicate the address of the website at which such filings are posted.

§ 617.13 Fees and costs

(a) When an action subject to this Part involves an applicant, the lead agency may charge a fee to the applicant in order to recover the actual costs of either preparing or reviewing the draft [and/] or final EIS. The fee may include a chargeback to recover a proportion of the lead agency's actual costs expended for the preparation of a generic EIS prepared pursuant to section 617.10 of this Part for the geographic area where the applicant's project is located. The chargeback may be based on the percentage of the remaining developable land or the percentage of road frontage to be used by the project, or any other reasonable methods. The fee must not exceed the amounts allowed under subdivisions (b) through (d) of this section. If the lead agency charges for preparation of a draft [and/] or final EIS, it may not also charge for review of the draft or final EIS; if it charges for review of a draft [and/] or final EIS, it may not also charge for preparation of the EISs. Scoping will be considered part of the draft EIS for purposes of determining a SEQR fee; no fee may be charged for preparation of an EAF or determination of significance.

(b) For residential projects, the total project value will be calculated on the actual purchase price of the land or the fair market value of the land (determined by assessed valuation divided by equalization rate) whichever is higher, plus the cost of all required site improvements, not including the cost of buildings and structures, as determined with reference to a current cost data publication in common use. In the case of such projects, the fee charged by an agency may not exceed two percent of the total project value.

(c) For nonresidential construction projects, the total project value will be calculated on the actual purchase price of the land or the fair market value of the land (determined by the assessed valuation divided by equalization rate) whichever is higher, plus the cost of supplying utility service to the project, the cost of site preparation and the cost of labor and material as determined with reference to a current cost data publication in common use. In the case of such projects the fee charged may not exceed one half of one percent of the total project value.

(d) For projects involving the extraction of minerals, the total project value will be calculated on the cost of site preparation for mining. Site preparation cost means the

cost of clearing and grubbing and removal of over-burden for the entire area to be mined plus the cost of utility services and construction of access roads. Such costs are determined with reference to a current cost data publication in common use. The fee charged by the agency may not exceed one half of one percent of the total project value. For those costs to be incurred for phases occurring three or more years after issuance of a permit, the total project value will be determined using a present value calculation.

(e) [Where an applicant chooses not to prepare a draft EIS,] The [the] lead agency will provide the applicant, upon request, with an estimate of the costs for preparing or reviewing the draft EIS calculated on the total value of the project for which funding or approval is sought. The applicant is also entitled to, upon request, copies of invoices or statements for work prepared by a consultant that are submitted to the lead agency in connection with any services rendered in preparing or reviewing an EIS.

(f) Appeals procedure. When a dispute arises concerning fees charged to an applicant by a lead agency, the applicant may make a written request to the agency setting forth reasons why it is felt that such fees are inequitable. Upon receipt of a request, the chief fiscal officer of the agency or his designee will examine the agency record and prepare a written response to the applicant setting forth reasons why the applicant's claims are valid or invalid. Such appeal procedure must not interfere with or cause delay in the EIS process or prohibit an action from being undertaken.

(g) The technical services of the department may be made available to other agencies on a fee basis, reflecting the costs thereof, and the fee charged to any applicant pursuant to this section may reflect such costs.

§ 617.14 through § 617.16 remains the same.

§ 617.17 Referenced material

The following referenced documents have been filed with the New York State Department of State. The documents are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 and for inspection and copying at the Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-1750.

(a) National Register of Historic Places, ([1994] 2017), 36 Code of Federal Regulation (CFR) Parts 60 and 63.

(b) [Register O] National Natural Landmarks Program, ([1994] 2017), 36 Code of Federal Regulation (CFR) Part 62.§ 617.18 remains the same.

§ 617.19 Effective date

This Part, as revised, applies to actions for which a determination of significance has not been made prior to January 1, [1996] 2019. Actions for which a determination of significance has been made prior to January 1, [1996] 2019 must comply with this Part effective [June 1, 1987] July 3, 2001.

§ 617.20

Appendices A and B are model environmental assessment forms that may be used to help satisfy this Part or may be modified in accordance with sections 617.2 (m) and 617.14 of this Part.

Appendix

Summary of Changes to the SEQR Regulations

617.2 - Definitions	A new definition was added for the term "green infrastructure" and non-substantial or conforming changes have been made to six existing definitions ("critical environmental area," "environmental assessment form," "environmental notice bulletin," "positive declaration," "scoping," and "Type II action").
617.4 - Type I List	617.4 (b) (5) (iii), (iv) & (v) – modified this item to lower the numeric threshold for number of new residential units that would trigger a Type I classification. 617.4 (b) (6) (iii) & (iv) – added a new numeric category threshold for smaller communities and modifies the existing threshold for parking that triggers a Type I classification. 617.4 (b) (9) – creates a threshold for when an action *that is located wholly or partially* within or substantially contiguous to a National Register listed historic site becomes a Type I action and adds properties determined to be eligible for inclusion on the State Register of Historic Sites to the Type I list.
617.5 – Type II List	617.5 (C) (2) – modified to include upgrading an existing building to meet energy codes. 617.5 (C) (3) – adds a new express Type II item for retrofit of an existing structure to incorporate green infrastructure. 617.5 (C) (7) – adds a new express Type II item for installation of telecommunications cables in existing highway or utility rights of way. 617.5 (C) (11) [formerly 9] – construction or expansion of a single-family, a two-family or a three-family residence - modified to include the conveyances of land in connection therewith. 617.5 (C) (14) & (15) - added a new express Type II item for installation of up to 25 acres of solar energy arrays on a closed landfill, environmental remediation sites (brownfields, environmental restoration project, and inactive hazardous waste sites), currently disturbed areas at publicly-owned WWTFs,

	currently disturbed areas at sites zoned for industrial use, and parking lots/garages. Installation of solar arrays on certain existing buildings. 617.5 (C) (16) [formerly 12] – Existing Type II for granting of individual setback and lot line variances modified to include lot line adjustments. 617.5 (C) (18) - added a new express Type II category for reuse of a residential or commercial structure, or of a structure containing mixed residential and commercial uses. 617.5 (C) (19) - added a new express Type II category for recommendations of a county or regional planning board or agency pursuant to General Municipal Law sections 239-m or 239-n. 617.5 (C) (39) - added a new express Type II category for an agency's acquisition and dedication of 25 acres or less of land for parkland, or dedication of land for parkland that was previously acquired, or acquisition of a conservation easement. 617.5 (C) (40) - added a new express Type II category for sale and conveyance of real property by public auction. 617.5 (C) (41) - added a new express Type II category for construction and operation of an anaerobic digester, within currently disturbed areas at an operating municipal solid waste landfill.
617.6 – Initial Review of Actions and Establishing lead agency	Removed the language that allows the lead agency to waive the requirement for an EAF.
617.8 - Scoping	617.8 (a) - Modifications were made to make scoping required for all EIS's, except for supplements to EIS's which remains optional. 617.8 (g) [formerly h] – modified this section to require that the project sponsor must incorporate eligible late filed comments on the scope into the DEIS or attach them to an appendix of the DEIS. Additional non-substantive amendments of a procedural nature were also made to other sections of 617.8.
617.9 – Preparation and content of environmental impact statements	617.9 (a) Changes to this section tighten the procedures to define when a DEIS is adequate for public review. 617.9 (b)(5)(iii) – A new clause was added to evaluate measures to avoid or reduce an

	actions impact on climate change and associated impacts of flooding and sea level rise.
617.12 – Document preparation, filing, publication and distribution.	617.12(c) (1) – section was modified to require draft and final scopes be noticed in the ENB; 617.12 (c) (5) – section was modified to add the existing statutory requirement that EIS's be published on a publicly available website and included in this section that draft and final scopes also be published. Other non-substantial modification and edits were also made.
617.13 – SEQR Fees	617.13 (e) – section was modified to require lead agencies, upon request, to provide applicants with copies of invoices for work prepared by a consultant in preparing or reviewing an EIS.

ZARIN & STEINMETZ

Case Law Update: May 15, 2019

Topic: Area Variances vs. Use Variances

Understanding the differences between use and area variances is not that difficult as the statutory tests are clearly articulated and quite distinct. The test for use variances is found in Town Law § 267-b(2), while the test for area variances is articulated in § 267-b(3) (with identical provisions found in the State's Village Law and General City Law). Understanding when to apply the use versus the area variance test can, however, present great challenges. As more zoning ordinances are being drafted with "limiting factors or criteria," particularly locational requirements such as distances from or frontage on a state or county road, or separation distances between similar uses, new and complex questions are emerging about how to obtain variances from these criteria.

Matter of Route 17K Real Estate, LLC v. Zoning Board of Appeals of the Town of Newburgh, 93 N.Y.S.3d 107 (2d Dep't Jan. 30, 2019)

The Town of Newburgh's ZBA granted "area variances" and issued a negative SEQRA declaration for a proposed hotel. Part of the variance application pertained to a provision in the Town Code requiring a hotel to have its "principal frontage" along a state or county highway. Petitioners brought an Article 78 proceeding to annul this determination. The Orange County Supreme Court denied the Petition and dismissed the proceeding and the Petitioners appealed.

The Second Department held that, pursuant to Town Law § 267(1)(b), an area variance is defined as the "authorization by the Zoning Board of Appeals for the use of land in a manner which is not allowed by the dimensional or physical requirements of the applicable zoning regulations" (emphasis added). Applying this rule to the current matter, the Second Department agreed with the ZBA and the Supreme Court that the principal frontage requirement is a physical requirement, rather than a use restriction, and therefore the application was properly considered one for an area variance. Moreover, the Second Department found that the grant of the area variance was rational

and that the ZBA's decision to issue a negative declaration did not constitute a violation of SEQRA.

Other recent cases, including two out of Westchester County, have also confronted situations where uses needed to be proximate to state or county roads. In the Matter of the Application of Manocherian v. Zoning Board of Appeals of the Town of New Castle, Index No. 68775/2016 (Westchester Cty. May 17, 2018), a rehabilitation facility in New Castle classified as a "nursing home" was required to "be located on lots fronting, or having direct access, to a state or county road," and in the Matter of the Application of Citizens for Responsible Hudson Institute Site Development, Inc. v. Zoning Board of Appeals of the Town of Cortlandt, Index No. 59903/2017 (Westchester Cty. Oct. 11, 2017), a drug and alcohol rehabilitation specialty hospital in Cortlandt was required to "front on" a state road. While the ZBA and courts in both cases treated variance requests from these requirements as area variances, important questions persist about whether such "frontage" or "fronts on" criteria or requirements are truly "physical or dimensional" in nature, or whether they are in actuality "locational" and more "use-oriented."

The Matter of Cooperstown Eagles, LLC v. Village Of Cooperstown Zoning Board of Appeals, 77 N.Y.S.3d 716 (3d Dep't May 17, 2018) presented another interesting zoning requirement (or limiting criteria)- "owner occupancy" - which is neither dimensional, physical nor locational.

The Petitioner sought to rent a second floor, two-bedroom apartment to tourists (*think an Air BnB near the Baseball Hall of Fame*) and requested an area variance from the Village of Cooperstown's requirement that tourist accommodations be "owner-occupied." The ZBA treated this as a request for an area variance and denied the Petitioner's request. Following this denial, the owner conveyed a 25% ownership interest to the tenant of the one-bedroom apartment located on the premises' first floor. Shortly thereafter, a Special Use Permit was issued for the tourist accommodation. An Article 78 proceeding was then brought challenging the denial of the area variance. The Otsego County Supreme Court dismissed this application and the property owner appealed.

The Third Department held that the ZBA's issuance of the Special Use Permit did not moot the owner's Article 78 petition, but also, the ZBA did not abuse its discretion in denying the

owner's application for an area variance, having appropriately considered all five applicable statutory factors.

Of interest is the fact that the ZBA treated this request as one for an area variance and that such treatment was not questioned by the courts. The ZBA noted that the owner-occupancy requirement was the "cornerstone" of the tourist accommodation special use because it was the "primary control mechanism relied upon for [the] purposes of reducing or attempting to reduce the negative impact of short-term rentals." No clear reasoning was presented as to why this request was appropriately one for an area variance. One could easily interpret the occupancy requirement as not being "physical" in nature - in many ways this seems akin to the two-family "use" requirement.

Topic: Spot Zoning

As unique and novel land uses are introduced into an existing, developed community, particularly one with an established zoning ordinance and regulatory scheme, any new use or text change is likely to be scrutinized for "spot zoning" unless such use is broadly introduced throughout the community.

In the Matter of Save Harrison, Inc. v. Town/Village of Harrison, 93 N.Y.S.3d 74 (2d Dep't Jan. 23, 2019), a text amendment authorizing assisted living residences in the Town/Village of Harrison was met with an array of challenges from neighbors, including one of unlawful spot zoning.

An eight-acre property in the Town was used for many years as a quarry. Litigation related to the quarry was resolved in December of 2014 and a settlement agreement between the owner of the premises and the Town was established (whereby the owner would discontinue quarry operations and the Town would entertain an application for approval of a senior living facility on the site). In March of 2015, the developer requested a text amendment to make senior living facilities a new special permit use. Included within the text were several limiting factors, such as a minimum lot area of six acres and 1,500 feet of frontage along an arterial road. In May of 2016, the Town Board approved the rezoning after the Planning Board, serving as the lead agency, issued a negative declaration.

The Petitioners commenced a hybrid Article 78 and declaratory relief action seeking to annul the underlying settlement agreement, the Planning Board's lead agency declaration and its negative declaration, as well as to declare the rezoning void on numerous grounds, including spot zoning. A Judgment in March of 2017 dismissed the Article 78 causes of action and awarded summary judgment in favor of the Town and the developer. In a 54-page Decision and Order that pre-dated the Judgment, Judge Gretchen Walsh of the Environmental Claims Part found no spot zoning. The Petitioners appealed.

The Second Department held that: 1) SEQRA review of the zoning amendment did not toll the four-month statutory period for a property owner to challenge the settlement agreement with the Town; 2) the six-year statute of limitations applicable to challenges to the substance of the local law did not apply to the Town's execution of a settlement agreement with the property owner; 3) the Planning Board was the proper lead agency for purposes of SEQRA review; 4) the Town Ordinance approving the rezoning amendment text did not constitute impermissible contract or spot zoning; and 5) the record was unclear whether the Town provided a "full statement" of its proposed action with regard to the rezoning request to Westchester County under General Municipal Law § 239-m.

As to the spot zoning claim, the court examined the Town's Comprehensive Plan and concluded that even though it emphasized senior housing in a particular area, it also called for senior housing town-wide. Therefore, the amendment was in conformance with the Town's Comprehensive Plan and was designed to further the interests of the community, and not simply those of the applicant. As illustrated by the Respondents, this special exception use could be applied to four potential sites in various neighborhoods.

In the Matter of Yorktown Smart Growth v. Town of Yorktown, 92 N.Y.S.3d 344 (2d Dep't Jan. 23, 2019), a rezoning for a BJ Wholesale Club's gas station was met with an unsuccessful spot zoning attack.

The Town Board of the Town of Yorktown rezoned a shopping center occupied by a Staples and a BJ's Wholesale Club from C-1 Commercial Shopping Center District to C-3 Commercial Limited District ("C-3"). It then granted a Special Use Permit to BJ's Wholesale Club for the construction of a gas station in an unused section of the shopping center parking lot (which would be a principal use). In two causes of action, a group of neighbors and an opposition

organization (including area gas station owners) claimed that the rezoning was illegal spot zoning. The lower court held that the "ultimate test [was] whether the change [was] other than part of a well-considered and comprehensive plan calculated to serve the general welfare of the community." The lower court found that the Town's rezoning was in conformance with its Comprehensive Plan, which called for the area to remain a shopping center, yet also encouraged enhanced economic development. The rezoning would allow for the shopping center to remain and allowed for the construction of the gas station, which would enhance economic development. Moreover, the lower court found that the rezoning did not "single out a small parcel of land for a use classification totally different from that of [the] surrounding area for the benefit of the owner of said property to the detriment of other others," as there was other land zoned C-3 directly proximate to the site. The Second Department agreed with the lower court and found that the issuance of the Special Use Permit was not illegal, arbitrary or capricious, or an abuse of discretion.

Matter of Star Prop. Holding, LLC v. Town of Islip, 83 N.Y.S.3d 146 (2d Dep't Aug. 22, 2018)

After a recommendation from the Planning Board of the Town of Islip, the Town Board had rezoned a site from Business-1 to Business-3 and granted a Special Use Permit to allow the site to be used as a gas station and convenience store. The Town Board also adopted a negative declaration under SEQRA. An Article 78 proceeding was brought by nearby business owners challenging the determination of the Planning and Town Boards. The Suffolk County Supreme Court dismissed the matter and the Petitioners appealed.

The Second Department held that: 1) owners of nearby businesses had standing to bring a SEQRA challenge to the granting of the application and adoption of the negative declaration made under SEQRA; 2) the Town Board did not improperly delegate its responsibilities as lead agency under SEQRA; and 3) that the Town Board's rezoning of the property did not constitute illegal spot zoning. As to the spot zoning claim, the court noted that "the inquiry focuses on whether the rezoning is part of a well-considered and comprehensive plan calculated to serve the general welfare of the community." In this matter, the court held that the Petitioners failed to establish that the rezoning was inconsistent with the Town's Comprehensive Plan and incompatible with surrounding uses.

The issue here is not simply whether a map revision or text change "benefits" the applicant. Instead, the inquiry must focus on the potential detriment to nearby property owners. Thus, a spot

zoning claim inherently triggers an analysis of environmental factors under SEQRA and important planning considerations presented in a Comprehensive Plan.

Topic: Reverse Spot Zoning

While benefits seemingly bestowed upon developers are frequently and commonly questioned as "spot zoning," less obvious and more infrequently found are those challenges where a property owner (or developer) feels that it is being singled out for unfair or punitive treatment. In those instances, the flip side of the coin is called into to play: an analysis of "reverse spot zoning."

Greenport Group, LLC v. Town Board of Town of Southold, 90 N.Y.S.3d 188 (2d Dep't Dec. 5, 2018)

In this matter, the Town Board of the Town of Southold rezoned a property to low-density residential. An action was brought against the Town Board by the current and previous owner alleging that the Town Board's actions were arbitrary and capricious, that the rezoning was inconsistent with the Town's Comprehensive Plan, that the rezoning constituted reverse spot zoning, that they had vested rights in the prior zoning designation, and that the rezoning amounted to regulatory taking. The Suffolk County Supreme Court granted partial summary judgment in favor of the Town Board. Plaintiffs appealed and the Town Board cross-appealed.

The Second Department held that: 1) the previous landowner did not have standing to challenge the rezoning decision; 2) the landowner did not have vested rights in the prior zoning classification; 3) the rezoning of subject property did not amount to a regulatory taking; 4) the rezoning decision was not arbitrary and capricious and was consistent with the Town's Comprehensive Plan; and 5) the rezoning of subject property did not amount to reverse spot zoning.

As to the reverse spot zoning claim, the Second Department agreed with the Supreme Court that the property "'was not arbitrarily singled out for different, less favorable treatment than neighboring properties in a manner that was inconsistent with a well-considered land-use plan, as would be required to sustain a finding of unconstitutional reverse spot zoning' . . . Rather, the [Town] Board demonstrated that the rezoning of the property was consistent with 'a well-considered land-use plan' . . . ." The court noted that the Town Board had demonstrated, before

the rezoning, that the Town's planning consultant performed a comprehensive study of a corridor that included the property and identified certain planning objectives. These objectives included preservation of the rural character and natural environment of the corridor. The court found that the Town Board further established that the rezoning, which was recommended by the planning consultant, was reasonably related to these legitimate objectives, since most of the property was woodlands and wetlands, was bordered by land zoned as parkland, and was across the street from a nature preserve.

Topic: Conformance with Comprehensive Plans

Matter of Bonacker Property, LLC v. Village of East Hampton, 93 N.Y.S.3d 328 (2d Dep't Jan. 23, 2019)

The Village of East Hampton amended its Zoning Code limiting the gross floor area for all homes in relation to lot size and the total coverage of the residential lot. Landowners brought a hybrid Article 78 proceeding and action against the Village for damages and declaratory relief challenging the amendments. The Suffolk County Supreme Court denied the petition and dismissed the action. The owners appealed.

The Second Department held that: 1) the Village's amendments were consistent with its Comprehensive Plan; 2) the Village's Planning and Zoning Committee was not subject to open meetings provisions; 3) the Village complied with SEQRA; and 4) the Supreme Court should not have summarily disposed of causes of action which sought to recover damages and declaratory relief not in the nature of an Article 78 claim. As to the claim that the amendment was not in conformance with the Village's Comprehensive Plan, the court noted that the Comprehensive Plan included a clear statement of the importance for the Village to ensure that new development or redevelopment of residential properties was compatible with the character of the existing neighborhood in which it occurs. Furthermore, the Comprehensive Plan recommended limiting the maximum gross floor area and coverage for residential lots, including accessory structures, so that new residential development would be more responsive and compatible with the scale of existing development. Therefore, the court found the subject amendments to be consistent with the Village's Comprehensive Plan.

Matter of Edwards v. Zoning Board of Appeals of Town of Amherst, 83 N.Y.S.3d 767 (4th Dep't July 25, 2018)

The Town of Amherst ZBA granted a Special Use Permit for the construction of a wireless communication tower. An Article 78 proceeding was brought challenging this approval. The Erie County Supreme Court dismissed the petition and an appeal was filed.

The Fourth Department held that: 1) the grant of Special Use Permit was not inconsistent with the Town's Comprehensive Plan; 2) the ZBA did not issue unlawful area variance; and 3) the ZBA did not improperly issue a negative declaration pursuant to SEQRA.

As to the issue regarding conformance with the Town's Comprehensive Plan, even though the Planning Department first determined that the tower was not consistent, it reconsidered and recommended approval of the application under certain conditions, including the use of screening. The court did not find that this was an arbitrary decision, as such a use was permitted under the Zoning Code as a specially permitted use. The court noted that "it is well settled that the inclusion of a permitted use in a zoning code 'is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood.'" The court stated that a "zoning authority" is required to grant a special use permit as long as the applicant has shown that they have satisfied the conditions required to minimize the anticipated impact of their proposed use.

These cases highlight the importance of carefully considered and drafted Comprehensive Plans. They should be predicated upon empirical studies and balanced community input. In addition, when boards are conducting rezoning processes, regardless of the outcome, the final resolutions should integrate concepts from the comprehensive plan. This will undoubtedly increase the likelihood that the board's decision will be upheld as a lawful exercise.

Topic: General Municipal Law Section 239-m

In light of the fact that compliance with General Municipal Law ("GML") § 239-m is a jurisdictional requirement, careful attention to this statute and the accompanying administrative process is of critical importance to municipal planners, private planners and developers.

Matter of Save Harrison, Inc. v. Town/Village of Harrison, 93 N.Y.S.3d 74 (2d Dep't Jan. 23, 2019) **(cited above)**

As explained above, a rezoning in connection with the proposed construction of a 160-unit assisted living facility was challenged on a variety of bases. One of those challenges questioned whether the Town had failed to refer a "full statement" of its proposed action to the Westchester County Planning Board under GML § 239-m. The lower court found that the Town/Village of Harrison had, indeed, sent everything necessary to the County, resulting in the issuance of three GML letters in support of the rezoning, site plan and special permit approvals.

On appeal, the Second Department articulated that "[g]eneral Municipal Law § 239–m(1)(c) required the Town Board to refer a 'full statement' of the proposed action to the county planning agency, including 'all . . . materials required by such referring body in order to make its determination of significance' pursuant to SEQRA and 'the complete text of [the] proposed local rezoning law.'" The text of the draft zoning amendment was sent to Westchester County for review and the Second Department found that it was not necessary for the Town to refer the final zoning amendment to the County (since the text did not differ substantially between the two). However, the court noted that the "applicant submitted numerous environmental studies to the Town, which were required by the Planning Board in order to issue its negative declaration." Pursuant to GML § 239–m, the court held that the Town was required to refer these documents to the County. Despite the fact the fact that the lower court maintained that the Record was sufficiently clear as to what was sent to the County by the Town, the Second Department reversed and remanded to the lower court for further inquiry into whether these environmental studies were submitted to the County. Accordingly, the Second Department ruled that the Supreme Court should not have awarded summary judgment in the Respondents' favor. See also Matter of Calverton v. Town of Riverhead, 160 A.D.2d 838 (2d Dep't April 18, 2018) (where the Second Department observed in a § 239-m challenge that there was "no evidence in the Record that the [County] determined the . . . referral to be deficient in any respect," so the challenge was rejected).

Matter of Johnson v. Town of Hamburg, 90 N.Y.S.3d 781 (4th Dep't Dec. 21, 2018)

The Town Board of the Town of Hamburg granted an application to rezone a parcel of land to allow for the construction of a clustered patio home project. The Petitioners brought an Article 78 proceeding seeking to annul a determination of Town Board with multiple claims, including a

violation of General Municipal Law § 239-m (for failure to obtain a recommendation from the Erie County Department of Environment and Planning ("ECDEP")), and that the submission to the ECDEP was insufficient. The Erie County Supreme Court annulled the rezoning determination. The Town Board and applicant appealed.

The Fourth Department held that: 1) notice relating to a rezoning application announcing a public hearing on the adoption of an amendment to the Town's Zoning Code was sufficient and 2) the Town Board did not violate SEQRA in allowing the application for the rezoning. The court also noted that the lower court had not addressed the claim regarding the General Municipal Law, and that it would address it for the sake of "judicial economy." The court found that "the record establishe[d] that, before taking final action on the proposed rezoning, the Town Board did refer the matter to the ECDEP for review in compliance with General Municipal Law § 239–m, and the ECDEP's failure to issue a recommendation within 30 days of 'receipt of a full statement of such proposed action' permitted the Town Board to make a final determination on the rezoning application." In addition, the court relied upon the affidavit of the Town Board's planning consultant to establish that the submission to the ECDEP included the SEQRA-related materials that the Petitioners contended were omitted.

Matter of Star Property Holding, LLC v. Town of Islip, 83 N.Y.S.3d 146 (2d Dep't Aug. 22, 2018) **(cited above)**

In the lower court's decision, there was found a violation of GML § 239-m for failure by the Town of Islip's Planning Board to refer the application for the Special Use Permit to the Suffolk County Planning Commission. The applicant remediated this by submitting an application to the Suffolk County Planning Commission, which the County determined to be a project of local concern.

It is clear that in light of these court decisions, and the fact that litigants are very focused on GML compliance, more attention needs to be paid to this largely ministerial requirement by municipal planners, boards and their staffs. There should be timely delivery of materials to the County along with cover letters identifying the materials sent. Development teams should follow up with the municipal staff and the County to confirm compliance. In addition, when matters governed by § 239-m are pending before two separate boards (i.e., Town Board and Planning

Board), particular attention should be paid to separate delivery of materials from both the Town Clerk and the Planning Board Secretary, as two separate records are simultaneously being made.

Topic: Zoning Code Regulations in the Context of State Mining Law

People v. Wainscott Sand and Gravel Corp., 62 Misc.3d 16 (2d Dep't Dec. 5, 2018)

Defendants, who had a permit to conduct sand mining and extraction operation, moved to dismiss accusatory instruments charging them with violating the Town of Southampton's Zoning Code by allowing road construction debris, including concrete and asphalt, to be deposited and processed at the mining premises. These actions, in effect, violated the pertinent certificate of occupancy. The Justice Court of the Town granted the Defendants' motion to dismiss the accusatory instruments, stating such matters were pre-empted by the Mined Land Reclamation Law ("MLRL"). The Town appealed.

The Appellate Term held that the supersession clause of the MLRL did not preempt the Town's Zoning Codes. The court noted that the suppression clause was not intended to "'limit municipalities' broad authority to govern land use' by means of their 'local zoning authority,' but to 'withdraw from municipalities the authority to enact local laws imposing land reclamation standards that were stricter than the State-wide standards'" under the MLRL. As the Town's regulations were not considered more strict, they were not superseded by the state law.

Topic: Ripeness and RLUIPA

Islamic Community Center of Mid-Westchester v. City of Yonkers Landmark Preservation Board, 742 Fed. App'x 521 (2d Cir. July 6, 2018)

A Religious non-profit, the Islamic Community Center for Mid-Westchester ("ICCMW"), closed on a property on which it planned to build a religious center and house of worship. The property was later landmarked. At no point did the ICCMW apply for a Certificate of Appropriateness. The ICCMW brought an action against the City alleging that its landmark designation violated the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") by discriminating against the ICCMW based on religious affiliation. City officials moved to dismiss and the ICCMW moved to strike and for leave to file a supplemental complaint to add a claim of First Amendment retaliation under § 1983. The United States District Court for

the Southern District of New York granted the motion to dismiss, but denied the motions to strike and for leave to file a supplemental complaint. The ICCMW appealed.

The Court of Appeals for the Second Circuit held that action was not ripe, as no final decision had been made. It noted that it had previously extended the final-decision requirement to zoning challenges based on substantive due process, First Amendment rights of assembly and free exercise; RLUIPA, and a state analogue to RLUIPA. The court noted that at no point was it clear how the landmark designation impacted ICCMW's ability to use its property let alone how it impacted its religious practices. Moreover, "ICCMW's failure to attain a final decision on its application by availing itself of the local procedure that could remedy its alleged harm - whatever that may be, since none has yet been articulated - bars it from litigating this claim in federal court."

Topic: Term Limit Rule and Contractual Obligations

Matter of Berg v. Planning Board of the City of Glen Cove, 93 N.Y.S.3d 689 (2d Dep't Feb. 6, 2019)

On October 5, 2000, a document labeled Memorandum of Understanding ("MOU") was executed by the mayors of the Village of Sea Cliff and the City of Glen Cove, among others. The MOU provided that the Village would not oppose a development project so long as it did not exceed certain development parameters. The MOU further provided that it did "not obviate any legal rights [the parties thereto] may otherwise have." On December 19, 2011, the Planning Board of the City of Glen Cove accepted an FEIS and granted the developer a Special Use Permit for a planned unit development ("PUD"). On November 18, 2014, the City Planning Board approved the developer's PUD site plan and subdivision application for phase one of the project. On June 11, 2015, the developer submitted an application to amend the PUD master development plan. On October 6, 2015, the Planning Board adopted a resolution finding that a supplemental EIS was not necessary. In November of 2015, the Village of Sea Cliff commenced a hybrid proceeding pursuant to Article 78 to review and challenge the Planning Board's determination.

The Village of Sea Cliff alleged that it was entitled to declaratory and injunctive relief regarding the allegations that the MOU was an enforceable contract and that the Respondents should be prohibited from taking any action to permit the development of the project in a manner that exceeds the parameters set forth in the MOU. The Second Department found that "'the term

limits rule prohibits one municipal body from contractually binding its successors in areas relating to governance unless specifically authorized by statute or charter provisions to do so.'" Furthermore, the court found that the express terms of the MOU did not obligate the Respondents to keep the development of the project within the parameters set forth. Rather, the MOU provided that the Village of Sea Cliff would not oppose the project so long as it did not exceed those parameters. Therefore, the Petitioners' sole remedy was to oppose the project.

This concept, called the "term limits rule," is designed to ensure that one group of public officials is not able to orchestrate or impede subsequent decision-making beyond their period of elected service.

Topic: Battle of the Boards

The Matter of Livingston Development Group, LLC v. Zoning Board of Appeals of the Village of Dobbs Ferry, 92 N.Y.S.3d 80 (2d Dep't Jan. 16, 2019) provides a fascinating example of differences of opinions between and among different boards within a single community.

The Petitioner submitted an application for site plan approval to the Planning Board for 12 condominium units overlooking the Hudson River. The Planning Board recommended that the Board of Trustees grant site plan approval for the project. The Board of Trustees subsequently granted site plan approval subject to certain enumerated conditions, including that the Petitioner obtain approval from the Village of Dobbs Ferry's Architectural and Historic Review Board ("AHRB"). In a decision dated October 21, 2014, the AHRB denied approval on the ground that the buildings were excessively dissimilar to the character of the surrounding area. The Petitioner appealed the AHRB's decision to the Village's ZBA, which, after a hearing, confirmed and upheld the AHRB's decision.

After commencement of an Article 78 proceeding, the lower court concluded that, when denying approval on the ground of excessive dissimilarity, the AHRB and the ZBA exceeded their authority by considering the impact of the proposed project on views of the Hudson River. This specific criterion was asserted to be under the purview of the Planning Board, as the "lead agency" charged with reviewing site plan applications for consistency with the Village's Local Waterfront Revitalization Plan.

Interestingly, the Second Department disagreed with the lower court and effectively reinstated the decision of the AHRB and the ZBA, finding that even if "the AHRB and the ZBA usurped the power of the Planning Board in considering the impact of the proposed project on views . . . the Zoning Board of Appeals' determination should have been upheld since the determination was not based exclusively upon that finding." The determination was also based on the fact that the proposed buildings would be detrimental due to the excessive dissimilarity they would create.

This case also provides fertile ground for more aesthetic and somewhat subjective determinations of "excessive similarity and/or dissimilarity."

Topic: Enforcement of SEQRA Mitigation Measures

Matter of The Mutual Aid Association of the Paid Fire Department of the City of Yonkers v. City of Yonkers, Index No. 61019/2018 (Sup. Ct. Westchester Cty. April 10, 2019)

As part of the site plan approval for a mixed-use commercial center including a Lowe's store, the Planning Board of Yonkers adopted the entirety of the City Council's SEQRA findings. The supplemental findings, in part, required the construction of a firehouse as part of the required mitigation. In 2015, Petitioner, a union of active firefighters, brought a claim alleging disregard by Defendants of the mandatory SEQRA mitigation measure regarding construction of the firehouse. The court found that the firehouse had to be built (pursuant to an order dated May 11, 2017).

In June 2017, the City issued two temporary certificates of occupancy. The Petitioner appealed to the City's ZBA, arguing that the temporary certificates should not have been issued because the firehouse had not been constructed. The ZBA decided it lacked jurisdiction to hear the appeal as it did not relate to the enforcement of the Zoning Ordinance. The Petitioner commenced a proceeding to annul the ZBA's determination that it lacked jurisdiction, and by order dated July 10, 2018, the court granted the petition, finding that the City's issuance of the temporary certificates resulted from a determination about the enforcement of the Zoning Ordinance. The court remanded the matter to the ZBA to hear the Petitioner's appeal. The Respondents filed a notice of appeal from the July 10, 2018 order. Meanwhile, on March 14, 2018, the City issued a Certificate of Occupancy. At a meeting on June 19, 2018, the ZBA voted, once again, not to hear the appeal for lack of jurisdiction. The Petitioner commenced the current matter to annul the

determination of the ZBA and to compel the ZBA to hear and decide the appeal. The court found that the ZBA had the jurisdiction to hear the appeal from the City's issuance of the Certificate of Occupancy. The court found that the City, in deciding whether to issue the Certificate, was required to determine whether full compliance with any statement or plan approved by the City Council or Planning Board, including those which involved SEQRA mitigation measures, was met. Therefore, the City's issuance of the Certificate of Occupancy necessarily resulted from a determination about enforcement of the Zoning Ordinance, establishing the ZBA's jurisdiction.

Note, the battles involving the Ridge Hill project are still pending.

Topic: Analysis of Agency Decision-Making

Matter of White Plains Rural Cemetery Association v. City of White Plains, 93 N.Y.S.3d 103 (2d Dep't Jan. 30, 2019)

The City Cemetery Association ("Association") applied to the City of White Plains ZBA for a determination that a proposed crematory was part of the cemetery's existing legal nonconforming use, and in the alternative, for a use variance. The ZBA declared that the proposed crematory was not a part of the cemetery's existing legal nonconforming use and denied the variance request. The Association brought an Article 78 proceeding. The Westchester County Supreme Court denied the Association's petition as to the nonconforming use and granted the Association's petition as to the use variance. The City appealed and the Association cross-appealed. The Second Department held that the proposed crematory was not part of existing nonconforming cemetery use and, therefore, required a use variance, and that the ZBA's denial of the use variance application was arbitrary and capricious.

In support of this holding, the Second Department noted that the Association submitted a financial analyst's projections and profit and loss statements (i.e., dollars and cents proof) demonstrating that it had operated at a loss for a five-year period preceding the filing of its application. The unrebutted evidence demonstrated that the crematory would be shielded from view, odorless, and would not impact air quality or historical resources. The Court further observed that the ZBA's concerns that surrounding home values would decrease and that cemetery association would build additional crematoriums on cemetery premises were predicated on speculation and appeared to be the product of generalized community opposition.

Matter of Hitner v. Planning Board of the Town of Patterson, 90 N.Y.S.3d 898 (2d Dep't Jan. 23, 2019)

In this matter, the lower court had upheld the Town of Patterson ZBA's determination that a Costco gas station was a permitted principal use on a site that also included a Costco Club. Petitioners appealed, and the Second Department found that this decision was not illegal, arbitrary, capricious, or an abuse of discretion. It should be noted that the court held that "where the issue involves pure legal interpretation of statutory terms, deference [to the ZBA] is not required[,]" and therefore it conducted its own independent review of the law. Nonetheless, it upheld the ZBA's determination.

Hitner relates to the holding in Yorktown Smart Growth, previously cited. Specifically, both address the emergence of gas stations directly within shopping centers, and sometimes associated or branded with a big box store. Municipalities should carefully assess their zoning provisions in these situations, especially when more than one principal use is permitted on a singular lot, or where it is in association with a members-only "big box" store.

Matter of Nicolai v. McLaughlin, 81 N.Y.S.3d 89 (2d Dep't July 5, 2018)

In this matter, the Petitioner had applied for a wetland control permit and site plan approval to construct a single-family dwelling on his residential property in a wetlands control area. The Town of Mount Pleasant Planning Board denied the application and the Petitioner commenced an Article 78 proceeding. The court noted that in the past, the Planning Board had allowed larger encroachments into wetlands and wetland buffers near the Petitioner's lot, and therefore could not reasonably explain its denial of this application. Therefore, the Westchester County Supreme Court reversed the Planning Board. The Second Department upheld this decision, finding that "[a]n agency's failure to provide a valid and rational explanation for its departure from its prior precedent 'mandates reversal.'" Clearly, articulation of board reasoning, particularly when it is different from prior decisions, is quite important.

Topic: FHA, ADA, and Section 1983 Claims

Town & Country Adult Living v. Village/Town of Mount Kisco, 2019 WL 1368560 (S.D.N.Y. March 26, 2019)

This case is part of prolonged litigation between an entity that provides housing for seniors with disabilities and the Village/Town of Mount Kisco. As part of a settlement, the Plaintiff (Town & Country Adult Living) had agreed to lease property from the Town, with a sale contingent on site plan approval. After much back and forth regarding the terms of the lease and the pending sale, and no site plan approval, the Plaintiff brought claims against the Village/Town and its legal counsel, and other individuals, under the Fair Housing Act ("FHA"), the Americans with Disabilities Act ("ADA"), and § 1983 (along with state claims). All claims failed.

The federal court held that to establish discrimination under the FHA or the ADA, Plaintiffs had three available theories: 1) intentional discrimination, 2) disparate impact and 3) reasonable accommodation. The federal court would not consider a claim of disparate treatment under the FHA because the Plaintiff only had brought it up in their opposition memorandum. The disparate impact claim failed because there was no occurrence of outwardly neutral policies and the Plaintiff had not shown a significant adverse or disproportionate impact from such a policy. Lastly, the Plaintiff did not discuss a reasonable accommodation claim under the FHA.

As to the § 1983 claims (involving substantive due process, procedural due process, and equal protection concerns), the substantive due process claim failed because the Plaintiff had not shown a cognizable property interest in acquiring site plan approval. The procedural due process claim failed because no vote had occurred without the Plaintiff having notice or the opportunity to be heard. Lastly, the Plaintiff's equal protection claim failed because the Plaintiff did not demonstrate differential treatment or that such treatment was based on malice or bad faith.

Since the federal court found that all of the claims over which it had original jurisdiction failed, it would not exercise supplemental jurisdiction over the remaining state claims.

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LAND USE LAW UPDATE

PROTECTING BOARD DECISIONS

Land Use Training Institute – May 15, 2019

Prepared by:

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PROTECTING BOARD DECISIONS

Appeals of municipal administrative decisions, including those of Planning Boards and Zoning Boards, are made by an Article 78 proceeding brought in the Supreme Court of the County where the municipality is located. Most appeals of Planning and Zoning Board decisions must be brought within thirty days after the filing of the Board decision in the office of the municipal clerk. In some cases involving an appeal of a decision under SEQRA, the appeal period is four months.

The standard of review that a Court must apply in reviewing an administrative decision, and in particular determinations of Planning and Zoning Boards, is whether the action taken by the board was illegal, arbitrary, or an abuse of discretion. Where a board's decision has a rational basis in the record and is supported by the evidence, and applies the proper standards, the Court will not substitute its own judgment for that of the board. Therefore, Courts will give deference to the decision of the board provided it can be supported by the record before it. Therefore, the most important thing for a board to be aware of is the record of the matter before them, and making sure the board's decision is supported by this record and the evidence placed before the board and that the proper standards are applied.

The record is comprised of everything that has been put before the board during the review of the application and as part of the public meeting process. Every written submission from the applicants and others, public comment, minutes, consultant memos are all part of the record. However, if information was not put before the board or discussed at a public meeting, it cannot serve as a basis for the board's decision. Everything that is said at a meeting becomes part of the record.

The standards to be applied vary by the type of application. For variances, the Zoning Board must undertake the necessary balancing and analyze the factors set forth in the enabling statutes (Village Law, Town Law or General City Law) for the applicable type of variance—use variance or area variance. The analysis should be set forth in the Board's decision and be based upon the information in the record. For site plan approval, the Planning Board must look to the municipality's Code which should set forth the specific items which the Planning Board is to consider as part of a site plan review and the criteria to be applied. The decision must be based upon a review of the specific criteria. For a special use permit, the applicable Board must again look to the Code and the specific conditions set forth. If the application meets the conditions for the special permit use, it should be approved. A special permit use is considered a permitted use in the zone provided the conditions are satisfied. For decisions on environmental permits such as steep slopes or wetlands, again, review the Code and apply and analyze the application based upon the criteria set forth in the Code.

A Board's decision, whether set out in a written resolution or findings, or contained within the minutes, should be carefully drafted to support the decision, based upon the record and in accordance with the legal standards so as not to be considered arbitrary or capricious. This decision will serve as the basis for the Court's review.

The Court decisions set forth below present examples of instances where Courts have either upheld or overturned a decision of an administrative Board based upon the decision and the record. As this is a land use law update, most are recent cases although based upon long standing reasoning, and a few are older.

Generalized Community Opposition and Quality of Evidence

Matter of White Plains Rural Cemetery Association v. City of White Plains, 93 N.Y.S.3d 103 (2d Dep't Jan. 30, 2019)

The White Plains Rural Cemetery Association ("Association") applied to the City of White Plains ZBA for a determination that a proposed crematory was part of the cemetery's existing legal nonconforming use, and in the alternative, for a use variance. The ZBA declared that the proposed crematory was not a part of the cemetery's existing legal nonconforming use and also denied the variance request. The Westchester County Supreme Court denied the Association's petition as to the interpretation, but found the ZBA's denial of the use variance was arbitrary, capricious and lacking a rational basis and ordered that the use variance be granted. The City appealed and the Petitioner cross-appealed with respect to the interpretation. The Second Department affirmed the decision of the Supreme Court.

In support of this holding, the Second Department noted that the Association submitted a financial analyst's projections and profit and loss statements (i.e., dollars and cents proof) demonstrating that it had operated at a loss for a five-year period preceding the filing of its application. The Court also held that the Board improperly determined the crematory would alter the essential character of the neighborhood, as the record contained unrebutted evidence from various experts demonstrating that the crematory would be shielded from view, odorless, and would not impact air quality or historical resources. The Court further observed that the ZBA's concerns that surrounding home values would decrease and that cemetery association would build additional crematoriums on cemetery premises were predicated on speculation and appeared to be the product of generalized community opposition.

The important things in this case were that the record contained significant unrebutted evidence presented by the applicant to support its position and which the Zoning Board did not consider, and that the Zoning Board seemed to based its decision not on the facts and evidence, but on generalized community opposition.

Blanchfield v. Town of Hoosick, 149 A.D.3d 1380, 53 N.Y.S3d 226 (3d Dep't 2017)

This case involved the legalization of a dog training business where it was determined a special use permit was required. The ZBA denied the special use permit and the Supreme Court dismissed the Petition. The Third Department reversed the judgment of the Supreme Court, granted the Petition and annulled the ZBA's denial of the specie use permit and ordered that it be granted. As the application was one for a special use permit, the applicant had only to show it could meet the applicable standards. The applicant provided actual sound decibel readings and presented specific measures to mitigate and potential noise impact as proof that the application met the ZBA's requirement that noise from the property should not exceed 80 decibels. The Board the summarily

determined that the applicant had not offered measures that would sufficiently mitigate the noise impacts. The Court found this determination to be without sufficient support in the record, and also stated that absent reliable proof to rebut the evidence provided by the applicant, there was not basis in the record to determine the Petitioner did not meet the conditions, and that it appeared the ZBA bowed to generalize objections from two neighbors.

Again, the record contained unrebutted evidence presented by the applicant to support its position and which the Zoning Board did not consider, and the Zoning Board seemed to have incorrectly based its decision not on the facts and evidence, but on generalized community opposition.

Matter of QuickChek Corporation v. Town of Islip, 166 A.D.3d 982, 89 N.Y.S.3d 210 (2d Dept. 2018) ***Leave to Appeal denied*** 2019 Slip Op 66829

In this case the Town Board had denied a special use permit application for a convenience market, minor restaurant and gasoline service station. The permit for the first two uses was granted, and the application for the gasoline service station denied. The applicant appealed and the Supreme Court granted the Petition and annulled the determination and remitted the matter for issuance of the special use permit. The Second Department affirmed. The Court cited the standard for a special use permit which is lighter than that for a variance, and requires only that the applicant show that it met the required conditions. The Court held the findings of the Town Board were not supported by substantial evidence. In particular there was no evidence to support that the gasoline service station would have a greater impact on traffic and in particular while there was evidence that there would be a 3% increase in traffic, there was no evidence this would have a greater impact than other permitted uses. The Court held all the reasons given in support of the denial were conclusory and unsupported by factual data and empirical evidence.

Matter of Osia Mengisopolous v. Board of Zoning Appeals of the City of Glen Cove, 2019 NY Slip Op 00440 (2d Dept. 2019)

Zoning Board denied the application for area variances and applicant appealed. Supreme Court granted the Petition and annulled the determination and the Second Department affirmed. The Court held that although the Zoning Board properly engaged in the balancing, it failed to meaningfully consider the statutory factors and cite particular evidence as to whether granting the variances would have an undesirable effect on the character of the neighborhood, adversely impact the physical for environmental conditions or result in a detriment to the health, safety or welfare of the neighborhood or the community, particularly as, since the Court state, most of the houses in the neighborhood were not in compliance with the zoning code. The ZBA decision was not supported by the actual facts.

Failure to Consider Planning Board Findings on Environmental Review

Matter of Luburic v. Zoning Board of Appeals of Village of Irvington, 106 A.D.3d 824 (2d Dept. 2013)

In this case, the Zoning Board denied the requested variance for a single family home. The Supreme Court annulled the determination, and remitted the matter to the ZBA to grant and the Second

Department affirmed. The Court held the record did not support the ZBA's determination that granting the application would produce and undesirable change in the neighborhood and have a negative impact on the surrounding physical and environmental conditions, or that feasible alternative might exist. The Petitioner had worked with the Planning Board for approximately three years to address environmental concerns and had received a Conditional Negative Declaration under SEQRA. No additional facts on this issue were before the Zoning Board and therefore there was no basis for a finding of impact on physical or environmental conditions. The Court held the findings were conclusory and insufficient and cited several specific findings in the ZBA's determination that were not supported by the record. Similarly the Court found the ZBA's denial did not contain sufficient factual and objective evident to support the rationality of the decision.

The fact that the Planning Board had reviewed the application and addressed environmental issues and there was nothing different or new on that issue before the Zoning Board was an important factor in the Court's decision.

Distinguishing Precedent

Matter of Nicolai v. McLaughlin, 81 N.Y.S.3d 89 (2d Dep't July 5, 2018)

In this matter, the Petitioner had applied for a wetland control permit and site plan approval to construct a single-family dwelling on his residential property in a wetlands control area. The Town of Mount Pleasant Planning Board denied the application and the Petitioner commenced an Article 78 proceeding. The record showed that the Planning Board in the past had allowed larger encroachments into wetlands and wetland buffers near the Petitioner's lot. The Planning Board failed to explain or provide any factual basis as to why it was differing from its prior actions. Therefore, the Westchester County Supreme Court reversed the Planning Board and the Second Department affirmed this decision and held the determination was arbitrary and capricious. The Court also noted that the Planning Board's belated effort to provide a distinction on appeal was not properly before the Court as it was not part of the record.

The important takeaway from this case is that where a Board reached contrary results on substantially similar facts, and does not follow its own past precedent, it must articulate clear reasons for reaching a different decision. In addition, it is important to note that the Board could not provide such explanation in the litigation where it was not part of the record.

SEQRA Hard Look

Matter of Green Earth Farms Rockland, LLC v. Town of Haverstraw Planning Board, 153 A.D.3d 823, 60 N.Y.S.3d 381 (2d Dept. 2017)

In this case the Planning Board as lead agency under SEQRA determined that a second Supplemental Environmental Impact Statement would not be required in connection with an amended site plan approval for a project which was amended to propose the addition of large convenience store with 16 gas pumps. A group of nearby property owners commenced an Article

78 proceeding to review this determination and the related granting of the amended site plan approval. The Supreme Court granted the Petition annulling the determinations of the Planning Board and the Second Department affirmed. The Court cited the applicable standard for review of a Planning Board's SEQRA determination stating that judicial review is limited to whether the determination was in accordance with lawful procedure and whether substantively it was affected by an error of law or was arbitrary and capricious or an abuse of discretion. This analysis requires a review of the record to determine if the Board identified the relevant areas of environmental concern, took a hard look and made a reasoned elaboration of the basis for the determination. The Court held the Board failed to comply with the substantive requirements of SEQRA in that it failed to take the requisite hard look at the project change adding the gas station and did not make a reasoned elaboration of it basis for determining that a second SEIS was not necessary to address the impacts of that change.

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D58060
C/htr

_____AD3d_____ Argued - October 4, 2018

MARK C. DILLON, J.P.
BETSY BARROS
ANGELA G. IANNACCI
LINDA CHRISTOPHER, JJ.

2017-04482 DECISION & ORDER

In the Matter of White Plains Rural Cemetery Association, respondent-appellant, v City of White Plains, appellant-respondent, et al., respondents.

(Index No. 3003/16)

John G. Callahan, Corporation Counsel, White Plains, NY (Doreen Lusita Rich of counsel), for appellant-respondent.

McCullough, Goldberger & Staudt, LLP, White Plains, NY (Patricia Wetmore Gurahian of counsel), for respondent-appellant.

In a hybrid proceeding pursuant to CPLR article 78 and action for a declaratory judgment, the City of White Plains appeals, and the petitioner cross-appeals, from a judgment of the Supreme Court, Westchester County (Helen M. Blackwood, J.), dated March 15, 2017. The judgment, insofar as appealed from, granted those branches of the petition which were to annul so much of a determination of the Zoning Board of Appeals of the City of White Plains dated November 2, 2016, as denied so much of the petitioner's application as sought a use variance to construct a crematory on premises the petitioner uses as a cemetery and remitted the matter to the Zoning Board of Appeals of the City of White Plains with a direction to, in effect, grant the use variance and issue a building permit. The judgment, insofar as cross-appealed from, in effect, declared that the proposed crematory is not a part of the existing nonconforming cemetery use and, therefore, requires a use variance.

ORDERED that the judgment is affirmed insofar as appealed and cross-appealed from, without costs or disbursements.

In March 2016, the White Plains Rural Cemetery Association, a nonprofit public cemetery (hereinafter the Cemetery), applied to the Zoning Board of Appeals of the City of White Plains (hereinafter the Board) seeking an interpretation that a crematory the Cemetery proposed to construct on premises the Cemetery uses as a cemetery is a permitted use under the cemetery's legal nonconforming use. In the alternative, the Cemetery requested a use variance for the crematory. On November 3, 2016, after a hearing, the Board denied the application. Thereafter, the Cemetery commenced this hybrid proceeding pursuant to CPLR article 78 to review the determination and action for a judgment declaring, in effect, that the proposed crematory is a part of the existing nonconforming cemetery use. The Supreme Court denied those branches of the petition which were to annul the Board's interpretation that the proposed crematory is not a part of the existing nonconforming cemetery use, in effect, declared that the proposed crematory is not a part of the existing nonconforming cemetery use and, therefore, requires a use variance, and granted those branches of the petition which were to annul so much of the determination as denied so much of the application as sought a use variance. The Board appeals and the Cemetery cross-appeals.

Great deference is accorded to a board's interpretation of a zoning ordinance (*see Appelbaum v Deutsch*, 66 NY2d 975, 977-978; *Matter of Witkowich v Zoning Bd. of Appeals of Town of Yorktown*, 133 AD3d 679, 680), and courts will uphold its reasonable construction of a term that is not otherwise defined in the zoning code (*see Appelbaum v Deutsch*, 66 NY2d at 977-978). Here, the Cemetery relies on the definition of "cemetery corporation" as found in Not-For-Profit Corporation Law § 1502(a), to support its contention that the Board could not rationally have interpreted a crematory to be separate and distinct from cemetery use. However, the Board was not required to import a definition from other statutes or sources having purposes different from zoning concerns (*see Appelbaum v Deutsch*, 66 NY2d at 978). Accordingly, the Board's decision to rely on a narrower definition of the term cemetery and crematory, such as are defined in the Mirriam-Webster dictionary, was neither irrational or unreasonable (*see id.* at 977; *Matter of Oakwood Cemetery v Village/Town of Mt. Kisco*, 115 AD3d 749, 751-752). Thus, we agree with the Supreme Court's declaration that the proposed crematory is not a part of the existing nonconforming cemetery use and, therefore, requires a variance.

"'Local zoning boards have broad discretion in considering applications for variances, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion'" (*Matter of Daneri v Zoning Bd. of Appeals of the Town of Southold*, 98 AD3d 508, 509, quoting *Matter of Matejko v Board of Zoning Appeals of Town of Brookhaven*, 77 AD3d 949, 949; *see Matter of Borrok v Town of Southampton*, 130 AD3d 1024, 1024). The rationale for this rule is that "'[l]ocal officials, generally, possess the familiarity with local conditions necessary to make the often sensitive planning decisions which affect the development of their community'" (*Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613, quoting *Matter of Cowan v Kern*, 41 NY2d 591, 599). Therefore, a zoning board's determination will generally be set aside "only if the zoning board acted illegally, arbitrarily, abused its discretion, or succumbed to generalized community opposition" (*Matter of DAG Laundry Corp. v Board of Zoning Appeals of Town of N. Hempstead*, 98 AD3d 740). The determinations will be sustained if they have a rational basis in the record (*see Edwards v Davison*, 94 AD3d 883).

"To qualify for a use variance premised upon unnecessary hardship there must be a showing that (1) the property cannot yield a reasonable return if used only for permitted purposes

as currently zoned, (2) the hardship resulted from unique characteristics of the property, (3) the proposed use would not alter the character of the neighborhood, and (4) the alleged hardship was not self-created" (*Matter of Westbury Laundromat, Inc. v Mammina*, 62 AD3d 888, 891[internal quotation marks omitted]; *see* General City Law § 81-b[3][b]).

With regard to the first element, "[i]t is well settled that 'a landowner who seeks a use variance must demonstrate factually, by dollars and cents proof, an inability to realize a reasonable return under existing permissible uses'" (*Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 287 AD2d 453, 456, quoting *Matter of Village Bd. of Vil. of Fayetteville v Jarrold*, 53 NY2d 254, 256). Contrary to the Board's determination, the Cemetery submitted evidence consisting of projections from a financial analyst and profit and loss statements which demonstrated that it had operated at a loss for the five-year period preceding the filing of its application. In finding that this evidence was contradictory and conflicted with a 2014 tax document indicating that the Cemetery had a positive income that year, the Board failed to differentiate investment income accrued in the Cemetery's statutorily required permanent maintenance fund (*see* Not-for-Profit Corporation Law § 1507[a]) from the net losses the Cemetery incurred as a result of its decline in revenue. As such, there was no rational basis for the Board's finding that the Cemetery was not experiencing a financial hardship.

As to the third element, the Board improperly determined that the 1,800-square-foot crematory would alter the essential character of the neighborhood. The unrebutted evidence demonstrated that the crematory would be shielded from view, would be odorless and not emit visible smoke, and had passed all necessary emissions and air quality testing. Other evidence indicated that the structure would not have an impact on any nearby historical resources and the crematory was not visible from the nearest residence, which is 400 feet away and across a major interstate highway. The Board's other concerns that surrounding home values would decrease and that granting the variance would allow for additional crematoriums to be constructed on the subject property are predicated on nothing more than speculation and appear to be the product of generalized community opposition (*see Matter of DAG Laundry Corp. v Board of Zoning Appeals of Town of N. Hempstead*, 98 AD3d 740).

It is undisputed that the Cemetery satisfied the remaining statutory criteria for the grant of a use variance (*see* General City Law § 81-b[3][b]). Therefore, we agree with the Supreme Court's determination annulling the Board's denial of so much of the petitioner's application as sought a use variance on the ground that it was arbitrary and capricious.

DILLON, J.P., BARROS, IANNACCI and CHRISTOPHER, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: April 20, 2017 523154

In the Matter of KAREN M. BLANCHFIELD, Doing Business as ROYALE BLANCHE FARMS,

Appellant,

v

TOWN OF HOOSICK et al.,

Respondents.

149 A.D.3d 1380
53 N.Y.S.3d 226

MEMORANDUM AND ORDER

Calendar Date: February 24, 2017

Before: Garry, J.P., Lynch, Clark, Mulvey and Aarons, JJ.

Cooper Erving & Savage LLP, Albany (Carlo A.C. de Oliveira of counsel), for appellant.

Schopf Law, PLLC, Clifton Park (Jonathan G. Schopf of counsel), for respondents.

Mulvey, J.

Appeal from a judgment of the Supreme Court (Melkonian, J.), entered May 27, 2016 in Rensselaer County, which dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, to review a determination of the Town of Hoosick Zoning Board of Appeals denying petitioner's request for, among other things, a special use permit.

Petitioner is the owner of property in the Town of Hoosick, Rensselaer County on which she operates a dog training and handling business. In April 2015, following a noise complaint from a neighbor, the Code Enforcement Officer of respondent Town

of Hoosick determined that petitioner's use of her property was in violation of the Town's Land Use Law and that a special use permit and site plan approval were required. Petitioner was similarly advised by the Town's Zoning Board of Appeals (hereinafter the ZBA). Petitioner submitted an application for a special use permit and for site plan approval and, after meeting with the ZBA over several months, the ZBA determined petitioner's applications complete and public hearings were held. Citing the current and foreseeable impact of dog noise on the neighbors, the ZBA denied petitioner's applications. Petitioner then commenced this CPLR article 78 proceeding. Supreme Court dismissed the petition, and petitioner appeals.

Initially, we note that when petitioner appeared before the ZBA, she did not raise her contention that the ZBA violated its own rules when it failed to refer her applications to the Town's Planning Board for a recommendation (see Land Use Law of the Town of Hoosick § 7.6.1). Accordingly, that issue may not now be raised in this proceeding (see Matter of Mary T. Probst Family Trust v Zoning Bd. of Appeals of Town of Horicon, 79 AD3d 1427, 1427-1428 [2010], lv denied 16 NY3d 708 [2011]; Matter of Showers v Town of Poestenkill Zoning Bd. of Appeals, 56 AD3d 1108, 1109 [2008]).

Petitioner claims that Supreme Court erred when it determined that she was required to obtain both a special use permit and site plan approval. First, she bases her claim that no special use permit is required on the theory that her business consists of the operation of a boarding kennel and breeding kennel, which uses are permitted by right.[1] Petitioner's

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[1] The petition also refers to petitioner's business as "animal husbandry," a use permitted as of right. The Land Use Law defines the term animal husbandry as "the raising of animals and birds for food, wool, breeding, preservation or pleasure" (Land Use Law of Town of Hoosick ch 13). Supreme Court rejected this claim and petitioner has not addressed it in her brief. Thus, we treat this argument as abandoned (see Matter of Albany Academies v New York State Pub. High Sch. Athletic Assn., 145 AD3d 1258, 1260-1261 [2016]; Matter of Salvador v State of New

property is located in a district designated "Agricultural/ Residential" (see Land Use Law of Town of Hoosick §§ 2.1.4, 3.2) in which boarding kennels and breeding kennels are permitted uses with site plan approval (see Land Use Law of Town of Hoosick § 3.2). In the Land Use Law, a breeding kennel is defined as "a facility where dogs are bred for sale, with more than nine dogs sold in one year" (Land Use Law of Town of Hoosick ch 13). A boarding kennel is defined as "a facility that accepts transient dogs and cats for short duration stays" (Land Use Law of Town of Hoosick ch 13). Petitioner's application for a special use permit described the existing and proposed use as "agriculture, training + show dog handling school + referral service." Her application for site plan approval similarly described the intended use as "training + handling center for show dogs," as did the short environmental assessment form that she submitted. Since petitioner's use of the property, as described by her, does not fit within the definitions of boarding kennel or breeding kennel, the ZBA properly determined that she was required to obtain a special use permit (see Land Use Law of Town of Hoosick § 3.1).[2] "It is well settled that unless the issue presented is one of pure legal interpretation, a zoning board's interpretation of a local zoning ordinance is afforded deference and will only be disturbed if irrational or unreasonable" (Matter of Lumberjack Pass Amusements, LLC v Town of Queensbury Zoning Bd. of Appeals, 145 AD3d 1144, 1145 [2016] [internal quotation marks, brackets and citations omitted]).

Next, petitioner asserts that site plan review is not required since the business use of the property began in 2006,

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York, 205 AD2d 194, 198 n [1994], appeal dismissed 85 NY2d 857 [1995], lv denied 85 NY2d 810 [1995]).

[2] We note that the effect of this provision is apparently to allow by special use permit any use not listed in the district schedule of use regulations (see Land Use Law of Town of Hoosick § 3.2), and that this was the course charted by the Code Enforcement Officer and the ZBA, rather than a use variance (see Land Use Law § 12.4.4 et seq.).

well before the 2009 enactment of the Land Use Law and the enactment of the 2014 version of a site plan review local law. We find petitioner's argument that she is allowed to continue her business as a lawful nonconforming use without site plan approval to be without merit (see Land Use Law of Town of Hoosick § 5.1). In 2001, the Town enacted a local law which provided, as is relevant here, that all changes in use required site plan approval by the Planning Board (see Site Plan Review Law for the Town of Hoosick, part II, § 2 [C]). When petitioner began her business in 2006, this constituted a change in use of her residential property and, accordingly, site plan approval was required at that time. To have a protected interest at the time of enactment of the Land Use Law in 2009, petitioner had to have received site plan approval pursuant to the 2001 Site Plan Review Law. Since petitioner never applied for or received site plan approval for her business use, such use was not a lawful nonconforming use at the time of the enactment of the Land Use Law in 2009 (see Glacial Aggregates LLC v Town of Yorkshire, 14 NY3d 127, 136 [2010]; Matter of Martinos v Board of Zoning Appeals of Town of Brookhaven, 138 AD3d 859, 860 [2016]). Further, petitioner's proposal, as reflected in her applications and the petition, is to enlarge and expand such use by employing trainers, handlers and groomers and by increasing the number of dogs on the premises. This modification and expansion of the use triggers the need for site plan approval (see Site Plan Review Law of the Town of Hoosick, § 3.010 [2014]). We find that Supreme Court did not err when it determined that petitioner needed site plan approval since this determination "is largely a fact-based inquiry, rather than a purely legal interpretation of the zoning law" (Matter of Lumberjack Pass Amusements, LLC v Town of Queensbury Zoning Bd. of Appeals, 145 AD3d at 1145). However, we disagree with the ZBA's denial of the special use permit and site plan approval.

When a zoning law enumerates a use as allowed by special use permit, it "'is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood'" (Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead, 98 NY2d 190, 195 [2002], quoting Matter of North Shore Steak House v Board of Appeals of Inc. Vil. of Thomaston, 30 NY2d 238, 243

[1972]; accord Matter of Frigault v Town of Richfield Planning Bd., 128 AD3d 1232, 1233 [2015], lv denied 26 NY3d 911 [2015]). An applicant is required to demonstrate "compliance with the conditions legislatively imposed upon the permitted use" (Matter of PDH Props. v Planning Bd. of Town of Milton, 298 AD2d 684, 685 [2002]), and a special use permit may be denied only if substantial evidence in the record corroborates such decision and it is not based on generalized community objections (see Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead, 98 NY2d at 196).

Land Use Law of the Town of Hoosick § 3.1 provides that "[a]ny use not listed in the schedule may be allowed by [s]pecial [p]ermit pursuant to [c]hapter 7, only if it can meet all applicable standards." Chapter 7 delegates to the ZBA the authority "to review and act upon all special permit uses in accordance with standards and procedures set forth in . . . [c]hapter [7]" (Land Use Law of Town of Hoosick § 7.1). Upon determining that an application is complete, the ZBA "shall review the application, taking into consideration the standards for [s]pecial [p]ermit review outlined in [s]ection 7.2 . . ., and any other special requirements for a particular use contained in this [l]ocal [l]aw" (Land Use Law of the Town of Hoosick § 7.4.3).[3] In compliance with the general standards set forth in Land Use Law of the Town of Hoosick § 6.1, the ZBA is to prescribe "such appropriate conditions and safeguards as may be required to," among other things, ensure that "[t]he proposed use will be compatible with the surrounding neighborhood and in harmony with the Comprehensive Plan for the Town of Hoosick" (Land Use Law of the Town of Hoosick §§ 7.3, 7.3.1).

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[3] The reference to section 7.2 of the Land Use Law relates to coordination of environmental impact review by the Planning Board and the ZBA and contains no standards. Instead, sections 7.3 through 7.3.10 set forth the guidelines for the ZBA to consider.

The record shows that the ZBA advised petitioner that the noise from her property should not exceed 80 decibels.[4] At the public hearing, petitioner explained that she was certified as a nurse to take sound readings and had done so at the property line over a period of approximately one month at different intervals of the day. She claimed that the noise from her property had not exceeded 70 decibels.[5] She also offered at least two proposals to address the concerns of the neighbors regarding any noise issue. She proposed a six-foot-high stockade fence and moving the outside pens so that they would be blocked by a building. The nearest neighbor, located across the road from petitioner's property, played a recording at the public hearing that he claimed was a recording that he made of noise emanating from petitioner's property. He also claimed that the noise was cited by a prospective purchaser of his property.[6] Another neighbor, who has a horse training and boarding business approximately 500 feet from petitioner's property, claimed that some of her customers expressed concerns about the noise from petitioner's property, and she allegedly provided copies of emails from those customers.[7]

In its determination, the ZBA did not identify any specific shortcomings in petitioner's mitigation measures, but summarily determined that petitioner had not offered measures that would sufficiently mitigate the dog noise impact from her business. We

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[4] Land Use Law of the Town of Hoosick § 6.1.1 provides, as a general standard, that there may be "[n]o continuous hum, or noise with any noticeable shrillness of a volume of more than 80 decibels, measured at lot lines."

[5] Although the minutes of the public hearing do not reflect this presentation by petitioner, both petitioner's and respondents' briefs make reference to this presentation.

[6] The neighbor allegedly submitted a letter from a realtor regarding the effect of the noise on the sale of his property, but it is not included in the record.

[7] No such documentation is included in the record.

view this determination of the ZBA to be without sufficient support in the record. Petitioner offered scientific measurement of the noise level and there was no other objective measure of the noise offered at the public hearing. The neighbor's recording of the noise is subject to an unreliable interpretation of its level based upon the ability to control the volume of the recording, and reliance on the recording would be unreasonable. Absent reliable proof that rebuts petitioner's offer of her measurement of the sound level and her offer of measures to address any noise concerns, there is no basis in the record to determine that petitioner did not meet the conditions imposed by the Land Use Law, and it appears that the ZBA bowed to generalized objections from two neighbors (see Matter of Kinderhook Dev., LLC v City of Gloversville Planning Bd., 88 AD3d 1207, 1209 [2011], lv denied 18 NY3d 805 [2012]). As such, the ZBA's determination is annulled.

Garry, J.P., Lynch, Clark and Aarons, JJ., concur.

ORDERED that the judgment is reversed, on the law, without costs, petition granted, determination annulled and matter remitted to the Zoning Board of Appeals of the Town of Hoosick to grant a special use permit and site plan approval to petitioner upon consideration of appropriate conditions and safeguards consistent with the requirements of the local laws of respondent Town of Hoosick.

ENTER:

Robert D. Mayberger
Clerk of the Court

166 A.D.3d 982 (2018)
89 N.Y.S.3d 210
2018 NY Slip Op 08136

In the Matter of QuickChek Corporation et al., Respondents,

v.

Town of Islip et al., Appellants.

2016-05332, 2016-05335. Index No. 3577/15.

Appellate Division of the Supreme Court of New York, Second Department.

Decided November 28, 2018.

In a proceeding pursuant to CPLR article 78 to review a determination of the Town Board of the Town of Islip dated January 29, 2015, denying an application for a special use permit to operate a gasoline service station, the appeals are from (1) a decision of the Supreme Court, Suffolk County (Ralph T. Gazzillo, J.), dated March 9, 2016, and (2) a judgment of the same court dated April 11, 2016. The judgment, upon the decision, granted the petition, annulled the determination, and remitted the matter to the Town Board of the Town of Islip for the issuance of the requested special use permit.

Austin, J.P., Roman, Sgroi and LaSalle, JJ., concur.

983 *983 Ordered that the appeal from the decision is dismissed, without costs or disbursements, as no appeal lies from a decision (*see* Schicchi v J.A. Green Constr. Corp., 100 AD2d 509 [1984]); and it is further,

Ordered that the judgment is affirmed, without costs or disbursements.

The subject two-acre parcel of land, upon which is located a used auto sales dealership, an automotive repair shop, and an area for the storage of cars and boats, is located in a business district in which gasoline service stations are a permitted use with a special permit. In 2013, the petitioner QuickChek Corporation applied to the Town of Islip Planning Board (hereinafter the Planning Board) and the Town Board of the Town of Islip (hereinafter the Town Board) for special permits to use the subject property as a convenience market, a minor restaurant, and a gasoline service station.

After a public hearing, the Planning Board granted special use permits for the convenience store and minor restaurant. After a second public hearing, the Town Board denied the application for a special permit to operate a gasoline service station. The petitioners then commenced this CPLR article 78 proceeding to review the Town Board's determination. The Supreme Court, upon finding, among other things, that the proposed use would not adversely affect the neighborhood or traffic, granted the petition, annulled the Town Board's determination, and remitted the matter to the Town Board for the issuance of the requested special use permit.

Unlike a variance, a special permit does not entail a use of the property forbidden by the zoning ordinance but, instead, constitutes a recognition of a use which the ordinance permits under stated conditions (*see Matter of* Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead, 98 NY2d 190, 195 [2002]). Thus, the burden of proof on an applicant seeking a special permit is lighter than that required for a hardship variance (*see Matter of* M&V 99 Franklin Realty Corp. v Weiss, 124 AD3d 783, 784-785 [2015]). In reviewing a town board's determination on special permit applications, we are "limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion," and we "consider substantial evidence only to determine whether the record contains sufficient evidence to support the rationality of the [b]oard's determination" (*Matter of* Beekman Delamater Props., LLC v Village of Rhinebeck Zoning Bd. of Appeals, 150 AD3d 1099, 1103 [2017] [internal quotation marks omitted]). "A denial of a special ... permit must be supported
984 by evidence in the record *984 and may not be based solely upon community objection" (*Matter of* White Castle

Sys., Inc. v Board of Zoning Appeals of Town of Hempstead, 93 AD3d 731, 732 [2012]).

Here, the material findings of the Town Board were not supported by substantial evidence. With regard to the alleged increased volume of traffic, there was no showing that the proposed use of a gasoline service station would have a greater impact on traffic than would other uses unconditionally permitted (*see Matter of Robert Lee Realty Co. v Village of Spring Val.*, 61 NY2d 892, 894 [1984]). While there was evidence that traffic would be increased by 3%, there was no evidence indicating that the proposed use would have any greater impact than would other permitted uses. Thus, the alleged increase in traffic volume was an improper ground for the denial of the special permit.

The other reasons set forth by the Town Board in support of its denial of the application for a special permit were conclusory and unsupported by factual data and empirical evidence (*see Matter of Framike Realty Corp. v Hinck*, 220 AD2d 501 [1995]).

Accordingly, we agree with the Supreme Court's determination to grant the petition, annul the Town Board's determination, and remit the matter to the Town Board for the issuance of the requested special permit.

2019 NY Slip Op 00440

IN THE MATTER OF OSIA MENGISOPOLOUS, Respondent,

v.

BOARD OF ZONING APPEALS OF THE CITY OF GLEN COVE, Appellant.

2016-09327, Index No. 1427/16.

Appellate Division of the Supreme Court of New York, Second Department.

Decided January 23, 2019.

In a proceeding pursuant to CPLR article 78 to annul a determination of the Board of Zoning Appeals of the City of Glen Cove dated January 27, 2016, which, after a hearing, denied the petitioner's application for area variances, the Board of Zoning Appeals of the City of Glen Cove appeals from a judgment of the Supreme Court, Nassau County (George R. Peck, J.), dated August 3, 2016. The judgment granted the petition, annulled the determination, and remitted the matter to the Board of Zoning Appeals of the City of Glen Cove for reconsideration of the petitioner's application for area variances.

Chase, Rathkopf & Chase, LLP, Glen Cove, NY (Daren A. Rathkopf of counsel), for appellant.

Sahn Ward Coschignano, PLLC, Uniondale, NY (Christian Browne and Nicholas Cappadora of counsel), for respondent.

Before: John M. Leventhal, J.P., Cheryl E. Chambers, Leonard B. Austin, Jeffrey A. Cohen, JJ.

DECISION & ORDER

ORDERED that the judgment is affirmed, with costs.

The petitioner lives in the City of Glen Cove in the R-4 zoning district, a neighborhood zoned for one-family and two-family residences (*see* Code of the City of Glen Cove § 280-59[A]). Most of the houses in the neighborhood, including the petitioner's house, were built before the enactment of the Code of the City of Glen Cove in 1920 and are located on lots that do not comply with the current zoning laws. The petitioner applied for five area variances to convert her one-family home into a two-family home. After a hearing, in a determination dated January 27, 2016, the Board of Zoning Appeals of the City of Glen Cove (hereinafter the Board) denied the application. The petitioner commenced this proceeding pursuant to CPLR article 78 to annul the Board's determination. The Supreme Court granted the petition, annulled the determination, and remitted the matter to the Board for reconsideration of the petitioner's application for area variances. The Board appeals.

In determining whether to grant an application for an area variance, a zoning board must engage in a balancing test weighing "the benefit to the applicant if the variance is granted . . . against the detriment to the health, safety and welfare of the neighborhood or community by such grant" (General City Law § 81-b[4][b]; *see* Town Law § 267-b[3][b]; *Matter of Colin Realty Co., LLC v Town of N. Hempstead*, 24 NY3d 96, 103; *Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 612; *Matter of Steiert Enters., Inc. v City of Glen Cove*, 90 AD3d 764, 766; *Matter of Goldberg v Zoning Bd. of Appeals of City of Long Beach*, 79 AD3d 874, 876). The zoning board must also consider: "(i) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (ii) whether the benefit sought by the applicant can be achieved by some method feasible for the applicant to pursue, other than an area variance; (iii) whether the requested area variance is substantial; (iv) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (v) whether the alleged difficulty was self-created, which

consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance" (General City Law § 81-b[4][b]; *see* Town Law § 267-b[3][b]; *Matter of Steiert Enters., Inc. v City of Glen Cove*, 90 AD3d at 766-767; *Matter of Monroe Beach, Inc. v Zoning Bd. of Appeals of City of Long Beach, N.Y.*, 71 AD3d 1150, 1150-1151).

We agree with the Supreme Court that, although the Board engaged in the required balancing test, the Board failed to meaningfully consider the relevant statutory factors. While the proposed variances were clearly substantial and the alleged difficulty was self-created, the Board's failure to cite to particular evidence as to whether granting the variances would have an undesirable effect on the character of the neighborhood, adversely impact physical and environmental conditions, or otherwise result in a detriment to the health, safety, and welfare of the neighborhood or community requires reconsideration of the application, weighing all of these factors (*see e.g. Matter of Sclafani v Rodgers*, 161 AD3d 1084, 1086; *Matter of Quintana v Board of Zoning Appeals of Inc. Vil. of Muttontown*, 120 AD3d 1248, 1249).

Accordingly, we agree with the Supreme Court's determination granting the petition, annulling the Board's determination, and remitting the matter to the Board for reconsideration of the petitioner's application.

LEVENTHAL, J.P., CHAMBERS, AUSTIN and COHEN, JJ., concur.

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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Argued - March 21, 2013

REINALDO E. RIVERA, J.P.
THOMAS A. DICKERSON
JOHN M. LEVENTHAL
SHERI S. ROMAN, JJ.

2012-00148

DECISION & ORDER

In the Matter of Vesna Luburic, respondent, v Zoning Board of Appeals of Village of Irvington, appellant.

(Index No. 5969/11)

Stecich Murphy & Lammers, LLP, Tarrytown, N.Y. (Marianne Stecich of counsel), for appellant.

Richard T. Blancato, Tarrytown, N.Y., for respondent.

In a proceeding pursuant to CPLR article 78 to review a determination of the Zoning Board of Appeals of the Village of Irvington dated February 4, 2011, which denied the petitioner's application for a site capacity variance to permit her to build a single-family residential dwelling on certain real property, the Zoning Board of Appeals of the Village of Irvington appeals from a judgment of the Supreme Court, Westchester County (Warhit, J.), entered November 22, 2011, which granted the petition, annulled the determination, and remitted the matter to the Zoning Board of Appeals of the Village of Irvington to grant the requested variance.

ORDERED that the judgment is affirmed, with costs.

Generally, local zoning boards have broad discretion in deciding applications (*see Matter of Pecoraro v Board of Appeals of Town of Hempstead,* 2 NY3d 608, 613; *Matter of Goldberg v Zoning Bd. of Appeals of City of Long Beach,* 79 AD3d 874, 876). "Courts may set aside a zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure" (*Matter of Pecoraro v Board of Appeals of Town of Hempstead,* 2 NY3d at 613). "[A] determination will not be deemed rational if it rests entirely on subjective considerations, such as general

community opposition, and lacks an objective factual basis" (*Matter of Cacsire v City of White Plains Zoning Bd. of Appeals,* 87 AD3d 1135, 1137). "Conclusory findings of fact are insufficient to support a determination by a zoning board of appeals, which is required to clearly set forth how and in what manner the granting of the variance would be improper" (*Matter of Gabrielle Realty Corp. v Board of Zoning Appeals of Vil. of Freeport,* 24 AD3d 550, 550 [internal quotation marks omitted]).

Here, the Supreme Court properly annulled the determination of the Zoning Board of Appeals of the Village of Irvington (hereinafter the ZBA), which denied the petitioner's second application for a site capacity variance needed to construct a single-family residence on the vacant lot she owned (hereinafter the subject property). Although the dismissal of the petitioner's appeal from the judgment in a previous CPLR article 78 proceeding constituted an adjudication on the merits with respect to the ZBA's findings that the petitioner's requested variance was substantial and her hardship was self-created (*see Catalanotto v Abraham,* 94 AD3d 937, 937; *Deutsche Bank Natl. Trust Co. v Posner,* 89 AD3d 674, 675; *Auriemmo v Auriemmo,* 87 AD3d 1090, 1091), the record before us does not support the ZBA's determination that granting the petitioner's second application would produce an undesirable change in the neighborhood and have a negative impact on the surrounding physical and environmental conditions, or that feasible alternatives to granting a site capacity variance might exist.

On the contrary, the record reveals that, after approximately three years of, inter alia, working with the Village of Irvington Planning Board (hereinafter the Planning Board), engaging in public hearings, and consulting with various experts, the petitioner obtained the requisite permit approval to build on the subject property if certain conditions were met. The Planning Board, as the lead agency under the State Environmental Quality Review Act (hereinafter SEQRA), issued a "Conditional Negative Declaration," concluding that, so long as certain conditions were met, the proposed construction would not have a significant adverse effect on the environment. Despite the Planning Board's extensive environmental review of the petitioner's plans, the ZBA concluded that the petitioner's proposed construction would have an adverse impact on the physical or environmental conditions of the neighborhood because the conditions imposed by the Planning Board were "impractical" and "implausible." However, given the Planning Board's role in addressing environmental concerns (*cf. Matter of Thorne v Village of Millbrook Planning Bd.,* 83 AD3d 723, 725), and in the absence of any further evidence to support its conclusion, the ZBA's finding on this factor lacked a rational basis.

Likewise, the ZBA's determination that the petitioner's proposed construction would produce an undesirable change in the neighborhood did not have a rational basis in the record. Aside from the site capacity variance needed to build any structure on the subject property, the plans submitted by the petitioner with her first application to the ZBA were in compliance with all applicable zoning codes for single-family dwellings. After her first application was denied, the petitioner addressed the ZBA's concerns by submitting new plans for a smaller house with a redesigned roof. The ZBA summarily dismissed these proposed changes as not "dramatic enough," citing, inter alia, an Advisory Opinion issued by the Planning Board, which characterized the petitioner's altered plans as a "modest revision." However, the Planning Board's Advisory Opinion made this assessment of the petitioner's altered plans in connection with construction and post-

construction activities on the subject property, not as they related to the character of the neighborhood. Indeed, in her altered plans, the petitioner, inter alia, reduced the house's floor area ratio from 4,163 square feet to 3,484.9 square feet and the lot coverage from 2,100 square feet to 1,741 square feet. Furthermore, the ZBA's denial of the petitioner's second application for a site capacity variance failed to address the factor of feasible alternatives.

Overall, the record does not contain sufficient factual and objective evidence to support the rationality of the ZBA's determinations denying the petitioner's application for a site capacity variance (*see Matter of Cacsire v City of White Plains Zoning Bd. of Appeals,* 87 AD3d 1135; *cf. Matter of Ifrah v Utschig,* 98 NY2d 304). Accordingly, the Supreme Court properly concluded that the ZBA's determination was arbitrary and capricious, annulled the determination, and remitted the matter to the ZBA to issue the requested variance.

In light of our determination, we need not reach the parties' remaining contentions.

RIVERA, J.P., DICKERSON, LEVENTHAL and ROMAN, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court

163 A.D.3d 572 (2018)
81 N.Y.S.3d 89
2018 NY Slip Op 05046

In the Matter of Francis A. Nicolai, Respondent,
v.
Michael H. McLaughlin et al., Appellants.

2016-11749. Index No. 2055/16.

Appellate Division of the Supreme Court of New York, Second Department.

Decided July 5, 2018.

In a proceeding pursuant to CPLR article 78 to review a determination of the Planning Board of the Town of Mount Pleasant dated April 18, 2016, which denied the petitioner's application for a wetland control permit and site plan approval, the Chairman and individual members of the Planning Board of the Town of Mount Pleasant and the Planning Board of the Town of Mount Pleasant appeal from a judgment of the Supreme Court, Westchester County (Anne E. Minihan, J.), entered October 7, 2016. The judgment granted the petition, annulled the determination, and directed the appellants to grant the petitioner's application.

Rivera, J.P., Leventhal, Chambers and Iannacci, JJ., concur.

573 *573 Ordered that the judgment is affirmed, with costs.

The petitioner applied to the Planning Board of the Town of Mount Pleasant (hereinafter the Planning Board) for a wetland control permit and site plan approval. The petitioner sought to construct a one-family dwelling and ancillary improvements in an area where such construction is prohibited under the Town Code of the Town of Mount Pleasant (hereinafter the Town Code) absent the Planning Board's approval. The Planning Board denied the application by determination dated April 18, 2016. The petitioner thereafter commenced this CPLR article 78 proceeding to review that determination. By judgment entered October 7, 2016, the Supreme Court, Westchester County, granted the petition, annulled the determination, and directed the Planning Board to grant the petitioner's application.

As an initial matter, the question of whether the petitioner failed to exhaust his administrative remedies is properly before this Court (*see* CPLR 7804 [f]). Nevertheless, and contrary to the Planning Board's arguments, the Supreme Court properly determined that the petitioner exhausted the administrative remedies available to him before commencing this proceeding (*see* Town Code § 111-7; *see also* Town Code § 111-13; L 2012, ch 60, pt D, § 36).

Turning to the merits, "`[a] local planning board has broad discretion in reaching its determination on applications ... and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion'" (*Matter of In-Towne Shopping Ctrs., Co. v Planning Bd. of the Town of Brookhaven*, 73 AD3d 925, 926 [2010], quoting *Matter of Kearney v Kita*, 62 AD3d 1000, 1001 [2009]; *see Matter of Ostojic v Gee*, 130 AD3d 927, 928 [2015]; *Matter of Kaywood Props., Ltd. v Forte*, 69 AD3d 628,
574 629-630 [2010]; *Matter of Davies Farm, LLC v Planning Bd. of Town of Clarkstown*, *574 54 AD3d 757, 758-759 [2008]). "`A decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious'" (*Matter of Amdurer v Village of New Hempstead Zoning Bd. of Appeals*, 146 AD3d 878, 879 [2017], quoting *Matter of Charles A. Field Delivery Serv. [Roberts]*, 66 NY2d 516, 516-517 [1985]). Where an agency reaches contrary results on substantially similar facts, it must provide an explanation (*see Matter of Amdurer v Village of New Hempstead Zoning Bd. of Appeals*, 146 AD3d at 879; *Matter of Campo Grandchildren Trust v Colson*, 39 AD3d 746, 746-747 [2007]). "An agency's failure to provide a valid and rational explanation for its departure from its

prior precedent `mandates ... reversal'" regardless of whether the record otherwise supports the determination (*Matter of Corona Realty Holdings, LLC v Town of N. Hempstead*, 32 AD3d 393, 395 [2006], quoting *Matter of Al Turi Landfill v New York State Dept. of Envtl. Conservation*, 289 AD2d 231, 233 [2001], *affd* 98 NY2d 758 [2002]).

Here, the Planning Board failed to set forth any factual basis in the determination as to why it was departing from numerous prior determinations that, for example, permitted larger encroachments into wetland and wetland buffer areas and permitted encroachments of the same or similar type into those areas within the immediate vicinity of the petitioner's lot. The Planning Board's belated effort to provide such distinctions are not properly before this Court (*see Matter of Coffey v D'Elia*, 61 NY2d 645, 647-648 [1983]; *Matter of Mobil Oil Corp. v Village of Mamaroneck Bd. of Appeals*, 293 AD2d 679, 681 [2002]; *Syracuse Bros. v Darcy*, 127 AD2d 588, 589 [1987]; *see also Town of Huntington v Beechwood Carmen Bldg. Corp.*, 82 AD3d 1203, 1207 [2011]). Accordingly, we agree with the Supreme Court that the determination was arbitrary and capricious (*see Matter of Charles A. Field Delivery Serv. [Roberts]*, 66 NY2d at 516).

We need not reach the parties' remaining contentions in light of the foregoing (*see Matter of Corona Realty Holdings, LLC v Town of N. Hempstead*, 32 AD3d at 395).

153 A.D.3d 823 (2017)
60 N.Y.S.3d 381
2017 NY Slip Op 06273

In the Matter of GREEN EARTH FARMS ROCKLAND, LLC, Respondents,
v.
TOWN OF HAVERSTRAW PLANNING BOARD et al., Appellants.

2015-00526. Index No. 2465/12.

Appellate Division of the Supreme Court of New York, Second Department.

Decided August 23, 2017.

Appeal from a judgment of the Supreme Court, Rockland County (Victor J. Alfieri, Jr., J.), dated October 15, 2014. The judgment, insofar as appealed from, (1) granted a petition filed pursuant to CPLR article 78 challenging the approval of a development project, (2), in effect, annulled a determination that a second Supplemental Environmental Impact Statement was not required, (3) annulled a site plan approval, and (4) remitted the matter to the respondent Town of Haverstraw Planning Board for further proceedings.

Dillon, J.P., Cohen, Duffy and Connolly, JJ., concur.

824 *824 Ordered that the appeal by the Town of Haverstraw Building Department is dismissed, as that party is not aggrieved by the judgment appealed from (*see* CPLR 5511); and it is further,

Ordered that on the appeal by the Town of Haverstraw Planning Board and Mt. Ivy Partners, Inc., the judgment is modified, on the law, (1) by adding to the first decretal paragraph thereof, after the phrase "the petition is granted," the words "insofar as asserted by the petitioners Paint'n Place, Inc., Parkway Realty Corp., Good Counsel Realty Ltd., and 202 United Development Corp.," and (2) by adding a decretal paragraph thereto dismissing the petition insofar as asserted by the petitioner John McDowell; as so modified, the judgment is affirmed insofar as appealed from by the Town of Haverstraw Planning Board and Mt. Ivy Partners, Inc., with costs payable to the petitioners.

In 2004, a developer, Davies Farm, LLC (hereinafter Davies Farm), applied for site plan approval and a zoning amendment in connection with proposed residential and commercial development of a 53.3-acre parcel of land located in the adjacent towns of Haverstraw and Ramapo (hereinafter the proposed development plan). In April 2005, the Town of Haverstraw Planning Board (hereinafter the Planning Board), as the lead agency under the State Environmental Quality Review Act (ECL art 8; hereinafter SEQRA), issued a positive declaration regarding the application for the proposed development plan and required the preparation of a draft environmental impact statement (hereinafter DEIS). After the DEIS was submitted in 2006, Davies Farm changed the proposed development plan by eliminating the proposed residential development in the Town of Haverstraw to avoid the need for a zoning amendment (hereinafter the supplemental proposed development plan). In response, the Planning Board required a Supplemental Environmental Impact Statement (hereinafter SEIS) as to the supplemental proposed development plan. In November 2009, the Planning Board accepted a final SEIS and, pursuant to SEQRA, adopted a findings statement certifying that the approved supplemental proposed development plan minimized or avoided adverse environmental impacts to the maximum extent
825 practicable. The supplemental proposed development plan at that time consisted of proposed commercial *825 development in the Town of Haverstraw (hereinafter the Haverstraw commercial phase) and a mix of residential and commercial uses, including "a deli/coffee shop" in the Town of Ramapo (hereinafter, respectively, the Ramapo residential phase and the Ramapo commercial phase).

In January 2012, the property's new owner, Mt. Ivy Partners, LLC (hereinafter Mt. Ivy), applied to the Planning Board for preliminary and final site plan approval for the Haverstraw and Ramapo commercial phases of the

project. However, Mt. Ivy's proposed Ramapo commercial phase was changed to include a deli/coffee shop with gas pumps in the Town of Ramapo, and the site plan depicted a 7,000-square-foot convenience store with 16 gas pumps. After soliciting comments from the public, consultants, and other agencies, the Planning Board issued a resolution dated November 28, 2012, determining that a second SEIS was not required. The Planning Board granted the requested preliminary and final site plan approval subject to certain conditions, requiring Mt. Ivy, among other things, to obtain all required approvals from the Town of Ramapo and the Rockland County Department of Health. The resolution did not mention the proposed gas station.

The petitioners, most of whom are owners of properties near the site of the supplemental proposed development plan, commenced this proceeding pursuant to CPLR article 78 against the Planning Board, Mt. Ivy, and the Town of Haverstraw Building Department (hereinafter the Building Department). The petition sought review of the Planning Board's determination finding that the preparation of a second SEIS was not warranted and granting the application for site plan approval. In the judgment appealed from, the Supreme Court determined that all the petitioners had standing under SEQRA to challenge the Planning Board's determination. Further, the court determined that the Planning Board failed to take the requisite "hard look" at the change in the proposed development from a deli/coffee shop to a large convenience store with 16 gas pumps. Accordingly, the court granted the petition, in effect, annulled the SEQRA determination, annulled the site plan approval, and remitted the matter to the Planning Board for the preparation of a second SEIS, in effect, limited to examining whether there were significant adverse environmental impacts arising from the proposed construction of the gas station. Mt. Ivy, the Planning Board, and the Building Department appeal.

As an initial matter, in the judgment appealed from, the Supreme Court, in effect, dismissed the petition insofar
826 as asserted against the Building Department. Accordingly, the *826 Building Department is not aggrieved by the judgment, and the appeal by the Building Department must be dismissed.

With respect to the issue of standing, "[t]o establish standing under SEQRA, a petitioner must show (1) an environmental injury that is in some way different from that of the public at large, and (2) that the alleged injury falls within the zone of interests sought to be protected or promoted by SEQRA" (*Matter of Tuxedo Land Trust, Inc. v Town Bd. of Town of Tuxedo*, 112 AD3d 726, 727-728 [2013]; *see Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772-775 [1991]; *Matter of Village of Chestnut Ridge v Town of Ramapo*, 45 AD3d 74, 89-90 [2007]). "An injury in fact may be inferred from a showing of close proximity of the petitioner's property to the proposed development" (*Matter of Tuxedo Land Trust, Inc. v Town Bd. of Town of Tuxedo*, 112 AD3d at 728; *see Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 687 [1996]; *Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead*, 69 NY2d 406, 414 [1987]). Since the petitioners Paint'n Place, Inc. (hereinafter Paint'n Place), Parkway Realty Corp. (hereinafter Parkway), Good Counsel Realty Ltd. (hereinafter Good Counsel), and 202 United Development Corp. (hereinafter 202 United) own or lease properties immediately across the street from, and within 500 feet of, the site of the proposed development, the Supreme Court properly inferred an injury in fact from the close proximity of those petitioners' properties to the proposed development (*see Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead*, 69 NY2d at 414; *Citizens for St. Patrick's v City of Watervliet City Council*, 126 AD3d 1159, 1160 [2015]; *Matter of Village of Chestnut Ridge v Town of Ramapo*, 45 AD3d at 90; *Matter of McGrath v Town Bd. of Town of N. Greenbush*, 254 AD2d 614, 616 [1998]). Moreover, those petitioners alleged environmental harm that comes within the zone of interests protected by SEQRA (*see Matter of Bloodgood v Town of Huntington*, 58 AD3d 619, 621 [2009]; *Matter of McGrath v Town Bd. of Town of N. Greenbush*, 254 AD2d at 616). Thus, the petitioners Paint'n Place, Parkway, Good Counsel, and 202 United have standing to challenge the Town Board's SEQRA determination.

However, the appellants correctly contend that the petitioner John McDowell, who lives more than 2,000 feet from the site of the proposed development, does "not live close enough to the site to be afforded a presumption of injury-in-fact based on proximity alone" (*Matter of Riverhead Neighborhood Preserv. Coalition, Inc. v Town of*
827 *Riverhead Town Bd.*, 112 AD3d 944, *827 945 [2013]; *see Matter of O'Brien v New York State Commr. of Educ.*, 112 AD3d 188, 193-194 [2013]; *Matter of Barrett v Dutchess County Legislature*, 38 AD3d 651, 653 [2007]). Further, the petitioners failed to demonstrate that the proposed development would cause McDowell to suffer an

environmental injury different from that of members of the public at large (*see Matter of Riverhead Neighborhood Preserv. Coalition, Inc. v Town of Riverhead Town Bd.*, 112 AD3d at 945; *Matter of Barrett v Dutchess County Legislature*, 38 AD3d at 654). Accordingly, the Supreme Court should have dismissed the petition insofar as asserted by McDowell (*see Matter of Long Is. Contractors' Assn. v Town of Riverhead*, 17 AD3d 590, 595 [2005]).

With respect to the Planning Board's SEQRA determination, "[j]udicial review of a lead agency's SEQRA determination is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (*Matter of Chinese Staff & Workers' Assn. v Burden*, 19 NY3d 922, 924 [2012] [internal quotation marks omitted]). "In assessing an agency's compliance with the substantive mandates of the statute, courts must review the record to determine whether the agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination" (*id.* at 924 [internal quotation marks omitted]; *see Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 231-232 [2007]; *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986]). "This standard of review applies to a lead agency's determination regarding the necessity for a SEIS" (*Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d at 232; *see Matter of Oyster Bay Assoc. Ltd. Partnership v Town Bd. of Town of Oyster Bay*, 58 AD3d 855, 859 [2009]).

Here, the Supreme Court properly concluded that the Planning Board failed to comply with the substantive requirements of SEQRA in determining that a second SEIS was not required prior to its approval of the site plan. As is relevant to this appeal, a lead agency may require a SEIS, "limited to the specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS that arise from ... changes proposed for the project" (6 NYCRR 617.9 [a] [7] [i]). "In making this fact-intensive determination, the lead agency has ... discretion to weigh and evaluate the credibility of ... reports and comments submitted to it and
828 must assess environmental *828 concerns in conjunction with other economic and social planning goals" (*Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d at 231; *see Matter of Oyster Bay Assoc. Ltd. Partnership v Town Bd. of Town of Oyster Bay*, 58 AD3d at 860).

Although a lead agency's determination whether to require a SEIS, or a second SEIS, is discretionary (*see Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d at 231), the lead agency must "consider[ ] the environmental issues requiring permits" and must make "an independent judgment that they would not create significant environmental impact" (*Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d at 234 n 2; *see Matter of Penfield Panorama Area Community v Town of Penfield Planning Bd.*, 253 AD2d 342, 349-350 [1999]). Here, the changes proposed for the project after the issuance of the 2009 findings statement included the construction of a large convenience store with 16 gas pumps. Although Mt. Ivy's representatives asserted that the gas station did not necessitate a second SEIS because Mt. Ivy would have to construct it in accordance with New York State requirements and would need to obtain permits from the Rockland County Department of Health during the building permit process, the Planning Board did not mention the gas station or petroleum storage in its resolution determining that a second SEIS was not required.

Under these circumstances, the Planning Board failed to take the requisite hard look at the project change adding the gas station, and did not make a reasoned elaboration of its basis for determining that a second SEIS was not necessary to address that change (*see Matter of Penfield Panorama Area Community v Town of Penfield Planning Bd.*, 253 AD3d at 349-350; *see also Matter of Town of Dickinson v County of Broome*, 183 AD2d 1013, 1014 [1992]; *cf. Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d at 229-230, 233-235; *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d at 429-430).

Since the Planning Board failed to comply with the requirements of SEQRA, the Supreme Court properly annulled both the SEQRA determination and the site plan approval for the commercial development phase of the project (*see* 6 NYCRR 617.3 [a]; *Matter of Yellow Lantern Kampground v Town of Cortlandville*, 279 AD2d 6, 12 [2000]).

The petitioners' remaining contentions are without merit.