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I. Private Disputes

- A municipality should not consider private agreements such as restrictive covenants or easement disputes in deciding whether to approve a permit application under local zoning regulations and land use laws

    - Matter of Friends of Shawangunks, Inc. v. Knowlton, 64 N.Y.2d 387, 392 (1985)

    - Matter of Pirrotti v. Town of Greenburgh, 25 Misc. 3d 1226(A), 906 N.Y.S.2d 775 (Sup. Ct. Westchester County 2009)

    - Matter of Smith v. Tabler, 2008 N.Y. Misc. LEXIS, *3-9 (Sup. Ct. Nassau County 2008) (upholding a municipality's approval of a partition in land)

II. Completeness

- Applicants do not need to submit perfect documents (SEQRA Handbook, 3d Edition (2010), 133)

- Rule of Reason

    - An agency's responsibility under SEQRA must be viewed in light of a "rule of reason;" *not every conceivable environmental impact, mitigating measure or alternative, need be addressed in order to meet the agency's responsibility*. The degree of detail-the reasonableness of an agency's action-will depend largely on the circumstances surrounding the proposed action. Neville v. Koch, 79 N.Y.2d 416, 583 N.Y.S.2d 802, 806 (1992) (emphasis added)

    - "A rule of reason is applicable not only to an agency's judgment about the environmental concerns it investigates, but to its decisions about which matters require investigation." Save the Pine Bush, Inc. v.

Common Council of Albany, 13 N.Y.3d 297, 890 N.Y.S.2d 405, 411 (2009)

- "In assessing whether an agency has met its substantive SEQRA obligations, the appropriate judicial focus is not upon the agency's ultimate judgments but upon the deliberative process by which they were reached, and the touchstone is reasonableness." Develop Don't Destroy (Brooklyn) v. Urban Dev. Corp., 59 A.D.3d 312, 874 N.Y.S.2d 414, 417 (1st Dept. 2009)

- "[T]he degree of detail with which each environmental factor must be discussed will necessarily vary and depend on the nature of the action under consideration." Gernatt Asphalt Prods. v. Town of Sardinia, 87 N.Y.2d 668, 642 N.Y.S.2d 164, 176 (1996)

- Circulating information to outside agencies leads to "informed decision making" by helping the Lead Agency to identify and evaluate issues with proposed projects. See Glen Head--Glenwood Landing Civic Council, Inc. v. Town of Oyster Bay, 88 A.D.2d 484, 453 N.Y.S.2d 732, 739 (1982)

- Public input in review process leads to Lead Agency having a broader perspective and increases likelihood project consistent with community values. (SEQRA Handbook, 3d Edition (2010), 4)

- SEQRA Handbook recommends early public involvement since it "can limit rumors and inaccurate stories regarding the proposed project which can be generated when project information is unknown or only partially available." (SEQRA Handbook, 3d Edition (2010), 112)

- Completeness of Site Plan Application for the purposes of triggering mandatory review timeframe for public hearing. See Sun Beach Real Estate Development Corp. v. Anderson, 98 A.D.2d 367, 469 N.Y.S.2d 964 (2d Dept. 1983); see generally N.Y. Town Law § 274-a (establishing that public hearing, where required, must be conducted within 62-days "from the day an application is received," and that decision must be rendered within 62 "after such hearing").

- See Tinker Street Cinema v. Town of Woodstock Planning Bd., 256 A.D.2d 970, 681 N.Y.S.2d 907 (3d Dept. 1998) (affirming lower Court's

determination that "application was never complete so as to trigger application of" mandatory review timeframes where draft DEIS "was determined to be inadequate and further studies were required by" municipality," even where agency did not adhere to SEQRA timeframes).

- See Golden Horizon Terryville Corp. v. Prusinowski, 63 A.D.3d 930, 882 N.Y.S.2d 174 (2d Dept. 2009) (holding that applicant stated valid cause of action for mandamus to compel processing of site plan application where it alleged that Planning Department and Planning Board were derelict in their "ministerial duty to docket the application;" applicant/petitioner alleged Planning Department was dilatory and placed unreasonable conditions on application).

III. Consultant/Comment Letters

- Timing of review letters depends on municipality

- Generally two paths

    - Require a submission, and then issue Denial Letter prior to Zoning Board or Planning Board Hearing the matter

        - Denial Letters set path forward for an Applicant's review

    - Submit application to staff, make an initial presentation (generally to Planning Board), have municipal board members refer back to staff, and then consultants review submission

- Issues to Consider When Hiring Consultants:

    - Turnaround period

    - One or more consulting firms

    - Form of comments

    - Communication with applicants

- Lead Agency may seek opinions of outside agencies, but "the final determination on this issue must remain with the lead agency principally responsible for approving the project." Coca-Cola Bottling Co. of New York v. Bd. of Estimate of City of New York, 72 N.Y.2d 674, 536 N.Y.S.2d 33, 37 (1988)

    - Lead Agency can use consultants to gather data, review materials prepared for determination of significance, and rely on specific expertise of another involved or interested agency (SEQRA Handbook, 3d Edition (2010), 64)

IV. Sequencing Involved Agencies

- Depends on municipal Staff/Consultant Memoranda and Denial Letters

    - Preliminary Feedback

    - Referrals

    - Coordination with SEQRA

    - Parallel tracks

    - ZBA/PB tensions

- Cannot stop review of site plan and environmental review just because variances need to be obtained. See Gasland Petroleum, Inc. v. Planning Bd. of Town of Beekman, 50 A.D.3d 1039, 857 N.Y.S.2d 584, 586 (2d Dept. 2008) (holding that prohibition would be an inappropriate remedy when its purpose is to prevent a Planning Board from conducting its environmental review before variances are granted)

- Planning Department Staff cannot delay processing application on basis that project ostensibly does not comply with zoning; power to interpret the zoning ordinance is vested in the building inspector and the Zoning Board of Appeals. Figgie Intern., Inc. v. Town of Huntington, 203 A.D.2d 416, 610 N.Y.S.2d 563 (2d Dept. 1994)

- Involved Agencies: "comfort letter" allowing Project to move forward towards approvals

- Waivers:

    - Town Board can authorize Planning Board to waive so long as no negative impact to public health, safety or general welfare, or inappropriate to a particular site plan. N.Y. Town Law § 274-a(5)

    - Parking requirements:

        - Municipalities seeking sustainable transportation strategies
        - Services such as Uber and Lyft have reduced need for car
        - Decrease carbon footprint
        - Land-banking
        - Shared parking

- Architectural Review Boards:

    - ARB is purely advisory and issues comments to the Planning Board prior to Site Plan Approval

    - ARB issues its own separate approval

V. Coordinating Zoning Text or Map Amendments and Site Plan Review

- Need to process both zoning text and known site plan applications simultaneously to comply with SEQRA

    - Reviewing separately may result in impermissible segmentation of the environmental review. See 6 NYCRR 617.3(g)(1)

        - See Citizens Concerned for Harlem Valley Env't v. Town Bd. of Town of Amenia, 264 A.D.2d 394, 694 N.Y.S.2d 108, 109 (2d Dep't 1999) (holding that a Town Board improperly segmented its review by failing to study the environmental impacts of mining operation during the time of the rezoning)

    - "Reviewing the 'whole action' is an important principal in SEQRA." (SEQRA Handbook, 3d Edition (2010), 55)

- Creative solution is to enter into a Memorandum of Understanding (MOU)

    - Not contain promise of a result, but require a municipality to process Zoning Text or Map Amendments and Site Plan in good faith, and not "pull the plug"

    - Submit proposed text or map amendments, Long Form EAF, Design Development Plans, and supplementary SEQRA studies first regarding zoning or legislative action

    - If municipality approves zoning amendments, then submit full engineered drawings and additional Site Plan Approval requirements

    - Seek to avoid additional SEQRA review

- Municipalities often like the process; fair to the Applicant, and provides certainty to stakeholders

- Determination of Lead Agency is to be decided between Legislative and Planning Boards

- Permissible Segmentation

VI. Freedom of Information Regarding Draft DEIS vs. Preliminary DEIS

- Competing considerations in SEQRA and FOIL regarding disclosure:

    - Scoping is used in EIS process to "ensure that the draft EIS will be a concise, accurate and complete document that is adequate for public review." (SEQRA Handbook, 3d Edition (2010), 104)

    - SEQRA implementing regulations indicate that DEIS should not be circulated until Lead Agency has deemed it complete and accurate. See 6 N.Y.C.R.R. §617.9(a)(3)

- FOIL

    - FOIL is premised on a presumption of access to records, unless it fits in one of the exemptions in Public Officers Law Section 87(2)

    - Robert Freeman, Executive Director of the Committee on Open Government, issued an advisory opinion which stated that incomplete drafts of a DEIS constitute a "record" subject to public access. (FOIL-AO-12388)

    - Argument to be made that Draft DEIS's are pre-decisional inter or intra-agency material, which are not (i) statistical or factual tabulations or data; (ii) instructions to staff that affect the public; (iii) final agency policy or determinations; or (iv) external audits.

        - May not need to provide pursuant to Section 87(2)(g) of Public Officers Law

        - Disclosure requirement hinges on whether inter or intra-agency material is reflective of opinion, advice, or recommendation

        - Note: Freedom of Information Law makes no reference to term "Draft"

    - Outside consultants can be considered an extension of the municipal government, subject to same disclosure requirements as if internal municipal staff drafted. See Xerox Corp. v. Town of Webster, 65 N.Y.2d 131, 133, 490 N.Y.S.2d 488, 490 (1985)

VII. Exactions

- All conditions imposed on land use applications that require an applicant to spend money must: (i) have an "essential nexus" to a legitimate governmental interest, and (ii) be "roughly proportional" to the impact they are intended to offset. Koontz v. St. Johns River Water Management Dist., 570 U.S. 595, 606, 133 S.Ct. 2586, 2595 (2013)

    - Koontz Court held that "essential nexus"/"rough proportionality" test applies to virtually all conditions reviewing agencies would impose on

land use applicants where there is a "direct link between the government's demand and a specific parcel of real property."

- Koontz held this analysis applied to demand by reviewing agency for wetlands permit requiring that applicant either: (i) significantly reduce the size of the proposed project, together with a conservation easement over the majority of the site, or (ii) implement improvements to government-owned land several miles away.

- Koontz expanded on previous caselaw, which pertained to physical takings:

    - Nollan v. California Coastal Commission, 483 U.S. U.S. 825, 107 S. Ct. 3141 (1987), Supreme Court held that there must be an "essential nexus" between a "legitimate state interest" and the condition that the reviewing agency seeks to impose.

        - Nollan Court held that an agency's conditioning of a permit on an applicant's grant of an easement allowing the public to cross over the applicant's beachfront in order to go between two public beaches had no "essential nexus" to the agency's purported concern that the project would cause a visual barrier to the ocean.

    - Koontz Decision also based in large part on the Supreme Court's Decision in Dolan v. City of Tigard, 512 U.S. 374, 114 S.Ct. 2309 (1994), Supreme Court went further and held that, even where an "essential nexus" exists, the reviewing agency still must make an "individualized determination" that a required physical dedication "is related both in nature and extent to the impact of the proposed development" - i.e., that the condition is "roughly proportional" to the impact the agency intends to offset.

        - Dolan Court held that while "[n]o mathematical calculation is required," the reviewing agency "must make some effort to quantify its findings" in support of the condition; conclusory statements will not suffice.

        - In Dolan, the Court held that the agency failed to demonstrate that requiring an applicant to dedicate a

pedestrian/bicycle easement was "reasonably related" to the number of vehicles and bicycle trips that the project (expansion of a plumbing and electrical supply store) would generate.

VIII. Evaluating Impacts Associated with School-Aged Children

- Mere claim by community members that a new residential development will attract families with school-aged children to the neighborhood is an illegal basis to deny an application

    - Fair Housing Act – MHANY Management, Inc. v. County of Nassau, 2017 WL 4174787 (E.D.N.Y. 2017) (upholding FHA claim; finding municipality alleged concern that a residential rezoning permitting townhouse developments would result in "overburdened and overcrowded schools" was not a legitimate basis for rejecting the rezoning since the record lacked any "substantial evidence" substantiating this concern)

    - Use v. User – violates the principle that zoning is concerned with the use of land, not with the identity of the user Sunrise Check Cashing v. Town of Hempstead, 20 N.Y.3d 481, 986 N.E.2d 898, 899 (2013)

        - Regulation of who may reside in a residential development must bear a "substantial relation to ... the public health, safety, morals or general welfare Blue Island Dev., LLC v. Town of Hempstead, 131 A.D.3d 497, 15 N.Y.S.3d 807, 811 (2d Dep't 2015) (annulling restriction requiring owner to rent units rather than sell them)

- Must be able to identify and quantify a specific impact associated with the additional school-aged children associated with the Project in order to require mitigation

    - Koontz – mitigation must have a direct "nexus" to an identified impact, and must be "roughly proportional" to the magnitude of the impact

    - Dolan – agency must make an "individualized determination" that the proposed mitigation "is related both in nature and extent to the impact

of the proposed development" – i.e., that the condition must be "roughly proportional" to the impact the agency intends to offset.

- "must make some effort to quantify its findings" in support of the condition; conclusory statements will not suffice

- School Impact Agreements

- SEQRA context – in quantifying the impact of additional school children, lead agency cannot require developer to provide mitigation for impacts of school children associated with other projects

    - Cumulative impact analysis