



6/25/2007

As part of our efforts to continue to provide resources for our clients, ELS will be distributing newsletters, practice forms and other helpful information from time to time.

Today we took a look at 16 cases throughout New York involving the State Environmental Quality Review Act (ECL Art. 8, hereinafter "SEQRA") decided during the first half of 2007.

7 of the cases were challenges claiming the insufficiency of environmental review by the Lead Agency as a result of a negative determination of environmental significance (Neg. Dec.). Of these cases, the Lead Agency's determination was upheld 4 times and overturned 3 times.

5 of the cases involved the issue of standing. 3 involved the statute of limitations. And, one case even sought mandamus to require the Lead Agency to adhere to the statutory time frames for action under SEQRA.

We hope this will be a helpful summary for you. If you would like a full copy of any of the slip opinions, please e-mail or call and we'll be happy to e-mail them to you.

**APPELLATE DIVISION – SECOND DEPARTMENT
DIGEST OF 2007 DECISIONS INVOLVING SEQRA ISSUES**

CAPTION	DATE	CITATION	ISSUES	SUMMARY
<u>Matter of Wells v. Board of Trustees of Incorporated Village of Northport</u>	May 1, 2007	2007, NY Slip Op. 03936	Negative determination of environmental significance.	Village of Northport enacted a zoning code amendment, which resulted in the up-zoning of approximately 45 acres of residential property located along the Northport Harbor effectively reducing the amount of future development upon these properties. As Lead Agency, the Village Board of Trustees issued a negative declaration of environmental significance. Petitioner challenged this determination. Court determined that, where the proposed zoning amendment "would have only beneficial environmental effects, the issuance of a negative declaration was appropriate, and an EIS was unnecessary."
<u>Matter of Barrett v. Dutchess County Legislature</u>	March 13, 2007	2007, NY Slip Op. 02113	Standing to challenge SEQRA determination; negative determination of environmental significance.	Petitioners argued that they are in close proximity to site of the project, which gave them standing. Supreme Court determined that the proximity of petitioners' residence to the site of the proposed project was insufficient, without more, to confer standing, and Petitioners had to demonstrate that they would suffer an environmental injury, which is "somewhat different from that of the public at large." Appellate Division reversed. Determined that petitioners' alleged environmental harm was different from that suffered by the public at large and therefore



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<u>Matter of Rocky Point Realty, LLC, v. Town of Brookhaven</u>	Jan.16, 2007	2007 NY Slip Op. 00315	Negative determination of environmental significance	came within the zone of interest protected by SEQRA. Appellate Division also held that the record established by the Legislature complied with the mandates of SEQRA, and that the issuance of a negative declaration was a proper exercise of discretion.
<u>Matter of Serdarevic v. Town of Goshen</u>	April 3, 2007	2007 NY Slip Op. 02945	Negative determination of environmental significance	Petitioner contended that the Town failed to comply with requirements of SEQRA in adopting its findings and determination. Court held that SEQRA requires that agencies "minimize or avoid adverse environmental effects, when considering proposed actions. In the EAF prepared in connection with the proposed condemnation, no adverse environmental impacts were identified. Petitioner failed to assert any significant potential for environmental harm that might result from the project. Town's issuance of a negative declaration was appropriate, and an environmental impact statement was unnecessary.
				Upon review of the record, the Court determined that the proposed condemnor had failed to satisfy its SEQRA obligations and issued a negative declaration without sufficiently identifying the relevant areas of environmental concern, taking a "hard look" at them, and making a "reasoned elaboration of the basis for its determination." The Town's declaration of non-significance was made without reference to any empirical or experimental data, scientific authorities, or any explanatory information, and consisted of



**APPELLATE DIVISION – SECOND DEPARTMENT
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**Matter of Ingraham
v. Planning Board of
the Town of
Southeast**

Jan. 30, 2007

2007 NY Slip
Op. 00645

Requirement for
Supplemental
Environmental
Impact
Statement

conclusory statements.

Petitioners commenced a proceeding to review a determination of the Planning Board, which granted an application for approval of a subdivision plat. Supreme Court properly denied the petition on such grounds. However, Appellate Division determined that Planning Board's determination nonetheless must be annulled. In a prior appeal, decided, while the instant case was pending, Appellate Division had already annulled the Planning Board's SEQRA determination and remitted the matter to the Planning Board for preparation and circulation of an SEIS. Thus, the determination by Supreme Court granting conditional final plat approval was annulled.



**APPELLATE DIVISION – THIRD DEPARTMENT
DIGEST OF 2007 DECISIONS INVOLVING SEQRA ISSUES**

CAPTION	DATE	CITATION	ISSUES	SUMMARY
<u>Matter of North Country Citizens for Responsible Growth, Inc., v. Town of Potsdam Planning Board</u>	April 26, 2007	2007 NY Slip Op. 03608	Statute of limitations; failure to take hard look	Petitioners contested Supreme Court's conclusion that 30-day statute of limitations commenced on October 5, 2005 and argued that the statute limitations period should not have commenced until October 26, 2005 when the Planning Board approved the overall site plan. The Appellate Division's first inquiry asked when the individual Petitioners suffered "a concrete injury not amenable to further administrative review and corrective action." Insofar as, the Planning Board's SEQRA determination and site plan approval were both parts of an integrated process, Appellate Division agreed with petitioners that they did not suffer the concrete injury until the site plan was approved (October 26, 2005). Court disagreed with petitioners' contentions that the Planning Board failed to take a "hard look" and make a "reasoned elaboration" with respect to population concentration and community character. Planning Board conducted an extensive 17 month review process; it included public comments, additional testing, expert reviews, comments from various agencies and prepared a full EIS.
<u>Beneke v. Town of Santa Clara</u>	Jan. 25, 2007	2007 NY Slip Op. 00440	Statute of limitations	Plaintiff contended that Supreme Court erred in refusing to allow him to amend his pleading. Appellate Division disagreed with Plaintiff. The Court of Appeals has consistently stated that in a proceeding alleging a SEQRA violation in the



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enactment of legislation, the challenge must be commenced within four months of the date of its enactment. While plaintiff contends that there is no statute of limitations where there has been a procedural breach in enacting a local law, that argument has been consistently rejected by the Third Department on the theory that it would "create an infinite period of challenge which would vitiate the purpose underlying the statute limitations."



**APPELLATE DIVISION – FOURTH DEPARTMENT
DIGEST OF 2007 DECISIONS INVOLVING SEQRA ISSUES**

CAPTION	DATE	CITATION	ISSUES	SUMMARY
<u>Matter of Coursen v. Planning Board Town of Pompey</u>	Feb. 2, 2007	2007 NY Slip Op. 00912	Negative determination of environmental significance.	Petitioners contend that the Planning Board failed to comply with SEQRA in issuing its negative declaration. Appellate Division held that the Planning Board properly "identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination."



**SUPREME COURT – SUFFOLK COUNTY
DIGEST OF 2007 DECISIONS INVOLVING SEQRA ISSUES**

CAPTION	DATE	CITATION	ISSUES	SUMMARY
<u>Bloodgood v. Town of Huntington</u>	April 30, 2007	2007 NY Slip Op. 31064(U)	Standing of association or organization	One of the petitioners is an unincorporated civic association comprised of over 500 active local citizens/members organized for the purpose of protecting Huntington's harbors and environment. In determining whether an association or organization has standing, the association must demonstrate that the interests it asserts are germane to its purposes as to satisfy the court that it is an appropriate representative of those interests. Based upon such criteria, the petitioner association failed to meet such burden. It has consistently been held that the protection of commercial interest is insufficient to support a challenge to the SEQRA determination of a legislative body.
<u>Lafiteau v. Guzewicz</u>	Feb. 13, 2007	2007 NY Slip Op 30143(U)	Negative determination of environmental significance.	Applicant-respondent amended its ZBA application by adding a second lot. Board made a negative determination of environmental significance based upon the EAF submitted in connection with applicant-respondents initial application, which did not include the second lot. A second EAF was not prepared or submitted. Court remitted the matter to the Board to determine the environment impact of the second amended application, including examination under SEQRA of the effect of any possible mitigating measures.
<u>Inland W. Coram</u>	Jan. 5, 2007	2007 NY Slip	Standing;	Rather than engaging in the debate over the issue of



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**Plaza, LLC v. Town
of Brookhaven**

Op 50173(U)

negative
determination of
environmental
significance

standing, the court determined that the respondents did, in fact, comply with the requirements of SEQRA in making a negative declaration and approving the underlying application.



**SUPREME COURT – NASSAU COUNTY
DIGEST OF 2007 DECISIONS INVOLVING SEQRA ISSUES**

CAPTION	DATE	CITATION	ISSUES	SUMMARY
<u>Matter of Lowe’s Home Ctrs. Inc. v. Venditto</u>	March 19, 2007	2007 NY Slip Op. 50542(U)	Mandamus to compel compliance with time periods established by SEQRA; statute of limitations	The sole relief sought was to compel compliance with the time periods established by SEQRA. The Court rejected respondent's assertion that the proceeding was untimely. As such proceeding was in the nature of mandamus to compel, the undisputed limitations period of four months does not begin to run until a demand for action was made and refused. Absent a formal rejection of a demand, the statute of limitations period does not begin to run. Petitioner’s application was granted. The Court directed the Town Board to make a written determination with respect to the adequacy of Petitioner’s DEIS, within 30 days from the date of service of a copy of the order and to comply with the timeframe set forth in SEQRA in completing its review of Petitioner's pending special use permit and site plan applications.
<u>Matter of Weinman v. Planning Board of Town of E. Hampton</u>	March 15, 2007	2007 NY Slip Op 30398(U)	Coordinated review; local determination of Type I Actions	Respondent Town had locally adopted a more restrictive list of Type I actions. The proposed action fell within the ambit of Respondent Town's own list of Type I actions. Petitioners request that Respondent Town interpret their own code in a manner which would require that all subdivisions be classified as Type I actions. The Court would not conclude that the Planning Board's determination that the action was an Unlisted action was an error of law, an abuse of discretion, or unsupported by substantial evidence. Any issue as to whether proper notices were sent to



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other potentially involve agencies when the Respondent became the lead agency is not an issue which may be raised, under the circumstances, by the Petitioners, but rather, any agency which may have been offended (if there be any) by the Respondent's determination in these proceedings. Petitioners lack standing to complain concerning Respondent Board's treatment of other agencies with regard to the issue of notice.



**SUPREME COURT – WESCHESTER COUNTY
DIGEST OF 2007 DECISIONS INVOLVING SEQRA ISSUES**

CAPTION	DATE	CITATION	ISSUES	SUMMARY
<u>Matter of White Plains Downtown Dist. Mgt. Assn., Inc. v. Spano</u>	Feb. 23, 2007	2007 NY Slip Op. 27094	Standing.	Case involved associational standing in context of article 78 proceeding involving SEQRA challenge. For association organization to have standing to challenge a SEQRA violation, the association must meet three requirements: (i) if an association or organization, is the petitioner, the key determination to be made is whether one or more of its members would have standing to sue; standing cannot be achieved merely by multiplying the persons a group purports to represent. (ii) An association must demonstrate that the interests it asserts are germane to its purposes so as to satisfy the court that it is an appropriate representative of those interests. (iii) It must be evident that neither the asserted claim, nor the appropriate relief requires the participation of individual members. The court determined that since individual members of the association had standing to sue, the association had standing to bring the action.



**SUPREME COURT – NEW YORK COUNTY
DIGEST OF 2007 DECISIONS INVOLVING SEQRA ISSUES**

CAPTION	DATE	CITATION	ISSUES	SUMMARY
<u>Matter of Municipal Art Society of NY Inc. v. New York State Convention Center Dev. Corp.</u>	May 21, 2007	2007 NY Slip Op. 51031(U)	Standing; statute of limitations; requirement of SEIS	Court determined that Petitioners had standing because they alleged that their close proximity to the subject area will cause them to be exposed to hazardous air emissions, excessive vehicle traffic, and an undue increase in noise, thereby alleging environmental harm different from that suffered by the public at large. Respondents had a Technical Memorandum prepared by its consultants in connection with its original FGEIS. Respondents argue that Petitioners challenge was not timely, because the final action was adoption of the FGEIS and not completion of the Technical Memorandum and Findings Statement. The Court disagreed. Petitioners demanded SEIS as to account for new information bearing on matters of environmental concern. Court disagreed. Merely because the project has changed does not necessarily give rise to the need for the preparation of an SEIS. An SEIS is required only if environmentally significant modifications are made after the issuance of an SEIS. In addition, the decision that an SEIS is not necessary does not require a hearing or public comment.
<u>Matter of Develop Don't Destroy, Brooklyn, Inc. v. Urban Development Corporation</u>	April 20, 2007	2007 NY Slip Op. 30825(U)	Requested injunctive relief pending appeal of SEQRA determination	Petitioners argue that under 6 NYCRR § 617.3 (a) developer is precluded from commencing demolition or making any physical alterations until SEQRA process and underlining Article 78 proceeding is complete. Petitioners contend that their procedural



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and substantive objections to SEQRA will be sustained and will result in a remand for environmental review. Requested that Court prevent demolition of buildings during its appeal. Court held that Petitioner's argument does not provide a sufficient legal basis to stay the demolition of the buildings as that regulation is limited to prohibiting "physical alteration" or demolition during the SEQRA process, which was completed in December 2006. Petitioner's argument is based on the presumption that it will succeed in nullifying the SEQRA determination in the Article 78 proceeding. There was an insufficient record for the court to consider if there was a legal basis to support such a conclusion.

