

SEQRA Basics

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Introduction to Hodgson Russ

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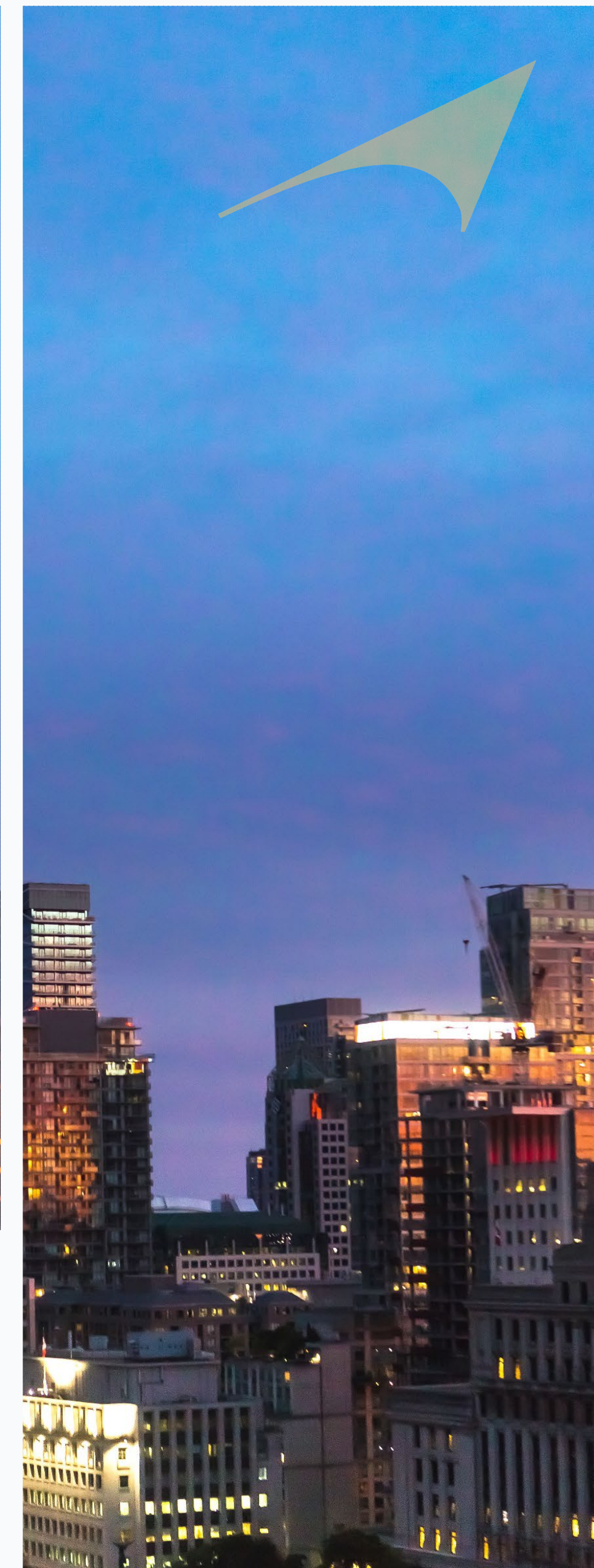
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Introduction to the Land Use Practice

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- Strategic Planning
- Development of State Regulations
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- State and Federal Regulatory
- SEQRA Environmental Review
- Financing
- Lease and Easement Agreements
- Contracts and Agreements
- Taxation
- Litigation
- Insurance
- Corporate Structuring and Collaborations
- Purchase, sale and related due diligence
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Experienced in wind, solar, energy storage, landfill gas-to-energy, bioenergy projects, electric vehicle infrastructure, energy efficiency and decarbonization strategies

CLIENTS

Clients: Developers, lenders, acquirers, landowners, permitting agencies, development agencies, parts and service suppliers, manufacturers, contractors and investors

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International Expertise: Counsel foreign entities participating in United States projects involving cross-border finance, CFIUS, FACTA Compliance, immigration issues, licensing and technology transfer, protection of foreign patents, international taxation and Tax Treaty compliance, multinational mergers and acquisitions, NAFTA and other trade issues

Agenda



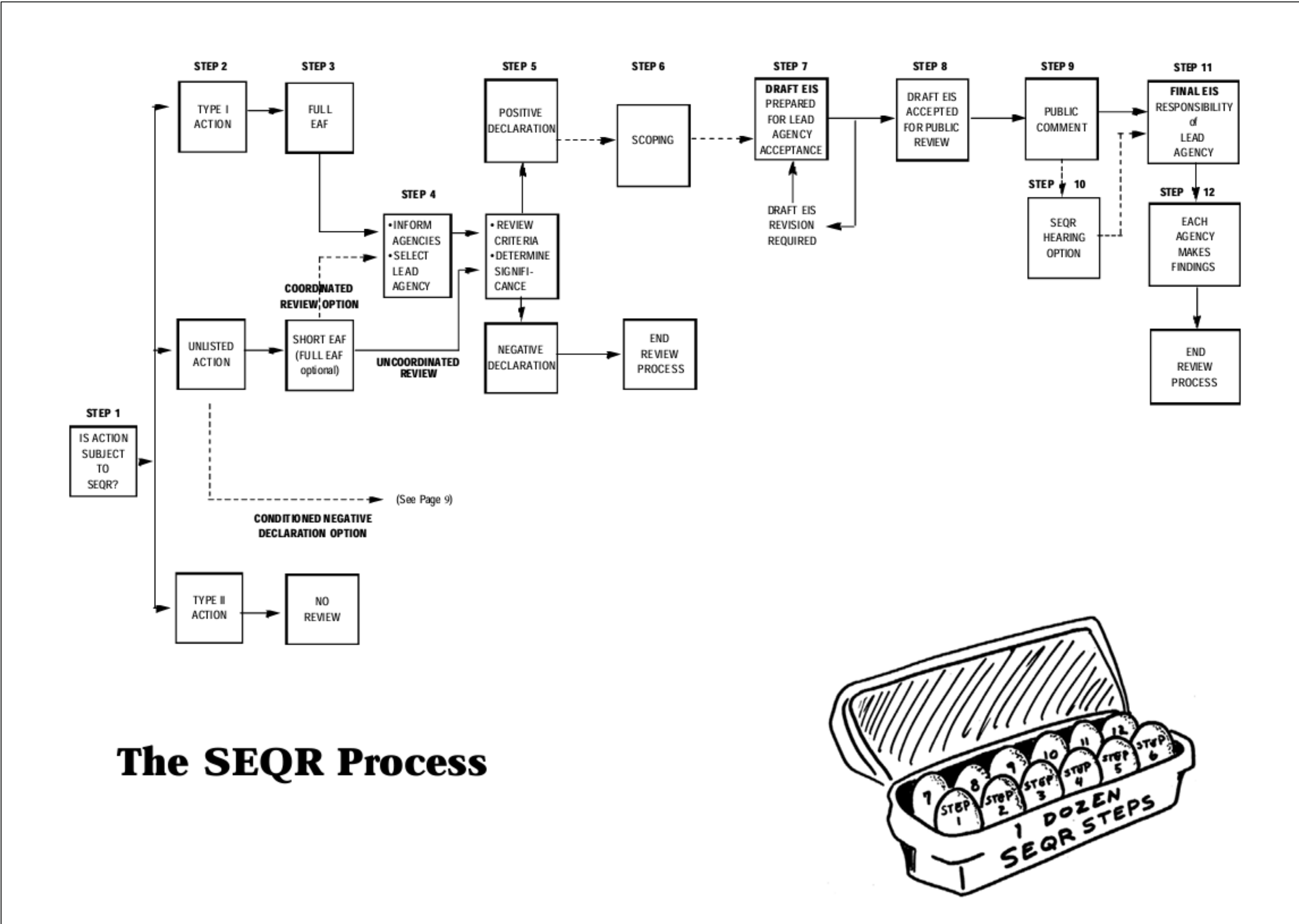
- SEQRA basics
- Common SEQRA pitfalls
- Best practices for SEQRA compliance
- Legal challenges
- Note on SEQRA amendments



What is “SEQRA”?

- Law Ch. 43, Consolidated Laws of NYS
- Regulations are Part 617 of Title 6 of the New York Codes, Rules and Regulations (“NYCRR”)
- Information resources on DEC website
<http://www.dec.ny.gov/permits/357.html>

Stepping through SEQRA



The SEQRA Process





SEQRA Process Overview

- Classify – Type I, Type II, or Unlisted
 - Check DEC and agency designations
 - Type I – more likely to have a significant adverse impact
 - Type II – no significant adverse impact
 - Unlisted – Not Type I or II - requires determination of significance and may require a DEIS
- Complete the corresponding Environmental Assessment Form
 - Type I requires the Full EAF – Part 1 by applicant, Parts 2 and 3 by lead agency
 - Type II never requires a determination of significance or a DEIS
 - Unlisted usually warrants short EAF but lead agency can decide to require full EAF to fully analyze impacts



SEQRA Process Overview

- Coordinate review
 - Type I (requires coordinated review)
 - Involved agency receiving initial application circulates to other involved agencies
 - Lead agency will be determined within 30 days – otherwise DEC will designate
 - Unlisted
 - If a DEIS is required, coordinated review
 - Uncoordinated review is allowed, but if one agency determines there may be a significant adverse environmental impact, must coordinate



SEQRA Process Overview

- Determine Significance
 - If SIGNIFICANT:
 - Scope Draft Environmental Impact Statement (DEIS) – must identify significant issues and contain the items identified in 6 NYCRR 617.8(e). Within 60 days of receipt of the draft scope, the lead agency must supply a final written scope to the applicant, involved agencies, and individuals who expressed written interest
 - Prepare DEIS – must contain the items identified in 6 NYCRR 617.9(b)(3)
 - Accept or return/revise DEIS – the lead agency has 45 days to accept or return the DEIS, and 30 days on any subsequent DEIS submittals
 - Public comment period – Lead agency issues Notice of Completion (see 6 NYCRR 617.12) and publishes DEIS online. Public comment must be open at least 30 days. SEQRA does not require a public hearing, but local law might
 - Prepare Final EIS – must include DEIS, revisions, supplements, and comments with lead agency response



SEQRA Process Overview

- Findings Statement
 - Each involved agency must prepare its own written findings statement after the Final Environmental Impact Statement (FEIS) is filed and before the agency makes its discretionary determination.
 - A positive findings statement means that the project or action is approvable after consideration of the FEIS and demonstrates that the action chosen is the one that avoids or minimizes adverse environmental impacts and weighs and balances them with the social, economic and other considerations.
 - A negative findings statement means the project cannot be approved and must document the reasons for the denial.
 - The findings can be finalized no sooner than 10 days following the Notice of Completion of the FEIS. The lead agency's findings must be made within 30 days of the filing date.
 - Findings of each agency must be filed with all other involved agencies and the applicant at the time they are adopted.



Common SEQRA Issues and Pitfalls



SEQRA Issue #1

- Failure to take the required “hard look” at all environmental impacts.



“Hard Look” and Judicial Review

- A lead agency’s SEQRA determination will be upheld so long as the agency:
 - (1) takes a “hard look” at the relevant environmental concerns raised during the review and
 - (2) provides a “reasoned elaboration” for its decision
- What constitutes a “hard look” is highly litigated
- Courts will look at the agency’s review to ensure the determination was not arbitrary, capricious, or unsupported by the record
- This review is deferential



“Hard Look” and Judicial Review

- *Elizabeth Street Garden, Inc. v. City of New York*, 217 A.D.3d 599 (1st Dep’t 2023)
- NYC Dep’t of Housing Preservation and Dev. (HPD) issued a negative declaration for a proposed low-income senior housing development
- Why the court found HPD took a hard look:
 - As to the impact on open spaces, HPD examined the study area at length
 - As to neighborhood character and cumulative impacts, conducting only a preliminary assessment was fine since no significant impacts were found

“Hard Look” and Judicial Review

- *Boyd v. Cumbo*, 210 A.D.3d 762 (2d Dep’t 2022)
- NYC Dep’t of City Planning (DCP) issued a negative declaration for a proposed rezoning to develop certain properties in Brooklyn
- Why the court found DCP took a hard look:
 - Since the development was less than 400 residential units, which is the threshold for a preliminary infrastructure analysis under the CEQR Technical Manual, DCP found there was no potential adverse impact related to water and sewer infrastructure



SEQRA Issue #2

- Failure to provide a written, reasoned elaboration for agency determination on application(s).
- The lead agency must “set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation.” 6 NYCRR 617.7(b)(4).



Drafting a Reasoned Determination

- State whether the agency found each potential impact likely, significant, or neither
- Describe mitigation included in the project plans
- Name sources relied on to reach conclusions
- Explain how cited sources support conclusions



Drafting a Reasoned Determination

- *Peterson v. Plan. Bd. of City of Poughkeepsie*, 163 A.D.3d 577 (2d Dep't 2018)
 - Petitioners challenged a negative declaration regarding proposed development adjacent to a historic district. City Planning Board *did* provide a written elaboration, but it was unreasonable and not supported by the record.
- *Rochester Eastside Residents for Appropriate Dev., Inc. v. City of Rochester*, 150 A.D.3d 1678 (4th Dep't, 2017)
 - Petitioners challenged the City of Rochester Director of Planning and Zoning's negative declaration regarding the proposed construction of an ALDI supermarket because there was known, undisputed presence of soil contamination on the site that was not addressed in the negative declaration.



SEQRA Issue #3

- Final determinations inconsistent with agency findings and/or the evidence in the record.



Denial after Negative Declarations

- Permissible - issuance of a negative declaration does not automatically require an agency to approve an action
- BUT, an agency may not make findings under SEQRA and then contradict and ignore those findings when denying the underlying application
 - *Matter of Kinderhook Dev., LLC v. City of Gloversville Planning Bd.*, 88 A.D.3d 1207 (3d Dep't 2011) (municipal board cannot render findings upon a negative declaration and then reverse itself on similar issues in support of a denial)



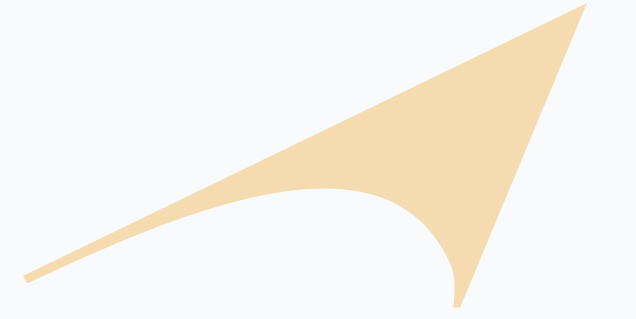
SEQRA Issue #4

- Failure to comply with the Open Meetings Law (“OML”)
- The purpose of the OML is to prevent municipal boards from privately debating and deciding matters in private which must be discussed and acted upon in public.
- If the OML is violated, the remedy is not immediate nullification of the action – the action is voidable upon good cause shown.



OML Requirements

- On November 8, 2021, Governor Hochul signed Chapter 587 of the Laws of 2021 which amended the OML and requires public bodies that maintain a website to **post meeting minutes on its website** within two weeks of the date of the meeting, or within one week of an executive session.
- On October 19, 2021, Governor Hochul signed Chapter 481 of the Laws of 2021 which amends OML §103(e) to require that records to be discussed at an open meeting be made available, to the extent practicable:
 - Upon request; and
 - Posted online at least 24 hours before a meeting if the public body maintains a website.



SEQRA Issue #5

- Improper segmentation/misapplying the concept of segmentation.



Segmentation

- Segmentation is contrary to the intent of SEQRA, but not illegal per se.
- Review may be segmented if:
 - Information on future project phase is too speculative
 - Future phase may not occur
 - Future phase is functionally independent of current phase



Segmentation

- *Adirondack Historical Assn. v. Village of Lake Placid/Lake Placid Village, Inc.*, 161 A.D.3d 1256, (3d. Dep't, 2018)
- The Village issued a negative declaration for its eminent domain acquisition of property needed for a redevelopment project.
- Petitioner challenged on the grounds of segmentation and failure to take a hard look at traffic impacts.
 - Not segmentation. The Village did not include this particular acquisition in its overall SEQR review because it did not anticipate the need for eminent domain.
 - BUT, no hard look. No evidence in the record or written elaboration that the traffic issues raised at public meeting and in written comment were considered or addressed. Court annulled the negative determination because this was a separate review with a separate record that provided no evidence for these conclusions.



SEQRA Compliance

- “Literal compliance with the letter and spirit of SEQRA is required, and substantial compliance with SEQRA is not sufficient to discharge an agency's responsibility under the act.” *Matter of Rochester Eastside Residents for Appropriate Dev., Inc. v. City of Rochester*, 150 A.D.3d 1678, 1679 (4th Dep’t 2017) (annulling negative declaration).

Challenges Under SEQRA





Standing to bring a SEQRA claim

- Test for standing:
 - Establish (1) an injury-in-fact different from that of the public at large and (2) that the injury is within the zone of interests sought to be protected by SEQRA
 - More than a generalized environmental concern
 - There is no presumption of standing for a SEQRA claim based on close proximity alone



Standing to bring a SEQRA claim

- *Creda v. City of Kingston Planning Bd.*, 212 A.D.3d 1043 (3d Dep't 2023)
 - Proposed redevelopment of ~2.5 acres of land into an apartment building, a boutique hotel, retail space, a pedestrian plaza and a parking garage in the Kingston Stockade Historic District (KSHD)
 - Nearby property owners in the KSHD challenged the negative declaration
 - Why Petitioners had standing:
 - Own property within the unique area of the KSHD
 - Impacts to the historical resources of the KSHD affects them more than the general public
 - Concerns fall within the stated purpose of SEQRA



Standing to bring a SEQRA claim

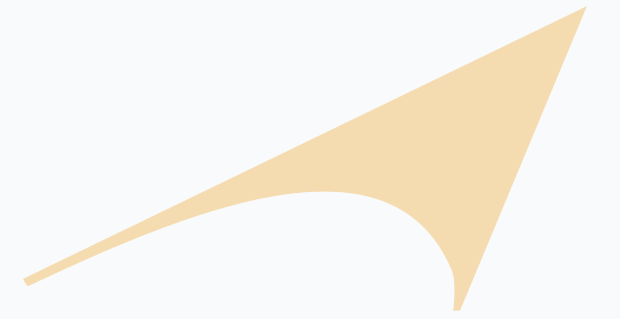
- Test for standing to challenge a zoning enactment:
 - When a property owner subject to a rezoning challenges the SEQRA review, the property owner does not need to allege environmental harm
 - *E.g.*, a new use is added to a zoning district where John Smith owns property – John Smith does not need to demonstrate environmental harm to challenge the municipality's SEQRA review



Standing to bring a SEQRA claim

- *Kogut v. Vill. of Chestnut Ridge*, 214 A.D.3d 808 (2d Dep't 2023)
 - New local law created two new permitted categories of building uses within the residential districts
 - The Petitioners – all property owners in the affected districts – challenged the Village's SEQRA compliance
 - Why Petitioners had standing:
 - They own property within the zoning districts impacted by the zoning enactment
 - "Property owner[s] ha[ve] a legally cognizable interest in being assured that the [Village] satisfied SEQRA before taking action to rezone [their] land."

Standing to bring a SEQRA claim



- *Friends of the Shawangunks v. Town of Gardiner Plan. Bd.*, 224 A.D.3d 961 (3d Dep't 2024): Organizational standing
- Organization challenged Board's grant of special use permit for residential construction within a Protection District
- Organizations have standing if one or more members would have standing. The members have standing if they suffer harm different in kind or degree from the public at large
 - A mere interest in environmental conservation does not confer standing
- After finding standing, the court affirmed the grant of the special use permit because courts defer to board SEQRA determinations when the board identifies areas of environmental concern, takes a hard look at them, and provides a reasoned elaboration of the grounds for its determination
- Impact: organizational standing to challenge zoning and land use decisions cannot come from mere interest in environmental conservation

Standard of Review Under SEQRA



- *Jellyfish Prop.'s, LLC v. Inc. Vill. Of Greenport*, 220 A.D.3d 778 (2d Dep't 2023)
- Village Board of Trustees adopted a resolution prohibiting short-term rentals
- Petitioners, owners of residential property that they used as short-term rentals, alleged that Board failed to comply with State Environmental Quality Review Act (SEQRA)
 - SEQRA obligates the government to balance an action's potential adverse environmental impact against the action's social and economic benefits
- Courts can review SEQRA determinations only for (1) procedural violations; (2) errors of law; (3) arbitrary and capricious action; or (4) abuse of discretion.
- Here, Board properly considered SEQRA because Board held two days of public hearings, received written comments, took a hard look at relevant areas of environmental concern, and elaborated on their determination
- Impact: boards can avoid scrutiny of their SEQRA determinations by acting thoroughly



Positive Declarations

- Positive declarations under SEQRA are not final agency actions that can be challenged in court
- Claims are not justiciable until the municipality has arrived at a definitive position on the issue that inflicts an actual, concrete injury
 - SEQRA positive declarations do not make the cut



Positive Declarations

- *Lewis Homes of N.Y., Inc. v. Bd. of Site Plan Review of the Town of Smithtown*, 212 A.D.3d 727 (2d Dep't 2023)
- Petitioners applied for site plan approval to redevelop property in the Town
- The Town Board issued a positive declaration and the Petitioners sued, alleging constitutional rights violations
- The causes of action failed as a matter of law because no final determination had yet been rendered and the allegations did not demonstrate it would be futile for Petitioners to proceed with the EIS process



Other Topics for Later Review

- The Environmental Justice Siting Law
 - SEQRA Changes
 - New Permitting Requirements
 - Division of Environmental Permitting Policy 24 -1, Permitting and Disadvantaged Communities Under the CLCPA (DEP 24-1)
- The New Wetlands Law
 - Regulations
 - Wetlands of Unusual Importance
 - Standard Operating Procedures (SOPs)
 - General Permits



Best Practices for Municipalities/Agencies

- Compliance with SEQRA is critical to protecting municipalities from Article 78 proceedings
- The concept of “too much paper” does not exist
 - A decision is only as good as the backup documentation
 - Establish the “hard look”
 - Provide concise reasoning for decisions
- Take advantage of escrow arrangements
- Utilize your municipal website
- Develop forms and standards and be consistent



SEQRA Resources

- SEQR Handbook - https://extapps.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf
- Stepping through the SEQR Process - <https://dec.ny.gov/regulatory/permits-licenses/seqr/stepping-through-process>
- Environmental Assessment Form Workbooks – <https://dec.ny.gov/regulatory/permits-licenses/seqr/eaf-workbooks>
- SEQR Cookbook - https://extapps.dec.ny.gov/docs/permits_ej_operations_pdf/cookbook1.pdf
- SEQR Flowchart - https://extapps.dec.ny.gov/docs/permits_ej_operations_pdf/seqrflowchart.pdf

Questions?



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Thank You!

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