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ECL Article 8: Displacement of Neighborhood Residents and Businesses Is an Environmental Effect Which Must Be Considered When Determining the Necessity of an Environmental Impact Statement; Noncompliance Results in Nullification of Permit Previously Granted

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to recover a judgment against the buyer, such seller should be required to prove actual damages sustained as a result of the buyer's breach.²⁸ Conversely, if the defaulting buyer can prove that a net benefit was conferred on the seller, he should be permitted to sue the seller to recover that amount.²⁹

The Court of Appeals decision in *Maxton Builders* reaffirmed the common law rule denying recovery of a deposit to the defaulting buyer in real estate purchases. The court, however, by limiting its holding to the seller's right to retain deposits approximating ten percent, has left open the issue of recovery of a higher percentage deposit by a defaulting purchaser. It is submitted that deposits in excess of twenty percent should be returned to the buyer as unenforceable penalties, or alternatively, that the net benefit conferred upon the seller should be returned on restitution principles.

Daniel Clivner

ENVIRONMENTAL CONSERVATION LAW

ECL Article 8: Displacement of neighborhood residents and businesses is an environmental effect which must be considered when determining the necessity of an environmental impact statement; noncompliance results in nullification of permit previously granted

In 1975, the New York State Legislature enacted the State Environmental Quality Review Act ("SEQRA"), contained in Article 8 of the Environmental Conservation Law.¹ SEQRA's provi-

them on the plaintiff: "the defendants made no effort to show that the actual damages were less than the plaintiff alleged or that there was, in fact, a net benefit conferred." *Id.*

²⁸ *Cf. Leading Bldg. Corp. v. Segrete*, 60 App. Div. 2d 907, 907-08, 401 N.Y.S.2d 561, 562 (2d Dep't) (where seller claims damages in excess of down payment, actual damages must be proved), *appeal dismissed*, 44 N.Y.2d 901, 379 N.E.2d 223, 407 N.Y.S.2d 697 (1978). *See generally* 36 N.Y. JUR. 2D *Damages* § 9 (1984) (plaintiff must prove actual damages sustained).

²⁹ *Cf. Maxton Builders*, 68 N.Y.2d at 382, 502 N.E.2d at 189, 509 N.Y.S.2d at 512 (dicta suggesting proof of net benefit as prerequisite to recovery); *Amtorg Trading Corp. v. Miehle Printing Press & Mfg. Co.*, 206 F.2d 103, 106-07 (2d Cir. 1953) (suggesting modern rule application in New York).

¹ N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 1984). SEQRA is modeled

sions require that agencies evaluate the environmental impact of "any action they propose or approve"² to determine whether such action "may have a significant effect on the environment."³ Upon an agency determination that a "significant effect" may result, the statute directs the preparation of an environmental impact statement ("EIS"),⁴ which ultimately affords the basis for the agency's

on the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 (1976). See Governor's Memorandum (N.Y.S. 3540-A, N.Y.A. 4533-A, 198th Sess.), reprinted in [1975] N.Y. LEGIS. ANN. 438; see generally Stevenson, *Early Legislative Attempts at Requiring Environmental Assessment and SEQRA's Legislative History*, 46 ALB. L. REV. 1114, 1119-27 (1982) (survey of SEQRA's legislative history, enactment and subsequent amendments). NEPA "introduce[d] federal courts to environmental questions comprehensively for the first time . . ." W. RODGERS JR., ENVIRONMENTAL LAW § 7.1, at 697 (1977).

² N.Y. ENVTL. CONSERV. LAW § 8-0109(2) (McKinney 1984). Under SEQRA, an "action" is defined as:

- (i) projects or activities directly undertaken by any agency; or projects or activities supported in whole or part through contracts, grants, subsidies, loans, or other forms of funding assistance from one or more agencies; or projects or activities involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use or permission to act by one or more agencies;
- (ii) policy, regulations, and procedure-making.

Id. § 8-0105(4). The statute specifies certain agency functions which are not "actions" and thereby exempt from its requirements. See *id.* § 8-0105(5). Exempt agency functions include nondiscretionary ministerial acts. See *id.*; Citizens for the Preservation of Windsor Terrace v. Smith, 122 App. Div. 2d 827, 828, 505 N.Y.S.2d 896, 898 (2d Dep't 1986).

³ N.Y. ENVTL. CONSERV. LAW § 8-0109(2) (McKinney 1984). If the agency finds that the action will not have a "significant effect on the environment," it may make a negative declaration to that effect, thus obviating the need for an Environmental Impact Statement ("EIS"). See *id.* § 8-0109, commentary at 78.

Although SEQRA was modeled on NEPA, NEPA's test for determining the necessity of an EIS provides a "demonstrably higher threshold" before an EIS will be required. See *Chinese Staff & Workers Ass'n v. City of New York*, 68 N.Y.2d 359, 365 n.6, 502 N.E.2d 176, 179 n.6, 509 N.Y.S.2d 499, 502 n.6 (1986); see also N.Y. ENVTL. CONSERV. LAW § 8-0109, commentary at 75 (McKinney 1984). Compare *City of New York v. United States Dep't of Transp.*, 715 F.2d 732, 745 (2d Cir. 1983) (no EIS needed for shipping of nuclear waste under NEPA), cert. denied, 465 U.S. 1055 (1984) with *Onondaga Landfill Sys., Inc. v. Flacke*, 81 App. Div. 2d 1022, 1023, 440 N.Y.S.2d 788, 790 (4th Dep't 1981) (relatively low threshold for requiring an EIS). Under NEPA, an EIS is required when a federal action will have a significant effect "on the quality of the human environment." See 42 U.S.C. § 4332(2)(c) (1969). SEQRA requires an EIS if the action may have a significant effect on the environment. See N.Y. ENVTL. CONSERV. LAW § 8-0109(2) (McKinney 1984). SEQRA defines "environment" to include "existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character." *Id.* § 8-0105(6). See generally Orloff, *SEQRA: New York's Reformation of NEPA*, 46 ALB. L. REV. 1128, 1130-33 (1982) (discussion of differences between SEQRA and NEPA).

⁴ N.Y. ENVTL. CONSERV. LAW § 8-0109(2) (McKinney 1984). Section 8-0109 directs that an EIS must include "(a) a description of the proposed action and its environmental setting; (b) the environmental impact of the proposed action including short-term and long-term effects; (c) any adverse environmental effects which cannot be avoided should the proposal be implemented; (d) alternatives to the proposed action . . ." *Id.* SEQRA's requirements

decision whether to proceed with or abandon the action.⁵ Construction of SEQRA's provisions has given rise to a variety of litigation in the New York courts.⁶ Recently, in *Chinese Staff and Workers Association v. City of New York*,⁷ the Court of Appeals, construing the term "environment" broadly,⁸ held that the dis-

with respect to the preparation of an EIS are substantive as well as procedural; the statute requires that the agencies identify alternatives which are of lesser environmental consequence than the proposed action. *See id.* § 8-0109(2)(d) & commentary at 73; *see also* Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 416, 494 N.E.2d 429, 435-36, 503 N.Y.S.2d 298, 304-05 (1986) (discussing substantive aspects of SEQRA); Glen Head-Glenwood Landing Civic Council, Inc. v. Town of Oyster Bay, 88 App. Div. 2d 484, 486-87, 453 N.Y.S.2d 732, 734 (2d Dep't 1982) (discussing SEQRA's procedural requirements).

⁵ *See* N.Y. ENVTL. CONSERV. LAW § 8-0109(4) (McKinney 1984). A draft EIS is used to inform and solicit comments from the public and other agencies with respect to the project under review. *See id.* After a draft EIS has been filed, the agency must determine whether or not to conduct a public hearing on the environmental impact of the proposed action. *Id.* § 8-0109(5). After the public hearing or the determination not to conduct such a hearing, the agency must prepare a final EIS within the statutory time period. *See id.* Finally, the agency decides whether to:

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

Id. § 8-0109(8). For a thorough discussion of SEQRA's procedural requirements, see Glen Head-Glenwood Landing Civic Council, Inc. v. Town of Oyster Bay, 88 App. Div. 2d 484, 486-87, 453 N.Y.S.2d 732, 734 (2d Dep't 1982). SEQRA, however, does not specify procedures for lack of compliance with the statutory provisions. *See* Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 416, 494 N.E.2d 429, 435, 503 N.Y.S.2d 298, 304 (1986); Crary, *Procedural Issues Under SEQRA*, 46 ALB. L. REV. 1211, 1231-33 (1982); Ruzow, *SEQRA in the Courts*, 46 ALB. L. REV. 1177, 1178 (1982). Therefore, judicial review may be obtained based on standards applicable to administrative agencies generally. *See* Jackson, 67 N.Y.2d at 416, 494 N.E.2d at 435, 503 N.Y.S.2d at 304. A court may find noncompliance when "a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion . . ." CPLR 7803(3) (McKinney 1981); *see* Environmental Defense Fund, Inc. v. Flacke, 96 App. Div. 2d 862, 862, 465 N.Y.S.2d 759, 761 (2d Dep't 1983); Town of Hempstead v. Flacke, 82 App. Div. 2d 183, 187, 441 N.Y.S.2d 487, 490 (2d Dep't 1981).

⁶ *See, e.g.,* Devitt v. Heimbach, 58 N.Y.2d 925, 928, 447 N.E.2d 59, 60, 460 N.Y.S.2d 512, 513 (1983) (mem.) (sale of county-owned real property requires EIS or determination of nonsignificance); Tri-County Taxpayers Ass'n, Inc. v. Town Bd. of Queensbury, 55 N.Y.2d 41, 46-47, 432 N.E.2d 592, 594, 447 N.Y.S.2d 699, 700-01 (1982) (town required to comply with SEQRA in establishing local sewer system); Schenectady Chems., Inc. v. Flacke, 83 App. Div. 2d 460, 462-63, 446 N.Y.S.2d 418, 420 (3d Dep't 1981) (permit to mine gravel annulled because agency failed to consider necessary factors before issuing negative declaration). *See generally* Ruzow, *supra* note 5, at 1179 (individual citizens primarily responsible for instituting litigation under SEQRA).

⁷ 68 N.Y.2d 359, 502 N.E.2d 176, 509 N.Y.S.2d 499 (1986).

⁸ *Id.* at 365, 502 N.E.2d at 180, 509 N.Y.S.2d at 503.

placement of neighborhood residents and businesses is an environmental effect which must be considered in determining the necessity of an EIS.⁹ The court further held that when an agency fails to adequately consider whether an EIS is necessary, the proper remedy is to nullify the permit and require the agency to begin anew.¹⁰

In *Chinese Staff and Workers*, a developer, seeking to construct a luxury high-rise condominium in Chinatown, applied to two New York City agencies for a special permit.¹¹ The agencies evaluated the effects of the condominium on the physical environment only¹² and, after the developer accepted certain modifications, determined that the project would not have a "significant effect."¹³ The special permit was thereafter approved.¹⁴ The plaintiffs, members of the Chinatown community,¹⁵ brought a combined plenary action and Article 78 proceeding, seeking a declaration that the special permit was null and void.¹⁶ They alleged violations

⁹ *Id.* at 366-67, 502 N.E.2d at 180, 509 N.Y.S.2d at 503.

¹⁰ *Id.* at 369, 502 N.E.2d at 182, 509 N.Y.S.2d at 505.

¹¹ *Id.* at 362, 502 N.E.2d at 177, 509 N.Y.S.2d at 500. The developer, Henry Street Partners, applied to the Department of City Planning ("DCP") and the Department of Environmental Protection ("DEP"), "the colead agencies responsible for implementing SEQRA in the City of New York." *Id.*, 502 N.E.2d at 177-78, 509 N.Y.S.2d at 500-01; see *supra* note 1. The condominium was to be constructed on a vacant lot in the Special Manhattan Bridge District ("SMBD"). *Chinese Staff & Workers*, 68 N.Y.2d at 362, 502 N.E.2d at 177, 509 N.Y.S.2d at 500. The SMBD was "designed to preserve the residential character of the Chinatown community, encourage new residential development on sites requiring minimal relocation, promote the rehabilitation of existing housing stock, and protect the scale of the community." *Id.*

¹² *Id.*, 502 N.E.2d at 178, 509 N.Y.S.2d at 501.

¹³ *Id.* Initially, DCP and DEP issued a conditional negative declaration asserting that the condominium would not have a "significant effect" on the environment if the developer accepted certain modifications regarding noise mitigation measures. *Id.* at n.2; see also *supra* note 3 (discussing significance of negative declaration).

¹⁴ *Chinese Staff & Workers*, 68 N.Y.2d at 362, 502 N.E.2d at 178, 509 N.Y.S.2d at 501. The special permit was approved by the City Planning Commission and the Board of Estimate. *Id.*

¹⁵ *Id.* Plaintiffs were the Chinese Staff and Workers Association, a non-profit corporation whose members are Chinese restaurant and garment workers; the New York Chinatown History Project, a non-profit corporation dedicated to preservation of Chinatown's historical resources; and individuals who live and work in Chinatown. *Id.* at n.3.

¹⁶ *Chinese Staff & Workers*, 68 N.Y.2d at 362, 502 N.E.2d at 178, 509 N.Y.S.2d at 501. An Article 78 proceeding "supplies today the uniform device for challenging or reviewing administrative action in court." SIEGEL § 557, at 774. CPLR 7803 instructs that review of an agency's action in an Article 78 proceeding is limited to whether the agency:

failed to perform a duty enjoined upon it by law; or . . . is proceeding or is about to proceed without or in excess of jurisdiction; or . . . whether a determination [by the agency] was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion . . .

of SEQRA and the City Environmental Quality Review ("CEQR"),¹⁷ which contains regulations implementing SEQRA within the city of New York.¹⁸ Plaintiffs alleged that the agencies acted in an arbitrary and capricious manner by failing to consider the displacement of neighborhood residents and businesses as an environmental consequence.¹⁹ Defendants, the City of New York and several of its agencies, maintained that "environment" should be construed to mean the *physical* environment.²⁰ The Supreme Court, Special Term, New York County, held in favor of the defendants.²¹ The Appellate Division, First Department, affirmed.²²

The Court of Appeals, in a well-reasoned opinion by Judge Alexander, reversed the judgment of the Appellate Division.²³ After examining the statutory definition of "environment," which in-

CPLR 7803(1)-(3) (McKinney 1981); *see also supra* note 5.

¹⁷ *Chinese Staff & Workers*, 68 N.Y.2d at 362-63, 502 N.E.2d at 178, 509 N.Y.S.2d at 501. Under SEQRA, local governments are authorized to incorporate rules, procedures, and guidelines into existing environmental quality review procedures. N.Y. ENVTL. CONSERV. LAW § 8-0113(3) (McKinney 1984); [1978] 6 N.Y.C.R.R. § 617.4(b). Pursuant to this authorization, New York City has implemented the City Environmental Quality Review ("CEQR"). *See* N.Y.C. Exec. Order No. 91, Aug. 24, 1977.

In addition to alleging violations of SEQRA and CEQR, the plaintiffs alleged violations of the SMBD regulations, the Uniform Land Use Review Procedure, and the due process clause of the New York Constitution. *See Chinese Staff & Workers*, 68 N.Y.2d at 362-63, 502 N.E.2d at 178, 509 N.Y.S.2d at 501.

¹⁸ *Id.* at 361, 502 N.E.2d at 177, 502 N.Y.S.2d at 500. The Department of Environmental Conservation regulations are also relevant to application of SEQRA in the City of New York. *See* [1978] 6 N.Y.C.R.R. §§ 617.1 to -14. These regulations were "adopted pursuant to section 8-0113" of SEQRA to implement its provisions, *see id.* § 617.1, and are binding on all local agencies unless the agencies adopt resolutions equally protective. *See id.* § 617.4. The regulations enumerate "Type I" actions which are likely to have a significant effect on the environment, *see id.* § 617.12, and "Type II" actions which will not require an EIS. *See id.* § 617.13.

¹⁹ *Chinese Staff & Workers*, 68 N.Y.2d at 363, 502 N.E.2d at 178, 509 N.Y.S.2d at 501. Although the condominium would have been built on an empty corner lot, [the executive director of the Asian American Legal Defense and Education Fund] argued that the high prices of the units—\$170,000 to \$500,000—and the wealthy people who would live in them could have caused 'secondary displacement' in the neighborhood, forcing out local stores and accelerating gentrification of the whole area.

N.Y. Times, Nov. 19, 1986, at B5, col. 5.

²⁰ *Chinese Staff & Workers*, 68 N.Y.2d at 363, 502 N.E.2d at 178, 509 N.Y.S.2d at 501.

²¹ *Id.* After joinder of issue, Special Term granted defendants' motion for summary determination, pursuant to CPLR 409(b), and for summary judgment, pursuant to CPLR 3212. *Id.* Plaintiffs' cross-motion for summary judgment was denied. *Id.*

²² *Chinese Staff & Workers Ass'n v. City of New York*, 111 App. Div. 2d 1081, 1081, 491 N.Y.S.2d 885, 885 (1st Dep't 1985).

²³ *Chinese Staff & Workers*, 68 N.Y.2d at 369-70, 502 N.E.2d at 182, 509 N.Y.S.2d at 505.

cludes "existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character,"²⁴ the court reasoned that to limit the scope of the term to the *physical* environment would be contrary to the plain meaning of the statute.²⁵ The court maintained that, under CEQR, agencies must review the short-term and long-term effects of a project, as well as the primary and secondary effects.²⁶ Concluding that the displacement of neighborhood residents and businesses is a long-term and secondary effect on the environment, the majority held that the agencies had rendered an arbitrary and capricious environmental analysis.²⁷ The court further held that the appropriate remedy was to nullify the special permit rather than to allow the agencies to subvert the objectives of SEQRA through post-hoc determinations and affirmations of the originally issued "negative declaration."²⁸

Chief Judge Wachtler, writing for the dissent, concurred with the majority that the agencies had rendered a flawed environmental analysis, but disagreed as to the appropriate remedy.²⁹ The dis-

²⁴ *Id.* at 365, 502 N.E.2d at 179, 509 N.Y.S.2d at 502 (quoting N.Y. ENVTL. CONSERV. LAW § 8-0105(6) (McKinney 1984)).

²⁵ *Chinese Staff & Workers*, 68 N.Y.2d at 365, 502 N.E.2d at 179-80, 509 N.Y.S.2d at 502-03. The statutory definition of "environment" under SEQRA provides: "[e]nvironment" means the physical conditions which will be affected by a proposed action, including . . . existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character." N.Y. ENVTL. CONSERV. LAW § 8-0105(6) (McKinney 1984) (emphasis added); see also CEQR § 1(f), N.Y.C. Exec. Order No. 91, Aug. 24, 1977 (same definition).

²⁶ *Chinese Staff & Workers*, 68 N.Y.2d at 367, 502 N.E.2d at 180, 509 N.Y.S.2d at 503. See N.Y. ENVTL. CONSERV. LAW § 8-0113(3)(a) (McKinney 1984); *supra* note 18. The alleged violation "must be judged not only according to the requirements of SEQRA but also according to the regulations promulgated by the City of New York in CEQR to the extent those regulations are more protective of the environment." *Chinese Staff & Workers*, 68 N.Y.2d at 364, 502 N.E.2d at 179, 509 N.Y.S.2d at 502. While SEQRA requires investigation into the "short-term and long-term" effects of a project, see N.Y. ENVTL. CONSERV. LAW § 8-0109(2)(b) (McKinney 1984), CEQR requires consideration of the project's "primary and secondary" effects as well. See CEQR § 1(g), N.Y.C. Exec. Order No. 91, Aug. 24, 1977.

²⁷ *Chinese Staff & Workers*, 68 N.Y.2d at 366-68, 502 N.E.2d at 180-81, 509 N.Y.S.2d at 503-04.

²⁸ *Id.* at 368-69, 502 N.E.2d at 181-82, 509 N.Y.S.2d at 504-05. The court maintained that its decision to nullify the special permit was based on *Tri-County Taxpayers Ass'n v. Town Bd. of Queensbury*, 55 N.Y.2d 41, 432 N.E.2d 592, 447 N.Y.S.2d 699 (1982). See *Chinese Staff & Workers*, 68 N.Y.2d at 369, 502 N.E.2d at 182, 509 N.Y.S.2d at 505. In *Tri-County Taxpayers*, the court annulled several resolutions and a special election undertaken by the town of Queensbury as part of a plan to establish a local sewer system. See *Tri-County Taxpayers Ass'n*, 55 N.Y.2d at 47, 432 N.E.2d at 595, 447 N.Y.S.2d at 702 (1982). The basis for the nullification was that the town had failed to comply with SEQRA. *Id.* at 45, 432 N.E.2d at 593, 447 N.Y.S.2d at 700.

²⁹ *Chinese Staff & Workers*, 68 N.Y.2d at 370-71, 502 N.E.2d at 182-83, 509 N.Y.S.2d

sent urged that invalidation of a project should occur only in cases where an EIS is clearly required.³⁰ If the agencies might issue another "negative declaration" upon consideration of the previously overlooked factors, the appropriate measure would be to remand the matter to the agencies for further evaluation.³¹

The holding in *Chinese Staff and Workers* has served to clarify the unsettled question of whether socio-economic factors constitute an effect on the environment within the meaning of SEQRA.³² It is submitted that the decision is equally significant for its determination of the appropriate judicial remedy when an agency fails to properly determine whether an EIS is necessary. By requiring strict compliance with SEQRA,³³ the court has acted in accordance with the legislative intent of the statute³⁴ as well as with its express mandate that an agency determine the necessity of an EIS "[a]s early as possible in the formulation of a proposal."³⁵ Moreover, the court has adhered to precedent by holding that failure to comply with SEQRA will result in a stay of all activity re-

at 505-06 (Wachtler, C.J. & Hancock, J., concurring and dissenting in part).

³⁰ See *id.* at 371-72, 502 N.E.2d at 184, 509 N.Y.S.2d at 507 (Wachtler, C.J. & Hancock, J., concurring and dissenting in part).

³¹ *Id.* (Wachtler, C.J. & Hancock, J., concurring and dissenting in part). The dissent distinguished *Tri-County Taxpayers* by finding that an EIS was obviously required in that situation. *Id.* (Wachtler, C.J. & Hancock, J., concurring and dissenting in part); see *Tri-County Taxpayers*, 55 N.Y.2d at 45, 432 N.E.2d at 593, 447 N.Y.S.2d at 700. The majority, asserting that the remedy proposed by the dissent would "frustrate [SEQRA's] important objectives," *Chinese Staff & Workers*, 68 N.Y.2d at 369, 502 N.E.2d at 182, 509 N.Y.S.2d at 505, strongly rejected amending the negative declaration as the proper remedy. *Id.* Although the court in *Tri-County Taxpayers* expressly held that an EIS was required, it is suggested that nullification of a special permit is not limited to this situation.

³² *Chinese Staff & Workers*, 68 N.Y.2d at 368, 502 N.E.2d at 181, 509 N.Y.S.2d at 504; see generally Ulasewicz, *The Department of Environmental Conservation and SEQRA: Upholding its Mandates and Charting Parameters for the Elusive Socio-Economic Assessment*, 46 ALB. L. REV. 1255, 1255-66 (1982) (discussing whether socio-economic issues are within SEQRA's scope).

³³ See *Chinese Staff & Workers*, 68 N.Y.2d at 369, 502 N.E.2d at 182, 509 N.Y.S.2d at 505; see also *Tri-County Taxpayers*, 55 N.Y.2d 41, 46, 432 N.E.2d 592, 594, 447 N.Y.S.2d 699, 701 (1982) (SEQRA should be administered "to the fullest extent possible").

³⁴ See Governor's Memorandum (N.Y.S. 3540-A, N.Y.A. 4533-A, 198th Sess.), reprinted in [1975] N.Y. LEGIS. ANN. 438-39. Governor Carey, in a memorandum discussing the enactment of SEQRA, focused upon the necessity of careful implementation of the Act to prevent further environmental deterioration within New York State. See *id.* at 438. He maintained that "state and local agencies have not given sufficient consideration to environmental factors when undertaking or approving various projects or activities" and he stressed the importance of having officials "intelligently assess and weigh environmental factors, along with social, economic and other relevant considerations." *Id.*; see generally Stevenson, *supra* note 1, at 1119 (Governor Carey's commitment to enactment of environmental review procedure).

³⁵ N.Y. ENVTL. CONSERV. LAW § 8-0109(4) (McKinney 1984).

garding the proposed action.³⁶ By ordering such a remedy, the court has also acted to preserve the effectiveness of the EIS. The essential function of the EIS is to inform and solicit comments from the public and other agencies with respect to the proposed project.³⁷ This solicitation of additional commentary provides the agency with information necessary to its determination of the environmental consequences of the action.³⁸ This EIS function, it is submitted, might be seriously impaired if courts implemented the dissent's remedy of merely remanding the matter for post-hoc evaluation of the relevant factors.

It is suggested that the Court of Appeals has sent a strong message to agencies which evaluate projects and to sponsors of such projects that less than literal compliance with SEQRA's provisions will not be tolerated. By refusing to allow a procedurally deficient determination to proceed on the condition of future compliance with SEQRA, the court has clearly emphasized that compliance with SEQRA cannot be a mere "afterthought."³⁹ It is suggested that an effect of the decision, although not articulated as

³⁶ See, e.g., *Devitt v. Heimbach*, 58 N.Y.2d 925, 447 N.E.2d 59, 460 N.Y.S.2d 512 (1983) (mem.) (resolution annulled for failure to comply with SEQRA); *Tri-County Taxpayers Ass'n, Inc. v. Town Bd. of Queensbury*, 55 N.Y.2d 41, 432 N.E.2d 592, 447 N.Y.S.2d 699 (1982) (failure to file EIS renders resolutions null and void); *Rye Town/King Civic Ass'n v. Town of Rye*, 82 App. Div. 2d 474, 442 N.Y.S.2d 67 (2d Dep't 1981) (office building construction stayed until preparation of EIS), *appeal dismissed*, 56 N.Y.2d 985, 439 N.E.2d 397, 453 N.Y.S.2d 682 (1982).

³⁷ See N.Y. ENVTL. CONSERV. LAW § 8-0109(4) (McKinney 1984); see also *Aldrich v. Patison*, 107 App. Div. 2d 258, 264, 486 N.Y.S.2d 23, 28 (2d Dep't 1985) (EIS contained summary of and response to comments received during "public comment period"); *Town of Henrietta v. Department of Env'tl. Conservation*, 76 App. Div. 2d 215, 220, 430 N.Y.S.2d 440, 445 (4th Dep't 1980) (EIS operates as "environmental 'alarm bell'"); Marsh, *Introduction—SEQRA's Scope and Objectives, Symposium on the New York State Environmental Quality Review Act*, 46 ALB. L. REV. 1097, 1097 (1982) (SEQRA requires that "thought precede action").

³⁸ See N.Y. ENVTL. CONSERV. LAW § 8-0109(4) (McKinney 1984). It is submitted that the legislature's intent that the public participate in the evaluation of a proposed project is reflected in the statutory requirement that the EIS "should be clearly written in a concise manner capable of being read and understood by the public. . . ." See *id.* § 8-0109(2); see also *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 422, 494 N.E.2d 429, 439, 503 N.Y.S.2d 298, 308 (1986) (EIS intended to be "comprehensible"); *Coalition Against Lincoln West, Inc. v. City of New York*, 94 App. Div. 2d 483, 486-87, 465 N.Y.S.2d 170, 173-74 (1st Dep't) (lead agencies and environmental consultants to residential and commercial project evaluate public reaction to draft EIS), *aff'd*, 60 N.Y.2d 805, 457 N.E.2d 795, 469 N.Y.S.2d 689 (1983).

³⁹ See *Chinese Staff & Workers*, 68 N.Y.2d at 369, 502 N.E.2d at 182, 509 N.Y.S.2d at 505.

such, will be to discourage impulsive or rash action taken in the hope that once a project gains momentum public officials will be reluctant to cancel it.

Sharon Parella

GENERAL MUNICIPAL LAW

GML § 50-i: Federal civil rights action is barred by plaintiff's failure to comply with notice of claim statute

Section 50-i of the New York General Municipal Law¹ provides that no tort action may be maintained against a municipal corporation² unless a notice of claim³ has been served on the cor-

¹ GML § 50-i (McKinney 1986). Section 50-i provides in part:

No action or special proceeding shall be prosecuted or maintained against a city . . . for personal injury . . . or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such city . . . unless, (a) a notice of claim shall have been made and served upon the city . . . in compliance with section fifty-e of this chapter

Id. § 50-i(1). Section 50-i was enacted by the New York Legislature in 1959. Ch. 788, § 1, [1959] N.Y. Laws 2082. Its purpose was to centralize provisions relating to the commencement of actions. JOINT LEGISLATIVE COMMITTEE ON MUNICIPAL TORT LIABILITY (1961). *See* N.Y. Gov. Spec. Mess. (Apr. 23, 1959), reprinted in [1959] N.Y. Laws 1773 (McKinney). Filing of a notice of claims has been required since enactment of section 50-e of the GML in 1945. Ch. 694, § 1, [1945] N.Y. Laws 1486.

Section 50-i established a uniform statute of limitations of one year and ninety days for bringing a tort action against a municipality and delineated a thirty day period after the serving of a notice of claim within which no action could be brought. GML §50-i(1)(b)-(c) (McKinney 1986). This section was intended by the legislature to give a municipality an opportunity to settle meritorious claims before being subjected to suit. *Renwick v. Town of Allegany*, 34 Misc. 2d 461, 464, 225 N.Y.S.2d 844, 847 (Sup. Ct. Cattaraugus County 1962), *rev'd on other grounds*, 18 App. Div. 2d 877, 236 N.Y.S.2d 902 (4th Dep't 1963).

² *See* N.Y. GEN. CONSTR. LAW § 66(2) (McKinney Supp. 1987). The definition of a municipal corporation includes counties, cities, towns, villages, and school districts. *Id.*

³ *See* GML § 50-e (McKinney 1986). The notice must be in writing, sworn to by the claimant, and must identify the nature of the claim, the time, place and manner in which the claim arose, and the items of damage. GML § 50-e(2) (McKinney 1986). The provisions of GML sections 50-e and 50-i are more than mere statutes of limitations or repose, for they establish that service of notice of claim is a condition precedent to the initiation of a lawsuit against a municipality. *Glamm v. City of Amsterdam*, 67 App. Div. 2d 1056, 1057, 413 N.Y.S.2d 512, 514 (3d Dep't 1979), *aff'd*, 49 N.Y.2d 714, 402 N.E.2d 143, 425 N.Y.S.2d 804 (1980); *Gregory v. City of New York*, 346 F. Supp. 140, 145 (S.D.N.Y. 1972); SIEGEL § 32, at 31. Although statutes of limitations are subject to tolling, the CPLR's tolling provisions do not apply to the notice of claim statutes because "[a] condition precedent is not a time limitation . . ." *Glamm*, 67 App. Div. 2d at 1057, 413 N.Y.S.2d at 514. As a condition prece-