



Willis H. Stephens, Jr., for appellant Planning Board  
of the Town of Southeast.  
William Maker, Jr., for respondents.

KAYE, Chief Judge:

At the heart of the two appeals before us is the impact of environmental and regulatory change on a residential development that has been in the planning and review stages for nearly 20 years. The particular question presented is whether the Planning Board of the Town of Southeast, lead agency under the State Environmental Quality Review Act (SEQRA), both took the

requisite hard look at project and regulatory changes that arose after the filing of a SEQRA Findings Statement, and made a reasoned elaboration that a second Supplemental Environmental Impact Statement (SEIS) was not necessary to address those changes. We conclude that the Board did both, and that its determination was not arbitrary or capricious.

#### Background

In 1988 Glickenhauß Brewster Development, Inc. submitted an application to the Board seeking subdivision approval for a residential development called the Meadows at Deans Corners. The site spans approximately 309 acres and, in its final form, proposes a cluster development of 104 homes.

After declaring itself lead agency, the Board issued a positive declaration, which determined that the project would likely have a significant impact on the environment, and required the preparation of a Draft Environmental Impact Statement (DEIS). Between 1988 and 1991, Glickenhauß submitted a DEIS, Final EIS (FEIS), Draft SEIS (DSEIS) and Final SEIS (FSEIS), which were reviewed by the Board and subject to public comment. On February 25, 1991, the Board issued a SEQRA Findings Statement determining that SEQRA's requirements had been met and that the project "minimized or avoid[ed] adverse environmental effects to the maximum extent practicable. . . ."

These early processes unearthed concern that the development would degrade the quality of the Croton Watershed

because Holly Stream, which runs through the site, is a tributary of the Muscoot Reservoir. Additionally, the Town of Southeast lies within the Croton Watershed, which supplies New York City with ten percent of its drinking water. The New York City Department of Environmental Protection (NYCDEP) opposed the initial sewage treatment plan and Glickenhauß substituted a more advanced plan with a subsurface disposal system. The Board's findings acknowledged that treated effluent from the development would flow into Holly Stream and be discharged into the Muscoot Reservoir. The findings also documented Glickenhauß's obligation to develop the advanced treatment plant in conjunction with NYCDEP. The Board granted preliminary subdivision approval on August 10, 1998, and conditional final approval on June 10, 2002.

Petitioners challenged the conditional final approval in an Article 78 proceeding. On February 3, 2003, Supreme Court Justice Francis A. Nicolai annulled the conditional final approval because of the Board's failure to take a hard look at certain areas of environmental concern. Judge Nicolai remitted the matter to the Board to determine whether a second SEIS was necessary in light of subsequent developments, namely the Army Corps of Engineers' (ACOE) expansion of the delineated wetlands acreage on the site; the tightened phosphorous regulations for the Muscoot Reservoir; Governor Pataki's designation of the Croton Watershed as a "Critical Resource Water"; the flagging of additional watercourses by NYCDEP not previously shown on the

site plan; the realignment of various roadways; the increase of stormwater basins from nine to twenty; the additional traffic development near the site; and the flooding caused by Hurricane Floyd.

After remittal, the chairman of the Board re-examined Meadows' file, which had been supplemented with the local wetlands permit application before the Town of Southeast Conservation Commission and the Town Board; the application for a State Pollution Discharge Elimination System (SPDES) permit before the New York State Department of Environmental Conservation (NYSDEC); the application for a wetlands activities permit before ACOE; and the application for approval of the Stormwater Pollution Prevention Plan (SPPP) before NYCDEP. The Board then reviewed two reports from the Town Conservation Commission's independent wetlands consultant, Stephan Coleman, and another report from Glickenhau's engineering consultant. Finally, the Board's own environmental and planning consultant examined the file and circulated a draft resolution for Board review. On April 14, 2003, the Board adopted a resolution that a second SEIS was not necessary because "any modifications to the project and any changes [to the regulations] . . . [were] not significant and will not result in any significant adverse environmental impacts. . . ." Final conditional approval was granted, for a second time, on February 23, 2004.

In May 2003 petitioners commenced Matter of Riverkeeper, Inc. v Planning Board of Town of Southeast -- the first of the two appeals before us -- challenging the Board's determination that a second SEIS was not required. In a comprehensive opinion dismissing the petitions, Judge Nicolai concluded that the Board had taken the requisite hard look at the areas of concern and made a reasoned elaboration of its decision not to require a second SEIS. The Appellate Division reversed. Without reflecting the proper standard of review, a divided Appellate Division determined that the Board "could not have met its obligation under SEQRA without requiring a SEIS to analyze the current subdivision plat in light of the change in circumstances since 1991" (32 AD3d 431, 435 [2d Dept 2006]).

The second appeal before us -- Matter of Ingraham v Planning Board of Town of Southeast -- commenced in March 2004, challenged the February 2004 conditional final approval on the ground that it violated various subdivision regulations of the Code of the Town of Southeast. Petitioners alleged that the final plat improperly utilized dead-end streets, the application was not "complete" because it did not include all of the required permits and the Board improperly waived a public hearing for final approval. Judge Nicolai found no violation of the Town's subdivision regulations. Although agreeing that no violation of the subdivision regulations had been shown, the Appellate Division annulled the February 2004 conditional final approval

based on its August 2006 decision that a second SEIS was required (36 AD3d 911, 912 [2d Dept 2007]). We now reverse the Appellate Division orders and dismiss the petitions.

Analysis

A lead agency's determination whether to require a SEIS -- or in this case a second SEIS -- is discretionary. The relevant SEQRA regulations provide that:

"[t]he 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"

(6 NYCRR 617.9 [a] [7] [i] [emphasis added]). The decision to prepare a SEIS as a result of newly discovered information "must be based upon . . . (a) the importance and relevance of the information; and (b) the present state of the information in the EIS" (6 NYCRR 617.9 [a] [7] [ii]). In making this fact-intensive determination, the lead agency has the discretion to weigh and evaluate the credibility of the reports and comments submitted to it and must assess environmental concerns in conjunction with other economic and social planning goals (see 6 NYCRR 617.1 [d]). The discretion to require a SEIS is distinguished from regulations regarding the preparation of a DEIS or FEIS, which a lead agency must itself prepare or require the applicant to prepare (see 6 NYCRR 617.9 [a] [1], [a] [5]).

Judicial review of an agency determination under SEQRA is limited to "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" (Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d 400, 417 [1986] [citations omitted]). This standard of review applies to a lead agency's determination regarding the necessity for a SEIS. It is not the province of the courts to second-guess thoughtful agency decisionmaking and, accordingly, an agency decision should be annulled only if it is arbitrary, capricious or unsupported by the evidence. The lead agency, after all, has the responsibility to comb through reports, analyses and other documents before making a determination; it is not for a reviewing court to duplicate these efforts. As we have repeatedly stated, "[w]hile judicial review must be meaningful, the courts may not substitute their judgment for that of the agency for it is not their role to 'weigh the desirability of any action or [to] choose among alternatives'" (Akpan v Koch, 75 NY2d 561, 570 [1990], quoting Jackson, 67 NY2d at 416; see also Matter of Merson v McNally, 90 NY2d 742, 752 [1997]).

Most of the changes to the proposed plan and the regulations since the Board's issuance of the 1991 SEQRA Findings Statement concerned the maintenance of the water quality of the Muscote Reservoir, which lies just south of the Town of Southeast. The Board's requirement of a technologically advanced

sewage treatment facility in its 1991 Findings Statement actually anticipated the regulatory changes that occurred years later. In 1998, the Army Corps of Engineers determined that the actual wetlands acreage impacted by the project was 79.59 acres, instead of the 71.8 acres documented in the Findings Statement. Then, in 2000, NYSDEC and NYCDEP issued Phase II water quality standards to limit the total maximum daily load (TMDL) of phosphorous into the New York City Water Supply Watershed, which includes the Muscoot Reservoir. The Phase II report indicated that even after applying upstream loading reductions, the designated phosphorous load would be exceeded in the Muscoot Reservoir; therefore, nonpoint source programs would be necessary to achieve the desired reductions. Finally, in 2001, Governor Pataki designated the East of Hudson portion of the New York City Watershed as a Critical Resource Water, thus subjecting the Meadows site to the Army Corps of Engineers' Nationwide Permit Program.

Beginning in 2000, Glickenhauß corresponded with NYCDEP to formulate a suitable Stormwater Pollution Prevention Plan that would comply with NYCDEP's regulations. The Town's wetlands consultant concluded that the final system proposed by Glickenhauß, including an additional eleven water quality basins, is an advanced system that is designed to comply with the pertinent regulations. The wetlands consultant also concluded that the sewage treatment plant and its treatment system "will eliminate a significant source of non-point pollution

sources . . . ." Accordingly, the Board determined in its April 2003 Resolution that the modifications to the SPPP would result in greater protection of water quality than originally determined in the DEIS, FEIS and initial SEIS, and that neither the modifications to the project nor the new regulations presented a significant adverse impact necessitating a second SEIS.

Other changes made to the project also sought to minimize wetlands impact and comply with existing regulations. Although the ACOE determined the amount of wetlands on the Meadows site was approximately 7.79 acres greater than that indicated in the 1991 SEQRA Findings Statement, the reports concluded that there was a decrease in the wetlands acreage actually impacted by the project. Moreover, the road realignments and culvert system mitigated wetlands impact and were designed to accommodate a 100-year flood event. These changes thereby supported the Board's conclusion that there were no new significant adverse impacts imposed by the increased wetlands acreage, road realignments and flooding caused by Hurricane Floyd.

Lastly, the Board reasonably concluded that the additional developments surrounding the Meadows would not pose significant adverse traffic impacts based on a 1998 traffic impact study with projected results to 2003.

We thus conclude that the Board took a hard look at the areas of environmental concern and made a reasoned elaboration of

the basis for its conclusion that a second SEIS was not necessary.<sup>1</sup> The Board relied on the material already in its file, including the DEIS, FEIS and initial SEIS, supplemental reports by the Town's wetlands consultant and the developer's engineering consultant, as well as its own environmental and planning consultant. The Board's determination that the changes did not present significant adverse environmental impacts and did not require the preparation of a second SEIS was not arbitrary or capricious and is supported by the evidence.

We also reject petitioners' assertion that the Board improperly deferred its SEQRA responsibilities by making the SEIS determination prior to the completion of various permitting processes. A lead agency improperly defers its duties when it abdicates its SEQRA responsibilities to another agency or insulates itself from environmental decisionmaking (see Akpan, 75

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<sup>1</sup> The Attorney General directs our attention particularly to a Ninth Circuit opinion issued last month determining that the EPA violated the Clean Water Act by failing to abide by the regulations for issuing a National Pollutant Discharge Elimination System (NPDES) permit (Friends of Pinto Creek v U.S. Evtl. Protection Agency, \_\_ F3d \_\_, 2007 WL 2874355, 2007 US App LEXIS 23251 [9th Cir 2007]). Similar to this appeal, the EPA issued TMDLs for a pollutant after public comment on the FEIS and subsequently revised the NPDES permit (id. at \*2, \*5). The court determined that the supplemental environmental assessment issued by the EPA should have addressed the revised permit and that the EPA Appeals Board should have considered petitioners' argument that the EPA failed to take a "hard look" (id. at \*9, \*25-26). In the case before us, however, the Southeast Planning Board -- unlike the EPA -- considered all of the regulatory and planning changes when it determined that a second SEIS was not required.

NY2d at 575; Matter of Coca-Cola Bottling Co. of N.Y. v Board of Estimate of City of N.Y., 72 NY2d 674, 682-683 [1988]). While a lead agency is encouraged to consider the opinions of experts and other agencies, it must exercise its own judgment in determining whether a particular circumstance adversely impacts the environment. Though the SEQRA process and individual agency permitting processes are intertwined, they are two distinct avenues of environmental review. Provided that a lead agency sufficiently considers the environmental concerns addressed by particular permits, the lead agency need not await another agency's permitting decision before exercising its independent judgment on that issue.<sup>2</sup>

Here, the Board's file included the permit applications for wetlands activities, the State Pollution Discharge Elimination System and the Stormwater Pollution Prevention Plan. These are the very areas of environmental concern upon which the Board allegedly deferred its independent judgment. In addition, the Board reviewed a report by the Town's wetlands consultant that concluded (after reviewing the developer's wetlands permit applications) that the Meadows plan complied with NYCDEP

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<sup>2</sup>Petitioners' reliance on Matter of Penfield Panorama Area Community v Town of Penfield Planning Bd. (253 AD2d 342 [4th Dept 1999]) is misplaced. The Penfield Planning Board insulated itself from the hazardous waste remediation plan and failed to exercise its judgment on the issue (id. at 344, 349-350). Here, as shown, the Board considered the environmental issues requiring permits and made an independent judgment that they would not create significant environmental impact.

regulations. The Board's April 2003 Resolution indicates a familiarity with the required permits and its mere acknowledgment that the developer would be required to seek approval from the ACOE pursuant to the Clean Water Act for wetlands disturbance does not rise to the level of improper deferral. On these facts, the Board, having access to the relevant permit applications and making independent decisions as documented in the April 2003 Resolution, was not required to wait for agency permitting decisions before determining whether to require a second SEIS.

Finally, the Board did not have an affirmative obligation to notify or solicit comments from other agencies when determining that a second SEIS was not required (see 6 NYCRR 617.9 [a] [7] [iii]). True, SEQRA encourages the open exchange of information between a lead agency and other involved agencies (see 6 NYCRR 617.3 [d]-[e]; 617.14 [c]) -- and for good reason. A lead agency often is not expert in a given area of environmental concern and can benefit from the responses of specialized agencies. However, a lead agency's discretion to solicit comments at this late stage in the SEQRA process must be balanced against SEQRA's mandate that the regulations be implemented "with minimum procedural and administrative delay . . . [and] in the interest of prompt review" (6 NYCRR 617.3 [h]).

While a lead agency's failure to solicit comments before determining that a SEIS is not required may at times

evidence the lack of a "hard look," that is not the case here. The Board's involvement in the Meadows project spanned almost 15 years at the time of the SEIS determination. The Board opened public comment periods when it reviewed the DEIS, FEIS and initial SEIS. In addition, the Board took into account expert reports finding that the changes in the project and the regulations posed no significant adverse environmental impact. That the Board did not solicit comments for a second SEIS does not mean that it failed to take a hard look. With an extensive understanding of the Meadows project, the Board properly applied its own discretion.

Finally, in light of our decision in Matter of Riverkeeper, we hold that the Appellate Division's decision in Matter of Ingraham should be reversed. We agree with the determination of Supreme Court and the Appellate Division that the Town Code's subdivision regulations were not violated when the Board granted conditional final approval in February 2004. Petitioners' remaining arguments have been rendered academic by this Opinion.

Accordingly, the orders of the Appellate Division should be reversed, with costs, and the petitions dismissed.

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Case No. 149: Order reversed, with costs, and petitions dismissed. Opinion by Chief Judge Kaye. Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Case No. 150: Order reversed, with costs, and petition dismissed. Opinion by Chief Judge Kaye. Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Decided November 19, 2007