

# Environmental Review in Condemnation Proceedings

By Lilia Factor

It is well known that a governmental authority seeking to acquire property by condemnation must establish that it is doing so for some public purpose, use or benefit. Eminent Domain Procedure Law ("EDPL") § 204. Indeed, condemnation proceedings are frequently challenged on these grounds.

However, it is just as effective to challenge a proposed taking on the grounds that the condemnor did not comply with the corollary requirement of conducting proper environmental review of the proposed action in accordance with the State Environmental Quality Review Action ("SEQRA"). See EDPL § 204(C)(3). As shown in a recent decision of the Appellate Division, Second Department, failure to follow SEQRA's mandate to "identify the relevant areas of environmental concern, take a hard look at them, and make a reasoned elaboration" with respect to the proposed taking can lead to the rescission of the condemnation determination.

In the *Matter of Raphael Rivero v. Rockland County Solid Waste Management*

*Authority*, 946 N.Y.S.2d 175, 2012 N.Y. N.Y. App.Div. LEXIS 4271 (June 6, 2012), petitioner challenged a decision to condemn his seven acre parcel, which is adjacent to a closed Town of Clarkston landfill. Respondent, which owns and uses the landfill and other adjacent property for its solid waste recycling facilities, sought to acquire the parcel to "expand and reconfigure its operations" and to allow the town to cap the

1.5 acre portion of petitioner's land on which it had previously dumped landfill waste. Petitioner pointed out the numerous adverse environmental impacts that could result and demanded a positive declaration of environmental significance and a Draft Environmental Impact Statement to study these. However, respondent took the position that any environmental impacts are speculative, that it has no concrete engineering plans for its future actions, and that the only "action" that is being considered is the condemnation itself, i.e. the transfer of title to the Authority.

Petitioner challenged the taking in an action pursuant to EDPL § 207 as being in violation of SEQRA. The Court agreed that respondent's approach of deferring review is a classic case of segmentation, which is expressly disfavored under SEQRA. See §§6 NYCRR 617.1(c) and 617.3(g). "[T]he fact that it [the Authority] had no 'concrete' plans for the expansion of its operations on the property did not relieve it of the requirement to conduct an environmental review of the entirety of Riverso's land."<sup>2</sup> The determination and negative declaration of environmental significance were annulled and the matter was remitted to the respondent to undertake the appropriate review.

This case highlights the importance of taking seriously the condemnor's responsibility to strictly comply with SEQRA in considering a taking. No shortcuts will do,



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which the New York State Department of Transportation learned the hard way in the *Matter of William A. Zut v. State of New York*, 2012 N.Y.App. Div. LEXIS 5581 (July 18, 2012). There, to avoid the necessity of holding public hearings, the state invoked a statutory exemption for an acquisition that is *de minimis* in nature (EDPL § 206(D)). It also classified the proposed drainage easement as a Type II action without significant impact on the environment, thus not requiring review. The Court, citing prior litigation in the matter, held that this was an abuse of discretion. In fact, it found the state's conduct to be so egregious and in bad faith, that instead of the usual relief of remitting the matter to the condemning authority, it granted the property owner's request for an injunction prohibiting the state from further pursuing the proposed condemnation.

As seen above, potential condemnors and condemnees should all keep in mind the importance of proper environmental review early in the decision making process<sup>3</sup>.

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<sup>1</sup> *Matter of Chemical Specialties Mfrs. Assn. v. Jorling*, 85 NY2d 382, 397 (1995).

<sup>2</sup> *Matter of Save the Pine Bush v. City of Albany*, 70 NY2d 193, 200; *Matter of Concerned Citizens for Env't v. Zagata*, 243 AD2d 20, 22 (2d Dept. 1998); *Matter of Long Is. Pine Barrens Socy. V. Planning Bd. of Town of Brookhaven*, 204 AD2d 548, 550-551 (2d Dept. 1994).

<sup>3</sup> See, e.g., *Matter of Gyrodyme Co. of Am., Inc. v. State Univ. of N.Y. at Stony Brook*, 17 AD3d 675 (2d Dept. 2005).