Hofstra Property Law Journal

Volume 2 | Issue 1 Article 3

9-1-1988

Expanding Traditional Land Use Authority through Environmental Legislation: The Regulation of Affordable Housing

John R. Nolon

Mary C. Stockel

HOFSTRA
PROPERTY LAW
JOURNAL

Volume 2 Fall 1988

EXPANDING TRADITIONAL LAND USE AUTHORITY THROUGH ENVIRONMENTAL LEGISLATION: THE REGULATION OF AFFORDABLE HOUSING

John R. Nolon and Mary C. Stockel***

INTRODUCTION

Since zoning was first sanctioned by the United States Supreme Court in 1926,[1] its evolution from a rigid, district-bound concept to a fluid regulatory instrument has been constant.[2] This evolution has

* Professor of Law, Pace Unversity School of Law. B.A., 1963, University of Nebraska, J.D., 1966, University of Michigan Law School. Member, American Bar Association, Section on Urban, State and Local Government Law. The author has served as an advisor to the U.S. Department of Housing & Urban Development and the President's Council on Development Choices in the 1980's.

** B.S.,; J.D., 1988, Pace Universtiy School of Law. Mary C. Stockel was a law clerk for Mr. Nolon during her third year of law school and received a certificate in Environmental Law from Pace University School of Law. She is presently working as an associate for Lowenstein, Sandler, Kohl, Fisher & Boylan.

1. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

2. In Rodgers v. Village of Tarrytown, 302 N.Y. 115, 96 N.E.2d 731 (1951), the New York Court of Appeals sustained, for the first time, the use of a "floating zone" — a zone not tied to a fixed district — as a valid method of preventing "young families, unable to find

closely paralleled the growing exigencies of urban and suburban development which have steadily challenged zoning laws, and the courts which interpret them, to meet increasingly complex land use demands.[3] This is reminiscent of the growth of the law of nuisance, which gradually expanded in scope as our early industrialized society required greater regulation to protect personal health, safety, and welfare.[4] As local zoning regulators struggled to cope with these increasing challenges, the legislature and judiciary generally provided the requisite authority.

In this progression of challenges, one of the latest to beset metropolitan and suburban jurisdictions is the much lamented lack of affordable housing.[5] In grappling with this problem — which affects the supply of local policemen, firemen,[6] teachers, and municipal

---

accommodations in the village, from moving elsewhere." *Id.* at 122, 96 N.E.2d at 733. The dissent vigorously objected, writing: "The decision here made gives judicial sanction to a novel and unprecedented device. . . . The device may have much to commend it in the way of administrative convenience, but it most assuredly is not 'zoning.'. . . [T]he board's action, here approved, is completely at odds with all sound zoning theory and practice, and may well prove to be the opening wedge in the destruction of effective and efficient zoning in this State." *Id.* at 126-27, 96 N.E.2d at 736 (Conway, J., dissenting).

3. "While stability and regularity are undoubtedly essential to the operation of zoning plans, zoning is by no means static. Changed or changing conditions call for changed plans, and persons who own property in a particular zone or use district enjoy no eternally vested right to that classification if the public interest demands otherwise." *Id.* at 121, 96 N.E.2d at 733.

4. In Whalen v. Union Bag & Paper Co., 208 N.Y. 1, 101 N.E. 805 (1913), the New York Court of Appeals, in the late pre-zoning period, enjoined the operation of a pulp mill representing an investment of over $1,000,000, because of its negative effect on stream quality and the resultant injury to the plaintiff, a downstream riparian owner of a 255 acre farm.

5. As early as 1978, Westchester County, New York documented the housing crisis facing communities within the county. Special Advisory Committee on Housing Policy, Report Concerning a County Housing Policy (Oct. 23, 1978). This report, formally adopted by the Westchester Board of Legislators, was based on the concept that "housing must be affordable to a wide range of occupants." *Id.* at 5.

A large number of foreclosures and abandonments spurred a study of the housing problems in Suffolk County. Report of the Suffolk County Housing Task Force to the Suffolk County Executive at 1 (Sept. 1982). The housing study, completed in 1980, concluded that there was "a serious shortage of affordable rental housing for low and moderate income households, both elderly and family." Cohalan, County Executive Housing Report 93 (Mar. 1980). It further held that the "continued occupancy of deteriorated housing and the growing tide of abandoned sound housing can both be looked on as symptoms of a lack of affordable housing." *Id.*

Orange County termed its housing crisis "a paradox" — while new housing was actively being built, many of the county's residents could not find the type of housing they needed. Office of Community Development, Orange County, New York Housing Needs Study at 1 (prepared by Buckhurst, Fish, Hutton, Katz, and Urbanomics) (Sept. 1986).

6. In Westchester County, the community of Pound Ridge has seen its volunteer fire department severely reduced over the past fifteen years because of the unavailability of afford-

workers[7] and the ability of young and old households to continue to live in the community[8] — land use regulators have turned to the State Environmental Quality Review Act (SEQRA).[9] SEQRA requires that these regulators[10] impose conditions on approvals[11] to

---

able housing in the community. Brown, *The Disappearing Volunteer Firefighter*, N.Y. Times, Mar. 6, 1988 § 22 (Westchester Weekly), at 1, col. 1. Former fire chief, Vincent Duffield, expounded on the problem: "The nucleus of a fire department is blue-collar workers. The average home in Pound Ridge probably sells for $350,000 to $500,000 and blue-collar workers don't make that kind of money." *Id.* An assistant chief was forced to move out of Pound Ridge after living there for thirty years because he could no longer afford to stay. *Id.* at p. 5, col. 1-2.

See also Dwarakanath, *Pleasantville Fire Department Seeks Volunteers*, Westchester Daily News, Apr. 3, 1988, where the fire chief also attributes the lack of volunteers to the lack of young people who can afford to live in the area.

7. Stuart Kolbert, a residential real estate marketing and sales consultant, noted that the increase in housing prices is forcing lower income wage earners, such as secretaries, office workers and other personnel, out of Westchester County. Kolbert, *Westchester Needs Action on Affordable Housing, Not Talk*, Westchester County Business Journal, May 23, 1988, at 5, col. 1. Kolbert also comments that one municipality was forced to modify residency requirements for the local police force, fire company, sanitation workers, and other civil servants because "they couldn't find housing within their means in the community." *Id.*

8. In 1979, the Westchester County Board of Legislators, Committee on Community Affairs, Health and Hospitals held public hearings throughout the County to discuss the current housing problems. Many senior citizens and young adults attended the public hearings to voice their concern over their ability to remain within their communities because of the high cost of housing. Westchester County Board of Legislators, Report and Recommendations: A Westchester County Housing Policy at 4 (1979).

Housing surveys taken within Westchester communities showed similar findings. A survey taken in Pelham, New York showed that twenty-six percent of the residents over the age of fifty were not satisfied with their present housing. Twenty-four percent responded that they could not afford their present housing. Twenty-two present felt that they would be forced to leave Pelham if their housing problems were not solved. Results of Pelham Housing Survey (Oct. 13, 1987) (as published by Nolon Associates, Inc.).

A 1988 housing survey taken in Harrison, New York, a Westchester community, showed that ninety percent of the Harrison residents responding to the survey and in need of housing would have to move out of town if their housing problem were not solved. Housing Needs and Attitude Study, Harrison, N.Y. at (unnumbered) 2 (1988). Forty percent of those responding were under the age of 40. *Id.*

9. N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 1984 & Supp. 1988).

10. Local boards are given the power to regulate land use under New York State's enabling statutes. For example, N.Y. TOWN LAW § 261 (McKinney 1987), empowers the town board to regulate land use "[f]or the purpose of promoting the health, safety, morals, or the general welfare of the community." These boards are required to follow the mandates of SEQRA, N.Y. ENVTL. CONSERV. LAW § 8-0103(6) (McKinney 1984), which applies to agencies including "any local agency, board, district, commission or governing body." N.Y. ENVTL. CONSERV. LAW § 8-0105(2) (McKinney 1984).

11. SEQRA is applicable to all actions including "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." N.Y. ENVTL. CONSERV. LAW § 8-0105(4)(i) (McKinney 1984). Case law has included rezonings and site plan and subdivision approvals within the definition of action. *See infra* note 34.

mitigate any negative impact on the environment,[12] defined by SEQRA to include "existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character."[13]

The inquiry of these regulators is severalfold:

1. Does the approval by a local agency of a steady succession of applications to build high-priced homes and job-generating commercial projects substantially contribute to the unprecedented inflation in housing prices which, in turn, prices out of the local market vast segments of the moderate and middle income population?

2. If so, can this result be appropriately classified as a "negative" environmental impact under SEQRA?

3. If so, can a local agency use SEQRA mitigation authority to require commercial and luxury residential developers to contribute to the solution of the affordable housing problem?

4. If so, how is this authority limited by the recent United States Supreme Court cases which have interpreted the Fifth and Fourteenth Amendments of the United States Constitution to limit the ability of land use regulators to impose conditions on development approvals?

In confronting these questions, attorneys for local agencies and developers, and ultimately the judiciary, are continuing their search for that illusive balance between property rights and the public interest that has proved to be a continuing drama since zoning was ratified by *Euclid* over 60 years ago.

This article is devoted to an examination of local land use regulation in the context of the use of SEQRA and its mandate, to mitigate environmental impacts to require the provision of affordable housing in high cost housing markets. As such, it looks at one contemporary manifestation of the growth of police power authority to meet new land use challenges.

I. THE AUTHORITY TO REGULATE LAND USE

A municipality may enact legislation in accordance with the power granted to it by the state. The New York Constitution grants local governments the power to adopt local laws which relate to governmental affairs so long as those laws are consistent with the Con-

12. *Id.* § 8-0109(1).
13. *Id.* § 8-0105(6).

stitution and other laws of the state.[14] The Constitution also authorizes the state legislature to grant local governments powers in addition to those set out in the Constitution.[15]

Through this authorization, the New York Legislature enacted enabling statutes delegating the regulation of land use to local governments. Each form of local government — *e.g.*, city, town and village — has its own enabling statute,[16] and each enabling statute empowers the local government to enact zoning regulations for the purpose of promoting the health, safety, morals, and general welfare of the community.[17] Specifically, these enabling statutes empower the governmental agency to regulate the height, size, area, density, and location of buildings and land uses in accordance with a comprehensive plan.[18]

The New York State Legislature granted municipalities an additional tool with which to control land use with the passage of the State Environmental Quality Review Act in 1976.[19] SEQRA requires all agencies, including municipalities and local boards, to prepare environmental impact statements for an action "which may have a significant effect on the environment."[20] If an action does have a significant effect on the environment, the agency must employ all practicable means to minimize that effect.[21] Thus, if a proposed development might have a significant effect on the environment, then a local board can impose conditions on the development to minimize that effect. In this way, the local board exerts control over land use for the health, safety and general welfare of the community and for the preservation of the environment.

The power to impose conditions through the enabling statutes or through SEQRA is limited by the United States and New York constitutions and by SEQRA itself. The United States Constitution prohibits the government from "taking" private property. The fifth amendment states: "No person shall be . . . deprived of life, liberty

---

14. N.Y. CONST. art. IX, § 2(c). Laws passed for this purpose are dubbed "Home Rule."

15. *Id.* § 2(b)(1).

16. N.Y. GEN. CITY LAW § 20 (McKinney 1982), N.Y. TOWN LAW § 261-84 (McKinney 1982), N.Y. VILLAGE LAW §§ 7-700 to 7-742 (McKinney 1982).

17. N.Y. GEN. CITY LAW § 20(24) (McKinney 1982), N.Y. TOWN LAW § 261 (McKinney 1982), N.Y. VILLAGE LAW § 7-700 (McKinney 1982).

18. N.Y. GEN. CITY LAW § 20(24) (McKinney 1982), N.Y. TOWN LAW § 261, 263 (McKinney 1982), N.Y. VILLAGE LAW § 7-700 (McKinney 1982).

19. N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 1984 & Supp. 1988).

20. *Id.* § 8-0109(2).

21. *Id.* § 8-0109(1).

or property, without due process of law; nor shall private property be taken for public use without just compensation."[22]

The Supreme Court has often applied the fifth amendment to local zoning regulations. In recent decisions, the Supreme Court held that a zoning regulation is not a taking if it substantially advances a legitimate state interest, is reasonably related to that state interest, and does not deny an owner economically viable use of his land.[23]

The New York Constitution contains a similar property clause: "Private property shall not be taken for public use without just compensation."[24] The New York courts will hold a land use regulation unconstitutional if it does not advance a public interest, is not reasonably related to the public interest advanced, and completely destroys the property's economic value.[25]

Finally, SEQRA requires that the conditions imposed on an action in order to mitigate negative environmental impacts must be practicable and reasonably related to the impact.[26]

II. Regulations Under SEQRA

The New York State Environmental Quality Review Act requires all agencies to use *all* practicable means to minimize or avoid adverse environmental effects.[27] This duty to mitigate adverse effects is said to give SEQRA "prodigious strength."[28] Under SEQRA, the agency is mandated to prepare an environmental impact statement (EIS) on any action proposed or approved which may have a significant effect on the environment.[29] Within the EIS, the agency must list the mitigation measures proposed for an action.[30]

An agency is defined by SEQRA as "any state or local

---

22. U.S. Const. amend V. The fifth amendment is applied to state and local governments through the fourteenth amendment. Chicago B & Q R.R. Co. v. Chicago, 166 U.S. 226 (1897).

23. *See infra* notes 108-36 and accompanying text. For a review of the history of the takings clause and a detailed analysis of the recent Supreme Court decisions in this area, see J. Humbach, *Economic Due Process & the Takings Clause*, 4 Pace Envt'l L. Rev. 311 (1987).

24. N.Y. Const. art I, § 7(a).

25. *See infra* notes 137-61 and accompanying text.

26. N.Y. Comp. Codes R. & Regs. § 617.3(b) (1987). *See infra* notes 51-104 and accompanying text.

27. N.Y. Envtl. Conserv. Law § 8-0109(1) (McKinney 1984).

28. P. Weinberg, *Commentaries*, N.Y. Envtl. Conserv. Law § 8-0101 (McKinney 1984).

29. N.Y. Envtl. Conserv. Law § 8-0109(2) (McKinney 1984).

30. *Id.* § 8-0109(2)(f).

agency,"[31] including any local agency, board, or governing body, thereby bringing local board actions under its umbrella.[32] The type of action subject to the SEQRA process is limited to an action of a discretionary nature.[33] Rezonings, as well as site plan and subdivision approvals, are discretionary and therefore require SEQRA review, while the issuance of an as-of-right building permit (which meets all zoning requirements) is not subject to SEQRA review.[34]

The legislature gives "environment" an expansive definition: "the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character."[35]

The Department of Environmental Conservation (DEC)[36] created a list of criteria to be used to determine if an action has a significant effect on the environment.[37] This list includes: the impairment of existing community character; the creation of a material conflict with a community's current plans or goals; the creation of a hazard to human health; the creation of a material demand for other actions which could result in a significant impact; and the impact of

---

31. *Id.* § 8-0105(3).

32. *Id.* § 8-0105(2). *See also* P. Weinberg, *Commentaries*, N.Y. ENVTL. CONSERV. LAW § C8-0105 (McKinney 1984); H.O.M.E.S. v. New York State Urban Dev. Corp., 69 A.D.2d 222, 418 N.Y.S.2d 827 (1979).

33. An action is defined by SEQRA to include "projects or activities involving the issuance to a person of a lease, permit, license, certificate or other entitlement for the use or permission to act." N.Y. ENVTL. CONSERV. LAW § 8-0105(4)(i) (McKinney 1984). SEQRA specifically excludes "official acts of a ministerial nature, involving no exercise of discretion." *Id.* § 8-0105(5).

34. *See* Spring-Gar Community Civic Ass'n v. Homes for the Homeless, Inc., 135 Misc. 2d 689, 697, 516 N.Y.S.2d 399, 404 (N.Y. Sup. Ct., Queens County, 1987) (holding that the city's policy to house homeless families in neighborhood hotels constitutes an action within the meaning of SEQRA); Di Veronica v. Arsenault, 124 A.D.2d 442, 443, 507 N.Y.S.2d 541, 543 (3d Dep't 1986) (holding that a site plan approval is an unlisted action requiring SEQRA review if the action might have a significant environmental effect on the environment); Brew v. Hess, 124 A.D.2d 962, 964, 508 N.Y.S.2d 712, 714 (1986) (holding that legislative changes in a zoning ordinance constitute an action under SEQRA); Badura v. Guelli, 94 A.D.2d 972, 973, 464 N.Y.S.2d 98, 99 (4th Dep't 1983) (holding that the rezoning from residential to industrial is a Type I action requiring SEQRA review); and Citizens for the Preservation of Windsor Terrace v. Smith, 122 A.D.2d 827, 828, 505 N.Y.S.2d 896, 898 (2d Dep't 1986) (holding that the issuance of an as-of-right building permit was a ministerial act and therefore not an action).

35. N.Y. ENVTL. CONSERV. LAW § 8-0105(6) (McKinney 1984).

36. *Id.* The DEC is authorized to adopt rules and regulations implementing the provisions of SEQRA. N.Y. ENVTL. CONSERV. LAW § 8-0113 (McKinney 1984).

37. N.Y. COMP. CODES R. & REGS. tit 6, § 617.11 (1987).

two or more related actions, when considered cumulatively. With respect to this last criteria, an agency *must* consider all reasonably related long-term, short-term, and cumulative effects including other subsequent actions.[38]

From this series of definitions and regulations, it is clear that a local agency must use all practicable means to minimize or avoid long-term and cumulative effects on existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character when reviewing rezonings and site plan and subdivision approvals. An "environmental impact is found not just in an action's effect on air and water but, . . . in its effect on land-use, density of population, and community character."[39] Thus, the environmental review process mandated by SEQRA gives a municipality an additional tool in regulating land use.

SEQRA requires that all agencies use *all* practicable means to minimize or avoid adverse environmental effects.[40] However, there is no section in SEQRA that defines or limits the scope of "all practicable means." The regulations passed pursuant to SEQRA state only that the conditions imposed to mitigate environmental impacts be substantive, practicable, and reasonably related to the impact.[41] We can turn to the National Environmental Protection Act (NEPA)[42] for guidance as to what these terms mean.

The federal government enacted NEPA in 1969 to "promote efforts which will prevent or eliminate damage to the environment,"[43] recognizing the profound impact of population growth and high-density urbanization on the natural environment.[44] NEPA states that the federal government's policy is "to use *all practicable means* and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare . . . and fulfill the social, economic, and other requirements of present and future

38. *Id. See* Save the Pine Bush, Inc. v. City of Albany, 70 N.Y.2d 193, 206, 512 N.E.2d 526, 531, 518 N.Y.S.2d 943, 948 (1987) (holding that the cumulative impact of other proposed or pending developments must be considered in a SEQRA review); Sutton v. Board of Trustees, 122 A.D.2d 506, 508, 505 N.Y.S.2d 263, 265 (1986) (holding that the long-range impact of the proposed project must be considered during SEQRA review).

39. P. Weinberg, *Commentaries*, N.Y. ENVTL. CONSERV. LAW § C8-0109:3 (McKinney 1984).

40. N.Y. ENVTL. CONSERV. LAW § 8-0109(1) (McKinney 1984).

41. N.Y. COMP. CODES R. & REGS. tit 6, § 617.3(b) (1987).

42. 42 U.S.C. §§ 4321-70a (1982 & Supp. IV 1986).

43. *Id.* § 4321.

44. *Id.* § 4331.

generations . . . ."[45]

Courts have interpreted NEPA to require that federal agencies mitigate the adverse environmental effects of major federal actions. The first circuit stated that the Nuclear Regulatory Commission was under a duty to minimize environmental damage.[46] The ninth circuit held that the adverse environmental effect need not be completely alleviated so long as "significant measures" are implemented to mitigate the project's effects.[47]

The failure to implement mitigation measures was challenged in *Prince George's County v. Holloway*.[48] In this case, the Navy prepared an Environmental Impact Statement to determine the effect of its relocation from Maryland to Mississippi on the local environment. The Navy, however, failed to mitigate the impact of introducing five thousand employees into the local housing market. The district court stated that "the availability of adequate housing and schools for low- and moderate-income groups . . . [is] of major environmental importance."[49] When such an environmental impact is noted, the agency must consider possible methods for mitigating that impact. The failure to do so invalidated the EIS in this case. In his opinion, Judge Gesell mentioned the possibility of constructing the housing that was needed for the employees as a mitigation measure.[50]

From the federal courts' interpretation of NEPA, federal agencies are required to mitigate potential environmental impacts, often imposing conditions which affect land use.

The line of reasoning in the federal cases is mirrored in New York. However, the duty to mitigate need not be implied. "SEQRA provides all involved agencies with the authority . . . to impose substantive conditions upon an action to ensure [the mitigation of environmental impacts]. The conditions imposed must be practicable and reasonably related to [these] impacts . . . ."[51]

---

45. *Id.* (emphasis added).

46. Public Serv. Co. v. U.S. Nuclear Regulatory Comm'n, 582 F.2d 77, 81 (1st Cir.), *cert. denied*, 439 U.S. 1046 (1978).

47. Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 987 (9th Cir. 1985). The significant measures taken in this case included extensive land dedications, highly restrictive development and construction controls, and permanent funding towards a habitat conservation program. *Id.*

48. 404 F. Supp. 1181 (D.D.C. 1975).

49. *Id.* at 1186.

50. *Id.* at 1187.

51. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.3(b) (1987). Both SEQRA and the regulations passed pursuant to it require the mitigation measures proposed for a project be

The extent of an agency's authority to mitigate environmental effects is demonstrated in *Town of Henrietta v. Department of Environmental Conservation.*[52] In *Henrietta*, the town granted the developer site plan approval and rezoned the property to commercial use for the construction of a shopping mall.[53] The county constructed new roads and interchanges to facilitate traffic around the mall.[54] The Army Corps of Engineers approved relocation of a creek in order to mitigate the loss of the creek.[55] The Department of Environmental Conservation required the preparation of an EIS in conjunction with applications for wetlands and air quality permits.[56] During SEQRA review, DEC determined that the project would totally eliminate a wildlife species in the area.[57] To mitigate this impact, the DEC imposed several conditions on the approval of the permits, including setting aside one portion of a twelve acre parcel of undeveloped land to remain undeveloped.[58] The imposition of these and other mitigation measures was challenged by both the county and the developer.

The fourth department upheld the mitigation conditions imposed by the DEC. In so doing, the court stated that: (1) an agency is not precluded from forecasting future needs;[59] (2) the statute authorizes the agency to implement measures to mitigate the adverse impacts created by these needs;[60] (3) the conditions imposed to mitigate the impact must be reasonable;[61] and (4) there must be substantial evidence to support the imposition of the conditions.[62] The court concluded that SEQRA was substantive but flexible, leaving room for a reasonable exercise of discretion.[63]

If an agency takes a 'hard look' at the environmental consequences of an action and takes reasonable steps towards mitigating the project's impact, a reviewing court will uphold the agency's de-

---

listed within the EIS. N.Y. ENVTL. CONSERV. LAW § 8-0109(2)(f) (McKinney 1984); N.Y. COMP. CODES R. & REGS. tit. 6, § 617.14(f)(7) (1987).

52. 76 A.D.2d 215, 430 N.Y.S.2d 440 (4th Dep't 1980).
53. *Id.* at 216, 430 N.Y.S.2d at 443.
54. *Id.* at 217, 430 N.Y.S.2d at 443.
55. *Id.*
56. *Id.*
57. *Id.* at 224, 430 N.Y.S.2d at 448.
58. *Id.*
59. *Id.* at 223, 430 N.Y.S.2d at 447.
60. *Id.* at 226-27, 430 N.Y.S.2d at 449.
61. *Id.* at 223, 226-27, 430 N.Y.S.2d at 447, 449.
62. *Id.* at 224, 430 N.Y.S.2d at 448.
63. *Id.* at 222, 430 N.Y.S.2d at 447.

termination. In *Jackson v. New York State Urban Development Corp.*,[64] the first department upheld the mitigation measures proposed by the Urban Development Corporation (UDC) to lessen the impact of its project on the neighborhood.

The UDC was commissioned by New York State to improve the blighted and deteriorating areas throughout the state and to provide adequate and safe housing for low-income families.[65] The project under review involved the rehabilitation of thirteen acres of land in New York City. UDC proposed to construct four high-rise office towers, a hotel and a wholesale merchandise mart.[66] The petitioners challenged UDC's EIS for failure to mitigate "the expected displacement" of the area's elderly citizens.[67]

The court upheld the mitigation measures proposed by the UDC which included the support of construction or rehabilitation of low income housing.[68] The UDC also considered contributing to a fund to establish low income housing; however, instead, UDC agreed to take that money and use it to restore neighborhood theatres and improve subway access.[69] The court held that although petitioners would rather have funds spent on housing, SEQRA left the choice between mitigation measures with the reviewing agency.[70] SEQRA requires that the agency look at the environmental impacts of a proposed action; it does not require an agency "to impose every conceivable mitigation measure, or [even] any particular one."[71] The court emphasized that when imposing mitigation measures, social, economic and other essential considerations must be balanced.[72] So long as an agency takes a hard look at the environmental consequences of an action, considers potential mitigation measures, and makes a reasonable choice, the court will uphold that choice.[73]

In a similar case, a developer did contribute to a housing fund to mitigate the adverse effects of its project on the surrounding neighborhood.[74] New York City created a Special Manhattan Bridge

64. 110 A.D.2d 304, 494 N.Y.S.2d 700 (1st Dep't 1985), *aff'd*, 67 N.Y.2d 400, 494 N.E.2d 429, 503 N.Y.S.2d 298 (1986).

65. N.Y. UNCONSOL. LAW § 6252 (McKinney 1984).

66. *Jackson*, 67 N.Y.2d at 412, 494 N.E.2d at 432, 503 N.Y.S.2d at 301-02.

67. *Id.* at 413, 494 N.E.2d at 433, 503 N.Y.S.2d at 302.

68. *Jackson*, 110 A.D.2d at 311, 494 N.Y.S.2d at 705.

69. *Jackson*, 67 N.Y.2d at 419, 494 N.E.2d at 437, 503 N.Y.S.2d at 306.

70. *Id.* at 421, 494 N.E.2d at 439, 503 N.Y.S.2d at 308.

71. *Id.*

72. *Id.*

73. *Id.*

74. Chinese Staff & Workers Ass'n v. City of New York, 68 N.Y.2d 359, 502 N.E.2d

District to provide for the commercial and residential needs of Chinatown, particularly, to alleviate its critical housing shortage.[75] The regulations enacted for the administration of this district were tailored to provide incentives for a mixture of income groups resulting in a balance of such groups within the community.[76] A special permit was created to provide the flexibility desired to adapt each new development to the needs of the community.[77] In December 1981, the Henry Street Partners (HSP) applied for a special permit to construct a high-rise luxury condominium on a vacant lot within the Special District.[78]

The Chinese Staff and Workers Association (the Association) challenged the issuance of the permit on the grounds that the city's failure to consider whether the introduction of luxury housing into the Chinatown community would accelerate the displacement of local residents and alter the character of the community was a violation of SEQRA.[79] The city had considered such impacts outside the scope of SEQRA because they were not "directly related to a primary physical impact" or would not "impinge upon the physical environment in a significant manner."[80]

The New York Court of Appeals agreed with the Association finding the city's view "contrary to the plain meaning of SEQRA."[81] Environment is broadly defined by SEQRA and expressly includes population patterns and existing community character.[82] Thus, the potential impacts[83] on population patterns and community character triggered the SEQRA process "with or without a separate impact on

---

176, 509 N.Y.S.2d 499 (1986).

75. New York City, N.Y. Dep't of City Planning, Zoning Resolution, ch. 6, art. XI, §§ 116-00 to 116-70 (1985).

76. *Id.* at § 116-00(e).

77. *Id.* § 116-03.

78. *Chinese Staff*, 68 N.Y.2d at 362, 502 N.E.2d at 177, 509 N.Y.S.2d at 500-01.

79. *Id.* at 362-63, 502 N.E.2d at 178, 509 N.Y.S.2d at 501. The plaintiffs also alleged similar violations of the City Environmental Quality Review procedures.

80. *Id.* at 365, 502 N.E.2d at 179, 509 N.Y.S.2d at 502.

81. *Id.* at 365, 502 N.E.2d at 179-80, 509 N.Y.S.2d at 503.

82. *Id.* at 365-66, 502 N.E.2d at 179-80, 509 N.Y.S.2d at 503. The court noted NEPA's inclusion of effects on the quality of the human environment as a trigger for the preparation of an EIS. *Id.* at 366 n.7, 502 N.E.2d at 180 n.7, 509 N.Y.S.2d at 503 n.7.

83. The court distinguished the dissenting opinion's holding that only *present effects* be considered (*Id.* at 370, 502 N.E.2d at 183, 509 N.Y.S.2d at 506) by pointing to SEQRA's mandate to consider the long-term effects of an action and its previous holding in *Jackson* that *potential displacement* was a valid consideration in a SEQRA review process. *Id.* at 366 n.8, 502 N.E.2d at 180 n.8, 509 N.Y.S.2d at 503 n.8.

the physical environment."[84]

The court went on to consider the extent the project impacted on the "community."

> The fact that the actual construction on the proposed site will not cause the displacement of any residents or businesses is not dispositive for displacement can occur in the community surrounding a project as well as on the site of a project. . . . [L]and development impacts not only on the actual property involved but on the community in general.[85]

The court also emphasized the consideration of one project's impact in light of other related actions.[86] The city "must look to more than the potential effects of this one parcel and must consider the potential impacts on the surrounding community."[87]

After completing an adequate EIS, the city conditioned its approval on the construction of a YMCA on the ground floor of the condominium; the renting out of ground floor space as private medical offices; and the contribution of five hundred thousand dollars to subsidize and rehabilitate low-income housing.[88]

---

84. *Id.* at 366, 502 N.E.2d at 180, 509 N.Y.S.2d at 503. *See also*, Matter of Briarwood Community Ass'n, N.Y.L.J., Apr. 18, 1988, at 19, col. 5 (N.Y. Sup. Ct.,) (where the court invalidated the Board of Estimate's EIS for failure to take the requisite 'hard look' at the impact the influx of 300 individuals . . . would have on the existing patterns of population and neighborhood character.").

85. *Chinese Staff*, 68 N.Y.2d at 367, 502 N.E.2d at 181, 509 N.Y.S.2d at 504 (citing Berenson v. Town of New Castle, 38 N.Y.2d 102, 110, 341 N.E.2d 236, 242, 378 N.Y.S.2d 672, 681 (1975)).

86. *Id.* SEQRA's regulations list as a factor in determining a project's effect on the environment "two or more related actions . . . none of which has or would have a significant effect on the environment, but when considered cumulatively, would [have such an effect]." N.Y. COMP. CODES RULES & REGS. tit. 6, § 617.11(a)(11) (1987). The regulations also require agencies to "consider reasonably related long-term, short-term and cumulative effects, including other simultaneous or subsequent actions." *Id.* § 617.11(b). *See also*, Save the Pine Bush, Inc. v. City of Albany, 70 N.Y.2d 193, 206, 512 N.E.2d 526, 531, 518 N.Y.S.2d 943, 948-49 (1987) (holding that it is a violation of SEQRA not to consider the potential, cumulative impact of other pending projects within a geographic area).

87. *Chinese Staff*, 68 N.Y.2d at 368, 502 N.E.2d at 181, 509 N.Y.S.2d at 504. The majority limits its holding to the review of actions under the City Environmental Quality Review Act. *Id.* at 364 n.4, 502 N.E.2d at 179 n.4, 509 N.Y.S.2d at 502 n.4. However, throughout its opinion, the majority cites SEQRA as a parallel authority. Therefore, a similar finding should result under a purely SEQRA analysis. *See* P. Weinberg, *Commentaries*, N.Y. ENVTL. CONSERV. LAW § C8-0109:3 (McKinney Supp. 1988). *See also Save the Pine Bush*, 70 N.Y.2d at 206, 512 N.E.2d at 531, 518 N.Y.S.2d at 948-49, where the court applied the holding in *Chinese Staff* to a purely SEQRA review in Albany.

88. Environmental Impact Statement, *see Chinese Staff*, 68 N.Y.2d 359, 502 N.E.2d 176, 509 N.Y.S.2d 499 (1986). *See also* P. Weinberg, Commentaries, N.Y. ENVTL. CONSERV. LAW § C8-0109:3 (McKinnery 1984).

The cases outlined above demonstrate the latitude given a reviewing agency when imposing mitigation measures on a development pursuant to SEQRA. The only limitation imposed by the court is that the reviewing agency take a hard look at the environmental impacts and that the agency impose mitigating measures reasonably related to this impact. If an agency meets this limitation, their decision will not be found arbitrary and capricious.

There is one recent case where the Court of Appeals found the mitigation measures imposed by a reviewing agency to be arbitrary and capricious.

In *E.F.S. Ventures Corp. v. Foster*,[89] a developer applied to the planning board for a modified site plan approval.[90] Upon completion of the SEQRA review process, the planning board approved the modified site plan application on the condition that the developer demolish newly constructed motel units and change the location of a newly constructed access road.[91]

The imposition of these conditions was challenged by the developer on two theories: (1) that the planning board is estopped from imposing the conditions;[92] and (2) if they are not estopped, then the conditions were arbitrary and capricious.[93] As to the developer's first argument, the court stated that to apply the doctrine of estoppel to the SEQRA review process would "override legislative mandates establishing environmental review procedures."[94]

The court, however, agreed with the developer's second argument. The court stated that when reviewing a site plan application, the planning board must consider "all the facts and circumstances surrounding the proposed project."[95] The fact that the application was a modification of a previously approved project and that the con-

---

In Yonkers, New York, a developer contributed $1.9 million to a fund dedicated to development of new affordable housing in the neighborhood of a proposed development. *Pierpointe Project Offers Fund for Displaced Yonkers Residents*, The Daily News, June 4, 1988, at 1, col. 2. The fund was created to prevent gentrification of the surrounding neighborhood after a study determined that the project would increase the value of surrounding land, making development more lucrative and pushing out existing residents and businesses. *Id.* at col. 2 and 3.

89. 71 N.Y.2d 359, 520 N.E.2d 1345, 526 N.Y.S.2d 56 (1988).

90. *Id.* at 364, 520 N.E.2d at 1347, 526 N.Y.S.2d at 58. The planning board approved the original site plan without a SEQRA review and without judicial challenge. *Id.*

91. *Id.* at 366, 520 N.E.2d at 1349, 526 N.Y.S.2d at 59. The construction of these units and access road were expressly approved by the planning board when the original site plan application was first before it.

92. *Id.* at 368, 520 N.E.2d at 1350, 526 N.Y.S.2d at 62.

93. *Id.* at 371, 520 N.E.2d at 1351, 526 N.Y.S.2d at 62.

94. *Id.* at 370, 520 N.E.2d at 1351, 526 N.Y.S.2d at 62.

95. *Id.* at 373, 520 N.E.2d at 1352, 526 N.Y.S.2d at 63.

struction of the project was nearly complete should have been considered. SEQRA requires the consideration of economic factors with environmental concerns.[96] A choice of mitigation measures with a severe economic impact is therefore arbitrary and capricious.[97]

The court went on to state that when considering a modified site plan application, although the entire site plan may be reviewed, the conditions imposed must be reasonably related to the proposed modifications.[98] To use the SEQRA process to impose unrelated conditions is an abuse of process clearly illustrated by the facts of this case.[99]

The interpretation of SEQRA derived from this line of cases suggests that a local board has the authority to impose conditions on an action in order to mitigate an environmental impact if (1) the local board takes a hard look at the environmental consequences of an action;[100] (2) the local board considers the long-term and cumulative impacts of the action and other related actions on the immediate and surrounding community;[101] (3) the conditions imposed are reasonably related to and economically feasible with respect to the action;[102] (4) the conditions imposed are reasonably related to the impact;[103] and (5) there is substantial evidence to support the imposition of the condition.[104]

III. JUDICIAL CONSTRAINTS ON LAND USE REGULATION

Properly imposed conditions which mitigate a negative environmental impact achieve a legitimate state interest based on the exercise of the local board's police power. The limit to the exercise of this power is found in the balance between the state interest being protected and the property right being infringed. If there is a reasonable relation between the impact and the mitigation measure im-

96. *Id.* (citing N.Y. ENVTL. CONSERV. LAW §§ 8-0103(7), (9) (McKinney 1984).

97. *Id.*

98. *Id.*

99. *Id.*

100. *See* Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 503 N.Y.S.2d 298, 494 N.E.2d 429 (1986); *see also supra* notes 64-73 and accompanying text.

101. *See* Chinese Staff & Workers Ass'n v. City of New York, 68 N.Y.2d 359, 502 N.E.2d 176, 509 N.Y.S.2d 499 (1986); *see also supra* notes 74-88 and accompanying text.

102. *See* E.F.S. Ventures Corp. v. Foster, 71 N.Y.2d 359, 520 N.E.2d 1345, 526 N.Y.S.2d 56 (1988); *see also supra* notes 89-99 and accompanying text.

103. *See* Town of Henrietta v. Department of Envtl. Conserv., 76 A.D.2d 215, 430 N.Y.S.2d 440 (4th Dep't 1980); *see also supra* notes 52-63 and accompanying text.

104. *See,* N.Y. COMP. CODES R. & REGS. tit. 6, § 617.3(b) (1987).

posed,[105] such a balance will be resolved in favor of the environment. Where land use and environmental regulations leave no economically viable use of the land or fail to substantially advance a legitimate state interest, a taking may be found.

In *Pennsylvania Coal Co. v. Mahon*,[106] Justice Holmes recognized the struggle between the government's police power and a land owner's property rights:

> As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the . . . due process clause [is] gone. One fact for consideration in determining such limits is the extent of the diminution [in property value]. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts.[107]

Two recent Supreme Court opinions set forth the state of the law as to when a land use regulation constitutes a taking. Justice Stevens, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[108] aptly summarized the controversy.

> Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property. A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area. . . . Similarly . . . one could always argue that a set-back ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for takings law purposes.[109]

The dispute in *Keystone* arose over the Bituminous Mine Subsidence and Land Conservation Act,[110] enacted by the Pennsylvania legislature to diminish the damaged caused by subsurface coal mining.[111] The Pennsylvania legislature found that the extraction of underground coal weakens the foundations of homes and buildings constructed over the mined areas. It causes sinkholes and troughs,

105. *Id.*
106. 260 U.S. 393 (1922).
107. 260 U.S. at 413.
108. 480 U.S. 470 (1987).
109. *Id.* at 490.
110. PA. STAT. ANN. tit. 52, §§ 1406.1-.21 (Purdon Supp. 1988).
111. *Id.* at §§ 1406.2-.4.

makes the land difficult to develop, and causes a loss of surface and ground water.[112] The regulations passed pursuant to this act require fifty percent of the coal beneath public buildings, homes and cemeteries to be kept in place as a means for providing support.[113]

An association of coal mine operators challenged the act and its implementing regulations on the grounds that they violated the takings clause of the United States Constitution.[114] In its takings analysis, the Supreme Court applied the fundamental takings test: a land use regulation is a taking if it "does not substantially advance legitimate state interest," *or* if it "denies an owner economically viable use of his land."[115]

The *Keystone* case turned on the first part of the takings test. Prior to its holding, the Court recognized "that the nature of the State's action is critical in takings analysis."[116] The Court cited a previous case which upheld a prohibition on the sale of liquor where the legislature declared the sale "to be injurious to the health, morals, and safety of the community,"[117] and a case which upheld a state order destroying infected cedar trees where the legislature acted to save an apple orchard.[118] It characterized the regulations in these cases as mere restraints on the uses of property which were tantamount to a public nuisance.[119] "Long ago it was recognized that 'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.' "[120]

With reference to the statute in *Keystone*, the Court determined that the Pennsylvania legislature was "acting to protect the public interest in health, the environment, and the fiscal integrity of the area."[121] This was a substantial public interest which did not require

---

112. *Keystone*, 480 U.S. at 486.

113. *Id.* at 487 (citing PA. CODE § 146(b)(2) (1986)).

114. *Id.* at 488.

115. *Id.* at 487 (citing Agins v. Tiburon, 447 U.S. 255, 260 (1980)).

116. *Id.* at 488.

117. Mugler v. Kansas, 123 U.S. 623, 668-69 (1887) (cited in *Keystone*, 480 U.S. at 488).

118. Miller v. Schoene, 276 U.S. 272, 280 (1928) (cited in *Keystone*, 480 U.S. at 490).

119. *Keystone*, 480 U.S. at 490.

120. *Id.* (citing Mugler v. Kansas, 123 U.S. 623, 665 (1887)). This concept follows the latin proposition: *sic utere tuo ut alienum non laedas* — use your own property in such a manner as not to injure that of another. BLACK'S LAW DICTIONARY 1238 (5th ed. 1979).

121. *Keystone*, 480 U.S. at 489. The Court stated that this "type of environmental concern that has been the focus of . . . much federal, state, and local regulation. . . ." *Id.* at 486.

compensation.[122] Thus, when a strong public interest is at stake, no taking is found.

However, if the regulation imposed to promote the public interest is not related to that interest, a taking will result. In *Nollan v. California Coastal Commission*,[123] the Nollans' applied to the California Coastal Commission for a building permit to demolish an existing cottage and, in its place, construct a three bedroom home.[124] The Commission approved the permit on the condition that the Nollans' grant the public an easement across the beach front on their property.[125] The Nollans' challenged the condition on the grounds that it deprived them of their property in violation of the Fifth Amendment to the United States Constitution.[126]

Similar to *Keystone*, the Court held that "land use regulation does not effect a taking if it 'substantially advances legitimate state interests' and does not 'den[y] an owner economically viable use of his land.' "[127] The state purpose advanced by the Commission was "protecting the public's ability to see the beach" and "assisting the public in overcoming the 'psychological barrier' to using the beach created by a developed shorefront."[128] The Court found this a legitimate exercise of the police power for which the Commission could have denied the building permit or imposed conditions such as a height or width limitation, which would have directly mitigated the undesirable psychological barrier.[129]

The Court held that the Commission violated this test since the condition it imposed had absolutely no relationship to the purpose

---

122. *Id.* at 493.

123. 107 S. Ct. 3141 (1987).

124. *Id.* at 3143.

125. *Id.*

126. *Id.* at 3144.

127. *Nollan*, 107 S. Ct. at 3146 (citing Agins v. Tiburon, 447 U.S. 255, 260 (1980)). Prior to its takings analysis, the Court noted: "Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, . . . we have no doubt there would have been a taking." *Id.* at 3145. "The right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property. . . . '[W]here government action results in 'a permanent physical occupation, of the property, our cases uniformly have found a taking'." *Id.* (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432-33 (1982)). A right to enter and cross property at will constitutes a "permanent physical occupation" and is a per se taking. *Id.* This type of taking is one which apparently does not require the court to consider various factors or weigh counterveiling interests.

128. *Id.* at 3147.

129. *Id.*

asserted.[130] The Supreme Court held that the condition or regulation imposed must have an "essential nexus" to the stated purpose.[131] Without this nexus, the "restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.' "[132]

A taking will also result if the legislation or conditions imposed deprive an owner economically viable use of his land. In *Keystone*, the Court found no evidence that the legislation made it "impossible for the petitioners to profitably engage in their business, or that there ha[d] been undue interference with their investment-backed expectations."[133] In looking at the evidence available, the Court compared the value of the "taken" property with the value of the remaining property.[134] Without such a comparison, many zoning limitations could be considered takings. For example, a zoning ordinance which requires that a building occupy only a percentage of the lot would be a taking of the vacant area.[135] Since the legislation in *Keystone* required only a portion of the coal to be left unmined, no taking was found.[136]

These two cases demonstrate that the Supreme Court will uphold legislation and regulations that advance a legitimate public interest if the conditions imposed by that legislation and those regulations have an essential nexus to the public interest being asserted and do not deprive the owner economical viable use of his property.

The New York courts' reasoning in takings cases has mirrored

---

130. *Id.* at 3148.

131. *Id.*

132. *Id.* (citing J.E.D. Assoc. v. Atkinson, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981)). The *Nollan* court found it difficult to understand the relationship between the public's inability to view the beach from the road and their ability to walk across the beach. *Id.* at 3149.

133. *Keystone*, 480 U.S. at 495. "[P]etitioners have not shown any deprivation significant enough to satisfy the heavy burden placed upon one alleging a regulatory taking." *Id.* at 493. The petitioners challenged the facial validity of the statute; therefore, the Supreme Court did not address that statute's affect on any one parcel of land. *Id.* at 495.

134. *Id.* at 493.

> Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights *in the parcel as a whole.*

Id. (citing Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978)) (emphasis supplied).

135. *Id.* at 494.

136. *Id.* at 495. The record indicated that seventy-five percent of the coal could be profitably mined. *Id.*

that of the Supreme Court. In *Mackall v. White*,[137] the New York Appellate Division, Second Department determined that the imposition of a public easement across an applicant's property to allow public access to a beach as a condition for subdivision approval (facts similar to those in *Nollan*) amounted to a taking of property without compensation.[138] The court found that the problem of beach access, although a legitimate state interest, was not created by the subdivision request; therefore, no relationship existed between the condition imposed and the application.[139]

If a relationship does exist between the condition imposed and the proposed application, that relationship must be reasonable. The court in *Holmes v. Planning Board*[140] held that a relationship is reasonable if it " 'directly relate[s] to and [is] incidental to the proposed use of the[] property'."[141] Applying the reasonable relationship test, the *Holmes* court held that the requirement of an easement as a condition precedent to a site plan approval was not arbitrary, and therefore, did not amount to a taking.[142]

In *Holmes*, the petitioner applied to the planning board for site plan approval for alterations to increase office space within an existing structure.[143] Approval was granted on the condition that petitioner provide a driveway easement to the adjoining property owner to allow access to a rear parking lot.[144] The planning board imposed this condition to help alleviate a critical traffic congestion problem. Although this problem existed prior to petitioner's application, the board determined that, if approved, the application would increase the problem. While the easement was not a permanent solution, it would help to alleviate some of the congestion.[145]

The Second Department's analysis in *Holmes*, decided prior to *Nollan*, parallels the Supreme Court's analysis in *Nollan*. First, the court stated that since the planning board has the power to deny a site plan application, it has the power to impose conditions "to fur-

137. 85 A.D.2d 696, 445 N.Y.S.2d 486 (2d Dep't 1981).

138. *Id.* at 696, 445 N.Y.S.2d at 487.

139. *Id.*

140. 78 A.D.2d 1, 433 N.Y.S.2d 587 (2d Dep't 1980).

141. *Id.* at 15, 433 N.Y.S.2d at 596 (citing Bernstein v. Board of Appeals, 60 Misc. 2d 470, 474, 302 N.Y.S.2d 141, 146 (N.Y. Sup. Ct., Nassau County, 1969)).

142. *Id.* at 20-21, 433 N.Y.S.2d at 600.

143. *Id.* at 3-4, 433 N.Y.S.2d at 590.

144. *Id.* at 9-10, 433 N.Y.S.2d at 594.

145. *Id.*

ther the health, safety and general welfare of the community."[146] An attempt by the planning board to alleviate traffic congestion is a valid exercise of the town's police power.[147] Finally, the court stated that to be valid, the condition must be reasonable: "a police power reasonable relationship test should be applied when scrutinizing the condition with respect to its effects upon the application."[148] Applying this test to the facts, the court determined that the condition imposed reasonably helped to alleviate a police power concern which would be exacerbated by the petitioner's application.[149]

So long as a reasonable relationship exists, a court will not question the wisdom or appropriateness of the legislation. In *Enki Properties, N.V. v. Loft Board*,[150] the petitioner challenged the constitutionality of the Loft Law.[151] The Loft Law was enacted to upgrade the fire and safety standards of commercial buildings in New York City being converted into residential lofts.[152] The court found that housing safety is a legitimate state concern.[153] So long as the statute is reasonably related to this concern, a reviewing court may not second guess the remedy chosen.[154]

> [O]nce it has been ascertained that there is an actual and manifest evil to which the challenged legislation bears a reasonable relation, the court may not dictate to the legislative body the choice of remedy to be selected; questions as to wisdom, need or appropriateness are for the Legislature.[155]

---

146. *Id.* at 12, 433 N.Y.S.2d at 595. The court references the New York courts' general acceptance of the imposition of conditions on local discretionary approvals. *Id.* at 15, 433 N.Y.S.2d at 596. Similarly in *Nollan*, the court stated that the California Coastal Commission had the power to review the application and deny the building permit completely. *Nollan*, 107 S. Ct. at 3147.

147. *Holmes*, 78 A.D.2d at 12, 433 N.Y.S.2d at 595. Justifying this assertion, the court found that the town's traffic control strategy was consistent with the town's comprehensive plan. *Id.* at 15, 433 N.Y.S.2d at 596 (citing Udell v. Haas, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968)). The court also found that the strategy was "compatible with regional and State planning goals." *Id.* (citing Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975)).

148. *Id.* at 19-20, 433 N.Y.S.2d at 599. In *Nollan*, the Court held that the regulation imposed must have an essential nexus to the public purpose being advanced. 107 S. Ct. at 3148.

149. *Holmes*, 78 A.D.2d at 20, 433 N.Y.S.2d at 599.

150. 128 Misc. 2d 485, 489 N.Y.S.2d 841 (N.Y. Sup. Ct., N.Y. County, 1985), *later proceeding*, 125 A.D.2d 178, 508 N.Y.S.2d 387 (1st Dep't 1986).

151. N.Y. MULT. DWELLINGS LAW §§ 280-87 (McKinney Supp. 1988).

152. *Id.* § 280.

153. *Enki Properties*, 128 Misc. 2d at 491, 489 N.Y.S.2d at 846.

154. *Id.*

155. *Id.* at 490-91, 489 N.Y.S.2d at 846 (citing I.L.F.Y. Co. v. City Rent & Rehabilita-

The court continued: "The court is not free to overturn legislation merely because alternatives to the Legislature's solutions exist."[156]

Many New York takings determinations also turn on the second part of the federal takings analysis: whether the action "den[ied] an owner economically viable use of his land."[157] The New York Appellate Division, Second Department stated that there is not a taking unless "the ordinance preclude[s] the use of the property for any purpose for which it [is] reasonably adapted, or that its economic values [are] completely destroyed."[158] In *Benway Stadium, Inc. v. Town of Volney*,[159] the Fourth Department held that there is not a taking unless "a reasonable return for the property may not be obtained from any use permitted by the existing ordinance."[160]

The New York courts' constitutional analysis of land use regulation involves a search for a legitimate public purpose. The regulation will not be overturned if it is reasonably related to that state purpose. So long as that reasonable relationship exists and the owner is not significantly denied the economical use of his land, the courts will not question the wisdom of the legislative body.

Environmental concerns mitigated under SEQRA are unquestionably legitimate state interests.[161] Therefore, the conditions imposed to mitigate negative environmental impacts need only be reasonably related to the stated purpose and to the action under review and may not deprive an owner of an economically viable use of his land.

IV. Imposing Affordable Housing Conditions Under SEQRA

A municipality has many powers to regulate land use granted to

---

tion Admin., 11 N.Y.2d 480, 489-90, 184 N.E.2d 575, 580, 230 N.Y.S.2d 986, 992 (1962)).

156. *Id.* at 492, 487 N.Y.S.2d at 846.

157. *Keystone*, 480 U.S. at 495; *Nollan*, 107 S. Ct. at 3146.

158. ITT Realty Corp. v. State of New York, 120 A.D.2d 706, 707, 502 N.Y.S.2d 504, 506 (2d Dep't 1986). No taking was found in this case because the parcel in question was made unusable by the owner's development on a portion of his property and the subsequent sale of an undeveloped portion.

159. 125 A.D.2d 943, 510 N.Y.S.2d 342 (4th Dep't 1986).

160. *Id.* at 944.

161. In *Henrietta*, the savings of a species' habitat was held a legitimate state interest. Town of Henrietta v. Department of Envtl. Conservation, 76 A.D.2d 215, 430 N.Y.S.2d 440 (4th Dep't 1980). *See supra* notes 52-63 and accompanying text. Similarly in *Jackson*, the savings of the human habitat was held a legitimate state interest. Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 503 N.Y.S.2d 298, 494 N.E.2d 429 (1986). *See supra* notes 64-73 and accompanying text.

it by enabling legislation in New York State. SEQRA, the most recent of this kind of legislation, is a powerful addition to traditional land use authority.[162] The authority delegated by SEQRA, through environmental review and the mandate to mitigate negative environmental impacts, is a sword which, when wielded wisely will seldom be blunted by the judiciary.

The potential power of the SEQRA sword is being tested in the area of affordable housing. Municipalities facing housing shortages are seeking means of developing housing affordable to their moderate and middle income residents. Through the SEQRA process, a municipality may accomplish this by approving a subdivision for development on the condition that the developer build a percentage of the units at an affordable price.

A municipality, when reviewing a subdivision application, must look at the development's impact on "existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character."[163] One luxury residential or job-producing commercial development may not be said to "cause" the dislocation of a meaningful segment of the community's moderate income population.[164] However, SEQRA requires that reviewing agencies consider the long-term and cumulative impacts of two or more related actions, which when considered together, might have a significant effect on the environment.[165] It also requires the review of a series of related actions.[166] By conducting such a review, cumulatively, of all

---

162. For a comment comparing SEQRA judicial review to judicial comprehensive plan analysis, see Damsky, *SEQRA & Zoning Law's Requirement of a Comprehensive Plan*, 46 ALB. L. REV. 1292 (1987).

163. N.Y. ENVTL. CONSERV. LAW § 8-0105(6) (McKinney 1984). *See also*, Chinese Staff & Workers Ass'n v. City of New York, 68 N.Y.2d 359, 366, 502 N.E.2d 176, 509 N.Y.S.2d 499 (1986) (holding that the potential impacts on population patterns and community character trigger the SEQRA process "with or without a separate impact on the physical environment"); Spring-Gar Community Civic Ass'n, Inc. v. Homes for the Homeless, 135 Misc. 2d 689, 697, 516 N.Y.S.2d 399, 404 (1987) (holding that the city's policy to house homeless families "may have a check on the existing population patterns and neighborhood patterns").

164. Recall that the traffic congestion problem in *Holmes* was not caused by the building permit application. The *Holmes* court allowed the imposition of conditions because the application exacerbated the problem. Holmes v. Planning Board, 78 A.D.2d 1, 11, 433 N.Y.S.2d 587, 594 (2d Dep't 1980).

In addition, SEQRA requires mitigation measures to be imposed if there is *any* negative impact on the environment. N.Y. ENVTL. CONSERV. LAW § 8-0109(1) (McKinney 1984) (emphasis added). It is irrelevant whether the action causes the impact or merely exacerbates it.

165. N.Y. ADMIN. CODE. tit. 6, §§ 617.11(a)(11), (b) (1987).

166. SEQRA's regulations mandate that two or more related actions which cumulatively produce a significant environmental impact be reviewed within an environmental impact state-

recent and pending actions involving luxury and commercial developments, the practices that have caused spiraling housing prices, and their resultant dislocation of moderate income people, come into clearer focus.

It is the imbalance of housing supply and demand within market areas that directly causes drastic escalation in housing prices. The addition of commercial development employing moderate and middle income wage earners as employees, while the housing stock is expanded slowly and only at the top of the market in price, creates enormous price competition at the middle of the market. The result is greater escalation of prices, which is exacerbated by the addition of luxury homes, with its tendency to inflate surrounding property values.

This escalation in price is largely responsible for the disappearance of housing affordable to moderate and middle income persons.[167] As young people reach the household formation stage, as more mature young couples begin families, and as older people retire and live on more modest incomes, they regularly find that they cannot continue to live within their community, largely now devoid of suitable homes at prices they can afford. By reviewing recent and pending development approvals cumulatively, lead agencies can as-

---

ment (EIS). N.Y. COMP. CODES RULES & REGS. tit. 6, § 617.11(a)(11) (1987). The regulations also require that a local agency consider reasonably related long-term and cumulative effects, including other simultaneous or subsequent actions. *Id.* § 617.11(b). It is not necessary that the related actions be on contiguous parcels of land or that the land have the same owner. In Save the Pine Bush, Inc. v. City of Albany, 70 N.Y.2d 193, 200-01, 512 N.E.2d 526, 528, 518 N.Y.S.2d 943, 945 (1987), the City of Albany amended its zoning ordinance to allow for commercial development within the community of Pine Bush, an area with "distinct environmental characteristics worthy of protecting." The petition in this case concerns the rezoning of approximately thirty acres of land within this geographic area. *Id.* at 201, 512 N.E.2d at 528, 518 N.Y.S.2d at 945. The New York Court of Appeals found that the city violated SEQRA by failing to consider the potential, cumulative impact of other pending projects within the geographic area of Pine Bush.

> Where a governmental body announces a policy to reach a balance between conflicting environmental goals — here, commercial development and maintenance of ecological integrity — in such a significant area, assessment of the cumulative impact of other proposed or pending developments is necessarily implicated in the achievement of the desired result.

Id. at 206, 512 N.E.2d at 531, 518 N.Y.S.2d at 948.

To aid in the cumulative review of a series of actions, SEQRA's regulations allow a local agency to prepare a generic EIS (GEIS) "to assess the environmental effects of a number of separate actions in a given geographic area which, if considered singly may have minor effects, but if considered together may have significant effects." N.Y. ADMIN. CODE. tit. 6, § 617.15(a)(1) (1987).

167. Documentation of this trend is referenced in notes 5-7, *supra*.

sess whether these approvals have resulted in the escalation of housing prices causing this erosion in demographic balance, which can be deemed a negative impact under SEQRA.

The definition of this dislocation of moderate income people as a "negative environmental impact" coincides with a traditional and fundamental view of the zoning authority, as well. Zoning must be in accordance with the comprehensive plan[168] and, as a police power measure, protect the public health, safety, and general welfare of the community.[169] The loss of firemen, policemen, hospital workers, ambulance corps volunteers, sanitation workers, municipal employees, teachers, young households, and the elderly directly bear on the public safety, health and welfare. Master plans typically contain specific objectives calling for balanced growth and development, the provision of a variety of housing types, and the achievement of a diverse and balanced demography.[170] Master planners assume that local land use regulators will exercise their authority to counter trends that frustrate these purposes, which includes the negative effect resulting from the erosion of the moderate income population.

The paradox inherent in labelling a luxury townhouse development or office building as a negative environmental impact under SEQRA is thus resolved. These macro-economic results are completely at odds with a sound environment, as defined by SEQRA, and with the public health, safety and welfare. In this context, the legitimate public interest test is clearly met. But this alone does not end judicial scrutiny. The conditions imposed by a local board on a

---

168. N.Y. GEN. CITY LAW § 20(24) (McKinney 1982), N.Y. TOWN LAW § 261, 263 (McKinney 1982), N.Y. VILLAGE LAW § 7-700 (McKinney 1982).

169. N.Y. GEN. CITY LAW § 20(24) (McKinney 1982), N.Y. TOWN LAW § 261 (McKinney 1982), N.Y. VILLAGE LAW § 7-700 (McKinney 1982).

170. The Town Development Plan of Yorktown, New York states that a "proper balance among residential choices, opportunities for employment, the availability of nearby stores, cultural and recreational facilities, will provide the greatest satisfaction in the everyday lives of the residents of the region." Town Development Plan, Town of Yorktown, Westchester County, New York at 5 (prepared by Naomi Tor, planner under the direction of the Planning Board) (May 1983). "[P]roviding opportunities for a wide range of housing choices has . . . been a key goal of the town." *Id.* at 8. Yorktown's articulated policy is to "continue its evolution to a balanced community providing a wide range of housing choices, including two family units, townhouses and garden apartments, while still preserving its suburban rural, predominantly single family character." *Id.* at 54.

Tarrytown, New York put this objective directly into its zoning ordinance in 1987. One purpose stated within the ordinance is "[t]o assist in the preservation and promotion of a variety of types of housing so as to provide opportunities and choices which may be attractive or appropriate for different interests and economic capabilities." Village of Tarrytown Zoning Ordinance, Art. I, § 120.14 (recodified Nov. 1985) (amended Nov. 1987).

developer must be reasonably related to both the public interest of maintaining a balanced community and the particular application under review.

A local board may impose several different types of conditions upon an application for a new development. It may require a developer to actually construct affordable housing,[171] or it may require the developer to contribute to an affordable housing trust fund.[172] Either of these solutions pass the "essential nexus" test. The *Nollan* court rejected the conditions imposed by the California Coastal Commission because the easement along the front of the property had no nexus to the public interest of viewing the beach.[173] A nexus would have existed if the Commission imposed a height or width limitation.[174]

This essential nexus is found in the proposed affordable housing conditions. Constructing affordable housing units or contributing to a fund dedicated to their construction is directly related to the public interest of creating affordable housing. Similarly, these conditions are related to the application since the continued development of high-priced houses and employment generating commercial development will exacerbate the lack of affordable housing.

Not only is there a direct relationship, but there is also a reasonable relationship. Recall that in *Holmes*, the proposed increase in office space was found to worsen a preexisting traffic congestion problem and the easement required was found to be a reasonable, temporary solution that would help to alleviate the problem.[175] Similarly, a requirement that a modest amount of affordable housing be provided as a condition of subdivision or site plan approval, although not solving the affordable housing problem, will reasonably help to

171. In *Jackson*, the Urban Development Corporation agreed to support the construction or rehabilitation of low income housing. Jackson v. New York State Urban Dev. Corp., 110 A.D.2d 304, 311, 494 N.Y.S.2d 700, 705 (1st Dep't 1985).

172. After the court's mandate to consider the effect of a development of the displacement of community residents, the Henry Street Partners agreed throught the EIS to contribute five hundred thousand dollars to subsidize and rehabilitate low income housing in New York City. Similarly, in Yonkers, New York, a developer contributed $1.9 million to a fund dedicated to development of new affordable housing in the neighborhood of a proposed development. Pierpointe Project Offers Fund for Displaced Yonkers Residents, The Daily News, June 4, 1988, at 1 col. 2. *See supra* note 88.

173. Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3148 (1987).

174. *Id.* at 3147.

175. Holmes v. Planning Board, 78 A.D.2d 1, 12, 433 N.Y.S.2d 587, 594 (2d Dep't 1980).

alleviate it.[176]

Once this "essential nexus" is established, the burden shifts to the developer to show that, as a result of the conditions imposed, there is no economically viable use of his land. Requiring a developer to construct a modest amount of affordable housing units within a new development minimally effects the economic value of the land. In fact, with skillful planning, no economic loss will occur.[177]

There is a clear and convincing relationship between the imposition of a condition to provide affordable housing on a project that has been found to worsen a documented affordable housing problem. The imposition of such conditions on all similarly situated developers complies with the requirements of SEQRA and substantially advances the legitimate state interest of protecting the public health, safety and welfare. By keeping the conditions imposed modest, there can be no valid claim that they are arbitrary and capricious or unreasonable or that they will deny an owner economically viable use of his land.

CONCLUSION

SEQRA, by virtue of its unambiguous mandate that regulating agencies abate negative environmental impacts and its expansive definition of the environment, has greatly expanded local land use authority. In compliance with recent U.S. Supreme Court cases, SEQRA clearly expresses a "legitimate state interest" and provides a specific procedure for "substantially advancing" that interest through the imposition of land use conditions which mitigate nega-

---

176. Such a requirement is far less obtrusive than the interference with the highly protected possessory interest guarded by the Supreme Court:

> A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)(citations omitted). In *Penn Central*, the Supreme Court upheld New York City's prohibition of building in the airspace above Grand Central Terminal. The Court emphasized that New York City did not deny the developer *all* uses of the air rights. In mitigation of the economic impact, the city allowed the developer to "transfer" his development rights. *Id.* at 137. Similarly in *Keystone*, the Pennsylvania statute denied the owner only a portion of his mining rights. Keystone Bituminous Coal Ass'n v. DeBenedicitus, 107 S. Ct. 1232, 1242 (1987).

177. For example, the affordable units could be placed on odd shaped lots that, but for the creation of affordable housing, would have remained undeveloped. A developer could also construct a two-family unit as opposed to a single family unit. Thus, each unit is sold at half the price while the construction cost is not significantly increased and the total sales price for the lot remains the same.

tive environmental impacts. The recent use of affordable housing conditions under SEQRA to prevent rapid demographic change at odds with established master plan kkobjectives is illustrative of the extent to which local regulators may now go and yet remain within the safe harbors of legislative and judicially-sanctioned authority. This is a contemporary example of the residency police power which follows it to respond to the intricate demands of modern society.