

# SEQRA and Aesthetics

By Jonathan Tarbet

Attorneys appearing before local boards often encounter the New York State Environmental Quality Review Act ("SEQRA"). SEQRA was enacted by the New York State Legislature in 1976. The New York State Department of Environmental Conservation ("DEC") is responsible for promulgating its regulations. The primary purpose of SEQRA is to inject environmental considerations directly into governmental decision-making. The level of environmental review required depends to some extent on the DEC category the action falls into — Type I, Type II or Unlisted Actions.



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human health.") Prior to any agency of the government at the state, county or local level making a discretionary decision to approve, fund or directly undertake an action, a review must take place to determine if such action may have a significant effect on the environment.

Judicial review of decisions made under SEQRA is limited

to whether the decision was in error of law, arbitrary or capricious, an abuse of discretion or a violation of lawful procedure. The focus of a reviewing court's inquiry is whether the reviewing 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.

Some lawyers may be surprised to find that aesthetics are a relevant area

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Type I actions are those that are likely to require further review under SEQRA and include non-residential projects physically altering 10 acres or more and zoning changes affecting 25 acres or more. Type II actions never require further review under SEQRA and include most matters related to single-family homes, such as zoning-board relief or building permits. Unlisted Actions fall somewhere between Type I and Type II actions and include the adoption of regulations, ordinances, local laws and resolutions that may affect the environment. ("Environment" is defined by the DEC as "the physical conditions that will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, resources of agricultural, archeological, historic or aesthetic significance, existing patterns of population concentration, distribution or growth, existing community or neighborhood character, and

of environmental review under SEQRA. Aesthetics would seem to be subjective and inherently a personal decision. While most people would agree that a big box store or power plant blocking the view of a scenic treasure raises aesthetic concerns worth further review, aesthetic review based on architectural style runs the risk of SEQRA review becoming hopelessly subjective and hostage to individual interpretations regarding architecture. The DEC is aware of this risk and has published a guidance policy "Assessing and Mitigating Visual Impacts" which was developed to provide direction to local reviewing agencies for evaluating visual and aesthetic impacts generated from proposed projects. The guidance policy

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## PRACTICE MANAGEMENT

# Networking Online or Off

*The Same Rules Apply*

By Allison C. Shields

Most attorneys say that their business comes through word of mouth or referrals. But how do you keep those referrals coming? How do you establish and maintain relationships with referral sources and potential clients? Through effective networking,



Allison C. Shields

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I am a member of a networking group whose mantra is, "It's better to give than receive, but what goes around comes around." This is a great networking philosophy and it makes networking much easier. Don't avoid networking because

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unable to locate a responsible family member/representative, or, if located, such individual refuses to participate. The reasons a patient's family/representative did not participate in the discharge planning process

other hand if the patient is "judgment proof" a suit for money damages is a waste of time. If there is some valid basis to maintain a guardianship, the good faith assertion that the hospital will act may encourage a family to

patient's "license" on adequate notice to the patient and the family, along with appropriate appeal information. The hospital then may institute a summary proceeding for possession in the local equivalent of a "landlord-tenant" court<sup>5</sup>. The hospital may seek the appointment of a guardian *ad litem* to represent the patient during the pendency of the proceeding if there is any indication that the adult patient is "incapable of adequately prosecuting or defending his rights" (New York Civil Practice Law and Rules 1201). If the patient retains his or her own counsel it is questionable whether the court will discern the need for a GAL but strategically it may be preferable to deal with someone other than the patient directly.

The summary proceeding will result in a quick hearing<sup>6</sup>. Unfortunately, in most states the jurisdiction of a local landlord-tenant court to fashion a complete remedy is limited.<sup>7</sup> Landlord-tenant courts are not designed to accommodate the unique needs of persons with significant medical issues. All those courts usually can do is grant possession of premises and ancillary relief in the form of money damages; they cannot compel the patient to accept any kind of placement. The patient may continue to refuse to cooperate. The hospital's only remedy then would be to secure an order of eviction and seek the assistance of the sheriff, who literally will put the patient out at the curb. Alternatively, the hospital may have made arrangements for an ambulette to take the patient home or to a subacute facility or skilled nursing facility which previously extended acceptance, or anywhere else the patient wanted to go. The admitting facility almost certainly will require an affirmative acknowledgment of consent to an admission, however, to secure a guarantee of payment or authorize the facility to bill a third party payer. What if the patient refuses to sign the admission papers and the facility declines to accept

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stresses the importance of evaluating the proposed project's impact on a designated aesthetic resource. Aesthetic resources are listed by category and include properties on or eligible for inclusion on National or State registries of historic places, parks, National Wildlife refuges and scenic areas of statewide significance.

If a place designated in any of the categories lies in the view shed of a proposed project, then a visual assessment is required. A visual assessment form known as the "visual EAF addendum" is supplied by the DEC. The form details questions related to the visibility of the project in relation to local parks or historic sites. Adverse aesthetic impact occurs when there is a detrimental effect on the perceived beauty of a place or structure. Significant aesthetic impacts are those that may cause a diminishment of the public enjoyment and appreciation of an inventoried resource, or one that impairs the character or quality of such a place.

A search of available case law reveals that denials based on the aesthetic impacts of a proposed project under SEQRA have been upheld; however those cases all fall easily into the category of extremely large structures or industrial operations blocking the view of a significant aesthetic resource. As SEQRA continues to evolve, it will be interesting to see how far local boards and judges will be willing to push aesthetic review under SEQRA into the realm of architectural review based on style.

The East Hampton Town Planning Board recently heard an argument from a local attorney that a 4,700 square foot commercial building would have a significant adverse impact on a historical building located across the street because the commercial building incorporated a flat roof and glass design typically associated with modern architecture. In a split vote the board disagreed with him and a judge rejected his argument in a subsequent article 78 proceeding. I expect that in the coming years attorneys representing project opponents will continue to use architectural style under the auspices of SEQRA aesthetic review to challenge projects. It will be up to local boards and the courts to decide where the line is between environmental protection and architectural opinion.

*Note: Jonathan Tarbet is a partner at Tarbet, Lester & Schoen, PLLC. He represents clients in land use and planning matters, real estate transactions, wills and estate matters, and general litigation. Mr. Tarbet started his law career in the corporate department of Dewey & LeBoeuf. After several years in the city, Jonathan moved back to his hometown of East Hampton where he served as an Assistant East Hampton Town Attorney representing the Zoning Board. In 2004, Jonathan started this law firm concentrating initially on land use and planning matters along with residential real estate transactions.*