

SEQRA/Nature Trail: New York Appellate Court Addresses Challenge to Proposed Sewage Easement



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

06/27/2019

Co-Author: Krystina Barner

The Appellate Division of the Supreme Court of New York (“Court”) in a June 7th opinion addressed a property owner’s request to annul a Town’s determination to acquire an easement to install a sewer line along a nature trail. See *Frank J. Ludovico Sculpture Trail Corp. v. Town of Seneca Falls*, No. 1477, 2019 WL 2399980 (N.Y. App. Div. June 7, 2019).

A key issue was whether the Town complied with the State Environmental Quality Review Act (“SEQRA”).

Pursuant to New York Eminent Domain Procedure Law § 207 (“EDPL”), Frank J. Ludovico Sculpture Trail Corporation (“LST”) petitioned the Court to annul a determination of the Town of Seneca Falls (“Seneca Falls”) to acquire an easement along a nature trail to install a sewer line. The nature trail had been established to commemorate the Women’s Rights movement.

LST argued that the determination must be annulled due to Seneca Falls’ failure to comply with EDPL Article 2. It alleged that Seneca Falls failed to comply with SEQRA when the Town Board (“the Board”) adopted a negative declaration.

A required “hard look” at the project’s impact on wildlife was allegedly not undertaken. Further, it was argued that no reasoned elaboration of the basis for its determination of no significant impact on wildlife or surface water was provided. See EDPL § 207(C)(3).

To determine whether a lead agency complied with the substantive requirements of SEQRA, the Court conducted a limited judicial review. It considered whether the lead agency:

1. identified the relevant areas of environmental concern,
2. took a hard look at them, and
3. made a reasoned elaboration of the basis for its determination.

SEQRA’s procedural mechanisms are stated to mandate strict compliance, and anything less will result in annulment of the lead agency’s determination.

The New York State Department of Environmental Conservation (“DEC”) had notified Seneca Falls that their database indicated the presence of certain endangered, threatened, or rare animal and plant species on the project site. The species identified included the northern long-eared bat, the imperial moth, the northern bog violet, and the presence of inland salt marsh.

To minimize impact, the DEC recommended the Board conduct a survey of the professional literature and determine whether the project site contained habitats favorable to the identified species. If so, a second survey to determine whether the species are present would be conducted. The Board was to consider modifications that would ensure minimal impact if species were determined to be present.

The Court determined there was no evidence that the Board conducted such surveys. The Board assumed the presence of the species and noted them in an environmental assessment form (including the Indiana bat). It explained that there would not be a direct impact on the Indiana bat's because they did not plan on clearing the trees the bats roost in until the winter time. The bats would be hibernating in caves during that time period. However, the Board failed to provide any such explanation with respect to the imperial moth, the northern bog violet, or any other animal or plant species that might live or grow in the inland salt marsh. While the presence of these species were noted along with bare conclusions there would be no significant impact on them, the Board neither took a hard look at the project's impact on the wildlife nor made a reasoned elaboration of the basis for the determination.

The Board was also deemed to have failed to consider the DEC'S recommendations for avoiding impacts on surface water (particularly the stream corridor). The EAF referenced a plan to reroute sewer main locations to the extent practicable. When impracticable, the plan was to horizontally directionally drill sanitary sewer piping to avoid impacts on the surface water. However, the Board stated on the previous page of the environmental assessment form that directional drilling would be used "when possible." Thus, while the Board anticipated there would be circumstances where rerouting was impracticable or directional drilling was not possible, it failed to address whether both circumstances could simultaneously exist on the site, and if so, what to do under such circumstances.

The Court concluded that the Board merely set forth general practices for avoiding significant adverse impacts on surface water and stream corridors without providing a reasoned elaboration. The rationale for the implementation of these practices to avoid significant adverse impacts on surface water was required to be provided. Because the Board failed to do so, the Court held the determination of Seneca Falls to acquire an easement over LST's property must be annulled.

A copy of the opinion can be downloaded [here](#).