

2019 WL 2399980
Supreme Court, Appellate Division,
Fourth Department, New York.

In the Matter of the FRANK J. LUDOVICO
SCULPTURE TRAIL CORP., Petitioner,
v.
TOWN OF SENECA FALLS, Respondent.

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OP 18-01073
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Entered: June 7, 2019

Synopsis

Background: Property owner petitioned to annul town's determination to acquire an easement in order to install a sewer line along nature trail.

[Holding:] The Supreme Court, Appellate Division, held that town board failed to take hard look at impact on wildlife or surface water, warranting annulment of determination.

Petition granted.

West Headnotes (3)

[1] Environmental Law

In determining whether lead agency complied with substantive requirements of State Environmental Quality Review Act (SEQRA), judicial review is limited to whether the lead 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.

Cases that cite this headnote

[2] Environmental Law

State Environmental Quality Review Act's (SEQRA) procedural mechanisms mandate strict compliance, and anything less will result in annulment of the lead agency's determination of significance.

Cases that cite this headnote

[3] Environmental Law

Town Board failed to take hard look at impact on wildlife or surface water of installation of sewer line along nature trail, or to make reasoned elaboration of basis for negative declaration pursuant to State Environmental Quality Review Act (SEQRA), and thus, annulment of board's determination was warranted; although board did not conduct surveys to determine whether project site contained habitats favorable to certain endangered, threatened, or rare animal and plant species, or whether such species were present, board nevertheless assumed and noted their presence in environmental assessment form (EAF), board offered no reasoning for conclusion that there would be no significant impact on the species, and board did not address how process of drilling sewer line would avoid adverse impacts to stream corridor, or to surface water in general. N.Y. EDPL § 207(C)(3).

Cases that cite this headnote

Attorneys and Law Firms

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Proceeding pursuant to Eminent Domain Procedure Law § 207 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to annul a determination of respondent. The determination resolved to acquire an easement over certain real property.

PRESENT: SMITH, J.P., CARNI, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

MEMORANDUM AND ORDER

It is hereby ORDERED that the determination is unanimously annulled on the law without costs and the petition is granted.

Memorandum: Petitioner commenced this original proceeding pursuant to EDPL 207 seeking to annul a determination of respondent to acquire an easement along a nature trail commemorating the women's rights movement in order to install a sewer line. We agree with petitioner that the determination must be annulled based upon respondent's failure to comply with EDPL article 2. Specifically, respondent failed to comply with the provisions of the State Environmental Quality Review Act ([SEQRA] ECL art 8) when its Town Board adopted a negative declaration pursuant to that act without taking the requisite hard look at the project's impact on wildlife or providing a reasoned elaboration of the basis for its determination of no significant impact on wildlife or surface water (*see* EDPL 207[C][3]).

[1] [2] In determining whether the lead agency complied with the substantive requirements of SEQRA, judicial review is "limited to whether the lead agency ... identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination" (*Matter of Wellsville Citizens for Responsible Dev., Inc. v. Wal-Mart Stores, Inc.*, 140 A.D.3d 1767, 1768, 33 N.Y.S.3d 653 [4th Dept. 2016]; *see Matter of Friends of P.S. 163, Inc. v. Jewish Home Lifecare, Manhattan*, 30 N.Y.3d 416, 430, 68 N.Y.S.3d 382, 90 N.E.3d 1253 [2017], *rearg. denied* 31 N.Y.3d 929, 72 N.Y.S.3d 26, 95 N.E.3d 328 [2018]). The requirement that the lead agency "set forth its determination of significance in a written form containing a reasoned elaboration" is in the regulations (6 NYCRR 617.7[b][4]; *see Matter of Rochester Eastside Residents for Appropriate Dev., Inc. v. City of Rochester*, 150 A.D.3d 1678, 1680, 54 N.Y.S.3d 484 [4th Dept. 2017]). "SEQRA's procedural mechanisms mandate strict compliance, and anything less will result in annulment of the lead agency's determination of significance" (*Rochester Eastside Residents for Appropriate Dev., Inc.*, 150 A.D.3d at 1679, 54 N.Y.S.3d 484; *see Matter of City Council of City of Watervliet v.*

Town Bd. of Town of Colonie, 3 N.Y.3d 508, 515, 789 N.Y.S.2d 88, 822 N.E.2d 339 [2004]).

[3] On November 19, 2015, the New York State Department of Environmental Conservation (DEC) made respondent aware that its database indicated the presence of certain endangered, threatened, or rare animal and plant species on the project site. Those species included the northern long-eared bat, the imperial moth, and the northern bog violet. In addition, the database indicated the presence of inland salt marsh. The DEC recommended that respondent conduct a survey of the professional literature and determine whether the project site contains habitats favorable to such species and, if so, that respondent conduct a field survey to determine whether the species are present. The DEC instructed that, if respondent determined that such species are present, modifications should be considered to minimize impact. There is no indication that respondent conducted such a survey. Instead, the record establishes that respondent assumed the presence of the species and noted them, along with the Indiana bat, in the December 2015 environmental assessment form (EAF). In part 3 of the EAF, respondent reasoned that there would be no direct take of bats because the clearing of any trees in which the bats roost would occur during the winter months when the bats are hibernating in caves. There was, however, no such reasoning with respect to the imperial moth, the northern bog violet, or any animal or plant species that might live or grow in the inland salt marsh. Their presence was merely noted in part 3 of the form, along with the bare conclusion that there would be no significant impact on those species. We thus conclude that the Town Board failed to take a hard look at the project's impact on wildlife (*see generally Wellsville Citizens for Responsible Dev., Inc.*, 140 A.D.3d at 1769, 33 N.Y.S.3d 653) and failed to make a reasoned elaboration of the basis for its determination (*see generally Rochester Eastside Residents for Appropriate Dev., Inc.*, 150 A.D.3d at 1680, 54 N.Y.S.3d 484).

In addition, the DEC made certain recommendations for avoiding impacts on surface water, particularly the stream corridor. In order to avoid such impacts, respondent noted in part 3 of the EAF that it planned to reroute sewer main locations "to the extent practicable" and that, if impracticable, sanitary sewer piping "can be horizontally directionally drilled to avoid impacts." On the previous page, however, respondent had already noted its intent to use directional drilling "when

possible.” Thus, respondent anticipated that there would be circumstances where rerouting was impracticable or directional drilling was impossible. Respondent did not address how it planned to avoid adverse impacts on the stream corridor in particular, or surface water in general, in circumstances where rerouting was impracticable and horizontal directional drilling was impossible, nor did respondent conclude that both such circumstances cannot or do not simultaneously exist on this site. By all appearances, respondent merely set forth general practices for avoiding significant adverse impacts on surface water and stream corridors without providing a reasoned elaboration that, by implementing such practices in this particular project, respondent would successfully avoid any significant adverse impacts on surface water. We thus conclude that the Town Board failed to make a reasoned elaboration of the basis for its determination (*see generally id.*).

We reject petitioner's challenge to the negative declaration with respect to historic and archaeological resources; noise, odor, and light; and consistency with community character.

Therefore, we conclude that the negative declaration with respect to wildlife and surface water is arbitrary and capricious (*see Wellsville Citizens for Responsible Dev., Inc.*, 140 A.D.3d at 1769–1770, 33 N.Y.S.3d 653), and thus the determination of respondent to acquire an easement over petitioner's real property must be annulled (*see EDPL 207[C][3]*).

In light of our determination, we do not consider petitioner's remaining grounds for annulment.

All Citations

--- N.Y.S.3d ----, 2019 WL 2399980, 2019 N.Y. Slip Op. 04621