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Alexander B. Grannis
Commissioner

NOV 30 2007

Christian DiPalermo
Executive Director
New Yorkers for Parks
355 Lexington Avenue
New York, NY 10017

RE: Petition of New Yorkers for Parks for a Declaratory Ruling or Advisory Opinion with respect to SEQRA and Alienation of Municipal Parkland

Dear Mr. DiPalermo:

This letter replies to your petition dated September 11, 2007 for a declaratory ruling or advisory opinion on the applicability of the State Environmental Quality Review Act ("SEQRA")[1] to alienation of municipal parkland. Specifically, you asked the following question:

> Whether a change in the use of parkland to a nonpark use or the adoption of a plan to make such a change including, but not limited to, a home rule resolution adopted by a municipality requesting State Legislative authority to alienate parkland, is an action that is subject to SEQRA and, if so, [what] is the proper timing for environmental review?

I must decline your request for a declaratory ruling based on the legal criteria for issuance of such rulings. The Department's legal authority for issuance of declaratory rulings is set out in Section 204 of the State Administrative Procedure Act ("SAPA") and 6 NYCRR §619.3(a). SAPA §204 provides:

> On petition of any person, an agency may issue a declaratory ruling with respect to (I) the applicability to any person, property, or state of facts of any rule or statute enforceable by it, or (ii) whether any action by it should be taken pursuant to a rule.

Under 6 NYCRR §619.3(a), the Department may decline to issue a declaratory ruling if the petition does not raise a question of the applicability of any regulation or statute enforceable by the Department. While the Department is charged with issuing regulations

[1] SEQRA is codified at Article 8 of the Environmental Conservation Law ("ECL"), which is implemented by Part 617 of Title 6 of the Official Compilation of Rules and Regulations of the State of New York (NYCRR).

implementing the SEQRA statute, the Department has no authority to review the application of SEQRA by other agencies. The Department previously determined that there are several aspects of SEQRA that are enforceable by it, and, hence, upon which it will issue declaratory rulings. *DEC Declaratory Ruling* 8-01 (1984). Specifically, the Legislature gave the Commissioner specific authority to: 1) resolve lead agency disputes [ECL §8-0111(6)]; 2) determine 'ungrandfathering' petitions [ECL §8-0111(5)(a)(I)]; and 3) determine fees on appeal [ECL §8-0113(2)(k)]. The application of SEQRA to the alienation of municipal parkland does not fall within one of these authorities. Accordingly, the following is an advisory opinion only.

In response to your questions, the Department's view is that a municipal resolution requesting legislation to alienate parkland falls within the definition of an action under SEQRA. Further, any reviews under SEQRA should be complete prior to the adoption of the resolution requesting legislation authorizing the alienation of parkland.

The Department's SEQRA regulations set out at 6 NYCRR §617.3(a) provide that: "[n]o agency involved in an action may undertake, fund or approve the action until it has complied with the provisions of SEQR. . .". The term "agency" means: ". . . a state or local agency." 6 NYCRR 617.2©. A local agency includes: ". . . any local agency, board, authority, district, commission or governing body, including any city, county and other political subdivision of the state." 6 NYCRR §617.2(v). The term "action" includes, *inter alia*, ". . . (3) adoption of agency rules, regulations and procedures, including local laws, codes, ordinances, executive orders and resolutions that may affect the environment . . ." 6 NYCRR §617.2(b). The term "approval" is defined under the regulations to mean "a discretionary decision by an agency to issue a permit, certificate, license, lease or other entitlement or to otherwise authorize a proposed project or activity." 6 NYCRR §617.2(e).

The municipal alienation process is formally initiated through a resolution adopted by the municipal governing board (county legislature, city council, town board or village board of trustees) pursuant to Municipal Home Rule Law (MHRL) §40, through which it requests the Legislature to enact special legislation authorizing the alienation of parkland.[2] The reason for the State legislative approval requirement is that, as explained by the Court of Appeals in *Friends of Van Cortlandt Park, et al. v. City of New York* (95 N.Y.2d 623), ". . . parkland is impressed with a public trust, requiring legislative approval before it can be alienated or used for an extended period for non-park purposes [citations omitted]." *Id.* at 630. The Office of Parks, Recreation and Historic Preservation, in its manual on parkland alienation, recommends that parkland alienation legislation identify parkland to be substituted for the parkland that is proposed to be alienated. *See Office of Parks, Recreation and Historic Preservation, Handbook on the Alienation and Conversion of Municipal Parkland*, p. 20 (2005). Identification of substitute parkland is important in determining the environmental significance of the action. Typically, most such legislation either identifies substitute parkland or spells out the requirement that alienated parkland must be replaced with parkland of equivalent or greater value.

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[2] Actions of the State legislature are exempt from SEQRA. 6 NYCRR §617.5(c)(37).

Parkland alienation clearly affects the environment. Over eighty years ago in *Williams v. Gallatin* (229 N.Y. 248, 253), the Court of Appeals explained "[a] park is a pleasure ground set aside for the recreation of the public, to promote its health and enjoyment." It needs no citation to say that parks such as Central Park in Manhattan, Prospect Park in Brooklyn, Washington Park in Albany and many others are State and national treasures. They are the breathing space of New York's metropolitan areas. Smaller neighborhood parks, as do larger parks, provide essential playground and recreational space for young families, small children and senior citizens. "Municipally owned parkland and open space are nonrenewable resources which are carefully preserved in all communities. Once lost to another use, open space is difficult to recover." *Handbook on the Alienation and Conversion of Municipal Parkland, supra*, p. 3 (2005).

Based on the foregoing, I conclude that a municipal resolution requesting the State legislature's permission to alienate parkland falls within the definition of an "action" under SEQRA since municipalities, including counties, cities, towns and villages, are "agencies," as defined by SEQRA, and the MHRL §40 resolution is discretionary and it affects the environment. *See Chatham Green, Inc. v. Bloomberg*, 1 Misc.3d 434 (Sup. Ct. NY Co. 2003).

The timing question is more complex than the question of whether a decision to alienate parkland is an action because there are several steps in the alienation process, beginning with the municipal home rule resolution and ending in the actual alienation of parkland. This is typical of many actions that involve SEQRA. Indeed, the SEQRA regulations recognize that "[a]ctions commonly consist of a set of activities or steps." 6 NYCRR §617.3(g). SEQRA contains several statements that strongly suggest that the process must be complete *prior* to the municipal home rule resolution requesting authority to alienate parkland. The SEQRA regulations state that, "[n]o agency involved in an action may undertake, fund or approve the action until it has complied with the provisions of SEQR. . ." 6 NYCRR §617.3(a); and, "[t]he basic purpose of SEQRA is to incorporate the consideration of environmental factors into the existing planning, review and decision-making processes of state, regional and local government agencies *at the earliest possible time.*" 6 NYCRR §617.1©; emphasis supplied. The phrase "at the earliest possible time" means the point in time when SEQRA can still play a meaningful role in the decision-making process. *See Tri-County Taxpayers Ass'n, Inc. v. Town Board of Queensbury*, 55 N.Y.2d 41, 46-47 (1982).

In *Tri-County, supra*, the Court of Appeals held that town board resolutions to create a sewer district constituted an "action" requiring the preparation of environmental impact statement prior to the board's adoption of its initiating resolutions. Somewhat akin to the alienation process, the formation of the sewer district in *Tri-County* involved a series of steps that, in relevant part, began with the adoption of a resolution affirming that the formation of the district was in the public interest. The resolution to create the district was subject to both voter and State Comptroller approval. Once both of these approvals were obtained the town board voted to issue the bonds to finance the district. With respect the question of timing, the Court stated:

> . . . an environmental impact statement should have been prepared and made available to the members of the town board and the public prior to the adoption of the resolutions of authorization in July, 1979. It is accurate to say, of course, that by actions of rescission later adopted the town board could have reversed the action authorizing the establishment of the sewer district. As a practical matter, for several reasons, however, the dynamics and freedom of decision-making with respect to a proposal to rescind a prior action are significantly more constrained than when the action is first under consideration for adoption. Thus, although not legally conclusive the initiatory action by the town board might well have been practically determinative. In effect the purpose of SEQRA is to assure the preparation and availability of an environmental impact statement at the time any significant authorization is granted for a specific proposal. . . [*Tri-County, supra*, at 46-47.]

In keeping with the Court of Appeals rationale in *Tri-County* and SEQRA's policy declarations discussed above, I conclude that a municipality must complete SEQRA before adopting its resolution pursuant to Municipal Home Rule Law §40 to alienate parkland. Additionally, I stated above that parkland alienation legislation typically identifies the substituted parkland or spells out that parkland of equivalent value must be substituted for the proposed alienated parkland. SEQRA's timing policies are enhanced by having the SEQRA process completed at the municipal resolution stage as it helps to ensure that offsetting or mitigation measures for the lost parkland will be incorporated into the State legislation.

Sincerely,

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