

STUDENT ARTICLES

IMPROVING COMMUNITY CHARACTER ANALYSIS IN THE SEQRA ENVIRONMENTAL IMPACT REVIEW PROCESS: A CULTURAL LANDSCAPE APPROACH TO DEFINING THE ELUSIVE “COMMUNITY CHARACTER”

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INTRODUCTION

Community character is the sense of place and identity that is formed through the dynamic interaction of people with their surroundings. It is what makes a house a home and a series of houses a neighborhood. It is a community’s perception of itself and is “shaped by time, experience, and action within the social, economic, historic, environmental, and cultural contexts of a specific place. As a composition of these various elements, community character is an intangible manifestation of a community’s relationship with the landscape—its cultural landscape.”¹

The cultural landscape of an area is formed by the interaction of people and places and is imbued with the historic and cultural influences that make it special on a personal, regional, or national level.² Thomas Cole, one of the Hudson River School painters,

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¹ Katie Ghilain, *Cultural Landscape Preservation in the Hudson Valley: St. Lawrence Cement’s Place in the Evolving Legal Protection of “Place”* 7 (May 5, 2006) (unpublished B.A. thesis, Vassar College) (on file with journal).

² See Paul Groth, *Frameworks for Cultural Landscape Study*, in

once noted that “[s]imple nature is not quite sufficient. We want human interest, incident and action to render the effect of landscape complete.”³ Dolores Hayden remarked:

The cultural landscape is by definition unique—that combination of natural landforms and buildings that defines a particular place or region. It is the creation of the women, men and children who lived their lives within that landscape. Preserved and interpreted for the public, the cultural landscape tells us who we are as Americans, far more effectively than most individual works of architecture or exhibits in museums ever can.⁴

Harvey Flad explains that “[t]he cultural landscape is a composite of a diversity of associations, artistic and historical, within the context of the natural frame of a scenic view.”⁵ Community character is the personality or ambiance that emerges from a cultural landscape.

The loss of any element of one’s sense of place can adversely impact a community’s identity,⁶ as visual cues are “bound up with one’s personhood” and understanding of “continuity and personal identity.”⁷ The World Trade Center, a symbol of American strength and a prominent feature of the famous New York City skyline, is a powerful example. Beyond the tragedy of the lives lost as a result of its destruction, the visual loss continues to haunt those who were accustomed to seeing the World Trade Center on a daily basis, those who viewed it when visiting or passing by, and even those who saw it only on television or in photographs. “It is the ability of these ‘ordinary’ landscapes to invoke an emotional response that gives them meaning and significance, and makes

UNDERSTANDING ORDINARY LANDSCAPES 1 (Paul Groth & Todd W. Bressi eds., 1997), *quoted in* Ghilain, *supra* note 1, at 3.

³ RODERICK NASH, *WILDERNESS AND THE AMERICAN MIND* 80 (1982) (quoting Thomas Cole).

⁴ Dolores Hayden, *Foreward* to *PRESERVING CULTURAL LANDSCAPES IN AMERICA*, at vii, ix (Arnold R. Alanen & Robert Z. Melnick eds., 1997).

⁵ *Community Character* 7 (Mar. 9, 2005) (testimony by Harvey Flad, prepared for Scenic Hudson and Warren P. Reiss, General Counsel) (on file with journal).

⁶ *See id.* at 4.

⁷ Donna Jalbert Patalano, *Police Power and the Public Trust: Prescriptive Zoning through the Conflation of Two Ancient Doctrines*, 28 B.C. ENVTL. AFF. L. REV. 683, 694 (2000–2001) (quoting Margaret Jane Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350, 362, 365 (1986)).

them worthy of legal protection.”⁸

A drastic change in a city skyline is a vivid example of the impact a particular change in the cultural landscape can have on a community’s character. Ill-suited development projects imperil many communities’ characters and cultural landscapes. The Hudson River Valley in New York, for example, is one of the most imperiled cultural landscapes, due to frequent power plant siting proposals, industrialization, and sprawl.⁹ However, not all changes in the landscape are negative: communities grow and evolve over time to accommodate changing aesthetic and economic desires. Towns revitalize downtown districts, reorient traffic patterns, and build parks. Towns and developers rebuild or restore old buildings for different uses. Increasing energy demand requires the establishment of new facilities, and population growth increases the need for housing, schools, stores, offices, and recreational areas. A balance must be struck between the need for development and the preservation of a community’s sense of place.

The mechanisms that purport to contribute to this task, such as zoning ordinances and environmental impact review requirements, are inadequate at present. Zoning regulations deal only with a particular municipality’s aesthetic and land use desires, meaning that the broader areas and landscapes that might be impacted by a proposed project are left unprotected.¹⁰ The proposed St. Lawrence Cement (SLC) plant,¹¹ an enormous cement manufacturing facility that would have been located in a particularly scenic, historic, and nationally significant part of the Hudson River Valley,¹² provides an illustrative example. Not only

⁸ Ghilain, *supra* note 1, at 3.

⁹ The National Historic Trust declared the Hudson River Valley between Columbia-Greene Counties and New York City one of “America’s Eleven Most Endangered Historic Places” in 2000. Janet Kealy, *The Hudson River Valley: A Natural Resource Threatened by Sprawl*, 7 ALB. L. ENVTL. OUTLOOK J. 154, 156 (2002).

¹⁰ See *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1442 (1978).

¹¹ In 2001, the St. Lawrence Cement Co., LLC applied to the Department of Environmental Conservation (DEC) for permits to build a 2.6 million ton dry-process cement manufacturing facility on its property in the Town of Greenport and City of Hudson. St. Lawrence Cement Co., LLC, DEC No. 4-1040-00011/00001 (Recommended Decision & Hearing Report—Grandfathering Issue June 12, 2003).

¹² While the Hudson Valley used to be a place of widespread industry,

would this massive plant have marred the scenic views captured in Hudson River School painter Frederic Church's paintings—views that are still visible from his estate, Olana—but it also would have had a large impact on the way that the residents of the Hudson Valley experience their environment on a daily basis.¹³

The community that would have been impacted by the SLC proposal reached beyond the towns in which it would have been sited,¹⁴ as there would have been noise, air, and light pollution disrupting the serenity of the area, as well as significant visual impacts resulting from the facility and its steam plume. The plant would have ruined the scenic views from across and along the river upon which many towns' economies and recreational

largely because of the transportation opportunities provided by the river, its economy has since become dominated by heritage tourism in recognition of the significance of the area for the development of America's first major art movement and the establishment of an appreciation for the environment as something to cherish instead of a threatening wilderness to confront and destroy. St. Lawrence Cement Co., LLC, DEC No. 4-1040-00011/00001 at 4–5 (Objection to Consistency Certification by the Department of State, Apr. 19, 2005) [hereinafter St. Lawrence Cement Objection]; cf. NASH, *supra* note 3, at 67 (discussing the 19th Century evolution of American attitudes toward the wilderness). Congress created the Hudson River Valley National Heritage Area in 1996, upon recommendation by the National Park Service that is it the “landscape that defined America . . . an exceptionally scenic landscape that has provided the setting and inspiration for new currents of American thought, art, and history.” David S. Sampson, *Maintaining the Cultural Landscape of the Hudson River Valley: What Grade Would the Hudson River School Give Us Today?*, 8 ALB. L. ENVTL. OUTLOOK J. 213, 220 (2004) (citing HUDSON RIVER VALLEY GREENWAY, HUDSON RIVER VALLEY NATIONAL HERITAGE AREA MANAGEMENT PLAN 16, 19 (2002), available at <http://www.hudsongreenway.state.ny.us/heritage/NHAManagementPlan.pdf>). Congress noted that “the outstanding scenic quality of the . . . Valley inspired the works of early American writers, artists, and designers; contributed to an appreciation of the national environment; fostered early environmental activism; and is reflective in existing historic properties.” *Id.* at 221–22. The Hudson River was designated as an American Heritage River by President Clinton in 1998 in order to encourage “natural resource and environmental protection, economic revitalization, and historical and cultural preservation.” *Id.* at 221 (citing Exec. Order No. 13,061, 62 Fed. Reg. 48,445 (Sept. 11, 1997)). These designations are a testament to the widespread recognition that it is a place of national importance that should be carefully protected.

¹³ See Flad, *supra* note 5, at 13 (discussing the cultural significance of the views along the Hudson).

¹⁴ See St. Lawrence Cement Co., LLC, DEC No. 4-1040-00011/00001 (Second Interim Decision of the Commissioner Sept. 8, 2004), available at <http://www.dec.ny.gov/hearings/11874.html> [hereinafter St. Lawrence Cement Second Interim].

activities depend. Thus, the zoning ordinances of the host municipalities specifying industrial use were not sufficient to encompass the full impacts of the proposed cement plant. The project's potential impacts on the entire Hudson Valley's community character were relevant, and they were a driving force behind the plant's ultimate defeat.¹⁵

Environmental impact review has the most potential to preserve cultural landscapes in New York, as New York's "little NEPA," the State Environmental Quality Review Act (SEQRA), requires the evaluation of a project's impacts on "community or neighborhood character."¹⁶ However, community character is never defined in SEQRA or in its corresponding regulations, so neither the developers nor the reviewing agencies or courts know what it should entail.¹⁷ As a result, it is used inconsistently, which

¹⁵ See St. Lawrence Cement Objection, *supra* note 12. In an unprecedented 19-page letter, Secretary of State Randy Daniels issued a negative coastal consistency determination pursuant to New York State's Coastal Management Program, N.Y. EXEC. LAW § 910-22 (Consol. 2007); N.Y. COMP. CODES R. & REGS. tit. 19, § 600.5 (2007), stating that "[t]he proposed project conflicts with the community character of the City of Hudson," and finding that the proposal would detract from the "appeal and identity" of the area. *Id.* at 13–14. For a discussion of the policies under which the plant was denied and their relevance to the community character inquiry, see Ghilain, *supra* note 1. SLC withdrew the proposal shortly after receiving the letter. Press Release, St. Lawrence Cement, St. Lawrence Cement Withdraws from Permitting Process in Greenport, New York (Apr. 24, 2005), available at <http://www.stlawrencecement.com/CA/ENC/id/61131/mod/home/page/news.html>.

¹⁶ SEQRA is a "little NEPA," which is a state version of the National Environmental Policy Act, or "NEPA." Several states have "little NEPAs," but New York's is unique in its comprehensive definition of environment. SEQRA applies to actions that "(i) are directly undertaken by an agency; or (ii) involve funding by an agency; or (iii) require one or more new or modified approvals from an agency or agencies." N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(b)(1) (2007). Under SEQRA, "[e]nvironment" means the physical conditions that will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, resources of agricultural, archaeological, historic or aesthetic significance, existing patterns of population concentration, distribution or growth, existing community or neighborhood character, and human health." In addition, one of the criteria indicating an adverse impact on the environment is "the impairment of the character or quality of important historical archaeological, architectural, or aesthetic resources or of existing community or neighborhood character." § 617.2(l).

¹⁷ City Environmental Quality Review (CEQR) regulations define "neighborhood character," but these guidelines are both insufficient to address the full cultural landscape and limited in application to New York City. See CITY ENVIRONMENTAL QUALITY REVIEW TECHNICAL MANUAL 3H-1 (2001),

results in the failure of SEQRA both to achieve its purpose¹⁸ and to protect cultural landscapes and the corresponding communities' characters.

The only way to ensure that developments are appropriate and that cultural landscapes are protected is to devise a methodology for understanding a community's character, a task which has thus far proven elusive.¹⁹ Cultural landscapes are the dynamic result of the interaction of humans with the land and are imbued with cultural values.²⁰ Because a community's character is derived from the cultural landscape, it is essential that the evaluator use an area's cultural landscape to understand its community character. This enables a more thorough evaluation of a proposed project than is currently achieved, such that the project's impacts can be mitigated to more effectively protect a community's character.

This article seeks to improve the means of protecting community character under SEQRA by proposing a multidisciplinary, cultural landscape-inspired methodology for use in environmental impact statement (EIS) analysis. The methodology is designed to elucidate the components of a cultural

available at <http://www.nyc.gov/html/oec/html/ceqr/ceqrpublish.shtml>.

¹⁸ See N.Y. ENVTL. CONSERV. LAW § 8-0101 (Consol. 2007) ("It is the purpose of this act to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state.").

¹⁹ The issues associated with community character as an ill-defined consideration in SEQRA are well-recognized, and the new Policy Division of the New York State Department of Environmental Conservation (DEC), the agency charged with implementing SEQRA, has already held one inconclusive round table discussion on the topic. Telephone Interview with Paul Bray, Policy Office, New York State Department of Environmental Conservation (Nov. 16, 2007).

²⁰ The National Park Service Conservation Study Institute, along with QLF/Atlantic Center for the Environment, developed a handbook for managers of cultural landscapes. They discuss the challenges faced by those dealing with cultural landscape management, including the fact that "[t]he multidisciplinary aspect of cultural landscapes challenges our traditional approach to resource management, which has been discipline-oriented and has created a dichotomy between nature and culture . . . [which] has proved to be a barrier to developing an integrated approach to landscape management." BARBARA E. SLAIBY & NORA J. MITCHELL, A HANDBOOK FOR MANAGERS OF CULTURAL LANDSCAPES WITH NATURAL RESOURCE VALUES 6 (2003), *available at* <http://www.nps.gov/csi/csihandbook/home.htm>.

landscape approach to defining the community character of an area. The benefit of this method of discussing community character is its ability to take seemingly disparate lines of information about the various historic, cultural, archaeological, economic, aesthetic, and social elements of an area and turn them into a coherent account of the impact that a proposed project will likely have on a community. The analysis draws upon information already gathered pursuant to other impact considerations required under SEQRA and provides a means of aggregating and analyzing the information according to what it indicates about a community's self-defined and dynamic character. The methodology should serve as a model for community character assessment in impact statements under SEQRA and other "little NEPAs," as well as in other contexts.²¹

Part I below discusses how zoning ordinances, environmental impact statements, and the courts currently address community character. Part II explains why local zoning and land use control regulations are inadequate to protect community character and why a well-defined means of discussing community character via a cultural landscape approach has the potential to improve the SEQRA process while simultaneously providing additional protection. Part III lays out the theory guiding the analysis and the methodology itself, including guidelines for preliminary determinations prior to commencing the community character analysis, the interrelated elements of community character, and the meaning of significance²² in the context of community character. It also justifies the approach and addresses potential criticisms. Part IV explains how this methodology might be implemented as a guidance document, such as a program policy,²³ that would provide a flexible set of considerations that can be tailored to

²¹ Other contexts may include contextual zoning, the creation of special districts, and historic or landmark preservation.

²² Significance in SEQRA refers to both the threshold finding required for an EIS to be prepared, N.Y. COMP. CODES R. & REGS. tit. 6, § 617.7 (2007), and the extent to which a project will adversely impact the environment (including community character) when determining whether environmental impacts outweigh social and economic concerns. § 617.11(d).

²³ For an example of the type of guidance document proposed, see the appended "Community Character" guide, which is modeled after the CEQR guide to "Neighborhood Character." See CITY ENVIRONMENTAL QUALITY REVIEW TECHNICAL MANUAL, *supra* note 17, at 3H-1.

individual areas or projects in the environmental review process and elsewhere.

I. COMPONENTS OF THE PROBLEM

A. *Land Use Planning*

Land use planning and decision making has consistently been recognized as being the province of state and local governments.²⁴ The courts accord significant deference to communities seeking to protect their character by enacting regulations and zoning ordinances to promote aesthetic values, pursuant to the broad reach of the “public welfare” that the states are charged with protecting.²⁵ Zoning ordinances and comprehensive plans allow municipalities to define the contours of the community’s identity and character, and they are usually upheld so long as they are tied to more traditional, yet broad, general welfare reasoning.²⁶ This standard reduces the likelihood that a municipality can enforce oppressive homogeneity or discriminate against unpopular groups under the guise of community character.²⁷

Comprehensive plans allow communities to “maintain their neighborhood character through common, implied and established expectations underlying the current state of the community, while at the same time generally recognizing private property rights.”²⁸ Unlike zoning, comprehensive plans involve open communication and work by urban planners who are less likely than town planning board members to be motivated by prejudices,²⁹ include long term goals and desires regarding future development, and are adopted

²⁴ The Supreme Court upheld local zoning as a valid exercise of the state’s police power to protect the public health, safety, morals, or general welfare in *Village of Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926). See Patalano, *supra* note 7, at 683, 687.

²⁵ See, e.g., *Berman v. Parker*, 348 U.S. 26, 33 (1954) (“The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is well within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”) (internal citation omitted).

²⁶ Patalano, *supra* note 7, at 693, 696.

²⁷ *Developments*, *supra* note 10, at 1446–47, 1452–53.

²⁸ Patalano, *supra* note 7, at 697.

²⁹ *Developments*, *supra* note 10, at 1453.

after the legislative body approves them by vote.³⁰

Both zoning ordinances and comprehensive plans are limited in scope to the particular municipality in which they are designed and adopted, meaning that they ignore the impact of the municipality's regulations on others in the region, including residents and the tourists upon whom nearby towns depend economically.³¹ Also, not all municipalities have zoning or comprehensive plans. Regional plans are rare, but they do exist.³²

B. SEQRA

The impacts of a proposed action on the community character or cultural landscape of an area are part of the environmental review process. Community character impact analysis is required implicitly under the National Environmental Policy Act (NEPA)³³ and explicitly under New York State's "little NEPA," the State Environmental Quality Review Act (SEQRA).³⁴ In contrast to NEPA, SEQRA has a broader definition of "environment" that explicitly requires consideration of a project's impact on "existing community or neighborhood character."³⁵ Unlike the "essentially

³⁰ See Patalano, *supra* note 7, at 699.

³¹ *Developments*, *supra* note 10, at 1442.

³² See, e.g., HUDSON RIVER VALLEY GREENWAY, COMMUNITY PLANNING GUIDE (2005), available at <http://www.hudsongreenway.state.ny.us/commcoun/complnguide2ndedition.pdf>.

³³ National Environmental Policy Act of 1969 § 101, 42 U.S.C. § 4331 (2006). Section 101 of NEPA requires the promotion of the general welfare and the creation and maintenance of conditions "under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." § 101(a). In addition, it requires the use of all practicable means to "assure for all Americans safe, healthful, productive, and [a]esthetically and culturally pleasing surroundings," § 101(b)(2), and "preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice." § 101(b)(4). In addition, the Council on Environmental Quality regulations require that federal agencies utilize a systematic, "inter-disciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts" in planning and decision making which may have an impact on man's environment. 40 C.F.R. § 1502.6 (2007).

³⁴ State Environmental Quality Review Act, N.Y. ENVTL. CONSERV. LAW § 8-0101 *et seq.* (2007).

³⁵ N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(1) (2007) ("*Environment* means the physical conditions that will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, resources of agricultural,

procedural” NEPA,³⁶ SEQRA has a substantive component that requires that the impacts be weighed, balanced, rationalized, and “avoided or minimized to the maximum extent practicable.”³⁷

The 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.”³⁸ It often serves to fill the gaps left in the absence of zoning regulations, other land use plans, or between the two.³⁹ In the case of community character, SEQRA provides explicit recognition of its importance by including it as part of its definition of “environment,” in addition to land, air, water, resources of historic or aesthetic significance, minerals, and several other physical components.⁴⁰ Because SEQRA includes “community or neighborhood character” in its definition of environment and in its criteria for determining the significance of the potential adverse environmental impacts, it is well-suited for an exploration of both the importance and the applicability of the concept.

When the lead agency reviews the project proponent’s Environmental Assessment Form⁴¹ and determines that a project is likely to have a significant adverse impact on the environment,⁴²

archaeological, historic or aesthetic significance, existing patterns of population concentration, distribution or growth, existing community or neighborhood character, and human health.”) (emphasis added). In addition, one of the criteria indicating an adverse impact on the environment is “the impairment of the character or quality of important historical archaeological, architectural, or aesthetic resources or of existing community or neighborhood character.” § 617.7(c)(1)(v).

³⁶ Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978).

³⁷ § 617.11(d).

³⁸ § 617.1(c).

³⁹ John W. Caffry, *The Substantive Reach of SEQRA: Aesthetics, Findings, and Non-Enforcement of SEQRA’s Substantive Mandate*, 65 ALB. L. REV. 393, 402 (2001).

⁴⁰ § 617.2(l).

⁴¹ Project proponents are required to prepare an Environmental Assessment Form (EAF), which includes information describing “the proposed action, its location, its purpose and its potential impacts on the environment.” § 617.2(m). The lead agency reviews the EAF to determine whether a project is likely to have a *significant* adverse impact on the environment. If so, a full Environmental Impact Statement must be prepared. *Id.*

⁴² The lead agency is often a town planning board that must also grant approval under municipal ordinances. The lead agency must be established

the agency proposing the action must prepare or request an environmental impact statement (EIS).⁴³ An action's impact is significant if there is "impairment of the character or quality of important historical, archaeological, architectural, or aesthetic resources or of existing community or neighborhood character."⁴⁴ Thus, unlike NEPA, where social impacts are insufficient to trigger the preparation of an environmental impact statement,⁴⁵ negative impacts on the community character of an area are sufficient to trigger the preparation of an EIS under SEQRA.⁴⁶ If an EIS is required, the lead agency may choose to determine the contents of the EIS through scoping hearings.⁴⁷ The project sponsor then prepares the draft EIS, which must contain "a concise description of the proposed action, its purpose, public need and benefits, including social and economic considerations," describe the environmental setting of the affected areas, and provide information regarding the "potential adverse environmental impacts," both short- and long-term, as well as impacts that cannot be mitigated, environmental resources unavoidably lost, growth-inducing aspects of the action, impact on the use and conservation of energy, solid waste, and agricultural development, mitigation measures, and reasonable alternatives.⁴⁸ Once prepared, the lead agency reviews the draft for adequacy and may choose to hold a public hearing and accept comments on the draft.⁴⁹ The project sponsor then revises the EIS if necessary, responds to the

before a decision of significance is made. § 617.6(b). The definition of "significance" is located in § 617.7(c)(1).

⁴³ § 617.1(d).

⁴⁴ § 617.7(c)(1)(v).

⁴⁵ 40 C.F.R. § 1508.14 (2007) (stating that the definition of "[h]uman environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement.").

⁴⁶ The criteria for determining the significance of a project include "the creation of a material conflict with a community's current plans or goals as officially approved or adopted" and "the impairment of the character or quality of important historical, archaeological, or aesthetic resources or of existing community or neighborhood character." N.Y. COMP. CODES R. & REGS. tit. 6, § 617.7(c)(1)(iv), (v) (2007); *see also In re Village of Chestnut Ridge v. Town of Ramapo*, 841 N.Y.S.2d 321, 339 (N.Y. App. Div. 2007).

⁴⁷ § 617.8.

⁴⁸ § 617.9(b)(5)(i)-(iv).

⁴⁹ § 617.9(a)(2), (a)(4).

comments, and submits the final EIS to the lead agency, which prepares findings regarding whether to approve or disapprove a project.⁵⁰ The lead agency may also determine that a supplemental EIS is required.⁵¹

C. *How Community Character Is Currently Addressed Under SEQRA*

1. *Community Character in EISs*

“Community character” is not defined in SEQRA, and this has resulted in uncertainty and inconsistency in use among project proponents and decisionmakers.⁵² The community character section of the EIS sometimes includes an analysis of a proposed project’s consistency with established land use plans and concerns about community services like fire, police, and education needs.⁵³ In some EISs, it focuses heavily on visual resources and aesthetics.⁵⁴ In others, community character impacts are limited to a single sentence stating that the proposed structure will be similar in character to existing structures on or near the property.⁵⁵ The other elements of a community’s character, such as historic and archaeological resources that are a source of local or national pride or that evoke a certain ambiance, are often considered only as separate factors by way of a superficial inquiry into whether there are any important archaeological sites located on the land or whether there are any listed or eligible sites from the National

⁵⁰ § 617.9(a)(5), § 617.11(d).

⁵¹ § 617.9(a)(7).

⁵² “Decisionmakers” include the lead agencies overseeing the environmental review, the ALJs charged with reviewing lead agency determinations, and the courts that then review ALJ determinations. They also include other involved agencies, such as government agencies like the DEC that must decide whether to issue permits or grant approvals for other aspects of the project.

⁵³ See, e.g., CLOUGH HARBOUR & ASSOCIATES LLP, LOWE’S OF POTSDAM DRAFT ENVIRONMENTAL IMPACT STATEMENT 11-6 (2007), available at http://www.vi.potsdam.ny.us/Lowes/DEIS/Final_Version_DEIS/FinalVersionDEISindex.html.

⁵⁴ See, e.g., THE L.A. GROUP LANDSCAPE ARCHITECTURE AND ENGINEERING, P.C. ET AL., DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR BELLEAYRE RESORT AT CATSKILL PARK 3-141 (2003) (on file with journal).

⁵⁵ See, e.g., FREUDENTHAL & ELKOWITZ CONSULTING GROUP, INC., DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR SITE PLAN APPROVAL GREEK ORTHODOX CHURCH OF THE HAMPTONS 169 (2007) (on file with journal).

Historic Register in the affected area.⁵⁶ While the presence or absence of certain resources or designated sites is an important component of the process, this should not be the end of the inquiry. Geographic proximity to a proposed project does not illuminate the site's importance to the community affected by a given project's impact on these resources; a community character analysis makes this connection.

2. *Community Character in Agency, Administrative, and Court Decisions*

Community character has gradually gained recognition and legitimacy in agency, administrative, and court decisions. The first time that the Nuclear Regulatory Commission (NRC) recommended that a power plant be denied,⁵⁷ it stated that the plant would have had an unacceptable impact on the national, historic, cultural, and scenic resources of the area,⁵⁸ all of which are components of the area's character.⁵⁹ In *Chinese Staff & Workers Association v. City of New York*,⁶⁰ the New York Court of Appeals recognized the legitimacy of community character as an "environmental impact," finding "that existing patterns of population concentration, distribution or growth and existing

⁵⁶ See, e.g., CLOUGH HARBOUR, *supra* note 53, at 7-1.

⁵⁷ The power authority of the State of New York wanted to build the Greene County Nuclear Power Plant, but the NRC's Final EIS revealed unacceptable impacts. Carl H. Petrich, *Aesthetic Impact of a Proposed Power Plant on an Historic Wilderness Landscape*, in PROCEEDINGS OF OUR NATIONAL LANDSCAPE 477 (Gary H. Elsner & Richard C. Smardon, coordinators, 1979), available at http://www.fs.fed.us/psw/publications/documents/psw_gtr035/psw_gtr035_11_petrich.pdf. Notably, the impacts deemed unacceptable were elements of community character, which Flad had previously laid out in his community character analysis.

⁵⁸ Ghilain, *supra* note 1, at 30 (citing Petrich, *supra* note 57, at 483).

⁵⁹ Flad prepared an assessment of the community character of the area for the Greene County Nuclear Power Plant (GCNPP), setting forth for the first time a methodology for defining a community's character and the potential impacts of a proposed project on it. The fact that the GCNPP was the first recommended denial of a nuclear power plant and the fact that it was based largely on elements that comprise community character suggests that Flad's analysis is a legitimate form and style of inquiry. It formed the basis of his analysis of community character in the St. Lawrence Cement plant proposal as well, and the methodology contained herein also draws from his community character work in these two cases. See Flad, *supra* note 5, at 1.

⁶⁰ *Chinese Staff & Workers Ass'n v. City of New York*, 502 N.E.2d 176 (N.Y. 1986).

community or neighborhood character are physical conditions [that] . . . require an agency to consider the potential long-term secondary displacement of residents and businesses in determining whether a proposed project may have a significant effect on the environment.”⁶¹

The rulings issued by administrative law judges (ALJs) and New York State Department of Environmental Conservation (DEC) Commissioners regarding community character in the environmental review process have been inconsistent, but they do suggest several things with regard to the state of the community character inquiry at this point. First, the elements of community character intertwine with other elements that are considered in the EIS, and some decisionmakers interpret this overlap as precluding community character as an independent inquiry.⁶² Other decisionmakers use the overlap as a way to limit or define community character in a particular case,⁶³ and still others believe that independent evaluation is nevertheless required.⁶⁴ Second,

⁶¹ *Id.* at 181. This case involved a challenge under CEQR, New York City’s implementation of SEQRA, to the environmental impact statement for a proposed luxury condominium. The Court of Appeals held that the EIS was insufficient because it did not include an evaluation of secondary impacts like population displacement, which is part of the “neighborhood character” inquiry. *Id.*

⁶² Commissioner Crotty determined that the community character impacts could be adequately considered under other impacts with regard to the St. Lawrence Cement project, stating that they are “often intertwined with other environmental issues and can be addressed in the context of those specific issues.” St. Lawrence Cement Second Interim, *supra* note 14. Also, regarding the Belleayre project, Deputy Commissioner Johnson concluded that because community character is intertwined, it should only be considered after the record is developed on particular environmental issues. Crossroads Ventures, Belleayre Resort at Catskill Park, DEC No. 0-9999-00096/00001, 00003, 00005, 00007, 00009, 00010 at 72 (Interim Decision of the Deputy Commissioner, Dec. 29, 2006) [hereinafter Crossroads Ventures Interim], *available at* http://www.dec.ny.gov/docs/legal_protection_pdf/crossroadsid.pdf.

⁶³ In *Lane Construction*, the ALJs noted that most of the impacts had otherwise been designated as issues for adjudication and held only that there was an adjudicable issue regarding the project’s adverse *visual* impacts on the community’s character. Lane Constr. Co., DEC No. 4-3830-00046/0001-0 (Interim Issues Ruling 2, Feb 22, 1996), *available at* <http://www.dec.ny.gov/hearings/11437.html> [hereinafter Lane Construction Interim 2].

⁶⁴ In upholding the ALJ’s ruling regarding the adjudication of community character impacts for the Palumbo Block Company mine, Commissioner Crotty stated that “parsing out community character by addressing only potential visual

community character can include a variety of impacts, including visual, noise, traffic, steam, lighting, pollution, recreation, water resources, human health, and occasionally economics.⁶⁵ Economics are considered primarily in the balancing process after the environmental impacts have been identified;⁶⁶ however, they are relevant to the community character analysis when there is a development study outlining smart growth principles that rely on particular physical aspects of the community and surrounding area.⁶⁷ In addition, ALJs and other decisionmakers have found

and noise impacts unduly excludes a thorough review of the proposed mine impacts on the community setting. . . . Accordingly, the issue of 'community character' cannot necessarily be viewed in isolation and may include a myriad of diverse components." Palumbo Block Co., Inc., DEC No. 4-1020-00035/00001 (Interim Decision Jun. 4, 2001), *available at* <http://www.dec.ny.gov/hearings/11632.html> [hereinafter Palumbo Interim].

⁶⁵ Susan F. Weber and Robert P. O'Connor noted that negative impacts upon certain elements of community character (visual aesthetics, quiet country atmosphere, recreational resources, thriving small businesses that depend on clean air and quiet, and health of residents) would result from increased truck traffic, runoff into the Kinderhook Creek, vibrations, noise and dust, the consequences of mining itself, and the eventual loss of Snake Hill, a "prominent geographical feature of the community" that would have been essentially erased by the mining proposed. Lane Construction Interim 2, *supra* note 63. Also, regarding the Palumbo Block Company mine, Commissioner Crotty agreed with the ALJ, who cited the Intervenors' contention that community character impacts "relate largely to the issues of noise and visual impacts, and to the importance of tourism, recreational and agricultural activities in the economy and social fabric of the area surrounding the proposed mine." Palumbo Interim, *supra* note 64 (citing Palumbo Block Co., Inc., DEC No. 4-1020-00035/00001 (Ruling 3: Ruling on Issues and Party Status Feb. 9, 2001) *available at* <http://www.dec.ny.gov/hearings/11631.html>). Regarding the St. Lawrence Cement plant, Commissioner Crotty included "scenic views and vistas, absence of pollution-created haze, [and] water resources" as environmental considerations that might be components of community character, where appropriate; however, she also stated that impacts on property values and economic-related matters are not stand-alone environmental impacts, though they may be relevant to the final balancing of environmental impacts versus economic benefits. St. Lawrence Cement Second Interim, *supra* note 14.

⁶⁶ Lane Construction Interim 2, *supra* note 63.

⁶⁷ Crossroads Ventures, Belleayre Resort at Catskill Park, DEC No. 0-9999-00096/00001, 00003, 00005, 00007, 00009, 00010, at 123 (Ruling 3: Ruling on Issues and Party Status Sept. 7, 2005), *available at* <http://www.dec.ny.gov/hearings/11135.html> (noting that the economic development studies suggested that community character is defined by the hamlets and villages in a unique environmental setting surrounded by the Catskill Forest Preserve, quality of life is a paramount concern, and while the economic development studies suggest that a resort facility in the area is compatible with the community visions, major tourist facilities should not be in the hamlets and villages; instead, a year-round

that neighborhood gentrification,⁶⁸ a quadrupled town population due to a proposed development,⁶⁹ traffic and parking problems arising from a proposed sports stadium,⁷⁰ and lower property values and future commercial development⁷¹ are also part of the inquiry. Third, the affected area that should be considered in the context of community character can be broader than the municipality in which it will be located.⁷²

Fourth, at the moment, there is a tendency in the SEQRA process for project proponents and the DEC to rely on compatibility with zoning regulations and economic development studies as the sole indicators of community character.⁷³ While the courts appear to be more accepting of a broader, comprehensive notion of community character, the Commissioners of the DEC and other decisionmakers are often content to rely on pre-determined zoning and land use plans when making decisions regarding issues to be adjudicated or the weight of community character impacts.⁷⁴ With the exception of one case, however, decisionmakers generally consider local zoning ordinances to be evidence of community character and worthy of consideration, but not determinative.⁷⁵

tourist market should mutually benefit both the proposed resort facility and the hamlets and villages).

⁶⁸ Palumbo Interim, *supra* note 64 (citing Chinese Staff & Workers Ass'n. v. City of New York, 502 N.E.2d 176, 180–81 (N.Y. 1986)).

⁶⁹ *Id.* (citing Tuxedo Conservation and Taxpayers Assoc. v. Town Bd. Of Tuxedo, 69 A.D.2d 320 (2d Dept. 1979)).

⁷⁰ *Id.* (citing H.O.M.E.S. v. New York State Urban Dev. Corp., 69 A.D.2d 222 (4th Dept. 1979)).

⁷¹ *Id.* (citing Meschi v. New York State Dep't of Env'tl. Conservation, 114 Misc. 2d 877 (Sup. Ct., Albany Co. 1982)). Note that this is contrary to *Lane Construction* and *St. Lawrence Cement*.

⁷² With regard to the St. Lawrence Cement proposal, Commissioner Crotty expanded the geographic range of the inquiry, noting that "local land use plans are not the only evidence of community character where . . . a project may have impacts on resources with recognized designated historic and cultural importance, such as the Olana State Historic Site." *St. Lawrence Cement Second Interim*, *supra* note 14.

⁷³ This is a common argument by applicants and the NYSDEC, and ALJs will sometimes defer to this reasoning. See *Crossroads Ventures Interim*, *supra* note 62, at 71–72.

⁷⁴ *Id.*

⁷⁵ The exception is *Belleayre*. See *supra* notes 62, 67 at 77. In *Lane Construction*, the ALJs first looked to see if there was a master plan or local zoning ordinance to consider, a "helpful but not necessary" element of the

New York has a strong history of “home rule,” such that local governments have broad powers to which the courts accord significant deference. Because land use has always been recognized as the province of state and local governments, there is concern that a town’s comprehensive plan might be disregarded by the DEC. However, rulings have clearly stated that the jurisdiction of the DEC does not change under SEQRA and that SEQRA is not limited by local laws.⁷⁶ While many applicants argue that home rule prevails and that consistency with local zoning ordinances or comprehensive plans is sufficient to evaluate compatibility with a town’s desired design, the general trend is for decisionmakers to require their consideration in addition to other factors.⁷⁷

Finally, it is clear from the inconsistencies in the opinions that there is little guidance with regard to how community character should be defined, the role of impacts considered elsewhere in the EIS in determining whether and how to adjudicate impacts on community character, and how exactly to deal with land use plans. On the applicant’s side, there is no information to help in outlining a community character analysis, in determining what the elements are or what the section should entail, or in crafting a Draft Environmental Impact Statement (DEIS) that properly defines community character and addresses the concerns embodied in SEQRA and in case law.

analysis. Lane Construction Interim 2, *supra* note 63. In the SLC case, Commissioner Crotty noted that “local land use plans are not the only evidence of community character where . . . a project may have impacts on resources with recognized designated historic and cultural importance, such as the Olana State Historic Site.” St. Lawrence Cement Second Interim, *supra* note 14. Deputy Commissioner Johnson suggested the opposite with regard to the Belleayre project, as he deferred to the DEC’s reliance on local land use plans and stated that it is the province of local governments to determine patterns of land use. Crossroads Ventures Interim, *supra* note 62, at 72. However, there is a suspended motion for reconsideration at this time that is based on the issue of the adequacy of local land use plans as the sole indication of community character, so it may be overturned. Telephone Interview with Marc Gerstman, Esq. (Nov. 21, 2007) (on file with journal).

⁷⁶ See *WEOK Broad. Corp. v. Planning Bd. of Lloyd*, 592 N.E.2d 778, 782 (N.Y. 1992).

⁷⁷ See discussion *supra* note 75.

II. ARGUMENT

A. *Local Zoning and Land Use Control Regulations Are Inadequate*

When a sponsor proposes an action that will have a significant environmental impact, zoning is an insufficient guide as to whether the impact will adversely affect the entire area's cultural landscape or its corresponding community character. First, a project's impacts are often felt beyond the municipality in which it is located. As a result, evaluating its compliance with the zoning restrictions and regulations of its home municipality will not adequately address the regional impacts of a given proposal. Similar to other environmental externalities that justify federal over state regulation, the visual changes and other impacts that often accompany actions that are subject to environmental review are not confined to the boundaries of the municipality in which the project will be located; this in turn justifies state oversight over locally sited projects.⁷⁸

The evaluation of a proposed project's impacts on the cultural landscape of an area should include the consideration of impacts on the broader experience of a place felt by all those affected. This is not unprecedented, as the DEC's visual impact analysis program policy requires that the visual assessment cover a five mile radius, which can spill outside of the community in which a project is sited.⁷⁹ Impacts to the landscape may adversely affect the tourism industry of towns and villages farther away that depend on certain visual cues and scenic landscapes to attract visitors, often in accordance with revitalization plans designed on the basis of smart growth and economic strategy. The Hudson Valley, for example, is a formerly industrially-based economy that is now driven by an appreciation of the scenic, historic, and cultural resources of the area and the recreational amenities that the water provides.⁸⁰ The towns and hamlets along the river gear much of their growth and tourism efforts to the resources provided by the scenic landscape,

⁷⁸ See *Developments*, *supra* note 10, at 1442.

⁷⁹ NEW YORK STATE DEP'T. OF ENVTL. CONSERV., *ASSESSING AND MITIGATING VISUAL IMPACTS: PROGRAM POLICY DEP-00-2* (2001), available at http://www.dec.ny.gov/docs/permits_ej_operations_pdf/visual2000.pdf.

⁸⁰ See *St. Lawrence Cement Objection*, *supra* note 12, at 13–14.

and the character of the towns reflects a desire to promote those values.⁸¹ Towns that are located across the river will be adversely impacted by some types of development; particularly affected will be those towns that depend on views that will be ruined by sights like barges moving up and down the river, light pollution, or a gigantic steam plume.⁸²

Second, zoning ordinances provide a static account of what a particular governing body decided the broad outline of a community should be at one point in time; however, the cultural landscape of an area is dynamic. While comprehensive plans and zoning regulations are often presumed to be evidence of a community's desired character,⁸³ treating these land use regulations as exclusive indicators ignores both SEQRA's focus on *existing* community or neighborhood character and the multidimensional nature of the cultural landscape that underlies community character. The evaluation of impacts on community character on a case-by-case basis permits municipalities to have greater flexibility and freedom to grow and change organically if desired. It also allows the process of document preparation and public comment to be more closely tailored to the specific situation. Blanket zoning provisions provide notice to future developers regarding a town's desired land use patterns, but they do not allow for public input regarding the full range of impacts a proposed project may have on the community, which is a necessary and important part of the environmental review process.

Finally, SEQRA's language suggests that zoning is a necessary component of the EIS, but community character is an independent inquiry. In the criteria for determining the significance of a proposed action, consistency with zoning ordinances and land use plans is listed as a separate factor for consideration from "the impairment of the character or quality of important historical, archaeological, architectural, or aesthetic

⁸¹ See Crossroads Ventures, LLC, Belleayre Resort at Catskill Park, Post-Issues Conference Brief of Catskill Preservation Coalition, Application No. 0-99999-00096/00005, at 22–24 (2004), available at <http://www.phoeniciatimes.com/e28/belleayre/CPCbrief.pdf> [hereinafter Crossroads Post-Issues].

⁸² St. Lawrence Cement Objection, *supra* note 12, at 14.

⁸³ See Crossroads Post-Issues, *supra* note 81, at 24–28.

resources or of existing community or neighborhood character.”⁸⁴ Had the desire been to rely solely on compliance with land use plans as a measure of the impact of a proposed project on community character, it would not be included as an independent element to evaluate. It is important to note that the community character analysis is not the usurpation of the local governments’ right to regulate land use, appearance, and character. Instead, the language of SEQRA suggests that its role is to protect this right, and the purpose of the community character methodology set forth in Part III is to provide a means of understanding and protecting the efforts of the local governments that will be affected.

B. *A Proper Community Character Analysis Will Improve the Efficiency and Effectiveness of the SEQRA Process While Simultaneously Protecting Community Character and Cultural Landscapes*

Many people, particularly developers and decisionmakers, feel that the environmental review process, in both SEQRA and NEPA, is an expensive and ineffective waste of resources that serves more as a defense against procedural challenge and delay than a means of internalizing the environmental impacts of a particular project.⁸⁵ Critics fault both SEQRA and NEPA for setting up a procedural framework for decision making that has resulted in the ossification of the process and the production of extensive EISs that increase delay and paperwork to an unnecessary extent, ultimately with little benefit since procedural compliance is the only requirement.⁸⁶ While the general notion is that EISs have led to a greater consideration of environmental impacts in the decision-making process and to less environmental damage, some suggest that adding a substantive requirement to the “essentially procedural”⁸⁷ NEPA would improve the process.⁸⁸

⁸⁴ N.Y. COMP. CODES R. & REGS. tit. 6, § 617.7(c)(1)(iv); § 617.7(c)(1)(v) (2007).

⁸⁵ Richard Ravitch & Hope Cohen, Op-Ed., *Building Blocks*, N.Y. TIMES, Aug. 5, 2007, at CY9, available at <http://www.nytimes.com/2007/08/05/opinion/nyregionopinions/05CIcohen.html?emc=eta1>.

⁸⁶ See, e.g., Stewart E. Sterk, *Environmental Review in the Land Use Process: New York’s Experience with SEQRA*, 13 CARDOZO L. REV. 2041 (1992) (examining the environmental impact statement requirements of SEQRA, and recommending a tax on development as an alternative).

⁸⁷ Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558

SEQRA already contains a substantive component, in that lead agencies have the authority to impose mitigation measures⁸⁹ and ultimately to deny projects that will have an unacceptable adverse impact on the environment, as revealed by the EIS and throughout the SEQRA process.⁹⁰ The substantive element of SEQRA is important because it is more likely to encourage the applicant to mitigate adverse impacts prior to the preparation of an EIS, since it is possible to mitigate the impacts to a point below the threshold of requiring an expensive EIS.⁹¹ Once an EIS is required, it is more likely to produce a useful, comprehensive evaluation that can be used both in decision making and in reducing a proposal's impact on the environment. Thus, SEQRA has the potential to improve the environmental review process and is a good place to experiment with the cultural landscape approach to community character proposed in this article.

The community character analyses in most EISs are currently

(1978).

⁸⁸ See, e.g., Jeffrey L. Carmichael, Note, *The Indiana Environmental Policy Act: Casting a New Role for a Forgotten Statute*, 70 IND. L.J. 613, 622 (1995) ("For NEPA to be more effective, Congress should amend the Act and make its substantive role clearer.").

⁸⁹ § 617.3(b). Of the 15 other states with "little NEPAs," a few have substantive components, including Minnesota and California. Neither Minnesota nor California, however, reference community or neighborhood character. See Minnesota Environmental Policy Act of 1973, MINN. STAT. § 116D.01 *et seq.* (2005); California Environmental Quality Act of 1970, CAL. PUB. RES. CODE § 21000 *et seq.* (2007). In contrast, Virginia's little NEPA is purely procedural and several states' little NEPAs do not contain a requirement regarding the choice of alternatives, including Washington, Massachusetts, North Carolina, Hawaii, and Maryland. See DAVID SIVE & MARK CHERTOK, "LITTLE NEPAs" AND THEIR ENVIRONMENTAL IMPACT ASSESSMENT PROCEDURES, ALI-ABA: ENVIRONMENTAL LITIGATION 3 (2005), available at http://www.sprlaw.com/pdf/spr_little_nepa_ali_aba_0605.pdf.

⁹⁰ See *In re Lane Constr. v. Cahill*, 704 N.Y.S.2d 687, 689–90 (N.Y. App. Div. 2000), *appeal denied*, 739 N.E.2d 1145 (N.Y. 2000) (upholding the Deputy Commissioner's denial of a permit application under SEQRA on the grounds that the proposed project would have insufficiently mitigated impacts on the "historic and scenic character of the community including visual and other impacts on the community," a ruling that has since been deemed to hold that proposals may be denied on purely SEQRA grounds). See also Caffry, *supra* note 39, at 398–99 (discussing the movement of the law toward a clear rule that applications could be denied under SEQRA due to significant adverse environmental impacts).

⁹¹ See *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 17 (2d Cir. 1997). The threshold is whether there will be a *significant* potential adverse environmental impact. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.7 (2007).

insufficient. Uncertainty regarding the contents of a community character analysis often leads EIS preparers to replicate the content of other sections of the EIS under the community character heading.⁹² While many of the other factors that must be considered are important contributors to cultural landscapes, such as land use regulations and plans, noise, historic sites, and visual or aesthetic resources, they are merely the raw materials necessary to begin a community character analysis. By drawing from the various analyses already in the EIS as evidence of the cultural landscape, project sponsors will be able to create a more cohesive, relevant, and non-duplicative account of community character. The cultural landscape approach proposed in this article has the potential to maximize efficiency while adding necessary analysis because it encourages the use of information already gathered for the EIS to conduct the community character analysis in accordance with clear guidelines, which will help to streamline the process and reduce unnecessary and useless duplication in the EIS. This will also ensure that the EIS is serving its purpose under SEQRA.⁹³

III. HOW THE PROCESS SHOULD WORK

A. *The Goal*

The goal of this article is to provide a methodology for defining the elusive “community character” that can be used as a guide for applicants in evaluating the impacts of a proposed project on the various, interrelated elements of the cultural landscape that may be adversely affected. I do not purport to propose a flawless, scientifically replicable method; community character is not only inherently subjective, but it is also a feature of the dynamic relationship between people and their environment. I propose this methodology as a way to ensure that all potential impacts on community character can be adequately identified and mitigated to

⁹² See, e.g., SARATOGA ASSOCIATES, DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR CARRIAGE HILL ESTATES PLANNED DEVELOPMENT DISTRICT 1.1, 3.13, 7.1 (2005), available at <http://www.townofbrunswick.org/building/CarriageHillDEIS/> (repeating content of objectives and topography sections in community character section of DEIS).

⁹³ The purpose of SEQRA is to infuse decision making with an awareness of environmental impacts and values through an information forcing mechanism, the environmental impact statement. See § 617.1(c).

the greatest extent practicable. Ideally, it would form the basis for a program policy⁹⁴ that would serve as a guide for those preparing and reviewing environmental impact statements and would be used in other contexts to define and preserve community character.

B. *The Theory Behind the Methodology*

The approach employed in the methodology discussed below and exemplified in the Appendix stems from the interrelated, multidisciplinary, dynamic nature of cultural landscapes. A community's sense of place, its character, is largely dependent upon the cultural landscape of an area, and the comprehensive nature of this inquiry mirrors that of community character as it has been employed thus far. The National Park Service (NPS), for example, has been protecting cultural landscapes as national resources since 1916⁹⁵ and defines a cultural landscape as "a geographic area, including both cultural and natural resources and the wildlife or domestic animals therein, associated with a historic event, activity, or person or exhibiting other cultural or aesthetic values."⁹⁶ While different from the community character approach in several respects,⁹⁷ the NPS's cultural landscape preservation

⁹⁴ See *infra* APPENDIX for an example of the type of guidance document proposed.

⁹⁵ See U.S. National Park Service History, <http://www.nps.gov/aboutus/history.htm> (last visited Feb. 26, 2009).

⁹⁶ Charles A. Birnbaum, Preservation Brief 36: Protecting Cultural Landscapes: Planning, Treatment and Management of Historic Landscapes, <http://www.nps.gov/history/hps/TPS/briefs/brief36.htm> (last visited Feb. 26, 2009).

⁹⁷ The NPS approach to cultural landscapes is limited significantly by its emphasis on history and its perspective that the natural environment is merely a setting or backdrop for historically significant events that may be useful in the cultivation of certain past concepts. In addition, it states that "[p]reservation and rehabilitation treatments seek to secure and emphasize continuity while acknowledging change." National Park Service, Guidelines for the Treatment of Cultural Landscapes: Factors to Consider When Selecting an Appropriate Treatment, http://www.nps.gov/history/hps/hli/landscape_guidelines/factors.htm (last visited Feb. 26, 2009). While continuity is an element to consider, the evaluation of community character focuses more on the dynamism of a given area and the ordinary movements of people throughout the area as they interact with the land. Finally, the NPS approach focuses on the environment or "natural landscape" as the backdrop or setting of events, rather than an integral part of the community's character. In sum, there is a reciprocity and dynamism that the NPS approach fails to consider.

planning process⁹⁸ embodies several important elements of the approach to cultural landscape description and evaluation. First, it emphasizes the importance of analyzing the landscape over time in order to understand the various “layers” of the landscape.⁹⁹ Second, it recognizes the need for the integration of various disciplines such as history, landscape architecture, landscape archaeology, forestry, agriculture, engineering, cultural geography, ecology, ethnography, and material and object conservation.¹⁰⁰ The NPS’s handbook states that “managing cultural landscapes

⁹⁸ The NPS prescribes an approach to the formulation of cultural landscape reports that aligns with its focus on the historical significance of a particular area. It involves historical research of certain historic periods to help understand the associations and characteristics that make a landscape significant, followed by the preparation of period plans that document the historical appearance of a place during a historically important time period. Existing conditions are then documented in existing condition plans, which will include the features that contribute to the landscape’s historic character. Once the beginning and ending points are established, the landscape must then be “read,” which involves viewing photographs from various vantage points for orientation and then on-the-ground investigations of character-defining features and visual and special relationships to understand the continuum on the ground as the result of “evolving natural systems and human interventions over time.” Historic plant inventories and site analysis are conducted to identify the historical significance and integrity of an area. “Historic significance” is defined as “the recognized importance a property displays when it has been evaluated, including when it has been found to meet National Register Criteria.” “Integrity” is defined as “a property’s historic identity evidenced by the survival of physical characteristics from the property’s historic or pre-historic period. The seven qualities of integrity are location, setting, feeling, association, design, workmanship, and materials.” Once this information has been gathered, a treatment plan may be formulated. Treatment plans include preservation, rehabilitation, restoration, and reconstruction. It is important to note that each of these plans is focused on the perpetuation of a historical time period deemed to be of “historical significance.” This contrasts with the notion of “community character” in that community character focuses more closely on the present in light of the dynamism of the area, while still taking into account the history of an area—“significant” or not. The NPS approach begs the question of who determines what constitutes “historical significance” and provides little guidance with regard to the present save the evaluation of its existing condition and the extent of changes since the “significant” historical period. The community character inquiry emphasizes the interplay between the environment and humans in the ordinary sense, rather than preserving a place for the purpose of perpetuating a specific human event that occurred against its backdrop. Birnbaum, *supra* note 96.

⁹⁹ National Park Service, Guidelines for the Treatment of Cultural Landscapes: Preservation Planning and the Treatment of Cultural Landscapes, http://www.nps.gov/history/hps/hli/landscape_guidelines/preservation_planning.htm (last visited Feb. 26, 2009).

¹⁰⁰ See Birnbaum, *supra* note 96.

relies on a holistic approach—one that encompasses all significant aspects of a historic property—as these are integrated places of natural, cultural, scenic, and sometimes recreational values that have evolved and been layered over time.”¹⁰¹ Finally, it recognizes the importance of considering natural resources and systems as integral parts of the cultural landscape that must be considered.¹⁰²

The explanation and basic outline for the community character analysis set forth below draws from lessons learned from the NPS’s handbook for cultural landscapes,¹⁰³ the community character evaluations prepared by Harvey Flad in the Greene County Nuclear Power Plant (GCNPP)¹⁰⁴ and St. Lawrence Cement plant¹⁰⁵ cases, as well as the foregoing analysis of case law. The elements are a general foundation for the future development of site-specific community character analyses. Flexibility is necessary in light of the situation and location dependent variables, but this proposal should serve as a helpful starting point. The analysis draws from various environmental impacts considered otherwise in the typical EIS in accordance with SEQRA regulations.¹⁰⁶ It integrates these and other relevant elements into a coherent account of a community’s character in order to provide a method of integration, identification, description, and interpretation.¹⁰⁷

¹⁰¹ SLAIBY & MITCHELL, *supra* note 20, at 11. The import of this quote lies with the “holistic approach” and recognition that places are integrated and have “natural, cultural, scenic, and sometimes recreational values that have evolved and been layered over time.” While the focus on historic property comports with the NPS’s theory of cultural landscapes, the focus is on *existing* community character in SEQRA and thus considers history as one of many important considerations.

¹⁰² See National Park Service, Factors, *supra* note 97.

¹⁰³ See Birnbaum, *supra* note 96.

¹⁰⁴ See *supra* notes 57–59 and accompanying text.

¹⁰⁵ See *supra* notes 11–15 and accompanying text.

¹⁰⁶ N.Y. COMP. CODES R. & REGS. tit. 6, § 617.7(c) (2007).

¹⁰⁷ It should be emphasized that this is not a superficial checklist for a project’s compatibility with various lists, plans, or “objective” analyses. For example, the history of an area as it contributes to a community character is not determined by the presence or absence of sites on the National Register of Historic Places. Instead, it may be a source of common identity or pride in the community and serve to attract tourists desiring a certain type of experience. This is not an argument against change or for the recreation of historic settings; rather, it is an acknowledgement of the varying ways in which a particular

C. *The Methodology & Elements of Community Character*

1. *Preliminary Determinations*

a) *Determine Whether a Community Character Analysis Is Appropriate*¹⁰⁸

An assessment of community character is appropriate when a proposed project has the potential to conflict with elements of the existing community's character. An action requires the preparation of a community character analysis when it has the potential to: conflict with land use regulations or the ambiance they are striving to create; alter the visual landscape through the destruction or alteration of a scenic vista or view corridor; conflict with existing architecture patterns; disrupt cultural or historic resources or the associations that they evoke; impair the general sense of place or personality of a particular neighborhood or community through a change in noise, appearance, land use, or traffic patterns; or effect a change in socioeconomic conditions or population composition or distribution. In addition to these specific triggers, any substantial change in the existing community's character that may result from the proposed action warrants a community character analysis.

b) *Define the Relevant Community*¹⁰⁹

Once the lead agency decides that the proposed project has the potential to have significant impacts and thus warrants a community character analysis, it must determine the community's size and scope. What is the relevant "community" or "cultural landscape" to be evaluated? What are the boundaries? On what level(s) should a given proposal be evaluated? According to Flad:

The scale of the community, or neighborhood of interest, relates to the history of land use and economic and social relationships among the people which constitute the cultural landscape. . . . An entire viewshed from a prominent

community sees itself in relation to the physical surroundings and historical significance of an area, and the way the community has changed over time.

¹⁰⁸ See *infra* APPENDIX at B. The elements of the methodology, particularly a) and b), are in this order to reflect the order of the SEQRA process; however, they are interdependent and therefore not necessarily sequential.

¹⁰⁹ See *id.* at C(1).

topographic height or a significant historic site can frame a community of concern, while a regional consciousness can incorporate a full 'sense of place' through its shared history of settlement, land use patterns, and architectural distinction.¹¹⁰

All impacts on the local community and area are relevant, but the size of the project may mean that impacts on a broader area are of equal concern. For example, the SLC plant would have adversely affected not only the Town of Greenport and City of Hudson in which the facility and mine would have been located, but it would have also impacted the views from the towns across the river and from Frederic Church's estate, Olana.¹¹¹ In addition, the Hudson Valley is a significant area in American history, so the impacts on the entire region were relevant in the analysis.¹¹² The project had to be consistent with state coastal management policies under the Coastal Management Program,¹¹³ which emphasized the state-level community's interest in the project. The national designations the area has received¹¹⁴ suggested that the impacts on the national community were relevant as well.

The boundaries of the relevant community are likely to be a subject of contention and are appropriately considered during the scoping stage of the EIS process. Because the most relevant impacts of a project from a distance will be aesthetic in nature, the visual and auditory presence of a proposed project once it is fully operational is the predominant factor to consider. Changes in traffic patterns, socioeconomic variables, and population composition or distribution in neighboring or nearby towns are also important considerations. The gravity of these impacts will vary depending on where the project will be located and its size. For example, if the proposed project is near a political border or in an exposed area, such as the shore of a river, it is likely to have a

¹¹⁰ Flad, *supra* note 5, at 4.

¹¹¹ *See id.* at 6.

¹¹² *See* St. Lawrence Cement Second Interim, *supra* note 14.

¹¹³ The Coastal Zone Management Program applies when there are "[a]ctions directly undertaken by state agencies within the coastal area including grants, loans or other funding assistance, land use and development, or planning, and land transactions shall be consistent with the coastal area policies of this article." N.Y. EXEC. LAW § 919 (Consol. 2007). There are forty-four policies and the proposed action must also be consistent with any approved Local Waterfront Revitalization Plans. N.Y. COMP. CODES R. & REGS. tit. 19, § 600.5 (2007).

¹¹⁴ *See* discussion *supra* note 12.

greater impact outside of the home municipality.

There are several additional inquiries that a lead agency should make when determining the outline of the relevant community. Are there any areas of recognized historic or cultural significance outside of the immediate vicinity that have important scenic views that will be affected? Is the proposed site located in or adjacent to one of these designated areas? Will the sight of the proposed project negatively affect towns that rely on the imperiled scenic vista? It is the lead agency's responsibility to consider all of the aforementioned factors in addition to input from various interested parties when making the determination about the size of the relevant community and the various levels (local, regional, state, national) at which an analysis should be conducted.

c) *Sources of Information and Guiding Principles*¹¹⁵

The data and information gathered for other sections of the EIS are a significant source of information for the community character inquiry. Site visits and photographs are essential, as they help a reviewing agency to visualize the community, both on the smaller scale of streets and towns as well as the larger scale of scenic views from a distance or from nearby towns. Historic photographs and maps are relevant in illustrating the way in which a community has evolved or the success of ongoing or completed revitalization efforts. Photo simulations that depict the area with and without the proposed project may be useful in determining the extent to which the proposed project will intrude upon the existing visual landscape.

Written records, such as land use regulations and other planning documents, designation explanations or dedications, and documents discussing the history and economy of the area are valuable sources for illuminating the way in which the community perceives itself and its character. Interviews with members of the community, including historians, residents, planners, and government officials are helpful in describing the existing community's experiences and conceptions. Surveys that inquire about the residents' recreational interests and valuations of particular components of the landscape are useful in determining the gravity of changes to the population's sense of place.

¹¹⁵ See *infra* APPENDIX at C(2).

Each of the aforementioned sources of information should be assessed by professionals in the relevant fields. The community character inquiry is necessarily multidisciplinary, as demonstrated by the various pieces of information and elements that are considered in the process. Coordination between various experts and cooperation with local people and government officials are essential ways of making sure that the depiction of the community's character will be comprehensive and accurate. Analysts must consider each of the pieces of information in the context of what they reveal about a community's character.

2. *Elements & Analysis: All Necessary, None Sufficient, and All Interrelated*¹¹⁶

The elements listed below and their accompanying analyses are meant to provide a list of necessary considerations that are not individually sufficient to define a community's character. They are all interrelated, but they are divided into different categories in an attempt to outline the various pieces of information and how they should be used in the process. While examples from the SLC case illustrate how the process should work, it is important to recognize that every proposal will be different. Integration of the elements listed, along with the cultural landscape approach's focus on contextualization and comprehensive analysis, should lead to a description of the relevant community's character.

a) *The Existing Landscape*¹¹⁷

SEQRA proclaims the importance of “*existing* community or neighborhood character,” and any attempt to describe a community's character must begin with an overview of the existing landscape. It involves a discussion of the settlement patterns—whether there are small, nucleated settlements separated by open countryside or dense areas of urban development surrounded by sprawling suburbs. It implicitly includes a consideration of the economic landscape, for there may be vast areas of agriculture or resource extraction operations. It includes a brief evaluation of the historic cultural landscape: are there small

¹¹⁶ See *id.* at C(2)(c).

¹¹⁷ See *id.* at C(2)(c)(1). This element's description was extracted from Flad, *supra* note 5, at 4–6.

homes or barns that have existed in small hamlets and villages for decades or are there many new developments? It may be relevant to include a more extensive discussion of the architecture of the area and either the way that it affects the ambiance as one moves through the area or the way that the area appears reminiscent of significant historic periods.

The existing landscape discussion will ideally consider the relationship between human settlement patterns and features of the natural landscape. Traffic patterns that dictate how people travel through their environment on a daily basis are pertinent. In addition to the physical elements of the landscape, the existing landscape element must contain information about the population distribution and socioeconomic composition of the relevant community to enable the evaluation of impacts like population displacement and other changes.

b) *Land Use Regulations*¹¹⁸

As noted previously, zoning ordinances, comprehensive or master plans, and other tangible land use decisions are often some of the most important indicators of a community's character, as they frequently provide insight into the desires of a community with regard to what a particular town or area should look like. However, depending on the size and scope of the project, the definition of "community" may necessarily change. As a result, the host community's zoning ordinances and plans may be utterly insufficient as a measure of the larger community's character, requiring consideration of multiple local ordinances and plans. Regional compacts or plans, if available, are relevant as well.

The inquiry with regard to land use regulations is not to ascertain whether a cement plant is planned for an "industrial use" zone. Rather, regulations and plans must be analyzed in terms of how they reveal a community's preferences. For example, in the Hudson Valley, the river has been transformed from a means of transportation to a source of recreation as its quality has improved over the past few decades.¹¹⁹ As a result, many town plans recognize the importance of this asset and orient their revitalization plans toward the water, rather than toward a town

¹¹⁸ See *infra* APPENDIX at C(2)(c)(2).

¹¹⁹ See *St. Lawrence Cement Objection*, *supra* note 12, at 13–14.

center.¹²⁰ In addition, master and comprehensive plans often discuss the desire to promote an economy based on mixed use development instead of massive resorts, in accordance with a desire to take advantage of the scenic amenities of the Hudson Valley.¹²¹

Regional cooperation and efforts are good indicators of broader planning desires and priorities. The Hudson Valley Greenway, for example, is a state agency that was established to “facilitate the development of a voluntary regional strategy for preserving scenic, natural, historic, cultural and recreational resources while encouraging compatible economic development and maintaining the tradition of home rule for land use decision-making.”¹²² It promotes the coordination of various municipal entities to improve people’s experience with the landscape through efforts like bike lanes and increased access to the Valley’s natural resources.¹²³ The Greenway’s programs and regional projects indicate the importance of considering the regional scale and the way that the region envisions itself and its future development.

With regard to coastal resources, many local governments have devised Local Waterfront Revitalization Plans under New York State’s Coastal Management Program.¹²⁴ While a project’s consistency with these plans is often evaluated in the context of the coastal consistency determination, these plans provide significant insight into a community’s values with regard to their natural resources. Urban revitalization plans are also relevant, as they provide evidence of the visual cues and alterations devised to create a sense of community history or direct the evolution of a community.¹²⁵

Revitalization and master or comprehensive plans are frequently driven by economics, either implicitly or explicitly. While it has been repeatedly stated that economics are relevant

¹²⁰ See Flad, *supra* note 5, at 28, 33.

¹²¹ See *id.*; see, e.g., BUCKHURST FISH & JACQUEMART, INC., COMPREHENSIVE PLAN VILLAGE OF CROTON-ON-HUDSON *passim* (Jan. 2003), available at http://www.crotononhudson-ny.gov/Public_Documents/crotonhudsonny_webdocs/cpindex.

¹²² Hudson River Valley Greenway, <http://www.hudsongreenway.state.ny.us/> (last visited Feb. 26, 2009), quoted in Flad, *supra* note 5, at 39.

¹²³ See Hudson River Valley Greenway, *supra* note 122.

¹²⁴ 42 N.Y. EXEC. LAW § 910-22 (Consol. 2007); see Flad, *supra* note 5, at 33.

¹²⁵ See Flad, *supra* note 5, at 32–33.

only in the balancing part of the SEQRA process,¹²⁶ the desire to promote certain types of tourism is indicative of what communities or regions value and why. To exclude this consideration because of its economic implications would be disingenuous. The Hudson Valley, for example, relies heavily on heritage tourism, and the desire to preserve heritage landscapes is an important consideration.¹²⁷ The Hudson Valley Greenway's economic development efforts focus on compatibility with "the preservation and enhancement of natural and cultural resources with an emphasis on agriculture, tourism and the revitalization of existing community centers and waterfronts."¹²⁸ This reveals the participating municipalities' priorities and weighs against the imposition of out-of-scale projects that will interfere with these efforts.

c) *Designations*¹²⁹

The historical resources section of the EIS often consists of two inquiries. The first is whether there are any sites listed or eligible to be listed on the National Register of Historic Places. The second is whether there are any archaeological resources that will be negatively impacted by a proposed project. A yes or no answer reveals little about the history of a given community or the way the community sustains or values that history. Similarly, noting, for example, that Congress created the Hudson River Valley National Heritage Area in 1996 and designated the Hudson River as an American Heritage River in 1998¹³⁰ reveals that there is national significance accorded to the area; however, these designations indicate little about why or what the implications

¹²⁶ See Lane Construction Interim 2, *supra* note 63. Lane Construction Interim 2.

¹²⁷ According to New York Tourism estimates from 2000, 25 million tourists visit the Hudson Valley each year, "which adds close to \$2.5 billion to the regional economy." Flad, *supra* note 5, at 39 (citing Lisa Foderaro, *Tourism Flowing Upriver to the Hudson Valley*, N.Y. TIMES, Aug. 21, 2000, at B1, available at <http://www.nytimes.com/2000/08/21/nyregion/tourism-flowing-upriver-to-the-hudson-valley.html>).

¹²⁸ Hudson River Valley Greenway Communities Council, <http://www.hudsongreenway.state.ny.us/commcoun/commcoun.htm> (last visited Feb. 26, 2009).

¹²⁹ See *infra* APPENDIX at C(2)(c)(3).

¹³⁰ See discussion *supra* note 12.

might be for a massive cement plant built on the shore.

The value of designations lies in their ability to represent a collective appreciation for and validation of certain cultural landscapes. They reveal the importance of maintaining resources already deemed significant to the local, regional, state, or national community. Using these designations requires an analysis of the reasoning behind their creation. The national designations for the Hudson River and Valley, for example, recognize and emphasize the scenic beauty and related cultural significance of the Hudson River Valley in terms of its cultivation of a uniquely American culture through art, ideas, and history.¹³¹

The community character analysis moves beyond a list of sites or legislative recognitions toward something more akin to the NPS's cultural landscape evaluation, which emphasizes the use of history to "bring greater understanding of the associations and characteristics that make the landscape . . . significant."¹³² What matters is the process of what the NPS terms "reading" the landscape: focusing on the evolving interaction between people and their environment, including certain aspects of the physical landscape of an area that might take on particular significance in light of the history of the area.¹³³ This is not an argument that all towns should be restored as much as possible to the way they looked in an "important" historical time period; rather, it is an argument for the recognition that an area's history is likely to play a role in how the community reacts to certain ideas and physical elements of the landscape due to their historical associations.

d) *Concern for the Visual Landscape: Scenic Views and Physical Landscape Features*¹³⁴

The EIS typically involves a visual analysis that takes into account the various lines of sight and locations from which a proposed project will be visible. The visual analysis, prescribed in

¹³¹ Sampson, *supra* note 12, at 220. As mentioned earlier, the designations recognized that the Hudson Valley is the "landscape that defined America . . . an exceptionally scenic landscape that has provided the setting and inspiration for new currents of American thought, art, and history." HUDSON RIVER VALLEY GREENWAY, *supra* note 12, at 19.

¹³² Birnbaum, *supra* note 96.

¹³³ *See id.*

¹³⁴ *See infra* APPENDIX at C(2)(c)(4).

a DEC program policy, attempts objectivity by essentially asking two questions: from which points will a project be visible, and for what period of time?¹³⁵ While an important starting point, this superficial visual impact analysis is inadequate with regard to the visual impact on community character; it reveals nothing about why certain views are significant and how they contribute to a particular community's sense of place.

In the GNCPP and SLC analyses, there were several lines of evidence used to probe the visual contribution to the cultural landscape of an area. First was the concern for scenic views, as evidenced not only through town planning but also through artists' role in representing place.¹³⁶ In the Hudson River Valley, the emergence of the Hudson River School, America's first endemic art movement, provides substantial evidence of the importance of the scenery of the Valley to the nation, as it was memorialized in art that is recognized globally and that continues to inspire artists today.¹³⁷ The role of authors of literary works is also pertinent, as authors are equally inspired by the visual landscape and tend to immortalize specific senses of place in writing.¹³⁸

Architectural history is another relevant concern, with regard to both elite and vernacular structures.¹³⁹ Elite structures, such as the various mansions and estates in the Hudson Valley, often provide unique examples of different types of architectural styles and form foci for heritage tourism.¹⁴⁰ For example, Frederic Church's estate, Olana, is a popular tourist site in the Valley and is a unique architectural treasure (in terms of the building itself and the carefully designed landscape).¹⁴¹ Visitors can see the same scenery that is captured in Church's paintings and experience the inspirational beauty of the landscape as he viewed it.

With regard to vernacular structures, it is necessary to look at settlement patterns, in terms of both density and spatial groups, in order to understand the history of settlement in the area.¹⁴² In

¹³⁵ See NEW YORK STATE DEP'T. OF ENVTL. CONSERV., *supra* note 79.

¹³⁶ See generally Flad, *supra* note 5, at 7–14.

¹³⁷ See *id.* at 9–14.

¹³⁸ See, e.g., *id.* at 10 (discussing Ralph Waldo Emerson).

¹³⁹ See generally *id.* at 14–20.

¹⁴⁰ See *id.* at 8.

¹⁴¹ See *id.* at 23–26.

¹⁴² Flad, *supra* note 5, at 17.

describing the area in the vicinity of the proposed site for the SLC facility, Flad stated:

This unique historical cultural landscape is composed of individual farmhouses and barns, fields and fences, mill sites and cemeteries. It is a domesticated landscape that documents over three hundred years of human activity. It is *where* generations of families created a nation. It is a landscape where *place* is equivalent to *community character*.¹⁴³

The connection between various structures of history and the present to the landscape and to the people is the connection of interest in defining a community's character. One possible guide is the criteria used to determine whether properties are eligible for inclusion on the National Register.¹⁴⁴ The National Park Service considers whether "[t]he quality of significance in American history, architecture, archaeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association"¹⁴⁵ and whether the place also 1) is associated with historically significant events; 2) is associated with significant people of our past; 3) has distinctive or significant characteristics, exemplifying a particular time period, method of construction, artist, or type; or 4) has or might have important information about history or prehistory.¹⁴⁶

Landscape architecture and design is another important component of the visual analysis.¹⁴⁷ Interest in cultural landscapes began in the field of landscape architecture, as it entails attention to the interaction of people with the landscape.¹⁴⁸ Landscape architecture has been said to blend "the areas of nature and man," and it is a tangible result of a deliberate effort to influence the human experience of the landscape.¹⁴⁹ In the Hudson Valley, Andrew Jackson Downing, Calvert Vaux, and Frederick Law Olmsted were prominent figures in the practice of shaping

¹⁴³ *Id.* at 18 (emphasis in original).

¹⁴⁴ *Id.* at 20.

¹⁴⁵ 36 C.F.R. § 60.4 (2007).

¹⁴⁶ *Id.*

¹⁴⁷ *See* Flad, *supra* note 5, at 22–23.

¹⁴⁸ PRESERVING CULTURAL LANDSCAPES IN AMERICA 7 (Arnold R. Alanen & Robert Z. Melnick eds., 2000).

¹⁴⁹ Flad, *supra* note 5, at 22.

landscapes and views of the Valley's estates, and they carried their understanding elsewhere in designing places like Central Park.¹⁵⁰ By designing and building carriage roads and trails through his land, Frederic Church created a "series of scenic experiences of the visitor."¹⁵¹ Church once noted that "I have made about one and three-quarters miles of roads this season, opening entirely new and beautiful views—I can make more and better landscapes in this way than by tampering with canvas and paint in the Studio."¹⁵² Landscape architecture is essentially three-dimensional art, and it provides an indication of how people were and are affected by the natural landscape.¹⁵³

e) *Perceptions of the People*¹⁵⁴

Residents should have a voice in the understanding and description of their community's character. While many of the aforementioned elements and components of those elements indicate preferences across the ages, and while there is a public comment opportunity once the EIS is complete, it is essential that the community character inquiry include personal voices earlier in the process.

Testimony regarding a community's character could come from interviews with planners, historians, government officials, and residents, public meetings, or surveys that ask questions regarding what it is that individuals value about the town in which they reside and the area through which they regularly travel. For example, in the SLC case, the Village of Athens conducted a study in conjunction with its Local Waterfront Revitalization Plan that indicated that the residents felt that "enjoying the view" was the most popular recreation activity.¹⁵⁵ Secretary of State Randy Daniels cited this survey in his determination that the visual impact of the plume that would result from the SLC plant's operations would impair the visual integrity of the scenery of the Hudson River from the City of Hudson and Village of Athens.¹⁵⁶ The

¹⁵⁰ See *id.* at 22–23.

¹⁵¹ *Id.* at 24.

¹⁵² *Id.*

¹⁵³ See *id.* at 25.

¹⁵⁴ See *infra* APPENDIX at C(2)(c)(5).

¹⁵⁵ See St. Lawrence Cement Objection, *supra* note 12, at 19.

¹⁵⁶ Ghilain, *supra* note 1, at 80.

specific content and type of survey will necessarily vary from place to place; however, community input is a vital way to understand how the *existing* members of the community define and value their cultural landscape.

3. *Determining Significance*¹⁵⁷

A proposed project's impact on the "existing community or neighborhood character" is significant¹⁵⁸ if it has the potential to have an adverse impact on one or more of the elements listed above. Thus, a proposed project will have a significant impact on community character if it will negatively affect the cultural landscape of the area in one or more ways, including but not limited to:

- Conflict with land use regulations or the ambiance that they are striving to create;
- Disruption or substantial alteration of the visual landscape through the destruction of a scenic vista or view corridor;
- Incompatibility with existing architecture patterns;
- Interference with cultural or historic resources, or the associations that they evoke; or
- Disruption of the general sense of place or "personality" of a particular neighborhood or community through a change in noise, appearance, land use, traffic patterns, or socioeconomic or population composition.¹⁵⁹

In accordance with SEQRA, these impacts must be weighed, alternatives devised, and impacts mitigated to the greatest extent practicable.¹⁶⁰

¹⁵⁷ See *infra* APPENDIX at D.

¹⁵⁸ A threshold finding of significance is required to determine whether an EIS must be prepared in the first place, N.Y. COMP. CODES R. & REGS. tit. 6, § 617.7 (2007). Findings must also weigh and balance the environmental impacts with social and economic concerns. § 617.11(d).

¹⁵⁹ The City of New York's City Environmental Quality Review guidelines state that the preliminary thresholds for an assessment of "neighborhood character," defined as "an amalgam of the various elements that give neighborhoods their distinct 'personality,'" include: land use, urban design, visual resources, historic resources, socioeconomic conditions, traffic, and noise. CITY ENVIRONMENTAL QUALITY REVIEW TECHNICAL MANUAL, *supra* note 17, at 3H-1.

¹⁶⁰ § 617.11(d)(5).

D. *Justification & Response to Probable Criticisms*

Several criticisms about the community character analysis proposed in this article can be anticipated. One likely criticism of the cultural landscape approach to community character analysis is that it introduces a level of subjectivity that should have no place in the evaluation of a project's environmental impacts. It may favor majority culture views and be used for reasons that raise issues of environmental justice and exclusion.¹⁶¹ In addition, asking the project sponsor to conduct this type of analysis seems counterintuitive, especially given the inquiry's subjective nature.

While a methodology of this sort does introduce an element of subjectivity into the analysis, it is important to recognize two things. First, every analysis is skewed by human bias and interpretation. The choice of locations for visual impact analysis, for example, will influence the results. A subjective component is necessary, for whether or not a project will be visible from a certain location means very little, as visibility really becomes significant when the visual alteration of the landscape negatively impacts the residents of a certain community or their tourists.

Second, subjectivity is necessary in this type of analysis. Community character is the product of a dynamic interaction between people and their landscape. As Carl Sauer stated, "[c]ulture is the agent, the natural area is the medium, the cultural landscape is the result."¹⁶² Dynamism is not something that can be readily quantified, nor is human interaction something that can be understood and defined without an element of subjectivity. Critics will probably point out that the subjectivity element will be dangerous in the hands of the project applicant whose project-driven orientation will promote an analysis that perverts the true character of the community. However, the variety of professionals and lines of analysis that are required to perform the comprehensive analysis proposed should aid in lending integrity to the process. Also, disagreements are meant to be addressed in adjudication, testimony, public hearings, written comments, and

¹⁶¹ This is a problem left unaddressed in SEQRA as well. One way to address this issue is to increase communication. This entails making sure that lead agencies encourage broad participation in public hearings and that they diligently listen to and respond to all comments provided in the public hearings.

¹⁶² PRESERVING CULTURAL LANDSCAPES, *supra* note 148, at 15.

opposition briefs. Community character is an issue that is often a subject of considerable discussion anyway: this article suggests another way to look at community character—a starting point for a well-informed discussion.

Finally, the methodology proposed cannot hope to correct all of the problems with SEQRA. Regardless, this methodology provides some new direction regarding community character in what has previously been an ad hoc and unfocused inquiry. It is a suggestion that will provide a guide from which applicants, decisionmakers, and opponents can draw in the decision making process.

V. FROM METHODOLOGY TO PRACTICE: WHAT NEEDS TO HAPPEN NEXT

Community character is a controversial and complicated concept. Because it is so subjective and lacks reliable guidelines, everyone has their own ideas about how much weight should be accorded to various components and who should ultimately determine what a community's character is. This is especially true when the EIS is prepared by developers who are most likely not community members. A program policy that prescribes elements of the analysis that can be tailored according to the particular area or project at issue is needed. The elements set forth in this article should provide a starting point for the crafting of a policy that will provide guidelines for analysis and review. An example of the type of guidance document envisioned, modeled after the "Neighborhood Character" guidelines in New York's City Environmental Quality Review Act (CEQR) technical manual,¹⁶³ is appended.¹⁶⁴

Ideally, a program policy would not only outline general elements to consider, but would also contain separate guidelines for certain areas. For example, a community character policy for the Hudson Valley might suggest that the project be evaluated in light of the national historic and cultural significance of the Valley as the birthplace of the first American art movement. Thus, a project that is in the viewshed of a painter's estate would have a

¹⁶³ CITY ENVIRONMENTAL QUALITY REVIEW TECHNICAL MANUAL, *supra* note 17, at 3H-1.

¹⁶⁴ See *infra* APPENDIX.

more significant impact on the cultural landscape of the Hudson Valley than one that was located in a different location or one that could be visually concealed. If the impacts on the view could be minimized, the character of the Hudson Valley community could be preserved. Crafting this type of policy must include consultation with local governments, planning agencies, and other interested parties, in recognition of the importance of local planning control and broader, regional cooperation.

Lead agencies and administrative law judges evaluating an EIS for adequacy must inquire into whether all of the significant elements of the community's character have been considered, keeping in mind the importance and interrelationship of the multidisciplinary components of the cultural landscape. The scoping process conducted before the EIS is prepared, which will be done by the lead agency (usually a local planning body in the municipality in which the project will be located), should help to ensure that all of the relevant aspects of community character are evaluated. In addition, many of the elements above will be best addressed and analyzed by geographers, landscape architects, historians, and various other experts in discerning the character and sense of place that the landscape exudes. Because these professionals will most likely be divorced from the project at hand, their analyses will be less subject to bias and their involvement should be encouraged in the scoping and EIS preparation stages.

CONCLUSION

Community character is an elusive concept that is left undefined in SEQRA and, consequently, is used inconsistently. By drawing from various fields of inquiry, this article sets forth a methodology for defining a community's character that recognizes the multidisciplinary and comprehensive nature of a cultural landscape—a community's sense of place that largely defines its character. The historic, cultural, aesthetic, visual, and economic elements of a community's character are embedded in the way that artists and literary authors represent place, the visual cues that are significant, either by designation or by local recognition, the built and natural environments, and the written evidence of a local government's decisions regarding future development. By considering all of these interrelated elements, by drawing from other sections of the EIS for some of the data and from outside

research and public participation for the rest, it is possible to formulate a coherent and comprehensive account of the “existing community or neighborhood character.”

The current approach, which often entails excluding community character as an independent inquiry in light of the elements otherwise found in the EIS or merely duplicating the contents of other sections, is ineffective and inefficient because it ignores the significance of community character and fails to provide protection. Only by properly describing the relevant community’s character can project sponsors and decisionmakers adequately evaluate the impacts of a proposed project. Disparate, uncoordinated, and inconsistent impact analysis fails to recognize the nature of community character as a composite of different visual cues and associations resulting from the history, culture, economy, and aesthetics of a particular place.

The dynamic relationship between people and the landscape, the cultural landscape of an area, is what will be most affected by a proposed project. It is this impact on the “environment” that SEQRA is meant to address by requiring an evaluation of a project’s impacts on “community or neighborhood character.” The methodology proposed in this article should help both to evaluate and mitigate this impact and to create a more effective and efficient environmental review process under SEQRA. It should also provide a model that can be used in the pursuit of community character preservation in other contexts.

APPENDIX

GUIDE TO COMMUNITY CHARACTER ANALYSIS

A. Definition

Community character is the sense of place and identity that is formed through the dynamic interaction of people with their surroundings. It is the result of a combination of elements that give a community a distinct personality or ambiance. These elements include: land use patterns and designs, historic and cultural resources, visual or aesthetic features of the built and natural landscape, traffic patterns, socioeconomic and population changes, and noise. Several, if not all, of these elements are described in other sections of the environmental impact statement under SEQRA; however, it is only when these elements combine to create the “context and feeling” of a community that they are relevant in the evaluation of a proposed action’s impact on the “existing community or neighborhood character.”

B. Determining Whether a Community or Neighborhood Character Assessment is Appropriate

1. Preliminary Thresholds

An assessment of community character is appropriate when a proposed project has the potential to conflict with elements of the existing community’s character, including but not limited to:

- Land use regulations or the ambiance that they are striving to create
- The visual landscape through the destruction or alteration of a scenic vista or view corridor
- Architecture patterns
- Cultural or historic resources, or the associations that they evoke
- The general sense of place or “personality” of a particular neighborhood or community through a change in noise, appearance, land use, traffic patterns, or socioeconomic or population composition or distribution

2. Combination of Moderate Impacts

It is necessary to evaluate a project's potential to have low to moderate impacts on more than one element of a community's character, for the cumulative effect may constitute a significant impact.

3. Comprehensive Analysis

Because the community character analysis requires a multidisciplinary, comprehensive account of the many interrelated elements that combine to produce a community's character, the inclusion of a community character analysis in the environmental impact statement shall include all of the elements discussed below. The community character inquiry shall not be limited to a single element, nor shall it be restricted to the elements listed.

C. Assessment Methods

1. Define the Relevant Community

The preliminary determination that must be made, most appropriately during the scoping process, is the relevant community's size and scope: What is the relevant "community" or "cultural landscape" to be evaluated? What are the boundaries? On what level(s) should a given proposal be evaluated: local, regional, statewide, or national? This determination should be made by the lead agency, taking into account the following non-exclusive factors:

- Size of the proposed project;
- Location of the proposed project: for example, whether it is near a political border such that it will have a substantial impact on more than one municipality or along a river such that it will be easily visible from the water and various points along the shore;
- Visibility during operation from surrounding towns and significant scenic viewpoints;
- Presence in, adjacency to, or visibility from areas of recognized historic or cultural significance (e.g., sites listed on the National Register of Historic Places or Scenic Areas of Statewide Significance);
- Geographic extent of noise, air pollution, and light

pollution;

- Impacts on traffic in the area during construction and operation.

It is important to consider both the structure itself and the components of its operation, which may include things like procuring and transporting raw materials and finished products. Smaller study areas may be appropriate for projects like commercial buildings that would likely only impact a particular street or neighborhood. Larger study areas may be appropriate when the project will be of a large scale, be easily visible from multiple locations, and/or generate increased, disruptive traffic and noise that is inconsistent with the existing nature and ambiance of the surrounding area.

2. Analysis Techniques

a. Information Gathering

1) Site Visits & Photographs are an essential starting place for the community character inquiry. Because the community's sense of place stems from moving through and interacting with the landscape, the evaluator must do so as well. Photographs are useful in illustrating the existing community, both on the smaller scale of streets and towns and the larger scale of scenic views from a distance and from nearby towns. Historic photographs may be relevant in illustrating the way in which a community has evolved or the success of revitalization efforts. In addition, photo simulations depicting the area with and without the proposed project are useful in illustrating the visual impact.

2) Other Sections of the EIS provide information directly and indirectly relevant to the elements set forth below. Rather than merely duplicating this information, it must be analyzed for what the information reveals about a community's character.

3) Written Records, including but not limited to comprehensive or master plans, zoning ordinances, designation records, and documents discussing the history, economy, and evolution of the area can be useful in illuminating the way a community conceives

of itself and its character.

4) Interviews & Surveys help identify the present-day opinions and aspirations of the towns and communities that will be affected. EIS preparers may interview historians, residents, planners, and government officials. Surveys of current residents regarding how they value different components of the landscape are useful in determining the gravity of the impact a particular project will have on the community and the importance of the resources, scenic or otherwise, that will be changed as a result.

b. Coordination & Cooperation

Because the community character inquiry involves investigating various areas of a particular community's history, economy, culture, art, appearance, and society, it is appropriate to enlist the help of professionals in each of these areas.

c. Describing the Existing Community Character

Community character involves identifying and integrating various elements of a community's cultural landscape. The following elements are all necessary and interrelated. They must be considered with regard to how and what they reveal about a community's personality, ambiance, or sense of place. This is a non-exclusive list, and the elements will be of varying significance, depending on the nature of the project, the resources in the area, and the size of the community that is being evaluated. Analyses for various geographic levels may be appropriate, especially if some elements will be more affected at one level than another.

Elements

1) The Existing Landscape includes a description of the existing landscape and should focus on the relationship between human settlement patterns and features of the natural landscape. It shall include a discussion of any or all of the following:

- Settlement patterns: Are there small, nucleated settlements separated by open countryside or dense areas of urban

development surrounding by sprawling suburbs?

- Economic impressions: Are there vast areas of agricultural or resource extraction operations? Is the landscape dominated by chain stores or small local businesses?
- Historic cultural landscape: Are there many small homes or barns that have existed for decades or are new housing developments more prevalent?
- Architecture of the area: How does the architecture affect the ambiance of the community as one moves through the area? Is it reminiscent of certain historic periods? Are there examples of unique types of architecture?
- Town layout: How do pedestrians and automobile drivers experience the landscape? Are there sidewalks, parks, and bike lanes? What is the primary mode of transportation? What are the traffic patterns? How do the means of transportation affect the way that people interact and move through the area?
- Population: What is the size, socioeconomic composition, and distribution?
- Photographs and other visual depictions of the area are particularly relevant.

2) **Land Use Regulations** provide important insights into a community's character. They indicate a community's desires regarding what a particular town or area should look like. The relevance of comprehensive or master plans and zoning ordinances vary, depending on the size and scope of the proposed project. They are more relevant for small-scale projects and neighborhood or town level inquiries. For larger scale projects, land use regulations have a smaller role in the evaluation. Regional plans are relevant as well, where available.

Land use regulations must be analyzed in terms of how they reveal a community's preferences. For example, town designs might be oriented toward a particularly significant building, landscape feature, or view. If so, it indicates the importance of that landscape element to the community and counsels in favor of its preservation. Master, comprehensive, and revitalization plans are excellent indicators of the way a particular community envisions its present and future personality, so proposed projects must be considered in light of their compatibility with such plans.

The economic goals driving planning documents may be relevant as well.

3) Designations are valuable because they represent a collective appreciation for and validation of certain cultural landscapes. They reveal the importance of maintaining resources already deemed significant to the local, regional, state, or national community. Using these designations requires an analysis of the reasoning behind their creation. What aspects of an area warranted their protection through legislation and other programs? What do the designations indicate about the way that people living in the area conceive of the history and spirit of the community? How do designations deepen the understanding of the ambiance of a particular area? Do they create associations or focus attention on certain elements of the landscape?

4) The Visual Landscape is perhaps the most important component of the community character analysis because the visual elements of a place serve as cues that conjure associations and most significantly impact one's conception of a community's character. The visual landscape analysis may include the consideration of:

- **Town planning:** How does a particular community regulate its appearance?
- **Artists' role in representing place:** What elements of the visual landscape have been memorialized by artists of local, regional, or national renown? How do artists' renderings of the landscape depict the personality or ambiance of a particular community? How do authors describe the visual elements of a place to create a particular mood?
- **Architectural history:** Both elite and vernacular structures are important. Are elite structures examples of unique or noteworthy types of architecture? Are they sources of tourism or general admiration? How do the vernacular structures and settlement patterns illuminate the history of the area and the depth of people's relationship with the area?
- **Landscape architecture:** Landscape architects manipulate the environment in order to create a particular view or sense of place, often with the goal of creating a particular

experience that can be shared by anyone who visits the location. Why did landscape architects emphasize certain views? How do their designs influence movement throughout the landscape and create a particular experience?

5) Perceptions of the People regarding the way they experience and value various aspects of the landscape are essential in understanding the way that the community collectively defines itself and its character. Surveys can be particularly useful in determining how the residents of a particular municipality or area understand the community's character. For example, if "enjoying the view" is voted the most important recreation activity, projects that would disrupt the view should be avoided or mitigated. Tourism hotspots that are frequented by residents and visitors may shed light on the way the town conceives of its personality and history. Historians can speak to the way that a particular area has evolved and the cultural, social, and historical significance of various features of the landscape. Government officials or planners can reveal the ways in which the area might change in the future. Their plans indicate how certain elements of the landscape will be emphasized or preserved and why.

3. Potential Impacts

a. No Future Action Alternative

Using the information gathered regarding the various elements of a particular community's character, assess how the community's character would change in the absence of the action.

b. Future Action Condition

Using the information gathered regarding the various elements of a community's character, compared to the no future action alternative, describe how the proposed action would impact the elements that define the relevant community's character.

D. Determining Impact Significance

A proposed project will have a significant impact on community character if it will negatively affect the cultural landscape of the area in one or more ways, including but not

limited to the following:

- Incompatibility with land use regulations or the ambiance that they are striving to create
- Disruption of the visual landscape through its destruction of a scenic vista or view corridor
- Inconsistency with architectural patterns
- Interference with cultural or historic resources or the associations that they evoke
- Disruption of the general sense of place or “personality” of a particular neighborhood or community through a change in the visual landscape, noise, land use, or socioeconomic or population composition

E. Developing Mitigation

Adverse impacts must be weighed against the benefits of the proposed project, alternatives must be devised, and impacts must be mitigated to the greatest extent practicable. Appropriate mitigation measures will depend on the elements of the community’s character that will be most affected, and may include, but are not limited to:

- Visual mitigation, including concealment techniques, architectural or design alterations, and location changes
- Traffic pattern modifications that reduce delay at certain areas or times
- Noise reduction during certain hours
- Population accommodation through the provision of affordable housing
- Offsets within the community, which may include park construction, road improvement, or recreational activity enablement

F. Developing Alternatives

Alternatives developed to avoid a project’s impacts on certain elements of a community’s character may be sufficient to avoid community character impacts as well.