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ZONING AND LAND USE PLAINNING

Courts Refine Standing Rules In Land Use Matters

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Several years ago, the city council of New Rochelle granted the application of ND Acquisition, LLC, to amend the city zoning code and map to apply a senior citizen zone overlay district zoning to certain real property located in the city. The city council also issued a negative declaration of environmental significance pursuant to the New York State Environmental Quality Review Act (SEQRA). These decisions combined to authorize the construction of a senior citizen residence on the property.

Thereafter, homeowners filed an action in the Supreme Court, Westchester County, against New Rochelle and its city council and planning board and against ND Acquisition, seeking to vacate and declare invalid the city council's decisions.

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The respondents/defendants moved to dismiss the hybrid CPLR Article 78/declaratory relief action on the ground that the homeowners lacked standing. The trial court granted their motions, and the homeowners appealed to the Appellate Division, Second Department.

The Second Department, in *Matter of Vasser v. City of New Rochelle*, 180 A.D.3d 691 (2d Dept. 2020), affirmed.

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In its decision, the Second Department explained that the homeowners lived approximately 1,200 to 1,800 feet from the proposed senior citizen residence. The homeowners, the appellate court added, did not live "adjacent to the subject property" but, rather were "several streets and building lots away from it" and were "separated from it by another housing complex."

Moreover, the Second Department continued, the homeowners' "speculative and unsubstantiated claims of potential harm" failed to make the requisite showing that they would suffer any "direct injury-in-fact different in kind or degree from that experienced by the public at large."

Therefore, the appellate court concluded, the homeowners failed to satisfy their burden of establishing that they had standing to file their action, and it affirmed the trial court's decision to dismiss.

The Test for Standing

The law of standing has developed in New York courts over decades, with the nearly 35-year-old New York Court of Appeals landmark decision in *Society of Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761 (1991), continuing to be regularly cited and relied on for the test for standing that it sets forth.

Nevertheless, and notwithstanding that standing is a threshold question that determines whether a person should be allowed access to the courts to adjudicate the merits of a particular dispute (*see Matter of Association for a Better Long Island, Inc. v. New York State Dept. of Environmental Conservation*, 23 N.Y.3d 1 (2014)), disputes over standing continue to occur with some frequency. *See, e.g., 159-MP Corp. v. CAB Bedford, LLC*, 181 A.D.3d 758 (2d Dept. 2020).

In land use matters, the standard for determining standing has been often stated. A plaintiff must show that it would suffer direct harm, injury that is in some way different from that of the public at large. As the Second Department pointed out in *Matter of CPD NY Energy Corp. v. Town of Poughkeepsie Planning Board*, 139 A.D.3d 942 (2d Dept. 2016), an allegation of "close proximity" may give rise to an inference of damage or injury that enables a nearby property owner to challenge a land use decision without proof of actual injury. However, this does not entitle a property owner to judicial review in every instance.

Rather, the property owner also must establish that the effect of the proposed change is different from that suffered by the public generally, and that the interest asserted by the property owner is arguably within the "zone of interests" the statute protects. *See, e.g., Matter of Sun-Brite Car Wash v. Board of Zoning & Appeals of Town of North Hempstead*, 69 N.Y.2d 406 (1987).

Property owners who are physically close to a proposed development may oppose the project for a host of reasons and, in sufficient numbers or where individuals have sufficient resources, may ask courts to intervene. The recent decision by the Supreme Court, Suffolk County, in *Amper v. Town of Southampton Planning Board*, No. 600583/2023 (Sup. Ct. Suffolk Co. Feb. 21, 2023), rejecting, on standing grounds, a challenge to a proposed golf community in eastern Suffolk County, highlights once again the need for all parties to this type of action to consider standing at the outset.

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The Case

The *Amper* case arose in October 2019, when the Town of Southampton Planning Board (the planning board) granted preliminary subdivision approval and site plan approval for the Lewis Road Planned Residential District. Property owners brought two actions seeking to annul the Planning Board's determinations and to have the matter remanded back to the planning board for a new SEQRA review.

Respondents pointed out that four petitioners each were located more than three-quarters of a mile from the outer boundary of the proposed project, that a Long Island Railroad right-of-way track separated one petitioner's property from the project, and that another petitioner's property was 3,300 feet away.

The court, in decisions and orders in *Thiele v. Town of Southampton Planning Board*, Nos. 6685/2018 and 6209/2019 (Sup. Ct. Suffolk Co. Nov. 4, 2021), dismissed these two actions for lack of standing, observing that "[g]enerally, the relevant distance is the distance between the petitioner's property and the actual structure or development itself, not the distance between the petitioner's property and the property line of the site."

After certain changes were made to the project (the project changes), the planning board granted final subdivision approval and site plan approval for the Lewis Road Project on Dec. 8, 2022.

Most of the same petitioners who filed the first two actions, plus three new individuals, brought a new action in the Supreme Court seeking to annul, vacate, and set aside the December 8 actions and to remand review of the proposed project back to the planning board for compliance with SEQRA and the town code.

Respondents contended that the doctrine of collateral estoppel barred the prior petitioners from relitigat-

ing their lack of standing and that, in any event, all of the petitioners lacked standing because none suffered an injury different from the public generally.

After the court decided that collateral estoppel precluded the prior petitioners (who did not assert any basis for standing tied to the project changes) from relitigating the standing issue, it addressed whether the three new petitioners had standing. It concluded that they did not.

According to the court, the new petitioners did not allege any specific injury from the project changes different than the public generally. Rather, they alleged in "conclusory terms" that the planning board's decisions "adversely impact [them] in a manner and degree different from members of the general public."

The court observed that one affidavit stated that the petitioners would be "negatively impacted by the traffic, noise, tree and land clearing, and disturbances caused by the proposed Lewis Road Project," and that they were "going to be able to acutely see, hear, and smell the activities from the recreational courts, the traffic going by our house (both construction traffic and ongoing operations), the golf course behind our home, and the maintenance buildings and wastewater treatment plant down the street."

The court said, however, that not only did this affidavit "fail to address specific injury to [the petitioners] resulting from the project changes," it couched their alleged injuries "in general terms."

In the court's view, other members of the general public presumably "would likewise be affected in the same way," thereby establishing that these petitioners failed to allege that they would suffer injury that was in some way different from that of the public at large.

Simply put, the court found, the three new petitioners were "among a larger segment of the general public residing on Spinney Road."

Interestingly, the court also found that the petitioners had submitted no evidence in contravention to an affidavit of a certified environmental professional that had been submitted in support of the respondents' motion to dismiss.

This affiant attested that the proposed project's new sewage treatment system/plant would have a 100-foot wide conservation area along two of its property lines that would be required to be kept in its natural vegetated state, with tree cover. He added that the treatment plant would be fully enclosed in a building approximately 15 feet high, and that the distance between the home on one of the petitioner's property and the sewage treatment system/plant would be "approximately 823 feet, or nearly l/6th of a mile."

The court decided that this affiant also demonstrated that the new petitioners' claims that traffic would increase on Spinney Road were "blatantly incorrect" because the plans called for Spinney Road being "only an emergency access route and nothing more."

The court, therefore, granted the motion to dismiss this third action against the project for lack of standing.

Conclusion

Local officials tasked with making decisions about development in their communities face a host of local, state, and federal laws and regulations that they must consider and with which they must comply.

Those who are opposed to the choices these officials make are entitled to challenge them—as long as they allege and demonstrate that they meet the requirements for standing. If they are able to satisfy the standing threshold, then courts may consider the merits of their objections. In the absence of standing, however, courts will reject challenges to the decisions these officials make about the use of land under their jurisdiction.

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