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Expert Analysis

Standing Still Perplexes Challengers In SEQRA Actions

By
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It has been a decade since the New York Court of Appeals' landmark decision in *Matter of Save the Pine Bush, Inc. v. Common Council of City of Albany*, 13 N.Y.3d 297 (2009), on standing in actions under the State Environmental Quality Review Act (SEQRA). Municipalities, however, continue to face court proceedings challenging their actions under SEQRA brought by petitioners who do not have standing and, therefore, who see their cases dismissed at the trial or at the appellate level.

Although not every court decision since *Pine Bush* on standing in SEQRA cases has rejected standing claims, many have done so. These decisions in particular can help elucidate the rules that property owners and other petitioners should keep in mind when evaluating whether to go to court—which also might have the beneficial corresponding effect of limiting the volume of SEQRA litigation that local governments face. That's because standing is a threshold issue that must be considered before a court action may proceed.

'Pine Bush' and a Key Precedent

Before a short refresher on *Pine Bush*, it is important to remember a 1991 standing decision that *Pine Bush* relied on: *Society of Plastics Industry v. County of Suffolk*, 77 N.Y.2d 761 (1991).

In *Society of Plastics*, the court held that "[i]n land use matters … the plaintiff, for standing purposes, must show that it would suffer direct harm, injury that is in some way different from that of the public at large" and that "the in-fact injury of which it complains" must fall "within the 'zone of interests,' or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted."

The court made clear that even the fact that an issue may be one of "vital public concern" does not entitle a party to standing.

Applying that test, the court in *Society of Plastics* decided that several representatives of the plastics industry lacked standing to challenge a law adopted by Suffolk County banning the use of certain plastics products by retail food establishments.

> SEQRA litigation can generate "interminable delay and interference with crucial governmental projects." A proper—and prompt—evaluation of standing can short circuit litigation that should never have been brought and, indeed, might avoid improper actions from being filed in the first place.

In *Pine Bush*, the court addressed at length the issue of standing in SEQRA matters. The issue in *Pine Bush* had to do with a hotel being

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built near a protected area that contained an endangered species of butterfly. The petitioner in that case was an organization whose members used the Pine Bush for recreation and who enjoyed the "unique habitat" found in the Pine Bush.

The court's rule may be simply stated: "[A] person who can prove that he or she uses and enjoys a natural resource more than most other members of the public has standing under the State Environmental Quality Review Act…to challenge government actions that threaten that resource." Although the rule may be simple to state, the court made it clear that it should not be read to mean that standing is easy to establish. It said, "[W]e do not suggest that standing in environmental cases is automatic, or can be met by perfunctory allegations of harm. Plaintiffs must not only allege, but if the issue is disputed must prove, that their injury is real and different from the injury most members of the public face."

Challenging a Municipal Decision Under SEQRA

The decision earlier this month by the Appellate Division, Second Department, in *Tilcon New York, Inc., v. Town of New Windsor*, No. 2016-10289 (2d Dept. May 8, 2019), illustrates the difficulty of demonstrating standing when challenging a local government's action under SEQRA.

Tilcon arose in 2013, when the town board of the upstate town of New Windsor entered into a lease with Jointa Lime Company relating to property owned by the town. In October 2015, approximately six months prior to the expiration of the lease, a Jointa agent sent an email to the town attorney expressing a desire to continue to rent the property on a month-to-month basis following expiration of the lease on April 14, 2016.

The town attorney replied that the town supervisor would accept the month-to-month tenancy, with monthly rent payments based on the pro-rated annual rent, but that the town reserved the right to terminate Jointa's tenancy on 30 days' notice. Jointa remained in possession of the property after the expiration of the lease and the town accepted monthly rent payments.

In May 2016, Tilcon New York, Inc., a business competitor of Jointa, filed a hybrid action and CPLR article 78 proceeding against the town and the town's board, zoning board of appeals, and building inspector. Tilcon alleged, among other things, that Jointa's month-to-month holdover tenancy violated SEQRA. The town defendants moved to dismiss on the ground that Tilcon lacked standing. The Supreme Court, Orange County, granted the motion, and Tilcon appealed to the Second Department, which affirmed.

The Second Department, citing to *Pine Bush*, affirmed that Tilcon had not established standing as to its cause of action alleging violations of SEQRA, reasoning that a generalized "interest" in the environment did not confer standing to challenge environmental injury. The appellate court found that Tilcon had not identified any environmental injury it had suffered or would suffer that differed from the alleged injury to the public at large.

Speculative Injuries

In 2017, the Second Department decided *Matter of Shapiro v. Torres*, 153 A.D.3d 835 (2d Dept. 2017). This case arose after the Long Beach city council awarded contracts for the construction of comfort stations along the city's boardwalk as part of a plan to reconstruct the boardwalk and restroom facilities that had been destroyed by Superstorm Sandy. Condominium owners alleged that the city's actions violated SEQRA, and they went to court.

The Second Department found that the condominium owners did not have standing to challenge the city's decision. It reasoned that "[c]lose proximity alone" was insufficient to confer standing where there were no zoning issues involved, and that "general environmental concerns" did not suffice.

The appellate court concluded that the condominium owners' alleged environmentally-related injuries were "too speculative and conjectural to demonstrate an actual and specific injury-in-fact."

In *Matter of Brummel v. Town of North Hempstead Town Board*, 145 A.D.3d 880 (2d Dept. 2016), was another notable decision on

standing in SEQRA cases. This case involved a challenge to SEQRA decisions by the Roslyn Water District, the town of North Hempstead, and Nassau County regarding an air stripper, which was intended to filter out contaminants from a town well, that the town proposed to locate in a wooded area in a town park.

A number of people who alleged that they frequently used and enjoyed the park—specifically the wooded area and paths within the vicinity of the proposed location for the air stripper—claimed that the construction of the air stripper would require the removal of numerous well-developed trees and vegetation, thus destroying the natural setting and scenic features of the wooded area.

The Supreme Court, Nassau County, decided that the individuals lacked standing, and they appealed to the Second Department, which affirmed.

In its decision, the Second Department ruled that the petitioners failed to establish that they used and enjoyed the portion of the park in the vicinity of the proposed location for the air stripper more than most other members of the public. Moreover, it found, the petitioners' alleged environmentally related injuries were "too speculative and conjectural" to demonstrate an actual and specific injury-in-fact.

Location, Plus

The same day the Second Department decided *Shapiro*, it decided *Matter of Green Earth Farms Rockland v. Town of Haverstraw Planning Board*, 153 A.D.3d 823 (2d Dept. 2017). In this case, property owners challenged a decision by the planning board of the town of Haverstraw under SEQRA that a property owner did not have to prepare a second supplemental environmental impact statement (SEIS) in connection with a proposed residential and commercial development of land located in Haverstraw and the adjacent town of Ramapo.

> These decisions in particular can help elucidate the rules that property owners and other petitioners should keep in mind when evaluating whether to go to court—which also might have the beneficial corresponding effect of limiting the volume of SEQRA litigation that local governments face.

The Supreme Court, Rockland County, determined that the petitioners had standing under SEQRA to challenge the planning board's determination.

The Second Department found that the Supreme Court had properly inferred an injury-in-fact for the petitioners who owned or leased property immediately across the street from, and within 500 feet of, the site of the proposed development due to their "close proximity" to the proposed development, and that those petitioners had alleged environmental harm within the zone of interests protected by SEQRA.

The Second Department, however, ruled that one individual petitioner, who lived more than 2,000 feet from the site of the proposed development, did not live close enough to the site to be afforded a presumption of injury-in-fact based on proximity alone. The appellate court also found that the petitioners failed to demonstrate that the proposed development would cause this property owner to suffer an environmental injury different from that of members of the public at large. Accordingly, it concluded, the trial court should have dismissed the petition insofar as asserted by this property owner.

Conclusion

As the court recognized in *Society of Plastics*, SEQRA litigation can generate "interminable delay and interference with crucial governmental projects." A proper—and prompt—evaluation of standing can short circuit litigation that should never have been brought and, indeed, might avoid improper actions from being filed in the first place. The Court of Appeals' statements that standing in environmental cases is not automatic, and that standing cannot be met by "perfunctory allegations of harm," certainly have withstood the test of time.