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ZONING AND LAND USE PLANNING

Guidelines for Evaluating Standing in Land Use Cases

By **Anthony S. Guardino**

Twenty-five years ago, in *Society of Plastics Indus. v. County of Suffolk*,[1] the New York Court of Appeals examined the law of standing and set forth a framework for deciding whether parties had standing to challenge governmental action in land use matters generally, and under the State Environmental Quality Review Act (SEQRA)[2] specifically. In that case, the court held that "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."

Since that decision, zoning and land use planning lawyers, developers, community members, and the courts have struggled with the "special injury" requirement established by the court. A decision on standing issued by the court late last year in *Matter of Sierra Club v. Village of Painted Post*,[3] however, has made the rules of standing significantly clearer.

ANTHONY S. GUARDINO *is a partner with Farrell Fritz in the firm's Hauppauge office.*

Background

In February 2012, the board of trustees of the upstate village of Painted Post, in Steuben County, adopted a resolution to enter into a bulk water sale agreement with SWEPI, LP, a subsidiary of Shell Oil Company, which operates gas wells in Tioga County, Pennsylvania. The village determined that, pursuant to 6 NYCRR 617.5(c)(25), the sale of its water was a so-called "Type II" action that was exempt from review under SEQRA.

Another resolution approved a lease agreement with Wellsboro & Corning Railroad for the construction of a water transloading facility on 11.8 acres of land, previously used for industrial purposes, to be used as a filling station upon which the water would be withdrawn, loaded, and transported via rail line to Wellsboro, Pennsylvania. The village determined that, pursuant to 6 NYCRR 617.4, the lease agreement was a so-called "Type I" action under SEQRA, and it issued a "negative declaration" concluding that the lease would not result in any potentially significant adverse impact on the environment based on a review of a full environmental assessment form (EAF), a report prepared by the village's engineering consultants, the site plan prepared for the railroad, and the deed to the property.

Soon after construction of the water loading facility began, a number of not-for-profit organizations and various individual residents of the village—including one named John Marvin—brought an Article 78 proceeding against the village, Painted Post Development, SWEPI,

and Wellsboro. The petitioners sought, among other things, an order annulling the village's Type II determination for the water sale agreement, the village's negative declaration for the lease of the rail loading facility, the village's water sale agreement with SWEPI, and the village's lease to Wellsboro. They also sought an order requiring the village to issue a "positive declaration" under SEQRA and to complete an environmental impact statement (EIS) for the totality of the plan rather than segmenting the water sale and the lease.

The respondents moved to dismiss, asserting, inter alia, that the petitioners lacked standing. In response, the petitioners submitted an affidavit from Marvin, who alleged that he was a longtime resident of the village who resided one-half block from the railroad line that crossed his street and a block and one-half from the rail loading facility. Marvin stated that when the water trains began running, he "heard train noises frequently, sometimes every night" and that the "[t]he noise was so loud it woke [him] up and kept [him] awake repeatedly." Marvin further stated that the "noise was much louder than the noise from other trains that run through the village" and that he was concerned that the "increased train noise will adversely impact [his] quality of life and home value."

The Supreme Court, Steuben County, found that the organizations had alleged only generalized environmental injuries that the public at large would suffer and that their generalized claims were insufficient to confer standing. With respect to the individual petitioners, excepting Marvin, the court determined that they, too, had alleged only general harm (i.e. disrupted traffic patterns, noise levels, and water quality) "no different than that experienced by the general public."

The four guidelines derivable from the court's decision in 'Painted Post' should help all parties evaluate the standing of petitioners challenging land use decisions and SEQRA determinations.

The court, however, found that Marvin had standing. It noted that he could see the water loading facility from his front porch and it concluded that his allegation of "train noise newly introduced into his neighborhood" was different from the noise suffered by the public in general.

The Appellate Division, Fourth Department, unanimously reversed and ruled that Marvin lacked standing. It reasoned that inasmuch as Marvin complained about the noise of a train that moved throughout the entire village, as opposed to the stationary noise of the transloading facility, Marvin would not suffer noise impacts "different in kind or degree from the public at large."

The dispute reached the Court of Appeals.

The Guidelines

The court, in a unanimous decision by Judge Sheila Abdus-Salaam, reversed the Fourth Department's decision, ruling that the appellate court, in concluding that Marvin lacked standing, had applied an "overly restrictive analysis" of the requirement to show harm "different from that of the public at large" when it reasoned that because other village residents also lived along the train line, Marvin did not suffer noise impacts different from his neighbors.

The rest of the court's decision, explaining why the Fourth Department's analysis had been "overly restrictive," can be distilled into four guidelines that help to clarify the "special injury" requirement of standing in land use cases.

First, the fact that more than one person might be harmed does not defeat standing. The court said in *Painted Post* that the alleged harm must be "specific to the individuals" who alleged it, and must be

"different in kind or degree from the public at large," but that it did not have to be unique. Applying that rule to Marvin, the court reasoned that he was not alleging an indirect, collateral effect from the increased train noise that would be experienced by the public at large, but rather a particularized harm that "may also be inflicted upon others in the community who live near the tracks."

Second, the number of people affected by the challenged action also is not dispositive of standing. In *Painted Post*, the court said that, applying the Appellate Division's reasoning would mean that because there were multiple residents who were directly impacted, no resident of the village would have standing to challenge the actions of the village, notwithstanding that the train noise fell within the zone of interest of SEQRA. Such a result, the court pointed out, effectively would "insulate" the village's actions from any review and would result in a standing rule that was so restrictive as to avoid judicial review.

Third, the key factor is that injuries must be "real and different from the injury most members of the public face." Applying this standard, the court concluded that Marvin's allegation about train noise caused by the increased train traffic keeping him awake at night, even without any express differentiation between the train noise running along the tracks and the noise from the transloading facility, was "sufficient to confer standing."

Finally, courts should be willing to examine allegations for standing purposes in the context of the full petition itself. The court did so when it said that although Marvin's affidavit set forth a "generalized complaint of train noise," there was no reason to decide, as the Appellate Division did, that he only was claiming noise from trains running on the tracks, and not from the trains in the loading facility. The court declared that, given his proximity to the facility and his allegations, it could "conclude that he was hearing noise from the facility, as well as the noise from the trains running along the tracks."

Additionally, the court observed, the verified petition referenced an engineer's report issued prior to the construction of the facility that stated that the loaded cars would be heavy, and that moving cars loaded with more than 96 tons of weight on and off sidings could be expected to result in significant noise from coupling and uncoupling cars, running the diesel engines required to move the railcars, and squeaking wheels. The court concluded that Marvin's allegations, "read in the context of the petition," sufficiently set forth harm caused not only by the noise of trains running along the tracks, but the trains in the loading facility.

Conclusion

Standing has been and is going to continue to be an important issue in land use cases. The four guidelines derivable from the court's Painted Post decision should help all parties evaluate the standing of petitioners challenging land use decisions and SEQRA determinations. However, because standing requires a detailed analysis of the facts presented by each case, courts will continue to wrestle with this threshold issue as they try to strike a balance between the protection of the environment and community character, and respect for individual property rights.

1. *Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761 (1991).

2. N.Y. Environmental Conservation Law (ECL), Article 8.

3. *Matter of Sierra Club v. Village of Painted Post*, 26 N.Y.3d 301 (2015).

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