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Expert Analysis

SEQRA Standing in The Appellate Division Departments

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Courts throughout the state regularly deal with the issue of standing in proceedings under the State Environmental Quality Review Act (SEQRA). Although courts generally take a broad view of standing, it requires more than rote recitation of the legal criteria. Petitioners must include specific factual allegations that demonstrate how they each meet the legal criteria.

This column discusses recent SEQRA standing decisions from all four Appellate Division departments involving a wide variety of petitioners and fact patterns. Collectively, these appellate rulings illustrate the breadth of situations in which SEQRA standing is considered by the judicial system, and the various factors that can lead to a finding of standing—or to a conclusion that standing has not been established.

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The Standard

As many courts have explained, standing is a threshold requirement for a party seeking to challenge governmental action under SEQRA. The burden of establishing standing in these matters is on the party seeking review. The existence of an injury-in-fact—an actual legal stake in the matter being adjudicated—ensures that the party seeking review has some concrete interest in prosecuting the proceeding or action.

In addition, to establish standing under SEQRA, a petitioner must establish an environmental injury that is in some way different from that of the public at large. E.g., *Matter of Save the Pine Bush v. Common Council of City of Albany*, 13 N.Y.3d 297 (2009); *Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761 (1991).

The First Department

The Appellate Division, First Department, recently considered organizational standing for SEQRA purposes in *Real Estate Bd. of New York v. City of New York*, 165 A.D.3d 1 (1st Dept. 2018).

Collectively, these appellate rulings illustrate the breadth of situations in which SEQRA standing is considered by the judicial system, and the various factors that can lead to a finding of standing—or to a conclusion that standing has not been established.

The case was brought by the Real Estate Board of New York (REBNY), a real estate industry advocacy organization. REBNY challenged New York City Local Law No. 50 (2015), which

placed limits on conversions of Manhattan hotels with at least 150 units to condominiums, and included a moratorium on certain projects. REBNY asserted the local law reduced the value of these properties.

The city moved to dismiss arguing, among other things, that REBNY lacked standing. The Supreme Court, New York County, granted the city's motion. REBNY appealed, and the First Department affirmed.

In its decision, the First Department explained that to demonstrate organizational standing, "[a]n organization must plead facts tending to show 1) that one or more of its members would have standing to sue; 2) the interests it asserts are germane to its purposes so as to satisfy the court that it is an appropriate representative; and 3) neither the asserted claim nor the relief requires the participation of the individual members."

Moreover, the court continued, "[o]ther rules of standing applicable to individuals apply with equal force to organizations." The most pertinent of these rules requires that "the litigant [] allege injury in fact which falls within the zone of interests protected by the statute invoked." Finally, the court added, "especially in land use matters, the injury must be 'different in kind or degree from that of the public at large.'"

The First Department then ruled that, although REBNY had standing to pursue its plenary action claims and its Uniform Land Use Review Process Article 78 claims, REBNY did not have standing to pursue its SEQRA claims. In the court's view, REBNY had "not shown that environmental concerns are germane to [its] organizational purposes." The court also found that "REBNY's claimed environmental harm [was] nothing more than economic harm," such as a reduction in property values and a loss of business opportunities—which are not within the zone of interests protected by the statute invoked, i.e., SEQRA.

Finally, the court decided that REBNY's standing was not salvaged by its contention "that 'SEQRA was a concern' for all REBNY members in proximity to the hotels due to potential impacts on traffic, noise, air quality, waste disposal, and demand for public services." According to the First Department, this argument "fail[ed] to establish injury separate and apart from injury to the general public."

The Second Department

The Second Department has decided quite a number of SEQRA standing cases recently, including *Tilcon New York v. Town of New Windsor*, 172 A.D.3d 942 (2d Dept. 2019).

The *Tilcon* case arose after the town board of the upstate town of New Windsor leased town property to Jointa Lime Company and subsequently agreed to continue to rent the property to Jointa on a month-to-month basis after the lease ended.

Tilcon New York, Inc., a business competitor of Jointa, alleged that Jointa's month-to-month holdover tenancy violated SEQRA, among other laws. The town defendants moved to dismiss, asserting that Tilcon lacked standing.

The Supreme Court, Orange County, agreed with the town defendants and dismissed the claims. The dispute reached the Second Department, which affirmed.

In its decision, the Second Department explained that Tilcon had not established standing as to its cause of action alleging violations of SEQRA "because a generalized 'interest' in the environment does not confer standing to challenge environmental injury." The court pointed out that, "[i]n addition to the requirement of demonstrating an injury-in-fact distinct from the public at large which falls within SEQRA's zone of interest," Tilcon had to "demonstrate that it will suffer an injury that is environmental and not solely economic in nature." The court concluded that "Tilcon failed to identify any environmental injury it had suffered or will suffer that differs from the alleged injury to the public at large."

The Second Department also has ruled recently that petitioners had not established SEQRA standing in the following cases:

- A petition objecting to a city council's approval of the construction of a senior citizen residence on certain city real property approximately 1,200 feet to

1,800 feet from the petitioners' homes was dismissed on SEQRA standing grounds. The court reasoned that the petitioners' residences were "not adjacent to the subject property" but, rather, were "several streets and building lots away from it and are separated from it by another housing complex." The court also held that the petitioners allegations of potential harm were "speculative and unsubstantiated" and, thus, failed to demonstrate the petitioners would suffer any direct injury-in-fact different in kind or degree from that experienced by the public at large" (*Vasser v. City of New Rochelle*, No. 57315/17 (2d Dept. Feb. 5, 2019));

• A board of fire commissioners' SEQRA challenge to a town planning board's determination to issue a negative declaration in connection with a multifamily residential project was dismissed for lack of standing. The court found that the fire commissioners' "concerns that an increase in the number of residents in its [fire] district would result in an increase in the number of service calls made by it, which would result in a financial burden on it, were insufficient to establish its standing since such concerns are solely economic in nature," and that their "claim relating to traffic impacts was insufficient to establish standing" because the fire commissioners "failed to demonstrate an environmental injury different from that suffered by the public at large" (*Bd. of Fire Comm'rs of Fairview Fire Dist. v. Town of Poughkeepsie Planning Bd.*, 156 A.D.3d 621 (2d Dept. 2017)); and

• A SEQRA challenge against a city's decision to award construction contracts to build public comfort stations along a boardwalk was rejected for lack of standing because "the petitioners' alleged environmentally related injuries [were] too speculative and conjectural to demonstrate an actual and specific injury-in-fact" (*Shapiro v. Torres*, 153 A.D.3d 835 (2d Dept. 2017)).

Property owners, developers, and local government officials should keep these factors in mind when commencing, or facing, litigation challenging government actions under SEQRA.

The Second Department also has recently upheld findings of SEQRA standing. *Star Prop. Holding v. Town of Islip*, 164 A.D.3d 799 (2d Dept. 2018) (owners of nearby businesses "alleged sufficient harm other than merely an increase in competition that they would sustain as a result of proposed development"); *Green Earth Farms Rockland v. Town of Haverstraw Planning Bd.*, 153 A.D.3d 823 (2d Dept. 2017) (petitioners owned or leased properties immediately across street from, and within 500 feet of, the site of a proposed development; the court inferred an injury-in-fact based upon proximity, and noted that the petitioners alleged environmental harm within the zone of interests protected by SEQRA).

The Third Department

The Third Department issued a notable SEQRA standing decision earlier this year. In *Hohman v. Town of Poestenkill*, 179 A.D.3d 1172 (3d Dept. 2020), local property owners challenged a decision by the upstate town of Poestenkill relating to its potential acquisition of a nature preserve.

The Supreme Court, Rensselaer County, dismissed the proceeding. The petitioners appealed, and the Third Department affirmed.

The Appellate Division explained that the "petitioners[']claim of standing is based upon the fact that they own property directly adjacent to the nature preserve and have asserted concerns that [Poestenkill], in conducting its SEQRA review, failed to consider the impact of increased motor vehicle and pedestrian traffic and/or the environmental effect that a newly proposed parking lot and hiking trail would have on the nature preserve."

The court held the petitioners' status as adjacent landowners "[did] not automatically confer standing on them to challenge the [t]own [b]oard's SEQRA negative declaration."

Furthermore, the court noted that the "petitioners' asserted concerns fail to allege any unique or distinct injury that they will suffer as a result of the [Poestenkill's] proposed land acquisition that is not generally applicable to the public at large."

The court concluded that the petitioners' alleged injuries were "speculative and conjectural and fail[ed] to demonstrate direct or specific injury different from that suffered by the general public in the vicinity of the nature preserve."

The Third Department reached the same result in another recent case, *Schulz v. Town Bd. of Queensbury*, 178 A.D.3d 85 (3d Dept. 2019). The court concluded that the plaintiff did not have SEQRA standing where he did not reside within the town that had established a sewer district which he challenged: "[a]lthough his homestead apparently straddles the Town line such that 1.2 acres of his land is situated in the Town, his property is located outside of—and approximately 15 miles away from—the sewer district." The court also said "plaintiff's status as a taxpayer, by itself, does not grant him standing to challenge the establishment of the sewer district."

The Fourth Department

The Fourth Department, in *Sheive v. Holley Volunteer Fire Co.*, 170 A.D.3d 1589 (4th Dept. 2019), considered the SEQRA standing of a petitioner-plaintiff who challenged a fire company's "Squirrel Slam" hunting contests. The petitioner resided about 50 miles from the area where the hunting contests were held, and "[s]he allege[d] an environmental injury-in-fact based on her fondness for squirrels, the impact that the hunting contests may have on the 'local ecology,' and the possibility that the contests may result in the killing of squirrels that she sees near her residence."

The Fourth Department ruled that the petitioner-plaintiff failed to meet her burden of establishing an environmental injury-in-fact. The court reasoned that, although she might have alleged some environmental harm, her allegations—at the most—amounted to an injury that was "no different in either kind or degree from that suffered by the general public." The court also found that the petitioner-plaintiff did not establish "the hunting activities at issue have affected the wildlife where she resided, nor had she established that she has used, or even visited, the area where the hunting contests have been conducted."

The Fourth Department recently issued several other opinions in the context of standing under SEQRA. *Schmidt v. City of Buffalo Planning Bd.*, 174 A.D.3d 1413 (4th Dept. 2019) ("petitioner's appreciation for historical and architectural sites does not rise to level of injury different from that of public at large for [SEQRA] standing purposes"); *Pilot Travel Ctrs., v. Town Bd. of Bath*, 163 A.D.3d 1409 (4th Dept. 2018) (no SEQRA standing where "petitioner failed to establish an injury distinct from members of the public at large"); *Wooster v. Queen City Landing*, 150 A.D.3d 1689 (4th Dept. 2017) (SEQRA standing found for petitioners who engaged in "repeated, not rare or isolated use" of property for recreation, study, and enjoyment, thereby demonstrating the threatened harm to that area will affect them differently than the public at large).

Conclusion

As these decisions should make clear, SEQRA standing is a threshold issue that requires a petitioner to establish an injury-in-fact that is (1) direct and different from that suffered by the public at large, and (2) within the zone of interests sought to be protected by the statute. Property owners, developers, and local government officials should keep these factors in mind when commencing, or facing, litigation challenging government actions under SEQRA.