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Zoning and Land Use

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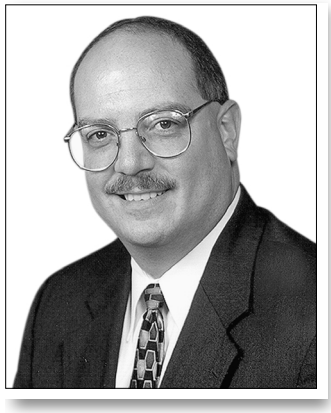
Standing Requires More Than Interest of Public at Large

Under New York law, parties seeking judicial review of a zoning or other administrative determination have the burden of establishing that they have standing to raise their claim. Standing is a threshold determination, resting in part on policy considerations — that only those parties who are aggrieved by an administrative action, and not the public at large, should be allowed access to the courts to adjudicate the merits of a particular dispute.[1] Standing to challenge an administrative action generally turns on a showing that the action will have a harmful effect on the challenger and that the interest to be asserted is within the zone of interest to be protected by the statute.[2]

The Court of Appeals applied the general rules of standing in a proceeding to review a zoning determination in *Sun-Brite Car Wash v. Board of Zoning & Appeals of the Town of North Hempstead*,[3] a case that arose on Long Island. The Court stated that challenges to a zoning determination, whether in the form of an Article 78 proceeding or an action for an injunction, may only be made by parties who are aggrieved by the determination. Aggrievement warranting judicial review requires a showing that a person has suffered "special damage, different in kind and degree from the community generally" as a result of the determination.[4] In other words, something more than the interest of the public at large is required to entitle a person to seek judicial review of a zoning or other land use determination.

In two subsequent cases that also arose on Long Island, the Court of Appeals applied



the general rules of standing to claims asserted under the State Environmental Quality Review Act (SEQRA).[5]

In *Society of Plastics Indus. v. County of Suffolk*,[6] a nationwide trade organization challenged a Suffolk County law banning the use of certain plastics on the basis that the county legislature had failed to conduct an adequate environmental review under SEQRA before passing the law. The court stated in that case that for standing purposes, a plaintiff must not only show that it will suffer "direct harm" or "injury that is in some way different from that of the public at large," but that the injury must be environmental and not solely economic in nature.

However, in *Har Enterprises v. Town of Brookhaven*,[7] the Court held that a petitioner whose property is the subject of a land use determination is presumptively adversely affected by an alleged SEQRA violation and, therefore, no allegation of specific environmental harm is necessary.

With these standards in mind, the Nassau and Suffolk County Supreme Courts and the Appellate Division, Second Department, have analyzed standing in several recent cases involving individuals, organizations and businesses. These rulings provide significant guidance with respect to the current application of the rules of standing in situations involving challenges to zoning and other land use decisions on Long Island.

Neighbors

Courts have held that alleging a petitioner's property is within close proximity to the property subject to a zoning or land use decision may give rise to an inference of damage or injury without proof of actual injury. However, the mere status of a "neighbor" does not automatically provide entitlement to judicial review in every instance.[8] That is because a petitioner's property may still be far enough from the subject property that the effect of the challenged determination on the petitioner is no different from that suffered by the public generally.

Consider the Second Department's decision in *Long Island Pine Barrens Society, Inc. v. Planning Board of the Town of Brookhaven*.[9] There, a number of individuals, including property owners, challenged the action of the Village of Lake Grove Planning Board granting preliminary subdivision approval for a 121-unit residential real estate project to be developed in a designated Special Groundwater Protection Area. After the Supreme Court, Suffolk County, determined that the petitioners did not have standing to challenge the planning board's determination, they appealed.

The Second Department affirmed, noting that parties whose property is the subject of a challenged administrative determination or lies in close proximity to subject property are the beneficiaries of a presumption that they are adversely affected by an alleged SEQRA violation and, accordingly, need not allege a specific harm.

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In this case, however, the Appellate Division found that the petitioners could not benefit from this presumption because they failed to demonstrate that their property was in close proximity to the parcel to be developed. Because they also failed to demonstrate that they would suffer an environmental injury that was in some way different from that of the public at large, the appellate court affirmed the lower court's decision.

In another case, *Jurman v. Town of Huntington Planning Board*,[10] an attorney with an office on Route 110 in Melville commenced an Article 78 proceeding seeking to annul the Town of Huntington Planning Board's decision to approve an amended site plan for the expansion of the Walt Whitman Shopping Mall. (The author's firm represented the property owner.) Suffolk County Supreme Court Justice Marquette Floyd ruled that the attorney, whose office was more than three miles south of the mall, did not have standing. Indeed, Justice Floyd observed, the attorney was in no different position than "any other citizen similarly situated on Route 110 in Melville who has concerns for increased traffic, noise, congestion, et seq."

In *Open Space Council, Inc. v. Planning Board of Town of Brookhaven*,[11] several individual petitioners and community groups challenged the Town of Brookhaven Planning Board's site plan approval for a proposed regional shopping mall in Yaphank. The Suffolk County Supreme Court found that individual petitioners who owned property eight miles and about 17 miles from the site did not have standing. The court also found that a property owner who lived in a condominium about one-half mile away from the site did not have standing, noting that between her and the site were at least 137 other attached housing units, numerous "green spaces," natural buffers and a four-lane road.[12]

On appeal, the Second Department disagreed with the Supreme Court's conclusion that the condominium owner did not have standing upon a finding that the record established that the nearby condominium complex would be impacted by traffic problems, problems related to a sewage treatment plant on the project site, and noise and traffic problems related to the construction of the mall. Under these circumstances, the Second Department concluded, the condominium owner had demonstrated sufficient potential injury in fact to sustain her burden of establishing standing.

Organizational Standing

Organizations such as civic and environmental groups often seek to challenge land use decisions in court.[13]

The key requirement for an organization to have standing is that one or more of the members of the organization has standing. Thus, in *Open Space Council, Inc. v. Planning Board of Town of Brookhaven*, the Second Department found that the Open Space Council had standing because the condominium owner had standing. An organization must also demonstrate that the interests it asserts are germane to its purposes and that neither the asserted claim nor the appropriate relief requires the participation of the individual members.[14]

Businesses

The second part of the two-part test for determining when a party has standing to contest administrative action, i.e., that the interest asserted is arguably within the zone of interest to be protected by the statute, is illustrated by the numerous court decisions that have concluded that the purpose of zoning is not to control or limit business competition.[15] For example, in *Sun-Brite Car Wash*, supra, the Court of Appeals held that a competitor, regardless of its proximity to the applicant's property, has no standing to challenge a zoning decision if its claims are based on a fear of increased business competition.[16]

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In that case, the owner of a gasoline station applied for a permit to erect an automatic car wash on its property. The owner received a variance, and Sun-Brite Car Wash, the lessee of a car wash across the street from the subject property, commenced an Article 78 proceeding.

The Supreme Court, Nassau County, found that Sun-Brite, as a lessee in the immediate vicinity of the affected property, was as a matter of law "aggrieved" and, therefore, had the requisite standing. It then vacated the decision granting the variance.

The Second Department reversed, concluding that Sun-Brite lacked standing to bring the Article 78 proceeding because its only substantiated objection to the variance was that it would result in increased competition.

The Court of Appeals granted leave to appeal and affirmed. It found that Sun-Brite lacked standing to seek judicial review because the threat of increased business competition is not an interest protected by the zoning laws. Individual property owners "have no vested rights to monopolies created by zoning laws or ordinances," the Court continued.

The Court added that the fact that Sun-Brite was a competitor would not alone deprive it of standing if it would suffer other injury, such as depreciation in the value of its property arising from the manner in which the challenged use was conducted. In this case, however, because the record revealed that the only substantiated objection to the variance was the claim that it would result in increased competition, Sun-Brite lacked standing to maintain the proceeding.

Courts do not apply standing principles in a heavy-handed fashion. However, they recognize that permitting anyone or everyone to seek judicial review would work against the welfare of the community by proliferating litigation, especially at the insistence of special interest groups, and by unduly delaying final dispositions. In most instances, therefore, courts require something more than the interest of the public at large to entitle a person to seek judicial review. The concept of standing is one that should be clearly analyzed by the party contemplating litigation, and by the opposing party as soon as practical.

(1) *Gernatt Asphalt Products v. Town of Sardinia*, 87 N.Y.2d 668 (1996).
(2) *Dairylea Coop. v. Walkley*, 38 N.Y.2d 6, 10 (1975).
(3) 69 N.Y.2d 406 (1987).
(4) Id. at 413.
(5) ECL, Art 8.
(6) 77 N.Y.2d 761 (1991).
(7) 74 N.Y.2d 524 (1989).
(8) See, e.g., *Sun-Brite Car Wash v. Board of Zoning & Appeals of North Hempstead*, supra.
(9) 213 A.D.2d 484 (2d Dept. 1995).
(10) N.o.r., Index No. 6003-98 (Sup. Ct., Suffolk Co., July 28, 1998). The author's firm represented the property owner in this case.
(11) 245 A.D.2d 378 (2d Dept. 1997).
(12) N.o.r., Index No. 5723-95 (Sup. Ct. Suffolk Co., Dec. 27, 1995).
(13) See, e.g., *Long Island Pine Barrens Society, Inc. v. Supervisor of Southampton*, 2003 N.Y. App. Div. Lexis 208 (2d Dept., Jan. 13, 2003); *Long Island Pine Barrens Society, Inc. v. Town Board of East Hampton*, 293 A.D.2d 616 (2nd Dep't 2002); *Port Jefferson Civic Assoc. v. Planning Board of Port Jefferson*, 286 A.D.2d 503 (2nd Dep't 2001).
(14) Id. at 775.
(15) See, e.g., *Cord Meyer Development Co. v. Bell Bay Drugs, Inc.*, 20 N.Y.2d 211 (1967); *Scannell v. Town Board of the Town of Smithtown*, 250 A.D.2d 832 (2d Dept. 1998); *Blumenreich Properties, Inc. v. Waters*, 14 Misc.2d 947 (Sup. Ct., Nassau Co. 1957).
(16) 69 N.Y.2d at 415.