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TAKING A STAND IN LAND USE AND SEQRA ACTIONS: EXAMINING THE REQUIREMENTS OF STANDING IN ENVIRONMENTAL CHALLENGES UNDER SEQRA AND ZONING REGULATIONS AND REVIEWING HOW THOSE REQUIREMENTS ARE APPLIED IN HYBRID CASES

By **Stephanie W. Ferradino, Esq.**

In the realm of litigation challenging environmental impact and zoning decisions, the complex and often misunderstood overlap of standing in the context of municipal zoning and the New York State Environmental Quality Review Act (SEQRA) can be frustrating for even the most experienced land use practitioner. Often, it is necessary to challenge a decision or defend a victory of both a zoning decision as well as the underlying environmental determination made under SEQRA. This article will analyze the treatment of standing under both SEQRA and land use decisions and show how the lower courts have been applying those divergent standards in recent hybrid decisions.

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I. Introduction

With the emergence of SEQRA, municipal zoning has become completely intertwined with the assessment of the environmental impacts of land use decisions. While there is much debate about whether SEQRA efficiently accomplishes its mission or unduly elongates the zoning process, the reality is that SEQRA presently exists and necessarily causes the courts to grapple with the day-to-day application of SEQRA in the context of land use decision-making. Whether the municipal decision is a variance for a bed and breakfast in a small village or a legislative amendment to a planned development district for a multi-billion dollar project, SEQRA is a part of the review process and the ultimate decision. A legal challenge to the land use decision or the environmental review (or both) forces courts and would-be challengers to face a variety of procedural issues, even before the merits are examined.

Although SEQRA was enacted in 1975, following the 1969 passage by Congress of the National Environmental Policy Act, many municipalities are still in the primary stages of understanding and implementing the Act correctly. Land use lawyers appearing on behalf of clients before municipal boards (often made up of citizen volunteers) regularly find themselves providing a significant education to ensure that, in addition to the state and local zoning law, the guidelines of SEQRA are correctly followed and applied. In instances where it is believed a municipality did not properly follow land use regulations or SEQRA, a whole host of interested parties can commence litigation in order to challenge the municipal actions.

The cast in these cases normally includes a project proponent (e.g., the applicant, property owner, contract vendee, etc.) and project opponents (e.g., neighbors, citizen groups, local businesses, etc.). The setting involves the project proponent or the project opponent appealing either a land use decision (e.g., a variance or amendment) or a SEQRA decision (e.g., a negative declaration or positive declaration) or in some cases both. When both the

underlying legislative land use decision and the administrative SEQRA determination are at issue, the challenge brought is often referred to as a “hybrid” action because it encompasses a combined declaratory judgment action and Article 78 proceeding. The attorney faced with bringing or defending a hybrid proceeding must be concerned with the proper form of the papers,¹ the appropriate time limitations governed by varying statutes, including when the clock begins to run for each of the challenged actions,² and—the primary focus of this article—whether or not the parties have standing to challenge one or all of the decisions.

The determination of whether a challenger seeking judicial relief is a proper party to the action must be considered at the outset in any litigation. For practitioners seeking to challenge any determination pertaining to SEQRA or land use cases, the first matter to consider is whether the party they represent can establish standing in order to seek the court’s review of the case. “Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria.”³ In the land use context, courts have applied liberal construction to the standing rules “so that land disputes are resolved on their own merits rather than by preclusive restrictive standing rules.”⁴

But what exactly are the standing rules for zoning decisions or for SEQRA? Are they the same or are they different? How have the courts been applying these standing rules when hybrid actions are involved? All of these questions will be examined in the subsequent paragraphs, including the common pitfalls practitioners should be aware of when pleading their cases.

II. Standing in Land Use Cases

Standing issues in land use cases or zoning determinations will necessarily be determined by the application of both statutory and case law; whether in the form of a CPLR Article 78 proceeding, an action

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seeking injunctive relief or a declaratory judgment, or a hybrid action.

The most common statutory authority for standing in land use cases can be found in statutes such as the General City Law, the Village Law and the Town Law. These laws similarly define those with standing as “any person or persons, jointly or severally aggrieved” for which the review procedure of the underlying municipal decision is often an appeal to the Supreme Court under Article 78 of the CPLR.⁵ However, as will be discussed later, an Article 78 is not the sole testing mechanism for municipal decisions and there are often circumstances when an Article 78 proceeding is joined in the same action by a declaratory judgment action, resulting in a hybrid action.

Traditionally, any person who has a legal right or interest in the property subject to the zoning determination is considered an “aggrieved person.”⁶ When the challenger is the affected property owner, she can easily demonstrate standing when the challenged decision is adverse to her. While the statutes assist in identifying immediate parties, such as applicants, who have standing to commence an action challenging land use decisions, it is the courts that have tackled the tougher questions of which additional parties are entitled to judicial review. The statutory language is always an excellent place to start, but the true crux for the practitioner is determining whether the challenger is an “aggrieved person” as that term is being defined in the constantly evolving decisions by the courts.

Aggrievement has been traditionally described as suffering “special damage” or an “injury in fact” different from injury to the public at large.⁷ However, pleading and proving special damage or injury in fact proved difficult in many land use cases.⁸ With the 1987 case of *Sun-Brite Car Wash, Inc. v. Board of Zoning and Appeals of Town of North Hempstead*, the Court of Appeals expanded the scope of an “aggrieved person” such that proximity to the property affected by the zoning decision “may give rise to an inference of damage or injury that enables a nearby owner to challenge a zoning board decision *without proof of actual injury*.”⁹ The court recognized that it is commonplace for those within a defined radius of the property at issue to receive a mandatory notice of the administrative proceedings so as to be given the opportunity to be heard.¹⁰ If neighbors entitled to mandatory notice have presumptive standing because of their proximity, the court reasoned that

others in the community, even those without entitlement to such notice, may be adversely affected by a decision simply because of their closeness to the property at issue.¹¹

However, the court also cautioned that proximity alone would not automatically provide standing.¹² A challenger must also allege an interest that “is arguably within the zone of interest to be protected by the [zoning] statute.”¹³ Therefore, the court in *Sun-Brite* recited a two-part analysis for establishing standing to challenge a zoning determination.¹⁴ According to this test, a challenger must allege: (1) adverse effect of the decision through (i) special damage different from the public at large or, in the alternative, (ii) sufficient proximity to presume adverse impact; and (2) interest within the “zone of interest” sought to be protected by the land use provision at issue.¹⁵

A. Proximity

Leaving ‘special damages’ aside, many of the current land use standing decisions dealing with the first prong on the *Sun-Brite* test are decided on the issue of proximity, which is often thought of (wrongly) as self-evident. While living close to the property is likely to be a key factor in most cases, it is certainly not a foregone conclusion and proximity details should be specifically alleged in the pleadings. Thus far, cases have not delineated a specific distance threshold or cut-off point for proximity to the property at issue; rather, the question is whether the challenger’s “closeness” to the property results in the negative outcome of which he has complained. Assessing proximity is highly fact-dependent and there are no bright line rules of “how far is too far?”¹⁶

A comparison of *Burns Pharmacy of Rensselaer, Inc. v. Conley, et al.*¹⁷ and *Center Square Association, Inc. v. City of Albany Board of Zoning Appeals*¹⁸ convincingly illustrates the inconsistency inherent in fact-based review of proximity. Both cases were decided by the Third Department and dealt with the oft-controversial issue of parking, but the court ultimately issued opposing findings on the issue of standing. In *Burns Pharmacy*, a property owner received an area variance to demolish an existing building and erect a Rite-Aid Pharmacy three blocks from the challengers’ properties; one of whom owned a competing pharmacy.¹⁹ The court considered the three-block distance (between 1,000 and 1,500 feet) from the challengers’ proper-

ties to the property at issue too far to infer injury because, at that distance, it was unlikely that the complained of parking and traffic problems would affect them.²⁰ Conversely, in *Center Square Association*, the property owner was granted a use variance allowing 13 apartments in an area zoned for one to two-family homes.²¹ The property owners' association was found to have standing because individual members of the group had properties which "either abutted or were within several homes of the properties at issue" and would necessarily be affected by an already congested, competitive on-street parking situation.²²

Suffice it to say that wholly failing to allege proximity in a land use case can be fatal to any finding of standing to challenge a zoning decision. The property company in *East End Property Company #1, LLC v. Town Board of Town of Brookhaven* found this out the hard way.²³ In challenging the issuance of a special permit, a waiver and area variances in the construction of a 350-megawatt dual-fuel, combined cycle combustion turbine electric power generator, the challenger's complete failure to demonstrate proximity to the project site robbed it of the ability to rely on the *Sun-Brite* presumption of adverse impact due to closeness.²⁴

B. Zone of Interest

As mentioned above, the *Sun-Brite* court instructed that a challenger to a zoning decision must also allege an interest which is "arguably within the zone of interest to be protected by the statute."²⁵ Simply stating that a matter is "one of vital public concern" is insufficient to confer standing and courts require more from a challenger.²⁶ In *Society of Plastics Industries, Inc. v. County of Suffolk* (which is actually a SEQRA standing case discussed at length below), the Court of Appeals explained that the "zone of interest" requirement "serves to filter out cases in which a person's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that [the drafters] intended to permit suit."²⁷ Therefore, courts look closely at the purpose of the zoning ordinance or statute at issue in order to determine whether the challenger's asserted interest was one the drafters were intending to protect.

Interestingly enough, it was the "zone of interest" prong which the challenger in *Sun-Brite* failed to establish.²⁸ The petitioner's only "substantiated objection" to the location of the competitor's car

wash was the threat of increased business competition.²⁹ Using the oft-quoted language of the earlier Court of Appeals case of *Cord Meyer Development Co. v. Bell Bay Drugs*,³⁰ the court reiterated that "individual property owners have no vested rights to monopolies created by zoning laws or ordinances. These are not enforced at the instance of one competitor in order to prevent or reduce competition."³¹ It should be noted, however, that the court in *Sun-Brite* left it open for challengers to plead depreciation in market value as a result of the project at issue. Pleading a diminution in property value, as opposed to loss of business due to competition, may support a court's finding of standing.³² Therefore, economic injury, without more, is not within the zone of interest protected by a municipality's zoning laws.

In summary, and borrowing from a famous fable, if Chicken Little seeks to challenge the rezoning of a farm to an industrial complex because she believes the proposed smokestacks will cause the sky to fall, she will need to do more to achieve standing than alert the reviewing court that this is a matter of vital public concern. Instead, she will still need to plead and prove several things: a special damage unique to her or her own proximity to the farm at issue, and that the damage of a fallen sky is within the zone of interest sought to be protected by the zoning ordinance. The review will be especially important when it is determined that Chicken Little comes from a neighboring town and that the particles she is concerned about are acorns.

III. Standing in Environmental Cases

Every land use decision, be it the approval of a site plan, the grant of a use variance or a municipality's approval of a zoning change, requires a prior examination of the project's impact on the environment through the SEQRA process.³³ While the land use and environmental decisions can occur at one meeting, the examination of the environmental impacts of a project triggers a decision by the lead agency *in advance* of any vote on the pending land use application. As challenges to the underlying land use decision may also allege violations of the SEQRA process, it is important to note the different requirements for standing under environmental challenges versus land use decisions, so that the necessary allegations supporting (or challenging) standing are included in the pleadings.

As noted above, guidance for the review of standing to challenge land use decisions is provided in both statutory and case law. However, when the challenge is to a lead agency's determination made under SEQRA, no such statutory guidance exists.³⁴ SEQRA is silent on specific standing requirements or limitations. The lack of guidance by the Legislature has resulted in New York courts addressing the issue of standing as claims are brought to them by parties seeking to adjudicate the merits of a specific environmental dispute.

A. The Emergence of the "Special Harm" Requirement

A decision made pursuant to SEQRA is also administrative in nature and follows the land use standing jurisprudence discussed in the Section II above. In the 1990 case of *Mobil Oil Corp. v. Syracuse Industrial Development Agency*, the Court of Appeals reiterated that a decision made pursuant to SEQRA must include a showing of injury in fact (or special harm, "different in kind and degree from the community at large"), and that the injury must be within the zone of interest sought to be protected by the statute at issue.³⁵ Furthermore, "to qualify for standing to raise a SEQRA challenge, a party must demonstrate that it will suffer an injury that is environmental and not solely economic in nature."³⁶ Presumably, requiring allegations of environmental harm differentiates the "zone of interest" under SEQRA from alternative forms of economic proof available to challengers to land use decisions, such as diminution of property value.

For factual reasons unclear from the record, the court in *Mobil Oil Corp.* found that, even though the petitioning oil company was a nearby property owner, it did not have "an especially close relationship to the property affected by the agency action" to enjoy a presumption of standing under SEQRA.³⁷ Proximity should be the true exception and not the rule. Without the finding of a "close relationship" of proximity, the court returned to an examination of "special harm" and did not find it in the petitioners' papers. Instead, the court rejected the solely economic basis for the challenge and dismissed the petition. However, the court did note that its decision was consistent with its recent decision in *Har Enterprises v. Town of Brookhaven*,³⁸ which found that, even in the absence of a showing of "special harm," a property owner will always have standing as no other party is more affected by the decision.³⁹

This additional limitation on standing became known as the "special harm" requirement and has been viewed by some as having created an exceptionally restrictive requirement for standing under SEQRA.

In 1991, the Court of Appeals decided *Society of the Plastics Industry, Inc. v. County of Suffolk*.⁴⁰ In that case, the court dismissed an action brought by several organizations concerned about a law passed in Suffolk County which they believed would increase waste, truck traffic, water pollution, etc.⁴¹ Because the court found that none of the petitioners could assert environmental injury not shared by all residents of Suffolk County, the court ultimately found that there was no showing of direct harm.⁴² This additional limitation became known as the "special harm" requirement and has been viewed by some as having created an exceptionally restrictive requirement for standing under SEQRA.⁴³ The primary objection from the dissent and commentators was that "under the new standard, someone who alleges environmental damage from an action which applies generally to an entire area and indiscriminately affects everyone in the area is precluded from judicial review . . . [and] can thus present a virtual impasse to judicial review."⁴⁴

B. The Pine Bush Case and the Present State of SEQRA Standing

In the fall of 2009, the Court of Appeals decided a case which reaffirmed the standards set forth in *Society of Plastics* by allowing proof, in support of a standing argument, of the challenging party's use of a natural resource which was greater than that of the public at large.⁴⁵ The court relied on its language in *Society of Plastics* which found that "standing of an organization could be established by proof that agency action will directly harm association members in their use and enjoyment of the affected natural resource."⁴⁶ In *Save the Pine Bush v. Common Council of the City of Albany*,⁴⁷ the court declared that 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 SEQRA to challenge governmental actions that threaten that resource."⁴⁸

The *Pine Bush* case involved a challenge by an organization which utilized the Pine Bush area of Albany for recreation, enjoyment and study.

The members, however, were not located in close proximity to the hotel which was the subject of the rezoning and environmental assessment. In finding standing, the court clarified that the *Society of Plastics* decision did not require physical proximity as an “indispensable element of standing in every environmental case.”⁴⁹ Instead, the court instructed that the harm alleged must impact the members differently from the public at large. The decision allows a segment of the population who actually uses a threatened site, but who are not owners or tenants of land in close proximity to the site, to challenge environmental decisions which actually affect them more than the general public.

Perhaps the Court of Appeals recognized the so-called “special harm” requirement had been applied harshly to those challenging SEQRA findings. The court noted that barring those who actually use the site from challenging the environmental decisions made, merely because they are not neighbors, sets too tough a standard and would preclude a segment of the population directly impacted by the decision itself.⁵⁰

It is interesting to set the decision in *Pine Bush* against the United States Supreme Court holding set forth in *Sierra Club v. Morton*.⁵¹ In *Sierra Club v. Morton*, the Court held that injury to a plaintiff’s aesthetic and environmental well-being, if alleged, would be sufficient to confer standing to challenge environmental injury. However, in that case, the plaintiff failed to make allegations that the challenged development would affect its members’ activities or pastimes. The Court noted that Sierra Club members are committed to generalized environmental interests rather than dedicated to one particular resource being threatened. The Pine Bush organization, on the other hand, was injured by the project’s direct impact on threatened and endangered species enjoyed by members who use the preserve. It is the direct environmental impact versus the generalized community concern where New York courts are drawing the line when it comes to standing under SEQRA. However, the *Pine Bush* decision also warns practitioners that standing is not automatically conferred on a party, but must be pleaded and proved in order to show the injury is both real and different from the injury to the public at large.⁵²

What does this mean for the proximity element discussed in *Mobil Oil Corp.* and *Har Enterprises*? In his concurrence in *Pine Bush*, Judge Pigott pointed

out that some courts have found a proximity exception to the special harm requirement of standing.⁵³ In *Michalak v. Zoning Board of Appeals of Town of Pomfret*, for example, the court found that landowners within 500 feet of the project were in close enough proximity as to be presumptively harmed by the environmental decision and thus the burden of proof of special harm was removed.⁵⁴ However, in *Oates v. Village of Watkins Glen*, a petitioner located 530 feet from a proposed construction site did not have close enough proximity to confer standing,⁵⁵ and in *Buerger v. Town of Grafton*, there was no presumption of proximity for a petitioner 600 feet away.⁵⁶ It is interesting to note that lower court decisions that predated *Pine Bush* signaled concerns with application of strict proximity tests. In *Harris v. Town Board of Riverhead*, the court found that “strict adherence to rules of proximity are [sic] unjust in relation to the harm as expressed by these individuals.”⁵⁷ In the *Riverhead* case, the petitioners under the Article 78 proceeding lived between a half mile and four miles away from the proposed bypass road project.⁵⁸ The court found that the injury for these owners was different from that suffered by the general public and granted standing. Based upon the argument advanced by Judge Pigott in *Pine Bush*, it may be plausible that a resident adjacent or in close proximity to a challenged project will presumptively have standing. Whether or not this will be the Court of Appeals’ view remains to be seen.

It is evident from Pine Bush that standing under SEQRA diverges from standing under land use standards.

Noting the earlier discussion concerning standing to challenge zoning decisions, it is evident from *Pine Bush* that standing under SEQRA diverges from standing under land use standards, which still require a showing of definitive proximity as an exception to injury in fact. Conversely, there is no “use or enjoyment” exception to injury in fact for challenging zoning decisions, and there appears to be a tighter connection between an assertion of presumptive proximity and the claimed environmental injury under SEQRA (to the extent the exception exists), as opposed to land use review.

C. Pleading SEQRA Standing

While it may seem to go without saying, practitioners involved in litigation where SEQRA is at issue must be careful to allege environmental harm in order to sustain a standing challenge. From a practical standpoint, a practitioner representing an organization challenging a project's impact on a natural resource must, if the group does not have close proximity to the project, be careful to fully document, allege and prove each element of standing as he would on proof of the underlying cause of action. Conclusory assertions of impact will not suffice. A dismissal motion will focus on the quality, specificity and nature of the claims made by the challenger, so effective pleading and quality proof are critical. The reviewing court will be looking for a concrete demonstration of how the members would be affected in their use and enjoyment of the resource and how that use differs from the public at large.

IV. Standing in Hybrid Cases (Land Use and SEQRA)

The term "hybrid" has been used in different legal contexts and normally can be found when multiple rights are at issue with varying forms of relief at stake. The United States Supreme Court has interpreted cases which raise both the free exercise of religion and substantive due process issues as "hybrid."⁵⁹ In the zoning law, hybrid actions occur when a petitioner has commenced both an Article 78 challenge to a municipal administrative decision and a declaratory judgment action to challenge a legislative decision.

Hybrid action cases are perfect examples to demonstrate the courts' inconsistent application of the principles of standing noted in the preceding sections.

In addition to the combination of different statutory relief sought in hybrid matters, many hybrid actions also contain both land use and SEQRA issues. Hybrid action cases are perfect examples to demonstrate the courts' inconsistent application of the principles of standing noted in the preceding sections. As described in the sections above, two separate and distinct standing requirements exist for challenging a municipal board zoning decision versus a SEQRA determination. When a simultane-

ous challenge to both findings is brought, there is often confusion as to which standard should apply.

In *O'Brien-Dailey v. Town of Lyonsdale*, the Town of Lyonsdale passed a local law which opened certain town roads for use by all-terrain vehicles (ATVs).⁶⁰ The petitioner was a resident of the town and owned property which fronted a road affected by the new ATV law. She challenged the underlying local law as well as various procedural and substantive issues under the SEQRA findings.⁶¹ A declaratory judgment action concerning the local law, and an Article 78 proceeding concerning SEQRA, was filed: a classic hybrid action.

The court set forth its analysis as follows: "(1) Does the Petitioner have standing to contest the Town's local law? (2) If Petitioner has standing, did the Town properly meet its obligation of review under the Vehicle and Traffic Law? (3) If Petitioner has standing, and if the Town met its review obligations under the Vehicle and Traffic Law, did the Town complete a proper review of its proposed action before adopting the local law?"⁶² Immediately, the framing of the issues makes clear that standing review was limited to that of the petitioner's ability to challenge the legislative decision made by the Town Board, and not a separate inquiry under SEQRA, although both forms of relief were requested.⁶³

The supreme court noted the requirements of injury in fact and being within the zone of interest sought to be protected, but then went on to find that parties with land in close proximity to the subject property "are beneficiaries of a presumption that they are adversely affected by the alleged SEQRA violation."⁶⁴ The benefit of the presumption of proximity is firmly entrenched in the case law of land use challenges, but less so in the area of SEQRA. However, leaving SEQRA review aside for the moment, a proper examination of the standing requirements for the petitioner to challenge a law which allowed ATVs to be driven on roads abutting her property would have likely found standing (which went undisputed) and she would have been in a position to challenge the validity of the ATV law.

With respect to the standing inquiry under SEQRA, the petitioner was required to plead a "special harm"—in other words, an environmental injury different than that faced by the public at large—and if "special harm" was absent, the petitioner might have argued proximity. As mentioned above, the court based its decision on the proximity (approximately 1,300 feet from the road affected by the

new ATV law) and found that distance to be a “sufficiently close proximity.” The distance sustained in the case is more than double that of the cases which *did not* find standing as cited by Judge Pigott in his concurrence in *Pine Bush* (recall the 600 feet in *Buerger*⁶⁵). Ultimately, the court cited the potential increase in ATV traffic near her home, which “[gave] rise to an injury different than the public at large.” (Though, for this commentator, increased ATV traffic is an issue to be faced by all residents of the Town of Lyonsdale.)

In the case of *Johnston v. Town Board of Town of Brookhaven*, the court again blended the differing standards in a challenge to a rezoning and a negative declaration under SEQRA.⁶⁶ The court articulated that different standards are necessary to determine standing for to challenge the administrative action and the alleged SEQRA violations, but found a proximity exception for either or both standing tests.⁶⁷ Here, the court simply failed to undertake a land use standing analysis, but found under the SEQRA analysis that the property was in close proximity (200 feet) to the project site and that the property owner would suffer environmental harm because of the project.

As mentioned previously, the Court of Appeals in *Mobil Oil Corp.* seemed to indicate that there must be a tighter connection under SEQRA standing review between an assertion of close proximity and the claimed environmental injury. In the *Johnston* case, the respondents made the compelling, yet rejected, argument that the petitioner must reside in close proximity to the area affected.⁶⁸ Apparently, the area affected by the actual project construction was nowhere close to the 200-foot proximity of the petitioner’s residence as cited in the petitioner’s papers, meaning that the impact was presumably at the northeast corner of the owner’s parcel which was much farther away from the distance of the petitioner’s residence to the property line of the owner. Arguably, *Mobil Oil Corp.* does require an “especially close relationship to the property affected by the agency action” in order to avoid the special harm pleading requirement and actually living near a disappearing forest might have more of an adverse impact than simply owning vacant land.

Interestingly enough, the facts in *Johnston* seem to support granting standing because petitioner would suffer “special harm” different from that suffered by the public at large in the felling of 92 acres of forest near her property, as this would affect scenic

views, and the injury fell within the zone of interest to be promoted or protected by the SEQRA. However, the court instead made its decision on the less clear and less persuasive ground of a SEQRA proximity exception.

The lower courts are not alone in applying blended standards in hybrid matters and failing to articulate in their decisions the different criteria for land use and environmental cases. The Second Department’s sole issue in the 2009 case of *Bloodgood v. Town of Huntington* was standing in a hybrid proceeding challenging the town board’s modification of the town code to include mixed use buildings in the town’s general business district.⁶⁹ The court’s analysis of the standing issue was limited to an articulation of the SEQRA standards, despite the fact that the action challenged the adoption of a rezoning resolution, sought a declaration that the local law was null and void, and challenged the issuance of a negative declaration.⁷⁰ While the court upheld standing for some of the petitioners, it dismissed the action against another, and did not undertake a detailed analysis of the facts to allow the reader to determine standing under the land use standards.⁷¹

An example of a detailed and exacting examination of land use standing vs. SEQRA standing can be found in *Village of Chestnut Ridge v. Town of Ramapo*, which was decided by the Second Department in 2007.⁷² While the decision predates *Pine Bush*, it provides an excellent review of the varying standing rules, as applied to differing parties from individuals to neighboring municipalities. Two residents and the four local villages challenged the SEQRA findings underlying a zoning change and a subsequent comprehensive plan change, as well as the Town of Ramapo’s zoning law which permitted adult living facilities adjacent to the villages.⁷³ There were also constitutional allegations relating to discrimination, equal protection, and the First Amendment, largely derived from the exclusion of unmarried students from the benefit of the law.⁷⁴ The Town’s Planning Board was also named in the action due to its issuance of a negative declaration under SEQRA and site plan approval to the potential owner of the residential sites.⁷⁵

Given the number of plaintiffs and defendants, there were several permutations of the various claims arising under the General Municipal Law, Municipal Home Rule Law, the Town Law and SEQRA, each with different standing implications for each claimant. Initially, the court concerned itself

with a municipality's ability to challenge a zoning law and the SEQRA findings of a town, and determined that there was sufficient statutory support for the municipalities' challenge.⁷⁶ The court then moved on to the standing principles (injury in fact and within the zone of interest sought to be protected) for challenging a land use decision.⁷⁷ The standing requirements were then applied to each individual plaintiff, with varying results; some were found to have standing and others were not.⁷⁸

After a detailed discussion of the differing factual issues concerning the zoning law and constitutional challenges, the court then addressed the issue of SEQRA standing.⁷⁹ Upon reciting the SEQRA standing requirement (environmental injury different from that suffered by the public at large and within the zone of interest), the court applied the standard to each of the plaintiffs individually. The individual residents' distance (in this case, across the street) from one of the affected sites provided standing, but it was not found in their challenge to the remaining sites, to which they were not in close proximity.⁸⁰ The court proceeded then to detail the difference in finding an environmental injury specific to a municipality which "neither breathes foul air, nor hears loud noises, nor waits in traffic."⁸¹ However, the allegations in the villages' petition citing shared infrastructure impacts, such as water and sewer, as well as increased traffic persuaded the court to find SEQRA standing.

V. Conclusion

From a practical standpoint, what is a litigant to do when the courts themselves have not resolved how to apply standing laws in complex land use matters? To put it simply: argue anything and everything. If your client seeks to challenge a zoning approval or SEQRA approval, the papers should include facts sufficient to prove standing under the land use test and show that your client suffers environmental harm. Careful attention should be paid to alternative theories of standing, specificity of facts, and the relationships between distance and impacts when applicable. Differences between economic and environmental harm should be carefully noted and utilized only when necessary in the proper context. If possible, recruit a resident with very close proximity to ensure a greater likelihood of success.

Should the client find herself defending a land use or environmental decision, the best practice

would be to carefully scrutinize the petitioner's papers to ensure that the principles discussed above have been correctly articulated and supported by specific and delineated facts. Has the petitioner shown proximity under the land use standards? In the environmental challenge, has special harm been properly asserted and claimed to have caused injury that is environmental in nature? Has proof been shown that the harm is within the zone of interest sought to be protected or promoted by the statute, and not simply economic in nature? Answers to these questions will form the basis of sound responding papers.

NOTES

1. See *Citizens Against Sprawl-Mart ex rel. Alcuri v. City of Niagara Falls*, 35 A.D.3d 1190, 1191, 827 N.Y.S.2d 803 (4th Dep't 2006), reargument denied, 38 A.D.3d 1370, 831 N.Y.S.2d 91 (4th Dep't 2007) (finding that a challenger filing a summons with notice to commence a hybrid proceeding did not properly do so, and dismissing the case).
2. See *Eadie v. Town Bd. of Town of North Greenbush*, 7 N.Y.3d 306, 821 N.Y.S.2d 142, 854 N.E.2d 464 (2006) (addressing the accrual date for alleged SEQRA violations).
3. *Society of Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761, 769, 570 N.Y.S.2d 778, 573 N.E.2d 1034 (1991).
4. *Rosch v. Town of Milton Zoning Bd. of Appeals*, 142 A.D.2d 765, 766, 530 N.Y.S.2d 321 (3d Dep't 1988) ("Because the welfare of the entire community is involved when the enforcement of a zoning law is at stake, there is much to be said for permitting judicial review at the request of any citizen, resident or taxpayer; this idea finds support in the provision for public notice of a hearing. But we also recognize that permitting *everyone* to seek review could work against the welfare of the community by proliferating litigation, especially in the instance of special interest groups, and by unduly delaying final dispositions.") (citing *Sun-Brite Car Wash, Inc. v. Board of Zoning and Appeals of Town of North Hempstead*, 69 N.Y.2d 406, 413, 515 N.Y.S.2d 418, 508 N.E.2d 130 (1987), reargument denied, 70 N.Y.2d 694, 518 N.Y.S.2d 1030, 512 N.E.2d 556 (1987)).
5. N.Y. Gen. City Law §81-c; N.Y. Village Law §7-712-c; N.Y. Town Law, §267-c; N.Y. CPLR art. 78.
6. See *Steers Sand & Gravel Corp. v. Brunn*, 116 N.Y.S.2d 879 (Sup 1952); see also *Mueller v. Anderson*, 60 Misc. 2d 568, 303 N.Y.S.2d 143 (Sup 1969); *Bettman v. Michaelis*, 27 Misc. 2d 1010, 212 N.Y.S.2d 339 (Sup 1961); *Horan v. Board of Appeals, Village of Scarsdale*, 6 Misc. 2d 571, 164 N.Y.S.2d 543 (Sup 1957); *Village of Russell Gardens v. Board of Zoning and Appeals of Town of North Hempstead*, 30 Misc. 2d 392, 219 N.Y.S.2d 501 (Sup 1961).

7. See *Cord Meyer Development Co. v. Bell Bay Drugs, Inc.*, 20 N.Y.2d 211, 282 N.Y.S.2d 259, 229 N.E.2d 44 (1967), reargument denied, 20 N.Y.2d 970, 286 N.Y.S.2d 1027, 233 N.E.2d 863 (1967) (finding no evidence of special damages); *Sun-Brite Car Wash*, supra n. 4, 69 N.Y.2d at 413.
8. See *Cord Meyer Development Co.*, supra n. 7.
9. *Sun-Brite Car Wash*, supra n. 4, 469 N.Y.2d at 414 (emphasis added).
10. *Sun-Brite Car Wash*, supra n. 4, 469 N.Y.2d at 414.
11. *Sun-Brite Car Wash*, supra n. 4, 469 N.Y.2d at 414.
12. *Sun-Brite Car Wash*, supra n. 4, 469 N.Y.2d at 414.
13. *Sun-Brite Car Wash*, supra n. 4, 469 N.Y.2d at 414.
14. See *Dairyalea Cooperative, Inc. v. Walkley*, 38 N.Y.2d 6, 377 N.Y.S.2d 451, 339 N.E.2d 865 (1975). A word of caution—there are two other “prudential limitations” on standing in addition to the “zone of interest” requirement: generally the inability to raise the legal rights of another; and adjudicating grievances best resolved by the representative branches. *Society of Plastics*, supra n. 3, 77 N.Y.2d at 773. The “zone of interest” limitation is the key factor in review of administrative (i.e., zoning) decisions. *Society of Plastics*, 77 N.Y.2d at 773.
15. See *Center Square Ass’n, Inc. v. City of Albany Bd. of Zoning Appeals*, 9 A.D.3d 651, 780 N.Y.S.2d 203 (3d Dep’t 2004) (deciding that petitioner established: (1) proximity; and, even though unnecessary, (2) injury in fact, in the form of evidence of immediate parking congestion on the particular block at issue; as well as (3) injuries falling within the zone of interest sought to be protected by the ordinance).
16. See *Zupa v. Paradise Point Ass’n, Inc.*, 22 A.D.3d 843, 803 N.Y.S.2d 179 (2d Dep’t 2005) (finding that a half mile is too far); *Darlington v. City of Ithaca, Bd. of Zoning Appeals*, 202 A.D.2d 831, 609 N.Y.S.2d 378 (3d Dep’t 1994) (finding that a half mile is too far); *Burns Pharmacy of Rensselaer, Inc. v. Conley*, 146 A.D.2d 842, 536 N.Y.S.2d 248 (3d Dep’t 1989) (finding that 1,000 to 1,500 feet is too far).
17. *Burns Pharmacy*, supra n. 16.
18. *Center Square Ass’n*, supra n. 15.
19. *Burns Pharmacy*, supra n. 16, 146 A.D.2d at 844.
20. *Burns Pharmacy*, supra n. 16, 146 A.D.2d at 844.
21. *Center Square Ass’n*, supra n. 15.
22. *Center Square Ass’n*, supra n. 15, 9 A.D.3d at 652-53.
23. *East End Property Co. #1, LLC v. Town Bd. of Town of Brookhaven*, 56 A.D.3d 773, 868 N.Y.S.2d 264 (2d Dep’t 2008), leave to appeal denied, 12 N.Y.3d 704, 876 N.Y.S.2d 705, 904 N.E.2d 842 (2009) and cert. denied, 130 S. Ct. 107, 175 L. Ed. 2d 31 (2009).
24. *East End Property*, supra n. 23.
25. *Sun-Brite Car Wash*, supra n. 4, 69 N.Y.2d at 414.
26. *Society of Plastics*, supra n. 3, 77 N.Y.2d at 769.
27. *Society of Plastics*, supra n. 3, 77 N.Y.2d at 744 (internal quotations marks and citations omitted) (finding this language particularly instructive in the area of SEQRA standing when the purpose of the Act is critical in defining those whose interests are intended to be protected).
28. *Sun-Brite Car Wash*, supra n. 4, 69 N.Y.2d at 415.
29. *Sun-Brite Car Wash*, supra n. 4, 69 N.Y.2d at 415.
30. *Cord Meyer Development Co.*, supra n. 7.
31. *Sun-Brite Car Wash*, supra n. 4, 69 N.Y.2d at 415 (citing *Cord Meyer Development Co.*, supra n. 7, 20 N.Y.2d at 215).
32. See *Burns Pharmacy*, supra n. 16; see also *Knights of Columbus, Council No. 277 v. Weaver*, 121 Misc. 2d 914, 915, 469 N.Y.S.2d 559 (Sup 1983).
33. See 22 N.Y.C.R.R. Part 617.
34. *Society of Plastics*, supra n. 3, 77 N.Y.2d at 770.
35. See *Mobil Oil Corp. v. Syracuse Indus. Development Agency*, 76 N.Y.2d 428, 433, 559 N.Y.S.2d 947, 559 N.E.2d 641 (1990) (citing the two-part test of *Dairyalea Cooperative*, supra n. 14).
36. *Mobil Oil Corp.*, supra n. 35, 76 N.Y.2d at 433.
37. *Mobil Oil Corp.*, supra n. 35, 76 N.Y.2d at 433 (citing *Sun-Brite Car Wash*, supra n. 4).
38. *Har Enterprises v. Town of Brookhaven*, 74 N.Y.2d 524, 549 N.Y.S.2d 638, 548 N.E.2d 1289 (1989).
39. *Mobil Oil Corp.*, supra n. 35, 76 N.Y.2d at 434 (citing *Har Enterprises*, supra n. 38).
40. *Society of Plastics*, supra n. 3.
41. *Society of Plastics*, supra n. 3, 77 N.Y.2d at 774.
42. *Society of Plastics*, supra n. 3.
43. See *Joan Leary Matthews, Restrictive Standing Under SEQRA: Have the New York Courts Gone Too Far?*, New York Zoning Law and Practice Report (Sept./Oct. 2003).
44. *Society of Plastics*, supra n. 3, 77 N.Y.2d at 786.
45. *Save the Pine Bush, Inc. v. Common Council of City of Albany*, 13 N.Y.3d 297, 890 N.Y.S.2d 405, 918 N.E.2d 917 (2009).
46. *Society of Plastics*, supra n. 3, 77 N.Y.2d at 776.
47. *Save the Pine Bush*, supra n. 45.
48. *Save the Pine Bush*, supra n. 45, 13 N.Y.3d at 301.
49. *Save the Pine Bush*, supra n. 45, 13 N.Y.3d at 305.
50. *Save the Pine Bush*, supra n. 45, 13 N.Y.3d at 305.
51. *Sierra Club v. Morton*, 405 U.S. 727, 734, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972).
52. *Save the Pine Bush*, supra n. 45, 13 N.Y.3d at 306.
53. *Save the Pine Bush*, supra n. 45, 13 N.Y.3d at 309.
54. *Michalak v. Zoning Bd. of Appeals of Town of Pomfret*, 286 A.D.2d 906, 731 N.Y.S.2d 129 (4th Dep’t 2001).
55. *Oates v. Village of Watkins Glen*, 290 A.D.2d 758, 736 N.Y.S.2d 478 (3d Dep’t 2002).
56. *Buerger v. Town of Grafton*, 235 A.D.2d 984, 652 N.Y.S.2d 880 (3d Dep’t 1997).
57. *Harris v. Town Bd. of Town of Riverhead*, 21 Misc. 3d 1112(A), 873 N.Y.S.2d 511, *12 (Sup 2008) (text on Westlaw).
58. *Harris*, supra n. 57.

59. *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990).
60. *O'Brien-Dailey v. Town of Lyonsdale*, 26 Misc. 3d 1228(A), 2009 WL 5909095 (N.Y. Sup 2009).
61. *O'Brien-Dailey*, supra n. 60.
62. *O'Brien-Dailey*, supra n. 60.
63. *O'Brien-Dailey*, supra n. 60.
64. *O'Brien-Dailey*, supra n. 60 at *3.
65. *Buerger*, supra n. 56.
66. *Johnston v. Town Bd. of Town of Brookhaven*, 11 Misc. 3d 1092(A), 819 N.Y.S.2d 848 (Sup 2006) (text on Westlaw).
67. *Johnston*, supra n. 66 at *6.
68. *Johnston*, supra n. 66 at *6.
69. *Bloodgood v. Town of Huntington*, 58 A.D.3d 619, 871 N.Y.S.2d 644 (2d Dep't 2009).
70. *Bloodgood*, supra n. 69.
71. *Bloodgood*, supra n. 69.
72. *Village of Chestnut Ridge v. Town of Ramapo*, 45 A.D.3d 74, 841 N.Y.S.2d 321 (2d Dep't 2007), leave to appeal dismissed, 12 N.Y.3d 793, 879 N.Y.S.2d 38, 906 N.E.2d 1072 (2009) and leave to appeal dismissed, 12 N.Y.3d 793, 879 N.Y.S.2d 39, 906 N.E.2d 1072 (2009).
73. *Village of Chestnut Ridge*, supra n. 72, 45 A.D.3d at 77.
74. *Village of Chestnut Ridge*, supra n. 72, 45 A.D.3d at 77-80.
75. *Village of Chestnut Ridge*, supra n. 72, 45 A.D.3d at 77-80.
76. *Village of Chestnut Ridge*, supra n. 72, 45 A.D.3d at 77-80.
77. *Village of Chestnut Ridge*, supra n. 72, 45 A.D.3d at 86.
78. *Village of Chestnut Ridge*, supra n. 72, 45 A.D.3d at 87.
79. *Village of Chestnut Ridge*, supra n. 72, 45 A.D.3d at 89.
80. *Village of Chestnut Ridge*, supra n. 72, 45 A.D.3d at 90.
81. *Village of Chestnut Ridge*, supra n. 72, 45 A.D.3d at 91.

RECENT CASES

Adequacy of alternative sites left available for adult businesses by zoning ordinance must be considered as of time ordinance is challenged, not as of time ordinance was enacted.

The town of Smithtown moved to close an adult business owned by TJS as violative of Smithtown's adult business zoning ordinance, which required that adult businesses be located at least 500 feet from each other and from various other land uses,

including churches, schools, and parks. TJS went to federal court and sought a declaratory judgment and permanent injunction against enforcement of the ordinance. At the ensuing bench trial, both sides presented expert testimony as to whether the ordinance preserved adequate alternative locations for adult businesses, as required by the First Amendment. The trial court ruled that the time at which the adequacy of alternative sites had to be assessed was the date of enactment of the zoning ordinance. The court found that on that date, there were adequate alternative sites available, and denied TJS's request for a declaratory judgment and permanent injunction.

On appeal, the U.S. Court of Appeals for the Second Circuit reversed and remanded, holding that in assessing the adequacy of sites left open by a zoning ordinance for operation of adult businesses, courts must consider the adequacy of alternatives that are available at the time the ordinance is challenged. The First Amendment, said the court, does not allow courts to ignore post-enactment, extralegal changes and the impact they have on the sufficiency of alternative avenues of communication. Alternatives available when a statute is passed can disappear, thus decreasing the adequacy of alternative sites actually available to would-be speakers. Conversely, if a municipality opens up new land to development, the availability of alternative sites might increase, thus rendering constitutional an ordinance previously enacted.

The court acknowledged that some courts have assessed adequacy of alternative sites at the time of an ordinance's enactment. While conceding that the number of sites left open by an ordinance at the time of its enactment may be relevant to its constitutionality, the court held that it is not constitutionally sufficient to limit the inquiry along those lines.

The court remarked that in arguing that the adequacy of alternative sites should be evaluated only as of the time of enactment, Smithtown was apparently motivated by concern that adoption of a contrary rule would allow adult businesses to mount repeated challenges to the same ordinance. The court conceded that this might be happen, but only if there were significant changes in the surrounding community. The burden of pleading and proof of such changes could be put on the plaintiff, the court said. And the consequences of the rule advocated by Smithtown would be constitutionally troubling—if the only relevant question were whether an ordi-

nance provided adequate alternatives on the day of its passage, any law that did so would thereafter be immune from First Amendment challenge, and protected speech could be silenced. Also, a strict time-of-passage rule might make it impossible for a city to save a constitutionally deficient ordinance by increasing the availability of alternative sites after enactment.

TJS also argued that only sites suitable for the operation of businesses similar in physical characteristics to an adult entertainment business should be regarded as available alternative sites. The court rejected this contention, saying that the possibility that some sites would be unprofitable or commercially unviable for adult businesses is not relevant to the availability inquiry. *TJS of New York, Inc. v. Town of Smithtown*, 598 F.3d 17 (2d Cir. 2010).

Grant of use variance to prior owner, for operation of antique furniture store, did not create reasonable expectation on part of subsequent owner that motorcycle sales, storage, and display store could be operated on same property.

In 2005 194 Main, Inc., purchased property in Port Washington zoned "Residence C." Before 194 Main purchased the property, an antique furniture store had been operated on the property pursuant to a use variance granted to a prior owner in 2002. 194 Main used the property for the sale, storage, and display of motorcycles, until the Town of North Hempstead sent it a notice of violation based on its nonpermitted use at the property. The Board of Zoning Appeals denied 194 Main's subsequent application for, *inter alia*, a use variance to permit it to operate a motorcycle sales, storage, and display store on the property. 194 Main brought an Article 78 proceeding and lost in Supreme Court.

On appeal, the Appellate Division affirmed. The evidence adduced at the hearing before the Board of Zoning Appeals established that 194 Main created its hardship by purchasing the land knowing that it was not zoned for commercial use. The fact that a use variance was granted to the prior owner for the use of an antique furniture store could not have led to a reasonable expectation by 194 Main that it could operate a motorcycle sales, storage, and display store under the prior use variance. The evidence at the hearing established that the circumstances of the prior variance granted by the Board were distinguishable from 194 Main's application, and, therefore, the Board was not bound by its earlier determination. *194 Main, Inc. v. Board of Zoning*

Appeals for Town of North Hempstead, 71 A.D.3d 1028, 897 N.Y.S.2d 208 (2d Dep't 2010).

Zoning Board of Appeals' denial of requested amendment to variance was arbitrary and capricious where amendment was de minimis.

The Zoning Board of Appeals of the Town of Oyster Bay (ZBA) granted an application of Alex Bout for an area variance in connection with a proposed addition to his home. Neighboring landowners complained, alleging that the footprint of the addition was larger than permitted by the variance, and that the side yard was narrower than permitted by the variance. The ZBA held a hearing, and denied Bout's application for an amended area variance, holding that the application contained a request to maintain a side yard at a width 16 inches less than it had previously approved, and that the footprint of the addition was "larger" than it had previously approved.

Bout commenced an article 78 petition seeking review of the denial. The Supreme Court transferred the proceeding to the Appellate Division, which in the interest of judicial economy decided the case on the merits even though the case was erroneously transferred.

There was no basis in the record, said the court, for the ZBA's conclusion that the application sought permission to maintain a side yard 16 inches narrower than previously approved. Even if the neighboring landowners' uncertified survey was correct, the application requested, at most, an amended variance permitting the petitioners to maintain the side yard at a width only 3.6 inches less than the previously approved side yard requirement, i.e., 7.7 feet wide rather than the previously approved eight feet, and to increase the overall footprint of the addition by a mere 8%, i.e., six inches larger than planned on one side and approximately 18 inches larger on the other side. The requested amendments to the variance were *de minimis*. Since the ZBA did not explain its reasons for reaching a different result on essentially the same facts as it had faced when making its prior decision, under the circumstances its determination to deny the application for an amended variance was arbitrary and capricious, and had to be annulled. *Bout v. Zoning Bd. of Appeals of Town of Oyster Bay*, 71 A.D.3d 1014, 897 N.Y.S.2d 205 (2d Dep't 2010).