



REPORT ON LEGISLATION

COMMITTEE ON ENVIRONMENTAL LAW

A. 114
S. 2380

M. of A. Bradley
Senator Morahan

THE BILL IS APPROVED

Bill 2380, presently before the New York State Senate, and Bill 114, already adopted by the New York State Assembly, would amend Article 8 of the Environmental Conservation Law by adding a new section entitled "Standing," which would ensure that petitioners are not denied standing to bring Article 78 petitions solely on the grounds that the petitioners do not suffer an alleged injury that differs in kind or degree from the injury that would be suffered by the public at large. These bills mirror previous bills proposed and tabled in 2004, S. 6493 and A. 8673, both of which the Committee on Environmental Law of the Association of the Bar of the City of New York also supported at that time.

From 1975, when SEQRA was passed, through 1991, plaintiffs who challenged state and city actions under SEQRA were only required to meet the traditional "injury in fact/zone of interests" test for standing. Under this test, a plaintiff was required to demonstrate: (1) that he or she had suffered, or would suffer, an injury, and (2) that such an injury is "arguably within the zone of interests" protected by the relevant statute. Dairylea Coop., Inc. v. Walkley, 38 N.Y.2d 6, 9, 339 N.E.2d 865, 867, 377 N.Y.S.2d 451, 454 (1975). In 1991, the Court of Appeals decided a case named Society of the Plastics Indus. v. County of Suffolk, 77 N.Y.2d 761, 573 N.E.2d 1034, 570 N.Y.S.2d 778 (1991). In the years since this decision, many New York courts have interpreted Society of Plastics as adding a third prong to the test for standing under SEQRA, namely, a showing that the plaintiff suffered, or will suffer a "special harm" that is in some way different from the harm suffered by the public at large. As a result, the purpose of SEQRA, to require thoughtful consideration of environmental impacts, has often been frustrated by closing the courthouse doors to many plaintiffs for failure to meet this restrictive third prong. Bills S. 2380 and A. 114 would restore the proper test for standing under SEQRA that was recognized prior to 1991 and thereby promote the statute's important goals.

By way of background, the Society of Plastics case concerned a challenge by a nationwide trade organization representing the plastics industry -- and one local member -- to a 1988 Suffolk County law banning the use of certain plastics products by retail food establishments. The challenged law had been enacted to address the threat that land burial and disposal of solid waste would pose to the quality of drinking water in Nassau

and Suffolk Counties, both of which derived their water supply from a sole source aquifer. Although the concerns of the plastics industry were plainly economic, not environmental, the local member alleged several potential adverse environmental consequences of the plastics law and challenged its enactment on the ground that the County had failed to conduct an appropriate environmental assessment under SEQRA before enacting the law. The Natural Resources Defense Council and other environmental groups submitted briefs defending the law and urging dismissal of the complaint. In one of its few split decisions under SEQRA, the Court of Appeals upheld the County's plastics ban on the basis that the plaintiff Society of Plastics had "failed to allege any threat of cognizable injury it would suffer, different in kind or degree from the public at large." Society of Plastics at 77 N.Y.2d at 778. Although the Society of Plastics court had intended to "prevent improper use of 'citizens' suits' as a delaying tactic by those whose interests are inconsistent with the environmental purposes of SEQRA," many subsequent judicial decisions, some of which are detailed below, have construed Society of Plastics' standing requirement to block legitimate SEQRA challenges. Ziamba v. City of Troy, 802 N.Y.S.2d 586, 590-91 (N.Y. Sup. Ct. 2005).

Since the Society of Plastics decision, courts have routinely denied plaintiffs standing to challenge SEQRA decisions, many of which were actually neighbors of the challenged project and who would be harmed by virtue of closeness to an extent *greater* than the public at large. The first such instance was the Third Department's decision in Shulz v. Warren County Board of Supervisors, 614 N.Y.S.2d 809, 206 A.D.2d 672 (3d Dep't 1994), lv. to appeal denied, 85 N.Y.2d 805, 650 N.E.2d 415, 626 N.Y.S.2d 756 (1995), in which property owners residing on the banks of Lake George challenged the subject action on the basis that it would pollute the lake. The court denied standing to petitioners on the basis that the lake was a body of public water and petitioners could not show a harm different from the public at large. Since Shulz, numerous New York appellate courts have denied standing in other cases in which petitioners were unable to meet this stringent standard derived from the divided Court of Appeals decision in Society of Plastics. Examples include:

- Long Island Pine Barrens Soc'y, Inc. v. Town Bd. of E. Hampton, 741 N.Y.S.2d 80, 81 (2d Dep't 2002). In a proceeding challenging several proposed developments in the Long Island Pine Barrens in Suffolk County, the Second Department held that the individual petitioners "failed to indicate how the proposed land uses would cause them an injury in fact, different from that suffered by the public at large."
- Rediker v. Zoning Bd. of Appeals of the Town of Philipstown, 280 A.D.2d 548, 721 N.Y.S.2d 77 (2d Dep't 2001), lv. to appeal denied, 96 N.Y.2d 716, 754 N.E.2d 1115, 730 N.Y.S.2d 32 (2001). In a challenge to a special use permit for a mono-pole with cellular phone antennas and an equipment building, two petitioners who lived approximately one-third of a mile away were denied standing because they "failed to allege an injury different in kind or degree from that suffered by all in the general vicinity," and an adjacent property owner was denied standing because his claims of harm concerned non-environmental procedures.

- Boyle v. Town of Woodstock, 257 A.D.2d 702, 682 N.Y.S.2d 729 (3d Dep't 1999). In a case involving approvals for a new highway department garage, the Third Department denied standing to an owner of property approximately one-half mile away, finding his allegations of adverse effects of air, noise, and water pollution to be "merely conclusory."

- Save Our Main St. Bldgs. v. Green County Legislature, 293 A.D.2d 907, 740 N.Y.S.2d 715 (3d Dep't 2002), lv. to appeal denied, 98 N.Y.2d 608, 775 N.E.2d 1288, 747 N.Y.S.2d 409 (2002). In this case, the court held that petitioners had no standing to challenge a SEQRA determination allowing the destruction of ten buildings in a historic district to make way for a modern-looking office building. For the owner of an antiques business located within the historic district, the court held that the petitioner lacked standing under Society of Plastics, despite the fact that his business was a mere two blocks from the project, because the antiques shop was on the same side of the street and not within the line-of-sight of the proposed new building.

One of the most egregious cases that demonstrates the ever-narrowing standing doctrine's impact upon environmental quality in New York City is New York City Coalition for the Preservation of Gardens v. Giuliani, 670 N.Y.S.2d 654 (1st Dep't 1997), aff'd, 666 N.Y.S.2d 918 (N.Y. App. Div. 1998). In a challenge to the City of New York's decision to develop community gardens located in the Lower East Side and Harlem into condominiums, individual residents and a community organization were denied standing under SEQRA on several grounds. The court first acknowledged, however, that the gardeners had made "extraordinary efforts . . . to establish and maintain the gardens in question", had demonstrated "the continued need to maintain these gardens for the stability of the community and for its [sic] beneficial impact on the surrounding environment", and had shown that the City's action would result in "the infringement upon their interest in preserving these community treasures for the future." 670 N.Y.S.2d at 658. Nevertheless, the First Department extended the Society of Plastics decision even further than other courts and found that, under the "injury in fact" test, neighborhood gardeners did not possess standing to challenge the City's action because they did not possess a "legally cognizable interest" in the community gardens. Id. at 659. The holding was the same regardless of whether the gardeners had maintained gardens with or without permission from the City, and their interests were implicitly equated to those of squatters. Id. (citing In re Application of Matthew Lee v. The New York City Dep't of Housing Preservation and Development, 622 N.Y.S.2d 944 (N.Y. App. Div. 1995)). Paradoxically, the court also summarily dismissed the gardeners' interests as nearby property owners stating that their "papers still complain, primarily, about the individual Petitioners' loss of the gardens, and are unconvincing and disingenuous in their attempt to establish any harm to Petitioners different from that suffered by the public generally." 670 N.Y.S.2d at 658 n.1.

As commentators have pointed out, "New York's doctrine of standing in environmental cases has no parallel in either federal standing law or the laws of most

other states, and thus makes New York one of the most restrictive jurisdictions for environmental plaintiffs.” Michael B. Gerrard, Judicial Review Under SEQRA: A Statistical Study, 65 ALB. L. REV. 365, 372 (2001); see also, Joan Leary Matthews, Unlocking the Courthouse Doors: Removal of the “Special Harm” Standing Requirement under SEQRA, 65 ALB. L. REV. 421, 450 (2001) (discussing the more flexible standing requirements under the environmental review statutes of California, Michigan, Washington and Wisconsin). The proposed Senate and Assembly bills would restore the proper injury in fact/zone of interests standing test for SEQRA claims that served New York well for almost two decades prior to the Society of Plastics decision in 1991. Further, these proposed bills would bring New York’s standing requirements in line with the laws of most other states and ensure that petitioners would have rights to challenge environmental decisions in state court--just as they have under the federal National Environmental Policy Act (“NEPA”). See Ocean Advocates v. United States Army Corps of Eng’rs, 361 F.3d 1108, 1119 (9th Cir. 2004) (applying injury-in-fact/zone of interests test and determining that plaintiff had standing to challenge NEPA violation).

Accordingly, the Committee on Environmental Law of the Association of the Bar of the City of New York endorses these bills.

February 2006