Thiele v. Town of Southampton Zoning Bd. of Appeals

Supreme Court of New York, Suffolk County

November 4, 2021, Decided

Index No. 6685/18

Reporter

2021 N.Y. Misc. LEXIS 6154 *; 2021 NY Slip Op 51141(U) **; 73 Misc. 3d 1228(A); 2021 WL 5818278

[1]** Fred W. Thiele, Jr., RICHARD AMPER, individually and as the Executive Director of the LONG ISLAND PINE BARRENS SOCIETY, INC., ROBERT DELUCA, individually and as the President of THE GROUP FOR THE EAST END, INC., ALBERT ALGIERI, individually and as the President of the CIVIC ASSOCIATION OF THE HAMLET OF EAST QUOGUE, SUSAN BAILEY, ORA A. RUENZEL SALMAGGI, MARISSA BRIDGE, JOSEPH LAMPORT, and ELIZABETH JACKSON, Petitioners, against Town of Southampton Zoning Board of Appeals, DLV QUOGUE OWNER, LLC, DLV QUOGUE, LLC, DLV PARLATO PARCEL1, LLC, DLV PARLATO PARCEL 2, LLC, DLV PARLATO PARCEL 3, LLC, DLV PARLATO PARCEL 4, LLC and DLV PARLATO PARCEL 5, LLC, and DLV PARLATO PARCEL 6, LLC, Respondents.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS

Core Terms

site, golf course, environmental, zone, properties, residential, confer, zoning code, proposed project, organizations, petitioners', proximity, distance

Headnotes/Summary

Headnotes

Parties—Standing—Petitioners lacked standing to annul determination of respondent zoning board of appeals interpreting applicable zoning code such that private golf course was permitted accessory use to proposed residential development.

Counsel: **[*1]** For Petitioners: Braymer Law, PLLC, Glens Falls, NY; Jeffrey Bragman, PC, East Hampton, NY.

For Respondents Devitt Spellman Barrett, LLP: Smithtown, NY; Sive, Paget & Riesel, New York, NY.

Judges: CARMEN VICTORIA ST. GEORGE, J.S.C.

Opinion by: CARMEN VICTORIA ST. GEORGE

Opinion

Petitioners seek to annul the determination of the Town's Zoning Board of Appeals (ZBA) interpreting the applicable zoning code such that a private golf course is a permitted accessory use to a proposed residential development. The DLV Quogue respondents seek to develop certain property with a residential subdivision

and a private, 18-hole golf course, together with maintenance and operating buildings/structures accompanying the golf course.

Background

This action and a separate but related action identified by Suffolk County Index No. 6209/2019 involve the same petitioners and the same DLV respondents (DLV). In this action, the Southampton Zoning Board of Appeals is a respondent, along with DLV, and in the related 2019 action the Town of Southampton Planning Board and the Town of Southampton Town Board are respondents, along with DLV.[1]

The DLV respondents submitted plans to the Town's Planning Board proposing a seasonal resort/planned residential **[*2]** development (PRD), with an accessory 18-hole golf course for private use by the subdivision homeowners and their guests. The Town Planning Board requested an interpretation of the zoning code, and eventually, the Zoning Board of Appeals (ZBA) addressed the question as to whether, according to the applicable zoning code, the proposed golf course would be allowed as an accessory use. The ZBA interpreted the zoning code, determining that a private golf course amenity would be a permissible accessory use under the applicable provisions of the code. Petitioners now seek review of the ZBA's interpretation of the zoning code, alleging that the ZBA's determination "is irrational [and] contrary to the meaning of the Village Zoning Code and [is] otherwise affected by errors of law."[2]

*[**2]* *The Dismissal Motions*

Initially, the DLV respondents moved for dismissal of the instant petition principally because the case was not ripe for review, but also because the petitioners lacked standing to sue (Motion Sequence 005). A decision was never rendered on Motion Sequence 005, and since that motion was made in June 2019, the action against the Town's Planning Board was commenced on or about November 2019. The **[*3]** DLV respondents concede that, with the Planning Board's determination to grant preliminary plat and site plan approval for the project, "ripeness is no longer an issue." Motion Sequence 006 subsequently made by the DLV respondents asserts that the instant petition should be dismissed for lack of standing by any of the individual petitioners and by the petitioner organizations.[3]

Motion Sequence 007 is the ZBA's motion to dismiss the instant petition based upon, *inter alia*, petitioners' lack of standing to maintain this proceeding; thus, this Court will focus on the issue of whether the petitioners have standing as raised by the respondents' respective motions.

Standing

"Whether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability

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[1] These actions were not transferred to this Court until on or about May 2021, and no decisions on any of the motions had been rendered prior to the transfer.

[2] In the related action, Index No. 6209/2019, petitioners seek to vacate decisions by the Town Planning Board that granted preliminary subdivision approval and site plan approval for the PRD because they allege that another environmental impact statement was necessary, that the golf course is not an allowed use, and that the project does not meet subdivision requirements/criteria, thereby rendering the Planning Board's preliminary approval arbitrary and capricious.

[3] The DLV respondents submit the same affirmation in support of Motion Sequence 006 as they do in support of Motion Sequence 002 to dismiss the petition in the separate but related action identified by Index No. 6209/2019.

which, when challenged, must be considered at the outset of any litigation [internal citation omitted]. 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" (*Society of the Plastics Industry, Inc. v. County of Suffolk, 77 NY2d 761, 769, 573 N.E.2d 1034, 570 N.Y.S.2d 778 [1991]*). "The burden of establishing standing to raise that claim is on the party seeking **[*4]** review" (***Id.***; see also *159-MP Corp. v. CAB Bedford, LLC, 181 AD3d 758, 122 N.Y.S.3d 59 [2d Dept 2020]*; *Matter of Vassser v. City of New Rochelle, 180 AD3d 691, 118 N.Y.S.3d 717 [2d Dept 2020]*).

"Petitioner has the burden of establishing both an injury-in-fact and that the asserted injury is within the zone of interests sought to be protected by the statute alleged to have been violated. In land use matters, moreover, petitioner 'must show that it would suffer direct harm, injury that is in some way different from that of the public at large'. These requirements ensure that the courts are adjudicating actual controversies for parties that have a genuine stake in the litigation" (*Matter of Association for a Better Long Island, Inc. v. New York State Department of Environmental Conservation, 23 NY3d 1, 6, 988 N.Y.S.2d 115, 11 N.E.3d 188 [2014]*, quoting *Society of Plastics, supra at 772-774*; *see also 159-MP Corp., supra at 760*).

"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 action. . ." (*Society of Plastics, supra at 772*). "The zone of interests test, tying the in-fact injury asserted to the governmental act challenged, circumscribes the universe of persons who may challenge administrative action. Simply stated, a party must show that the in-fact injury of which it complains (its aggrievement, or the adverse effect upon it) falls within the 'zone of interests,' or concerns, sought to be promoted or protected by the statutory provision under which the agency **[*5]** **[**3]** has acted" (*Society of Plastics, supra at 773*).

While an allegation of close proximity might give rise to an inference of damage/injury such that a nearby property owner may challenge a land use decision without proof of actual injury, the property owner is not entitled to judicial review in every instance, but only when the property owner can establish that the interest asserted is different from that suffered by the public community at large, and is thus, within the "zone of interests" (*159-MP Corp., supra at 761*).

With respect to associations or organizations and their standing in these matters, there are three requirements: "*First*, if an association or organization is the petitioner, the key determination to be made is whether one or more of its members would have standing to sue; standing cannot be achieved merely by multiplying the persons a group purports to represent. *Second*, an association must demonstrate that the interests it asserts are germane to its purposes so as to satisfy the court that it is an appropriate representative of those interests. *Third*, it must be evident that neither the asserted claim nor the appropriate relief requires the participation of the individual members [emphasis in original]" (*Society of Plastics, supra at 775*).

At oral argument of **[*6]** the instant motions, it was tacitly conceded that the first named petitioner, Fred W. Thiele, Jr. lacks standing to sue. His resume of public service does not confer standing upon him, and it is apparently undisputed that he lives more than sixteen (16) miles from the site of the project sought to be developed; accordingly, he has not, and cannot, allege any injury in fact, and his name should be stricken from the caption of this matter.

As to the remaining individual petitioners, the DLV respondents emphasize the undisputed facts that petitioners Algieri, Bridge, Lamport, and Jackson are each located more than 3/4 of a mile from the outer boundary of the proposed project, and that the Salmaggi and Bailey petitioners are each located more than 1/2 mile from the nearest proposed residential home site, nearly one mile from the proposed clubhouse buildings, and that there exists a permanently protected forested buffer zone more than seven hundred (700) feet thick separating the nearest portion of the golf course from the Salmaggi and Bailey residences. It is further undisputed that there also exists a Long Island Railroad right-of-way track separating Salmaggi's property from the project, **[*7]** and that already existing residential and some commercial development, plus the protected forested space, separates the Bailey property from the project's nearest proposed residential lot which is approximately 3,300 feet away.

"Generally, the relevant distance is the distance between the petitioner's property and the actual structure or development itself, not the distance between the petitioner's property and the property line of the site" (*Matter of Tuxedo Land Trust, Inc. v. Town Bd. of Town of Tuxedo, 112 AD3d 726, 728, 977 N.Y.S.2d 272 [2d Dept 2013*, *affirming* ***Matter of Tuxedo Land Trust, Inc. v. Town of Tuxedo****, 34 Misc 3d 1235[A], 950 N.Y.S.2d 611, 2012 NY Slip Op 50377[U] [Sup Ct Orange County 2012]* [nominally proximate property to development site insufficient to confer presumptive standing overcome by existence of buffers between petitioner's property and site to be developed]; *see also Matter of Barrett v. Dutchess County Legislature, 38 AD3d 651, 831 N.Y.S.2d 540 [2d Dept 2007]* [less than half a mile distance from proposed project insufficient to presumptively confer standing/inference of injury without additional proof]; *cf.* ***Cade v. Stapf****, 91 AD3d 1229, 937 N.Y.S.2d 673 [3d Dept 2012]* [petitioner's home 400 feet from proposed water tower had standing]).

Furthermore, neither in their opposition papers nor at oral argument, did any of the petitioners challenge the affidavit of Charles J. Voorhis, a principal and member of Nelson, Pope **[**4]** & Voorhis, LLC, a professional **[*8]** environmental and planning consulting firm, that was previously submitted with the DLV defendants' papers. The affidavit is significant in that it sets forth the lengthy distances between the individual petitioners' residences/properties and various areas of the proposed development site, and which also notes all of the development (e.g., roads, overhead wires, traffic, residential properties, commercial office buildings, a railroad line, permanently protected forest land, gas stations) that already exists between the petitioners' respective properties and the DLV development site. Notably, the Voorhis affidavit asserts without contravention that petitioners Elizabeth Jackson and Albert Algieri do not own the properties upon which they rely for standing. The actual owners of those respective properties are not parties to this action. Accordingly, none of the foregoing properties (Algieri, Bridge, Lamport, Jackson, Salmaggi and Bailey) are proximate to the project site and/or its boundaries; therefore, they have not demonstrated that presumptive standing based upon proximity to the proposed project should be conferred upon them.

Aside from the lack of proximity to the proposed project, **[*9]** none of the petitioners, including Messrs. Amper and DeLuca, have shown any actual and specific injury that is different in kind or degree from that alleged to be suffered by the general public, and that is not too speculative (*see* ***Matter of Long Island Business Aviation Association, Inc. v. Town of Babylon****, 29 AD3d 794, 795, 815 N.Y.S.2d 217 [2d Dept 2006]*). Based upon the submitted papers, and at oral argument, the principal injury articulated by the petitioners in support of their standing argument is that the groundwater will be

harmed by development of the golf course on the project site. The petitioners' allegations are generalized ("they will be adversely affected by the negative impacts to community character, natural habitat, and ground water from the proposed Lewis Road PRD") and fail to demonstrate that the individual petitioners will suffer an environmental injury that is in any way or kind different from the community-at-large. In fact, they do not submit any evidence to establish how each of them is actually injured and how such injury differs in kind or degree from the public/community at large. There is also no evidence that any of the petitioners has a private or on-site well that might suffer any type of individualized **[*10]** injury from the irrigation of the proposed golf course or from any other project elements/activities.

Of note, the DLV respondents maintain in their papers, as well as at oral argument, not only that none of the environmental impact studies conducted demonstrate that the golf course would have any adverse environmental impact, including upon the aquifers, but also that the Algieri, Bailey, Salmaggi, Bridge/Lamport, and Jackson properties get their water from the Suffolk County Water Authority (SCWA) rather than from private wells located on their respective pieces of property. Annexed to the Voorhis affidavit is the documentation from the SCWA (billing statements). The petitioners have not offered any proof controverting the environmental impact statements or the SCWA documentation. Thus, none of the petitioners has demonstrated an individualized injury by generally pleading that the project will have a negative impact on the aquifers lying beneath/near the project site (*Long Island Pine Barrens Society v. Planning Board of the Town of Brookhaven, 213 AD2d 484, 485, 623 N.Y.S.2d 613 [2d Dept 1995]* [generalized allegations that project will have adverse impact on underlying aquifer insufficient to establish standing]).

Aside from the alleged groundwater contamination, the individual petitioners do not allege any **[*11]** other individual injuries/effects (e.g., traffic, visual obstruction) of the proposed development on their properties different than the public generally since they are located well distant from it, and the traffic impact study conducted concluded that there would be no **[**5]** possibility for any perceptible traffic from vehicles traveling to and from the project site.

Although laudable, the petitioners' commitment to environmental causes, especially with respect to petitioners Amper and DeLuca, does not, however, serve to confer standing (*Society of Plastics, supra at 769, 770-771*; *Matter of Citizens Emergency Committee to Preserve Preservation v. Tierney, 70 AD3d 576, 896 N.Y.S.2d 41 [1st Dept 2010]*; *Long Island Pine Barrens, supra at 485-486*). The fact that Mr. DeLuca and Mr. Amper are the titular heads of environmental organizations who use and enjoy the Pine Barrens lands, while asserting generalized claims that the proposed project will have an adverse impact on the groundwater, is insufficient to confer standing on them individually, or to confer standing upon their respective organizations (*see Matter of Niagara Preservation Coalition, Inc. v. New York Power Authority, 121 AD3d 1507, 994 N.Y.S.2d 487 [4th Dept 2014]*; *Matter of Clean Water Advocates of NY, Inc. v. New York State Dept. of Environmental Conservation, 103 AD3d 1006, 962 N.Y.S.2d 390 [3d Dept 2013]*. Inasmuch as the individual petitioners have failed to demonstrate or allege an environmental injury different in kind or degree from the community generally means that the **[*12]** petitioner organizations also do not have standing since they are dependent upon the standing of the individual petitioners (*Society of Plastics, supra at 775*; *Matter of Tuxedo Land Trust, 112 AD3d at 728*; *Matter of Bloodgood v. Town of Huntington, 58 AD3d 619, 622, 871 N.Y.S.2d 644 [2d Dept 2009]*).

The cases relied upon by petitioners for standing are inapposite to the facts and circumstances of this action. In *Matter of Long Island Pine Barrens Society, Inc. v. Central Pine Barrens Joint Planning & Policy Commission (138 AD3d 996, 31 N.Y.S.3d 104 [2d Dept 2016])*, the applicant developer sought a waiver to expand a sand and gravel mine in what is known as a "core preservation area" of the Pine Barrens, and Richard Amper, in his capacity as the Pine Barrens Society's Executive Director and in his individual capacity, was found to have standing to sue; nevertheless, the petition was denied on the merits. In that case, the "core preservation area" sought to be mined fell within the zone of interests sought to be protected by the Pine Barrens Protection Act of 1993; the Society's interests were germane to its purposes, and the claim asserted by the Society required the participation of individual members.[4] In the action before this Court, it is undisputed that the DLV respondents have not sought a waiver to permit development in any "core preservation area," but that DLV proposes development in what is known as the compatible growth area, where development is allowed.

In the other case cited to support **[*13]** standing, *Matter of Save the Pine Bush, Inc. v. Common Council of the City of Albany, 13 NY3d 297, 918 N.E.2d 917, 890 N.Y.S.2d 405 (2009)*, the Court did "not suggest that standing in environmental cases is automatic, or can be met by perfunctory allegations of harm. Plaintiffs must not only allege, but if the issue is disputed must prove, that their injury is real and different from the injury most members of the public face" (*Id. at 306*). Here, as noted, there are only perfunctory allegations of harm that are not any different in kind from that alleged to be suffered by the general public; there is no evidence that the aquifer will be harmed, and even if there were proof contradicting the environmental impact studies already noted herein, there is no evidence that either Mr. Amper or Mr. DeLuca would be prevented from using or enjoying the **[**6]** Pine Barrens.

Based upon the foregoing, the dismissal motions of the DLV respondents (Motion Sequences 005 and 006) and of the ZBA (Motion Sequence 007) are each granted on the basis of lack of standing, and the instant petition filed under Index No. 6685/2018 (denominated as Motion Sequence 001) is hereby dismissed in its entirety, with prejudice.

The foregoing constitutes the Decision and Order of this Court.

Dated: November 4, 2021

Riverhead, NY

CARMEN VICTORIA ST. GEORGE, J.S.C.

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[4] See also *Long Island Pine Barrens Society, Inc. v. Central Pine Barrens Joint Planning & Policy Commission, 113 AD3d 853, 980 N.Y.S.2d 468 (2d Dept 2014)* that also involved an application for a waiver to develop within the core preservation area wherein Mr. Amper and the Society were found to have standing to bring the action.