ALERT
DECEMBER 15, 2009

REAL ESTATE
News Concerning
Recent Real Estate Issues

COZEN O'CONNOR
www.cozen.com

PUBLIC INTEREST GROUPS AT THE GATE:
A More Generous Standing Requirement Broadens the Class of Permissible Challengers of Land Use Approvals

Peter G. Geis • 212.453.3751 • *pgeis@cozen.com*
Paul J. Proulx • 212.883.4944 • *pproulx@cozen.com*

With regard to all but the most routine of projects, a common question faced by developers, businesspeople and property owners seeking land use approvals is "Who is going to be upset by this project?", followed shortly by "What can they do about it?". Because the cost of litigation to defend land use approvals can be significant, and the potential for project delay can be serious, it is frequently wise to consider the litigation risks before embarking on the planning and approval processes.

In New York, most projects involving discretionary government approvals, such as rezonings, variances and special permits, are subject to environmental review under the State Environmental Quality Review Act ("SEQRA"). Land transactions with municipalities and public works projects also predominantly require environmental reviews under SEQRA. The requisite environmental review, which can be very broad under SEQRA, often presents significant opportunities for project opponents to attack land use approvals by claiming defects in the SEQRA process, leading to potentially protracted litigation.

Until a recent Court of Appeals decision, public interest groups and others faced a significant hurdle when seeking to bring a SEQRA-based challenge to a land use approval - the requirement that litigants have "standing" to sue. The concept of "standing" relates to the right of a person or entity to challenge an action in court. For a classic tort, "standing" is often clear: a passenger in a car that was involved in an accident, a patient who received allegedly negligent care from a doctor. In the environmental and land use context, the laws on "standing" evolved over a number of years, resulting in the creation of a relatively restrictive standard.

The courts in New York have long held that mere economic injury is not sufficient to confer standing in a SEQRA-based challenge. In order to have standing, a person or entity needs to show a "special harm" that is "different in kind or degree from the public at large." Applying this special harm standard, courts had created a commonly-held notion that standing was to be conferred only upon persons or groups having close proximity to the project in question. As a result, persons who are concerned about the impact of a particular land use decision, but who do not reside within close proximity to the actual project, often see their challenges denied by the courts for lack of standing, with the merits of their challenges left unevaluated.

The recent New York Court of Appeals decision in *Save the Pine Bush Inc. v. Common Council of the City of Albany* signaled a relaxation in the criteria for standing, at least in SEQRA-based challenges. In this case, Save the Pine Bush, Inc. challenged a land use approval that was issued involving the Albany Pine Bush area, alleging that the SEQRA environmental review conducted as part of the approval process was incomplete with regard to certain butterflies. Save the Pine Bush, Inc. is a well-established organization, whose members clearly had an interest in the Pine Bush beyond that of the general public. However, Save the Pine Bush, Inc. also clearly did not have any members who met the proximity test that had developed over the past eighteen years.

In finding that the organization nevertheless had standing, the Court of Appeals noted that the membership allegedly made continual use of the Pine Bush for recreation, study and enjoyment of the unique habitat - a "repeated, not rare or isolated use." This usage was enough, the Court determined, to meet the requirement that standing exists for parties who will be impacted differently from the "public at large." While not removing proximity as a factor to be considered when evaluating standing, the Court made clear that residence within a certain distance is not a bright-line test for standing.

Although the Pine Bush decision has been hailed by many environmental and community groups as perhaps ushering in an era where such groups will have easier access to the

courts, it is unclear just how broadly the New York courts will in fact confer standing upon these potential litigants. In its opinion, the Court of Appeals acknowledged that litigation based upon SEQRA claims can be lengthy and costly, as well as potentially damaging to development in general. The Court therefore recognized the need to strike a balance between closing the courthouse doors to parties that are legitimately aggrieved, on the one hand, and lowering the bar so much that parties with tenuous connections to the actions in question could delay or frustrate projects through litigation, on the other.

In the end, the Court of Appeals held that the determination of whether a potential litigant has sufficient standing to bring a SEQRA-based challenge requires a fact-based analysis, in which the court must evaluate whether the potential litigant truly is impacted in a manner different from the public at large. While this analysis might not always be easy, it is a necessary function of the gate-keeping role that is vested, at least on first impression, in the lower courts.

It is unclear how New York courts will handle this issue moving forward. Many questions remain, and the answers no doubt will evolve over the years:

- **What degree of specific interest would be required for a project opponent to prove standing?** Save the Pine Bush, Inc. clearly had a legitimate and sincere interest in the Pine Bush. Whether the Court of Appeals would have found standing for a more general and/or less local environmental advocacy group is less clear.
- **How much time, cost, effort and other resources of the courts and the parties should be devoted to resolving threshold standing issues, particularly to the detriment of the stalled construction project?** In this regard, the Court of Appeals seemed to realize it was opening a potential can of worms, but felt that was necessary. Might courts now get bogged down on detailed discussions of the mission and membership of a plaintiff group before turning to the merits of the actual challenge?
- **Is the Pine Bush decision limited to SEQRA-based challenges to land use approvals, or does it apply more generally to land use issues: such as standing to challenge violations of a municipal zoning ordinance or to challenge a governmental real property transfer?** While SEQRA provides project opponents with numerous windows for challenge, they can also challenge land use approvals or a governmental real property transfer as being contrary to the municipal charter, zoning law, or other statute. To what degree is the Pine Bush standing test to be applied in these contexts?

If you are considering a project involving government approvals, or are concerned about such a project that might impact upon you, your family, or your business, please contact us. Cozen O'Connor land use attorneys are frequently called upon to represent developers who seek to obtain or defend land use approvals, as well as individuals and groups who seek to challenge them. We are also experienced in analyzing these issues on a due diligence basis prior to commencing the planning or approval processes for a potential project.

COZEN O'CONNOR REAL ESTATE PRACTICE GROUP

Christian G. Beltz
Richard H. Berney
Howard M. Brown
J. Patrick Cohoon
Raymond G. Console
Robert S. Davis
William F. Davis
Christine R. Deutsch
Herman C. Fala
Anthony Faranda-Diedrich
Kenneth K. Fisher
Douglas W. Frankenthaler
Peter G. Geis
Edward L. Harris
Howard B. Hornstein
Marc S. Intriligator
Helene S. Jaron
Elizabeth E. Kearney
Bernard Lee
Jeffrey A. Leonard
Diana C. Liu
Henry F. Miller
Shawn Neuman
Tracey B. Nguyen
Jennifer G. North
Christopher J. Preate
Paul J. Proulx
Jonathan B. Rosenbloom
Richard Salomon
Gerald N. Schrager
Dan A. Schulder
Jason R. Sieminski
Adam M. Silverman
Robert A. Silverman
Susan E. Stanier
Burton K. Stein
Benjamin Suckewer
R. David Walker
Matthew I. Weinstein
Carl Weiss
Ross Weiss
Abby M. Wenzel
James R. Williams
Thomas P. Witt