New York State Bar Association

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Memorandum in Support

ENVIRONMENTAL LAW SECTION

ELS #2 March 26, 2009

A. 3423 By: M. of A. Bradley
S. 1635 By: Senator Thompson
Senate Committee: Environmental Conservation
Assembly Committee: Environmental Conservation
Effective Date: Immediately

AN ACT to amend the environmental conservation law, in relation to enacting the environmental access to justice act

LAW AND SECTIONS REFERRED TO: Section 8-0119 of the environmental conservation law

MEMORANDUM PREPARED BY THE ENVIRONMENTAL LAW SECTION

THE SECTION SUPPORTS THIS LEGISLATION

The Environmental Law Section supports this bill because it removes barriers to the courts for all plaintiffs in controversies arising under SEQRA, New York's time honored environmental review mechanism for community based development.

Access to the courts is available to plaintiffs who demonstrate that they have "standing to sue." Standing is a legal concept that enables a party with a sufficient stake in a controversy to file a court action. New York and federal courts have traditionally interpreted standing broadly to allow controversies to be heard on their merits. Standing continues to be granted broadly by the federal courts in environmental litigation.

The state of the law on standing for plaintiffs to bring claims under the State Environmental Quality Review Act (SEQRA) today, however, is far more restrictive than it was for the first sixteen years following SEQRA's enactment in 1975. From 1975 until 1991, plaintiffs who challenged state and local SEQRA decisions were only required to meet the traditional "injury in fact/zone of interests" test for standing. Under this test, a plaintiff is required to demonstrate that he or she has or likely will suffer an injury that 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). This test applies to numerous and varied legal challenges – and it applied to SEQRA challenges for sixteen years.

Opinions expressed are those of the Section/Committee preparing this memorandum and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

Since a 1991 Court of Appeals decision, however, plaintiffs are now required to meet a more stringent – and often times impossible – "special harm" test for standing. Society of the Plastics Industry v. County of Suffolk, 77 N.Y.2d 761, 573 N.E.2d 1034, 570 N.Y.S.2d 778 (1991). Under the special harm test, a plaintiff is required to demonstrate that he or she has suffered harm that is different in kind and degree from the harm suffered by the general community. Id. at 774, 573 N.E.2d at 1041, 570 N.Y.S.2d at 785. This test, while perhaps reaching a correct result based on the pleadings for the plaintiffs in Society of the Plastics Industry in which an industry challenged Suffolk County's efforts to protect Long Island's sole source aquifer by reducing the volume of plastic food containers in its landfills, has wreaked havoc for plaintiffs who raise legitimate environmental claims under SEQRA.

New York's current special harm rule is more stringent than the standing test for challenges brought under the federal National Environmental Policy Act (NEPA), upon which New York's SEQRA was based. This more stringent rule is not justified in logic or by the language or the legislative history of SEQRA and has worked an injustice – sometimes a profound injustice – for plaintiffs with legitimate SEQRA claims.

A November 2002 comparison of cases before and after the New York Court of Appeals 1991 decision graphically demonstrates that plaintiffs are routinely being denied standing in SEQRA cases. Michael B. Gerrard, "Standing Under SEQRA: Progeny of 'Society of the Plastics Industry'," N.Y.L.J., p. 3 (Nov. 22, 2002). Based on this data, since SEQRA's enactment in 1975, 101 appellate court decisions have addressed the issue of standing. Id. at 3, 5. Prior to the 1991 decision in Society of the Plastics Industry, the courts in New York found that the plaintiffs had met the legal requirements of standing to pursue their challenge in court in 68% of cases. Id. at 5. Since the 1991 decision, however, only 48% of the cases were allowed to go forward. Id.

The courts have developed some exceptions to the special harm requirement, but these do not provide sufficient access to the courts. For example, landowners or residents who live adjacent to or in close proximity to a project need not plead special harm. This exception is helpful, but frequently no landowner or resident is either adjacent to or within any recognized numerical distance constraints of close proximity. Nor do the courts consistently apply the same criteria for determining a plaintiff's "close proximity." In one jurisdiction, plaintiffs who own land or reside within 500 feet of a challenged project were close enough to remove the burden of pleading special harm. See McGrath v. Town Bd. of N. Greenbush, 254 A.D.2d 614, 616, 678 N.Y.S.2d 834, 836 (3d Dep't 1998); Sopchak v. Guernsey, 176 A.D.2d 403, 403, 574 N.Y.S.2d 110, 111 (3d Dep't 1991). However, that same court also held that plaintiffs who resided within 530 feet, 600 feet, and 700 feet of a project were not close enough. See Oates v. Vill. of Watkins Glen, 290 A.D.2d 758, 736 N.Y.S.2d 478 (3d Dep't 2002); Buerger v. Town of Grafton, 235 A.D.2d 984, 985, 652 N.Y.S.2d 880, 881-82 (3d Dep't 1997); Gallahan v. Planning Bd. of the City of Utica, 307 A.D.2d 684, 685, 762 N.Y.S.2d 850, 851 (3d Dep't 2003).

Even a location a mere two blocks from a project was insufficient to establish close proximity. 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. denied, 98 N.Y.2d 608, 775 N.E.2d 1288, 747 N.Y.S.2d 409 (2002). In Save Our Main Street Buildings, the court held that plaintiffs had no standing to challenge a SEQRA determination allowing the destruction of ten buildings in an historic district to make way for a modern-looking office building. Specifically, the court held that the owner of an antique business in the historic district, whose business was a mere two blocks from the project, was on the same side of the street and not within the line of sight of the proposed new building. Id. at 908, 747 N.Y.S.2d at 717.

Restoring the injury in fact/zone of interests standing test for SEQRA claims, which served the State well for sixteen years, will serve as an important check on the SEQRA process. At this time, no such check exists and in effect, SEQRA is virtually unenforceable in many, if not most, cases.

For the above reasons, the Environmental Law Section **SUPPORTS** this legislation.