Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

Matter of TONY AVELLA, etc., x

Petitioner,

- against -

THE NEW YORK CITY BOARD OF STANDARDS AND APPEALS, et al.,

Respondents.
x

Index Number 18206 2006

Motion Date December 20, 2006

Motion Cal. Number 1

The following papers numbered 1 to 20 read on this petition in an Article 78 proceeding to annul a determination of respondent The New York City Board of Standards and Appeals (BSA) which granted an application of respondents Steve Chon and Inn Spa World, Inc. (jointly Spa World) for a special permit, and to direct the BSA to deny the application; a cross motion by respondents BSA, Meenakshi Srinivasan, Satish Babbar and Christopher Collins to dismiss the petition on the grounds that petitioner lacks standing and the capacity to sue; and a cross motion by respondents Spa World to dismiss the proceeding on the same grounds.

| | Papers Numbered |
|---|---|
| Notice of Petition - Affidavits - Exhibits..... | 1-3 |
| Notices of Cross Motion - Affidavits - Exhibits.. | 4-11 |
| Answering Affidavits - Exhibits..... | 12-14 |
| Reply Affidavits..... | 15-20 |

Upon the foregoing papers it is ordered that the cross motions are granted and the petition, as amended, is dismissed. (CPLR 7804[f].)

Petitioner Tony Avella, individually and as a member of the New York City Council representing the residents of the 19th Council District, commenced this proceeding pursuant to CPLR article 78 to challenge a determination of the BSA which

granted the application of Spa World for a special permit to build and operate a physical culture establishment (PCE) at a premises located in a light manufacturing (M1-1) zoning district within the 19th City Council District.[1] Respondents Srinivasan, Babbar and Collins, Commissioners of the BSA who participated in the determination, and respondent Spa World cross move for an order dismissing the petition on the ground that petitioner lacks standing to challenge the administrative determination and lacks capacity to sue.

It is well established that without both capacity and standing, a party lacks authority to sue. (See, Matter of Graziano v County of Albany, 3 NY3d 475, 479 [2004].) Standing is a threshold determination that a person should be allowed access to the courts to adjudicate the merits of a particular dispute. (The Society of the Plastics Indus. v County of Suffolk, 77 NY2d 761, 769 [1991]; Caprer v Nussbaum, 36 AD3d 176, 183 [2006].) The burden of establishing standing to raise a claim challenging an administrative determination is on the party seeking review. (See, The Society of the Plastics Indus. v County of Suffolk, supra, at 769.) The question of standing to challenge a particular governmental action may be answered by the statute involved identifying the class of persons entitled to seek review or, absent such statutory guidance, by the case law on standing. (See, The Society of the Plastics Indus. v County of Suffolk, supra, at 769.)

In the instant case, the New York City Charter provision governing variances and special permits states that any decision of the BSA relating thereto "may be reviewed as provided by law," New York City Charter § 668[d]. The Administrative Code of the City of New York § 25-207(a) provides that any person or persons, jointly or severally aggrieved by any decision of the BSA, may seek review in the Supreme Court. Due to the limiting language of the Administrative Code provision, it is clear that petitioner's status as a City Council member alone does not confer standing in this matter; rather, petitioner must be aggrieved by the determination to be reviewed herein to have standing to maintain this proceeding.[2]

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[1]Although a PCE is not permitted as of right in an M1-1 zoning district, Zoning Resolution (ZR) 73-36 authorizes the BSA to permit the use in an M1-1 district upon making certain findings.

[2]As is pertinent here, the Administrative Code provision is much more limited than the parallel provisions of the Village Law (§ 7-712-c[1]), the General City Law (§ 81-c[1]) and the Town Law (§ 267-c[1]) which identify not only an aggrieved person but also

(See, e.g.,Golden v Steam Heat, Inc., 216 AD2d 440 [1995]; Bowman v Squillace, 74 AD2d 887 [1980]; Marshall v Quinones, 43 AD2d 436 [1974]; Bachety v Volz, 65 Misc 2d 176 [1970], affd 39 AD2d 842 [1972].)

To be aggrieved by a decision for standing purposes in land use matters, a person must have a legally cognizable interest that is or will be affected by the determination and must demonstrate an injury that is different from the public at large. (See, Matter of Sun-Brite Car Wash v Board of Zoning and Appeals of The Town of North Hempstead, 69 NY2d 406 [1987]; Matter of Long Is. Bus. Aviation Assn. v Town of Babylon, 29 AD3d 794 [2006]; Golden v Steam Heat, Inc., supra; see also, The Society of the Plastics Indus. v County of Suffolk, supra, at 774-775.) Although an inference of such injury may be extended to a property owner alleging close proximity to the premises in issue (see, Matter of Sun-Brite Car Wash v Board of Zoning and Appeals of the Town of North Hempstead, supra, at 414; Golden v Steam Heat, supra.), the petition at issue does not allege any facts sufficient to show, or to allow an inference, that petitioner has suffered or will suffer any harm from the underlying decision of the BSA. (See, Matter of Long Is. Bus. Aviation Assn. v Town of Babylon, supra; Matter of Chatham Towers v Bloomberg, 18 AD3d 395 [2005]; Golden v Steam Heat, Inc., supra.)

In his opposition to the cross motions to dismiss, and in the amended petition served therewith, petitioner asserts that he has sustained harm in that the BSA decision nullified his legislative vote or the votes of his Council predecessors with regard to ZR 73-36, and usurped his power and the power of the City Council to legislate. Petitioner claims standing as a legislator based on these injuries. Since the reply papers submitted by respondents address this allegation of standing, the court deems the cross motions to be directed to the amended pleading. The court also notes that despite the assertion in the petition that the proceeding is brought on behalf of all similarly situated residents in the Council District, petitioner presents no arguments in support of representative standing. One does not, as a general rule, have

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"any officer, department, board or bureau" of the particular governmental entity as having standing to apply for an Article 78 review of any decision of the particular Zoning Board of Appeals. Similarly, these state enabling statutes permit the appeal of decisions of the relevant planning board on the issuance of special use permits not only by aggrieved persons but also by officers, departments, boards or bureaus of the same city, town or village. (General City Law § 27-b[9]; Town Law § 274-b[9]; Village Law § 7-725-b[9].)

standing to assert claims on behalf of another, and to the extent petitioner seeks review as the representative of other residents, he lacks standing to do so. (See, The Society of the Plastics Indus. v County of Suffolk, supra, at 773; Urban Justice Ctr. v Pataki, ___ AD3d ___, 828 NYS2d 12, 17 [2006]; Caprer v Nussbaum, supra.)

Although circumstances presenting nullification of legislative votes and usurpation of legislative power will confer legislator standing (see, Silver v Pataki, 96 NY2d 532, 539 [2001]), the conduct complained of by petitioner does not constitute vote nullification or usurpation of power. Contrary to petitioner's characterization of the BSA determination as an "executive incursion into legislative territory" in an attempt to bring this matter within the holding of Silver v Pataki (supra), when considering applications for special permits, the BSA acts as a quasi-judicial body. (See, Real Holding Corp. v Lehigh, 2 NY3d 297 [2004]; Knight v Amelkin, 68 NY2d 975 [1986]; Jewish Reconstructionist Synagogue of the North Shore v Incorporated Village of Roslyn Harbor, 40 NY2d 158, 162 [1976]; Louzoun v Deutsch, 152 AD2d 657 [1989]; see, e.g., Matter of Palm Mgt. Corp. v Goldstein, 29 AD3d 801, 804 [2006], affd ___ NY3d ___, 2007 NY LEXIS 322; Matter of Waylonis v Baum, 281 AD2d 636, 638 [2001].) As recited in the petition, the BSA's decision was made after public hearings at which testimony was taken and upon findings of fact relative thereto. The allegations of the petition, accepted as true for the purposes of the cross motions, do not implicate the effectiveness of petitioner's legislative vote, or show any improper action by the BSA that nullified that vote or usurped the Council's authority. What petitioner complains of are alleged errors by the BSA in its interpretation of ZR 73-36, its application of case law related thereto, and its findings based on the evidence before it. Such conduct is not akin to the injury recognized in Silver where it was alleged that the Governor had invalidated portions of properly enacted legislation by exercising an unconstitutional line-item veto. (See, Silver v Pataki, supra.)

Petitioner's alternative basis for urging standing is also without merit. That an issue may be considered one of vital public concern does not entitle a party to standing. (See, The Society of the Plastics Indus. v County of Suffolk, supra, at 769.)

Dated: April 16, 2007

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J.S.C.