

Civic Association Granted Standing to Challenge Zoning Variance

St. John's Law Review

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Recommended Citation

St. John's Law Review (1975) "Civic Association Granted Standing to Challenge Zoning Variance," *St. John's Law Review*: Vol. 50 : No. 1, Article 12.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol50/iss1/12>

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amended EPTL sections 5-4.2¹²⁴ and 11-3.2(b)¹²⁵ to bring them into conformity with the new law. Section 5-4.2 states that in an action for wrongful death "the contributory negligence of the decedent shall be a defense, to be pleaded and proved by the defendant,"¹²⁶ thus providing an exception to the traditional New York rule requiring the plaintiff to prove his freedom from contributory negligence. Section 11-3.2(b) provides the same exception for a survival action when joined with a wrongful death action.¹²⁷ The new amendments limit these exceptions to actions accruing before September 1, 1975,¹²⁸ the effective date of CPLR article 14-A.¹²⁹ Any such actions accruing after that date will be subject to the provisions of article 14-A.

One probable result of the new law will be a decrease in negligence litigation. Since a negligent defendant will no longer be able to escape all liability by proving contributory negligence on the part of the plaintiff, but may anticipate at most some diminution of damages, an increased number of settlements should result. More significant, however, is the greater equity of the new law — an injured party will no longer be completely barred from recovery for injuries due only in part to his own negligence.

ARTICLE 78 — PROCEEDING AGAINST BODY OR OFFICER

Civic association granted standing to challenge zoning variance.

Recent judicial decisions, on both federal¹³⁰ and state¹³¹ levels, evince a trend towards a relaxation of restrictive requirements for

¹²⁴ Ch. 69, § 2, [1975] N.Y. Laws 94 (McKinney).

¹²⁵ Ch. 69, § 3, [1975] N.Y. Laws 94-95 (McKinney).

¹²⁶ EPTL 5-4.2 (McKinney Supp. 1975).

¹²⁷ *Id.* 11-3.2(b).

¹²⁸ *Id.* 5-4.2, 11-3.2(b).

¹²⁹ CPLR 1413.

¹³⁰ Under the early federal test for standing a plaintiff was required to show that a legal interest or property right of his had been violated or was in danger of being violated. *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118 (1939). A far more liberal test, however, was enunciated in 1970 by Justice Douglas in the landmark decision of *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970). The Court announced a bipartite test: the plaintiff must demonstrate that he has suffered injury in fact, economic or otherwise, and that his interest is "arguably within the zone of interests to be protected . . . by the statute or constitutional guarantee in question." *Id.* at 153. The Court further established that the "interest, at times, may reflect 'aesthetic, conservational, and recreational' as well as economic values." *Id.* at 154, quoting *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608, 616 (2d Cir. 1965).

This two-pronged test was criticized in *New Hampshire Bankers Ass'n v. Nelson*, 113 N.H. 127, 302 A.2d 810 (1973), wherein the court held that the injury in fact test should alone be controlling. *Id.* at 128-29, 302 A.2d at 811. There is some disagreement, however, as to the precise definition of injury in fact. Compare *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 683-90 (1973) (liberal approach

standing to contest administrative determinations.¹³² In the area of zoning, however, New York authorities have been reluctant to deviate from established principles. To find a plaintiff "aggrieved," as mandated by the standing tests set forth in various zoning provisions,¹³³ New York courts have insisted upon a showing that the plaintiff would be personally and adversely affected by the official decision. This has been interpreted as requiring a petitioner challenging a zoning ordinance or variance to show that he is a property owner in the proximate vicinity of the subject premises¹³⁴ and that he would suffer pecuniary damage by the enforcement of the regulation in question.¹³⁵

This cursory manner of disposing of suits dealing with zoning

granting standing) *with* *Warth v. Seldin*, 95 S. Ct. 2197 (1975) (restrictive approach denying standing). It is conceivable that the *Warth* Court denied standing to avoid the controversial substantive issue of racial discrimination. Whether this decision heralds a return to more restrictive federal standing requirements, therefore, is yet to be resolved.

¹³¹ See, e.g., *Coghill v. Boucher*, 511 P.2d 1297 (Alas. 1973) (action by residents and registered voters seeking to enjoin lieutenant governor from authorizing procedures in upcoming election); *Channel 10, Inc. v. Independent School Dist. No. 709*, 298 Minn. 306, 215 N.W.2d 814 (1974) (action by news media agency challenging school board's meeting policies); *New Hampshire Bankers Ass'n v. Nelson*, 113 N.H. 127, 302 A.2d 810 (1973) (action by bankers' association protesting issuance of negotiable orders of withdrawal by savings banks).

For two New York decisions granting a petitioner standing in an article 78 proceeding without requiring a showing of personal grievance or personal interest in the outcome, see *Andrews v. Nagourney*, 41 App. Div. 2d 778, 342 N.Y.S.2d 79 (2d Dep't) (mem.), *aff'd*, 32 N.Y.2d 784, 298 N.E.2d 680, 345 N.Y.S.2d 542 (1973), and *Policemen's Benevolent Ass'n v. Board of Trustees*, 21 App. Div. 2d 693, 250 N.Y.S.2d 523 (2d Dep't 1964) (mem.).

¹³² Standing to contest administrative actions has been defined as a judicially developed doctrine which relates primarily to situations in which an individual or a group challenges governmental action on the grounds that it violates private rights or some constitutional principle.

Hasl, Standing Revisited — The Aftermath of Data Processing, 18 ST. LOUIS U.L.J. 12, 13 (1973) (footnote omitted). The doctrine is far more ambiguous than this definition suggests, however, and has created much confusion in the law. Professor Hasl, noting that "the more the courts explain the test, the less it can be understood," *id.* at 40, describes standing as the "most amorphous concept in the entire domain of public law." *Id.* at 12.

¹³³ See N.Y. VILLAGE LAW § 7-712(3) (McKinney 1973); N.Y. GEN. CITY LAW §§ 38, 82 (McKinney 1968); N.Y. TOWN LAW §§ 267(7), 282 (McKinney 1965).

¹³⁴ See, e.g., *Manor Woods Ass'n v. Randol*, 29 App. Div. 2d 778, 287 N.Y.S.2d 734 (2d Dep't 1968) (mem.) (petitioner association owning no realty lacked standing); *Lido Beach Civic Ass'n, Inc. v. Board of Zoning Appeals*, 13 App. Div. 2d 1030, 217 N.Y.S.2d 364 (2d Dep't 1961) (mem.) (incorporated property owners association owning no realty not a "person aggrieved"); *Vitolo v. Chave*, 63 Misc. 2d 971, 314 N.Y.S.2d 51 (Sup. Ct. Nassau County 1970) (community civic association owning no realty not a "person aggrieved").

¹³⁵ *Unitarian Universalist Church v. Shorten*, 64 Misc. 2d 1027, 316 N.Y.S.2d 837 (Sup. Ct. Nassau County 1970) (movants failed to establish that they would suffer special damages); *Blum v. Board of Zoning & Appeals*, 8 Misc. 2d 403, 166 N.Y.S.2d 32 (Sup. Ct. Nassau County 1957) (absent a showing of personal damages residential property owners are not aggrieved persons); *Blumberg v. Hill*, 119 N.Y.S.2d 855 (Sup. Ct. Westchester County 1953) (petitioners without special injury or damage to personal or property rights lacked standing).

challenges¹³⁶ was recently criticized by the New York Court of Appeals in *Douglaston Civic Association, Inc. v. Galvin*.¹³⁷ Concerned with the "glaring inconsistency" between the stringent standing requirements involved in zoning litigation and the less restrictive rules on standing in related fields,¹³⁸ and even more with the "particular need in zoning cases for a broader rule,"¹³⁹ the *Douglaston* Court found that a civic association had standing to challenge the grant of a zoning variance.¹⁴⁰

Douglaston involved a proceeding pursuant to CPLR article 78¹⁴¹ and section 668e-1.0 of the New York City Administrative Code¹⁴² to review the New York City Board of Standards and Appeals' denial of a rehearing on the grant of a zoning variance. Despite initial opposition by town residents, both individually and through the *Douglaston Civic Association*, the Board had granted a hardship variance to an estate, awarding it permission to construct

¹³⁶ Indeed, some courts, believing that the claimant does not deserve relief on the merits, deny standing, thereby confusing these separate considerations. See Ayer, *Primitive Law of Standing in Land Use Disputes: Some Notes From a Dark Continent*, 55 IOWA L. REV. 344, 350 (1969). The Supreme Court has stated that the correct test of standing is whether the plaintiff is a "proper party to request an adjudication of a particular issue . . ." *Flast v. Cohen*, 392 U.S. 83, 99-100 (1969) (footnote omitted). Yet, it has been contended that consideration of substantive issues is not an improper "way of looking at standing." See Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 426 (1974).

¹³⁷ 36 N.Y.2d 1, 324 N.E.2d 317, 364 N.Y.S.2d 830 (1974), *aff'g* 43 App. Div. 2d 739, 350 N.Y.S.2d 708 (2d Dep't 1973), *rev'g mem.* 69 Misc. 2d 686, 330 N.Y.S.2d 810 (Sup. Ct. Queens County 1972).

¹³⁸ 36 N.Y.2d at 6, 324 N.E.2d at 320, 364 N.Y.S.2d at 834, *citing* National Org. for Women (NOW) v. State Div. of Human Rights, 34 N.Y.2d 416, 314 N.E.2d 867, 358 N.Y.S.2d 124 (1974) (NOW permitted to challenge newspaper publisher's maintenance of separate male and female help-wanted columns) and *Glen Cove Municipal Civil Serv. Comm'n v. Glen Cove NAACP*, 34 App. Div. 2d 956, 312 N.Y.S.2d 400 (2d Dep't 1970) (mem.) (NAACP allowed to contest allegedly discriminatory criteria for employment in fire department) and *American Jewish Congress v. Carter*, 19 Misc. 2d 205, 190 N.Y.S.2d 218 (Sup. Ct. N.Y. County 1959), *modified on other grounds*, 10 App. Div. 2d 833, 199 N.Y.S.2d 157 (1st Dep't), *aff'd*, 9 N.Y.2d 223, 173 N.E.2d 788, 213 N.Y.S.2d 60 (1960) (religious organization granted standing to challenge discriminatory practices of foreign oil company).

¹³⁹ 36 N.Y.2d at 6, 324 N.E.2d at 320, 364 N.Y.S.2d at 834.

¹⁴⁰ *Id.* at 7, 324 N.E.2d at 320, 364 N.Y.S.2d at 835. The Court noted that its holding would apply to the several zoning statutes, see note 133 *supra*, in which the "aggrieved person" standing test is contained. *Id.* at 5 n.2, 324 N.E.2d at 319 n.2, 364 N.Y.S.2d at 833 n.2.

¹⁴¹ CPLR 7801 reads: "Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article." Article 78 has been described as "a comprehensive set of provisions regulating judicial review of actions by State and local officers or agencies." 8 WK&M ¶ 7801.02.

¹⁴² NEW YORK, N.Y. ADMIN. CODE ch. 27, § 668e-1.0 (1970). Subdivision a provides that "[a]ny person or persons, jointly or severally aggrieved by any decision of the board upon appeal or review . . . may present . . . a petition . . . setting forth that such decision is illegal . . ." As the Court explained, the Code thus establishes that an aggrieved person may challenge the board's decision in an article 78 proceeding in the nature of a certiorari. 36 N.Y.2d at 5, 324 N.E.2d at 319, 364 N.Y.S.2d at 833.

a six-story multiple apartment dwelling in an area zoned for single-family homes.¹⁴³ When the Board refused the Association's request for a rehearing,¹⁴⁴ the individual petitioners joined with the Association in seeking judicial review of the denial. Special term rejected the Board's motion to dismiss the petition,¹⁴⁵ but the Appellate Division, Second Department, reversed,¹⁴⁶ raising for the first time the issue of standing. The second department found, *inter alia*, that the civic organization lacked standing to bring the proceeding since it was not a property owner.¹⁴⁷ Although the Court of Appeals affirmed the dismissal of the action on other grounds,¹⁴⁸ it ruled that a civic or property owners' association has standing to challenge the grant of a zoning variance.¹⁴⁹

The decision of the Court of Appeals was motivated by several policy considerations. The extension of standing to a neighborhood association would allow the expense of contesting a zoning change to be more evenly distributed among property owners,¹⁵⁰ sparing the individual property owner the burden of having to personally attack a proposed zoning change.¹⁵¹ Furthermore, the adoption of a broader rule on standing would be compatible with the fundamental objective of zoning laws, *viz*, protection of the public.¹⁵² Indeed, it would be "ironic," the Court concluded, to "force a court to reject . . . a challenge [by an association representing] that segment of the public which stands to be most severely affected"¹⁵³ by a zoning board's determination.

¹⁴³ See 36 N.Y.2d at 4, 324 N.E.2d at 318-19, 364 N.Y.S.2d at 832.

¹⁴⁴ The Board refused to accept the Association's argument that the discovery of new evidence warranted a rehearing. See *id.* at 5, 324 N.E.2d at 319, 364 N.Y.S.2d at 833. See also note 148 *infra*.

¹⁴⁵ 69 Misc. 2d at 686, 330 N.Y.S.2d at 810.

¹⁴⁶ 43 App. Div. 2d at 739, 350 N.Y.S.2d at 708.

¹⁴⁷ *Id.* at 739, 350 N.Y.S.2d at 709.

¹⁴⁸ 36 N.Y.2d at 8-9, 324 N.E.2d at 321-22, 364 N.Y.S.2d at 836. A second issue raised on appeal was whether the delayed discovery of certain evidence constituted "substantial new evidence," the presence of which would make the Board's refusal to review the case arbitrary or capricious. *Id.* According to the facts of the case, the estate had been granted its hardship variance on the basis of evidence representing its "Cost of Land" as \$121,878. In an estate tax proceeding eight years earlier, however, the estate had valued this same parcel of land at \$35,000. Although this information had been a matter of public record for over three years, it was not found by the petitioners until after the expiration of the time period within which they were allowed to protest the variance. Accordingly, the Court affirmed the appellate division's dismissal of the petition, holding that the information did not constitute "substantial new evidence" and that the Board's refusal was not arbitrary and capricious. *Id.*

¹⁴⁹ *Id.* at 4, 324 N.E.2d at 318, 364 N.Y.S.2d at 832.

¹⁵⁰ *Id.* at 6-7, 324 N.E.2d at 320, 364 N.Y.S.2d at 834-35.

¹⁵¹ *Id.*

¹⁵² *Id.* at 7, 324 N.E.2d at 320, 364 N.Y.S.2d at 835.

¹⁵³ *Id.*

The Court enumerated certain criteria, originally set forth by Justice Hopkins in his concurring opinion in the appellate division, which it considered relevant to the determination of whether a particular organization constituted an appropriate representative body:

- (1) the capacity of the organization to assume an adversary position, (2) the size and composition of the organization as reflecting a position fairly representative of the community or interests which it seeks to protect and (3) the adverse effect of the decision sought to be reviewed on the group represented by the organization as within the zone of interests sought to be protected.¹⁵⁴

Finally, the Court of Appeals added that membership in the association should be open to all residents and property owners in the immediate area.¹⁵⁵ Applying these criteria to the Douglaston Association, the Court concluded that it qualified as an appropriate representative. The size and composition of the organization, involving over a thousand owners and residents, established both its capacity to maintain an adversary position and its ability to effectively represent its members. And, the effect of the variance in question was clearly within the zone of interests to be protected.¹⁵⁶

Although the Court recognized that a grant of standing to a group lacking proper interest in the issue and financially incapable of bringing suit would only prove detrimental to those with a legitimate vested interest, the equivocal language of the enumerated criteria raises doubt as to their effectiveness as guidelines for courts in the future. Moreover, their application may prove burdensome to the very property owners the Court was purporting to protect.

The first factor, capacity to assume an adversary position,

¹⁵⁴ *Id.* at 7, 324 N.E.2d at 321, 364 N.Y.S.2d at 835, quoting 43 App. Div. 2d at 740, 350 N.Y.S.2d at 711. It is interesting to note that the *Douglaston* Court does not use the more restrictive language generally employed by the New York courts, *viz.*, "aggrieved or injured," see cases cited notes 133-35 and accompanying text *supra*, but incorporates the more liberal language of *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970), *viz.*, "within the zone of interests to be protected," see note 130 *supra*.

¹⁵⁵ 36 N.Y.2d at 7, 324 N.E.2d at 321, 364 N.Y.S.2d at 835, citing ALI, MODEL LAND DEVELOPMENT CODE § 2-307(3) (Proposed Official Draft, Apr. 15, 1975). This fourth factor concerning participation in the association merely demonstrates the Court's insistence on nondiscriminatory membership regulations. Manifesting a similar policy, the ALI CODE, *supra*, provides:

The Land Development Agency shall issue an order designating a neighborhood organization as qualified under this Section if it finds that

- (e) full participating membership in the neighborhood organization is open at least to all registered voters within its boundaries.

¹⁵⁶ 36 N.Y.2d at 8, 324 N.E.2d at 321, 364 N.Y.S.2d at 836.

presumably signifies more than mere legal capacity or the technical ability to be a plaintiff. Its precise meaning, however, is not explained. Furthermore, the decision seems to equate capacity with size and composition,¹⁵⁷ which raises the question of why capacity, on the one hand, and size and composition, on the other, are listed as two separate factors. Such vague wording may invite investigation into the organization in question, in which case not only the size and composition, but conceivably the fabric of the entire organization, even, for example, its treasury, could be exposed to inquiry.¹⁵⁸

Interestingly, none of the factors established by the Court expressly mandate that any member of the association show he has suffered or will suffer injury in fact.¹⁵⁹ In reference to the second factor, however, the Court did state that the size and composition of the association "establishes its ability . . . to adequately represent the 'aggrieved' neighborhood members."¹⁶⁰ The use of the word "aggrieved," here and in the statement that the "Association is an 'aggrieved person,'"¹⁶¹ may imply that it is necessary to show injury in fact. Similarly, the third factor's concern with "the adverse effect of the decision . . . on the group represented"¹⁶² may also be interpreted as requiring injury in fact. Nevertheless, the Court does not specify whether such injury is an absolute prerequisite for standing purposes.

While *Douglaston* appears to be a liberal decision and a significant step towards bringing New York into line with the current trend, it may well be a source of many problems for those struggling with its interpretation. The practitioner representing a civic association should take note that *Douglaston's* imprecise language may lead the courts to postpone consideration of the merits while considering peripheral issues regarding the internals of the organization itself. At this time, therefore, insofar as standing in zoning

¹⁵⁷ The Court concluded that the Association's "size and composition . . . establishes its ability to undertake an adversary position . . ." *Id.*

¹⁵⁸ Justice Hopkins, concurring in the appellate division decision, indicated that such an investigation might be necessary when he said that "[o]f course, there may be cases where a civic organization from its size or composition is suspect . . ." 43 App. Div. 2d at 741, 350 N.Y.S.2d at 711.

¹⁵⁹ In *NOW v. State Div. of Human Rights*, 34 N.Y.2d 416, 314 N.E.2d 867, 358 N.Y.S.2d 124 (1974), the Court granted standing even though there was neither a specifically named injured plaintiff nor any injury in fact. But, in *Sierra Club v. Morton*, 405 U.S. 727 (1972), having failed to allege that it or its members suffered injury, the plaintiff association was denied standing.

¹⁶⁰ 36 N.Y.2d at 8, 324 N.E.2d at 321, 364 N.Y.S.2d at 836.

¹⁶¹ *Id.*

¹⁶² *Id.* at 7, 324 N.E.2d at 321, 364 N.Y.S.2d at 835.

disputes is concerned, New York remains in a transitional stage. Perhaps legislative action would be an appropriate solution.¹⁶³

DOMESTIC RELATIONS LAW

DRL 170(5): Family court order of protection held to be a sufficient predicate for a nonfault divorce.

Section 170(5) of the Domestic Relations Law¹⁶⁴ reflects the recent liberalization of divorce law in New York.¹⁶⁵ Under this provision, if a "husband and wife have lived apart pursuant to a decree or judgment of separation for a period of one or more years,"¹⁶⁶ either party to the marriage¹⁶⁷ may, regardless of fault,¹⁶⁸ procure

¹⁶³ See *id.* at n.4, 324 N.E.2d at n.4, 364 N.Y.S.2d at n.4. Professor Sedler urges that the concept of standing be abandoned completely, as it "is of little real significance [*sic*]." Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479, 511 (1972). On the other hand, Professor Jaffe, in several articles, posits that standing should be not of right but within the discretion of the court. He contends that the developing relaxed standards for standing cause certain risks and dangers for the administrative process. See Jaffe, *Standing Again*, 84 HARV. L. REV. 633, 638 (1971); Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 *id.* 255, 286-87, 302-05 (1961).

¹⁶⁴ DRL 170(5) provides that a divorce should be granted if:

The husband and wife have lived apart pursuant to a decree or judgment of separation for a period of one or more years after the granting of such decree or judgment, and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such decree or judgment.

¹⁶⁵ Prior to the enactment of the Divorce Reform Law in 1966, ch. 254, [1966] N.Y. Laws 833, the only ground for divorce in New York was adultery by the spouse against whom the action was brought. Frequently, where such a ground did not legitimately exist, parties seeking to dissolve their marriage would offer perjured testimony to procure a divorce. See Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32 (1966). Currently, in New York, there exist six different grounds for a divorce, see DRL 170, two of which are commonly referred to as no-fault grounds. See Atkins, *The Developing Divorce Reform Law*, 45 N.Y. ST. B.J. 545 (1973); Branstein, *No-Fault Divorce, Alimony, and Property Settlement*, *id.* 241 (1973).

¹⁶⁶ DRL 170(5) (emphasis added). The only other requirement of § 170(5) is that the plaintiff submit satisfactory proof that he or she has substantially complied with all the conditions of the separation decree or judgment. *Id.* Courts have been quite liberal in accepting substantial compliance, often to the extent of affording a plaintiff the opportunity to remedy any unsatisfactory performance. See, e.g., Vitale v. Vitale, 37 App. Div. 2d 963, 964, 327 N.Y.S.2d 89, 90 (2d Dep't 1971); Rubin v. Rubin, 35 App. Div. 2d 460, 461, 317 N.Y.S.2d 571, 573 (4th Dep't 1971).

¹⁶⁷ An early and particularly vexing issue encountered in the application of DRL 170(5) was whether that section should be available to the party adjudicated guilty when the prior separation decree was obtained. See, e.g., Church v. Church, 58 Misc. 2d 753, 755, 296 N.Y.S.2d 716, 718 (Sup. Ct. Westchester County 1968) (divorce action pursuant to § 170(5) may not be maintained by a guilty spouse); Frishman v. Frishman, 58 Misc. 2d 208, 210, 295 N.Y.S.2d 70, 72 (Sup. Ct. Kings County 1968) (either guilty or innocent spouse may procure a divorce under § 170(5)). The principal objection to permitting a divorce in favor of a "guilty" spouse was that it would deprive the innocent, and often less financially able, spouse of economic benefits which would otherwise accrue from the marital status, *viz.*, property rights; inheritance rights; social security, medical, and retirement benefits; etc. See Hendel v. Hendel, 59 Misc. 2d 770, 300 N.Y.S.2d 350 (Sup. Ct. N.Y. County 1969), *modified*, 44 App. Div. 2d 532, 353 N.Y.S.2d 454 (1st Dep't 1974) (mem.).