

ENVIRONMENTAL

Attempted use of SEQRA to Avoid Competition Rejected

By E. Christopher Murray

The Suffolk County Supreme Court recently dismissed two related cases challenging the approval of a change of zone and the granting of zoning variances to permit the building of a Hess gasoline station and convenience store at the corner of Harned Road and Jericho Turnpike in Commack, New York. These cases were commenced by Gasoline Heaven, a competing gas station down the road from the property on Jericho Turnpike, and four town residents who lived in a nearby housing development.

In *Gasoline Heaven at Commack, et al. v. Town of Smithtown Town Board, et al.*, Index No. 21799-2012, Justice Ralph Gazzillo held that petitioners lacked standing to challenge the Town Board's negative declaration under the State Environmental Quality Review Act ("SEQRA") issued in connection with the change of zone, and that petitioners also did not have standing to assert a claim of spot zoning. In *Gasoline Heaven of Commack, et al. v. Giarradeo, et al.*, Index No. 12 8404, Justice Gazzillo dismissed an Article 78 proceeding filed by the same petitioners to challenge the granting of zoning variances for the pro-

ject because the proceeding was commenced more than thirty days after the Zoning Board decisions were filed with the town clerk's office.

In the hybrid Article 78/Declaratory Judgment proceeding, for standing purposes petitioners alleged that they were in close proximity to the proposed project, and would be harmed by increased traffic and noise, and the danger caused by the traffic generated by the development at a busy intersection. Both Hess and the town board moved to dismiss the hybrid action, arguing, *inter alia*, that the petitioners had not set forth sufficient facts to show that they had standing to challenge the SEQRA determination or to allege spot zoning.

The Supreme Court, relying on a Court of Appeals decision in *Sun-Brite Car Wash, Inc. v. Board of Zoning Appeals of Town of North Hempstead*, 69 N.Y.2d 406, and other appellate level determinations, agreed and held that the individual petitioners had not sufficiently alleged an injury different in type or severity than the injury that would allegedly be suffered generally by the town residents. The court



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also determined that Gasoline Heaven's status as a mere competitor was not protected by either SEQRA or the zoning laws and, thus, Gasoline Heaven did not have standing.

The court's determination highlights that SEQRA is not intended to prevent competition, but rather the environment. The court saw through the generalized allegations of injury

such as increase traffic and noise, and held that they were not sufficient, even if a petitioner is located in close proximity to the property. In order to assert a claim under SEQRA, a petitioner must set forth specific facts as to why he or she is going to be harmed in a unique way, otherwise a petitioner faces being thrown out of court on a motion to dismiss.

The same petitioners also saw their Article 78 petition challenging the zoning variances rejected upon motions by Hess and the Town. Petitioners contended that the Town's Board of Zoning and Appeals acted arbitrarily and capriciously in approving the variances. However, the determinations on the variances were filed in the town clerk's office on February 15 2013, but the Article 78 petition was not

filed until March 22, 2013. Accordingly, the Supreme Court held that the petition was untimely under the thirty day limitation period for challenging zoning decisions.

Petitioners argued that the limitation period did not begin to run on February 15 because the Zoning Board's determination did not state the conditions imposed upon the granting of the variances. The court rejected that argument because the document filed on February 15 met all the requirements of *Town Law* §267-a(2), namely, that the vote on each variance was set forth. The Supreme Court determination emphasizes the importance of the short statutory period for commencing an Article 78 proceeding, especially when it comes to challenging zoning decisions.

Both decisions emphasize that courts will be wary of SEQRA or land use challenges motivated by a fear of competition. In order to weed out the attempted misuse of SEQRA and zoning laws by competitors, courts will strictly enforce standing and timing requirements.

Note: E. Christopher Murray is Chair of the Environmental Practice Group at Ruskim MoscowFaltischek, P.C. and represents Hess Corporation in the above matters.