STATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE

SAM FARELLA, DAVID G. POHLE,
ASSHA SANGAVI, RICHARD GARVIN,
PHILIP F. CLAPPIN, MARY B. CLAPPIN,
EUGINIE BARRON and KENNETH YTUARTE,

Petitioners,

-against-

THE TOWN OF DURHAM,

Defendant.

DECISION and ORDER
INDEX NO. 09-1142
RJI NO. 19-09-4375

Supreme Court Greene County All Purpose Term, November 2, 2009
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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TERESI, J.:

Petitioners commenced this Article 78 "writ of mandamus" proceeding seeking to compel the Town of Durham (hereinafter "the Town" or "Respondent") to enforce its site plan review law and to declare the New York State Department of Environmental Conservation (hereinafter "DEC") as the lead agency for New York State Environmental Quality Review Act (hereinafter "SEQRA") review purposes. They also seek a declaration that the Town's site plan review law and SEQRA apply to a nonparty's change in use of their property, located in the Town, to a

"motocross race track..." (hereinafter "motocross property"). Prior to answering, Respondent moves to dismiss the petition on numerous grounds. Because Petitioners set forth no viable mandamus to compel cause of action, that portion of their petition is dismissed. However, as the Respondent failed to demonstrate that Petitioners' declaratory judgment cause of action is defective, that portion of its motion is denied.

Considering first the Respondent's "standing" motion to dismiss, Respondent failed to demonstrate that no Petitioner has standing to bring this proceeding. It has long been recognized that residents living in close proximity to a challenged project have standing to challenge it, because of the "direct" harm threatened. (Society of Plastics Indus. v County of Suffolk, 77 NY2d 761 [1991], see also Save the Pine Bush, Inc. v. Common Council of City of Albany, __ NY3d __, 2009 WL 3425317 [2009][specifically recognizing that proximity can confer standing, but stating that standing is not limited solely to proximity]). However, it is Petitioners' burden to prove that their "injury is real and different from the injury most members of the public face." (Save the Pine Bush, Inc., supra).

Here, Petitioner Assha Sangavi's affidavit demonstrates the she and her partner, Petitioner Richard Garvin, live on their own property located directly adjacent to the motocross property. Additionally, as previously found by the Hon. Daniel Lalor, Petitioners Sam Farella and David Pohle also live directly adjacent to the motocross property. (Farella, Et. Al. V. Weldon House, Inc. Et. Al., Sup Ct Greene County, August 13, 2009, Lalor, AJSC, index no. 09-0843 [hereinafter "Decision"]). Both the Sangavi affidavit and the prior Decision demonstrate, not only these Petitioners' proximity, but also that their potential injury is real and different from the "injury most members of the public face." (Save the Pine Bush, Inc., supra). In opposition,

Respondent failed to make any factual demonstration controverting Petitioners Sangavi, Garvin, Farella, or Pohle's showing. (Save the Pine Bush, Inc., supra, quoting Society of Plastics Indus., supra). Accordingly, Respondent's "standing" motion to dismiss is denied relative to Petitioners Sangavi, Garvin, Farella, or Pohle's claims.

The remaining Petitioners, however, failed to submit any proof of their proximity to the motocross property, their interest in this litigation, that the motocross property project would cause them to suffer an injury, or that their injury would be "different" from the public's injury. (Save the Pine Bush, Inc., supra). Because Petitioners Philip Clappin, Mary Clappin, Eugene Barron and Kenneth Ytuarte failed to demonstrate any of the above, their claims are dismissed for lack of standing.

Turning to Respondent's motion seeking dismissal because a mandamus proceeding does "not lie to direct a Town to enforce local land use laws", it is granted. It is well established that a mandamus to compel proceeding seeks "an extraordinary remedy which lies only to compel performance of acts which are mandatory, not those that are discretionary." (Barnwell v. Breslin, 46 AD3d 990, 991 [3d Dept. 2007]; Klostermann v. Cuomo, 61 NY2d 525, 539 [1984]; Gimprich v. Board of Education of City of New York, 306 N.Y. 401 [1954]). It is equally well settled, as conceded by Petitioners, that "the decision to enforce a municipal code rests in the discretion of the public officials charged with its enforcement and relief in the nature of mandamus is simply unavailable". (Church of Chosen v. City of Elmira, 18 AD3d 978 [3d Dept. 2005]; Mayes v. Cooper, 283 ADD.2d 760 [3d Dept. 2001]; Manuli v. Hildenbrandt, 144 AD2d 789 [3d Dept. 1988]; Dyno v. Village of Johnson City, 261 AD2d 783 [3d Dept. 1999]; Young v. Town of Huntington, 121 AD2d 641 [2d Dept. 1986]).

To the extent that Petitioners seek to compel the Town to enforce its site plan review law, they fail to state a cause of action. "[T]he decisions of local municipal officials on whether to enforce zoning codes [,or as here a site plan review law,] are discretionary and not subject to judicial oversight in a civil suit or by way of mandamus." (Manuli, supra at 790). Because the Town's decision relative to enforcement of its site plan review law is discretionary, its enforcement may not be compelled by this mandamus proceeding.

Closely related, Petitioners also failed to state a viable cause of action seeking Respondent to declare that the its site plan review law applies to a nonparty's change in use of their property to a "motocross race track..." Because this Court cannot compel the Town to enforce its site plan review law "[a]ny judicial declaration with respect to whether the activities or structures on the [nonparty's] property violated the [site plan review law] would... be purely advisory and would not create any binding obligation to act on [the Town]. In this posture, [Petitioners'] claim against [the Town] lacks the necessary justiciability for a declaratory judgment action to lie." (Id. citing Jones v. Beame, 45 NY2d 402 [1978]).

Respondent also demonstrated that Petitioners failed to state a mandamus cause of action compelling it to declare the DEC as the lead agency for SEQRA review purposes. Petitioners' cause of action is unsupported by any mandatory - nondiscretionary requirements of SEQRA. Rather, SEQRA specifically vests the Commissioner of the DEC with the authority to declare the "lead agency", when a dispute arises. (NY ECL §8-0111[6]). As Petitioners failed to allege or demonstrate that Respondent has a mandatory - nondiscretionary duty to declare the DEC the "lead agency" for SEQRA review purposes, no mandamus to compel cause of action has been stated.

With the dismissal of the foregoing claims, Petitioners' sole remaining cause of action seeks a declaration that SEQRA applies to a nonparty's change in the use of their property to a "motocross race track...". While Petitioners have denominated their petition as a "writ of mandamus", the content of the petition and its relief clause both set forth a cause of action seeking declaratory relief on this issue. (CPLR §§3001 and 3017[b]). Accordingly, to the extent that the petition seeks a declaration that SEQRA applies to the Respondent's determinations regarding a nonparty's change in the use of their property to a "motocross race track...", it is converted to a declaratory judgment complaint pursuant to CPLR §103(c). (Seymour v. Nichols, 21 AD3d 1234 [3d Dept. 2005]). As so modified, Respondent's motion to dismiss has not addressed the converted complaint and is denied without prejudice on this issue.

Accordingly, to the extent set forth above, the petition is dismissed and Petitioners' remaining claim is converted to a declaratory judgment action. Respondent is granted leave to answer or move to dismiss[1] within thirty days of the date of this Decision and Order.

This Decision and Order is being returned to the attorneys for the Respondent. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall

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[1] Although CPLR §3211(e) permits only one motion to dismiss, Respondent is granted leave to bring a second motion to dismiss, if so advised, because of the conversion of Petitioners' petition to a declaratory judgment complaint. Respondent has not yet had an opportunity to challenge such converted petition/complaint by a motion to dismiss, prior to answering. By granting leave, Respondent is not deprived of such right. (*See generally* Held v. Kaufman, 91 NY2d 425 [1998], Sevenson Hotel Associates, Inc. v. Stranges, 262 AD2d 957 [4th Dept. 1999]).

not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: December 7, 2009
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause, dated August 9, 2009, Affirmation of Gerald Bunting, dated July 17, 2009, Petition, dated July 14, 2009, with attached Exhibits A-C.
2. Notice of Motion, dated August 31, 2009, Affidavit of Gary Hulbert, dated August 31, 2009, with attached Exhibits A-B, Affirmation of Tal Rappleyea, undated.
3. Affirmation of Gerald Bunting, dated October 20, 2009, Affidavit of Asha Sangavi, dated October 20, 2009, with attached Exhibits D-K.
4. Affirmation of Tal Rappleyea, dated November 2, 2009.