State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: December 1, 2022 533518

In the Matter of 61 CROWN STREET, LLC, et al.,
Appellants,
v
MEMORANDUM AND ORDER
CITY OF KINGSTON ZONING BOARD OF APPEALS et al.,
Respondents,
et al.,
Respondents.

Calendar Date: October 18, 2022

Before: Garry, P.J., Lynch, Reynolds Fitzgerald, Ceresia and McShan, JJ.

Rodenhausen Chale & Polidoro LLP, Rhinebeck (Victoria L. Polidoro of counsel), for appellants.

Barbara Graves-Poller, Corporation Counsel, Kingston, for City of Kingston Zoning Board of Appeals and another, respondents.

Riseley & Moriello, PLLC, Kingston (Michael A. Moriello of counsel), for JM Development Group, LLC and others, respondents.

Garry, P.J.

Appeal from a judgment of the Supreme Court (Richard Mott, J.), entered May 17, 2021 in Ulster County, which, in a proceeding pursuant to CPLR article 78, dismissed the petition.

This appeal concerns another challenge to the Kingstonian Project, a plan to redevelop certain parcels of land located in the City of Kingston, Ulster County (*Matter of 61 Crown St., LLC v New York State Off. of Parks, Recreation & Historic Preserv.*, 207 AD3d 837 [3d Dept 2022]; *61 Crown St., LLC v City of Kingston Common Council*, 206 AD3d 1316 [3d Dept 2022], *lv denied* ___ NY3d ___ [Nov. 22, 2022]). As proposed, the project would demolish an outdoor parking lot and a defunct municipal parking garage in the Kingston Stockade Historic District (hereinafter KSHD) to construct apartments, a boutique hotel, retail space, a pedestrian plaza and a new parking garage.[1] The KSHD is zoned as a C-2 commercial district within the "Mixed Use Overlay District" (hereinafter MUOD), which was created in 2005 to implement the City's comprehensive plan to "adaptively reuse existing commercial and industrial buildings to provide rental multifamily housing, including affordable housing, to present and future residents" and "encourage mixed-use, mixed-income, pedestrian-based neighborhoods" (Code of City of Kingston § 405-27.1 [A] [2], as added by Common Council of the City of Kingston Resolution No. 20 of 2005 § 2). During the pertinent time period, the following uses were permitted in the MUOD by special use permit: "[t]he conversion of existing commercial or industrial buildings, or sections of them, into residential apartments . . . of which some will be dedicated as affordable housing" and "[s]ite and building enhancements that promote a mixed-use, mixed-income, pedestrian-based neighborhood" (Code of City of Kingston § 405-27.1 [D], as added by Common Council of the City of Kingston Resolution No. 20 of 2005 § 2). The Code of the City of Kingston further required that "[a]t least 20% of the residential units in the adaptive reuse of commercial or industrial buildings, of five or more units, . . . be established as affordable housing units" (Code of City of Kingston § 405-27.1 [E], as added by Common Council of the City of Kingston Resolution No. 20 of 2005 § 2).

The project was determined to be subject to the State Environmental Quality Review Act (*see* ECL art 8 [hereinafter

[1] One parcel to be redeveloped is adjacent to the KSHD (*see generally 61 Crown St., LLC v City of Kingston Common Council*, 206 AD3d at 1316).

SEQRA]). During the public comment phase of that review, a community group and certain individuals requested an interpretation of the foregoing code sections as to whether the project, contemplating new construction of residential units, was allowed in the MUOD and, if allowed, whether the affordable housing requirement applied. Respondent Eric Kitchen, in his capacity as the City's Zoning Enforcement Officer (hereinafter the ZEO), concluded that new construction residential uses were permissible as site enhancements and that the affordable housing requirement, expressly applicable to only adaptive reuses, thus need not be followed. Petitioners, property owners within the KSHD and near the project site, administratively appealed. Following a public hearing, respondent City of Kingston Zoning Board of Appeals (hereinafter the ZBA) upheld the ZEO's determination, while urging the City's Common Council to revisit its inconsistent and "flawed" affordable housing requirements.

Petitioners then commenced this CPLR article 78 proceeding to annul the ZBA's determination as, among other things, arbitrary and capricious. Respondents JM Development Group, LLC, Herzog Supply Co., Inc., Kingstonian Development, LLC and Patrick Page Holdings, L.P. (hereinafter collectively referred to as the developers) as well as the ZBA and the ZEO (hereinafter collectively referred to as the municipal respondents) joined issue and, in their respective answers, asserted, among other things, that the petition should be dismissed for lack of standing.

Shortly thereafter, the City amended various provisions of its code concerning affordable housing (*see* Common Council of the City of Kingston Resolution No. 23 of 2021). In pertinent part, the code section governing the MUOD added a third purpose, "to encourage the development of affordable housing units" in accordance with the newly-enacted City of Kingston Zoning Code § 405-8 (Code of City of Kingston § 405-27.1 [A] [2] [c], as amended by Common Council of the City of Kingston Resolution No. 23 of 2021 § 1), and established that new construction of residential uses is permitted as of right (*see* Code of City of Kingston § 405-27.1 [B] [2], as amended by Common Council of the City of Kingston Resolution No. 23 of 2021 § 1). As a result,

the municipal respondents moved to dismiss the proceeding as moot. The developers supported that motion, and petitioners opposed, cross-moving for leave to amend their petition to add Common Council as a respondent and two SEQRA claims regarding the foregoing amendments. Supreme Court agreed that petitioners lacked standing and dismissed the petition on that ground, denying the foregoing motion and cross motion as moot. Petitioners appeal.

Initially, petitioners argue that Supreme Court erred in denying their cross motion as moot given that they sought to include a challenge to the code amendments. Petitioners have since pursued such a challenge in a separate CPLR article 78 proceeding, and an appeal from a judgment in that proceeding is now pending before this Court. Their claim of error is therefore moot (*see Matter of Dudley Rd. Assn. v Adirondack Park Agency*, 214 AD2d 274, 278-279 [3d Dept 1995], *lv dismissed and denied* 87 NY2d 952 [1996]). Given that the subsequent proceeding seeks to invalidate the amendments, which, by operation of law, would revive the version of the code presently before us, we cannot say that this proceeding is itself moot (*see Matter of City of Glens Falls v Town of Queensbury*, 90 AD3d 1119, 1120-1121 [3d Dept 2011]).[2] That said, we agree with Supreme Court that petitioners lack standing to maintain this proceeding.

We reject petitioners' primary claim that they have presumptive standing to challenge the subject interpretation based solely upon the location of their properties within the MUOD. Any party seeking judicial review of an administrative action bears the burden of establishing both injury-in-fact and "that the in-fact injury of which it complains (its aggrievement, or the adverse effect upon it) falls within the zone of interests, or concerns, sought to be promoted or protected by the . . . provision [of law] under which the [administrative entity] has acted" (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 773 [1991] [internal quotation marks and citation omitted]). "In some instances, the party's particular relationship to the subject of the action may give

[2] Supreme Court has, in fact, annulled the affordable housing portion of the amendments as SEQRA noncompliant.

rise to a presumption of standing" (*Matter of Har Enters. v Town of Brookhaven*, 74 NY2d 524, 528 [1989] [citation omitted]), but what is meant by this presumption is that an inference as to harm or injury is permitted (*see id.; Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead*, 69 NY2d 406, 414 [1987]; *Matter of Rossi v Town Bd. of Town of Ballston*, 49 AD3d 1138, 1142 [3d Dept 2008]; *Matter of Massiello v Town Bd. of Town of Lake George*, 257 AD2d 962, 963 [3d Dept 1999]). In zoning matters, "[a]s in any other challenge to administrative action" (*Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead*, 69 NY2d at 412), it remains the petitioning party's burden to "satisfy the other half of the test" (*id.* at 414; *see Matter of East Thirteenth St. Community Assn. v New York State Urban Dev. Corp.*, 84 NY2d 287, 295-296 [1994]).[3]

Accepting that petitioners' respective proximities to the project are presumptive evidence of injury (*see Matter of 61 Crown St., LLC v New York State Off. of Parks, Recreation & Historic Preserv.*, 207 AD3d at 840), they have nevertheless failed to prove that their stated interests fall within the zone of those to be protected by the City's zoning code. Petitioners first allege diminution in their properties' values and a reduction in their enjoyment thereof due to the "intrusive architecture" of the "massive, out of scale development" and the attendant impact on the historic character of the area. Those interests, which have accorded them standing in several related proceedings, are not implicated by the ZBA's interpretation presently before us. Petitioners further allege that the project will result in a net loss of parking spaces available to the public. The impact of that loss is said to be two-fold: petitioners' properties will be less desirable to rent because the employees of petitioners' tenants will have less off-street parking and the tenants' customers may shop elsewhere due to a lack of convenient parking.

[3] It warrants emphasizing that, notwithstanding the circumstances of the subject request for interpretation of the code, this is not a challenge to the SEQRA review undertaken as part of a zoning change (*compare Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 687 [1996]).

Standing rules should not be applied heavy-handedly (*see Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead*, 69 NY2d at 413), and parking congestion may be considered an injury generally protected by zoning laws (*see e.g. Matter of Center Sq. Assn., Inc. v City of Albany Bd. of Zoning Appeals*, 9 AD3d 651, 652-653 [3d Dept 2004]; *see generally Matter of East Thirteenth St. Community Assn. v New York State Urban Dev. Corp.*, 84 NY2d at 296). Here, however, the allegations relating to parking are rooted only in economic harm due to increased business competition. As petitioners acknowledge, this is not a protected interest (*see Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead*, 69 NY2d at 415; *Matter of VTR FV, LLC v Town of Guilderland*, 101 AD3d 1532, 1533 [3d Dept 2012]; *Matter of Riverhead PGC, LLC v Town of Riverhead*, 73 AD3d 931, 933-934 [2d Dept 2010], *lv denied* 15 NY3d 709 [2010]).[4] Accordingly, we discern no basis upon which to disturb Supreme Court's dismissal of this proceeding.

Lynch, Reynolds Fitzgerald, Ceresia and McShan, JJ., concur.

ORDERED that the judgment is affirmed, without costs.

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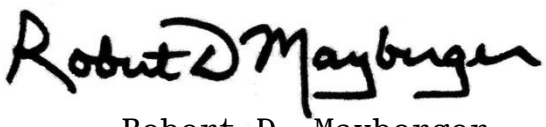

Robert D. Mayberger
Clerk of the Court

[4] For this reason, petitioners have now conceded that their primary claim of "competitive disadvantage" as owners of properties subject to adaptive reuse, as opposed to those who may construct on vacant land, cannot confer standing.