STATE OF NEW YORK
SUPREME COURT COUNTY OF CAYUGA

In the Matter of the Application of
CNY SCRAP PROCESSING, LLC,

Petitioner,

vs. Index #: 2022-0042

MORLEY FLYNN, TOWN OF STERLING,
TOWN OF STERLING ZONING BOARD OF APPEALS,

Respondents.

BEFORE: HON. THOMAS G. LEONE
ACTING SUPREME COURT JUSTICE

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DECISION AND ORDER

LEONE, J.

This matter represents the latest iteration of litigation relating to a junkyard/scrapping operation within the Town of Sterling that has been ongoing in one form or another for over a decade. The Verified Petition of Petitioner NY Scrap Processing, LLC (hereinafter, "Petitioner") includes over 200 pages of documentation outlining the procedural and factual history of the ongoing disputes. In response, Respondents Town of Sterling (hereinafter, "the Town") and the Town of Sterling Zoning Board of Appeals (hereinafter "the ZBA") and Respondent Morley Flynn (hereinafter, "Flynn") included over 200 pages of additional documentation.

Distilling the lengthy and complex procedural history to its most simple terms, Petitioner alleges that, following a Settlement Agreement signed between Petitioner and the Town of Sterling relating to the same property at issue in the instant petition (*see CNY Scrap Processing, LLC. V Town of Sterling*, Index No. 2015-0206 [Cayuga County Sup. Ct. 2015]), Flynn, whose father owns a parcel of property that surrounds subject junkyard/scrapping operation owned by Petitioner, filed a complaint with the Sterling Code Enforcement Officer on and then lodged a formal complaint with Respondent ZBA. Acting on the complaint, the ZBA commenced a formal hearing. Petitioner objected to the proceedings on grounds that Flynn lacked standing to bring the complaint and that the complaint was not timely. The ZBA rejected these assertions and proceeded to substantively address the merits of the application. After considerable debate and discussion, the ZBA found in favor of the complaint.

Petitioner then commenced this action, asserting that Flynn lacked standing to commence the underlying ZBA action, the ZBA action was not timely, and the findings of the ZBA were arbitrary, capricious, and not reasonably supported by the evidence.

In the present motion, the Town and the ZBA move pursuant to CPLR § 7804(f) to dismiss the Verified Petition on the grounds that Flynn had standing to commence the underlying ZBA action, the ZBA action was timely, and the findings of Respondent ZBA were sound and reasonably supported by the evidence.

In opposition to the motion, Petitioner replies to the Motion to Dismiss by reiterating its position, requesting denial of the Motion, and requesting this Court grant the relief sought in the Petition.

CPLR § 7804 governs the Court's analysis:

> "CPLR 7804(f) provides that the respondent in an article 78 proceeding may, within the time allowed for answer, move to dismiss the petition based on an 'objection in point of law,' which is akin to an affirmative defense [Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C7804:7]. On a pre-answer motion to dismiss an article 78 petition, whether on standing grounds or otherwise, only the petition is to be considered and all of its allegations are deemed to be true" (*Sinnecock Neighbors v Town of Southampton*, 37 N.Y.S. 3d 679 [Suffolk Co. Sup. Ct, 2016]).

"In considering a motion to dismiss a CPLR article 78 proceeding pursuant to CPLR 3211(a)(7) and 7804(f), all of the allegations in the petition are deemed to be true and are afforded the benefit of every favorable inference" (*Gilbert v Planning Bd. Of Town of Irondequoit*, 148 A.D. 3d 1587 [4th Dept. 2017]). Where parties raise a motion to dismiss pursuant to CPLR 7804(f) and the parties are requesting "a purely legal conclusion based on arguments raised in the [motion papers] and based on undisputed facts," the presiding court may convert the motions to one of summary judgment (*see Corrales v Zoning Board of Appeals of Villages of Dobbs Ferry*, 164 A.D. 3d 582 [2nd Dept. 2018]).

> "Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria. In land use matters, a party challenging governmental action has standing if it shows that it would suffer direct harm (*i.e.*, injury-in-fact) that is in some way different from that of the public at large and, further, that the claimed harm is within the zone of interests protected by the statute or statutes alleged to have been violated. As to the requirement of injury-in-fact, an allegation of close proximity alone may give rise to an inference of damage or injury that enables a nearby property owner to challenge a land use decision without proof of actual injury. The harm that is alleged must be specific to the individuals who allege it, and must be different in kind or degree from the public at large, but it need not be unique. Standing should be liberally construed so that land use disputes are settled on their own merits rather than by preclusive, restrictive standing rules." (*Sinnecock Neighbors v Town of Southampton*, 37 NYS3d 679 [Suffolk Co. Sup. Ct. 2016] [internal citations and quotations omitted]).

It is undisputed that the Town of Sterling Land Use Regulations identify the class of parties "who may appeal" to the ZBA: "Appeals to the ZBA may be made by any person or Town Official aggrieved or affected by any provision of these Regulations or by any order to

stop, cease and desist issued by the Code Enforcement Officer in enforcing the provisions of these Regulations" (Article 4-11).

It is equally undisputed that the underlying ZBA action was commenced by Flynn. In articulating standing, Flynn's application to the ZBA provided as follows:

> The expansion of CNY Scrap Processing LLC's permit affects me in multiple ways. First my family owns all of the property bordering CNY Scrap Processing, LLC. The operation and expansion of a scrap processing facility negatively impacts our property values, and quality of life. Second this blatant disregard for our Town's laws creates a precedent for further abuse by industry that could affect every citizen of this town.

In his Affidavit in support of the instant litigation, Flynn identifies that he was born in 1987 and lived at 14761 State Route 104, a parcel that surrounds the subject parcel containing Petitioner's junkyard/scrapping operation, until 2005 when he left to attend SUNY Maritime. For an unknown amount of time thereafter, he used this residence as a mailing address he often was at sea. In 2018, Flynn moved into his wife's residence at 445 Lansing Street in Fair Haven, where he operates a business from the home.

Flynn concedes that "Glenn Flynn, [his] father, who purchased [14761 State Route 104] and built a home in 1985, was and is the titled owner." Flynn asserts he is an invited guest to the home four to five times a week, where he will routinely "work on the property to preserve wildlife habitat, protect groundwater, produce timber, and provide wilderness recreation activities" in addition to letting his mother care for his infant child. Flynn does not argue, nor does he submit any evidence establishing, that he has any kind of legal interest in 14761 State Route 104.

Flynn cannot avail himself of the presumption of injury-in-fact by virtue of close geographic proximity to the subject property from his personal residence at 445 Lansing Street, as the two properties are separated by at least 2 miles – as the crow flies – and at least 5.1 miles by road travel.[1] Given the great distance, the presumption of an injury-in-fact does not provide Flynn with standing (*see Rediker v Zoning Bd. of Appeals of Town of Philipstown*, 280 A.D. 2d 548 (2nd Dept. 2001] [finding petitioners lacked an inference of injury, and therefore lacked standing, where they lived one-third mile from subject property]; *see also Powers v De Groodt*,

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1 Said distances were computed using Google Maps (www.google.com/maps, last accessed October 9, 2022); *see Carreiro v Colbert*, 5 NYS3d 327 [Tompkins Co. Sup. Ct. 2014] [noting courts commonly take judicial notice of distances and geography in summary judgment motions]).

43 A.D. 3d 509 [3rd Dept. 2007] [4700 feet separation insufficient to create presumption of injury-in-fact). Thus, Flynn's standing depends upon a demonstration of an actual and specific personal injury.

Flynn attempts to create such a personal harm by advancing what could only be described as a familial proxy action. Flynn did not articulate any personal harm caused by the municipal action. Instead, he nebulously asserts that the action will harm the property of "his family." Because Flynn identifies the property as being owned by "his family," he claims by extension that every member of the family can vicariously assert standing to bring actions on behalf of "the family." The problem with this syllogism is self-evident: legal title to the property is held solely by Flynn's father, and Flynn's connection to the parcel is limited to visiting as an invited guest. While Flynn's father, as the landowner, or his mother, as a next-door resident, would clearly have standing, Flynn has no legal right to commence a legal action that could have drastic ramifications on his father's use and enjoyment of his own property solely because he is a regular invited guest to the property.

In his application, Flynn repeatedly uses the plural third person pronoun "our" in describing the 14761 State Route 104 property. While he used to reside at that address years ago before moving miles away with his wife, he advances no legal interest, whether current or anticipatory, at the time he commenced the underlying action. For all intents and purposes, Flynn may never have any legal interest whatsoever in the property. Accordingly, his claims that "our family's property or quality of life" will be impacted by the action ignore the fact that he has no actual, legal interest in the valuation of said property. Moreover, while Flynn believes the activities may be a negative, the landowner whose rights he attempts to vicariously assert may very well not share that position. Flynn does not identify any legal right to serve as the agent for his parents, the individuals who are actually allegedly harmed-in-fact by the neighboring activity.

Flynn has no more established legal right to commence the underlying action than any member of the public. Flynn identifies no legal basis or authority to act as an agent or power of attorney on behavior of the landowner who is the subject of the action. Instead, he commenced the action, not because he himself sustained an injury-in-fact, but because a third party is allegedly sustaining an injury-in-fact, and he is proceeding with an action to ensure that the landowner's interests are being preserved. Outside of the legally-insignificant biological nexus, Flynn has no greater legal right to commence this action than any other third person.

Flynn advances no jurisprudence as to how a family member without any legal interest in a property can commence an action of this nature vicariously in the name of someone who has individual standing. Flynn asserts standing exists "when a party owns property in close proximity to the property at issue." The record is clear, however, the person who filed the appeal with the ZBA (*i.e.* Flynn) does not "own property in close proximity to the property at issue." The party who owns the property in close proximity to the property at issue is Glenn Flynn (and arguably, by extension, his wife who resides at the property). While there is no doubt that Flynn has an emotional connection with his childhood home and is an invited guest of his parents on a regular basis, this does not create standing as to permit a son to commence legal actions that could encumber his father's use and enjoyment of his own property.

This Court is cognizant that standing should be construed liberally so land use disputes are settled on their own merits. However, the instant application pushes "aggrieved person" beyond its breaking point. *Society of Plastics* and its progeny relating to "injury in fact" and the like requires the party asserting standing to have an actual legal stake in the matter being adjudicated in that the party must suffer some kind of direct harm different from the public at large. Flynn demonstrates no greater rights to his parent's parcel than any other member of the public who visits the home with equal regularity. This Court cannot strain standing to a degree where third parties can vicariously assert direct harm.

To the extent that Flynn alternatively asserts that he had standing to protect the citizens from the Town setting a "precedent for further abuse by industry that could affect every citizen of this Town," such "[p]otential generalized harm does not constitute direct harm" (*see Brunswick Smart Growth, Inc. v. Town of Brunswick*, 73 A.D. 3d 1267 [3rd Dept. 2010]).

Given that Flynn does not personally have any legal stake in the application, as opposed the actual landowner whose rights he sought to vicariously adopt, Flynn lacked standing to bring the action with Respondent ZBA. As such, it was an error for the ZBA to permit the application to proceed through the preliminary gates, much less through substantive determination.

Therefore, the Town's and ZBA's motion to dismiss is respectfully DENIED and CNY Scrap Processing, LLC's Petition is GRANTED.

This constitutes the Order of the Court.

Dated this 3rd day of ~~October~~ MAY, 2023 at Auburn, New York.

HON. THOMAS G. LEONE
ACTING SUPREME COURT JUSTICE