SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of
SHMUEL VASSER, JOSEPH RAFALOWICZ and
DANIEL KRASNER,

Petitioners,

For a Judgment Pursuant to Article 78 and Section 3001 of the Civil Practice Law and Rules

Decision & Order
57315/2017
(Seq. 1, 2, 3 & 4 Dispo.)

-against-

THE CITY OF NEW ROCHELLE, THE CITY COUNCIL OF THE CITY OF NEW ROCHELLE, THE CITY OF NEW ROCHELLE PLANNING BOARD AND ND ACQUISITIONS, LLC,

Respondents.

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MINIHAN, A.J.S.C.

New York State Courts Electronic Filing ("NYSECF") Doc. Nos. 1 through 120 were read on this petition and complaint (NYSECF Doc. No. 1) brought by *pro se* petitioners, SHMUEL VASSER, JOSEPH RAFALOWICZ and DANIEL KRASNER, pursuant to CPLR 3001 and 7803(3) to vacate the resolution dated January 17, 2017 granting the application of ND ACQUISITIONS, LLP to amend the Senior Citizen Zone District Overlay Chapter, § 331-85 of the City's Zoning Code and Zoning Map, to apply the senior citizen zoning to the Cooper's Corners property in New Rochelle, New York; and an order to vacate a second resolution dated January 17, 2017 issuing a negative declaration of environmental significance pursuant to the New York State Environmental Quality Review Act ("SEQRA") concerning the amendment of the zoning code and map.

New York State Courts Electronic Filing ("NYSECF") Doc. Nos. 1 through 120 were read on this on this motion to dismiss by the CITY of NEW ROCHELLE, the CITY COUNCIL of the CITY of NEW ROCHELLE, and the CITY of NEW ROCHELLE PLANNING BOARD (NYSECF Doc No. 37) and on this motion to dismiss by ND ACQUISITIONS, LLC (NYSECF Doc No. 75) and on this motion to amend the petition brought by petitioners (NYSECF Doc No. 107).

Upon consideration of the foregoing papers, and the proceedings had herein, and for the following reasons, it is ordered that the petition pursuant to CPLR 3001 and 7803(3) is denied in its entirety as petitioners do not have standing; the motion pursuant to CPLR 203 (f), 3025 and 7802 permitting the filing of an amended petition and joinder of additional parties is denied

and the motions to dismiss pursuant to CPLR 3211 (a) and 7804 (f) by respondent ND Acquisitions, LLC is granted; and the motion to dismiss pursuant to CPLR 3211(a)(2),(3), (7) and 7804 (f) by City respondents is granted.

Facts and Procedural History

In this hybrid article 78 proceeding, *pro se* petitioners, Shmuel Vasser, Joseph Rafalowicz and Daniel Krasner, homeowners in the City of New Rochelle commenced this proceeding pursuant to CPLR 3001 and 7803(3) seeking an order to invalidate the resolution dated January 17, 2017 granting the application of ND Acquisitions, LLP to amend the Senior Citizen Zone District Overlay Chapter, § 331-85 of the City's Zoning Code; to amend the Zoning Map; and to apply the Senior Citizen Zone Overlay District to 11 Mill Road, located in the City of New Rochelle; and an order vacating a second resolution dated January 17, 2017 issuing a negative declaration of environmental significance pursuant to SEQRA concerning the approval of the petition to amend the zoning code and the zoning map.

ND Acquisitions, LLC is owned by National Development, which has been in the business of developing assisted living housing for decades, and has completed more than twenty senior housing communities that include a combination of independent, assisted and memory care housing.

On November 18, 2016, ND Acquisitions, LLP, petitioned the City Council to amend the text of the Senior Citizen Overlay District to allow the City Council to: (I) overlay the Senior Citizen District in single-family residence districts, and; (ii) vary or modify applicable bulk requirements when warranted by special circumstances in overlaying the Senior Citizen District on a particular property. The petition further requested that the Council overlay the Senior Citizen zoning to the property located at 11 Mill Road (Block 3180, Lot 1) in the City of New Rochelle known as "Cooper's Corners" pursuant to preliminary site plans, prepared by JMC, dated November 15, 2016. Cooper's Corners is located at the intersection of North Avenue and Mill Road and in close proximity to the Hutchinson River Parkway. The petition for the proposed zoning amendments was placed on the Council's December 13, 2016 agenda.

The petition to amend was in connection with ND Acquisition LLC's proposal to construct a sixty-four unit, seventy-two bed senior citizen residential facility known as "Memory Health Care Facility" at the Cooper's Corners. Memory Health Care Facility is a proposed residential assisted living complex dedicated to providing state-of-the-art care and services to memory challenged senior citizens which would replace the long standing commercial garden and nursery center at Cooper's Corners that contains a paved parking lot and a one-family residence.

After several public hearings, meetings, and an environmental review, which petitioners challenge in this proceeding, the City Council, as the lead agency, adopted two resolutions/ordinances, on January 17, 2017, City Council Resolution 15-2017, approving the petition to amend the zoning code and the zoning map and Resolution 16-2017, issuing a negative declaration as to the zoning amendments.

Petitioners argue that the proposed facility qualifies as a Medical Care Facility as defined in the zoning code § 331-4, which may not be built in an Senior Citizen Zone Overlay District. They contend that the City Council, as the lead agency, improperly issued a negative declaration by resolution 16-2017, finding that the amendment to the code and map contains no adverse environmental impacts under SEQRA. Petitioners state that the process used to adopt the negative declaration was undertaken in disregard of SEQRA and NYS Open Meetings Law. They argue that City respondents ignored the analysis required for a Type I Action and an Unlisted Action under SEQRA since neither an Environmental Impact Statement was prepared nor was a Full Environmental Assessment Form issued. To that end, petitioners argue that respondents treated the amendment to the code as a mere "clean-up item" item by including it as a component of ND Acquisition LLC's application to allow the construction of the Memory Health Care Facility. Petitioners urge that aside from the amendment as it relates to the proposed project, the amendment has an adverse impact on approximately eighty percent of the City's geographical area and is in direct conflict with the City's land-use plan. Thus, they challenge this "City Wide Zoning Amendment." Petitioners urge that the City respondents' actions were in contravention of existing zoning laws and the City's 2016 Comprehensive Plan as well as in disregard of the public notice requirements of NYS Open Meetings Law.

Specifically in this proceeding, petitioners bring seven causes of action for an order annulling the negative declaration under SEQRA purporting to find no adverse impact for the following actions taken by the City Council: (a) an amendment to the City Code to allow multi-family senior citizen housing in single-family residential districts, and (b) approving the application dated November 18, 2016 for the construction of the Memory Health Care Facility; (ii) annulling the zoning amendments contained in the ordinance on the grounds that the City Council failed to undertake the required SEQRA review and violated New York State's Open Meetings Law; (iii) annulling the portion of the ordinance approving the application by ND Acquisitions, LLC to construct the Memory Health Care Facility; (iv) vacating the portion of the ordinance amending the New Rochelle zoning map that applies Senior Citizen Zone Overlay District Zoning to Cooper's Corners to allow construction of Memory Health Care Facility, on the grounds that the Memory Health Care Facility is a medical care facility as defined in the City Code and as such, may not be built in a Senior Citizen Zone Overlay District; (v) enjoining respondents from taking any action in reliance on the negative declaration and the ordinance; (vi) declaring that the zoning amendments are inconsistent with the City's Comprehensive Plan and are *ultra vires*; and (vii) declaring that the negative declaration and ordinance are defective as a matter of law.

By verified answer with three affirmative defenses, including lack of standing, ND Acquisitions LLC denies the allegations to the verified petition and complaint for declaratory relief[1]. By motion to dismiss pursuant to CPLR 3211 (a) and 7804 (f), respondent ND Acquisitions, LLC only move to dismiss those claims seeking declaratory and injunctive relief contending that petitioners, fail to state a cause fo action and lack standing to pursue their claims

[1]Petitioners have failed to serve ND Acquisitions LLC with a summons when serving the petition and rather only served a notice of petition as to the article 78 proceeding. ND Acquisitions, LLC has agreed to waive this procedural defect.

since they fail to demonstrate particularized harm, only alleging speculative and generalized, community-wide harm in the form of alleged environmental impacts and loss in property values. Notwithstanding, ND Acquisitions, LLC contends that, the City Council, utilizing its broad legislative discretion, and only after the requisite public participation, including a duly noticed Public Hearing, voted to adopt the zoning amendments to apply the Senior Citizen District Overlay to Cooper's Corners. ND Acquisitions, LLC argues that the proposed Memory Health Care Facility is not a medical care facility but rather a state-licensed facility subject to requirements that prohibit the admission of residents that require 24-hour medical care. As to the claims that have been answered, they contend that the administrative record supports the City Council's determination that the proposed Memory Health Care Facility is consistent with the neighborhood character and the City's Comprehensive Plan, by enhancing the community and providing much-needed senior housing opportunities. ND Acquisitions, LLC argues that the City Council's review pursuant to SEQRA was comprehensive and petitioners have failed to outline any adverse impacts, particularly that would impact them individually. Of importance, ND Acquisitions, LLC acknowledges that the project has yet to obtain site plan approval from the City's Planning Board, and the majority of the petitioners' alleged concerns are not ripe for adjudication.

As to Resolution 15-2017, ND Acquisitions, LLC contends that the negative declaration was issued pursuant SEQRA with justification after a thorough review. Similarly, they argue that petitioners' claim that the zoning amendment is "City wide" as it "rezon[es] well over 25 acres of the City to SC Zone," and that the City Council was required to consider the potential significant adverse impacts of the text amendment on all residences is flawed. To the contrary, ND Acquisitions, LLC argues that the amendment did not "rezone" any specific properties, and rather it will only be applied onto specific properties when, and if, the Council in its discretion determines to do so, as it did in this case with Cooper's Corners.

By verified answer with five affirmative defenses, including lack of standing, the City respondents deny the allegations to the verified petition and complaint for declaratory relief.

By motion to dismiss pursuant to CPLR 3211(a)(2),(3), (7) and 7804 (f) the City respondents adopt ND Acquisitions, LLC's legal arguments and contend for the same reasons that the petition/complaint for declaratory and injunctive relief must be dismissed and the petition must be denied in its entirety with prejudice. By affidavit in support, Luiz Aragon, the Commissioner of Development of the City of New Rochelle who is responsible for operation of the City's Office of Development, including Planning, Zoning, Buildings, Housing, among other things, avers that he was involved in the City's review to amend which included meeting with the applicant and local residents concerning the proposed action and the subject zoning actions. Commissioner Aragon supervised the environmental review for the proposed action and avers that the City followed appropriate procedures very thoroughly in adopting the amendments and appropriately adopted the negative declaration finding the proposed action will have no significant adverse impacts. Commissioner Aragon notes that the facility is an appropriate use and will result in the reduction of potential impacts as compared to the present non-conforming use as a garden center.

By opposition to the motions to dismiss, petitioners argue that they have standing to challenge the City wide zoning amendment and in any event, as to Cooper's Corners, the size, nature and location of the proposed facility is threatening almost every aspect of the petitioners' daily life including "traffic, parking, utilization of emergency vehicles, use of centralized commercial size laundry operation, food delivery impact, waste and garbage generation, utilization of trucks and other commercial deliveries, odors which are regularly generated by commercial centralized deliveries and odors which are regularly generated by commercial centralized food preparation services and large volume laundry services and know no physical boundaries." Petitioners maintain that the amendment is an action listed under SEQRA and that no environmental review was performed with regard to the City wide zoning amendment and rather only focused on the Cooper's Corners site. Even to that extent, they urge that nothing in the record demonstrates that the short EAF form was actually reviewed and considered and that there was no justification for the issuance of the negative declaration. Petitioners urge that the City counsel violated the Open Meetings Law, Public Officer's Law, § 104 when it failed to conspicuously post notice of the public meetings as it displayed notice during the Christmas holidays on the property and in the newspaper for 3 consecutive days over the Christmas holiday, when most people were traveling. As to injunctive relief, petitioners argue that since ND Acquisitions, LLC appeared before the Planning Board and are proceeding through the process that they are entitled to a preliminary injunction pursuant to CPLR 6311. Petitioners argue that respondents improperly filed answers contemporaneously with the motions to dismiss and that there is no notice of motion requirements.

By reply, ND Acquisitions LLC maintain that petitioners do not have standing to challenge the City wide zoning amendment as it proposes no particular action and impacts eighty percent of the City's geographical area. By reply, City respondents adopt the same legal arguments as LLC Acquisitions, LLC.

By notice of motion to amend the petition, filed days after the reply submissions, petitioners seek an order pursuant to CPLR 203 (f), 3025 and 7802 permitting the filing of an amended petition and joinder of additional parties as petitioners. Petitioners seek to join Harry and Jacqueline Stone who reside within approximately 250 feet of the proposed Memory Care Facility, in the Kensington Woods community.

By letter dated August 1, 2017, petitioners requested that the motion to amend the petition be decided before the motions to dismiss.

By opposition to the motion to amend, ND Acquisitions, LLC contends that aside from the surprise of adding the Stones as additional parties, since they never expressed objection to the project, the motion must be denied for several reasons. The petitioners' contention that the "Stones contacted petitioners asserting that never received notice of the proposed development," is belied by their attendance at the November 2016 meeting. To that end, their challenges to compliance with public notice requirements has expired.

Standard of Review

CPLR 7804 (f) provides that a 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 (*see* 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, only the petition is to be considered and all of its allegations are deemed to be true (*Matter of East End Resources v Town of Southold Planning Bd.*, 81 AD3d 947 [2d Dept 2011]). Factual allegations consisting of bare legal conclusions, that are inherently incredible or that are flatly contradicted by documentary evidence, however, are not entitled to such consideration (*Godfrey v Spano,* 13 NY3d 358 [2009]; *Mamoon v Dot Net Inc.* 135 AD3d 656 [1st Dept 2016]).

On a motion pursuant to CPLR 3211(a) to dismiss a complaint for lack of standing, "the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing, rather than on the plaintiff to affirmatively establish its standing in order for the motion to be denied [and] the motion will be defeated if the plaintiff's submissions raise a question of fact as to its standing" (*Deutsche Bank Trust Co. Ams. v Vitellas*, 131 AD3d 52, 59-60 [2015]).

Standing is a threshold determination and the issue as to whether the person seeking relief is a proper party must be considered at the outset of a proceeding (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991]). The burden to establish standing is on the party seeking review and that an issue may be a "vital public concern" does not automatically entitle a party to standing (*see Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991]; *see also Matter of Long Island Pine Barrens Soc., Inc. v Planning Bd. of the Town of Brookhaven*, 213 AD2d 484, 485 [2d Dept 1995]).

To establish standing in a proceeding pursuant to CPLR Article 78, a petitioner must show that he will suffer an injury in fact that is distinct from that of the general public (*see Matter of Transactive Corp. v New York State Dept. of Social Servs.*, 92 NY2d 579, 587 [1998]); *see also Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 774 [1991]; *Matter of Meehan v County of Westchester*, 3 AD3d 533 [2d Dept 2004]). "The existence of an injury in fact--an actual legal stake in the matter being adjudicated--ensures that the party seeking review has some concrete interest in prosecuting the action which casts the dispute 'in a form traditionally capable of judicial resolution' "(*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 773 [1991]). Thus, a private citizen who does not show any special rights or interests in the matter, other than those common to all taxpayers and citizens, has no standing to sue (*see Kadish v Roosevelt Raceway Assocs.*, 183 AD2d 874 [1992]); *see also Matter of Meehan v County of Westchester*, 3 AD3d 533 [2d Dept 2004]). However, "standing principles . . . should not be heavy-handed; in zoning litigation in particular, it is desirable that land use disputes be resolved on their own merits rather than by preclusive, restrictive standing rules" (*Matter of Sun-Brite Car Wash, Inc. v Bd. of Zoning and Appeals of the Town of N. Hempstead*, 69 NY2d 406, 413 [1987]; *Matter of Barrett v. Dutchess County Legislature,* 38 AD3d 651 [2d Dept 2007]; *Zupa v Paradise Point Assoc.*, 22 AD3d 843, 844 [2d Dept 2005]).

In land use matters where the petitioner's property is in close proximity to the property that is the subject of the administrative action, this close proximity alone may give rise to an inference of damage to petitioner without pleading and proving special damage (*Matter of Sun-Brite Car Wash, Inc. v. Bd. of Zoning and Appeals of the Town of N. Hempstead*, 69 NY2d 406, 414 [1987]; *Zupa v Paradise Point Assoc.*, 22 AD3d 843, 844 [2d Dept 2005]; *Rediker v Zoning Bd. of Appeals of the Town of Philipstown*, 280 AD2d 548, 550 [2d Dept 2001]). Merely being an adjacent landowner does not automatically provide standing in every instance however (*Matter of Sun-Brite Car Wash, Inc. v Bd. of Zoning and Appeals of the Town of N. Hempstead*, 69 NY2d 406, 413 [1987]; *Zupa v Paradise Point Assoc.*, 22 AD3d 843, 844 [2d Dept 2005]). A neighbor must also demonstrate that his or her interest is within the "zone of interest" protected by the zoning laws to establish standing to enjoin a zoning ordinance violation (*see Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead,* 69 NY2d 406, 410 [1987]; *Matter of Long Island Business Aviation Assoc., Inc. v Town of Babylon*, 29 AD3d 794, 795 [2d Dept 2006]; *Zupa v Paradise Point Assoc.*, 22 AD3d 843, 844 [2d Dept 2005]).

The test is whether the neighbor is close enough to suffer some harm other than that experienced by the public generally and "even where petitioner's premises are physically close to the subject property, an ad hoc determination may be required as to whether a particular petitioner itself has a legally protectable interest so as to confer standing" (*Matter of Sun-Brite Car Wash, Inc. v Bd. of Zoning and Appeals of the Town of N. Hempstead*, 69 NY2d 406, 414 [1987]; *Matter of Harris v Town Bd. Of Town of Riverhead*, 73 AD3d 922 [2d Dept 2010]).

Even accepting petitioners' allegations as true on the motions to dismiss, petitioners claim of standing as a matter of law based on the proximity of their property is unavailing. Petitioners concede that they live outside of the two hundred fifty-foot radius of property owners that are required to receive mailed notice of the hearing pursuant to the Zoning Code § 331-146. Petitioners have not articulated that they are within close enough proximity to proposed facility to overcome the motions to dismiss or to be entitled to an inference of injury as a matter of law (*Radow v Board of Appeals of Town of Hempstead*, 120 AD3d 502 [2d Dept 2014])(petitioners residing .69 miles away from the subject beach club were not entitled to a presumption of injury); *Riverhead Neighborhood Reservation Coalition, Inc. v Town of Riverhead Town Board*, 112 AD2d3d 944 [2d Dept 2013](petitioners who lived 1300 to 2000 feet away from the site lacked standing); *Rediker v Zoning Bd. of Appeals of the Town of Philipstown*, 280 AD2d 548, 550 [2d Dept 2001](petitioners living approximately one-third of a mile from the proposed cell tower were not entitled to an inference of injury); *Matter of Casement v Town of Poughkeepsie Planning Board,* 162 AD2d 685 [2d Dept 1990])(distance of .7 mile from project does not generate an inference of injury); *Matter of Concerned Citizens for Open Space, Inc, v City of White Plains*, 2003 WL22283389 [Sup. Ct. Westchester Co. 2003](residences 832 feet to 2519 feet from project not entitled to inference of injury based on proximity).

Turning to the record evidence, on the claims that were answered, the fact that petitioners' homes are separated by another housing complex, Kensington Woods Community , other streets and roads supports the aforestated conclusion (*see eg, Oates v Village of Watkins Glen*, 290 AD2d 758 [3d Dept 2002]; *Matter of Gallahan v Planning Board of City of Ithaca,* 307 AD2d 684 [3d Dept 2003] (existence of houses, commercial property, woods and roads

between petitioner's home and project undermines claim for inference of injury based on proximity). Commissioner Aragon describes Cooper's Corners as situated at the edge of a residential district near the intersection of Mill Road and North Avenue and at its northern and eastern boarders the property abuts the Hutchinson River Parkway. According to Commissioner Aragon, the Kensington Woods Community, designated a single-family senior citizen zone, immediately abuts the property's western border which is a private, gated age-restricted senior residence community consisting of detached single-family homes. According to Commissioner Aragon, petitioners are not from the Kensington Community but rather a separate housing community known as The Bonnie Crest, with petitioner Vasser residing approximately 1,200 feet from the site, petitioner Krasner residing approximately 1,400 from the site, and petitioner Rafalowicz residing approximately 1,800 feet from the site.

Petitioners' arguments concerning standing merely based on proximity would essentially negate the element of a distinct injury, and such a strained interpretation of the requirement finds no support in the case law (*Rediker v Zoning Bd. of Appeals of the Town of Philipstown*, 280 AD2d 548, 550 [2d Dept 2001]). Without the presumption of injury, the speculative harm that petitioners claim that would result from the proposed facility including increased noise, odor, traffic, *inter alia*, does not afford standing, for they are no different in kind or degree from that suffered by all in the general vicinity (*Eastview Properties, Inc. v Town of Chester Planning Board,* 138 AD3d 838 [2d Dept 2016]; *Park v Town of New Windsor Zoning Bd. of Appeals,* 26 NYS3d 588 [2d Dept 2016]; *CPD N.Y. Energy Corp. v Town of Poughkeepsie Planning Bd.*, 139 AD3d 942 [2d Dept 2016]; 24 Carmody-Wait 2d § 145:244 and § 145:1498 [2016]). Such overboard allegations of negative impacts on neighborhood character and diminution of property value do not prove actual harm distinct -from the community at large (*CPD N.Y. Energy Corp. v Town of Poughkeepsie Planning Bd.*, 139 AD3d 942 [2d Dept 2016]). Even if petitioners' allegations are true, they have not substantiated that they will incur any specific particularized concrete injury distinguishable to them resulting from the resolutions (*Matter of Harris v Town Bd. Of Town of Riverhead*, 73 AD3d 922 [2d Dept 2010]). Of importance, many of petitioners' specious claims of proposed harm are not ripe since the proposed facility will be subject to further administrative review and approval.

As to standing to challenge the "City Wide Zoning Amendment," petitioners have also failed to demonstrate any particular or direct impact to them as to the zoning amendments since other than the proposed facility, the zoning amendments do not bind the City respondents to any particular course of action for any other properties.

Notwithstanding their lack of standing, petitioners' claims for injunctive relief are dismissed since they have not moved for such relief by order to show cause or notice of motion on notice to respondents pursuant to CPLR Article 63 (*see* CPLR 6311).

Motion for Leave to Amend

Petitioners move pursuant to CPLR 203(f), 3025 and 7802(d), for leave to file an amended petition and to join Harry and Jacqueline Stone as petitioners.

Although leave to amend a pleading should be freely given in the absence of prejudice or surprise to the opposing party (CPLR 3025 [b]), to grant such leave is within this court's discretion (CPLR 7802 [d]; *Pergament v Roach*, 41 AD3d 569, 572 [2d Dept 2007]), and a motion should be denied where the proposed amendment is palpably insufficient or patently devoid of merit (*see Mastrokostas v 673 Madison, LLC*, 109 AD3d 459, 460 [2d Dept 2013]). "[A] court shall not examine the legal sufficiency or merits of a pleading unless such insufficiency or lack of merit is clear and free from doubt" (*United Fairness, Inc. v Town of Woodbury*, 113 AD3d 754, 755 [2d Dept 2014]).

The amended pleading does not sufficiently demonstrate that the Stones "sustained special damage, different in kind and degree from the community generally" as a result of the resolutions (*Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead*, 69 NY2d 406, 413 [1987]) or that their property is in close proximity to the proposed project entitling them to an inference of injury sufficient to provide standing (*see McCabe v Minicozzi*, 277 AD2d 487 [2d Dept 1996], *citing*, *Matter of Darlington v City of Ithaca*, 202 AD2d 831 [3d Dept 1994]; *see also Matter of Shelter Is. Assn. v Zoning Bd. of Appeals of Town of Shelter Is.*, 57 AD3d 907 [2d Dept 2008]). So too there is no valid pre-existing action to which the amended petition could relate back to since petitioners lack standing (*see Goldberg v Camp Mikan-Recro*, 42 NY2d 1029 [1977]; *see also McCormack v County of Westchester*, 255 AD2d 296 [2d Dept 1998]). Accordingly, the motion to amend the pleading is denied since the amended pleading is palpably insufficient.

It is hereby ORDERED, since petitioners have failed to establish standing, the petition cannot proceed to the merits and the combined Article 78 and declaratory judgment causes of action are dismissed; and it is further

ORDERED, that respondents' claim for costs is denied.

The foregoing constitutes the opinion, decision and order of this Court.

Dated: White Plains, New York
September 14, 2017

Honorable Anne E. Minihan, A.J.S.C.

TO: NYCEF