

SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA,
Justice

In the Matter of GERSHOW RECYCLING OF
RIVERHEAD, INC. and 27 HUBBARD AVENUE
ASSOCIATES, LLC,

Petitioners-Plaintiffs,

For a Judgment pursuant to Article 78 of the Civil
Practice Law and Rules, and for additional relief

- against -

THE TOWN OF RIVERHEAD, THE PLANNING
BOARD OF THE TOWN OF RIVERHEAD, THE
ZONING BOARD OF APPEALS OF THE TOWN OF
RIVERHEAD, and JEFFERSON MURPHREE, as the
Town of Riverhead Building and Planning
Administrator,

Respondents-Defendants.

CASE DISPOSED: YES
MOTION R/D: 6/22/15
SUBMISSION DATE: 3/17/17
MOTION SEQUENCE No.: 001 MOT D
003 MOT D

ATTORNEY FOR PETITIONER
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ATTORNEYS FOR RESPONDENT
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Upon the following papers filed and considered relative to this matter:

Notice of Verified Petition/Complaint dated August 8, 2015; Verified Petition/Complaint dated August 5, 2015; Exhibits A through CCC; Notice of Motion dated June 22, 2015; Affidavit dated June 11, 2015; Exhibits 1 through 9 annexed thereto; Affidavit of Michael R. James dated August 25, 2015; Exhibits 1 through 12; Affirmation in Opposition dated August 28, 2015; Exhibits 1 through 75; Reply Affidavit dated September 10, 2015; Exhibits A and B annexed thereto; Respondents' Memorandum of Law; Petitioners' Memorandum of Law in Opposition; Respondents' Reply Memorandum of Law; and upon due deliberation; it is

ORDERED, that the Verified Petition/Complaint, for an Order and Judgment (1) annulling and vacating the July 18, 2014 letter denying petitioners' amended site plan issued by respondent Jefferson V. Murphree, as the Building and Planning Administrator for respondent Town of Riverhead, and directing the respondent Planning Board of the Town of Riverhead

approve such Amended Site Plan; (2) directing that the appeal of such denial letter be heard by this Court in the instant proceeding, or the related lawsuit commenced by the Town of Riverhead against petitioners entitled Town of Riverhead v. Gershow Recycling of Riverhead, Inc., et al., under Index No. 10559/14, which is based on the same issues, claims, and purported evidence, as such denial letter, or in the consolidation of such proceedings, and not before respondent Zoning Board of Appeals of the Town of Riverhead, and (3) enjoining the Zoning Board of Appeals from hearing the appeal of such denial letter, is granted to the extent that it is

ORDERED, that the letter issued by Jefferson V. Murphree, Building and Planning Administrator, dated July 18, 2014, which denied the petitioners/plaintiffs' application for site plan approval on the basis that the subject property has been converted from the non-conforming pre-existing auto salvage yard into a recycling center, is hereby vacated and annulled; and it is further

ORDERED, that the petitioners/plaintiffs' application for site plan approval is hereby remanded to the Planning Board of the Town of Riverhead for consideration and determination; and it is further

ORDERED, that the motion by respondents/defendants, pursuant to CPLR 3211(a)(1), (a)(2) and (a)(7), and CPLR 7806, for an Order dismissing the Verified Petition/Complaint for lack of subject matter jurisdiction, failure to state a cause of action and based upon the documentary evidence furnished herein, is denied.

It appears that the subject property, located at 27 Hubbard Avenue, Riverhead, New York, ("site") has been owned, used, and operated as what the parties have all parties have previously referred to as a junk yard. The petitioners have previously applied for and been granted State and Town Junk Dealers' Licenses from the Town Clerk of the Town of Riverhead. In July 2012, in connection with improvement work to be performed at the site, the petitioners submitted an application for site plan approval to the Town Planning Department and Building Department, for what they described as "de minimus" improvements. Such approval was granted by permit issued by the Town Planning and Building Departments in August 2012.

In November 2013, the Town of Riverhead identified certain improvements made to the site that did not appear on the original site plan, and requested the submission of an amended site plan showing such improvements, as they were build, or "as-built". The Amended Site Plan was submitted to the Planning Department, and after being denied by the Planning Department, was referred to the Planning Board for formal site plan approval. A public hearing on the Amended Site Plan was conducted by the Planning Board on April 3, 2014. Subsequently, the Town Architectural Review Board ("ARB") advised petitioners that it sought to schedule a review of the Amended Site Plan and the petitioners appeared before the ARB on April 23, 2014.

By Resolution dated April 15, 2014, the Riverhead Town Board authorized the Town Attorney to commence litigation against the petitioners on the ground that the site was allegedly being used and occupied in violation of the Town Code. Specifically, the lawsuit seeks declaratory, injunctive, and monetary relief, primarily on the grounds that the prior owner of the site had used it only as an "auto salvage yard", a legal pre-existing non-conforming use, but that

the petitioners were using the site for “recycling” of “scrap metal” and “other material unrelated to an auto salvage yard”, which constituted a change in nonconforming use.

Prior to a determination by the Planning Board on the petitioners’ pending application for site plan approval, Jefferson Murphree, in his capacity as the Town’s Building and Planning Administrator, by letter dated July 18, 2014, denied the approval of the petitioners’ application. The denial was based upon Murphree’s determination that the use of the site had been converted from a non-conforming pre-existing auto salvage yard into a recycling center. The letter advised petitioners that they had the right to appeal the determination to the Town’s Zoning Board of Approval (“ZBA”) within sixty days.

In response to Murphree’s letter of denial, the petitioners commenced the instant Article 78 proceeding to annul and vacate the denial letter and enjoin the ZBA from hearing the appeal of the letter, on the ground that *inter alia*, the denial letter was issued without authority, and the ZBA lacked jurisdiction to hear such appeal. The respondents moved for a dismissal of the petition/complaint.

On a motion to dismiss brought under CPLR 3211, all of the facts alleged in the complaint are presumed to be true, the pleadings must be given a liberal construction with the plaintiffs given the benefit of every possible favorable inference, and the Court’s inquiry is limited to the legal sufficiency of the complaint (see, Davis v. Boenheim, 24 N.Y.3d 262, 268). To prevail, the defendant must “conclusively demonstrate” that the facts as alleged in the complaint do not “fit within any cognizable legal theory” as a matter of law (see, Leon v. Martinez, 84 N.Y.2d 83, 88). Here, the respondents/defendants have failed to demonstrate that the petition fails to fit within any cognizable legal theory under the facts as alleged by petitioners/plaintiffs. In addition, the Court is properly vested with subject matter jurisdiction, and the documentary evidence does not establish respondent’s entitlement to dismissal. Accordingly, the motion to dismiss is denied.

Turning to the issues raised in the petition/complaint, respondent Jefferson Murphree contends that he was authorized under sections 26-18 and 26-20 of the Riverhead Town Code to render a determination on the petitioners’ application for site plan approval. Those sections of the Code provide as follows:

§ 26-18 Powers and Duties of the Administrator

The Administrator of the Building Department shall administer, supervise, manage, coordinate and enforce the zoning laws and applicable local laws, ordinances, rules and regulations of the Town of Riverhead and the applicable building codes, state and/or local and applicable laws of the State of New York . . . In addition, the Administrator of the Building Department shall have the authority to review, evaluate, judge and advise on applications related to the Town Code of the Town of Riverhead, and such applicable laws, ordinances and regulations of the Town of Riverhead and applicable laws of the State of New York.

**§26-20 Town Building and Planning Administrator for
Town of Riverhead**

The Town Building and Planning Director and the Planning Director of the Town of Riverhead shall be vested with authority to make, issue and render determinations regarding compliance with the provisions of the Zoning Code for site plan, special permit and subdivision applications; however, the Director of Planning shall not have authority as granted to authorized issuing officers as set forth in Section 3-1 of the Town Code. Nothing hereinabove shall be deemed to diminish or restrict the performance of such duties as are vested in and imposed upon the Planning Director or such officers or persons acting under the supervision of the Planning Director.

Murphree's contention to the contrary, the language of the Code does not authorize the Building and Planning Administrator to approve or deny applications for site plan approval, which authority is vested in the Planning Board as set forth in the Town Code and New York State Town Law §271-a. The language of the Code only generally provides Murphree with the authority to "review, evaluate, judge and advise on applications" and "make, issue and render determinations regarding compliance" with the Zoning Code. The parties have not reference any language in the Code that specifically permits the Building and Planning Administrator to render a denial of an application for site plan approval that has been submitted to the Planning Board.

Site plan review is permitted and governed by Town Law §274-a, which defines a site plan as "a rendering, drawing, or sketch prepared to specifications and containing necessary elements" and which "shows the arrangement, layout and design of the proposed use of a single parcel of land." Town Law §274-a(1). Site plan review is limited to "consideration of the layout, design and related aspects of the proposed development." Hill v. Planning Bd. of the Town of Amherst, 140 A.D.2d 967, 968, 529 N.Y.S.2d 642. The issue of the use of property is beyond the scope of site plan review, and a use may not be disapproved "under the guise of denying site plan approval." Mialto Realty, Inc. v. Town of Patterson, 112 A.D.2d 371, 372, 491 N.Y.S.2d 825, 825 (see also, Riverhead PGC, LLC v. Town of Riverhead, 21 Misc.3d 1112(A), *19, 873 N.Y.S.2d 515, rev'd on other grounds, 73 A.D.3d 931).

Under the circumstances presented, the Denial Letter issued by Jefferson Murphree was improperly rendered and is therefore annulled and vacated. The application for site plan approval is remanded back to the Planning Board for decision. The issue of the use of the subject property shall be resolved in the litigation that was previously commenced by the Town of Riverhead to determine that issue.

The foregoing constitutes the Order of this Court.

Dated: June 12, 2017

Hon. Denise F. Molia

Hon. Denise F. Molia, A.J.S.C.