SHORT FORM ORDER AND JUDGMENT

INDEX No. 19433-07

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

P R E S E N T :

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 8/9/07
ADJ. DATES 7/14/08
Mot. Seq. # 001 -Mot D; CDISP
Mot. Seq. # 002 - MD
Mot. Seq. # 003 - MD
Mot. Seq. # 004 - XMG

JAMES HARRIS, JOHN SAIVES, JOSEPH V. GRAZIANO, JOSEPH J. GOETZ, JAMES JAMES BARNES, JOHN GREEN and UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 1500, Petitioners, For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules -against- TOWN BOARD OF THE TOWN OF RIVERHEAD, TOWN OF RIVERHEAD HEADRIVER LLC and WAL-MART REAL ESTATE BUSINESS TRUST Respondents.	JAMES F. GAUGHRAN, ESQ. Attys. For Petitioner 191 New York Ave. Huntington, NY 11743 DAWN THOMAS, ESQ. Town Atty. For Town of Riverhead Attys. For Resp. Town 200 Howell Ave. Riverhead, NY 11901 BRACKEN & MARGOLIN, LLP Attys. For Resp. Headriver, LLC 1601 Veterans Memorial Hwy. Islandia, NY 11749 MANATT, PHELPS & PHILLIPS, LLP Attys. For Resp. Walmart Real Estate 7 Times Sq. New York, NY 10036 RIVKIN, RADLER, LLP 926 RexCorp Plaza Uniondale, NY 11556 KEN FRIEDMAN, ESQ. 7 Times Sq. New York, NY 10036

Upon the following papers numbered 1 to 35 read on this Article 78 Petition , motions for dismissal and cross motion for summary judgment; Notice of Petition and supporting papers 1 - 6; Notices of Motion and supporting papers 7-10; 13-16; Notice of Cross Motion and supporting papers 20-27; Answering Affidavits and supporting papers 29-30; Replying Affidavits and supporting papers 33-34; Other 11-12 (Memorandum); 17-19 (Memorandum); 28 (Memorandum); 31-32 (Memorandum); 35 (Transcript); and after hearing counsel in support of and in opposition to the motions, it is

ORDERED that this Article 78 Petition (#001) and Declaratory Judgment Action, seeking a Judgment of this Court vacating, annulling and setting aside the determination of the respondents/defendants

constituting the Town Board of the Town of Riverhead, which granted respondent/defendant Headriver LLC's application for site plan approval, pursuant to Resolution No.557 dated June 5, 2007, on behalf of a Wal-Mart Supercenter, together with a motor vehicle repair shop and a 54-seat food shop as permitted uses in the Destination Retail Center Zoning District, based upon variance relief from the Code of the Town of Riverhead, and declaring Riverhead Code Sections 108-332, together with Town of Riverhead Local Laws No.47-2005 and No.14-2007 null and void *ab initio*, is granted; and it is further

ORDERED that the motion (#002) by respondents/defendants Town Board of the Town of Riverhead and Town of Riverhead, seeking an order pursuant to CPLR 3211(a)(1), 3211(a)(3), 3211(a)(5), 7804(f), and CPLR 217(1) dismissing the Petition-Complaint on the grounds that each cause of action may not be maintained either because petitioners-plaintiffs lack standing, the claim was brought after the applicable four-month statute of limitations, or based upon documentary evidence, is denied; and it is further

ORDERED that the motion (#003) by respondents/defendants Headriver LLC and Wal-Mart Real Estate Business Trust, seeking an order pursuant to CPLR 3211(a)(1), 3211(a)(3), 3211(a)(5), 3211(a)(7) and 7804(f) dismissing the Petition-Complaint on the grounds that each cause of action may not be maintained either because petitioners-plaintiffs lack standing, the claim was brought after the applicable four-month statute of limitations, based upon documentary evidence, or the cause of action fails to state a claim, is denied; and it is further

ORDERED that the cross motion (#004) for partial summary judgment by petitioners/plaintiffs seeking an Order pursuant to CPLR 3211(f) converting the pending motion to dismiss into a motion for summary judgment on the Declaratory Judgment portion of the present hybrid action and pursuant to CPLR 3212 awarding summary judgment in favor of petitioners/plaintiffs on the Declaratory Judgment cause of action declaring Riverhead Code Sections 108-332, together with Town of Riverhead Local Laws No.47-2005 and No.14-2007 null and void *ab initio*, is granted, and it is further

ORDERED AND ADJUDGED that Riverhead Code § 108-332 together with Town of Riverhead Local Laws No.47-2005 and No.14-2007 are declared null and void *ab initio*; and it is further

ORDERED AND ADJUDGED that Resolution No.557, dated June 5, 2007, of the respondents/defendants constituting the Town Board of the Town of Riverhead, which granted respondent/defendant Headriver LLC's application for site plan approval, on behalf of a Wal-Mart Supercenter, together with a motor vehicle repair shop and a 54-seat food shop as permitted uses in the Destination Retail Center Zoning District, based upon variance relief from the Code of the Town of Riverhead, is vacated, annulled, and set aside; and it is further

ORDERED AND ADJUDGED that this constitutes the decision and judgment of the court and that petitioners/plaintiffs shall recover from non-municipal respondents/defendants costs (*see* Town Law §274-a[12]) and disbursements in the sum of $ _____ as taxed by the clerk and petitioners/plaintiffs shall have execution therefor.

This hybrid proceeding/declaratory judgment action challenges the action of the respondent/defendant Town Board of the Town of Riverhead (Town Board) in approving a site plan application and variance relief on behalf of respondent/defendant Headriver LLC (Headriver). The approval authorizes the construction of a Wal-Mart Supercenter, with a motor vehicle repair shop, a 54-seat food shop, and a separate retail building as permissible uses in the Destination Retail Center (DRC) Zoning District of the Town Code. The property is located along Route 58, just east of the terminus of the Long Island Expressway. Route 58 is the main thoroughfare of the North Fork, supporting numerous commercial and retail uses, including the Tanger Outlet Mall Complex, restaurants, hotels, and shopping centers. As will be shown below, all parties acknowledge the major congestion problems associated with Route 58.

The project approved by the Town Board would be the largest single retail use in the five towns of the East End of Long Island. Permission has been granted to construct a Wal-Mart Supercenter "big box" store of 169,547 square feet (including a building of 146,018 square feet, an outdoor vestibule of 2,238

square feet, a covered garden center of 9,091 square feet, an uncovered garden center of 8,025 square feet to the east of the building and a 4,175 square foot uncovered garden center to the south of the building). Additionally, approval was granted for a separate 27,000 square foot retail building, a motor vehicle repair center, and a 54-seat food center. To accomplish same, Headriver would need to import 41 Transfer of Development Rights Credits (TDR's), the largest allocation of such credits for a single project in any existing TDR program.

However, even with the importation of such a large number of TDR's, in order to permit the build-out and the increase in retail space, the following six items of variance relief were also needed for the project and were granted by the Town Board:

(1) Parking stall dimensions of 9.5 x 19 feet and 8 x 19 with 8 foot access aisle for each handicapped accessible parking stall instead of the required 10 x 20 feet, for all 918 parking stalls;

(2) Impervious surface area of 78.12 percent of the parcel instead of the required maximum of 75 percent of parcel area (an increase of approximately 28,823 square feet of additional blacktop);

(3) Floor area ratio of 21.75 percent of the parcel area instead of the required maximum floor area ratio of 20 percent of the parcel area (an increase of approximately 16,166 square feet);

(4) Front yard landscaped area setback of 33.43 feet to the applicant's offer of dedication of 17 feet from the roadbed of Route 58, instead of the required 50 feet (the elimination of 11,599 square feet or 33% of front yard landscaping);

(5) Contiguous landscaped area of 10.4 percent of the parcel instead of the required minimum of 20 percent of the parcel area (the elimination of approximately 88,686 square feet or over two acres of landscaped area);

(6) Parking lot landscaped area of 8.4 percent of parcel area instead of the required minimum 10 percent parcel area (the elimination of 14,781 square feet of landscaped area).

Petitioners/plaintiffs assert various claims against the site plan approval, such as, (a) the Town Board does not have the authority or jurisdiction to hear and grant variances pursuant to Town Law §267-b; (b) that even if the Town Board had such variance power, it misapplied the balancing test set forth in Town Law §267-b(3)(b);(c) the approval is contrary to the permitted uses in the DRC Zoning District; (d) the Town Board failed to comply with Transfer of Development Rights provisions of the Zoning Code; and (e) that the environmental review process as required by SEQRA should have started anew, instead of relying upon a previously rejected prior application.

Respondents/defendants, prior to filing answers or the required Administrative Return pursuant to CPLR 7804(e), move to dismiss the petition-complaint on the grounds of lack of standing, untimeliness, documentary evidence, or the failure to state a claim. At oral argument, respondents/defendants conceded the point that petitioners/plaintiffs possess the appropriate standing to contest the declaratory judgment branch of this hybrid action (*see* transcript, July 14, 2008, pp 14, 21, 64). Therefore, the challenge to standing is limited to the Article 78 aspect of the proceeding, that is, the challenge to the Town Board's action of granting site plan approval.

In response to the motions to dismiss, petitioners/respondents cross-moved to convert the motions into summary judgment relief on the declaratory judgment portion of the hybrid action.

Zoning History

Before the Court addresses the pending motions, an examination of the recent zoning history and the attempts to develop this parcel is in order. Some of the history, which is set forth below, can be found in

the accompanying hybrid action entitled ***Matter of Riverhead PGC, LLC v Town of Riverhead, et al,*** Suffolk County Index No. 07-20504.

The Headriver parcel was previously the location of a site plan application for a 135,000 square foot Lowe's lumberyard with a 38,000 square foot outdoor display area. That site plan application was forwarded to the Suffolk County Planning Commission pursuant to General Municipal Law §239-m.

The Court has before it a December 5, 2001 Staff Report from the Suffolk County Planning Department that recommended disapproval of the special permit application for the Lowe's lumberyard. It is noted that the Kroemer Avenue Extension is classified as a "50 ft. roadway right-of-way," providing access to Adchem (a manufacturing/processing facility) and the then under construction Applebee's restaurant. By letter the same date, the Suffolk County Planning Commission disapproved the Lowe's project as an unwarranted further intensification of retail commercial development within the Route 58 corridor.

As a result of the disapproval, a super-majority (4 votes) was needed by the Town Board to adopt the site plan (*see* General Municipal Law §239-m). On February 20, 2002, the Town Board failed to obtain four votes and the application for a special use permit was deem denied. Headriver commenced a special proceeding to review the determination of the Town Board (***Matter of Headriver LLC v Town Bd. of Town of Riverhead***, Index No. 02-06448). By order dated June 12, 2002, Justice Elizabeth H. Emerson denied a motion to dismiss the petition.

Prior thereto, and beginning with a series of workshops in 1999, the Town of Riverhead commenced the Comprehensive Plan process, pursuant to Town Law §272-a, to afford its residents a vision for the Town as it moves into the century. The Comprehensive Plan examined eleven different elements, with the Proposed Land Use Plan in Chapter 2 being the centerpiece, weaving together the many goals and recommendations set forth through out the Plan.

The Land Use Element, Chapter 2, offers a vision statement that seeks "[a] thriving commercial corridor along Route 58, with reduced traffic congestion and an attractive visual quality"(Plan, p 2 - 1). The Plan proposed the creation of a new zoning district along the westerly end of Route 58, called Destination Retail Center (DRC) (*see* Plan, p 2 - 6). The purpose supporting this new district is to provide a location for large retail centers along Route 58, "while linking development to open space protection along the Route 58 corridor and in Agricultural zones"(Plan, p 2 - 12). The proposed design concepts included campus-like layouts, no strip development/freestanding businesses, a higher floor area ratio with the purchase of TDR's, with significant open space and landscaping requirements in parking lots (*see* Plan, p 2 - 12). A key principal of the Plan was that "[b]usiness district zoning along Route 58 should be expanded to allow 'destination retail' uses at the western end of Route 58" (Plan, p 2 - 28).

Under the Agricultural Element, Chapter 3, of the Plan, amendments to the Town Code were suggested to "[r]equire TDR to increase coverage within the Destination Retail Center (DRC) district from 10 percent to a maximum of 15 percent, at the rate of one (1) development right per 1,500 square feet of increased floor area" (Plan, p 3 - 14). It was noted that although the Town had a TDR program since 1997, it had never been used (*see* Plan, p 3 - 15).

The Business Districts Element, Chapter 6, noted that "Route 58 is Riverhead's largest and most important commercial center" and that high percentages of residents utilize that roadway (Plan, p 6 - 2). In discussing Route 58, it was acknowledged that the roadway "suffers from traffic congestion and poor aesthetics, and these issues need to be addressed before additional development is allowed there" (Plan, p 6 - 6).

The Plan (*see* p 6 - 6) continues:

> Drivers on route 58 experience significant delays, ... As traffic conditions have worsened on Route 58, more and more people have

> been using Middle Road and Sound Avenue as bypass routes. As evidence of the increasing traffic, speeding and car accidents increased on Middle Road over the course of the 1990's, according to the Town Engineer. The Town should discourage use of Middle Road and Sound Avenue as bypass routes, ...

In describing the goals and policies for the Business Districts, the Plan (*see* p 6 - 10) states:

> On Route 58, the challenge is to ensure that new development does not replicate the problems associated with older strip development, and instead 'gives back to the community' by protecting open space and trees, improving the design of commercial buildings, signs, and parking lots, and maintaining lush greenery along the roadway.

The Plan called for special design standards for the Route 58/Tanger Mall area (*see* Plan, p 6 - 11), with the creation of the DRC Zoning District in the west end of Route 58, with specific improvements (*see* Plan, p 6 - 35). The Plan called for strict design and landscaping standards along Route 58 (*see* Plan, p 6 - 37), including a policy to "[m]aximize landscaped areas along the Route 58 corridor by reducing the maximum floor area ratios, increasing the extent of landscaped areas, and reducing off-street parking requirements through shared parking" (Plan, p 6 - 38). It was explained that low base densities are established for the DRC zone, with sizable bonus densities for the purchase of development rights (*see* Plan, p 6 - 38).

The Transportation Element, Chapter 9, notes that "Route 58, has become congested to the point that it is now faster to travel on Route 25, the very facility the bypass was constructed to relieve. The solution lies in capacity improvements to Route 58, which would attract through-vehicles back to the appropriate facility" (Plan, p 9 - 7). Importantly, for purposes of the motion to dismiss, the Plan (p 9 - 11) notes:

> Congestion is bad enough that drivers familiar with the area routinely use other roads as bypass routes. Middle Road and Sound Avenue have become the bypass routes of choice for many people, but neither road is very well-suited for bypass traffic.

The Plan goes on to recommend the desired goal of expanding and improving Route 58 (*see* Plan, p 9 - 11). In fact, such is the first goal listed under the Goals & Policies section of the Transportation Element (*see* Plan, p 9 - 17). To help accomplish these goals, one suggestion concerning the widening of the existing right-of-way is "through site plan review, the Town can require newly developed properties to dedicate land along the road frontage to accommodate the widening project" (Plan, p 9 - 17). Additionally relevant to the instant motion to dismiss, is one of the suggested roadway improvements, as shown on Figure 9 - 3 (following p 9 - 19), "Dedicate existing Kroemer Avenue Extension." A second goal is the discouragement of the use of east-west Town roads as bypasses to Route 58 (*see* Plan, p 9 - 21). Also related to the motion to dismiss is the discussion concerning the need for traffic-calming techniques on side streets, where the Plan states "[a]mong the potential candidates are the side streets off of Route 58, local residential streets experiencing through-traffic, ..." (Plan, p 9 - 32).

In Appendix D to the Plan, which discusses Economic Trends, it is recognized that the western end of Route 58 will attract tourists and other out-of-town visitors and "Tanger Mall and the 'destination retail' cluster require a different approach, from an economic development perspective" (Plan, D - 10).

In Appendix G to the Plan, which discusses Transportation, the bypassing of Route 58 is noted at G - 3, G - 4, G - 8 ("[c]ongestion on Route 58 is significant enough that drivers familiar with the area seek out alternative routes through residential communities, bypassing both Route 58 and Route 25") and G - 9.

In the interim, the litigation between Headriver and the Town Board continued and by Order dated July 21, 2003, the Appellate Division, Second Department, affirmed the denial of the Town Board's motion

to dismiss (*see* ***Matter of Headriver LLC v Town Bd. of Town of Riverhead***, 307 AD2d 314, 762 NYS2d 808 [2d Dept 2003]).

Thereafter, by resolution dated November 3, 2003, the Town Board adopted the Town of Riverhead Comprehensive Plan (*see* Town Law §272-a[7]). By doing so, "[a]ll town land use regulations must be in accordance with a comprehensive plan adopted pursuant to this section" (Town Law §272-a[11]). On May 4, 2004, the Court of Appeals affirmed the order of the Appellate Division discussed above (*see* ***Matter of Headriver LLC v Town Bd. of Town of Riverhead***, 2 NY3d 766, 780 NYS2d 505 [2004]).

Upon the adoption of the Plan, the Town Board began to implement it with, in particular, the adoption of Local Law No. 32-2004 on October 5, 2004, which established the DRC Zoning District. The purpose and intent section states that it "is the further intent to allow increased floor area in the DRC Zoning Use District with the use of transferred development rights where appropriate. Development is intended to have a campus-style layout, with no strip or freestanding businesses permitted" (§108-257). Allowable use in the DRC Zoning District are set forth as follows (§108-258):

A. Permitted uses:
(1) Retail stores or shops.
(2) Hotels.
(3) Car dealerships.
(4) Banks.

B. Accessory uses. Accessory uses shall include those uses customarily incidental to any of the above permitted uses or specially permitted uses when located on the same lot. Specifically included are the following:
(1) Drive-through windows for banks and pharmacies.

Lot, yard, bulk, and height requirements are all set forth in the Town's Zoning Schedule, pursuant to §108-259(A). As such, maximum building lot coverage is limited to 15% (footprint) of the lot size. Additionally, in keeping with the recommendations of the Comprehensive Plan, §108-259(C) directs that "properties shall provide a contiguous landscaped area equal to at least 20% of the lot area." Also in keeping with the Comprehensive Plan, the Supplementary Requirements of §108-260 mandate design standards where "[d]evelopment is intended to have a campus-style layout, with no strip-style development permitted" (§108-260[A][1]). Moreover, added Parking Standards require parking lots to be landscaped for at least 10% of their land area, in addition to the 20% parcel-wide landscaping set forth above (*see* §108-260[C][6]). Finally, landscaped walkways are required to connect and create "parking fields" of no more than 250 spaces each (*see* §108-260[C][6]).

Concomitantly with the enactment of the DRC Zoning District on October 5, 2004, the Headriver parcel was re-zoned from Industrial A and placed into the DRC Zoning District, as part of the recommendations of the Comprehensive Plan.

During the on-going litigation (*see* ***Matter of Headriver LLC v Town Bd. of Town of Riverhead***, Index No. 02-06448), efforts were made to settle the matter by switching the proposed use to the current one of a Wal-Mart Superstore. The project grew in size and uses, as detailed above, with the submission of an amended site plan application. Apparently, an effort was undertaken to settle the litigation and a draft Town Board resolution to that effect was circulated. Documents before the Court discuss a date of March 1, 2005 for presentment to the Town Board. The draft resolution called for the contribution of $850,000.00 from Headriver to the Town of Riverhead's Community Development Fund, in lieu of the purchase of development rights.

The settlement resolution was abandoned and the Town Board processed Headriver's amended site plan application by requesting a supplemental draft environmental impact statement.

The Headriver project seeks to utilize Agricultural Preservation Credits (TDR's) under a program established by the Town of Riverhead by virtue of Local Law No. 12-2005, adopted April 19, 2005. The program is currently set forth at Article LXII of the Zoning Code (§§108-321 to 108-332) and is intended to "implement the land use policies set forth in the Town of Riverhead Comprehensive Plan with specific reference to protection of the lands located within the Agricultural Protection Zone ... and the necessary and appropriate economic development of the community" (Section 108-323).

The Code provides that "the relevant sending and receiving districts ... shall be those areas specifically mapped in accordance with the stated goals of the ... Comprehensive Plan" (§ 108-324). Section 108-325 sets forth the criteria the Town Board must follow prior to mapping a sending or receiving district. For instance, prior to mapping a receiving district, the Town Board is to determine the effects of potential increase development, including adequate transportation (*see* § 108-325[B][1]). However, the Local Law then immediately designates a sending district (*see* § 108-326) and ten receiving districts (*see* § 108-327), including the DRC Zoning District (*see* § 108-326[G]). It is these two Code sections that are challenged in the declaratory judgment branch of the action.

Under the TDR program, the Town's Planning Board determines TDR credits (*see* §§ 108-328 to 108-330) and is declared to be the sole administrator of the TDR program (*see* § 108-331). TDR credits may be used to increase the development yields within mapped receiving areas (*see* § 108-330). In the DRC Zoning District, TDR credits may be used to increase development yield associated with site plan applications made to the Town Board "...at a rate of an additional 1,500 square feet of floor area per preservation credit redeemed to a maximum 0.3 floor area ratio" (§ 108-330[H]).

The authority to vary the development standards for commercial site plans, that is, § 108-332, was added to the TDR program by Local Law No. 47-2005 on August 16, 2005. It is this section of the Zoning Code upon which the Headriver site plan approval is premised and that which is challenged in the declaratory judgment branch of the action. The adopted code provision, as set forth in the submission from the Town Clerk, is set forth as follows:

> A. The Town Board shall be the administrator for application of preservation certificates on commercial site plan application as follows:
>
> > (1) In the event that preservation credit certificates are to be applied to commercial development as set forth in this chapter, the Town Board shall have the authority to vary the development standards set forth in this chapter including; but not limited to: parking, floor area ratio and lot coverage requirements. The Town Board shall utilize the standards set forth in §276 of the Town Law of the State of New York in determining whether to vary development standards as set forth herein.
> >
> > (2) Section 108-311 is adopted pursuant to the Municipal Home Rule Law of the State of New York and is expressly intended to supersede the provisions of Town Law §276 and Chapter 108-76 of the Town Code of the Town of Riverhead.

The Town Law section cited to be utilized to vary development standards is that of §276. However, no standards are contained in that law. That statute only sets forth planning board requirements for subdivision review, and lacks any standards for variance review. In essence, the August 16, 2005 enactment is arguably void for failing to set forth standards for review of the variance requests to be entertained by the Town Board. Moreover, Chapter 108-76 is the section of the Town Code that discusses the powers of the Zoning Board of Appeals. It is a detailed section, with many provisions. Although subsection (2) of the code provision references the supersession power of the Municipal Home Rule Law, that argument has not been advanced, and in effect, withdrawn by respondents/defendants in the opposition papers and at oral

argument, do to their reliance upon Town Law §274-a(5) for the Town Board's authority vary development standards.

On November 15, 2005, Headriver submitted a Draft Supplemental Environmental Impact Statement to the Town Board for the Wal-Mart Store as part of the amended site plan application and as a supplement to the EIS for the original Lowe's lumberyard complex. The single page of the Draft EIS submitted to the Court (*see* S-2) reveals an intention at that time was for the project to dedicate the Kroemer Avenue right of way to the Town and an undetermined amount of land to Suffolk County in connection with improvements to Route 58.

The limited record before the Court discloses that a public hearing was held on the Headriver project on February 15, 2006, before the Town Board. Many of the same objections that are set forth in the instant proceeding were raised at that time. The Court does note a reference to a letter, dated August 1, 2005, from the Town's Planning Director to the attorney for the applicant which claims to state that the accessory uses are not in compliance with the master plan nor the implementing zoning code (*see* Transcript of public hearing minutes, p 6). Additionally, comments were received from a resident complaining of her bypassing of Route 58, particularly in the summer months, while traveling home from work (*see* Transcript of minutes, p 23).

The Suffolk County Planning Commission forwarded a highly critical letter, dated November 1, 2006, pursuant to its review function of General Municipal Law §239-b and the Suffolk County Administrative Code. Although the vote was seven in opposition to the site plan, with one abstention, the failure to obtain a quorum precluded the rendering of a determination. However, the letter detailed numerous objections to the Headriver project, including the undermining of the effectiveness of the DRC zoning code; the free-standing nature of the proposed use, instead of the required orientation as part of a "campus-style" configuration; the lack of a contiguous landscaped area equal to at least 20% of the lot area; the lack of 10% landscaping of the land area of the proposed parking lots; the over-intensification of use of the premises, exceeding the allowable lot coverage of 15% by an additional 58,844 sq. ft. or 43.4%, coupled with the reduction of the parking stall size (10' x 20' to 9.5' x 19') and the land banking of 37 parking stalls; the unwarranted intensified commercial development of Route 58; and finally, the increase in traffic generation of Route 58 further diminishing the safety and traffic carrying capacity of the road.

The minutes of the meeting reveal that the Commission would also want an economic analysis of the impact on existing businesses and stores. The limited record before the Court, does not reflect any consideration by the Town Board of the issues raised in the letter of November 1, 2006, which was deemed a matter left for local determination.

By letter dated February 7, 2007, the State of New York Department of Transportation (DOT) commented on the site plan. It noted that there was an identified need for a new traffic control signal at Route 25 and Kroemer Avenue as part of the off site mitigation for development of the site and the need for a new Traffic Impact Study.

By subsequent letter dated March 8, 2007, DOT noted that the Traffic Impact Study still identifies a need for a new traffic control signal at Route 25 and Kroemer Avenue, but the project no longer proposed that the developer will install it as part of the developers' mitigation.

The County Executive of Suffolk County forwarded a letter, dated April 2, 2007, concerning the site plan application to the Supervisor of the Town which complained of the construction of storefronts very close to the county right of way and offered the "hope that the planning on the town level would take into consideration proper setbacks, as well as the size of the stores seeking approval. The Wal-Mart application is one that has the potential to further saturate this already heavily trafficked road."

On May 10, 2007, the Town Board by Local Law No. 14-2007 amended Section 108-332 to substitute "the agency responsible for commercial site plan approval" for the term "Town Board" and clarified the standard for variance as that set forth in Town Law §267-b. This Court does not agree with the

claim of respondents/defendants that the amendment simply corrected "certain typographical errors." The changes were substantial and cannot be deemed to be *de minimus*. For the first time, standards for the exercise of Town Board authority where included in the Code provision. The adoption of the amendment and filing of the Local Law with the Secretary of State occurred within four months of the filing of the instant hybrid proceeding.

On June 5, 2007, the Town Board, by Resolution #557, approved the Headriver site plan, with the six variances, by a vote of three in favor, one absent, and one abstention.

Petitioners/plaintiffs commenced this hybrid action by filing a pleading, with five claims for relief, with the Suffolk County Clerk on July 5, 2007. The first attacks the site plan approval as null and void for not complying with the provisions of the transfer of development rights program. The second claim is that is that the Headriver project fails to comport with the permitted uses allowable in the DRC Zoning District or the Comprehensive Plan. That third claim seeks a declaratory judgment that the Town Board does not have jurisdiction to grant variances and that §108-332 is violative of the Town Law. The fourth claim is that a 54-seat food shop and a motor vehicle repair shop are not permitted uses in the DRC Zoning District. The fifth claim challenges SEQRA compliance and, in particular, the Supplemental Environmental Impact Statement.

Motion to Dismiss

Instead of waiting for the filing of the required administrative return (*see* CPLR 7804[e]), respondents/defendants Headriver and Wal-Mart Real Estate Business Trust (Wal-Mart) move pursuant to CPLR 3211(a)(3) to dismiss the petition on the grounds of lack of standing. As stated above, at oral argument, respondents/defendants conceded the fact that standing exists with regard to the declaratory judgment claims (*see* transcript, July 14, 2008, pp 14, 21, 64). Therefore, the lack of standing claim only addresses the Article 78 claims of the hybrid action.

Petitioners/plaintiffs are homeowners either in the vicinity of the Headriver project or the Tuccio parcel, that is the identified sending parcel under the TDR program. Some of the homes are located adjacent to Route 58. The claim in the petition-complaint is that due to their proximity and due to the size of the Headriver project, petitioners/plaintiffs "claim direct injuries distinct from the public-at-large based upon the claims alleged herein" (hybrid action, ¶ 16). Respondents/defendants submitted affidavits from individuals who measured the distance from the Headriver and Tuccio parcels to the parcels of the respective petitioners/plaintiffs.

Respondents/Defendants also offer an affidavit from an employee of an engineering firm who was asked to ascertain distances for each petitioner/plaintiff from the Headriver project and the property identified in the Town Board's approval resolution as the sending parcel for TDR purposes (the Edwin Fishel Tuccio parcel). The distances are alleged to be between one mile to four miles from the project to one-half a mile to 3.8 miles from the Tuccio parcel. Movants argue that petitioners/plaintiffs are unaffected by the Headriver project in any way that is different from the effects on the public in general and that they are so physically remote from the site that they can not meet the two-part test for standing under ***Matter of Mobil Oil Corp. v Syracuse Indus. Dev. Agency***, 76 NY2d 428, 433, 559 NYS2d 947 (1990). Based upon the applicable caselaw and the particular facts of this case, the Court must disagree.

The Appellate Division, Second Department has restated the rules governing a motion to dismiss in ***State of New York v Grecco,*** 21 AD3d 470, 800 NYS2d 214 [2d Dept 2005]). The Court's inquiry is limited to determining whether, taking the allegations of the complaint as true and affording plaintiff the benefit of every reasonable inference, plaintiff has stated a cause of action against one or more defendants (*see* ***Parsippany Constr. Co. Inc. v Clark Patterson Assoc., P.C.,*** 41 AD3d 805, 839 NYS2d 179 [2d Dept 2007]; ***Sirlin v Town of New Castle,*** 35 AD3d 713, 826 NYS2d 676 [2d Dept 2006]; ***Dunleavy v Hilton Hall Apts. Co., LLC***, 14 AD3d 479, 789 NYS2d 164 [2d Dept 2005]). In applying the standard, the Court expresses no opinion as to the truth or falsity of the allegations of the complaint or, consequently, as to the

conclusions petitioners/plaintiffs argue should be drawn therefrom. On the procedural posture of the action, these issues are not properly before the Court.

Movants argue that the "harm" alleged of increased traffic congestion is no different than that which any member of the general public might experience and that the distances from the project and the sending parcel are too distant to confer standing (*see* ***Matter of Many v Village of Sharon Springs Bd. of Trustees***, 218 AD2d 845, 629 NYS2d 868 [3d Dept 1995]; ***Matter of McGrath v Town Bd. of N. Greenbush***, 254 AD2d 614, 678 NYS2d 834 [3d Dept 1998]; ***Long Island Contrs' Assn. v Town of Riverhead***, 17 AD3d 590, 793 NYS2d 494 [2d Dept 2005]).

However, the record before the Court establishes that the impact of the Headriver project will be felt by more than the abutting property owners. The record, as detailed above, supports the claim that the Headriver project will exacerbate traffic problems confronting properties along or adjacent to Route 58. It is acknowledged that while the Town of Riverhead is largely a rural town, Route 58 currently suffers from serious traffic problems and that traffic experts have consistently recommended traffic mitigation measures. The DRC Zoning District resulted from the findings of the Comprehensive Plan, and as such, was designed to mitigate some of the problems associated with the traffic congestion along Route 58. The Comprehensive Plan is replete with concerns regarding the bottlenecking of Route 58 near the terminus of the Long Island Expressway and the resulting circumstance of drivers bypassing the traffic of Route 58 by utilizing local roads.

The concern that the introduction of the largest retail establishment on the East End on to this 'hot-spot' of traffic congestion coupled, as alleged, with a site plan that is contrary to the design standards of the DRC Zoning District, constitutes a real and direct injury and harm to some of these petitioners/plaintiffs. As noted above, the project calls for the importation of 60,000 square feet of additional retail space upon the site, beyond the maximum density of the DRC Zoning District, for a project that is alleged to be consistent with the SC Zoning District. As alleged in the hybrid action and supporting documentation, the Comprehensive Plan's desire to avoid the diverting of more traffic to bypass routes, the improvement of Route 58, and the routing of traffic back to the Route 58 corridor, is ignored by the challenged site plan approval, which fails to mandate a single recommended traffic mitigation measure, as suggested by other reviewing agencies. The Comprehensive Plan noted the consequences resulting from the diversion of through-traffic, that is, the harm to the financial health of the Town's largest and most lucrative business district.

The Court finds that petitioner/plaintiff James Harris has demonstrated potential injury-in-fact to sustain his burden of establishing standing by virtue of his residence adjacent to Route 58, on a street that is often used as a bypass to Osborne Avenue. His claim of such a cut-through is unchallenged by respondents/defendants. His location of just over one mile along Route 58 from the Headriver parcel, when coupled with the overwhelming evidence of increased traffic along Route 58, as expressed in the Comprehensive Plan and all of the documents set forth above, demonstrates that Mr. Harris can articulate a harm that is different than that of the general public.

Joseph Goetz, who resides under one-half mile from the sending parcel, that is, the Edwin Fishel Tuccio property, can also articulate sufficient harm to establish standing. Resolution No.557 expressly stated that the TDR's are to come from the Tuccio property. Mr. Goetz's proximity to the expected source of development rights can support a claim that due to the failure of the Town Board to properly comply with the procedures of the TDR program, he possesses a harm that is different than the general public.

The Court also finds that petitioner John Saives has demonstrated potential injury-in-fact to sustain his burden of establishing standing by virtue of his location in the middle of an identified sending area under the TDR program. Resolution #557 expressly stated that the TDR's are to come from the property of Edwin Fishel Tuccio. Mr. Saives, who resides directly within an Agricultural Protection Zoning District can articulate a claim that due to the failure of the Town Board to properly comply with the procedures of the TDR program, he possesses a harm that is different than the general public.

Finally, even Joseph V. Grazino, due to the configuration and layout of the subdivision where he resides and the lack of a traffic light, is directly affected by the increased traffic on Route 58 and offers a harm different than that of the average resident.

The Court agrees with petitioners/plaintiffs' claim that their direct injuries are not shared by the public at large and are unique to those living in this area. Route 58 is the one main road in this section of the Town and the residential neighborhoods are in close proximity to this roadway. Strict adherence to rules of proximity are unjust in relation to the harm as expressed by these individuals. In particular, Mr. Harris' direct harm of residing on a bypass road, a harm that is repeatedly recognized in the Comprehensive Plan, demonstrates that he has offered more than a generalized claim of traffic congestion.

Injury-in-fact may arise either from the presumption established by allegations demonstrating close proximity to the subject property or, in the absence of such a presumption, the existence of an actual and specific injury.

Distance alone will not preclude standing if there is sufficient proof of harm (*see* ***Town of Southold v Cross Sound Ferry Serv., Inc.***, 256 AD2d 403, 681 NYS2d 571 [2d Dept 1998]; ***Matter of Open Space Council, Inc. v Planning Bd. of Town of Brookhaven***, 245 AD2d 378, 666 NYS2d 191 [2d Dept 1997]). In the ***Cross Sound Ferry*** case, standing was afforded homeowners along Sound Avenue, even though many resided many miles from the ferry facility. Similarly, petitioners/plaintiffs are located upon the same roadway that is the central thoroughfare of a rural town. The facts of the ***Open Space Council*** case demonstrate that the sheer size of a project, when coupled with direct impacts from traffic problems, will afford a party standing. Unlike those cases where increased traffic posed a generalized problem to the public over a wide area, the traffic issues here constitute a legally recognizable injury (*see* ***Matter of Center Sq. Assn. Inc. v City of Albany Bd. of Appeals***, 9 AD3d 651, 780 NYS2d 203 [3d Dept 2004]; ***Citizens for Aquifer Protection & Employment v Town of Cortlandville***, 16 Misc2d 1121(A), 847 NYS2d 900 [Sup Ct Courtland County, 2007]).

Just as where a proposed action that may affect a party's water supply can be found to be a direct harm (*see* ***Matter of Many v Village of Sharon Springs Bd. of Trustees***, 218 AD2d 845, 629 NYS2d 868 [3d Dept 1995]), here, the bypass of traffic issue, as detailed above, is also a direct harm which is different than that of a simple generalized concern. Unlike the parties in ***Matter of Barrett v Dutchess County Legislature***, 38 AD3d 651, 831 NYS2d 540 (2d Dept 2007), in the instant case, petitioners/plaintiffs have offered more, sufficient to satisfied their burden and confer standing.

Petitioners/plaintiffs have asserted sufficient grounds to support their claim that the traffic problems associated with the Headriver project will impact and harm them, an individualized harm that is not generalized or one which is merely common to the general public.

Since it is uncontroverted that certain individual petitioners/plaintiffs are members of the United Food and Commercial Workers Union Local 1500, their standing is attributable to that organization (*see* ***Matter of Long Island Pine Barrens Socy., Inc. v Town of Islip***, 261 AD2d 474, 690 NYS2d 95 [2d Dept 1999]).

The Court rejects the motions to dismiss the declaratory judgment claims of this hybrid action, pursuant to CPLR 3211(a)(5), as untimely. The facial challenges to the Local Law and code provisions are subject to the six-year statute of limitations set forth in CPLR 213(1). It is conceded that the hybrid action was instituted within thirty (30) days of the filing of the resolution of the Town Board, therefore, the Article 78 claims are timely. Moreover, the action was brought within four months of the effective date, by filing, of Local Law 14-2007, which amended Section 108-332. As such, petitioners/plaintiffs can timely state even procedural challenges to the adoption of the amendment to Section 108-332.

Summary Judgment on Declaratory Judgment Claim

Petitioners/plaintiffs cross-move for partial summary judgment seeking an Order pursuant to CPLR

3211(f) converting the pending motion to dismiss into a motion for summary judgment on the Declaratory Judgment portion of the hybrid action. At oral argument, respondents/defendants agreed that the defenses are ripe for summary judgment (*see* Transcript, p 21). Since the parties have charted a course for summary judgment on these issues the Court will convert the motion into one for summary disposition (*see* ***Mancuso v Rubin***, 52 AD3d 580, 861 NYS2d 79 [2d Dept 2008]; ***Mihlovan v Grozavu***, 72 NY2d 506, 534 NYS2d 656 [1988]).

The declaratory judgment branch of the hybrid action challenges §108-332 of the Town Code, which emanated from Local Laws No. 47-2005. The challenge is to the attempted transfer of variance jurisdiction from the Zoning Board to the Town Board. Unlike in the relation hybrid action, these petitioners/plaintiffs have not sought summary judgment with regard to the claimed fails of the Town of Riverhead in the mapping of the sending and receiving districts of the TDR program.

Since no triable issues have been shown to exist with regard to those issues, pursuant to CPLR 3212, this Court awards summary judgment in favor of petitioners/plaintiffs on the Declaratory Judgment causes of action.

The §108-332 Challenge

The discussion must begin with an examination of Town Law §274-a, which was amended in 1992. For the first time the statute provided a statutory definition of the term "site plan" (*see* Town Law §274-a[1]). In pertinent part, the statute defines a site plan as:

> ... a rendering, drawing, or sketch prepared to specifications and containing necessary elements, as set forth in the applicable zoning ordinance or local law, which shows the arrangement, layout and design of the proposed use of a single parcel of land as shown on said plan.

Town Law §274-a(2) permits the town board to authorize the planning board to review and approve site plan applications. Town Law §274-a(3) sets forth the procedure for an application for an area variance.

> Notwithstanding any provision of law to the contrary, where a proposed site plan contains one or more features which do not comply with the zoning regulations, application may be made to the zoning board of appeals for an area variance pursuant to section two hundred sixty-seven-b of this article, without the necessity of a decision or determination of an administrative official charged with the enforcement of the zoning regulations.

Town Law §274-a(4) permits the authorized board to impose reasonable conditions and restrictions. Town Law §274-a(5) sets forth a provision entitled "Waiver of requirements," which states:

> The town board may further empower the authorized board to, when reasonable, waive any requirements for the approval, approval with modifications or disapproval of site plans submitted for approval. Any such waiver, which shall be subject to appropriate conditions set forth in the ordinance or local law adopted pursuant to this section, may be exercised in the event any such requirements are found not to be requisite in the interest of the public health, safety or general welfare or inappropriate to a particular site plan.

Under the Riverhead Town Code, site plan review is set forth under Article XXVI (§§108-128 to 108-133). Pursuant to §108-129(A) the Town Board has authorized the Planning Board, in keeping with

Town Law §274-a, to review site plans, except within urban renewal areas. The provision does state:

> To the extent the Town Board continues as the agency reviewing site plans pursuant to this article, references to the 'Planning Board' in connection with site plan review shall be interpreted to mean the 'Town Board.'

Application procedures are set forth in §108-131 and the needed contents of an application "which shall include at least the following elements," are set forth in §108-132.

In defense of the six variances granted, as set forth in Resolution No. 557, respondents/defendants initially expressly relied upon the variance five-factor balancing test of Town Law §267-b and the claim of supersession power. In light of the arguments advanced by petitioners/plaintiffs and the Court of Appeals caselaw to the contrary, the focus shifted to a claim of authority pursuant to Town Law §274-a(5). This argument is without merit.

To begin, the Practice Commentaries, by Terry Rice, that accompany Town Law §274-a (*see* McKinney's, Book 61, §§ 260 - 274-a, p 471), explains the workings of §274-a(5) as follows:

> Town Law §274-a(5) empowers a town board to authorize a planning board to waive any of the requirements for site plan approval if such requirements "are found not to be requisite in the interests of the public health, safety or general welfare or inappropriate for a particular site plan." Consequently, if the mandates of a zoning law regarding site plans or site plan regulations are not necessary for a particular site plan, the planning board may dispense with compliance with those requirements; but only if the town board has authorized the granting of such relief. If a waiver is granted, the board may impose appropriate conditions on such waiver.

Such reveals that it is the planning board, after authorization from the town board, that can waive requirements for site plan approval, if found to be contrary to the "interests of the public health, safety or general welfare." Such has no application to the instant facts.

A review of the Legislative Bill Jacket that accompanies the 1992 Town Law amendment supports petitioners/plaintiffs' request for summary judgment. The State Senate Memorandum in support notes that the new provisions "provides applicants faced with dimensional difficulty an opportunity for administrative relief" and further notes, in pertinent part:

> In addition, the bill authorizes town and village boards to empower their planning boards (or other authorized body) to waive, subject to appropriate conditions, any requirements for the approval of site plans.
>
> * * *
>
> Finally, the bill provides that in the event local site plan or special use permit requirements present dimensional difficulties to a particular applicant, an area variance may bd applied for to the zoning board of appeals.

Counsel to the Office of Rural Affairs, in his July 9, 1992 Memo of Approval, described the legislation's features as follows:

> The bill provides that where a proposed site plan or special permit application contains one or more features which do not comply with the zoning regulations, application may be made to the zoning board of

> appeals for an area variance without the necessity of first obtaining an adverse decision from an administrative official charged with the local enforcement of the zoning. The bill provides that the local legislative body may empower the administrative body authorized to review site plans (or approve special permits), to waive any approval requirements when such requirements are unnecessary.

Additionally, the July 10, 1992 Memorandum of Approval from the Association of Towns explains the two provisions at issue as follows:

> New sections 274-a and 274-b clarify the authority of a town board, as part of its zoning law, to authorize their planning board or other body (such as a ZBA) to review site plans and special use permits. As part of that review process, it establishes a board's authority to condition approvals where such conditions are directly related to and incidental to a proposed site plan or special permit. It also enables the town board to further authorize the reviewing body to waive any particular pre-established requirement for the approval of a site plan or special permit, where appropriate. Further, it authorizes direct appeals to a ZBA for an area variance whenever a site plan or special use permit application contains any element not consistent with applicable zoning regulations.

As can be seen, Town Law §274-a authorizes a planning board or other reviewing body "to waive any particular pre-established requirement for the approval of a site plan or special permit, where appropriate," while, concurrently, authorizing "direct appeals to a ZBA for an area variance whenever a site plan or special use permit application contains any element not consistent with applicable zoning regulations." It is clear that Town Law §274-a(3) leaves the granting of variances from dimensional requirements of a zoning code to the zoning board of appeals. It is also clear that Town Law §274-a(5) authorizes a planning board to waive site plan requirements, if, a town board authorizes such waiver power, pursuant to criteria set forth from the town board to guide the planning board.

Therefore, it must be recognized that Town Law §274-a(5) has no application to the facts before the Court, since the Town Board has not authorized the planning board to entertain site plan applications in the DRC Zoning District and has failed to set forth criteria or "appropriate conditions" to be utilized by a planning board in considering a waiver.

In any event, §274-a(5) is addressed to "particular pre-established requirement[s] for the approval of a site plan," such, as in the instant case, the Site Plan Review procedures and contents of an application requirements found under §108-131 and §108-132 of the Town Code. As noted, the waiver provision relates to requirements specific to site plan approval.

Here, the Town Board granted no less that four variances found under the zoning regulations that are directly set forth in the Zoning Code under 108 Attachment 3, Commercial Districts Schedule of Dimensional Regulations or, with regard to the size of a parking stall, §108-60(E)(2), the Off-Street Parking provisions and even the definition of "Parking Space" under §108-3. No code provisions of the Site Plan Review section, that is, Article XXVI, §108-126 through §108-133 were varied or waived by the Town Board and, at best, two provisions of the DRC Zoning District were varied or waived (§108-259[C] and §108-260[C][6]). Moreover, no discussion is found in the approval resolution that explains why the zoning requirements "are found not to be in the interest of the public health, safety or general welfare or inappropriate to a particular site plan" (Town Law §274-a[5]).

This Court does not believe, upon reviewing Town Law §274-a(5), that its application is designed to include the standards set forth under the DRC Zoning Code under §108-257 through §108-260, unless a Town Board has granted such authorization to a Planning Board, with the requisite conditions and

guidelines. As stated above, such did not occur here. Resolution No. 557 did not waive criteria which are specific to the site plan but, instead, granted variances to dimensional requirements set forth in the zoning schedule.

It is axiomatic that only the zoning board can vary the requirements of the Zoning Code. Town Law §267-b(1) expressly establishes the authority of the Zoning Board to interpret the Zoning Code. It is well established that the State Legislature has preempted the field and that the Town Board may not assume jurisdiction that has been given to the zoning board (*see* ***Matter of Cohen v Board of Appeals of the Vil. of Saddle Rock***, 100 NY2d 395, 764 NYS2d 64 [2003]; ***Kodogiannis v Zoning Bd. of Appeals of Town of Malta***, 42 AD3d 739, 839 NYS2d 588 [3d Dept 2007]).

Under the state statutory scheme, it is incumbent upon the zoning board to consider variances from dimensional requirements and further, to interpret the Zoning Code to ascertain if a Wal-Mart Supercenter, a motor vehicle repair center, and a 54-seat food store are permitted uses in the DRC Zoning District. The issue of whether a proposed use is permissible cannot be raised before a planning board or other board reviewing a site plan (*see* ***Jamil v Village of Scarsdale Planning Bd.***, 24 AD3d 552, 808 NYS2d 260 [2d Dept 2005]; ***Swantz v Planning Bd. of the Vil. of Cobleskill***, 34 AD3d 1159, 824 NYS2d 781 [3d Dept 2006]). The proper forum is not the board reviewing the site plan but the building inspector or the zoning board.

The Court disagrees with respondents/defendants' claim that the Town Board did not actually grant variances but only relaxations. The claim is belied by the fact that Resolution No. 557 notes that dimensional relief from the schedule of dimensional regulations is required and that the area variance five-part balancing test is applied to support the Town Board's determination. Moreover, Zoning Code §108-332 twice indicates that the Town Board will "vary development standards." Additionally, the code amendment contradicts itself. At first, it invokes Town Law §267-b as the standard for review (*see* §108-332[A][1]) and then immediately claims that the code amendment is intended to supersede that same law (*see* §108-[A][2]).

Finally, no issue of a supersession enactment, by virtue of Local Laws 47-2005 and 14-2007, is before the Court as respondents/defendants, throughout their submissions and at oral argument, rely upon the provisions of Town Law §274-a(5) and claim that "the supersession language in the local law was entirely superfluous and unnecessary" (Respondents Reply Memorandum, p 6).

The Town Board's grant of variance relief is void since such appellate authority resides solely with the Zoning Board. The granting of variances by the Town Board was a major component of the site plan approval. Since only the Zoning Board can approve such variances (*see* Town Law §274-a[3]), the site plan approval is void, as are Local Laws 47-2005 and 14-2007.

Conclusion

The Court also agrees with the claim that a motor vehicle repair center and a food shop are not permitted uses in the DRC Zoning District (*see* §108-258). The definition of "Permitted Use" set forth under the definitions section of the Code, that is, §108-3, states "[a]ny use which is not listed as a permitted ... use shall be considered a prohibited use." On the limited record before the Court, it is clear that Resolution No 557 fails to explain how these additional uses can be considered to be an Accessory Use ("A ... use customarily incidental and subordinate to the principal ... use" [§108-3, Definitions]). At oral argument, an unsupported claim was offered that the Town Board made that determination during the application process (*see* transcript, pp 83 - 85). However, since this is a claim that would best be left for a determination upon a full record and since the challenged Resolution No. 557 has already been declared to be void, the Court need not address this issue.

The defense offered by respondents/defendants, to the effect that they need not comply with the "campus-style" layout because it is only set forth as an intent by the Town Board in the Legislative Purpose (§108-257) of the DRC Zoning Code, is belied by the express design standard set forth in the Supplementary

Requirements under §108-260. In any event, as explained above, it appears that the Town Board undertook to issue either a use variance or an interpretation of the zoning code, both of which are solely within the province of the Zoning Board. This issue could have supplied the basis for a denial of the site plan (*see* ***Matter of Home Depot, USA, Inc. v Town of Mount Pleasant***, 293 AD2d 677, 741 NYS2d 274 [2d Dept 2002], *lv denied*, 99 NY2d 507, 757 NYS2d 817 [2003] [the record supported the planning board's conclusion that the proposed site plan ignored the planned, campus-style development that characterized much of the zoning district]). Once again, the Court need not address this issue, since dispositive relief has been granted to petitioners/plaintiffs.

In any event, the Town Board cannot ignore the express statutory regulations of the DRC Zoning District and the years of planning that culminated with the Town Board's adoption of the Town of Riverhead Comprehensive Plan. Pursuant to Town Law §272-a, the Town Board is bound to act in keeping with its Comprehensive Plan and the zoning code amendments adopted to fulfill the goals and policies of that Plan.

Town Law §272-a(11)(a) offers the following mandate - "[a]ll town land use regulations must be in accordance with a comprehensive plan adopted pursuant to this section." The term "land use regulation" is defined to include "any zoning, subdivision, special use permit or site plan regulation which prescribes the appropriate use of property or the scale, location and intensity of development" (Town Law §272-a[2][b]). As noted in the Practice Commentaries by Terry Rice,(*see* McKinney's, Book 61, §272-a, p 444), "[i]n other words, all town regulations which effect land use must consider and be in accordance with a town's comprehensive plan."

The Town Board, in its role as site plan administrator, cannot approve site plan applications that run counter to the Town Law, its Comprehensive Plan, and its own zoning code. One of the most cherished principles of our democracy is the respect and deference accorded our governing laws by our citizenry. Town Boards are not exempt from that fundamental ideal.

Accordingly, the motions to dismiss are denied, the cross motion for partial summary judgment is granted and the declaratory judgment branch of the hybrid action is granted, as indicated above. The granting of declaratory relief renders the Article 78 branch of the hybrid action moot. This constitutes the decision and Judgment of the Court.

DATED: 10/6/08

THOMAS F. WHELAN, J.S.C.