

**DISTRICT COURT OF THE COUNTY OF SUFFOLK, THIRD DISTRICT**

Present:

HON C. STEPHEN HACKELING  
JUDGE

MOTION DATE: OCTOBER 30, 2013

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THE TOWN OF HUNTINGTON

AGAINST

JENNIFER LA VERTU

Defendant

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Appearances: Jacob C. Turner  
Assistant Town Attorney  
Attorney for the Plaintiff  
Town of Huntington  
100 Main Street  
Huntington, New York 11743

The Law Office of Steven A. Morelli, P.C.  
Paul Bartels  
Attorney for the Defendant  
1461 Franklin Avenue  
Garden City, New York 11530

Upon the following papers numbered 1 to 3  
Read on this motion to vacate the Declaration of Delinquency  
Notice of Motion and supporting papers 1  
Notice of Cross Motion and supporting papers    ;  
Affirmation in Opposition and supporting papers 2  
Answering Affidavits and supporting papers;  
Reply 3  
Filed papers  
Other

The defendant’s motion to vacate a Conditional Discharge and/or dismiss a Declaration of Delinquency (dated January 11, 2013) is granted. There appears to be no disputed issues of fact raised in the parties papers. As such, there is no need to conduct a New York C.P.L. Sec 410.70 hearing and the Court directs verdict in this matter.

**The Facts**

In June 2012, after pleading guilty to one of two violations of § 87-25A of the Huntington Town Code, the defendant entered into a plea bargain to pay a \$750.00 fine and agreed to a consensually imposed “Conditional Discharge” which was drafted by the Town of Huntington (hereafter “the Town”). The Court approved the plea and the Conditional Discharge which required the defendant to “follow through

to legalize dwelling at 4 Meredith Drive, Huntington Station, New York, to be completed within 4 months of this notice.” It is undisputed that the defendant applied for a “letter in lieu” of a Certificate of Occupancy, which was approved in writing by the Town on February 21, 2012. Thereafter, on October 16, 2012, the Town issued a disapproval of defendant’s application for a letter in lieu of a Certificate of Occupancy. This document states that “this disapproval supercedes previous approved inspection from February 21, 2012.” The defendant asserts that the Town “did not inform (her) of this disapproval until many months later, in March 2013” and that she “received a copy of the denial . . . only after several trips to Town Hall and after her filing a foil request.” (Defendant’s affirmation ¶¶ 8, 14).

The Declaration of Delinquency hearing has been adjourned several times, and defendant indicates she and her agent (Mr. Condon) have continued their efforts to obtain all the necessary permits, although her efforts have been frustrated by the Town as its position is that it will not reissue the letter in lieu or a Certificate of Occupancy unless the defendant addresses other ancillary issues which arose during the defendant’s February 12, 2012 application for a letter in lieu concerning rear decks and a one story frame edition.

### Discussion

Sec. 87-25 (A) of the Town Code provides:

“ It shall be unlawful to maintain, occupy, or use. . . A structure. . . for which a Certificate of Occupancy . . . has not been issued. . . ”

Sec. 198-102 provides:

Nonconforming Uses:

The lawful use of any land, building or structure existing at the time of this chapter may be continued ...

§198-107.1 Nonconforming use designated as an affirmative defense.

In any prosecution for a violation of the provisions of this chapter, it is an affirmative defense that the building, structure or use is a nonconforming use as defined in § 198-2. A defendant who raises this affirmative defense must plead and prove it by a preponderance of the evidence.


The subject Conditional Discharge requires the defendant to “ follow through to legalize” her dwelling. The term “legalize” is not defined in the Town Code. Dwellings are buildings and buildings are deemed structures under the Town Code (see §87-46 “definitions”) and all structures are required to have a Certificate of Occupancy except for structures which predate the zoning code. Although not defined in the code, the Town issues a documents it identifies as a “letter in lieu” of Certificate of Occupancy when it determines that the structure predates the zoning code and are exempted from requirements of §87.25(A) by §198.102.

The Court notes that the provisions of §198.102 do not require a pre zoning code structure to have a "letter in lieu" and also that it is not sure if the document annexed as Exhibit B of the defendant's motion is a letter in lieu or an inspection report underlying a letter in lieu. However, the Court does note that the Exhibit B document dated February 21, 2012 does check the "Approved" box. It is uncontroverted that the defendant actually obtained either an "Approval" for a letter in lieu or the actual letter in lieu for a dwelling measuring 47.7' x 34.6'. Generally, any ambiguity in a written contract or instrument must be construed against the drawer of the instrument. See *Moran v. Standard Oil Co.*, 211 N.Y. 187 (N.Y. 1914); *Zaremba v. Interface Flooring Sys. Inc.*, 195 AD 2d 471 (N.Y.A.D. 2d Dept. 1993); see also, *Wing v. Wing*, 112 AD 2d 932 (N.Y. A.D. 2d 1985).

The June 9, 2011 Count #1 summons to which the defendant plead guilty asserted that she "allowed there to be maintained a two story dwelling. . .without a Certificate of Occupancy". The February 21, 2012 inspection report approval indicates that the inspector found "no extension to match the size on the permit" which was issued in 1956. (See Exhibit D). It also indicates that he "approved" the dwelling for a letter in lieu as the "rear decks were to be added to an open permit"; and would be dealt with separately.

It would be reasonable to conclude that the Town in obtaining a Conditional Discharge was seeking to address only the legalization issues framed in its accusatory instrument. As the drafter of the instrument the Town could have and should have put the defendant on notice as to what additional actions the defendant must take to "legalize" the two story structure other than obtaining the letter in lieu approval. At this time it appears that the Town is refusing to issue/reissue a letter in lieu of Certificate of Occupancy because its records indicate the possible existence of "an addition" which the inspector could not find and which in all likelihood was never built. It is apparent that the defendant is at a loss to understand what additional action is required to prove the non-existence of the permitted but not built structure.

The Court finds the consensual conditions the defendant promised to fulfill in the Conditional Discharge were satisfied. <sup>1</sup> The Court makes no determination regarding the validity or invalidity of the letter in lieu or its disapproval.

  
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J.D.C.

Dated: 11-27-13

nailed 12-2-13

Decision to be published  yes  no.

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<sup>1</sup> The Court notes the Town Code allows the Director of the Building Department to revoke an issued Certificate of Occupancy. See § 87.31. To the extent that a letter in lieu is issued; there exist no code provision allowing for its subsequent revocation