

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

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CA 08-00283

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, GREEN, AND PINE, JJ.

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IN THE MATTER OF BRIAN YAEGER AND BRUCE YAEGER,  
PETITIONERS-APPELLANTS,

V

MEMORANDUM AND ORDER

TOWN OF LOCKPORT PLANNING BOARD, TOWN OF LOCKPORT  
ZONING BOARD OF APPEALS, AND MCDONALD'S USA, LLC,  
RESPONDENTS-RESPONDENTS.

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DAVID J. SEEGER, BUFFALO, FOR PETITIONERS-APPELLANTS.

HOPKINS, GARAS & SORGI, PLLC, WILLIAMSVILLE (SEAN W. HOPKINS OF  
COUNSEL), FOR RESPONDENT-RESPONDENT MCDONALD'S USA, LLC.

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Appeal from a judgment of the Supreme Court, Niagara County  
(Frank Caruso, J.), entered October 4, 2007. The judgment granted  
respondents' motion and dismissed the CPLR article 78 petition.

It is hereby ORDERED that the judgment so appealed from is  
unanimously reversed on the law without costs, the motion is denied,  
the petition is reinstated, and respondents are granted 20 days from  
service of the order of this Court with notice of entry to serve and  
file an answer.

Memorandum: Petitioners commenced this CPLR article 78  
proceeding seeking to annul the determinations of respondents Town of  
Lockport Planning Board (Planning Board) and Town of Lockport Zoning  
Board of Appeals (ZBA) granting various applications of respondent  
McDonald's USA, LLC (McDonald's) with respect to the construction of a  
restaurant. In moving to dismiss the petition, McDonald's contended,  
inter alia, that petitioners failed to name the owners of the property  
in question as necessary parties and that the statute of limitations  
with respect to them had expired. The Planning Board and the ZBA  
joined in the motion to dismiss. Supreme Court granted the motion and  
dismissed the petition "after due consideration of CPLR 1001 (b) . . .  
." We note at the outset that we reject the contention of McDonald's  
that the appeal is moot because it has already built the restaurant  
and opened it for business. Although petitioners did not seek  
injunctive relief to prevent the construction of the building (see  
*generally Matter of Dreikausen v Zoning Bd. of Appeals of City of Long  
Beach*, 98 NY2d 165, 172-173), they sought relief in the form of  
building "modifications that do not require demolition of the  
restaurant."

We agree with petitioners that the court erred in granting the motion to dismiss. At the time of the motion, the property owners were necessary parties pursuant to CPLR 1001 (a), and thus their joinder was required (see generally *Matter of Southwest Ogden Neighborhood Assn. v Town of Ogden Planning Bd.*, 43 AD3d 1374, lv denied 9 NY3d 818; *Matter of Ferruggia v Zoning Bd. of Appeals of Town of Warwick*, 5 AD3d 682; *Matter of Artrip v Incorporated Vil. of Piermont*, 267 AD2d 457). The expiration of the statute of limitations, however, is not the equivalent of a jurisdictional defect (see *Windy Ridge Farm v Assessor of the Town of Shandaken*, 11 NY3d 725, 726-727) and, pursuant to CPLR 1001 (b), "[w]hen a person who should be joined under subdivision (a) has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned." Because the property owners were subject to the jurisdiction of the court, the court should have "summoned" the property owners (*id.*; see *Windy Ridge Farm*, 11 NY3d at 727; *Matter of Alexy v Otte*, 58 AD3d 967). We conclude, however, that the property owners are no longer necessary parties because they have since conveyed their interest in the property to McDonald's.

Entered: May 1, 2009

Patricia L. Morgan  
Clerk of the Court