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| <b>Jane H. Concannon Revocable Trust v Building<br/>Dept. of the Town of E. Hampton</b>                                                                                                                                                 |
| 2018 NY Slip Op 30270(U)                                                                                                                                                                                                                |
| February 5, 2018                                                                                                                                                                                                                        |
| Supreme Court, Suffolk County                                                                                                                                                                                                           |
| Docket Number: 4297/2016                                                                                                                                                                                                                |
| Judge: Martha L. Luft                                                                                                                                                                                                                   |
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Short Form Order

Index No. 4297/2016

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 50 - COUNTY OF SUFFOLK

**COPY****P R E S E N T:**

Hon. Martha L. Luft  
Acting Justice Supreme Court

**DECISION AND ORDER**

\_\_\_\_\_  
JANE H. CONCANNON REVOCABLE  
TRUST,

Petitioner,

-against-

THE BUILDING DEPARTMENT OF THE  
TOWN OF EAST HAMPTON, TOWN OF  
EAST HAMPTON ZONING BOARD OF  
APPEALS and BREAKERS MOTEL, INC.,

Respondents.

Mot. Seq. No. 001 - MD  
Orig. Return Date: 05/31/2016  
Mot. Submit Date: 08/08/2017

Mot Seq. No. 002 - MD  
Orig. Return Date: 05/12/2016  
Mot. Submit Date: 08/08/2017

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Upon reading and filing of the following papers: (1) Notice of Petition and Complaint and supporting papers, Order to Show Cause and supporting papers; (2) Answer, Return and Affirmation in Support of the Answer, affirmation affidavits and exhibits in opposition to the Order to Show Cause, affirmation and affidavit and exhibits in opposition to the Petition/Complaint, and the reply affirmation, it is

**ORDERED**, that the three Article 78 “causes of action” in the petition are dismissed; and it is further

**ORDERED**, that the plenary fourth cause of action for a permanent injunction is dismissed; and it is further

**ORDERED**, that the petitioner/plaintiff’s motion for a preliminary injunction is denied.

This is an Article 78 petition and plenary action brought by a revocable trust which owns property and a house adjacent to the 26-unit Breakers Motel. According to the submissions, the Breakers Motel has been located at the same site on Old Montauk Highway, Montauk, in the Town of East Hampton since at least the 1950’s. The trust had challenged the issuance of a building permit for interior renovations to a small restaurant inside the Breakers Motel by unsuccessfully appealing the Town of East Hampton Building Department’s determination to issue a building permit dated April 27, 2015 to the Town of East Hampton Zoning Board of Appeals (“ZBA”). The building permit had approved renovations to the existing restaurant area inside the motel, including updating the dining area and adding a bar, improving the kitchen facilities in the basement, raising the deck eight inches to avoid a tripping hazard and replacing the bay window with a sliding door.

The building permit for the restaurant renovations was consistent with a certificate of occupancy (“CO”) for the motel which was issued by the Building Department on December 14, 2005, which included a restaurant. It also was consistent with the motel site plan, which was approved by the Planning Board on January 19, 2011 and which also included a restaurant. The site plan was subjected to a public hearing on September 15, 2010. The record indicates that the hearing opened with the pronouncement that the proposed site plan included a restaurant. It is undisputed that the hearing was attended by the grantor of the petitioner trust, Jane Concannon. Her attendance apparently was pursuant to a notice dated August 25, 2010 and sent by certified mail. The notice described the 2010 site plan approval application as for a staircase and deck addition to a “multi-unit motel building containing a restaurant, motel and resort uses.” The certified mail return receipt signed by Ms. Concannon is contained in the record. In addition, a memorandum was submitted to the Planning Board in 2010 on the site plan application



reciting the presence of a restaurant on the site. The 2011 site plan approval noted that the Breakers' property was "currently improved with a restaurant."

The petitioner/plaintiff ("petitioner") submitted an appeal to the ZBA on May 1, 2015. The appeal challenged (1) the inclusion of restaurant uses on the December 14, 2005 CO and (2) the issuance of the April 27, 2015 building permit. The ZBA conducted hearings at which testimony was taken from the petitioner and the owner of the Breakers and reviewed extensive legal briefs and exhibits. In the meantime, the Breakers proceeded with the renovations. Breakers alleges that by the time this petition was brought it had expended in excess of \$350,000 on the renovations.

With respect to the merits, the petitioners argued to the ZBA that because the restaurant had not operated since the 1970's, an application for a special permit under the current Town Code was required before either the 2005 CO or the 2015 building permit could have been issued. The Breakers' owners countered by asserting that the restaurant always has been a permitted use and was in place prior to the current zoning laws requiring a special permit. The Breakers' Motel also argued that the restaurant equipment and fixtures remained in place after it ceased operation in the 70's and were the basis for the 2005 CO and 2010 site plan.

All parties concede that this was not a case where a pre-existing, non-conforming use had been extinguished because the restaurant operation had been abandoned for the simple reason that the restaurant always was permitted and never was non-conforming. In fact, the petition notes that prior to 1984 the Breakers Motel property was zoned "Multiple Residence District" ("MD") which permitted a restaurant as accessory to a motel. In 1984 the Town Code was amended to include the Breakers Motel property in the "Resort District" ("RS") which also permitted such restaurants pursuant to special permits.

With respect to the procedural aspects of the ZBA application, Breakers argued that the appeal to the ZBA was untimely because NYS Town Law Section 267-a and East Hampton Town Code Section 255-8-35(A) impose a 60-day statute of limitations on such appeals and the CO was issued in 2005, ten years before the appeal. The petitioner argued that it could not challenge the 2005 CO because it had no notice, actual or constructive, of the 2005 CO and that it only learned of the restaurant when the building permit was applied for and granted.

The ZBA denied the petitioner's appeal at its March 1, 2015 meeting and issued Findings of Fact and a Determination on April 5, 2016. The ZBA declined to consider the

substance of petitioner's appeal because it found that it was untimely pursuant to the 60-day limit in the NYS Town Law and Town Code provision cited above. The ZBA found that the petitioner had constructive notice, at a minimum, at the time of the 2010 site plan application and the 2011 site plan approval by reason of the facts recited above. The ZBA also found that the petitioner had constructive notice of the restaurant renovations by way of the excavation for a new septic system in 2014.

The petitioner then brought this proceeding by order to show cause. The petition seeks a judgment annulling the ZBA's denial of the appeal and revoking the building permit, as well as a permanent injunction enjoining further renovations without a special permit. An application for a TRO restraining any further construction pending a hearing and determination of the petition was denied on April 27, 2016 (Garguilo, J.) The petitioner argues that it had no notice of the 2005 CO so that the statute of limitations does not apply and that the CO was illegally issued. Breakers and the Town argue that the ZBA determination should not be overturned and was a proper exercise of discretion. Breakers argues that the statute of limitations under Town Law runs from the March 1 denial such that the petition was filed untimely under the applicable 30 statute of limitations in Town Law Section 267-c.

### **The Article 78 Claims (First, Second and Third Causes of Action)**

The ZBA's dismissal of the appeal for untimeliness was neither arbitrary nor capricious nor an abuse of discretion and should not be disturbed. The ZBA correctly found that, at a minimum, the petitioner was chargeable with notice of the restaurant at the time of the 2010 site plan application and 2011 site plan approval. *Majer v Schmidt*, 169 A.D.2d 501, 564 N.Y.S.2d 722 (1<sup>st</sup> Dep't 1991).

Furthermore, a challenge to a determination such as the 2015 Building Permit, which was predicated upon earlier determinations (the 2005 CO and the 2011 site plan approval) is untimely. The 2015 building permit did not "re-start the clock" of the statute of limitations for a challenge to the underlying CO or site plan approval. *Palm Management Corp. v Goldstein*, 8 NY3d 337, 833 NYS2d 423 (2007).

### **The Fourth Cause of Action for an Injunction**

The petitioner argues that a permanent injunction should be issued enjoining the Breakers Motel from operating a restaurant "unless and until the Breakers applies for and obtains a special permit pursuant to the applicable provisions of the Town Code." However, the Town Code does not require a special permit for a restaurant under the facts



presented here. While a special permit would be required for a new restaurant, since the restaurant use here had been in place prior to the 1984 adoption of the RS Zoning District and the special permit requirements added at that time, the restaurant is not a new use. Simply stated, the concept of “use” in the context of zoning regulations is not the equivalent of “in use” or “used” as is made clear in the following definitions in East Hampton Town Code Sections 255-1-14 (G) and (H):

G. Use. The word "use" refers to any purpose for which a lot or structure, or any part thereof, is arranged, intended or designed to be used, put, occupied, maintained, made available or offered and for which a structure is erected, reconstructed, razed, demolished, rebuilt, moved, altered or enlarged. A personal wireless service facility should be considered a "use" whether a structure itself, on a structure or affixed to street furniture such as a utility pole.

H. Used. The word "used" refers to the fact that a lot or structure, or part thereof, actually is being employed for a particular use.

The Section 255-1-14 definition of “use” is consistent with that which is generally accepted in New York zoning law:

USE: The specific purpose for which land or a building is designed, arranged, intended, or for which it is or may be occupied or maintained. The term "permitted use," or its equivalent, shall not be deemed to include any nonconforming use.

USE: The purposes for which a structure or premises, or part thereof is occupied, designed, arranged or intended.

*Salkin, N.Y. Zoning Law & Prac., 3d Edition* § 38:05, Sample definitions.

The record indicates that the restaurant configuration never has been changed and that the kitchen fixtures and equipment have remained since the 1970's. The area in question was “designed, arranged and intended” to be a restaurant; i.e., the use continued, even though it was not “used” as a restaurant. This is not a case where an abandoned restaurant use later became non-conforming or illegal because a subsequent zoning law amendment prohibited a restaurant operation. “A use of property that is no longer authorized due to re-zoning, but lawfully existed prior to the enactment of the existing zoning ordinance, is a nonconforming use....Nonconforming uses are necessarily

inconsistent with the land-use pattern established by an existing zoning scheme.” *Toys R Us v. Silva*, 89 N.Y.2d 411, 417, 676 N.E.2d 862, 865 (1996). *See also, Rudolf Steiner Fellowship Foundation v. De Luccia*, 90 N.Y.2d 453, 685 N.E.2d 192 (1997); *Town of Islip v. P.B.S. Marina, Inc.*, 133 A.D.2d 81, 82, 518 N.Y.S.2d 427, 427 (2d Dep’t 1987). Such non-conforming uses, which are rendered illegal by new code amendments, are considered abandoned after they are not operated for a specified period of time. *Id.*, 89 NY2d at 418. In those cases a variance or other special permission is required to reinstate the abandoned use which no longer conforms to the code.

East Hampton Town Code Section 255-5-25 distinguishes pre-existing uses which have remained conforming from pre-existing non-conforming uses and dispenses with the need for a special permit for the former:

Special permit uses which either **lawfully exist on the effective date of this article** or which subsequently come into being pursuant to the provisions hereof shall, in all respects, **constitute lawful and conforming uses** under this chapter. With the exception of the requirement in § 255-5-26 hereof, no such use shall again require the issuance of a special permit in order to be maintained, operated, continued, enlarged or altered, and building permits may be issued therefor, subject only to provisions of this chapter applicable to any such use in any such district. The preceding sentence shall not, however, be construed to apply to natural resources special permits required pursuant to Article IV of this chapter. (*emphasis supplied*).

As set forth above, Section 255-5-25 of the Town Code treats uses that are in conformance with the amended Code (such as the restaurant here) differently from those which are rendered illegal by Code amendments or zone changes. A restaurants remained a legal use at this property even after the 1984 Code amendment, and even though the restaurant was not “used.” Town Code Section 255-25 clarifies that any use that existed prior to the special permit requirement and that remains a legal use under the amended Code will not be treated as a non-conforming use would be. Thus, Town Code Section 255-5-25 provides that a use which is legal under the new Code does not require a special permit to be “maintained... or altered”, as is the case with the Breakers Motel restaurant. As specified in Section 255-5-25 only a building permit was required. Since there is no need for a special permit, neither a temporary nor a permanent injunction pending the issuance of such a permit is warranted.

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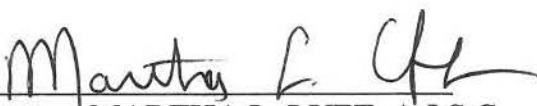
### Statute of Limitations

Since the Town waived the statute of limitations objection in point of law in the answer, it cannot be raised by the non-municipal respondent Breakers Motel. *Matter of Hans v. Burns*, 48 A.D.2d 947, 369 N.Y.S.2d 27 (3d Dep't 1975). As a result, the court cannot consider the merits of this defense, which was raised only by Breakers.

Submit judgment.

E N T E R

Date: February 5, 2018  
Riverhead, New York

  
MARTHA L. LUFT, A.J.S.C.

☒ FINAL DISPOSITION

☐ NON-FINAL DISPOSITION