

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

TOWN OF OYSTER BAY,

Plaintiff,

-against-

120 WESTEND LLC,

Defendant.

IAS PART: 5

NASSAU COUNTY

INDEX NO.: 608065/2020

MOTION SEQ. #: 1

SUBMIT DATE: 08/24/2020

The following papers having been read on this motion:

Order to Show Cause .....1
Opposition .....2
Reply .....3

Plaintiff, the Town of Oyster Bay, moves by order to show cause for a preliminary injunction against Defendant to halt construction, use, and occupancy of Defendant's commercial property, located at 120 Jericho Turnpike, Jericho, Nassau County, New York, as a homeless shelter. Defendant, a limited liability corporation, has opposed the application in its entirety. A temporary restraining order was previously granted by this Court on August 7, 2020, upon the presentation of the within order to show cause and pending a decision on the application. Upon due deliberation, the order to show cause is granted in accordance with the following.

Background

The property known as 120 Jericho Turnpike had been used continuously as a hotel/motel pursuant to a special use permit issued by Plaintiff in 1965. The property is located in what is known as a neighborhood business zoning district. The building situated upon the property was last operated as a Hampton Inn hotel, which ceased operations at the building as of late 2019 or early 2020. Following the departure of the Hampton Inn, the property was purchased by Defendant.

Plaintiff alleges that Defendant intends to use and occupy the entirety of the premises as “transitional housing” pursuant to a contract Defendant entered into with the Nassau County’s transitional housing program. The proposed facility would involve the operation of a 24-hour per day, 7 day per week, fully-staffed homeless shelter that would provide services, facilities, and programs for approximately 80 families who would reside in the building for, on average, six to eight months. Plaintiff alleges that the facility would have a common dining room, on-site childcare, and utilize the Jericho School District to educate the school-aged children living at the facility. Defendant does not refute these facts whatsoever.

It is Plaintiff’s position that based upon the foregoing facts, Defendant is required to apply for proper zoning and use permits, to allow for proper inspections of the property based upon the intended use, and to obtain all necessary approvals for said permits including, but not limited to, a multiple-residence license, a public assembly license, and a certificate of occupancy with approval and completion prior to occupying the building. Defendant was notified of these requirements in a letter from Plaintiff to both Defendant and non-party Nassau County, dated July 31, 2020.

Just prior to seeking and obtaining the temporary restraining order upon the presentation of the within order to show cause, Plaintiff had issued a series of stop work orders and notices of violation, based upon Defendant performing work on the subject property without seeking to obtain any permits or approvals from Plaintiff. Plaintiff also has indicated that Defendant denied Plaintiff’s inspectors access to the interior of the premises to examine the alterations to the building being performed.

#### Plaintiff’s Arguments

Plaintiff alleges that the operation of an adult shelter at that location is an illegal use of said property and construction of such facility was begun without any permits being applied for by Defendant with Defendant refusing to permit inspection of the work being performed at the property. Plaintiff also states that Defendant prevented any type of inspection of the property during construction by Plaintiff, creating a serious and imminent danger to the life, health, safety, and welfare of the public.

Plaintiff asserts that Defendant has violated and continues to violate the following local laws: Town Code §93-30, Change of Occupancy; Town Code 93-12.1, Violation of Directives; New York State Building Code §105.5.2, Change in Use or Occupancy. Plaintiff also alleges that

other potential violations of building and fire codes may be uncovered if a proper inspection is permitted to be performed on the subject premises.

In support of its application, Plaintiff has submitted an affidavit from a Deputy Commissioner from the Department of Planning and Development for Plaintiff, who is a licensed building inspector with the State of New York and the Town of Oyster Bay. His affidavit states that the conversion of the hotel to transitional housing is in direct and flagrant violation of the Town Code of Plaintiff. He further states that a special use permit was issued to the former owner of the premises in 1965 for use as a hotel, originally a Howard Johnson's Motor Lodge, and that this special use permit is not and has never been tantamount to approval for use of the premises as transitional housing. New York State Building Code §202 defines "transient" as occupancy of a dwelling unit or sleeping unit for not more than thirty (30) days; however, according to the Deputy Commissioner, the different use of the subject property has its own requirements regarding density, parking, occupancy levels, hours of operation, potential staffing and employees, and its potential impact on traffic, noise, sewage/waste, school district, and surrounding neighborhoods.

The Deputy Commissioner maintains that the neighborhood business zoning district does not and never has permitted the use of the subject property as a hotel "as of right", but rather allowed the use conditioned upon the application and grant of a special permit by the Town Board for Plaintiff. Traditionally, the applicant must demonstrate that the proposed special permit use is fully consistent with those uses specifically granted as of right uses within the particular zoning district, taking into consideration all relevant and applicable factors.

The history of this property indicates that, since its inception approximately fifty-five years ago, the then owners/operators had sought Plaintiff's approval to make several additions and/or modifications to the subject property. For example, according to Plaintiff, the prior owner made applications to amend the site plan to modernize the property, to eliminate a cross-easement, and to add five additional parking spaces. In addition, the prior owner filed applications for certain variances, such as one to make the hotel taller and one to reduce the number of off-street parking spaces required. The prior owner also filed applications during their occupancy to make certain other interior renovations and to grant Nextel a special use permit to install a wireless antenna to the building.

### Defendant's Opposition

Defendant's opposition papers contain an affidavit from a member of its organization and a memorandum of law from its counsel, amongst other things. The following timeline and account is taken from a combination of these portions of Defendant's submission.

Non-party Community Housing Innovations, Inc. (hereinafter "CHI"), is a state and federally funded not-for-profit corporation which is in the business of operating and providing housing and assistance to those in need, including providing emergency shelter for homeless individuals. CHI has done business with Nassau County for decades. On or about June 4, 2020, CHI had obtained permission from the Nassau County Department of Social Services (hereinafter "NCDSS") to utilize the property soon to be owned by Defendant as a homeless shelter. The Commissioner for NCDSS approved the use of property in Jericho as part of a previously entered into Memorandum of Understanding, dated May 1, 2017.

Defendant states, in pertinent part, that following the June 4, 2020, contract with Nassau County, CHI was informed that the proposed Jericho location had passed a health and safety inspection and had complied with all of the terms and conditions of the Memorandum of Understanding that NCDSS imposed; consequently, NCDSS authorized services to commence at the premises on August 1, 2020, subject to a satisfactory final inspection by it. On June 12, 2020, an email was sent from the New York State Office of Temporary and Disability Assistance (hereinafter "NYS OTDA"), accepting CHI's budget for the facility at the Jericho location. On July 6, 2020, Defendant entered into a lease agreement with CHI to operate a shelter at the Jericho location for a ten-year term, commencing on August 17, 2020.

Apparently, while CHI was involved in its process with Defendant and Nassau County, on June 29, 2020, prior to the anticipated sale of the premises, the prior occupant was renewing its operating permits with Plaintiff's Department of Planning and Development, who at the time advised the then owners that the multiple residence usage at the premises had passed inspection, but a certificate of compliance would not be processed until a nine hundred dollars (\$900.00) fee was paid. That fee was paid in full by the prior occupant on that same day. On July 6, 2020, Plaintiff's Department of Planning and Development sent a renewal notice for a "license for a place of assembly" to the prior occupant, advising it that this license will be issued upon paying an additional four hundred dollar (\$400.00) fee and the passing of inspection by the public assembly inspector. Once again, these events took place prior to the actual change of ownership

of the subject property to Defendant and in the absence of any notice to Plaintiff that a change of use was anticipated.

On July 6, 2020, Defendant entered into a ten-year lease with non-party CHI as stated in the above. Thereafter, on July 23, 2020, Jericho School District held a school board meeting in which Defendant discloses its intention to convert the premises to a homeless shelter. Following this meeting, between July 29, 2020 and August 5, 2020, Plaintiff issued various summonses to Defendant, including stop-work orders and notices of violation. Having formed the opinion that Defendant refused to acknowledge the validity of these measures, Plaintiff sought an immediate temporary restraining order and a preliminary injunction while the underlying action is pending, which is the basis of the application herein. It should be noted that Defendant was properly notified of the immediate temporary restraining Plaintiff intended to file and failed to oppose same upon presentation to this Court.

Defendant, in seeking the immediate lifting of the temporary restraining order currently in place, argues that Plaintiff cannot demonstrate a likelihood of success on the merits by clear and convincing evidence; furthermore, that the equities in the matter do not favor Plaintiff. Defendant additionally argues that the underlying lawsuit is subject to dismissal because Plaintiff did not have approval from its Town Board to initiate a lawsuit at the time filed, thus making the application null and void *ab initio*. This Court rejects the latter argument outright, as not only does Town Code §93-13, Actions by Attorney, authorize the instant lawsuit, but also the circumstances surrounding this case favor allowing a more flexible application of Town Law §268. *See Town of Baylon v. Investment Properties, Inc.*, 85 AD3d 1013, 925 NYS2d 878 (Mem) (2<sup>nd</sup> Dept., 2011); *see also Town of Caroga v. Herms*, 62 AD3d 1121, 878 NYS2d 834 (3<sup>rd</sup> Dept., 2009).

Most significantly, Defendant argues that the operation of the premises as transitional housing for homeless individuals is immune from local zoning laws since New York State has pre-empted the subject matter of homeless facilities by the passage of Article 7 of the Social Services Law, §460 through §463-B, which comprehensively regulates residential care facilities and leaves Plaintiff without authority whatsoever. Defendant maintains in support of this interpretation of Article 7 of the Social Services Law that the Appellate Division, Second Department, has consistently held that a local municipality is prohibited from imposing conditions on the operation of a residential care facility due to such pre-emption, citing *Destefano v. Emergency Housing Group, Inc.* (281 AD2d 449, 722 NYS2d 35 [2<sup>nd</sup> Dept., 2001]), *Matter of City of New York v.*

Town of Blooming Grove Zoning Board of Appeals (305 AD2d 673, 761 NYS2d 241 [2<sup>nd</sup> Dept., 2003]), and Matter of Adkins v. Board of Appeals (199 AD2d 261, 604 NYS2d 234 [2<sup>nd</sup> Dept., 1993]). Defendant has also asserted that the pre-emption should be applied not only to the proposed use of the property as a shelter, but also to the building code violations that it has been cited for by Plaintiff.

#### Discussion

For the purposes of this decision, the Court must first address the issue of whether Plaintiff is correct in its position that Defendant requires a special use permit to operate the shelter at the intended Jericho location. Beginning the analysis with Social Services Law §460, the Court agrees with Defendant that the State has “the comprehensive responsibility for the development and administration of programs, standards, and methods of operation, and all other matters of state policy, with respect to residential care programs for children and adults and all facilities and agencies, whether public or private.” The Court is also in agreement that the State has authority to license and to grant operating certificates for homeless shelters, as well as the regulation of those operations, concerning such issues as capacity limits, qualifications, and number of staff, the reporting of incidents and injuries, fire and overall safety requirements, and bath, kitchen, and toilet facilities. However, the Court disagrees that the above licensing and regulating authority contained in the statute may be stretched to preclude a local government authority from requiring that a proposed facility comply with local use and zoning laws altogether. Article 7 of Social Services Law, while extremely comprehensive, does not make any such reference, nor can it be reasonably read to imply such authority.

Turning now to the caselaw relied upon by Defendant, the Court finds it equally unavailing. The DeStefano case is illustrative on the situation at bar, as that was an action commenced by residents of the City of Middletown to permanently enjoin the operations of the Westend Emergency Housing Group, defendant therein. The complaint in that case contained two causes of action; first, that defendant was violating the public nuisance law, and; second, that defendant had breached a municipal zoning ordinance by providing services that were not covered by its status as a shelter for adults. The City of Middletown was requiring defendant to obtain a special use permit for those activities.

The defendant in the DeStefano case was a not-for-profit corporation operating two buildings, providing primary care for alcoholics, counseling, and advice on job training and financial management. The two buildings operated by defendant were located on a large campus owned by New York State Dormitory Authority, but within the City of Middletown. Also located on the campus was the Middletown Psychiatric Center. Plaintiffs sought to shut down Defendant's operations, alleging that it had become a magnet for non-residents to move in to the City of Middletown and with a tendency for violence and instability, thus burdening the City's resources and posing a threat to public safety.

Following the dismissal of both causes of action, the Appellate Division, Second Department, affirmed the decision of the lower court. When considering the zoning issue raised by plaintiff, the court held that services being provided by the defendant were consistent with and ancillary to its approved function of being a shelter for adults and that the requirement of a special use permit by the City amount to an improper imposition of a condition on an adult home. DeStefano at 451, 38-39. Moreover, the regulation of an adult home was illegal because the regulation of such facilities had been pre-empted by the state, with the Appellate Division citing Matter of Adkins.

Here, the distinctions between the present matter and DeStefano are manifest. The adult care facility proposed at the Jericho location has no operating history at that location. The subject property which Defendant sought to have used by CHI is not State-owned property amongst a campus of other state-facilities one of which included a psychiatric hospital. The City's attempt to curtail the operations of an existing facility were clearly violative of both the spirit and purpose of the Social Services Law, whereas Plaintiff's current actions do not make such an endeavour.

This Court further finds that Defendant's reliance on the Appellate Division's findings in Adkins is likewise misplaced. This particular decision by the Second Department involved an appeal following a decision by the lower court on an Article 78 proceeding and is only two paragraphs in length, lacking a thorough analysis of the underlying situation that was before the trial court therein. In that matter, petitioner was operating a nursing home and had a special use permit to do so. The respondent, a local village, conditioned the renewal of the permit on the plaintiff removing all residents from the third floor of the home. The lower court found, and the Appellate Division affirmed, the finding that such regulation is pre-empted by the Statue under Social Services Law §460 and that, since the premises had been operating in compliance with the

applicable regulations, any restrictions by the village were impermissible at that point. By contrast, in the instant matter, Plaintiff is not seeking to establish regulations on the home after it has already been opened and operating; rather, it is requiring Defendant to apply for a use permit to establish said use is permissible before it opens its doors.

The third case relied upon by Defendant is City of New York v. Town of Blooming Grove. In that matter, petitioner sought to modify certain conditions contained in a special use permit that has been issued by the Town in 1981. The petitioner therein was the owner of Camp LaGuardia, which once contained a women's prison, but had served as a shelter for homeless men for decades, with minimal modification to the jail-like setup it once had. In 1980, the City sought to build two dormitory-type buildings on its property and applied for a special use permit to construct and use the buildings to house the homeless population. The respondent approved the special use permit, but placed several conditions on the permit, one which essentially limited the areas where the residents could occupy and another which required petitioner to screen prospective residents for potential behavior problems.

Later, in March of 2000, petitioner sought to modify the 1981 special permit conditions; in particular, the City sought to change the restrictions on the residents to conform with certain State regulations that allowed greater freedom of movement during reasonable hours. It also sought to change the screening requirement to adhere to State and Federal laws. These modifications to the application were denied by respondent, which then held that the property was being run in violation of the town zoning law and ordered the City to comply within thirty days. The lower court after a hearing found in favor of the Town-respondent, but on appeal, the Appellate Division reversed and granted the City's petition. The Second Department held that where the State has demonstrated its intent to pre-empt an entire field and thereby preclude any further local regulation, local laws regulating the same subject matter will be deemed inconsistent and not given effect. City of New York v. Town of Blooming Grove at 674, 242. The Appellate Division further held that the camp was comprehensively regulated by the State and local zoning authorities were therefore precluded from using zoning ordinances to permit requirements *to control the details of the shelter* (emphasis added). Id.

Once again, the situation before this Court is much different. There is not a shelter currently operating at the prospective Jericho location. Plaintiff is not attempting to control the



details of the potential shelter; rather, Plaintiff is seeking to determine in the first instance whether an adult residence is a permitted use under its building code.

Defendant herein emphasizes the contract process that it went through and the approvals it received along the way to support their position that it was understood by all those involved that only State approval, through NYS OTDA and NCDSS, were required to move forward with the proposed use of the subject property. However, the documents contained in the various moving papers do not buttress that argument. For example, the announcement and notice of application procedure issued by Nassau County, which Defendant clearly participated in, is not in conflict with Plaintiff's position. Section 1, entitled "Application Essentials," contains various subsections, including one with the heading "Site control", containing the following language: "Do you own, lease, or have other legal rights to occupy the proposed property? *Can the proposed property be lawfully occupied as a shelter, in accordance with all [New York State] and local laws and codes (emphasis added)?*" This very question anticipates that the applicant will need to comply with local laws and codes in order to proceed with its application and lawfully operate its facility as a shelter if accepted. Indeed, even the lease contract between Defendant and CHI states in Section 8.5, that the tenant is responsible for obtaining any and all permits, licenses, certificates, or other authorizations necessary or required in connection with the lawful and proper construction of any alterations and with the in connection with the use, occupancy, operation, and management of the premises.

Finally, the Memorandum of Understanding entered into by Defendant with Nassau County states in Section 3, subsection (b), "The provider represents that it owns, leases, or has other legal rights to occupy the above-named premises and that said premises *may be lawfully occupied as a shelter, in accordance with all local laws and codes*. Provider shall fill out and submit a 'Shelter Contact Information Form' for each shelter location (emphasis added)." Coinciding with this, 18 NYCRR §491.3, while relied upon by Defendant, also states that in submitting operational plans for a new facility, such plans must include "documents sufficient to show that the facility will be in *compliance with all State and local laws, regulations, and codes as specified in section 491.6 of this part (emphasis added)*." See 18 NYCRR §491.3(c)(1)(xvi).

Conclusion

Based upon the moving papers of Plaintiff and Defendant, this Court finds that Plaintiff has established by clear and convincing evidence that there is not any pre-emption by the State of New York that allows a property owner to convert a facility to a potential non-conforming use without local review and approval. While the Court certainly acknowledges the State's interest in insuring localities do not interfere with the day-to-day operations of such facilities as that proposed by Defendant, the Court finds that there is not any authority, either statutory or caselaw, in support of the proposition that this interest allows an operator to locate a facility anywhere it can obtain a contract to do so without even attempting to adhere to local zoning and use laws.

Thus, the Court is satisfied that Plaintiff has met its burden on the motion, having demonstrated a likelihood of success on the merits in requesting a preliminary injunction. *See Town of Riverhead v. Gezari*, 63 AD3d 1042, 881 NYS2d 172 (2<sup>nd</sup> Dept., 2009). Furthermore, the Court finds that maintaining the status quo is essential while the ultimate rights of the parties are determined. *See Shake Shack Fulton Street Brooklyn, LLC v. Allied Property Group LLC*, 177 AD3d 924, 112 NYS3d 196 (2<sup>nd</sup> Dept., 2019). Accordingly, the order to show cause is hereby granted, and the temporary restraining order put in place upon the signing of this order to show cause on August 7, 2020, shall remain in full force and effect until further order of this Court.

Plaintiff shall file and serve a copy of the within order with notice of entry upon Defendant within ten (10) days from the date of this order. Thereafter, the parties shall participate in preliminary conference virtually and shall complete and submit the required stipulation and order on or before November 19, 2020.

This hereby constitutes the decision and order of this Court.

DATED: September 21, 2020

ENTER



HON. ARTHUR M. DIAMOND

J.S.C.

**ENTERED**

**Sep 22 2020**

NASSAU COUNTY  
COUNTY CLERK'S OFFICE