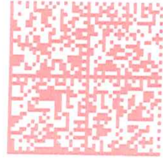
L. Michael Mackey
Supreme Court Justice
Albany County Courthouse, Room ~~38~~ 271
16 Eagle Street
Albany, New York 12207



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L. MICHAEL MACKEY
Justice of the Supreme Court

JUSTIN CORCORAN
Law Clerk
JULIA J. CANNIZZARO
Secretary

December 23, 2019

Thomas S. West, Esq.
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Re: The Landmark's Society of Greater Utica v Planning Board of the City of Utica
Index No. 2797-19

Dear Mr. West:

Enclosed please find original Decision and Order, for filing and service.

Very truly yours,

L. Michael Mackey
Supreme Court Justice

LMM: jjc

cc: Loretta Simon, Esq.
Assistant Attorney General
NYS Office of the Attorney General
The Capitol
Albany, New York 12224

Kathleen M. Bennett. Esq.
Bond, Schoeneck & King, PLLC
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Syracuse, New York 13202 (w/Enc.)

Kathryn Hartnett, Esq.
Assistant Corporation Counsel
City Hall,1 Kennedy Plaza, 2nd Floor
Utica, New York 13502

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of

DECISION and ORDER
Index # 02797-19

THE LANDMARKS SOCIETY OF GREATER UTICA, JOSEPH BOTTINI, #NOHOSPITALDOWNTOWN, BRETT B. TRUETT, JAMES BROCK, JR., FRANK MONTECALVO, JOSEPH CERINI, AND O'BRIEN PLUMBING AND HEATING SUPPLY, a Division of ROME PLUMBING AND HEATING SUPPLY CO. INC.,

Petitioners-Plaintiffs,

-against-

PLANNING BOARD OF THE CITY OF UTICA, NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION, ERIK KULLESEID, ACTING COMMISSIONER, DORMITORY AUTHORITY OF THE STATE OF NEW YORK AND MOHAWK VALLEY HEALTH SYSTEM,

Respondents-Defendants.

For a Judgment Pursuant to Article 78 and Section 3001 of the Civil Practice Law and Rules.

(Albany County Supreme Court, Article 78 Term)

(Justice L. Michael Mackey, Presiding)

APPEARANCES:

THE WEST FIRM
Attorneys for Petitioners-Plaintiffs
(Thomas S. West, Esq. and
Cindy M. Monaco, Esq., Of Counsel)
677 Broadway, 8th Floor
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(Loretta Simon, Esq., Assistant Attorney General)

Environmental Protection Bureau
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BOND, SCHOENECK & KING, PLLC
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Valley Health System
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Syracuse, New York 13202

WILLIAM M. BORRILL
Corporation Counsel
Attorneys for Respondent-Defendant Planning Board
of the City of Utica
(Kathryn Hartnett, Esq., Assistant Corporation Counsel)
City Hall
1 Kennedy Plaza, 2nd Floor
Utica, New York 13502

Mackey, J.:

Petitioners-plaintiffs ("petitioners") commenced this hybrid CPLR article 78 proceeding and declaratory judgment action ("proceeding") alleging, in five causes of action, a "short-circuiting" by respondents of statutory processes in connection with the construction of a proposed health care campus in downtown Utica, Oneida County (Verified Petition and Complaint, ¶2). The first two causes of action pertain to respondents New York State Office of Parks, Recreation and Historic Preservation (OPRHP) and Dormitory Authority of the State of New York's (DASNY) (hereinafter collectively referred to as the "State respondents") alleged violations of their duties under Parks, Recreation and Historic Preservation Law § 14.09 and its implementing regulations (*see* 9 NYCRR part 428). More specifically, petitioners seek a determination annulling and invalidating a Letter of Resolution the State respondents entered into

with respondent Mohawk Valley Health System (MVHS). The third, fourth, and fifth causes of action in the Petition and Complaint challenge the adequacy of the Planning Board's review under the State Environmental Quality Review Act (SEQRA) (*see* Environmental Conservation Law art 8; 6 NYCRR part 617). In an Amended Verified Petition and Complaint, petitioners added a sixth cause of action alleging that the Planning Board's Site Plan Approval of the project was invalid because of the failures alleged in the original Petition.

The State respondents move for an order pursuant to CPLR 103(c), 3211(a)(2), 3211(a)(7), 7801(1) and 7804(f): (1) converting this hybrid proceeding-action to a CPLR article 78 proceeding and (2) dismissing the first and second claims on the grounds that they are not ripe for judicial review and fail to state a cause of action. Similarly, MVHS moves to dismiss the petition pursuant to CPLR 3211(a)(1), (2), (7) and 7804(f). The Planning Board moves for an order dismissing the petition pursuant to CPLR 3211(a) and 7804(f). Finally, respondents move to dismiss the sixth cause of action on statute of limitations grounds. Other than converting the case to an Article 78 proceeding, petitioners oppose respondents' motions in their entirety.

Background

In 2017, MVHS was conditionally awarded a State grant of up to $300 million pursuant to the Oneida County Health Care Facility Transformation Program for development of a proposed integrated health center to be located in Oneida County (*see* Public Health Law § 2825-b).[1] The purpose of the grant is to develop a health care facility, parking garage and surface

[1] The conditional award letter states that it is not a final commitment to provide funds, but rather is evidence of the New York State Department of Health's intention to enter into a Master Grant Contract with MVHS provided certain conditions are satisfied.

parking to replace two existing inpatient hospitals. MVHS proposes to construct the health care facility on approximately 55 properties (80 tax map parcels), only some of which it owns.

At present, DASNY is assisting with management of the grant and *may* issue tax-exempt or taxable bonds to reimburse costs incurred by MVHS at a future date.[2] Projects financed with the proceeds of DASNY bonds must be reviewed in accordance with Parks, Recreation and Historic Preservation Law § 14.09, which requires consultation with OPRHP to determine if a project will have adverse impacts on historic resources. Here, Section 14.09 consultation commenced in September 2018 and the State respondents entered into a Letter of Resolution ("LOR"), together with MVHS, on January 10, 2019 (*see* Verified Petition and Complaint, Ex C). The LOR acknowledges that the proposed project will have an adverse impact on a number of buildings that are either listed on the State and National Registers of Historic Places, or eligible for listing, reflects feasible and practicable alternatives that have been explored, and sets forth a number of stipulations and mitigation measures to avoid, minimize or mitigate adverse impacts to historic and archaeological resources. The LOR also provides for ongoing consultation among the parties as the project evolves.

As to the coordinated SEQRA review of the project, the Planning Board of the City of Utica served as lead agency, identified the project as a Type I action and issued a positive declaration requiring the preparation of an environmental impact statement to assess potential adverse environmental impacts and to identify possible mitigation and/or alternatives to avoid or minimize those potential impacts. For its part, DASNY participated as a potentially involved agency. In October 2018, MVHS submitted a Draft Environmental Impact Statement (DEIS) to

[2] To date, however, DASNY has not approved or authorized financing for any portion of the project costs. Nor has MVHS requested DASNY financing.

the Planning Board. In March 2019, following a public hearing and a written public comment period, the Planning Board accepted MVHS's FEIS as accurate and adequate with respect to its scope and content. At its regular meeting on April 18, 2019, the Planning Board resolved to issue a written findings statement that found the proposed project in the downtown location is the alternative that best minimizes impact to the environment, while providing significant beneficial impacts in terms of revitalization, secondary economic growth and service to a population in need of healthcare. The Planning Board's written SEQRA findings were issued on April 30, 2019. In turn, DASNY issued its SEQRA findings on August 7, 2019. On September 19, 2019 the Planning Board granted Site Plan Approval for the project.

Analysis

Preliminarily, the Court must address the State respondents and MVHS's argument that petitioners' first cause of action, which seeks a declaratory judgment that the LOR is invalid, should be converted to a CPLR article 78 proceeding. Generally, "a declaratory judgment action is not the proper vehicle to challenge an administrative procedure, where judicial review by way of [an] article 78 proceeding is available" (*Matter of Fulton County Economic Dev. Corp. v New York State Auths. Budget Off.*, 100 AD3d 1335, 1335 [3d Dept 2012][internal quotation marks and citation omitted]). Upon reviewing the substance of petitioners' first cause of action, the Court finds that "the relationship out of which the claim arises and the relief sought" by petitioners is more appropriately reviewable in the context of a CPLR article 78 proceeding (*Solnick v Whalen*, 49 NY2d 224, 229 [1980]; *see Matter of Town of Olive v City of New York*, 63 AD3d 1416, 1418 [3d 2009]). Indeed, the essence of petitioners' challenge is directed at specific acts on the part of OPRHP and DASNY, not the constitutionality of the relevant statutes

or regulations (*see Matter of Aubin v State of New York*, 282 AD2d 919, 921-922 [3d Dept 2001], *lv denied* 97 NY2d 606 [2001]; *Matter of Sutherland v Glennon*, 221 AD2d 893, 894 [3d Dept 1995]). Further, the relief sought is annulment and invalidation of the LOR. Finally, counsel for petitioners stated at oral argument that he had no objection to converting the declaratory judgment portion of this hybrid case to a CPLR article 78 proceeding. Accordingly, the declaratory judgment portion of the case is converted to a CPLR article 78 proceeding.

Next, respondents assert that petitioners' claims must be dismissed on the ground that they are not ripe for review. "In order for an administrative decision to be ripe for judicial review in a CPLR article 78 proceeding, the challenged action must be final (*see* CPLR 7801[1]). An action is considered to be final when it represents a definitive position on an issue which imposes an obligation, denies a right or fixes some legal relationship, resulting in an actual, concrete injury. The harm suffered must not be amenable to further administrative review and corrective action. We have previously recognized that this rule is easier stated than applied." (*Matter of Guido v Town of Ulster Town Bd.*, 74 AD3d 1536, 1536-1537 [3d Dept 2010] [internal quotation marks and citations omitted]; *see Matter of Essex County v Zagata*, 91 NY2d 447, 453 [1998]).

The LOR herein is part of an ongoing consultation process pursuant to Section 14.09 regarding impacts the project will have on historic properties (*see* Verified Petition and Complaint, Ex C, at 2-3).[3] To this end, the LOR provides that the parties will undertake additional actions, such as further testing, a complete assessment of buildings owned by MVHS and those it does not currently own, and continue consulting as more properties are acquired and details about the buildings become known (*see id.*). DASNY has not yet issued bonds, or

[3] 9 NYCRR § 428.10 provides that the Section 14.09 consultation "should, if at all possible, culminate in the execution of a Letter of Resolution between the commissioner and the undertaking agency."

received a request for financing, nor has the New York State Department of Health issued a master grant contract. While petitioners argue that harm may occur at some future date should action be taken that impacts historic properties, the LOR itself does not inflict harm or authorize the destruction of any historic buildings. Moreover, the LOR is a voluntary agreement that may unilaterally be terminated by the undertaking agency (see 9 NYCRR 428.10[d]). Under the circumstances presented, the Court concludes that the LOR does not constitute the type of final agency action that would render this matter ripe for judicial review. Finally, because the LOR process is voluntary, in the opinion of the Court the alleged deficiencies in that process do not give rise to causes of action upon which relief may be granted. Accordingly, the State respondents' motion to dismiss the first and second causes of action is granted (see *Wegman v. Dairylea Coop.*, 50 A.D2d 108 [Fourth Dept 1975]).

The Court now turns to MVHS and the Planning Board's contention that the SEQRA determination is non-final and, therefore, not subject to review under CPLR article 78. In response to the initial petition MVHS and the Planning Board argued that petitioners' challenge to the SEQRA process was not ripe because the Planning Board had not yet granted site plan approval. That question need not be decided, however, because during the pendency of this proceeding the Planning Board granted site plan approval and petitioners amended their petition to reflect that change of circumstances. Thus, regardless of whether the SEQRA process became "final" when the FEIS was issued or when site plan approval was granted, clearly that issue is now ripe for review. Accordingly, the motion to dismiss the third, fourth and fifth causes of action is denied.

Lastly, the Court addresses respondents' motion to dismiss the sixth cause of action challenging the Planning Board's Site Plan Approval, which was issued on September 19, 2019 and filed with the Utica City Clerk the next day. General City Law 81-c provides that a proceeding to challenge a decision of a city board must be instituted within 30 days after the decision has been filed with the city clerk. Here, respondents move to dismiss the sixth cause of action because more than 30 days elapsed between filing of the Planning Board's Site Plan Approval and service and filing of the amended petition challenging the same. Petitioners oppose the motion and argue that the sixth cause of action should be deemed to "relate back" to the original petition because the sole basis for respondents' challenge to Site Plan Approval is the infirmities in the LOR and SEQRA procedures alleged in the original petition. CPLR 203(f) provides that a "claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." Although the original petition gave notice of the alleged deficiencies in the LOR and SEQRA procedures it did not give, and could not have given, notice that Site Plan Approval was being challenged since that had not yet occurred. Relating a challenge to Site Plan Approval back to a time before approval occurred would simply defy logic. Accordingly, the sixth cause of action cannot be deemed to relate back to the original petition and, because Site Plan Approval was not challenged within 30 days after it was filed with the Utica City Clerk, that cause of action must be dismissed.

Accordingly, it is hereby

ORDERED that the motion to convert the declaratory judgment portion of the case to an

Article 78 proceeding is **GRANTED**; and it is further

ORDERED and **ADJUDGED** that the State respondents' motion to dismiss the first and second causes of action is **GRANTED** and the proceeding is **DISMISSED** as against the State respondents; and it is further

ORDERED that the motion to dismiss the third, fourth, and fifth causes of action is **DENIED**; and it is further

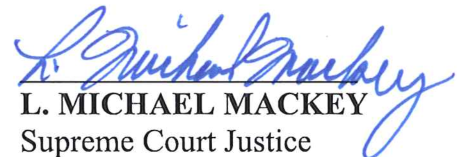
ORDERED and **ADJUDGED** that the motion to dismiss the sixth cause of action is **GRANTED**; and it is further

ORDERED that respondents Planning Board and MVHS shall answer the petition within 15 days after service of this Decision and Order with notice of entry; and it is further

ORDERED that respondent Planning Board shall file with the court a record of the proceedings below within 15 days after service of this Decision and Order with notice of entry.

ENTER.

Dated: December 23, 2019
Albany, New York



L. MICHAEL MACKEY
Supreme Court Justice

This memorandum constitutes the Decision and Order of the Court. The original Decision and Order is being forwarded to petitioners' counsel. A copy of the Decision and Order, together with all papers upon which it is granted is being forwarded to the Office of the Albany County Clerk for filing. The signing of this Decision and Order and delivery of a copy of same to the County Clerk shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule regarding filing entry and notice of entry.

Papers Considered:

1. Notice of Petition, dated May 8, 2019; Summons, dated May 8, 2019; Verified Petition

and Complaint, dated May 8, 2019, with annexed exhibits; Affidavit of Joseph Minicozzi, sworn to May 3, 2019, with annexed exhibit; Affidavit of Brett Truett, sworn to May 7, 2019; Affidavit of James G. Brock, Jr., sworn to May 7, 2019; Affidavit of Joseph Cerini, sworn to May 7, 2019; Affidavit of Steven Grant, sworn to May 7, 2019, with annexed exhibits; Affidavit of Frank Montecalvo, Esq., sworn to May 7, 2019, with annexed exhibits; Memorandum of Law of Petitioners-Plaintiffs, dated May 8, 2019;

2. Notice of Motion to Dismiss, dated June 12, 2019; Affirmation of Kathleen M. Bennett, Esq., dated June 12, 2019, with annexed exhibits; Respondent Mohawk Valley Health System's Memorandum of Law in Support of Motion to Dismiss Petitioners/Plaintiffs' Article 78 Petition/Declaratory Judgment Complaint, dated June 12, 2019;

3. Notice of Cross-Motion to Convert and Dismiss, dated June 12, 2019; Affidavit of John Bonafide, sworn toJune 7, 2019, with annexed exhibits; Affidavit of Robert S. Derico in Support of Motion to Dismiss, sworn to June 11, 2019; State Respondents' Memorandum of Law in Support of their Cross-Motion to Convert the Action and Dismiss, dated June 12, 2019;

4. Notice of Motion to Dismiss, dated June 12, 2019; Affidavit of Brian Thomas in Support of Motion to Dismiss, sworn to June 12, 2019; Affidavit of Kathryn Hartnett, Esq., sworn to June 12, 2019, with annexed exhibits;

5. Affidavit of Brett Truett, sworn to June 19, 2019, with annexed exhibits; Affirmation of Thomas S. West, Esq., dated June 20, 2019, with annexed exhibit; Petitioners-Plaintiffs Memorandum of Law in Opposition to Motion to Dismiss, dated June 19, 2019; Petitioners-Plaintiffs Sur-Reply Memorandum of Law dated June 25, 2019;

6. Affirmation of Kathleen M. Bennett, Esq. in Support of Motion to Dismiss, dated June 20, 2019; Respondent Mohawk Valley Health System's Memorandum of Law in Further Support of Motion to Dismiss Petitioners/Plaintiffs' Article 78 Petition/Declaratory Judgment Complaint, dated June 20, 2019;

7. Attorney General's Letter Brief in Reply to the State Respondents' Motion, dated June 20, 2019;

8. Reply Affidavit of Kathryn Hartnett, Esq. in Support of Motion to Dismiss, sworn to June 20, 2019;

9. Correspondence from AAG Loretta Simon addressed to Thomas S. West, dated August 14, 2019, with enclosed copy of the SEQRA Findings Statement issued by DASNY;

10. Affirmation of Thomas S. West dated October 30, 2019 the attached exhibit;

11. Amended Verified Petition and Complaint dated November 4, 2019, with

attached exhibits and letter brief of Thomas S. West dated November 4, 2019;

12. Notice of Motion to strike Amended Pleadings dated November 22, 2019, affirmation of Loretta Simon dated November 21, 2019, with attached exhibit, Memorandum of Law dated November 22, 2019;

13. Notice of Motion dated November 21, 2019 and affidavit of Kathryn Harnett dated November 21, 2019, with attached exhibit;

14. Notice of Motion to Dismiss dated November 21, 2019, Affirmation of Kathleen Bennett dated November 21, 2019, with attached exhibits, and Memorandum of Law dated November 21, 2019;

15. Letter brief of Thomas S. West dated November 26, 2019;

16. Reply affidavit of Kathryn Harnett dated December 11, 2019;

17. Affirmation of Kathleen Bennett dated December 11, 2019; and

18. Reply Affirmation of Loretta Simon dated December 12, 2019.