SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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

Petitioners-Plaintiffs,

For a Judgment pursuant to Article 78 and Section 3001 of the Civil Practice Laws and Rules,

-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.

AFFIRMATION OF KATHLEEN M. BENNETT, ESQ.

Index No.: 02797-19

Hon. Michael Mackey

Kathleen M. Bennett, an attorney duly admitted to practice law in the State of New York, affirms under penalty of perjury, pursuant to CPLR R. 2106, as follows:

1. I am a member of Bond, Schoeneck & King, PLLC, attorneys for Respondent Mohawk Valley Health System ("MVHS") in the above-captioned proceeding.

2. I have personally represented MVHS in connection with all phases of its ongoing project to construct a new Health Care Campus in the City of Utica (the "Project"), including the acquisition of property, environmental review, land use approvals, and the eminent domain process. As such, I am fully familiar with the facts, circumstances, and proceedings in this case, including the motion by Respondent Planning Board of the City of Utica (the "Planning Board")

to change venue from Albany County to Oneida County, and the cross-motion by Petitioners to retain venue in Albany County or, in the alternative, to transfer venue to Onondaga County.

3. I respectfully submit this affirmation in opposition to Petitioners' cross-motion inasmuch as it seeks an Order holding that venue for this proceeding is properly placed, and will be retained in Albany County.

4. Contrary to Petitioners' contentions, venue was improperly designated in Albany County in the first instance, and the Planning Board timely observed the procedural requisites set forth in CPLR R. 511 by serving a demand for change of the place of trial on the ground that the county designated for that purpose is improper prior to answering the Petition, which demand designated Oneida County as a proper venue for trial, and timely moving to change the place of trial within 15 days after service of the demand.

5. Accordingly, the Planning Board is entitled to an order granting its motion and changing of the place of trial to Oneida County, as a matter of right. CPLR R. 511(a)-(b); *see Agostino Antiques, Ltd. v. CGU-Am. Employers' Ins. Co.*, 6 A.D.3d 469, 470 (2d Dept. 2004); *Sellars v. Tubbs*, 171 A.D.2d 1025, 1025-26 (4th Dept. 1991); *Burstein v. Fazzari*, 239 A.D.2d 375, 375-76 (2d Dept. 1997); *Kearns v. Johnson*, 238 A.D.2d 121, 122 (1st Dept. 1997); *Franklin Traffic Serv., Inc. v. Helmer's Fuel & Trucking, Inc.*, 142 A.D.2d 936, 936 (4th Dept. 1988); *Kelson v. Nedicks Stores, Inc.*, 104 A.D.2d 315, 316 (1st Dept. 1984); *see also Lombardi Assocs. v. Champion Ambulette Serv.*, 270 A.D.2d 775, 776 (3d Dept. 2000); *Cruz v. Taino Constr. Corp.*, 38 A.D.3d 391, 392 (1st Dept. 2007); *Cooper v. Otis Elevator Co.*, 178 A.D.2d 575, 575 (2d Dept. 1991).

6. It is well settled that a plaintiff or petitioner "who selects an improper venue in the first instance forfeits the right to choose the place of venue." *Burstein*, 239 A.D.2d at 375-76;

accord Lombardi Assocs., 270 A.D.2d at 776 ("Having selected an improper county for venue in the first instance, plaintiff forfeited its right to designate the place of trial"); *Cooper*, 178 A.D.2d at 575 ("The plaintiffs . . . improperly designated venue of the instant action . . . thereby forfeiting their right to designate venue"); *Sellars*, 171 A.D.2d at 1025-26 ("Although plaintiffs had the right to select the place of venue in the first instance, they forfeited that right by choosing an improper county"); *Kelson*, 104 A.D.2d at 316 ("It is settled that a plaintiff will forfeit the right to select the place of venue by choosing an improper venue in the first instance").

7. It is equally well settled that, where the petitioner has forfeited the right to select the place of venue by designating an improper county in the first instance, and the respondent timely observes the procedural requisites set forth in CPLR R. 511 for demanding and thereafter moving to change the place of trial to a proper county, as specified by the respondent, the respondent is entitled to a change of venue as of right, and the motion is not subject to the discretion of the court. *Sellars*, 171 A.D.2d at 1025-26 ("Defendants became entitled to select the county of venue, having first served a demand for a change of venue (CPLR 511[a]) and thereafter moving to change venue (CPLR 511[b])"); *Burstein*, 239 A.D.2d at 375-76 ("[W]here the defendant . . . properly serves with his answer a demand for change of venue pursuant to CPLR 511 (b), and follows it up within 15 days with a motion to change venue to a proper county . . . the motion should be granted" [*internal citations omitted*]); *Kearns*, 238 A.D.2d at 122 (holding that Supreme Court erred in denying a motion for change of venue because the county initially designated was improper and the defendant "met the filing requirements of CPLR 511, which provides for a motion for transfer of venue as of right, where she served her demand contemporaneously with her answer and moved for transfer of venue within the 15 day period imposed by CPLR 511 (b)"); *Franklin Traffic Serv., Inc.*, 142 A.D.2d at 936 ("While plaintiff was

free to designate . . . the county of venue [pursuant to CPLR § 509], defendant, upon a motion timely made [pursuant to CPLR R. 511 (b)], was entitled to a change of venue as a matter of right"); *Kelson*, 104 A.D.2d at 316 (holding that Supreme Court abused its discretion in denying the defendant's motion to change venue where it was improperly designated by the plaintiff in the first instance and the defendant "fully complied with the statutory procedure for changing venue by serving a written demand with its answer and thereafter moving to change venue . . . within 15 days after service of the demand"); *accord Lombardi Assocs.*, 270 A.D.2d at 776; *Cruz*, 38 A.D.3d at 392; *Cooper*, 178 A.D.2d at 575.

I. ALBANY COUNTY IS NOT A PROPER VENUE FOR THIS PROCEEDING

8. Here, Petitioners improperly designated Albany County as the place of trial when they commenced this proceeding, and therefore forfeited their right to choose the place of trial. *See Lombardi Assocs.*, 270 A.D.2d at 776; *Burstein*, 239 A.D.2d at 375-76; *Cooper*, 178 A.D.2d at 575; *Sellars*, 171 A.D.2d at 1025-26; *Kelson*, 104 A.D.2d at 316.

9. Throughout their papers in opposition to the Planning Board's motion and in support of their cross-motion, Petitioners argue that venue was properly placed in Albany County at the time this proceeding was commenced based on the mandatory venue rule set forth in CPLR § 505(a), which provides that "[t]he place of trial of an action by or against a public authority constituted under the laws of the state shall be in the county in which the authority has its principal office or where it has facilities involved in the action." *See* Affirmation of Thomas S. West, dated January 28, 2020 ("West Affirmation"), ¶¶ 52, 61, 65, 72, 75, 84, 93.

10. Specifically, Petitioners assert that CPLR § 505(a) was applicable to this proceeding at the time of commencement because they asserted declaratory judgment claims as

against the Dormitory Authority of the State of New York ("DASNY"), a public authority having its principal office in Albany County. West Affirmation, ¶¶ 52, 61, 65, 72, 75, 84, 93.

11. For a number of reasons, as discussed fully below, Petitioners' contentions that CPLR § 505(a) applies to this proceeding and that venue is proper in Albany County are plainly false, lacking in merit, and have already been implicitly rejected by this Court.

A. CPLR § 505(a) is Inapplicable to this CPLR Article 78 Proceeding

12. Initially, as this Court held in its Decision and Order executed on December 23, 2019 and entered on December 26, 2019, a true and correct copy of which is attached as **Exhibit A** for the Court's ease of reference (the "Decision & Order"), Petitioners' claims against DASNY were improperly brought as declaratory judgment claims in the first instance, because "'a declaratory judgment is not the proper vehicle to challenge an administrative procedure, where judicial review by way of [an] article 78 proceeding is available.'" Ex. A, at 5 (*alteration in the original*) (quoting *Matter of Fulton County Economic Dev. Corp. v. New York State Auths. Budget Off.*, 100 A.D.3d 1335, 1335 [3d Dept. 2012]).

13. In connection with the motions of MVHS, DASNY, and Respondent New York State Office of Parks, Recreation and Historic Preservation ("OPRHP" and, together with DASNY, the "State Respondents") that sought conversion of Petitioners' hybrid proceeding-action to a CPLR article 78 proceeding, this Court reviewed the substance of Petitioners' first cause of action against DASNY, including "'the relationship out of which the claim [arose] and the relief sought' by petitioners." Ex. A, at 5 (quoting *Solnick v. Whalen*, 49 N.Y.2d 224, 229 [1980]); *see also Matter of Town of Olive v. City of New York*, 63 A.D.3d 1416, 1418 (3d Dept. 2009). The Court concluded that Petitioners' declaratory judgment claims against the State

Respondents were "more appropriately reviewable in the context of a CPLR article 78 proceeding," and converted the entire case to an article 78 proceeding. Ex. A, at 5-6.

14. CPLR § 505(a) only governs the "place of trial of an *action* by or against a public authority" – *not* the venue of a special proceeding, which is governed by CPLR §§ 506(b) and 7804(b). CPLR § 505(a) (*emphasis added*); *see also Cohen v. Dep't of Soc. Servs.*, 37 A.D.2d 626 (2d Dept. 1971) (holding that the action should have been commenced as a CPLR article 78 proceeding, and transferring the case to a proper venue pursuant to CPLR § 506[b]), *aff'd* 30 N.Y.2d 571 (1972); *Melvin v. Union Coll.*, 195 A.D.2d 447, 448 (2d Dept. 1993) (holding that "the Supreme Court properly converted the appellant's action to a proceeding pursuant to CPLR article 78" and transferred the proceeding to proper venue under CPLR §§ 506[b] and 7804[b]); *Purcell v. Metro. Transp. Auth.*, 127 A.D.2d 827, 827 (2d Dept. 1987); *Bd. of Educ. of Cent. High Sch. Dist. No. 2 v. Allen*, 25 A.D.2d 659, 660 (2d Dept. 1966) (holding that "the actions should be treated as special proceedings under article 78 of the CPLR and transferred to the Supreme Court, Albany County" pursuant to CPLR § 506[b]); *Molinari v. Triborough Bridge & Tunnel Auth.*, 146 Misc. 2d 580, 582 (Sup. Ct. New York County 1990) (noting that, if the court were to convert the actions into article 78 proceedings as requested the defendant, CPLR § 506[b] would be the applicable venue provision, rather than CPLR § 505[a]).

15. Accordingly, in light of this Court's holding that the declaratory judgment claims against DASNY should have been brought in a special proceeding pursuant to CPLR article 78, rather than as declaratory judgment claims in a plenary action (Ex. A, at 5-6), CPLR § 505(a) – the venue provision upon which Petitioners rely to support their contention that venue is proper in Albany County (West Affirmation, ¶¶ 52, 61, 65, 72, 75, 84, 93) – is inapplicable on its face.

16. Notably, Petitioners argue strenuously in opposition to the Planning Board's motion for change of the place of trial that CPLR § 504 is not applicable to their claims challenging Respondents' environmental review under the State Environmental Quality Review Act ("SEQRA") because "the SEQRA claims are Article 78 claims" and "venue as to those claims is governed by CPLR 7804(b) and CPLR 506(b), not CPLR 504." West Affirmation, ¶ 69; *see also id.* at ¶¶ 74, 78. However, Petitioners apparently fail to recognize that their own argument applies equally to CPLR § 505(a). That is, because this Court already determined that the *entire case* should have been brought as a special proceeding under article 78 of the CPLR (Ex. A, at 5-6), CPLR §§ 506(b) and 7804(b) – and not CPLR § 505(a) – are the applicable venue provisions, even as to Petitioners' claims against DASNY.

17. Indeed, later on in their own papers, Petitioners argue that, because this Court converted Petitioners' entire hybrid proceeding-action "to a straight Article 78 proceeding . . . . the Planning Board's reliance on procedural provisions involving plenary actions . . . should not be countenanced." West Affirmation, ¶ 87.

18. Petitioners should not be heard to make and rely upon this argument against the Planning Board, and then talk out of the other side of their mouths and disregard the principles they espouse when it suits them. Applying Petitioners' own logic, because this Court held that this entire case should have been brought as a CPLR article 78 proceeding from the outset and converted it to such on the motions of MVHS and the State Respondents, "[Petitioners'] reliance on procedural provisions involving plenary actions" – that is, CPLR § 505(a) – "should not be countenanced." West Affirmation, ¶ 87.

B. Provisions Governing the Proper Venue for Actions Against DASNY are Irrelevant Because DASNY is Not a Party to this Proceeding

19. Moreover, in its prior Decision & Order, this Court aptly held that Petitioners had no valid, actionable claims against DASNY at the time this proceeding was commenced, and therefore dismissed the claims asserted against DASNY on ripeness grounds and for failure to state causes of action upon which relief may be granted. *See* Ex. A, at 6-7.

20. Because DASNY was not properly named as a party to this proceeding at the time of commencement, is not now a party to this proceeding, and – absent further Order of this Court reversing its own Decision & Order – will not be a party to this proceeding going forward, Petitioners' reliance on the location of DASNY's principal office to support their argument that venue is proper in Albany County pursuant to CPLR § 505(a) is woefully misplaced.

21. Petitioners attempt to avoid the consequences of this Court's Decision & Order by asserting that DASNY and the other State Respondents "remain parties to these proceedings pending [the Court's] decision on the Petitioners' motion for reargument/renewal." West Affirmation, ¶ 42; *see also id.* at ¶¶ 23, 75. However, contrary to their assertions, Petitioners' filing of a motion to renew and reargue the State Respondents' motion to dismiss in no way invalidates or overrides this Court's Decision & Order dismissing the State Respondents from this proceeding, nor does it stay the effect of that Decision & Order.

22. Quite plainly, the State Respondents – including DASNY – do not "remain parties" to this proceeding "pending" the Court's decision on Petitioners' motion, as Petitioners contend (West Affirmation, ¶ 42); to the contrary, the State Respondents remain *non-parties* to this proceeding, *pursuant to* this Court's Decision & Order granting their motion to dismiss (Ex. A,

at 6-7), unless and until this Court reverses or modifies that Decision & Order and issues a new Order providing otherwise.

23. Accordingly, inasmuch as Petitioners now purport to rely on their improper assertion of invalid declaratory judgment claims against DASNY as the basis for their contention that venue was properly placed in Albany County at the time of commencement, their argument flagrantly disregards and flies in the face of this Court's prior Decision & Order, and should thus be rejected in its entirety.

C. Even if CPLR § 505(a) Applied to this Proceeding, Oneida County Would be the Proper Venue for Trial

24. Finally, even assuming, *arguendo*, that Petitioners had asserted valid declaratory judgment claims against DASNY in this case, and this Court had determined the case should be styled as a plenary action rather than an article 78 proceeding – such that CPLR § 505(a) was, in fact, an applicable venue provision – Oneida County would be the proper venue for trial, because CPLR § 505(a) provides that the trial of an action by or against a public authority is proper in *either* "the county in which the authority has its principal office *or* where it has facilities involved in the action." CPLR § 505(a).

25. As set forth in the Affirmation of Kathryn Hartnett, assistant corporation counsel for the Planning Board, dated January 21, 2020, with exhibits annexed thereto ("Hartnett Affirmation"), Oneida County is the location of the "facilities involved" in the case – that is, the new Health Care Campus that MVHS seeks to construct in the City of Utica, which Project underlies all of Petitioners' claims in this case. Hartnett Affirmation, ¶¶ 24-25.

26. Accordingly, even if CPLR § 505(a) were applicable here, venue would be more properly be placed in Oneida County, where the "facilities involved" in the case are located, than

in Albany County, which is merely the county in which DASNY has its principal office, and is otherwise unconnected with and unaffected by the subject matter of this case. *See Initiative for Competitive Energy v. Long Island Power Auth.*, 178 Misc. 2d 979, 988 (Sup. Ct. Suffolk County 1998); *Molinari*, 146 Misc. 2d at 582 (holding that the defendant's decision to raise tolls would most directly affect the residents of the county where the increased tolls would be paid and venue was therefore properly laid in that county because that was where the "facilities involved" in the action were located, rather than the county where the defendant had its principal office).

27. In *Initiative for Competitive Energy*, the plaintiffs brought a declaratory judgment action seeking to enjoin the defendant public authority's acquisition of an electric company's retail electric operations and transmission and distribution facilities, including an electric generating plant, through a stock acquisition that would be financed through the issuance and sale of bonds. *Initiative for Competitive Energy*, 178 Misc. 2d at 984-85. Although the electric generating plant had not yet been acquired by the defendant power authority when the action was commenced, nor when the court was considering the defendant's motion to change venue to the county where its principal office was located, the court nonetheless found that the electric generating plant constituted the public authority's "facilities involved in the action," within the meaning of CPLR § 505(a). *Id.* at 988. Indeed, the court expressly cited CPLR § 505(a) as the basis for its holding that, "[a]lthough [the public authority's] principal office is in Nassau County, venue in Suffolk County is proper since facilities involved in this action, principally the [electric generating] plant, are located in Suffolk County." *Id.*

28. Likewise, here, even if DASNY was a party to this case and the case was deemed to be a plenary action rather than a special proceeding, venue would be properly placed in Oneida

County, where DASNY's "facilities involved in the action" are located. CPLR § 505(a); *see Initiative for Competitive Energy*, 178 Misc. 2d at 988; *Molinari*, 146 Misc. 2d at 582.

29. To the extent Petitioners attempt to argue that the new Health Care Campus to be constructed in the City of Utica does not constitute DASNY's "facilities involved" in this case because the Project has not yet been completed or financed by DASNY (West Affirmation, ¶ 64), their argument is based on a hyper-technical and illogical reading of CPLR § 505(a). *See Bourne v. Long Island R.R. Co.*, 158 Misc. 2d 213, 214-15 (Sup. Ct. Nassau County 1993) ("To limit the phrase 'where it has facilities' in CPLR 505 (a) to mean that the public authority must own the facility would be construing the language of the statute too narrowly").

30. Moreover, the interpretation of the "facilities involved" language in CPLR § 505(a) urged by Petitioners ignores the practical realities of this case and would lead to absurd results: if the new Health Care Campus that is the subject of this litigation does not constitute DASNY's "facilities involved in the action" for purposes of CPLR § 505(a), as Petitioners contend, then Petitioners have no valid, actionable claims against DASNY, and their motion for reargument and/or renewal is wholly lacking in merit – indeed, it is precisely *because* "DASNY has not yet issued bonds, or received a request for financing" that Petitioners' claims against DASNY were dismissed on ripeness grounds in the first instance (*see* Ex. A, at 6-7). Petitioners cannot have their proverbial cake and eat it too.

31. For each of the reasons set forth above, Petitioners improperly designated Albany County as the place of trial in the first instance, and thereby waived its right to select the venue for this proceeding. *See Lombardi Assocs.*, 270 A.D.2d at 776; *Burstein*, 239 A.D.2d at 375-76; *Cooper*, 178 A.D.2d at 575; *Sellars*, 171 A.D.2d at 1025-26; *Kelson*, 104 A.D.2d at 316.

II. ONEIDA COUNTY IS THE ONLY PROPER VENUE FOR THIS PROCEEDING

32. As the Planning Board demonstrated in support of its motion for change of the place of trial, the only proper venue for any action or special proceeding against the City of Utica Planning Board is Oneida County, pursuant to the mandatory rule proscribed by section 242 of the Second Class Cities Law. Hartnett Affirmation, ¶¶ 30-31.

33. This provision of the law states, in relevant part, that with respect to a city of the second class such as the City of Utica, "[t]he place of trial of *all* actions *and proceedings* against the city, or any of its officers, *boards* or departments *shall* be the county in which the city is situated." Second Class Cities Law § 242 (*emphasis added*).

A. There is No Conflict Between Applicable Venue Provisions

34. In addition to being mandatory as to the Planning Board under the specific rule set forth in section 242 of the Second Class Cities Law, venue is also proper in Oneida County under the more general venue provisions applicable to this proceeding, CPLR §§ 506(b) and 7804(b). Hartnett Affirmation, ¶¶ 27-28, 30-35; *Matter of Zelazny Family Enters., LLC v. Town of Shelby*, No. 871 CA 19-00028, 2019 NY Slip Op 09124, 2019 N.Y. App. Div. LEXIS 9273, *3-*5 (4th Dept. Dec. 20, 2019); *see also* West Affirmation, ¶ 76.

35. Indeed, that venue would be proper in Oneida County under CPLR § 506(b) is undisputed. Petitioners expressly concede that "venue would have been (and would be) proper in any county in the 5th Judicial District," including but not limited to Oneida County, under CPLR § 506(b). West Affirmation, ¶ 76.

36. Because Oneida County is a proper venue for trial under Second Class Cities Law § 242 and CPLR §§ 506(b) and 7804(b), there is no conflict between the various venue provisions applicable to this proceeding. As such, the Court must read the applicable venue

provisions together and transfer this proceeding to Oneida County, the only venue that is proper under all of the pertinent statutory provisions. *See Zelazny Family Enters., LLC*, 2019 N.Y. App. Div. LEXIS 9273 at *4 ("[I]n the absence of an irreconcilable conflict, statutory provisions are to be read together whenever possible"); McKinney's Cons Laws of NY, Book 1, Statutes § 391.

37. Notably, as discussed fully in section I(C), above, Oneida County would also be a proper venue for trial of any claims validly asserted against DASNY, as the county where DASNY's "facilities involved" in this case are located. *See* CPLR § 505(a). Thus, no conflict would exist between mandatory venue provisions here even if CPLR § 505(a) were applicable, as Petitioners contend. Accordingly, even if this Court should deem CPLR § 505(a) to be applicable, it must read that venue provision together with Second Class Cities Law § 242 and transfer this proceeding to Oneida County, the only venue that is proper under both provisions. *See Zelazny Family Enters., LLC*, 2019 N.Y. App. Div. LEXIS 9273 at *4; McKinney's Cons Laws of NY, Book 1, Statutes § 391.

B. Even if a Conflict Existed, Second Class Cities Law § 242 Would Govern

38. Even assuming, *arguendo*, that a conflict did exist between applicable venue provisions in this proceeding, the specific rule set forth in Second Class Cities Law § 242 would govern, and Oneida County would be the only proper venue for trial.

39. Established rules of statutory construction mandate that general venue provisions, such as those set forth in CPLR §§ 504(2) and 506, "must yield" to a more specific rule, such as that proscribed by Second Class Cities Law § 242, if there is a conflict between the general and the specific. *Zelazny Family Enters., LLC*, 2019 N.Y. App. Div. LEXIS 9273 at *5 (citing McKinney's Cons Laws of NY, Book 1, Statutes § 397); *accord Velez v. Port Auth. of New York & New Jersey*, 111 A.D.3d 449, 450 (1st Dept. 2013) ("Where . . . a special statute . . . is in

conflict with a general act covering the same subject matter . . . the special statute 'controls the case and repeals the general statute insofar as the special act applies'").

40. Thus, even if there were a conflict between the general and the specific venue provisions applicable to this proceeding – the former being CPLR §§506(b) and 7804(b), and the latter being Second Class Cities Law § 242 – the specific rule set forth in section 242 of the Second Class Cities Law would necessarily govern, and venue would be properly placed in Oneida County. Second Class Cities Law § 242; *Zelazny Family Enters., LLC*, 2019 N.Y. App. Div. LEXIS 9273 at *3-*5.

41. In their papers opposing the Planning Board's motion for change of the place of trial and in support of their cross-motion to retain venue in Albany County, Petitioners have set forth a number of arguments attempting to demonstrate that Second Class Cities Law § 242 is inapplicable to this proceeding, and that Oneida County is not a proper – or at least not the *only* proper – venue for trial of this proceeding. However, as discussed below, Petitioners' arguments are unavailing and must be rejected.

C. Petitioners Failed to Demonstrate that Second Class Cities Law § 242 is Inapplicable

42. Initially, Petitioners assert that Second Class Cities Law § 242 is "inapt" here because "the claims at issue . . . are asserted against the Planning Board, not the 'City.'" West Affirmation, ¶ 74; *see also id.* at ¶ 85 (attempting to distinguish *Zelazny Family Enters., LLC* on the ground that the respondents in that case were a Town and a Town Board). This argument is patently frivolous, inasmuch as it is belied by the language of the law itself, on its face.

43. Section 242 of the Second Class Cities Law expressly states that it is applicable to "all actions and proceedings" brought, not only against a city of the second class, but also against "any of its officers, *boards* or departments." Second Class Cities Law § 242 (*emphasis added*).

Quite plainly, the Planning Board is a "board" of the City of Utica, and Second Class Cities Law § 242 is therefore expressly applicable to the Planning Board.

44. Furthermore, Petitioners' discussion of the "distinction between administrative bodies/actions and legislative bodies/actions" (West Affirmation, ¶ 78) is utterly irrelevant to the motion and cross-motion presently before the Court and has no bearing whatsoever on the applicability of Second Class Cities Law § 242.

45. Although Petitioners fail to make their point directly, the implication of this discussion appears to be that Second Class Cities Law § 242 is applicable only to litigation involving legislative bodies and functions of the City of Utica, and not to litigation involving an administrative body, such as the Planning Board, performing an administrative function, such as conducting an environmental review pursuant to SEQRA. *See* West Affirmation, ¶ 78; *see also id.* at ¶ 85 (attempting to distinguish *Zelazny Family Enters., LLC* on the ground that each of the respondents was a "legislative body, not an administrative body" and the case "included a challenge to the [respondent's] legislative act").

46. However, for purposes of the motion and cross-motion now pending before this Court, the distinction Petitioners draw "between administrative bodies/actions and legislative bodies/actions" (West Affirmation, ¶ 78) is one without a difference. Nothing in section 242 of the Second Class Cities Law limits its applicability to the "legislative bodies/actions" of a city to which that law applies. To the contrary, section 242 expressly states that it is applicable to the "boards" of a city of the second class, without qualification and notwithstanding that such "boards" may properly be classified as "administrative bodies" performing "administrative actions." Second Class Cities Law § 242.

47. Similarly, it is irrelevant that, as Petitioners note, "only SEQRA claims" are asserted against the Planning Board (*see* West Affirmation, ¶ 78). As discussed above, there is no conflict in this case between the general venue provisions applicable to SEQRA proceedings – CPLR §§ 506(b) and 7804(b) – and the more specific provision set forth at section 242 of the Second Class Cities Law, inasmuch as venue is proper in Oneida County under any of these provisions. Hartnett Affirmation, ¶¶ 27-28, 30-35; *Zelazny Family Enters., LLC*, 2019 N.Y. App. Div. LEXIS 9273 at *3-*5. And, even if a conflict did exist, the more specific provision included Second Class Cities Law § 242 would necessarily prevail over the more general provisions in CPLR §§ 506(b) and 7804(b). *See Zelazny Family Enters., LLC*, 2019 N.Y. App. Div. LEXIS 9273 at *5 (citing McKinney's Cons Laws of NY, Book 1, Statutes § 397); *accord Velez*, 111 A.D.3d at 450.

48. Additionally, Petitioners spill considerable ink attempting to distinguish the Appellate Division, Fourth Department's recent decision in *Zelazny Family Enters., LLC* from this proceeding, in furtherance of their broader endeavor to avoid the mandate of Second Class Cities Law § 242. *See* West Affirmation, ¶¶ 77, 79-92. However, their efforts fall far short of the mark.

49. Petitioners first attempt to distinguish *Zelazny Family Enters., LLC* by arguing that "[u]nlike the case at hand, *Zelazny* did not involve a diverse-defendant situation to which different 'mandatory' venue provisions having the very same 'shall' language applied (i.e., CPLR 505[a] applicable to DASNY). Therefore, the conflict of different venue provisions (mandatory or otherwise) pertaining to different defendants was not before the *Zelazny* court." West Affirmation, ¶ 84. According to Petitioners, in light of the alleged "conflict" between the mandatory venue provisions of CPLR § 505(a) and Second Class Cities Law § 242 in this

proceeding, the "court is empowered to select among them (*see* CPLR 502) *and* consider discretionary grounds for changing venue." West Affirmation, ¶ 79.

50. However, for all the reasons discussed in section I, above, CPLR § 505(a) is not now, and never has been, properly applicable to this proceeding. As such, contrary to Petitioners' contention, this proceeding – like *Zelazny Family Enters, LLC* – does "not involve a diverse-defendant situation to which different 'mandatory' venue provisions having the very same 'shall' language appl[y]." *See* West Affirmation, ¶ 84.

51. In addition, even if CPLR § 505(a) were applicable here, it would not be in conflict with Second Class Cities Law § 242, because Oneida County is a proper venue for trial under both provisions. As discussed in section I(C), above, CPLR § 505(a) provides that an action against a public authority may be maintained in the county "where it has facilities involved in the action" – here, Oneida County. Hartnett Affirmation, ¶¶ 24-25. Accordingly, Petitioners' attempt to distinguish *Zelazny Family Enters., LLC* and avoid the application of Second Class Cities Law § 242 to this proceeding based on the existence of a purported "conflict" between that provision and CPLR § 505(a) must be rejected.

52. Because there is no conflict between "mandatory" venue provisions applicable to this proceeding, CPLR § 502 – which provides that "[w]here, because of joinder of claims or parties, there is a conflict of provisions under this article, the court, upon motion, shall order as the place of trial one proper under this article as to at least one of the parties or claims" – is inapposite here. Likewise, none of the case law that Petitioners cite for the proposition that "in the face of conflicting venue provisions, the court has discretion to choose among them and consider other factors and discretionary grounds for retention or change of venue" (West Affirmation, ¶ 84; *see also id.* at ¶¶ 73, 79) is relevant or applicable here.

53. To the extent Petitioners attempt to distinguish *Zelazny Family Enters, LLC* on the ground that each of the respondents was a "legislative body, not an administrative body" and the case "included a challenge to the [respondent's] legislative act," whereas here, "Petitioners did not sue the City of Utica, its Common Council or its officers – rather, Petitioners sued a body, the Planning Board, seeking Article 78 relief premised on three SEQRA claims" (West Affirmation, ¶ 85), they again draw a distinction that is without a difference for purposes of the venue motions before this Court.

54. Again, section 242 of the Second Class Cities Law expressly applies to "*all* actions and proceedings against the city, or any of its officers, *boards* or departments," regardless of whether the action or proceeding is against a "legislative body" or an "administrative body," or whether it arises out of a "legislative act" or an "administrative act." Second Class Cities Law § 242 (*emphasis added*).

55. The cases cited by Petitioners do not say anything to the contrary – in fact, they say nothing *at all* regarding the "legislative" versus "administrative" distinction that Petitioners attempt to draw, nor about the scope or application of section 242 of the Second Class Cities Law. *See* West Affirmation, ¶ 85 (citing *Int'l Summit Equities Corp. v. Van Schoor*, 166 A.D.2d 531, 532 [2d Dept. 1990]; *Weber v. Lacey*, 281 A.D. 290 [4th Dept. 1953]).

56. Petitioners also argue that *Zelazny Family Enters, LLC* is distinguishable from this proceeding because it involved a "combined '*action and proceeding*'" in which "the entirety of the action/proceeding was against the Town, not split among other defendants." West Affirmation, ¶ 86. Petitioners contrast those circumstances with this proceeding by asserting that, here, the "action portion pertain[s] to the State Respondents and the only claims for relief against the Planning Board [are] Article 78 claims." *Id.*

57. Aside from the obvious infirmity of failing to offer any explanation as to why this distinction actually *matters* for purposes of the motions presently before the Court, Petitioners' "argument" also completely ignores and disregards this Court's prior Decision & Order, which held that there is no "action portion" of this proceeding, and there are no claims at all "pertaining to the State Respondents," who have been dismissed from the case and are no longer parties. Ex. A, at 5-7.

58. Next, Petitioners assert that *Zelazny Family Enters, LLC* is distinguishable from this proceeding because the respondents there "did not seek conversion to a straight Article 78 proceeding, as the Planning Board did here, and, thereafter, seek a change of venue." West Affirmation, ¶ 87. Petitioners contend that, "[h]aving obtained the requested relief, the Planning Board's reliance on procedural provisions involving plenary actions or 'actions and proceedings' should not be countenanced" (*id.*) and "the Planning Board should be found to have waived reliance on application of [Second Class Cities Law § 242]" (*id.* at ¶ 88).

59. In this regard, Petitioners' argument appears to be based on a faulty premise: that the "actions and proceedings" language in section 242 of the Second Class Cities Law is intended to *limit* the application of that provision to *only* those cases that involve a hybrid "action and proceeding." *See* West Affirmation, ¶¶ 87-88; *see also id.* at ¶ 82. Petitioners' contention appears to be that, because the Court converted this case to a CPLR article 78 proceeding on the motions of MVHS and the State Respondents, it is no longer a hybrid "action and proceeding" and Second Class Cities Law § 242 – which applies only to hybrid action/proceedings – is no longer applicable.

60. Petitioners' strained interpretation of Second Class Cities Law § 242 is not supported by its language or the Fourth Department's decision in *Zelazny Family Enters, LLC.*

The term "all actions and proceedings" is properly read in the disjunctive, to refer to "all actions" and "all . . . proceedings." Second Class Cities Law § 242. Had the legislature intended that the law would apply only to "all hybrid action/proceedings" instead, it could have done so expressly, and we must presume it would have done so had that been its intention.

61. In *Zelazny Family Enters., LLC*, the Fourth Department found that neither CPLR § 504, which is applicable only to "actions," nor CPLR § 506, which applies only to "proceedings," was directly applicable to the "hybrid CPLR article 78 proceeding and declaratory judgment action" at issue in that case. *Zelazny Family Enters., LLC*, 2019 N.Y. App. Div. LEXIS 9273 at *5. However, the court found that Town Law § 66, which provided that "[t]he place of trial of all actions and proceedings against a town or any of its officers or boards shall be the county in which the town is situated" (*id.* at *4), applied to both actions *and* proceedings, and was therefore more directly applicable to the hybrid action/proceeding at issue there than CPLR §§ 504 and 506.

62. That the "actions and proceedings" language rendered Town Law § 66 the venue provision most directly applicable to a hybrid action/proceeding in *Zelazny Family Enters., LLC* in no way means that the applicability of that provision is *limited* to hybrid action/proceedings. Nor does the corresponding language in section 242 of the Second Class Cities Law limit the applicability of that provision to hybrid action/proceedings.

63. By its terms, section 242 of the Second Class Cities Law is applicable to "all . . . *proceedings* against the city, or any of its officers, *boards* or departments," including the proceeding presently before this Court. Second Class Cities Law § 242 (*emphasis added*). To the extent Petitioners urge a contrary interpretation of this provision, their arguments are baseless.

64. Although Petitioners then go on to critique the Fourth Department's holding in *Zelazny Family Enters., LLC* (*see* West Affirmation, ¶¶ 90-91), arguing, *inter alia*, that it is "inconsistent with longstanding precedent . . . and scholarly analysis opining that in a combined action-proceeding, 'the respective claims [are] treated separately in light of the procedural and substantive provisions applicable to each" (*id.*. at ¶ 91), such arguments are irrelevant to this case, which is not a "combined action-proceeding." Thus, these arguments need not be addressed by Respondents or the Court on the pending motion and cross-motion.

65. Second Class Cities Law § 242 is the only mandatory venue provision applicable to this proceeding, and it places the proper venue for trial squarely in Oneida County. The other venue provisions applicable to this article 78 proceeding, CPLR §§ 506(b) and 7804(b), likewise provide that venue may properly be laid in Oneida County. Because there is no conflict between applicable mandatory venue provisions here, the condition precedent to the Court's exercise of discretion to choose between two conflicting venue provisions (*see* CPLR § 502) has not been satisfied. Accordingly, Oneida County is the only proper venue for this proceeding.

III. THE CITY OF UTICA PLANNING BOARD'S DEMAND AND MOTION FOR CHANGE OF THE PLACE OF TRIAL WERE TIMELY

66. CPLR R. 511 plainly provides that a demand for change of the place of trial on the ground that the county designated is improper is timely where it is served "with the answer or before the answer is served." CPLR R. 511(a).

67. The Planning Board has not yet served an answer to the Petition in this proceeding, nor has its time to do so expired. Hartnett Affirmation, ¶ 3. Pursuant to the Scheduling Order decreed by this Court during the conference conducted on January 21, 2020 and executed on

January 22, 2020, the remaining Respondents, including the Planning Board, have until February 14, 2020 to answer the Petition.

68. Accordingly, the demand for change of the place of trial that the City of Utica Planning Board served on December 31, 2019 (Hartnett Affirmation, ¶ 13, Ex. C), was timely served "before the answer." CPLR R. 511(a). *Agostino Antiques, Ltd.*, 6 A.D.3d at 470 ("[The plaintiff's] choice of venue was improper, and accordingly, the plaintiff forfeited its right to select the venue of this action. Thereafter, when the defendant . . . properly served with its answer a demand for change of venue pursuant to CPLR 511 (b) followed by a motion to change venue to a proper county pursuant to CPLR 503 (a), 510, and 511, the motion should have been granted" [*internal citations omitted*]).

69. The case law makes clear that the timeliness requirement of CPLR R. 511(a) is to be interpreted literally: a demand served with or before the respondent's answer is timely. This is true regardless of whether the respondent's time to answer was extended, whether the respondent engaged in motion practice prior to answering, or whether the respondent removed the case to federal court and it was remitted back to state court prior to answering and serving a demand for change of place of trial. *Zelazny Family Enters., LLC*, 2019 N.Y. App. Div. LEXIS 9273 at *6-*7; *Am. Tax Funding, LLC v. Druckman Law Group PLLC*, 175 A.D.3d 1055, 1055 (4th Dept. 2019); *N. County Communications Corp. v. Verizon New York, Inc.*, 196 Misc. 2d 149, 151-153 (Sup. Ct. Albany County 2003).

70. For instance, in *Am. Tax Funding, LLC*, the court rejected the plaintiff's contention that the defendant's motion for a change of venue was untimely, stating:

> Supreme Court properly determined that defendant's motion was timely and in compliance with the procedure set forth in CPLR 511. We agree with defendant that the court's prior order granting

> it leave to serve a late answer pursuant to CPLR 3012 (d) effectively extended the time for it to serve its written demand for a change of venue. Defendant timely served its written demand on May 9, 2017, 'before the answer [was] served' on May 15, 2017.

Am. Tax Funding, LLC, 175 A.D.3d at 1055 (*alteration in the original*) (*internal citations omitted*).

71. Similarly, in *Zelazny Family Enters., LLC*, the court held that, contrary to the petitioners' contention, the "respondents did not waive their right to challenge venue by seeking additional time to answer," concluding "that the extension of time to answer . . . provided respondents additional time to answer and therefore additional time to serve a timely demand to change venue." *Zelazny Family Enters., LLC*, 2019 N.Y. App. Div. LEXIS 9273 at *6-*7. The court also held that the respondents did not waive their right to challenge venue by participating in a pre-answer motion to consolidate. *Id.* at *7.

72. In *N. County Communications Corp.*, Supreme Court, Albany County likewise rejected a challenge to the timeliness of a demand for change of the place of trial, notwithstanding that the defendants removed the action to federal court two days before their time to answer the complaint in state court expired, the defendants made an untimely motion to dismiss in federal court, the federal court remanded the case back to state court before the untimely motion to dismiss was fully submitted and directed the defendants to file a motion to dismiss in state court, the defendants failed to timely answer or move to dismiss the complaint in state court, and the defendants' demand to change venue was not served until after all of this – some seven months after the action was commenced. *N. County Communications Corp.*, 196 Misc. 2d at 151-52.

73. The *N. County Communications Corp.* court found that, although the defendants were already in default by the time they served the demand, their time to answer was effectively extended by a letter that the plaintiff sent to the defendants, advising that they were in default and stating that the plaintiff would seek a default judgment if an answer was not served within 20 days. *N. County Communications Corp.*, 196 Misc. 2d at 152. Thus, in assessing the timeliness of the defendants' demand for change of venue, the court concluded that:

> CPLR 511 simply requires that a demand for change of venue be *made with or before the answer*. The statute does not provide that the demand be made within the time the answer is required. Thus, given that the court construes plaintiff's letter as an extension to file an answer, and that a demand to change venue may be made with the answer, the court determines that defendants' demand and subsequent motion were timely.

Id. at 152-53 (*emphasis in the original*) (*internal citations omitted*).

74. Supreme Court, Albany County also found that a demand to change the place of trial was timely served in a case where, following a "lengthy factual and procedural background," the plaintiffs served an amended complaint, which the defendants moved to dismiss prior to answering. *Belair Care Ctr., Inc. v. Cool Insuring Agency, Inc.*, No. 901476-14, 58 Misc. 3d 1207(A), 2017 N.Y. Misc. LEXIS 5191, *2, *5, *6 n.3 (Sup. Ct. Albany County Nov. 6, 2017). It was only after the court issued its decision on the defendants' motions (granting them in part and denying them in part), that the defendants served their answers to the amended complaint and their demands to change the place of trial. *Id.* at *5-6. The court ultimately held that the "'plaintiffs' choice of venue was improper and they have accordingly forfeited their right to select the venue to this action.' Accordingly, the branch of the . . . Defendants' motions seeking to transfer venue *must* be granted." *Id.* at *13 (*emphasis added*) (*internal citations omitted*).

75. Indeed, New York courts – including the Court of Appeals – have even repeatedly held that demands for change of the place of trial are timely when they are not served until the defendant or respondent serves an amended answer, having failed to serve such a demand with the initial answer. *Ross v. City of Rochester*, 8 N.Y.2d 1067, 1068 (1960); *Penniman v. Fuller & Warren Co.*, 133 N.Y. 442, 444-45 (1892); *Valley Psychological, P.C. v. Gov't Employees Ins. Co.*, 95 A.D.3d 1546, 1547 (3d Dept. 2012) ("Initially, we note that there is no dispute that defendant had the right to file an amended answer to the complaint (*see* CPLR 3025 [a]), and since that amended answer superceded [*sic.*] its prior answer, defendant had the right to serve with it a demand for a change of venue. Since defendant's motion to change venue was filed within 15 days of the service of that demand, Supreme Court should not have denied it as untimely" [*internal citations omitted*]); *Corea v. Browne*, 45 A.D.3d 623, 624 (2d Dept. 2007) ("The defendants substantially complied with [CPLR R. 511(a)] when they served a demand together with the amended answer and made a motion within the 15-day period required under the statute, even though they failed to serve a demand together with the original answer").

76. Here, the City of Utica Planning Board's demand for change of the place of trial was unquestionably timely, because it was served prior to the Planning Board's answer. CPLR R. 511(a). That Respondents engaged in motion practice prior to answering – as was their absolute right to do under CPLR R. 3211 – and that their time to answer the Petition has been extended has no bearing on the timeliness of the demand. *See Zelazny Family Enters., LLC*, 2019 N.Y. App. Div. LEXIS 9273 at *6-*7; *Am. Tax Funding, LLC*, 175 A.D.3d at 1055; *N. County Communications Corp.*, 196 Misc. 2d at 151-53; *Belair Care Ctr., Inc.*, 2017 N.Y. Misc. LEXIS 5191 at *5-*6, *13; *see also Ross*, 8 N.Y.2d at 1068; *Penniman*, 133 N.Y. at 444-45; *Valley Psychological, P.C.*, 95 A.D.3d at 1547; *Corea*, 45 A.D.3d at 624.

IV. THE PLANNING BOARD'S MOTION FOR CHANGE OF VENUE IS NOT SUBJECT TO THE COURT'S DISCRETION

77. Venue was improperly designated in Albany County in the first instance and the Planning Board timely observed the procedural requisites set forth in CPLR R. 511 prior to answering the Petition. Therefore, this motion is not addressed to the court's discretion and the Planning Board is entitled to an order granting its motion and changing of the place of trial to Oneida County as a matter of right. *See Agostino Antiques, Ltd.*, 6 A.D.3d at 470; *Sellars*, 171 A.D.2d at 1025-26; *Burstein*, 239 A.D.2d at 375-76; *Kearns*, 238 A.D.2d at 122; *Franklin Traffic Serv., Inc.*, 142 A.D.2d at 936; *Kelson*, 104 A.D.2d at 316; *see also Lombardi Assocs.*, 270 A.D.2d at 776; *Cruz*, 38 A.D.3d at 392; *Cooper*, 178 A.D.2d at 575.

78. It is only when such a motion to change the place of trial is untimely – which is not the case here – that the motion is at the discretion of the Court. *Callanan Indus., Inc. v. Sovereign Constr. Co.*, 44 A.D.2d 292, 295 (3d Dept. 1974) ("Having failed to make a timely demand for a change of venue required by subdivision (a) of CPLR 511 and having failed to make a motion within the 15-day requirement of subdivision (b) of CPLR 511, defendants were not entitled to a change of venue as a matter of right and their motion thus became one addressed to the court's discretion"); *Gousgounis v. Bravor Plumbing Heating Co.*, 155 A.D.2d 269, 270 (1st Dept. 1989) ("Where, as here, the motion for change of venue is predicted on the ground that the designated county is improper (CPLR 510 (1)), the motion must be 'served with the answer or before the answer is served' (CPLR 511 (a)). Since the instant motion was made after the service of the answer, the statutory requirement had not been satisfied, and the motion was addressed to the court's discretion"); *see also Du Pont v. Bank of Utica*, 9 A.D.2d 807, 808 (3d Dept. 1959) ("The action was not brought in the proper county . . . and the respondents would

have been entitled to a change of venue as a matter of right had they made a timely demand in compliance with rule 146 of the Rules of Civil Practice. However, their failure did not deprive the court below of its power to order in its discretion that the venue of the action be changed to a proper county. This discretionary power has been recognized for years").

79. Accordingly, because the Planning Board timely demanded and moved for change of the place of trial in full satisfaction of the procedural requisites of CPLR R. 511, its motion is not subject to the Court's discretion, and the Planning Board is entitled to a change of venue as a matter of right.

V. MVHS DOES NOT OPPOSE PETITIONERS' CROSS-MOTION IN THE ALTERNATIVE, REQUESTING TRANSFER TO ONONDAGA COUNTY

80. In the alternative to retaining venue in Albany County, Petitioners' cross-motion requests that the Court transfer this proceeding to Onondaga County for trial. West Affirmation, ¶¶ 5, 112.

81. Although Oneida County is the only county where venue for this proceeding in proper, pursuant to the applicable statutory venue provisions (Second Class Cities Law § 242; CPLR §§ 506[b], 7804[b]), MVHS previously indicated its consent to this proceeding being transferred to Onondaga County for trial, as a compromise position. Accordingly, MVHS does not oppose Petitioners' cross-motion inasmuch as it seeks a transfer of venue to Onondaga County, and respectfully requests that this proceeding be transferred to Onondaga County for trial in the event this Court should deny the Planning Board's motion for change of the place of trial to Oneida County.

Dated: January 31, 2020

Kathleen M. Bennett

EXHIBIT A

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of

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.

DECISION and ORDER
Index # 02797-19

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:

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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

12/26/19
KM

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.