

**SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: THIRD JUDICIAL DEPARTMENT**

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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,

- against -

**AFFIRMATION OF  
THOMAS S. WEST  
IN RESPONSE TO  
ORDER TO SHOW  
CAUSE & OPPOSITION  
TO MVHS MOTION FOR  
LEAVE TO APPEAL & IN  
SUPPORT OF CROSS  
MOTION**

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,

**INDEX NO. 02797-19**

Respondents.

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**THOMAS S. WEST, ESQ.**, pursuant to Rule 2106 of the Civil Practice Law and Rules (“CPLR”) and under the penalties of perjury, affirms as follows:

1. I am an attorney at law duly licensed to practice in the State of New York and am the founder of The West Firm, PLLC, the attorney of record in the above-captioned proceeding. As such, I am fully familiar with the underlying proceedings and all actions taken relative thereto,

including Respondents' relentless procedural maneuverings which have unduly delayed decision-making on the merits of this case.

2. As the attorney of record for Petitioners in this matter, I have handled all aspects of this case since its inception. Therefore, all matters stated herein are based upon my personal information and knowledge.

3. I make this Affirmation in response to this Court's Order to Show Cause, dated January 29, 2020, and in opposition to the motion by Respondent Mohawk Valley Health System ("MVHS") for leave to appeal (the "Leave Motion") the Decision and Order of the Supreme Court, Albany County (Mackey, J.), entered on December 26, 2019 (the "December 2019 Order"), and "to stay all proceedings in the Supreme Court including the time to answer the petition and filing of the administrative record pending a determination on this motion and a subsequent appeal." *See* Affirmation of Kathleen Bennett, Esq., dated January 27, 2020 ("Bennett Leave Affirmation"), ¶ 32.

4. Additionally, I make this Affirmation in support of Petitioners' cross-motion for leave to appeal the December 2019 Order to the extent that it dismisses the sixth claim for relief challenging the partial site plan approval of the Respondent Planning Board of the City of Utica (the "Planning Board"). Making this cross-motion is necessitated by MVHS's Leave Motion, given that the propriety of dismissal of the sixth claim for relief is inextricably tethered to MVHS's appeal relative to the SEQRA claims (i.e., the third, fourth and fifth claims for relief). Accordingly, Petitioners make this cross-motion because it is their only means to protect themselves in the event this Court grants the Leave Motion. (In the event this Court denies the Leave Motion, Petitioners withdraw their Cross-Motion.)

5. Further, this Affirmation is meant to supplement my earlier Affirmation to this Court, dated January 28, 2020, opposing MVHS's Proposed Order to Show Cause (the "West 1/28/20 Affirmation"), which details, among other things, the tortured procedural history of this case. I therefore incorporate herein by reference the West 1/28/20 Affirmation and all exhibits, which demonstrate the procedural quagmire caused by Respondents' unbridled efforts to delay and avoid the merits of this case at all costs.

### **General Background**

6. As reflected in the West 1/28/20 Affirmation, Respondents have held this case hostage for over eight months, all the while destroying building after building after building in the Hospital Project footprint.

7. The latest tendrils in Respondents' procedural web are this Leave Motion which seeks to stay "all" proceedings before the Supreme Court pending decision by this Court, followed immediately thereafter, on January 30, 2020, by a motion for reargument by MVHS before Justice Mackey relative to the very same SEQRA claims asserted here.

8. In pressing its request for leave to appeal, MVHS asserts inconsistent and, indeed, disingenuous claims. For example, MVHS asserts that it is "urgent" for this Court to grant leave and decide this appeal. Bennet Leave Affirmation, ¶ 8. Honestly, how "urgent" could it be, given MVHS's request for relief that would indeterminately stay a decision on the merits of this case – i.e., which case has already been pending for over eight months due to relentless motion practice, ever-changing deadlines for answering the Petition, belated requests for change of venue, and motions before this Court that are violative of the lower court's Scheduling Order made just days prior to the Leave Motion?

9. MVHS also suggests that the only outstanding issues in this case pertain to the three SEQRA claims. *See, e.g.*, Bennett Leave Affirmation, ¶ 8. MVHS neglects to mention, however, the numerous motions pending before Justice Mackey that affect the propriety of this Leave Motion – among them, the Planning Board’s motion to change venue to Oneida County and MVHS’s most recent motion for reargument before Justice Mackey on the SEQRA claims. A change of venue to Oneida County (or Onondaga County [per Petitioners’ alternative request for relief]) would place this matter in the Fourth Department and, therefore, out of this Court’s jurisdiction. A favorable decision on MVHS’s reargument motion would moot the issues presented in this Leave Motion. On this basis alone, this Court should deny MVHS’s Leave Motion and allow Justice Mackey to decide the motions before him, and, absent a change of venue, the merits of this case.

10. MVHS also asserts that no prejudice will result to Petitioners if this Court grants the Leave Motion (and stays all proceedings below). Bennett Leave Affirmation, ¶ 32. Conveniently, however, MVHS neglects to mention that it has already razed at least 13 buildings in the Hospital Project footprint, has promised to demolish more, and eminent domain proceedings are imminent as to properties not under MVHS’s present control. A true and accurate copy of a notice sent to one of the Petitioners in this matter, showing the early stages of condemnation proceedings, is annexed hereto and incorporated herewith as **Exhibit A**.

11. Notably as well, the only so-called prejudice that MVHS alleges (if this Court does not issue a stay) is that Respondents will have to answer the Petition. MVHS alleges it would be “unjust, inefficient and inequitable” to have to respond on the merits. Bennett Leave Affirmation, ¶ 32. Of course, had the Respondents not engaged in protracted delay tactics, their answers and the administrative Return would have been submitted long ago, and their work-load would have

been far diminished. It is difficult to discern how submitting an answer and the Return can be such a hardship, when compared with the voluminous submissions Respondents have generated in spinning their tangled procedural web, wasting time, money and judicial resources. Moreover, Respondents' alleged prejudice (i.e., having to answer the Petition and submit the Return) pales in comparison to Petitioners' prejudice (i.e., the irretrievable loss of historic and cultural resources that has occurred and continues to occur by Respondents' affirmative acts). If there is anything "unjust" or "inequitable" here, it is Respondents' actions in having run rough-shod through the Downtown Site landscape destroying historic, archeological and cultural resources.

12. Finally, despite MVHS's allegation that Petitioners could have protected their interests by seeking preliminary injunctive relief at the outset, the Respondents are fully aware that the not-for-profit Petitioners and individual Petitioners lack the means to provide the undertaking that would be required for a project of this magnitude. *See Bennett Leave Affirmation*, ¶ 32.

13. In light, however, of Respondents' relentless delay tactics, including this recent Leave Motion, Petitioners will be moving for a stay pursuant to CPLR 7805, staying any further action or decision-making relative to the Hospital Project. Unless Justice Mackey transfers venue to another court, this motion will be made before Justice Mackey. This motion for stay will be, thus, another motion pending before Justice Mackey, further militating against this Court's granting the Leave Motion or a stay of any kind relative to the proceedings below.

14. For these reasons (as more fully detailed below), Petitioners respectfully maintain that, in the interests of justice, this Court should exercise its discretion to deny the Leave Motion in its entirety.

### **Respondents Seek Inconsistent Relief: Venue Change & Leave Before This Court**

15. In their quest to exacerbate the already-existing procedural morass, Respondents seek inconsistent relief as between the lower court and this Court. MVHS's Leave Motion seeks review by this Court relative to the SEQRA claims (i.e., the third, fourth and fifth claims for relief). The Planning Boards' earlier-filed demand and motion in the proceedings below (including a motion improperly made in Oneida County) seek a change of venue to Oneida County. The venue motion is currently before Justice Mackey. If the Planning Board's venue motion is decided in its favor, this matter will be in the Fourth Department and outside this Court's jurisdiction.

16. Additionally, in response to the Planning Board's motion for a change of venue, Petitioners cross-moved for retention of venue in Albany County, or, alternatively, transfer to Onondaga County (which is in the 5<sup>th</sup> Judicial District). *See generally*, Exhibit A to the West 1/28/20 Affirmation. If Justice Mackey grants the alternative relief, this matter will be in the Fourth Department and, thus, outside this Court's jurisdiction.

17. According to the Scheduling Order, dated January 22, 2020 (Exhibit H to Exhibit A of the West 1/28/20 Affirmation) (the "Scheduling Order"), Justice Mackey will be deciding the venue motions on or about February 7, 2020.

18. The Leave Motion, therefore, should await Justice Mackey's decision on the pending venue motions, in accordance with the Scheduling Order.

### **The Leave Motion Is Inconsistent with The Scheduling Order**

19. As noted, the parties agreed to the Scheduling Order on January 22, 2020. The Scheduling Order requires Respondents' answers and the Return to be submitted by February 14, 2020. This schedule was arrived at following a conference before Justice Mackey that lasted almost 1 hour and is a schedule that is on consent of all the parties, including MVHS.

20. The February 14<sup>th</sup> deadline represents at least an additional month of time to the Respondents, as compared with prior deadlines that have come and gone, with Respondents maneuvering for extensions at every turn. Pursuant to the December 2019 Order, answers and the administrative record were due January 15, 2020. We believe that Justice Mackey imposed a short fuse on the filing on the merits (15 days following service of notice of entry) because of the delay that had been created by Respondents relative to decision-making on the merits. In the context of negotiations with the Respondents, we gave a series of short-term extensions, ultimately leading up to the extension that was agreed to among the parties and So Ordered by Justice Mackey in the Scheduling Order. As provided in the Scheduling Order, the answers and the administrative record are now due on Friday, February 14, 2020.

21. The Scheduling Order also sets timelines for the venue and reconsideration motions pending before Justice Mackey.

22. In the process of negotiating the Scheduling Order, and as memorialized in the Scheduling Order (at p.2), Petitioners gave up significant rights: namely, Petitioners agreed to withdraw their motion to amend to assert additional claims and/or add parties. Petitioners did so to facilitate bringing this matter to a decision on the merits.

23. Just days later, on January 27, 2020, MVHS presented its proposed Order to Show Cause to this Court, seeking an immediate stay of all proceedings below. This Court did not grant the temporary stay, but MVHS continues to press its Leave Motion and its request for a stay pending the outcome of the intermediate appeal.

24. In the Leave Motion, MVHS seeks a prolonged stay of all proceedings below (including the time to answer), pending decision by this Court if it grants permission to appeal.

25. Petitioners maintain that MVHS's requested relief directly conflicts with the deadlines to which they agreed in the Scheduling Order in this Article 78 proceeding (which is supposed to be a summary proceeding). Petitioners maintain that MVHS's actions thus suggest bad faith during negotiations before Justice Mackey and demonstrate unprincipled behavior.

**The Motions for Reconsideration Militate against Granting the Leave Motion**

26. On January 10, 2020, Petitioners moved for reargument/renewal before Justice Mackey relative to dismissal of the first and second claims for relief (against the State Respondents) and dismissal of the sixth claim for relief (challenging the Planning Board's partial site plan approval). *See* Exhibit C to Exhibit A to West 1/28/20 Affirmation.

27. Accordingly, when MVHS brought its Order to Show Cause before this Court on January 27<sup>th</sup> for leave to appeal on the SEQRA claims, Petitioners' motion for reconsideration was already pending before Justice Mackey. And, the Scheduling Order notes timelines for responsive papers later this month and oral argument by February 28, 2020.

28. Then, two days after bringing this Leave Motion, on January 29<sup>th</sup>, MVHS moved for reargument before Justice Mackey relative to the SEQRA claims which are the basis for the Leave Motion to this Court. A true and accurate copy of MVHS's notice of cross motion for reargument is annexed hereto and incorporated herewith as **Exhibit B**. All of their papers in support of that cross motion can be supplied to this Court upon request.

29. MVHS's motion for reargument before Justice Mackey is inconsistent with its Leave Motion which seeks to stay all proceedings below.

30. Petitioners respectfully maintain that these pending motions should be heard and decided by Justice Mackey in accordance with timelines set forth in the Scheduling Order before any determination by this Court.



### **Granting the Leave Motion/Stay Would Further Prejudice Petitioners**

31. Severe, irreparable prejudice to Plaintiffs from further delay of decision-making on the merits of this case is patent, given MVHS's relentless destruction of buildings in the Hospital Project footprint – all of which is premised on a final environmental impact statement ("FEIS") that Petitioners maintain has gaping holes relative to impact assessment and mitigation as to historical/cultural resources, cumulative impacts and alternatives. Buildings are being destroyed without a hint of public or judicial oversight, and MVHS has affirmatively stated it will continue to destroy more.

32. It is, therefore, nothing short of a slap in the face for MVHS to claim that no prejudice will result to Plaintiffs from further delay in deciding the merits of this case and granting the requested stay.

33. A stay of the proceedings below (i.e. delaying decision on the merits) – without a stay restraining MVHS from continuing to raze buildings or acquire properties via condemnation – will virtually ensure that this matter is mooted.

34. Thus, if this Court grants MVHS's requested relief, there could not be a more compelling example where (1) further prejudice will surely result to Petitioners, and (2) Respondents will be rewarded for their relentless, unprincipled behavior.

### **Under the Governing Standards & in the Interests of Justice, the Leave Motion Should be Denied**

35. Beyond the multiple procedural issues above, Petitioners respectfully maintain that this Court should deny the Leave Motion under the substantive standards governing permissive appeals.

36. The overarching standard guiding this Court's discretion in determining whether to grant a permissive appeal is whether the interests of justice call for review and warrant the requested relief. *See Rosenberg v. Rosenberg*, 24 A.D.2d 26, 27 (1<sup>st</sup> Dep't 1965) ("the paramount consideration [is] whether the interests of justice call for our review of the particular case"); *see also Hrisinko v. Board of Educ. Of City School Dist. of City of N.Y.*, 101 A.D.3d 451 (1<sup>st</sup> Dep't 2012).

37. Among the specific factors influential in this decision are: (1) the precedential impact of the point involved; (2) the public nature of the case; (3) the newness of the issue; and (4) whether the decision at issue may conflict with decisions of other lower courts. David D. Siegel, *New York Practice* (2d ed.), § 526, at pp. 818-819; *see also Handy v. Butler*, 183 App. Div. 359, 361 (2d Dep't 1918). Additionally, a grant of leave to appeal may be properly conditioned to avoid potential prejudice to the other party. David D. Siegel, *New York Practice* (2d ed.), § 526, at p. 819; *see also Rosenberg*, 24 A.D.2d at 27.

38. Applying these factors here, Petitioners respectfully maintain that leave to this Court is not warranted.

39. The SEQRA claims are straightforward claims, with the underlying issue being whether these claims were/are ripe for review. There is nothing novel about this. There is nothing of precedential impact or involving public policy. There is also no conflict with other courts involving any principles of law.

40. If this Court grants the Leave Motion, Petitioners will brief the Court on the merits regarding the ripeness of their SEQRA claims when this matter was commenced.

41. More fundamentally, however, Respondents' position – i.e., that, after commencement of this litigation, Petitioners were required to challenge separately every

subsequent agency approval based on the very same SEQRA/FEIS defects already asserted in the pending proceeding – is baseless. Once litigation is commenced challenging a project and its location based on a defective SEQRA review/FEIS, there is no rule of law requiring a petitioner to challenge thereafter each and every subsequent approval by the lead agency and other involved agencies. Such a rule would lead to piecemeal litigation, endless motion practice, and pure chaos.

42. Indeed, had Petitioners failed to commence their challenge to the FEIS until after the Planning Board issued its Partial Site Plan Approval in September 2019, there is little doubt that Respondents would be arguing that Petitioners' challenges to the FEIS are time-barred. W. Ginsberg and P. Weinberg, *Environmental Law and Practice in New York* (West's N.Y. Pr. Series), § 4:40, at p. 348-350 ("These relatively short limitations periods, combined with the ambiguity surrounding when various SEQRA determinations are actually ripe for review, often lead prudent practitioners to err on the side of caution by challenging agency action earlier rather than later;" noting cases where petitioners waited too long to mount their SEQRA challenges).

43. In the end, after more than eight months of delay, rampant procedural maneuvering, failure to negotiate in good faith or abide by agreements, and ongoing destruction of buildings to pave the way for the Hospital Project, Petitioners respectfully urge this Court to deny the Leave Motion in its entirety, including as to any stay of the proceedings before Justice Mackey.

44. Alternatively, if this Court grants MVHS's Leave Motion to hear the SEQRA claims (i.e., appealing the lower court's denial to dismiss the third, fourth and fifth claims for relief), Petitioners request that this Court grant the cross-motion relative to the sixth claim for relief (i.e., because appeal on this claim, if decided in Petitioners' favor, would reinstate the claim challenging the Planning Board's Partial Site Plan Approval and, thus, would moot MVHS's appeal on that issue).

45. Finally, if this Court grants MVHS a stay of any duration, Petitioners respectfully request that such be conditioned on Respondents' taking no further action relative to the Hospital Project, including building demolition, excavation, construction, application for financing, and any and all matters relative to furthering the Hospital Project at the Downtown Site.

### **Conclusion**

46. In conclusion, the Leave Motion is one more effort by Respondents to delay long overdue decision-making on the merits of this case and, thereby, facilitate unfettered building destruction to moot this controversy. In light of Respondents' behavior and the resulting environmental harm, Petitioners respectfully urge this Court to allow this matter to proceed to conclusion before Justice Mackey, after which time, all intermediate orders will be subject to review on ultimate appeal of the Judgment.

WHEREFORE, your affiant respectfully requests that this Court deny the Leave Motion in its entirety (including as to a stay or any further extensions of time to answer on the merits) and allow the matter to proceed before Justice Mackey. In the alternative, if this Court grants the Leave Motion to hear the SEQRA claims, your affiant respectfully requests that Petitioners' cross motion for leave to appeal relative to the sixth claim for relief be granted. Finally, in the event this Court grants a stay of any kind relative to the Leave Motion, your affiant respectfully requests that such be conditioned on Respondents' refraining from any additional action to further the Hospital Project, including, but not limited to, building demolition, excavation, project construction, application for financing and all matters that would further this Project.

Dated: February 5, 2020



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Thomas S. West

# **EXHIBIT A**

KATHLEEN M. BENNETT, ESQ.  
[kbennett@bsk.com](mailto:kbennett@bsk.com)  
P 315 218 6531

January 22, 2020

**VIA CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

418 Lafayette St. Corp.  
P.O. Box 4205  
Utica, New York 13504

Re: *Negotiation of the Purchase of 418, 420-422, 424-428, and 430 LaFayette Street, and Carton Street, Utica, New York; Tax Map Numbers 318.34-1-25; 318.34-1-26; 318.34-1-27; 318.34-1-28; 318.34-1-29 (the "Property")*

Dear Property Owner:

Please recall that we represent Mohawk Valley Health System ("MVHS") with respect to its acquisition of properties in downtown Utica in connection with the building of its new medical center. Over the past couple of years, MVHS and my office have been the primary contacts for any negotiations regarding the sale of your Property to MVHS. However, from this point forward, in the event 418 Lafayette St. Corp. wishes to engage in discussions about the sale of its Property, such negotiations should be handled by and any inquiries directed to the County of Oneida County Attorney's Office.

Should you have any questions, please feel free to contact me.

Sincerely,

BOND, SCHOENECK & KING, PLLC



Kathleen M. Bennett

# **EXHIBIT B**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY**

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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.

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**NOTICE OF CROSS MOTION  
FOR REARGUMENT**

Index No. 02797-19

Hon. Michael Mackey

**MOTION BY:**

Respondent-Defendant MOHAWK VALLEY  
HEALTH SYSTEM

**DATE, TIME AND PLACE OF  
HEARING:**

February 28, 2020, at 9:30 a.m., at the Albany  
County Supreme Court, Albany County Courthouse,  
Room 102, 16 Eagle Street, Albany, New York  
12207

**SUPPORTING PAPERS:**

Memorandum of Law in Support of Cross Motion for  
Reargument and in Opposition to Petitioners' Motion  
for Renewal and Reargument; Affirmation of  
Kathleen Bennett, Esq. with Exhibits 1-5.

**RELIEF DEMANDED AND GROUNDS  
THEREFOR:**

Permission for Reargument.

**ANSWERING AFFIDAVITS:**

By stipulation, Petitioners/Plaintiffs' responding  
papers, if any, shall be served on or before February  
21, 2020.



Dated: January 30, 2020

Respondent Mohawk Valley Health System

By: 

Kathleen M. Bennett, Esq.  
Bond, Schoeneck & King, PLLC  
One Lincoln Center 13502-4234  
Tel. No. (315) 218-8000  
Attorneys for Mohawk Valley Health System

TO: Thomas S. West, Esq.  
The West Firm, PLLC  
Attorney for Petitioners/Plaintiffs  
677 Broadway, Floor 8  
Albany, New York 12207  
Tel. No. (518) 641-0500

cc:

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City of Utica Corporation Counsel  
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Loretta Simon, Assistant Attorney General  
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