

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH DEPARTMENT

**BOWERS DEVELOPMENT, LLC and ROME
PLUMBING & HEATING SUPPLY CO. INC.,**

NOTICE OF MOTION

Petitioners,

Case No.: OP 22-00744

-against-

**ONEIDA COUNTY INDUSTRIAL DEVELOPMENT
AGENCY and CENTRAL UTICA BUILDING, LLC,**

Respondents.

PLEASE TAKE NOTICE that upon the annexed Affirmation of Laura L. Spring, Esq., sworn on the 25th day of January, 2023, a motion will be made at a Motion Term of the Supreme Court, Appellate Division, Fourth Department, at the M. Dolores Denman Courthouse, 50 East Avenue, Rochester, New York 14604 on **February 14, 2023 at 10:00 a.m.** for an order granting reargument or for the leave to appeal to the Court of Appeals from this Court's Memorandum and Order, dated December 23, 2022 pursuant to Practice Rule of the Appellate Division 1250.16(d), Civil Practice Law and Rules 2221 and Civil Practice Law and Rules 5602(a)(1)(i), together with such other and further relief as to the Court seems just and equitable.

PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR 2214, answering affidavits, if any, are to be served on the undersigned at least seven days prior to the return date of this motion.

PLEASE TAKE FURTHER NOTICE that pursuant to Practice Rule of the Appellate Division 1250.4 the within motion will be submitted on the papers and that oral argument of the

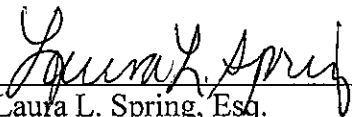
motion is neither required nor permitted.

Dated: January 25, 2023

Respectfully Submitted,

**COHEN COMPAGNI BECKMAN
APPLER & KNOLL, PLLC**

By:



Laura L. Spring, Esq.

Attorneys for Defendant,

Central Utica Building, LLC

507 Plum Street, Suite 310

Syracuse, New York 13204

Telephone: (315) 477-6293

lspring@ccblaw.com

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Petitioners,

-against-

**ONEIDA COUNTY INDUSTRIAL DEVELOPMENT
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Respondents.

**AFFIRMATION OF
LAURA L. SPRING, ESQ.**

Case No.: OP 22-00744

Laura L. Spring, Esq., hereby affirms under penalty of perjury and pursuant to CPLR 2106:

1. I am an attorney duly admitted to practice in the State of New York and a member of Cohen Compagni Beckman Appler & Knoll, PLLC, attorneys for Central Utica Building, LLC ("CUB"), one of the Respondents in this matter.

2. I submit this Affirmation in support of the joint motion of CUB and the Oneida County Industrial Development Agency ("OCIDA"), for an order granting leave to reargue and/or leave to appeal to the Court of Appeals from this Court's Memorandum and Order in OP 22-00744 dated December 23, 2022 ("Order") pursuant to CPLR 2221, Rule 1250.16(d) and CPLR 5602 (a) (1) (i).

3. The above-captioned original special proceeding was commenced in the Appellate Division Fourth Department pursuant to Eminent Domain Procedure Law ("EDPL") § 207 on May 10, 2022 (NYSCEF Doc. No. 1).

4. Pursuant to the Order, this Court annulled the Determination and Findings ("Findings") of the OCIDA dated April 7, 2022. (NYSCEF Doc. 34).

5. Notice of Entry of the Order was served on December 26, 2022 (NYSCEF Doc. No. 34).

6. CUB submits this motion and incorporates by reference herein the arguments and supporting case law set forth in the Affirmation of Paul J. Goldman ("Goldman Affirmation") dated January 24, 2023, the attorney for OCIDA.

7. As stated in Mr. Goldman's Affirmation, it is respectfully submitted that the majority erred by failing to give any deference to the Findings of OCIDA that a parking lot for a privately owned medical office building is a "commercial use within OCIDA's statutory authority". (R.5879, Para. 1).¹ Instead, the majority wrongfully concluded that the parking lot was a part of a larger hospital and healthcare facility project and thus was not a "commercial use." This conclusion conflicts with the precedent of the Court of Appeals and the Appellate Division Second and Third Department. Therefore, CUB respectfully submits that the Court overlooked or misapprehended the law and requests leave to reargue and/or leave to the Court of Appeals. CPLR 2221 (d) (2). *Paduano v. Boland*, 277 A.D. 2d 979 (4th Dept., 2000).

8. Respectfully, this Court should have, but did not follow its decision in *Matter of Nearpass v. Seneca County Indus. Dev. Agency*, 152 A.D. 3d 1192 (4th Dept. 2017). In *Nearpass*, this Court held that the term "commercial" was ambiguous and that deference to the determination of the Seneca County IDA, as to whether or not that project was "commercial" represented an interpretation by the administrative agency of a broad statutory term which will be upheld if

¹ "R" refers to the Record on Appeal in this proceeding (NYSCEF Doc. Nos. 9-17) followed by the applicable page.

reasonable. By not granting deference to OCIDA's interpretation of the term "commercial" the majority failed to follow Nearpass.

9. The majority erred in not applying Nearpass, and granting deference to OCIDA's determination that the condemnation of 411 Columbia Street in the City of Utica (Section 318.41, Block 2, Lot 38) ("the O'Brien Property") for a surface parking lot for the adjoining privately owned medical office building ("MOB") now being built by CUB as part of a commercial project.

10. The cases relied on by the majority were cases that did not involve New York Industrial Development Agencies ("IDAs") and no analysis was provided as to why the majority relied on those cases to invalidate the Finding.

11. Notably, the Majority's holding is in conflict with the precedent set forth in the Second Department which cited Nearpass and its rational basis as the standard of review of the actions of the Town of Hempstead IDA. Lawrence Union Free School District v. Town of Hempstead Industrial Development Agency, 196 A.D. 3d 486, 487 (2d Dept. 2021).

12. There is no dispute that the O'Brien Property is to be used as a surface parking lot for the MOB. The MOB is a privately owned medical office building that is a "commercial enterprise" whose tenants are commercial enterprises. This Court has held that "[t]he private practice of medicine by a hospital's attending physicians is primarily a commercial enterprise only incidentally related to the hospital's function of providing health care to the community". Matter of Genesee Hosp. v. Wagner, 47 A.D. 2d 37, 46 (4th Dept. 1975), affirmed, 39 N.Y. 2d 863 (1976).

13. Moreover, the Court of Appeals has held that a parking facility owned by a not-for-profit organization is a "commercial facility under Real Property Tax Law ("RPTL") Greater Jamaica Dev. Corp. v. New York City Tax Comm., 25 N.Y. 3d 614,630 (2015), as well as the Second and Third Departments, See Ellis Hosp. v. Assessor of the City of Schenectady, 288 A.D.

2d 581, 583 (3d Dept. 2001); Matter of St. Francis Hosp. v. Taber, 75 A.D. 3d 635, 639-640 (2d Dept. 2010); Matter of Vassar Bros. Hosp. v. City of Poughkeepsie, 97 A.D. 3d 756, 759 (2d Dept. 2012).

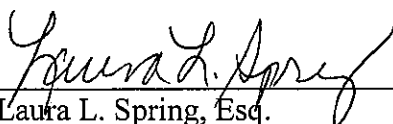
14. The facts in this matter are undisputed and supported by the record. CUB, as the owner of the MOB, requested the acquisition of the O'Brien Property for parking and has the exclusive right to control that use and is not incidental to a hospital use. Therefore, the acquisition of a parking lot is a corporate purpose for which an IDA may utilize its eminent domain to create a parking lot as part of commercial project thus necessitating the majority to review their holding in this matter.

15. Finally, as set forth in the Goldman Affirmation this is a novel issue of public importance, it conflicts with the precedent of the Court of Appeals and creates a conflict among the Departments of the Appellate Division and therefore, the instant motion should be granted.

WHEREFORE, your deponent respectfully requests an Order granting the Respondents' motion for leave to reargue and/or leave to appeal from the December 23, 2022 Order of this Court to the Court of Appeals pursuant to CPLR 2221 and Rule 1250.16 (d) and CPLR 5602 (a) (1) (i), together with such other and further relief as may be just and equitable.

Dated: January 25, 2023

**COHEN COMPAGNI BECKMAN
APPLER & KNOLL, PLLC**

By: 
Laura L. Spring, Esq.

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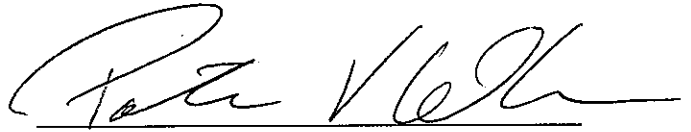
STATE OF NEW YORK)
) ss:
COUNTY OF ONONDAGA)

I, PATRICIA V. WHITE, being duly sworn, deposes and says that I am not a party to the above action, am over 18 years of age and reside in Cicero, New York.

I further certify that on this date I electronically filed the Defendant's Central Utica Building, LLC, Motion for Reargument/Leave to Appeal to the Court of Appeals with the Clerk of the Supreme Court, of the State of New York, Appellate Division, Fourth Department using the CM/ECF system, which sent notification of such filing to the following:

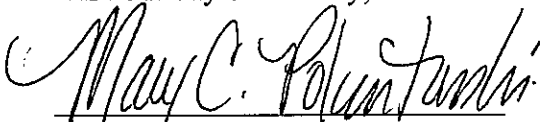
1. Michael A. Fogel, Esq., *Attorneys for Petitioner's Bowers Development, LLC and Rome Plumbing & Heating Supply Co. Inc.*, mfogel@fogelbrown.com.
2. Patrick D. Donnelly, Esq., *Attorneys for Petitioner's Bowers Development, LLC and Rome Plumbing & Heating Supply Co. Inc.*, pdonnelly@fogelbrown.com.
3. Paul J. Goldman, Esq., *Attorneys for Respondent Oneida County Industrial Development Agency*, pgoldman@goldmanpllc.com.

Dated: January 25, 2023



Patricia V. White

Sworn to and subscribed before me
this 25th day of January, 2023.


Notary Public

MARY C. POKRENTOWSKI
Notary Public, State of New York
No. 01PO6166952
Qualified in Onondaga County
Commission Expires May 29, 2023