

COPY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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TOWN OF WOODBURY and the TOWN OF WOODBURY
TOWN BOARD,

Plaintiffs,

-against-

Index No. EF006036-2018

VILLAGE OF WOODBURY, VILLAGE OF WOODBURY BOARD
OF TRUSTEES and ORANGE COUNTY,

Defendants.

-----X

Monday
June 24, 2019
3:05 p.m.

EXAMINATION BEFORE TRIAL

of the Plaintiffs, TOWN OF WOODBURY and the TOWN OF
WOODBURY TOWN BOARD, by and through its witness,
JOSEPH MCKAY, held at the offices of Burke, Miele,
Golden & Naughton, 40 Matthews Street, Goshen, New
York before a Notary Public in and for the State of
New York.

ROBERTA O'ROURKE
Court Stenographer
P.O. Box 142
Cornwall, New York 12518
(845) 527-2572

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A P P E A R A N C E S :

CATANIA, MAHON, MILLIGRAM & RIDER, PLLC
Attorneys for Plaintiffs
One Corwin Court
Newburgh, New York 12550
845-565-1100
BY: RICHARD M. MAHON, II, ESQ.
AND: JOSEPH G. McKAY, ESQ.
AND: LIA FIERRO, ESQ.

BURKE, MIELE, GOLDEN & NAUGHTON, LLP
Attorneys for Defendants - Village of Woodbury
and Village of Woodbury Board of Trustees
40 Matthews Street, P.O. Box 216
Goshen, New York 10924
845-294-4080
BY: RICHARD B. GOLDEN, ESQ.

A L S O P R E S E N T :

Frank Polermo

N O T P R E S E N T :

ORANGE COUNTY DEPARTMENT OF LAW
Attorneys for Defendant - County of Orange
255-275 Main Street
Goshen, New York 10924
845-291-3150

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STIPULATIONS

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IT IS HEREBY STIPULATED, by and between the attorneys for the respective parties hereto, that:

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All rights provided by the C.P.L.R., and Part 221 of the Uniform Rules for the Conduct of Depositions, including the right to object to any question, except as to the form, or to move to strike any testimony at this examination is reserved; and in addition, the failure to object to any question or to move to strike any testimony at this examination shall not be a bar or waiver to make such motion at, and is reserved to, the trial of this action.

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This deposition may be sworn to by the witness being examined before a Notary Public other than the Notary Public before whom this examination was begun, but the failure to do so or to return the original of this deposition to counsel, shall not be deemed a waiver of the rights provided by Rule 3116 of the C.P.L.R., and shall be controlled thereby. The filing of the original of this deposition is waived.

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IT IS FURTHER STIPULATED that a copy of this examination shall be furnished to the attorney for the witness being examined without charge.

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JOSEPH MCKAY, the witness herein, having been first duly sworn by Roberta O'Rourke, a Notary Public of the State of New York, was examined and testified as follows:

THE REPORTER: Will you state your name, please?

THE WITNESS: Joseph McKay, M-C-K-A-Y.

THE REPORTER: What is your business address?

THE WITNESS: One Corwin Court, C-O-R-W-I-N, Court, Newburgh, New York 12550.

EXAMINATION BY MR. GOLDEN:

Q Mr. McKay, I'm going to dispense with the usual instructions as you're familiar with them.

A Yes. Before you start the questioning I just want to make clear we've had an off the record discussion among counsel. My understanding is that you won't be asking many questions concerning advice I may have given to the town board or the town board members. But I just want to let you know that the town board has not formally authorized me to waive any attorney/client

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communications. So I will answer all your questions to the best of my ability without violating that parameter.

Q Understood, I'm not going to ask you any questions concerning those things.

When were you appointed first to be town attorney for the Town of Woodbury, New York?

A The firm, my understanding is the firm's been the attorney for the Town of Woodbury for close to 30 years now. I joined the firm in 2010. At that time Richard Liberth, a partner in the firm, was the primary attorney for the Town of Woodbury. Because I had a similar background in or about 2010 I began working with Woodbury matters and within a few years thereafter I became the primary contact representing the town.

Q I don't have to have this marked, just as a for instance on January 9th, 2018 there was a reorganization meeting and as is typical the town designated, among other appointments, attorney for the town. This one in 2018 there is a motion offered to designate Joseph McKay with the law firm of Catania, Mahon, Milligram & Rider as general legal counsel. So it was really 2018 at least that

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you were being appointed. Were you so appointed, to the best of your recollection, in 2017, '16 and some prior years?

A Yes. I don't know the exact language of those re-org minutes, they may have said to appoint the law firm, some of them may say to appoint me as a member of the firm. I'd have to review the reorganization minutes. But I began representing the town when I joined the firm in 2010 and gradually took over the representation from Richard Liberth until at some point in John Burke's term, Supervisor Burke's term, I became the primary attorney representing the town.

Q Is it fair to say that throughout the term of Supervisor Sutz you were the primary attorney from your law firm for the Town of Woodbury?

A Yes.

Q And that has continued to the present day?

A Yes.

Q Can you look at Exhibit C before you, please, those are meeting minutes of March 2nd, 2017 of the town board, correct?

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A Yes.

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Q And if you would look at the

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beginning, the top of page two of those minutes it

5

says Supervisor Sutz stated he spoke with Attorney

6

McKay this morning about the land swap issue,

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Attorney McKay will investigate the issue and see if

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he can locate a recent survey done, if not one will

9

need to be done to determine who owns what, which

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will cost about 10 to 15,000. Do you remember that

11

conversation?

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A I don't recall that specific

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conversation, but I don't dispute that I discussed

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it with him that day.

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Q That doesn't refresh your recollection

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at all with respect to having that conversation and

17

the topics of the conversation?

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A Well, all it says is that he says he

19

spoke with me about the land swap issue.

20

Q Right.

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A I don't doubt that he did.

22

Q I'm asking you a different question is

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whether or not this refreshes your recollection as

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to whether or not you have a present recollection of

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that conversation with Supervisor Sutz?

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A No, but I can see here that -- no.

Q And further on down it says Attorney McKay is also researching what Harriman is taxed for the highway property versus what they are not taxed for the property. Does that refresh your recollection about talking with Supervisor Sutz with respect to that issue?

A It doesn't refresh my recollection of having that discussion that day but yes, I did have a discussion with Supervisor Sutz and the board members concerning the potential impact with respect to Harriman.

Q So you don't have any recollection of this conversation on the morning of March 2nd, 2017?

A No recollection of that particular conversation, no.

Q Continuing on on that same paragraph, it says Councilman Hunter noted the board began discussing this issue in February of 2016 with Attorney McKay and does not want to see it delayed.

Do you recall discussing any issue in February 2016 with respect to this issue?

A I have two reactions to that sentence, one is that I believe Councilman Hunter testified

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earlier that this was not about the property swap and that it was about construction of a building on the park property.

Q Let me stop you because I'm not asking for your commentary, I'm asking for an answer to the question that I posed.

A All right.

Q Do you recall discussing with the board this issue in February of 2016, and this issue you can decide for yourself what that means, including the sentence before it that Supervisor Sutz putting together a packet for both boards for visuals of both properties?

A It would not have been in February of 2016. I don't believe it would have been as early as February of 2017.

Q When do you first recall discussing the land swap with any town board member including the supervisor?

A I had discussions with Supervisor Sutz at a meeting sometime during the summer of 2016.

Q Can you look at Exhibit D before you, D as in David?

A Okay.

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Q If you look on the third page of that exhibit, which is marked page five, there is an entry in your firm's billing records in which it indicated that July 21st there was a conference between LEF and JGM regarding property swap proposal. There's a further reference about researching whether proposed land swap requires permissive referendum. Do you recall those?

A Generally, yes.

Q And at or about that time were you discussing any of this with any town board members or the supervisor?

A Well, yes, this is a year after what I just stated as the first time that I discussed this. So, yes, the board was discussing this at or about that time in July of '17.

Q Again, if you could listen to my questions and just answer the questions. I'm asking if you recall whether or not you had a conversation with the supervisor or any town board members concerning the land swap in or about July 21st, 2017?

A Yes.

Q Who did you have the conversation

1

2 with?

3

A Those conversations would have taken
4 place likely during attorney/client session at a
5 town board meeting.

6

Q Do you recall having those
7 conversations?

8

A Yes.

9

Q Did you have any conversations outside
10 of an attorney/client meeting with the entire board
11 with any of the individual members or the
12 supervisor?

13

A Can you break that up into smaller
14 questions?

15

Q Sure. You said that you had
16 conversations in or about this time with the town
17 board in an attorney/client meeting, correct?

18

A Yes.

19

Q Did you ever have individual
20 conversations with either the supervisor or any town
21 board member concerning that issue?

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A Certainly.

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Q At or about this time?

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A I think it's fair to say that I had
25 these discussions with the town board. I don't

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recall any specific conversation I may have had with any individual member.

Q Do you recall specifically an attorney/client meeting with the town board?

A Specifically in July of 2017?

Q Yes.

A As I sit here today do I have a -- can I say with certainty? No. But I do remember discussing these matters with the town board and they would have been an attorney/client session.

Q So you don't recall whether that occurred in July of 2017?

A I don't have a specific recollection of an attorney/client session in July of 2017.

Q Would you look at Exhibit E, please?

A Yes.

Q And that then is a portion of an invoice and detailed billing by your firm to the Town of Woodbury, correct?

A A portion of one, yes.

Q That's what I said.

A Okay.

Q And on the second page of this exhibit, which is apparently page three of your

1
2 detailed work breakdown, there's an entry for
3 December 14th, 2017, several entries. One of those
4 entries has, two of those entries has a JGM, is that
5 you?

6 A Yes, sir.

7 Q One of those entries on December 14th,
8 2017 by JGM is a teleconference with Councilman
9 Palermo RE property transfers, do you recall that
10 teleconference?

11 A Yes.

12 Q And is this correct that you discussed
13 with him the property transfers?

14 A Yes.

15 Q Did you know at that time whether or
16 not the property transfers were completed?

17 A Absolutely not.

18 Q Did Mr. Sutz, then Supervisor Sutz,
19 ever discuss the property transfers with you at any
20 time?

21 A Yes.

22 Q When do you recall that he discussed
23 those property transfers with you?

24 A I remember having a meeting with
25 former Supervisor Sutz in the summer of 2016, it was

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with him, Mayor Queenan, Desiree Potvin and myself.

Q Was that when you were out to lunch at some meeting?

A Yes.

Q And obviously there was no attorney/client protection at that meeting, correct?

A Correct.

Q So what occurred at that meeting?

A The meeting was to discuss a number of topics between the town and the village. One of the topics of the meeting was at that time there was a proposal to create a joint municipal building that would be used by both the town and the village. So there was some general discussion about how that might work, where it might be located, how it would be financed.

Q Any conversations dealing with the land swap?

A Yes.

Q Could you detail those for me, please?

A They were not detailed in any way, it was just a broad discussion. You don't want me to give a narrative but.

Q No, as to the particulars of what you

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discussed with respect to the land swap I actually do want you to give a narrative of what was discussed.

A So during that meeting of course I'm there with my client and people who are not my client. So I would describe it as a general broad discussion, no particular legal advice per se. To me it was issue spotting type discussion. And we discussed the potential to transfer the highway garage property in exchange for the old reservoir park property. There was a discussion. There were no maps and deeds, no surveys.

Q What do you recall of the specific conversation of who said what with respect to the issue of the land swap?

A I can recall what I said.

Q What did you say?

A I said that there were a lot of issues that I thought should be reviewed, discussed and analyzed. The town owned all of the property behind town hall including the highway garage, the salt shed and the senior center. It also owned a small parcel towards Townsend Avenue, I believe. And what I discussed was how the process would work is if

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2 instead of the town owning all of that property, if
3 it were either subdivided or if there was a change
4 in ownership and explained that you would then have
5 town and village vehicles crossing each other's
6 property potentially. There's a street or driveway
7 that runs behind town hall in front of the highway
8 garage, it's not a street, it's called Penny Lane.
9 And I suggested that we have the town engineer
10 survey the area and come up with a proposal as to
11 where the lines should be redrawn to ensure proper
12 ingress and egress for vehicles, maybe some traffic
13 mitigation, cross easements for parking. I
14 suggested that the road, they should consider
15 dedicating Penny Lane because I didn't think it was
16 advisable to have, if the roadbed of Penny Lane for
17 instance became village property, I had a concern
18 that people on town business would be traversing the
19 village's private property to get in and out of town
20 property. So those were the general things I
21 pointed out at that meeting.

22 Q And you don't recall what anybody else
23 said in response to the number of issue spotting as
24 you called it?

25 A Not specifically, no.

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Q Pat you on the back and said what a great job Joe or didn't say what are you talking about, you're crazy Joe? They didn't say anything in response that you can recall?

A Well, I certainly didn't get the pat on the back. And, no, I don't think there was a -- there was no adverse response per se. There was a lot of information and I think people were just considering it. And again this was at a point where it was only a discussion. The town engineer had not surveyed the property. There was no details.

Q What other conversations do you recall with Supervisor Sutz in particular other than that conversation?

A Very, very limited. You mean concerning the property?

Q Yes, property transfer, swap.

A Just very limited.

Q What do you recall of the limited ones, when did they occur?

A The way I recollect it is after that meeting that I just discussed really nothing happened for a long period of time. It wasn't any, any communication I believe with Supervisor Sutz

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concerning the property swap until sometime near the July of '17 entries that you mentioned, that's my recollection.

Q Subsequent to July 20th, 2017 when there was a resolution to authorize the supervisor to sign any and all documents upon final preparation, review and authorization by counsel certain specified properties, were you asked to prepare, review or authorize such documents?

A Absolutely not.

Q When was the first time you saw these meeting minutes? I assume you were sent them routinely by the town clerk, correct?

A Yes, correct.

Q Did you read them usually?

A Yes, usually.

Q So knowing how expedited the town clerk prepares meeting minutes --

A Yes.

Q -- you probably got them on July 21st or thereabouts?

A So the question is did I read them when I got them because I agree Desiree would have gotten them done right away, in some short period of

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time thereafter, yes I became aware of it.

Q You did not reach out to the supervisor at that point saying what do you want me to do or something to that effect?

A Right, I do not think David contacted me at all after that.

Q No I'm asking if you contacted him.

A No, I did not. No, I did not.

Q When you read this motion, did you understand authorization to mean you sat like a sixth board member to authorize an action or that you were to authorize documents?

A Certainly I have no authority to authorize anything for the town board, that's done by the town board members. But that sentence to me means, or meant, and I think still does, that some type of documents would be prepared by my firm, I would provide them to the town board and they could then be acted upon by the town board.

Q Could you look at Exhibit A, which is the Complaint, paragraph 40? And that in essence says that there were efforts taken by some unnamed people to ensure that the attorney for the town was kept out of the property exchange process, correct?

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A Correct. And it also says the town engineer.

Q And the town engineer and it also says the town board actually I think?

A Yes, correct.

Q I'm focusing in on you right now.

A Yes.

Q Were you aware of any efforts taken to ensure that you were kept out of the property exchange process?

A Yes.

Q How so?

A I came to learn after the July meeting that as early as December of 2016 a survey had been prepared by Steven Green concerning the property. In all my meetings between 2016 and July of 2017 former Supervisor Sutz never mentioned to me that such a survey was being undertaken or as of March 17, 2017 that one existed. I was never provided with any information concerning any of the details of the proposed property transfer.

For instance, the resolutions indicate that there's going to be a transfer of one lot and a portion of another. There was never any discussion,

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no explanation of what portion of the lot was going to be transferred.

Q Doesn't the resolution state that portion is going to be transferred?

A It says a portion, but it doesn't say what.

Q Isn't there a parenthetical after the portion?

A I don't know what you are looking at. Can I finish this answer first?

Q Sure.

A It's also evident from the meeting minutes that I was not -- I was told not to attend by Supervisor Sutz, told not to attend the February, March and July meetings where the property transfer was discussed.

Q Do you normally attend every town board meeting?

A For the last five or six years I have attended virtually every meeting, substantially all the meetings.

Q How would that work, you would wait for the supervisor to ask you to come to the meeting or you normally would come to the meeting unless you

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were told not to come?

A The second part, I have meetings calendared throughout the entire year. I assume I have no other commitments for those nights, I assume I'm going to be at the town board meeting unless I'm asked not to be there.

Q So unless you're told not to come you actually go?

A Sure, and it would have to be the supervisor that told me not to go.

Q Understood. But I mean if you didn't get a call from the supervisor at all you had this meeting on your calendar you would show up?

A Correct.

Q Without an invite?

A Correct. Can I finish my answer about the efforts that were taken?

Q Yes, we'll get back to that.

A Okay.

Q If you look at Plaintiffs' Exhibit 7 and the motion at the bottom of page one.

A Yes.

Q Identifies lot 21 and a portion of lot 20 (highway garage and salt shed), that was not an

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identification of a portion of lot 20?

A No. I mean in a real property transaction I'd like to know what the meets and bounds are if we're changing a lot line or -- no, to me that's an insufficient description of the transfer of a property.

Q It certainly is an insufficient description that the county clerk would ever take to go ahead and allow a document to be filed. But that's different from my question about whether or not there was an identification of what portion of a lot was intended to be transferred by a resolution.

Are you saying that this is not an intent as to what was intended to be transferred as the portion of lot 20?

A I can't answer --

Q You can't answer, you can't answer it.

A I can't answer as to someone's intent.

Q Objectively we all deal with objective intent all the time, is that right?

A Yes, uh-hum.

Q And that's taken from the words that are set forth. Not talking about any subjective intent. But when it says a portion of lot 20

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J. McKay

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(highway garage and salt shed), are you saying that

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that has no value whatsoever as an intent of what

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portion of lot 20 was going to be transferred?

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A Correct because it doesn't say what

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portion of lot 20 is going to be transferred.

7

Q Was the highway garage and salt shed

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on there?

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A On some portion of the lot.

10

Q And were there other things on another

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portion of the lot?

12

A I know that there was additional

13

vacant land.

14

Q And what about the town senior center?

15

A Correct, yes, on lot 20.

16

Q That's not noted in this

17

parenthetical, is it?

18

A No. Not in the minutes, no.

19

Q All right, go ahead, what other

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efforts are you aware of that were taken to ensure

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that you were kept out of the property exchange

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process?

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A After that meeting, I apologize if I

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re-state, I'm not sure exactly the things I said

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before.

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Q Go ahead.

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A After that meeting in or about the summer of 2016 when I made all of the suggestions about --

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Q '16 or '17?

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A No, that would have been '16. They took their action in '17.

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Q Right.

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A So I had the laundry list, so to speak, of questions concerning how the property transfer would be accomplished. I didn't receive any further -- didn't have any substantive discussions with Supervisor Sutz about it from that time until, until this came up again in the early parts of '17. There was a reference to the fact that the supervisor has indicated in one of the meeting minutes that I'm looking for a survey. If he's discussing the highway garage property and the senior center property he already knew at that meeting that he had obtained the survey. Based on my discussions with the town board they had never seen it.

Q Again, I'm talking about the efforts to keep out of process, not describing the process.

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J. McKay

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A To me that was an effort. In other words, not disclosing to me that the fact that he had retained or the village had retained a survey.

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Q And you've identified that before.

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A Okay.

7

Q So other than the survey issue --

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A Survey.

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Q -- what were the issues, and not inviting you to meetings?

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A Not inviting me to meetings. Cutting off communication with me concerning the property swap after the meetings, not having me draft a contract, not having me draft any of the deeds, not providing me with the information to do that.

16

And I believe part of it, in other words, none of my suggestions, my point is none of the suggestions that I had made had been followed up on. In other words, there was no discussion after my summer of 2016 meeting.

21

Q You're saying if somebody didn't discuss something with you that's an effort to keep you out of the process?

24

A Well, when I, when I am, when somebody asks me to be involved, somebody asks me for legal

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2 advice and I give a list of things that need to be
3 investigated, and then David starts potentially
4 doing some of those things himself and not telling
5 me about it, yes I think that's an effort to do
6 things without me being involved.

7 Q Understood that. Anything else?

8 A I think I covered it.

9 Q Going back to Exhibit D if you look on
10 the third page of the exhibit noted as page five, on
11 July 25th it indicates that you reviewed exchange of
12 land with Village of Woodbury.

13 Now, this was after the July 20th
14 resolution, is that correct?

15 A Correct.

16 Q What did you review?

17 A Well, I certainly didn't review any
18 documents because I didn't have any, but generally
19 when I became aware of the fact that they had taken
20 this action two things jumped out at me immediately,
21 one was whether we needed a permissive referendum to
22 proceed. And, secondly, whether we needed a review
23 or approval by the New York State Legislature. So
24 those things would have been done essentially on my
25 own initiative after becoming aware of the action

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that the town board took.

Q Well, on July 21st on that same page there is a research whether the proposed land swap requires permissive referendum by LEF, correct?

A Okay, yes. Wait, I'm sorry. On July 21st? Yes, okay, July 21st.

Q So my question to you, and I don't want you to confuse it with that other entry if you are, I'm trying to get you to recall what did you do within the description of review exchange of land with Village of Woodbury if you recall it, and if you don't recall it you don't recall it, but I don't want you to guess at it by saying it might have been the permissive referendum?

A I wasn't guessing. I hadn't looked at the entry above, I was answering.

Q You believe you were looking at permissive referendum here on July 25th?

A Yes, I believe so. And additionally I believe primary concern of mine is that it might be subject to legislative approval transferred from the park property -- from a park property from the village to the town.

Q I have nothing further.

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MR. MAHON: I have no questions.

(Whereupon, the proceeding was concluded.)

(The jurat is on the next page.)

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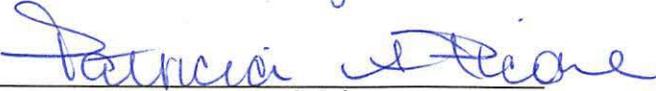
STATE OF NEW YORK)
COUNTY OF ORANGE)

I have read the transcript of my testimony taken at the time and place noted on the title page, and I acknowledge it to be true and correct. Any and all corrections will be put on the errata sheet included at the end of this transcript.



Joseph McKay

Sworn before me this
31st day of July, 2019.



Notary Public

PATRICIA A. PICONE
Notary Public, State of New York
Qualified in Orange County
No. 01PI5013338
Commission Expires July 15, 2023

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J. McKay

W I T N E S S I N D E X

Examination by Mr. Golden4

E X H I B I T S

NONE

I N F O R M A T I O N R E Q U E S T E D

NONE

C E R T I F I C A T I O N

I, ROBERTA O'ROURKE, a Stenotype Reporter and Notary Public within and for the State of New York, hereby certify:

That the witness whose examination is hereinbefore set forth was duly sworn or affirmed by a Notary Public and that the transcript of said examination is a true record of the testimony given by the said witness; and

That I am not related to any of the parties in this action by blood or marriage, and I am in no way interested in the outcome of this matter.

Roberta O'Rourke

Roberta O'Rourke