

To be submitted.

Court of Appeals
of the
State of New York

IN THE MATTER OF BOWERS DEVELOPMENT, LLC, AND
ROME PLUMBING & HEATING SUPPLY CO., INC.,

Petitioners-Respondents,

– against –

**APL-2023-
00052**

ONEIDA COUNTY INDUSTRIAL DEVELOPMENT
AGENCY AND CENTRAL UTICA BUILDING, LLC,

Respondents-Appellants.

**BRIEF OF THE COUNTY OF ONEIDA, AS *AMICUS*
*CURIAE***

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RULE 500(f) DISCLOSURE STATEMENT

The County of Oneida is a New York municipal corporation. It has no parents, subsidiaries, or affiliates.

PRELIMINARY STATEMENT

This appeal concerns the County of Oneida’s (“County”) decades-long effort to revitalize the City of Utica’s (“Utica”) blighted downtown area—a process that has been remarkably successful but which is increasingly constrained by a lack of parking. In 2022, the Oneida County Industrial Development Agency (“OCIDA”) determined to condemn property for a parking lot for a medical office building to be developed by Central Utica Building, LLC (“CUB”). OCIDA determined that the condemnation would serve a “commercial” purpose by improving the local economy and providing additional parking downtown (R.5880).¹ In response, rival property developer Bowers Development, LLC (“Bowers”)—displeased that CUB’s project had been greenlighted over its own competing proposal (*see* R.6045)—commenced an original proceeding, arguing that OCIDA could not support the CUB project by the use of eminent domain because the medical office building is a “hospital” or “health-related facility” and, therefore, the procurement of real property to provide parking for the occupants of this building was not within the jurisdiction of an

¹ Citations to the administrative record bear the prefix (R.__). Citations to the appendix bear the prefix (A.__).

industrial development agency (“IDA”). Remarkably, a majority of the Fourth Department was swayed by this transparently tactical argument and overturned OCIDA’s determination (A.989–990).

As OCIDA and CUB argue more fully in their briefs, the Fourth Department’s decision contravenes this Court’s precedents, which require courts to defer to the determinations of agencies unless irrational, and not to intervene in those determinations to pick winners and losers in business disputes. The County of Oneida writes separately to highlight the impacts the decision will have on Utica’s economic recovery, which depends on the both the availability of parking and the success of credible developers who can reliably shepherd their project concepts into reality.

The County respectfully submits this *amicus* brief in support of the appeal.

BACKGROUND

The County is home to 232,125 people. Its seat, and largest city, is Utica. Located on the Erie Canal, Utica thrived in the 19th and early 20th centuries as a center of manufacturing, transportation, and national defense (R.840–841). Its fortunes declined in the mid- to late- 20th century as rail and road transport supplanted the Erie Canal, industry moved offshore, and the Cold War ended (R.840–841, 2360–2361). Yet in the 21st century, Utica’s story began to change (R.5217). Decades-long efforts of OCIDA, residents, lawmakers, local leaders, and

the business community produced an economic recovery which is transforming once-blighted sections of Utica (R.697, 893).

This recovery has strained parking in the downtown area (*see* R.848–851 [transportation analysis]). The Utica Memorial Auditorium—a multi-purpose arena—was recently expanded to include the adjoining NEXUS Center, a large tournament-based recreation facility (R.176). The historic Hotel Utica, an architectural icon, has been purchased and refurbished by a national hotelier (R.679). Utica’s brewery district and historic Baggs Square neighborhood have experienced an influx of business startups and growth (R.893, 4431, 5218). Developers have, after decades, begun to revitalize Utica’s harbor district along the Mohawk River and Erie Canal (R.5902). And just recently, the County announced the opening in Marcy (two miles North of Utica) of the world’s largest silicon carbide wafer manufacturing facility (R.680).

The Integrated Health Campus

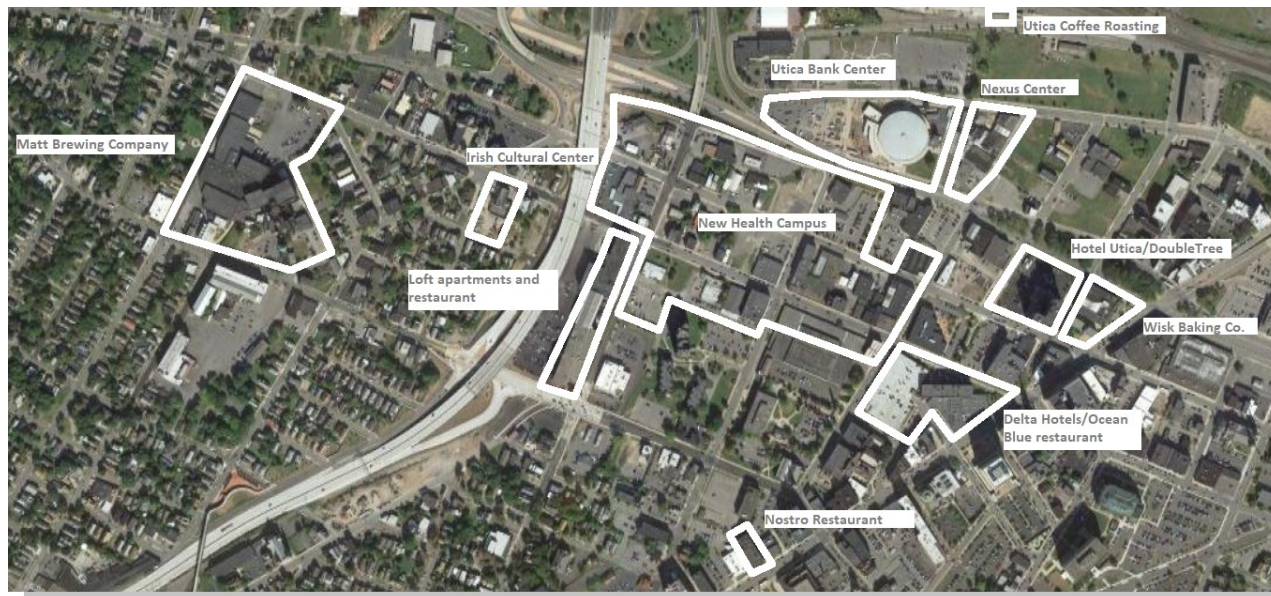
In 2014, two Utica hospitals—Faxton St. Luke’s Healthcare and St. Elizabeth Medical Center—affiliated together as Mohawk Valley Health System (“MVHS”) (R.6). In 2018, MVHS applied for financial assistance to create an integrated health campus in the blighted downtown Utica area (R.7). MVHS explained that the project would consist of a new hospital building, utility plant, a private medical office building, and parking facilities (R.7). The parking facilities would include a new

garage with approximately 1,500 spaces and several parking lots with approximately 1,300 parking spaces, for a total of 2,800 spaces (since reduced) (R.7). MVHS committed this parking for use by the health campus *and* for the “community for non-hospital related events” (R.7). Thereafter, the Utica Planning Board determined that the project would have several “growth inducing” benefits to the economy, including “beneficial impacts in this blighted and underutilized area of the City” and an “expan[sion] in downtown parking” which will “result in a net increase in downtown parking capacity” (R.5249–5250).

The County championed the health campus project both for its benefits to the public health and to Utica’s economic transformation, as explained in a letter from the County Executive: “I strongly support this project Long has the proposed area been blighted, abandoned and in disrepair . . . In one fell swoop a neighborhood ignored for over 50 years will become the focal point of the new Utica” (R.697 [Letter, Hon. Anthony J. Picente, Jr. to City of Utica Planning Board]).

The health campus is welcome, but it will further strain parking in the downtown area. This will make it difficult to continue Utica’s economic recovery and make it difficult to attract new businesses. Indeed, as the below map illustrates, the health campus is surrounded by other new projects, all of which compete for parking with preexisting businesses and residences. The existence of these projects and their impact on parking is manifest and obvious to local decisionmakers, who

naturally considered the health campus project as a component of Utica’s broader redevelopment efforts (*see* R.679–680 [letter from Mohawk Valley Economic Development Growth Enterprises Corporation to City of Utica Commissioner of Urban & Economic Development (June 19, 2018)]).



Bowers

Bowers is a Syracuse-based developer with a history of purchasing derelict Utica properties for redevelopment but not completing the projects.² In 2016, Bowers purchased the historic New Century Club on Genesee Street to redevelop the property, but seven years later the project remains unfinished (*see id.*). In 2017, Bowers purchased the Kempf Block of Utica to develop housing and commercial space, but six years later, the project remains unfinished (*see id.*). In 2018, Bowers

² *See* Bowers Development, LLC — List of Ongoing Projects, *available at* <https://bowers-development.com/projects/> (last accessed Aug. 18, 2023).

purchased 1900 Bleecker Street to build a distribution center, but five years later, the project remains unfinished (*see id.*). And in 2021, Bowers contracted with the City of Utica to purchase the Kennedy Parking Garage—barely 200 feet from the new health campus project—with promises to renovate the garage, which is desperately needed to support parking downtown.³ But two years later—with the new MVHS hospital rising to prominence on Utica’s skyline—the Kennedy Garage remains closed. Local papers report that the proposed sale has fallen through.⁴

The CUB Medical Office Building Project and OCIDA’s Determination of Commercial Purpose.

With the health campus project underway, MVHS turned to the medical office building. It received proposals from both Bowers and CUB to develop the office building (*see* R.5499, R.5893). However, MVHS chose to lease the property that is to become the medical office building to CUB on the basis that its development concept was more feasible than Bowers’, with financing and several tenants already secured (*see* R. 5577, R.5863–5894). In December 2021, CUB offered to purchase adjacent property (the “Property”) from its owner in order to secure parking for the

³ *See* Steve Howe, Kennedy Parking Garage the Latest Utica Approved Project for Bowers Development, Observer Dispatch (Sep. 10, 2021), available at <https://www.uticaod.com/story/news/local/2021/09/10/uticas-kennedy-parking-garage-latest-project-bowers-development/5716842001/> (last accessed July 20, 2023).

⁴ *See* Edward Harris, Utica May Face Legal Action Over Failed Sale of Kennedy Parking Garage, Observer Dispatch (Aug. 3, 2023), available at <https://www.uticaod.com/story/news/2023/08/03/utica-may-face-legal-action-over-failed-sale-of-kennedy-parking-garage/70515447007/>

office building, only to learn that the owner had already promised to sell the Property to Bowers (R.5282). Consequently, CUB wrote OCIDA and asked it to obtain the Property by eminent domain (R.5282). CUB explained that “the [medical office building] project . . . will be transformative both to downtown Utica and to the delivery of health care services in Oneida and surrounding counties” (R.5282).

OCIDA issued a notice of public hearing for the acquisition, which explained that the project would “facilitate the delivery of healthcare services to the residents of Oneida County, create new and improved job opportunities, reduce unemployment, eliminate blight in the immediate area of the Project, promote urban renewal and redevelopment and on an overall basis result in the betterment of community” (R.5287). The public hearing went forward, and on April 7, 2022, OCIDA adopted a Findings and Determination (the “Determination”) authorizing the condemnation of the Property (R.5857–6000, 6031–6040). OCIDA determined that the condemnation served a “commercial” purpose because, among other things, it would create job opportunities, foster economic prosperity, and “reduce burdens on public parking facilities in the area and also alleviate traffic” (R.5880 [emphasis added]).

The Fourth Department Annuls the Condemnation

Bowers and the then-owner of the Property, Rome Plumbing & Heating Supply Co., Inc. (together, “Petitioners”), commenced an original proceeding to

annul the Determination. They argued, among other things, that OCIDA lacked jurisdiction to condemn the Property because the medical office building project is not one of the types of projects expressed in General Municipal Law Section 858 (*see* A.16–17).

On December 23, 2022, the Fourth Department rendered a memorandum and order (“Order”) annulling the Determination (A.989–996). The Order is by a majority of four Justices, with a dissenting memorandum by Justice Curran. The majority agreed with the Petitioners and determined that General Municipal Law Section 858 is exhaustive and does not authorize IDAs to undertake projects related to hospital and healthcare facilities (A.990). It then held that although OCIDA had determined that the project served a commercial purpose as a parking lot, “the record establishes that . . . the primary purpose of the acquisition was not a commercial purpose. Rather, the property was to be acquired because it was a necessary component of a larger hospital and healthcare facility project” (A.990).

In his dissent (A.990–996), Justice Curran wrote that the majority improperly substituted its findings regarding the purpose of the project for OCIDA’s, without giving OCIDA proper deference (A.992–993). He also argued that General Municipal Law Section 858, which enumerates the powers of IDAs, is not exclusive and therefore does not bar IDAs from supporting different types of projects (A.995).

OCIDA and CUB filed motions to the Fourth Department for reargument of its Order, or alternatively, for leave to appeal to this Court (A.998–1034). The Fourth Department denied reargument, but granted leave to appeal to this Court (A.1080).

INTEREST OF THE AMICUS

The County is the municipal corporation encompassing Utica, the largest municipality in the Mohawk Valley (*see* Oneida County Charter § 101). It is the appointing authority for OCIDA (*see* General Municipal Law § 901), but OCIDA is separate and independent from the County. The County is deeply involved in the health campus project and invested in its success (R.5758). It is also involved in numerous development projects in the ten square-block area of Utica in which the health campus is situated. The County has intimate knowledge concerning the growth and development of the downtown Utica area, including the track records of developers such as Bowers. Therefore, the County has a manifest interest in this appeal. If not reversed, the Order will stifle Utica’s economic growth by reducing the parking available to businesses and residents. It will curtail OCIDA’s powers for this project and for any project which an opponent claims is not semantically confined to one of the categories enumerated in General Municipal Law Section 858. This will jeopardize the County’s decades-long effort to create a prosperous Utica.

ARGUMENT

The Court should reverse the Order because the Fourth Department failed to defer to OCIDA's determination that a commercial purpose underlay its condemnation of the Property. Instead, the Fourth Department impermissibly performed its own review of the administrative record to render its own finding that the project's primary purpose was not commercial, and in the process picked winners and losers in what is essentially a business dispute (A.990). This determination constituted a lapse in deference and overlooked the predominance of the record, which squarely establishes that the condemnation serves a commercial purpose in providing parking to the downtown area, furthering the County's efforts to return Utica to economic prosperity.

Courts should generally defer to the determinations of administrative bodies (*see Matter of Howard v. Wyman*, 28 NY2d 434, 437 [1971]). Agencies often administer broadly drafted state laws, and therefore must occasionally construe and apply those statutes to render a determination (*see id.*). This is particularly true when reviewing a matter within an agency's area of expertise (*see Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]). When reviewing such determinations, "the . . . court's function is limited . . . The administrative determination is to be accepted by the courts if it has warrant in the record and a reasonable basis in law" (*Howard*, 28 NY2d at 437 [reversing the Appellate Division and reinstating an agency's

determination that a burglary did not qualify as a “catastrophe” compensable by welfare under the Social Services Law]).

This deference holds in condemnation proceedings. For example, in *Matter of Kaur v NY State Urban Dev. Corp.*, the respondent urban development corporation condemned 17 acres of property to support the development of a new campus for Columbia University, determining that the project served a public purpose by eliminating blight and creating jobs, and therefore was a proper exercise of eminent domain (15 NY3d 235, 244 [2010]). A group of landowners petitioned to annul the condemnation, and a plurality of the Appellate Division granted the petition, finding that the agency’s determination of “public use” was “wholly unsupported by the record and precedent” (*id.* at 252). This Court reversed, holding “the *de novo* review of the record . . . was improper . . . since there is record support . . . for ESDC’s determination that the Project site was blighted, [and that] the Appellate Division plurality erred when it substituted its view for that of the legislatively designated agency” (*id.* at 255).

Here, the Appellate Division did exactly what this Court prohibited in *Kaur*. OCIDA is charged with administering the New York State Industrial Development Agency Act (*see* General Municipal Law § 901). That statute establishes the purposes of IDAs and authorizes IDAs to use eminent domain as necessary for such purposes (*see id.* 858[4]). OCIDA, after extensive proceedings—and upon a public

record replete with references to development projects in the vicinity—determined to condemn the Property on the basis that it served a commercial purpose in creating jobs, fostering economic development, and alleviating parking and traffic congestion (R.5880). This had abundant support in the record (*see* R.5566; R.5881). Moreover, the IDA’s decisionmakers were all steeped in the community, and therefore brought considerable expertise to bear concerning local conditions (and the strains that recent development have imposed on parking). But the Appellant Division simply disagreed with the IDA and disregarded its expertise, holding that its own review of the record showed that the “primary purpose” of the condemnation was not commercial (A.990). Respectfully, the Appellate Division’s role was not to review the record *de novo* to discern the “primary purpose” of the condemnation (and General Municipal Law § 858 contains no “primary purpose” requirement), but to instead determine whether OCIDA’s determination of a commercial purpose was rational, *i.e.*, supported in the record—which it clearly was (*see Kaur*, 15 NY3d at 255).

The Appellate Division’s decision will hurt Oneida County. The City of Utica’s economic recovery is welcome, with developers siting several large projects—including the new health campus—in the downtown area (R. 176, R.679, R.893, R.4431, R.5218). But this growth depends on the continued availability of parking. According to a traffic study prepared by an engineering firm, the health

campus project will create demand for 1,723 parking spaces during peak hours, which will be satisfied by the construction of a new garage (1,455 spaces) and the creation of a parking lot for the medical office building (375 spaces) (*see* R.851 [traffic study by C & S Engineers, Inc.]). If the Property cannot be condemned and used as a parking lot, the health campus project will be “short” on parking by several hundred spaces, forcing drivers to park on neighboring streets and lots (R.848). With parking already scarce, neighboring businesses will suffer and eventually, developers will take their projects elsewhere.

The Fourth Department’s Order is even more troubling because it picked winners and losers in what is, at its core, a business dispute among rival developers. The record shows that Bowers wanted to develop the medical office building itself, but that MVHS chose to partner with CUB because CUB’s concept for the office building was more feasible (*see* R. 5577, R.5863–5894). Lacking MVHS’ backing, Bowers nonetheless contracted to purchase the adjacent parking area from its then-owner (it remains unclear whether Bowers has actually consummated the purchase, because no deed has been filed). When OCIDA then condemned the parking area (the Property), Bowers turned to the Appellate Division to reverse OCIDA. This improperly enlisted the judiciary to overturn an essentially legislative determination, all in order to pick winners in a business dispute (*see Kaur*, 15 NY3d at 255).

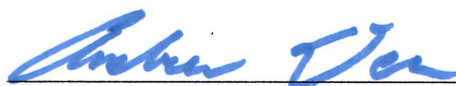
The Appellate Division’s order also has significance for IDAs statewide. The order assumes that General Municipal Law Section 858’s statement of the purposes of IDA’s is exhaustive, and then manufactures a red line barring IDAs from supporting “hospital” or “healthcare facility” projects. It presumes that each parking spot in a municipality can be allocated to a single purpose, when in reality, a lack of parking in one area (such as for a medical office building) will simply cause spillover to nearby areas (burdening businesses). Without discussion, the Order grafts a “primary purpose” test onto IDAs’ use of eminent domain—which will prevent them from condemning property for even mixed purposes if the statutorily enumerated purpose (commerce) is coupled with a non-statutorily enumerated purpose (healthcare). And most concerning, it does all this after refusing to defer to OCIDA’s determination that the condemnation is “commercial.” The consequences are clear. IDA’s will now be afraid to support sophisticated projects that cannot be facilely categorized under General Municipal Law Section 858. If IDAs do proceed, their determinations will be subject to attack by their opponents and second-guessing by the courts.

CONCLUSION

For these reasons, and for those more fully argued by Respondents in their appeal, the County respectfully asks that the Court reverse the order of the Appellate Division and dismiss the petition.

Dated: Utica, New York
August 21, 2023

Respectfully submitted,

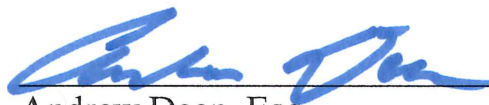


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PRINTING SPECIFICATIONS CERTIFICATION

The undersign certifies, pursuant to 22 NYCRR 500.13(c)(1), that the foregoing brief was prepared on a computer using the word processing software “Microsoft Word.” The font used is a monospaced typeface font, Times New Roman, point size 14, with double line spacing. The total number of words in the body of this brief, exclusive of the statement of status of the related litigation, the corporate disclosure statement, the table of contents, the tables of cases and authorities and the statement of questions presented, is 3,164 words.

Date: August 21, 2023



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