To be Argued by:
MICHAEL A. FOGEL
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Fourth Department

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

Docket No.:
OP 22-00744

Petitioners,

– against –

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

Respondents.

BRIEF FOR PETITIONERS

FOGEL & BROWN, P.C.
Michael A. Fogel, Esq.
Patrick D. Donnelly, Esq.
Attorneys for Petitioners
120 Madison Street, Suite 1620
Syracuse, New York 13202
(315) 399-4343
mfogel@fogelbrown.com
pdonnelly@fogelbrown.com

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PRELIMINARY STATEMENT

Petitioners Bowers Development, LLC ("Bowers") and Rome Plumbing & Heating Supply Co. Inc. ("Rome Plumbing") (collectively "Petitioners"), by their attorneys, Fogel & Brown, P.C., submit this brief in support of the Verified Petition ("Petition").

This an original special proceeding brought by Petitioners pursuant to Eminent Domain Procedure Law ("EDPL") § 207 for review and rejection of the determination and findings of respondent Oneida County Industrial Development Agency ("OCIDA") in this matter related to the purported acquisition by eminent domain of the property at 411 Columbia Street, Utica, New York (SBL 318.41-2-38) (the "Property") for respondent Central Utica Building, LLC ("CUB") for a medical office building/ambulatory surgery center ("MOB") project by CUB ("CUB's project") on the same property where Petitioner Bowers Development, LLC ("Bowers") intends to build an MOB.

Petitioners pursuant to EDPL § 207 seek to annul OCIDA's determination to acquire the Property by eminent domain because (1) the proposed acquisition is not within the condemnor's statutory jurisdiction or authority; (2) the condemnation does not meet the requirements of serving a public purpose as the public purpose is pretextual or illusory; (3) the condemnor failed to comply with EDPL Article 2 and the federal and state constitutions; and (4) the condemnor failed to comply with the

State Environmental Quality Review Act, Environmental Conservation Law Article 8 ("SEQRA").

Bowers is one of the largest and most active developers in the City of Utica. Bowers has invested a significant amount of time, effort and money into developing and restoring buildings in Utica. Bowers has a contract to purchase the Property and intends to construct a brand-new state-of-the-art medical office building (i.e., an MOB) on the Property that will have more square footage than the MOB proposed by CUB. Bowers intends to build an MOB that compliments the hospital development at that location and provides more jobs and greater space for doctors so that more and better medical services can be provided to the community.

CUB is a private entity made up of a group of private doctors who submitted an application in November 2021 to OCIDA for tax reduction benefits to help it build its MOB and who requested in that application that OCIDA take the Property through eminent domain as CUB asserted that the Property was part of and, in fact, necessary for its MOB project. CUB stated in its application, "Without this property it will be impractical if not impossible to construct the MOB as proposed. If CUB is unable to acquire the [Property] from the property owner, CUB will request that [OCIDA] acquire the property through eminent domain."

OCIDA in its haste to take the Property from Petitioners and give it to CUB acted with complete disregard, and in violation, of the limits of its statutory authority

and in bad faith. OCIDA lacks the authority to take the Property by eminent domain for CUB's project because the proposed project is not a type of project for which OCIDA has statutory jurisdiction or authority.

OCIDA also failed to comply with the requirements of Article 2 of the EDPL, the federal and state constitutions and SEQRA. OCIDA's violations of the EDPL and the constitutions include but are not limited to failures to comply with public hearing and notice requirements and requirements to inform the public and make the record of the hearing available. OCIDA and CUB have also failed to demonstrate that they can and will meet the constitutional requirement of "sure and certain" just compensation prior to determining to take the Property by eminent domain.

Moreover, the purported public purpose is pretextual and illusory as OCIDA is taking the property from a private developer who intends to build a MOB and giving it to another private development entity to build a MOB.

OCIDA's violations of SEQRA include but are not limited to the failure to take a hard look at the environmental impacts associated with the taking and CUB's proposed project in the proposed location with the proposed design that purportedly necessitates OCIDA's condemnation. This includes a failure to take the required hard look at environmental impacts associated with the proposed larger size and changed location of the MOB from what was purportedly examined previously. This also includes a failure to take the required hard look at environmental impacts

associated with the proposed location of CUB's MOB in relation to a helicopter pad proposed to service the hospital in that location. Finally, OCIDA by its own admission engaged in impermissible segmentation of review in violation of SEQRA.

For all the reasons stated herein and in the Petition, OCIDA's determination and findings should be rejected and annulled pursuant to EDPL § 207.

STATEMENT OF FACTS

Petitioner Bowers is one of the largest and most active developers in the City of Utica and has invested a significant amount of time, effort and money into developing and restoring buildings in Utica (Dkt. 2, pg. 1, ¶ 2, pg. 6, ¶¶ 28-29, pg. 26, ¶ 169, pgs. 559-560; R. 5302, 5561).[1] Bowers has a contract with the owner of the Property, Rome Plumbing, to purchase the Property, and Bowers intends to construct a brand-new state-of-the-art medical office building at the Property (Dkt. 2, pgs. 1-2, ¶ 2, pg. 5, ¶ 21, pg. 6, ¶¶ 30-31; Dkt. 8, pg. 41; R. 5302).

The subject property that Respondent CUB requested Respondent OCIDA acquire by eminent domain for its MOB project is 411 Columbia Street in the City of Utica, Oneida County, New York (SBL 318.41-2-38), referred to herein as the Property (Dkt. 2, pg. 1, ¶ 2, pg. 4, ¶ 17, pg. 6, ¶¶ 30-31, pgs. 69, 72; Dkt. 8, pg. 41; R. 5302, 5611). The Property is usually referred to by CUB and OCIDA as the

[1] References in this brief to "Dkt." refer to documents filed in this proceeding on the New York State Courts Electronic Filing ("NYSCEF") docket system. References to "R." refer to the Record filed by OCIDA on NYSCEF.

"O'Brien Parcel" because the Property was owned by J.P. O'Brien Plumbing and Heating Supply, Inc., which merged into Rome Plumbing (Dkt. 2, pg. 4, ¶ 18, pg. 72; Dkt. 8, pg. 41; R. 5611).

OCIDA and CUB have been aware since at least September 2021 that Bowers has a contract to purchase the Property and plans to develop the Property into a MOB (Dkt. 2, pg. 6, ¶ 31, pg. 56, 64, 72; R. 5302, 5315).

On or about November 12, 2021, CUB submitted an Application for Financial Assistance, dated November 12, 2021, to OCIDA. CUB's application sought financial assistance from OCIDA for the development of a medical office building/ambulatory surgery center (referred to herein as CUB's MOB project or CUB's project) on parcels of property that include the Property (Dkt. 2, pgs. 6-7, ¶¶ 32-35; R. 5606, 5611). CUB's application also included a request that OCIDA acquire the Property by eminent domain and then give the Property to CUB for its project (Dkt. 2, pg. 6, ¶ 34, pg. 97; R. 5611). The application stated, "Without this property it will be impractical if not impossible to construct the MOB as proposed. If CUB is unable to acquire [the Property] from the property owner, CUB will request that [OCIDA] acquire the property through eminent domain." (Dkt. 2, pg. 6, ¶ 34, pg. 97; R. 5611).

CUB has described its MOB project to OCIDA as a physician-hospital ambulatory surgery center joint venture with 6 operating rooms or 6 ambulatory

surgery center suites, medical clinics, a cardiology medical group and health-related tenants all within the footprint of the Wynn Hospital development that is being built at that location and that the project is within the Mohawk Valley Health System ("MVHS") campus (Dkt. 2, pg. 15, ¶ 11, pg. 35, pg. 7; Dkt. 8, pg. 41 ¶ 13; R. 5282, 5287, 5567, 5604, 5610). MVHS is a private entity that operates hospitals (Dkt. 2, pg. 12 ¶ 54, pg. 51; R. 5610).

On or about November 15, 2021, OCIDA posted an agenda on its website stating the following item for the OCIDA meeting on November 19, 2021:

> Consider an inducement resolution relating to the Central Utica Building, LLC facility, providing preliminary approval for financial assistance in the form of exemptions from sales tax (estimated at $1,820,000 not to exceed $2,002,000) and exemptions from mortgage recording tax (estimated at $128,138 not to exceed $140,951), which financial assistance is consistent with the Agency's Uniform Tax Exemption Policy, and authorizing the Agency to conduct a public hearing. The project is considered a "retail facility" and the Agency will need to make findings at a future meeting to qualify financial assistance.

(Dkt. 2, pg. 7 ¶ 36, pg. 44; R. 5717).

On November 19, 2021, OCIDA held a meeting to discuss the CUB project. One or more members of the OCIDA board believed that the amount of the financial benefit being requested by CUB was too large and proposed that the financial benefit be reduced to $500,000 in sales tax exemption and $140,951 in mortgage recording tax exemption (Dkt. 2, pg. 7 ¶ 37, R. 5717, 5724). OCIDA then scheduled a public

hearing as to whether to grant the requested financial benefit, in the reduced amount (Dkt. 2, pg. 7 ¶ 37; R. 5738, 5754, 5778, 5787).

On December 10, 2021, OCIDA held the public hearing, and Bowers submitted a letter objecting to CUB's application and OCIDA's consideration of issuance of financial benefits for the CUB project because, among other things, it included the Property as part of the project even though CUB did not own, lease, or otherwise have the Property under its control and Bowers has a contract to purchase the Property and intends to build an MOB (Dkt. 2, pgs. 7-8 ¶¶ 37-38, pg. 48; R. 5738, 5754, 5760, 5778, 5787). That same day, CUB submitted a letter to OCIDA requesting that OCIDA reconsider reducing the requested tax benefit (Dkt. 2, pg. 8, ¶ 38; R. 5751).

At OCIDA's regular meeting on December 17, 2021, a majority of the OCIDA board now stated it believed that the amount of the financial benefit requested was not too large and proposed that the financial benefit be the full amount requested by CUB. OCIDA then scheduled a public hearing, for January 18, 2022, as to whether to grant the financial benefit in the full amount requested (Dkt. 2, pg. 8, ¶ 39, pgs. 46, 64, 421, 447, 462, 501; R. 5752, 5787, 5793, 5828, 5790).

On January 18, 2022, Bowers submitted comments to OCIDA objecting to approval of the financial assistance again based on, among other things, that CUB does not own, lease or otherwise control the Property, which by CUB's own

admission was a necessary part of its project (Dkt. 2, pg. 8, ¶ 40, pgs. 51-59, 82; R. 5790, 5985, 6373, 6378).

On January 21, 2022, OCIDA sent a letter to the Oneida County Executive asking for a determination as to whether CUB's MOB project, including the Property, met the requirements for financing as a "retail" facility pursuant to General Municipal Law § 862(2)(c). The letter stated:

> Central Utica Building, LLC, on behalf of itself and/or the principals of Central Utica Building, LLC and/or an entity formed or to be formed on behalf of any of the foregoing (collectively, the "Company") has applied to the Agency to enter into a transaction in which the Agency will assist in the construction of a 94,000± square foot state-of-the-art medical office building and appurtenant facilities including parking areas and all infrastructure, utilities and amenities to support the same (collectively, the "Improvements") situated on parcels of land measuring 2.90± acres in the aggregate adjacent to the new Wynn Hospital . . . and acquisition and installation of equipment in the Improvements (the "Equipment"), all for the purpose of providing a seamless and integrated health care delivery system together with the Wynn Hospital, and to enhance and expand the delivery of health care services to the community (the Land, the Improvements and the Equipment are referred to collectively as the "Facility" and the construction and equipping of the Improvements is referred to as the "Project"). The Agency is providing financial assistance in the form of exemptions from sales and use taxes and exemptions from mortgage recording taxes . . . The Facility will be "primarily used in making retail sales to customers who personally visit" such Facility, as such phrase is used in connection with Section 862 of the General Municipal Law . . .

(Dkt. 2, pgs. 8-9, ¶ 41, pgs. 61-62; Dkt. 8, pg. 41, ¶ 41).

Prior to the January 18th public hearing, unbeknownst to Petitioners, on January 14, 2022, CUB submitted a letter to OCIDA requesting that OCIDA take the Property by eminent domain. CUB's letter states, "ownership of the O'Brien Parcel is essential to the MOB development", and "the location of the MOB and its ambulatory surgery center within the footprint of the Wynn Hospital is critical to MVHS" (Dkt. 2, pg. 9, ¶ 42, pgs. 64-67; R. 5282).

OCIDA subsequently scheduled a public hearing for February 23, 2022 as to whether to take the Property by eminent domain and set a deadline of March 2, 2022 for all written comments (Dkt. 2, pg. 9, ¶ 43, pgs. 69, 70; R. 5287, 5288).

On February 23, 2022, prior to the public hearing, Petitioners submitted comment letters to OCIDA objecting to taking the Property by eminent domain and provided comments at the public hearing (Dkt. 2, pg. 9, ¶ 44, pgs. 72-188; R. 5560, 5587).

During this time, Bowers repeatedly requested, including by phone and email, access to the documents referenced in the Notice of Public Hearing so that Bowers could review and comment on them before the March 2, 2022 deadline for written comments (Dkt. 2, pg. 10, ¶ 45, pg. 21, ¶ 122, pg. 29, ¶ 190, pgs. 253, 536; *see also* Dkt. 2, pgs. 12-13, ¶ 54; R. 5842). OCIDA did not provide access to the documents, and in response to Bowers' last request, counsel for OCIDA responded by email on March 1, 2022 that he would advise when those documents are ready (Dkt. 2, pg.

10, ¶ 45, pg. 248, 253; R. 5842). OCIDA had still not provided access to the documents by the March 2, 2022 deadline for public comments (Dkt. 2, pg. 10, ¶ 45, pgs. 248, 252-253; R. 5587-5588, 5842, 5851-5852). OCIDA thus admitted that the documents referenced in the public hearing notice were not available for inspection prior to the deadline for public comments on March 2, 2022.

On March 1, 2022 and March 2, 2022, Petitioners submitted additional comment to OCIDA, including comments regarding the above referenced denial of access to documents referenced in the Notice of Public Hearing (Dkt. 2, pg. 10, ¶ 46, pgs. 252; R. 5587).

On or about February 28, 2022, OCIDA posted an agenda on its website stating the following item for the OCIDA meeting on March 3, 2022:

> Consider a final authorizing resolution relating to the Central Utica Building, LLC Facility, approving financial assistance in the form of exemptions from mortgage recording taxes (valued at $128,138) and exemptions from sales tax (valued at $1,820,000), which financial assistance is consistent with the Agency's Uniform Tax Exemption Policy, and authorizing the form and execution of related documents, subject to changes approved by counsel and conditioned upon (a) CUB acquiring an interest in the O'Brien Parcel, either through fee ownership or a land lease for a minimum term of twenty years; (b) CUB and CNYC executing a sublease for a minimum term of ten (10) years and minimum 20,000 square feet; and (c) CUB and MVASC executing a sublease for a minimum term of ten (10) years and minimum 18,000 square feet.

(Dkt. 2, pg. 10, ¶ 47, pg. 524; Dkt. 8, pg. 13, ¶ 47).

On March 3, 2022, at the regular OCIDA meeting, upon information and belief, OCIDA adopted a Final Authorizing Resolution purporting to grant CUB financial assistance for its MOB project in the form of exemptions from mortgage recording taxes (valued at $128,138) and exemptions from sales tax (valued at $1,820,000) subject to certain conditions (Dkt. 2, pgs. 10-11, ¶ 48, pg. 524; Dkt. 8, pg. 13, ¶ 48).

On March 16, 2022, OCIDA sent an email with a letter to Bowers' attorney stating that the record of the public hearing was now available for inspection at OCIDA's office and at the Oneida County Clerk's office and that the public comment period was extended to March 30, 2022 (Dkt. 2, pg. 11, ¶ 49, pg. 30, ¶ 191, pg. 528; R. 5856-5857). Bowers' attorney then again called and left a message with OCIDA asking questions about inspecting the documents, but no one from OCIDA called back (Dkt. 2, pg. 11, ¶ 49).

On March 17, 2022, Bowers' attorney went to OCIDA's office and requested access to the above referenced records (Dkt. 2, pg. 11, ¶ 50, pgs. 30-31, ¶ 196, pgs. 532-533, 574). The records were not available for inspection, and OCIDA's staff rushed to put together some documents that were not stapled or bound in any way and a binder of other documents (*id.*). Bowers' attorney asked if he could make copies of these documents and was told by OCIDA staff that he could not (*id.*). Bowers' attorney inspected the documents and binder, and then went to the County

Clerk's office to inspect what had been provided to the County Clerk by OCIDA and about making copies (*id.*). The binder and documents at the County Clerk's office did not match the binder and documents at OCIDA's office (*id.*). Bowers emailed OCIDA in an effort to clear up the differences and get the full official record of the proceedings so that Bowers could comment on same (*id.*). By the comment period deadline of March 30, 2022, OCIDA still had not provided same, and OCIDA did not respond to Bowers email until after March 30, 2022 (*id.*).

On March 30, 2022, Bowers submitted an additional comment letter to OCIDA commenting on OCIDA's failure to provide the record as stated above and continuing to provide objections to the taking by eminent domain (Dkt. 2, pgs. 11-12, ¶ 51, pg. 536; R. 5850).

Bowers included in that comment letter a letter by the City of Utica Mayor recently published in the local newspaper the Observer-Dispatch (Dkt. 2, pgs. 11-12, ¶ 51, pgs. 559-560; R. 5873-5874). That letter by the Mayor of the City of Utica, dated March 22, 2022, stated, among other things:

> The Oneida County Industrial Development Agency is now considering taking the property (that is scheduled to be privately developed into a medical office building) through eminent domain, so a different private entity can construct its own medical office building. It is an improper overreach of government power to take property from one private developer and give it to another for the same end use. Why should taxpayers bear the cost of eminent domain when the developer who already owns the property plans on constructing a medical office building on the same site?

> . . .
> As for the broader medical campus project, there are ample opportunities that can benefit everyone if the respective parties are willing to communicate and work together. The city has been willing to work with all parties for the betterment of our community. It is my hope other project stakeholders will do the same.

(Dkt. 2, pg. 12, ¶ 52, pgs. 559-560; R. 5873-5874). The letter by the Utica Mayor also discussed the Kennedy Parking Garage which is next to the proposed location of CUB's MOB project and stated:

> Kennedy is a deteriorating garage which needs at least $13 million in repairs. To put this in perspective, a 1% property tax increase yields approximately $300,000 in revenue. This figure equates to a 43% tax increase for city residents.
>
> As the city is experiencing transformational redevelopment, a private developer made a $1.5 million offer to purchase Kennedy, which the city's Urban Renewal Agency (URA) and Common Council approved. The $13 million of repairs, coupled with the $1.5 million purchase offer, yields a nearly $15 million benefit to Utica taxpayers.

As the article indicates, the private developer under contract to purchase the Kennedy garage is Bowers (Dkt. 2, pg. 12, ¶ 53, pgs. 559-560; R. 5873-5874).

The Mayor's letter further stated:

> Kennedy is an important piece in the development of the new downtown hospital, and the developers have repeatedly tried to meet with MVHS and the County to discuss the hospital's parking needs. The developers have publicly stated their willingness to construct additional levels of parking onto Kennedy to accommodate the hospital. Unfortunately, MVHS and the County have refused to meet with the developer.

Again, said developer of the Kennedy Parking Garage is Bowers (Dkt. 2, pg. 12, ¶ 53, pgs. 559-560; R. 5873-5874).

Bowers in its March 30, 2022 letter also, as in previous letters, requested that OCIDA keep the public comment period open until after OCIDA responded to Bowers' FOIL request made to OCIDA back in January 2022 (Dkt. 2, pg. 13, ¶ 55, pg. 536; R. 5850). However, OCIDA closed the public comment period and then conveniently responded less than three business days later on April 4, 2022 to the FOIL requests which obviously prevented Bowers from reviewing and commenting on the documents received in response to the FOIL request (Dkt. 2, pg. 13, ¶ 55, pg. 29, ¶ 187, pgs. 562).

On April 7, 2022, OCIDA voted to take the Property by eminent domain and then issued the subject determinations and findings. OCIDA completed the publication of its determinations and findings on April 15, 2022 (Dkt. 2, pg. 13, ¶ 56; Dkt. 8, pg. 17, ¶ 56, pg. 39). On May 11, 2022, Petitioners commenced this EDPL Article 2 proceeding challenging OCIDA's determinations and findings (Dkt. 2 – Petition).

ARGUMENT

POINT I

THE PROPOSED ACQUISITION IS NOT WITHIN OCIDA'S STATUTORY JURISDICTION AND AUTHORITY BECAUSE CUB'S PROJECT IS A HOSPITAL OR HEALTH-RELATED FACILITY

Industrial development agencies are creatures of statute and are limited to the specific powers provided to them under the statute. The statute must be strictly construed against an agency when an agency is determining to condemn property, and the statutory authority should not be extended by inference or implication (*Schulman v People*, 10 NY2d 249, 255 [1961], cited by *Syracuse Univ. v Project Orange Assocs. Servs. Corp.*, 71 AD3d 1432, 1435 [4th Dept 2010]; *In re Reed's Basket Willow Swamp Park*, 6 Misc 3d 1025[A] *3 [Sup Ct, Kings County 2005]). Any doubt about the extent of such authority should be determined against the agency seeking to lay claim to such power (*id.*).

The industrial development agency in this case, OCIDA, lacks the authority to take the Property by eminent domain for CUB's project because the proposed project is not a type of project for which OCIDA has statutory authority.

GML Article 18-A contains the provisions of law governing the authority and powers of industrial development agencies within New York State. GML § 858, in Article 18-A, provides the current list of projects for which industrial development

agencies have authority. GML § 901 specifically provides that OCIDA's authority and powers are set forth in GML Article 18-A, which includes GML § 858.

The original purpose of industrial development agencies under the statute was to encourage and attract industrial uses to New York State (*see e.g.* 1981 NY Op. Atty. Gen. 55; 1980 NY Op. Atty. Gen. Inf. 139). The original statute has been amended several times to add additional specific projects for which industrial development agencies have authority (*see e.g. id.*). For example, chapter 659 of the Laws of 1997 added "continuing care retirement communities".

The current list of projects for which industrial development agencies, such as OCIDA, have authority under GML § 858 is as follows: "industrial, manufacturing, warehousing, commercial, research, renewable energy and recreation facilities including industrial pollution control facilities, educational or cultural facilities, railroad facilities, horse racing facilities, automobile racing facilities, renewable energy projects and continuing care retirement communities".

Industrial development agencies activities, including eminent domain takings, are limited to the types of projects set forth in GML § 858. These types of projects do not include hospitals or other health-related facilities (1981 NY Op. Atty. Gen. 55; 1980 NY Op. Atty. Gen. Inf. 139; *see also Madison Cnty. Indus. Dev. Agency v State Authorities Budget Off.*, 151 AD3d 1532, 1535–36 [3d Dept 2017] [industrial development agency exceeded its statutory authority under GML § 858 by forming

a subsidiary; the court stated the rules of interpretation that "All parts of a statute must be harmonized with each other as well as with the general intent of the whole statute, and effect and meaning must, if possible, be given to the entire statute and every part and word thereof . . . Consistent therewith, we should avoid 'construe[ing] one portion of [a] statute in such a manner as to render another portion thereof meaningless'"]).

OCIDA does not mention in its determinations and findings the above referenced Attorney General Opinions – 1981 NY Op. Atty. Gen. 55 and 1980 NY Op. Atty. Gen. Inf. 139 – which are on point and referenced in our letter to OCIDA dated February 22, 2022. The letter is Exhibit 8 to the Verified Petition (Dkt. 2, pg. 74) and in the Record (R. 5303). These Attorney General Opinions are the authority referenced in the McKinney's case notes of GML § 858 for health related facilities. The case that OCIDA cites in its determinations and findings as to why it purportedly has authority is *Nearpass v Seneca Cnty. Indus. Dev. Agency*, 152 AD3d 1192, 1193 (4th Dept 2017). However, that case related to whether a casino fits within the terms "commercial" and "recreation" for purposes of granting tax assistance challenged in an CPLR Article 78 proceeding. That case does not mean "commercial" swallows up all the other terms or applies to a hospital or health-related facility such as CUB's project. The Attorney General Opinions conclude that as a matter of law hospitals, nursing homes or other health-related facilities are not within an IDA's jurisdiction

and authority (1981 NY Op. Atty. Gen. 55; 1980 NY Op. Atty. Gen. Inf. 139). The fact that the term "continuing care retirement communities" was added to GML § 858 after these opinions in 1997 supports that conclusion.[2]

The proposed CUB project, which by CUB's own admission includes the Property, is a hospital or health-related facility. CUB and OCIDA have described CUB's project as a physician-hospital ambulatory surgery center joint venture with 6 operating rooms, medical clinics, a cardiology medical group and health-related tenants all within the footprint of the hospital development (*see e.g.* Dkt. 8, pg. 41 ¶ 13; R. 5282, 5287, 5567, 5604, 5610).

Therefore, the CUB project is not a type of project for which OCIDA has jurisdiction or authority because it is not one of the types of projects specifically provided for in GML § 858. Thus, OCIDA lacks the jurisdiction and authority to take the Property by eminent domain for the proposed CUB project (*see generally Hargett v Town of Ticonderoga*, 35 AD3d 1122, 1124 [2006], *lv denied* 8 NY3d 810 [2007] [Highway Superintendent exceeded his authority under Highway Law and therefore his determination to condemn the property was annulled pursuant to EDPL § 207]; *Syracuse Univ.*, 71 AD3d at 1435 [electric corporation was not allowed to condemn the property since it exceeded its authority under the

[2] The term "life care communities" was added to GML § 858 in 1994 and changed to "continuing care retirement communities" in 1997 (1997 Sess. Law News of N.Y. Ch. 659; 1994 Sess. Law News of N.Y. Ch. 66).

Transportation Corporations Law since corporate purposes in the statute did not include "steam distribution"]).

OCIDA and CUB obviously want all projects swallowed up in the term "commercial", but that is contrary to the jurisdiction and authority granted under GML § 858 as discussed above (*see* 1981 NY Op. Atty. Gen. 55; 1980 NY Op. Atty. Gen. Inf. 139; *Madison Cnty. Indus. Dev. Agency*, 151 AD3d at 1535–36).

OCIDA and CUB try to characterize the project as "commercial" or "a commercial office building whose tenants will be providers of health care services." (*see e.g.* OCIDA's Answer, Dkt. 8, pg. 5 ¶ 1). One could also try to characterize a nursing home as a commercial hotel that provides health care services, but as discussed in the cited Attorney General Opinions, that would be incorrect and would allow the term "commercial" in GML § 858 to swallow up all the other terms and not give effect to all the terms of the statue read together (*see* 1981 NY Op. Atty. Gen. 55; 1980 NY Op. Atty. Gen. Inf. 139). The addition of terms such as "continuing care retirement communities" to GML § 858 demonstrate that the legislature did not intend the term "commercial" to be all encompassing.

OCIDA now is trying to disconnect the Property from CUB's MOB facility by trying to characterize this as simply a commercial public parking lot use (*see* OCIDA's Answer, Dkt. 8, pg. 2), even though CUB has submitted that the Property

is part of its project, and in fact, admitted that the Property is an "essential" and "necessary" piece of its Project (*see e.g.* R. 5282, 5287).

OCIDA and CUB cannot have it both ways and say on the one hand that the Property is an "essential" and "necessary" part of CUB's project to help justify the need to take the Property, but then on the other hand that OCIDA is taking the Property as just a commercial public parking lot in an obvious attempt to avoid the limits on its statutory authority. That is absurd, but that is what OCIDA has argued (*see e.g.* Dkt. 8, pgs. 1-2).

Obviously, OCIDA is being disingenuous and trying to get around its statutory limits. It is troubling that a public authority such as OCIDA would so blatantly attempt to avoid its statutory limitations. But OCIDA cannot avoid the documents in its record and the admissions by CUB which clearly state that the Property is an "essential" and "necessary" part of CUB's project.

In fact, CUB admitted in its application to OCIDA, that the project cannot be built without the Property: "Without this property it will be impractical if not impossible to construct the MOB as proposed. If CUB is unable to acquire the O'Brien Parcel from the property owner, CUB will request that the Agency acquire the property through eminent domain." (R. 5611). CUB has admitted that the parking improvement on the Property is an essential part of the Project, just like the elevators or stairs or ambulatory surgery suites.

CUB further states in its application, "By being located within the Wynn Hospital footprint the MOB will enable the development of a seamless and integrated health care delivery system . . . " (R. 5654, 5707). CUB states the "Medical Office Building Project", which it describes as 2.9 acres including the Property, is "all for the purpose of providing a seamless and integrated health care delivery system together with the Wynn Hospital . . . " (Dkt. 2, pg. 150; R. 6373).

MVHS in its letter to OCIDA dated February 23, 2022 "indicates that the acquisition of the O'Brien Property is critical to the construction of the CUB MOB and the ambulatory surgery center" (*see e.g.* Dkt. 8, pg. 55 ¶ XVI). MVHS has stated, "The centerpiece of the medical office building is the six-OR, Article 28, Medicare-certified ambulatory surgery center. The surgery center will be owned for a for-profit proprietary entity in conjunction with the hospital." (R. 5570). MVHS has also stated that "because the Wynn Hospital will essentially be an inpatient facility, the outpatient surgery center will be required to handle a current volume of surgery being performed at St. Elizabeth and St. Luke's Hospital to move to this ambulatory surgery center" and "this new six-OR ambulatory surgical center is absolutely a vital addition to the area's healthcare community, as well as the hospital's complete package of services offered." (R. 5570-5571).

OCIDA stated in the Notice of Public Hearing, dated February 2, 2022, that the purpose of the public hearing was "to consider the proposed acquisition by

condemnation of [the Property] in connection with the undertaking and development of a certain approximately 94,000 SF medical office building and a fully licensed six (6) suite ambulatory surgery center in the footprint of the Wynn Hospital". The Notice states that the acquisition "has been represented by [CUB] to facilitate the delivery of healthcare services" and "is necessary for the development of the Project." The Notice also states that the Property "has been represented to be essential to the development of the Project and the six (6) suite ambulatory surgery center therein . . . " (R. 5909).

OCIDA even stated in its most recent letter to the Court that the "O'Brien Property . . . is a critical component of . . . the integrated health complex ["IHC"] that is now known as The Wynn Hospital" and that the Property is "required for the medical office building that contains a six operating room ambulatory surgery center . . . which is a critical component of the IHC. This medical office building must be opened prior to the opening of the Hospital . . . " (Dkt. 23).

Therefore, despite Respondents' attempts to get around OCIDA's statutory limits, GML § 858 does not give OCIDA statutory jurisdiction or authority for this type of project as it is a hospital or other health-related facility.

For all the foregoing reasons, pursuant to EDPL § 207(C)(2), the Court should reject and annul OCIDA's determination and findings as CUB's project is not within OCIDA's statutory jurisdiction.

POINT II

THE PROPOSED ACQUISITION IS NOT WITHIN OCIDA'S STATUTORY JURISDICTION AND AUTHORITY BECAUSE CUB'S PROJECT VIOLATES ANTI-PIRATING PROVISIONS

OCIDA also lacks the authority to take the Property by eminent domain for CUB's project because the proposed project violates anti-pirating provisions of GML § 862 that an industrial development agency is not allowed to violate.

CUB's project is intended to relocate doctors' offices or principal places of work from, among other places, the St. Luke's hospital campus in the Town of New Hartford, New York to the City of Utica, New York (*see e.g.* Dkt. 2, ¶ 81 and pg. 389; R. 178, 782, 4272, 5721). CUB's project thus violates the anti-pirating provisions of GML § 862 so, for this reason also, CUB's project is not within OCIDA's statutory jurisdiction or authority (*see Marine Buffalo Assocs., L.P. v Town of Amherst Indus. Dev. Agency, Ciminelli Dev. Co*., 5 AD3d 1014, 1015 [4th Dept 2004]). The Respondents' assertions that OCIDA's assistance is needed for CUB to remain competitive are without sufficient basis and are conclusory (*see id.* at 1015). OCIDA asserts in its Answer that OCIDA's assistance is needed "to preserve the competitive position of CUB" (Dkt. 8, ¶ 65). There has not been sufficient or any evidence presented showing that this is true. Conclusory statements by CUB are insufficient. But, it is worth noting that statements such as this by CUB

and OCIDA show without question that this proposed acquisition is all about assisting CUB with its Project.

For all the foregoing reasons, pursuant to EDPL § 207(C)(2), the Court should reject and annul OCIDA's determination and findings as CUB's project is not within OCIDA's statutory jurisdiction and authority.

POINT III

THE CONDEMNATION DOES NOT MEET PUBLIC PURPOSE REQUIREMENTS AS THE PRIVATE BENEFIT IS DOMINANT AND THE OSTENSIBLE PUBLIC PURPOSE IS PRETEXTUAL AND ILLUSORY

Pursuant to the federal and state constitutions and the EDPL, private property rights cannot be taken without a legitimate public purpose. There may be an incidental private benefit to a private company so long as there is a dominant public purpose. It logically follows then that an incidental public benefit coupled with a dominant private purpose will invalidate a condemnor's determination under the EDPL (*Syracuse Univ.*, 71 AD3d at 1433). "If the public use is contingent and prospective and the private use or benefit is actual and present, the public use is incidental to the private use, and in such a case, the power of eminent domain clearly cannot lawfully be exercised" (26 Am. Jur. 2d Eminent Domain § 49, citing *Syracuse Univ.*, 71 AD3d 1432). The public purpose may not be pretextual or illusory (*see Syracuse Univ.*, 71 AD3d at 1433; *Steel Los III, LP v Power Auth. of*

State, 21 Misc 3d 707, 715 [Sup Ct, Nassau County 2008]). An ostensible public purpose that is a pretext for a private benefit is insufficient and unlawful (*see Syracuse Univ.*, 71 AD3d at 1433; *Steel Los III, LP*, 21 Misc 3d at 715). Condemnation efforts resting on a desire to achieve a transfer of property from one private entity to another private entity for essentially the same use is unlawful (*see Syracuse Univ.*, 71 AD3d at 1433; *Steel Los III, LP*, 21 Misc 3d at 715; *99 Cents Only Stores v Lancaster Redevelopment Agency*, 237 F Supp 2d 1123, 1125 [C.D. Cal. 2001] [Redevelopment Agency was not allowed to replace commercial retailer 99 cent store with Costco by eminent domain; ostensible public purpose was pretextual]).

Here, the private use is dominant, and OCIDA and CUB have asserted an ostensible public purpose that is a pretext for the dominant private benefit of the private entity CUB who wants to take the Property, for purposes of developing an MOB, from a developer, Bowers, who is already planning to build an MOB on the Property.

OCIDA repeatedly in its Answer calls Bowers' MOB project "conceptual" (*see e.g.* Dkt. 8, ¶ 2), but CUB's project is also "conceptual". OCIDA states in its determination and findings, among other things, that it should take the Property from Bowers for reasons including that Bowers has not acquired the Property (Dkt. 8, pg. 59, ¶ 4[g]). Yet OCIDA is giving the Property to someone who does not even have

a contract to acquire the Property, i.e., CUB, and who is asking for financial assistance from OCIDA. CUB has also stated that it "cannot solicit and evaluate funding commitments until it knows that it has a project to finance—which will require the acquisition of the O'Brien Parcel" (Dkt. 8, pg. 139).

Clearly, the Mayor of the City of Utica found Bowers to be a credible developer in approving the sale of the Kennedy Parking Garage to Bowers "which needs at least $13 million in repairs" (*see* the Mayor's letter dated March 22, 2022 at Dkt. 2, pg. 559). "The $13 million of repairs, coupled with the $1.5 million purchase offer, yields a nearly $15 million benefit to Utica taxpayers." (*id.*). The City of Utica Mayor also stated in his letter to the local newspaper, "It is an improper overreach of government power to take property from one private developer and give it to another for the same end use. Why should taxpayers bear the cost of eminent domain when the developer who already owns the property plans on constructing a medical office building on the same site?" (*id.*).

Furthermore, prior to making its determinations and findings, OCIDA never reached out to Bowers to discuss Bowers' plans for the MOB and has refused to meet with Bowers to discuss Bowers' plans, despite repeated offers by Bowers to meet (*see e.g.* Dkt. 2, ¶¶ 54, 165, 174, 175, 181 and pgs. 76, 78, 559). OCIDA now outrageously and erroneously in its Answer asserts that Bowers never requested such a meeting (*see* Dkt. 8, ¶¶ 75, 83, 84), but even if that were true, OCIDA who says it

took very seriously its obligations should have requested to meet with Bowers. Moreover, there are documents in the record showing that Bowers did request to meet (*see e.g.* Dkt. 2, pg. 56; R. 6380-6381). Bowers letter to OCIDA dated September 13, 2021, states, "Why hasn't anyone from OCIDA / OC taken the time to speak or meet with [Bowers] to discuss their plans for the site? . . . If you have any questions related to our proposed development plans and would like to hear more about them, please let us know and we would be happy to meet with OCIDA / OC to discuss them at your earliest convenience." (Dkt. 2, pg. 56). Other later communications by Bowers indicated that OCIDA should meet with Bowers and that Bowers was open to further questions from OCIDA (*see e.g.* Dkt. 2, pg. 80).

OCIDA also asserts in its Answer that Bowers has not shown any drawings or provided any detail as to Bowers' MOB (Dkt. 8, pg. 3). Again, this is false and must be corrected. Bowers has provided drawings, detail and information as to the size and location of Bowers' MOB project and indicated that the MOB will be 150,000 sf (*see e.g.* Dkt. 2, pgs. 80, 86, 89, 90), i.e., larger than CUB's MOB, which seems to keep changing in size as CUB works on its conceptual plans (*see e.g.* Dkt. 2, pg. 96 – CUB's November 12, 2021 application stating its MOB will be approximately 70-80,000 sf; Dkt. 2, pg. 67 – December 9, 2021 CUB letter stating its MOB will be approximately 100,000 sf; Dkt. 2, pg. 69 – February 23, 2022 OCIDA hearing notice stating CUB's MOB will be approximately 94,000 sf).

OCIDA's false statements in its Answer are in fact shocking, and OCIDA has shown throughout these proceedings how a government entity should not behave.

For all the foregoing reasons, the Court should reject and annul OCIDA's determination and findings as OCIDA and CUB have failed to meet the public purposes requirements of the federal and state constitutions and EDPL § 207.

POINT IV

OCIDA FAILED TO COMPLY WITH EDPL ARTICLE 2 AND THE FEDERAL AND STATE CONSTITUTIONS

EDPL § 207(C)(1) requires the condemnor to act in conformity with the federal and state constitutions. Under the Fifth Amendment to the Constitution of the United States, no person shall be "deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Section 6 of Article 1 of the New York Constitution provides that "no person shall be deprived of life, liberty or property without due process." Section 7 of Article 1 of the New York Constitution provides that "Private property shall not be taken for public use without just compensation." The federal and state constitutions allow the use of the power of eminent domain only for a good-faith public purpose, and a condemnor's powers must be applied in good faith and according to due process of law (*see e.g. Zutt v State*, 99 AD3d 85 [2d Dept 2012]; *Vill. of Haverstraw v Ray River Co.*, 62 AD3d 1016, 1017 [2d Dept 2009]).

OCIDA has not acted in conformity with the federal and state constitutions and EDPL and in good faith and according to due process of law.

A. EDPL Article 2 Procedural Failures, Constitutional Violations and Lack of Due Process

EDPL Article 2 provides specific, stringent notice and hearing requirements as to the public at large and those with an interest in the property. Not only is strict compliance required, a condemnor should scrupulously comply with these requirements in its exercise of its very serious power to seize private property by eminent domain. 17B Carmody-Wait 2d § 108:8 states (citations omitted), "Statutes delegating the power of eminent domain call into active operation a power which, however essential to the existence of government, is in derogation of the ordinary rights of private ownership, including the right of control which an owner usually has over his or her property. Accordingly, strict compliance with the conditions and requirements of such statutes is necessary."

OCIDA has not strictly complied with the requirements of EDPL Article 2 in this condemnation proceeding.

Pursuant to EDPL § 202, OCIDA was required to give notice to the public of the purpose, time and location of this hearing setting forth the proposed location and any alternate locations of the project at least ten (10) but no more than thirty (30) days before the public hearing to those with an interest in the Property either by

personal service or certified mail, return receipt requested. If the condemnee is represented by an attorney of record, a copy the public hearing notice should be served on that attorney. The notice served on the attorney certainly should not be different from the notice served on the condemnee.

OCIDA failed to send Petitioners' attorney a copy of the Notice of Public Hearing prior to the public hearing, just a letter referencing the Notice of Public Hearing. Exhibit 5 in OCIDA's determination and findings (Dkt. 8, pgs. 88-92) is false as only the letter was attached to the email in Exhibit 5, not the Notice of Public Hearing. Therefore, OCIDA's purported Record is incorrect and misleading. OCIDA for this reason, and other reasons set forth in the Petition, has failed to provide a proper and complete record of the proceedings, although required to do so by EDPL §§ 203 and 207. Frankly, Petitioners are yet again left to wonder what else is incorrect or missing from the various and different versions of the record OCIDA has purportedly made available (*see* Verified Petition, Dkt. 2, ¶ 50 and pgs. 253, 536-542).

If OCIDA's taking of the Property is for just a commercial public parking lot to provide parking to the general public as OCIDA now tries to assert (to try to get around the restriction on its statutory authority discussed above), then OCIDA has not complied with the EDPL Article 2 notice requirements and must provide a new Notice of Public Hearing and a public hearing on that public parking lot "Project".

The current Notice of Public Hearing states the "Project" is "a certain approximately 94,000 SF medical office building and a fully licensed six (6) suite ambulatory surgery center in the footprint of the Wynn Hospital located at 601 State Street (corner of State and Columbia) (the "Project") by Central Utica Building, LLC . . ." (Dkt. 8, pg. 74; R. 5287). OCIDA is thus either being misleading and trying to get around the limits of its statutory authority or it has failed to strictly comply with EDPL § 202.

Pursuant to EDPL § 201, a public hearing on the eminent domain condemnation is required, and the hearing is not meant just for the condemning board to be present and listen to comments. The hearing must also "inform the public".

OCIDA failed to make available to Petitioners and the public the documents it stated were available in its Notice of Public Hearing. OCIDA did not "inform the public" at the public hearing about the project and why taking the Property by eminent domain was necessary. No presentation, PowerPoint, charts, tables, drawings or maps or anything was presented to the public at the public hearing. The OCIDA board was not present at the public hearing, and only an OCIDA staff member presided over the hearing. The OCIDA staff member simply read the Notice of Public Hearing, after being requested to do so, and then comments were made by the public (*see* Verified Petition, Dkt. 2, ¶¶ 117-121).

Although required by EDPL § 203 as discussed above, and despite repeated requests by Petitioners, copies of the Public Hearing record were not made available to the public timely or at all for examination without cost during normal business hours at the condemnor's principal office and the office of the clerk or register of the county in which the property proposed to be acquired is located (*see* Verified Petition, Dkt. 2, ¶ 50, 122 and pgs. 253, 536-542).

All of this shows that OCIDA had no real interest in conducting a public hearing that truly informed the public, that gave proper opportunity to the public to comment and that allowed for proper examination of the issues in public view.

B. Unequal Treatment of Bowers Compared to CUB

The federal and state constitutions require equal treatment. EDPL § 101 specifically provides that a purpose of the EDPL is "to ensure equal treatment". OCIDA's proposed taking of the Property from one private developer (Bowers) who it knows intends to construct an MOB on the Property and giving it to another private MOB developer (CUB) to construct an MOB is not equal treatment.

Among other things discussed above and throughout the Verified Petition and this brief, the fact that OCIDA and CUB refused to meet with Bowers to discuss Bowers' plans for an MOB and did not try to work out a solution here with Bowers rather than resorting to eminent domain clearly demonstrates bias and a lack of

"equal treatment". Contrary to OCIDA's assertions, it has not taken very seriously its obligation to treat everyone equal.

For all the reasons stated herein and in the Petition, OCIDA has not treated Bowers equally to CUB, and OCIDA's determination and findings should be annulled.

C. Failure to Comply with "Sure and Certain" Just Compensation Requirements

Pursuant to the federal and state constitutions and the EDPL, OCIDA is required to pay "just compensation" for property it condemns based on the property's value in its "highest and best use". "Just compensation" has been interpreted to mean "sure and certain" compensation (*see e.g. Keystone Assocs. v Moerdler*, 19 NY2d 78, 89 [1966]). That is, a mechanism is in place to guarantee there is a source of funds from which to pay the ultimate judicially determined just compensation damages. A condemnor should not move forward with condemnation proceedings if it cannot provide "sure and certain" compensation.

Here there is no sufficient showing of such mechanism to guarantee payment of just compensation. There is no sufficient showing that OCIDA will be able to provide a sure and certain source of compensation. OCIDA, unlike a municipality or the State, has no power to tax. There has been no showing that OCIDA has its

own revenue in a sufficient amount to pay the required just compensation if the Property is taken through eminent domain.

Accordingly, the condemnation was done without authority, without a sure and certain means to pay the required compensation of the value of the Property in its highest and best use, and thus in violation of the federal and state constitutions and the EDPL.

Upon information and belief, there is an agreement between CUB and OCIDA regarding taking the Property by eminent domain and payment by CUB of the just compensation. Based on this, CUB may argue that it will pay the just compensation. However, first, there has been insufficient showing that CUB has the resources to pay the value of the Property in its highest and best use. In fact, CUB is asking OCIDA for financial assistance in the form of exemptions from mortgage recording tax and sales tax exemption.

Second, there has been insufficient showing much less "sure and certain" guarantee that CUB will pay the required amount and not ultimately seek to evade paying or dissolve as a limited liability company, i.e., LLC leaving insufficient funds for the damages resulting from the taking by eminent domain (*see Keystone Assocs.*, 19 NY2d at 89 ["the property owner cannot be relegated to the doubtful responsibility or solvency of a private corporation or of an individual"]). There has been no posting of a bond or deposit of an amount in escrow reasonably anticipated

to cover the anticipated eminent domain damages based on appraisal analysis of the value of the Property in its highest and best use. Similar arguments apply to any extent that an MVHS entity has entered into the agreement between CUB and OCIDA to pay the just compensation. In addition, the above indicates there has been an impermissible delegation of eminent domain powers to a private, non-government entity, i.e., CUB and MVHS.

Accordingly, the condemnation is in violation of the federal and state constitutions and the EDPL and should be annulled.

D. Excess Taking

Pursuant to the EDPL and SEQRA, OCIDA was required to give notice of alternate locations and consider all reasonable alternatives to the taking and take no more than is necessary (*see e.g.* EDPL §§ 202, 203; 6 NYCRR §§ 617.9, 617.11). Taking more property than is required constitutes excessive taking and is a violation of constitutional limitations (*see e.g. Feeney v Town/Vill. of Harrison*, 4 AD3d 428, 428 [2d Dept 2004] ["Town did not show on this record that condemnation of the petitioner's entire parcel is necessary"]).

Here, alternatives were not examined and addressed, and it was not shown that taking the entire Property is necessary. CUB has not demonstrated that the entire Property is needed for the CUB project and that this is not an excessive taking. CUB proposes to use the Property for a single level of parking as part of CUB's MOB

project but has not shown why a parking garage on only a part of the Property would not be reasonable or why a parking garage on CUB's property would not be reasonable.

Therefore, OCIDA's determination and findings should be annulled.

E. Bad Faith

All of the foregoing as well as the following show that OCIDA and CUB are acting in bad faith. A condemnor acting without a public purpose or pretextually to benefit a private entity constitutes acting in bad faith and requires annulment of a decision to take property by eminent domain, as set forth above. Bad faith in eminent domain proceedings can also be based on conduct irrespective of whether the condemnor has a legitimate public purpose or whether the public purpose is pretextual, and such bad faith conduct also requires annulment of the condemnation (*see e.g. Zutt*, 99 AD3d at 104).

The actions and inactions of OCIDA show bad faith. OCIDA is responsible for making good faith efforts to negotiate with property interest holders and avoid condemnation of property. OCIDA has not met with Bowers to try to negotiate a solution that avoids eminent domain. OCIDA has ignored communications from Bowers and avoided opportunities to meet with Bowers and Rome Plumbing. Despite numerous attempts by Bowers, OCIDA has refused to even discuss Bowers' plans for an MOB (Dkt. 2, ¶¶ 158-165).

OCIDA has certainly not acted consistently with the letter and spirit of the EDPL, including EDPL §§ 101 and 301. EDPL § 101 states that a purpose of the EDPL is "to encourage settlement" and "reduce litigation". EDPL § 301 requires OCIDA to make "every reasonable and expeditious effort" to negotiate an agreement with the property interest holders "at all stages" of the EDPL proceedings.

Further, the proposed taking is at odds with OCIDA's purpose and mission. OCIDA's purpose is to encourage development in places like the City of Utica and aid developers, not to interfere with developers or select the developer of its choosing. Interfering with and taking property and development opportunities away from Bowers, one of the largest and most active developers in the City of Utica, and giving them to developers that OCIDA apparently favors more is contrary to and defeats OCIDA's purpose (Dkt. 2, ¶¶ 167-169).

As stated above, clearly the Mayor of the City of Utica found Bowers to be a credible developer in approving the sale of the Kennedy Parking Garage to Bowers "which needs at least $13 million in repairs" (*see* the Mayor's letter dated March 22, 2022 at Dkt. 2, pg. 559).

It should also be noted that the City of Utica, where the Property is located, has not asked OCIDA to take the Property by eminent domain. In fact, the City of Utica Urban Renewal Agency ceased an eminent domain proceeding it had

commenced for the Property when it learned that Bowers had a contract to purchase the Property and plans to develop an MOB on the Property (Dkt. 2, ¶¶ 171-173).

Further evidence of bad faith is OCIDA's delayed response to FOIL requests and seeming inability to provide a full and accurate copy of the record of the EDPL proceeding. OCIDA took over 72 days to respond to Bowers' FOIL requests, which conveniently resulted in the FOIL response being provided after OCIDA had closed public comment on the hearing. Bowers repeatedly requested that the public comment period be kept open until after OCIDA responded to the FOIL requests, but OCIDA closed the public comment period and then responded less than three business days later to the FOIL requests clearly depriving Bowers of any real opportunity to meaningfully review and comment on these documents (Dkt. 2, ¶¶ 183-185).

On January 21, 2022, Bowers submitted FOIL requests for documents obviously relevant to the eminent domain proceedings, which requests were thus made prior to the February 23, 2022 public hearing. OCIDA first stated that it could respond to the FOIL requests within 20 business days. Then 25 days later OCIDA stated it could respond in 30 business days (i.e., over 55 days after the FOIL request). OCIDA finally responded on April 4, 2022 (i.e., over 72 days after the FOIL request) after it had closed all public comments on the eminent domain proceedings on March 30, 2022. Bowers repeatedly asked for the public comment period to be kept open

until after OCIDA responded to the January 21, 2022 FOIL requests, including by letter emailed to OCIDA on March 30, 2022, but OCIDA refused (Dkt. 2, ¶¶ 186-189).

During this time, Bowers also repeatedly requested, by phone and email, access to the documents referenced in the Notice of Public Hearing so that Bowers could review and comment on them before the March 2, 2022 deadline for written comments. OCIDA did not provide access to the documents, and in response to Bowers' last request, counsel for OCIDA responded by email on March 1, 2022 that he would advise when those documents are ready. OCIDA had still not provided access to the documents by the March 2, 2022 deadline for public comments. On March 2, 2022, Petitioners submitted a comment letter to OCIDA that included a request that the public comment period be kept open due to the above referenced denial of access to documents referenced in the Notice of Public Hearing (Dkt. 2, ¶ 190).

On March 16, 2022, OCIDA sent an email with a letter to Bowers' attorney stating that the record of the public hearing was now available for inspection at OCIDA's office and at the Oneida County Clerk's office and that the public comment period was extended to March 30, 2022. Bowers' attorney then again called and left a message with OCIDA asking questions about inspecting the documents, but no one from OCIDA called back (Dkt. 2, ¶¶ 191).

On March 17, 2022, Bowers' attorney went to OCIDA's office and requested access to the above referenced records. The records were not available for inspection, and OCIDA's staff rushed to put together some documents that were not stapled or bound in any way and a binder of other documents. Bowers' attorney asked if he could make copies of these documents and was told by OCIDA staff that he could not. Bowers' attorney inspected the documents and binder, and then went to the County Clerk's office to inspect what had been provided to the County Clerk by OCIDA and to ask about making copies. The binder and documents at the County Clerk's office did not match the binder and documents at OCIDA's office (Dkt. 2, ¶ 192). Contrary to OCIDA's assertions (Dkt. 8, ¶ 50), the differences were not and could not be the result of the binder at the County Clerk's office being purportedly dissembled at the time of the attempted inspection of the purported Record (*see* Dkt. 2, pg. 580).

Bowers emailed OCIDA stating there were differences in the purported record at the two locations and sought to obtain the official complete record of the proceeding so that Bowers could comment on same by the March 30, 2022 deadline. By the comment period deadline of March 30, 2022, OCIDA still had not responded to Bowers email (Dkt. 2, ¶¶ 193). On March 30, 2022, Bowers submitted an additional comment letter to OCIDA commenting on OCIDA's failure to provide the record as stated above and asking for the comment period to be kept open.

However, OCIDA refused to keep the comment period open past March 30, 2022 (Dkt. 2, ¶¶ 195).

On April 2, 2022, OCIDA finally responded to Bowers email about the differences in the purported record at OCIDA's office versus the purported record at the County Clerk's office. However, OCIDA did not reopen the public comment period, and OCIDA's comments amounted to nothing more than evasion and obviously incorrect or false statements (Dkt. 2, ¶ 196).

All this shows bad faith on the part of CUB and OCIDA and demonstrates OCIDA is willing to continue to brazenly proceed regardless of whether or not such actions are legal or within its authority.

For all these reasons, the determination to take the Property by eminent domain was in bad faith and unlawful, and pursuant to EDPL § 207, the Court should reject and annul OCIDA's determination and findings.

POINT V

OCIDA FAILED TO COMPLY WITH SEQRA

OCIDA, in its proceedings and determinations and findings for taking the Property by eminent domain, was required to comply with SEQRA, Article 8 of the Environmental Conservation Law ("ECL"), and the regulations implementing SEQRA – 6 NYCRR Part 617 (*see e.g.* EDPL § 207[C][3]). OCIDA failed to comply with SEQRA and the implementing regulations.

SEQRA's procedural requirements mandate strict compliance, and anything less will result in annulment of an agency's determination (*see e.g. Dawley v Whitetail 414, LLC*, 130 AD3d 1570, 1571 [4th 2015]). Literal compliance with the letter and spirit of SEQRA is required and substantial compliance will not suffice (*see e.g. id.*; *Stony Brook Vill. v Reilly*, 299 AD2d 481, 483 [2d Dept 2003]). SEQRA requires an agency such as OCIDA in determining the significance of an action, such as condemning a property, to carefully consider the criteria in the SEQRA implementing regulation 6 NYCRR § 617.7 (*see e.g. Dawley*, 130 AD3d at 1571; *Riverso v Rockland Cnty. Solid Waste Mgmt. Auth.*, 96 AD3d 764, 765 [2012]; *Munash v Town Bd. of Town of E. Hampton*, 297 AD2d 345, 347 [2d Dept 2002]; *Corrini v Village of Scarsdale*, 1 Misc 3d 907[A], *5-7 [Sup Ct, Westchester County 2003]). The agency must take a "hard look" at all the factors in 6 NYCRR Part 617 (*see e.g. Munash*, 297 AD2d at 347-348; *Corrini*, 1 Misc 3d 907[A] at *5-7). The agency must identify relevant areas of concern, thoroughly analyze those concerns, and then fully document its findings and make a reasoned elaboration of the basis of its determination (*see e.g. Munash*, 297 AD2d at 347-348; *Corrini*, 1 Misc 3d 907[A] at *6-7 [although the proposed use was located just 100 yards away from its prior use, a traffic study should have been done; the board should not have assumed that there would be no impact from the changed location; the board did not present any

data to support their conclusion that there would be no traffic impact from the change in location; the board failed to take a "hard look"]).

OCIDA has not identified the relevant areas of environmental concern, has not thoroughly analyzed the concerns, has not taken the "hard look" required by SEQRA and has failed to provide a reasoned elaboration for its determinations.

A. Failure to Take a Hard Look as to the Changed MOB Location and Larger Size

OCIDA attempts to rely on a SEQRA review done by the City of Utica Planning Board in 2018/2019 for the MVHS hospital development (*see e.g.* Dkt. 8, pg. 54, ¶ 29). However, OCIDA has its own obligation to do its own SEQRA review and make its own findings for its own actions. OCIDA has the principal responsibility for carrying out or approving its eminent domain action.

Moreover, CUB's MOB is larger and in a different or changed location than the MOB purportedly considered in the SEQRA review by the City of Utica Planning Board in 2018/2019 (*see e.g.* Dkt. 2, ¶ 211; Dkt. 8, pg. 64 – Exhibit 1 to OCIDA's determination and findings; Dkt. 8, pg. 71 – Exhibit 3 to OCIDA's determination and findings; R. 4710, 6343). CUB's project must be examined under SEQRA in its proposed larger size and changed location (*see Corrini*, 1 Misc 3d 907[A] at *5-7 [The board should not have assumed that there would be no impact from the changed location of the proposed use, although it was just 100 yards from

the prior location; the petitioners requested at the public hearing that a traffic study be done; the board did not present any data to support their conclusion that there would be no traffic impact from the change in location; the court held a traffic study should have been done due to the changed location; the court held that the board failed to take a "hard look" under SEQRA at the changed location]).

Here, CUB's MOB location has been moved by more than 100 yards with the MOB being larger and on a different street corner, and it is this project with this MOB location with this parking configuration that CUB and OCIDA have asserted necessitates the condemnation (*see e.g.* Dkt. 8, pg. 55, ¶ XVI; Dkt. 8, pgs. 64, 71; R. 5282, 5284, 5287).

The location of this MOB project in a different location, on a different tax parcel, with a larger size fronting on a different street with different entrance locations may have different and greater environmental impacts and implications, including for vehicle and pedestrian traffic, trucks going to the Property, loading areas and emergency vehicles and ambulances going to the CUB MOB and/or the proposed hospital emergency room across the street (*see e.g.* Dkt. 2, ¶ 213; Dkt. 8, pg. 55, ¶ XVI; Dkt. 8, pgs. 64, 71; R. 51, 5282, 5284, 5287). The different location of the MOB and its entrances may have implications as to traffic and trucks interfering with what appears to be the proposed ambulance entrance to the hospital emergency room. The different location and larger size may have significant

impacts as to electrical needs, utilities, water and sewer usage and other issues that have not been examined. All these issues were raised in letters to OCIDA during the proceedings (*see e.g.* Dkt. 2, pg. 538), but OCIDA did not take a "hard look" at these issues (*see Corrini*, 1 Misc 3d 907[A] at *5-7).

OCIDA was required to review the potential environmental impacts associated with the different location and larger size of the MOB for which the taking was made. At a bare minimum, a traffic study should have been done as to the different location to determine if the different location will cause significant interference with ambulances and traffic going to the hospital emergency room and CUB's MOB, among other things that should have been examined (*see Corrini*, 1 Misc 3d 907[A] at *5-7).

For all the foregoing reasons, OCIDA has failed to comply with SEQRA and take a "hard look". Therefore, OCIDA's determination and findings should be annulled.

B. Failure to Take a Hard Look at the Helicopter Landing in Relation to the Different MOB Location

CUB's MOB is located closer to the proposed helistop or helicopter landing pad of the hospital than the MOB proposal purportedly examined by the City of Utica Planning Board in 2018/2019 (*see e.g.* Dkt. 8, pgs. 64, 71; R. 51, 5284). The different location puts CUB's MOB potentially in the flight path of helicopters

landing at the hospital (*see e.g. id.*; Dkt. 2, pg. 538, 551, 553, 554-558; R. 4480-4483).

The location of CUB's MOB across the street from the proposed ground-level helicopter pad raises concerns as to whether appropriate spacing will be provided around the helicopter pad, including but not limited to with regards to turbulence, exhaust and for approach and departure paths and sight lines (*see e.g. id.*). Notice to the Federal Aviation Administration ("FAA") may be needed pursuant 14 CFR § 77.9 (*see* Dkt. 2, pg. 551; R. 5865). The medical imaging and similar equipment proposed to be used in the CUB project in this different location may have significant interference with helicopter instruments, compasses and navigational equipment (*see e.g.* Dkt. 2, pg. 140, 538, 552; R. 385, 436, 481, 559, 586, 5866). Nearby electromagnetic devices, magnetic resonance imaging machines ("MRI"), large ventilator motors, elevator motors or other devices that consume large amounts of electricity may cause temporary aberrations and interference with such helicopter equipment (*see e.g. id.*). Helicopter exhaust can affect building air quality if the heliport passes too close to fresh air vents on top of a building (*see e.g.* Dkt. 2, pg. 558-557; R. 4482-4483).

All of this remains true even if the helicopter pad is purportedly going to be located on the parking garage of the hospital as stated by OCIDA (*see* Dkt. 8, ¶ 88), although there is a lack of evidence of that location in the record and that is contrary

to the documents in CUB's application and the MVHS application in the record. That is contrary even to Exhibit 1 of OCIDA's determination and findings that again shows the helicopter pad immediately across the street from the MOB CUB now proposes (*see* Dkt. 8, pg. 64). Regardless, a helicopter pad on the proposed parking garage at the hospital could still put CUB's MOB, its electromagnetic equipment, and its air vents in the path of the helicopter.

OCIDA admits in its Answer that the MOB in its different location will now only be "partially blocked by the Wynn Hospital" from the heliport landing pad (*see* Dkt. 8, pg. 27, ¶ 88). In other words, OCIDA has essentially admitted that the different location of the MOB could put part of it in the path of the helicopter and that OCIDA has not taken the "hard look" required by SEQRA as to this changed location that puts part of the MOB in the path of the helicopter. Thus, OCIDA has not taken a "hard look" and provided a reasoned elaboration as to why this partial amount resulting from this different location does not still present an issue. OCIDA's failure to do so requires annulment of its determinations and findings (*see Munash*, 297 AD2d at 347-348; *Corrini*, 1 Misc 3d 907[A] *5-7).

For all these reasons, OCIDA's determination and findings should be annulled.

C. Impermissible Segmentation

Impermissible segmentation occurs when the environmental review under SEQRA of a single project is impermissibly broken down into smaller stages or actions, as though they are independent or unrelated. Impermissible segmentation is contrary to the letter and spirit of SEQRA and requires the agencies determination to be annulled (*see e.g. Riverso*, 96 AD3d at 765-766).

In *J. Owens Bldg. Co. v Town of Clarkstown*, 128 AD3d 1067, 1069 (2d Dept 2015), the Town sought to acquire through eminent domain the petitioners' property for the purpose of, among other things, drainage and storm water management improvements in connection with a larger revitalization project for the Town. It was stated in documents in the record that the drainage plan "is a key component to the overall" revitalization project. Even though the drainage plan was part of the larger revitalization project, the Town Board studied only the potential impact of the drainage plan during its SEQRA review for the acquisition. However, under SEQRA, the Town Board was obligated to consider the environmental concerns raised by the entire project. Since the Town Board failed to properly comply with SEQRA, its determination and findings had to be rejected under EDPL § 207.

In this case, OCIDA similarly engaged in impermissible segmentation in violation of SEQRA when, by its own admission (*see e.g.* Dkt. 8, pg. 2, 27 ¶ 89), it only looked, purportedly, at environmental impacts as to part of CUB's MOB

project, i.e., the O'Brien Parcel, and not as to CUB's project as a whole, including among other issues the different location and size of this project that is the reason for taking the O'Brien Parcel. Therefore, OCIDA's determination and findings must be rejected under EDPL § 207 (*see Owens Bldg. Co.*, 128 AD3d at 1069).

OCIDA and CUB cannot have it both ways and say that the Property is an "essential" and "necessary" part of CUB's project so that it needs to be taken by eminent domain for CUB's project but then that CUB's project and the Property can be examined separately under SEQRA as separate projects so that it does not matter what changes have been made between the previously examined MOB project and CUB's project. That is absurd, but that is what OCIDA has argued (*see e.g.* Dkt. 8, pg. 2, 27 ¶ 89). Failure to examine CUB's project as a whole is impermissible segmentation in violation of both the letter and spirit of SEQRA.

For all the foregoing reasons, including those set forth in the Petition, the Court should reject and annul OCIDA's determination and findings pursuant to EDPL § 207(C)(3) for failure to comply with SEQRA.

POINT VI

RESPONSE TO RESPONDENTS' AFFIRMATIVE DEFENSES

The following points address Respondents' affirmative defenses, although it remains Respondents' responsibility to prove their affirmative defenses (*see generally Brignoli v Balch, Hardy & Scheinman, Inc.*, 178 AD2d 290, 290 [1st Dept

1991]; *Allen Grp., Inc. (Allen Testproducts Div.) v New York State Dep't of Motor Vehicles*, 147 AD2d 856, 857 [3d Dept 1989]).

1. The Petition States a Cause of Action

Of course the Petition states a cause of action upon which relief may be granted. This proceeding is specifically provided for under EDPL § 207.

2. This Proceeding Is Timely and Not Barred by the Statute of Limitations

This EDPL § 207 proceeding was commenced within the applicable statute of limitations. EDPL § 207(A) provides that the petition must be filed within 30 days after the condemnor's completion of its publication of its determination and findings. OCIDA in its Answer admits that it did not complete publication of the determinations and findings until at least April 14, 2022 (*see* Dkt. 8, ¶ 56). The petition was filed on May 11, 2022, i.e., less than 30 days later (*see* Dkt. 2). To the extent this affirmative defense is addressed to SEQRA, EDPL § 207(C)(3) specifically provides for review as to whether the condemnor has complied with Article 8 of the Environmental Conservation Law, i.e., SEQRA, and the SEQRA issues are addressed in the Verified Petition and above.

3. This Proceeding Is Ripe for Judicial Review

This proceeding is specifically provided for under EDPL § 207 as discussed above. To the extent this affirmative defense is addressed to Respondents' failure to

show the constitutional "sure and certain" just compensation requirements can be met, that is addressed in the Petition and above in Point IV(C).

4. CUB Was Named as a Potentially Necessary Party and Entity to which OCIDA, upon Information and Belief, Delegated Condemnation Responsibilities

Both CUB and OCIDA raise as an affirmative defense that CUB is not a proper party and should be dismissed. CUB was named in this proceeding as a potentially necessary party and as an entity to which OCIDA, upon information and belief, delegated condemnation responsibilities, including because the EDPL Article 2 proceeding was done at CUB's request for CUB's project, and CUB is reportedly paying OCIDA's costs and expenses.

If Petitioners did not name CUB, it is more than likely that OCIDA would have raised failure to name a necessary party as a defense. Furthermore, the indications are that OCIDA delegated condemnation responsibilities to CUB, including the obligation to make an offer of just compensation as part of the process of determining whether a condemnation is needed and the requirement to have the ability to provide just compensation before deciding to proceed with condemnation as discussed above. Indications of OCIDA's delegation to CUB, include that OCIDA has stated, "The taxpayers are not paying for the acquisition of the O'Brien Property as the OCIDA will be reimbursed for any and all costs incurred to acquire the O'Brien Property." (Dkt. 8, pg. 54 ¶ 31). CUB has stated, "We will coordinate

with OCIDA to ensure all proper steps are taken to acquire this property prior to resorting to eminent domain." (R. 5604).

Even if the Court determines that CUB is not a proper party to this proceeding, it only requires dismissal as to CUB and not as to the proceeding against OCIDA.

5. Both Petitioners' Have Standing

Respondents admit in their Answers that Rome Plumbing has standing as the owner of the Property (*see e.g.* Dkt. 6, ¶ 19 and Dkt. 8, ¶ 19), and the Verified Petition sworn to by Rome Plumbing and Bowers affirms that Bowers has a contract to purchase the Property (*see e.g.* Dkt. 2, ¶¶ 1-2, 10, 20 and Verifications, pgs. 38-39). It is settled law that contract vendee's have standing to bring EDPL § 207 proceedings (*see e.g. Faith Temple Church v Town of Brighton*, 17 AD3d 1072, 1073 [4th Dept 2005]; *see generally Vill. of Port Chester v Sorto*, 14 AD3d 570, 571 [2d Dept 2005] [EDPL broadly defines a "condemnee" as a "holder of any right, title, interest, lien, charge or encumbrance" in or on real property; condemnee had standing despite not having a written lease in his name]).

Furthermore, OCIDA's own Determinations and Findings found that Bowers is the contract vendee (*see e.g.* Dkt. 8, pg. 41 ¶¶ 18-19 ["Bowers as the contract vendee of the O'Brien Property"]; Dkt. 8, pg. 44 ¶ 42 ["Bowers is the beneficiary of an agreement to acquire the O'Brien property"]; Dkt. 8, pg. 47 ¶ 3 ["Mr. O'Brien had previously entered into a contract to sell the property to Bowers"]; Dkt. 8, pg. 47 ¶

6 ["contract vendee"]; Dkt. 8, pg. 59 ¶ 4[g] ["Bowers as the contract vendee"]). CUB did not raise standing as an affirmative defense, but CUB's own letter to OCIDA in OCIDA's filed record states the condemnation is needed because Rome Plumbing has contracted to sell the Property (*see e.g.* Dkt. 8, pg. 69). It should also be noted that OCIDA never asked Petitioners to submit the contract to OCIDA. All this shows Bowers has standing as the contract vendee.

6. The Public Hearing Was Not Properly Noticed

OCIDA's failures to comply with the applicable law, including Article 2 of the EDPL and the federal and state constitutions is addressed in the Petition and above, including in Point IV.

It must also be addressed that OCIDA here yet again in its Answer is incorrect about the facts. OCIDA asserts in its Answer that Respondents did not object at the public hearing as to issues regarding the notice and service of the notice (Dkt. 8, ¶ 109). Respondents did object (*see e.g.* Dkt. 2, pg. 77; R. 5306).

Also, OCIDA's statements regarding the record being made available for comment are incorrect or misleading (*see e.g.* Dkt. 8, ¶ 111). The issues as to the purported record and whether the full and accurate record was ever made available are discussed in this brief, the Petition and correspondence to OCIDA (*see e.g.* Point IV(E) above; Dkt. 2, pg. 580).

7. The Condemnation Violates the Public Purpose Requirements

This issue is addressed in the Petition and above, including in Point III.

8. The SEQRA Review, by OCIDA's Own Admission, Was Not Proper and Complete

The SEQRA issues are addressed in the Petition and above, including in Point V.

9. OCIDA Has Not Acted in Good Faith

OCIDA's bad faith is addressed in the Petition and above, including in Point IV.

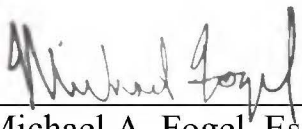
10. The Proposed Acquisition Is Not Within OCIDA's Statutory Jurisdiction and Authority under Article 18-A of the GML

This is addressed in the Petition and above, including in Point I. Please also note that OCIDA's last affirmative defense is mislabeled "Twelfth Affirmative Defense" while we believe it should be labeled "Tenth" as OCIDA only asserts ten affirmative defenses in its Answer.

CONCLUSION

For all the foregoing reasons, including those stated above and in the Petition, Petitioners respectfully request that the Court (i) pursuant to EDPL § 207, reject and annul OCIDA's determination and findings, (ii) grant Petitioners attorneys' fees, costs, disbursements and expenses pursuant to EDPL § 702(B), and (iii) grant Petitioners such other and further relief as is just and proper.

Dated: July 26, 2022
Syracuse, New York



Michael A. Fogel, Esq.
Patrick D. Donnelly, Esq.
FOGEL & BROWN, P.C.
Attorneys for Petitioners
120 Madison Street, Suite 1620
Syracuse, New York 13202
Tel: (315) 399-4343
mfogel@fogelbrown.com
pdonnelly@fogelbrown.com

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