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.

REPLY BRIEF FOR PETITIONERS

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PRELIMINARY STATEMENT

Bowers Development, LLC ("Bowers") and Rome Plumbing & Heating Supply Co. Inc. ("Rome Plumbing") (collectively "Petitioners"), by their attorneys, Fogel & Brown, P.C., submit this Reply Brief in response to the Joint Brief of Oneida County Industrial Development Agency ("OCIDA") and Central Utica Building, LLC ("CUB") (collectively "Respondents").

This an original special proceeding pursuant to Eminent Domain Procedure Law ("EDPL") § 207 for rejection of the determination of OCIDA to condemn the property at 411 Columbia Street, Utica (the "Property") for a medical office building/ambulatory surgery center ("MOB") project by CUB ("CUB's project") on the same property where Bowers intends to build an MOB.

As set forth in Petitioners' prior brief (Dkt. 26), OCIDA does not have the statutory authority to condemn the Property for CUB's project. OCIDA's purported public purpose is pretextual. OCIDA has failed to comply with EDPL Article 2 and the federal and state constitutions. OCIDA has failed to comply with the State Environmental Quality Review Act ("SEQRA"), including by failing to take a "hard look" at the environmental impacts of the changed location and larger size of CUB's project compared to what was reviewed by the City of Utica Planning Board in 2018/2019 and by impermissible segmentation of the SEQRA review.

For all the reasons stated herein and in the Verified Petition (Dkt. 2) and in Petitioners' prior brief (Dkt. 26), the Petition should be granted.[1]

ARGUMENT

POINT I

REPLY TO RESPONDENTS' ERRONEOUS QUESTIONS PRESENTED, STANDARD OF REVIEW AND ASSERTIONS THAT THE TAKING IS FOR "A PUBLIC PARKING LOT"

OCIDA and CUB in their statements about the questions presented and standard of review are yet again wrong and misleading about the law and facts.

EDPL § 207(C) specifically states, "The court shall either confirm or reject the condemnor's determination and findings. The scope of review shall be limited to whether: (1) the proceeding was in conformity with the federal and state constitutions, (2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority, (3) the condemnor's determination and findings were made in accordance with procedures set forth in this article and with article eight of the environmental conservation law [SEQRA], and (4) a public use, benefit or purpose will be served by the proposed acquisition." A negative conclusion with respect to any one of those factors mandates rejection of the condemnor's determinations (*see e.g. Syracuse Univ. v Project Orange Assocs. Servs. Corp.*, 71 AD3d 1432, 1433

[1] References to "Dkt." are to documents filed in this proceeding on the New York State Courts Electronic Filing ("NYSCEF") system. References to "R." refer to the Record filed by OCIDA (Dkt. 9 to 17).

[4th Dept 2010]; *Hargett v Town of Ticonderoga*, 35 AD3d 1122, 1124 [3d Dept 2006], *lv denied* 8 NY3d 810 [2007]).

Respondents' attempts to distort the standard of review or otherwise narrow it to solely a question of whether there has been a sufficient public purpose evaluation are simply nonsense. Respondents' statement that the taking of the Property is for "a public parking lot" is completely contrary to the record and is fully addressed in Petitioners' prior brief and further in this brief.

CUB is paying for the condemnation, and OCIDA will give the Property to CUB (*see e.g.* Dkt. 2, pgs. 64-65, 524; Dkt. 8, pg. 16, ¶ 31, pg. 139). OCIDA stated in the condemnation hearing notice, dated February 2, 2022, 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's March 3, 2022 agenda states: "Consider a final authorizing resolution relating to the [CUB] Facility, approving financial assistance in the form of [tax exemptions] *conditioned upon . . . CUB acquiring an interest in the O'Brien Parcel*" (Dkt. 2, pg. 524) (emphasis added). The resolution granting the exemption states it is conditioned on CUB "acquiring an interest in" the Property (R. 6496 – Section 2[a]). Even CUB's letter, dated March 2, 2022 (solicited by OCIDA after Petitioners' comments on OCIDA's lack of authority) says CUB will only make the parking available to the public after business hours and does not even state what the hours will be (R. 5992).

The taking is for CUB's project, and Respondents' attempt to now say it is for "a public parking lot" is inconsistent with the record, the representations to the public and the hearing notice and is a ruse made in a blatant attempt to avoid the limits on OCIDA's authority and SEQRA requirements.[2]

For all these reasons and those stated in this brief, the Court pursuant to EDPL § 207 should reject OCIDA's determination to take the Property for CUB's project.

POINT II

THIS CONDEMNATION IS NOT WITHIN OCIDA'S STATUTORY JURISDICTION AND AUTHORITY

For all the foregoing reasons, including those in Petitioners' prior brief (Dkt. 26), this condemnation is not within OCIDA's statutory jurisdiction and authority. Therefore, OCIDA's determination and findings should be rejected pursuant to EDPL § 207(C)(2).

[2] Respondents make yet another ridiculous argument in footnote 3 on page 3 of their brief. Respondents argue that because Petitioners are challenging OCIDA's grant of tax exemptions to CUB's project in a separate proceeding that means the condemnation is not for CUB's project. The challenge under Index No. 004110/2022 is to the tax exemptions granted by OCIDA to CUB's project, while this proceeding OP 22-00744 is the challenge to OCIDA's determination to take the Property for CUB's project, which challenge is required to be brought in the Fourth Department pursuant EDPL § 207. The challenge to the tax exemptions is required to be brought in a CPLR Article 78 proceeding in the New York Supreme Court. As to footnote 2 on page 3 of Respondents' brief, those definitions do not support Respondents' argument. Also, Respondents yet again get the facts wrong when they state on page 2 of their brief that the Property is to the "north" of the Wynn Hospital. It is to the south (*see e.g.* R. 864, 5906).

A. OCIDA does not have the authority to use eminent domain in connection with a hospital or any other health related facility

As stated in the Attorney General Opinions discussed in Petitioners' prior brief (Dkt. 26, Point I), "There is no basis for inferring a legislative intent to cover a hospital, a nursing home, or any other health-related facility under the umbrella word 'commercial' . . . " (1981 NY Op. Atty. Gen. 55; 1980 NY Op. Atty. Gen. Inf. 139).

OCIDA and CUB obviously want all projects swallowed up in the term "commercial", but that is contrary to the jurisdiction and authority granted under General Municipal Law ("GML") § 858. 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 (*see e.g. Schulman v People*, 10 NY2d 249, 255 [1961], cited by *Syracuse Univ.*, 71 AD3d at 1435; *Hargett*, 35 AD3d at 1124; *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.*).

According to Respondents' own statements to the public and this Court, the project is a hospital or other health related facility. CUB and OCIDA have described CUB's project as a physician-hospital ambulatory surgery center joint venture including 6 operating rooms and health related tenants as part of and essential to the

hospital development (*see e.g.* Dkt. 23; R. 5282, 5287, 5567, 5604, 5610, 5616). OCIDA stated in the Notice of Public Hearing for the condemnation proceeding that the acquisition of the Property "has been represented by [CUB] to facilitate the delivery of healthcare services" and that the Property is "essential" to "the six (6) suite ambulatory surgery center" (R. 5909).

The Mohawk Valley Health System ("MVHS"), an entity which operates hospitals and that will operate the ambulatory surgery center, has stated the acquisition of the Property is "critical" to "the ambulatory surgery center" (*see e.g.* R. 5570-5571, 5546, 5616, 5981). MVHS has stated, the "centerpiece" of the project 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 in its most recent letter to this Court, objecting to Petitioners' request to extend the due date for its initial brief, stated that the 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).

Respondents have rushed this condemnation and this proceeding before this Court on the basis that it is necessary, essential and critical to the hospital development and the surgery needs of the hospital. Yet now to avoid the limits on OCIDA's authority, they want to say this is "a public parking lot" somehow separate from the CUB project.

Respondents' arguments and cited legal authority as to jurisdiction or authority to take property for a public parking lot are irrelevant since as discussed above, including in Point I, the taking here is for CUB's project.

GML § 858 is the relevant statute here, not Real Property Tax Law ("RPTL") § 485-b. RPTL § 485-b and an Assessor's authority to grant real property tax exemptions is not at issue here. The issue here is an industrial development agency's authority. An Assessor and an industrial development agency ("IDA") are different types of entities with different powers, and as stated above, the powers granted to an industrial development agency must be strictly construed against it when it seeks to condemn property. The standards as to whether an Assessor can grant real property

tax exemption to a commercial project under RPTL § 485-b are not at issue here. The types of projects listed and the requirements are not even the same between RPTL § 485-b and GML § 858. Respondents' long discussion of RPTL § 485-b and cases and other legal authority cited in that discussion are nonsensical and simply not applicable. RPTL § 485-b does not provide a basis for OCIDA to condemn the Property for CUB's project.

The inclusion of the term "retail" in GML § 862 does not mean a hospital or any other health related facility is included in an industrial development agency's authority under GML § 858. Respondents have not provided any legal authority holding that a hospital or any other health related facility is within the term "retail". Again, the statute must be strictly construed against the agency (*see e.g. Schulman v People*, 10 NY2d at 255).

The Oneida County Executive's confirmation that CUB's project is a retail project entitled to tax exemption is being challenged in a separate proceeding (Onondaga County Index No. 004110/2022).

The New York State Comptroller publication cited by Respondents on page 28 of their brief provides no authority on whether CUB's project is a "retail" project and within an industrial development agency's authority to condemn property granted pursuant to GML § 858. It is just a mere mention in a general report on many issues for discussion. It is not a reasoned legal opinion with legal analysis and

conclusions directly addressed to the issue before this Court, while the New York State Attorney General Opinions discussed in Petitioners' prior brief (Dkt. 26, Point I) are such legal authority.

The New York State Authorities Budget Office publication cited by Respondents on page 29 of their brief similarly provides no authority on whether CUB's project is a "retail" project and within an industrial development agency's authority to condemn property granted pursuant to GML § 858. It simply reports that an industrial development agency approved financial assistance to a medical surgery facility. It is not a legal analysis of whether that industrial development agency actually had the authority to make the approval. Unlike the New York State Attorney General Opinions discussed in Petitioners' prior brief (Dkt. 26, Point I), that Budget Office publication is not a reasoned legal opinion with legal analysis and conclusions directly addressed to the issue before this Court.

The case cited by Respondents – *Gardner v Axelrod*, 104 AD2d 633, 633-634 (2d Dept 1984) – is not on point. That case is regarding whether a nurse operating a nursing home out of her house can avoid being deemed a nursing home for public health regulation if she deeds ownership of her house to herself and the eight nursing home residents in her house as tenants in common.

Similarly, Respondents' reliance on *Nearpass v Seneca Cnty. Indus. Dev. Agency*, 152 AD3d 1192 (4th Dept 2017) is misplaced. As discussed in Petitioners'

initial brief, that case does not support Respondents' contention that it has authority to condemn the property here. At most *Nearpass* stands for the proposition that an IDA has the authority to grant financial benefits for a casino and that a casino project falls within the definition of "commercial" in GML § 862. That holding does not help Respondents. Significantly, an IDA's grant of financial benefits for a project versus an IDA's attempt to utilize eminent domain to take a property from one party to give it to another cannot possibly be viewed through the same lens. As set forth above, a condemnor's exercise of eminent domain powers must be strictly construed. Applying this standard here further dictates that *Nearpass* does not support Respondents' action.

Respondents provide no basis to find that the Attorney General Opinions cited by Petitioners (1981 NY Op. Atty. Gen. 55; 1980 NY Op. Atty. Gen. Inf. 139) are out of date or superseded by 10 NYCRR 700.2(a)(4) and (5). If anything, 10 NYCRR 700.2 supports that CUB's project is a type of hospital or other health related facility for which the Attorney General Opinions sought to establish the principle that there was no basis to include such types of facilities in the term "commercial" in GML § 858. 10 NYCRR 700.2 is in Part 700, which is titled "State Hospital Code" and 10 NYCRR 700.2(a) includes the following definition: "(13) Outpatient department shall mean a hospital division or department primarily engaged in providing services for ambulatory patients, by or under the supervision

of a physician, for the prevention, diagnosis or treatment of human disease, pain, injury, deformity or physical condition."

Further, by CUB's and MVHS's own admissions, the project will need a certificate of need approval from the New York State Department of Health pursuant to Public Health Law Article 28, which is titled "Hospitals" (R. 5616, 5570-5571). It strains credulity that a project that requires a certificate of need from the Department of Health is not a hospital or health care related facility.

In addition, although it is not determinative of the issue, while OCIDA and CUB now preposterously assert that the ambulatory surgery center will not have beds, fluids or food provided, there is simply no support in the record for that assertion. In fact, the record seems to indicate the opposite, including the pages pointed to by Respondents. And such a statement or determination is not contained in OCIDA's determination and findings.

Respondents' last argument is also erroneous. Respondents argue that the CUB project cannot be a hospital or any other health related facility, because if it were, it would be tax exempt under RPTL § 420-a(1)(a) and Tax Law § 1116(a)(4). First, again, the authority of an Assessor to grant real property tax exemptions pursuant to the RPTL is not at issue here. Similarly, the authority of the Department of Taxation and Finance pursuant to the Tax Law is not at issue here. The issue here is the authority of an industrial development agency under GML § 858. Second,

Respondents are yet again wrong or misleading as a hospital, nursing home or other health related facility is not necessarily exempt under RPTL § 420-a or Tax Law § 1116 (*see e.g.* RPTL § 414 and 420-a; Tax Law § 1116[a][4] and [5]). In any event, these types of facilities were found by the New York State Attorney General to not be within an industrial development agency's authority under the GML.

Therefore, the Court should reject OCIDA's determination and findings.

B. Anti-pirating

OCIDA also lacks the authority to take the Property for CUB's project because the proposed project violates anti-pirating provisions of GML § 862 as discussed in Petitioners' prior brief (Dkt. 26, Point II).

Contrary to Respondents' assertions, anti-pirating provisions are subject to review under EDPL § 207(C)(2) since an IDA is acting outside its authority if the project violates the anti-pirating provisions. Also contrary to OCIDA's assertions, this issue was raised in the public comments (Dkt. 2, pg. 254; R. 5589).

Contrary to OCIDA's assertions, the relocation is not completely within the City of Utica. CUB's project is intended to relocate surgery services from the St. Luke's hospital campus in the Town of New Hartford to the City of Utica (*see e.g.* Dkt. 2, pg. 389; R. 178, 782, 4272, 5721), and the consolidation is being done by choice and is not mandated (*see e.g.* R. 177 ["MVHS made the decision to consolidate the St. Luke's and SEMC campuses to a single facility."]).

For all these reasons, pursuant to EDPL § 207(C)(2), the Court should reject OCIDA's determination and findings.

POINT III

OCIDA FAILED TO COMPLY WITH SEQRA

As discussed in Petitioners' prior brief (Dkt. 26, Point V), OCIDA failed to comply with SEQRA.

Contrary to OCIDA's assertions, the challenge here is not to the City of Utica Planning Board's SEQRA review in 2018/2019. The challenge is to OCIDA's SEQRA review for its condemnation for CUB's project, in which OCIDA failed to take a hard look at the environmental impacts related to the changed location and larger size of CUB's project compared to what was reviewed by the Planning Board and to OCIDA's impermissible segmentation of the SEQRA review. Therefore, Respondents' reference to *Truett v Oneida County*, 200 AD3d 1721 (4th Dept 2021) and the attachment to their brief of the case *The Landmarks Society of Greater Utica, et al. v Planning Bd. of the City of Utica et al.*, Index. No. CA2020-001365 (Sup Ct, Oneida County October 22, 2020) are irrelevant.

Pursuant to SEQRA, OCIDA was required to take a "hard look" at the issues raised in the public comments as to the changed location and larger size of CUB's project then what was reviewed previously by the Planning Board and make a reasoned elaboration of the basis of its determinations (*see e.g. Munash v Town Bd.*

of Town of E. Hampton, 297 AD 2d 345, 347-348 [2d Dept 2002] [board which sought to obtain property through condemnation for proposed a project failed to take "hard look" at environmental concerns; board did not wait for a report from its consultant on environmental concerns raised during the public comment period]; *Corrini v Village of Scarsdale*, 1 Misc 3d 907[A], *5-7 [Sup Ct, Westchester County 2003] [although the proposed use was located just 100 yards away from its prior use, a traffic study should have been done; petitioners requested at the public hearing that a traffic study be done; instead of performing a traffic analysis, the board simply applied their knowledge of the area and decided that because the proposed facility was located within 100 yards of the existing facility there would not be any impact; the board did not present any data to support their conclusion that there would be no traffic impact from the change in location; thus the board failed to take a "hard look"]).

OCIDA has not taken the "hard look" required by SEQRA and has failed to provide a reasoned elaboration. Therefore, its determination must be annulled (*see Munash*, 297 AD 2d 345; *Corrini*, 1 Misc 3d 907[A]).

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

As set forth in Petitioners' prior brief (Dkt. 26, Point V), CUB's MOB is larger and in a different location than the MOB considered in the SEQRA review by the

Utica Planning Board in 2018/2019 (*see e.g.* Dkt. 2, ¶ 211; Dkt. 8, pg. 64 – Exhibit 1; Dkt. 8, pg. 71 – Exhibit 3; 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] [board failed to take "hard look" at impacts from changing the location within 100 yards from prior 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, 5512).

The different location with a larger size fronting on a different street may have different and greater environmental impacts and implications, including for vehicle and pedestrian traffic, truck loading and ambulances going to and from the MOB among other issues raised during the public comment period (*see e.g.* Dkt. 2, ¶ 213, pg. 538; Dkt. 8, pg. 55, ¶ XVI; Dkt. 8, pgs. 64, 71; R. 51, 5282, 5284, 5287). However, OCIDA did not take a "hard look" at these issues and give a reasoned elaboration as required by SEQRA.

There is no reference in OCIDA's determination and findings to any review by a traffic expert regarding the changed location of CUB's project. At a bare minimum, a traffic expert should have been consulted as to the different location and

to provide analysis as to whether any potential traffic impacts would result (as requested by Petitioners during the public comment period – *see* R. 5852). There is no reference in OCIDA's determination and findings to any expert review regarding the issues of increased water and sewer demand due to the increased size of CUB's project. There is no reference to any expert review regarding the increased demand on electrical and other utilities due to the increased size of CUB's project. The bottom line is that OCIDA failed to comply with SEQRA because it failed to evaluate the potential environmental impacts associated with the eminent domain proceeding.

Therefore, OCIDA's determination and findings must be rejected and annulled pursuant to EDPL § 207(C)(3).

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

Again, the challenge here is not to the Utica Planning Board's SEQRA review in 2018/2019. The challenge is to OCIDA's SEQRA review for its condemnation for CUB's project.

As set forth in Petitioners' prior brief (Dkt. 26, Point V), CUB's MOB is located closer to the proposed helicopter landing pad of the hospital than the MOB proposal examined by the 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 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). 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).

As discussed in Petitioners' prior brief (Dkt. 26, Point V), all of this remains true even if the helicopter pad is purportedly going to be located on the parking garage of the hospital. However, it must again be noted that there is a lack of evidence of that location in the record, and that appears to be yet another changed circumstance from the SEQRA review done by the Planning Board in 2018/2019.

Contrary to OCIDA's assertion, there is no erroneous statement by Petitioners about the helipad being on the ground. Petitioners point these issues out as to the location of the helipad on the ground versus on the parking garage in their prior papers (*see e.g.* the Verified Petition, Dkt. ¶¶ 221, 229). The documents cited by Petitioners show there are genuine and present concerns regarding the impacts of the new location of the MOB in relation to the location of the helipad (*see e.g.* R. 436 ["Electromagnetic effects"], 477 ["obstacle clearance"], 586 ["Magnetic Resonance Imagery (MRI) Systems"], 4480-4483 ["reduced approach/departure path",

"ventilation systems", "exhaust fumes"], 5852, 5861-5871). Calling Petitioners' claims "speculative" are to no avail here and are in fact an admission by OCIDA that it has not taken a hard look at these issues. It is OCIDA's responsibility to take a "hard look" at issues raised during the public comment period, not Petitioners' (*see e.g. Corrini*, 1 Misc 3d 907[A]).

It must also again be stated that OCIDA has also admitted 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 admitted that the different location of the MOB could put part of it in the path of helicopters and that OCIDA has not taken the "hard look" required by SEQRA.

There is no reference in OCIDA's determination and findings to any expert review regarding the helicopter issues raised in the public comments. OCIDA thus has failed to take the required hard look at these issues.

Therefore, OCIDA's determination and findings should be rejected and annulled pursuant to EDPL § 207(C)(3).

C. Impermissible Segmentation

Again, the challenge here is not to the Planning Board's SEQRA review. The challenge is to OCIDA's SEQRA review for its condemnation for CUB's project, where OCIDA admits that it did not look at the impacts of CUB's project as a whole during its SEQRA review for the condemnation.

Contrary to OCIDA's assertions, *J. Owens Bldg. Co. v Town of Clarkstown*, 128 AD3d 1067, 1069 (2d Dept 2015) does apply as OCIDA has failed to address environmental concerns raised during the condemnation proceedings as to the larger size and changed location of CUB's project by admittedly segmenting its SEQRA review for the condemnation proceeding to just a part of CUB's project.

For all these reasons, the Court should annul OCIDA's determination and findings pursuant to EDPL § 207(C)(3) for failure to comply with SEQRA.

POINT IV

THE CONDEMNATION DOES NOT MEET PUBLIC PURPOSE REQUIREMENTS

As discussed in Petitioners' prior brief (Dkt. 26, Point III), an incidental public benefit coupled with a dominant private purpose will invalidate a condemnor's determination of public purpose (*Syracuse Univ.*, 71 AD3d at 1433).

Also, the public purpose may not be pretextual or illusory (*see e.g. 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 unlawful (*see e.g. 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, OCIDA's determination should be annulled because the private use is dominant, and the public purpose is a pretext for the dominant private benefit of CUB. The taking is not for a public parking lot. It is for CUB's project, and OCIDA is taking the Property from Bowers who intends to build an MOB and giving it to CUB to build an MOB. OCIDA's unwillingness to even meet with Bowers despite repeated requests (as discussed in the prior brief Dkt. 26, Point III) further supports that this is pretextual taking.

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 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 [Property]" (Dkt. 8, pg. 139).

Now, in their brief (pg. 5), Respondents call Bowers' project "pure fiction". That is clearly nonsense as set forth in Bowers' prior letters and the Verified Petition, sworn to by Bowers (*see e.g.* Dkt. 2, ¶¶ 1-2, 9, 21, 28-31, 93; pgs. 56, 80, 86, 89, 90). Clearly, the Mayor of the City of Utica (which is the subject City) found Bowers to be a credible developer in approving the sale of the Kennedy Parking Garage to Bowers (*see* the Mayor's letter dated March 22, 2022 at Dkt. 2, pg. 559). The 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.*).

The Mayor further stated, "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." (*id.*). Despite this letter being included in Petitioners' comments, OCIDA still refused to even meet with Bowers (as discussed in Petitioners' prior brief Dkt. 26, pgs. 26-27, 36-37). This further supports that the purported public purpose is pretextual and not primarily for the benefit of the City of Utica.

Therefore, the Court should reject OCIDA's determination and findings.

POINT V

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

Contrary to OCIDA's assertion, none of the claims raised by Petitioners are outside the scope of review required by EDPL § 207. EDPL § 207(C)(1) specifically states the review must include whether "the proceeding was in conformity with the federal and state constitutions". EDPL § 207(C)(3) specifically states the review must include whether "the condemnor's determination and findings were made in accordance with procedures set forth in this article [EDPL Article 2]".

As set forth in Petitioners' prior brief (Dkt. 26, Point IV), OCIDA has not acted in conformity with the federal and state constitutions and EDPL Article 2.

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

Not only is strict compliance with EDPL Article 2 procedures 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."

Here, by OCIDA's own admission the public notice issued for the eminent domain proceeding was deficient because according to them the purported condemnation is for "a public parking lot" now and not for CUB's project. Yet, the public notice that was issued clearly states that it was for CUB's project (R. 5909). The Court should not allow OCIDA to get away with this "shell game" where they are trying to seize private property. The public notice was clearly deficient and misleading as it did not accurately communicate to the public why OCIDA was exercising its powers of eminent domain. If the purpose of the eminent domain is for "a public parking lot" and not for CUB's project, then OCIDA is required to start this process over with an accurate public notice (*see* EDPL § 202; *W.C. Lincoln Corp. v Vill. of Monroe*, 295 AD2d 440, 440 [2d Dept 2002]).

Again, the public hearing notice communication to Petitioners' attorney should not have been different from the notice sent to Petitioners, and it was improper for OCIDA to make it appear in its determination and findings (Dkt. 8, Exhibit 5 on pgs. 88-92) that the email and letter to Petitioners' attorneys included the public hearing notice, when all that was sent was the email and letter, not the public hearing notice itself.

Respondents assert in their brief that Petitioners did not object during the public comment period as to issues regarding the notice. That is yet again a false or incorrect statement by Respondents. Petitioners did object (R. 5306). Also, it was not until after the public comment period that Respondents argued the taking is for "a public parking lot". As discussed above, the public hearing notice does not say that. OCIDA is either being misleading and trying to get around the limits of its statutory authority or it has failed to strictly comply with EDPL § 202.

OCIDA's assertions regarding the record being made available for comment are incorrect (*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 Petitioners' prior brief and prior correspondence to OCIDA (*see e.g.* Dkt. 26, Point IV(E); Dkt. 2, pg. 580; R. 5855).

B. Unequal Treatment of Bowers Compared to CUB

These issues are addressed in Petitioners' prior brief (Dkt. 26, including in Point III and IV). OCIDA continues to outrageously and erroneously assert that Bowers never requested to meet with OCIDA to discuss Bowers' plans. OCIDA refused to meet with Bowers despite repeated offers by Bowers to meet (*see e.g.* Dkt. 2, ¶¶ 54, 165, 174, 175, 181 and pgs. 76, 78, 559). 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 also indicated that OCIDA should meet with Bowers and that Bowers was open to meeting (*see e.g.* Dkt. 2, pg. 80).

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

Again, OCIDA should not determine to condemn property without knowing that it can provide "sure and certain" compensation (*see Keystone Assocs. v Moerdler*, 19 NY2d 78, 89 [1966]). Petitioners should not have to wait until the EDPL Article 5 proceeding to find out whether OCIDA actually has the resources available to provide "sure and certain" compensation.

D. Excess Taking

As discussed in Petitioners' prior brief (Dkt. 26, Point IV), OCIDA has not considered whether a parking garage could be built on part of the Property in order to take less of the Property. It has also not been shown or considered why that number of parking spaces is needed for CUB's project.

E. Bad Faith

As set forth in Petitioners' prior brief (Dkt. 26, Point IV), bad faith can be challenged in an EDPL § 207 proceeding (*see Zutt v State*, 99 AD3d 85 [2d Dept 2012]).

Also, again, OCIDA provided the subject FOIL request just a few days *after* it closed the public comment period, over 72 days after the request was made and despite requests to keep the public comment period open until the FOIL request was provided. Of course the FOIL request was regarding this proceeding, and it is ridiculous for OCIDA to assert it was unrelated. OCIDA's bad faith is discussed extensively in Petitioners' prior brief, including in Point IV.

For all the foregoing reasons, OCIDA's determination and findings should be rejected pursuant to EDPL § 207(C)(1) and (3).

POINT VI

STANDING FOR BOWERS HAS ALREADY BEEN ESTABLISHED, INCLUDING BY OCIDA'S OWN FINDINGS AND DETERMINATIONS

Respondents' assertion that Bowers lacks standing is erroneous, a waste of time and of no avail.

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). Further, 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; *see also* CPLR 105[u]).

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'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). Here again OCIDA is trying to take a position that is contrary to its own record and Determination and Findings since it determined during the eminent domain proceeding that Bowers was a "contract vendee."

It should also again be noted that CUB did not raise standing as an affirmative defense in its Answer, and it is OCIDA's responsibility to prove its affirmative defense (*see e.g. Brignoli v Balch, Hardy & Scheinman, Inc.*, 178 AD2d 290, 290 [1st Dept 1991]). The cases cited by OCIDA in the Joint Brief either do not say what OCIDA says or are not on point. The case *Matter of Dairylea Coop. v Walkley*, 38 NY2d 6, 9 (1975) is not an eminent domain case and does not say what OCIDA says, and there is obviously more than mere allegation here. The case *East*

Thirteenth St. Community Assn. v New York State Urban Dev. Corp., 84 NY2d 287, 295 (1994), is regarding non-condemnees that were seeking standing through the zone of interest and is obviously not relevant to this proceeding. Similarly, in the case cited by OCIDA – *Didden v Village of Port Chester*, 322 F Supp 2d 385, 391 (SDNY 2004), the parties seeking recourse in that 42 USC § 1983 action were not parties to the contract at issue. In the case cited by OCIDA – *Johnson v State*, 10 AD3d 596, 597 (2d Dept 2004) – the partnership did not even allege that it had a contract to purchase the property. *Faith Temple Church v Town of Brighton*, 17 AD3d 1072 (4th Dept 2005), does not hold that a contract needs to be submitted to prove standing, and simply decides that a contract vendee is a "condemnee". Again, as stated above, OCIDA in its own Determinations and Findings found that Bowers is the contract vendee.

It is irrelevant, but it is also false and outrageous for Respondents to assert that they asked for the contract at all, much less several times prior to OCIDA making its determination and findings (Respondents' Joint Brief, pgs. 5, 16). Respondents never asked Petitioners to submit the contract to OCIDA, and Respondents do not cite to any document in the record that supports this contention. OCIDA just proceeded full steam ahead with the condemnation for CUB's project without ever asking for the contract or meeting with Petitioners.

OCIDA throughout these proceedings has been less than truthful and has not conducted itself the way a government agency should when it is seeking to take private property rights away.

CONCLUSION

For all the foregoing reasons, including those stated in the Verified Petition (Dkt. 2) and in Petitioners' prior brief (Dkt. 26), 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: September 12, 2022
Syracuse, New York

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I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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