To be argued by:
Paul J. Goldman, Esq.
Time Requested: 15 Minutes

New York Supreme Court

Appellate Division — Fourth Department

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

Appellants,

- against -

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

Respondents

Docket No.:
OP 22-00744

JOINT BRIEF OF RESPONDENTS

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PRELIMINARY STATEMENT

The Oneida County Industrial Development Agency ("OCIDA") and Central Utica Building, LLC ("CUB") submit this joint brief in opposition to the Brief for Petitioners dated July 26, 2022 (the "Petitioners' Brief"). The final environmental impact statement ("EIS") and findings statement (the "SEQR Findings Statement") issued by the City of Utica Planning Board (the "Planning Board"), as lead agency, pursuant to the State Environmental Quality Review Act (the "SEQR Act") for the Integrated Health Campus consisting of the Wynn Hospital, the privately developed medical office building ("MOB") and other improvements (collectively, the "IHC") in the City of Utica (the "City") always reflected that the approximately ±1.09 acre parcel of real property located at 411 Columbia Street in the City (Section 318.41, Block 2, Lot 38) (the "O'Brien Property") was a surface parking lot (R.785, R.5899, R.5906). That use of the O'Brien Property was evaluated by OCIDA under Eminent Domain Procedure Law ("EDPL") Article 2 (the "EDPL Findings") (R.5875-6000). During the public purpose evaluation, CUB represented that the O'Brien Property would be parking for the general public invitees of the privately developed ±94,000 SF medical office building (the "CUB Project") and employees of the tenants therein during regular office hours and to any member of the public visiting the Wynn

Hospital on the weekends and after regular business hours (R[1].5992). It will be the closest surface parking lot to the staff entrance of the hospital (R.5892-5893, ¶2(a), R.862).

The four parcels directly to the north of the Wynn Hospital building site were always to be used for a MOB with adjacent surface parking (R.785, R.861-862, R.5906). The MOB was to be located on a corner parcel and was never intended to be on an interior mid-block parcel like the O'Brien Property (R.864, R.5906). The CUB Project is the MOB portion of the IHC in the SEQR Findings Statement (R.5955, R.5477, R.6397, 3rd Whereas Clause, R.5669, Question 7(h), R.6468, R.5890, XVII, ¶33).

Contrary to Petitioners mischaracterization of the "MOB project by CUB" (Petitioners' Brief, at p.1), this proceeding is limited to the tax parcel upon which the OCIDA completed its EDPL Article 2 review. The O'Brien Property is a separately subdivided tax parcel (R.5511, R.5522). The CUB Project is to be constructed on the adjoining but separate tax parcel known as Section 318.41 Block 2 Lot 37 containing ±1.46 acres (R.5901, R.5511, R.5522) (the "Building Parcel"). As the EDPL makes clear, the subject of this proceeding is limited to the use of the O'Brien

[1] "R" refers to the Administrative Record on Review (the "Record") followed by the applicable page of the Record.

Property. EDPL §103(C)[2]. Contrary to allegations set forth in the Petitioners' Brief, this eminent domain proceeding has nothing to do with the Building Parcel since it was not reviewed by OCIDA under EDPL Article 2. Petitioners' attempt to extend the review to the Building Parcel and the challenges to the propriety of OCIDA's decision to provide financial assistance (as defined in General Municipal Law §854(14)) to the CUB Project are not properly before this court under EDPL §207[3].

Undeterred by the fact that the proposed acquisition is limited to the O'Brien Property, Petitioners now erroneously conflate a medical office building to be built on the Building Parcel into a "hospital or health related facility" (Petitioners' Brief – Point I, pp 18 & 22) (R.5532-5533). The CUB Project is a commercial office building whose tenants will be health care providers that require accessibility to the Wynn Hospital. The CUB Project is not a "hospital or health related facility" since it does not have beds, food service or inpatient facilities (R.5531-5532, R5368, R.5483-5485). Fatal to Point I of Petitioners' Brief are the respective definitions of a "Hospital" or "Health-related facility" in the State Hospital Code regulations at 10 NYCRR 700.2(a)(4) and (5), respectively, as follows:

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[2] The definitions of "Acquisition" and "Public Project" make it abundantly clear that the focus should be on the parcel reviewed by OCIDA. See EDPL §§ 103(A) and (G).

[3] Petitioners have commenced a separate proceeding in Onondaga Supreme Court under Index No.: 004110-2022 (the "Article 78 Proceeding") to challenge OCIDA's decision to provide financial assistance. If the condemnation of the O'Brien Property and the development of the CUB Project are not separate actions, then there would be no reason for the Article 78 Proceeding.

> (4) Health-related facility shall mean a facility, institution, intermediate care facility, or a separate or distinct part thereof, providing therein lodging, board and social and physical care, including but not limited to the recording of health information, dietary supervision and supervised hygienic services incident to such care to six or more residents not related to the operator by marriage or by blood within the third degree of consanguinity.
>
> (5) Hospital shall mean an institution with beds for one or more inpatients not related to the operator which is primarily engaged in providing services and facilities to inpatients by or under the supervision of a physician and which the following requirements: ….

Under the above definitions, the CUB Project is not a hospital or health related facility (i.e., nursing home). *See* Gardner v. Axelrod, 104 A.D.2d 633, 633-634 (2d Dept. 1984).

Importantly, the acquisition of the O'Brien Property for public parking is not complicated to evaluate (R.5884, ¶12). During the OCIDA's public purpose review, Petitioners received all of the plans for the development of surface parking on the O'Brien Property yet they failed to articulate why that use is not a "public use" under EDPL Article 2 (R.5509-5545). The reason is simple -- a publicly available surface parking lot is a "public use" under recently established precedent from this Court for other parking properties within the IHC. Matter of Truett v. Oneida County, 200 A.D.3d 1721 (4th Dept. 2021) *lv. denied* 38 N.Y.3d 907 (2022). *See also* Matter of PSC, LLC v. City of Albany Indus. Dev. Agency, 200 A.D.3d 1282 (3d Dept. 2021) *lv. denied* 38 N.Y.3d 909 (2022). As the condemning authority and pursuant to

EDPL §204, the OCIDA issued the EDPL Findings finding that public parking for the CUB Project and Wynn Hospital would promote and maintain job opportunities and economic development (R.5891, ¶34, R.5890, ¶31, R.6044-6045, R.5480, R.5488, R.5888, ¶23). The CUB Project, with its delivery of critical services, was also determined to enhance access to healthcare for the entire community that will promote the economic welfare of the citizens and the economic development of a blighted area of the City (R.5891, ¶¶34-37, R.6453-6464, R.6467-6474, R.6477-6490, R.6494-6497).

In the Petition, Bowers Development, LLC ("Bowers") asserts that it is developing a superior medical office building on the O'Brien Property. However, the Bowers development is a pure fiction. Bowers never presented any evidence that such a development exists other than in his own mind. Bowers did not tender a site plan of its conceptual development and never demonstrated how it could be constructed and operated without the right to use the adjoining parcels owned by Mohawk Valley Health System ("MVHS") (R.5886-5894). Bowers failed to present any committed leases or financing (R.5878, ¶¶40-41, R.5882, ¶5). Indeed, Petitioners have not provided OCIDA with their unconditional purchase contract for the O'Brien Property despite several demands. As a result, OCIDA rejected Bowers' claim that its development was real (Petition, ¶2, Ex. 4, pp 2-3 *compare* R.5878,

¶¶40-41, R.5882, ¶5, R.5886, ¶17 and ¶19, R.5887, ¶21, R.5890, ¶32, R.5891, ¶34, R.5893, ¶4(c), R.5894, ¶4(f), R.6041-6045).

At the penultimate vote on the EDPL Findings, Michael Fitzgerald, Vice Chair of the OCIDA, articulated why the CUB Project was real and why the Bowers concept was hypothetical as follows:

> "Why Cub? They have four essential factors that Bowers/O'Brien have failed to demonstrate 1) an agreement with the Hospital to house the [Ambulatory Surgery Center] ASC's, the radiation and other departments (a claimed willingness to do so is not enough) 2) lease commitments for enough of the MOB to make financing viable, 3) an agreement to house the major invasive cardiac group in the county in proximity to the Hospital, a must for such procedures and 4) a timeframe which meets the Hospital's need for the ASC to be open concurrent with the new Hospital." (R.6042-6045).

OCIDA, based on the personal knowledge of its members of the long standing blighted conditions in the portion of the City where the IHC is being developed and the critical importance of the medical services, determined that the acquisition of the O'Brien Property would eliminate blight, enhance the redevelopment of the immediate area of the IHC, promote the health, well-being and prosperity of the citizens and the economic revitalization of the area (R.5893, ¶3(b)-(c), R.6453-6454, R.5217-5218, R.5245-5247). The EDPL Findings confirm that OCIDA reviewed and addressed in good faith all of the contentions of the public (R.5875-6000).

QUESTIONS PRESENTED

1. Does the OCIDA have the statutory authority to condemn the O'Brien Property for use as a public parking lot?

Answer. Yes. Pursuant to General Municipal Law ("GML") §901 and §858(4), the OCIDA has the power to acquire the O'Brien Property pursuant to the EDPL for a public parking lot. *See* Truett v. Oneida County, Id. PSC, LLC v. City of Albany Indus. Dev. Agency, Id.

2. Will the acquisition of the O'Brien Property serve a public purpose?

Answer. Yes. The acquisition is a component of the surface parking contemplated in both the EIS and SEQR Findings Statement, and thus serves a public purpose of mitigating parking issues, traffic congestion and providing parking for visitors, patients and employees of the tenants of the CUB Project, and general parking for the Wynn Hospital after customary business hours and on weekends (R.4251, R.4252-Medical Office Building (MOB), R.5235-5236). Truett v. Oneida County, 200 A.D.3d 1721 (4th Dept. 2021) *lv. denied* 38 N.Y.3d 907 (2022). The propriety of OCIDA's public purpose determination is also confirmed by the elimination of blight and economic redevelopment within the area of the IHC. Goldstein v. New York State Urban Dev. Corp., 13 N.Y.3d 511, 517-518 (2009) (the proposed land use improvement project will, by removing blight and creating in its place the above-described mixed-use development, serve a "public use, benefit or

purpose" in accordance with the requirement of EDPL 204(B)(1)). Matter of United Ref. Co. of Pa. v. Town of Amherst, 173 A.D.3d 1810, 1811 (4th Dept 2019) *lv. denied* 34 N.Y.3d 913 (2020) (Here, respondent's condemnation of the vacant property serves the public use of redevelopment and urban renewal).

3. Did the OCIDA comply with the SEQR Act and the requirements of Article 2 of the EDPL?

Answer. Yes. The environmental impacts of the IHC, including the associated MOB, which is the CUB Project, were evaluated by the Planning Board as the lead agency for the benefit of all involved agencies (R.58, ¶10, R.4243-5213, R.5214-5281, R.46-47). OCIDA, as an involved agency (R.58, ¶10), determined that the CUB Project was the "medical office building by private developer" referenced throughout the EIS and the SEQR Findings (R.6397, 3rd Whereas Clause) and that there was no material change in that MOB component so that no further review under the SEQR Act was required (R.6397-6452).

The EDPL Findings confirm that OCIDA satisfied the procedural requirements of EDPL Article 2 and undertook a substantive review of all comments on the acquisition of the O'Brien Property for a public parking lot (R.5875-6045, R.5301-5546).

4. Should the EDPL Findings be annulled (R.5875-6045)?

Answer. No. The OCIDA's public purpose evaluation is supported by the record so that the EDPL Findings must be confirmed. Court St. Dev. Project, LLC v. Utica Urban Renewal Agency, 188 A.D.3d 1601, 1602 (4th Dept. 2020).

STANDARD OF REVIEW

The standard of review under EDPL §207 is whether Petitioners met their burden of proof of showing that the public purpose evaluation of OCIDA is without foundation and baseless. Court St. Dev. Project, LLC v. Utica Urban Renewal Agency, Id. Matter of GM Components Holdings, LLC v. Town of Lockport Indus. Dev. Agency, 112 A.D.3d 1351, 1352 (4th Dept. 2013) *appeal dismissed* 22 N.Y.3d 1165 (2014). If an adequate basis for such determination is shown, and the objector cannot demonstrate that such determination is without foundation, it should be confirmed. Matter of Butler v. Onondaga County Legislature, 39 A.D.3d 1271, 1271-1272 (4th Dept. 2007) *citing* Waldo's Inc. v. Village of Johnson City, 74 N.Y.2d 718, 720 (1989). The appellate review of the EDPL Findings is quite limited to whether: (1) the proceeding was constitutionally sound; (2) the condemnor had the requisite authority; (3) the determination complied with the SEQR Act and EDPL Article 2; and (4) the acquisition will serve a public use. Court St. Dev. Project, LLC v. Utica Urban Renewal Agency, Id. It is beyond caval that the taking of the O'Brien Property for a public parking lot is rationally related to a conceivable public purpose,

because the public may access both the CUB Project and the Wynn Hospital from that parking lot. Matter of Kaufmann's Carousel v. City of Syracuse Indus. Dev. Agency, 301 A.D.2d 292, 303 (4th Dept. 2002) *lv. denied* 99 N.Y.2d 508 (203).

FACT STATEMENT

(Overview)

The principal purpose behind the development of the IHC was to build a single integrated hospital campus having the newest technology and surrounded by a core of physician practices so as to provide better and more accessible medical care that would attract medical specialists (R.4248-4249. R.5218). The reason it is being constructed in the downtown portion of the City is to facilitate the economic redevelopment and to address what has long been designated as a Federal "Historically Underutilized Business" zone ("HUB"), a distressed area and a "potential environmental justice area" (R.47, R.158 R.188). The record confirms the long-standing blighted conditions proximate to the O'Brien Property (R.1, R.697, R.2412-2423, R.4255-4257, R.6409-Revitalization of a Blighted Area, R.5217).

From the inception, the IHC always had a MOB critical component that was to be constructed by a private developer (R.4250-§1.1.4, R.4252, R.5981, R.6406-Description of Action, R.6365-6369) as follows:

> A future MOB is proposed. It is anticipated that the MOB would be owned and operated by a private developer. As illustrated on Figure 3, the proposed location of the MOB is south of Columbia Street and west of Cornelia Street (R.4251-4252).

The O'Brien Property is a parking lot in the EIS and SEQR Findings Statement (R.4251-Figure 3, R.5522, R.5511-Existing Condition Plan *compare* R.5512, R.6492, R5906). MVHS owns three of the four parcels that are located to the south of the Wynn Hospital that have been ground leased by MVHS to CUB, including the Building Parcel location of the CUB Project (R.6492, R.5904). During the EIS process, the MOB was shown as being at the southwest corner of Columbia and Cornelia streets. For ease of access and proximity to the primary entrance to the Wynn Hospital, the MOB was relocated to the Building Parcel (R.5512, R.6366). This relocation of the CUB Project did not result in any change in the parking use of the O'Brien Property, and the OCIDA expressly found that the CUB Project did not result in a material change to the MOB component of the IHC (R.5378, R.6397-6398). Importantly, the record confirms that there are no other immediately adjacent surface parking alternatives to the O'Brien Property capable of handling the parking requirements of the CUB Project (R.5892-5893, ¶2(a)). Contrary to the contention in Petitioners' Brief (p.13), the Kennedy Garage is approximately a block distant from the CUB Project so that even if repaired, it is not a viable solution for the

elderly and infirm patients and recipients of out-patient surgical procedures at the CUB Project (R.5284, R.5522).

(Coordinated Review under the SEQR Act by the Planning Board)

In 2018, MVHS submitted an application and Environmental Assessment Form ("EAF") (R.27-85) to the Oneida County Local Development Corporation ("OCLDC"), an affiliate of the OCIDA, for the IHC (R.2-26). The OCLDC determined that the IHC was a Type I action requiring coordinated review under the SEQR Act and a lead agency to conduct such review (R.86-87).

Pursuant to 6 NYCRR §617.6(b)(2), OCLDC coordinated the lead agency designation (R.86-87, R.56-61). On February 22, 2018, the Planning Board declared its intent to be the lead agency by notifying all other potentially involved agencies, including OCIDA (R.90-91). After receiving no objection, on May 7, 2018, the Planning Board declared itself as the Lead Agency and identified the IHC as a Type I action under the SEQR Act, and issued a Positive Declaration requiring the preparation of an environmental impact statement ("EIS") to assess potential significant adverse environmental impacts and to identify possible mitigation and/or alternatives to avoid or minimize those potential impacts (R.92-153).

On May 17, 2018, MVHS submitted a draft scoping document to the Planning Board to focus the draft EIS on potentially significant adverse impacts of the entire IHC, including the MOB, and to eliminate irrelevant or nonsignificant impacts (R.154-761). The Planning Board held a scoping hearing on June 7, 2018 and accepted written comments (R.213-296, R.185, R.762-763). The Planning Board adopted a final scoping document on July 19, 2018, which was filed and noticed in accordance with the SEQR Act (R.5216, R.184-761).

Thereafter, MVHS submitted the DEIS to the Planning Board (R.764-4238). On November 15, 2018, the Planning Board reviewed the DEIS and used the final scoping document and the standards contained in 6 NYCRR §617.9 to accept the DEIS as adequate with respect to scope and content for commencing public review (R.4239-4240).

The Planning Board held a public hearing on the DEIS on December 6, 2018 (R.4626-4672), and accepted written public comments until December 27, 2018 (R.4672 Lines 21-22, R.5216). Based on the comments received, a final EIS was prepared (R.5216, R.4243-5213). The Planning Board determined that the FEIS was complete on March 21, 2019 (R.5216, R.4241-4242). The EIS was subsequently provided to all involved agencies, including the OCIDA, and placed at the various repositories and on the website (R.5216). The EIS addressed specific substantive comments raised during the public comment period and discussed mitigation to

minimize potential negative impacts from the IHC, including the MOB that is the CUB Project, to the maximum extent practicable (R.5216, R.4243-5213). Of particular importance was that the MOB was shown to have surface parking on the O'Brien Property (R.4251-4252).

On April 30, 2019, the Planning Board issued the SEQR Findings Statement which certified that the requirements of 6 NYCRR Part 617 had been satisfied (R.6402-6452). The SEQR Findings Statement addressed the environmental impacts from the MOB (R.6406).

Petitioner, Rome Plumbing & Heating Supply Co. Inc. formerly J.P. O'Brien Plumbing and Heating Supply, Inc. ("O'Brien") was one of the named petitioners that challenged the SEQR Findings Statement. On October 20, 2020, Judge Bernadette Clark, Oneida County Supreme Court, dismissed the case and determined, among other things, that the challenge to the Planning Board's SEQR review was meritless[4].

The SEQR Findings Statement expressly considered anticipated benefits, potential environmental impacts, and relevant mitigation measures associated with the MOB and its associated parking field as follows:

- "Parking Mitigation -- This potential impact will be minimized by the construction of one municipal parking garage and multiple surface lots. The TIS

[4] See *The Landmarks Soc. of Greater Utica, et al. v Planning Bd. of the City of Utica, et al.*, Index. No. CA2020-001365 (Oct. 22, 2020), attached, as Appendix A.

> [traffic impact study] included a parking supply demand analysis based on similar facilities in urban settings. The two current facilities provide approximately 2,800 spaces. The Project will provide approximately 2,330 spaces broken down as follows: 1,455 spaces for the hospital component, 375 spaces for the Medical Office Building ("MOB") and 500 spaces for the City/public" (R.6427);
>
> - "The Planning Board finds that the mitigation measures will minimize Project's potential impacts on transportation (traffic, parking, pedestrians) to the maximum extent practicable" (R.6429).

The OCIDA, as an involved agency, undertook and completed its review of the CUB Project under the SEQR Act and passed a separate resolution pursuant to the SEQR Act (the "SEQR Resolution") (R.6397-6452). OCIDA determined that the coordinated review of the environmental impacts of the IHC included both a medical office building (by private developer) and the multiple surface lots (R.6397, 2nd Whereas Clause). The OCIDA determined that the CUB Project constituted the MOB component of the IHC (R.6397, 3rd Whereas Clause). Further, OCIDA, as a named involved agency, affirmed that the SEQR Findings Statement was applicable to the CUB Project (R.6398, 2nd Whereas Clause). The OCIDA also expressly affirmed that the CUB Project, including the acquisition of the O'Brien Property as a public parking lot, resulted in no material change to the scope of the MOB by a private developer component of the IHC that would in any way contravene the

conclusions in the SEQR Findings Statement and consequently no additional SEQR Review was required (R.6397-6398). In the EDPL Findings, the OCIDA reaffirmed that there was no material change in the scope of the CUB Project that would affect the determinations made in the SEQR Findings Statement (R.5883, ¶9, R.5378).

(OCIDA's Article 2 Review for the Acquisition of the O'Brien Property)

On or about November 12, 2021, the CUB applied to the OCIDA for financial assistance for the CUB Project (R.5419-5475). At that time, the application to the OCIDA reflected that the O'Brien Property was a required component of the property assemblage (R.5466). On January 14, 2022, CUB represented that it was unable to obtain ownership or control of the O'Brien Property and requested that the OCIDA initiate proceedings under the EDPL to acquire the O'Brien Property (the "Notice") (R.5282-5285).

Prior to the January 14, 2022 condemnation request, OCIDA was advised that the O'Brien Property was subject to a certain purchase and sale contract with Bowers (R.5876, ¶16). Notwithstanding that representation and despite several requests to review that document, the contract was never presented to the OCIDA and is not in the record.

At the January 21, 2022 meeting, OCIDA approved a resolution to commence the EDPL Article 2 review of the parking use of the O'Brien Property. On or about February 2, 2022, the OCIDA issued its Notice of a Public Hearing, pursuant to EDPL Article 2, stating that a public hearing was scheduled for February 23, 2022 at 9:00 AM at the Oneida County Legislative Chambers in the City (the "Public Hearing") (R.5909-5910, R.5286-5300). On February 3, 2022, the OCIDA provided O'Brien and Bowers with timely notice of the Public Hearing as required by EDPL §201 and §202. (R.5914, R.5916, R.5291, R.5297). The Notice of Public Hearing was served more than the ten (10) day minimum and less than the thirty (30) day maximum notice required in EDPL §202(A) (R.5914, R.5920, R.5291, 5297). In addition, on February 4, 2022, the Attorney for Bowers was provided a courtesy copy of the letter to O'Brien and Bowers on the scheduled date for the Public Hearing (R.5922). Pursuant to EDPL §202(A), the Notice of Public Hearing was published in The Observer Dispatch for the required five successive issues commencing on February 7, 2022 and continuing each day thereafter through February 11, 2022 (R.5911-5913). The certified mail receipts confirm that service of the Notice of Public Hearing upon O'Brien and Bowers was complete on February 7, 2022 (R.5920).

In compliance with EDPL §203, the OCIDA conducted the Public Hearing on February 23, 2022 (R.5927-5964, R.5547)). A recording of the Public Hearing was made available on the OCIDA website (R.5877, ¶29). The transcript of the Public Hearing along with all written comment submitted to the OCIDA before and after the Public Hearing were made available for public inspection at the offices of the OCIDA and the Oneida County Clerk (R.5966-5969, R.5877, ¶¶27-29).

At the Public Hearing, representatives of CUB (R.5565-5574, R.5578-5581), MVHS (R.5576-5578), the Counsel for Bowers (R.5560-5565) and a principal of Bowers spoke (R.5574-5576, R.5878, ¶30, R.5547). Written comments were submitted by O'Brien (R.5301) and on behalf of Bowers by Brown Duke & Fogel, P.C. ("BDF") dated February 22, 2022 ("BDF I") (R.5302-5475), March 2, 2022 ("BDF II") (R.5587-5846) and March 30, 2022 ("BDF III") (R.5850-5874), Michael Galime, dated March 2, 2022, Brett Truett, dated February 28, 2022 (R.5489-5496), Katie Aiello, dated March 2, 2022 (R.5502-5503), Gail Coopy, dated March 2, 2022, MVHS, dated February 23, 2022 (R.5477), Chad Davis, a member of the Oneida County Board of Legislature, dated March 1, 2022 (R.5504-5505), Mark Harf, dated February 23, 2022 (R.5500-5501), Robert Sullivan, dated March 29, 2022 (R.6334), Lily Werenczak, dated March 29, 2022 (R.6331), Robert Lott, dated March 30, 2022 (R.6333), and CUB, dated March 1, 2022 (R.5480-5488) and others listed in the EDPL Findings Statement (R.5480-5488, R.5878, ¶31). During the public comment

period, on March 2, 2022, CUB confirmed that the entire parking lot, including the O'Brien Property, would be made available to the public (R.5992), and the plan set for the CUB Project shows the proposed use of the O'Brien Property as an ungated parking lot (R.5512).

After the Public Hearing closed, in the EDPL Findings, the OCIDA evaluated every comment letter on the use of the O'Brien Property as a parking lot and made specific determinations with respect to all contentions (R5879-5891, R.5301-5546, R.6046-6336). The transcript of the Public Hearing was not produced until March 11, 2022 which delayed the assembly and filing of the record of the Public Hearing until March 16, 2022 (R.5878, ¶32). With that delay, OCIDA provided notice by certified mail return receipt requested to both O'Brien and Bowers of the filing of the transcript of the Public Hearing and the record of all comments at the offices of OCIDA and the Oneida County Clerk which notice stated that the public comment period was extended to March 30, 2022 at 5:00 PM (R.5994-5995, R.5849). The notice of the extension of the public comment period was received by O'Brien on March 19, 2022 and Bowers and Counsel of Bowers on March 18, 2022 (R.5996). In addition, a notice of the extension of the inspection period was published in The Observer Dispatch for another five successive issues commencing on March 22, 2022 (R.5998-6000). EDPL §203 only requires that a stenographic record of the hearing be "kept, including written statements submitted". Here, the

complete stenographic record of the Public Hearing and all written statements submitted to the OCIDA were kept by the OCIDA and made publicly available at the offices of the OCIDA and the Oneida County Clerk (Instrument No.: F2022-000025) (R.5301-5874, R.5967-5969). Therefore, the OCIDA satisfied its obligations with respect to the record under EDPL §203 which only requires that "[C]opies of such record shall be available to the public" refers to the immediately preceding sentence on the record of the Public Hearing (i.e. stenographic record of the Public Hearing) and all other written statements. The OCIDA went above and above the statutory minimum requirement in EDPL §203 as it made the entire record of the documents that it reviewed available to the public at its office and at the Office of the Oneida County Clerk (R.5877, ¶¶27-29, R.5966-5969).

Petitioners' self-serving contentions in Petitioners' Brief (p.32) that the record of the Public Hearing was not available to them is simply untrue. Counsel to Bowers received copies of all requested documents and was in no way prevented from reviewing the stenographic record and all public comment as well as documents in the possession of OCIDA such as the EIS and SEQR Findings Statement. Petitioners' contentions about the response to their numerous FOILs with very detailed information requests also fails as the OCIDA reasonably responded to all of their voluminous requests for information under the Public Officers Law §89(3)(a). Save Monroe Ave., Inc. v. New York State Dept. of Transp., 197 A.D.3d 808, 810

(3d Dept. 2021) *lv. denied* 38 N.Y.3d 905 (2022). In addition, OCIDA responded to one of such requests substantially prior to the closing of the Public Hearing, and then Bowers promptly provided another detailed request unrelated to the parking lot use of the O'Brien Property which required a substantial period of time to compile, review and assemble all of the responsive documents. This in no way affected the ability of Petitioners to provide comment on the use of the O'Brien Property as a parking lot.

Prior to the April 7, 2022 meeting of the OCIDA, each member received a full and complete set of the record of proceedings with respect to the evaluation of the use of the O'Brien Property as a public surface parking lot (R.6042). At the April 7, 2022 meeting, the OCIDA discussed in detailed the public purpose of the use of the O'Brien Property for parking (R.6041-6045). The Vice Chair of OCIDA prepared a statement that he read into the record as to why the CUB Project was real and why the Bowers concept was not, which statement affirmed why he thought that the CUB Project was very important to the community (R.6044-6045). Importantly, both MVHS and CUB represented to the OCIDA that the opening of the CUB Project prior to the Wynn Hospital was critical to its success and the delivery of medical services (R.5971, R.6356-6361, R.6365-6370). At the April 7, 2022 meeting, the OCIDA approved: (a) the EDPL Findings and synopsis thereof (the "Synopsis") (R.6001-6003); (b) the publication of the Synopsis in The Observer Dispatch for at

least two successive issues pursuant to EDPL §204(A) (R.6004-6005, R.6039-6040); and (c) authorized the service of the notice of Synopsis on the record owner and the contract vendee pursuant to EDPL §204(C) (R.6029-6038, R.6006-6009). The OCIDA made the express determinations required under EDPL §204(B)(1)-(4) (R.5892-5895). Finally, the OCIDA satisfied the ninety (90) day completion requirement set forth in EDPL §204(A) since the EDPL Findings were approved by the OCIDA on April 7, 2022 which is within the ninety day period from the February 23, 2022 conclusion of the Public Hearing (R.5896 *compare* R.5927).

The OCIDA completed the publication of the Synopsis in The Observer Dispatch for three consecutive issues commencing on April 15, 2022 which satisfied the two (2) day publication requirement in EDPL §204(A) (R.6004-6005). On April 8, 2002, OCIDA satisfied the requirements of EDPL §204(C)(1)-(4) with the Synopsis, and OCIDA included a courtesy copy of the EDPL Findings with its service by certified mail return receipt requested on both O'Brien, and Bowers (R.6006-6012). The service of the Synopsis on O'Brien and Bowers was completed on April 11, 2022 (R.6014). A courtesy copy of the Synopsis was mailed to Counsel for Bowers on April 8, 2022 (R.6022).

On or about May 11, 2022, Bowers and O'Brien, now represented by the same counsel, filed its Verified Petition. On May 12, 2022, the Court issued its Scheduling Order. On or about June 3, 2022, the OCIDA filed a Verified Answer and a nine (9) volume record of the proceedings. On June 3, 2022, Respondent CUB filed its Verified Answer. Petitioners' Brief was filed on July 26, 2022.

POINT I

THE TAKING OF THE O'BRIEN PROPERTY BY THE OCIDA IS PERMITTED UNDER GML §858(4)

The OCIDA has the express statutory power to acquire real property by eminent domain pursuant to GML §858(4). GML §858 does not define the term "commercial". As a result, each individual industrial development agency must utilize its good faith business judgment and determine what projects constitute a commercial project that will benefit their community. Matter of Nearpass v. Seneca County Indus. Dev. Agency, 152 A.D.3d 1192, 1193 (3d Dept. 2017). In *PSC LLC*, the City of Albany Industrial Development Agency instituted eminent domain proceedings to acquire several parking lots. PSC, LLC v. City of Albany Indus. Dev. Agency, Id. First, under the *PSC, LLC* precedent, the acquisition of the O'Brien Property by OCIDA for a surface parking lot is a commercial project under GML §854(4) and GML §858.

Second, the determination by the OCIDA that the acquisition of the O'Brien Property for a public parking lot is a commercial use within the meaning of GML §854 is entitled to great deference and is certainly reasonable considering the magnitude of the regionally significant IHC and the CUB Project and their importance to the citizens of Oneida County. Nearpass v. Seneca County Indus. Dev. Agency, Id.. The determination of the OCIDA that the acquisition of the O'Brien Property for a public parking lot is both reasonable and rational considering

that the Wynn Hospital represents a Six Hundred Eleven Million Dollar ($611,000,000) investment following a mandated hospital consolidation and closure, and the CUB Project involves a private investment of approximately Forty-two Million ($42,000,000) that is critical to the opening of the new hospital (R.5477, R.5338, R.5480).

The New York State Comptroller, when considering the definition of a commercial project under the GML, has stated that "an essential element of any valid commercial activity appears to be the promotion of employment opportunities and prevention of economic deterioration in an area for whose benefit the industrial development agency was created." Opns St Comp, 1985 No. 85-51 (N.Y.St.Cptr), 1985 WL 25843. The State Comptroller thus concluded that a determination as to whether the development of an apartment complex is a commercial activity "must be made by local officials based upon all the facts relevant to the proposed project, [and] any such determination should take into account the stated purposes of the New York State Industrial Development Agency Act, that is, promotion of employment opportunities and the prevention of economic deterioration." Opns St Comp, 1985 No. 85-51 (N.Y.St.Cptr), 1985 WL 25843. Here, the OCIDA's determination that the CUB Project would promote and maintain job opportunities and reduce long standing blighted conditions in the immediate area of the IHC is

consistent with the purposes underlying Article 18-A of the GML (R.5885, ¶15, R5893, ¶3(b), R.5891, ¶36, R.6494(c), R.6454, R.1).

Even if, as asserted by the Petitioners that the O'Brien Property is analyzed as being a part of the CUB Project, OCIDA has the power to provide financial assistance to a commercial office building whose tenants are providers of health care services under GML §854(4) (R.5879). Nearpass v. Seneca County Indus. Dev. Agency, 152 A.D.3d 1192 (4th Dept. 2017). Since the word "commercial" is not defined in Article 18-A of the GML, relevant statutory analysis of that word under Real Property Tax Law ("RPTL") §485-b (Business investment exemption) confirms that a medical office building is a commercial development entitled to that exemption. Specifically, RPTL §485-b(1) lists the type of properties eligible for that exemption as follows:

> Real property constructed, altered, installed or improved subsequent to the first day of July, nineteen hundred seventy-six for the purpose of **commercial**, business or industrial activity shall be exempt from taxation and special ad valorem levies, …, to the extent hereinafter provided (*emphasis added in bold*).

The RPTL §485-b exemption is available to the following types of real property:

> The provisions of this section shall apply to real property used primarily for the buying, selling, storing or developing goods or **services**, the manufacture or assembly of goods or the processing of raw materials. This section shall not apply to property used primarily for the furnishing of dwelling space or accommodations to either residents or transients other than hotels or motels (*emphasis added in bold*). RPTL §485-b(5).

Therefore, under the above definition, commercial real property entitled to this exemption must be used to provide either goods or services. The CUB Project provides "services" so that it is a commercial project within RPTL §485-b. Importantly, the RPTL §485-b exemption is not available to the limited category of real property used to provide dwelling space or accommodations to either residents or transients other than hotels or motels. RPTL §485-b(5). The record confirms that the CUB Project does not have any beds, food service or inpatient facilities (R.5531-5532, R.5368-5371, R.5483-5485). .

Both case precedent and the New York State Department of Taxation and Finance Opinions of Counsel confirm that a medical office building is commercial real property entitled to the RPTL §485-b commercial property exemption. 10 Op. Counsel SBRPS No. 125. *See also*, Glengariff Corp. v. Bd. of Assessors of County of Nassau, 128 A.D.2d 872, 873 (2d Dept. 1987). Beyond the good faith business judgment of the OCIDA, the definition of a commercial project under

RPTL §485-b was relied upon by the OCIDA in their determination that the CUB Project is a commercial project within the meaning of GML §854 (R.5881). That interpretation is clearly rational considering the Forty-two Million ($42,000,000) dollar investment and the unique services to be provided therein that impact the health and safety of the residents of Oneida County (R.5623, R.5653-5656, R.5763-5767, R.5754-5758). The fact that a tenant of the CUB Project will operate an ambulatory surgery center does not change the predominate use from a medical office building into a hospital or health related facility under 10 NYCRR §700.2(a)(4) and (5) since there are no beds for overnight stays, food service or inpatient services (R.5707, R.5531-5532, R.5483-5485).

In addition, the CUB Project also qualified for financial assistance as a permitted retail project since it is built within a highly distressed area under GML §862(2)(b)(ii) (R.6453-6488). The County Executive of Oneida County confirmed that the CUB Project is a retail project under GML §862(2)(c) (R.6489-6490). The New York State Comptroller has issued a publication confirming that retail projects are "retail stores, as well as other operations such as hotels, motels, legal and medical offices". Division of Local Government Services & Economic Development – "Industrial Development Agencies in New York State – Background, Issues and Recommendations dated May 2006", p.10. *See* https://www.osc.state.ny.us/files/local-

government/publications/pdf/idabackground.pdf. Similarly, the New York State Authorities Budget Office has acknowledged that an outpatient medical surgery center is a permitted retail project eligible to receive financial assistance. Authorities Budget Office IDA 2018 New Projects dated July 20, 2020, p.5. *See* https://www.abo.ny.gov/reports/compliancereviews/IDANewProjectsAnalysisFinalReport.pdf.

Contrary to the arguments in Petitioners' Brief (Point I) and the assertions in the Petition, the CUB Project is not a "hospital or health related facility" since it lacks beds, food facilities and does not provide traditional in-patient general hospital or nursing home services (R.5368-5370). Gardner v. Axelrod, 104 A.D.2d 633. *See definitions* 10 NYCRR §700.2(a)(4) and (5). As a result, Petitioners' attempt to buttress their completely erroneous principal contention based on their citation to outdated opinions of the Attorney General (1981 N.Y. Op. Atty. Gen. 55; 1980 N.Y. Op. Atty. Gen. (Inf.) 139) also fails (R.5531-5532, R.5483-5485). These opinions are substantially out of date with the current trend for the delivery of minor surgical procedures on an out-patient basis. Further, these opinions have been superseded by the applicable definitions in 10 NYCRR §700.2(a)(4) and (5) that have an effective date of December 12, 2018. These regulatory definitions confirm that the CUB Project is neither a hospital nor health related facility. Considering the magnitude of the investment in the CUB Project and the Wynn Hospital and their critical

importance to employment, economic growth and the delivery of health care, the determination of OCIDA must be upheld as a completely appropriate local determination that satisfies the standard established in *Nearpass*.

If the CUB Project were a tax-exempt hospital then it would be entitled to the exemption from New York State sales taxes pursuant to Tax Law §1116(a)(4) obviating any need for the exemption provided by the OCIDA. *See* Wegmans Food Mkts. V. Department of Taxation and Fin. Of State of N.Y., 126 Misc.2d 144 *aff'd* 115 A.D.2d 962 (4th Dept. 1985) *lv. denied* 67 N.Y.2d 606 (1986). It is not. In addition, if the CUB Project were truly a "hospital", then it would be exempt from real estate taxes under RPTL §420-a(1)(a). Viahealth of Wayne v. VanPatten, 90 A.D.3d 1700, 1701-1702 (4th Dept. 2011). Again, it is not. The principal use of the CUB Project is as a privately owned commercial office building whose tenants are various health care providers, which is commercial real property under any definition.

POINT II

THE ACQUISITION OF THE O'BRIEN PROPERTY FOR PUBLIC PARKING IS A PUBLIC PURPOSE UNDER THE EDPL

The primary purpose of EDPL Article 2 is to insure that a condemnor does not acquire property without having made a reasoned determination that the condemnation will serve a valid public purpose. Waldo's, Inc. v. Village of Johnson City, 141 A.D.2d 194, 198 (3d Dept. 1988) *citing* Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 417-418 (1986). The standard of review of the EDPL Findings is whether it is conceivably related to a public purpose. Matter of Kaufmann's Carousel v. City of Syracuse Indus. Dev. Agency, 301 A.D.2d 292, 303 (4th Dept. 2002) *lv. denied* 99 N.Y.2d 508 (2003). The OCIDA has broad discretion in determining what constitutes a public purpose. Rafferty v. Town of Colonie, 300 A.D.2d 719, 723 (3d Dept. 2002). What constitutes a "public purpose" under the EDPL is defined broadly and encompasses any use that contributes to the health, safety, general welfare, convenience or prosperity of the community. Matter of 225 Front St. Ltd. v. City of Binghamton, 61 A.D.3d 1155, 1157 (3d Dept. 2009). Under that standard, the acquisition of the O'Brien Property for surface parking is indisputably a "conceivable" public purpose since that parking lot will contribute to the health, safety, convenience and prosperity of the community accessing their healthcare services at the CUB Project and the Wynn Hospital. Truett v. Oneida County, 200 A.D.3d 1721 (4th Dept. 2021) *lv. denied* 38 N.Y.3d 907 (2022). The

acquisition of the O'Brien Property that will be used for parking for a larger project serves a public purpose. Matter of Molly, Inc. v. County of Onondaga, 2 A.D.3d 1418 (4th Dept. 2003). Finally, the acquisition of land for parking is a public purpose even if the majority of users of such parking field may be patients of a hospital. Matter of Incorporated Vil. of Garden City (Lorentzen), 15 A.D.2d 513 (2d Dept. 1961).

This Court in *Truett* determined that a parking facility is a public purpose so that a surface parking lot on the O'Brien Property must be accorded the identical status as having a "conceivable" public purpose, because it was delineated as surface parking in both the EIS and SEQR Findings Statement. In addition, the Appellate Division Third Department in *PSC LLC v. City of Albany Indus. Dev. Agency* determined that the acquisition of surface parking lots by an industrial development agency is within its statutory powers under GML §854(4) and GML §858 so as to be a conceivable public purpose under the EDPL. Critically, Petitioners' Brief fails to address the two most recent EDPL §207 reviews being *Truett* and *PSC, LLC*, both of which are outcome determinative on the public use determination made by the OCIDA in the EDPL Findings (R.5885).

Additional reasons which confirm the public purpose determination of OCIDA are the elimination of blight and redevelopment. Goldstein v. New York State Urban Dev. Corp., 13 N.Y.3d 511, 517-518 (2009) (that the proposed land use improvement project will, by removing blight and creating in its place the above-described mixed-use development, serve a "public use, benefit or purpose" in accordance with the requirement of EDPL 204(B)(1)); Matter of United Ref. Co. of Pa. v. Town of Amherst, 173 A.D.3d 1810, 1811 (4th Dept 2019) *lv. denied* 34 N.Y.3d 913 (2020) (Here, respondent's condemnation of the vacant property serves the public use of redevelopment and urban renewal).

OCIDA has broad discretion in determining if a taking of private property is needed. Rafferty v. Town of Colonie, Id. Further, the need for property to complete another development, by itself, is a permitted basis for an acquisition by eminent domain. PSC, LLC v. City of Albany Indus. Dev. Agency, Id. Most condemnations involve some aspect of personal benefit to a private party which is permitted provided that the public purpose is dominant. Matter of Kaufmann's Carousel v. City of Syracuse Indus. Dev. Agency, Id. Matter of Waldo's, Inc. v. Village of Johnson City, 74 N.Y.2d 718 (1989). Clearly, the public purpose of the commitment of the O'Brien Property for public parking is dominant since no other use is proposed.

Petitioners' citation to *Syracuse Univ.* and *Steel Los III* as precedent to reject the public purpose determination of the OCIDA are inapposite. Petitioners' Brief, pp 24-25. In *Syracuse Univ.*, there was no public purpose served by the proposed taking by a private utility company of a parcel of land containing a cogeneration facility. In that case, the taking sought to terminate an unprofitable steam production contract through the condemnation of the cogeneration facility. Matter of Syracuse Univ. v. Project Orange Assoc. Servs. Corp., 71 A.D.3d 1432, 1434 (4th Dept. 2010). The underlying rationale for the decision in *Syracuse Univ.* is that it was essentially a private matter lacking any conceivable public purpose other than as a ruse to terminate an unfavorable steam production contract.

Similarly, *Steel Los III* involved the use of condemnation to eliminate a lease which the court found served no public purpose. Steel Los III, LP v. Power Auth. of State, 21 Misc.3d 707, 717 (Nassau Cty. Sup. Ct. 2008) (but principally conferred a private benefit by eliminating Calpine's obligation to pay rent under the Bethpage lease).

Here, the use the O'Brien Property as a public parking lot serves the public by providing proximate parking to access healthcare services in addition to providing overnight and employee parking for the Wynn Hospital (R.5892-5893, ¶2(a). Proximate surface parking is essential for an ambulatory surgery center, Central New York Cardiology, P.C. ("CNYC"), an affiliate of CUB, and the other physician practices in the CUB Project that serve the elderly and infirm population. In sum, the EDPL Findings are the required "reasoned determination that the taking of the O'Brien Property serves a valid public purpose" under *Jackson* (R.5875-6001).

POINT III

THE ANTI-PIRATING PROVISION OF THE GENERAL MUNICIPAL LAW ARE NOT SUBJECT TO REVIEW UNDER EDPL SECTION 207 AND WERE NOT VIOLATED

(Overview – No Violation of the GML §862(1) – Anti-Pirating Prohibition)

This original proceeding on the EDPL Findings does not involve the grant of financial assistance to the CUB Project to be constructed on the Building Parcel which is the subject of a separate the Article 78 Proceeding[5]. As a result of its juxtaposition of the parcels, Petitioners' allegations regarding anti-pirating (Petitioners' Brief, Point II) are misdirected here. Moreover, the contentions regarding anti-pirating were never asserted at the Public Hearing or in any written comment to OCIDA, and they are therefore not properly before this Court pursuant to the preclusion provisions of EDPL §202(C)(2) (R.5910 *compare* R5303-5309, R.5560-5565, R.5587-5590, R.5850-5853). Even if considered by this Court, there is no violation of GML §862(1).

(No Violation of the Out of Area Prohibition)

GML §862 has two prohibitions on the provision of financial assistance by an Industrial Development Agency. An agency may not fund any project if: (a) the completion of such project results in the removal of a project occupant from one area of the state to another area in the state; or (b) the project results in the abandonment

[5] See n.3, *supra*.

of a project occupant within the state. The statute goes on to provide two exceptions to the movement prohibitions where the industrial development agency determines based on the application that: (a) the project is reasonably necessary to discourage the project occupant from removing a facility outside of the state; or (b) the project is reasonably necessary to preserve the competitive position of the project occupant in its respective industry.

The CUB Project does not violate the anti-pirating provisions of GML §862(1) since the relocation of CNYC into the CUB Project is clearly permitted, because that relocation is completely within the City (R.5368-5369). Northeast Parent & Child Socy. v. City of Schenectady Indus. Dev. Agency, 114 A.D.2d 741, 742 (3d Dept. 1985) (Here, where the relocation will be within the municipality, the statute is not contravened). As a principal tenant of the CUB Project, CNYC articulated both the substantive and business reasons for its relocation from its existing space in the City which is proximate to the soon to be closed St. Elizabeth's Medical Center. CNYC has outgrown its existing non-contiguous office space and needs larger and more modern office space to accommodate the addition of new physicians, staff and to provide state of the art diagnostic services (R.5368-5369). Moreover, CNYC's lease expires in May 2023, and CNYC set forth that a location proximate to the Wynn Hospital would enhance the delivery of health care services (R.5368-5369). As a result, CNYC articulated a legitimate and an unchallenged basis

for its relocation next to Wynn Hospital that does not violate the out of the area prohibition set forth in GML §862(1) since their move is totally within the City (Petition, Ex. 4, pp 1-3, R.6494, ¶6(d)).

Petitioners' contention (Petitioners' Brief at p.23) that the CUB Project will result in the relocation of doctor's offices from Faxton St. Luke's hospital in the Town of New Hartford is unsupported speculative conjecture lacking any record support. Beyond being speculative and desperate, it relates solely to the mandated hospital consolidation having nothing to do with the use of the O'Brien Property as a parking lot. Finally, there is no possible violation of GML §862(1) with Mohawk Valley ASC, LLC since it is a new business locating into the CUB Project (R.5369).

(No Abandonment Violation)

Importantly, CNYC's current lease is scheduled to expire in May 2023 which date is proximate to the date of the opening of the CUB Project (R.5369). The Court of Appeals has held that there is no prohibited abandonment under GML §862(1) where an occupant's lease is about to expire as follows:

> "Moreover, there was no abandonment of the downtown Buffalo location since BDO's lease was about to expire." Matter of Main Seneca Corp. v. Town of Amherst Indus. Dev. Agency, 100 N.Y.2d 246, 251 (2003).

The CUB Project application confirms that the abandonment provisions of GML §862(1) are not violated here since CNYC requires suitable space proximate to the Wynn Hospital prior to the expiration of its lease (R.5368-5369).

(The Competitive Advantage Exception to GML §862(1) Was Satisfied)

The CUB application establishes that CYNC is relocating to the CUB Project for competitive reasons: (a) CNYC needs additional space, (b) the fragmented and non-contiguous nature of space that they currently occupy on multiple floors no longer satisfies the requirements of their practice, (c) the need for new equipment and (d) a new modern office is needed to recruit new physicians providing new specialties not present in the Oneida County market (R.5368-5369- Central New York Cardiology P.C.). The CUB application sets forth the need for the new ASC to be operational prior to the opening of the Wynn Hospital (R.6495-6496 §2(d)-(m), R.5480). In sum, the CUB application establish the competitive reasons justifying the determination made by OCIDA that there is no violation of GML §862(1) (R.6494-6496, Petition, Ex. 4, pp 1-2).

OCIDA had substantial record support for its approval of financial assistance for the CUB Project as needed to maintain its competitive position since it is a critical component of the IHC which will contain the sole hospital in the City and which would promote job opportunities and health and welfare for the residents (R.6340, R.6491-6498). Main Seneca Corp. v. Erie County Indus. Dev. Agency, 195 Misc.2d 164, 170 (Erie Cty. Sup. Ct.) *aff'd* 12 A.D.3d 1113, 1114 (4th Dept. 2004).

> On this record, the Court is satisfied that there is an effective showing that Respondent Danforth's move was reasonably necessary to preserve its competitive position in the industry and that Respondent Erie County IDA had

> a rational basis for its decision, and did not act arbitrarily, when it authorized the acquisition. There is no violation of Section 862(1) here.

(Summary)

Contrary to the record support confirming the unique nature of a regionally significant mandated hospital consolidation project, Petitioners offers nothing but speculative assertions and erroneous legal arguments of a violation of GML §862(1). The discrete issue under review by this Court is whether the portion of the EDPL Findings dealing with the public purpose determination on the use of the O'Brien Property as a public parking lot is supported in the record. Moreover, on this record there is also no violation of GML §862(1) since there is no out of area relocation, no abandonment because of the proximate lease expiration and the application confirms that the CUB Project is a permissible project under the GML Article 18-a. Rather, the application demonstrates the unique nature of the IHC and the CUB Project and their importance to all citizens so that the determinations of the OCIDA are both completely supported and should not be disturbed.

POINT IV

THE OCIDA COMPLIED WITH ALL PROCEDURAL REQUIREMENTS OF ARTICLE 2 OF THE EDPL AND THE FEDERAL AND STATE CONSTITUTIONS

The OCIDA fulfilled the statutory mandate of EDPL §201 by properly noticing and holding the Public Hearing in the City (R.5286-5297). Pursuant to EDPL §202(A), the Notice of Public Hearing described that the taking of the O'Brien Property was for parking for the CUB Project and the Wynn Hospital and the visitors and invitees of such facilities (R.5294-5295). As set forth in the Fact Statement of this Brief, the OCIDA satisfied the notice, service and publication for the Public Hearing in EDPL §202 (R.5298).

Both O'Brien and Bowers received service of the Notice of Public Hearing on February 7, 2022 as required by EDPL §202(C)(1) (R.5297) which satisfied the maximum and minimum notice requirements for the Public Hearing set forth in EDPL §202(C)(2) (R.5293, R.5297). Contrary to Petitioners' erroneous contentions (Petitioners' Brief, p.30), EDPL §202(C)(1) provides that the Notice of Public Hearing may be served on either the "record billing owner or his or her attorney of record". This statute does not require service on both. Here the service upon the "record billing owner" satisfied the statutory requirement (R.5291-5297). Moreover, Counsel for Bowers specifically declined to receive service of the Notice of Public Hearing (R.5877, ¶20). In addition, Bowers counsel attended and spoke at the Public

Hearing and did not raise that objection so it was waived pursuant to EDPL §202(C)(2) and is improperly raised in Petitioners' Brief (R.5547, R.5553).

The contention in Petitioners' Brief (pp 30-31) that the Notice of Public Hearing was insufficient or misleading clearly lacks merit because the project location requirement of EDPL §202(A) was satisfied since the Notice of Public Hearing states that it is being held to "consider the proposed acquisition by condemnation of 411 Columbia Street" (SBL No.: 318.41-2-38) in the City (the "Additional Project Land")" (R.5287). Moreover, this objection on the sufficiency of the notice was not raised at the Public Hearing or in the record and was thus waived pursuant to EDPL §202(C)(2) (R.5560-5565). Finally, the Notice of Public Hearing complied with EDPL §202(C)(2), because it advised the property owners wishing to challenge the taking may do so only based on issues raised at the Public Hearing (R.5295).

Contrary to the contentions in Petitioners' Brief (pp 31-32), the maps of existing condition of the O'Brien Property and proposed use thereof were at the offices of the OCIDA and were at the dais throughout the Public Hearing (R.5884, ¶12). The reading of the Notice of Public Hearing was sufficient to outline the purpose of the hearing (i.e. the taking and location of the O'Brien Property for a parking lot) (R.5556, Lines 2-7, R.5884, ¶13) and both O'Brien and Bowers provided their views on the proposed acquisition (R.5301, R.5478, R.5560-5565, R.5574-

5576). Importantly, a review of the total taking of the O'Brien Property is not difficult since the Notice of Public Hearing identified the address of the O'Brien Property by its section, block and lot number (R.5295). Court St. Dev. Project, LLC v. Utica Urban Renewal Agency, 188 A.D.3d 1601, 1604 (4th Dept. 2020). Thus, the Public Hearing was conducted in accordance with EDPL §203. Legal Aid Socy. of Schenectady County v. City of Schenectady, 78 A.D.2d 933 (3d Dept. 1980).

As set forth in the Fact Statement of this Brief, the OCIDA satisfied the requirements in EDPL §203 by making the transcript of the Public Hearing and all comments publicly available at its offices and at the Oneida County Clerk (R.5878, ¶¶27-33, R.5966-5969, R.5968, ¶¶21-24, R.5969). The OCIDA went above and beyond the minimum statutory requirement of the filing of the transcript and all public comments set forth in EDPL §203 and made available all documents considered by the OCIDA in the EDPL Findings.

The OCIDA reviewed all comments with a very detailed response that was incorporated into the EDPL Findings (R.5879-5891). The OCIDA made available the complete record of documents on the O'Brien Property to each of the members:

> Mr. Goldman noted that the full volume of the record has been copied and delivered to every member of the Agency board. Chair Grow referenced to the online board attendees, the bound volume of the record in front of him as a copy of the full record that was provided to all board members in advance of the meeting and that they each had an opportunity to review in advance of the meeting (R.6042).

At the April 7, 2022 meeting, the members of OCIDA commented on the EDPL Findings and then unanimously approved them (R.6041-6042). Pursuant to the OCIDA resolution, the EDPL Findings, the Synopsis of the EDPL Findings, the notice of Synopsis of the EDPL Findings for publication were approved and authorized the mailing of the Synopsis to O'Brien and Bowers (R.6029-6043). OCIDA published the Synopsis of the EDPL Findings in The Observer Dispatch for three days (i.e. an additional day beyond the two day requirement in EDPL §204(A)). (R.6004-6005). The EDPL Findings satisfied the requirements of EDPL §204(B) (R.5892-5894). Pursuant to EDPL §204(C), OCIDA timely served the Synopsis upon O'Brien and Bowers and its counsel (R.6008-6014).

The record confirms that all procedural requirements of Article 2 of the EDPL were satisfied. O'Brien and Bowers availed themselves of the multiple opportunities to provide comment. The process followed by the OCIDA in noticing and conducting the Public Hearing, considering all comments and ultimately approving the EDPL Findings is constitutionally sound since the right to notice and due process were strictly adhered to by OCIDA. Goldstein v. New York Urban Dev. Corp., 64 A.D.3d 168, 185-186 (2d Dept. 2009) (the procedures outlined in the EDPL have been held to satisfy the due process requirements of the Federal and State Constitutions). First Broadcasting Corp. v. City of Syracuse, 78 A.D.2d 490 (4th Dept. 1981).

POINT V

PETITIONERS' ERRONEOUS EDPL CONTENTIONS

Within Point IV of the Petitioners' Brief, the Petitioners asserts several claims of violations of the EDPL which are outside the scope of review under EDPL §207 and which are either erroneous or premature.

Unequal Treatment

The claim of unequal treatment lacks merit. First, contrary to the self-serving statements in the Petitioners' Brief, Bowers has not provided its contract to acquire the O'Brien Property so that it has no standing as an aggrieved party (See Point VII, *infra*). Second, Bowers never asked to present its concept to OCIDA. Third, Bowers never presented a site plan or a roster of committed tenants or evidence of financing (R.5887, ¶21). Fourth, neither MVHS nor CNYC desire to be part of any conceptual plan of Bowers (R.5886, ¶19). In sum, there is no record basis for the claim of unequal treatment, because Bowers never had a project. As a result of the above failures by the Petitioners and the substantial evidence presented on the feasibility of the CUB Project, the OCIDA determined that the CUB Project was viable (R.6041-6045).

Just Compensation

This contention is premature as the OCIDA is not required to tender just compensation prior to the vesting of title under EDPL Article 4 (R.5883, ¶7). Petitioners' refuse to provide OCIDA with its contract which suspends the condemnor's obligation to make an offer of just compensation under EDPL §303. *See* EDPL §302.

Excess Taking

Contrary to the Petitioners' contentions (Petitioners' Brief pp 35-36), the EDPL Findings address all alternatives for surface parking to the O'Brien Property (R.5892-5893, ¶2(a)). Proximate parking is a requirement to operate the CUB Project with its elderly and infirm patient base. The suggestion that the Kennedy Garage is a reasonable alternative is a fallacy. First, the distance between the CUB Project and the Kennedy Garage is not conducive for the kind of patients using the CUB Project. Second, Bowers has not acquired the garage and has not commenced the required work which is admittedly in need of $13,000,000 of repairs. Simply stated, the Kennedy Garage is not a viable parking solution in terms of proximate access and certainty of safety (R.5889, ¶30). The development plans for the CUB Project confirm that there was no excess taking since the entire O'Brien Property is needed as a public parking. Rafferty v. Town of Colonie, 300 A.D.2d 719 (3d Dept. 2002). Hallock v. State of New York, 32 N.Y.2d 599, 605 (1973).

Bad Faith

The contention that the OCIDA is acting in bad faith is defeated by the record since the OCIDA addressed all comments (R.5875-6000). The Petitioners were given multiple opportunities to provide comment on the use of the O'Brien Property. In its evaluation, the OCIDA went beyond the minimum record required under EDPL §203.

With respect to the contentions involving the Public Officers Law, which are part of the pending Article 78 Proceeding[6], OCIDA in good faith responded to every FOIL request made by the Petitioners and provided approximately 6,328 pages of responsive documents and a privilege log. *See* Matter of Save Monroe Ave., Inc. v. New York State Dept. of Transp., 197 A.D.3d 808, 810 (3d Dept. 2021) *lv. denied* 38 N.Y.3d 905 (2022). The Petitioner's complaints ring hollow as Bowers' counsel submitted three lengthy comment letters that were addressed in the EDPL Findings (R.5302-5475, R.5587-5846, R.5850-5874). In addition, Bowers and Counsel spoke at the Public Hearing (R.5938-5943, R.5952-5954). Importantly, Petitioners have not asserted that any document was omitted from the record. This is further confirmed by the fact that the Oneida County Clerk had the entire record which was filed and available on its website[7] (R.5847-5849 *compare* R.5966-5967). In sum,

[6] See n.3, *supra*.
[7] Oneida County Clerk's Office Instrument No.: F2022-00025.

OCIDA satisfied the obligations to prepare both a transcript of the Public Hearing and retain all comments pursuant to EDPL §203 (R.5967-5969). Notwithstanding that "bad faith" is not among the factors to be reviewed under EDPL §207, the record here confirms that the OCIDA went beyond the statutory minimums and ensured ample time for the public to present their views. The record has no evidence of bad faith on the part of the OCIDA. Matter of Pfohl v. Village of Sylvan Beach, 26 A.D.3d 820, 820-821 (4th Dept. 2006). All that is being presented by the Petitioners is unsubstantiated legal argument and conjecture that does not prove "bad faith". Matter of Woodfield Equities LLC v. Incorporated Vil. of Patchogue, 28 A.D.3d 488 (2d. Dept. 2006).

POINT VI

THE OCIDA IN ITS CAPACITY AS AN INVOLVED AGENCY COMPLIED WITH THE REQUIREMENTS OF THE SEQR ACT

(OCIDA Undertook the Required Hard Look)

Petitioners' contention that the OCIDA did not comply with the SEQR Act is meritless. First, the SEQR Findings Statement included the entire IHC and MOB by private developer and related surface parking that is the CUB Project (R.6397, 3rd Whereas). The EIS and the SEQR Finding Statement thoroughly examined the environmental impacts of the entire IHC at full buildout that included two medical office buildings and a surface parking use of the O'Brien Property (R.5899). The CUB Project, with its 94,000SF, is not a Type I action (6 NYCRR §617.4(b)(6)(v)) such that it is an Unlisted action under the SEQR Act[8] that does not carry the presumption of significant adverse impact on the environment. 6 NYCRR §617.4(a)(1). As an Involved Agency, OCIDA accepted and incorporated the SEQR Findings Statement into its SEQR Resolution (R.6397-6452). Thereafter, OCIDA reasonably concluded that there was no material difference between the MOB and the CUB Project (R.6397-6452).

[8] The SEQR Act categorizes actions into Type I (presumes a significant environmental impact requiring an Environmental Impact Statement—such presumption can be overcome however) and Type II (no evaluation under the SEQR Act is required). If an action does not fall under either Type I or Type II, it is considered "Unlisted."

Second, this Court has recently rejected the precise SEQR challenge raised by Petitioners here. Matter of Truett v Oneida County, 200 AD3d 1721, 1721 (4th Dept. 2021) *lv. denied* 38 NY3d 907 (2022) (finding that condemnor could reasonably rely on SEQR determination of lead agency).

Third, the Department of Environmental Conservation's SEQR Handbook expressly states that "if an involved agency concurs with the completed findings of the lead agency, and those findings respond fully to the environmental concerns of the involved agency, then the involved agency may adopt all or a portion of the lead agency's findings within the involved agency's findings" (SEQR Handbook, at 146 (4th Ed 2020)) (R.5378).

In the January 21, 2022 environmental review of the CUB Project, the OCIDA expressly reaffirmed that SEQR Findings Statement as follows:

> Based on the representations made by the Company, there has been no material change in the scope of the Project that would affect the Findings Statement adopted by the Planning Board. Accordingly, the Agency determines that no additional SEQRA review is required in connection with the provision of financial assistance in support of the Project (R.6398-Section 2).

Because the potential environmental impacts of the private medical office building by a private developer were thoroughly considered in the coordinated SEQR Act review undertaken by the Planning Board of the entire IHC and because the OCIDA, as an Involved Agency, considered and permissibly adopted the SEQR

Findings Statement, the Court should reject Petitioners' claim seeking to annul the EDPL Findings based on an erroneously alleged failure to comply with SEQR Act.

Finally, this appeal represents O'Brien´s second challenge to the SEQR Act determination of the Planning Board that was rejected by Oneida Court Supreme Court so that the challenge set forth in the Petitioners' Brief is both untimely under CPLR §217 and barred by the equitable doctrines of res judicata and/or collateral estoppel (**Appendix "A"**). In addition, since Bowers has not produced its contract for the O'Brien Property, it is similarly subject to the actions taken by O'Brien, as the property owner, who asserted and exhausted its remedies on all SEQR Act challenges. As a result, both Petitioners are barred from challenging the SEQR Act determination for the CUB Project pursuant to res judicata and/or collateral estoppel principles. Jackson v. New York State Urban Development Corp., 67 NY2d 400, 424 (1986). Matter of Village of Johnson City v. Bolas, 157 A.D.2d 1009, 1010 (3d Dept 1990) (Accordingly, having had a prior full and fair opportunity to litigate the issues now raised, *Waldo's* is precluded from a redetermination of those issues).

(The Heliport Landing Location Contentions Were Fully Addressed)

Contrary to the allegations in the Petition, the Hospital Helipad claims were evaluated by the Planning Board in the EIS and the SEQR Findings Statement (R.4254). In the final EIS, the Planning Board found that the helipad will be designed to FAA specifications and will have approximately 40± flights operations per year and will be coordinated to identify optimal arrival and departure procedures (R.4254). Ultimately, the helistop (a minimally developed helicopter facility for boarding and discharging patients or cargo without support facilities (i.e., fuel)) will be located on top of the County Parking Garage contrary to Petitioners' erroneous contention in the Petition (¶221) that it is at ground level (R.5889, ¶29). Beyond being unrelated to the use of the O'Brien Property as parking, the helicopter claims are speculative and lack any support.

(No Segmentation)

Petitioners' segmentation claims are meritless since coordinated review of the entire IHC was undertaken by the Planning Board. *See* 6 NYCRR 617.3(g)(1). The environmental review of the CUB Project was included within the environmental review of the entire IHC made at full build out so that there is no impermissible segmentation. The *J. Owens Bldg.* precedent cited in the Petitioners' Brief misses the mark since the environmental review undertaken by the Planning Board was for the entire IHC, including the MOB. Matter of J. Owens Bldg. Co., Inc. v. Town of Clarkstown, 128 A.D.3d 1067, 1069 (2d Dept. 2015).

POINT VII

BOWERS HAS NOT PLED OR PROVED THAT IT HAS STANDING

EDPL §207(A) provides that "any person or persons jointly or severally, aggrieved by the condemnor's determination and findings made pursuant to section two hundred four of this article may seek judicial review thereof by the Appellate Division". In Paragraph 2 of the Petition, Bowers makes its sole allegation of standing under EDPL §207 as follows:

> 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. As CUB and OCIDA were aware by at least September 2021, 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.

Given the unwillingness of Bowers to provide any evidence of its purchase contract, Bowers cannot satisfy that it is aggrieved under EDPL §207. In addition, the mere allegation of the existence of a contract does not confirm an unconditional obligation to acquire the O'Brien Property so that Bowers has not proved that it has standing to be a petitioner under EDPL §207. Matter of Dairylea Coop. v. Walkley, 38 N.Y.2d 6, 9 (1975). Aggrievement under EDPL §207 is limited to those suffering

injury, economic or otherwise. East Thirteenth St. Community Assn. v. New York State Urban Dev. Corp., 84 N.Y.2d 287, 295 (1994). Bowers did not prove that it had an equitable interest in the condemned property to qualify as a condemnee under the EDPL. Johnson v. State, 10 A.D.3d 596, 597 (2d Dept. 2004) (in this case, the partnership failed to show that it had any equitable interest in the condemned property, so as to qualify as a "[c]ondemnee" …)". Since Bower did not prove that it has a contractual agreement to acquire the O'Brien Property or that it has waived all purchase contingencies, it lacks standing under EDPL §207, and the Petition brought by Bowers should be dismissed for this reason and for the other reasons set forth in this Brief and the respective answer of the Respondents. Didden v. Village of Port Chester, 322 F.Supp.2d 385, 391 (SDNY 2004) *aff'd* 173 Fed Appx. 931 (2nd Circ. 2006) *cert. denied* 549 U.S. 1166 (2007). Faith Temple Church v. Town of Brighton, 17 A.D.3d 1072 (4th Dept. 2005). Unlike the petitioner in *Faith Temple Church*, the Petitioners did not place their purchase contract in the record.[9] As a result, Bowers has failed to plead and prove contract vendee standing. Bowers' mere allegations of standing are insufficient.

[9] See, Contract dated October 28, 2003 with Alan and Lily Groos submitted into the record in the *Faith Temple Church* case.

CONCLUSION

The EDPL Findings should be confirmed and the Petition should be dismissed with costs.

Dated: August 31, 2022

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR 1250.8(j)

The undersigned attorney hereby certifies, pursuant to 22 NYCRR 1250.8(j), that the foregoing brief was prepared on a computer using Microsoft Word. A proportionally spaced typeface was used, as follows:

Name of typeface:	Times New Roman
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Line spacing:	Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, and this Statement or any authorized addendum containing statutes, rules, regulations, etc. is no more than 11,832 words according to the word processing software used to prepare the brief.

EXHIBIT "A"

DECISION AND ORDER DATED OCTOBER 22, 2020
IN *LANDMARKS SOC. OF GREATER UTICA*,
Index. No. CA2020-001365 (Oct. 22, 2020)

STATE OF NEW YORK

SUPREME COURT CHAMBERS

BERNADETTE T. CLARK
Justice

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October 22, 2020

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RE: The Landmarks Society of Greater Utica, et al. v. Planning Board of the City of Utica and Mohawk Valley Health System
Index No.: CA2020-001365
RJI No.: 32-20-0370

Dear Counselors,

Enclosed herein please find a filed stamped copy of the Decision and Order rendered on October 22, 2020 by Hon. Bernadette T. Clark. As a courtesy, we have filed the original Decision and Order with the Oneida County Clerk's Office. Please serve a filed, stamped copy upon the necessary parties, with Notice of Entry to this Court.

Thank you for your courtesies.

Very truly yours,

Hon. Bernadette T. Clark, J.S.C.
BTC/ru
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At a term of Supreme Court of the State of New York held in and for the County of Oneida at the Oneida County Courthouse, 200 Elizabeth Street, Utica, New York on the 2nd day of September, 2020.

PRESENT: HONORABLE BERNADETTE T. CLARK
Justice Presiding

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONEIDA

THE LANDMARKS SOCIETY OF GREATER UTICA JOSEPH BOTTINI, #NOHOSPITALDOWNTOWN, BRETT B. TRUETT, JAMES BROCK, JR., FRANK MONTECALVO, JOSEPH CERINI, AND O'BRIEN PLUMBING & HEATING SUPPLY, a Division of ROME PLUMBING AND HEATING SUPPLY CO. INC.,

Petitioners,

vs.

PLANNING BOARD OF THE CITY OF UTICA, and MOHAWK VALLEY HEALTH SYSTEM,

Respondents.

DECISION AND ORDER

Index No.: CA2020-001365
RJI No.: 32-20-0370

Oneida County Supreme Court

Justice Bernadette T. Clark, Presiding

APPEARANCES:

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Bernadette T. Clark, J.

Before the Court is a Petition seeking a judgment pursuant to Article 78 of the New York Civil Practice Law and Rules. Petitioners, The Landmarks Society of Greater Utica, Joseph Bottini, #NOHOSPITALDOWNTOWN, Brett B. Truett, James Brock, Jr., Frank Montecalvo, Joseph Cerini and O'Brien Plumbing and Heating Supply, a Division of Rome Plumbing and Heating Supply, Co., Inc. (hereinafter Petitioners) against the Planning Board of the City of Utica (Respondent Planning Board) and Mohawk Valley Health Systems (Respondent MVHS).

Procedural History

This action was initially commenced as a hybrid Complaint and Petition[1] in Albany County Supreme Court on May 8, 2019 and was assigned to the Honorable Justice L. Michael Mackey, New York State Supreme Court, Albany County. On June 12, 2019, Respondent MVHS filed a Notice of Motion to Dismiss then Petitioner-Plaintiff's Article 78 proceeding as well as Plaintiff's Declaratory Judgment Complaint. Also, on June 12, 2019, the City of Utica filed a Notice of Motion to Dismiss the Petitioner's Petition/Complaint.

During this time, the New York State Office of Parks Recreation and Historic Preservation as well as the Dormitory Authority of the State of New York, (hereinafter, State

[1] Justice Mackey determined in his December 26, 2019 Decision to convert the case to an Article 78 proceeding.

Respondents) were also parties to this action. The State Respondents also filed Motions to Dismiss in this matter.

Justice Mackey presided over Oral Argument in Albany County Supreme Court on October 31, 2019. Thereafter, on November 4, 2019, Petitioner/Plaintiffs filed an Amended Verified Petition and Complaint. The Respondents filed Motions to Dismiss to strike the Amended Verified Petition and Complaint on November 21 and 22, 2019.

On December 23, 2019, Justice Mackey issued a written Decision, ordering the following relief: *granting* the Motion to convert the declaratory judgment action to an Article 78 proceeding; *granting* the State Respondents Motion to Dismiss the first and second causes of action thereby dismissing the proceeding against the State Respondents.

Justice Mackey *denied* the Respondents Motion to Dismiss the Third, Fourth and Fifth Causes of Action and *granted* the Motion to Dismiss the Sixth Cause of Action. Thereafter, on January 10, 2020 Petitioners filed a Motion pursuant to CPLR §2221 for Leave to Renew and/or Reargue Justice Mackey's December 23, 2019 Decision and Order. The Respondents' each filed Motions to Renew and/or Reargue as well. On April 13, 2020 Justice Mackey issued a Decision and Order: *denying* Respondent MVHS Motion to Reargue the denial of their previous Motion to Dismiss Petitioner's Third, Fourth and Fifth Causes of Action; *denying* Petitioner's Motion to Reargue the Court's Decision and Order dismissing their Sixth Cause of Action as untimely[2] and

[2] Justice Mackey also dismissed Petitioner's Sixth Cause of Action challenging the Respondent Planning Board's Site Plan Approval issued on September 19, 2019. The Court held that a proceeding to challenge a decision of a city

denying Petitioner's Motion to reinstate the First and Second Causes of Action; and *granted* Respondent Planning Board's Motion for discretionary venue-transfer pursuant to CPLR §510(3).

After Justice Mackey issued his Decision and Order on April 13, 2020, it was filed on the same day with the Albany County Clerk. Unfortunately, due to the circumstances surrounding the COVID-19 pandemic, this case, which Justice Mackey had transferred to Oneida County, remained in the Albany County Clerk's Office until it was sent to the Oneida County Supreme Court Clerk on July 24, 2020. This Court, received the case on July 24, 2020, consisting of three large cartons, containing the ten (10) volume Article 78 Return, Pleadings and Memoranda of Law. Also, on July 24, 2020, this Court scheduled a Skype conference with all of the attorneys to be held on July 29, 2020, with all of the Attorneys of Record. During the conference, Oral Argument was scheduled for September 2, 2020 at the Oneida County Courthouse. On August 11, 2020 the Court held a phone conference with all attorneys and asked whether they would consent to a Site Visit with the Court. The parties consented to the Site Visit which took place on August 14, 2020 with all of the attorneys' present. Oral Argument was held on September 2, 2020 at the Oneida County Courthouse with all COVID-19 protocols in place. At the close of Oral Argument, the Court reserved Decision.

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board must be commenced within thirty (30) days of filing with the City Clerk. The Court found that the Petitioners challenge was filed after the Statute of Limitations and run and did not relate back.

Facts

Since November of 2014, Respondent MVHS, has been planning to build a single location healthcare facility (Project) to replace Faxton-St. Luke's Healthcare (FSLH) and St. Elizabeth Medical Center (SEMC).[3] The MVHS Project "consists of the construction and operation of an Integrated Health Campus (IHC) in downtown Utica." The IHC will replace the hospital facilities located at St. Luke's and St. Elizabeth campuses. When constructed, the IHC will occupy 25 acres and consist of 670,000 sq. ft. of hospital, a central utility plant (CUP) parking facilities, one municipal garage and several surface lots, a medical office building (by a private developer) pedestrian bridge over Columbia Street campus grounds and a helipad.

In January 2015, Governor Andrew Cuomo pledged $300 million dollars to help fund a new facility in Oneida County. As a result, MVHS hired several consultants to study site selection for the new hospital. Elan Planning and Design, LLC. and O'Brien and Gere Engineers, Inc. conducted a comprehensive site evaluation of twelve (12) sites all of which were located in Oneida County. The study considered many factors including access to the site, environmental and infrastructure issues. On June 12, 2015 a report was issued to the MVHS Board of Directors which recommended the Downtown City of Utica location. (Downtown Site).

Another consultant, Hammes Company, also hired by MVHS, reached the same conclusion and confirmed that the Downtown Site in the City of Utica was the best choice. The

[3] Faxton St. Luke's and St. Elizabeth Medical Center became affiliated in March 2014 and is known as MVHS.

MVHS Board of Directors considered both reports and voted unanimously on July 23, 2015, selecting the Downtown Site for the new hospital. Thereafter, in September of 2015 MVHS's decision was made public and announced to the community. As part of the New York State Budget released in March of 2016, the New York State Legislature approved $300 million dollars for consolidation of licensed healthcare facilities to be located within the largest population center in Oneida County. MVHS's selection of the Downtown Site was believed to be consistent with New York State Public Health Law§2825-b. According to MVHS, this funding was essential to the new hospital project's ultimate success.

On February 2, 2018, the Oneida County Local Development Corporation (OCLDC) determined the Project to be a Type 1 Action under SEQRA and opted not to act as Lead Agency. Thereafter, on February 22, 2018, the Respondent Planning Board voted to declare itself as Lead Agency. On May 7, 2018, Respondent Planning Board issued a Resolution in response to MVHS's application to the OCLDC to initiate the process. Included in their application was a full Environmental Assessment Form (EAF) pursuant to the New York State Environmental Quality Review Act, (hereinafter SEQRA). It was agreed that the proposed Project was a Type I Action under SEQRA. The Respondent Planning Board completed Part II of the full EAF and determined this Project would result in a moderate to large impact to: Land, Surface Water, Ground Water, Historic and Archeological Resources, Transportation, Energy, Noise, Odor, Light, Human Health, Community Plans and Community Character. In addition, the Respondent Planning Board completed Part III of the full EAF and concluded that this

Project would require an Environmental Impact Statement (EIS) in order to fully assess the significant adverse impacts on the environment and to explore possible mitigation and alternatives to avoid or reduce those impacts.

After receiving no objections of its intent to serve as Lead Agency on February 22, 2018, the resolution passed unanimously, and the Respondent Planning Board officially became the Lead Agency for the SEQRA review. Respondent Planning Board issued a positive declaration and pledged to follow all provisions of SEQRA and its regulations in 6 NYCRR Part 617, et. al.

According to the April 19, 2018, Planning Board Resolution, Respondent MVHS submitted a Draft Scoping Document on May 17, 2018, in order to focus the Draft Environmental Impact Statement (DEIS) on the potentially significant adverse impacts. As required, the Respondent Planning Board held a public hearing on June 7, 2018 and allowed written public comments on the Draft Scoping Document until June 20, 2018. Thereafter, on July 19, 2018, the Respondent Planning Board adopted a Final Scoping Document. On October 26, 2018, Respondent MVHS submitted the DEIS to the Respondent Planning Board.

During this process, Respondent MVHS conducted a wide variety of community meetings regarding the Project beginning in 2015, when seven (7) meetings with 507 attendees were held. In 2017, MVHS held 74 meetings with 1,518 attending. In 2018, MVHS held five (5) meetings with 83 attendees. In 2019, MVHS held 47 meetings, with 3,896 attendees. In the end, Respondent MVHS held a total of 180 meetings with 6,218 attendees. (Scholefield, Aff. Ex. A).

The Respondent Planning Board held a meeting on November 15, 2018. The staff of the City of Utica Economic and Urban Development and the Planning Board members considered the scope and content of the DEIS. After comparing the Final Scoping Document to the Part 617.9 Regulations, the Respondent Planning Board passed a resolution accepting the DEIS dated October 26, 2018, determining that it was adequate with respect to its scope and content. Pursuant to 6 NYCRR 617.8(f) on December 6, 2018, the Respondent Planning Board held a Public Hearing on the DEIS and accepted written public comments until December 27, 2018. In February 2019, MVHS's environmental and engineering consultants, after a review and consideration of the public comments, prepared a Final Environmental Impact Statement (FEIS). A Review of the FEIS by the Respondent Planning Board as SEQRA Lead Agency for the project is required by the statue and its regulations. (6 NYCRR, Part 617).

On March 21, 2019, the Respondent Planning Board, as SEQRA Lead Agency, passed a resolution accepting the FEIS as having met the requirements of Part 617.9(b)(8) of the regulations. A notice, reflecting this action of the Planning Board, was published in the Environmental Notice Bulletin and on the City of Utica's website. At the Respondent Planning Board's meeting on April 19, 2019, having reviewed a proposed written Findings Statement dated April 2019, the Planning Board voted and issued the written forty-three (43) page Findings Statement. Further, the Respondent Planning Board directed that the staff of the Utica Economic and Urban Development arrange for the official filing of the Findings Statement pursuant to Part 617.12(b) and (c) of the regulations. In addition, the Respondent Planning Board arranged for

the Findings Statement to be available to the public and provided upon request. The Findings Statement was issued in compliance with Article 8 of the Environmental Conversation Law, SEQRA and 6 NYCRR, Part 617.

On April 19, 2019, the Respondent Planning Board issued a Findings Statement covering 47 pages. The Findings Statement sets forth the Project Impacts and Mitigation by topic: Land; Surface Water; Ground Water; Air; Aesthetic Resources; Historic and Archaeological Resources; Transportation; Energy; Utilities; Noise and Odor; Human Health; Solid Waste Management; Growth Inducing Aspects; Cumulative Impacts; Unavoidable Adverse Environmental Impacts; Irreversible and Irretrievable Commitment of Resources; Alternatives and Alternative Sites. On September 19, 2019, Respondent Planning Board, as Lead Agency under SEQRA, issued Final Site Plan Approval to MVHS for the Project.

Contentions of the Parties

Petitioners first argue that the FEIS' deferral of necessary on-site testing, consideration of alternatives and development of avoidance/mitigation plans regarding Archeological and Historic Resources until *after* conclusion of the SEQRA process resulted in a fatally deficient FEIS. The main thrust of Petitioner's first argument is that when the Respondent Planning Board ended the SEQRA process, relying on the Letter of Resolution (LOR), it failed to fulfill its obligation under SEQRA as Lead Agency. Petitioners claim that when the Respondent Planning Board signed off on the Project by accepting the FEIS on March 21, 2019 and adopted its'

Findings Statement on April 18, 2019, they violated SEQRA. Specifically, Petitioners allege that the Respondent Planning Board deferred to a later date necessary on-site testing regarding Historic and Archeological Impacts, failed to consider alternatives and also failed to develop avoidance/mitigation plans for the numerous Historic Resources on the site. Petitioners next argue that the Respondent Planning Board failed to consider the Cumulative Traffic Impacts during off peak times and special events at NEXUS Center. Petitioners contend that the FEIS did not evaluate foreseeable, significant Cumulative Traffic Impacts from the NEXUS Center, which is under construction and adjacent to the Project. Finally, Petitioners claim that the Respondent Planning Board failed to properly and thoroughly evaluate the St. Luke's Campus (St. Luke's), as a potential site with sufficient detail to examine carefully the comparable environmental facts. Ultimately, Petitioners maintain that these significant omissions by the Respondent Planning Board resulted in their failure to take a "*hard look*" at these issues as required under SEQRA. *See, Jackson v. N.Y. Urban Dev. Corp.*, 67 N.Y. 2d 400 (1986).

I. Historic and Archeological Resources

Petitioner relies primarily on three cases to support their contention that the Respondent Planning Board failed to take a "*hard look*" at the Historic and Archeological Resources. First, Petitioners cite *Pyramid Co. v. City of Watertown Planning Board*, 24 A.D. 3d 1312 (4th Dep't 2005), where the Court annulled the Planning Board's approval for a shopping center due to deficiencies in the FEIS, including that the Planning Board failed to take the necessary "*hard*

look" at the environmental issues. Second, *Penfield Panorama Area Community, Inc. v. Town of Penfield Planning Bd.*, 253 A.D. 2d 342 (4th Dep't 1999), where the Court annulled the Planning Board's approval for a cluster subdivision because the Planning Board deferred resolution of a hazardous waste remediation issue until after the conclusion of the SEQRA process. *Penfield,* at 349-350. Third, *in Brander v. Town of Warren, Town Board*, 18 Misc. 3d 477 (Sup. Ct., Onondaga Cnty, 2007), the Court annulled the Town Board's issuance of special permits and adoption of the FEIS and Findings Statement. The *Brander* Court reasoned that the environmental concerns regarding the wind turbine farm were not dealt with where the SEQRA process ended prior to the OPRHP consultation process, leaving historic site mitigation unresolved and not completed at the time SEQRA was concluded." *Brander*, at 482-483. Petitioners claim that these cases support their request to this Court to annul the Respondent Planning Board's acceptance of the FEIS and its Findings Statement.

In sum, Petitioners claim that:

> "the FEIS is infirm on three independent grounds: 1) the admitted need for further date collection/review to identify impacts to Archeological and Historic Resources; 2) the need to still evaluate whether alternatives exist to avoid or minimize impacts to Historic and Archeological Resources; 3) the need to still develop avoidance mitigation plans.

Petitioners argue that "the FEIS defers all of this until after conclusion of the SEQRA process to be worked out unilaterally by MVHS and the State Respondents, bereft of public review of any or any possible judicial oversight". Pet. MOL, p. 15.

In opposition, Respondents contend that Petitioners commenced this Article 78 proceeding as a "thinly veiled attempt to convince the Court to second guess the thorough and fully compliant environmental review process undertaken by the Respondent Planning Board.

Although, according to Respondents, Petitioner refers to the historically and socially significant self-proclaimed Columbia-Lafayette neighborhood, they stood by and never even attempted to obtain a preliminary injunction from the Court. An injunction would have preserved the *status quo* and prohibited the demolition and construction from going forward. Respondents vigorously argue that "the record demonstrates that the Planning Board took the required "*hard look*" at the potential impact on Archeological and Historic Resources, the cumulative impacts on traffic and viable alternative sites. *See, Jackson*, 67 N.Y. 2d at 417.

Respondents aver that even if the Petitioners' claims were not time-barred because they failed to timely challenge Final Site Plan Approval and were not moot, their SEQRA claims are without merit and the Petition should be denied.

Despite Petitioners claim to the contrary, Respondents argue that the Planning Board did take a "*hard look*" at the potential impact on both Archaeological and Historic Resources. *Id.* Respondents took exception to the Petitioners allegation that the Respondent Planning Board deferred:

> "the need for further data-collection/review to determine archeological and historic impacts; the need to evaluate whether alternatives exist to avoid or minimize potential impacts to these resources and the need to develop avoidance/mitigation plans." Pet. MOL, p. 15.

Respondents argued that the Planning Board was very well aware of the Historic and Archeological Resources located in the Project area. Respondents point to the Phase IA Architectural Inventory which included all 49 architectural resources located in the Project Area of Potential Effect (APE) which was prepared by Panamerican Consultants, who are experts in cultural resources management. Respondents contend that the data collection specifically investigated and identified all of the impacts on both Archeological and Historic Resources and Panamerican Consultant's reports were included in the DEIS. The Respondents assert that the architectural inventory: listed *every* building in the Project APE; their eligibility to the National Registry of Historic Properties, SNRHPA; and description of each building and current photographs of each building. Respondents also pointed out that based upon the expert reports included in the DEIS, the Respondent Planning Board was well aware of all of the adverse environmental impacts including which historic buildings may be demolished. Respondents argue that Petitioners claim, that the Respondent Planning Board "blindly relied" on the conclusions of OPRHP and "failed to assess the impacts on Archeological and Historical Resources and mitigate those impacts", ignores the record in this case. Citing *Matter of Catskill Heritage Alliance, Inc., v. New York State Dec,* 161 A.D. 3d 11, (3d Dep't 2018), Respondents claim that it is proper to rely on OPRHP, an agency with expertise in this area, concerning adverse impact to historical properties and to consider the agency's findings. *Id.*

Respondents refer to specific additional findings made solely by the Planning Board with regard to Historic and Archeological Resources:

"[t]he Columbia-Lafayette neighborhood is not a vibrant, historically and culturally significant neighborhood. Instead, the neighborhood is a documented blighted area, located in a HUB zone; in a former Empire Zone; designated as a potential EJ area; and in the Urban Renewal Plan Utica Downtown Development Project Area, Despite revitalization of surrounding areas over the years, there has been little development in this area for almost 30 years."

"MVHS provides a well-funded Project that can address the features that have blighted this portion of the city for decades while providing important public benefits in accordance with the Urban Renewal Plan and the City's Master Plan. MVHS has indicated, and the Planning Board agrees that reuse of these existing buildings for medical, or any other purpose, is not feasible, which is further evidenced by the fact that there has been no redevelopment of revitalization of this urban area for decades despite the availability of many programs to incentivize such revitalization. Accordingly, to allow for transformative economic revitalization in an area that has been blighted and underutilized for decades as envisioned by the Urban Renewal Plan and the City Master Plan and consistent with other revitalization efforts, demolition of these buildings is necessary and the social and economic benefits of the Project outweigh the long term adverse impact associated with demolition of these buildings."

"Finally, while the IHC will replace existing architectural styles, the current design is consistent with recent City-approved and completed modifications to the AUD and Landmarc buildings, as well as styles proposed for the Utica Inner Harbor Redevelopment and NEXUS projects.

Nevertheless, as mitigation, MVHS will incorporate several design and construction themes into the IHC design, which are elements of existing buildings within the downtown area. These include:

- Romanesque Revival Style design (reflected in the Harberer Building and Jones Building)
- (German Romanesque Style design (reflected in the Utica Turn Hall/Turnverein Building)
- Corner Pallisters with corbelled brick cornice (Utica & Mohawk

Valley Railway Car Barn)
- Brick Cornices (Child Building)

> The architectural design, as an acknowledgement to the city's building history, incorporates brick construction in the first two floors of the new hospital. All the identified historically meaningful buildings were also of brick construction. MVHS has indicated that this meaningful design element will be part of the new hospital's design and it provides an opportunity for the new hospital to pull from the history of downtown Utica into present day." Findings Statement, pp. 15-17.

Moreover, Respondents disagree that the case law cited by Petitioners supports their position that the Court must annul the FEIS. First, with regard to *Matter of Pyramid*, Respondents note that the following facts are distinguishable from the facts at bar for several reasons:

> 1) FEIS failed to include supporting data; 2) failure to respond to concerns raised during the public comment phase with respect to cultural, historic or archeological resources; 3) FEIS stated that the Board will work with the State Historic Preservation Office to "determine the presence of any historic or cultural resources which may be impacted by the project; and 4) the Findings Statement contains no references to cultural historic or archeological resources. *Matter of Pyramid Co.*, 24 A.D. 3d at 1315.

Respondents argued that here:

> 1) the presence of historic and cultural resources have been identified; 2) the impacts to historic and cultural resources have been thoroughly analyzed; 3) studies of the impacts were included in the DEIS and FEIS; 4) public concerns have received responses; and 5) the Findings Statement contains an entire multiple page section on cultural Historic and Archeological Resources." Resp. MOL, pp 21-22.

Likewise, Respondents claim *Matter of Brander, supra,* is also easily distinguishable from the facts herein because the special permits required that "no less than 60 days prior to the

start of construction the Town Board must receive a Letter Of Resolution (LOR) for historic site mitigation from Department of Public Service and OPRHP." The *Brander* Court held that because the Board failed to obtain the LOR by the time SEQRA was completed, the historic site mitigation was not resolved prior to the time the SEQRA concluded. *Matter of Brander*, 18 Misc. 3d at 477.

Respondents assert that here, because the Planning Board reviewed the LOR that had been consented to by MVHS, DASNY and OPRHP and was included in the FEIS, following *Brander* historic site mitigation had been resolved prior to the conclusion of SEQRA. Thus, Respondents urge that the Petitioners claim that the LOR improperly deferred mitigation must fail because according to *Brander,* the LOR is the resolution of mitigation. Resp. MOL p. 22. As a result, Respondents urge this Court to dismiss Petitioners Third Cause of Action.

II. Cumulative Traffic Impacts

Next, Petitioners allege that the FEIS suffers from fatal defects and must be annulled because it failed to evaluate "foreseeable, significant traffic impacts from the NEXUS Center." Petitioners press two arguments in this regard. First, that MVHS committed to evaluate "reasonable foreseeable" traffic and utility infrastructure impacts from the NEXUS Center early on in Section 1.5 of the Final Scoping Document. Second, SEQRA requires that an EIS consider "all reasonably related short-term and long-term impacts, cumulative impacts and other associated environmental impacts." Pet. MOL, p. 22 (citations omitted), Petitioners conclude that

the FEIS's failure to evaluate the Cumulative Traffic Impacts from special events at the NEXUS Center, where the annual attendance may exceed 322, 500 annually, results in the Planning Board's failure to take a "*hard look*", at Cumulative Traffic Impacts. Pet. MOL, p. 26. *See also, Jackson,* 67 N.Y. 2d at 417.

Respondents argue that the record clearly demonstrates that Petitioners allegations regarding the Cumulative Traffic Impacts are not accurate and claim that the Planning Board took the appropriate "*hard look*", and the FEIS evaluated the Cumulative Traffic Impacts as well. Respondents detail the Respondent Planning Boards efforts, in conjunction with the City of Utica Department of Urban and Economic Development, to identify projects within close proximity to the Project Site. The NEXUS Center, NYSDOT Route 5S Project and a City of Utica Sewer Project were identified. Respondents contend that an assessment of Cumulative Traffic Impacts was provided in Section 5 of the DEIS and the responses to comments in Section 3.18 limited by consideration of reasonably foreseeable impacts, not speculative ones. Respondents further claimed that based upon the information available regarding the NEXUS Center in consultation with NYSDOT and the AUD Authority, Cumulative Traffic Impacts were considered and included in Appendix F of the DEIS. However, Respondents pointed out that the initial Traffic Impact Study (TIS) was completed in October 2018 and the DEIS was filed in November of 2018. Respondents argued that the TIS Addendum included the estimated typical AM and PM peak period traffic and that off-peak or special events traffic for the NEXUS Center was not included "because in consultation with NYSDOT it was determined that those events were not

expected to impact typical commuter peak periods". Resp. MOL, p. 27. Respondent contends that the Planning Board properly relied on the expertise of the NYSDOT who advised by letter dated March 8, 2019, that "all traffic related concerns had been addressed to the satisfaction of the NYSDOT." Again, *citing* the Court of Appeals in *Jackson*, 67 N.Y. 2d at 427-28, "[n]othing in SEQRA bars an agency from relying upon information or advice received from others, including consultants or other agencies, provided that the reliance was reasonable" *Id.* Thus, Respondents urge the Court to find that the Respondent Planning Board satisfied the requirements of SEQRA in taking a "*hard look*" at the Cumulative Traffic Impacts with regard to special events and off-peak traffic at the NEXUS Center. *Id.* For these reasons, Respondents urge this Court to dismiss Petitioners Fourth Cause of Action.

III. Alternative Site Selection

Petitioners final claim is that the FEIS failed to evaluate the St. Luke's Site in sufficient detail so that a proper comparative assessment of environmental factors could have been done. Instead, Petitioners describe the process undertaken by the Respondent Planning Board was that "the FEIS simply engaged in result-oriented backfilling maintaining that St. Luke's is not within the objective and capabilities of Respondent MVHS." Petitioner MOL, p. 25. Petitioners pointed out that Respondent MVHS had initially included the St. Luke's campus as a viable site in the DEIS's siting memo and then "reversed course." Pet. MOL, p. 26. Petitioners next argue that SEQRA requires consideration of those alternatives that are "feasible considering the objective

and capabilities of the project sponsor." 6 NYCRR §617.9 (B)(5)(v). Petitioners emphatically state that "that sum total of the environmental analysis for comparing St. Luke's and the Downtown Site is as follows:

"Environmental:

> For this portion of the matrix the following factors were evaluated: 100-year floodplain, cultural resources, wetlands, steep slopes (amount of land with less than 15% slope), and endangered/threatened species. All 3 sites are not located in 100-year floodplain. Only the St. Luke's site is not listed or eligible for listing on the State and/or Federal Register; it is also not located within an archeologically sensitive area. None of the sites encroach upon state wetlands or the buffer area; St. Luke's does encroach upon a potential federal wetland. All 3 sites are relatively flat and none of the sites will have restrictions for clearing as it relates to the Indiana Bat and other endangered species.
>
> Development of the ...Downtown site[] will require coordination with the State Historic Preservation office (SHPO)...The Downtown site would require demolition of all buildings within the defined property boundaries for the hospital. This will require coordination with SHPO. However, the downtown option will also create opportunities to catalyze development of key downtown buildings that lie on the periphery of the hospital development..." DEIS, Appendix D, at pp. 15-16."

In addition, Petitioners cite to an absence of supporting data, especially as it relates to costs associated with each site so that a meaningful analysis could be undertaken. See Pet. MOL, p. 30. Petitioners also claim that the position that the St. Luke's Site is not within MVHS capabilities because funding pursuant to Public Health Law §2825-b was contingent on the Project site being within the City of Utica, "is simply not true." *Id.* Petitioners aver that Public

Health Law §2825-b requires only that the IHC be located in the "largest population center of Oneida County", it does not mention the City of Utica.

Petitioners also state that the DEIS provides in Section 2.3.5 at p. 27 that "St. Luke's stands on equal ground with the Downtown site relative to Public Health Law §2825-b." Pet. MOL, p. 31. Petitioners argue that Respondent MVHS was required to meaningfully evaluate St. Luke's Site and not select "the Downtown site because it was a pre-determined reality due to political strong-arming." Pet. MOL, p 33. Petitioner Montecalvo claimed in his Affidavit that "political leaders exerted significant pressure from the outset to jam this Project into downtown Utica, no matter what the consequences, without public input and regardless of environmental impact." Petitioner Montecalvo Aff.

While Petitioner concedes that the Planning Board "admittedly has the discretion to select among alternatives, it argued that the Respondent Planning Board:

> "does not have the discretion to turn a blind eye to political maneuvering and accept as final an EIS that fails to provide any meaningful evaluation of a site owned by the Project Sponsor."

Petitioners contend this is especially true when the Project sponsor itself found St. Luke's to be a viable site and which has, far fewer and less significant impacts than the selected site. Pet. MOL, at 34.

Petitioners concluded that the FEIS was lacking in sufficient detail to allow a comparative assessment of St. Luke's and the Downtown Site for the following reasons:

- The only environmental factors evaluated at St. Luke's were: 100-year floodplain, wetlands, cultural resources, steep slopes and endangered/threatened species.

- No analysis was performed regarding land/geology/soils, surface water, groundwater, air, aesthetics, transportation, traffic, utilities, human health, local community character, among other environmental factors, as to which the Downtown Site was found to have significant impacts.

- No data or studies were provided as to costs for upgrades or as to logistical issues at St. Luke's versus the Downtown Site.

- Because MVHS owns St. Luke's there was and is no impediment to performing a meaningful analysis as to these pertinent environmental and non-environmental factors.

In opposition, the Respondents argue that the documentary evidence in this case, the Findings Statement, and the FEIS and the DEIS "overtly demonstrate" that detailed analysis about potential alternative sites, including the "no action alternative" was done in compliance with SEQRA. Respondents assert that, because MVHS is a private applicant, it is incumbent upon the Lead Agency to review and consider which sites would best achieve its own objectives as outlined in its prior evaluation of site alternatives in the Hospital Site Selection Memo. The MVHS site selection process identified twelve (12) potential sites in Level 1 located in Oneida County. Each Site was screened and "fatal flaws" were identified in all but three Sites: the Downtown Site; the Psychiatric Center; and St. Luke's Campus. Respondents described that each of the three remaining sites were scored on seven criteria: size; utilities; accessibility; zoning approvals and impact fees; monetary factors; community factors; perception and

sustainability; and environmental. According to the DEIS, The Downtown site scored 53, the Psychiatric Center scored 50 and St. Luke's scored 46. During the SEQRA review MVHS also hired Hammes Company to give a second opinion on the Project site location which also chose the Downtown site as the best option for MVHS. Respondents argued that the contents of the Selection Process Memo led MVHS to choose the Downtown site for the Project.

Respondents challenged Petitioner's accusation that there was a lack of detail sufficient to make a comparison between the Downtown Site and St. Luke's:

> "The Planning Board made detailed comparisons to St. Luke's site, but found it does not meet the goals and objectives of MVHS due to numerous feasibility problems including the improper and/or inadequate configuration of patient facilities and deficiencies in the HVAC, communication and pressurization systems that would be suboptimal at best to upgrade...The Planning Board explained that residential neighborhoods were a concern for the St. Luke's site (and the Psych Center site), where there are adjacent single-family residential neighborhoods and the surrounding area is zoned residential. In comparison, the Downtown Site has no single-family residential uses adjacent nor any residential zoning districts... Moreover, St. Luke's was not a feasible alternative for the project because both St. Luke's and St. Elizabeth-operating hospitals providing critical medical services to the local population-must be fully functional while the new medical center is being constructed. Retrofitting St. Luke's and constructing additional site components needed for the Project would significantly disrupt its ability to provide necessary services and would exorbitantly increase the anticipated timeframe and cost for construction." Resp. MOL, p. 35 (citations omitted).

Respondents also cite to the Planning Board's Findings Statement which provides several advantages to the Downtown Site:

- Acting as a catalyst for urban redevelopment in a blighted area:

- Providing a well-funded project that can address this portion of the City and the features that have blighted this area of the City for decades while providing important public benefits;
- Excellent water pressure and capacity, including water capacity sufficient to accommodate fire flows without onsite storage of water;
- A location relatively close to National Grid's Terminal Substation located to the north at Harbor Point which has two transformers and distribution buses. Dedicated underground cables can be provided to the new hospital, which would provide a high level of reliability;
- The City street grid, which is an asset because multiple routes can be used to arrive at the hospital;
- A location less than two miles from the Thruway, less than 0.5 miles from the North/South Arterial (NYS Routes 5, 8 and 12), and located along Oriskany Street (NYS Routes 5A and 5S), which has the benefit of being planned in conjunction with the NYSDOT's Oriskany Street/5S project allowing the access needs of the hospital to be addressed as part of the original re-design of the roadway;
- Ready access to public transit;
- High visibility;
- Sustainability/smart growth since repurposing urban parcels is considered a sustainable initiative as higher density in the urban environment minimizes the need for energy, allows for non-motorized types of transportation, and increases the efficiency for the delivery utilities and services;
- No encroachment on an existing residential neighborhood; and
- A part of a broader downtown revitalization vision.

Additionally, Respondents point to the Findings Statement which explained,

> "MVHS's decision, to locate the new healthcare campus in Downtown Utica was made after extensive research and studies were performed. Criteria analyzed in these studies included access to the Site by populations served environmental impacts and infrastructure requirements. Specifically, an initial study was performed by Elan Planning Design and Landscape Architecture, PLLC and O'Brien and Gere Engineers, Inc., which prepared a comprehensive site evaluation of 10+ sites within Oneida County that could support a replacement facility.

> Those 10+ sites were narrowed to three sites that were studied more closely. That report that was issued on June 12, 2015 and included as part of the FEIS recommended the downtown Utica Location. Subsequently, Hammes Company retained by MVHS, provided a second opinion on the Site recommendation of the Downtown Site as the best option for MVHS to pursue." The Findings Statement, p. 44.

Thus, for these reasons, Respondents urge the Court to dismiss Petitioners Fifth Cause of Action.

Respondents Further Contentions

IV. Final Site Plan Approval

In addition to opposing Petitioners claims, as set forth above, which seek to invalidate the Respondent Planning Boards SEQRA findings, Respondents raise two additional arguments urging the dismissal of this Petition. First, Respondents argue that Petitioners have no basis to challenge the Planning Board's SEQRA findings because "[w]here the challenged action relates to SEQRA Review, the limitations period commences with the filing of a decision which represents the final determination of SEQRA issues." *McNeill v. Town Bd. Of the Town of Ithaca*, 260 A.D. 2d 829, 830 (3d Dep't 1999). Respondents point out that in Justice Mackey's Decision and Order dated December 26, 2019, the Court dismissed, as time-barred, Petitioners amended Petition, filed on November 4, 2019, which purported to challenge the Final Site Plan Approval. Respondents Claim that because the Final Site Plan Approval cannot be challenged, this Court cannot grant any relief on Petitioners SEQRA claims. Resp. MOL, p. 38. Respondents state that since the Final Site Plan Approval was issued on September 19, 2019,

which was the final determination on SEQRA issues, Petitioners only had until October 20, 2019 to initiate a challenge. *See General City Law* §81-c. (which provides for a thirty (30) day statute of limitations). Respondents argue that:

> "imposing a timely claim addressed to Final Site Plan Approval is a prerequisite to judicial review of the SEQRA findings thus, "without a valid, timely challenge to the final determination the SEQRA claims remain adrift and unreviewable in the same way they were not ripe for review prior to the final determination." Resp. MOL, p. 40. *See also McNeill,* 260 A.D. 2d at 830.

Respondents claim that without a challengeable final determination there is no challengeable SEQRA claim. For these reasons, Respondent asserts that "the FEIS is challenged as a means of invalidating a final determination and the final determination is what makes the FEIS claim ripe for review because it is final and caused an injury for which redress is sought. Accordingly, the Petitioners SEQRA claims are not viable and must be dismissed. Resp. MOL, p. 41.

V. Mootness Doctrine

Finally, Respondents argue that this Court should dismiss Petitioners claims because they are moot. Respondents assert that the Mootness Doctrine is invoked where a change in circumstances prevents a Court from rendering a decision that would effectively determine an actual controversy. Resp. MOL, p. 41. *Dreikausen v. Zoning Bd. of Appeals*, 98 N.Y. 2d 165 (2002). Respondents state that:

> "the most important factor for a Court to consider when evaluating a claim of mootness in the context of a construction project is whether the claimant failed to seek preliminary injunctive relief or otherwise preserve the *status quo* to prevent construction from commencing or continuing during the pendency of the litigation." *Dreikausen*, 98 N.Y. 2d at 746.

Respondents assert that it is undisputed that the Petitioners never moved for a preliminary injunction or sought to preserve the *status quo*. Respondents contend, that also significant, is whether work was undertaken without authority or in bad faith and whether substantially completed work is readily undone, without hardship. *See, Dreikausen,* 98 N.Y. 2d at 746. Respondents cited to several cases, including a New York Court of Appeals case, that rejected the view that would insulate Petitioners who did not seek a preliminary injunction to prevent demolition or construction because of monetary constraints. *Citineighbors Coalition of Historic Carnegie Hill*, 2 N.Y. 3d 729 (2004). *Matter of Breunn v. Town Bd. Of Town of Kent*, 145 A.D. 3d 878 (2nd Dep't 2016). With this case law as a backdrop, Respondents argued that this Petition should be dismissed as moot because:

1) Petitioner never filed for a stay or a preliminary injunction;
2) The work performed by MVHS on the Project was not undertaken in bad faith because it was performed in accordance with properly issued demolition permits and in accordance with site plan approval that Justice Mackey already decided was not challengeable.
3) The demolition work cannot easily be undone without substantial hardship to MVHS because whatever archeological resources or historic structures have been demolished and the substantial expenses of over Fifty-Two Million Dollars ($52,000.000) on the Project cannot be recouped.
4) The Project is important to the Community-at-large and serves the public need for a facility with the newest technology, services and advancements in patient safety and quality.

Respondent concluded their argument by stating, "[w]here Petitioners have failed to take any measures to seek injunctive relief, they should not now be permitted to pursue their claims" and the Court should find that this matter is moot. Resp. MOL, p. 45.

Analysis

Standard of Review

In reviewing the adequacy of a FEIS, the Court, once satisfied, that the agency has strictly complied with SEQRA's procedural requirements[4], will review the record to evaluate whether the agency " identified the relevant areas of environmental concern, took a *"hard look"* at them, and made a reasoned elaboration of the basis of [its] determination." *Bronx Committee for Toxic Free Schools v. NYC School Const. Auth.*, 20 N.Y. 3d 148, 55 (2012). It is well established that Courts may not weigh the desirability of the action or choose among alternatives. However, the Court *must* make a searching review of the record to ascertain and ensure that the agency has satisfied SEQRA both procedurally and substantively *Chinese Staff and Workers Ass'n v. City of New York*, 68 N.Y. 2d 359, 363 (1986). Moreover, it is equally well-settled that judicial review of an agency's SEQRA compliance and determination is limited and can only be annulled if it was made in violation of lawful procedure, was affected by an error of law or was

[4] Based upon the papers submitted, the court did not find any allegations by Petitioners that Respondents had violated SEQRA's procedural requirements. Moreover, Petitioners did not advance any procedural flaws in the SEQRA process during Oral Argument on September 2, 2020.

arbitrary and capricious. *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y. 2d 400, 416 (1986).

Importantly, the Court's inquiry here is not to determine whether the Lead Agency was "right or wrong" but rather whether the Lead Agency considered the data and made a reasoned decision. *Mobil Oil Corp v. City of Syracuse Indus. Dev. Agency*, 224 A.D. 2d 15, 25 (4th Dep't 1996), *app. Denied,* 89 N.Y. 2d 811 (1997). Thus, this Court will not substitute its own judgment for that of the Respondent Planning Board, nor evaluate the data *de novo. See id.* This Court will, however, construe reasonable reliance on outside experts' conclusions in favor of the Respondent Planning Board's decisions, as required by relevant case law. *See id.* at 29; *see also, Jackson, supra,* at 417. As the Court of Appeals instructed in *Jackson*, "[n]ot every conceivable environmental impact, mitigating measure or alternative must be identified and addressed." *Jackson*, 67 N.Y. 2d at 417.

SEQRA Review

The New York State Legislature has made the SEQRA process self-enforcing. Of course, the Department of Environmental Conservation (DEC) is responsible to issue regulations with respect to the SEQRA process, the DEC is not authorized to review the implementation of SEQRA by other governmental agencies. As the DEC readily acknowledges, there are no "SEQRA Police." The watchdog for SEQRA depends upon concerned individual citizens or citizen groups who can demonstrate that they may be harmed by an agency's failure to make a

proper decision or that allows a project to go forward without the proper review. When this occurs, legal action pursuant to Article 78 of the New York CPLR is the proper vehicle for redress. While SEQRA contains no provision regarding judicial review, Courts must be guided by standards applicable to administrative proceedings generally. *Jackson,* 67 N.Y. 2d at 416. Here, the Petitioners urge this Court in this proceeding under Article 78, to rescind the Project approvals because of the deficiencies in the FEIS and grant a new review under SEQRA.

As explained in detail above, Petitioners contend that the environmental impact review process was flawed in three significant ways. This Court will address each of these claims in the order in which Petitioners argued in their Memorandum of Law dated May 9, 2019. This Court will also address Respondents opposition in their Memorandum of Law dated February 14, 2020. Finally, this Court will then address the two additional arguments pressed by the Respondents, also in their Memorandum of Law dated February 14, 2020 and Petitioners Affirmation in Reply to Respondents' Opposition to the Verified Petition dated February 25, 2020.

I. Archeological and Historical Resources

Petitioners commenced this Article 78 proceeding seeking to annul the determination of the Respondent Planning Board because the "*hard look*" standard under SEQRA was not satisfied with regard to the Archeological and Historic Resources. Petitioners claim that the FEIS deferred the identification of impacts to Archeological and Historic Resources, the need to

evaluate whether alternatives exist to avoid or minimize impacts and the need to develop avoidance/mitigation plans.

After a thorough examination and consideration of the extensive record and the relevant case law, this Court respectfully disagrees. The *Pyramid* case relied upon by Petitioners is readily distinguishable from the facts herein. In fact, to some extent *Pyramid* can best be described as how not to conduct a SEQRA review. In *Pyramid,* the Watertown Planning Board (Board) determined not to engage in scoping or issue a positive declaration. Instead, the Planning Board opted to rely upon the project developer's DEIS. The Court in *Pyramid* determined that in doing so the Board "abdicated its, power and responsibilities under SEQRA because SEQRA requires strict adherence to procedural requirements...and its failure cannot be deemed harmless." *Pyramid,* 24 A.D. 3d at 1313. Moreover, after acknowledging the presence of wetlands, the Board merely stated in conclusory fashion that the Project *would not affect the wetlands*, then failed to include a consultant's report in the DEIS, and then ignored the public comments in the FEIS and the Findings Statement. *Id.* More relevant, in *Pyramid,* the Board, in the DEIS, concluded the project would not affect cultural, historic or archaeological resources. Adding insult to injury, the Board ignored DEC's data to the contrary, only stating that "the Board will work with the State Historic Preservation Office (SHPO)." Fatally, the Findings Statement failed to even refer to Cultural Historic or Archeological Resources. *Id.*

In this Court's view, the *Pyramid* case not only fails to support Petitioners claims, it bears no resemblance to the Respondent Planning Board's SEQRA review. First, Petitioners here

make no claim that there were any procedural flaws in the SEQRA process. Based upon the extensive Record before this Court, the Respondent Board followed SEQRA and took the requisite "*hard look*" at the Historic and Archeological Resources, impacts and mitigation. Second, the Respondent MVHS fully acknowledged its responsibility to document each and every Historical and Archeological significant building in the Project Impact Area and hired an expert consultant, Panamerican, to collect the data and submit it to SHPO very early on in the process. Moreover, the DEIS, FEIS and the Finding Statement all include a considerable discussion, analysis, and evaluation of the Historical and Archeological data assembled by Panamerican.

Petitioners contend that Respondent Planning Board's SEQRA review has "holes or defects in the substantive SEQRA record and the biggest hole is the evaluation of Historical and Archaeological Resources." Oral Argument, p. 11. This Court strenuously disagrees with Petitioners conclusion. After a close examination of the Record, this Court agrees with Respondents that the LOR did not defer the evaluation and mitigation of the Historical and Archeological Resources. Rather the LOR *is* the evaluation and mitigation of these resources. Respondent MVHS entered into a comprehensive LOR with DASNY and OPRHP, State Agencies with the specialized expertise charged with the responsibility to protect New York State's Historic and Archeological Resources. It is important to note here that the then Chief Judge of the New York Court of Appeals declared:

> "to be sure, the lead agency under SEQRA is likely to be nonexpert in environmental matters and will often need to draw on others. The statute and regulations not only provide for this but strongly encourage it" 6NYCRR 617.30[i].

The notion that the agencies "punted", as suggested here by Petitioners, is belied by a careful reading of the LOR between MVHS, DASNY and OPRHP:

> Whereas, DASNY recognizes its responsibilities pursuant to Article 14 of PRHPL to avoid minimize or mitigate adverse impacts to historic resources and/or archeological sites to the fullest extent practicable consistent with other provisions of law;
>
> Whereas, OPRHP has reviewed the preliminary scope of the Project provided by O'Brien and Gere[5] and submitted to OPRHP via their Cultural Resource Information System (CRIS) on October 3, 2016, including the proposed Project Impact Area (PIA).

As provided above in the LOR, this agreement required a complete assessment of buildings MVHS currently controls that are listed in Appendix A and proposed for removal. The LOR also clearly provides that upon site control of the remaining buildings, the Applicant *will commence* a complete assessment of the remaining buildings. The LOR continued that the assessment will include photographs of the interior and exterior sufficient to provide OPRHP with a general understanding of the state of the resource as well as a written assessment and general condition of the building. Thus, the LOR is a detailed agreement outlining with

[5] O'Brien and Gere Engineers were hired as consultants on this Project along with Panamerican who catalogued each property in the APE.

specificity what is required by the Respondents with regard to evaluation and mitigation of *all* of the Historic and Archeological Resources affected by this Project.

In *Penfield,* the Court concluded that the Planning Board improperly deferred resolution of the hazardous waste remediation issue. *Penfield*, 253 A.D. 2d at 344. The *Penfield* Court noted that the FEIS stated that "primary areas of concern containing hazardous waste have been identified and additional characterization is required... and some site clean-up may also be required." Thereafter, the Board conditioned its' approval on the developer's agreement "to get a site remediation plan from the NYSDEC and MCDOH." *Id.*

Certainly, the Respondent Planning Board here did not engage in a total relinquishment of its' responsibility to exercise its critical judgment on the issues presented in the DEIS as the Board did in *Penfield. Penfield,* 253 A.D. 2d at 344. Once again, the record here speaks for itself. Both the FEIS and the Findings Statement make it clear that the Respondent Planning Board was aware of each and every Historic and Archeological Resource in the Project area. The Findings Statement identified that the Project area included several Historic Properties that are listed in the New York State and National Registers or, are eligible to be included and that potential significant adverse impacts to these Historic and Archeological Resources *will occur* due to construction. That is where the analysis by the Board in *Penfield* ended...identifying that there was hazardous waste on the site. *See id.* By contrast, identifying the Historical and Archeological Resources is where Respondent Planning Board, through the FEIS and the Findings Statement, *began* its consideration. The Findings Statement describes the potential

adverse impacts including; demolition; mitigation of both Archeological and Historic Resources and its' critical analysis, that:

> "to allow for transformative economic revitalization in an area that has been blighted and underutilized for decades as envisioned by the Urban Renewal Plan and the City Master Plan and consistent with other revitalization efforts, demolition of these buildings is necessary and the social and economic benefits of the Project outweigh the long term adverse impact associated with demolition of these buildings." Findings Statement, p. 19.

More importantly here, the Respondent Planning Board *did not defer* the creation of an unknown plan to some indefinite time in the future as the Board did in *Penfield. See id.* The Respondent Planning Board stated in the Findings Statement that it:

> "reviewed the LOR and concurs that the mitigation proposed in the LOR will minimize the potential impacts to historical and archeological resources to the maximum extent practicable when weighed and balanced with social, economic and other considerations." Findings Statement, p. 19.

The Petitioner's reliance on *Brander v. Town of Warren Town Board* to persuade this Court that Respondent Planning Board failed in its obligation under PRHP §14.09 is inapposite. *Brander v. Town of Warren Board,* 18 Misc. 3d 477 (Sup. Ct. Onondaga 2007). In *Brander,* after receiving a letter from OPRHP *encouraging* the project sponsor to continue the consultation process under §14.09...*by fully exploring all feasible and prudent alternatives* and by giving due consideration to *feasible and prudent plans that avoid or mitigate the adverse impact.* The Town of Warren Board ignored this "suggestion" and instead of allowing the consultation process with OPRHP to continue, The Town of Warren Planning Board issued its Findings Statement and

delegated its Lead Agency duties and responsibilities to the PSC and OPRHP sometime in the future. *Id.* More egregious, however, was the Town of Warren Board's *failure to secure a LOR* for historic site mitigation from the PSC and OPRHP as *required* by the special use permits *prior* to the conclusion of the SEQRA process. *Id.* Thus, the *Penfield* court properly *annulled* the Planning Board's determination approving the cluster subdivision.

The record here confirms that the Respondent Planning Board was fully engaged throughout the SEQRA process. Contrary to Petitioner's contention, there was *not* an improper deferral by the Respondent Planning Board. Not only did Respondent MVHS enter into a comprehensive agreement for *all* of the Historic and Archeological Resources with DASNY and OPRHP, the Planning Board examined and considered the LOR which was extensively referred to in its Findings Statement and it is incorporated into the FEIS.

In this Court's view, a close examination of the LOR demonstrates that Respondents complied fully with SEQRA's substantive requirements. The LOR was fully executed by MVHS, DASNY and NYS OPRHP on January 10, 2019, and it remains in full force and effect today. While there is a process for dispute resolution in the LOR there is no proof here of any disputes between MVHS, DASNY and OPRHP. The LOR also has a termination clause which provides that if its terms cannot be carried out, any signatory may terminate the LOR. As stated above, the LOR has not been terminated or amended. Critically, the parties agreed that the responsibilities under §14.09 will be addressed by implementing the following stipulations,

which are intended to take into account the impacts of the Project *on known and as of yet unknown historic resources*. The stipulations are detailed and comprehensive and include:

Buildings

- A complete assessment of buildings it currently controls and are in appendix A and proposed for removal.
- Upon site control of the remaining buildings, the applicant will commence a complete assessment of the remaining buildings listed in Appendix A.
- Assessment will include photographs of exterior and interior conditions.

Archaeology

- Archeological testing will commence once the Applicant obtains site control. Reports associated with the listing must be filed with OPRHP in a timely manner and meet NYS Archeological Standards.
- No ground disturbing activities in the PIA will commence until all archeological testing has been completed at each identified site.

Treatment Measures

- In accordance with Section §14.09, efforts that would avoid or minimize impacts to historic buildings should be explored and documented. An alternatives analysis relating to the disposition of historic buildings in the PIA must be submitted to OPRHP for review and comment *prior to any activity* on the site that might damage the resources. (emphasis added).
- The Parties expressly agreed that buildings located within the footprint of the hospital building and parking garage structure will not be retained.
- Avoidance efforts to avoid the removal or direct impacts to buildings identified as historic Appendix A and located outside of the footprint of the Hospital and Parking Garage will be EXPLORED. Documentation outlining this exploration of alternatives will be provided to OPRHP prior to any action that would directly impact the involved resources.

Minimization

> Efforts that would include options to lessen the overall as of yet to be fully documented impacts to historic resources located outside the Hospital and Parking Structure footprints will need to be explored. This assessment should include a discussion of potential retention of some of the historic resources as part of the development planning and mitigation.

- Mitigation Options: Where it has been determined by the parties that *Some or all* of the historic resources must be removed from the PIA, the following mitigation measures may be applied:

  1. Exploration of the potential reuse of existing structures located outside of the hospital building and parking structure's footprints, deemed retainable and adaptable for a productive hospital-associated use, provided sufficient resources to complete the project remain.

  2. Where buildings cannot be retained the Applicant will follow OPRHP's standard resource documentation process outlined in Appendix B.

  3. Other appropriate mitigation for the loss of historic resources as agreed to by the parties (*i.e.* reuse of building name panels, significant intact architectural elements, *etc.)* will be incorporated into the new structure or hospital site creating historic linkage and homage to the history of this portion of the City of Utica.

After examining the provisions of the LOR, this Court strenuously disagrees with Petitioners argument that there is a *"gaping hole"* in the SEQRA process because some of the buildings were private properties and they (Respondents) did not have access to them so they "punted." In fact, in this Court's view, the Respondents have complied with §14.09 having completed a very "robust and detailed evaluation" of the Historic and Archeological Resources,

considered ways to avoid impacts when possible and sought to minimize impacts and implement mitigation options.

This Court concludes that the LOR requires the same rigorous process to be completed *prior* to any impacts to any resource whether in the hospital and garage footprint or outside of that footprint. It is evident that there were a finite number of Historic and Archeological Resources associated with this Project. The LOR, which was part of the FEIS, required that *each and every one* of these properties be evaluated in the exact same manner. Importantly, not one brick of any of the buildings outside of the hospital footprint can be impacted in any way unless it is subject to the exact same specified mitigation measures in the LOR and is approved by SHPO. Thus, the notion that this ongoing consultive process was a deferral is totally without merit. The caselaw is perfectly clear that in order to run afoul of SEQRA there must be a conscious effort by the Lead Agency to ignore, recommendations, circumvent the consultation process, or fail to secure a LOR. See generally, *Pyramid, Penfield, Brander, supra.*
As Respondents aptly stated during Oral Argument:

> "an inventory of every building that will be impacted with this Project with a photograph of it and a description of it is in that so the Respondent Planning Board had in front of it every building that was going to be impacted by this project…The LOR says we agree that the buildings within the hospital footprint[6], not the Project footprint they are all going to be demolished…but mitigation measures of documenting those buildings have been conducted in consultation with SHPO throughout…no building Judge, outside that footprint has been demolished without SHPO signing off on it and approving that

[6] The LOR says Hospital Footprint and Parking Garage Footprint.

> demolition. So what's left now Judge, I believe of the list of I think 14 buildings of historic significance within the project footprint, I think there are four left and none of those buildings will come down unless SHPO signs off on it and the notion that's all done in secret is wrong SHPO is a public agency." Respondents Oral Argument, pp. 59-61.

For the reasons stated above, this Court must dismiss Petitioners Third Cause of Action because Respondents complied with SEQRA and took a *"hard look"* at the Historic and Archeological Resources impacted by the Project.

II. Cumulative Traffic Impacts

Petitioners maintain that Respondents failure to have their traffic study analyze "off peak" traffic associated with the adjacent Project known as the NEXUS Center left a "second hole" in the SEQRA process. However, Petitioners concede that an Addendum to the Traffic Impact Study (TIS) in Appendix D to the FEIS was done regarding AM/PM peak period traffic generated by the NEXUS Center. Petitioners contend that the "off peak" and "special events" traffic were also required to be considered in the SEQRA process and were not considered.

Here, the TIS and the TIS Addendum were prepared by the C&S Companies in October of 2018 and March 2019, respectively, covering over 600 pages and incorporated into the FEIS. The DEIS had discussed the NEXUS Center which *at that time* was considered somewhat speculative yet it was considered to the extent possible. The TIS was completed initially in October 2018, and the DEIS was filed in November 2018. Significantly, the NYSDOT sent a letter to the City of Utica on March 8, 2019, stating that the traffic related concerns relating to

the Project had been addressed to the satisfaction of the NYSDOT. It is well settled that a Lead Agency may rely upon the advice it receives from other agencies or consultants with particular expertise during the SEQRA process, it is not only proper under the regulations it is encouraged. *Matter of Coca Cola Battling Company of N.Y. v. Board of Estimate City of N.Y., 72 N.Y, 2d 674 (1988).* This in no way can be viewed as a failure by the Respondent Planning Board to take a *"hard look"* at Cumulative Traffic Impacts. *Id.* All of the data, including additional traffic counts completed on January 15, 2019, in further consultation with NYSDOT took place at three study area intersections along NYS Route 5S. The TIS and TIS Addendum which included traffic impacts and traffic mitigation were incorporated into the FEIS and the Findings Statement. In fact, the Finding Statement noted:

> "[B]y letter dated March 8, 2019, NYSDOT stated that MVHS satisfactorily resolved its comments relating to traffic mitigation in connection with SEQRA process. The Planning Board has independently considered traffic impacts as discussed in the FEIS, the TIS and the TIS Addendum and agrees that the proposed mitigation will minimize traffic impacts to the maximum extent practicable." Findings Statement, p. 22.

As a result, this Court finds that the Respondent Planning Board satisfied the requirements of SEQRA and took a *"hard look"* at Cumulative Traffic Impacts. As Respondent Planning Board's counsel pointed out during Oral Argument, "if the traffic study indicated that there wouldn't be level of service Impact, or they would be minor during peak commuting times, I'm not sure why there is such a concern that they would be worse at off-peak commuting

times." Respondent Planning Board, Oral Argument, p. 48. This Court agrees. Accordingly, for the reasons stated above, this Court must dismiss Petitioners Fourth Cause of Action.

III. Evaluation of Alternative Sites

Petitioners third and final argument is that the FEIS is fatally defective due to the Respondent Planning Board's failure to evaluate St. Luke's as an alternative site for this project.

The public debate regarding where the new hospital in our community would be located has continued for several years, even to this day. This "debate" has been covered extensively by the media including numerous letters to the Editor as well as paid advertisements. In addition, there are still numerous lawn signs scattered about the landscape of Oneida County that read: "NoHospitalDowntown"; "Build it Downtown"; "Build it at St. Luke's"; "We Support the Hospital Downtown." To say that it is controversial would be an understatement. During Oral Argument, it was evident to this Court that emotions still run high on both sides of this debate.

However, one thing upon which both sides agree...is the law governing this Court's role in deciding this issue. As stated above but it certainly bears repeating, "while Courts may not weigh the desirability of the action or choose among alternatives, the Court must perform a searching review to assure itself that the agency has satisfied SEQRA." *Chinese Staff and Workers' Assn. v. City of New York*, 68 N.Y. 2d 359, 363 (1986) *citing Jackson,* 67 N.Y. 2d at 416. That is, this Court *must* review the record to evaluate whether here, the Respondent Planning Board identified the relevant areas of environmental concern, took a *"hard look"* at

them and made a "reasoned elaboration of the basis of its determination." *Bronx Committee for Toxic Free Schools v. N.Y.C. School Const. Authority,* 20 N.Y. 3d 148, 155 (2012). Stated more simply, "it's not for you (Judge) to substitute what they chose, but it is for you to substitute whether or not they did a proper job. Petitioners, Oral Argument, p. 11.

There is also no dispute that an FEIS must include an evaluation of reasonable alternatives 6 NYCRR §617.9(b)(1). In that regard, it is the role of the Lead Agency to simply take a *"hard look"* at alternatives, consider the data and give a reasoned response. If that is accomplished the judicial inquiry must end. *Mobil Oil Corp.,* 224 A.D. 2d at 25 quoiting *Sun Co. v. City of Syracuse Indus. Dev. Agency,* 209 A.D. 2d 35 (4th Dep't 1995).

Respondent MVHS began the process by hiring consultants to evaluate 12 potential sites in Oneida County. That process formed the basis for Respondent MVHS's Hospital Site Selection Memo which was included in the DEIS. Thereafter, each of the twelve sites were screened for fatal flaws under specific criteria and nine (9) were eliminated. After that analysis was completed three viable sites remained: the Downtown Site; the Psychiatric Center Site; and St. Luke's Campus Site. The three remaining sites were evaluated and scored utilizing seven criteria[7]. The Downtown Site scored *53* followed by the Psychiatric Center *50* and St. Luke's *46.* Subsequently, MVHS hired another consultant, Hammes Company, to give a second opinion. The Downtown Site was selected as the best option for MVHS by the Hammes

[7] The seven criteria were: size; utilities; accessibility; zoning approvals and impact fees; monetary factors; community factors; perception and sustainability and environmental.

Company. As a result of this extensive process, the MVHS Board of Directors chose the Downtown Site for the Project.

Petitioners claim that because St. Luke's was still considered a viable alternative by MVHS at the time the DEIS was issued, somehow indicated that St. Luke's was not properly considered an alternative location for the Project as the process continued. This Court fails to see how this fact detracted from the inquiry as to whether the Planning Board took a *"hard look"* at St. Luke's. In fact, St. Luke's *was* considered as a viable alternative as it was ranked in the top three sites after nine (9) potential sites were eliminated for fatal flaws. Moreover, St. Luke's was part of the rigorous screening process that evaluated and scored each site using the seven (7) criteria.

Based upon this record, there can be no serious question that the St. Luke's Site was given a *"hard look"* as an alternative. Certainly, it was reasonable for the Respondent Planning Board to consider and evaluate the reality that it would be a virtual physical impossibility to keep St. Luke's hospital open, fully serving its patients, with quality of care, amidst a full-blown construction site which bordered a residential neighborhood, among several other equally compelling reasons.

Petitioners argued strenuously:

> "At the very least, MVHS was required to meaningfully evaluate St. Luke's – a site which it owns and which it admitted was viable – as an alternative location for the project. MVHS did not do so, and this is

> because the Downtown Site was a predetermined reality due to political strong – arming."

Petitioner Montecalvo stated in his Affidavit, "political leaders exerted significant pressure from the outset to jam this project into Downtown Utica no matter what the consequences.

However, this Court is convinced that it would not matter whether the comparative analysis of the St. Luke's Site with regard to the environment was "only two paragraphs" or twenty paragraphs. See, Pet. MOL, at p. 28. In this Court's opinion, Petitioners strenuous objection to the decision to locate this Project Downtown is really not whether the St. Luke's Site was given the requisite *"hard look"* under SEQRA, but rather, that the St. Luke's site was not chosen.

Once again, in this Court's view, a close examination of the Record here, including the DEIS, with the Site Selection Memo, the FEIS and the Findings Statement, leads inexorably to the conclusion that the Respondent Planning Board took the requisite *"hard look"* at St. Luke's as an alternative site for this Project because it considered and evaluated the data and the impacts, in their environmental analysis and gave reasoned responses to all concerns raised. *See Mobil Oil Corp* at 25.

Accordingly, for the reasons stated above, this Court must dismiss the Petitioners Fifth Cause of Action.

IV. Final Site Plan Approval

Respondents further argue that because Petitioners failed to timely challenge the Planning Board Site Plan Approval by October 20, 2019, there is no mechanism for this Court to review their SEQRA claims.

On December 26, 2019, Albany County Supreme Court Justice L. Michael Mackey, determined that Petitioners attempt to challenge the Final Site Plan Approval was denied because the thirty (30) day statute of limitations had run and the Amended Petition did not relate back. This Court agrees with Respondents that since the Planning Board Final Site Plan Approval cannot be challenged, the SEQRA process is effectively concluded. Petitioners argued that:

> "the claim that we have to go challenge every subsequent approval that's issued for a Project, can you imagine the burden to Petitioners of limited means to have to go out and start a case every time a subsequent approval is issued on a Project?" Pet., Oral Argument, p. 40.

This Court concurs with the sound reasoning in *Matter of Beer v. Village of New Paltz*, 1634 A.D. 3d 1215, (3d Dep't 2018) (where the Court found that Petitioners failed to timely challenge the water district and rejected their attempt to avoid the statute of limitations by claiming their challenge was to the SEQRA determination). Here, Petitioners couch their challenge to the FEIS. However, in order to review SEQRA under these circumstances the Final Site Plan Approval would necessarily be invalidated. Thus, reviewing SEQRA here would allow an end run around the statute of limitations which this Court cannot allow. *Id.*

V. The Mootness Doctrine

Respondents contend that Petitioners three SEQRA Causes of Action should be denied as moot. This Court agrees. In this Court's opinion, there are two glaring omissions by Petitioners that detrimentally affected the course of this litigation. First, Petitioners *failure* to timely challenge the Respondent Planning Board's Final Site Plan Approval (discussed more fully above). Second, Petitioners *failure* to seek a stay or a preliminary injunction once Final Site Plan Approval was given by the Respondent Planning Board.

A claim is deemed moot "when a change of circumstances prevents a Court from rendering a decision that would effectively determine an actual controversy." *Dreikausen v. Zoning Bd. Of Appeals*, 98 N.Y. 2d 165 (2002).

Petitioners stated during Oral Argument, on September 2, 2020, regarding the application of the Mootness Doctrine:

Petitioner:	I think at the end of the day, the mootness argument comes down to a good faith argument…we've acted in good faith, done everything in our power to get to the merits. We do not have the financial means for a bond.
The Court:	Are you saying that the Respondents here acted in bad faith?
Petitioner:	They acted in bad faith by delaying the merits and then they took advantage of COVID.
Court:	Took advantage of COVID?
Petitioner:	They've been constructing out there the whole time while the Courts have been shut down.
Court:	Don't say the Courts were shut down I think that's a mischaracterization.
Petitioner:	I actually withdraw that. While access to the Judicial system was compromised.

Court: But you weren't saying that that's the reason why you didn't file for a preliminary junction, right? You said it was because of the economics of doing so.

Petitioner: Economics was a huge a factor and also our belief that the Respondents had acted in bad faith by delaying the filings on the merits...They took advantage of those procedural opportunities that yes are available to them.

Court: But don't they have a duty to represent their client vigorously?

Petitioner: Absolutely, absolutely and our position is that this extreme procedural flurry that we went through in January...was a direct result of their effort to zealously represent their clients to delay the merits, so that they could take down all the buildings and ultimately begin construction...They made the decision to take the risk to proceed with construction. And if there's an error in the SEQRA process, I think it's the duty of this Court to declare that error, require that they fix the issue, then proceed with the project absent that, if you find there's mootness as to the hospital footprint it doesn't apply to the rest of the property.

Court: So, your clients never tried to stop the project by getting a preliminary injunction, correct.

Petitioner: Correct...so we recognize that we have not made a motion for a preliminary injunction, but we don't feel that that's the end of the analysis. Because number one, for Petitioners like these who have no money to invest in this type of project, it's not a viable remedy to go for a bond, because bonds are mandatory and the amount is discretionary, but for a multimillion dollar project, how could a court set a nominal bond?

Addressing the Mootness Doctrine Respondent MVHS stated in reply:

Respondent MVHS: I would like to start with the mootness issue because I take great issue with the representations Mr. West has made indeed stating to your Honor that the Respondents have acted in bad faith. There is absolutely no basis for this. This proceeding was commenced on May 9, 2019. We filed a Motion to Dismiss it, as not ripe, and fully briefed that Motion by June 2019. Oral argument was scheduled October 31, 2019, (by Judge Mackey) that wasn't anything we did, Judge. In the meantime, the Planning Board issued Final Site Plan Approval on September 19, 2019. The time to challenge that had passed...and we don't know why the Petitioners didn't amend their Petition at that time, within the time frame to challenge that, which is the first time we could put a shovel in the ground. But they didn't.

Court: And that wasn't because of bonding or anything? In other word's they could have challenged Final Site Plan Approval...without posting a bond?

Respondent MVHS: Absolutely Judge. In fact, they tried to in November after the oral argument. Mr. West talks about that we made a Motion for permission to appeal in the Third Department – that caused no delay whatsoever in this proceeding because they did not stay this proceeding...we did nothing to delay this. And at all times through this process, once that Final Site Plan Approval was given, they had every opportunity to go to the Judge and say: We want an injunction we want a ruling on the merits. At no time did they ever move for injunction.
Your honor toured the site...and you saw the footprint of the hospital has been fully cleared, cement has been poured for the foundation, steel has arrived, this project has moved forward, because it was never enjoined...this case is essentially moot. And the other reason its moot is *because they never challenged the Site Plan Approval.*

This Court opines that, Petitioners failure to seek a preliminary injunction or a stay to either prevent construction on the Project from commencing or continuing, once the Planning Board issued Final Site Plan Approval was fatal to their case.

The case law is clear. The most important factor this Court must consider when reviewing whether a claim is moot, in the context of a construction project, is whether the Petitioners sought preliminary injunctive relief or a stay in order to preserve the *status quo* to prevent construction from commencing or continuing. *(Matter of Dreikausen v. Zoning Board of Appeals of City of Long Beach* 98 N.Y. 2d 165, 172 (2002). In addition, it is undisputed that Respondents had the absolute right to begin construction once they had the Final Site Plan Approval. There is nothing in this Record to suggest Respondents acted without authority including to obtain the proper permits. *See Citing Neighbors Coalition of Historic Carnegie Hill v. N.Y. City Landmark Pres Comm'n,* 2 N.Y. 3d 727, 728 (2004). Moreover, after considering

this Court's colloquy during Oral Argument, this Court finds that Respondent MVHS did not engage in any delay tactics that would amount to bad faith as claimed by the Petitioners. *See* Oral Argument, *supra*. In fact, later in the Oral Argument, Petitioners' counsel stated, "[m]aybe bad faith is too strong a term; they used every trick in the book zealously representing their clients." Oral Argument, p. 76. This Court, in evaluating the Mootness Doctrine, must also consider how far the work has progressed and whether substantially completed work is readily undone. *See id.*

At the Project Site visit on August 14, 2020, this Court observed the hospital footprint – all the buildings previously standing were demolished, site work was extensive, both concrete footings and steel were in the ground. Respondents claim and it is not disputed that "to date, Respondent MVHS has expended Fifty-Two Million Dollars ($52,000,000.00) on the Project. There can be no doubt that it would be a substantial hardship to Respondent MVHS after they have expended millions of dollars when realistically this demolition work cannot be undone...the Historic and Archeological buildings have been demolished.

This is especially true when Petitioners stood idly by and made no attempt to enjoin construction during the pendency of this litigation. This nonfeasance, that Petitioners chalked up to monetary constraints, is unavailing. Moreover, the assumption that Supreme Court would require a bond in an amount more than they could or wanted to give, was just that, an assumption. *Id.* Finally, Petitioners allegation that economic constraints prevented them from seeking a preliminary injunction is without merit and has been soundly rejected by the Court of

Appeals. *See, Matter of Weeks Woodlands Ass'n, Inc. v. Dormitory Auth. Of the State of N.Y.*, 95 A.D. 3d 747, 748 (2012), *citing Citineighbors*, N.Y. 2d at 727, *supra*. Importantly, Petitioners could have avoided the costs associated with obtaining a preliminary injunction had they challenged the Final Site Plan Approval in a timely manner.[8] Although, Petitioners repeatedly criticized Respondents "bad faith motives" and alleged continued delays "using every trick in the book", these claims are not substantiated in this Record.

In the final analysis, what Petitioners have seemingly failed to come to grips with is the fact, that, by failing to seek injunctive relief or a stay from Supreme Court, they themselves are complicit in this Project having reached its present advanced stage. *Matter of Weeks Woodlands Assn.* 95 A.D. 3d at 748. Thus, this Court finds that Petitioners failed to make sufficient efforts to safeguard their rights and, as a result, this controversy has been rendered moot and must be and is dismissed.

Petitioners remaining contentions to the extent not specifically addressed herein have been fully reviewed and found to be without merit.

Conclusion

After thoroughly considering the almost 6,000 pages of this Article 78 Return, the numerous Memoranda of Law, and Affidavits submitted on behalf of the parties, as well as an

[8]After Judge Mackey ruled Petitioners could not challenge Final Site Plan Approval, Petitioners did not appeal the denial of their Motion to the Appellate Division.

extensive Oral Argument, this Court finds, for the reasons stated above, that the Petition is dismissed in its entirety.

NOW, therefore, for the foregoing reasons, it is hereby

ORDERED and ADJUDGED, that Petitioners Third Cause of Action is **DISMISSED**; and it is further

ORDERED and ADJUDGED, that Petitioners Fourth Cause of Action is **DISMISSED**; and it is further

ORDERED and ADJUDGED, that Petitioners Fifth Cause of Action is **DISMISSED**; and it is further

ORDERED and ADJUDGED, that the Petition is **DISMISSED** in its entirety because it is Moot.

This shall constitute the Decision and Order. The original Decision and Order is returned to the attorney for the Defendants. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this Decision and Order does not constitute entry or filing under CPLR Rule 2200. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER:

Dated: October 22nd, 2020
At Utica, New York.

Hon. Bernadette T. Clark
Justice of the Supreme Court