SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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-Plaintiffs

For a Judgment pursuant to Article 78 and Section 3001 of the Civil Practice Laws and Rules,

against-

PLANNING BOARD OF THE CITY OF UTICA, NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION, ERIK KULLESEID, ACTING COMMISSIONER, DORMITORY AUTHORITY OF THE STATE OF NEW YORK AND MOHAWK VALLEY HEALTH SYSTEM,

Respondents-Defendants.

AFFIRMATION OF KATHLEEN M. BENNETT, ESQ. IN SUPPORT OF MOTION TO STRIKE

Index No. 02797-19

Assigned Judge:
Hon. Michael Mackey, J.S.C.

KATHLEEN M. BENNETT, an attorney duly admitted to practice law in the State of New York, affirms under penalty of perjury pursuant to CPLR § 2106 as follows:

1. I am a member of the law firm of Bond, Schoeneck & King, PLLC, attorneys for Respondent Mohawk Valley Health System ("MVHS") in the above captioned matter.

2. I have personally represented MVHS in connection with its proposal to construct a new Health Care Campus in the City of Utica, including the acquisition of property, the environmental review process, and land use approval and eminent domain processes. As such, I am familiar with the facts, circumstances and proceedings in this case.

3. I respectfully submit this Affirmation in opposition to the Article 78 proceeding filed by the Petitioners challenging the environmental review of the hospital project by the City of Utica Planning Board.

4. MVHS is proposing to construct a new Health Care Campus in the City of Utica. The proposed Health Care Campus includes a 670,000± sf hospital, central utility plant, parking

facilities (one municipal parking garage and multiple surface lots), medical office building (by private developer), campus grounds, utility/pedestrian bridge (over Columbia Street) and helipad (the "Project").

5. On May 8, 2019, Petitioners filed a hybrid petition/action claiming that the Letter of Resolution ("LOR") and Final Environmental Impact Statement ("FEIS") were defective. On June 12, 2019, MVHS moved to dismiss the Petition on ripeness grounds because the LOR and FEIS were not final determinations, and therefore not subject to review under CPLR Article 78.

6. On September 19, 2019, the City of Utica issued site plan approval for the project and filed that resolution with the City Clerk on September 20, 2019.

7. The Court held oral argument on the Respondents' motions to dismiss on October 31, 2019. During oral argument, I advised the Court that at the time of filing the original pleading, it was not ripe for review since the Planning Board had another approval to issue. However, during the months between the submission of the motion to dismiss and the scheduled oral argument, the Planning Board issued its "final" approval and it was now too late to challenge that approval.

8. Undaunted by their tardiness, on November 4, 2019, Petitioners filed without leave an "Amended Verified Petition and Complaint" (the "Amended Petition"), which purported to add a sixth cause of action challenging the final determination of the Partial Site Plan Approval ("Final Site Plan Approval") issued on September 19, 2019 by the City of Utica Planning Board ("Planning Board").

9. On November 21, 2019, MVHS moved to dismiss the Amended Petition on grounds that Petitioners had failed to timely challenge the Final Site Plan Approval within 30 days of the Planning Board's decision and had failed to seek permission to file a supplemental pleading.

10. By Decision and Order entered December 26, 2019, this Court dismissed the first, second and sixth causes of action of the Amended Petition, including the claims challenging the site plan approval.

11. Accordingly, MVHS now must respond on the merits of the SEQRA claims.

Information Outside the Record Must be Stricken

12. Together with its original verified petition, Petitioners submitted the affidavit and exhibits of Mr. Minicozzi, which purports to introduce census data and analytical population data that was not before the Planning Board and was not part of the administrative record.

13. To the contrary, Mr. Minicozzi purports to describe the map, data, analytics and methodology he employed on or about May 1, 2019 and then goes on to state his findings and conclusions in his capacity "as a certified city planner."

14. By attempting to introduce this evidence, Petitioners are not only asking the Court to consider facts outside the record, but also to consider the opinion testimony of an individual who has never been qualified as an expert to give opinion testimony, and never testified or otherwise participated as an expert in the environmental review process undertaken by the City of Utica Planning Board ("Planning Board").

15. It is well settled that for purposes of Article 78 proceedings, the content of the record is limited to the information that was before the administrative agency or body at the time the decision was made, and cannot be buttressed or challenged based on factual material which is not formally part of the record under review. See Gerrard, Environmental Impact Review in New York, Section 7.05.

16. The Court should refuse to consider affidavits or expert reports - - like that of Mr. Minicozzi - - submitted for the first time during litigation, when such information was not before the Planning Board. Center of Deposit, Inc. v. Vill. of Deposit, 108 A.D.3d 851, 853 (3d Dept. 2013) (refusing to consider evidence impermissibly included in record but permitting report that was before planning board to be included in record); New York State Thruway Auth. v. Dufel, 129 A.D.2d 44, 48 n. 3 (3d Dept. 1987) (rejecting technical report not part of record).

17. It is patently improper for Petitioners to attempt to circumvent the sacrosanct rule, fundamental to the review of agency decisions pursuant to CPLR Article 78, that the Court's review and the record of the proceeding are limited to the information that was before the agency at the time. See Fichera v. N.Y. State Dept. of Envtl. Conserv., 159 A.D.3d 1493 (4th Dept. 2018) (petitioners impermissibly relied on reports and information generated 'well after the DEC made its determination').

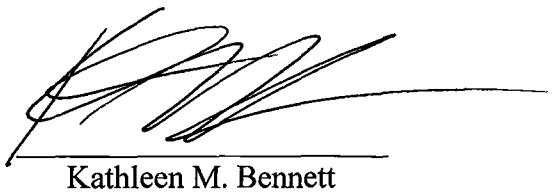
18. Here, Petitioners essentially attempt to proffer data and the "expert" opinion, analysis and report of Mr. Minicozzi's concerning census data, generated in May 2019. At no point do Petitioners acknowledge that this information was not before the Planning Board and not part of the record. Neither Mr. Minicozzi nor the Petitioners offer any explanation or justification for seeking to include information dehors the record.

19. As the Record makes clear, the Petitioners were well familiar with the proceedings before the Planning Board, and in fact were active participants in the process. If Petitioners wanted to offer an alternative analysis by way of Mr. Minicozzi's geographic and economic analytics firm Urban3 LLC, or through any other means, they certainly were well aware of how to do so, within the constructs of the SEQRA review process.

20. However, there is no basis for the Court to consider this information now, and Petitioners' attempt to do must be summarily rejected. Itzler v. Town Bd. of Town of Huntington, 2015 N.Y. Misc. LEXIS 4350 (Sup. Ct. Suffolk Cty. 2015) (because they were not part of the record before the agency, the affidavits of experts submitted by petitioners were not admissible and were not considered by the Court); Carpenter v. City of Ithaca Planning Bd., 190 A.D.2d 934 (3d Dept. 1993) (rejecting material not part of record before respondent at time of determination). To permit Petitioners to flout these rules would be wholly inconsistent with the Court's limited scope of review of the Planning Board's decision.

21. Accordingly, the affidavit and exhibits of Mr. Minicozzi must be stricken in their entirety.

Dated: February 14, 2020



Kathleen M. Bennett