

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.,

Index No. 02797-19

Petitioners-Plaintiffs

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

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

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.

**RESPONDENT MOHAWK VALLEY HEALTH SYSTEM'S
MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STRIKE
AFFIDAVIT AND EXHIBITS OF JOSHEPH MINICOZZI**

BOND, SCHOENECK & KING, PLLC
Kathleen M. Bennett, Esq.
One Lincoln Center
Syracuse, New York 13202
Telephone: (315) 218-8000

Attorneys for Respondent

PRELIMINARY STATEMENT

Respondent Mohawk Valley Health System (“MVHS”) respectfully submits this Memorandum of Law in support of its motion to strike the affidavit and exhibits of Joseph Minicozzi dated May 3, 2019, which were improperly submitted to the Court by Petitioners in support of the Petition. As set forth in the accompanying affirmation of Kathleen M. Bennet, Esq., dated February 14, 2020, the affidavit and exhibits of Mr. Minicozzi purport to introduce census data and analytical population data that was not before the Planning Board and was not part of the administrative record. 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.” 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”). Accordingly, the affidavit and exhibits are outside the administrative record and must be stricken from consideration in this proceeding.

ARGUMENT

This Court should strike the Affidavit of Mr. Minicozzi and attached exhibits because they were not part of the record before the Planning Board and were submitted for the first time during litigation.

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. SEQRA Litigation [CITE], Section 7.05. 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).

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 Env'tl. Conserv., 159 A.D.3d 1493 (4th Dept. 2018) (petitioners impermissibly relied on reports and information generated 'well after the DEC made its determination'). 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.

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

Dated: February 14, 2020

BOND, SCHOENECK & KING, PLLC

By: 

Kathleen M. Bennett, Esq.
Suzanne O. Galbato Esq.

One Lincoln Center
Syracuse, New York 13202
Telephone: (315) 218-8000
E-mail: bennetk@bsk.com

Attorneys for Respondents