SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

THE LANDMARKS SOCIETY OF GREATER UTICA, JOESEPH 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 Law and Rules,

Index No.: 02797-19

-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.

PETITIONERS'-PLAINTIFFS' SUR-REPLY MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS

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POINT I
THE PLANNING BOARD WAS REQUIRED TO, BUT DID NOT, MEANINGFULLY CONSIDER ALTERNATIVE LOCATIONS UNDER MVHS'S CONTROL FOR THIS PUBLIC BENEFIT PROJECT

The Respondents' Reply Papers impermissibly assert new matter, not set forth in their original moving papers, addressing the merits of the Petitioners' SEQRA claim that the Final Environmental Impact Statement ("FEIS") is deficient for failing to meaningfully evaluate alternative locations. In their argument, Respondents misrepresent (1) the public versus private nature of this Project, (2) the regulatory requirements applicable to MVHS, as project sponsor, and the Planning Board, as lead agency, relative to assessing alternative sites in order to pass muster under SEQRA, and (3) whether St. Luke's as a location was within MVHS's goals and objectives, thus making it a viable alternative. These are all merits-based arguments that are improper on this motion to dismiss. *See, e.g.,* Bennett Affirmation, dated June 20, 2019 ("Bennett Second Affirmation"), ¶¶ 13, 16, 22, 23; MVHS Memorandum of Law, dated June 20, 2019 ("MVHS Second Memorandum of Law"), at pp. 2, 4-5.

In any event, as set forth below, and as detailed in Petitioners' Memorandum of Law, dated May 9, 2019 ("Petitioners' Memorandum of Law"), the facts are as follows. First, although MVHS is a private entity, the Project is a public benefit project which has received public funding and *will require* the use of eminent domain to proceed on the Downtown Site. Second, MVHS as project sponsor, and the Planning Board as lead agency, were required to, but did not, meaningfully evaluate the MVHS-owned St. Luke's Campus as an alternative location for the Project. Third, the FEIS is fatally deficient because it lacks any such analysis that would allow for a comparative assessment of environmental factors. Fourth, State funding could have been obtained for placing the Project at St. Luke's, as St. Luke's satisfies the statutory requirement that the integrated health

care facility be located in the largest population center in Oneida County; and, this means that St. Luke's meets MVHS's goals.

A. The Project Is a Public Benefit Project that Will Require the Use of Eminent Domain to Proceed at the Selected/Approved Downtown Site Location

Respondents cannot have it both ways, claiming that MVHS is a private sponsor, not subject to a meaningful SEQRA alternatives analysis, but MVHS can select a site it does not own or control for which eminent domain *will need to be invoked* in order to place the Project on the Downtown Site. MVHS also has publicly announced that it plans to break ground within months, and that cannot occur until it has acquired all properties in the Downtown Site; that cannot happen until eminent domain is invoked to forcibly take the property of some of the Petitioners; and that means eminent domain is imminent. Therefore, MVHS's claims that it can select a site – which it does not own or control – bereft of any meaningful SEQRA review as to sites it does own and control – is intellectually insulting.

As fully detailed in Petitioners' Memorandum of Law (pp. 10-12), as repeatedly stated in the FEIS and Findings Statement for this Project, although "MVHS is a private entity, the [Project] is a public facility that will serve public needs and receive public funding," and "MVHS will require the assistance of the [City of Utica Urban Renewal Agency] to complete site acquisition through the use of eminent domain." Hartnett Affidavit, Exhibit C, SEQRA Findings, at pp. 1, 33. Therefore, this is a public project, not a private one; and MVHS should fold its "private entity" card.

B. In any Event, MVHS and the Planning Board Were Required to Meaningfully Evaluate St. Luke's as an Alternative Location, Since MVHS Owns this Site

Also contrary to Respondents' contention, MVHS was, indeed, required to meaningfully evaluate St. Luke's as an alternative location. Respondents claim that the Downtown Site was selected privately by MVHS, as a private entity, and there was no need to comply with SEQRA relative to that site selection process. Seemingly, according to Respondents, MVHS could pick any site it wanted, even one not under its control, and, when it comes down to SEQRA compliance, MVHS and the Planning Board have no responsibility to meaningfully assess any alternative locations, including sites owned by MVHS. *See, e.g.,* Bennett Second Affirmation, ¶¶ 5-12; MVHS Second Memorandum of Law, at pp. 3-5.

As detailed in Petitioners' Memorandum of Law (p. 27), however, the rule that private project sponsors are required to analyze as alternative locations only those sites under their ownership and/or control exists because private sponsors do not have eminent domain powers. That rule has no applicability where, as here, the Project qualifies as a public benefit project for which eminent domain can and most certainly *will* be used.

Moreover, even if the private sponsor rule applies to MVHS, Respondents' argument fails in any event because MVHS owns the St. Luke's Campus. Thus, pursuant to 6 NYCRR 617.9(b)(5)(v), the FEIS for this Project was required to include a meaningful evaluation of St. Luke's – namely, at a level of detail sufficient to allow for a comparative assessment with the Downtown Site. The FEIS fails to do so, and, regardless of who was responsible for site selection, the Planning Board's acceptance of the FEIS – which lacks a meaningful evaluation of St. Luke's – is a violation of SEQRA. Petitioners' Memorandum of Law, at pp. 27, 33; *see also id.,* at pp. 27-30, 34-35 & Point I.C, below.

C. The FEIS is Fatally Deficient for Omitting any Meaningful Analysis of St. Luke's and Other Environmental Impacts, Leaving a Gaping Hole in the SEQRA Process

As fully detailed in Petitioners' Memorandum of Law (pp. 27-30, 34-35) and supporting affidavits, the FEIS is fatally deficient because it lacks any meaningful evaluation of St. Luke's which would allow for a comparative assessment of environmental factors. Moreover, given Respondents' argument that MVHS selected the Downtown Site, to the extent the Planning Board felt constrained by that choice in its SEQRA review, the Planning Board violated SEQRA. *Cf. Sun Co., Inc. v. City of Syracuse Indus. Dev. Agency,* 209 A.D.2d 34, 50 (4th Dep't 1995) ("SIDA failed, however, ... to analyze reasonable alternatives to the Carousel Landing Project ... SIDA was unable to consider other alternatives because it was bound by the terms of the Preferred Developer Agreement ...[which] bound SIDA to pursue a definite course of action , precluding meaningful consideration of other alternatives... This is a clear failure to comply with SEQRA").

In addition, the Planning Board concluded the SEQRA process and accepted the FEIS, notwithstanding the admitted lack of data/necessary information as to historical and archeological impacts, alternatives and mitigation. Petitioners' Memorandum of Law, at pp. 13-20. For these and other reasons (*id.,* at 20-26), the FEIS is fatally defective, and the Planning Board failed to fulfill its SEQRA responsibilities.

In short, Respondents maintain that the "Planning Board's action was limited to finding that the entire Project as proposed by MVHS in the location selected by MVHS [was] the [best alternative" in weighing environmental and socio-economic factors. *See* Bennett Second Affirmation, ¶ 17. This was not possible to do, however, absent a meaningful analysis of the MVHS-owned St. Luke's Campus and consideration of other environmental factors as to which essential data and mitigation measures were lacking.

D. State Funding Could Have Been Obtained for the St. Luke Campus, Rendering that Location Viable for the Project

As a back-up to the "we can select whatever site we want" argument, Respondents try to defeat Petitioners' SEQRA-alternatives cause of action by maintaining that St. Luke's did not meet their goals/objectives because of State funding issues. Respondents assert that the City of Utica is the population center of Oneida County, thus intimating that State funding could not have been obtained for placing the Project at St. Luke's. *See, e.g.,* Bennett Second Affirmation, ¶¶ 10, 13, 16; MVHS Second Memorandum of Law, at p. 2. Respondents are, yet again, wrong.

As fully detailed in Petitioners' Memorandum of Law (pp. 30-31, 33) and supporting affidavits, St. Luke's, which is located no more than three miles from the Downtown Site, is in an even larger population center than is the Downtown Site. State funding, therefore, could have been obtained. Notably, this factual reality is memorialized in MVHS's DEIS, which states that, in the site selection process, St. Luke's and the Downtown Site rated equally in terms of compliance with Public Health Law 2825-b. Petitioners' Memorandum of Law, at pp. 31, 32 (citing DEIS, Section 2.3.5, at p. 27).

While MVHS did not apply for funding for the St. Luke's location, that is another – and irrelevant – matter and has no bearing on whether St. Luke's was (and remains) a viable alternative location for this Project. Even MVHS tacitly acknowledges as much, stating *not* that State funding couldn't be obtained for St. Luke's, but only that without State funding, the Project could not be built. *See* Bennett Second Affirmation, ¶ 10. Thus, funding under Public Health Law 2825-b could have been obtained for placing the Project at St. Luke's. And, as explained in Petitioners' Memorandum of Law (pp. 31-33), St. Luke's is also fully compliant with the other legitimate objectives asserted by MVHS. Thus, St. Luke's is a viable alternative location for the Project.

POINT II
THE PLANNING BOARD'S RESOLUTION ADOPTING SEQRA FINDINGS AUTHORIZES PROCEEDING WITH THE PROJECT AT THE DOWNTOWN LOCATION

The Respondents assert that the resolution adopting the Planning Board's SEQRA Findings (the "Resolution") authorizes City staff only to make the necessary SEQRA filings and publications and does not authorize further actions to proceed with the Project at the Downtown Site location (*e.g.,* land acquisitions and transfers). In so stating, the Respondents are seemingly disingenuous and are, in fact, wrong.

The Resolution contains four (4) distinct "resolved" clauses relative to this issue, stating:

> "NOW, THEREFORE, BE RESOLVED that … the City of Utica Planning Board directs the City of Utica Economic and Urban Development Staff to arrange for a copy of the findings statement to be maintained in the City's files that is readily available to the public and made available upon request…
>
> BE IT FURTHER RESOLVED that the City of Utica Economic and Urban Development Staff shall arrange for the filing of the findings statement in accordance with the provisions of Sections 617.12(b) and (c) of the Regulations; and
>
> BE IT FURTHER RESOLVED that the City of Utica Economic and Urban Development Staff are authorized to take whatever steps are necessary to carry out this Resolution; and
>
> BE IT FURTHER RESOLVED that this Resolution shall take effect immediately." Hartnett Affidavit, Exhibit B, at p. 3.

Several points are noteworthy. First, publication and filing are addressed, respectively, in the first two clauses. The third clause, therefore, is superfluous if it were intended to address

SEQRA's publication and filing requirements; thus, such a reading must be rejected. *See, e.g., Levine v. Bornstein,* 4 N.Y.2d 241, 244 (1958) (stating cardinal rule of statutory construction that interpretation not be adopted that renders phrases superfluous); *Columbus Park Corp. v. Department of Housing Preservation and Dev. of City of N.Y.,* 80 N.Y.2d 19, 30-31 (1992) (stating same rule as to contract interpretation).

Second, the third "resolved" clause authorizes City Economic Urban and Development Staff "to take whatever steps are necessary to carry out this Resolution." This is broad language on its face. Moreover, the SEQRA Findings adopted in the Resolution acknowledge that the City of Utica Urban Renewal Agency "is authorized to acquire property in the Project footprint through eminent domain and then convey that property to the project sponsor." The SEQRA Findings also state that because "not all owners agreed to sell [ ] MVHS will require the assistance of the URA to complete the site acquisition through the use of eminent domain. *See* Hartnett Affidavit, Exhibit C, SEQRA Findings, at pp. 33; *see also* 1-6, 19-20, 32-33 (all denoting Downtown Site as Project location). Per the fourth "resolved" clause, the Resolution is effective immediately. The Resolution, therefore, presently authorizes City staff to proceed with steps relative to property acquisition and/or transfer in the Project footprint, including through eminent domain.

Accordingly, the Respondents' argument to the contrary must be rejected. The Resolution could not be more final as to the Downtown Site location, and the injury to Petitioners from eminent domain could not be more real.

POINT III
THE PLANNING BOARD'S RESOLUTION ADOPTING SEQRA FINDINGS IS FINAL DECISION-MAKING AS TO THE PROJECT'S DOWNTOWN LOCATION

The Respondents cannot succeed in making the Planning Board's Resolution non-final for purposes of Petitioners' SEQRA claims either because MVHS proposed and "selected" the Downtown Site in its Siting Study, or because other approvals irrelevant to the Project's Downtown Site location have not yet been obtained.

A. MVHS's Proposal for Use of the Downtown Site Does Not Alter the Fact that the Planning Board's SEQRA Findings Establish the Downtown Site as the Project's Location, Which Determination is Final and Binding as to All Involved Agencies

To be clear, it is the Planning Board's adoption of SEQRA Findings – not MVHS's proposed use of the Downtown Site – that establishes the Downtown Site as the location for the Project and commits all other involved agencies to this location. The Resolution, therefore, is a final decision that commits the Planning Board (as lead agency) and all involved agencies to a definite course of action: the Downtown Site location will not change, regardless of how many other approvals are needed for this Project. Moreover, given that the Resolution authorizes City Urban and Economic Development staff to take all steps necessary to make the Downtown Site a reality for the Project, this decision by the Planning Board could not be more final.

In the end, the fact that MVHS initially "selected" this location in pursuing the Project is not relevant to the effect of the Planning Board's adoption of SEQRA Findings and Petitioners' claims relative to the Planning Board's SEQRA violations. The Planning Board's Resolution adopting SEQRA Findings, not MVHS's proposal, establishes the Downtown Site as the location for the Project, binds all other involved agencies, and, for purposes of SEQRA, is a final determination ripe for review.

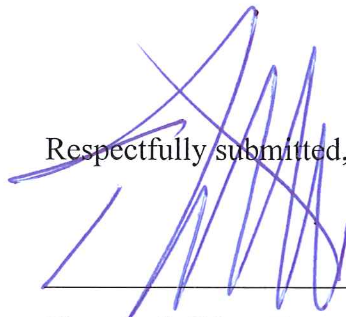
B. The Planning Board's SEQRA Findings Are Final, Notwithstanding the Lack of Site Plan or Other Involved Agency Approvals

In this case, the Planning Board assumed lead agency status *prior* to any application to the Planning Board for site plan review or other permits. For purposes of the claims at issue here, this does not affect the finality of the Planning Board's decision-making. MVHS has moved forward with property acquisition in the Downtown Site; and the City will be transferring city-owned properties to MVHS imminently. Given the anticipated schedule for ground-breaking, eminent domain looms in the immediate future for Petitioners. This begs the question: how much more final and committed to a definite course of action could this decision-making be?

For all the reasons explained in Petitioners' Memorandum of Law in Opposition to Respondents' Motion to Dismiss, dated June 19, 2019, Respondents' house of cards must fall. Petitioners respectfully urge this Court to deny Respondents' motion to dismiss and hear this case on its merits before invocation of eminent domain and full-scale building demolition on the Downtown Site.

Dated: June 25, 2019

Respectfully submitted,



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