

**STATE OF NEW YORK  
SUPREME COURT**

**COUNTY OF ALBANY**

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THE LANDMARKS SOCIETY OF GREATER  
UTICA, JOSEPH BOTTINI,  
#NOHOSPITALDOWNTON, 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.,

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

PETITIONERS-PLAINTIFFS,

-against-

INDEX NO. 02797-19  
RJI No.

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.

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**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 Reply Affirmation in support of Respondent MVHS's motion to dismiss the hybrid Article 78 petition/Declaratory Judgment action.

4. In their opposition papers, Petitioners obfuscate the issues and raise new claims and arguments that were not contained in their Verified Petition/Complaint.

5. In particular, Petitioners assert that the claims raised in the Verified Petition/Complaint are ripe as to MVHS and the City of Utica Planning Board because the City of Utica Planning Board “selected” the Downtown site as part of its SEQRA Findings.

6. This argument is complete fabrication as the City of Utica Planning Board had no involvement in the site selection process for the proposed Health Care Campus.

7. Instead, the site selection decision was made exclusively by the Board of Directors for MVHS. MVHS is a private not-for-profit entity charged with serving the healthcare needs of the public. Its mission, to provide excellence in healthcare for its communities, is what guides it in all decisions, including its decision with respect to the location of the new, regional Health Care Campus. See Exhibit A.

8. The decision by the MVHS Board of Directors to locate the new Health Care Campus in Downtown Utica was made after extensive research and studies were performed. Criteria analyzed in these studies included access to the site by the populations served, environmental impacts and infrastructure requirements. An initial study was performed by Elan Planning, Design, & Landscape Architecture, PLLC (Elan) and O’Brien & Gere Engineers, Inc. (OBG), which prepared a comprehensive site evaluation of 10+ sites within Oneida County that could support a replacement facility. That report, issued on June 12, 2015, recommended the downtown Utica location.

9. Subsequently, Hammes Company, who MVHS engaged in December 2014, provided a second opinion on the initial site recommendation study. After performing a comprehensive review of the report, Hammes confirmed the recommendation of the downtown site as the best option for MVHS to pursue.

10. The availability of \$300 million as part of the Oneida County Healthcare Transformation Act also factored into MVHS’s decision with respect to site location. The Act requires that the new healthcare facility be located within Oneida County’s largest population center, which is the City of Utica. Without this grant MVHS would not be able to financially support building a new Health Care Campus.

11. On July 23, 2015, the MVHS Board of Directors unanimously approved the downtown location for the new, regional Health Care Campus after an extensive a review of all

the information presented and based on its belief that the downtown Utica site would best serve the healthcare needs of the community for many years into the future.

12. Accordingly, the “definite and final” decision with respect to the site selection was made almost 4-years ago by a private entity that is not subject to SEQRA in connection with its decision-making processes.

13. The SEQRA regulations recognize that the “objectives of a private project sponsor are important in determining what alternatives should be considered in an environmental impact statement.” *See Matter of Applications for Permits for Crossroads Ventures*, 2006 N.Y. ENV LEXIS 88, at \*96 (Interim Deputy Comm’r Decision Dec. 29, 2006).

14. The SEQRA regulations also specifically provide that where, as here, a project is proposed by a private party, “site alternatives may be limited to parcels owned by, or under option to” the “private project sponsor.” (6 NYCRR § 617.9(b)(5)(v).) Accordingly, SEQRA recognizes that private developers are limited in their choice of alternative sites based on their economic resources, the prevailing trends in the real market, and what sites are available. *See Horn v. International Business Machines Corp.*, 110 A.D.2d 87(2d Dept. 1985).

15. MVHS is a private entity that provides a vital service for the benefit of the public. Accordingly, MVHS was free to consider and select any site to determine whether that site would satisfy its goals and objectives in evaluating a “range of reasonable alternatives” that are “feasible, considering [its] objectives and capabilities.” *See* 6 NYCRR § 617.9(b)(5)(v).

16. MVHS is a private applicant and has evaluated a reasonable range of alternatives to determine which would be feasible considering its own objectives and capabilities. Those considerations are also important in the lead agency’s SEQRA analysis, which does not require an evaluation of alternatives that do not achieve the goals of a private applicant. *See* 6 NYCRR § 617.9(b)(5)(v); *see also* *See Matter of Applications for Permits for Crossroads Ventures*, 2006 N.Y. ENV LEXIS 88, at \*96 (*Interim Deputy Comm’r Decision Dec. 29, 2006*); *Shellabarger v. Onondaga County Water Authority*, 105 A.D.2d 1134, 1135 (4<sup>th</sup> Dept. 1984). *See Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 417 (1986) (under SEQRA, the lead agency has latitude to evaluate environmental effects and to choose among alternatives, but the project sponsor’s objectives and capabilities is a central factor).

17. Accordingly, there is no basis whatsoever for Petitioners’ assertions that the Planning Board selected the Downtown site when it issued the SEQRA Findings Statement. The

Planning Board had no such authority and the Planning Board did no such thing. Rather the Planning Board's action was limited to a finding that the entire Project as proposed by MVHS in the location selected by MVHS is the alternative that best minimizes impacts to the environment while providing significant beneficial impacts in terms of revitalizing a blighted area, secondary economic growth, and better serving the populations most in need of healthcare, as well as meeting MVHS's goals and objectives for the Project.

18. Despite the Petitioners' arguments to the contrary, this SEQRA determination does not commit the Planning Board, or any other involved agency, to issuing any other necessary approvals for the Project. It means only that the Project can be approved, not that it actually will be approved. Thus, the SEQRA Findings Statement has not authorized any holes in the ground, let alone a gigantic hole in the ground as claimed by Petitioner.

19. Nor does the SEQRA Findings authorize the City to assist MVHS with the acquisition of properties through the use of eminent domain. First, the Planning Board does not have condemnation authority under any state or local law. Second, the acquisition of property by eminent domain is governed by the process and procedures found in the New York State Eminent Domain Procedure Law ("EDPL") and includes certain public notices, public hearings, determinations and offers to be made prior to acquisition. None of those required EDPL steps has been undertaken by an agency with condemning authority. Accordingly, Petitioners' claims that eminent domain is imminent are disingenuous and misleading.

20. Ultimately, MVHS, as a private entity not subject to SEQRA, could have started acquiring properties in 2015 immediately after it made the decision to locate the Project in Downtown Utica. In fact, MVHS began negotiations and entered into option agreements to acquire properties as early as January 2018 – long before the Planning Board issued its SEQRA Findings. MVHS then commenced closing on properties following the SEQRA Findings Statement so that it would have the requisite site control necessary to submit a site plan application to the Planning Board – aware of the risk involved in doing so – that it could spend millions of dollars to acquire multiple properties only to have one of the many necessary future approvals denied.

21. Finally, Mr. West's belated affirmation relaying a news story concerning a decision by the City of Utica Common Council to transfer certain unused, blighted properties to MVHS does not require a different result. First, the Common Council is not a named

Respondent and its actions are not properly before this court in this proceeding. Second, the transfer of unused blighted properties does not commit the City to undertaking acquisition of privately owned properties by eminent domain. Third, the transfer of unused, blighted properties does not commit the Planning Board, or any other involved agency, to a definite course of action or in any other way ripen Petitioners' claims for review. Acquisition of the properties simply allows MVHS to submit a complete application for site plan approval to the Planning Board.

22. Accordingly, as stated in MVHS's initial moving papers, the Petitioners' "claimed harm may be prevented or significantly ameliorated by further administrative action." As such, "the matter is not ripe." Matter of Adirondack Council, Inc. v. Adirondack Park Agency, 92 A.D.3d 188, 190 (3d Dep't 2012).

23. Accordingly, since several key events have not yet occurred, the Petition is not ripe for review and should be dismissed.

**WHEREFORE**, your affiant respectfully requests that the Respondent MVHS's Motion to Dismiss be granted, and for such other and further relief as the Court may deem just and proper.

Dated: June 20, 2019



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Kathleen M. Bennett

# Exhibit A

December 20, 2018

**Statement submission by the Mohawk Valley Health System Board of Directors for inclusion in the Draft Environmental Impact Statement for the State Environmental Quality Review related to the new MVHS Integrated Healthcare Campus.**

As the Board of Directors for the Mohawk Valley Health System (MVHS), a not-for-profit entity, we are charged with serving the healthcare needs of the public. Our mission, to provide excellence in healthcare for our communities, is what guides us in all decisions, including the location of the new, regional healthcare campus.

Our 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 the populations we serve, environmental impacts and infrastructure requirements. An initial study was performed by Elan Planning, Design, & Landscape Architecture, PLLC (Elan) and O'Brien & Gere Engineers, Inc. (OBG), which prepared a comprehensive site evaluation of 10+ sites within Oneida County that could support a replacement facility. That report, issued on June 12, 2015, recommended the downtown Utica location.

Subsequently, Hammes Company, who we began to engage in December 2014, provided a second opinion on the site recommendation of the initial study. After performing a comprehensive review of the report, Hammes confirmed the recommendation of the downtown site as the best option for MVHS to pursue.

The New York State legislation that allocated \$300 million for the project requires that the new facility be located within Oneida County's largest population center. The downtown Utica site meets this condition. MVHS was awarded the \$300 million Health Care Facility Transformation Grant in April 2017 by the New York State Department of Health (NYSDOH) and the downtown location was crucial to MVHS receiving that grant. Without this grant MVHS would not be able to financially support building a new healthcare campus.

On July 23, 2015, the MVHS Board of Directors unanimously approved the downtown location for the new, regional healthcare campus. The healthcare needs of our community are our priority and at the center of all we do. We chose downtown Utica after an extensive a review of all the information presented to us and our belief that the downtown Utica site would best serve the healthcare needs of our community for many years into the future.

Mohawk Valley Health System Board of Directors