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.

Index No. 02797-19

RESPONDENT MOHAWK VALLEY HEALTH SYSTEM'S MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO DISMISS PETITIONERS/PLAINTIFFS' ARTICLE 78 PETITION/DECLARATORY JUDGMENT COMPLAINT

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PRELIMINARY STATEMENT

Respondent Mohawk Valley Health System ("MVHS") respectfully submits this Memorandum of Law in further support of its motion to dismiss the Petition/Complaint pursuant to CPLR 7804(f) and Rule 3211(a)(1), (2) and (7).

Petitioners attempt to evade the ripeness requirement by asserting that their claims against the City of Utica Planning Board and MVHS are based on the City of Utica Planning Board's "selection" of the Downtown site as part of its SEQRA Findings. Petitioners' site selection claim, which was not raised in the Petition, is both factually incorrect and legally deficient and the motion should be granted in its entirety.

ARGUMENT

As set forth in the Bennett Reply Affirmation, the City of Utica Planning Board had no involvement in the site selection process for the proposed Health Care Campus. Instead, the site selection decision was made by the Board of Directors for MVHS and was based on a number of factors. Bennett Reply Aff., ¶¶6-7. Those considerations are important in the lead agency's SEQRA analysis, which does not require an evaluation of alternatives that do not achieve the proposed project's goals. See 6 NYCRR § 617.9(b)(5)(v); *see also Crossroads Ventures*, 2006 N.Y. ENV LEXIS 88, at *96. Under SEQRA, the lead agency has latitude to evaluate environmental effects and to choose among alternatives, the feasibility of which given the project sponsor's objectives and capabilities is a central factor. *See Jackson v. N.Y. State Urban Dev. Corp.,* 67 N.Y.2d 400, 417 (1986). The criteria established here, the scoring of those criteria, and the ultimate site selection were all carefully considered in light of the project sponsor's objectives and capabilities and relevant environmental factors.

Petitioners' assertions that the Planning Board selected the Downtown site when it issued the SEQRA Findings statement are baseless. The Planning Board had no such authority and the Planning Board did no such thing. 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 a meeting MVHS's goals and objectives for the Project. Bennett Reply Aff., ¶16-17 The Planning Board's action did not commit it or any other agency to approvals. Nor did it authorize the City to assist MVHS with the acquisition of properties through the use of eminent domain. *Id.*, ¶ 18-19. Petitioners' assertions also overlook that MVHS is a private entity not subject to SEQRA. MVHS could have started acquiring properties in 2015 immediately after it made the decision to locate the Project in Downtown Utica. MVHS's acquisition of properties entirely at its own risk, in no way renders the Planning Board's action final. *Id.*, ¶ 20.

I. Petitioner's myopic focus on the "Planning Board's site selection" does not ripen their claims.

Petitioners have failed to establish that their claims are ripe. By attempting to repackage their claims on the Planning Board's site selection, Petitioners have only succeeded in perpetuating an inaccurate portrayal of the record and ignoring the facts. Tellingly, Petitioners have not disputed that per the City of Utica Zoning Ordinance, MVHS must apply to the City of Utica Planning Board ("ZBA") for site plan approval (§ 2-29-542 (b)). In addition, MVHS will also need to apply to the City of Utica Zoning Board of Appeals for a special use permit and area variances. Petitioners have not disputed that *if and when* these completed applications are

submitted to the Planning Board/ZBA, the respective board may deny, approve, or approve with modifications those applications. Instead, Petitioners focus exclusively on site selection and assert without substantiation that "the finality of the Planning Board's locational decision could not be more clear." First, the Planning Board did not select the site. In any event, the Planning Board's action with regard to the project in the location MVHS selected does not make it a final agency action that can be reviewed, and Petitioners have cited no authority to the contrary.

Petitioners also attempt to claim "concrete injury" based on the "imminent acquisition of properties" through eminent domain and otherwise. Merely claiming that MVHS has acquired properties does not somehow make the Planning Board's action any more final. The fact that MVHS assumed the risk of acquiring properties does not change the fact that additional approvals are still required. Petitioners have conveniently ignored those additional steps and instead distort the Planning Board's action. While it is one step in the process, it is not a final one that can be reviewed and Petitioners have failed to refute Respondents' ripeness argument.

Petitioners' reliance on *Town of Red Hook v. Dutchess County Resource Recovery Agency*, 146 Misc.2d 723 (Sup. Ct. Dutchess Cty., 1990) is not persuasive and in no way requires a finding that the claims are ripe for review. In *Town of Red Hook*, it was the Dutchess County Resource Recovery Agency that selected the site at issue. There is a marked difference between a public authority selecting a site prior to completion of the SEQRA process and here, a private entity doing so according to its decision making process, which is not subject to SEQRA review. Petitioners ignore that the SEQRA regulations 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).) 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). Requiring a private developer to consider alternative sites not within its control would be unrealistic and onerous. *See id.* Petitioners have cited no authority analogous to this situation where the private applicant, MVHS, selected the site and its reliance on *Town of Red Hook* is misplaced.

Petitioners have also failed to distinguish *Guido v. Town of Ulster Town Bd.*, 74 A.D.3d 1536 (3d Dept. 2010). The fact that the Court in *Guido* acknowledged that finality is assessed on a case-specific basis in no way undermines its applicability in this case - - it supports it. Petitioners' assertion that here site plan review will not change the location in unavailing and is not a basis for distinguishing *Guido.* To the contrary, it is not that the approvals would change the location. Rather, like the situation in *Guido*, there is no concrete injury unless and until the applications for approvals are made and acted upon. Similarly, the notion that Petitioners are being forced to wait until there is a "gigantic hole in the ground" to have their SEQRA claims reviewed is nothing but hyperbole. Petitioners have not actually disputed that there will be no "hole in the ground" unless and until the approvals are applied for and granted, at which time there may be a claim that is ripe for review.

II. Petitioners have failed to establish that the LOR is ripe for review.

Petitioners continue to assert without substantiation that the LOR is ripe for review. However, Petitioners have not persuasively distinguished authority directly on point. Petitioners claim that *Glick v. Harvey* is factually distinguishable because the LOR in that case stated that it would not be effective until DASNY made its SEQRA findings. 2014 WL 96413 (Sup. Ct. New York Cty., Jan. 7, 2014). Petitioners claim that here the LOR became effective on execution, and

based on the LOR the Planning Board gave city agencies and the applicant the "go ahead" to acquire properties. Petitioners continue to ignore that other agency approvals still have to occur, just as in *Glick*. The notion that because the LOR was effective on execution it somehow distinguishes this situation from *Glick*, is unfounded. Here as in *Glick*, several steps, including the state agencies' SEQRA findings, have yet to occur and the LOR is likewise not ripe for judicial review.

With regard to the LOR, also Petitioners assert that the Planning Board's commitment to a site "is a present reality, as is the resulting injury, and no future agency action...will prevent or ameliorate that injury." However, Petitioners ignore the key point that each of these discretionary approvals could prevent or ameliorate the alleged harm sustained by the Petitioners. As of this date, MVHS has not submitted the complete applications to obtain these approvals. As a result, Petitioners/Plaintiffs have not been injured, there is nothing for the Court to review and the Proceeding/Action should be dismissed in its entirety.

In addition, Petitioners' assertion that the LOR is effective on execution, and the Planning Board then gave city agencies and the applicant the "go ahead", is of no consequence. It in no way transforms the LOR into a final agency action that can be reviewed. MVHS could have acquired properties at any time, and did not have to wait for the SEQRA determination. In other words, the fact that MVHS has acquired properties at its own risk, knowing that approvals may not occur, does not somehow make the LOR final, or make *Glick* any less dispositive in this situation. As for the assertion by Petitioners that eminent domain is "imminent" that, too, is unsubstantiated and inaccurate. There has been no eminent domain action whatsoever to date. Accordingly, Petitioners have failed to demonstrate that the validity of the LOR is ripe for review, and MVHS's motion to dismiss should be granted.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Motion to Dismiss Petitioners/Plaintiffs' Article 78 Petition/Declaratory Judgment Complaint be granted.

Dated: June 20, 2019

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