

**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.,

**REPLY AFFIDAVIT OF  
KATHRYN HARTNETT,  
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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**STATE OF NEW YORK )**

**ss:**

**COUNTY OF ONEIDA )**

I, **KATHRYN HARTNETT**, being duly sworn, deposes and states as follows:

1. I am over 21 years of age and am employed as an Assistant Corporation Counsel for the for the City of Utica, New York. I represent Respondent Planning Board of the City of Utica, and as such, I am fully familiar with the facts and circumstances of this case.
2. I make this affidavit in support of Respondent Planning Board of the City of Utica's motion to dismiss the hybrid Article 78 petition/Declaratory Judgment action.
3. Petitioners' response to Respondents' motion to dismiss is based on a misleading assumption that the Planning Board has authorized eminent domain to be used to acquire properties

for the Downtown Hospital Project.

4. To the extent that Petitioners assert the injury they are suffering is the imminent loss of property through eminent domain, their claims are purely speculative, and which they advance by a highly disingenuous reading of the Planning Board Resolution of April 18, 2019. Petitioners' Final Memorandum of Law states "the Planning Board's resolution, adopting its SEQRA Findings, not only establishes the Downtown Site as the location for the Project, but also authorizes the City of Utica Economic and Urban Development staff to take whatever steps are necessary to carry out the resolution. Those steps include pursuing property acquisition at the Downtown Site (which process is well underway) to pave the way for full-scale building demolition, including acquisition via eminent domain," (Final Memorandum of Law p. 2), and "[i]n fact, the finality of the Planning Board's locational decision could not be more clear. The Planning Board's Resolution expressly resolves 'that the City of Utica Economic and Urban Development Staff are authorized to take whatever steps are necessary to carry out this Resolution.' This authorization allows city authorities to assist MVHS in acquiring properties in the Downtown Site, including those properties that cannot be acquired voluntarily." (Final Memorandum of Law p. 6).

5. The Planning Board Resolution authorizes no such thing. The effective language of the resolution is as follows: "Now, therefore, be resolved that on a motion made by Mr. Caruso, seconded by Mr. Mitchell and approved, the City of Utica Planning Board determines to issue the written findings statement dated April, 2019; and be it further resolved that on a motion made by Mr. Caruso, seconded by Mr. Mitchell and approved, 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 accessible to the public and made available upon request, as well as to be made available to the public on the city's website, City Hall & the Utica Public Library, and to be provided to the other involved and interested agencies; and 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. L 2(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 . . ." (See Hartnett Affidavit, Exhibit B).

6. Petitioners take issue with the final resolution clause, urging the Court that it means

the Planning Board has authorized the use of eminent domain to take property. A plain reading of the entire resolution makes clear this was a catch-all clause to allow Urban and Economic staff to perform the ministerial functions associated with effecting the rest of the resolution. For example, the resolution requires Urban and Economic staff to arrange for the filing of the findings statement in accordance with the provisions of sections 617. L 2(b) and ( c) of the regulations.

7. The clause with which Petitioners take issue clearly allows staff devise their own means to effectuate the ministerial tasks given in the rest of the Resolution.

8. It strains credulity to assert that this innocuous line in the resolution was meant to authorize City use of the Eminent Domain power.

9. First, the Planning Board is a City agency of limited authority. It is not a condemning authority.

10. Second, the only City bodies with condemning authority are the Utica Common Council and the Utica Urban Renewal Agency. (See N. Y. Gen. City Law § 20 (2); N.Y. Gen. Mun. Law § 506).

11. Emphatically, neither of these bodies have taken any steps toward exercising eminent domain power. Neither body has declared an intent to acquire properties in the Project footprint. Neither body has sought or obtained appraisals for any properties in the Project footprint. Finally, neither body has held a public hearing on the use of eminent domain to acquire the properties in the Project footprint.

12. Petitioners cite *Jones v. Amicone*, 27 A.D.3d 465, 468-469 (2d Dep't 2006) to support its argument that the Planning Board resolution – allowing staff to "take whatever steps are necessary to carry out this resolution" – was a final agency decision in that it authorized the City to proceed with eminent domain. This case does not help Petitioners.

13. In *Jones*, the Common Council (a legitimate condemning authority) was the lead agency, and stated in its SEQR findings "that condemnation would take place upon completion of the SEQRA review." The Court found this constituted a final agency action causing injury, but dismissed that part of the petition based on statute of limitation grounds.

14. The Planning Board made no such statement in this case, in its findings or otherwise. And even if it had, arguably, it still would not give rise to an injury because the Planning Board is not a condemning authority like the Common Council of a City.

15. Petitioners therefore rely on a twisted and suspicious reading of the Planning

Board's April 18, 2019 resolution. This reading is patently incredible, and there are no facts to support it. They cannot show an injury based on "imminent eminent domain," when no proper condemning authority has taken any steps to acquire properties in the Project footprint.

16. In further support of Petitioners' case, Attorney West states in his Affirmation of June 20, 2019 that on June 19, 2019, the City of Utica Common Council voted to sell several properties to MVHS. Attorney West erroneously states these properties are owned by the City of Utica; they are in fact owned by the Utica Urban Renewal Agency. Aff. of Thomas West of June 20, 2019, para.7). Attorney West states "MVHS and the other Respondent-Defendants are engaged in a concerted strategy to acquire properties and demolish buildings to create a gaping hole in downtown Utica that is as large as the hole that they left in the SEQRA . . ." Aff. of Thomas West of June 20, 2019, para.8).

17. MVHS is a private entity, and is free to acquire properties as it sees fit, including City of Utica Urban Renewal Agency properties, if that agency has agreed to sell them. MVHS has, in fact, had a great deal of success in acquiring properties on its own, (See Aff. of Brett Truett of June 19, 2019, Exhibit A).


18. Still, Attorney West's assertion fails to demonstrate that Petitioners have suffered an injury, as acquisition of the Urban Renewal properties in and of itself does not guarantee the project will go forward in light of the remaining approvals that are required. (See Aff. of Kathryn Hartnett of June 12, 2019).

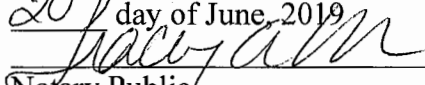
19. The sale is *not* a final agency determination within the context of this project, and does not support Petitioners' assertion that they are imminently going to be deprived of their property through eminent domain.

20. Since Petitioners cannot make a credible case they have suffered an injury, their claims are not ripe for review, and Respondent Planning Board of the City of Utica's Motion to Dismiss should be granted.

**WHEREFORE**, your deponent respectfully requests that the Respondent Planning Board of the City of Utica's Motion to Dismiss be granted, and for such other and further relief as the Court may deem just and proper.

Dated: June 20<sup>th</sup>, 2019

  
KATHRYN F. HARTNETT, ESQ.  
ASSISTANT CORPORATION COUNSEL FOR  
THE CITY OF UTICA

Sworn to before me this  
20 day of June, 2019  
  
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Notary Public

TRACEY A. MILLS  
Notary Public - State of New York  
No. 01MI6185254  
Qualified in Oneida County  
My Commission Expires April 14, 2020