1 STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY
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THE LANDMARKS SOCIETY OF GREATER UTICA, JOESEPH BOTTINI,
4 #NOHOSPITALDOWNTOWN, BRETT B. TRUETT, JAMES BROCK, JR.,
FRANK MONTECALVO, JOSEPH CERINI, AND O'BRIEN PLUMBING &
5 HEATING SUPPLY, a division of ROME PLUMBING AND HEATING
SUPPLY CO. INC.,
6
Petitioners-Plaintiffs,
7
For a Judgment pursuant to Article 78 and Section 3001
8 of the Civil Practice Law and Rules,

9 -against- Index No. 02797-19

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PLANNING BOARD OF THE CITY OF UTICA, NEW YORK STATE OFFICE
11 OF PARKS, RECREATION AND HISTORIC PRESERVATION,
ERIK KULLESEID, ACTING COMMISSIONER, DORMITORY AUTHORITY
12 OF THE STATE OF NEW YORK AND MOHAWK VALLEY HEALTH SYSTEM,

13 Respondents-Defendants.

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16 - O R A L A R G U M E N T -

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BEFORE: HON. L. MICHAEL MACKEY
18 Justice of the Supreme Court

19

20 Transcript of the Proceedings held on the record

21 on October 31, 2019, at the Albany County Courthouse, Albany,

22 New York.

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1 APPEARANCES:

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1 THE COURT: Good morning.
2 Counsel, we will take appearances for the record.
3 MR. WEST: Yes. Thomas S. West, The West Firm,
4 PLLC, for the petitioner-plaintiffs.
5 MS. SIMON: Loretta Simon, Assistant Attorney
6 General on behalf of the Dormitory Authority of the
7 State of New York and the Office of Parks, Recreation
8 and Historic Preservation.
9 MS. HARTNETT: Kathryn Hartnett, Assistant
10 Corporation Counsel for the City of Utica, on behalf of
11 defendant Board of the City of Utica.
12 MS. BENNETT: Kathleen Bennett, attorney for Mohawk
13 Valley Health System.
14 THE COURT: Mr. West.
15 MR. WEST: Yes. Your Honor, just a couple of
16 housekeeping matters first.
17 There was our submission on, I think it was June
18 25th, we asked for permission to submit a sur-reply and
19 we submitted the sur-reply.
20 I was wondering about the status of that.
21 THE COURT: Yes. I'm going to accept the
22 sur-reply.
23 MR. WEST: Okay.
24 And I hate to push my luck, but we did want to file

1 one additional affirmation, which I have served on
2 opposing counsel, which just documents the destruction
3 of the first building yesterday, and nothing more than
4 that.
5 THE COURT: All right. Well, I will accept this,
6 but I will allow the respondents an opportunity to
7 submit papers in reply to this if you wish to.
8 MS. BENNETT: Okay. I would be prepared to lodge
9 an objection on the record now if your Honor would like
10 or we can do it in writing later.
11 THE COURT: Either. I mean we can address this
12 issue first.
13 MS. BENNETT: So, I would object to this
14 submission.
15 Yes, MVHS has commenced demolition, but those facts
16 don't make this action ripe for review. That decision
17 came or the demolition came way after the facts that are
18 relevant.
19 The decision that led to the demolition of the
20 buildings was the site plan approval by the City. That
21 was granted on September 19th. But that decision has
22 gone unchallenged and the time to challenge that
23 decision has expired.
24 Filing prematurely does not absolve the petitioner

1 of the fact that it needed to file a timely challenge to
2 that final decision.
3 And this Court is bound by the facts that were pled
4 in the complaint and not subsequent and now untimely
5 claims. The facts and the pleadings support the motion.
6 So we object to this submission as being untimely and
7 irrelevant.
8 THE COURT: Okay. Well, I'm going to accept it. I
9 will give you an opportunity to submit a reply if you
10 think that's appropriate.
11 MS. BENNETT: Okay.
12 THE COURT: Would you like that opportunity?
13 MS. BENNETT: Yes, your Honor.
14 THE COURT: All right. How much time would you
15 like?
16 MS. BENNETT: A week, your Honor.
17 THE COURT: Is that acceptable to everyone?
18 MS. SIMON: Yes, your Honor. We would like to
19 object also and we would like to reply.
20 THE COURT: All right. And one week is sufficient
21 time?
22 MS. HARTNETT: Yes, your Honor.
23 THE COURT: All right. Okay.
24 MR. WEST: Thank you, your Honor.

1 I'm under the assumption since it's their Motion to
2 Dismiss, that the respondents should go first, but I'm
3 happy to address it in whatever order you would like.
4 THE COURT: I have to say it really doesn't matter
5 to me. There are a lot of motions and cross-motions.
6 So whoever wants to go first, that's fine.
7 MR. WEST: We don't have a cross-motion at this
8 point, your Honor.
9 THE COURT: Okay.
10 MR. WEST: We are opposing --
11 THE COURT: You have a petition and then there is a
12 Motion to Dismiss the petition.
13 MR. WEST: Correct. Yes.
14 THE COURT: Alright. We can address the Motion to
15 Dismiss first.
16 MS. SIMON: Okay. Your Honor, would you like me to
17 stand or can I sit?
18 THE COURT: Whichever you are more comfortable
19 doing.
20 MS. SIMON: I will sit if that's okay with the
21 Court.
22 THE COURT: That's fine.
23 MS. SIMON: And I do have one request. I sometimes
24 don't hear that well, especially in these large

1 courtrooms, so I may have a hard time sometimes hearing
2 what you say. If I miss it, I hope you don't mind I
3 interrupt you and ask you what you said.
4 THE COURT: That's fine.
5 MS. SIMON: So, your Honor, there are two claims
6 against the State of New York here, the first two causes
7 of action. They both involve Parks, Recreation and
8 Historic Preservation Law 14.09. And the State has
9 moved to, number one, convert this action to -- he is
10 requesting a declaratory judgment in addition to the
11 Article 78, but to convert it to an Article 78. And
12 then secondly, to dismiss for prematurity and failure to
13 state a claim.
14 I would like to take one moment just to address the
15 issue of converting the DJ. This is not properly
16 brought as a DJ. To annul an agency action, you must
17 bring it and use the vehicle of Article 78.
18 My brief cites about half a dozen cases, including
19 Court of Appeals and Appellate Division. Opposing
20 counsel cites one case in opposition to converting it,
21 which is a Seneca County Supreme Court case, Nearpass v
22 Seneca. It's in his brief.
23 And in the opening line the Court refers to it as
24 an Article 78, not a DJ. Repeatedly through the

1 decision it refers to this as an Article 78, citing
2 Article 78, 7804, and there is no finding about a DJ in
3 that case. It's entirely without standing.
4 So, we ask the Court -- I rely on my brief on my
5 issues regarding a motion to convert, but we ask the
6 Court to convert it.
7 Secondly, on the motion to dismiss on ripeness
8 grounds, the fact that the agency here, the Dormitory
9 Authority, has not issued any final action, makes this
10 unripe. The final action here would be funding if and
11 when DASNY, or Dormitory Authority, issues bonds.
12 There has been no request from MVHS, Mohawk Valley
13 Health Services, for bonding, and there has been no
14 issuance of any bonds by DASNY.
15 Secondly, the finality issue requires harm. There
16 is no harm from the fact that Dormitory Authority has
17 consulted with the Parks Department. There is no harm.
18 There is no authorization for demolition. It's a
19 resolution to address feasible improvement alternatives
20 to mitigate impacts to historic properties.
21 THE COURT: So it's your argument that it's not
22 ripe as against your clients?
23 MS. SIMON: Correct.
24 THE COURT: You are not addressing the other

1 parties?

2 MS. SIMON: Correct, your Honor.

3 THE COURT: You don't take any position regarding

4 the ripeness of the proceeding as against the other

5 parties?

6 MS. SIMON: Correct.

7 THE COURT: All right.

8 MS. SIMON: Just to digress for one moment and talk

9 about 14.09 and why this consultation process is not

10 ripe, we have to understand what 14.09 is.

11 The cases opposing counsel cites all involve SEQRA,

12 State Environmental Quality Review Act. That is a

13 distinct, independent, separate statute. That's in the

14 Environmental Conservation Law. This is in Parks,

15 Recreation and Historic Preservation Law. 14.09 says

16 that an agency, only a state agency by the way, MVHS has

17 no obligation here to participate in this process, but

18 they did it voluntarily and they entered into an

19 understanding of how to go forward voluntarily.

20 So the state agency that has the obligation here is

21 Dormitory Authority. They are required to consult with

22 Parks if they may take an action.

23 So an action under 14.09 includes funding. DASNY,

24 Dormitory Authority, may issue bonds. So that's why

1 they have to do this consultation.
2 THE COURT: Well, won't the Dormitory Authority
3 also be responsible for administering the $300 million
4 grant?
5 MS. SIMON: I'm sorry. Could you speak into your
6 mic? I can't hear you.
7 THE COURT: Sure.
8 Doesn't the Dormitory Authority also have
9 responsibility for administering the $300 million grant
10 that was awarded?
11 MS. SIMON: They are working with the Department of
12 Health and the Department of Health is granting that
13 money and the Department of Health has not been sued
14 here.
15 THE COURT: Right. But the Dormitory Authority has
16 responsibility with respect to administering that grant,
17 is that right?
18 MS. SIMON: Administration, yes. Not the decision
19 to allocate.
20 THE COURT: All right. Okay.
21 MS. SIMON: So there is a distinction there. And
22 the reason they are here is because they are funding.
23 Let me take that back. They may fund in the form of
24 bonds. That's their role as a state agency here. And

1 yes, they are working with DOH for administration, but
2 they did not make that allocation or that decision or
3 that determination and they have not sued DOH,
4 Department of Health.
5 THE COURT: All right.
6 MS. SIMON: So, the requirement is that the State
7 agency for 14.09, you know, which is in our papers, has
8 to explore feasible, prudent alternatives, and avoid
9 mitigating adverse impacts.
10 So there is no question that they engaged in
11 consultation. The petition states -- so if you take all
12 the facts stated in the petition as true, they admit
13 that there has been consultation.
14 Once you have engaged in consultation, according to
15 the regs, you have met the requirement 14.09.
16 So, in the first instance, this is not ripe,
17 because 14.09 is a process along the way to funding. If
18 and when they issue those bonds, then it would be ripe.
19 The case law cited by opposing counsel to say that
20 the 14.09 is ripe, are all SEQRA cases, again, a
21 separate law. There is almost no case law on 14.09, a
22 Letter of Resolution ripeness.
23 The Letter of Resolution is the agreement, you may
24 recall from the papers that they entered into, to say

1 how they are going to go forward, how they are going to
2 continue consultation, and how they are going to address
3 these historic buildings.
4 That consultation is ongoing. What they seek in
5 the petition is the Court to order the State to continue
6 consultation.
7 We admit consultation has taken place. It's
8 ongoing and it will continue. The Letter of Resolution
9 says as much. So they have no cause of action against
10 the State for the 14.09 provision.
11 THE COURT: Okay.
12 MS. SIMON: But, your Honor, the Letter of
13 Resolution is also important because there are probably
14 about 20 reported cases on 14.09. Only two deal with
15 Letters of Resolution. And one is almost entirely on
16 point here.
17 So, I would like to briefly discuss that case.
18 It's in my brief and opposing counsel has responded to
19 it. That case is Glick v Harvey. This is a situation
20 in New York City where NYU, a private entity, wants to
21 develop, and may in the future use Dormitory Authority
22 funding. And in that situation the Court found that the
23 Letter of Resolution was not final. And I'm going to
24 quote from the Court's finding. The Letter of

1 Resolution does not constitute the type of final agency
2 action that would render the matter ripe for judicial
3 review.
4 This is the only case on point. And in opposition,
5 their reply papers say nothing on 14.09, but rather they
6 cite SEQRA cases where ripeness was an issue, where
7 agencies acted outside their authority.
8 One of those cases is Gordon v Rush. It's sort of
9 a well known SEQRA case out of Long Island, where a
10 local government decided to take on SEQRA review
11 themselves after DEC had already become the lead agency
12 and issued its SEQRA determination. The Court said,
13 hey, you are without authority to do that.
14 There is no such thing here and it's really a very
15 different situation.
16 DASNY, Dormitory Authority, is acting within its
17 authority to consult with Parks. That's exactly what
18 they are supposed to do.
19 So to say that here, the petition says that this is
20 outside the authority of DASNY, Office of Parks, is
21 frankly ridiculous.
22 So in the case the Court granted Dormitory
23 Authority's and Park's Motion to Dismiss. So what does
24 it have in common with this case? Both cases, this case

1 and Glick, involved development by a private entity.
2 There it was NYU. Here it's MVHS.
3 In both, Parks Department, Office of Parks here,
4 determined that they were eligible listed and/or
5 eligible properties, historic properties. Same thing
6 here. Parks made that determination.
7 In both situations parks advised what, you know,
8 could be done to avoid adverse impacts. And in both
9 situations the entities entered into a Letter of
10 Resolution. So it's almost identical.
11 Here, as in Glick, the private entity did not apply
12 for DASNY funding. Here, as in Glick, DASNY did not
13 issue any bonds. And here, as in Glick, the LOR on its
14 very terms said it was not final, that a consultation
15 was going to be ongoing.
16 So the Court at least has that one case to look to,
17 very similar to what we have here. And one thing that
18 has changed between June and now, which opposing counsel
19 will say and has raised, in June Dormitory Authority had
20 not issued its Finding Statements pursuant to SEQRA.
21 Since then they have.
22 THE COURT: In August I think you sent those to me.
23 MS. SIMON: Sorry?
24 THE COURT: You sent those to me in August.

1 MS. SIMON: I did, yes.
2 So, yes, we are one step closer to finality, but
3 not completely, until DASNY takes that final action.
4 If you look at 14.09, the action is not the
5 consultation. It's the funding. You look at the
6 definition. It's when the agency -- the only thing that
7 triggers 14.09 is the funding, in this case.
8 So the Glick case is a case that the Court can rely
9 on that is consistent and has very similar facts to this
10 case.
11 The second issue is whether or not there is any
12 harm here. There is no harm either from Parks or from
13 Dormitory Authority entering into this consultation. It
14 does not authorize demolition. No permits are issued.
15 There is no action here that causes the harm. And that
16 is a prerequisite for ripeness. This is not ripe if
17 there is no harm.
18 So, we feel very strongly that the case law, and
19 rely on our briefs, supports our position. And that the
20 second claim that we raise with the Court for dismissal
21 is that there is no cause of action to begin with.
22 First of all, the Parks Department's role here is
23 purely advisory. They provide technical assistance.
24 They let the entities know whether or not they are

1 historic properties here, and whether they are eligible
2 or listed on the National Register. Their role is
3 advisory. There is no claim that Parks is doing
4 anything improper here.
5 So it should be dismissed against Parks.
6 But for DASNY also, because the requirement for
7 DASNY, Dormitory Authority, is to consult. They have
8 consulted. Petitioners admit that they have consulted.
9 They have met their obligation.
10 So, in addition to the ripeness issue, it's failure
11 to state a claim, and it should be dismissed for that
12 reason.
13 Finally, your Honor, 14.09 because it only requires
14 consultation and because they acknowledge that it has
15 taken place, the requirements under 14.09 have been met.
16 Their argument is the State is acting outside its
17 authority. That is not true.
18 But strangely, petitioners are asking the Court to
19 order continuation of consultation for the State. We
20 are engaged in consultation. The State is meeting its
21 obligation. There is no harm. There is no concrete
22 injury here from consultation. And we ask the Court to
23 convert it and dismiss it.
24 THE COURT: Mr. West, do you want to respond at

1 this point or would you prefer that I hear from all of
2 the respondents regarding the Motions to Dismiss and
3 then you respond?
4 MR. WEST: Thank you for that opportunity, your
5 Honor.
6 I believe it would be better for the Court if we
7 heard all of the motions to dismiss. There is a lot of
8 similar themes that I will address. Admittedly the
9 State has a couple of additional issues, but I think
10 that would be better for the Court.
11 THE COURT: Okay. That's all right.
12 Who would like to go next?
13 MS. BENNETT: Your Honor, Kathleen Bennett for
14 MVHS.
15 MVHS, together with the City and the State, move to
16 dismiss. In addition to the claims that were raised
17 against the State, the petitioners are also seeking to
18 invalidate the Final Environmental Impact Statement and
19 the SEQRA findings that were issued by the City of Utica
20 Planning Board.
21 And the crux of our argument with respect to those
22 claims against MVHS and the City with respect to that
23 SEQRA determination is that the rule is clear that if
24 the claimed harm may be prevented or significantly

1 ameliorated by further administrative action, then the
2 matter is not ripe for review. And that's clearly the
3 case here.
4 Although the issuance of the Finding Statements by
5 the City Planning Board concluded the Environmental
6 Review Process, it was not the final action for the City
7 Planning Board.
8 THE COURT: Let me just ask you. Now, there is no
9 real bright line and clear line as to when something is
10 ripe and when it isn't. It's a case-by-case analysis,
11 right?
12 MS. BENNETT: That is correct, your Honor, and --
13 go ahead.
14 THE COURT: Well, let me just ask you. I mean, you
15 would agree -- I will ask you. Do you agree that at
16 some juncture the petitioners are entitled to judicial
17 review of their claims here?
18 MS. BENNETT: I do agree that at some point they
19 would have been, had they filed a timely petition
20 against the final determination that was made by the
21 City of Utica.
22 THE COURT: So, you are saying that it's now time
23 barred?
24 MS. BENNETT: Yes, your Honor.

1 THE COURT: All right.
2 And why wasn't it, I mean, explain to me why it was
3 not ripe when they filed it.
4 MS. BENNETT: So, your Honor, at the time that they
5 filed, our position is that the Findings Statement
6 didn't cause harm to the petitioners. The Findings
7 Statement wasn't a final action that allowed MVHS to
8 take any action with respect to construction or
9 demolition of the hospital. That would not occur until
10 after the City Planning Board issued a site plan
11 approval. So, maybe the City Planning Board denies the
12 site plan approval. Maybe the City Planning Board
13 imposes conditions on the site plan approval that would
14 address their harms.
15 There was further administrative action that had
16 yet to occur that could have ameliorated those harms
17 that they claimed.
18 THE COURT: So, let me just stop you there. I
19 think one of the allegations is that there were several
20 historic properties that were not addressed in the
21 Environmental Impact Statement, because your client did
22 not have access to that. Is that right?
23 MS. BENNETT: That is their claim.
24 THE COURT: Right. Well, are there some? I mean,

1 do you agree that there are some where you didn't have
2 access? I think you even said in your papers you did
3 not have access, right?
4 MS. BENNETT: There were properties that Parks had
5 identified as being eligible or for listing on the
6 registry, yes, your Honor. But we did have reports
7 prepared based on information that we had. Even though
8 we could not gain physical access to some of those
9 properties, that did not mean that we did not review the
10 historic nature of those properties and consult with
11 Parks during and throughout the SEQRA process.
12 THE COURT: So you attempted to gain physical
13 access to the properties, right?
14 MS. BENNETT: Yes, your Honor, but physical -- I
15 would submit that physical access wasn't required for us
16 to do the study and the consultation that was required
17 by SEQRA.
18 THE COURT: All right. Well, what about the ones
19 where you couldn't gain physical access? Didn't you say
20 that there would be an ongoing review process for the
21 properties where you didn't have physical access?
22 MS. BENNETT: So, there is an ongoing consultation
23 process that occurs throughout the project, your Honor,
24 yes, under 14.09, and we are satisfying the requirements

1 of Section 14.09 in terms of the consultation required
2 with Parks.
3 THE COURT: Now, under the Eminent Domain Procedure
4 Law though, you could have gained physical access.
5 MS. BENNETT: MVHS does not have eminent domain
6 authority and the City of Utica Planning Board does not
7 have eminent domain authority.
8 The City of Utica agencies that do have eminent
9 domain authority have not yet started the eminent domain
10 process.
11 THE COURT: Right.
12 Is there anything in the record to show that you
13 sought assistance from the City or the department of the
14 city that had eminent domain authority to try to gain
15 access to these historic properties so you could do a
16 full evaluation?
17 MS. BENNETT: Well, your Honor, again, we believe
18 that the evaluation that our historic consultant
19 performed, was a full evaluation of properties.
20 THE COURT: Well, you do concede in your papers
21 that you weren't able to gain access to some of the
22 properties. So that, I mean, didn't you concede that it
23 wasn't a full evaluation, because you couldn't get in or
24 couldn't get on the property?

1 MS. BENNETT: I don't believe we conceded that it
2 wasn't a full evaluation. I believe that we conceded
3 that we couldn't get in.
4 But honestly, your Honor, in terms of assessing
5 whether a property is historic in nature, more often
6 than not it has to do with the age of the structure and
7 the exterior of the structure, both of which we could
8 determine without access to the structure.
9 THE COURT: What about, like, test pits or borings
10 or other investigations or artifacts? Things like that
11 you weren't able to do because you didn't have access to
12 the property, right?
13 MS. BENNETT: Not at that time, your Honor.
14 THE COURT: And you are going to do that in the
15 future, but isn't that after the period where there
16 could be public comment concerning this issue?
17 MS. BENNETT: Well, no, your Honor, because there
18 was still a public hearing on the Site Plan Review. So
19 there was still an opportunity for the public to comment
20 on that.
21 THE COURT: Well, has it been done at this point
22 then? Have you acquired title to those properties?
23 MS. BENNETT: MVHS has acquired title to all of the
24 properties within the hospital footprint voluntarily

1 without the use of eminent domain and is now undertaking
2 demolition and continuing consultation work,
3 remediation, test pits. They are in the process of
4 doing all of that.
5 THE COURT: All right.
6 Okay. You can continue.
7 MS. BENNETT: And I guess, your Honor, I would
8 submit that, you know, in terms of having those claims
9 reviewed as to whether or not we took an adequate look
10 at historic preservation issues, those all could have
11 been properly brought in a petition challenging the Site
12 Plan Review and raised at that time and addressed at
13 that time. At that time they may have been ripe,
14 because the City, again, may have imposed conditions as
15 to those historic properties that may have ameliorated
16 the harm caused. But they didn't give that an
17 opportunity to play out. So they filed prematurely.
18 The City then issued its decision and they did not
19 challenge that decision. So filing prematurely does not
20 cure the defect of timely challenging the decision that
21 did make all of this final and that did cause
22 potentially harm to them and that did allow MVHS to move
23 forward with the project.
24 THE COURT: When was the site plan approval issue?

1 MS. BENNETT: September 19th, your Honor. And
2 there was a 30-day limitations period that would have
3 expired on October 21st.
4 THE COURT: The 30 days runs from what? The filing
5 with the city clerk?
6 MS. BENNETT: Yes, which I believe occurred on
7 October 20th.
8 THE COURT: All right.
9 MS. BENNETT: So, obviously that's the difference
10 here, is there was still a decision to be made by the
11 planning board that could have ameliorated the harm.
12 And as noted by the Attorney General's Office, the
13 Planning Board Findings Statement is not even the final
14 step in the SEQRA process for the project. Every
15 involved agency also must prepare its own Findings
16 Statement prior to issuing any discretionary approvals,
17 and it's free to reach its own determination.
18 Here DASNY does not issue a SEQRA Findings
19 Statement or any discretionary approvals for the
20 project. So, in other words, in this case petitioners'
21 claimed harm could have been prevented or significantly
22 ameliorated by further administrative action.
23 We would submit that this situation is analogous to
24 that in the Guido case, which is cited in our brief. In

1 Guido the Planning Board made a SEQRA Findings Statement
2 that was similar to the SEQRA Findings Statement issued
3 by the City of Utica.
4 The petitioners filed a challenge to that SEQRA
5 Findings Statement. In that case, as in this case, the
6 Planning Board had not issued the necessary land use
7 approvals, such as the Site Plan Review, and the Third
8 Department held that the SEQRA findings were not ripe
9 for review under those facts.
10 Petitioners have attempted in their papers to evade
11 the ripeness requirement by asserting that their claims
12 against the City of Utica Planning Board and MVHS are
13 based on the City of Utica Planning Board's selection of
14 the downtown site as part of its SEQRA findings.
15 But petitioners' site selection claims, which was
16 not raised in the petition, is factually incorrect and
17 legally deficient.
18 The City of Utica Planning Board had no involvement
19 in the site selection process for the proposed health
20 care campus. The site selection decision was made by
21 the board of directors for MVHS. And MVHS is a private,
22 not-for-profit entity, and as such it is not subject to
23 SEQRA. It is this fact that makes the Town of Red Hook
24 case cited by petitioners inapplicable. Red Hook

1 involved siting decision by a public authority. That is
2 an agency that is subject to SEQRA. MVHS is not an
3 agency that is subject to SEQRA and its selection of the
4 downtown location is not an appealable decision.
5 Petitioners --
6 THE COURT: Let me just stop you there.
7 MS. BENNETT: Yes, your Honor.
8 THE COURT: Now, my understanding is this project
9 is going to cost, what was it, $600 million? And half
10 of it is going to be funded through a public grant, is
11 that right?
12 MS. BENNETT: I don't know what the final price tag
13 is at this point, your Honor. That is kind of a moving
14 number, but yes, there is a significant portion that's
15 coming from the State grant being issued by the
16 Department of Health.
17 THE COURT: All right. Now, SEQRA does require an
18 evaluation of alternatives, does it not?
19 MS. BENNETT: Yes. And that was done, your Honor.
20 THE COURT: All right. Where do I find that in the
21 Final Environmental Impact Statement? Where is there an
22 analysis of alternative site locations?
23 MS. BENNETT: I believe it's section two of the
24 Final Environmental Impact Statement. I would have to

1 confirm that, but I believe that is the correct section.
2 THE COURT: All right. So, you are saying that
3 there was an analysis in the Environmental Impact
4 Statement of alternative locations?
5 MS. BENNETT: Yes, your Honor.
6 THE COURT: All right.
7 MS. BENNETT: And when dealing with a private
8 applicant in terms of reviewing alternative locations,
9 SEQRA Law is very clear that in undertaking that
10 analysis, the consideration of those alternatives also
11 has to look at the site that best serves the goals and
12 objectives of the project response when dealing with
13 private applicants.
14 THE COURT: Right. But you agree that reasonable
15 alternatives do have to be considered under SEQRA?
16 MS. BENNETT: Yes. And they were, your Honor.
17 THE COURT: All right. Okay.
18 MS. BENNETT: Petitioners also attempt to claim
19 concrete injury based on the imminent acquisition of
20 properties through eminent domain and otherwise.
21 But here we don't have any imminent eminent domain
22 acquisition. No agency within the City of Utica has
23 taken any action at all to start any eminent domain
24 proceedings.

1 The fact that MVHS has negotiated with property
2 owners to voluntarily acquire the properties, is not an
3 agency action that's subject to challenge. Nor does the
4 voluntary acquisition of properties by MVHS make the
5 Planning Board's SEQRA action any more final.
6 It should also be noted, and I did note that the
7 Planning Board does not have eminent domain authority.
8 And at this point, I mean, I also agree with every
9 argument that was made by Miss Simon on behalf of the
10 State claims, so I won't go into those at this point.
11 THE COURT: Okay.
12 Miss Hartnett.
13 MS. HARTNETT: Your Honor, Attorney Bennett has
14 made basically every argument that I was going to make.
15 I would like to address one argument advanced by
16 petitioners.
17 To overcome our Motion to Dismiss they have to show
18 that they suffered an actual, concrete injury. And one
19 of the arguments that they are advancing to attempt to
20 show this injury is made by reference to a Planning
21 Board resolution made, I believe it was April 18th,
22 2019, in which the Planning Board accepted the SEQRA
23 findings or issued its SEQRA findings and authorized
24 urban and economic development staff to take whatever

1 steps are necessary to carry out this resolution. And
2 from that rather innocuous sentence, the petitioners
3 have made a logical leap and argued that this authorizes
4 the City of Utica to acquire properties or invoke its
5 eminent domain authority.
6 And we wrote in our papers that we disputed this
7 reading of the resolution. It reads a lot into the
8 resolution that isn't there. Clearly this sentence,
9 this clause to take whatever steps are necessary to take
10 to carry out this resolution, was really just a
11 ministerial catch all.
12 But in any event, a Planning Board resolution has
13 no binding authority and in no way authorizes or allows
14 the initiation of the use of condemnation by any City
15 agency. The only two condemning authorities under the
16 control of the City are the City of Utica Common Council
17 and the City of Utica Urban Renewal Agency. And I
18 understand that this is a big project. There has been a
19 lot of planning and it has been contemplated that if the
20 use of eminent domain was required, that the City of
21 Utica Urban Renewal Agency would be the likely
22 condemning authority for properties within the hospital
23 footprint.
24 However, the Urban Renewal Agency is a separate

1 public benefit corporation that has intertwined
2 operations with the City, but it has its own independent
3 board. The Planning Board can in no way bind the
4 actions of the Urban Renewal Agency. And the only way
5 the Urban Renewal Agency can acquire properties or begin
6 a condemnation proceeding, is by the resolution of its
7 own board.
8 And I believe that this argument was advanced
9 because it attempts to shoehorn the facts of this case
10 to be like -- to make the rule of Jones v Amicone apply.
11 But that case is distinguishable. In that case the city
12 council was acting as lead agency and was also the
13 condemning authority for a project to build a minor
14 league baseball stadium. And when that lead agency, the
15 city council, issued a Findings Statement, it also
16 committed the City to the use of condemnation for that
17 project.
18 This is not the case under our facts here, where
19 the Planning Board cannot bind another city agency, is
20 not the condemning authority.
21 So, I just wanted to address that, because I don't
22 think that these petitioners can show the requisite
23 injury.
24 I agree with Attorney Bennett that Guido versus

1 Ulster Town Board controls this case.
2 Was there any other questions, your Honor?
3 THE COURT: No. Thank you.
4 Mr. West.
5 MR. WEST: Thank you, your Honor.
6 I think I have to give you a little context for
7 this case if you don't mind, okay?
8 I have been involved with, I'm sure your Honor has
9 seen many NIMBY cases where you have adjoining land
10 owners proposing a project. That's not the case here.
11 We have the Landmark Society of Greater Utica is our
12 primary petitioner-plaintiff, because they are
13 not-for-profit, dedicated to historic preservation in
14 the City of Utica and the surrounding area, and they
15 believe very strongly, as is evidenced in their
16 affidavits, that what was done here is fundamentally
17 wrong to have sidestepped the proper review of not only
18 the historic structures, but the archeological
19 structures.
20 Mr. Bottini, Joe Bottini, was the county historian
21 when this litigation was commenced. He has been fired
22 since then, but this is not just neighbors wanting to
23 oppose development in their neighborhood. This is
24 people who have serious beliefs that what happened here

1 is fundamentally wrong.
2 And let me just characterize what we are
3 challenging, because I think there has been some
4 misconception of what we are challenging.
5 There is no question under the law that a project
6 of this magnitude has to go through the SEQRA process in
7 order to get approved and it has to follow each step of
8 the process properly. And if they stub their toe or
9 miss something or avoid something, it's the duty of this
10 Court to send them back to square one to start over.
11 So, what did they do? They embarked upon a
12 multi-year process. They produced thousands of pages of
13 a Draft Environmental Impact Statement. And then they
14 ultimately came up with SEQRA findings that were adopted
15 in April of this year by the Planning Board. The City
16 Planning Board was chosen as the lead agency. They went
17 through the coordination process, et cetera. We are not
18 challenging that. What we are challenging, your Honor,
19 are substantial defects in the FEIS that was produced
20 for this project, because it does not consider the
21 historic and archeological impacts. It fails to
22 consider cumulative impacts. And most importantly, it
23 fails to evaluate alternatives.
24 Now, it is the cornerstone of SEQRA, if you are

1 required to go through this process, that it is going to
2 be a public process, just like your Honor noted in some
3 of your questions about whether or not the public would
4 have access to the SEQRA process that's happening under
5 the lore or not. And impacts are supposed to be
6 properly identified before an FEIS is accepted and
7 before findings are accepted.
8 And in addition to requiring an open public process
9 that includes all of the elements, all right, it has to
10 provide appropriate mitigation.
11 All right. So, why are we challenging this? Okay.
12 What did they do? They decided, based upon this
13 putative premise, that because they are private, they
14 didn't have access to these facilities, that they would
15 avoid historic and archeological review entirely. They
16 never made any application. I submit the City is a city
17 and it could have one of its agencies make an
18 application under 404 of the Eminent Domain Procedure
19 Law, to go in and do all the analysis, go inside those
20 properties and evaluate the historic significance, and
21 also to look at the archy issues, which your Honor noted
22 requires test pits and the like.
23 Now, let me just step back one step further and
24 talk about the significance of this area. They talk

1 about it as a blighted area that should be torn down as
2 part of urban renewal. We gave up on that concept
3 decades ago of just tearing down historic structures
4 without a proper evaluation, without the archeological
5 evaluation.
6 Utica was once known as the furnace capital of the
7 world, okay? This section of Utica --
8 THE COURT: The what capital?
9 MR. WEST: The furnace. The furnace. I didn't
10 know this until I got into this case. It's actually
11 kind of fascinating. It was the place where these
12 furnaces, these boilers were being built, where
13 technology was innovating as part of the industrial
14 revolution. In fact, the boilermaker history of Utica
15 is so famous, that one of the most famous road running
16 races in Upstate New York, The Boilermaker, is named
17 after. And that's what our clients are seeking not only
18 to preserve, but to have processed properly in an open
19 and public forum.
20 So, getting back to SEQRA. Had they done their job
21 properly, okay, they would have made application. They
22 would have gone or they would have bought the
23 properties. They would have evaluated them properly the
24 way the historic parks and historic preservation

1 regulations require, and they would have included a full
2 evaluation of those impacts, what the potential impacts
3 are from this project, which is raising and destruction,
4 and what they would do to preserve those impacts, called
5 mitigation.
6 Now, unfortunately I have been practicing over 40
7 years under environmental issues, including SEQRA. And
8 you know, for better or for worse, as they say, I have
9 been involved with hundreds of projects where New York
10 State DEC or any other lead agency requires us to
11 complete our consultation process with SHPO, the State
12 Historic Preservation Office, before the project can
13 proceed, and include those impacts in your DEIS, and
14 include your proposed mitigation, whatever it is.
15 Now, it can vary. Sometimes for Dormitory
16 Authority building, for example, I think they preserve
17 some of the artifacts and said the building itself would
18 preserve them. It's a different resolution each time.
19 But what happens under SEQRA that didn't happen here is
20 they didn't include that evaluation in their EIS. It
21 wasn't being public so these people could comment on it.
22 And the process is going to continue after SEQRA has
23 been finalized, between buddies. They said they are
24 good friends. They said DASNY and Parks are good

1 friends and they will get through the process
2 appropriately.
3 Our clients don't have any opportunity to see that
4 process. They don't have any opportunity to comment on
5 that process.
6 Now, let's talk about ripeness. Because we are
7 challenging the FEIS, okay, which did confirm the site
8 selection, I don't care if MVHS selected it in the first
9 instance. The Planning Board, when it issued its
10 findings and accepted the DEIS as an FEIS, concluded
11 that the downtown site was preferable, without a full
12 evaluation of cumulative impacts from other adjacent
13 traffic generating impacts, and without this component
14 of the historic and archeological impacts.
15 Now, they said that they looked at alternatives.
16 In my experience, your Honor, it's nothing short of
17 pathetic what they did for an alternatives analysis.
18 And one thing that has not happened, because we really
19 haven't had a return date on the merits, we have had a
20 motion to dismiss, the agencies have not been required
21 to submit their return under Article 78.
22 By the way, we don't have a preference for whether
23 this is a declaratory judgment or Article 78 proceeding.
24 But if the State wants it to be an Article 78

1 proceeding, somebody has to produce to this Court the
2 return. And you're probably going to hate me for saying
3 that, because you are going to get thousands of pages of
4 documents if that's what occurs.
5 THE COURT: I don't have the FEIS.
6 MR. WEST: You should.
7 THE COURT: I have the Findings Statements, but I
8 don't have the FEIS. That has not been provided to me.
9 MR. WEST: Procedurally, your Honor, we brought
10 this action. They moved to dismiss. So we are not at
11 the point in the process -- in my experience, the way
12 this works in these types of state cases and local
13 cases, is when you get the return date of the
14 proceeding, they are required under Article 78 to
15 produce the return. They should be required to produce
16 the return, which is the FEIS, and all of the public
17 comments.
18 Do you want to say something, Counsel?
19 MS. SIMON: May I?
20 THE COURT: Yes.
21 MS. SIMON: No, that's not accurate.
22 You have the option in an Article 78 proceeding to
23 move to dismiss at the return date or to answer.
24 If you have grounds for dismissal, you move to

1 dismiss.
2 If the Court determines that it would not be
3 dismissed, then the CPLR and Article 78 gives you the
4 opportunity to answer and the Court will set a later
5 date to do so. That's when you provide the full record.
6 So yes, in an Article 78 we provide a full record
7 of what the State considered when it made its
8 determination, but that only comes if you do an answer.
9 THE COURT: All right.
10 MR. WEST: So, your Honor, you know, just getting
11 back to the ripeness issue, you're 100 percent correct.
12 It has to be decided on its own facts and circumstances.
13 There is nothing that's going to happen. The Planning
14 Board approval didn't reject this project. Nothing is
15 going to happen in the future that's going to take away
16 from the fact that as of the time when the FEIS was
17 accepted by the Planning Board and when their findings
18 were issued, the location of this project was set in
19 stone in downtown Utica, and they did not evaluate their
20 own property, the St. Luke's Campus, which is only two
21 to three miles away, that would have been eligible for
22 the same funding from the State. They didn't evaluate
23 it because there was no way -- they had nothing to
24 compare it to. They didn't know the archy or historic

1 significance of the downtown site.
2 The St. Luke's Campus has none of these problems.
3 They have built buildings up there. It's been through
4 those types of reviews without any problem.
5 THE COURT: Let me just ask you.
6 What do I have in front of me to show whether the
7 respondent of the lead agency took a hard look at
8 alternative sites?
9 MR. WEST: I think you need the FEIS in front of
10 you, your Honor.
11 THE COURT: But don't I need that to address the --
12 do I need that to address the ripeness issue?
13 MS. BENNETT: No, your Honor.
14 MS. HARTNETT: No, you don't.
15 THE COURT: All right.
16 Let me just follow up on that, why you say no, that
17 I don't need that to address the ripeness issue.
18 MS. BENNETT: Because, your Honor, the ripeness
19 issue has to do with the fact that there were approvals
20 that still had to be issued by the City of Utica and
21 that those approvals could have addressed all of the
22 issues that Mr. West has raised and talked about. And
23 to the extent that those subsequent approvals did not
24 address all of the arguments raised by Mr. West, then he

1 could have filed his petition then.
2 And Mr. West wants to talk a lot about process.
3 THE COURT: Yes.
4 MS. BENNETT: And there is a process.
5 THE COURT: Let me just ask you this though. Do
6 you disagree that the location was set in stone as of
7 the time that the FEIS was accepted?
8 MS. HARTNETT: I absolutely disagree with that,
9 your Honor.
10 THE COURT: All right. What other location was
11 being considered after that point?
12 MS. HARTNETT: I think if you want to know why it
13 wasn't set in stone, you have to look forward to the
14 additional processes that the Planning Board would need
15 to go through to actually allow the project to move
16 forward on that site.
17 The Site Plan Review process could have completely
18 tanked the project and nothing would have been built
19 down there. If the project didn't meet the Site Plan
20 Review standards and there was no way to meet those
21 standards and still have a feasible downtown hospital
22 project, then that hospital could not have been built
23 downtown and, therefore, at the time the FEIS was
24 issued, that location was not set in stone.

1 THE COURT: All right.

2 Mr. West, why do you say that that location was set

3 in stone as of the time of the FEIS?

4 MR. WEST: It's very simple, your Honor.

5 There is no subsequent decision making from the

6 City that was going to change that. The FEIS, which was

7 adopted by the Planning Board, is the same agency that

8 does the Site Plan Review. Site Plan Review, as we all

9 know, is a process that looks at how you are going to

10 orient buildings, how pretty it's going to look, what

11 the pedestrian access is going to be, to make sure that

12 you conform to the extent possible with city code

13 standards.

14 It's not a question of rejecting a project that

15 they already blessed four months or in April of this

16 year, okay? There is nothing in the Planning Board

17 process for Site Plan Review that is going to change

18 anything. And, in fact, it hasn't changed it, your

19 Honor. And so I think that's just a strong man

20 argument. Ripeness occurred when they adopted the FEIS

21 and when they issued their findings.

22 THE COURT: Let me just ask you. What's the real

23 harm that your clients suffered at that time that might

24 have been avoided --

1 Let me ask it this way. What real harm to your
2 clients might be avoided by judicial review at the time
3 of the acceptance of the FEIS, as opposed to at a later
4 stage?
5 MR. WEST: Your Honor, it's very simple. Once they
6 finalized the SEQRA process with the FEIS and their own
7 findings, they closed the door on the public process.
8 Maybe there is a public process relative to how
9 pretty the site looks and how the buildings are oriented
10 and what their setbacks are under Site Plan Review, but
11 that has nothing to do with the fundamental issues in
12 this case.
13 These people were deprived of an opportunity to
14 have historic structures and archeological artifacts
15 properly evaluated and properly identified with a proper
16 plan of mitigation included as part of the SEQRA
17 process. That's what happens everyplace else in the
18 state, except for here, all right? And that was the
19 harm that occurred.
20 There is nothing in the Site Plan Review process
21 that says that they can change the location of the
22 project after they have applied for it. And in fact,
23 your Honor, we sued the Planning Board, okay, as part of
24 this case. Our papers are before the Planning Board,

1 not just before their attorney.
2 And so if those are our public comments, in
3 essence, on the entire process, did they do anything in
4 the Planning Board Site Plan Approval Process to react
5 to our papers? No. They just plotted ahead, like they
6 have done all along.
7 So the harm, which you are proper to ask, was the
8 process was cut short. There was no evaluation of
9 cumulative impacts or impacts to archy and historic
10 structures that infected the alternatives analysis.
11 Because if you don't know what the impacts are, how can
12 you compare the impacts of the downtown site to the St.
13 Luke's Campus, two to three miles away, which MVHS owns,
14 and which has none of those potential impacts.
15 All right. They couldn't do it. So they just cut
16 the process out. What's happened now? Now it's behind
17 closed doors. They may be consulting. We are not
18 asking for consultation to occur. We are asking for
19 consultation to be completed before the EIS is finalized
20 and before they render their findings. At that point in
21 time there is no longer this procedural hole, this
22 procedural defect in the SEQRA process.
23 Let me just say, we have addressed Glick. Glick is
24 not a precedent here, because in Glick the lore said it

1 wasn't final. I don't see any language in the lore here
2 that says it's not final, as was represented in this
3 Court. It's completely different.
4 And if you look at the SEQRA findings adopted by
5 DASNY, it's clear that they rely on the SEQRA findings,
6 they rely on the lore. They, in fact, confirm the lore.
7 They indicate that they will deal with that in the
8 future, the very harm that we're complaining about, that
9 we were denied the opportunity to have occur in the
10 public process.
11 Let me just see if there is anything else here I
12 would like to address from counselors' arguments. I
13 know I have a number of notes, but I probably covered
14 most of it.
15 This argument by the State that there is no bonds,
16 therefore there is no harm, that misses the boat
17 entirely. The harm occurred when the FEIS was issued.
18 The State felt so compelled to follow the FEIS, that if
19 you look at their findings, it's replete. The lead
20 agency determined. The lead agency said. The lead
21 agency determined. In fact, it's very carefully worded
22 so that they are not making any of their own
23 determinations on these issues. That shows how final
24 the findings were and the EIS process was when it was

1 completed in April.
2 Just give me a minute, your Honor.
3 I think your Honor hit the nail on the head when
4 you said that there was no public comment on when these
5 test pits are going to occur and when these historic
6 evaluations are going to occur, because it's going to be
7 a private consultation process with no opportunity for
8 public review.
9 Now, if I could just close by addressing the
10 merits.
11 We have not submitted a brief on the merits because
12 of the Motions to Dismiss. And in the ordinary course I
13 would expect the Court to rule on the Motions to Dismiss
14 and give the parties an opportunity to address the
15 merits.
16 If you want us to address the merits, we are happy
17 to do so. I think the merits are very simple. I have
18 covered them in Court today. But we would like an
19 opportunity to actually submit on that.
20 THE COURT: Well, is there anything regarding the
21 merits that you think I need to take into consideration
22 in ruling on the Motions to Dismiss?
23 MR. WEST: Well, I think that the starting point
24 for your consideration is the Verified Petition and

1 Complaint, which on a Motion to Dismiss has to be taken
2 as true, as your Honor knows. And we have detailed all
3 of our factual and legal arguments in there.
4 So I think for the purposes of ruling on these
5 ripeness issues and lack of harm and now this new
6 argument that we had to go participate in the Planning
7 Board process, which I'm quite confident our clients
8 did. I'm quite confident that they opposed the project.
9 To me, those do not detract from the merits as pleaded
10 in our case, which is very simple. They took a gaping
11 hole out of SEQRA by bypassing the review of the
12 historic structures and archeological structures. They
13 failed to consider cumulative impacts in their traffic
14 analysis of adjacent public centers that have huge
15 events. They weren't considered as part of the FEIS.
16 And the alternatives analysis, as I said, I can't come
17 up with a better term than to say it's pathetic. It's a
18 couple of paragraphs to say that they did it to check
19 the box, but there is no meaningful comparison, nor
20 could they do a meaningful comparison, because they
21 didn't have important information before them.
22 THE COURT: All right.
23 Anyone have anything further they would like to
24 add?

1 MS. HARTNETT: Your Honor, first of all, there is a
2 few things I would like to address that Mr. West said.
3 I will stand up. I'm sorry.
4 First of all, I believe that there was a briefing
5 on the merits, as petitioner submitted a Memorandum of
6 Law on May 9th with their petition and I don't --
7 MR. WEST: I stand corrected about that, your
8 Honor. We do have that submission. I'm sorry.
9 Thank you.
10 MS. HARTNETT: We did not.
11 THE COURT: You have not answered the petition.
12 MS. HARTNETT: We have not answered, because we
13 moved to dismiss.
14 The other thing I would like to address is the idea
15 that by filing litigation with this Court in Article 78,
16 that they have somehow participated in the Planning
17 Board's Site Plan Review process. And I don't think
18 it's reasonable to expect a Planning Board to
19 incorporate pending litigation into its decision making
20 process, you know, an issue related to the same
21 proceeding.
22 Finally, everything Mr. West is arguing goes
23 against the standard for finality that has been
24 expressed by the Third Department in Guido, and the

1 Court of Appeals in Stop the Barge, the Court of Appeals
2 in Walton, and the Court of Appeals in Essex versus
3 Zagata.
4 A final EIS is not a final action sufficient for
5 the review they are seeking if that same agency has
6 additional decisions in its purview that could
7 ultimately ameliorate or mitigate the circumstances that
8 are challenged or aggrieved in an Article 78 petition.
9 So, that's all from me, your Honor. Thank you.
10 MS. BENNETT: And, your Honor, Mr. West spent a lot
11 of time, I think, arguing the merits, you know, to which
12 there is no record before the Court and which there does
13 not need to be a record before the Court to make a
14 determination with respect to ripeness.
15 Mr. West wants to discuss proper process, but as
16 Miss Hartnett noted, there is also a process for
17 commencing legal proceedings in these types of cases and
18 he hasn't followed it.
19 Fundamental prerequisite is ripeness, that the harm
20 is final. Here all of the SEQRA claims that Mr. West
21 raises could have been ameliorated as part of the Site
22 Plan Review process. That is not a rubber stamp. It
23 has an entirely different set of criteria. It's
24 discretionary with the City. It's not a rubber stamp as

1 it was presented.

2 If those concerns were not ameliorated as part of
3 the Site Plan Review, then the process requires a
4 challenge to be filed within 30 days, and then those
5 SEQRA claims that he raises are brought in that lawsuit.
6 That's when the harm occurs. That's when all of those
7 SEQRA claims would have been properly raised.

8 That was not done in this case. The fact that he
9 filed prematurely doesn't cure that. He had to file to
10 challenge the site plan decision made by the Planning
11 Board within 30 days. He didn't do it. There is no
12 look ahead.

13 The facts of this ripeness motion have to be based
14 on the facts as they existed at the time the petition
15 was filed. At that time there was no final decision.
16 He doesn't get to jump ahead. We don't get to lose a
17 statute of limitations defense because he filed
18 prematurely. So that would not be proper here.

19 With respect to the acquisition of properties,
20 which I think is causing some confusion here, I really
21 just feel the need to say though that petitioners are
22 the people who have denied MVHS access to the
23 properties, and now they are using that as an argument
24 against MVHS, which seems a little disingenuous.

1 Second. As Mr. West should know with his 40 years'
2 experience, private developers typically don't acquire
3 property to receiving approvals. Deals are almost
4 always made contingent on receiving SEQRA approvals and
5 final approvals from whatever municipal agency has to
6 issue those final approvals.
7 So the process that's gone on here is no different
8 than the process any other private developer in any
9 other municipality across the entire State of New York
10 goes through with respect to obtaining project
11 approvals.
12 THE COURT: So, do you think the issue of whether
13 this is a private or a public development is outcome
14 determinative?
15 MS. BENNETT: I'm sorry, I guess I don't
16 understand.
17 THE COURT: Well, you said your client's a private
18 developer. Do you think the question of whether it's a
19 private or public development is outcome determinative?
20 MS. BENNETT: Well, to the extent that if it was a
21 public agency that was making a decision with respect to
22 site selection or site location, that public agency, you
23 know, would have had to have taken certain steps before
24 selecting the site.

1 THE COURT: What steps would those be?
2 MS. BENNETT: So, a public agency before it takes
3 an action that sets it to a definitive course of future
4 action, does have to comply with SEQRA. So that would
5 be the Red Hook case where you had a public authority
6 that was looking to locate a site and it had to
7 undertake SEQRA before it ultimately selected its site.
8 THE COURT: When you say undertake SEQRA, obviously
9 SEQRA hadn't been undertaken here. But you are talking
10 about there had to be a SEQRA analysis of alternate
11 sites because it was a public agency?
12 MS. BENNETT: Yes, your Honor. And that agency
13 would have been held to a different standard with
14 respect to its alternatives analysis.
15 THE COURT: All right.
16 And despite the fact that your client has received
17 or is receiving a public grant of $300 million, you
18 think you still retain the private developer analysis
19 for these purposes?
20 MS. BENNETT: Yes, your Honor. With respect to
21 site location, yes, because the grant did not say you
22 have to build at X site. That was a decision that was
23 made by MVHS, which is a private entity.
24 THE COURT: All right.

1 So, if it were a public agency, then you are saying
2 the procedure that was followed here was improper?
3 MS. BENNETT: I'm not saying that, your Honor. I'm
4 saying it would have to be based on the facts of that
5 case in particular. It's just a very different
6 analysis.
7 THE COURT: All right.
8 MS. BENNETT: And so I don't think it's analogous
9 and I don't think you can, you know, automatically draw
10 one conclusion or the other.
11 THE COURT: All right.
12 MS. SIMON: May I?
13 THE COURT: Yes.
14 MS. SIMON: Your Honor, at least in terms of a
15 response to that last point.
16 THE COURT: Yes.
17 MS. SIMON: SEQRA applies to state and local
18 government actions, not private. So any action -- if
19 you are going to issue a permit for something or you are
20 going to issue funding, those are actions subject to
21 SEQRA of state or local agencies.
22 Interestingly, 14.09 of the Parks, Recreation and
23 Historic Preservation Law, only applies to State
24 agencies, not local, not private entities. So the only

1 entity here in this case that had to consult, was
2 Dormitory Authority, and of course, as we have said,
3 they have.
4 I wanted to respond to one point opposing counsel
5 made on the Letter of Resolution. It does on its face
6 say that consultation will be ongoing.
7 The Letter of Resolution and the whole process of
8 14.09 does not command an outcome. There is no outcome
9 required. They just have to consult. So technically
10 Dormitory Authority after consulting could walk away,
11 but they didn't. They signed a Letter of Resolution to
12 try and work out and mitigate adverse impacts.
13 Did you have a question, your Honor?
14 THE COURT: Well, here's a case that I think has
15 some language that may be relevant here. So I just want
16 to raise this with counsel, let everybody address it if
17 they wish.
18 So this is Horn versus International Business
19 Machines Corp., 110 AD2d 87. It's a Second Department
20 case. And at page 95 I'm just going to read a section
21 here. In determining whether the discussion contained
22 in an EIS regarding alternatives to the proposed action,
23 especially the matter of alternative locations, is
24 sufficient under SEQRA guidelines, a crucial factor to

1 consider is whether the applicant is a private developer
2 or a governmental agency. And I think that's been
3 argued here today.
4 It goes on to say the importance of this
5 distinction lies in the fact that governmental agencies
6 possess the power of eminent domain and hence, have a
7 much broader range of alternative sites available to
8 them, than does a private developer. Private developers
9 are limited in the choice of alternative sites. Their
10 selection will be dictated by their own economic
11 resources, by the prevailing trends in the real estate
12 market, and very simply, by what suitable sites are
13 actually available for acquisition.
14 So, here the developer actually owns an alternate
15 site, right? St. Luke's is owned by your client, owned
16 or controlled by your client?
17 MS. BENNETT: Yes, your Honor. We own or control
18 St. Luke's and that was considered as part of the
19 analysis, but it was ruled that it's not feasible to
20 construct at that location. And that would be part of
21 the record that would be submitted if the Court were to
22 get to the merits of the case.
23 THE COURT: Right, but that's not before me at this
24 point on the motion to dismiss. I just don't have it.

1 MS. BENNETT: That is correct, your Honor.
2 THE COURT: All right. So for purposes of the
3 Motion to Dismiss, I have got to accept as true the
4 allegations in the petition.
5 MS. BENNETT: Yes, your Honor.
6 THE COURT: All right.
7 Anything further?
8 MR. WEST: Just briefly respond, your Honor. Just
9 a couple of quick points.
10 DASNY concedes on page 5 of its findings that
11 eminent domain is available to the City, okay? It's
12 just a data point for you.
13 THE COURT: Who concedes that?
14 MR. WEST: The Dormitory Authority.
15 THE COURT: All right.
16 MR. WEST: In the findings that they filed in
17 August, page 5, right in the middle of the paragraph.
18 It is possible that some properties may need to be
19 acquired by eminent domain, quote unquote.
20 And I think your Honor hit the nail on the head
21 again. It doesn't matter whether you looked at the
22 private or public analysis, because they own the
23 alternative site that should have been properly
24 evaluated and selected, which is St. Luke's.

1 And finally, your Honor, we are in the unusual
2 position of being told we are too early and we are too
3 late, okay, and that's incongruous and it's for the
4 Court to resolve, but I urge you to reject that just on
5 its face, because you can't be too early and too late at
6 the same time.
7 THE COURT: All right.
8 Anything further, anyone?
9 MS. SIMON: Just one thing, your Honor.
10 Because we are here on ripeness, judicial
11 intervention is not normally, in all the case law,
12 allowed until the State action is final, and in the case
13 of local government, the local action is silent.
14 And this ripeness doctrine prevents piecemeal
15 review at all different stages. The greatest body of
16 case law says you don't do that. You don't decide if
17 you like the EIS, and then if you like the Findings
18 Statement, and then if you like the other actions that
19 take place before the final determination. That is what
20 the bulk of the case law says.
21 So, they are up against a good body of case law
22 that says it's not ripe until each agency, in the case
23 of an agency, takes its final action, to avoid piecemeal
24 review.

1 THE COURT: Right. But what about the alleged harm
2 that would occur to petitioners by not having a full
3 evaluation of, I think it was the 12 historic
4 properties, at the time of the FEIS? Isn't that alleged
5 harm something that I have got to take into
6 consideration here?
7 MS. SIMON: The harm is, must be concrete.
8 What goes into a document like the Letter of
9 Resolution or even an FEIS, is not concrete harm. It's
10 not concrete until something happens, until a final
11 determination is made, and in the case of this
12 development, some of these historic buildings are coming
13 down.
14 However, I would point out, you know, if the Court
15 is going to accept the picture that was submitted of a
16 building that came down, I'm told that's not one of the
17 historic buildings. Just so the Court knows there won't
18 be that information in our response.
19 THE COURT: Okay.
20 MS. BENNETT: Your Honor, to that point in terms of
21 having that concern addressed. Again, going back to the
22 process, the process is that the harm is concrete when
23 there is a final decision. The City of Utica Planning
24 Board did not issue a final decision until

1 September 19th. At that point they could have filed a
2 petition, raising of all of these claims that would have
3 been ripe. They did not follow the process.
4 THE COURT: All right. Anything further from
5 anyone?
6 MR. WEST: Just thank you, your Honor. It's
7 obvious that you took time to prepare for this. You
8 gave us plenty of time and we really appreciate the
9 accommodation from the Court.
10 MS. SIMON: Yes. Thank you, your Honor.
11 MS. BENNETT: Yes. Thank you, your Honor.
12 THE COURT: And you would like a week to submit a
13 reply to the affirmation that was submitted today?
14 MS. BENNETT: Yes, your Honor.
15 THE COURT: Thank you.
16 MS. BENNETT: Thank you.
17 (The proceedings were concluded.)
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4 C E R T I F I C A T I O N
5
6 I, Tracie Pamela Hilton, C.S.R, R.P.R., a Senior
7 Court Reporter for the Unified Court System, Third Judicial
8 District of the State of New York, do hereby certify that I
9 attended and reported the foregoing proceedings; that it is
10 a true and accurate transcript of the proceedings had therein
11 to the best of my knowledge and ability.
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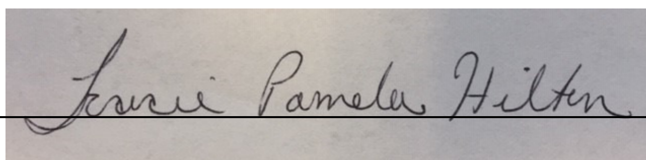

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18 Tracie Pamela Hilton
Certified Shorthand Reporter
19 Registered Professional Reporter
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Dated: November 13, 2019
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