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

Assigned Judge:
Hon. Michael Mackey,
J.S.C.

RESPONDENT MOHAWK VALLEY HEALTH SYSTEM'S MEMORANDUM OF LAW IN OPPOSITION TO THE AMENDED VERIFIED PETITION

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PRELIMINARY STATEMENT

Respondent Mohawk Valley Health System ("MVHS") respectfully submits this Memorandum of Law in opposition to the Amended Verified Petition ("Petition").

MVHS is attempting to build a hospital in downtown Utica, New York. The proposed Integrated Health Campus (IHC) includes a 670,000± sf hospital, central utility plant, parking facilities (one municipal parking garage and multiple surface lots), medical office building (by private developer), campus grounds, utility/pedestrian bridge (over Columbia Street) and helipad (the "Project"). Affidavit of Steven M. Eckler sworn to on February 13, 2020 ("Eckler Aff."), ¶¶ 7-23. The Project will provide greater access to a state -of-the-art healthcare facility to residents of the City of Utica, Oneida County and the region, including populations of refugees and low-income individuals, while at the same time serving as a catalyst for economic growth in downtown Utica and enhancing downtown revitalization efforts. Id.; Affidavit of Robert Scholefield sworn to on February 13, 2020 ("Scholefield Aff."), ¶¶ 17-19.

Petitioners in this proceeding oppose MVHS's proposal to construct the IHC and are challenging the Final Environmental Impact Statement ("FEIS") issued by the City of Utica Planning Board ("Planning Board") in connection with its review under the State Environmental Quality Review Act ("SEQRA"). Petitioners have commenced this Article 78 proceeding in a thinly veiled attempt to convince the Court to second-guess the thorough and fully compliant environmental review process undertaken by the City of Utica Planning Board.

Despite Petitioners' blustering about preserving what they have dubbed the "Columbia-LaFayette Neighborhood," Petitioners never even attempted to obtain preliminary injunctive relief to preserve the status quo and prevent construction from commencing or continuing during the pendency of the litigation. Since the so called "neighborhood" and many of the resources or

structures that Petitioners sought to protect through their SEQRA claims no longer exist, Petitioners cannot maintain that their claims are anything short of moot, especially when the work has been undertaken with properly issued demolition permits and in accordance with site plan approval that this Court determined was not challengeable. The substantially completed site preparation work is impossible to undo, and the hardship that would result to Respondent MVHS is especially compelling in light of the importance of the Project to the community-at-large - namely by providing healthcare services to underserved populations, including Medicaid enrollees and uninsured individuals in the City, serving the largest and most diverse population in Oneida County, and catalyzing economic revitalization of blighted downtown Utica. Scholefield Aff., ¶18.

Petitioners seek judicial review of what they claim to be Respondents' "short-circuiting" of statutory processes under SEQRA and its implementing regulations. The third, fourth and fifth claims which remain in the Petition following the Court's Decision and Order entered December 26, 2019, seek a determination that the FEIS issued by the Planning Board is defective because it deferred the assessment of archeological/historic impacts, failed to adequately consider Cumulative Impacts on traffic, and failed to evaluate viable alternative sites in detail. However, as set forth below, the record demonstrates that the Planning Board took the required "hard look" at the potential impact on archeological and historic resources, the Cumulative Impacts on traffic and viable alternative sites. Even if the Petitioners' claims were not time-barred because they failed to timely challenge Final Site Plan Approval, and were not moot, their SEQRA claims are without merit and the Petition should be denied.

FACTUAL BACKGROUND

The relevant factual background is set forth in the Administrative Record and the accompanying affidavits of Steven Eckler, Robert Scholefield, Eric Lints and Kathleen Bennett, Esq., which are incorporated by reference. As detailed therein, on February 2, 2018, MVHS submitted an application to the Oneida County Local Development Corporation (OCLDC) requesting certain financial assistance related to the Project. The MVHS application to OCLDC included Part 1 of the full Environmental Assessment Form (EAF), pursuant to the New York State Environmental Quality Review Act (SEQRA). R. 1; Affirmation of Kathleen Bennett ("Bennett Aff.") ¶¶ 5-6.

On February 2, 2018, based on its review of the EAF, the OCLDC determined the Project to be a Type I action under SEQRA, thereby requiring establishment of a Lead Agency that would conduct a coordinated review. However, the OCLDC felt that it had limited jurisdiction over the Project and opted not to act as Lead Agent. Eckler Aff., ¶¶ 24-26.

The full EAF submitted by MVHS to OCLDC identified the City of Utica Planning Board (Planning Board), which must issue site plan approval for the Project, as an Involved Agency making it eligible to act as the Lead Agency. R. 28; Bennett Aff., ¶ 8.

Given the professional planning staff at its disposal and the knowledge base required to properly conduct coordinated review for the Project, OCLDC expressed a desire for the Planning Board to act as Lead Agency. R.1; Bennett Aff. ¶ 9. At the February 22, 2018 Meeting, the Planning Board declared its intent to serve as Lead Agency and sent notice of that intention to all other involved and interested agencies. R. 121; Scholefield Aff., ¶ 20. After providing additional time for objections and having received no objections, on May 7, 2018, the Planning Board

declared itself Lead Agency for the purpose of undertaking a coordinated environmental review process pursuant to SEQRA. (R. 202-203). Eckler Aff. ¶ 28.

The scoping process identifies potential environmental impacts of an action which should be addressed in a DEIS. Eckler Aff., ¶ 29. On May 17, 2018, MVHS submitted a draft scoping document to focus the draft environmental impact statement on the relevant potentially significant adverse impacts and to eliminate consideration of those impacts that are irrelevant or nonsignificant. R. 235-262; Scholefield Aff., ¶ 22; Bennett Aff., ¶ 12. The scoping document is described fully in the affidavit of Steven Eckler (¶¶ 29-44) as are the scoping of historic impacts, Cumulative Impacts, and alternative sites. (¶¶ 44-70); R. 240-262. The Planning Board held a public scoping hearing on June 7, 2018, accepted written comments on the draft scoping document until June 20, 2018 (including those of Petitioners R. 505), and adopted a final scoping document on July 19, 2018. Scholefield Aff., ¶¶ 23-24. R. 278-385.

MVHS submitted a draft environmental impact statement (DEIS) to the Planning Board on October 26, 2018. R. 987; Scholefield Aff. ¶ 25; Bennett Aff., ¶ 15. At a regular meeting of the Planning Board held on November 15, 2018, the City of Utica Economic and Urban Development staff and the Board members discussed the scope and content of the DEIS using the final scoping document and the standards contained in Section 617.9 of the Regulations to pass a resolution accepting the DEIS, dated October 2018, as adequate with respect to its scope and content for the purpose of commencing public review. R. 984-4514; Eckler Aff. ¶ 73.

The Planning Board held a public hearing on the DEIS, pursuant to 6 NYCRR 617.8(f), on December 6, 2018, at 5:00 p.m. at the New York State Office Building, 207 Genesee St., Utica, NY, and accepted written public comments until December 27, 2018. R. 4522-4579; Scholefield Aff., ¶ 27.

Based on the comments received from the public, at the request of the Planning Board, MVHS's environmental and engineering consultants prepared a Final Environmental Impact Statement ("FEIS"), dated March 2019 in accordance with the Regulations for review by the Board, acting as SEQRA Lead Agency for the Project. R. 4587. At its regular meeting on March 21, 2019, the Planning Board, acting as the SEQRA Lead Agency for the Project resolved to accept the FEIS as accurate and adequate with respect to its scope and content pursuant to the standards contained in Section 617.9(b)(8) of the Regulations. R. 4580; Scholefield Aff. ¶ 29.

Notice of the Planning Board's acceptance of the FEIS was published in the Environmental Notice Bulletin and appears on the City of Utica website. Bennett Aff., ¶ 20. At its regular meeting on April 18, 2019, the Planning Board, acting as the SEQRA Lead Agency for the Project resolved to issue a written findings statement that found the Project in the downtown location as proposed 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. R. 5606-5675; Scholefield Aff., ¶ 30; Bennett Aff. ¶ 20.

The SEQRA findings statement is a written document that is prepared following the acceptance of a final EIS that declares all SEQRA requirements for making decisions on an action have been met. Bennett Aff. ¶ 22. Specifically, a positive findings statement, such as that issued by the Planning Board, means only that the Project can be approved, not that it actually will be approved. Although issuance of the SEQRA findings statement concluded the environmental review process for the Planning Board, it was not the final action for the Planning Board, which still had to consider a site plan application for the Project. Id., ¶ 23.

Site plan approval had not yet occurred when, on May 8, 2019, Petitioners filed a hybrid petition/action claiming that the Letter of Resolution ("LOR") and Final Environmental Impact Statement ("FEIS") were defective. On June 12, 2019, MVHS moved to dismiss the Petition on ripeness grounds because the LOR and FEIS were not final determinations and, therefore, not subject to review under CPLR Article 78. Bennett Aff., ¶ 24.

On September 19, 2019, the City of Utica issued site plan approval for the project and filed that resolution with the City Clerk on September 20, 2019. Scholefield Aff. ¶ 32; Bennett Aff. ¶ 25. Although Petitioners could have sought leave to amend the Petition at that time to challenge Final Site Plan Approval, they failed to do so within the 30-day statute of limitations under General City Law Section 81-c.

The Court held oral argument on the Respondents' motions to dismiss on October 31, 2019. On November 4, 2019, Petitioners filed without leave an "Amended Verified Petition and Complaint" (the "Amended Petition"), which purported to add a sixth cause of action challenging the final determination of the Partial Site Plan Approval ("Final Site Plan Approval") issued on September 19, 2019 by the Planning Board.

On November 21, 2019, MVHS moved to dismiss the Amended Petition on grounds that Petitioners had failed to timely challenge the Final Site Plan Approval within 30 days of the Planning Board's decision and had failed to seek permission to file a supplemental pleading.

By Decision and Order entered December 26, 2019, this Court dismissed the first, second and sixth causes of action of the Amended Petition. Bennett Aff. ¶ 29. What remains for consideration are Petitioners' SEQRA claims, which are without merit and require denial of the Petition.

ARGUMENT

As set forth below, Petitioners cannot satisfy their burden of demonstrating that the Planning Board's actions are irrational, and the Court should decline Petitioners' thinly veiled request to second-guess the Planning Board.

STANDARD OF REVIEW

It is well-settled that judicial review of an agency's substantive SEQRA compliance is limited. The Court of Appeals has consistently held that a court may neither second guess an agency's decision nor substitute its judgment for that of the agency. "[I]t is not the role of Courts to weigh the desirability of any action or choose among alternatives[.]" Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 416, 503 N.Y.S.2d 298, 305 (1986) (emphasis added); see also Akpan v. Koch, 75 N.Y.2d 561, 570, 555 N.Y.S.2d 16, 20 (1990). Accordingly, an agency's determination can be annulled only if the determination "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." See Jackson, 67 N.Y.2d at 416 (citations and internal quotation marks omitted); see also Residents of Bergen Believe in Env. & Democracy, Inc. v. County of Monroe, 159 A.D.2d 81, 84, 558 N.Y.S.2d 422, 424 (4th Dep't 1990).

SEQRA requires an agency to balance the benefits of a proposed project against its unavoidable environmental risks in determining whether to approve the project. Despite Petitioners' argument to the contrary, the general substantive policy of SEQRA "is a flexible one. It leaves room for a responsible exercise of discretion and does not require particular substantive results in particular problematic instances." Henrietta v. Department of Environmental Conservation, 76 A.D.2d 215, 222, 430 N.Y.S.2d 440, 446-7 (4th Dep't 1980) (emphasis added).

Judicial review of the SEQRA Record is governed by the "hard look" test: the court must "determine whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination." Jackson, 67 N.Y.2d at 417 (citations omitted). The standard is not whether the agency was "right or wrong", but whether the "agency has given due consideration to pertinent environmental factors." Akpan, 75 N.Y.2d at 571 (emphasis added). If the agency "consider[s] the data and give[s] a reasoned response," the judicial inquiry is at an end. Mobil Oil Corp. v. City of Syracuse Indus. Dev. Agency, 224 A.D.2d 15, 25, 646 N.Y.S.2d 741, 749 (4th Dep't 1996), app. den., 89 N.Y.2d 811, 657 N.Y.S.2d 403 (1997) (citations and internal quotation marks omitted).

In the instant proceeding, this Court's review of the Planning Board's SEQRA compliance is tempered in several respects. First, the Court may not substitute its own judgment for that of the Planning Board unless the Planning Board's determination is "arbitrary, capricious or unsupported by substantial evidence." Jackson, 67 N.Y.2d at 417 (citations omitted).

> [T]he legislature in SEQRA has left the agencies with considerable latitude in evaluating environmental effects and choosing among alternatives. Nothing in the law requires an agency to reach a particular result on any issue, or permits the courts to second-guess the agency's choice.

Id. (citations omitted) (emphasis added).

Second, all reasonable doubts are to be construed by the Court in favor of the Planning Board's findings and determinations. See Henrietta, 76 A.D.2d at 224. "[I]t is not the court's role to evaluate de novo the data presented" to the Planning Board. Akpan, 75 N.Y.2d at 571; see also Mobil Oil Corp., 224 A.D.2d at 25. Similarly, the Planning Board's "reasonable reliance upon expert advice" is to be afforded considerable deference. See Mobil Oil Corp., 224 A.D.2d at 29.

Third, the Planning Board's substantive obligations must be viewed by the Court in "light of a rule of reason." Jackson, 67 N.Y.2d at 417; see also Dryden v. Tompkins County Bd. of

Representatives, 78 N.Y.2d 331, 334, 574 N.Y.S.2d 930, 931 (1991); Henrietta, 76 A.D.2d at 224. "Not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed" to satisfy the substantive requirements of SEQRA. Jackson, 67 N.Y.2d at 417 (citations and internal quotation marks omitted). An environmental review need only "deal with specific significant environmental impacts which can be reasonably anticipated." Industrial Liaison v. Williams, 131 A.D.2d 205, 210, 521 N.Y.S.2d 321, 325 (3d Dep't 1987), aff'd, 72 N.Y.2d 137, 531 N.Y.S.2d 791 (1987) (citations and internal quotation marks omitted); see also Webster Assocs. v. Town of Webster, 59 N.Y.2d 220, 228, 464 N.Y.S.2d 431, 434 (1983) ("degree of detail with which each factor must be discussed . . . var[ies] with the circumstances and the nature of each proposal.").

As discussed in more detail below, the Petitioners have failed to allege the facts necessary to overcome this exacting standard of review. Instead, their Petition is nothing more than an attempt to have this Court substitute the judgment of Petitioners for that of the Planning Board. SEQRA was not enacted to determine whether a decision by a lead agency enjoys universal support. Clearly that is not the case here. A challenger's subjective disagreement with the SEQRA determination made by a lead agency, as in the case of Petitioners, cannot form the basis of a SEQRA challenge. That is especially the case where, as here, the Lead Agency took a long hard look at all the impacts and complied with the letter and spirit of SEQRA. Accordingly, the Petition should be dismissed in its entirety.

POINT I

THE PLANNING BOARD TOOK A HARD LOOK AT HISTORIC AND ARCHEOLOGICAL IMPACTS

Petitioners assert that the FEIS is deficient and the Planning Board has failed to take a hard look at the potential impact on archeological and historic resources. Specifically, Petitioners claim that the Planning Board deferred necessary data collection, consideration of alternatives and development of avoidance/mitigation plans to another agency (OPRHP) and until after the conclusion of the SEQRA process. However, a review of the Record demonstrates that these allegations are not true and that the Planning Board took the appropriate hard look at historic and archeological impacts.

First, there is no basis for the Petitioners' claim that the Planning Board deferred necessary data collection to fully determine the extent of the Project's impact on historic and archeological resources. Instead, the Record before the Court demonstrates that the Planning Board had a Phase 1A Archeological Investigation and a Phase 1A Architectural Inventory prepared by Panamerican Consultants, Inc., who are experts in cultural resources management. These reports were appended to the DEIS. R. 989, 2588, 2680. Section 3.6 of the DEIS provides an overview of these investigations, and specifically identifies the impacts on both archeological and historic resources. R. 1062.

For example, the DEIS summarizes the findings of the Archeological Investigation as follows:

> The former natural setting of the project area in proximity to the Mohawk River indicates that the APE is sensitive for precontact archaeological sites. Three precontact archaeological sites (or sites with a precontact component) were previously found within one mile of the APE including: 617 Cooper Street Historic & Precontact

> Site (USN A06540.001660; NYSM 12158); 613 Court Street Historic and Precontact Site (USN A06540.001668; NYSM 12166); and 613 Court Street Historic and Precontact Site (USN A06540.001668; NYSM 12166).
>
> However, years of urban development very likely disturbed or destroyed any precontact sites if any are or were present. The overlay comparison of historic maps identified only four small locations where no structures were ever recorded and thus are presumably the least disturbed (see Appendix E, Figure 15). It is possible that archaeological sites could be covered by fill and pavement but due to the size of the APE, mechanical removal of fill/pavement is not logistically practical. *The possibility of finding archaeological sites beneath fill is too low to warrant the level of effort required to conclusively determine their presence or absence.* The most practical approach to assess the extent of soil disturbances and archaeological sensitivity would be the review of soilboring data which recorded the depth of fill and stratigraphy.
>
> Historic Archaeological Sensitivity
>
> The project area is sensitive for the presence of a variety of historic archaeological resources associated with, but not exclusive to, urban centers. As noted above, an historic site identified as 442 Lafayette Street Historic Site (NYSM 12153; USN A06540.001655) is within the APE. The site's National Register eligibility is presently undetermined and, therefore, the site will likely require Phase 2 investigation to assess its significance. *Although it's possible that historic structural foundations and other cultural features could be present beneath pavement and/or fill, the likelihood of intact historically significant cultural resources is considered low.*

R. 1064-1065. Thus, there can be no dispute that the Planning Board knew the full extent of the archeological resources present in the Project area and Petitioners' assertions to the contrary are unsupported by the Record.

Likewise, the Phase 1A Architectural Inventory assessed if any existing State/National Register of Historic Places-listed or -eligible resources (individual and historic districts) were present within the Project area and provided an inventory of ALL architectural resources (structures) in the Project area. The Architectural Inventory included a tabular list of ALL

buildings in the Project area and their current S/NRHP eligibility information together with building descriptions and current photographs. R. 2753-2861. The DEIS summarized the information with respect to historic resources as follows (R. 1065-1066):

> Forty-nine architectural resources were identified in the Project APE; 43 buildings older than 50 years of age and six buildings less than 50 years of age (see Appendix E, Table 4.1). Three contributing resources to the State/National Register-Listed Downtown Genesee Street Historic District are also located in the Project APE:
>
> - 301 Columbia Street (USN 06540.002010)
> - 608 Broadway (building section in APE at 335 Columbia Street per parcel data [USN 6540.002007])
> - 401-407 Columbia Street (USN 6540.002011)
>
> Four existing National Register-eligible architectural resources are in the Project APE:
>
> - 440 Lafayette Street (USN 06540.001491)
> - 442 Lafayette Street (USN 06540.001490)
> - 444 Lafayette Street (USN 06540.001489)
> - 506 Columbia Street (shares address with 509 Lafayette Street [USN 06540.001555])
>
> The survey documented thirty-four resources that are not presently in the OPRHP historic resource database (CRIS).
>
> The report (and inventory) was subsequently submitted to SHPO via CRIS to obtain recommendations as to each building's S/NRHP eligibility. In correspondence dated July 17, 2018 (see Appendix E), SHPO indicated that the Project area includes a portion of the Downtown Genesee Street Historic District, which is listed in the New York State and National Registers of Historic Places. The Project area also includes 10 other buildings, which have been identified by SHPO as eligible for inclusion in the registers. [See table 8 from the DEIS below].

SHPO USN	Address	Property Name	SHPO Determination of Eligibility
06540.002010	301 Columbia Street	Brick Commercial	NR Listed in the DowntownGenesee Street Historic District
06540.002095	326-334 Columbia Street	Haberer Building	S/NR Eligible
06540.002011	401 Columbia Street	Brick Commercial	NR Listed in the

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			Downtown Genesee Street Historic District
06540.002107	460-464 Columbia Street	Witzenberger Building	S/NR Eligible
06540.000101	300 Lafayette Street	Former Utica & Mohawk Valley Railway Car Barn/Electric Express/Girrard Chevrolet Service Garage	S/NR Eligible
06540.02114	333 Lafayette Street	Childs Building	S/NR Eligible
06540.002119	437 Lafayette Street		S/NR Eligible
06540.001489	440 Lafayette Street	L. Snyder House	S/NR Eligible
06540.001490	442 Lafayette Street	S. Isele House	S/NR Eligible
06540.001491	444 Lafayette Street	C & A Eichmeyer House	S/NR Eligible
06540.001555	509 Lafayette Street	Utica Turn Hall/Utica Turnverein	S/NR Eligible

Accordingly, the Planning Board was aware of the "historic" resources located within the Project area. In fact, the Planning Board had photographs and detailed descriptions, not just of ALL the "historic" resources, but of ALL the buildings in the Project area. R. 2753-2861. Therefore, the Plaintiffs' assertion that site ownership and further study of these resources was necessary before assessing potential environmental impacts is readily dispelled by the information in the Record before the Planning Board.[1]

Second, not only was the Planning Board sufficiently apprised of both the historical and archeological resources in the Project area, but the DEIS also specifically identified the impacts of

[1] This assertion is also disingenuous, since Petitioners are the property owners denying internal access to their properties.

the Project on those resources. Specifically, Section 3.6.2 of the DEIS identified the following Project-related impacts on archeological and historic resources, namely (R. 1067):

- Disturbance of a known archaeological site – 442 Lafayette Street (NYSM 12153; USN A06540.001655)
- Potential impacts to sections of the Chenango Canal and associated Huntington Basin, which may remain intact with the project's APE (possibly deeply); the area includes the following properties within the APE:
  - Chenango Canal: 318-333 Oriskany Street, 402 Oriskany Street, 514-524 Lafayette Street, 506 Columbia Street, and depending on the degree of disturbance related to recent arterial construction, possibly 509 Lafayette Street
  - Huntington Basin: 401 & 402 State Street, and the section of State Street between these addresses.

- Potential site disturbance impacts to parcels deemed archaeologically sensitive by SHPO, which recommended further testing:
  - 437 Lafayette Street
  - 458 Columbia Street
  - Witzenberer Building (460-464 State Street)
  - 450-454 State Street (SHPO notes that a foundation associated with a structure on this property was previously partially exposed during some sidewalk related impacts).

> . . . at least two contributing buildings within the listed district and ten eligible historic resources may be demolished during implementation of the project.

The historic resources that may be demolished were identified as those set forth in the table above (DEIS, Table 8).

Thus, based on the expert reports in the Record, the Planning Board was also specifically aware of ALL adverse environmental impacts to both historic and archeological resources as a result of the Project. Accordingly, the Record shows that there was sufficient data collection, expert studies and analyses to permit the Planning Board to identify ALL environmental impacts

on ALL historic and archeological resources within the Project area. As a result, the Petitioners' claims to the contrary must fail.

Petitioners also argue that the Planning Board did not evaluate or mitigate the impacts to historic and archeological resources and that the Planning Board erroneously deferred mitigation plans to DASNY and OPRHP to decide in the future. This claim is also belied by the Record.

Specifically, Section 3.6.3 of the DEIS identifies proposed mitigation measures for the demolition/disturbance of historic/archeological resources. R. 1067-1068. Those mitigation measures include preparing further recordations of architectural and archeological resources, not to further assess potential impacts, which are known, but rather to mitigate the elimination of those resources by preserving information related to those resources. The identified mitigation measures also include consulting with SHPO pursuant to the terms of a Letter of Resolution (LOR) that is discussed in the FEIS and attached thereto. Again, this consultation, which is required by statute independent of SEQRA, is not being done as a means to further identify and assess potential impacts – those impacts are known and have been assessed by the Planning Board. Instead, following through with the consultation process as required in the LOR, which was finalized prior to the completion of SEQRA, provides a method for those impacts to be mitigated by gathering and storing in a State database relevant information about the historic and archeological resources that are being removed or disturbed.

In its Findings Statement, the Planning Board does not blindly rely on the LOR, but rather reviewed the LOR and determined that the mitigation proposed therein was also acceptable to the Planning Board. R. 5607. The Petitioners blindly ignore this language in the Planning Board's findings statement and, as a result, their claim that the Planning Board erroneously delegated its SEQRA duties to OPRHP must fail.

Moreover, Petitioners' "delegation" argument also ignores the well settled law that reliance on OPRHP is permissible and has been upheld in the courts of this State. For example, in Matter of Catskill Heritage Alliance, Inc. v. New York State Dept. of Envtl. Conservation, the Court acknowledged that NYSDEC complied with its statutory obligation to consult with OPRHP concerning any adverse impacts that the Project may have upon historic property and was entitled to consider OPRHP's findings as they related to historic property. 161 A.D.3d 11, 22-23, 74 N.Y.S.3d 401, 409-10 (3d Dep't 2018); see also Cathedral Church of St. John the Divine v. Dormitory Auth., 224 A.D.2d 95, 101-02, 645 N.Y.S.2d 637, 641 (3d Dep't 1996). In Matter of Catskill, the court also relied on the fact that the NYSDEC considered statements made by experts together with expert reports. 161 A.D.3d at 22-23.

Here, like the NYSDEC in Matter of Catskill, the Planning Board considered OPRHP's findings and also relied on expert reports and considered statements made by Petitioners. Accordingly, it was appropriate for the Planning Board to consider the LOR and OPRHP's findings in connection with making its own findings and Petitioners' claims to the contrary are baseless.

Petitioners' most egregious omission is that they completely ignore the additional findings made by the Planning Board with respect to historic and archeological resources - findings that were not based on consultation with OPRHP or in reliance on the LOR. Specifically, based on all the information in the Record before it, the Planning Board concluded in the Findings Statement that:

> the Columbia-Lafayette neighborhood is not a vibrant, historically and culturally significant neighborhood. Instead, the neighborhood is a documented blighted area, located in a HUB zone; in a former Empire Zone; designated as a potential EJ area; and in the Urban Renewal Plan Utica Downtown Development Project Area. Despite revitalization of surrounding areas over the years, there has been little development in this area for almost 30 years.

MVHS provides a well-funded Project that can address the features that have blighted this portion of the City for decades while providing important public benefits in accordance with the Urban Renewal Plan and the City's Master Plan. MVHS has indicated, and the Planning Board agrees that reuse of these existing buildings for medical, or any other purpose, is not feasible, which is further evidenced by the fact that there has been no redevelopment or revitalization of this urban area for decades despite the availability of many programs to incentivize such revitalization. Accordingly, to allow for transformative economic revitalization in an area that has been blighted and underutilized for decades as envisioned by the Urban Renewal Plan and the City Master Plan and consistent with other revitalization efforts, demolition of these buildings is necessary and the social and economic benefits of the Project outweigh the long term adverse impact associated with demolition of these buildings.

Finally, while the IHC will replace existing architectural styles, the current design is consistent with recent City-approved and completed modifications to the AUD and Landmarc buildings, as well as styles proposed for the Utica Inner Harbor Redevelopment and NEXUS projects.

Nevertheless, as mitigation, MVHS will incorporate several design and construction themes into the IHC design, which are elements of existing buildings within the downtown area. These include:

- Romanesque Revival Style design (reflected in the Harberer Building and Jones Building)
- (German) Romanesque Style design (reflected in the Utica Turn Hall / Turnverein Building)
- Corner Pallisters with corbelled brick cornice (Utica & Mohawk Valley Railway Car Barn)
- Brick Cornices (Child Building)

The architectural design, as an acknowledgement to the city's building history, incorporates brick construction in the first two floors of the new hospital. All the identified historically meaningful buildings were also of brick construction. MVHS has indicated that this meaningful design element will be part of the new hospital's design and it provides an opportunity for the new hospital to pull from the history of downtown Utica into present day.

R. 5638.

Accordingly, Petitioners' claims that the Planning Board deferred its obligation to assess the impacts on architectural and archeological resources, or blindly relied on the conclusions of OPRHP – the state agency with expertise in the area – with respect to mitigation of those impacts are negated by the Record before the Court. Instead, it is patent that the Planning Board identified the relevant areas of environmental concern, took a hard look at them, and made a 'reasoned elaboration' based on substantial evidence and expert advice, which was uncontroverted in the Record. Simply because Petitioners' disagreed with the Planning Board's conclusions relative to historic and archeological resources is not a sufficient basis to overturn the Planning Board's Findings Statement.

Nevertheless, Petitioners' lament about the destruction of historic buildings and the so-called, self proclaimed "Columbia LaFayette Neighborhood" in an effort to play on this Court's sympathies. However, the law is clear that the nature of the impacts to the historical and archeological resources as a result of the Project is not relevant to the issues before the Court. "In reviewing a SEQRA determination, a court is solely concerned with the procedural and substantive mandates of SEQRA, not with the ultimate environmental consequences of the *proposed* action." Campaign for Buffalo History, Architecture & Culture, Inc. v. Buffalo & Fort Erie Pub. Bridge Auth., Civil Action No. 12-cv-00605(M), 2013 U.S. Dist. LEXIS 25390, *20 (W.D.N.Y. Feb. 22, 2013) (internal quotation marks omitted) (emphasis in original) (citing Mitskovski v. Buffalo and Fort Erie Public Bridge Authority ("Mitskovski II"), 415 Fed. Appx. 264, 2011 WL 285240, *2 (2d Cir. 2011)).

> [A]gencies have considerable latitude evaluating environmental effects and choosing between alternative measures. While judicial review must be meaningful, the courts may not substitute their judgment for that of the agency for it is not their role to weigh the desirability of any action or to choose among alternatives.

Campaign for Buffalo History, Architecture & Culture, Inc., 2013 U.S. Dist. LEXIS at *21-22 (citing Akpan, 75 N.Y.2d at 570).

In fact, demolition/disturbance of historic and/or archeological resources has been upheld where, as here, the Lead Agency determined that buildings slated for demolition were only a small part of the historic district; where buildings slated for demolition were unsafe and an eyesore; where there was little chance that buildings slated for demolition could be rehabilitated; and/or where buildings slated for demolition were dilapidated or out of repair. See Dunk v. City of Watertown, 11 A.D.3d 1024, 1025-26, 784 N.Y.S.2d 753, 755 (4th Dep't 2004); see also Campaign for Buffalo History, Architecture & Culture, Inc., 2013 U.S. Dist. LEXIS at *32. Likewise, the Planning Board's findings that the so-called "Columbia-LaFayette neighborhood" is a documented blighted area with no redevelopment or revitalization for almost 30-years, that the Project area is included within the City's Urban Renewal Area, and that the existing buildings cannot be reused for medical, or any other purpose is sufficient to support the demolition/disturbance of historic and archeological resources. R. 5638.

Petitioner's reliance on Matter of Pyramid Co. of Watertown v. Planning Bd of Town of Watertown, 24 A.D.3d 1312, 807 N.Y.S.2d 243 (4th Dep't 2005) is misplaced. In that case, the

> FEIS failed to include supporting data to respond to concerns raised during the public comment phase with respect to cultural, historic or archeological resources and instead stated only that the Board would work with the State Historic Preservation Office to "determine the presence of any historic or cultural resources which may be impacted by the proposed project." The Findings Statement contains no references to cultural, historic, or archeological resources.

Matter of Pyramid Co., 24 A.D.3d at 1315. Those are not the facts of this proceeding. To the contrary, in this case the presence of historic and cultural resources has been identified, the impacts to historic and cultural resources have been analyzed, studies related to historic and archeological impacts have been included in the DEIS and FEIS, public concerns have received responses in the

FEIS, and the Findings Statement contains an entire, multiple page, section on cultural, historic and archeological resources. R.1063-1069, 2587-2829, 4659-4665, 5019-5030, 5623-5626.

Petitioners' reliance on Matter of Brander v. Town of Warren Town Bd. is also easily distinguishable. 18 Misc. 3d 477, 847 N.Y.S.2d 450 (N.Y. Sup. Ct. Onondaga Cty. 2007). Specifically, the court found the SEQRA review deficient because the special permits required that no less than 60 days prior to the start of construction the town board must receive a letter of resolution for historic site mitigation from the Department of Public Service and OPRHP. The court found that because there was no LOR by the time SEQRA was completed that historic site mitigation had not been resolved and completed at the time SEQRA was concluded. 18 Misc. 3d 477. Here, there was a LOR included as part of the FEIS, which according to the holding in Brander demonstrates that historic site mitigation had been resolved and completed prior to the conclusion of the SEQRA. As such, Petitioners' claim that the LOR defers mitigation to some future date must fail. See Matter of Brander, 18 Misc. 3d at 483. Instead, the LOR is the resolution of mitigation according to the holding in Brander.

Accordingly, for all the reasons set forth in this point the Petitioners' third cause of action must be dismissed.

POINT II

THE PLANNING BOARD TOOK A HARD LOOK AT CUMULATIVE IMPACTS

Petitioners allege that the FEIS is fatally defective because it fails to adequately consider Cumulative Impacts from traffic from special events at the Nexus Center, which is currently under construction in downtown Utica. Petition, ¶¶ 63; 106-123. Petitioners allege that the Cumulative Impacts from the Nexus Center are required to be considered in the FEIS because the Nexus Center will affect the same infrastructure and traffic related resources as the Project. Id., ¶¶ 113; 116.

However, Petitioners acknowledge that a supplemental traffic impact analysis was performed as part of the FEIS, which incorporated into the analysis typical am/pm peak period traffic anticipated from the Nexus Center. The sole basis for Petitioners' claim that the FEIS was "defective" is the allegation that the analysis did not consider traffic from special events at the Nexus Center. Id., 117-118. As set forth below, a review of the Record demonstrates that these allegations are not true and that the Planning Board took the appropriate hard look at Cumulative Impacts. The FEIS evaluated Cumulative Impacts to infrastructure and traffic, typical commuter peak periods will not be impacted, and the Planning Board appropriately relied on traffic experts and the Department of Transportation's analysis of the effect on traffic generated from special events associated with the Nexus Center.

The Scoping of Cumulative Impacts Was Proper.

As set forth in NYDEC's SEQRA Handbook, Cumulative Impacts occur when multiple actions affect the same resource(s). Cumulative Impacts result from the "incremental or increased impact of an action(s) when the impacts of that action are added to other past, present and reasonably foreseeable future actions. Cumulative impacts can result from a single action or a number of individually minor but collectively significant actions taking place over a period of time." (http://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf) See Eckler Aff., 59.

As the Final Scoping Document reflects, Cumulative Impacts must be assessed when actions are proposed, or can be foreseen as likely, to take place simultaneously or sequentially in a way that the combined impacts may be significant. The assessment of Cumulative Impacts (like direct impacts) should be limited to consideration of reasonably foreseeable impacts, not speculative ones. Id. at ¶ 61. Here, the Final Scoping Document stated that the DEIS would

summarize the potential Cumulative Impacts of the proposed project in conjunction with other proposed and existing projects in the area. R. 386-968; Eckler Aff., ¶ 61.

To accomplish that, OBG made a reasonable effort to identify potential "foreseeable future actions." In consultation with the City's Department of Urban & Economic Development, several projects were identified as potentially occurring within or proximal to the Project area and within a similar timeframe as the proposed IHC Project:

- Expansion of the Utica Memorial Auditorium, including the proposed NEXUS Center ("NEXUS"). NEXUS will be an approximately 170,000 sf tournament-based recreation play facility, utilized for ice hockey, box lacrosse, soccer, and other field sports that can be performed on a 200 x 85-foot playing surface. NEXUS will include three playing surfaces, 25± locker rooms, commercial office space, college classroom space, retail space, food and beverage services, and other multi-purpose training space. NEXUS is proposed to be developed on the block immediately east of the existing Auditorium, and will include the removal of Charles Street, an existing City street
- NYSDOT Route 5S (Oriskany Street) safety improvement project. Construction on this 2-year Project began in April 2018, and will include reconstruction, re-aligning, and re-configuring intersections along Oriskany Street between Broadway and Broad Street
- City of Utica Combined Sewer Overflow ("CSO") Control Project A9.2. Construction on this 6-month project will begin in May 2018, and will include construction of a large-diameter storm sewer from John Street to Broad Street, the rehabilitation and re-purposing of the existing Old Erie Canal Conduit between

> Seneca Street and John Street, and other incidental storm and sanitary sewer modifications within the project limits. The project will convey previously separated stormwater flows to a dedicated stormwater discharge point at Broad Street (Ballou Creek)

R. 262; Eckler Aff., ¶ 62. As the Record demonstrates, and the Affidavit explains, the final scoping document indicated that Cumulative Impacts to traffic and utility infrastructure would be evaluated in the DEIS/FEIS. R. 262. The Final Scoping Document indicated that the evaluation would rely on existing, readily available information including environmental impact assessments prepared by others for those projects (if available). In addition, potential cumulative traffic impacts would be incorporated into the IHC Project's traffic impact study prepared by the C&S Companies. R. 262; Eckler Aff. ¶¶ 64-65.

DEIS analysis of Cumulative Impacts.

Consistent with the Final Scoping Document, an assessment of Cumulative Impacts was provided in Section 5 of the DEIS (R. 1113) and responses to Cumulative Impact-related substantive comments were provided in Section 3.18 of the FEIS Responsiveness Summary. R. 4702. The introductory narrative to the section noted that, consistent with SEQRA implementing regulations, the assessment of Cumulative Impacts was limited to consideration of reasonably foreseeable impacts, not speculative ones. R. 1113; Eckler Aff. ¶¶ 91-92.

Even though a formal site plan application had not yet been submitted for the NEXUS project, it was discussed in the DEIS, albeit impacted by the availability of publicly accessible information. The DEIS included the following assessment of the NEXUS project with respect to the Construction phase:

> The Upper Mohawk Valley Memorial Auditorium Authority (Aud Authority) is contemplating additional development adjacent to the

> Aud; the Aud is a multi-purpose arena and home to the Utica Comets of the American Hockey League. If constructed, the proposed NEXUS Center (NEXUS) would consist of an 170,000± sf tournament-based recreation play facility which would be utilized for ice hockey, box lacrosse, soccer, and other field sports that can be performed on a 200-foot by 85-foot playing surface. NEXUS would include three playing surfaces, 25± locker rooms, commercial office space, college classroom space, retail space, food and beverage services, and other multi-purpose training space.
>
> NEXUS would be developed in the block between Charles Street on the west and Broadway on the east, and Oriskany Street on the south and Whitesboro Street on the north. Charles Street would be abandoned, and NEXUS would be connected to the existing Aud. No site plan applications in support of NEXUS have been submitted to the City and a construction schedule has not been identified. Therefore, cumulative construction phase impacts are not anticipated. However, if the NEXUS Project becomes more than just speculation, construction-related impacts would be minimized through coordination and implementation of maintenance and protection of traffic plans, as well as implementation of project-related mitigation measures identified throughout this DEIS.

With respect to Cumulative Impacts during the operations phase, preparation of the Traffic Impact Study ("TIS") in support of the IHC Project involved close coordination with the NYSDOT. Multiple conversations and meetings were conducted as the development of TIS advanced through the impact and mitigation phases. Cumulative impacts between the IHC and the NEXUS Center have been considered in the DEIS to the extent possible given the lack of any submitted NEXUS-related applications or availability of detailed information from the NEXUS project sponsor. Based on conversations with the NYSDOT and the Aud Authority (August 2018), it was identified that current events at the Aud typically do not impact commuter peak periods. It was also reiterated by both the Aud Authority and NYSDOT that there was not enough detailed information available regarding the NEXUS project to include potential impacts in the IHC Project TIS, which was appended to the DEIS (Appendix F). The initial TIS was completed in October 2018 and the DEIS was filed in November 2018. R. 1113; See Eckler Aff., ¶ 93.

The FEIS was prepared following the close of the public comment period in late December 2018 and was filed in March 2019. Id., ¶¶ 94-95. During preparation of the FEIS, additional information regarding the NEXUS project became available and was provided by the NEXUS project sponsor. Id., ¶ 96.

Based on that information, the 10th Edition of the Institute of Transportation Engineer's Trip Generation Manual was used to estimate the traffic that will be generated by the NEXUS project during the typical weekday AM and PM peak hours. Eckler Aff., ¶ 97. The anticipated traffic generated by the NEXUS project was incorporated into the Future No-Build Condition analysis for the TIS Addendum, and that was appended to the FEIS (Appendix D). R. 5031. The estimated anticipated typical AM and PM peak period traffic generated by the NEXUS project was included in the TIS Addendum. Eckler Aff., ¶ 97. The off-peak or special events associated with the Nexus project was not included, because it was determined in consultation with the NYSDOT that those events are not expected to impact typical commuter peak periods.

Petitioners contend that because impacts from the special events were not included that the Cumulative Impacts on traffic was not adequately considered. Neither the Record nor the case law support that contention. Not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before a FEIS will satisfy the substantive requirements of SEQRA. Friends of P.S. 163, Inc. v. Jewish Home Lifecare, Manhattan, 30 N.Y.3d 416, 430, 68 N.Y.S.3d 382, 389 (2017) (citations and internal quotation marks omitted); Jackson, 67 N.Y.2d at 417. An environmental review need only "deal with specific significant environmental impacts which can be reasonably anticipated." Industrial Liaison, 131 A.D.2d at 210 (citations and internal quotation marks omitted). Here, the Cumulative Impacts on traffic which could reasonably be anticipated to occur during peak periods, for IHC and NEXUS operations were included in the

FEIS and TIS Addendum. R. 5031. By correspondence dated March 8, 2019, the NYSDOT advised the City of Utica that the traffic-related concerns had been addressed to the satisfaction of the NYSDOT. R. 148; Eckler Aff., 98. Accordingly, the Planning Board took the requisite hard look at the Cumulative Impacts on traffic, which could reasonably be anticipated to occur during AM and PM peak periods and, therefore, satisfied the requirements under SEQRA.

Contrary to Petitioners' assertions, the effect of off-peak or special events was neither ignored nor disregarded. Based on a reasoned analysis and reliance on the NYSDOT, off-peak or special events were not expected to impact typical commuter peak periods and, therefore, did not require further analysis. It is well-settled that a lead agency "may rely upon the advice it receives from others, including consultants, if reliance is reasonable." Stewart Park & Reserve Coalition v. NYSOT, 157 A.D.2d 1, 7, 555 N.Y.S.2d 481, 484 (3d Dep't 1990), aff'd 77 N.Y.2d 970, 571 N.Y.S.2d 905 (1991) (citations omitted). As the Court of Appeals made clear in Jackson, a lead agency's

> reliance on advice from another agency did not violate its obligation to make its 'own independent judgment of the scope, contents and adequacy of' the EIS (ECL 8-0109 [3]). Nothing in SEQRA bars an agency from relying upon information or advice received from others, including consultants or other agencies, provided that the reliance was reasonable under the circumstances. On this record, the courts below were correct in concluding that [the lead agency] reasonably exercised its discretion both in its reliance on the advice of another agency ...

67 N.Y.2d at 427-28. This is especially true here, where the Planning Board reasonably relied on the expertise of the NYSDOT in the realm of traffic analysis as to whether off-peak or special events were expected to impact typical commuter peak periods, - - and Petitioners have pointed to no expert opinion to the contrary. See Matter of Halperin v. City of New Rochelle, 24 A.D.3d 768, 774-75, 809 N.Y.S.2d 98, 107 (2d Dep't 2005) ("'lead agency . . . may rely upon advice it

receives from others including consultants'" or other agencies, and "SEQRA and its implementing regulations not only provide for this, but strongly encourage it."). Here, the Planning Board analyzed the effect of the Nexus project and appropriately relied on its consultation with NYSDOT to consider the reasonably anticipated Cumulative Impact on traffic, and the NYSDOT confirmed in March 2019 that its traffic concerns had been addressed. Accordingly, the Planning Board satisfied the requirements of SEQRA in taking a hard look at Cumulative Impacts, and the fourth cause of action in the Petition must be denied.

POINT III

THE PLANNING BOARD PROPERLY EVALUATED ALTERNATIVE SITES

Petitioners' Fifth Claim for Relief alleges that the FEIS is "fatally defective" because it purportedly "fails to evaluate viable alternatives in sufficient detail." Pet. ¶¶ 124-144. To the contrary, the Findings Statement, the FEIS, and the DEIS contain detailed analyses about potential alternative Project sites, as well as the "no action" alternative and alternatives for Project magnitude, design, and timing. See Findings Statement at R. 5648-5652; FEIS § 3.3, R.4626; and DEIS at R. 1021-1037 and R. 2553. These documents overtly demonstrate this Claim has no basis in fact.

An EIS is prepared to assess the significant adverse environmental impacts that a given project might have, and it must include an evaluation of "reasonable alternatives" to the project proposed. 6 NYCRR § 617.9(b)(1). An EIS must include a discussion of "reasonable alternatives to the action that are feasible, considering the objectives and capabilities of the project sponsor" including the "no action alternative." 6 NYCRR § 617.9(b)(5)(v). The purpose of requiring analysis of these alternatives "is to aid the public and governmental bodies in assessing the relative costs and benefits of the proposal." See Webster Assoc., 59 N.Y.2d at 228. To be meaningful, the

assessment must be based on an awareness of all reasonable options other than the proposed action, but "the degree of detail with which each alternative must be discussed will, of course, vary with the circumstances and nature of each proposal." Id.

MVHS is a private applicant and it previously evaluated a reasonable range of alternatives to determine which sites, and other alternatives, would achieve its objectives. R. 2553-2586. Under SEQRA, the Lead Agency must consider which alternative would—or would not—be feasible or reasonable given the private applicant's objectives and capabilities. See Jackson, 67 N.Y.2d at 417.[2]

Moreover, SEQRA does not dictate substantive results and its implementing regulations are clear that an EIS "must be analytical and not encyclopedic." 6 NYCRR § 617.9(b)(1); see also Henrietta, 76 A.D.2d at 222. Thus, it is well settled that "an agency's substantive obligations under SEQRA must be viewed in light of a rule of reason. 'Not every conceivable . . . alternative must be identified and addressed before a FEIS will satisfy the substantive requirements of SEQRA.'" Akpan v. Koch, 152 A.D.2d 113, 118, 547 N.Y.S.2d 852, 855 (1st Dep't 1989) aff'd 75 N.Y.2d 561 (quoting Aldrich v. Pattison, 107 A.D.2d 258, 266 (2d Dep't 1985)). The Lead Agency's task is simply to take "a hard look at alternatives and consider a reasonable range of alternatives." Jackson, 67 N.Y.2d at 422. If the agency "'consider[s] the data and give[s] a reasoned response,'" the judicial inquiry is at an end. Mobil Oil Corp., 224 A.D.2d at 25 (quoting Sun Co. v. City of Syracuse Indus. Dev. Agency, 209 A.D.2d 35 (4th Dep't 1995)). "[I]t is not the role of the courts to weigh the desirability of any action or choose among alternatives" (Jackson, 67 N.Y.2d at 416) or to "second-guess thoughtful agency decisionmaking" (Matter of Riverkeeper, Inc. v. Planning

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[2] Indeed, SEQRA does not require lead agencies to evaluate those alternatives that do not achieve the goals of the proposed action. See 6 NYCRR § 617.9(b)(5)(v); see also Crossroads Ventures, 2006 N.Y. ENV LEXIS 88, at *96; Shellabarger v. Onondaga County Water Authority, 105 A.D.2d 1134, 1135, 482 N.Y.S.2d 610, 611 (4th Dep't 1984).

Bd. of Town of Southeast, 9 N.Y.3d 219, 232, 851 N.Y.S.2d 76, 81 (2007)). "[I]n reviewing the substantive issues raised in a SEQRA proceeding, [a] court will not substitute its judgment for that of the agency if the agency reached its determination in some reasonable fashion." Violet Realty, Inc. v. City of Buffalo Planning Board, 20 A.D.3d 901, 902-03, 798 N.Y.S.2d 283, 284 (4th Dep't 2005) (citations and internal quotation marks omitted) (alterations in original).

The Planning Board's operative SEQRA analyses are contained in the DEIS, the FEIS, and the Findings Statement, which confirm that the Planning Board took a hard look at reasonable Project alternatives here. That Petitioners disagree with the conclusions resulting from these thorough analyses provides no basis to overturn the Planning Board's rationale and well-supported Findings Statement.

The Planning Board's SEQRA review detailed the objectives and capabilities of the Project sponsor here, MVHS, which are central parameters for evaluating the range of reasonable and feasible alternatives under SEQRA. See 6 NYCRR 617.9(b)(5)(v). The FEIS explains that MVHS is a private entity whose "mission is to provide excellence in public healthcare for its community" and recognizes that substantial efforts have "focused on consolidating existing resources, eliminating redundancies, expanding the depth and breadth of services, improving access and elevating the quality of healthcare services in the region." R.4592, FEIS § 1.1.1. The FEIS indicates that "MVHS has achieved some success, but it has been constrained by the age and physical limitations of the existing facilities." R.4592, FEIS § 1.1.1. Therefore, "[t]o further its goal of delivering higher quality, more effective care with better community outcomes at a lower cost," and in light of the funding available under Public Health Law § 2825-b, MVHS proposed the Project to "combine services from both the St. Luke's and SEMC campuses, replace the St. Luke's and SEMC campuses, reduce the number of beds in the community, and consolidate patient

services" at a new Integrated Health Campus. R.4592, FEIS § 1.1.1. The location MVHS proposed for the Project is in downtown Utica, "proximal to the City's urban core, as well as the City's proposed 'U' District, existing Brewery District, Bagg's Square and Utica Harbor Point," which area the City has targeted for economic redevelopment for years, "making it a prime location for consideration by MVHS." R. 4594, FEIS § 1.1.3.

Once a site has been selected and a project has been identified by a private sponsor, SEQRA does not require that multiple sites be evaluated pursuant to the regulatory criteria or that the site with the least environmental impact be selected. See Palczynski v. County of Herkimer, 55 A.D.3d 1242, 1243, 865 N.Y.S.2d 418, 420 (4th Dep't 2008). Nevertheless, the Planning Board considered MVHS' prior evaluation of site alternatives contained in the Hospital Site Selection Process Summary Memo (the "Selection Process Memo") (DEIS, Appendix D) and evaluated public comments submitted on the subject before rendering its Findings. R. 2553-2586; 4626-4648. The Selection Process Memo explained how MVHS first identified potential sites "to build one, combined, hospital providing acute inpatient, outpatient, and other health care services." R. 2556, DEIS, Appendix D, pg. 2. That process identified twelve potential sites in Oneida County, which MVHS then analyzed further as follows:

- Level 1: A high-level analysis was applied to determine whether the sites had the key items necessary for the hospital to function properly (e.g., available infrastructure, adequate access, and a good transportation network). DEIS, Appendix D, pg. 2. Each site was screened for "fatal flaws" that warranted eliminating a site from further consideration (e.g., lack of sewer/water infrastructure, access limitations, inadequate transportation network, and initial permitting needs). DEIS, Appendix D, pg. 3-7. Fatal flaws were identified at all but three sites: the Downtown Site, the Psychiatric Center,

and St. Luke's R. 2564-2566, DEIS, Appendix D, pg. 8-10.

- Level 2: The three remaining sites were each scored according to a defined rubric that examined seven criteria "necessary for a successful and functioning site that will meet the hospital current and future expansion needs." R. 2567, DEIS, Appendix D, pg. 11. Those seven criteria were: size; utilities; accessibility; zoning approvals and impact fees; monetary factors; community factors, perception and sustainability; and environmental. R. 2567, DEIS, Appendix D, pg. 11. Those criteria, and their sub-criteria, were assigned point values (higher values represented more desirable features or conditions) and each site was scored for each criteria. R. 2567-2572, DEIS, Appendix D, pg. 11-16.
- Capacity Analysis: The three remaining sites were also evaluated to identify areas where Project components could be located (e.g. the hospital, parking areas, office building, etc.) and the top two sites analyzed for circulation and functional entrances. R. 2578-2580, DEIS, Appendix D, pg. 18-20.

The information and conclusions in the Selection Process Memo led MVHS to choose the Downtown Site for the Project location.

At no point in the alternative site analysis were sites eliminated from consideration based on the statutory language under Public Health Law 2825-b[3] that required the new facility to be located in the largest population center in Oneida County. Rather, the sites were carefully evaluated based on engineering, constructability, environmental, and socio-economic factors, all of which were proper considerations for this analysis. However, despite Petitioners' assumptions to the contrary, this does not mean that all the alternative sites would have satisfied Section 2825-

[3] The majority of the 12 sites considered were outside of the City of Utica. DEIS, Appendix D, at 3.

b's locational requirement. Instead, it simply means that sites were initially evaluated based on other factors – namely environmental and engineering – and that MVHS considered the importance of Section 2825-b independently of that analysis when making its final site selection.

Notably, in Level 2, the Downtown Site scored the same or higher than the St. Luke's site in 5 of the 7 categories evaluated for selecting the proposed Project site, and the Downtown Site scored 7 points higher overall than St. Luke's. R. 2572, DEIS, Appendix D, pg. 16. During its SEQRA review, the Planning Board recognized that the Hammes Company, retained by MVHS, provided a second opinion on the site recommendation of the initial study which confirmed the recommendation of the Downtown Site as the best option for MVHS to pursue. R. 5650, Findings Statement at 44; R. 4628, FEIS at § 3.3, Comment 25.

The discussion of environmental considerations in the Selection Process Memo, which Petitioners cite as evidence that the FEIS failed to contain sufficient detail to permit a comparative assessment of St. Luke's and the Downtown Site (see Pet. Mem. at 27-29, 34), merely reflects part of the analysis for one of the seven criteria analyzed during Level 2 for potential project sites. See R. 2553, 2567; 2571-2572, DEIS, Appendix D, pg. 11, 15-16. However, the Selection Process Memo does not reflect the "sum total of the environmental analysis for comparing St. Luke's and the Downtown site" as Petitioners allege. Pet. Mem. at 28.[4] Rather, the FEIS and Findings Statement further analyzed the information submitted by MVHS along with numerous public comments. The FEIS concludes that "the Downtown Site not only satisfied MVHS's goals and objectives, but also minimizes or avoids environmental impacts for the reasons identified in the DEIS and in this FEIS." R. 4637 FEIS § 3.3, Response 35. The arguments now raised by Petitioners were considered in the FEIS and the categories of potential impacts Petitioners allege

[4] The analyses in the Selection Process Memo were further explained in FEIS § 3.3, Response 33. R. 4634-4635.

were missing (see, e.g., Pet. Mem. at 34) were also analyzed, together with ways to mitigate or avoid those impacts to the maximum extent practicable. See e.g., R. 4645- 4722, FEIS § 3.3, Comment 47 and Responses 47, 142, 60, 63, 144, 134, 76, 77, 230.

Contrary to Petitioners' baseless assertions, the Planning Board made detailed comparisons to St. Luke's site, but found that it does not meet the goals and objectives of MVHS due to numerous feasibility problems including the improper and/or inadequate configuration of patient facilities and deficiencies in the HVAC, communication and pressurization systems that would be suboptimal at best to upgrade. R. 4628-4629, FEIS § 3.3., Response 26. See also Scholefield Affidavit, ¶¶ 20-33. In addition, the Planning Board explained that residential neighborhoods were a concern for the St. Luke's site (and the Pysch Center site), where there are adjacent single-family residential neighborhoods and the surrounding area is zoned residential. R. 4627, FEIS § 3.3, Response 22. Those uses were considered incompatible with the Project. In comparison, the Downtown Site has no single-family residential uses adjacent nor any residential zoning districts. The Planning Board reasoned that "[s]ingle family homeowners have an expectation that the value and enjoyment of their properties will be protected, whereas, high rise apartment dwellers who choose to live in a city, would anticipate being surrounded by mixed uses." R. 4627, FEIS § 3.3, Response 22. Moreover, St. Luke's was not a feasible alternative[5] for the Project because both St. Luke's and St. Elizabeth—operating hospitals providing critical medical services to the local population—must be fully functional while the new medical center is being constructed. Retrofitting St. Luke's and constructing additional site components needed for the Project would significantly disrupt its ability to provide necessary services and would exorbitantly increase the anticipated timeframe and cost for construction. Scholefield Affidavit, ¶¶ 20-33.

[5] FEIS acknowledges that earlier statements regarding the viability of the St. Luke's site were no longer relevant because of how the Project and funding had developed. FEIS § 3.3, Response 28.

In contrast, the Findings Statement determined that advantages to the Downtown Site included:

- Acting as a catalyst for urban redevelopment in a blighted area;
- Providing a well-funded project that can address this portion of the City and the features that have blighted this area of the City for decades while providing important public benefits;
- Excellent water pressure and capacity, including water capacity sufficient to accommodate fire flows without onsite storage of water;
- A location relatively close to National Grid's Terminal Substation located to the north at Harbor Point which has two transformers and distribution buses. Dedicated underground cables can be provided to the new hospital, which would provide a high level of reliability;
- The City street grid, which is an asset because multiple routes can be used to arrive at the hospital;
- A location less than two miles from the Thruway, less than 0.5 miles from the North/South Arterial (NYS Routes 5, 8 and 12), and located along Oriskany Street (NYS Routes 5A and 5S), which has the benefit of being planned in conjunction with the NYSDOT's Oriskany Street/5S project allowing the access needs of the hospital to be addressed as part of the original re-design of the roadway;
- Ready access to public transit;
- High visibility;
- Sustainability/smart growth since repurposing urban parcels is considered a sustainable initiative as higher density in the urban environment minimizes the need for energy,

allows for non-motorized types of transportation, and increases the efficiency for the delivery utilities and services;

- No encroachment on an existing residential neighborhood; and
- A part of a broader downtown revitalization vision.

R. 5650, Findings Statement at 44.

The SEQRA Record clearly demonstrates that the Planning Board carefully considered a myriad of relevant factors to assess each alternative site, giving due regard for the Project sponsor's objectives and capabilities. The Planning Board took a hard look at Project alternatives, including the St. Luke's site as a potential Project location, and the Planning Board's well-reasoned conclusion finding the Downtown site appropriate must be upheld. Therefore, Petitioners' fifth cause of action should be dismissed.

POINT IV
BECAUSE PETITIONERS FAILED TO FILE A TIMELY CHALLENGE TO THE PLANNING BOARD'S FINAL SITE PLAN APPROVAL BY OCTOBER 20, 2019, THERE IS NO MECHANISM FOR THEIR SEQRA CLAIMS TO BE REVIEWED

Petitioners' third, fourth and fifth causes of action seek to invalidate the Planning Board's SEQRA findings, detached from any viable challenge to the final determination of the Planning Board. The SEQRA claims are the means to the end of invalidating Final Site Plan Approval, but as this Court properly held, Petitioners have no claim concerning Final Site Plan Approval. "Where the challenged action relates to SEQRA review, the limitations period commences with the filing of a decision which represents the final determination of SEQRA issues." McNeill v. Town Bd. of the Town of Ithaca., 260 A.D.2d 829, 830, 688 N.Y.S.2d 747, 748 (3d Dep't 1999), lv. denied, 93 N.Y.2d 812, 695 N.Y.S.2d 540 (1999) (citations omitted); Wassaic Watershed & Viewshed Prot. Project v. Town of Amenia Town Bd., Index No. 2015-52164, 2016 N.Y.Misc. LEXIS 7028, *8 (N.Y. Sup. Ct. Dutchess Cty. June 21, 2016). Here, the Petitioners failed to

challenge Final Site Plan Approval within the statute of limitations and, therefore, cannot pursue any SEQRA claims.

By Decision and Order entered on December 26, 2019, the Court dismissed as time-barred the proposed sixth cause of action contained in the Amended Petition filed on November 4, 2019, which challenged Final Site Plan Approval. The Court properly held that the challenge to Final Site Plan Approval was not filed within the 30-day statute of limitations pursuant to General City Law 81-c and cannot relate back to the time of the filing of the Petition, when it had not yet occurred. See Manupella v. Troy City Zoning Bd. of Appeals, 272 A.D.2d 761, 763, 707 N.Y.S.2d 707, 711 (3d Dep't 2000) (dismissing petition in its entirety where petitioner failed to join necessary party before the General City Law 81-c statute of limitations expired). Since the Court dismissed the challenge to the Planning Board's Final Site Plan Approval, the Court cannot grant relief on Petitioners' SEQRA claims.

The Final Site Plan Approval was the final determination that would have rendered Petitioners' SEQRA claims ripe for judicial review, had a timely challenge been commenced. Petitioners have offered no authority that would justify the late claim or otherwise allow them to deprive Respondents of the statute of limitations defense and circumvent General City Law Section 81-c. The remaining challenges to the SEQRA determination in the Amended Petition cannot be said to have ripened by way of site plan approval, when that had not yet occurred at the time of the original pleading, and the amended pleading filed on November 4, 2019 was not timely and should have been rejected in toto. The SEQRA claims are without merit because the Amended Petition cannot serve as a mechanism to "ripen" the SEQRA challenge.

If Petitioners wanted to take the position that the SEQRA challenge was now ripe for review because Final Site Plan Approval occurred on September 19, 2019, then they could have,

and should have, timely commenced a challenge to Final Site Plan Approval by way of seeking permission to supplement the Petition on or before October 20, 2019. If Petitioners had done so, in a timely manner before October 20, 2019, then Petitioners may have been able to properly interpose a claim relating to the SEQRA claims by way of a timely challenge to the Planning Board's final determination. Having failed to do so, they should not be permitted to do so now.

Petitioners cannot end-run the statute of limitations applicable to their challenge of the Final Site Plan Approval by pursuing SEQRA claims. In Matter of Beer v. Village of New Paltz, 163 A.D.3d 1215, 1217, 80 N.Y.S.3d 713, 715 (3d Dep't 2018), the petitioners attempted to characterize the proceeding as a challenge to Town Board's SEQRA determinations, when their allegations were directed at the establishment of water district, to which a 30-day statute of limitations applied. The Court found that petitioners had failed to timely challenge the establishment of the water district and rejected their attempt to skirt the 30-day limitations period by claiming that their challenge was to the SEQRA determination. Similarly, here, Petitioners should not be permitted to flout the statute of limitations and pursue the SEQRA claims, especially when no relief can be granted without invalidating the Final Site Plan Approval.

It is well-settled in the context of environmental review claims that the review of an agency's SEQRA findings is circumscribed and limited. This is demonstrated by the requirement to "balance the goals of preventing piecemeal review of each determination made in the context of the SEQRA process which would subject it to unrestrained review . . . result[ing] in significant delays in what is already a detailed and lengthy process. . . . against the possibility of real harm to the complaining party…" Matter of Guido v. Town of Ulster Town Bd., 74 A.D.3d 1536, 1537, 902 N.Y.S.2d 710, 712 (3d Dep't 2010) (citations and internal quotation marks omitted) (alterations in original). For that reason, there must be a "final determination" and actual injury

before a SEQRA claim is ripe for review. Without it, there is nothing for the Court to review. Stated differently, the SEQRA findings can only be reviewed in the context of a final determination by the SEQRA Lead Agency – and in this case that final determination is in the form of Final Site Plan Approval by the City Planning Board.

The mere assertion, in a belatedly filed "amended" pleading filed without permission of the Court, that Final Site Plan Approval "happened" during the pendency of the proceeding is insufficient to render the SEQRA claims reviewable because the Petition is devoid of a timely filed and valid challenge to Final Site Plan Approval. The Petitioner's failure to timely challenge Final Site Plan Approval in a proper pleading makes that impossible. See Save the Woods & Wetlands Ass'n v. Village of New Paltz Planning Bd., 296 A.D.2d 679, 680, 746 N.Y.S.2d 230, 232 (3d Dep't 2002) (petitioners' supplemental petition naming a necessary party which was filed after the 30-day statute of limitations expired was time-barred).

In short, interposing a timely claim addressed to Final Site Plan Approval is a prerequisite to Court review of the SEQRA findings. See McNeill, 260 A.D.2d at 830. Having failed to timely challenge that final determination, the untethered SEQRA claims are not reviewable and must be dismissed. Absent a valid - - timely interposed -- challenge to the final determination the SEQRA claims remain adrift and unreviewable in the same way they were not ripe for review prior to the final determination. That point applies with equal force whether it is based on the claims not being ripe because there has been no final determination, or whether Petitioners failed to timely challenge the final determination. Either way, without a challengeable final determination, there is no challengeable SEQRA claim. As a practical matter, there is no logical endpoint or relief to be had from a vacuous challenge to the FEIS. The FEIS is challenged as a means of invalidating a final determination, and the final determination is what makes the FEIS claim ripe for review because

it is final and caused an injury for which redress is sought. Accordingly, the SEQRA claims are not viable and must be dismissed.

POINT V

PETITIONERS' SEQRA ARGUMENTS ARE MOOT

The SEQRA causes of action raised by the Petitioners should be denied as moot because they no longer serve any practical purpose. As was explained above, Respondents vehemently disagree with Petitioners' assertions that the Planning Board failed to take a hard look at historic or archeological resources, Cumulative Impacts and alternatives prior to issuing a negative declaration and granting site plan approval for the Project. However, despite Petitioners' passionate blustering about preserving the so-called "Columbia-LaFayette Neighborhood," Petitioners never even attempted to obtain preliminary injunctive relief to preserve the status quo. As a result, MVHS continued to move forward with the Project relying on its valid and unchallengeable site plan approval and, now, much of the so-called "Columbia-LaFayette Neighborhood" has been demolished pursuant to properly granted demolition permits issued to MVHS. (See Affidavit of Eric Lints, ¶3). Thus, since the "neighborhood" and many of the resources or structures that Petitioners sought to protect through their SEQRA claims no longer exist, those claims must be denied because they are now moot.

"Typically, the doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy." Dreikausen v. Zoning Bd. of Appeals, 98 N.Y.2d 165, 172, 746 N.Y.S.2d 429, 432 (2002); see Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714, 431 N.Y.S.2d 400, 402 (1980). The most important factor for a court to consider when evaluating a claim of mootness in the context of a construction project is whether the claimant failed "to seek preliminary injunctive relief or otherwise preserve

the status quo to prevent construction from commencing or continuing during the pendency of the litigation." Dreikausen, 98 N.Y.2d at 746; see., e.g., Imperial Improvements v. Town of Wappinger Zoning Board of Appeals, 290 A.D.2d 507, 507, 736 N.Y.S.2d 409, 410 (2d Dep't 2002) (no injunction or stay sought); Fallati v. Town of Colonie, 222 A.D.2d 811, 813, 634 N.Y.S.2d 784, 786 (3d Dep't 1995) (no injunction sought before Appellate Division); Stockdale v. Hughes, 189 A.D.2d 1065, 1068, 592 N.Y.S.2d 897, 900 (3d Dep't 1993) (no injunction or stay sought); Ughetta v. Barile, 210 A.D.2d 562, 563, 619 N.Y.S.2d 805, 807 (3d Dep't 1994), lv. denied, 85 N.Y.2d 805, 626 N.Y.S.2d 756 (1995) (proceeding commenced after construction completed). "Also significant are whether work was undertaken without authority or in bad faith, and whether substantially completed work is readily undone, without undue hardship. Further, a court may elect to retain jurisdiction despite mootness if recurring novel or substantial issues are sufficiently evanescent to evade review otherwise." Citineighbors Coalition of Historic Carnegie Hill v. N.Y. City Landmarks Pres. Comm'n, 2 N.Y.3d 727, 729, 778 N.Y.S.2d 740, 742 (2004) (quoting Matter of Dreikausen, 98 N.Y.2d at 173); PSEG Long Island, LLC v. Town of E. Hampton, 154 A.D.3d 703, 705-06, 62 N.Y.S.3d 437, 440 (2d Dep't 2017).

Here, it is undisputed that the Petitioners never moved for a preliminary injunction, or otherwise sought to preserve the status quo, pending the outcome of the Article 78 proceeding. Failure to seek an injunction is the most important factor to consider when determining whether a claim is moot and is dispositive in most cases. See, e.g., Matter of Town of Mt. Pleasant v. Delaney, 149 A.D.3d 1086, 1087-88, 53 N.Y.S.3d 340, 342-43 (2d Dep't 2017) (concerning construction of a community residential facility); Matter of Lilly Pad, LLC v. Zoning Bd. of Appeals of Vill. of E. Hampton, 136 A.D.3d 823, 823-24, 24 N.Y.S.3d 910, 910 (2d Dep't 2016). Petitioners watched mutely as the very public demolition project in downtown Utica progressed

and never attempted to obtain an injunction. "[P]etitioners' explanation that they did not do so because of monetary constraints is unavailing[.]" Matter of Bruenn v. Town Bd. of Town of Kent, 145 A.D.3d 878, 880, 43 N.Y.S.3d 488, 489-90 (2d Dep't 2016) (citing Citineighbors Coalition of Historic Carnegie Hill, 2 NY3d at 729-30). The First Department unequivocally determined that the failure to seek an injunction was fatal to the SEQRA claims of a group opposing a hospital in Matter of Weeks Woodlands Ass'n, Inc. v. Dormitory Auth. of the State of N.Y., where the opponents failed to seek an injunction to halt construction, and stated as follows:

> [T]he environmental concerns invoked by petitioners are the increased traffic and the aesthetic cost anticipated to result from the enlargement and expansion of the hospital buildings. In view of the advanced stage the work on the project has reached and petitioners' failure to do all they could to timely safeguard their interests, the concerns they invoke, while not to be deprecated, must be weighed against the public interest to be served by the upgrading of respondent hospital's antiquated 1950s-era facilities. The latter interest, to reiterate, is the enhancement of the hospital's ability to treat and rehabilitate sick and disabled children. Taking all of the circumstances into account, we find that the interests invoked by petitioners do not warrant retaining jurisdiction of their appeal notwithstanding their failure to take all available steps to protect their own interests. We disagree with the dissent's suggestion that respondents' proceeding with the modernization of the children's hospital could reasonably be viewed as an instance of "bad faith," notwithstanding that Supreme Court denied petitioners' motion for a preliminary injunction and petitioners then failed even to request such relief upon this appeal. While we agree with the dissent that, on balance, petitioners have the stronger argument on the merits, not even petitioners have suggested that respondents' position on the merits is frivolous or lacking in a good faith basis. If petitioners wished to cast the risk of going forward with the work upon respondents, it was imperative for them at least to seek relief preserving the status quo at each stage of the proceeding, including the appeal to this Court. The Court of Appeals has expressly rejected the argument that a party suing to halt construction need not seek a preliminary injunction if it anticipates that the bonding requirement for such relief will exceed the amount it wishes to provide. In Citineighbors, the petitioners did not try to enjoin construction during this litigation's pendency, nonfeasance that they chalk up to monetary constraints' and the unlikelihood of success. In short,

> petitioners simply assumed that Supreme Court would not grant them injunctive relief or, in the alternative, would require an undertaking in an amount more than they could or wanted to give. Under Dreikausen, however, petitioners were required, at a minimum, to seek an injunction in the circumstances presented here. Having pursued a strategy that foisted all financial risks (other than their own legal fees and related expenses) onto the property owner and the developer, petitioners may not expect us to overlook the substantial completion of this construction project.

95 A.D.3d 747, 752-53, 945 N.Y.S.2d 263, 268 (1st Dep't 2012) (internal citations and quotations omitted).

The work performed by MVHS was not undertaken in bad faith because it was performed in accordance with properly issued demolition permits and in accordance with site plan approval that this Court determined was not challengeable. Lints Aff., ¶19. "After obtaining the approvals necessary to commence construction--a time-consuming endeavor--the property owner and developer had every business incentive to complete the building as quickly as possible so as to profit from their investment and avoid paying interest on construction loans." Citineighbors Coalition of Historic Carnegie Hill, 2 N.Y.3d at 729.

The demolition work cannot easily be undone without substantial hardship to MVHS because whatever archeological resources or historic structures were present have been destroyed and the substantial expense incurred by MVHS cannot be recouped in the event the Court prevents the IHC Project from going forward. To date, MVHS has expended over $52,000,000 on the Project in the form of site work, demolition, property acquisition and abatement. Lints Aff., ¶ 45. A list of the alleged historic buildings and archeological resources that have either been demolished or are scheduled to be demolished in the immediate future is provided in the Affidavit of Eric Lints in paragraphs 27 through 44. The present case is similar to Citizens for St. Patrick's v. City of Watervliet City Council, 126 A.D.3d 1159, 1160-61, 5 N.Y.S.3d 582, 584-85 (3d Dep't 2015), in that the SEQRA claims that were dismissed in that case sought to protect a church that

had already been demolished and the Court took into account the money already spent by the developer on demolition costs while the opponents to the Project failed to seek an injunction to prevent it.

In addition to the substantial hardship that MVHS would suffer if the SEQRA claims were granted, the Court should also consider the damage to others. Matter of Town of Mt. Pleasant, 149 A.D.3d at 1087-88 (2d Dep't 2017). The Project is important to the community-at-large because it will provide much needed healthcare services to underserved populations and provide for the economic revitalization of blighted downtown Utica. The integrated campus serves the public need by (1) creating a facility with the newest technology, services and advancements in patient safety and quality so that the community can receive the most up-to-date healthcare services that rivals those found in large cities; (2) serving the growing demand for healthcare due to the rapidly increasing and aging population in the region; and (3) improving accessibility to and availability of services by attracting specialists and providing services that otherwise would not be available to the community. In addition, the opportunity to gain greater operational efficiencies through the elimination of duplicative and redundant functions will help to reduce the rate of increase in healthcare spending and to achieve improved financial stability. It will benefit Medicaid enrollees and uninsured individuals in the City and serve the largest and most diverse population in Oneida County. Scholefield Aff., ¶18. By contrast, where Petitioners have failed to take any measures to seek injunctive relief, they should not now be permitted to pursue their claims, and the Court should find that they are barred by the doctrine of laches. Stockdale v, 189 A.D.2d at 1068 ("We conclude that petitioners failed to make sufficient efforts to safeguard their rights here by failing to seek an injunction or stay to prevent construction on the subject complex from commencing or continuing during the pendency of this litigation.")

Accordingly, the SEQRA claims must also be dismissed as moot and barred by laches.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition be denied in its entirety, with prejudice.

Dated: February 14, 2020

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