

Response 54:

As stated in the DEIS (Section 3.2), the stormwater management infrastructure for the proposed downtown IHC will be designed in accordance with the NYS Stormwater Management Design Manual (Design Manual), as required by NYSDEC SPDES General Permit for Stormwater Discharges from Construction Activity (Permit No. GP-0-15-002). For redevelopment projects, such as the proposed downtown hospital, Chapter 9 of the Design Manual requires a comparison of pre-development impervious surfaces to post-development impervious surfaces, with the stormwater management design based on the net gain or net loss of impervious surfaces.

From Section 9.1 (<http://www.dec.ny.gov/chemical/29072.html>): *“Redevelopment of previously developed sites is encouraged from a watershed protection standpoint because it often provides an opportunity to conserve natural resources in less impacted areas by targeting development to areas with existing services and infrastructure. At the same time, redevelopment provides an opportunity to correct existing problems and reduce pollutant discharges from older developed areas that were constructed without effective stormwater pollution controls.”*

From Section 9.2.1: *“If the redevelopment activities result in no change to hydrology that increases the discharge rate from the project site, the ten-year and hundred-year criteria do not apply. This is true because the calculated discharge for pre-development versus post-development flows result in zero net increase”*

Additionally, there is no requirement to use a single discreet storm event for design. The standard is to use published storm data found at <http://precip.eas.cornell.edu/>, which provides current, regional rainfall data that specifically accounts for current New York State climatology and increasingly extreme storms.

Comment 55: Frank Montecalvo, Attorney at Law, Letter, 12/26/18:

Runoff from the proposed “U-District” adjacent to the Downtown site must be addressed as a cumulative impact.

Response 55:

See Responses 51 and 125.

Comment 56: Frank Montecalvo, Attorney at Law, Letter, 12/26/18:

The Draft EIS fails to consider relocation of the Project to the St. Luke’s Campus as mitigation. (a) The number of patient beds will be close to if not within those currently/historically on site, suggesting that the Project environmentally would be the replacement of an existing facility on site with no new impacts other than construction/demolition. (b) The wetland on-site is a natural flooding buffer. (c) The 7/1/17 storm caused no flooding at or near the St. Luke’s Campus. (d) There are no pending large projects nearby that would cause cumulative impacts.

Response 56:

Given the critical medical services to be provided through the Project, it is designed to avoid flooding to the greatest extent practicable. Under these circumstances, relocation of the Project to the St. Luke’s Campus is not warranted. See Responses 28 and 48.

3.6 GROUNDWATER**Comment 57: Frank Montecalvo, Attorney at Law, Letter, 12/26/18:**

Impact on Groundwater: This topic is addressed in Draft EIS Section 3.3. The presence of impacted groundwater from prior industrial uses is mentioned as a concern. The EIS needs to acknowledge that this concern could be mitigated by Relocation of the Project to the St. Luke’s Campus, due to the lack of prior industrial uses there.

Response 57:

See Responses 28 and 48. Moreover, relocation is not necessary because the DEIS has demonstrated that any impacted groundwater from prior industrial use would be remediated in connection with the Project, thereby resulting in an environmental benefit.

3.7 AIR**Comment 58: Frank Montecalvo, Attorney at Law, Letter, 12/26/18:**

Impact on Air: This topic is addressed by the Draft EIS in Section 3.4. Fugitive emissions from regulated materials and impacted soils is acknowledged as a potential concern during construction (Draft EIS p. 67/3527). Relocation of the Project to the St. Luke's Campus should be considered to mitigate this concern due to the lack of prior industrial uses at that location.

The Draft EIS acknowledges that the Project's road closures could increase emissions from mobile sources (p. 64/3527). Relocation of the Project to the St. Luke's Campus should be considered to mitigate this concern because road closures would be unnecessary at the St. Luke's Site.

Response 58:

As stated in DEIS Section 3.4, IHC operations will result in air emissions from boilers, emergency generators, and additional minor sources. In accordance with New York State regulations, the proposed emission sources are exempt from permitting (*i.e.*, exempt and trivial activities). In addition, the annual potential to emit (PTE) is below the Title V major source thresholds. Based on the expected air emission sources, it is likely that the proposed hospital will not require an air permit or registration. The IHC will still be required to meet the requisite air quality standards regardless of the need for permitting. Adherence to these standards will mitigate potential significant adverse impacts from operations. In addition, the new hospital will incorporate new equipment, which will meet current standards regarding performance and efficiencies.

In regard to the comments, the age of St. Luke's would suggest that the type and magnitude of impacts from Asbestos Containing Material (ACM) and Lead-Based Paint (LBP) resulting from the renovation or demolition of the facility would be substantially similar to those encountered at the downtown location.

Section 3.4 of the DEIS includes a description of measures to be implemented to mitigate impacts from fugitive and mobile emissions. In regard to fugitive emissions, the DEIS states the following:

Prior to the initiation of construction activities, a hazardous building materials survey will be conducted to identify the potential presence of hazardous materials such as ACM and LBP in buildings to be demolished. In addition, an additional environmental subsurface investigation will be conducted (including soil and groundwater sampling) to evaluate potential impacts from past or existing land use, if any, that would require special handling and disposal during construction activities. Samples will be analyzed for volatile organic compounds (VOCs), semi-volatile organic compounds (SVOCs), Target Analyte List (TAL) metals and total petroleum hydrocarbons (TPH). Soil sampling results will be compared to NYSDEC Part 375 Soil Cleanup Objectives (SCOs) for Unrestricted Use and for Restricted Commercial Use; groundwater sampling results will be compared to NYSDEC Division of Water Technical and Operational Guidance Series (TOGS 1.1.1) Ambient Water Quality Standards and Guidance Values for Class GA waters.

Based on the data, wastes will be removed, stockpiled, handled, transported and disposed in accordance with applicable local, state and federal regulations. Waste management protocols (including reporting and manifesting) will be implemented in addition to E&SCs and dust suppression measures previously identified.

In addition, the DEIS states that:

[]...the New York State Department of Labor's Code Rule 56 requires that all work that disturbs ACM be done by trained workers following special procedures and engineering controls (including air monitoring) to prevent the spread of asbestos into the air and ensure ACM has been properly removed.

In regard to mobile source emissions, the DEIS stated that the Project Sponsor would be required to:

- Prepare and implement of a maintenance and protection of traffic plan in accordance with the Manual on Uniform Traffic Control Devices (MUTCD) for Streets and Highways to minimize traffic delays and queued vehicle exhaust emissions during construction
- Coordinate with road jurisdictions to optimize signal timings at specific intersections to facilitate the adequate flow of traffic adjacent to the Project Site during operations.

See Responses 28 and 48 for the remainder of the comment that focuses on the St. Luke's Campus as an alternative for the Project as proposed. Moreover, relocation is not necessary because the DEIS has demonstrated that any impacted soil from prior industrial use would be managed in accordance with state regulations and ultimately remediated in connection with the Project, thereby resulting in an environmental benefit.

3.8 AESTHETIC RESOURCES

Comment 59: Linda K. Paciello, Ph.D., Resident (New Hartford), Letter, 12/18/18:

The lights from the hospital, parking lots, helipad, *etc.* will certainly create a large section of light. How will this affect the other residents of the area?

Response 59:

Site lighting already exists within and proximal to the Project Site and includes street and building (interior and exterior) to provide for general, accent, or task lighting considerations. Much of the existing exterior lighting fixtures predate current designs that promote energy efficiency and dark sky objectives. To mitigate light migration and glare, the DEIS (Section 3.5), indicated that the Project will be designed to conform with City Code requirements (City Code Section 2-29-387), which require the following:

- The illumination of off-street parking facilities shall be designed so that the light from lighting fixtures in such facilities does not reflect direct rays or spill over into adjacent residential districts. Lighting arrangements for all off-street parking facilities shall be approved by the City
- Lighting fixtures shall not be placed higher than 12 feet above the finished grade, except that in business districts the Planning Board may approve lighting fixtures of a greater height, but not exceeding 25 feet above the finished grade
- Fixtures shall be of the non-spill type, hooded/shielded with reflective cut-offs to reduce glare
- Candle power per fixture shall not exceed 3 foot-candles measured at grade level directly under the fixture.

Outdoor site lighting for the proposed IHC will consist of a combination of pole-mounted, bollard-mounted, or wall-mounted LED lighting. Lighting of the surface parking lots and access roadways will be accomplished using approximately 127-watt LED fixtures mounted on 25-foot high poles. The poles will be spaced appropriately to provide acceptable lighting levels, no greater than 3 foot-candles measured at grade directly under the fixture. The fixtures will be hooded to reduce glare, and direct light downward to the parking lot surface.

Walkways will be lit using both bollard and pole mounted LED light fixtures. Pole mounted walkway lighting will be approximately 66-watt fixtures on 12-foot poles, and bollard lighting will be 28-watt fixtures.

The helipad (and associated lighting) will be designed in accordance with FAA specifications (see Section 1.1.4 of this FEIS Responsiveness Summary; see also Responses 6, 10, 11 and 12.

To further minimize light or glare impacts, the following additional measures will be considered:

- Building design would use low-reflective glass and other materials, window recesses and overhangs, and façade modulation
- The number of reflective surfaces may be limited
- Landscaping, screens, and “green walls” may obstruct light from shining to off-site locations
- Nighttime illumination of the site and selected buildings may be restricted and provided only when function or safety requires it
- Interior lighting, if appropriate, would be equipped with automatic shut-off times. Automatic shades may be installed where lighting is required for emergency egress
- Parking lots and structures may include screens or landscaping to obstruct glare caused by vehicle headlights

Adherence to New York Building Code requirements for outdoor lighting, as well as the use of the mitigation measures described above should provide sufficient mitigation to eliminate potential significant adverse impacts related to aesthetics from light and glare. Specific information relative to stationary building fixtures and signage would be provided as part of the construction level plans associated with the City’s Building Permit process.

Comment 60: Frank Montecalvo, Attorney at Law, Letter, 12/26/18:

Impact on Aesthetic Resources including Lighting: This topic is addressed by the Draft EIS in Section 3.5. It acknowledges the types of buildings currently on the Downtown site, that they will be replaced with more modern looking structures, and that the new structures will be consistent with the appearance of the renovated Utica Aud and what is planned at Harbor Point. However, the determination of appropriate aesthetics at the Downtown site has been standardized by the Gateway Historic Canal District Design Standards adopted in 2005. Although the Applicant acknowledged the existence of these standards in its CON application (*i.e.*, noting a height limitation of 7 stories/70 feet on Draft EIS p. 373/3527), the Draft EIS failed to apply the standards. At 9 stories, the Project exceeds the acknowledged height standard making it an aesthetic impact requiring mitigation. This could be accomplished by:

1. Redesigning the Project to conform to Gateway Historic Canal District Design Standards

Response 60:

The Gateway Historic District-Form Based Code Overlay District is intended to foster a vibrant, safe, twenty-four-hour District that encourages a broad range of residential, commercial, office, institutional, public, cultural and entertainment uses and activities. The design standards define and promote the district as a desirable place to live, work and recreate. Virtually all uses, including hospital uses, are permitted within the Overlay District and new construction that follows the strict guidelines is approved without Planning Board review. Developments that do not meet the guidelines may still proceed if they follow the normal site plan review process by the Planning Board. Since the proposed Project does not follow the strict guidelines, site plan review by the Planning Board is required.

In fact, since the adoption of the Overlay District in 2002, there has only been one building constructed in accordance with the guidelines.

Regardless, this area has been targeted by the City of Utica for economic redevelopment for years rendering its development by MVHS consistent with the applicable City plans.

As noted in the comment, the DEIS, and in Figure 25 to Figure 27, the new structures will be consistent with the appearance of the renovated Utica AUD, NEXUS, and development at Harbor Point. See also Response 62.



Figure 24. View of Proposed IHC From the Northeast (Source: NBBJ 2018)

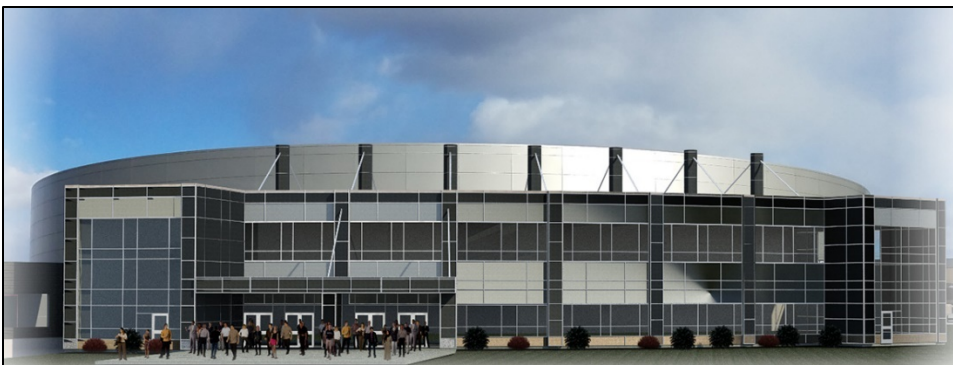


Figure 25. Utica AUD (Source: Upper Mohawk Valley Memorial Auditorium Authority)



Figure 26. NEXUS (Source: Upper Mohawk Valley Memorial Auditorium Authority)

Comment 61: Frank Montecalvo, Attorney at Law, Letter, 12/26/18:

2. Relocating the Project to the St. Luke's Campus where the standards do not apply and the building form is consistent with what is already on-site.

Response 61:

See Responses 28, 48 and 60.

Comment 62: Frank Montecalvo, Attorney at Law, Letter, 12/26/18:

Another short-coming of the Draft EIS is the failure of its artist renderings to show the Project in context with surrounding buildings from important vantage points. Utica has a distinctive and unique skyline perhaps best appreciated driving south on Route 12 Arterial or east on Oriskany Boulevard. The Arterial/Oriskany Boulevard interchange is an important Gateway to Downtown. Travelling east on Oriskany Blvd. as one emerges from under the interchange, the skyline of Utica is revealed, 'up close and personal' on the right with prominent architectural examples such as the Adirondack Bank Building, Grace Church, State Office Building, new Bank of Utica clocktower, City Hall's 'Tower of Hope,' and M&T Bank's "Gold Dome" alternately coming into view. These buildings are also viewable as one travels south on Rt. 12 over the interchange. From either vantage point, the Project's massive, lengthy, 9-story "slab," out-of-scale with the neighborhood and street-grid, and placed across Cornelia St., will block these views.³²

Response 62:

The Commenter offers an opinion. As stated in the DEIS, the proposed action will replace the predominant 19th and 20th century architectural building styles, which currently characterize the Project footprint. While the IHC will replace these existing 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. Renderings were provided in the DEIS (Section 3.5). Furthermore, following consultation between DASNY, MVHS and the New York State Office of Parks, Recreation and Historic Preservation (OPRHP), also known as the State Historic Preservation Office (SHPO³³), 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)



Figure 27. View Along Lafayette Street (Source: Hammes Company, NBBJ, Dwyer Architectural, SSR (2018))

³² The following Google Map® photographs were included with the Commenter's submission:

- Eastbound Oriskany Blvd emerging from interchange. (Commenter's note: This viewshed is better appreciated in-person from different points while driving, without Google Map's distorted perspective.)
- Southbound Rt 12 passing over interchange. (Commenter's note: This viewshed is better appreciated in-person from different points while driving, without Google Map's distorted perspective.)

The photographs are included with the Commenter's original correspondence, which is included in Appendix B to this FEIS Responsiveness Summary.

³³ OPRHP and SHPO are used interchangeably throughout this document.

- (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)

It is MVHS's intent to review these key architectural details as the design progresses to take advantage of any opportunity to incorporate them.

In addition, as stated in the DEIS (Section 3.5), the architectural design, as an acknowledgement to the city's building history, incorporates brick construction in the first two floors of the new hospital (see Figure 28). In SHPO's matrix of buildings, 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 an opportunity for the new hospital to pull from the history of downtown Utica into present day while maintaining the City's deep roots in industrial and commercial construction.

3.9 HISTORIC AND ARCHAEOLOGICAL RESOURCES

Comment 63: Frank Montecalvo, Attorney at Law, Letter, 12/26/18:

Impact on Historic and Archeological Resources: This topic is addressed by the Draft EIS in Section 3.6 as well as in Appendices E and H. The Draft EIS acknowledges and extensively documents the existence of sites of Historic or Archeological significance within the Downtown site which may be disturbed/destroyed/adversely affected by the Project, including sites on the National Registry, sites eligible for the National Registry, sites listed in the Downtown Genesee St. Historic District, and sites related to operation of the Erie/Chenango Canals. The Draft EIS postpones definition of mitigation measures pending further study, consultation with, and action by OPRHP to prescribe measures to mitigate impacts to known and unknown historic properties; but anticipates such measures to include further assessments/testing of properties, *etc.* (which might be characterized as documenting what is there and saving some artifacts before structures are destroyed). The Draft EIS needs to acknowledge that impacts to Historic and Archeological Resources may be avoided by relocating the Project to the St. Luke's Campus.

Response 63:

The OPRHP administers programs authorized by both the National Historic Preservation Act (NHPA) of 1966 and the New York State Historic Preservation Act (SHPA) of 1980. Under Section 106 of the NHPA and Section 14.09 of the New York SHPA, state agencies which undertake activities affecting historic properties, including those properties which have been determined to be eligible for listing on the State or National Registers, must consult with OPRHP when any aspect of the proposed undertaking may or will cause any change, beneficial or adverse, in the quality of any eligible or registered property in the Project impact area. OPRHP's role in the review process is to ensure that effects or impacts on eligible or listed properties are considered and avoided or mitigated during the Project planning process. If OPRHP finds an adverse impact, there are three possible outcomes:

- If OPRHP and the undertaking agency agree on a course of action it should be set forth in the Letter of Resolution (LOR) and at the conclusion of the undertaking the agency must certify in writing that the undertaking was completed in accordance with the LOR.
- If the undertaking agency determines that there are no feasible and prudent alternatives, but determines it is in the public interest to proceed, it may unilaterally terminate the consultation process by providing written notice to OPRHP of this conclusion and its supporting reasons.
- If the undertaking agency and OPRHP both agree that there are no alternatives, but that it is in the public interest to proceed and make a joint written declaration to this effect.

NYSDOH and DASNY have the obligation to consult with OPRHP prior to release of the grant funds for the IHC. As a result, DASNY required MVHS, as the Project Sponsor, to engage in the consultation process with OPRHP early in the planning process. MVHS made an initial submission to OPRHP's Cultural Resource Information System (CRIS) in September 2016. The ensuing process, which included multiple points of coordination and consultation between DASNY, OPRHP and MVHS, was previously outlined in the DEIS (Section 3.6).

Based on that consultation and in support of the impact evaluation process, two cultural resource investigations were performed by MVHS to identify the potential presence and/or likelihood of historic and archaeological resources within the Project footprint. Those evaluations, which included a Phase 1A Cultural Resource Investigation and an Architectural Inventory, were summarized in and appended to the DEIS (Appendix E).

Based on OPRHP's review of those investigations, it was concluded by OPRHP that the Project could impact resources listed or eligible for listing on the National Register of Historic Places, as well as areas with known or suspected sensitivity to the presence of archaeological resources. Those resources were clearly defined in SHPO's correspondence, which was also appended to the DEIS (Appendix E).

Consistent with SEQRA, the consultation process, regardless of site control, resulted in an identification of baseline conditions and potential Project-related impacts on those existing cultural resources. Throughout the consultation process, MVHS has been clear in its intentions that, consistent with the need to meet its Project objectives, the Project may require demolition of existing buildings within the Project footprint – that is the magnitude of the impact, which was identified and assessed in the DEIS.

In accordance with SHPA, to mitigate these impacts, MVHS has signed a LOR with OPRHP and DASNY. A copy of the LOR is appended to this FEIS Responsiveness Summary (Appendix C). The LOR states that if reasonable and prudent alternatives that might avoid direct and indirect impacts to identified and yet to be identified resources cannot be found, that appropriate mitigation measures/stipulations will be implemented to offset any loss to historic resources. These agreed upon measures consist of:

BUILDINGS

- As soon as practicable, the Applicant (MVHS) will commence a complete assessment of buildings it currently controls that are listed in Appendix A (of the LOR) and proposed for removal.
- Upon site control of the remaining buildings, the Applicant will commence a complete assessment of the remaining buildings listed in Appendix A (of the LOR).
- This assessment will include photographs of exterior and interior conditions. Sufficient (10 to 20) images should be prepared to provide the OPRHP with a general understanding of the state of the resource. These images, along with a written assessment of the general condition of the building, will be submitted to OPRHP via the CRIS program.

ARCHAEOLOGY

- Archaeological testing, as previously requested by SHPO in their letter to O'Brien & Gere dated June 18, 2018 (see DEIS Appendix E), will commence once the Applicant obtains site control. Reports associated with the testing must be filed in a timely manner and must meet NYS Archaeological Standards.
- No ground disturbing activities in the Project Impact Area (PIA) will commence until all archaeological testing has been completed at each identified site and the results of the testing have been reviewed by SHPO. Notwithstanding the above, the parties acknowledge and agree that MVHS will be allowed to perform certain environmental testing and engineering surveys (borings) as needed on properties MVHS or the City of Utica control within the PIA.
- Unanticipated discoveries, including the discovery of human remains during construction, will follow the protocol outlined in Appendix C (of the LOR).

TREATMENT MEASURES (BUILDINGS)

In accordance with Section 14.09 of the SHPA, efforts that would avoid or minimize impacts to historic buildings should be explored and documented. An alternatives analysis relating to the disposition of historic buildings in the PIA must be submitted to SHPO for review and comment prior to any activity on the site that might damage the resources. This analysis should explore the following opportunities:

- The parties expressly agree that buildings located within the footprint of the hospital building and parking garage structure will not be retained. If appropriate and agreed upon, salvageable, architecturally significant features of the removed buildings (*i.e.*, building name panels, significant intact architectural elements, *etc.*) will be incorporated into the new structure or hospital site.
- Avoidance: To the extent practicable, efforts to avoid the removal or direct impacts to buildings identified as historic (Appendix A of the LOR) and located outside of the footprint of the Hospital and Parking Garage will be explored. Documentation outlining this exploration of alternatives will be provided to SHPO prior to any action that would directly impact the involved resource(s).
- Minimization: If practicable, efforts that would include options to lessen the overall, as of yet to be fully documented, impacts to historic resources located outside of the hospital building and parking structure footprints will need to be explored. This assessment should include a discussion of the potential retention of some of the historic resources as part of the development planning and mitigation.
- Mitigation Options: Where it has been determined by the parties that some or all of the historic resources must be removed from the PIA, the following mitigation measures may be applied:
 1. Exploration of the potential reuse of existing structures located outside of the hospital building and parking structure's footprints, deemed retainable and adaptable for a productive hospital-associated use, provided sufficient resources to complete the Project remain.
 2. Where buildings cannot be retained the Applicant will follow SHPO's standard resource documentation process outlined in Appendix B (of the LOR).
 3. Other appropriate mitigation for the loss of historic resources as agreed to by the parties (*e.g.*, reuse of building name panels, significant intact architectural elements, *etc.*) will be incorporated into the new structure or hospital site creating historic linkage and homage to the history of this portion of the City of Utica.

Activities accomplished in accordance with the LOR will be considered in compliance with Section 14.09 of the New York State Parks, Recreation and Historic Preservation Law. "Nothing in SEQRA bars an agency [which has the ultimate decision-making authority] from relying upon information or advice received from others, including consultants or other agencies, provided that the reliance was reasonable under the circumstances." See *Jackson*, 67 N.Y.2d at 427. In fact, courts look favorably on agency consultation with SHPO when reviewing whether the agency took a hard look at impacts on historic resources. See *Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 427 (1986).

It is not required that the mitigation proposed by the LOR be undertaken prior to the completion of the SEQRA review because SEQRA prohibits the issuance of any permits or approvals prior to its completion. Thus, it is sufficient that the LOR specify the appropriate mitigation measures to be undertaken once the Project receives the necessary approvals. In regards to relocating the Project to St. Luke's to mitigate Project-related impacts on cultural resources, see Responses 28, 48 and 67.

Comment 64: Steven Grant, President, LSGU, Letter, 12/27/18:

The current US Secretary of the Interior guidelines discourage demolition only as a last resort after all other options have been exhausted. Since the St. Luke's campus is a viable 2nd site, as determined by MVHS, another option to explore exists.

[In addition to 2 National Register of Historic Places (NRHP) listed properties and 9 NRHP eligible properties], three properties are also in the expanded NRHP listed Downtown Genesee Street Historic District which represents an obstacle to removal as demolition in the district is also restricted. NYSHPO requires investigation and documentation of the above mentioned historically and culturally significant properties, which in many cases has not yet commenced and is required as part of the SEQRA process.

The NRHP eligible St. Elizabeth campus, which MVHS is proposing to repurpose, is located in Utica's Scenic & Historic Preservation District and subject to review/approval of any exterior alterations or proposed demolition.

Response 64:

See Responses 9, 28 and 63. The remainder of the comment is noted. MVHS is not proposing to demolish the SEMC (see Response 177).

Comment 65: Thomas S. West, West Law Firm (on behalf of Brett Truett & NoHospitalDowntown), Letter, 12/27/18:

The DEIS is woefully incomplete and, indeed, fatally defective relative to evaluation of adverse impacts to historical and archaeological resources. The DEIS documents that, pursuant to article 14 of the New York State Parks, Recreation and Historic Preservation Law ("PRHPL"): (1) consultation with the OPRHP (SHPO) is in progress, but has not concluded; (2) more investigation is necessary (including subsurface testing); and (3) no letter of resolution has yet been obtained. *See generally*, DEIS, Section 3.6 and Appendix E (correspondence from SHPO, dated June 18, 2018, and July 17, 2018; correspondence from O'Brien & Gere, dated August 16, 2018).

The DEIS also documents that the Applicant is attempting to bypass SEQRA's requirement that practicable avoidance and mitigation measures be evaluated in a *public* forum (subject to public scrutiny and opportunity for comment) *prior* to decision-making. *See* [DEIS] Appendix E, Letter from O'Brien & Gere, dated August 16, 2018.

Response 65:

See Responses 63 and 67.

Comment 66: Thomas S. West, West Law Firm (on behalf of Brett Truett & NoHospitalDowntown), Letter, 12/27/18:

More specifically, a Phase IA archaeological investigation was completed for the Project area, resulting in a finding that the Downtown Site is sensitive for pre-contact archaeological sites and a variety of historic archaeological resources, including a historic site (442 Lafayette Street). A Phase IA architectural survey of existing buildings within the Downtown Site was also conducted, resulting in a finding of 49 architectural resources, including a portion of the Downtown Genesee Street Historic District (which is listed in the State and National Register of Historic Places), three contributing buildings to that historic district, and ten other buildings eligible for inclusion in the State and National Registers. *See generally*, DEIS Section 3.6 & Appendix E.

By letter dated June 18, 2018, SHPO informed the Applicant that a Phase II Site Examination would be required for the 442 Lafayette Street Historic Site, and Phase IB subsurface testing would be required on certain specified locations. By letter dated July 17, 2018, SHPO did three things: SHPO (1) reserved its right to comment further on archaeological issues upon completion of the required Phase II and Phase IB testing; (2) determined that, based on the planned demolition of at least two contributing buildings within the historic district and ten eligible historic resources, "the project as designed will have an Adverse Impact on historic resources;" and (3) directed an assessment of alternatives to avoid or lessen impacts regarding building demolition (*e.g.*, save structures in place or move buildings for adaptive re-use). *See* [DEIS] Appendix E (SHPO Letter, dated June 18, 2018).

In response, rather than performing the SHPO-directed testing, or addressing SHPO's mitigation recommendations, or developing an avoidance/mitigation plan as part of the SEQRA process, the Applicant sought a letter of resolution from SHPO, requesting that mitigation measures be developed after-the-fact. Appendix E (O'Brien & Gere Letter, dated August 16, 2018); see also DEIS, Section 3.6.3. The DEIS hypothesizes as to what the so-called after-the-fact "mitigation" measures ultimately might be – for example, providing SHPO with photographs of the historically significant buildings to be demolished, performing archaeological testing at some future date after the SEQRA process has terminated, and coming to terms on undisclosed/yet-to-be determined "treatment measures" (*i.e.*, to be developed after termination of the SEQRA process and after deciding to utilize the Downtown Site for this Project). See DEIS, Section 3.6.3.

In support of this request, the Applicant cites the alleged inability to gain full Project Site access (*i.e.*, because the Applicant does not own/control all of the affected properties) and the alleged need to achieve a balance between historic resource preservation and providing health care. DEIS, Appendix E (Letter from O'Brien & Gere, dated August 16, 2018). Of course, not a scintilla of legal authority supports the proposition that health care supersedes the procedural and substantive requirements of SEQRA; nor is there any legal support for the Applicant's intimation that health care concerns (even if they were valid here, which they are not) trump the State's long-settled policies, statutory directives and regulations directing agencies to, among other things, mitigate adverse impacts to listed and eligible historic properties to the fullest extent practicable. See, *e.g.*, PRHPL § 14.09(1), (2); 9 NYCRR Part 428.8.

Response 66:

See Responses 63 and 67, as well as the approved LOR (Appendix C to this FEIS Responsiveness Summary).

Comment 67: Thomas S. West, West Law Firm (on behalf of Brett Truett & NoHospitalDowntown), Letter, 12/27/18:

The Applicant's attempt to bypass the heart of SEQRA - which mandates evaluation of impacts *and* mitigation in a public process *prior* to decision-making - is unlawful, both procedurally and substantively. Further, neither of the Applicant's asserted reasons for attempting to side-step SEQRA's impact/mitigation evaluation requirement has any merit.

Response 67:

This comment represents a fundamental misunderstanding of the SEQR process. It is expected that the Lead Agency may consult with other Involved or Interested Agencies during the environmental review process. This is especially true when an Involved or Interested Agency possesses unique expertise related to a study or analysis that was required as part of the EIS. Here, impacts to historic resources were identified as a potential significant environmental impact requiring further study in the EIS. In connection with the study and evaluation of those impacts to historic resources, the applicant, together with DASNY, commenced consultation with OPRHP pursuant to the requirements of the State Historic Preservation Law (implementing regulations are 9 NYCRR Parts 426–428). See Response 63.

"Nothing in SEQRA bars an agency [which has the ultimate decision-making authority] from relying upon information or advice received from others, including consultants or other agencies, provided that the reliance was reasonable under the circumstances." See *Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 427 (1986) (finding the Lead Agency's reliance on a letter from SHPO did not violate the Lead Agency's obligation to make its own independent judgment of the EIS). In fact, NYSDEC tends to defer to the determinations of the OPRHP concerning the historic significance of buildings and sites. Courts have looked favorably on Lead Agency consultation with SHPO when reviewing whether the agency took a hard look at impacts on historic resources. A court also looked favorably, however, at a determination regarding impacts on historic resources that considered not only OPRHP's findings but also the statements of the applicants' expert.

Accordingly, completion of the consultation process as part of the SEQRA process and prior to the issuance of the FEIS and the Findings Statement comports with the purpose and intent of SEQRA. Such consultation was completed during the public process in response to public and agency concerns about the impact of the Project on historic resources. Consultation and the subsequent agreement with SHPO was undertaken by the Project Sponsor to mitigate the concerns identified by the public and the reviewing agencies. This process comports with the overriding purposes of SEQRA.

Now, where an FEIS has investigated potential adverse impacts to archeological and historic resources, the Lead Agency must address those potential adverse impacts when developing its SEQR findings. Specifically, the Lead Agency must articulate how those impacts have been avoided or mitigated to the maximum extent practicable, when weighed and balanced with social, economic and other considerations. The Planning Board, as the Lead Agency, may attach conditions to its final decision, where appropriate, to ensure that the identified mitigation is implemented. The agreement reached with OPRHP can properly be considered by the Planning Board in making its findings and the Planning Board can require compliance with the agreement as part of its Findings Statement.

Comment 68: Thomas S. West, West Law Firm (on behalf of Brett Truett & NoHospitalDowntown), Letter, 12/27/18:

First, SEQRA requires meaningful evaluation of environmental impacts and mitigation in the DEIS, as part of the public review process; and historical, archeological, architectural and aesthetic resources are expressly considered part of the environment and are protected under SEQRA. See ECL 8-0105(6), ECL 8-0109(1), (2), (8); 6 NYCRR 617.7(c)(1)(v); 6 NYCRR 617.9(b)(5)(iii), (iv); see also *Orchards Assocs. v. Planning Bd. of Town of N Salem*, 114 A.D.2d 850 (2d Dep't 1985). Given that the DEIS, itself, acknowledges that it does not contain the data necessary for full evaluation of impacts to historic/archaeological resources and mitigation as to same, the DEIS is fatally defective on its face, both procedurally and substantively. Accordingly, due to this material inadequacy, the SEQRA process should be immediately suspended and a supplemental EIS required that complies with the full procedures of the governing Part 617 regulations. See 6 NYCRR 617.9(a)(7)(i) & (iii).

Response 68:

The DEIS is not fatally defective because MVHS did not have access to the sites for purposes of undertaking further review of historic impacts. In fact, MVHS was able to submit an expert report that analyzed each building and considered the impact of the Project on each building. This report was sent to OPRHP and was attached to the DEIS (Appendix E). This report formed the basis for the LOR reached between OPRHP, DASNY and MVHS. There is no expert information in the comments that contradicts this report or the LOR and suspension of the environmental review process is not necessary. See Responses 63 and 67.

Comment 69: Thomas S. West, West Law Firm (on behalf of Brett Truett & NoHospitalDowntown), Letter, 12/27/18:

The Applicant's rationale for seeking to bypass meaningful public evaluation of impacts to, and mitigation regarding, historical/archaeological resources is fundamentally flawed. Unavailing is the Applicant's assertion that it should get a free pass as to data collection necessary for impact assessment (*i.e.*, the Phase II and Phase IB studies directed by SHPO) until after conclusion of the SEQRA process because of the alleged inability to obtain full site access now. The Applicant claims that it has the power of eminent domain. Assuming, without deciding if that is true, then the Applicant may avail itself of Eminent Domain Procedures Law § 404. Section 404 accords the condemnor the right of entry prior to acquisition (upon proper notice) in order to prepare studies necessary as a prerequisite to the condemnation process. In other words, the Applicant's site access excuse is utterly meritless. Moreover, to the extent the Applicant does not have eminent domain power, that merely highlights that its selection of the Downtown Site is fatally defective and that the Applicant should instead be pursuing the Applicant-owned St. Luke Campus (which has been found to be a feasible alternative site for the IHC). In other words, if the Applicant does not have the power to use Section 404 of the Eminent Domain Procedures Law, then the Downtown Site is fatally defective, because information cannot be gathered that is necessary to complete the SEQRA process.