

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 Law 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.

STATE OF NEW YORK)
) ss.
COUNTY OF ALBANY)

**Affidavit of Robert S. Derico
in Support of Motion to
Dismiss**

Index No. 02797-19

ROBERT S. DERICO, being duly sworn, deposes and says:

1. I am the Acting Director of the Office of Environmental Affairs and the Agency Preservation Officer ("APO") at the Dormitory Authority of the State of New York ("DASNY" or the "Authority"), a named respondent in the above-captioned case. I have worked at DASNY since 1999 and have served in this capacity since 2018. Prior to my promotion to Acting Director, I was employed by DASNY as a Senior Environmental Manager and Assistant Agency Preservation Officer in the DASNY Office of Environmental Affairs ("OEA") for approximately 11 years. Prior to that time, I worked as an Environmental Manager and Assistant Agency

Preservation Officer in OEA for approximately five years. I worked as an Associate Architect at DASNY before becoming an Environmental Manager. I have a Bachelor of Science Degree in Architectural Technology from the New York Institute of Technology and I have been a licensed architect in the State of New York since 1995.

2. In my capacity as Acting Director and APO, I am responsible for ensuring DASNY's compliance with Section 14.09 of the Parks, Recreation and Historic Preservation Law ("§ 14.09"), the State Environmental Quality Review Act ("SEQRA"), and other environmental laws and regulations. I am overseeing the § 14.09 review and consultation with the New York State Office of Parks, Recreation and Historic Preservation ("OPRHP"), which acts as the State Historic Preservation Office in New York State,¹ regarding the Mohawk Valley Health System's ("MVHS") proposed Integrated Health Center project to be located in downtown Utica, New York (the "Project"). As such, I am familiar with the facts and circumstances set forth herein. I submit this affidavit in support of the State's motion to dismiss this action.

3. The Petitioners in this case challenge DASNY's § 14.09 review of the Project.

4. On or about April 3, 2017, MVHS was conditionally awarded a grant of up to \$300 million pursuant to the Oneida County Health Care Facility Transformation Program, codified as Public Health Law 2825-b (the "Grant"). The purpose of the Grant is to develop the Project, which consists of the construction of an Integrated Health Center, parking garage and surface parking to replace two existing outdated inpatient hospitals. The Project is generally bordered by Oriskany Street to the North; Broadway to the East; Columbia Street to the South; and State Highway Route 5 to the West.

1. The Commissioner of OPRHP serves as the State Historic Preservation Officer under § 14.09 and is responsible for assisting state agencies (including public authorities) that undertake activities that may affect historic properties.

5. The conditional award letter specifically states that the letter is not a final commitment to provide funds, but rather is evidence of the intention on the part of the New York State Department of Health (“DOH”) to enter into a Master Grant Contract (“MGC”) with MVHS, provided certain conditions are satisfied.

6. DASNY is assisting DOH with the administration of the Grant.

7. The Project will be constructed upon real property consisting of approximately 55 properties (80 tax map parcels), some of which are currently owned by MVHS and some of which are not. It is my understanding that MVHS intends to acquire the parcels it does not own by negotiated sale with the current property owners. I have been informed that most property owners have granted access to MVHS and/or its agents to undertake certain activities, such as appraisals and other inspections, on the properties to be acquired by MVHS. I have been further informed that some property owners, including the some of the Petitioners in this action, have refused to allow MVHS and/or its agents access to their properties.

8. On or about February 23, 2018, DASNY received a letter from the Planning Board of the City of Utica seeking lead agency status for a coordinated review to be undertaken pursuant to the State Environmental Quality Review Act, Article 8 of the Environmental Conservation Law and implementing regulations set forth in 6 NYCRR Part 617 (“SEQRA”). By letter dated March 21, 2018, DASNY agreed that the Planning Board was the proper lead agency and asked to be included as a potentially involved agency.

9. At the outset, I wish to emphasize that although DASNY may, in the future, issue tax-exempt or taxable bonds to pay or reimburse costs incurred by MVHS in furtherance of the Project, DASNY has not yet approved or authorized financing for any portion of the Project. Nor has DASNY undertaken or issued approvals for any other action with respect to the Project. In

fact, DASNY has not even issued its SEQRA findings on the Final Environmental Impact Statement pursuant to SEQRA because there is currently no action pending before it. Until such time as DASNY takes some such future discretionary action, DASNY will not have effectuated any “undertaking” or “action” that would mandate compliance with § 14.09.

**PUBLIC HEALTH LAW § 2825-b: ONEIDA COUNTY HEALTH CARE FACILITY
TRANSFORMATION PROGRAM**

10. The Oneida County Health Care Facility Transformation Program, codified as Public Health Law 2825-b, was enacted in 2015 (the “Transformation Program”). The Transformation Program was established under the joint administration of DOH and DASNY for the purpose of strengthening and protecting continued access to health care services. The Transformation Program authorizes up to \$300 million to be awarded in the form of capital grants to general hospitals for the purposes of consolidating multiple licensed health care facilities into an integrated system of care.

11. DOH and DASNY entered into an agreement on October 17, 2016 setting forth the responsibilities of each party with respect to the award, distribution, and administration of the funds made available through the Transformation Program (the “Agreement”).

12. As stated above, on April 3, 2017, MVHS was conditionally awarded a capital grant of up to \$300 million to develop the Project.

13. The Agreement provides, among other things, that DASNY shall be responsible for determining whether a Grant applicant has submitted an application to fund eligible expenses in connection with a capital work or purpose and which expenses may properly be reimbursed from bond proceeds.

14. The Agreement also provides that at the request of the New York State Division of the Budget (“DOB”), and subject to obtaining the approvals of the Members of DASNY and the Public Authorities Control Board and the execution of a financing agreement with DOB, DASNY shall use its best efforts to undertake to issue bonds in one or more series to finance the Grants that have been awarded pursuant to the Transformation Program. To date, no bonds have been authorized or issued by DASNY to finance Project costs.

15. Under the provisions of the Agreement, DASNY is responsible for determining whether a Project is subject to SEQRA review and must verify that an appropriate review has either been undertaken by another Lead Agency or undertake a review on behalf of DOH as Lead Agency. If a coordinated SEQRA review is undertaken that results in the issuance of an Environmental Impact Statement (“EIS”), the Agreement states that DASNY will assist in the preparation of DOH’s findings.² If DASNY is asked to undertake, fund or approve the Project in the future, DASNY would also issue SEQRA findings as necessary.

16. Pursuant to the Agreement, DASNY will also undertake the review required pursuant to § 14.09 of the State Historic Preservation Act.

DASNY FINANCING PROCESS

17. DASNY was created pursuant to Chapter 524 of the Laws of 1944 of the State of New York, as amended, for the purpose of financing and constructing facilities for a variety of public and private institutions, including hospitals (such as MVHS), nursing homes, facilities for the aged and certain not-for-profit institutions, including independent colleges and universities.

18. To carry out its statutory purpose of financing facilities for Qualifying Entities, DASNY issues and sells its negotiable bonds and notes (collectively referred to herein as “bonds”)

2. Although DOH’s SEQRA findings may rely on the analysis completed by DASNY, DOH retains and exercises its own decision-making authority.

and loans the proceeds of such bonds to Qualifying Entities for the purpose of constructing, improving or reconstructing their facilities.

19. DASNY is also authorized to issue bonds to reimburse the State of New York for advances made under certain programs to further important projects supported by the State of New York, such as the Integrated Health Center to be constructed by MVHS pursuant to the Transformation Program. All financings, whether undertaken on behalf of Qualifying Entities or for the State of New York, must be approved by the members of the DASNY Board, which takes official actions at public meetings held pursuant to New York State's Open Meetings Law (Pub. Off. Law §§ 100-111).

20. Prior to authorizing the issuance of bonds on behalf of a Qualifying Entity, DASNY staff reviews and analyzes certain documentation, including financial, corporate, and operational information regarding the Qualifying Entity. If DASNY issues tax-exempt bonds, then a public hearing is required pursuant to the provisions of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA").

21. Prior to authorizing the issuance of bonds to reimburse the State of New York for expenditures made in furtherance of a project, DASNY staff reviews and analyzes certain documentation to verify that bond proceeds may be used to reimburse for those costs.

22. In addition, projects to be financed with the proceeds of DASNY bonds must be reviewed in accordance with § 14.09 and, as applicable, SEQRA, prior to DASNY Board approval for the issuance of such bonds. DASNY takes this responsibility seriously and devotes significant resources to the environmental and historic review of all its projects to meet or even exceed the requirements of these statutes. For example, DASNY's practice is to initiate the §14.09 and environmental review process much earlier than is required. Where DASNY is not the Lead

Agency in a coordinated SEQRA review, as here, DASNY asks to be included as a potentially involved agency in the review. This is done so that DASNY and/or its clients can be involved in the consultation and review processes as early as possible in order to avoid and mitigate adverse impacts prior to committing significant resources to a course of action that might preclude DASNY's Board from authorizing the issuance of bonds in the future, should funding be requested.

23. The DASNY Board adopts the necessary documents to undertake a financing only after the financial and corporate information set forth above has been analyzed; a TEFRA public hearing has been held if one is required; and § 14.09 and SEQRA have been complied with, including the issuance of SEQRA findings for actions involving the preparation of an EIS.

24. In this case, MVHS has made no request for DASNY financing, nor has the DASNY Board approved or otherwise taken any official action with respect to the Project. In fact, DASNY has not even issued SEQRA findings for this Project.

THE § 14.09 REVIEW

25. Section 14.09 (and the implementing regulations set forth at 9 NYCRR Section 428) directs a review and consultation process with OPRHP to determine whether there are any feasible and prudent alternatives that would avoid or mitigate any adverse impacts of the undertaking to historic resources. Section 14.09 does not mandate a particular outcome, and it certainly does not automatically prohibit an agency from undertaking a project that will have an impact on historic resources if that impact can be satisfactorily mitigated.

26. In evaluating alternatives, DASNY and OPRHP may – but are not required to – consider factors such as cost, program needs, safety, efficiency or alternative sites. However, as

stated in 9 NYCRR § 428.8(d), “none of these factors standing alone shall be determinative of whether a particular proposal is feasible or prudent.”

27. As set forth in 9 NYCRR § 428.10 (d), an undertaking agency is even permitted to unilaterally terminate the consultation process and proceed with a project in certain circumstances.

28. DASNY has worked on many projects with OPRHP over the years. I have personally worked with John Bonafide, Director, Technical Services Bureau at OPRHP, on dozens of projects and together we have negotiated many Letters of Resolution pursuant to 9 NYCRR §428.10. I believe we have a strong working relationship that helps ensure that the State’s cultural, historic, and archeological resources are protected, and that any adverse impacts are avoided or mitigated to the maximum extent practicable.

29. DASNY is involved in the § 14.09 review of the Project in order to fulfill its obligations under the Agreement, and in anticipation of a potential future “undertaking,” facilitating DASNY’s review of a funding request at some future date, should DASNY be asked to issue bonds to pay the costs of the Project.

30. DASNY’s involvement with the §14.09 review began on September 18, 2018, when John Bonafide of OPRHP contacted me. Mr. Bonafide informed me that he had been working with MVHS to develop a Letter of Resolution (“LOR”) pursuant to § 14.09 to manage the long-term development associated with this Project. Over the next several months, DASNY worked with OPRHP and MVHS to develop the LOR. We discussed provisions related to avoidance and mitigation measures to address potential impacts of the Project on known and as of yet unknown historic resources, including the resources identified in Appendix A to the LOR.

31. The LOR was fully executed on January 10, 2019.

32. The LOR acknowledges that the Project will cause an adverse impact on a number of buildings that are either listed on the State and National Registers of Historic Places, or eligible for listing; reflects feasible and practicable alternatives that have been explored; and sets forth a number of stipulations and mitigation measures to avoid, minimize or mitigate adverse impacts to historic and archeological resources.

33. Some of the mitigation measures set forth in the LOR to be completed include: a complete assessment of all of the buildings set forth in Appendix A to the LOR (both those that are currently controlled by MVHS and those that it will acquire in the future); archeological testing; and the completion of an alternatives analysis, which *must be submitted to OPRHP for review and comment prior to any activity on the site that might damage the resources* (emphasis added).

34. According to the LOR, the alternatives analysis must consider, among other things, the incorporation of salvageable, architecturally significant features of the removed buildings, such as building name panels and significant intact architectural elements. To the extent practicable, efforts to avoid the removal or direct impacts to buildings outside the hospital and garage footprints and identified as historic in Appendix A will be explored, including the potential reuse of existing structures deemed retainable and adaptable for a productive hospital-associated use, provided sufficient resources to complete the Project remain.

35. The LOR states that where it has been determined by the parties that certain buildings cannot be retained, the Applicant must follow OPRHP's standard resource documentation process and undertake other appropriate mitigation for the loss of historic resources as agreed to by the parties that will create historic linkage and homage to the history of the City of Utica.

36. By its terms, the LOR mandates continuing consultation between MVHS, DASNY and OPRHP as additional properties are acquired and more details about the currently inaccessible buildings are available. The LOR requires the parties to take into account future conditions and mitigate adverse impacts as they become known.

37. Rather than the LOR remaining static and relying only on information as it is currently understood, it requires ongoing collaboration among the parties as the Project evolves. As stated in the LOR, “*all parties agree that if reasonable and prudent alternatives that might avoid direct and indirect impacts to yet to be identified resources cannot be found, that appropriate mitigation measures will be developed to offset any loss to Historic resource.*” (emphasis added). As set forth above, the LOR requires that documentation regarding the exploration of alternatives to be provided to OPRHP **prior** to any action that would directly impact the involved resources.

38. The Petitioners erroneously state on Page 8 of the Petition that the LOR “commits to the broad-scale razing of all buildings within the Project footprint.” This is not correct. The LOR distinguishes between the “Project Impact Area,” or “PIA”, and the footprints of the new hospital and parking garage structure. In addition to the hospital and garage structures, the Project Impact Area includes real property to be utilized for associated uses including surface parking and green space.

39. The LOR states that the buildings located within the “*footprint of the hospital building and parking garage structure will not be retained.*” (emphasis added). However, 4 buildings on the list of identified historic resources, (including 301 Columbia Street and 401 Columbia Street, which are the only two properties on Appendix A that are actually listed on the State or National Registers of Historic Places), are not within the hospital or parking garage

footprints. As the Project progresses, it is possible that some or all of these 4 buildings could be reused or repurposed by MVHS.

40. Although Petitioners suggest that DASNY, OPRHP, and MVHS are free to ignore the provisions in the LOR and proceed with the Project without regard to the historic resources contained in the Project site, this is not the case. Although Petitioners may disagree with the terms of the LOR, the State entities required to comply with §14.09 have fully abided with the letter and spirit of the law and have agreed to continue to consult with each other to mitigate adverse impacts to historic resources into the future.

COORDINATED SEQRA REVIEW

41. As previously indicated, DASNY participated in the coordinated SEQRA review of the Project, with the Planning Board of the City of Utica serving as lead agency.

42. On or about February 23, 2018, DASNY received a letter from the Planning Board of the City of Utica seeking lead agency status for a coordinated review pursuant to SEQRA. By letter dated March 21, 2018, DASNY agreed that the Planning Board was the proper lead agency for the SEQRA review and asked to be included as a potentially involved agency in the coordinated SEQRA review.

43. DASNY participated as an involved agency in the review by attending numerous public meetings and hearings in connection with the Project, and by reviewing and commenting on preliminary drafts of the Draft EIS and Final EIS.

44. On April 30, 2019, the City of Utica Planning Board issued its SEQRA findings.

45. As an involved agency, DASNY would issue findings pursuant to SEQRA at such time as it directly undertakes, approves, or funds any discretionary action related to the Project. As previously indicated, DASNY has not yet issued SEQRA findings, as there has been no action


or undertaking by DASNY in connection with the Project, and none is even currently pending consideration by DASNY.

CONCLUSION

46. In my experience as the Acting Director of the Office of Environmental Affairs and the APO, DASNY has fully complied with § 14.09. In order to carry out its responsibilities under the Agreement with respect to the administration of the Grant, and because there may be a future bond issuance, MVHS, DASNY and OPRHP entered into an LOR. This was done well in advance of any DASNY involvement that formally triggers such a review in order to ensure compliance with § 14.09 early in the process.

47. In addition, the provisions of the LOR require ongoing communication with OPRHP as additional properties are acquired and the Project evolves. At this point in time, however, DASNY has not made SEQRA findings, has not authorized financing for the Project, nor taken any action contemplated by the LOR.

48. Therefore, the Petitioners' the first and second causes of action against DASNY should be dismissed.



Robert S. Derico

Sworn to before me this
11th day of June 2019.


Notary Public

LYNN B. RICHARD
Notary Public, State of New York
Qualified in Rensselaer County
No. 01R15024045
Commission Expires 2/22/2022