Matter of Progressive Action of Lower Manhattan v Zucker
2020 NY Slip Op 30677(U)
March 3, 2020
Supreme Court, New York County
Docket Number: 160480/2017
Judge: Shlomo S. Hagler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 17EFM

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In the Matter of

PROGRESSIVE ACTION OF LOWER MANHATTAN, GEORGE CAPSIS, and ARTHUR Z. SCHWARTZ,

Petitioners,

- v -

HOWARD ZUCKER, AS COMISSIONER OF THE NY STATE DEPARTMENT OF HEALTH, the STATE OF NEW YORK, and MOUNT SINAI BETH ISRAEL HOSPITAL,

Respondents,

For an Order and Judgment Pursuant to the NY State Environmental Quality Review Act and Article 78 of the CPLR.

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INDEX NO. 160480/2017

MOTION DATE 08/02/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON PETITION

HON. SHLOMO S. HAGLER:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 10, 26, 65, 66, 67, 68, 69, 70, 71, 81, 87, 89, 91, 93, 98, 99, 100, 101, 102, 103, 104, 105, 106, 108, 110, 111, 112, 113, 114, 115, 116, 117, 119, 120, 123
were read on this petition to/for ARTICLE 78 (BODY OR OFFICER).

In this Article 78 proceeding, petitioners seek an order which 1) compels the New York State Department of Health ("DOH")[1] to reverse its approvals of six Certificate of Need ("CON") applications which allowed the closure of six portions of Mount Sinai Beth Israel Hospital (the "Hospital"), 2) compels DOH to assess the closures in compliance with the State Environmental Quality Review Act ("SEQRA"), 3) enjoins the Hospital from closing any parts of the facility until

[1] The State respondents are Howard Zucker, DOH commissioner; DOH; and the State of New York. The court refers to them collectively, as DOH.

there is full SEQRA compliance, and 4) compels the Hospital to reopen the portions which it already has closed. A cross motion to the petition and motion sequence numbers 002-004 all sought dismissal for failure to serve the petition. This Court granted motion sequence number 005, in which petitioners sought an order extending their time to serve the petition on respondents, and denied the other motions as moot. Respondents subsequently answered the petition, and the proceeding has been fully submitted to this Court.

BACKGROUND FACTS

In September of 2013, Continuum Health Partners – which, as Mount Sinai Medical Center ("Mount Sinai"), owns a number of hospitals and medical facilities in New York – purchased Beth Israel Medical Center at First Avenue and 16th Street in Manhattan (NYSCEF Doc. No. 27 [Amended Petition] ¶ 35). The other full-service Manhattan hospitals that are part of Mount Sinai are The Mount Sinai Hospital on the upper east side; Mount Sinai St. Luke's in Morningside Heights; and Mount Sinai West in the midtown area (NYSCEF Doc. No. 100 [Mt. Sinai Answer] ¶ 78). Among other things, the New York Eye and Ear Institute ("NYEEI") (*id.* ¶ 80), a children's hospital at Mt. Sinai Hospital (*see id.* ¶ 85), and various urgent care centers also are part of Mount Sinai (*see generally* NYSCEF Doc. No. 106 [Certified Record] at p 84).

Since the purchase, Beth Israel has been referred to as "Mount Sinai Beth Israel" ("MSBI"). The petition states that before the sale, Beth Israel had around 800 inpatient beds (*id.* ¶ 6). MSBI asserts that the Hospital was only licensed to operate 701 beds, and this included 150 beds for individuals with mental health and/or addiction problems (NYSCEF Doc. No. 114 [Boal Aff] ¶ 4). According to the amended petition, in 2015, the Hospital accounted for 25 percent of hospital admissions in lower Manhattan and over 90,000 emergency room visits (NYSCEF Doc. No. 27

[Amended Petition] ¶ 6). MSBI counters that, regardless, only about 165 of the non-behavioral beds are occupied on the average day (NYSCEF Doc. No. 114 [Boal Aff] ¶ 4).

In May of 2016, Mount Sinai announced that it intended to close MSBI and build a much smaller facility with approximately 70 beds (NYSCEF Doc. No. 27 [Amended Petition] ¶ 36). Mount Sinai also announced the creation of an urgent care walk-in center and the addition of an MRI unit at the Hospital's Union Square facility, at a projected cost of $3,974,002 and $5,563,000, respectively (*id.* ¶¶ 39, 42 [a], [b]). There was a great deal of community opposition to the proposal to close MSBI. Especially in light of the 2010 closing of St. Vincent's Hospital in the West Village, lower Manhattan residents worried about the potential insufficiency of area medical services (*id.* ¶¶ 37-38). In the midst of the review process, on June 8, 2017, the New York State Public Health and Hospital Planning Council ("PHHPC") held an informational meeting which addressed these and other public concerns. At the meeting, MSBI representatives, elected officials, and community members spoke. Among other things, they described the plans for future care and analyzed the ways in which other Mount Sinai hospitals and other area hospitals would absorb the patient burden. Various officials and petitioner Arthur Z. Schwartz wrote to respondent Howard Zucker, calling for a more comprehensive view, and arguing that the entire MSBI project be viewed together as a Type I action subject to extensive SEQRA review. Petitioners state there was no response from DOH.

CON Applications

Until the new hospital is functional,[2] MSBI will remain open. In the meantime, however, Mount Sinai has commenced the process of shutting down portions of the Hospital. For each

[2] On July 22, 2019, MSBI applied to DOH for permission to build the new hospital, and on July 17, 2019, MSBI applied to the New York City Board of Standards and Appeals ("BSA") for a zoning variance (NYSCEF Doc. No. 123 [MSBI's July 25, 2019 letter to the court]). If approved,

change, Mount Sinai applied to DOH for a separate CON, which is necessary before a health care provider builds a new facility, renovates existing health care facilities, adds or decertifies services, converts bed uses, or makes other specified changes (DOH Regulations [10 NYCRR] § 710.1 [c] [1]). A CON is necessary for projects which cost over $15 million for a general hospital (10 NYCRR § 710.1 [c] [1]).

When a party submits a CON application, DOH may engage in a full, limited, or administrative review. As is relevant here, a full review requires consideration and a recommendation from PHHPC, and is necessary for (1) "the addition of beds . . . or conversion of beds which establish a different level of care" (10 NYCRR § 710.1 [c] [2] [i] [a]); (2) proposals for adding, modifying or changing the method of delivery of adult or pediatric cardiac surgery (10 NYCRR § 710.1 [c] [2] [i] [b] [2]); (3) cardiac catheterization, including situations in which a cardiac catheterization laboratory center service is moved to another site belonging to the facility (10 NYCRR § 710.1 [c] [2] [i] [b] [3]); (4) the conversion of beds if they are not appropriate for limited review; and (5) proposals which cost over $30 million for a general hospital or over $15 million for other medical facilities (10 NYCRR § 710.1 [c] [2] [i] [c]).[3] DOH undertakes a limited review if the total cost of the project is under $15 million for a general hospital or $6 million for all other medical facilities, as long as the project does not require full or administrative review for another reason (10 NYCRR § 710.1 [c] [5]). Limited review is appropriate for proposals relating to (1) the purchase of specified medical equipment including MRIs for use by a general hospital (10 NYCRR § 710.1 [c] [5] [ii] [a]); (2) the decertification of beds, unless a certificate of need

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the new facility is expected to open in 2021 (Manhattan (NYSEF Doc. No. 27 [Amended Petition] ¶ 39).

[3] Full review is not mandated if the project falls within the exceptions specified at DOH Regulation § 710.1 (c) (4). Petitioners do not argue that one of the exceptions applies.

application is required under another provision (10 NYCRR § 710.1 [c] [5] [iv] [a]); (3) the conversion of beds for medical/surgical, intensive care, and pediatric intensive care uses, where "the acute care inpatient facility is already a certified provider" (10 NYCRR § 710.1 [c] [5] [iv] [d]; (10 NYCRR § 710.1 [c] [5] [iv] [d] [1, 2, 5]); and (4) the decertification of services other than those which expressly require full review (10 NYCRR § 710.1 [c] [5] [iv] [b]). Finally, medical facilities which undertake projects that are "related programmatically" must "submit for review a single application encompassing all such projects pursuant to the requirements of this Part" (10 NYCRR § 710.1 [c] [7]). Applications which treat "various activities or stages . . . as though they were independent, unrelated activities, needing individual determinations of significance" impermissibly segment the action and are not allowed (*see* 6 NYCRR § 617.2 [ah]).

Finally, in determining the total project cost, DOH considers

> "total costs for construction . . ., total costs for real property, for fixed and movable equipment, architectural and/or engineering fees, construction manager and/or consultant fees, construction loan interest costs, and other financing, professional and ancillary fees, charges and allowances. Such costs shall include the cost of all capital items associated with an acquisition, lease arrangement and/or construction. . ."

(10 NYCRR 710.1 [b] [1]).

MSBI made a total of six CON applications in 2016 and 2017, all of them for limited review. The first two, which MSBI submitted in November 2016, sought to close the Hospital's 20-bed pediatric unit, and to convert its 5 medical surgery beds to pediatric intensive care beds and then transfer them to Mount Sinai's flagship hospital (NYSCEF Doc. No. 27 [Amended Petition] ¶ 41 [a], [b]). In January and February 2017, MSBI submitted applications to decertify the cardiac surgery program and the maternity unit, respectively (*id.* ¶ 41 [c], [d]). The petition notes that there were multiple applications for the conversion of MSBI beds to other purposes and then to move

them to other Mount Sinai facilities (*id.* ¶ 41 [e]). In particular, four medical beds were converted to intensive care beds and then transferred to other Mount Sinai facilities (*id.*). In July 2016, MSBI applied to decertify 26 physical medicine and rehabilitation beds (*id.* ¶ 41 [f]). The applications all noted, in part, that "[t]his project is part of a larger effort of Mount Sinai to create a more integrated healthcare system, and to more effectively use system resources" (*e.g.*, NYSCEF Doc. No. 106 [Certified Record] at p 51 [regarding decertification of pediatric beds]), and they supported their application by including the percentage of use of the resources the applications sought to close. Each application stated that the total cost of the project was the $500 filing fee. The petition notes that, although PHHPC did not vote on the CON applications because they were subject to limited review, it held an informational meeting about "the Beth Israel transformation" on June 8, 2017 (NYSCEF Doc. No. 27 [Amended Petition] ¶ 46).

SEQRA Review

As part of the review process, DOH also evaluated the need for environmental review under SEQRA. After consideration, DOH determined that none of the closings and reduction and transfers of beds would have a significant adverse impact on the environment. In other words, DOH found each one to be a Type II action (NYSCEF Doc. No. 106 [Certified Record] at pp 34, 88, 152, 181, 210, 226). DOH approved all six CON applications (*see id.* at pp 35-36, 89-90, 153-154, 182-183, 211-212, 227-228). The petition contends that Mount Sinai stopped the services prior to the approvals by DOH (NYSCEF Doc. No. 27 [Amended Petition] ¶ 43).

Petitioners' Arguments

Petitioners filed the original petition on November 27, 2017 and filed the amended petition on February 12, 2018. Petitioner Schwartz alleges that he had a heart attack after the cardiac surgery program had been shut down. He was rushed to MSBI because he lives in the

neighborhood. Although he was able to be treated without surgical intervention, had Schwartz required surgery, MSBI would have had to transfer him to another of Mount Sinai's hospitals more than 80 blocks away. The other individual petitioner, 90-year-old George Capsis, lives in the West Village, has various medical problems, and is reliant on MSBI. Progressive Action of Lower Manhattan ("PALM"), the third petitioner, is a network which supports progressive causes in the area and which includes members in the pertinent geographic area (NYSCEF Doc. No. 27 [Amended Petition] ¶¶ 2-4). The petitioners assert violations of SEQRA, of the CON process, and of the State Constitution.

Petitioners argue that respondents' threshold challenges lack merit. According to petitioners, they have standing to bring this proceeding. Petitioners allege that PALM has standing as a representative of the community which has focused extensively on the closing of MSBI and because at least one of its members – Schwartz – has individual standing (citing *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761 [1991] [*Society of Plastics*]). Capsis allegedly has standing as an involved member of the community with age-related health issues. Finally, they argue that Schwartz has standing because he lives one mile from MSBI's current location, suffers from heart disease, sought and received treatment for a heart attack at MSBI, and is married to someone who has had two heart valve repairs.

Petitioners contend the matter is not moot. They allege that respondents' argument to the contrary is inconsistent with their concession that MSBI closed the maternity unit before DOH approved the CON.[4] According to petitioners, if the CON had been denied, MSBI would have had to reopen the unit. Similarly, they contend, the court can direct the unit to reopen. They note that

[4] Respondents challenge petitioners' assertion that MSBI also closed other units prior to approval of the related CON applications.

many parts of MSBI are still operational, and they state that, therefore, future changes in services, including the reopening of shuttered units, are possible.

Petitioners assert that by segmenting the review of their proposed plans and obtaining approval in a piecemeal fashion, Mount Sinai has violated SEQRA (*id.* ¶ 61). Petitioners claim that DOH should have designated itself the lead agency and that, instead, it allowed Mount Sinai to evade a mandatory environmental review. Moreover, petitioners state that DOH conducted a sham analysis which ignored or fabricated data concerning the full impact "of the closure of [MSBI] as it currently exists" (*id.* ¶ 64). They point out that human health is considered an aspect of the environment under SEQRA (6 NYCRR § 617.2). Both the City Environmental Quality Review ("CEQR") Technical Manual (Mayor's Office of Environmental Coordination CEQR Technical Manual [CEQR Manual] [avail at https://www1.nyc.gov/assets/oec/technical-manual/20_Public_Health_2014.pdf]) and the SEQRA Handbook [SEQRA Handbook] [available at https://www.dec.ny.gov/docs/permits_ej_operations_pdf/dseqrhandbook.pdf]) mention that the public health implications of a proposed action must be considered, and DOH regulations state that an action may have a significant environmental impact if it creates a "material conflict with a community's existing plans or goals as officially approved or adopted" or creates a health hazard (10 NYCRR §§ 97.13 [4], [7]). Therefore, petitioners allege that the closing of a hospital or any portion thereof has the potential for significant environmental impact and an environmental assessment form should have been prepared (*see* 10 NYCRR § 97.7 [b]). Petitioners argue that SEQRA segmentation is not appropriate where, as here, individual review does not "disclose the overall impact of the program" (*Matter of Board of Mgrs. of the Plaza Condominium v New York City Dept. of Transp.*, 131 AD3d 419, 420 [1st Dept 2015]).

Petitioners next challenge the CON approval process. They accuse Mount Sinai of improperly "packag[ing] the closing of hospital services at the existing Beth Israel facility into multiple narrowly-framed applications" in order to avoid a full review at meetings open to the public (NYSCEF Doc. No. 27 [Amended Petition] ¶ 40). According to the petition, Mount Sinai should have submitted a single CON which included all six proposed reductions in services and the conversion and transfer of beds to other locations (*id.* ¶ 44). Petitioners also argue that the CON should have included the applications for an expansion of the 10 Union Square facility (NYSCEF Doc. No. 39), the addition of a second MRI unit at Union Square (NYSCEF Doc. No. 40), and the demolition of NYEEI Residence Building (NYSCEF Doc. No. 41).[5] This combined CON would have allowed DOH to assess the true cost of the changes, which exceed the $30 million threshold for full review. Instead, all the proposed projects except the demolition of NYEEI underwent limited review (*see* NYSCEF Doc. No. 27 [Amended Petition] ¶¶ 40-44, 52-53). According to petitioners, by its failure, DOH ignored Public Health Law § 2802, which requires that existing hospitals provide high-quality services, and the CON regulations (*see* 10 NYCRR § 710.1 [a]).

In addition, petitioners challenge the estimated $500 cost of some of the proposed changes – commenting, for example, that "the 'cost' of moving or ending maternity services caused [Beth Israel] to lose over $30 million" (*id.* ¶ 44). They also question the content of DOH's "absorption analysis," which was presented at a special informational meeting of the PHHPC on June 8, 2017, and which determined that other area hospitals can absorb the "patient burden" if the proposed project goes through (*id.* ¶¶ 49-51). Petitioners claim that respondents have "sidestepped all public process" and thus violated the regulations which implement the Public Health Law (*see id.* ¶ 60).

[5] The NYEEI Residential Building will be replaced by the proposed new hospital.

As its third cause of action, petitioners allege that DOH has violated the provision of the State Constitution that states, in pertinent part, that "[t]he protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state and by such of its subdivisions and in such manner, and by such means as the legislature shall from time to time determine" (NY Const art XVII, § 3).[6] They note that Public Health Law § 2800 declares that DOH has "the central, comprehensive responsibility" for satisfying this directive (citing, e.g., *State of New York v Local 1115 Join Bd, Nursing Home & Hosp. Empls. Div.* (56 AD2d 310, 317-318 [2d Dept 1977]). Petitioners state that the third cause of action is justiciable because it involves the "enforcement of a clear constitutional or statutory mandate" (citing *Hurrell-Harring v State of New York*, 15 NY3d 8, 26 [2010] [complaint alleging deprivation of right to counsel was justiciable]). Additionally, petitioners cite *Campaign for Fiscal Equity v State of New York* (86 NY2d 307, 314 [1995]), which held that the State Constitution's mandate to provide a school system "wherein all the children of this state may be educated" (NY Const art XI, § 1) implicitly requires the State to "offer all children the opportunity of a sound basic education" (*Campaign for Fiscal Equity*, 86 NY2d at 316). Petitioners analogize *Campaign for Fiscal Equity* to the issue at hand, urging that Article 17, section 3 of the Constitution creates an affirmative obligation on the State and therefore a court challenge is appropriate.

DOH's Arguments

In discussing the merits of the first and second causes of action, DOH emphasizes that courts have limited power to overturn administrative actions. Courts annul agency decisions "only

[6] Petitioners also refer to the Constitution's provision that "[t]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine (NY Const art 17, § 1). However, they do not assert this violation in the complaint or analyze it in their current papers.

if [they are] arbitrary, capricious or unsupported by the evidence" (*Matter of Friends of P.S. 163, Inc. v Jewish Home Lifecare, Manhattan*, 146 AD3d 576, 577 [1st Dept 2017] [*P.S. 163, Inc.*] [internal quotation marks and citations omitted], *affd* 30 NY3d 416 [2017]). Courts defer to the agency's interpretation of its own regulations unless they are irrational (*Matter of Franklin St. Realty Corp. v NYC Envtl. Control Bd.*, 164 AD3d 19, 24 [1st Dept 2018], *affd* – NY3d –, 2019 NY Slip Op 08976 [2019]). Courts do not second-guess agency determinations (*P.S. 163, Inc.*, 146 AD3d at 577).

Under these principles, DOH states that there is no legal basis for granting the petition. DOH denies any wrongdoing under any of the charges (NYSCEF Doc. No. 101 [DOH Answer]). For the first cause of action, DOH refers generally to SEQRA and the implementing regulations for the best statement of the environmental laws, and states that CEQR Manual and SEQRA Handbook, while not binding, were mischaracterized by petitioners and support DOH's actions. In response to the second and third causes of action, DOH refers to Public Health Law § 2802 and Article 17, section 3 of the New York State Constitution as well as to 10 NYCRR § 710.1. DOH alleges that petitioners have misrepresented or inaccurately described the prevailing laws and regulations. As affirmative defenses, DOH asserts that petitioners' first and third causes of action are not ripe for review by the courts and do not challenge a final determination, that the first and third causes of action are not justiciable, and that DOH's decisions were rational.

DOH argues that the petitioners' SEQRA challenge lacks merit, as the closing of a hospital unit is a Type II action. It relies on the affidavit in support of Henry Joseph, who works as a program research specialist in DOH's Bureau of Architecture and Engineering Review (NYSCEF Doc. No. 103 [Joseph Aff]). Among other things, Joseph considers whether and to what extent CON applications trigger a SEQRA analysis. Joseph notes that in addition to the state regulations

governing SEQRA (6 NYCRR §§ 617.1 *et seq*), DOH's own set of regulations applies (10 NYCRR §§ 97.1 *et seq*). Although the petition argues that DOH wrongfully did not act as lead agency and conduct a SEQRA evaluation, Joseph states that "DOH was designated as the lead agency for each of the Mt. Sinai project applications" (NYSCEF Doc. No. 103 [Joseph Aff] ¶ 6). Joseph claims that the proposed actions were all Type II actions because each one involved the "issuance of a permit, certification or registration which does not relate to construction," and because the "approval of . . . the reduction in the number of existing beds or the conversion of existing beds to the same or a lesser number of different level of care beds" (*id.* ¶¶ 12-14 [citing 10 NYCRR §§ 97.14 (b) (Type II) (1), (10)]). Moreover, DOH contends that it disfavors aggregating the applications for SEQRA purposes because none of the closures trigger environmental review.

As for the second cause of action, DOH argues that MSBI's CON applications to decertify and to transfer hospital beds do not require full review because they are not within the categories exempted from limited review (10 NYCRR § 710.1 [c] [1] [v]; 10 NYCRR §§ 710.1 [c] [5] [a], [d]). DOH states that, contrary to petitioners' contention, there is no plan to modify or change the delivery of pediatric cardiac surgery or cardiac catheterization. It argues that limited review was appropriate for MSBI's application to decertify its adult cardiac surgery unit because "historical research" revealed that "every application to decertify any of the services has been processed as a limited review application, other than if some other element of the application tripped the requirement for a [CON] application" (NYSCEF Doc. No. 102 [Delcogliano Aff] ¶ 30).

Furthermore, DOH claims that the cost of closing the sections of the Hospital does not meet the monetary threshold for full review. It points out that, under the regulations, full review is necessary only if a project's total cost exceeds $30 million (10 NYCRR § 710.1[c][2][i][c]). Lost revenue is not one of the pertinent factors, DOH stresses. Therefore, DOH states that petitioners

incorrectly add lost income to their computation of the cost of the projects. Furthermore, DOH states, the cost of constructing the new facility is not integrally related to the closures, and therefore, that cost is not part of the computation.

According to DOH, petitioners' arguments relating to segmentation of the CON applications also fail. It argues that there was nothing improper about considering the applications separately because it always retained the discretion to approve some applications and deny others. DOH points out that MSBI was aware of DOH's discretion and planned to close each hospital unit for which it obtained DOH approval even if other of MSBI's CON applications were denied. Therefore, DOH contends, the applications were not "related programmatically" within the meaning of the regulations (*see* 10 NYCRR § 710.1 [c] [7]), and the decision to consider the applications independently was rational.[7]

In support of its answer, DOH relies on the affidavit of Barbara Delcogliano, deputy director at DOH's Division of Planning and Licensure, who supervised DOH's review of MSBI's six CON applications (NYSCEF Doc. No. 102 [Delcogliano Aff]). Delcogliano notes that proposals that cost over $30 million for a general hospital or $15 million for other medical facilities require full review (10 NYCRR § 710.1 [c] [5]). This cost is tabulated by including total construction costs, total real property costs, construction loan interest costs and other costs relating to financing, and costs relating to acquisition, leases, and construction (10 NYCRR § 710.1 [b]). Delcogliano states that the CON applications fell under this threshold because there was no construction, real estate purchase, or financing involved (NYSCEF Doc. No. 102 [Delcogliano Aff] § 24). Further, Delcogliano states, the projects are not related programmatically within the

[7] DOH also states that the CON applications were not "necessary" parts of a long-range plan. Although arguably the closings were not necessary, they unquestionably were related to Mount Sinai's overall vision, including the plan for the smaller hospital.

meaning of 10 NYCRR § 710.1 (c) (7), because that provision only applies if each project "could not independently function and operate on its own" (NYSCEF Doc. No. 102 [Delcogliano Aff] § 25). Delcogliano asserts that the closure of cardiac surgery-adult services cost only $500, and that "based on [DOH's] historic practice . . . the decertification [of the cardiac surgery unit] does not require a certificate of need application" (*id.* ¶ 30). There is no particularized information about this determination. Delcogliano also points out that the applications to close MSBI and to open the proposed new facility would trigger CON applications that likely would trigger full review.

DOH also urges dismissal of the third cause of action, which asserts that DOH violated the State's constitution (NY Const art 17, § 1). Citing *Brownley v Doar* (12 NY3d 33, 43 [2009]), which involves the legislature's discretion to determine how to provide for the needy, DOH contends that the matter is not justiciable. Instead, DOH argues, justiciability only exists when the Legislature has an affirmative duty to act in a specified manner.

MSBI's Arguments

MSBI's answer also denies most of the allegations in the petition (NYSCEF Doc. No. 100 [MSBI Answer]). It states that MSBI is "antiquated and severely underutilized and costs [Mount Sinai] approximately $100 million per year in operating losses" (*id.* ¶ 36). MSBI states that it will not close MSBI or its critical services units until it opens the new hospital (*id.* ¶ 39). It acknowledges that it closed the maternity unit at MSBI before DOH approved the closure (*id.* ¶ 43).

MSBI's first affirmative defense challenges petitioners' standing. MSBI argues that because the new facility will be even closer to Schwartz than the existing one, Schwartz cannot assert an injury. In addition, as for Schwartz and Capsis, MSBI states that the accessibility of health

care is not within SEQRA's zone of interests. MSBI contends that PALM is an unincorporated association and can only sue through its president or its treasurer.

The second affirmative defense, capacity to sue, involves the petitioner or plaintiff's power to assert "its grievance before the court" (*id.* at 155).[8] MSBI states that Capsis admittedly suffers from dementia (*see George Capsis v City of New York* [*Capsis*], Sup Ct NY County, Bluth, J., Index No. 153514/2017, NYSCEF Doc. No. 1 [Verified Petition] ¶ 1), and therefore he lacks the capacity to appear on his own behalf (citing *Brewster v John Hancock Mut. Life Ins. Co.*, 280 AD2d 300, 300 [1st Dept 2001]). Indeed, an attorney representing a client with dementia has the duty to notify the court and seek the appointment of a guardian ad litem (*id.*).

As a third affirmative defense, MSBI argues that the petition is moot because injunctive relief is impossible at this point. In particular, MSBI notes that if the petition is not moot now, it "will shortly become moot as a result of the fact that MSBI will shortly file an application with DOH for a CON authorizing construction of a new MSBI hospital, which will require full review by DOH, a public hearing before the PHHPC, an application to the BSA for a zoning variance and special permits, and a public hearing before the BSA" (NYSCEF Doc. No. 100 [MSBI Answer] ¶ 73). In their supplemental papers, both MSBI and DOH point to cases such as *Golden v Metropolitan Transp. Auth.* (126 AD2d 128 [2d Dept 1987] [Golden]), in support of their argument that the matter is moot. MSBI also argues that there has been no SEQRA violation because SEQRA does not apply to the CON applications. Sixth, MSBI asserts that the petition does not articulate any other viable legal claims.

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[8] Capacity to sue also is a threshold question (*Excess Line Assn. of N.Y. (ELANY) v Waldorf & Assoc.*, 30 NY3d 119, 123 [2017]).

In addition to the above, MSBI's answer states that its proposed changes, including the construction of the newer, smaller hospital, is the result of "extensive study of the population, demographics and expected health care needs of the Lower Manhattan community" (*id.* ¶ 83). According to MSBI, the cost of renovating the existing hospital is prohibitive. It also would require the Hospital to close altogether during the "extensive necessary rehabilitation work" (*id.* ¶ 84). MSBI argues that it was not feasible or in the best interests of MSBI patients to defer the CON applications until it had finalized the plans for the new hospital. MSBI asserts that it was proper to submit the CON applications individually because it would have gone forward with each individual change even if DOH disapproved the other CON applications.

In support, MSBI submits the affidavit of Jeremy H. Boal, M.D., its president (NYSCEF Doc. No. 114 [Boal Aff]).[9] Boal challenges Schwartz's statement that the cardiac surgery unit was closed when, on January 31, 2017, Schwartz suffered a heart attack and presented at MSBI. Instead, Boal states, the CON application was approved that July (*but see* NYSCEF Doc. No. 27 [Amended Petition] ¶ 41 [c] [stating that cardiac surgery unit was closed months prior to approval]). Boal emphasizes that if MSBI were to remain open, the cost of refurbishing the outdated facility would exceed $1 billion, and that MSBI currently loses nearly $100 million a year. He states that although the new hospital will have only 70 beds, "it will have the capacity to be expanded if community needs warrant increased capacity," and it will be able to treat patients who present with heart attacks among other health crises (*id.* ¶ 5). He states that the smaller hospital is appropriate given the changes in health care treatment methodologies.[10]

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[9] MSBI submitted this document as part of its response to petitioners' reply papers.
[10] In addition, Boal states that MSBI did not have 800 beds. Instead, MSBI is licensed to operate only 701 beds, including 150 beds for patients with emotional- or addiction-related health issues. This statement is misleading, as it apparently relates to the number of beds that exist now that MSBI has decertified and transferred the units in question. Its first decertification application, for

In its legal memorandum, MSBI emphasizes that Environmental Conservation Law ("ECL") § 8-0101, which contains SEQRA, requires an environmental impact statement only if the action "may have a significant effect on the environment" (ECL § 8-0109 [2]). It argues that DOH rationally decided the closures would have no significant impact on public health, and thus it rationally decided a Type II designation was appropriate. Most important, MSBI states, the impact on public health the petitioners assert is not the type of impact on "human health" contemplated by the 6 NYCRR § 617.2 (l). It argues that the SEQRA Handbook speaks of public health in terms of hazardous materials, and that petitioners' arguments to the contrary are based on selective and inaccurate characterizations of the Handbook. In addition, MSBI states that, even if petitioners' definition of public health impacts were accurate, their argument would fail, as petitioners merely assert that it will take patients more time to get to hospitals that provide services once available at MSBI. MSBI points out that there are other hospitals and medical facilities in the area which provide the pertinent treatments, and that the new MSBI will be only a few blocks away from the existing hospital.

MSBI also states it did not improperly segment its applications. Relying on cases such as *Matter of Settco, LLC v New York State Urban Dev. Corp.* (305 AD2d 1026, 1026-1027 [4th Dept 2003], *lv denied* 100 NY2d 508 [2003]) and *Matter of New York City Coalition for Preserv. of Gardens v Giuliani* (175 Misc 2d 644, 655 [Sup Ct, NY County 1997], *affd* 246 AD2d 399 [1st Dept 1998]), it states that segmentation does not apply here, where the actions are properly designated as Type II actions. Further, segmented review is acceptable if, among other things, the future phases may not take place and they are "functionally independent of current phase(s)"

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example, stated that, at the time of the application, MSBI was certified for 825 inpatient beds (NYSCEF Doc. No. 106 [Administrative Record] AR00002).

(SEQRA Handbook Ch 2 [D] [4]). MSBI conceded that it owns the facilities in question, some of the changes occurred relatively contemporaneously, and the changes share certain common goals, but argues that the CONs involve independent projects and DOH considered them independently without regard to its position on the other applications. It additionally reiterates DOH's arguments on this issue.

DISCUSSION

Standard of Review

Petitioners challenge DOH's CON determinations under the prevailing standard, stating that the decisions are arbitrary and capricious and an abuse of discretion (*see Matter of Chinese Staff & Workers' Assn. v Burden*, 19 NY3d 922, 923-924 [2012]). It is not the court's job to second-guess the agency's determination (*P.S. 163, Inc.*, 30 NY3d at 430). The court also cannot "substitute its judgment for that of the agency" (*Matter of Community United to Protect Theodore Roosevelt Park v City of New York*, 171 AD3d 567, 568 [1st Dept 2019] [internal quotation marks and citation omitted]). At the same time, "[t]he judicial standard of review for an administrative agency decision, while deferential, does not require the Court to act as a rubber stamp" (*Matter of Adirondack Wild: Friends of the Forest Preserve v New York State Adirondack Park Agency*, 34 NY3d 184, 199 [2019]; *see Matter of Goldstein v New York State Urban Dev. Corp.*, 13 NY3d 511, 549 [2009]).

Analysis

Initially, this Court turns to the question of standing. Standing rests partly on the consideration "that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria" (*Society of Plastics*, 77 NY2d at 769). Even if the issue is of "vital public concern," courts do not consider the matter without

establishing standing (*id.*). "Related to this principle is a general prohibition of one litigant raising the legal rights of another" (*Matter of Mental Hygiene Legal Serv. v Daniels*, 33 NY3d 44, 50 [2019] [*Daniels*] [internal quotation marks and citation omitted]). Standing is a justiciability issue, and therefore is a threshold question (*Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148 [1994]).

In addition to the jurisdictional component, standing has "a prudential component, involving rules of self-restraint, which includes the determination that a party is well-situated to bring an action on its own or on behalf of another" (*Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 NY3d 377, 408 [2017] [internal quotation marks and citation omitted]). An individual must show an injury in fact that falls within the statute's zone of interests (*see Matter of Sierra Club v Village of Painted Post*, 26 NY3d 301, 309 [2015] [*Sierra Club*]). In addition, an individual or an organization must allege an injury that is "in some way different from that of the public at large" (*Society of Plastics*, 77 NY2d at 774). Finally, the rules governing standing "should not be 'heavy-handed'" (*Sierra Club*, 26 NY3d at 311 [quoting *Matter of Association for a Better Long Is., Inc. v New York State Dept. of Envtl. Conservation*, 23 NY3d 1, 6-7 (2014)]). Accordingly, courts are reluctant "to apply [standing] principles in an overly restrictive manner where the result would be to completely shield a particular action from judicial review" (*Sierra Club*, 26 NY3d at 311).

Based on the above, this Court determines that petitioner Arthur Z. Schwartz has standing. He lives in the neighborhood that will be impacted by the closure of MSBI. More particularly, he has a heart condition due to which he has sought treatment at MSBI, and due to which he may be

a candidate for cardiac surgery, which is no longer provided at MSBI.[11] This is more than a "tenuous, ephemeral, or conjectural [harm] but is sufficiently concrete and particularized to warrant judicial intervention" (*Daniels*, 33 NY3d at 50 [internal quotation marks and citation omitted]). If individuals who depend on the Hospital for a specific type of service which it no longer provides lack standing, it is hard to imagine that any individual would satisfy the test. Further, respondents argue that neighborhood organizations also lack standing. If neither individuals nor organizations had standing, it would impermissibly shield DOH's determination from Article 78 challenges (*see Sierra Club*, 26 NY3d at 311).

MSBI's argument that the proposed new hospital will be closer to Schwartz's residence is not relevant to this issue, as Schwartz is within the statutory zone of interests and the closure affects him. Further, although MSBI states that the new hospital will have an emergency department, it does not indicate whether there will be a cardiac surgery unit. In fact, the CON application relating to the closure of the cardiac unit indicates that all cardiac surgeries will be provided at Mount Sinai Hospital or Mount Sinai St. Luke's, neither of which is in the neighborhood at issue (NYSCEF Doc. No. 32 at p 3).

In *Saratoga County Chamber of Commerce v Pataki* (100 NY2d 801, 813 [2003], *cert denied* 540 US 1017 [2003]), the Court of Appeals held that because individual plaintiffs had standing to sue, it was unnecessary to address the question of whether the organization had standing. Several subsequent decisions in this State have reiterated this principle (*e.g. Mulgrew v Board of Educ. of the City School Dist. of the City of N.Y.*, 75 AD3d 412, 414 n 2 [1st Dept 2010];

[11] The parties dispute the question of whether the cardiac surgery unit was closed when Schwartz suffered his heart attack in January 2017. This Court concludes that this matter is not critical to the issue of standing because, due to the underlying cardiovascular disease which precipitated the heart attack, he relies on the presence of a nearby hospital capable of providing full cardiac treatment.

see New York State United Teachers v State of New York, 140 AD3d 90, 95 [3d Dept 2016], *lv denied* 28 NY3d 915 [2017]). Thus, there is no need to consider the issue further. Furthermore, because Schwartz has standing, the court need not evaluate petitioner George Capsis' capacity to sue.

In addition, the action is not moot. Contrary to respondents' argument, the fact that certain units of an existing hospital have been closed does not render the closures irreversible. Here, MSBI still exists and some units are operational. Moreover, as petitioners point out, MSBI closed at least one of the units, the maternity unit, before its CON application was approved by DOH, and it would have had to reopen the unit if DOH had denied the application. Petitioners note that, therefore, reopening a unit while MSBI still exists is feasible. The caselaw on which respondents rely is not persuasive. In *Golden*, for example, the Second Department found that an agency determination made in violation of the rules governing SEQRA but upheld the denial of injunctive relief because the project – the implementation of a one-way toll system instead of the previously existing two-way toll system – had "actually been implemented" (*Golden*, 126 AD2d at 132). Here, respondents have not persuaded the court that reopening a hospital unit will be unduly burdensome – especially as, in their papers, they assert that the closure and the transfer of beds were simple and inexpensive procedures qualified for limited review. The fact that MSBI intends to open a new hospital also does not render this a "fait accompli" (*Matter of E.F.S. Ventures Corp. v Foster*, 71 NY2d 359, 372 [1988] ["an injunction will not issue to prohibit a fait accompli"]).[12]

The court now turns to the causes of action in the petition. First, it evaluates petitioners' first cause of action, the SEQRA claim against DOH. Initially, the court notes that, contrary to the

[12] This Court notes that this court's duty is to remit matters to DOH, not to determine whether a hospital unit should reopen. DOH, not this Court, will make the ultimate decision. However, it has the power to stay further action pending DOH consideration.

implication in the petition (*see* NYSCEF Doc. No. 27 ¶ 63),[13] DOH served as lead agency and issued a Type II determination for each application (NYSCEF Doc. No. 103 ¶ 6; NYSCEF Doc. No. 106 [Administrative Record] AR00032, AR000086, AR000150, AR000179, AR000208, AR000224). Thus, petitioners' suggestion that DOH may not have undertaken an initial assessment lacks merit. Instead, the only viable SEQRA challenge is to the rationality of the Type II determinations.

The court concludes the CON decisions were not violative of SEQRA. The closing of hospital units does not constitute an environmental harm within the meaning of SEQRA. As MSBI states, the impact that petitioners assert is not the type of impact on "human health" that 6 NYCRR § 617.2 (l) contemplates. The Full Environmental Assessment Form, Part 2 – Identification of Potential Project Impacts (https://www.dec.ny.gov/docs/permits_ej_operations_pdf/feaf2.pdf)[14] places the focus on proposed actions that "may have an impact on human health from exposure to new or existing sources of contaminants" (*id.* § 16). The form lists, as some of the potential hazards, (1) projects that involve the remediation of environmental hazards, (2) the construction or modification of waste facilities or that may impact such facilities or such waste, or (3) other site-specific hazards which may affect people who are in the area on or near the project (*id.*). Thus, the provision is not applicable. This does not mean that access to health care is insignificant, simply that the closures are not environmental hazards for the purposes of SEQRA.

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[13] Petitioners concededly do not know whether DOH was the lead agency, but they asserted that DOH should have been so designated (*see* NYSCEF Doc. No. 27 ¶ 10).
[14] An EAF is not required if there is a Type II designation, but which illustrates the type of harm to human health that is at issue under SEQRA (*see Matter of Chinese Staff & Workers' Assn. v Burden*, 19 NY3d 922, 924 [2012]).

The CEQR Manual also shows that there is no danger to public health here.[15] It states that "[w]here no significant unmitigated adverse impact is found in other CEQR analysis areas, such as air quality, water quality, hazardous materials, or noise, no public health analysis is warranted" (CEQR Manual https://www1.nyc.gov/assets/oec/technical-manual/20_Public_Health_2014.pdf, Ch 200 p 20-2). None of these risks are involved here. Further, this case does not present the types of "unusual circumstances" in which "potential public health consequences" are not addressed under a specific category but nonetheless mandates further analysis (*id.* [setting forth, as examples, the potential impact of pesticide application to control the spread of West Nile Virus and the potential spread of gastrointestinal illness resulting from the installation of devices that aerosolize water]). Thus, petitioners' argument on this issue is misguided.

In addition, petitioners' segmentation argument lacks merit. Petitioners contend that DOH violated SEQRA because it improperly conducted a segmented environmental review of the CON applications. Segmentation refers to "the division of environmental review of an action such that various activities or stages are addressed under this Part as though they were independent, unrelated activities, needing individual determinations of significance" (6 NYCRR § 617.2 [ah]). Segmentation may occur where the project sponsor tries to avoid a non-Type II designation by splitting up the project into small parts, or where "activities that may be occurring at different times or places are excluded from the scope of environmental review" (SEQRA Handbook Ch 2 [D] [1]). The lead agency has the discretion to determine whether segmentation is appropriate in a given situation (*id.* [D] [6]). Among other things, the lead agency considers: 1) the segments share a purpose or goal; 2) the projects are being performed at or around the same time; 3) the projects

[15] Although the petition does not rely on or assert a cause of action under CEQR, it cites to the CEQR Manual. CEQR "implements SEQRA in the City of New York" (*Akpan v Koch*, 75 NY2d 561, 567 [1990]).

involve the same geographic location; 4) the projects, if considered together, have "a potentially significant adverse impact, even if the impacts of single activities are not necessarily significant by themselves"; 5) the projects are components of "an identifiable overall plan"; 6) the projects are in some way interdependent; and 7) if the lead agency approves one project, it essentially commits the agency to approve the others (*id.* [D] [3]).

Although the applications at issue here satisfy several of the factors listed in SEQRA Handbook Ch 2 [D] – for example, the closing of each unit is part of Mount Sinai's overall plan to streamline its services, it is closing the units in succession, and the units are all located at MSBI – the court finds that there was no improper segmentation of the CON applications under SEQRA. However, the closures, when considered together, do not have a more significant environmental impact than the individual closures (*see Tribeca Community Assn. v New York City Dept. of Sanitation*, 83 AD3d 513, 515 [1st Dept 2011] [finding no evidence of improper segmentation of an agreement involving the relocation of some sanitation facilities on this basis]). In this circumstance, therefore, the segmenting does not thwart the purposes of SEQRA (*see Matter of Saratoga Springs Preserv. Found. v Boff*, 110 AD3d 1326, 1327-1328 [3d Dept 2013]).

Moreover, although "it wasn't a secret that [MSBI] was closing" or that there is a plan to construct a new hospital in its stead (NYSCEF Doc. No. 117 [Oral Argument Transcript] at p 23, lines 22-23), this does not mean that the CON applications should have been considered along with the application to demolish the NYEEI residential building and construct the new hospital. The beds in question, for the most part, were decertified altogether, with around nine beds being transferred to other Mount Sinai hospitals. In these respects, the projects "are functionally independent" (SEQRA Handbook Ch 2 [D] [4]). Therefore, the segmentation is permissible for

the purposes of the environmental law (*see Matter of Concerned Citizens for Envt. v Zagata*, 243 AD2d 20, 22-23 [3d Dept 1998], *lv denied* 91 NY2d 808 [1998]).

The second cause of action challenges the CON approval process. Petitioners argue that respondents improperly tallied the cost of the projects because they should have considered lost profits (NYSCEF Doc. No. 27 [Amended Petition] ¶ 44 [stating that MSBI lost over $30 million in income when it ended its maternity services]). The court rejects petitioners' argument that lost profits are part of the total project cost. Under the governing regulations, the total project cost includes

> "total costs for construction, including but not limited to costs for demolition work, site preparation, design and construction contingencies, total costs for real property, for fixed and movable equipment, architectural and/or engineering fees, construction managers and/or consultant fees, construction loan interest costs, and other financing, professional and ancillary fees, charges and allowances"

(10 NYCRR § 710.1[b] [1]). Thus, only those expenses related to the projects themselves are considered. Petitioners also mention that some CON applications involved the "transfer [of] beds to other locations" (NYSCEF Doc. No. 27 [Amended Petition] ¶ 44). This generally entails the purchase of new beds rather than the physical transportation of old beds to a different hospital. However, even if the cost of the new beds, which can equal or exceed $100,000, is considered a "movable equipment" cost within the meaning of 10 NYCRR § 710.1(b) (1), this would not bring the total costs of the six CON applications to $15 million, in which situation limited review would not be automatic.

Petitioners are incorrect that MSBI was required to submit a single application because the projects are related programmatically. This argument relies on 10 § NYCRR 710.1 (c) (7), which states, in pertinent part:

> "Medical facilities which will undertake *during their fiscal year* a number of *construction and/or acquisition projects* related programmatically, the aggregate total project cost of which during said period *will exceed $6 million*, shall submit for review a single application encompassing all such projects . . . . If a subsequent audit reveals that during any such period a medical facility has undertaken several projects or submitted several proposals or applications, related programmatically, the total aggregate project cost of which exceeds $6 million, the facility's reimbursement rate . . . may be reduced to the extent it includes, the cost of the related projects" (emphasis supplied).

Assuming, for the sake of argument, that all six applications relate to acquisition projects, and that all were to be performed during the same fiscal year, the aggregate project cost still does not exceed $6 million.

Petitioners argue that demolishing the NYEEI residence building, adding an MRI unit and creating an urgent care walk-in center at 10 Union Square are programmatically related to the closures – indeed, that they are all part of the same project – and, therefore, DOH should have considered them along with the six CON applications. Instead, as already stated, the CON applications indicate that each closure was part of Mount Sinai's effort to better integrate its healthcare system and use Mount Sinai's resources more effectively and efficiently. MSBI and DOH considered the applications in connection with the efforts to streamline services. In addition, the demolition and construction are not taking place, if at all, during the same fiscal year as the closures. On the contrary, MSBI applied for the six CONs at issue years before Mount Sinai submitted its application to build the new hospital, without knowing whether the new construction will be approved. The new hospital is not scheduled to open, if approved, until 2021, and the CON applications were filed in 2016 and 2017. Thus, the CON applications before the court are not "programmatically related" to the demolition of the NYEEI residence building within the meaning of 10 NYCRR § 710.1 (c) (7). The court also does not believe that DOH violated the prevailing

rules or acted irrationally when it did not consider the addition of an MRI unit or the creation of the urgent care walk-in center together with the closures of the units at MSBI. There is no evidence that these applications were dependent upon the approval of the six CON applications at issue here.

Petitioners' other arguments do not change the court's conclusion. For example, because it is rational to consider the CON applications separately, none of the CONS relating to MSBI involve activities which alter or expand more than 10 acres or 240,000 square feet. Thus, petitioners' argument based on 6 NYCRR § 617.4 (b) (6), which deems such projects Type I actions, fails. Their reliance on 6 NYCRR § 617.4 (b) (10) (i), (vi), which states that unlisted actions exceeding 25% of any threshold in the section if, as is relevant here, the project occurs "substantially contiguous to" a publicly owned or operated parkland, recreation area or designated open space," including landmarked sites, are Type I actions, is not persuasive. This provision only applies to unlisted actions, and the proceeding at hand does not involve unlisted actions.

However, DOH erred in conducting a limited review for the closing of the cardiac surgery unit without providing a rational explanation for its decision. Under 10 NYCRR § 710.1 (c) (2) (i) (b) (2), proposals that involve the addition, modification, or change in the delivery method of adult or pediatric cardiac surgery require a full review. Neither respondent provides a persuasive explanation for their deviation from this clear directive. Most significantly, there is no discussion in the certified record which explains why a limited review was applied (NYSCEF Doc. No. 106 [Certified Record] at pp 104-166). "As a general principle, judicial review of an administrative determination is limited to a review of the record evidence and the court may not consider arguments or evidence not contained in the administrative record" (*Matter of Nelson v New York State Div. of Hous. & Community Renewal*, 95 AD3d 733, 734 [1st Dept 2012]). Thus, the court's inquiry should be at an end.

Even if it considered the arguments DOH presents in opposition to the petition, the court would conclude that DOH has not explained its rationale sufficiently. As already stated, DOH refers vaguely to "historical research" which showed that "every application to decertify any of the services has been processed as a limited review application, other than if some other element of the application tripped the requirement for a [CON] application" (NYSCEF Doc. No. 102 [Delcogliano Aff] ¶ 30). This statement does not support DOH's position. For one thing, DOH has not provided any evidence relating to the historical review. It is not clear whether this research included studies of CON applications to decertify cardiac surgery beds. For another, Delcogliano specifically notes that DOH conducts limited reviews of such applications only if another element of the CON application "trips" the requirement for a full review (*id.*). The application to decertify a cardiac surgery unit is just such an element. The appropriate remedy is not to order the reopening of the unit, but to remit the issue to DOH for reconsideration.

Finally, the court dismisses the third cause of action which alleges that DOH violated the State Constitution. "[T]he manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government" (*Roberts v Health & Hosps. Corp.*, 87 AD3d 311, 324-25 [1st Dept 2011] [internal quotation marks and citation omitted], *lv denied* 17 NY3d 717 [2011]). In particular, Article 17 Section 3 of the New York Constitution provides the Legislature with such discretion in determining the manner and means by which to promote public health (*Hope v Perales*, 83 NY2d 563, 578 [1994]),[16] and Public Health Law 2800 provides that DOH has "the central, comprehensive responsibility for the

[16] Although petitioners refer to Article 17, section 1 in their memorandum of law (NYSCEF Doc. No. 113), their petition only referred to section 3. Therefore, this Court does not address section 3. It notes, however, that petitioners have not raised a viable issue that the challenged closures violate section 1.

development and administration of the state's policy with respect to hospital and related services" (*see Matter of Levine v Whalen*, 39 NY2d 510, 515-517 [1976]). Petitioners have not provided any specific evidence showing that the closure of several units of MSBI – or even the probable future closure of MSBI – violates DOH's discretion and constitutes a failure to protect and promote public health. Although petitioners reference the fact that St. Vincent's Hospital, in the West Village, closed in 2010 (*e.g.*, NYSCEF Doc. No. 27 [Amended Petition] ¶ 38), they do not show that the trend has deprived downtown residents of their right to health care. Petitioners' reliance on *Campaign for Fiscal Equity, Inc. v State of New York* (100 NY2d 893 [2003] [*Campaign for Fiscal Equity*]), among other cases, is misplaced. In *Campaign for Fiscal Equity*, the court found a constitutional violation based on the determination that the New York City Public School System deprived all of its students of a sound basic education. Moreover, that determination was based on an overwhelming amount of evidence, including "the testimony of 72 witnesses and . . . 4,300 exhibits" (*id.* at 902). Here, on the other hand, petitioners make a conclusory statement about the denial of health care to New York City residents based on the closing of one hospital.

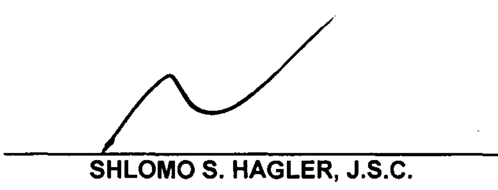
CONCLUSION

Based on the foregoing, it is

ORDERED and ADJUDGED that the issue of the closure of the cardiac surgery unit is severed and remanded to DOH for consideration consistent with this order; and it is further

ORDERED and ADJUDGED that the remainder of the petition is dismissed.

The Clerk shall enter judgment accordingly.



3/3/2020
DATE

SHLOMO S. HAGLER, J.S.C.

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
[ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER

APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE