

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

CITY OF CROSSGATE,)
MAYOR, KIRK HILBRECHT)
)
)
)
)
)
v.)
)
UNITED STATES DEPARTMENT)
OF VETERANS AFFAIRS)
810 Vermont Avenue, NW)
Washington, DC 20420)
)
and)
)
DAVID SHULKIN,)
SECRETARY OF THE UNITED)
STATES DEPARTMENT OF)
VETERANS AFFAIRS)
in his official capacity)
810 Vermont Avenue, NW)
Washington, DC 20420)

Civil Action No. _____

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, City of Crossgate, Kentucky, brings this action pursuant to the 28 U.S.C. 1331, challenging the issuance of a Record of Decision (“ROD”) by the United States Department of Veterans Affairs (“VA”) regarding a Replacement Robley Rex VA Medical Center (“VAMC”) in Louisville, Kentucky. The Record of Decision¹ and Final Environmental Impact Statement² were completed without a full and adequate environmental review as required by the National

¹ See Exhibit (“Exh.”) 1.

² See Exh. 2.

Environmental Policy Act (“NEPA”). The proposed VAMC comprises a massive greenfield project that would be designed and constructed over multiple years and result in a complex covering nearly 40 acres, approximately 1,000,000 square feet of building space, servicing over 1500 patients per day, and profoundly impacting the traffic, transportation, and land use patterns in the area. The total cost of the project is estimated at over one (1) billion dollars.

Construction of the VAMC would have major and significant environmental impacts which were not properly assessed during the NEPA environmental review process. The selection of the proposed VAMC site at Brownsboro Road is inextricably intertwined and tainted by a “sweetheart deal” with the property owner, wherein the property was appraised inconsistently with controlling VA regulations and was purchased at a significant, unexplained premium over the value of the property. Further, the site at issue was purchased prior to the completion of the NEPA analysis, also in a manner inconsistent with VA and NEPA requirements. This Complaint seeks a declaratory judgment and injunctive relief requiring the VA to comply with NEPA and complete a full and adequate review of the environmental impacts of the VAMC project, including reasonable alternatives. The Complaint also seeks an injunction prohibiting the VA from providing any funds or taking any other action toward the construction of the VAMC project until it has fully complied with the requirements of NEPA.

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331. The declaratory and injunctive relief requested by Plaintiff would redress the injuries that Plaintiff complains of herein and this Court has the authority to grant the relief requested by Plaintiff. 28 U.S.C. §§ 2201-2202. An actual controversy within the meaning of 28 U.S.C. § 1331 and 2201

exists between the parties regarding the VA's compliance with the requirements of NEPA prior to and after selecting the Brownsboro Site for the VAMC project.

2. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 since this matter arose under the National Environmental Policy Act and presents a federal question.

3. Venue is proper in this judicial district and in this Court under 28 U.S.C. § 1391(e)(1)(A) because this judicial district is where a substantial part of the events or omissions giving rise to the claims occurred and a substantial part of property that is the subject of the action is situated. This is the district in which this action arose.

4. The issuance of the Record of Decision by the VA of October 12, 2017, and the issuance of the Final Environmental Impact Statement constitute final agency action that is reviewable under the Administrative Procedure Act, 5 U.S.C. 701-706.

PARTIES

PLAINTIFF

5. Plaintiff is the City of Crossgate ("Crossgate"), located in Jefferson County, Kentucky, adjacent to the proposed Brownsboro site location. Crossgate was built in the late 1960s and currently has over 100 single family homes and over 240 citizens. Several of these Crossgate homes will be directly adjacent to VAMC buildings, whose design calls for heights reaching 162 feet. Crossgate is dedicated to the protection and preservation of its rights and the rights of its citizens, including providing for the health, safety, and welfare of its citizens and their properties. In addition, Crossgate's property, recreational, aesthetic, business, governmental, and environmental interests have been, are being, and will continue to be adversely affected by the Defendant's actions as set forth herein. The Mayor of Crossgate is Kirk Hilbrecht, a local business person and veteran.

6. Crossgate also brings this action on behalf of its citizens. Crossgate citizens' property, recreational, aesthetic, business, and environmental interests have been, are being, and will be adversely affected by the Defendant's actions as set forth herein. The citizens' use and enjoyment of their property and of Crossgate's property would be diminished by the construction and operation of the VAMC.

7. Crossgate and its citizens will suffer concrete injury from the unlawful construction and operation of the VAMC without adequate environmental review as required by the National Environmental Policy Act. Plaintiff's injuries are squarely within the zone of interests sought to be protected under the National Environmental Policy Act, and the failures of compliance with that Act and with VA procedures are directly related to the harms complained of and will be redressed by the relief requested of this Court.

DEFENDANTS

8. The United States Department of Veterans Affairs ("VA") is the federal agency tasked with caring for America's veterans. The VA is headquartered in Washington, D.C. The VA has Medical Centers and offices throughout the country, including in Louisville, Kentucky. The VA has proposed constructing a new Medical Center ("VAMC") at the Brownsboro Road site in Louisville, Kentucky, to replace the existing Robley Rex VAMC currently located on Zorn Avenue in Louisville, Kentucky.

9. Defendant David Shulkin is Secretary of the United States Department of Veterans Affairs in Washington, D.C. Plaintiff brings this action against Sec. Shulkin in his official capacity only. Sec. Shulkin is the federal officer ultimately responsible for overseeing the construction and operation of the VAMC, and the federal officer responsible for proper compliance with the National Environmental Policy Act for the proposed major federal action of

construction and operation of the VAMC. Sec. Shulkin is the federal officer responsible for compliance with any injunction related to the VA that this Court issues.

FACTUAL BACKGROUND

10. On January 11, 2017, Crossgate submitted comments regarding the draft Environmental Impact Statement, to the VA in opposition to the selection of the Midlands Site.³ Those Comments contained a detailed and thorough factual narrative leading to the issuance of the ROD. That factual background is summarized here.

11. A determination was first made by the VA on May 7, 2004 to conduct a six-month study, through the Capital Asset Realignment for Enhanced Services (“CARES”) process, to determine the best way to replace the 52-year-old Robley Rex VA Medical Center on Zorn Avenue in Louisville, Kentucky VA. Officials alleged that the hospital was overcrowded, outdated, and the VA was unable to expand the current site. The VA, through the Capital Asset Realignment for Enhanced Services (“CARES”) process, recommended further studies needed to be conducted for the replacement of the medical center. The CARES Summary Report is devoid of any environmental review considerations. In addition, all thirteen possibilities for a revamped VAMC contemplate either re-use of the Zorn Avenue property or co-location of services with the University of Louisville in Downtown Louisville.

12. Later that month, on May 27, 2004, an investment partnership was formed between Blue Equity, LLC and former co-developer, Fenley Real Estate, and the partnership paid \$4.96 million to Margaret Hildebrand and her brother, Henry, to purchase 36 acres of residential-zoned farmland near Brownsboro Road and the Watterson Expressway (“Midlands

³ See Exh. 3; Crossgate Comments.

site”). The Jefferson County Property Valuation Administrator determined the property tax assessment for the Midlands site to be \$4.96 million.

13. In late 2004, as part of the CARES process, questionnaires were mailed to stakeholders, including veterans, veterans’ family members, and VA or VAMC employees, requesting their input on a future site location for the VA replacement medical facility. During that same period, on April 29, 2005, a handful of veterans spoke out at a VA public hearing to voice their opinions concerning Louisville’s need for improved health care facilities for veterans. The veterans also expressed concerns regarding traffic and parking if a new facility would be built downtown. The VA then issued its CARES Stage 1 Summary Report in August of 2005.

14. In late 2005, U.S. Representative Anne Northup imposed a deadline on the VA to make a decision regarding the site of a new hospital by June 1, 2006. Rep. Northup expressed a preference for the new VAMC to be built downtown near the University of Louisville’s Medical School and Hospital, which includes the region’s only Level 1 Trauma Center. The VA then began conducting public hearings in late 2005 regarding its plans to build the new VAMC.

15. In June of 2006, the CARES Stage 1 Study was published, alleging a need for a VA replacement medical center in Louisville.⁴ On June 30, 2006, then-VA Secretary R. James Nicholson held a news conference in Louisville announcing the decision to build a new medical center to replace the existing facility. The press release announcing the decision noted that the VA will conduct the necessary due diligence for property acquisition and request congressional approval before the new facility can be built. Secretary Nicholson, Representative Anne Northup, Senator Mitch McConnell, and Representative Ron Lewis held a press conference in Louisville announcing a new facility that would break ground in two to four years. Although a

⁴ Exh. 3; Crossgate Comments, Exh. 2, *VA Fact Sheet*, page 1, February 8, 2013.

site had not been selected, it was announced by Sec. Nicholson during the press conference that the location would likely be downtown.⁵

16. In February of 2007, the Louisville-Metro Council and the City of Graymoor-Devondale approved a zoning change for the Midlands Site to planned development, allowing for a neo-traditional development with residential and commercial elements. Due to a lawsuit and economic considerations, the Midlands development was discarded by the developer. That same month, the VA issued its Fiscal Year Construction and 5-Year Capital Investment Plan. The proposed new Louisville VAMC ranked fourth in priority.⁶ In March of 2007, the firm URS Smith Group was selected to begin architectural and engineering work on a new Louisville VAMC once the public funds were secured.⁷

17. In February of 2008, Mayor Jerry Abramson and the University of Louisville President, James Ramsey, submitted a proposal to the VA for a downtown hospital.⁸ According to the new Fiscal Year Construction and 5-Year Capital Investment Plan issued in February of 2008, the VAMC now ranked seventh in priority⁹ due to resources needed for the aftermath of Hurricane Katrina. In September of 2008, the VA approved preliminary funding for the replacement Louisville VAMC.¹⁰

18. In March of 2009, the VA commenced a traffic study pertaining to the replacement Louisville VAMC. On April 6, 2009, the VA held a public meeting at the Clifton

⁵ *Id.*

⁶ Exh. 3; Crossgate Comments, Exh. 2, *VA Fact Sheet*, page 1, February 8, 2013.

⁷ *Id.*

⁸ Exh.3; Crossgate Comments, Exh. 1, Louisville Courier Journal, *Timeline for Midlands VA Hospital land purchase*, page 2, (February 23, 2014).

⁹ Exh. 3; Crossgate Comments, Exh. 2, *VA Fact Sheet*, page 1, February 8, 2013.

¹⁰ *Id.*

Center to discuss potential site options. Several commenters, including veterans, voiced opposition to a new site location and wanted the VAMC to remain on Zorn Avenue.

19. In July 2009, the M. Davis and Company (“MDAC”) completed a survey regarding veteran preferences for the replacement Louisville VAMC. MDAC surveyed 537 veterans served by the current Louisville VAMC to determine the preference regarding the location of a new VA medical center in Louisville, showing overwhelmingly support for the VAMC to remain at the Zorn Avenue site. In October 2009, \$75 million was appropriated by Congress for real estate acquisition, master planning, design, and preliminary site development of a replacement Louisville VAMC.¹¹ That same month, a feasibility study regarding the replacement of the Louisville VAMC was completed.¹² The feasibility study concluded that each alternative was feasible. The study did not attempt to identify any particular site, but rather evaluated a generic new site’s feasibility compared to reconfiguring existing Zorn Avenue facility.¹³ In January of 2010, then VA Secretary Shinseki requested that a more comprehensive analysis be conducted for potential site options.¹⁴

20. On April 7, 2010, the VA issued a request for available “greenfield” sites for the hospital. Secretary Shinseki gave his approval for the exploration of options outside of Downtown Louisville focusing on “greenfield” sites.¹⁵

21. On April 10, 2010, the VA published a press release expressing the VA’s interest in procuring land for a replacement VAMC seeking proposals for a minimum of 25-acres in

¹¹ *Id.*

¹² *Id.*

¹³ Exh. 4; Final PEA at E-2.

¹⁴ Exh. 3; Crossgate Comments, Exh. 5, *Shinseki Letter to Coffman*, Executive Summary, page 2, April 7, 2010.

¹⁵ Exh. 3; Crossgate Comments, Exh. 6, Ben Adkins, *VA seeking more site options for new Louisville facility*, page 2, Louisville Business First (April 7, 2010).

Jefferson County, Kentucky. Secretary Shinseki stated in his letter to U.S. Representative Coffman that the “purpose of this site selection process was to identify the Greenfield site best-qualified to serve as a potential location for the proposed VAMC.” The sites were required to have a minimum of 25 acres, all but eliminating most sites in or around Downtown Louisville, and unreasonably ignoring the option of acquiring downtown properties that could have been aggregated to meet the minimum acreage requirement.

22. The Westport Road interchange to the Watterson Expressway was completed and opened on April 29, 2010. From May 11 to May 13, 2010, a site selection survey was conducted by the VA Site Selection Board, focusing on greenfield sites.

23. On June 22, 2010, Senator Mitch McConnell sent a letter to Secretary Shinseki with a proposed VA timetable for completion of the VAMC. In August of 2010, Secretary Shinseki authorized a due diligence study on the top three greenfield sites, the downtown site, and the existing Zorn Avenue VAMC.¹⁶

24. On December 10, 2010, the first appraisal was conducted on the Midlands site on by Galloway Appraisals for the VA’s Office of Acquisition, Logistics, and Construction (“OALC”). This first appraisal determined the value of the property to be \$9.6 million: \$7.5 million for the 22.3 commercial acres and \$2.1 million for the 14.5 residential acres.¹⁷ The appraisal was not released publicly. The appraiser has since stated that the appraisal was a draft, but there is no indication that it was marked accordingly. A second appraisal by the same appraiser, Galloway Appraisals, for OALC valued the identical property at \$12.9 million on

¹⁶ Exh. 3; Crossgate Comments, Exh. 2, *VA Fact Sheet*, page 1, February 8, 2013.

¹⁷ Exh. 3; Crossgate Comments, Exh. 1, Louisville Courier Journal, *Timeline for Midlands VA Hospital land purchase*, page 4 (February 23, 2014).

February 29, 2012. This discrepancy became the subject of the VA's later IG Report, summarized *infra*.

25. The VA held another public meeting on May 11, 2011 at the Clifton Center to present proposals for three greenfield sites, while still maintaining that they were considering the downtown and Zorn Avenue sites. On August 5, 2011, Congress awarded \$13 million for improvements and \$10 million in upgrades for the Zorn Avenue Louisville VAMC. On September 21, 2011, 100 parking spaces were leased at the Zorn Avenue Ramada Hotel parking lot to be used for employee parking at the VAMC. After repeated attempts, Senator McConnell again asked for a decision from the VA to be finalized regarding the location of the replacement Louisville VAMC. The VA responded that the decision would be made in September 2011. In a letter from Senator McConnell to Secretary Shinseki, dated October 1, 2011, the Senator requested that the VA speed up the selection process without openly showing interest in any specific site location.¹⁸ On November 10, 2011, Secretary Shinseki formally announced the preferred site as the Midlands site, with the St. Joseph's site as the second preferred site.¹⁹ Blue Equity held a public meeting on November 17, 2011 regarding the replacement VAMC's potential location at the Midlands site.

26. The Kentucky Department of Transportation held a public meeting at Ballard High School on the traffic issues within the a five-mile radius of the Brownsboro Road site on December 15, 2011. During the meeting, the impact of the proposed VA Hospital relocation on local traffic was not discussed. A traffic study was conducted by URS Smith Group, the

¹⁸ Exh. 3; Crossgate Comments, Exh. 10, *McConnell Letter to Shinseki*, page 1, October 1, 2011.

¹⁹ Exh. 3; Crossgate Comments, Exh. 2, *VA Fact Sheet*, page 1, February 8, 2013.

consulting group hired by the VA, on December 23, 2011.²⁰ The traffic study compared the numbers from the 2006 study for mixed commercial and residential use to the 2011 traffic study for mixed commercial and residential usage, despite that proposal being discarded by the developer in 2008 as economically infeasible. In 2006, the estimated traffic was 5,877 vehicles per day. In 2011, the number dropped to 3,978 vehicles per day, which reflected the updates to the new Westport Road interchange that had been completed. The traffic estimate for the VA Hospital is 3,780 vehicles per day. There was significant opposition to the Brownsboro Site at that meeting.

27. On January 11, 2012, Blue Equity released a preliminary Traffic Report on the Midlands Development Site which compared the traffic count for the Midlands mixed-use development with the relocated hospital. The preliminary report showed that the VA Hospital relocation to Brownsboro Road would create less traffic than Blue's original mixed-use Midlands project. This was a specious comparison, as the mixed-use project had been discarded due to legal and economic considerations.

28. As mentioned, *supra*, on February 29, 2012, a second appraisal was prepared for the Midlands site. This time, the property was valued at \$12.9 million.²¹ This appraisal was criticized by the VA's Inspector General ("IG") both on the appraisal value of the property, the method by which the VA acquired the property, and the failure to obtain a follow-up appraisal. The IG found that "The Office of Acquisition, Logistics, and Construction did not obtain a required review appraisal for determining the appropriateness of the two appraisals prior to

²⁰ Exh. 3; Crossgate Comments, Exh. 11, *Technical Memorandum* from Paul Slone to Jonathon Blue and Bill Northcut (December 23, 2011).

²¹ Exh. 3; Crossgate Comments, Exh. 1, Louisville Courier Journal, *Timeline for Midlands VA Hospital land purchase*, page 6, (February 23, 2014).

purchasing the land for \$12,905,000. VA did obtain a review appraisal in April 2014, nearly two years after the property was purchased and at a cost of \$2,447. Spending \$2,447 for the review appraisal was a waste of the taxpayers' money because of the timing of the review appraisal was useless in determining whether the VA paid just compensation for the property.”²²

29. In March 2012, the Draft Programmatic Environmental Analysis (“DPEA”) was published. On March 10, 2012, Senator McConnell announced that Secretary Shinseki would determine a final replacement Louisville VAMC site by Spring 2012.²³

30. On March 12, 2012, the City Council of Crossgate (the neighborhood adjacent to the Midlands site) held a meeting at Thomas Jefferson Unitarian Church, with over one hundred people attending. The agenda included a discussion by the VA officials about their plans for the new hospital. The VA was unable to provide answers to basic questions concerning alternatives, timelines, impacts, noise, and accessibility and traffic.

31. The VA held a public meeting at Kammerer Middle School on April 18, 2012 to discuss the DPEA study. Approximately 600 people attended the meeting. The meeting was very disorganized, the PA system did not work, and once again, the VA officials were unwilling or unable to answer basic questions about the VAMC proposals. The public had concerns about the size of the proposed replacement Louisville VAMC siting at the Midlands site, the number of vehicles that would travel in and out of the site, and the impact on already strained local roads.

²² Exh. 3; Crossgate Comments, Exh. 22, VA Office of Inspector General Report, *Review of Land Purchase for the Replacement Hospital in Louisville, Kentucky*, What We Found Report Highlights.

²³ Exh. 3; Crossgate Comments, Exh. 12, Bruce Schreiner, *McConnell: VA may pick hospital site this spring*, page 1 (March 10, 2012).

32. On April 29, 2012, the DPEA public comment period closed.²⁴ Sometime that month, the VA Office of Construction and Facilities Management (“CFM”) commenced the space planning process for the Brownsboro Road site.²⁵ On April 30, 2012, URS Smith Group was officially selected by the US Department of Veterans Affairs to provide full architectural and engineering services for the development of the new VAMC.²⁶

33. The City of Crossgate held a public meeting concerning the proposed VAMC at the Brownsboro site on March 12, 2012. The meeting was open to the general public. Present at the meeting were the Mayor of Crossgate, several council members, and about 30 members of the public. VA staff was also present but were unable to answer many of the questions asked by the audience. The audience raised many issues of concern, including accessibility and traffic, stormwater drainage, diminution of the fair market values of property, lighting, and noise.²⁷

34. In May 2012, the Contractor, URS Smith Group, began the master planning process at the Brownsboro site.²⁸ The Final PEA was published on June 8, 2012 with a finding of no significant impact. The FONSI for the PEA was signed on June 15, 2012.

35. On June 10, 2012, and before the site-specific Environmental Assessment (“SEA”) or the EIS were completed, and before the FONSI for the PEA was signed, the VA agreed to pay \$12.9 million for the purchase of the Midlands site and, a month later, the deal was finalized.²⁹ Secretary Shinseki announced the Brownsboro site’s formal selection for the

²⁴ Exh. 3; Crossgate Comments, Exh. 2, *VA Fact Sheet*, page 2, February 8, 2013.

²⁵ *Id.*

²⁶ Exh. 3; Crossgate Comments, Exh. 13, URS/Smith Group Press Release, page 1, April 30, 2012.

²⁷ Exh. 3; Crossgate Comments, Exh. 14, City of Crossgate Meeting Minutes, page 3, March 12, 2012.

²⁸ Exh. 3; Crossgate Comments, Exh. 2, *VA Fact Sheet*, page 2, February 8, 2013.

²⁹ Exh. 3; Crossgate Comments, Exh. 1, Louisville Courier Journal, *Timeline for Midlands VA Hospital land purchase*, page 7 (February 23, 2014).

replacement Louisville VAMC.³⁰ On June 19, 2012, reconstruction of the Brownsboro Road exit from the Watterson Expressway began. On June 21, the VA completed the traffic study of the area (after discovering flaws in the first traffic study).

36. The PEA states, “The *purpose* of the Proposed Action is to provide a replacement, full-service (inpatient and outpatient) hospital (i.e., VAMC) of sufficient capacity to service the current and projected future healthcare needs of US Veterans requiring services from the Louisville VAMC catchment area, primarily in western Kentucky and southern Indiana. VA has sized this required site and facility to accommodate an anticipated 65,000 or more patients per year.”³¹ “The Proposed Action is *needed* to replace the existing Louisville VA medical facilities that have reached the end of their serviceable lives.”³² The PEA eliminated the “Downtown” site, the Fegenbush site, and the existing Louisville VAMC site without review, but did review the Midlands site, St. Joseph’s site, and the No Action alternative.³³ The FONSI concluded, “After careful review of the Final PEA, VA has concluded that implementation of the Proposed Action at either the Brownsboro Site or the St. Joseph Site would not have a significant impact on the quality of the human or natural environment provided VA implements the mitigation, avoidance and management measures identified in the Final PEA.”³⁴ The VA later determined that a full EIS was required to evaluate the environmental impacts of the VAMC proposals. The purchase of the Midlands site before the NEPA process was complete violates the obligation in CEQ and VA regulations to not prejudicially commit resources.

³⁰ Exh. 3; Crossgate Comments, Exh. 2, *VA Fact Sheet*, page 2, February 8, 2013.

³¹ Exh. 4, PEA FONSI at 1.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

37. By July 2012, the site planning for the Brownsboro Road site was anticipated to be completed.³⁵ On July 10, 2012, the Federal Government paid \$12.9 million for the Brownsboro Road property. The press release described the property as 34.5 acres even though the Jefferson County PVA listed the property as 36.7 acres. The remaining 2.2 acres was deeded to the State of Kentucky by Blue Equity for the slip ramp which was set to be opened in October 2012. That same month, the public reacted to the price paid for the Brownsboro site. As stated above, the property was appraised in 2010 for \$9.6 million. In 2012, the property was appraised for \$12.9 million. The Inspector General and several legislators took issue with the overvalued appraisal of the property, and the VA's arbitrary acquisition of the property at that price.

38. On August 15, 2012, the VA hosted another public meeting held at the Clifton Center.³⁶ Approximately 400 people attended the meeting. The master planners of the Midlands site, Oculus, Inc., and the architect, Perkins + Will, presented the preliminary master plan. The consultants were slightly more prepared than the VA officials from the April 18 meeting, but the results were the same. When questioned regarding the size of the site and surrounding buildings, the consultant said, "It would be cozy." Again, the VA was unwilling to give answers to many of the questions raised by the public, including many veterans.

39. On October 9, 2012, Metro Council member Ken Fleming held a town hall meeting to seek feedback from residents in the Seventh District about their concerns regarding the replacement VAMC. On October 25, 2012, the slip ramp from the Watterson Expressway to Brownsboro Road opened. Another VA public meeting was held on November 14, 2012 at the Clifton Center to update veterans and the public about the Midlands site. Approximately 300

³⁵ Exh. 3; Crossgate Comments, Exh. 2, *VA Fact Sheet*, page 2, February 8, 2013.

³⁶ *Id.*

people attended the meeting. Again, the VA was unwilling to answer many of the questions and concerns of the public. Many of the veterans and citizens in the audience remained frustrated because of the failure to get informative answers from the VA after attending public meetings with the VA on March 12, April 18, and August 15, 2012. The Master Plan for the Brownsboro Road site was completed in November 2012.³⁷

40. On February 8, 2013, the Mayor Greg Fischer held a meeting at the Zorn Avenue Louisville VAMC and the VA Fact Sheet was distributed.³⁸ The design was underway as of February and the design phase was expected to last approximately 18-24 months.³⁹ In April 2013, Representative Mike Coffman, an outspoken critic of VA fraud and waste, wrote to Secretary Shinseki requesting an unredacted copy of the contract for the Brownsboro Road site.⁴⁰

41. A letter from Secretary Shinseki to Representative Coffman on June 30, 2013 set out a timeline for the sequence of events for the new hospital's construction.⁴¹ The letter from the Secretary states specifically that "[t]his land was purchased to serve as the location of the replacement VA Medical Center in Louisville, Kentucky" and contained a compact disc with the requested documents.⁴²

42. On November 3, 2013, the Kentucky Medical Association endorsed the construction of the medical complex downtown and opposed the selection of the Midlands site. The VA currently refers veterans with acute medical problems to the Rudd Heart and Lung Institute, the James Graham Brown Cancer Center, and the Frazier Rehabilitation Center, all of

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Exh. 3; Crossgate Comments, Exh. 15, *Letter from Representative Mike Coffman to Secretary Shinseki*, page 1 (April 22, 2013).

⁴¹ Exh. 3; Crossgate Comments at 9.

⁴² *Id.*

which are located downtown. Throughout 2013, the VA continued to remodel and build at the Zorn Avenue site including renovations to the back entrance of the hospital to improve access, a new free-standing drug treatment building at the site, and the addition of satellite parking area at the nearby Ramada Hotel parking lot. On January 17, 2014, a Parking Solicitation Proposal for leasing parking spaces from Mellwood Avenue was proposed for the Zorn Avenue Louisville VAMC.⁴³

43. In February of 2014, major national news stories began to circulate regarding falsified wait times for veterans at Arizona VA facilities. That same month, hearings were conducted by the Senate Committee on Veterans Affairs regarding the falsified wait times. The goal of the hearing was to hold the VA accountable for its failures in caring for veterans. On February 26, 2014, Representative Coffman wrote to Secretary Shinseki requesting the appraisals for the land purchased for the replacement Louisville VAMC at Brownsboro Road.⁴⁴ On March 5, 2014, U.S. Representative Coffman (Chairman of the House Subcommittee on Oversight and Investigations), asked why there was a 31% increase between the first and second appraisal for the Midlands site. Representative Coffman noted that the value within 14 months jumped from \$9.6 million to \$12.9 million. Representative Yarmuth also joined in the questioning stating, “It is critical that not only is the VA a good steward of taxpayers’ dollars, but that the community have confidence in this project. Therefore, I request that you (the acting VA Inspector General Richard Griffin) investigate the actions taken thus far by the VA” in the Louisville replacement project.

⁴³ Exh. 3; Crossgate Comments, Exh. 8, Department of Veterans Affairs, X—Lease – Parking Spaces (January 15, 2014).

⁴⁴ Exh. 3; Crossgate Comments, Exh. 16, *Letter from Representative Coffman to Secretary Shinseki* (February 26, 2014).

44. On March 7, 2014, Grow Smart Louisville (“GSL”), a non-profit volunteer organization working to promote smart growth in Metro Louisville, suggested to the VA that the Brownsboro site be used as a VA Cemetery in concert with the nearby Zachary Taylor Cemetery down Brownsboro Road, as the Zachary Taylor Cemetery is closed to new interments. The only interments that are being accepted are subsequent interments for veterans or eligible family members in an existing gravesite. The VA failed to address this suggestion or other alternative uses for the Midlands site.⁴⁵

45. On April 16, 2014, almost two years after the Midlands site was purchased, a Public Scoping Meeting was held at the Clifton Center to present the Site-specific Environmental Assessment (“SEA”).⁴⁶ The consultant present at the meeting was Labat Environmental Inc. who were conducting the environmental assessment of the proposed VAMC. Public comments were due on the SEA on April 25, 2014, while previous comments were not made available. Approximately 100 people attended the meeting and voiced their concerns about traffic on Brownsboro Road and the effects of construction and blasting on nearby homes. Others had concerns about noise and pollution caused by traffic.

46. On May 31, 2014, Secretary Shinseki resigned after pressure from Congress related to substandard timely care and false records covering up related timelines.⁴⁷ The House Committee on Veterans’ Affairs Subcommittee on Oversight and Investigations criticized the VA for poor management, lack of accountability and falsifying testimony and evidence.

⁴⁵ Exh. 2, Final EIS at 49.

⁴⁶ See Exh. 5.

⁴⁷ Exh. 3; Crossgate Comments, Exh. 17, Tom Cohen, *Shinseki resigns, but will that improve things at VA hospitals?* (May 31, 2014).

47. The 5th District Highway Office of the Kentucky Transportation Cabinet sent out a news release on July 7, 2014 to residents in the Highway 42 corridor. The release invited residents to a Public Information Meeting to take place on July 24th seeking public input on the plans to improve the interchange at US 42 and the Watterson Expressway. The meeting was advertised in the Courier-Journal on July 10, 2014.

48. On July 12, the VA announced a third satellite parking lot was now available at the Mellwood Arts Center for 99 cars. A meeting was then held on July 24, 2014 as scheduled at the Christ Church United Methodist Fellowship Hall, led by Project Manager, Travis Thompson, from the Kentucky Transportation Cabinet. Public comments for the traffic proposal were due on August 8, 2014.

49. More VA scandals came to light regarding long waits for appointments, plus cost overruns in the millions of dollars for new hospitals in Aurora, Colorado, Orlando, New Orleans, Omaha, and Las Vegas (where the ER was built too small and the contractor forgot to build the ambulance drop-off ramp).

50. In October 2015, after many comments from citizens, citizens' groups such as GSL, and after the Louisville Metro Council unanimously passed a resolution all calling for the VA to conduct an EIS to fully comply with its obligations under NEPA, the VA reversed course and determined that a full EIS was necessary. "Upon analysis of the study results and comments received from the public in response to the draft analysis of the Brownsboro Road site, VA concluded that we must prepare an EIS to fully comply with NEPA."⁴⁸

⁴⁸ Exh. 3; Crossgate Comments, Exh. 18, *Robert Nabors II Letter to Rep. Jeff Miller* (December 30, 2015).

51. According to the current projections regarding proposed schedules for the completion of the new Louisville VAMC, the phased construction is to begin in early 2019 subject to budget and appropriations considerations. In 2023, the new VA campus is projected to open and 2025 is the latest extended completion date.

52. The VA completed its Draft Environmental Impact Statement in October 2016 and provided the public the opportunity to comment on the EIS until January 11, 2017. The only three sites considered were the Zorn Avenue site and the two suburban sites, Brownsboro Road and St. Joseph on Old Henry Road. There were no aggregated, brownfield, or downtown sites considered. The St. Joseph site was sold in early 2016 and is currently being developed for residential homes. That property is no longer available as a potential replacement Louisville VAMC site, despite its consideration as an alternative in the DEIS.

53. Shortly after the DEIS was released in October 2016, the City of Crossgate formed a committee to communicate, understand, and analyze the full extent of the VA's proposed VAMC replacement project and its impacts on veterans, the surrounding community, and the city as a whole. The committee included members from Crossgate, Northfield and Graymoor-Devondale. The committee submitted FOIA and Open Records Requests to several government agencies in an attempt to gather as much information as possible to make informed choices.

54. On January 11, 2017, Crossgate submitted extensive comments on the DEIS voicing all of their concerns regarding the inadequacies of the of the VA's analysis of the impacts to veterans and the lack of consideration to site alternatives which is in violation of NEPA.

55. A Final EIS was issued on April 28, 2017.

56. On October 12, 2017, VA Secretary David J. Shulkin, MD, signed the Record Of Decision, which incorporated the Final EIS in its entirety, signaling the VA's decision to "approve and implement Alternative A (the Brownsboro Site) for the Replacement Robley Rex VAMC." *ROD* at 24.

57. The *ROD* states that the VA considered five sites: three greenfield sites (Brownsboro site, the St. Joseph site, and the Fegenbush Site), as well as the Downtown Site, and the existing Zorn Avenue site reconfiguration. The *ROD* states that sometime around 2011, the VA identified the Brownsboro and St. Joseph sites as the top two options for "provid[ing] timely healthcare to Veterans" with the "least impact on the surrounding environment." *ROD* at 3. In considering both of those sites, the VA conducted an EIS of the top two options (Alternative A and B), as well as a third option in continuing the existing hospital located off Zorn Avenue (Alternative C). The Fegenbush Site and Downtown Site, as well as reconfiguring the current Zorn Avenue site were dismissed without analysis. The VA only considered two suburban greenfield sites and the No Action alternative.

58. In the end, prior to completion of the NEPA process, the VA prejudicially committed financial resources by acquiring the Midlands property, fatally tainting any NEPA review of that and other alternatives and making a mockery of the NEPA process.

APPLICABLE LAW

The National Environmental Policy Act

59. NEPA is our "basic national charter" for environmental protection. 40 C.F.R. § 1500.1. Among the statute's goals are to "insure that environmental information is available to public officials and citizens before decisions are made and actions are taken," and to "help public officials make decisions that are based on [an] understanding of environmental consequences,

and take actions that protect, restore, and enhance the environment.” *Id.* § 1500.1(b)-(c).

60. Congress enacted NEPA in 1969 to “promote efforts which will prevent or eliminate damages to the environment.” 42 U.S.C. § 4321. Congress declared that it is the policy of the federal government, “[t]o create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.” Section 101.

61. Section 101(a) also reflects Congressional acknowledgment of the “profound influences of population growth, high-density urbanization [and] industrial expansion.” NEPA requires, “the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.” 101(b)(3). “[E]ach person should enjoy a healthful environment.” 101(c).

62. Section 102(2)(C) states both NEPA’s “threshold” requirement and the “adequacy” requirement. It provides:

[A]ll agencies of the Federal government...include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment [the “threshold” requirement], a detailed statement by the responsible official on:

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effect which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local and short term use of man’s environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Four of these requirements (i, ii, iv, v) define the responsibility of the agency to consider the environmental impacts of their action. The remaining requirement (iii) mandates that the VA must consider alternatives to their proposed action.

63. NEPA also requires other decision-making responsibilities. Section 102(2)(E) requires federal agencies to “study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of public resources.” A more elaborative statement of the requirement found at § 101(2)(C)(iii), this requires the consideration of alternatives even if an EIS is not prepared. Section 102(2)(A) requires federal agencies to “utilize a systematic, interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man’s environment,” and Section 102(2)(B) requires federal agencies to “identify and develop methods and procedures...which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations.” Section 102(2)(F) requires federal agencies to “recognize the worldwide and long-range character of environmental problems.”

64. Regulations adopted by the Council on Environmental Quality (“CEQ”) at 40 C.F.R. Parts 1500-1508 implement NEPA and are binding on all federal agencies. Federal agencies are also required to adopt and implement NEPA procedures to ensure that early and continuing opportunities for the public to be involved in identifying impacts and defining the project’s “purpose and need” and the range of alternatives. 23 U.S.C. § 139(f)(1), (f)(4). The VA

has promulgated supplemental regulations for complying with NEPA. *See* 38 C.F.R. Part 26 and VA's "NEPA Interim Guidance for Projects."⁴⁹

65. To achieve NEPA's objectives, NEPA requires all agencies of the federal government to prepare an Environmental Impact Statement for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

According to the Council on Environmental Quality ("CEQ"), the term "major Federal action" includes "actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18.

66. Major federal actions include "new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies," 40 C.F.R. § 1508.18(a), and "[a]pproval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities." 40 C.F.R. § 1508.18(b)(4). "Major reinforces but does not have a meaning independent of significantly." 40 C.F.R. § 1508.18.

67. The EIS must describe, among other things: (1) the environmental impact of the

⁴⁹ The VA NEPA implementing regulations were last updated in 1989. As stated in the VA's own 2010 NEPA Interim Guidance for Projects [Exh. 3; Crossgate Comments, Exh. 7], "the current regulations no longer meet the needs of the Agency." *Id.*, Part 1, at 10. At the time the Interim Guidance was published in 2010, it stated that the "VA is currently developing new agency NEPA regulations and Directive/Handbook to reflect the Agency's current operations, organization, and mission." The new regulations and guidelines would "enable VA to better address current environmental challenges of their actions and provide adaptability for the future," "provide clarity on roles and responsibilities for environmental planning within VA and explain how environmental planning relates to VA programs, plans, and projects," and "will also explain the relationship between VA and local, state, regional, and tribal agencies in the environmental planning process." *Id.* at 10-11. New VA NEPA regulations have yet to be promulgated.

proposed action, and (2) any adverse environmental effects that cannot be avoided should the proposal be implemented. *Id.* § 4332(2)(C)(i), (ii).

68. To determine whether a proposed action significantly affects the environment, and whether an EIS is required, the lead federal agency may first prepare an environmental assessment. 40 C.F.R. § 1508.9. An environmental assessment must provide sufficient evidence and analysis to determine whether to prepare an EIS. *Id.* The lead agency must take a “hard look” at the relevant environmental concerns and alternatives to the proposed action. *Id.*

69. If the agency concludes in an environmental assessment that a project may have significant impacts on the environment, then an EIS must be prepared. 40 C.F.R. § 1501.4.

70. The EIS must provide a “full and fair discussion of significant environmental impacts and ... inform[s] the decision makers and the public of reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” *Id.* at § 1502.1. The discussion of alternatives is the “heart” of the NEPA process and is intended to provide “a clear basis for choice among options by the decision maker and the public.” 40 C.F.R. § 1502.14. Agencies must “[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.” *Id.* § 1502.14(a). The alternatives evaluated are defined by the underlying “purpose and need” for the project. *Id.* at § 1502.13.

71. The public participates in NEPA reviews and decision making from the earliest stages of the proposed federal action. The views of the public – recognized as “essential” in the NEPA regulations – are not limited to scrutinizing and commenting on the fully disclosed environmental impacts of the proposed federal actions, although this is an important function of

public involvement. The VA regulations also recognize the crucial role the public plays in the NEPA process. *See* 38 C.F.R. 26.4(b)(4).

72. In an EIS, the federal agency must identify direct, indirect, and cumulative impacts of the proposed action, consider alternative actions and sites and their impacts, and identify all irreversible and irretrievable commitments of resources associated with the action. 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1508.7, 1508.8, 1502.14.

73. Direct effects are those “which are caused by the action and occur at the same time and place.” 40 C.F.R. § 1508.8(a). Indirect effects are those “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” *Id.* at § 1508.8(b). A cumulative effect is “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions.” *Id.* at § 1508.7. The types of resources and values included in the analysis of direct, indirect, and cumulative impacts of a project include, but are not limited to, ecological, aesthetic, historic, cultural, economic, social, or health. *Id.* at § 1508.8(b).

74. A federal action will significantly affect the environment “if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts. 40 C.F.R. § 1508.27(b)(7). NEPA requires that a reviewing agency consider in the same EIS any “connected” actions, including actions that are “interdependent parts of a larger action” and “depend on the larger action for their justification.” 40 C.F.R. § 1508.25(a)(1)(iii).

75. If, after a “hard look” at the proposed action and its potential effects, the agency concludes that there will not be any significant environmental impacts, the agency may issue a

Finding of No Significant Impact (FONSI), and is not required to issue an EIS. Otherwise, if the record does not support a FONSI, the agency must issue an EIS.

76. Federal agencies must also ensure the professional integrity and accuracy of “discussions and analyses” in an EIS and their evaluation of environmental consequences is based on “accurate scientific information” of “high quality.” 40 C.F.R. §§ 1502.24, 1500.1(b). Accurate and high-quality scientific analysis is “essential” to implementing NEPA to provide the public and decision makers an opportunity to provide fully informed comments on the purpose and need of a proposed federal action, the alternatives to implementing the action, the cost effectiveness of alternatives (when included in an EIS), and the impacts. *Id.* at § 1500.1(b).

77. In order to assure that fair and thorough consideration of alternatives is undertaken prior to any major federal action occurring, the CEQ regulations constrain commitment of resources in a manner that might prejudice such review. Specifically, 40 C.F.R. 1506.1 imposes “Limitations on actions during NEPA process” and prohibits the sort of prejudicial actions committed by the VA:

- (a) Until an agency issues a record of decision as provided in § 1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:
 - (1) Have an adverse environmental impact; or
 - (2) Limit the choice of reasonable alternatives.
- (b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.

(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

(1) Is justified independently of the program;

(2) Is itself accompanied by an adequate environmental impact statement; and

(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

(d) This section does not preclude development by applicants of plans or designs or performance of other work necessary to support an application for Federal, State or local permits or assistance.

Nothing in this section shall preclude Rural Electrification Administration approval of minimal expenditures not affecting the environment (e.g. long leadtime equipment and purchase options) made by non-governmental entities seeking loan guarantees from the Administration.

40 C.F.R. § 1506.1.

The Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706

78. The APA provides for judicial review of final actions of federal agencies, such as those at issue in this case. A reviewing court shall hold unlawful and set aside agency actions, findings, and conclusions found to be arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

79. The APA authorizes suit by “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.” 5 U.S.C. § 702. “[A]gency action” includes “the whole or a part of an agency rule,

order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. § 551(13). Under the APA, a “reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1).

CLAIMS FOR RELIEF

FIRST CLAIM

THE VA’S FAILURE TO COMPLETE THE NEPA PROCESS PRIOR TO THE COMMENCEMENT OF PROJECT ACQUISITION VIOLATED THE PROHIBITION ON PREJUDICIAL COMMITMENT OF RESOURCES BY AN AGENCY PRIOR TO COMPLETION OF THE NEPA PROCESS AND DEMONSTRATED AND IMPROPER AND UNLAWFUL BIAS TOWARD THE SELECTION OF THE MIDLANDS SITE

80. The allegations made in numerical paragraphs 1-79 are incorporated herein by reference as if fully set forth below.

81. The construction and operation of the new VAMC is a “major Federal action significantly affecting the quality of the human environment” subject to NEPA. 42 U.S.C. § 4332(2)(C).

82. Under NEPA, environmental review must be completed *before* resources are irreversibly and irretrievably committed to the action under review. 42 U.S.C. § 4332(C); 40 C.F.R. § 1501.2. Accordingly, the VA is required to complete the NEPA process *before* any funds are expended for the acquisition of property to support the construction and operation of a new VAMC.

83. The VA issued the Record of Decision on October 12, 2017.

84. The VA agreed to purchase the Midlands site on June 10, 2012, more than five years before the NEPA process was completed.

85. The analysis of environmental effects in an environmental impact statement must also show a good faith objectivity on the part of the agency. This requirement is not met if the

environmental review is biased, or if an agency predetermines its decision or makes a prior commitment that prevents impartial analysis. 40 C.F.R §1502.2(g). Both *pro forma* compliance with NEPA procedures and *post hoc* rationalizations as to why and how the agency complied with NEPA are arbitrary.

86. VA's own NEPA implementing regulations state, "[t]he major decision points for VA actions, by which time the necessary environmental documents *must* be completed, are as follows... (6) Land acquisition for development. Prior to the Secretary's acceptance of custody and accountability (for Federal lands), or acceptance of offer to donate or contract for purchase (for private lands)." 38 C.F.R. 26.7 (Emphasis added.); *see also* 40 C.F.R. 1506.1.

87. The VA's *NEPA Interim Guidance for Projects* also specifically states, "Remember: No demolition, construction or earthmoving can begin (which clearly demonstrate a final decision regarding an action) before NEPA analysis and decisions are completed. Other example project related prohibitions prior to completion of the NEPA analysis including purchasing property or awarding of construction contracts."⁵⁰

88. In addition, as noted in the VA Inspector General Report with regards to the premature purpose of the Midlands Site, the VA failed to comply with VA land purchase requirements and overpaid over \$3 million for the Midlands site property, all prior to completing the required NEPA analysis.

89. The acquisition of the property constituted a prejudicial commitment of resources in direct violation of 40 C.F.R. 1506.1. There was no independent justification for the property

⁵⁰ Exh. 3; Crossgate Comments, Exh. 7, *NEPA Interim Guidance for Projects*, September 30, 2010. *See also* 38 CFR 26.7(b)(6) ("The major decision points for VA actions, by which time the necessary environmental documents must be completed, are as follows: (6) Land acquisition for development. Prior to the Secretary's acceptance of custody and accountability (for Federal Lands), or acceptance of offer to donate or contract for purchase (for private lands).")

acquisition, nor was that acquisition supported by an adequate environmental impact statement. The interim action of the VA in acquiring the property prejudiced the ultimate decision by tending to determine subsequent development and by limiting alternatives, and was arbitrary, capricious and otherwise inconsistent with law.

90. The VA also acted unlawfully by arbitrarily segmenting the VAMC project to allow the immediate purchase of the property after the PEA and FONSI were issued.

91. The bias was also well documented throughout the process as several VA officials made public statements that it was limiting consideration to only the Midlands site.⁵¹

92. Through the VA's prejudicial commitment of resources on its preferred alternative, the VA has failed to perform the kind of good faith, objective review that NEPA demands.

93. As a result of these premature actions and express bias shown towards the Midlands site, the entire NEPA process has been tainted. The VA has unlawfully prejudiced the PEA, the SEA, and the EIS by purchasing the Midlands property despite being years away from completing its obligations under NEPA.

94. The VA's acquisition of the Midlands site prior to completing the NEPA process, and the prejudgment and bias as a result of that premature acquisition, is contrary to NEPA, the CEQ's implementing regulations, and VA's own NEPA implementing regulations set forth above, is arbitrary and capricious and not in accordance with the law and must be set aside under the APA; and constitute agency action unlawfully withheld which must be judicially compelled under the APA. 5 U.S.C. § 706(1) and (2). The PEA, SEA, EIS, and associated FONSI and RODs should be voided, and the VA should be directed to perform an unbiased, rigorously

⁵¹ Exh. 3; Crossgate Comments at 22-23.

thorough, and objective examination in compliance with NEPA and its implementing regulations.

SECOND CLAIM

THE VA FAILED TO RIGOROUSLY EXPLORE AND OBJECTIVELY EVALUATE ALL REASONABLE ALTERNATIVES.

95. The allegations made in all numerical preceding paragraphs 1-94 are incorporated herein by reference as if fully set forth below.

96. The VA must “[r]igorously explore and objectively evaluate all reasonable alternatives,” [40 C.F.R. 1502.14(a)] and, “devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits” [*id.* at (b)] even if “reasonable alternatives not within the jurisdiction of the lead agency” [*id.* at (c)]. The alternatives requirement is the “heart” of an environmental impact statement. 40 C.F.R. 1502.14.

97. The PEA identified to alternatives for VAMC site, the Midlands site and the St. Joseph’s site. However, early in the NEPA review, the St. Joseph property was bought by a developer and slated for development. This would leave only two alternatives: the Midlands site and the no action alternative.

98. The no action alternative was only included because the VA was required by NEPA to do so. The VA never considered it a viable alternative.

99. Under the auspices of considering only “greenfield” sites, the VA unreasonably discarded all urban sites in favor of sites in more affluent areas of Jefferson County, Kentucky. As a result -- the VA failed to consider any sites in urban communities, including socio-economically depressed communities with available sites. Likewise, the VA failed to consider brownfield sites, such as those in downtown Louisville, the West End of Louisville, or the South

End of Louisville. The VA unreasonably narrowed consideration of downtown and other urban sites by arbitrarily limiting consideration to parcels of land with a minimum acreage much larger than the typical urban property; ignoring the option of acquiring smaller adjoining tracts and aggregating them to satisfy the minimum acreage requirements. Such a failure unreasonably limited alternatives and is a fatal flaw that infected all subsequent consideration of alternatives.

100. Despite several parties coming forward with other reasonable alternative sites, including other “greenfield” sites, the VA failed to consider or evaluate any other sites pursuant to NEPA.

101. Thus, the VA only considered one alternative, the Midlands site, and failed to perform a full, good faith comparison of a reasonable range of alternatives. One alternative does not constitute a range of alternatives satisfying NEPA.

102. The failure to analyze any other reasonable alternative again is indicative of VA bias towards the Midlands site as indicated by its officials’ many public comments.

103. The VA’s failure to adequately consider alternatives sites, and to consider aggregating individual properties in urban areas to satisfy acreage requirements, is contrary to NEPA, and the CEQ’s implementing regulations, and is arbitrary and capricious and not in accordance with the law. The PEA, SEA, EIS, and associated FONSI and RODs should be voided, and an unbiased, rigorously thorough, and objective examination should be performed in compliance with NEPA and its implementing regulations.

THIRD CLAIM

THE VA’S FAILURE TO REVIEW THE CHOSEN COURSE OF ACTION NEPA AND THE APA

104. The allegations made in numerical paragraphs 1-103 are incorporated herein by reference as if fully set forth below.

105. On October 12, 2017, the VA issued its Record of Decision.

106. The ROD approved the Midlands Site as the site of the new Rex Robley VAMC. However, in the ROD, the VA declined to include the Benefits building in the new VAMC complex.

107. The construction and operation of the VAMC without the benefits building was not an alternative evaluated under NEPA.

108. Having approved an alternative that was not among those analyzed the VA has violated NEPA, the CEQ's implementing regulations, the VA's own implementing regulations, and is arbitrary and capricious and not in accordance with the law, constitutes agency action unlawfully withheld which must be judicially compelled under the APA. 5 U.S.C. § 706(1) and (2). The PEA, SEA, EIS, and associated FONSI and RODs should be set aside, and the VA should be ordered to adequately consider the chosen course of action pursuant to NEPA.

FOURTH CLAIM

THE VA FAILED TO PREPARE A SUPPLEMENTAL ASSESSMENT AND IMPACT STATEMENT

109. The allegations made in numerical paragraphs 1-108 are incorporated herein by reference as if fully set forth below.

110. NEPA regulations require a party to produce a supplemental impact statement or assessment when: (1) the agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (2) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. 40 C.F.R. § 1502.9.

111. Several significant new circumstances and information relevant to environmental concerns and bearing on the proposed action or its impacts have occurred. These include the

unavailability of the St. Joseph alternative, a severely outdated traffic study, the unavailability of proposed road construction projects, the need for another VA cemetery, and the availability of other reasonable alternatives the VA failed to consider.

112. The VA also made substantial changes in the proposed action that are relevant to environmental concerns where it decided not to construct the VBA building at the Midlands site. In doing so, the VA failed to properly evaluate reasonable alternatives available for the smaller footprint of the VAMC.

113. Having failed to include significant new circumstances and information and given substantial changes in the proposed action, the VA has violated NEPA, the CEQ's implementing regulations, the VA's own implementing regulations, and such action is arbitrary and capricious and not in accordance with the law, constitutes agency action unlawfully withheld which must be judicially compelled under the APA. 5 U.S.C. § 706(1) and (2). The PEA, SEA, EIS, and associated FONSI and RODs should be set aside, and the VA should be ordered to adequately consider the chosen course of action pursuant to NEPA.

FIFTH CLAIM

THE VA VIOLATED E.O. 12,898 AND FAILED TO ADEQUATELY REVIEW ENVIRONMENTAL JUSTICE IN NEPA REVIEW.

114. The allegations made in numerical paragraphs 1-113 are incorporated herein by reference as if fully set forth below.

115. In addition, the VA arbitrarily (and in violation of Executive Order No. 12,898 ("EO 12898")) eliminated all reasonable alternatives located on an urban site when it decided to evaluate only "greenfield" sites. The VA failed to comply with NEPA when it failed to evaluate a range of reasonable alternatives, including those in minority and low-income communities.

116. EO 12898 by its own terms indicates that it has no force of law.

117. Passed under the Clinton Administration, EO 12898 requires the VA “to the greatest extent practicable” to make “achieving environmental justice part of its mission.” This requires agencies to “analyze the human health, economic and social effects of their actions, including effects on minority and low-income communities, when this analysis is required under [NEPA].”

118. The VA failed to adequately consider environmental justice concerns by failing to consider urban properties that could be aggregated to meet project acreage needs, particularly available property in low-income and minority neighborhoods.

119. In particular, the failure to consider sites in Louisville’s urban core and the West End – predominately lower income and minority communities and where the majority of veterans live – the VA has failed to comply with NEPA

120. The PEA, SEA, EIS, and associated FONSI and RODs should be set aside, and the VA should be ordered to comply with EO 12898 and NEPA environmental justice requirements.

SIXTH CLAIM

THE VA FAILED TO ADEQUATELY ANALYZE THE ENVIRONMENTAL IMPACTS OF EACH ALTERNATIVE IN THE EIS AS REQUIRED UNDER NEPA

121. The allegations made in numerical paragraphs 1-120 are incorporated herein by reference as if fully set forth below.

122. NEPA requires the VA to conduct a rigorous evaluation of the direct, indirect, and cumulative environmental impacts of each alternative and to disclose those impacts to the public. 40 C.F.R. § 1502.14(a). NEPA also requires the VA to “[d]evote substantial treatment to each

alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.” *Id.* at (b).⁵²

123. Not only is the lack of detailed analysis respecting the two non-preferred sites legally unsupportable under NEPA, but the EIS’s analysis of the Midlands site is itself lacking in detail and does not adequately address the wide range of traffic, environmental, and socioeconomic problems associated with the site. This includes the VA’s failure to:

- a. develop substantial evidence, support, data, or analysis for each of the alternatives;
- b. the VA’s failure to identify any methodologies to compare alternatives;
- c. take a “hard look” at the environmental impacts of developing the St. Joseph, Zorn Avenue, or other sites
- c. properly assess the traffic and accessibility implications of the new VAMC using relevant, current data;
- d. use a baseline for traffic and accessibility at the Midlands site as it currently exists (undeveloped);
- e. consider the implications of building on a constricted site where future growth can only be through the use of eminent domain;
- f. properly assess the stormwater, flooding, sewer, and groundwater effects on the site, neighboring cities, and MSD’s infrastructure;
- g. plan for potential hazard issues associated with karstic geology on the site;

⁵² See also 40 C.F.R. 1502.14 (“Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, *thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.*”) (Emphasis added).

- h. adequately address karst, sinkhole and other geological issues associated with extensive excavation and construction;
- i. address adequate availability of utilities;
- j. adequately analyze solid and hazardous waste from the proposed project;
- k. analyze the costs and resources required for adequate fire protection;
- l. consider the opposition by other government agencies;
- m. address proper mitigation of noise pollution;
- n. use correct assumptions regarding whether the Kentucky Transportation Cabinet will make local road enhancements to deal with obvious increases in traffic;
- o. address the fact that, under the local land use plan, the replacement VAMC would be a clearly incompatible use for the area and would not comply with federal and local planning and zoning ordinances law and regulations;
- p. consider that many residential properties in the area will have a diminished market value;
- q. evaluate significant climate change and GHG emission concerns and considerations;
- r. analyze air and water quality;
- s. consider historic and archeological resources; and
- t. adequately analyze the socio-economics of each alterative;
- u. adequately consider the direct, indirect and cumulative impacts of each alternative; and
- v. a wide range of other problems.

124. Having failed to conduct a rigorous evaluation of the direct, indirect, and cumulative environmental impacts of each alternative and to disclose those impacts to the public, the VA has violated NEPA, the CEQ's implementing regulations, the VA's own implementing regulations, and is arbitrary and capricious and not in accordance with the law, constitutes agency action unlawfully withheld which must be judicially compelled under the APA. 5 U.S.C. § 706(1) and (2). The PEA, SEA, EIS, and associated FONSI and RODs should be set aside, and the VA should be ordered to conduct a rigorous evaluation of the direct, indirect, and cumulative environmental impacts of each alternative and to disclose those impacts to the public.

SEVENTH CLAIM

THE VA'S IMPLEMENTING REGULATIONS ARE OUTDATED IN VIOLATION OF NEPA

125. The allegations made in numerical paragraphs 1-124 are incorporated herein by reference as if fully set forth below.

126. The VA's NEPA implementing regulations are codified in the Federal Register at 38 C.F.R. Part 26. These regulations were last updated in 1989.

127. As stated in the VA's own 2010 NEPA Interim Guidance for Projects, "the current regulations no longer meet the needs of the Agency."⁵³

128. At the time the Interim Guidance was published in 2010, it stated that the "VA is currently developing new agency NEPA regulations and Directive/Handbook to reflect the Agency's current operations, organization, and mission." The new regulations and guidelines would "enable VA to better address current environmental challenges of their actions and provide adaptability for the future," "provide clarity on roles and responsibilities for

⁵³ Exh. 3; Crossgate Comments, Exh. 7, *NEPA Interim Guidance for Projects*, September 30, 2010, at 10.

environmental planning within VA and explain how environmental planning relates to VA programs, plans, and projects,” and “will also explain the relationship between VA and local, state, regional, and tribal agencies in the environmental planning process.”⁵⁴

129. None of these improvements have been accomplished.

130. The VA’s reliance on outdated policies and guidelines to advance this project renders the NEPA review arbitrary.

131. Utilizing outdated and inadequate regulations, the VA has violated NEPA, the CEQ’s implementing regulations, and is arbitrary and capricious and not in accordance with the law, constitutes agency action unlawfully withheld which must be judicially compelled under the APA. 5 U.S.C. § 706(1) and (2). The PEA, SEA, EIS, and associated FONSI and RODs should be set aside, and the VA should be ordered to update its NEPA implementing regulations before choosing a site for the VAMC.

RELIEF REQUESTED

WHEREFORE, Plaintiff prays that this Court:

1. Accept jurisdiction over this Complaint;
2. Issue a declaratory judgment declaring that the VA has violated NEPA because the environmental impact statement prepared by the VA did not fully and adequately consider the environmental impacts of the development and of other reasonable alternatives;
3. Find and declare that the VA acquisition of the Brownsboro Road site constituted a prejudicial commitment of resources in advance of completion of the NEPA process, necessitating a voiding of the ROD and remand to the agency;

⁵⁴ *Id.* at 10-11.

4. Issue a mandatory injunction requiring the VA to comply with the provisions of NEPA;
5. Issue an injunction prohibiting the VA from providing any funds or taking any other action toward the construction of the project until it has complied with the requirements of NEPA;
6. Allow the plaintiff to recover the costs of this action, including reasonable attorneys' fees including reasonable attorneys' fees incurred in connection with this action, as provided for under the Equal Access to Justice Act, 28 U.S.C. § 2412(a), (d), and other applicable law; and
7. Grant such other and further relief as the Court deems just and proper and in the public interest.

Respectfully submitted,

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Date: March 16, 2018