SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

THE LANDMARKS SOCIETY OF GREATER UTICA, JOESEPH BOTTINI, #NOHOSPITALDOWNTOWN, BRETT B. TRUETT, JAMES BROCK, JR., FRANK MONTECALVO, JOSEPH CERINI, AND O'BRIEN PLUMBING & HEATING SUPPLY, a division of ROME PLUMBING AND HEATING SUPPLY CO. INC.,

Petitioners-Plaintiffs,

For a Judgment pursuant to Article 78 and Section 3001 of the Civil Practice Law and Rules,

Index No.: 02797-19

-against-

PLANNING BOARD OF THE CITY OF UTICA, NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION, ERIK KULLESEID, ACTING COMMISSIONER, DORMITORY AUTHORITY OF THE STATE OF NEW YORK AND MOHAWK VALLEY HEALTH SYSTEM,

Respondents-Defendants.

PETITIONERS-PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS

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PRELIMINARY STATEMENT

Petitioners-Plaintiffs ("Petitioners") respectfully submit this Memorandum of Law, and the accompanying affidavit of Brett Truett, sworn to June 19, 2019 ("Truett Affidavit"), in opposition to the motions to dismiss by Respondents-Defendants New York State Office of Parks, Recreation and Historic Preservation ("OPRHP"), Erik Kulleseid, Acting Commissioner, Dormitory Authority of the State of New York ("DASNY") (collectively, the "State Respondents"), the Planning Board of the City of Utica ("Planning Board") and Mohawk Valley Health System ("MVHS") (collectively, "Respondents"). The Respondents' motions to dismiss amount to nothing more than a carefully orchestrated house of cards that must fall.[1]

Respondents seek to dismiss this case on ripeness grounds asserting a host of reasons that have nothing to do with Petitioners' claims or their asserted injuries. According to the Planning Board and MVHS, Petitioners' SEQRA claims will not be ripe for review until all approvals for the Project are obtained from all involved agencies. According to the State Respondents, Petitioners' statutory/regulatory violation claims will not be ripe until the State Respondents complete ongoing private consultations (that will be shielded from public review) and DASNY funds the Project. None of this, however, is pertinent to Petitioners' challenge.

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[1] This Memorandum of Law addresses the following motion papers from the Respondents: (1) from the State Respondents, the Affidavit of Robert S. Derico, sworn to June 11, 2019 (the "Derico Affidavit"); the Affidavit of John Bonafide, sworn to June 7, 2019 (the "Bonafide Affidavit"); the State Respondents' Memorandum of Law is Support of Their Cross-Motion to Convert the Action and Dismiss, dated June 12, 2019 (the "State Memorandum of Law"); (2) from the Planning Board and/or MVHS, the Affidavit of Kathryn Hartnett, sworn to June 12, 2019 (the "Hartnett Affidavit"), the Affidavit of Brian Thomas, sworn to June 12, 2019 (the "Thomas Affidavit"), the Affirmation of Kathleen M. Bennett, dated June 12, 2019 (the "Bennett Affirmation"), and the Respondent Mohawk Valley Health System's Memorandum of Law in Support of Motion to Dismiss Petitioners/Plaintiffs' Article 78/Declaratory Judgment Complaint (the "MVHS Memorandum of Law").

In this case, Petitioners do not challenge details of the Project's site plan design as it proceeds before the Planning Board. Nor do Petitioners challenge DASNY's funding mechanisms for the Project or what may, or may not, happen down the road with the State Respondents' private consultations. The issue in the case, which has its foundation in the name of Plaintiff-Petitioner #NoHospitalDowntown, is the final decision by the Planning Board to locate the Project on the Downtown Site, in the face of as-of-yet unknown historical and archaeological impacts, a final environmental impact statement ("FEIS") that is defective because of the absence of a full exploration of those impacts with defined mitigation, and the absence of any meaningful evaluation of alternatives that would have led this Project to another site to avoid these and other impacts. Regardless of how many other agency approvals are needed for the Project, the Downtown Site location will not change – that decision in final.

There is also certain injury. The Planning Board's resolution, adopting its SEQRA Findings, not only establishes the Downtown Site as the location for the Project, but also authorizes the City of Utica Economic and Urban Development staff to take whatever steps are necessary to carry out the resolution. Those steps include pursuing property acquisition at the Downtown Site (which process is well underway) to pave the way for full-scale building demolition, including acquisition via eminent domain. Consequently, the finality of the Downtown Site selection and the resulting injury could not be more definitive. No additional administrative action by the Planning Board or any other agency can ameliorate that injury, and, thus, Petitioners' SEQRA claims are ripe for review.

Also ripe for review are Petitioners' claims against the State Respondents asserting violations of the Parks, Recreation and Historic Preservation Law (PRHPL) and its implementing regulations. To force this Project into the Downtown Site regardless of historical/archeological

impacts, the State Respondents short-circuited the consultation process and violated their own regulations by executing a so-called letter of resolution ("LOR") that resolves nothing. The LOR commits to building destruction in the hospital and parking garage footprint (including numerous Register-eligible buildings, one of which is owned by Petitioner Brett Truett), while also admitting that archeological and historical impacts from the Project are not yet known, alternatives have yet to be considered, there are no mitigation plans in place, and perhaps the parties will agree to mitigation in the future. The State Respondents' commitment to razing all these buildings – which allows placement of this Project on the Downtown Site without full impact assessment or defined mitigation – is final agency action, not subject to further corrective administrative action. Thus, these claims are ripe for judicial review. And, Petitioners' Verified Petition and Complaint states viable causes of action for relief, including as to declaratory relief.

ARGUMENT

POINT I
PETITIONERS-PLAINTIFFS' CLAIMS ARE RIPE FOR REVIEW

A. General Principles Regarding Finality and Ripeness

Agency action is "final" for purposes of judicial review when the decisionmaker arrives at a definitive position on the issue that inflicts an actual, concrete injury. *Stop-The-Barge v. Cahill,* 1 N.Y.3d 218, 223 (2003). In making the finality determination, the court must "analyze what the determination sought to be reviewed is and when an impact on petitioner occurred." *Wing v. Coyne,* 129 A.D.2d 213, 216 (3d Dep't 1987). Moreover, even when ultimate resolution of the matter is still pending, a determination may be final if the governmental entity acts beyond its statutory authority and causes injury. *Center of Deposit, Inc. v. Village of Deposit,* 90 A.D.3d 1450, 1452 (3d Dep't 2011); *see also Gordon v. Rush,* 100 N.Y.2d 236, 243 (2003).

Determining ripeness of agency action involves a two-step case-by-case inquiry. *See Gordon,* 100 N.Y.2d at 242. First, the action must impose an obligation, deny a right or fix a legal relationship as consummation of the administrative process (i.e., the decisionmaker must have arrived at a definitive position on the issue that inflicts a concrete injury – a final decision); second, there must be a finding that the apparent harm inflicted by the action "may not be prevented or significantly ameliorated by further administrative action..." which could render the dispute academic. *Id.*

Thus, the ripeness determination is not subject to a bright-line rule; rather, ripeness is dependent on the specific circumstances of each case. *See Center of Deposit, Inc.,* 90 A.D.3d at 1451; *Mattia v. Village of Pittsford Planning and Zoning Bd. of Appeals,* 61 Misc.3d 592, 600 (Sup. Ct., Monroe Cnty., 2017). And, the ultimate question is whether the challenged action has caused injury that is not amenable to further administrative review and corrective action. *Gordon,* 100 N.Y.2d at 242. Under these standards, Petitioners' claims are ripe for judicial review.

B. The SEQRA Claims are Ripe for Review

The case-by-case ripeness analysis begins with an assessment of what action Petitioners are challenging and what injury they are asserting. *Wing,* 129 A.D.2d at 216 ("we must analyze what the determination sought to be reviewed is and when an impact upon petitioners occurred"). Petitioners' SEQRA claims are three-fold: that the Planning Board violated SEQRA substantively by:

(1) concluding the SEQRA process and selecting the Downtown Site based on the LOR and, hence, inadequate information about impacts and mitigation relative to historic and archeological resources;

(2) concluding the SEQRA process and selecting the Downtown Site without adequate information as to cumulative impacts from the proximate Nexus Center project; and

(3) concluding the SEQRA process and selecting the Downtown Site without a meaningful comparison of alternative locations (i.e., the St. Luke Campus).

All of Petitioners' SEQRA claims are focused on a single issue – the Planning Board's selection of the Downtown Site as the definite location for the Project, absent adequate information to support that determination. "Where an agency adopts an ordinance committing itself to a definite course of future activities, such determination constitutes an 'action' within the meaning of SEQRA and, concomitantly, a 'final determination" for Statute of Limitations purposes." *Wing,* 129 A.D.2d at 217.

The selection of the Downtown Site for the Project is definite and final. By resolution, dated April 18, 2019 (the "Resolution"), the Planning Board adopted its SEQRA Findings which specify the Downtown Site as the location for this Project. *See* Hartnett Affidavit, ¶ 4 & Exhibits B & C thereto. Per its Resolution, the Planning Board thus committed to this location. This location will not change, regardless of how many other approvals are needed for the Project (including site plan review by the Planning Board and DASNY funding approval). Therefore, the Planning Board's adoption of the Resolution, committing to the Downtown Site, is final agency action for purposes of SEQRA review. *See, e.g., Wing*, 129 A.D.2d at 216-217 (finding that statute of limitations on SEQRA claims began to run when the county legislature adopted its SEQRA findings and the final environmental impact statement, and not when the Legislature later adopted resolutions funding the project; stating that the focus of the challenge was "on the … requirements of SEQRA, not on the project's financing mechanism").

In fact, the finality of the Planning Board's locational decision could not be more clear. The Planning Board's Resolution expressly resolves "that the City of Utica Economic and Urban Development Staff are authorized to take whatever steps are necessary to carry out this Resolution." Hartnett Affidavit, Exhibit B thereto, at p.3. This authorization allows city authorities to assist MVHS in acquiring properties in the Downtown Site, including those properties that cannot be acquired voluntarily. Indeed, the City is already in the process of authorizing the transfer of city-owned properties in the Downtown Site to MVHS, and the use of eminent domain is imminent to secure those properties that cannot be voluntarily acquired. Truett Affidavit, ¶¶ 7, 8 & Exhibits C & D thereto.

Thus, this authorization in the Resolution not only underscores the finality of the agency action; it highlights the existence of concrete injury to Petitioners (i.e., imminent acquisition of properties, including through the use of eminent domain, to demolish historically significant buildings in the hospital and parking garage footprint). Importantly, site plan review by the Planning Board or approvals from other agencies will not ameliorate this injury in any way.

The Planning Board's determination, therefore, is final and ripe for review. *See Wing,* 129 A.D.2d at 215-217 (finding county resolution adopting SEQRA findings to be final agency action ripe for review; noting that after adoption of the resolution, the county commenced land acquisition negotiations; finding that this resolution "marked the completion of the SEQRA decision-making process insofar as Albany County's commitment to the civic center project"); *see also Jones v. Amicone,* 27 A.D.3d 465, 468-469 (2d Dep't 2006) (finding city council's adoption of SEQRA findings to be final agency action ripe for review where the findings statement "identified, authorized and committed the City Council to future actions necessary for the project, including the acquisition by condemnation of certain properties on the proposed site;" rejecting petitioners'

argument that SEQRA challenge was not ripe until later date when city council adopted special ordinance authorizing the city to acquire by gift, purchase or condemnation certain properties on the site).

Indeed, the marked haste with which MVHS has acquired Downtown Site properties since adoption of the Planning Board's Resolution cannot escape notice. Truett Affidavit, ¶¶ 4-6 & Exhibits A & B thereto. While MVHS's and the Planning Board's attorneys assert here that the SEQRA claims are unripe for lack of final agency action or harm, they apparently have not told MVHS. Truett Affidavit, ¶¶ 4-6, 11 & Exhibits A-D thereto. Since the Planning Board's adoption of its SEQRA Findings via the Resolution, MVHS has been acquiring properties in and around the Downtown Site as quickly as it can, amounting to 12 properties to date. Truett Affidavit, ¶¶ 4-6 & Exhibits A & B thereto. MVHS has made public announcements that it anticipates building demolition and breaking ground this coming September. Truett Affidavit, ¶¶ 4, 8 & Exhibit D thereto. And, the City is currently in the process of authorizing the transfer of City-owned properties in the Downtown Site to MVHS for the Project. Truett Affidavit, ¶ 7 & Exhibit C thereto. The next inevitable step, already authorized by the Planning Board's Resolution, is the invocation of eminent domain to secure Downtown Site properties that cannot be acquired voluntarily. Truett Affidavit, ¶ 8 & Exhibit D thereto. Thus, there is nothing non-final about the Project's location and the resulting harm to Petitioners. *See generally,* Truett Affidavit & Exhibits A-D thereto.

MVHS and the Planning Board make bald assertions that further administrative action (e.g., site plan review, funding approvals, and other agency approvals) "could prevent or ameliorate the alleged harm claimed by Petitioners." *E.g.,* MVHS Memorandum of Law, at p. 8. They fail, however, to provide any explanation as to how determining site plan elements or issuing

funding or other approvals for the Project will diminish Petitioners' asserted injuries of the loss of one's private property and the ultimate loss of numerous historically significant resources. No amount of other agency approvals or "prettying up" the Project through site plan review will change the Project's location or diminish the resulting injuries.

In short, location is the crux of Petitioners' complaint – namely, that (1) the Planning Board concluded the SEQRA process and selected the Downtown Site without having sufficient information to support that determination; and (2) due to the sensitive resources at the Downtown Site, the Project will result in the forcible loss of private property and large-scale unmitigable environmental impacts. Site plan review by the Planning Board, funding approvals by DASNY, and other project approvals will not change the Project's location and the resulting injuries claimed by Petitioners. Hence, the SEQRA claims are ripe for review, regardless that additional approvals are necessary for the Project to be funded and constructed.

In this regard, *Town of Red Hook v. Dutchess County Resource Recovery Agency,* 146 Misc.2d 723 (Sup. Ct., Dutchess Cnty., 1990) is instructive. In *Town of Red Hook,* the Dutchess County Resource Recovery Agency ("Agency") declared itself lead agency to determine the environmental impact of implementing a county-wide recycling program, expanding an existing resource recovery facility, selecting of a site for an ash residue landfill, and implementing a host community benefit program. The Agency issued a positive declaration and initiated the preparation of an environmental impact statement ("EIS") on solid waste management. The final EIS and SEQRA findings adopted by the Agency concluded that a certain site in the Town of Red Hook was the preferred location for the ash residue landfill. *Id.* at 725.

The Town of Red Hook then commenced a proceeding arguing that the Agency's review failed to comply with SEQRA because, among other things, the Agency had not completed its

studies with respect to wetlands, depth to groundwater and bedrock on the proposed Red Hook site. The Agency moved to dismiss on several grounds, stating that, at that time, only one phase of the SEQRA process had been completed regarding the landfill study and that if further site-specific information (still to be completed) indicated problems with the site that could not be mitigated, the Agency would not pursue a landfill permit with the Department of Environmental Conservation ("DEC"). The Agency also argued that, if the Red Hook site were pursued, such would be subject to full review in the DEC permitting process (including as to the anticipated studies). Thus, the Agency argued that judicial review was inappropriate because site-specific studies still needed to be done, the impact of the final EIS was not final as to the Red Hook site, and no harm had been inflicted on the town. The Agency also argued that there was no harm to the town, because any harm was contingent on future issuance of a landfill permit by the DEC. *Id.* at 725-727.

The court rejected all these arguments. Relative to finality/ripeness, the court noted that the Agency's findings statement designated the Red Hook site as the preferred location for the ash landfill, and no alternative site was suggested. Thus, the court found that "[b]y adopting the resolutions approving the [final] EIS and Findings Statement the Agency committed itself to a definite course of future action with a distinct impact on the Town of Red Hook and thus these resolutions constitute a final determination subject to judicial review." *Id.* at 727. That is, judicial review did not have to await the further anticipated studies, which the Agency admitted were necessary, or the DEC's permitting decision (which permit was necessary for the project to be constructed).

By analogy here, just as the Agency in *Town of Red Hook* made its preferred site selection, the Planning Board has definitively selected the Downtown Site in its SEQRA Findings.

Comparable to the town's argument in *Town of Red Hook,* the crux of Petitioners' challenge is that the Planning Board had insufficient information to make that selection (including relative to impacts to and mitigation regarding historical and archeological resources). Like respondent's argument in *Town of Red Hook,* MVHS and the Planning Board argue here that the Planning Board's Resolution adopting the SEQRA Findings is not final/ripe for review (even though the selected location for the Project will not change), there is no harm because any harm is contingent on other approvals for the Project, and judicial review must wait until all approvals are granted for the Project. Per *Town of Red Hook,* Respondents' arguments fail.

Indeed, because the Planning Board's Resolution also gives the green light for property acquisition in the Downtown Site – which process is well underway, with the use of eminent domain imminent (Truett Affidavit, ¶¶ 4-11 & Exhibits A-D thereto) – this case presents an even more compelling case for ripeness than *Town of Red Hook. See Jones,* 27 A.D.3d at 468-469 (finding city's adoption of SEQRA findings ripe for review where such authorized land acquisition); *Wing,* 129 A.D.2d at 215-217 (finding county's resolution adopting SEQRA findings regarding civic center project ripe for review where county commenced land acquisition negotiations shortly thereafter). The Planning Board's action, therefore, could not be more final and ripe for review; thus, the motions to dismiss the SEQRA claims must be denied.

Finally, *Guido v. Town of Ulster Town Bd.,* 74 A.D.3d 1536 (3d Dep't 2010) (on which MVHS and the Planning Board rely) does not warrant a different result. *See* MVHS Memorandum of Law, at pp. 7-8. At the outset, *Guido* acknowledges that the finality/ripeness determination is not subject to any bright-line rule and must be assessed "on a case-by-case basis in order to avoid inappropriate results in particular circumstances." 74 A.D.3d at 1537. *Guido* also acknowledges that a lead agency's issuance of a final EIS fixes one aspect of the legal relationship between

involved agencies, "as all involved agencies must rely upon the [final] EIS as the basis for their review of the environmental impacts that they are required to consider in connection with subsequent permit applications." *Id.* at 1537. In performing its fact-specific evaluation, the *Giudo* court found that the petitioners' SEQRA challenge to the Planning Board's review of the residential development project was not ripe because the injuries asserted by petitioners could have been prevented or ameliorated by further corrective action of the Planning Board (through its special permit and site plan review processes). *Id.* at 1537-1538. In contrast, here, no amount of site plan review by the Planning Board (or any other agency approval) will change the selected location for the Project at the Downtown Site and the resulting injuries, including the authorized property acquisitions that are ongoing and will proceed through the use of eminent domain. Therefore, the Planning Board's Resolution adopting its SEQRA Findings is not "subject to its own corrective action" so as to prevent or ameliorate Petitioners' claimed injuries. Accordingly, the rationale and result in *Guido* do not apply in the instant case.

In the end, MVHS's and the Planning Board's contention that Petitioners' SEQRA claims against the Planning Board will not be ripe until the Project has received *all* its approvals from all involved agencies is plain error. As ample precedent makes clear, Petitioners need not wait until all Project approvals are obtained and there is a gigantic hole in the ground on the Downtown Site in order to have their SEQRA claims judicially reviewed. *See, e.g., Stop-The-Barge,* 1 N.Y.3d at 221-24 (rejecting the argument that statute of limitations for challenging one agency's SEQRA determination did not begin to run until other involved agency subsequently issued air permit; rejecting the argument that until air permit was issued, there was no injury because the project could not proceed without the air permit); *Jones,* 27 A.D.3d at 468, *supra*; *Town of Red Hook,* 146 Misc. 2d at 725-727, *supra.*

Consequently, Petitioners' SEQRA claims are ripe for judicial review, and MVHS's and the Planning Board's motions to dismiss these claims must be denied.

C. The Claims Against the State Respondents Are Ripe for Review

Once again, the starting point for assessing Respondents' ripeness challenge to the first and second causes of action (i.e., the LOR claims) is examining what action Petitioners are challenging and what injury Petitioners are asserting. *See Gordon,* 100 N.Y.2d at 242. The Verified Petition and Complaint asserts two claims against the State Respondents, both of which charge that the State Respondents short-circuited the PRHPL consultation process to expediently allow for placement of the Project on the Downtown Site (including full-scale demolition of all buildings in the hospital and parking garage footprint), admittedly without adequate information as to impacts and without any mitigation plans in place, and for no valid reason. Specifically, the claims are: that the State Respondents (1) exceeded their authority by executing the LOR, because the LOR conflicts with PRHPL 14.09 and the plain language of 9 NYCRR 428.10 by committing to building destruction but deferring impact assessment and mitigation; and (2) acted irrationally, because the LOR's deferral on impact assessment, alternatives evaluations, and mitigation planning is premised exclusively on the legally invalid claim that site access cannot be obtained presently.

To support their contention that these claims are unripe, the State Respondents attempt to confuse what it, and what is not, at issue. *See generally,* Derico Affidavit, ¶¶ 9-24, 29, 45-47. Petitioners are not challenging DASNY's financing of the Project, DASNY's SEQRA review, or whatever may be DASNY's ultimate SEQRA findings relative to its financing determinations. *See, e.g.,* Derico Affidavit, ¶¶ 9, 17-24, 47.

Petitioners also are not asserting any claim as to the timing of DASNY's involvement in the consultation process under PRHPL 14.09. *See* Derico Affidavit, ¶¶ 16, 22, 29, 45-47. The

fact is that DASNY, as an involved agency - not a "potentially involved agency" (contrast Derico Affidavit, ¶ 8, with ¶4) – engaged in the consultation process that resulted in the LOR. DASNY's articulations that it could have engaged in the process at a later date and that there were other potential outcomes in the consultation process are irrelevant. *See* Derico Affidavit, ¶¶ 22, 25, 27, 45, 46; *see also* Bonafide Affidavit, ¶ 14. The facts are: (1) DASNY did engage in the PRHPL 14.09 process with OPRHP; (2) that process resulted in a particular outcome – the LOR; and (3) the LOR's compliance with statutory/regulatory requirements and its rationality are precisely what is at issue. Thus, the State Respondents' articulations regarding what they could have done, but did not do, are irrelevant.

Also not relevant is that affiants for DASNY and OPRHP are buddies, have a good working relationship, and have had personal discussions between them regarding mitigation. Derico Affidavit, ¶¶ 28-30. Such does not give either agency carte blanche to ignore (1) the statutory directive to fully explore all feasible and prudent alternatives to avoid or mitigate adverse impact, and (2) the specific regulatory requirements governing letters of resolution. Therefore, the majority of DASNY's articulations in its supporting affidavit are irrelevant to the finality/ripeness inquiry.

To the extent the State Respondents' affidavits assert relevant information, they confirm (1) the history of the consultation process engaged in here, (2) the serious and certain adverse impacts to historical resources from this Project (including impacts to which the LOR irrevocably commits), (3) the lack of knowledge/data as to the full extent of the impacts, (4) the absence of alternatives evaluations, and (5) the absence of mitigation plans.[2] *See* Derico Affidavit, ¶¶ 32

[2] The State Respondents' affidavits also reiterate the irrational basis asserted in the LOR for deferring on impact assessment, alternatives evaluation and development of mitigation plans – namely, that site access cannot be obtained. *See, e.g.,* Derico Affidavit, ¶ 36 (stating continuing

(acknowledging adverse impact to listed and eligible buildings), 33, 34 & 37 (admitting the lack of alternatives analysis and mitigation plans), 35 & 36 (admitting lack of knowledge of full extent of impacts), 39 (acknowledging that the LOR commits to destruction of, at a minimum, all buildings located within the footprint of the hospital building and parking garage structure; also stating that impacts to buildings will exceed beyond those in the footprint but that some of those additional impacts might be mitigated by reuse/repurposing); Bonafide Affidavit, ¶¶ 28, 31, 34 (admitting that more data/testing is needed and that the extent of impacts to historical and archeological resources is not yet known), 30 & 32 (admitting that no mitigation plans are in place), 32 (admitting that the project will require demolitions). The State Respondents' own articulations, therefore, establish the existence of a definitive agency position that inflicts concrete injury that will not be ameliorated by further administrative action.

That is, at a bare minimum (and regardless of any "ongoing consultations"), the LOR commits to razing all buildings within the hospital and parking garage footprint. Bonafide Affidavit, Exhibit C, at p. 3. This includes numerous Register-eligible buildings, one of which is owned by Petitioner Brett Truett. Under the plain language of the LOR, the State Respondents' position on this matter could not be more definitive; nor could the injury be more concrete: these buildings "will not be retained." Also, given the stipulation in the LOR that these buildings "will not be retained," additional future consultation among the parties will not change this result and the attendant injury. Thus, under the two-prong test, the validity of the LOR is ripe for review.

Additionally, it matters not that the ultimate resolution of issues subject to private ongoing consultation remains pending, or that DASNY's funding approval for the Project has yet to be

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consultation is needed due to "currently inaccessible buildings"). Of course, pursuant to Eminent Domain Procedure Law 404, full site access can be obtained, thus rendering the LOR irrational.

obtained. Where (as here), the action is challenged as being beyond the agencies' authority, and that action (the LOR) inflicts a concrete injury, the action is a final determination, subject to judicial review. *See Center of Deposit, Inc.,* 90 A.D.3d at 1452 (even when "ultimate resolution of the matter is still pending, a determination may be final if the governmental entity acts beyond its statutory authority and causes injury"); *see also Gordon,* 100 N.Y.2d at 243. Moreover, as noted, regardless of future consultations or other approvals needed to fund the Project, the LOR's commitment to razing all the buildings in the hospital/parking garage footprint will not change. This commitment is a present reality, as is the resulting injury, and no future agency action (including DASNY's ultimate funding determinations) will prevent or ameliorate that injury. Accordingly, the validity of the LOR is ripe for judicial review. *See Wing,* 129 A.D.2d at 215-217 (finding that statute of limitations began to run when county legislature committed, by resolution, to the civic center project and shortly thereafter commenced land acquisition negotiations; rejecting argument that limitations period did not begin to run until later dates of funding/bonding resolutions, where the focus of petitioner's challenge was not the project's funding mechanism).

Notably, MVHS's property acquisition in the Downtown Site continues to proceed with haste as to private properties, with city-owned properties shortly to follow. Truett Affidavit, ¶¶ 4-7, 11 & Exhibits A-C thereto. MVHS anticipates building demolition and breaking ground in September, or the latest by the end of the year. Truett Affidavit, ¶¶ 4, 8 & Exhibit D thereto. Given the Planning Board's Resolution – authorizing city agency staff "to take whatever steps are necessary to carry out this Resolution" – MVHS has a green light to acquire Downtown Site properties by eminent domain; and given MVHS's anticipated demolition schedule, the use of eminent domain is right around the corner. *See* Hartnett Affidavit, Exhibit B thereto, at p. 3; Truett Affidavit, ¶ 8 & Exhibit D thereto. Thus, nothing is uncertain or contingent about the injury

inflicted as a result of the LOR, regardless of subsequent DASNY funding approvals. Contrary to Respondents' argument, Petitioners need not wait until there is a gigantic hole in the ground, from broad-scale building demolition on the Downtown Site, in order to have their challenge to the LOR judicially reviewed.

Finally, contrary to Respondents' argument, *Glick v. Harvey,* 2014 WL 96413 (Sup. Ct., N.Y. Cnty., Jan. 7, 2014), *aff'd as modified (on other grds),* 121 A.D.3d 498 (1st Dep't 2014), *aff'd,* 25 N.Y.3d 1175 (2015), lends no support for their position that the LOR is unripe for review. *See, e.g.,* State Memorandum of Law, at pp. 8-9; MVHS Memorandum of Law, at pp. 8-9. Ripeness is indisputably a fact-specific inquiry and *Glick* is factually distinguishable. The letter of resolution in *Glick* specifically stated that it "shall not be effective unless and until ... DASNY ma[d]e [its] findings under SEQRA consistent with the determination described above" [relative to mitigating adverse impact per the plan to which the applicant had agreed]. 2014 WL 96413, at *18; *see also id.,* at *19 ("under the very terms of the [letter of resolution], until DASNY issues such written [findings] pursuant to SEQRA, the [letter of resolution] is not in effect"). In *Glick,* no application for funding had yet been submitted to DASNY, and, therefore, DASNY was not yet required to issue SEQRA findings. *Id.,* at *19. Because the letter of resolution was, by its express terms, not effective until DASNY made it SEQRA findings, the court reasoned that the terms of the letter of resolution could change, particularly given that project construction was not slated to begin until seven years into the future. *Id.,* at *19-20. On this basis, the court determined that the letter of resolution was not final agency action. *Id.*

In contrast here, however, the LOR became effective when it was fully executed, on January 10, 2019. Bonafide Affidavit, ¶¶ 29, 36 & Exhibit C thereto (Section II, Duration, stating that the LOR "will expire if its terms are not carried out within five [5] years from the date of its

execution"). Based on the effective LOR, the Planning Board gave city agencies and MVHS the go-ahead to acquire properties in the Downtown Site for ultimate building demolition, including through the use of eminent domain (which is imminent). Truett Affidavit, ¶ 8 & Exhibit D. That injury will not change. Accordingly, *Glick* is factually distinguishable and does not support Respondents' position. The validity of the LOR (as being ultra vires and irrational) is ripe for judicial review, and the Respondents' motion to dismiss the first and second causes of action on ripeness grounds must be denied.

POINT II
THE FIRST AND SECOND CLAIMS STATE VIABLE CAUSES OF ACTION AGAINST THE STATE

Without citation to supporting authority, the State Respondents urge that the LOR is not subject to judicial review because the LOR is a "voluntary agreement, with no mandated outcome." State Memorandum of Law, at p. 10. They argue that because DASNY could have terminated the consultation process, there is no cause of action to challenge the validity of the LOR. Distilled to its essence, the State Respondents' position is that compliance with the PRHPL and 9 NYCRR 428 is subject to their utter whim – i.e., that they can do whatever they want when they issue letters of resolution – insulated from any judicial review – simply because they could have chosen (but did not choose) a different outcome. Under fundamental principles of administrative law, the State Respondents are incorrect.

It is axiomatic that administrative agencies, as creatures of the Legislature, have only those powers delegated to them by statute (and necessary implication). *Tze Chun Liao v. New York State Banking Dept.,* 74 N.Y.2d 505, 510 (1989); *Finger Lakes Racing Ass'n, Inc. v. New York State Racing & Wagering Bd.,* 45 N.Y.2d 471, 480 (1978). Further, administrative agencies are bound by the regulations they enact and are not at liberty to interpret or apply their regulations in a manner

that is inconsistent with the plain regulatory language. *Visiting Nurse Serv. of N.Y. Home Care v. New York State Dept. of Health,* 5 N.Y.3d 499, 506 (2005); *Mid Island Therapy Assocs., LLC v. New York State Educ. Dept.,* 129 A.D.3d 1173, 1175 (3d Dep't 2015). Finally, as a general matter, in carrying out their statutory/regulatory mandates, agencies must act rationally, not arbitrarily and capriciously.

Here, the governing statute is the PRHPL 14.09, and the governing regulations are 9 NYCRR Part 428. The statute requires that all feasible and prudent alternatives and mitigation be fully explored. And, simply because the regulations (9 NYCRR 428.10) allow for three different possible outcomes (i.e., termination of consultation by the undertaking agency, letter of resolution, or commissioner's agreement that the project should proceed in the public interest regardless of adverse impact) does not erase the specific regulatory requirements that apply to the letter of resolution option. The letter of resolution is the option that the State Respondents chose when they executed the LOR. The State Respondents, therefore, are bound by the regulatory language pertinent to that option; and other possible outcomes – that they did not elect – are not relevant.

Petitioners' first and second causes of action challenge the State Respondents' compliance with PRHPL 14.09 and 9 NYCRR 428 based on invalidity of the LOR – namely, that LOR is (1) ultra vires because, *inter alia,* it conflicts with the plain regulatory language and (2) irrational because it defers necessary testing (in contravention of the regulatory language) based on an inaccurate premise (i.e., the inability to obtain site access). Challenges to an agency's compliance with the PRHPL and its implementing regulations state cognizable causes of action. *See, e.g., Kuzma v. City of Buffalo,* 45 A.D.3d 1308 (4th Dep't 2007); *Cathedral Church of St. John the Divine v. Dormitory Auth. of State of N.Y.,* 224 A.D.2d 95, 101 (3d Dep't 1996), *lv. denied,* 89 N.Y.2d 802 (1996).

Thus, the State Respondents' motion to dismiss the first and second causes of action under CPLR 3211(a)(7) must be denied.

POINT III
THE FIRST AND SECOND CLAIMS ARE A PROPER SUBJECT FOR DECLARATORY RELIEF

"The primary purpose of a declaratory judgment is to adjudicate the parties' rights before a wrong actually occurs in the hope that later litigation will be unnecessary." *Klostermann v. Cuomo,* 61 N.Y.2d 525, 539 (1984). The general purpose of a declaratory judgment is to serve some practical effect in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations. Moreover, the "declaratory judgment remedy is applicable in cases where a constitutional question is involved or the ... meaning of a statute is in question and no fact question is involved." *Dun & Bradstreet, Inc. v. City of N.Y.,* 276 N.Y. 198, 206 (1937)

Here, Petitioners maintain that, in executing the LOR, the State Respondents acted in excess of their statutory and regulatory authority and irrationally. The LOR represents an ongoing violation of law presenting imminent injury to Petitioners – property acquisition and building destruction in the Downtown Site. It is this wrong that Petitioners seek to prevent and, thus, request a declaration that the LOR is invalid, as are any approvals premised on the LOR. *See Nearpass v. Seneca County Indus. Dev. Agency,* 52 Misc. 3d 533, 536 (Sup. Ct., Seneca Cnty., 2016) (challenging agency resolution and seeking Article 78 and declaratory relief; seeking declaratory relief that all agreements based on the resulting agency resolution were null and void). Particularly given the strenuous nature of the State Respondents' non-finality argument, a declaratory judgment action is proper to challenge this ultra vires agency action and prevent injury to Petitioners.

Petitioners, therefore, respectfully request that this Court deny the State Respondents' motion to convert.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully urge this Court to deny Respondents motions in their entireties. Petitioners maintain that their claims are ripe for review and should be heard on the merits, prior to the irretrievable loss of private property and the broad-scale destruction of historically significant resources on the Downtown Site.

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