SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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

Petitioners-Plaintiffs

Index No. 02797-19

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

against-

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

Respondents-Defendants.

RESPONDENT MOHAWK VALLEY HEALTH SYSTEM'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PETITIONERS/PLAINTIFFS' ARTICLE 78 PETITION/DECLARATORY JUDGMENT COMPLAINT

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PRELIMINARY STATEMENT

Respondent Mohawk Valley Health System ("MVHS") respectfully submits this Memorandum of Law in support of its motion to dismiss the Petition/Complaint pursuant to CPLR § 7804(f) and Rule 3211(a)(1), (2) and (7). Petitioners/Plaintiffs' hybrid Article 78 proceeding and declaratory judgment action seeks judicial review of what they claim to be Respondents' "short-circuiting" of statutory processes to protect historic resources and the environment. The Petition/Complaint seeks a determination that the Final Environmental Impact Statement ("FEIS") issued by the City of Utica Planning Board ("Planning Board") is defective, as well as an annulment and invalidation of the Letter of Resolution ("LOR") entered into on or about January 10, 2019 by the Dormitory Authority of the State of New York ("DASNY"), the New York State Office of Parks, Recreation and Historic Preservation ("OPRHP") and MVHS. As set forth below, there is no final agency action or determination ripe for review by the Court. The Proceeding/Action is nothing but a thinly veiled attempt to derail MVHS's efforts to build a hospital in downtown Utica before critical events in the process have occurred. SEQRA findings have not yet been issued by all involved agencies and MVHS has not yet submitted applications to the lead agency or to other involved agencies for the various discretionary approvals. The Petition is therefore not ripe for judicial review and must be dismissed.

STATEMENT OF FACTS

Petitioners/Plaintiffs oppose MVHS's proposal to construct a new Health Care Campus in the City of Utica. The proposed Health Care Campus includes a 670,000± sf hospital, central utility plant, parking facilities (one municipal parking garage and multiple surface lots), medical office building (by private developer), campus grounds, utility/pedestrian bridge (over Columbia

Street) and helipad (the "Project"). *Bennett Affirmation*, ¶ 4. The City of Utica Planning Board has acted as Lead Agency for the purpose of undertaking a coordinated environmental review process pursuant to the New York State Environmental Quality Review Act. *Id.*, ¶ 10-11. MVHS submitted a Draft Environmental Impact Statement ("DEIS") to the Planning Board on October 26, 2018. *Id.*, ¶ 15. Following a public hearing and the acceptance of written comments, the Planning Board requested, and MVHS prepared a Final Environmental Impact Statement dated March 2019. *Id.*, ¶ 18. The Planning Board accepted the FEIS at a meeting on March 21, 2019, and on April 18, 2019 the Planning Board resolved to issue a written findings statement that found the proposed project in the downtown location is the alternative that best minimizes impacts to the environment, while providing beneficial revitalization, secondary economic growth, and service to a population in need, as well as meeting MVHS's objectives. *Id.*, ¶ 19, 21.

Significantly, the issuance of the SEQRA findings statement is not the final action for the Planning Board. It must still consider MVHS's site plan application for the Project - - once a completed application has been submitted. Nor is the SEQRA findings statement the final step in the SEQRA process for this Project. Each involved agency must prepare its own SEQRA findings statement before they issue any discretionary approvals for the Project. To date, DASNY and NYSOH have not yet issued a SEQRA findings statement. *Bennett Affirmation*, ¶ 23-26.

Not only has no other involved agency issued SEQRA findings, but also none of those agencies have issued any discretionary approvals for the Project. In fact, many of these involved agencies do not even have completed applications pending before them. With over 20 discretionary and ministerial permits and approvals that are prerequisites for the Project to

proceed, there can hardly be alleged injury that is incapable of redress in subsequent stages of the process. For example, MVHS must apply to the City of Utica for site plan approval. *Bennett Affirmation*, ¶ 39; City of Utica Zoning Ordinance, §2-29-542(b). Under the current zoning ordinance, MVHS must also apply to the ZBA for a special use permit and for certain area variances. *Bennett Affirmation*, ¶ 39. Importantly, MVHS has not even submitted completed applications to the Planning Board and ZBA, and the Court has no way of assessing whether the boards may deny, approve or approve with modifications those applications. Likewise, NYSDOH still needs to consider the master grant contract and DASNY may still need to consider the issuance of bonds for the Project. *Bennett Affirmation*, ¶ 26. Nor can the LOR signed by MVHS, OPRHP and DASNY be considered a final agency action or determination that might justify judicial review at this stage. The LOR states that appropriate mitigation measures and stipulations will be implemented to offset loss to historic resources should the Project receive other approvals to move forward. *Bennett Affirmation*, ¶ 35; Exhibit A. The LOR does not authorize, or even set into motion any activities that could be viewed as inflicting injury. In short, the Petition seeks judicial review of a matter that is not ripe.

ARGUMENT

CPLR 7804(f) allows a respondent in an Article 78 proceeding to raise an objection in point of law in a motion to dismiss. "A motion to dismiss for lack of ripeness is properly brought pursuant to CPLR 3211(a)(2) inasmuch as it implicates the Court's subject matter jurisdiction." *Shafranov v. Planning Bd. of the Town of Riverhead*, 2011 N.Y. Misc. LEXIS 6284, *10 (Sup. Ct. Suffolk Cty., December 6, 2011), citing *Matter of New York State Inspection, Sec. & Law Enforcement Emps., Dist. Council 82, AFSCME, AFL-CIO v. Cuomo*, 64 N.Y.2d 233, 241 n.3 (1984).

I. There is no final or binding agency determination that can be challenged.

If there is no actual controversy between the parties, the Court does not have subject matter jurisdiction and the case must be dismissed pursuant to CPLR 3211(a)(2). *860 W. Tower, Inc. v. New York State Dept. of Tax & Fin.*, 2014 N.Y. Misc. LEXIS 3259, *4 (Sup. Ct. New York Cty., July 17, 2014). "[A] proceeding under [Article 78] shall not be used to challenge a determination: (1) which is not final or can be adequately reviewed by appeal to a court or to some other body or officer or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application. . . ." CPLR 7801. In other words, "[t]o challenge an administrative determination, the agency action must be final and binding upon the petitioner." *Matter of Ranco Sand & Stone Corp. v. Vecchio*, 27 N.Y.3d 92, 98 (2016) (citations omitted).

"Administrative actions as a rule are not final unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." *Matter of Essex Cty. v. Zagata*, 91 N.Y.2d 447, 453 (1998) (citations omitted). "An administrative determination becomes 'final and binding' when two requirements are met: completeness (finality) of the determination and exhaustion of administrative remedies." *Walton v. New York State Dept. of Corr. Servs.*, 8 N.Y.3d 186, 194 (2007); *see also Carter v. State*, 95 N.Y.2d 267, 270 (2000). "The finality requirement 'draw[s] from case law on ripeness for judicial review.'"[1] *Matter of Ranco Sand & Stone Corp.*, 27 N.Y.3d at 98 (citations omitted); *see also Walton*, 8 N.Y.3d at 195. An agency action is final or ripe for review if "a pragmatic evaluation reveals that the decision-maker has arrived at a definitive position on the issue that

[1] "As the Court has recognized, the ripeness doctrine is closely related to the finality requirement, and in order for an administrative determination to be final, and thus justiciable, it must be ripe for judicial review." *Matter of Ranco Sand & Stone Corp.*, 27 N.Y.3d at 98 (citations omitted).

inflicts actual, concrete injury." *Matter of Adirondack Council, Inc. v. Adirondack Park Agency*, 92 A.D.3d 188, 190 (3d Dept. 2012) (internal citations/quotations omitted); *see also Ranco*, 27 N.Y.3d at 98-100, *Treadway v. Town Bd. of Ticonderoga,* 163 A.D.2d 637, 638 (3d Dept. 1990). With regard to the injury requirement, if "the anticipated harm is insignificant, remote or contingent . . . if the claimed harm may be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party, [then] the matter is not ripe." *Matter of Adirondack Council, Inc.*, 92 A.D.3d at 190 (internal citations/quotations omitted) (finding an act not "final" where it merely constituted guidance upon which an entity *could* act); *see, e.g.*, *Matter of Schaefer v. Legislature of Rockland Cnty.*, 112 A.D.3d 642, 643 (2d Dept. 2013) (deciding that where a "plan" was merely a recommendation for future action, any alleged "'environmental harm which might befall the petitioner[s] . . . [was] purely speculative,' and [thus] no 'actual, concrete injury' was inflicted." (citations omitted)).

This Article 78 proceeding is premature because there is no final agency action, much less one from which there can be a claim of actual, concrete injury. The Planning Board's issuance of the SEQRA findings challenged in the Petition is not the final action for the Planning Board. *Bennett Affirmation*, ¶ 23. Although the issuance of the findings statement concludes the environmental review process for the Planning Board, it is not the final action for it. The Planning Board still has to consider a site plan application for the Project. MVHS has not yet submitted a complete site plan application for approval. If and when it does, then the Planning Board may deny, approve or approve with modifications the site plan. Any modifications addressed to the site plan may alter the size, design, landscaping and/or engineering of the Project - - which could address Petitioners' concerns. *Id.*, 23-25.

Another fact that Petitioners/Plaintiffs conveniently omit is that the Planning Board's FEIS is not even the final step in the SEQRA process for this Project. *Bennett Affirmation*, ¶ 24. Instead, each involved agency also must prepare its own SEQRA findings statement, prior to issuing any discretionary approvals, and is free to reach its own determinations. Here, DASNY and NYSDOH have *not* issued a SEQRA findings statement or any discretionary approvals for the Project. Findings, and/or subsequent approvals, by those agencies could impose additional restrictions or conditions that would impact the Project and could alleviate Petitioners' concerns. *Id.*, ¶ 25. In the event an involved agency reaches a different conclusion in its findings statement, then the Project will not be able to proceed until those differences are worked out. *Id.*, ¶ 24. In other words, Petitioners' claimed harm "may be prevented or significantly ameliorated by further administrative action." *Matter of Adirondack Council, Inc. v. Adirondack Park Agency*, 92 A.D.3d 188, 189 (3d Dept. 2012) (citations omitted).

This situation is analogous to that in *Guido v. Town of Ulster Town Bd.*, 74 A.D.3d 1536 (3d Dept. 2010). In *Guido*, the Court held that although the Planning Board had made its SEQRA determination and all of the involved agencies must rely on the FEIS as the basis for their review in connection with subsequent permit applications, the Planning Board had "not yet granted any of the fundamental approvals necessary to render their SEQRA decision a 'final' action." *Guido*, 74 A.D.3d at 1537. For example, the Court noted that a special permit, site plan or subdivision approvals had not yet been granted, and that those approvals would be needed before the Town Building Department may consider issuing the building permit which was the prerequisite for commencement of the proposed development. *Id.*

Similarly, here, the City of Utica Planning Board has not yet approved the Project site plan. MVHS must still apply to the City of Utica Planning Board for site plan approval. *Bennett*

Affirmation, ¶ 38; City of Utica Zoning Ordinance, §2-29-542(b). MVHS will also be required to apply to the City of Utica ZBA for a special use permit and for area variances, but has not yet submitted those applications to the ZBA. *Bennett Affirmation*, ¶ 38. In *Guido*, the Court further found persuasive that the Planning Board's SEQRA determination continued to be subject to its own corrective action and there remained a possibility that the perceived injury to petitioners would be prevented or significantly ameliorated by such action, and that the dispute would be rendered moot. *Guido*, 74 A.D.3d at 1537. Based on that, the Court found the challenges brought by the petitioners were not ripe for review. *Id.*, at 1538. Here, MVHS has not even submitted completed applications and no determinations have been made. The Court has no way of assessing whether the boards may deny, approve or approve with modifications those applications. Each of those discretionary approvals could prevent or ameliorate the alleged harm claimed by Petitioners. Accordingly, based on *Guido*, this Court should dismiss the Petition/Complaint because it does not present a controversy ripe for judicial review. *See Id.*, at 1537-38.

Furthermore, the LOR also "does not constitute the type of final agency action that would render the matter ripe for judicial review." *See Matter of Glick v. Harvey*, 2014 N.Y. Misc. LEXIS 35, *54 (Sup. Ct. New York Cty., January 7, 2014). In *Glick*, the petitioners sought a declaration that the LOR violated Section 14.09 of the PRHPL and sought to have it annulled because the state agencies had allegedly failed to consider the development of an alternative location for the project. *Glick*, 2014 Misc. LEXIS at *48. However, the Court found that the applicant had not yet sought DASNY funding and therefore DASNY had not made any findings under SEQRA. *Id.*, at *50-51. The Court refused to presume what findings DASNY might make, and what effect those findings might have on the project. *Id.*, at *53-54. The Court

therefore concluded that the LOR was not a final agency action and was not ripe for review. *Id.*, at *54. Likewise, MVHS has not yet sought DASNY's assistance with financing and, therefore DASNY has not issued SEQRA findings. As a result, the Petition/Complaint is not ripe and should be dismissed.

Far from demonstrating ripeness, the Petition/Complaint itself makes clear that no final agency action has occurred. No discretionary permits have been issued by the City of Utica and no SEQRA findings or discretionary approvals have been made by DASNY or DOH. Petitioners/Plaintiffs conveniently omit those facts, apparently in an effort to portray the LOR as a determination that is subject to judicial review. [2] Coupled with the undisputed facts that none of the other involved agencies have issued SEQRA findings and there are a number of discretionary and ministerial approvals still required, the LOR is in no way a final determination that would make this matter ripe for review.

In addition, there is no injury. Petitioners/Plaintiffs have failed to allege and cannot prove that the "decision-maker has arrived at a definitive position on the issue that inflicts actual, concrete injury." *Matter of Adirondack Council, Inc. v. Adirondack Park Agency*, 92 A.D.3d 188, 190 (3d Dept. 2012) (internal citations/quotations omitted). If and when MVHS submits applications to the Planning Board for site plan approval, and to the ZBA for a special use permit and area variances, the boards may deny, approve or approve with modification those

[2] However, the allegations Petition concerning the LOR only serve to reinforce Respondents' point that the LOR is *not* a final determination. The Petition/Complaint is replete with references to the LOR's *lack of finality*, including: the LOR indicates "further onsite testing is needed" and "alternatives have not been fully evaluated" and "these matters will be addressed..." *Petition/Complaint*, ¶ 3; ¶ 87; the LOR "resolves nothing, instead deferring impact identification, evaluation and possible mitigation to a later date." *Id*, ¶ 47; 84; the LOR "provides that the consultation process will continue." *Id.*, ¶ 86; and "issuance of the LOR...is premature..." because testing and information collection review *is not yet complete. Id.*, ¶ 87.

applications. Those discretionary approvals could prevent or ameliorate the alleged harm sustained by Petitioners. *Bennett Affirmation*, ¶ 39-40. To date, MVHS has not submitted completed applications, so any alleged harm is entirely speculative. Similarly, the LOR does not authorize or even put into motion any activities that could be viewed as inflicting injury. In fact, the opposite is true. The actions which are the subject of the Article 78 proceeding have not inflicted any injury on Petitioners/Plaintiffs at all, much less injury that is concrete or incapable of redress through the subsequent stages of the process. There can be no legitimate claim of actual, concrete injury, and the Petition/Complaint must be dismissed.

Dismissal of the Petition/Complaint also is warranted in light of the need to "balance the goals of preventing piecemeal review of each determination made in the context of the SEQRA process which would subject it to unrestrained review . . . result[ing] in significant delays in what is already a detailed and lengthy process. . . .against the possibility of real harm to the complaining party..." *Matter of Guido v. Town of Ulster Town Bd.*, 74 A.D.3d 1536, 1537 (3d Dept. 2010) (citations omitted). Here, the balance tips decidedly in the favor of preventing "piecemeal review," especially given that involved agencies still need to issue SEQRA findings, and discretionary permits and approvals are still required. Accordingly, because there is no final agency action and Petitioners/Plaintiffs have not been injured, there is nothing for the Court to review and the Proceeding/Action should be dismissed in its entirety.

II. The Declaratory Judgment Action should be converted to an Article 78 Proceeding and be dismissed.

Petitioners/Plaintiffs seek a judicial declaration that the LOR is invalid and further seek an order requiring the OPRHP, DASNY and MVHS to resume the consultation process and proceed with testing, consideration of alternatives and development of avoidance/mitigation plans. "Generally, a declaratory judgment action is not the proper vehicle to challenge an

administrative procedure, where judicial review by way of article 78 proceeding is available." *Greystone Mgmt. Corp. v. Conciliation & Appeals Bd.*, 62 N.Y.2d 763, 765 (1984); *see Town of Fishkill v. Royal Duchess Props.*, 231 A.D.2d 511, 512 (2d Dept. 1996) (affirming conversion of action from declaratory judgment to Article 78 because a state agency's final decision was being challenged).

Here, declaratory judgment is not the proper vehicle to challenge the LOR or require action by the agencies and MVHS. Assuming there were final agency determinations at issue (which there are not) judicial review by way of the Article 78 proceeding would provide the avenue for relief. In this case, the Court should convert the declaratory judgment action to an Article 78, but dismiss it for lack of finality. *See Syracuse Brigadiers, Inc. v. Racing & Wagering Bd.*, 275 A.D.2d 918, 919 (4th Dept. 2000) (finding an article 78 proceeding should have been dismissed due to lack of finality and that it was improper for the Court to convert the action to declaratory judgment because it was not the appropriate vehicle to challenge the determination and there was no need for such a declaration). Petitioners/Plaintiffs should not be permitted to circumvent the entire administrative review structure, including Article 78 review, by attempting to fashion a declaratory judgment action where it is not an appropriate mechanism for seeking relief. Petitioners/Plaintiffs cannot evade the ripeness defect by shoehorning their claims into an action for declaratory judgment. Even if this matter is not dismissed for lack of a final agency action subject to judicial review, the Court should convert the action to an Article 78 proceeding.

CONCLUSION

For the foregoing reasons, Respondent Mohawk Valley Health System respectfully requests that the Petition/Complaint be dismissed in its entirety. In the event that the motion is denied, Respondent respectfully requests that the complaint be converted to a petition and that Respondent be granted 30 days to answer.

Dated: June 12, 2019

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