SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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

Petitioners-Plaintiffs,

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

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.

STATE RESPONDENTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR CROSS-MOTION TO CONVERT THE ACTION AND DISMISS

LETITIA JAMES
Attorney General of the State of New York
Attorney for State Respondents-Defendants
Environmental Protection Bureau
The Capitol
Albany, New York 12224-0341
(518) 776-2416

LORETTA SIMON
LISA BURIANEK
Assistant Attorneys General
Of Counsel

Dated: June 12, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATE STATUTES

STATE REGULATIONS

PRELIMINARY STATEMENT

Respondents-Defendants the New York State Office of Parks, Recreation and Historic Preservation and Erik Kulleseid as Acting Commissioner (Parks); and the Dormitory Authority of the State of New York (DASNY), collectively "the State Respondents," submit this memorandum of law in support of their motion to convert the declaratory judgment portion of this hybrid matter to a CPLR Article 78 proceeding, and to dismiss the petition as both premature and for failure to state a cause of action. Petitioners' claims relate to a proposed health care facility to be located in the City of Utica, New York. The first two causes of action concern the State Respondents' duties pursuant to § 14.09 of the Parks, Recreation and Historic Preservation Law regarding any application for approval or financing of a project that may affect historic properties. PRHPL § 14.09. The remaining three causes of action challenge the environmental review pursuant to the State Environmental Quality Review Act (SEQRA) for the proposed health care facility. Environmental Conservation Law (ECL) § 8-0101, *et seq.*-.

RELEVANT FACTS

Mohawk Valley Health System (MVHS) has been conditionally awarded a State grant of $300 million (the Grant) pursuant to the Oneida County Health Care Facility Transformation Program, codified as Public Health Law 2825(b), for development of a proposed integrated health center to be located in downtown Utica, New York. *See* June 11, 2019 Affidavit of Robert S. Derico (Derico Aff) ¶¶ 4-5. The purpose of the Grant is to develop a health care facility, parking garage and surface parking (the Project) to replace two existing outdated inpatient hospitals. Derico Aff ¶ 4. The Project is to be constructed on approximately 55 property parcels, some of which are owned by MVHS and some of which are not. Derico Aff ¶ 7. Certain properties within the Project footprint are listed on the State or National Registers of Historic

Places (Registers). *See* June 7, 2019 Affidavit of John Bonafide (Bonafide Aff) ¶ 22; *see also* Derico Aff ¶ 32.

DASNY is assisting with management of the Grant and may issue bonds to further support the Project at a future time Derico Aff ¶ 6. DASNY was created for the purpose of financing and constructing facilities for a variety of public and private institutions, including hospitals (such as MVHS), nursing homes, facilities for the aged and certain not-for-profit institutions, including independent colleges and universities. Derico Aff ¶ 17. To carry out its statutory purposes, DASNY issues and sells negotiable bonds, loaning the proceeds of such bonds to qualifying entities for the purpose of constructing, improving or reconstructing facilities. Derico Aff ¶ 18. DASNY is also authorized to issue bonds to reimburse the State of New York for monies advanced to support programs such as the proposed MVHS integrated health care center. Derico Aff ¶¶ 19-21.

Projects to be financed with the proceeds of DASNY bonds must be reviewed in accordance with Section 14.09, which requires consultation with Parks to determine if the project will have adverse impacts on historic resources. Derico Aff ¶ 22. Section 14.09 consultation between DASNY and Parks commenced in September, 2018 and the parties entered into a Letter of Resolution together with MVHS on January 10, 2019. Derico Aff ¶¶ 30-31. Petitioners challenge the Letter of Resolution.

Petitioners also challenge the SEQRA review for the Project. The Planning Board of the City of Utica served as lead agency; DASNY participated in the coordinated SEQRA review of the Project as an involved agency. Derico Aff ¶¶ 41-43. The City of Utica issued its SEQRA findings on April 30, 2019. Derico Aff ¶ 44. DASNY has not issued its SEQRA findings. Derico Aff ¶ 45.

LEGAL FRAMEWORK

State Historic Preservation Act Section 14.09 Consultation Process

The State Historic Preservation Act of 1980 (the Act) gives Parks and other state agencies responsibilities for agency activities affecting historic properties. PRHPL Title 14. As relevant here, before a State agency undertakes an activity, including approval or funding of a project that may affect historic sites, that agency must give notice to and consult with Parks concerning any change or impact of the project, beneficial or adverse, on the quality of certain historic properties. Bonafide Aff ¶¶ 7-8; PRHPL § 14.09(1). The Act requires consultation "as early in the planning process as practicable and prior to preparation or approval of the final design or plan." *Id.* Parks reviews and comments on whether the proposed project might have an adverse impact on any listed or eligible site.[1] The role of Parks is limited to consulting and advising. *Id* § 14.09(2).

Parks' regulations establish a process for implementing the requirements of section 14.09. *See* 9 NYCRR § 428. If an application is made to a state agency regarding a property that is listed or eligible, Parks and the undertaking agency consult to avoid or mitigate impacts to such properties "to the fullest extent practicable." PRHPL § 14.09(2); 9 NYCRR §§ 428.1, 428.8. If at all possible, the undertaking agency and Parks enter into a "Letter of Resolution" (LOR) setting forth a course of action specifying how the undertaking will proceed. 9 NYCRR § 428.10(b). However, if an agency determines that there are no "feasible and prudent alternatives which would avoid or satisfactorily mitigate adverse impacts and also determines

[1] An eligible or listed site is any historic, architectural, archeological, or cultural property listed on the national register of historic places, or the state register, or is determined to be eligible for listing on the state register by the commissioner of Parks. *See* PRHPL § 14.03(5) & (9); *see also* § 14.09(1).

that it is nevertheless in the public interest to proceed" it may unilaterally terminate consultation. 9 NYCRR § 428.10(d)..

State Environmental Quality Review Act Process

The State Environmental Quality Review Act (SEQRA) mandates that state and local agencies determine whether a project may have a significant effect on the environment and specifies procedures which agencies must follow in order to minimize adverse impacts to the environment. *See* ECL art. 8; *see also* 6 NYCRR § 617. SEQRA requires that a "lead agency" be established for the SEQRA review. 6 NYCRR § 617.6. A "lead agency" is an involved agency principally responsible for approving an action, and for determining whether the proposed project may have a significant adverse impact on the environment and whether an environmental impact statement (EIS) is required. 6 NYCRR § 617.2(v). If there is more than one involved agency, a lead agency must be established. 6 NYCRR § 617.6(b)(2). An "involved" agency means an agency that "has jurisdiction by law to fund, approve or directly undertake an action. If an agency will ultimately make a discretionary decision to fund, approve or undertake an action, then it is an "involved agency" notwithstanding that it has not received an application for funding or approval at the time the SEQR process is commenced. The lead agency is also an "involved agency." 6 NYCRR § 617.2(t).

After completion of the SEQRA review process, and an EIS, each involved agency prepares a written "Findings Statement." A findings statement "considers the relevant environmental impacts presented in an EIS, weighs and balances them with social, economic and other essential considerations, provides a rationale for the agency's decision and certifies that the SEQR requirements have been met." 6 NYCRR § 617.2(p); *see also* § 617.11.

ARGUMENT

POINT I

THE DECLARATORY JUDGMENT PORTION OF THE CASE SHOULD BE CONVERTED TO AND BE REVIEWED AS A CPLR ARTICLE 78 PROCEEDING

Petitioners' hybrid action/proceeding should be converted to, and reviewed as, a CPLR Article 78 proceeding. CPLR § 7803(2); *see also* CPLR § 103(c). An Article 78 proceeding is the appropriate vehicle to challenge the government determinations at issue here. *See,* CPLR § 7803(3). "Whenever governmental activity is being challenged, the immediate inquiry is whether the challenge could have been advanced in a CPLR article 78 proceeding." *See Matter of Frontier Ins. Co. v. Town Bd. of Town of Thompson,* 252 A.D.2d 928, 929 (3d Dept 1998) (citations omitted). A declaratory judgment action is not the proper vehicle to challenge an administrative determination where Article 78 judicial review is available. *See Greystone Mgmt. Corp.et al. v. Conciliation & Appeals Bd. of the City of New York*, 62 N.Y.2d 763, 765 (1984) (finding that the appellate court did not abuse its discretion in refusing to grant declaratory relief where landlords sought to challenge rent-setting procedure); *see also Matter of Aubin v. State of New York*, 282 A.D.2d 919, 920-922 (3d Dept 2001), *lv denied*, 97 N.Y.2d 606 (2001) (where party sought article 78 and declaratory relief regarding administrative process by which State acquired land in the Adirondack Park, court affirmed the claims were subject to Article 78 review and dismissed for untimeliness).

Where a hybrid proceeding seeks to annul an agency determination, the declaratory judgment portion should be converted to an Article 78 proceeding. *See e.g. Matter of Sutherland v. Glennon,* 221 A.D.2d 893, 894 (3d Dept 1995) (where petitioners did not challenge constitutionality of any statute or regulation, rather they sought annulment of an agency determination); *see also Matter of Russo v. Jorling*, 214 A.D.2d 863, 864-865 (3d Dept 1995),

appeal denied, 86 N.Y.2d 705 (1995) (where petition sought annulment of a DEC determination, court converted declaratory judgment portion of hybrid case to an article 78). A claim that an administrative action was "affected by an error of law" is reviewable pursuant to CPLR § 7803(3). *See New York City Health and Hosps. Corp. v. McBarnette,* 84 N.Y.2d 194, 204-205 (1994) (allegations that quasi-legislative acts of administrative agencies are affected by an error of law should have been raised pursuant to CPLR article 78). In fact, administrative actions should be reviewed pursuant to article 78 even where the alleged error of law involves constitutional violations. *See Matter of Town of Stony Point v. State of N.Y. Dept. of Fin., Off. of Real Prop. Servs.* 107 A.D.3d 1217, 1218 (3d Dept 2013) (constitutional challenge to a denial of an application for a specific equalization rate should have been raised as an CPLR article 78 proceeding).

Here, the proper vehicle for petitioners' challenge to the Letter of Resolution and SEQRA is an article 78 proceeding; there is no need to resort to a declaratory judgment action. Pursuant to CPLR § 103(c), the Court has discretion to convert, rather than dismiss, a proceeding not brought in proper form. Accordingly, the declaratory judgment portion of the matter should be converted to a CPLR article 78 proceeding.

POINT II

PETITIONERS' CLAIMS AGAINST THE STATE RESPONDENTS SHOULD BE DISMISSED

This Court should dismiss the claims against State Respondents because the claims are not ripe. Moreover, the claims fail to state a cause of action. CPLR § 3211(a)(2), § 7801(1), § 3211(a)(7).

A. The First and Second Causes of Action Are Not Ripe

Before the Court can hear a claim against an agency the action must be final. CPLR § 7801(1). Agency actions are not final until "they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." *Matter of Essex County v. Zagata*, 91 N.Y.2d 447, 453 (1998) (citation omitted). To determine whether an action is final, courts must consider an inquiry into the appropriateness or "the completeness of the administrative action" and whether the action "inflicts an actual concrete injury." *Id.* quoting *Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 518-520 (1986); *see also Matter of Jamaica Water Supply Co. v. Public Service Commn. of State of New York,* 152 A.D.2d 17, 20 (3d Dept 1989). Simply put, there is no final agency action to challenge here.

Petitioners' first and second causes of action challenge a Letter of Resolution (LOR) (Petition ¶¶ 87, 90, 95) for a consultation process that is not final. The LOR is part of a continuing consultation process pursuant to section 14.09, does not constitute a final agency undertaking appropriate for judicial review, and imposes no injury or harm to petitioners. Any ruling at this time as to the adequacy of the LOR or the § 14.09 consultation process would be an impermissible advisory opinion. *See In re Workman's Compensation Fund*, 224 N.Y. 13, 16 (1918) (the function of the court is to determine controversies, not give advisory opinions); *see also Matter of Joint Queensview Hous. Enter. v. Grayson*, 179 A.D.2d 434, 436-437 (1st Dept 1992) (advisory letters of hypothetical prospective transactions found to be premature); *Church of St. Paul*, 67 N.Y.2d at 518 (citation omitted) (courts "conserve judicial machinery for problems which are real and present or imminent, not to squander it on abstract or hypothetical or remote problems").

The LOR is not a final agency action appropriate for judicial review, and by its terms demonstrates that the § 14.09 consultation on impacts to historic properties is ongoing. DASNY

is engaged in § 14.09 consultation with Parks because it *may*, in the future, issue taxable or tax-exempt bonds to pay or reimburse costs incurred by MVHS in furtherance of the project. However, DASNY has taken no action that would give rise to a cognizable claim. It has not issued bonds. There has been no request or application made for DASNY financing. DASNY has not undertaken or issued approvals for any other action with respect to the project. Derico Aff ¶ 9. Furthermore, DASNY, as an involved agency, has not issued a SEQRA Findings Statement, and there is no pending DASNY action that would require it to issue Findings. Derico Aff ¶¶ 9, 45.

In a similar proceeding involving a LOR, pursuant to the § 14.09 consultation process, Supreme Court found that the subject LOR was not ripe for judicial review. *Matter of Glick v. Harvey*, 2014 N.Y. Misc. LEXIS 35, 54 (Sup Ct, NY County 2014). There, as here, petitioners alleged that the LOR signed by DASNY, Parks and a private institution (New York University or NYU), constituted final action subject to judicial review. *Id.* at 52. NYU planned a development project that involved adding academic buildings and housing, with potential impacts to historic properties. In *Glick*, as here, no financing had been sought from or issued by DASNY, and no SEQRA Findings Statement had been issued by DASNY. For those reasons, and because the LOR would not be effective until SEQRA was complete, the *Glick* court concluded "the LOR does not constitute the type of final agency action that would render the matter ripe for judicial review," and granted the cross motions to dismiss by DASNY and Parks. *Id* at 54.

As in *Glick*, the terms of the instant LOR demonstrate that the § 14.09 consultation process is ongoing and that additional actions are required. The LOR specifies: "the parties agree that ongoing consultation, in accordance with PRHPL Section 14.09 and its implementing regulations at 9 NYCRR Part 428, will explore alternatives that would avoid or minimize

impacts to identified historic/archaeological resources." Bonafide Aff, Exhibit C at 2. It prohibits ground disturbance until further testing is completed. Bonafide Aff ¶ 32, Exhibit C at 2. Furthermore, the LOR requires a complete assessment of buildings the project sponsor owns and those it does not currently own. Bonafide Aff ¶ 34. While buildings located within the footprint of the proposed hospital building and parking garage will not be retained, four buildings outside that footprint may be reused or repurposed. Derico Aff ¶¶ 38-39; Bonafide Aff, Exhibit C at 3. Stipulations in the LOR require continuing consultation as properties are acquired and more details about the buildings are known. Derico Aff ¶¶ 33, 36; Bonafide Aff, Exhibit C at 2.

Curiously, while petitioners recognize that the consultation process is not complete ("the LOR provides that the consultation process will continue") (Petition ¶ 86), they ask the Court to order a continuation of the consultation process (Petition at 30 [2]). There is no dispute that consultation commenced and is ongoing. Bonafide Aff ¶¶ 30, 33; Derico Aff ¶¶ 30, 40. It is Parks' practice to encourage State agencies to sign an LOR early in the consultation process and not terminate consultation after the signing of the LOR. Bonafide Aff ¶¶ 13, 35. The fact that the State Respondents here engaged early in the consultation process by signing a LOR and continuing consultation, does not give rise to a cause of action.

What is more, in order to establish grounds for a viable cause of action, petitioners must demonstrate an actual, concrete injury they have suffered. *Matter of East Ramapo Cent. Sch. Dist. v. King*, 29 N.Y.3d 938, 939-940 (2017) (Article 78 dismissed against the State where determination was non-final and petitioner failed to articulate any actual concrete injury). Petitioners have failed to do so. Instead, petitioners anticipate harm that may occur at some time in the future, should action be taken that affects historic properties at the Project site. Specifically, petitioners are concerned with the potential razing of historic or cultural resources.

Petition ¶ 6. But the LOR does not inflict harm, nor does it authorize the destruction of any historic buildings, and cannot be deemed ripe for review. *See, e.g. Matter of National Fuel Gas Distrib. Corp. v. Public Service Commn. of State of N.Y.,* 71 A.D.3d 62, 64 (3d Dept 2009) (harm anticipated by utility, in the form of a future reduction in its rates, was speculative and not ripe). Though petitioners may be concerned about the potential future impacts to historic properties from the Project, any potential injury is contingent on future approvals. Where injury is remote or contingent, the claim is not ripe. *Church of St. Paul,* 67 N.Y.2d at 523; *see also Matter of Edmead v. McGuire*, 67 N.Y.2d 714, 716 (1986).

The LOR here is not the end of the section 14.09 consultation process and it is not ripe for review. Even if the LOR was the final word on section 14.09 consultation for historic properties at the Project site, which it is not, it would not be eligible for judicial review unless and until final agency action – here, when a State agency undertaking is completed.

B. The First and Second Causes of Action Fail to State a Claim Against State Respondents

In addition to lack of ripeness and cognizable injury, the Court should dismiss the first and second claims against the State Respondents on the separate ground that the petition fails to state a cause of action. CPLR § 3211(a)(7). Where petitioners fail to set out a cognizable cause of action, the courts may dismiss the claims. If all the allegations in the petition/complaint are deemed true, "[t]he question is not whether a cause of action can be proved but whether one has been stated." *Wegman v. Dairylea Coop.*, 50 A.D.2d 108, 110 (4th Dept 1975).

Petitioners claim the LOR is flawed, but they have failed to state a claim because there is no legal requirement for a LOR. Rather, the LOR is a voluntary agreement, with no mandated outcome. 9 NYCRR § 428.10. The legal requirement pursuant to Section 14.09 is for a state agency to *consult with Parks* before carrying out, approving, or funding a project that has the

potential to impact historic resources eligible for or listed in the Registers. Bonafide Aff ¶ 7. Petitioners do not claim that DASNY has not consulted with Parks. Furthermore, the regulations allow an undertaking agency to unilaterally terminate Parks consultation if that agency determines that there are no feasible and prudent alternatives that would avoid or mitigate the project's adverse impacts to historic resources and that it is in the public interest to proceed with the project. 9 NYCRR § 428.10(d); *see also* Bonafide Aff ¶ 14. Here, section 14.09 consultation is ongoing, there is no undertaking, no application for funding has been made to DASNY , and DASNY has not issued bonds. Derico Aff, ¶¶ 24, 45. Accordingly, Petitioners have failed to state a claim against the State Respondents because there is no legal requirement to do more than consult with Parks, which consultation has occurred and which process continues.

CONCLUSION

For all the foregoing reasons, this hybrid proceeding should be converted and the dismissed as to State Respondents because the first and second causes of action are not ripe for judicial review and fail to state a cause of action.

Dated: June 12, 2019
Albany, New York

LETITIA JAMES
Attorney General of the State of New York
Attorney for State Respondents-Defendants

By: _____
Loretta Simon
Assistant Attorney General
Environmental Protection Bureau
The Capitol
Albany, New York 12224-0341
(518) 776-2416
Loretta.Simon@ag.ny.gov