STATE OF NEW YORK
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DIVISION OF SOCIAL JUSTICE
ENVIRONMENTAL PROTECTION BUREAU

June 20, 2019

Charles E. Diamond
Chief Clerk
Supreme Court, Albany County
Albany County Courthouse
16 Eagle Street, Room 102
Albany, NY 12207-1077

Re: ***The Landmarks Society of Greater Utica, et al. v. Planning Board of the City of Utica, et al.***
Index No. 02797-19

Dear Mr. Diamond:

The New York State Office of Parks, Recreation and Historic Preservation and the Dormitory Authority of the State of New York (State respondents) submit this letter brief in reply on the State's motion to convert and dismiss the above-captioned matter. CPLR § 2214 (b). Kindly forward this letter to the assigned judge.

Petitioners' Allegation that State Respondents Exceeded Their Authority is Wrong

Petitioners argue that the State respondents' motion to dismiss for prematurity must be rejected because the State has exceeded its authority by entering into a Letter of Resolution (LOR) regarding certain historic resources at the project site. *See* Petitioners' June 19, 2019 Memo. of Law (Pet. MOL) at 12. Petitioners are wrong.

State law directs state agencies to engage in consultation involving historic properties and the regulations specifically authorize LORs. *See* PRHPL § 14.09; 9 NYCRR § 428.10 ("The dialogue contemplated by sections 428.8 and 428.9 of this Part should, if at all possible culminate in the execution of a *Letter of Resolution* between the commissioner and the undertaking agency") (*emphasis added*).

Oddly, petitioners argue that *Matter of Glick v Harvey* (2014 NY Misc LEXIS 35 [Sup Ct, NY County 2014]) "lends no support" for the State's position that the LOR is unripe for review. Pet. MOL at 16. In fact, *Glick* is the only reported case on ripeness of an LOR and shares many of

the same facts as this case. Most importantly, the *Glick* court found that the LOR *was not ripe* for review. 2014 NY Misc LEXIS 35 at *54. As in *Glick*, the LOR set forth future actions yet to be taken; DASNY has issued neither its SEQRA findings nor any financing for the project. Contrary to petitioners' claim, the LOR is not ripe for challenge.

In support of their allegation that the State is acting *ultra vires* by issuing the LOR, and that the case is ripe for that reason, petitioners cite to cases involving the State Environmental Quality Review Act (SEQRA). However, the Parks, Recreation and Historic Preservation Law (PRHPL) is a separate and distinct statute from SEQRA. PRHPL § 14.09 imposes an obligation on State agencies to consult with the Office of Parks, Recreation and Historic Preservation (Parks) where there is an "undertaking." The undertaking for DASNY's purposes is possible future financing. *See* June 11, 2019 Affidavit of Robert S. Derico (Derico Aff). As set forth in the State's motion to convert and dismiss, there is no final agency action here: DASNY has not issued financing, nor has it issued "Findings" pursuant to SEQRA, as an involved agency and it is not lead agency for the SEQRA review process. *See* Derico Aff; *see also* State respondents' June 12, 2019 Memo. of Law. The State is not acting in excess of its jurisdiction, there are no SEQRA claims against DASNY or Parks, and the LOR is still unripe.

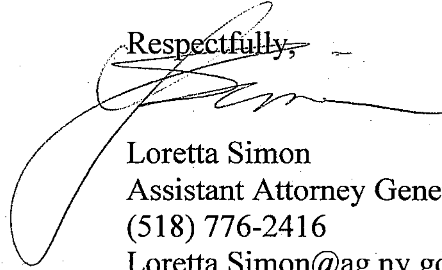
In another attempt to salvage their claim, petitioners rely on *Gordon v Rush* (100 NY2d 236 [2003]). *Gordon* is inapposite. In *Gordon,* a local town board issued a SEQRA positive declaration for a project where the lead agency, the State Department of Environmental Conservation (DEC), had already issued a negative declaration. The Court of Appeals found that the board acted outside it authority: "[s]ince the Board was bound by the DEC's negative declaration, it acted outside the scope of its authority when it decided to conduct its own SEQRA review and issued a positive declaration" (*Gordon,* 100 NY2d at 245).

Petitioners here cannot show that the State respondents have acted outside their authority. To the contrary, the State respondents have clear statutory and regulatory directives to engage in consultation and enter into a LOR. *See* Derico Aff and June 7, 2019 Affidavit of John Bonafide (Bonafide Aff). Their claim that the State "acted irrationally" in issuing the LOR goes to the merits, not ripeness.[i] Pet. MOL at 12. Petitioners' claim that the LOR conflicts with PRHPL because "State Respondents short-circuited the PRHPL consultation process to expediently allow for placement of the project on the Downtown Site" does not allege a legal failing. Pet. MOL at 12. To the extent petitioners complain that the State consulted quickly, it acted in accord with the law, which requires that consultation commence "as early in the planning process as practicable and prior to preparation or approval of the final design or plan." PRHPL § 14.09 (1).

Finally, petitioners assert that "the LOR commits to razing all buildings." Pet. MOL at 14. The LOR does not authorize demolition of any buildings; rather, it acknowledges that the project will require demolitions and establishes options to be considered to mitigate losses to the extent possible. *See* Bonafide Aff ¶ 32. This is wholly consistent with the statute, which does not prohibit demolitions but requires agencies to "the fullest extent practicable ... avoid or mitigate adverse impacts." PRHPL § 14.09 (2). Further, in the event an agency determines that there are no feasible and prudent alternatives to avoid or satisfactorily mitigate adverse impacts, and "that it is nevertheless in the public interest to proceed with the undertaking," it may do so. 9 NYCRR § 428.10 (d).

Accordingly, for these reasons and those set forth in the State respondents' motion, the LOR is not ripe. The claims against DASNY and Parks must be converted to a CPLR Article 78 proceeding and dismissed.

Respectfully,



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[i] To the extent the petitioners argue the LOR is "irrational" because petitioner believes the State respondents should have site access through eminent domain, the State respondents are not condemnors here.