SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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In the Matter of the Application of

FRIENDS AND RESIDENTS OF GREATER GOWANUS, VOICE OF GOWANUS, LINDA MARIANO, MARLENE DONNELLY, ANN KATHRIN KELLY, and MARGARET MAUGENEST,

Petitioners,

-against-

CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF CITY PLANNING, and MARISA LAGO, in her capacity as Director of the Department of City Planning,

Respondents.

– and –

CITY PLANNING COMMISSION

Nominal Respondent.

GOWANUS RESIDENTS, OWNERS, AND WORKERS (GROW), JOSEPH IGNERI, DONNA BRUNO, and JENNIFER REILLY,

Intervenors/Respondents.

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AFFIRMATION OF RACHEL RAMIREZ-GUEST IN SUPPORT OF MUNICIPAL RESPONDENTS' PROPOSED ORDER TO SHOW CAUSE AND IN OPPOSITION TO THE PETITION

Index No. 501178/2021
(Levine, J.)

Rachel Ramirez-Guest, an attorney admitted to practice before the Courts of the State of New York, affirms the following pursuant to § 2106 of the CPLR of the State of New York and under the penalties of perjury:

1. I am a Assistant Corporation Counsel at the Office of the Corporation Counsel of the City of New York, representing Respondents in the above-captioned matter—the City of New

York, the New York City Department of City Planning ("DCP"), and Marisa Lago, in her capacity as Director of DCP—as well as Nominal Respondent New York City Planning Commission (together, "Municipal Respondents"). I make this affirmation in support of Municipal Respondents' Order to Show Cause, in opposition to the above-captioned Petition, and to provide the Court with new law relevant to the disposition of this matter.

2. I submit this affirmation based on my personal knowledge; documents and records in the City's possession; and conversations with City Respondents and other City officials and employees who have knowledge of facts relevant to this case.

Petitioners' third and fourth claims—concerning remote ULURP hearings—must be dismissed based on Mayoral Executive Order 188 dated March 13, 2021.

3. Petitioners' third and fourth claims challenging the use of remote hearings during the City's Uniform Land Use Review Procedure ("ULURP") are based solely on alleged violations of the City's ULURP rules, 62 RCNY Chapters 1 and 2 (the "ULURP Rules"), and specifically on their belief that the ULURP Rules require ULURP hearings to be held in-person. *See e.g.,* Pets' Mem. of Law (Dkt. No. 14) at 17–19. To the extent those claims have any basis—and they do not—they have been nullified by Mayor de Blasio's issuance of Executive Order 188 on March 13, 2021, annexed to this affirmation as Exhibit A. That Order explicitly suspends any in-person hearing requirements that might independently exist under the City's ULURP Rules. Specifically, the Mayor's Order states that "hearings and meetings related to the Uniform Land Use Review Procedure may be held by remote means," and ratifies prior actions "taken in furtherance of holding such hearings and meetings by remote means." Ex. A, Mayoral Executive Order 188, §§ 2, 6. To this end, Mayoral Executive Order 188 explicitly suspends various provisions of the City's ULURP Rules to the extent those provisions could be read to prohibit remote ULURP meetings or hearings. *See* Ex. A. § 2(b) (suspending certain ULURP Rules "to the extent such

provisions would require physical in-person hearings or meetings to be held by community boards, borough boards, or the City Planning Commission, in order to enable the holding of hearings and meetings by remote means"). The provisions specifically suspended by the Order are: RCNY Title 62 Chapter 1 Section 1-01, Chapter 2 Sections 2-03(d) and (e), Chapter 2 Sections 2-05(c) and (d), and Chapter 2 Section 2-06(f).

4. As mentioned, Petitioners' third and fourth claims are premised on their reading of now-suspended ULURP Rules. They rely entirely on section 2-03(d), which requires that a community board hold its ULURP public hearing at a "convenient place of public assembly chosen by the board and located within its community district" or, "if . . . there is no suitable and convenient place within the community district, the hearing shall be held at a centrally located place of public assembly within the borough." 62 RCNY § 2-03(d); *see* Pets' Mem. of Law (Dkt. No. 14) at 17–18. This provision is suspended by Mayoral Executive Order 188. *See*, Ex. A, § 2(b)(ii).

5. It is beyond dispute that the Mayor, as chief executive, has authority to suspend local law, ordinances, and regulations in times of emergency. *See* N.Y. Exec. L. § 24; *see also* New York City Admin. Code § 10-171 (incorporating the Mayor's power to declare a local state of emergency pursuant to N.Y. Exec. L. § 24). In addition, there is no dispute here that both the State and the City have declared states of emergency due to the ongoing COVID pandemic.

6. As the Mayor has exercised this authority to suspend all relevant provisions of the ULURP Rules "to the extent such provisions would require physical in-person hearings or meetings to be held by community boards, borough boards, or the City Planning Commission," those provisions relied on by Petitioners are inoperative and therefore Petitioners' claims must be dismissed. Ex. A, Mayoral Executive Order 188.

7. The only other law governing the City's ULURP hearings is the State Open Meetings Law, codified at Art. 7 of the N.Y. Public Officers Law. The Open Meetings Law's requirement that public bodies, such as community boards, hold in-person meetings was suspended by the Governor in March 2020. Specifically, the Governor amended the Open Meetings Law "to the extent necessary to permit any public body to meet and take such actions authorized by law without permitting in public in-person access to meetings and authorizing such meetings to be held remotely by conference call or similar service, provided that the public has the ability to view or listen to such proceeding and that such meetings are recorded and later transcribed." (emphasis added). N.Y. Exec. Order No. 202.1 (March 12, 2020). The Governor's Order continues to be renewed monthly and remains in effect. *See* N.Y. Exec. Order No. 202.96, dated February 26, 2021 (extending the suspension of in-person requirements of the Open Meetings Law, among other things).

8. The remote hearing procedures used by Respondent City Planning Commission far exceed the minimum requirements for public access set forth in the Open Meetings Law as modified by N.Y. Exec. Order No. 202.1. As set forth in greater detail in the Affirmation of Susan Amron, dated January 25, 2021 ("Amron Aff.") (Dkt. No. 66) ¶¶ 21–24, City Planning Commission's remote public hearings process allows the public not only the "the ability to view or listen," as required by N.Y. Exec. Order No. 202.1, but also the ability to participate by phone or Zoom (video-conference). The Commission makes video recordings of the hearings freely available online and provides transcripts upon request. Amron Aff. ¶ 24.

9. The remote hearing procedures used by the affected community boards, which are not named in this litigation, likewise exceed the minimum requirements for public access set forth in the Open Meetings Law as modified by N.Y. Exec. Order No. 202.1. *See e.g.,* Letter from

Christopher Gene King to the Court, dated March 12, 2021, (Dkt. No. 145) (setting forth procedures for public access and participation in remote hearings held by Brooklyn community boards 6 and 2, which, like the Commission's remote hearings, are accessible by phone and video-conference); *see also* Supplemental Affidavit of Jonathan Keller, dated February 12, 2021 (Dkt. No. 115) (providing further detail regarding remote hearings processes for Brooklyn community board 6).

10. As Mayoral Executive Order 188 suspended the ULURP Rules in dispute "in order to enable the holding of hearings and meetings by remote means," Ex. A § 2(b), and the ULURP remote hearing processes far exceed the minimum requirements provided by N.Y.S. Executive Order 202.1, Petitioners' third and fourth claims, arguing that remote ULURP hearings are unlawful, must be dismissed.

Petitioners' first claim—regarding precertification notice to community boards and the borough president—must be dismissed per this Court's ruling.

11. Petitioners seek mandamus to compel Respondent DCP to provide notice of certification of the Gowanus Neighborhood Plan ULURP Application to Brooklyn community boards 2 and 6, the Brooklyn borough president, and the Brooklyn borough board (the "Affected Public Bodies") pursuant to City Charter §197-c(c) ("Section 197-c(c)"). At the hearing on February 4, 2021, the Court ruled that the email notice provided by DCP to the Affected Public Bodies on December 18, 2020[1] complied with the precertification notice requirement in Section 197-c(c), and in any event, that the Petitioners lack standing to challenge such notice to the Affected Public Bodies. The Court's ruling was as follows:

[1] DCP's email providing precertification notice to the Affected Public Bodies can be found in the record as Dkt. No. 78.

> I want you to issue an order officially that the precertification that occurred met the standards set forth in the law because to me only the community board . . . and the boro (sic) president and the boro (sic) president's body that have the interests in whether or not they are able to access what is necessary.

Transcript of Oral Argument at 62:20-25, *Friends and Residents of Greater Gowanus et al. v. City of New York et al.*, 501178/2021 (Sup. Ct. Kings County Feb. 4, 2021), annexed to this affirmation as Exhibit B ("Transcript of Feb. 4, 2021 Hearing").

> I am ruling on the first prong if (sic) Mr. Zakai's argument in terms of precertification, it was ample notice to the Community Board. [The Community Board] are not the plaintiffs and petitioners. They are not challenging it.

Ex. B, Transcript of Feb. 4, 2021 Hearing at 68:10-15.

> There was a two-party argument [Petitioners] had last time. One was that [precertification notice] wasn't properly published to the Community Board, and I found that it was.

Ex. B, Transcript of Feb. 4, 2021 Hearing at 64:22-25.

12. As this Court has acknowledged, and as set forth more fully in Municipal Respondents' Mem. of Law (Dkt. No. 102) Point I, Section B, DCP fully complied with the Charter-mandated precertification notice requirement. Accordingly, Petitioners' first claim must be dismissed.

This Court has likewise indicated that Petitioners' second claim regarding publication of the precertification notice lacks merit and accordingly it must also be dismissed.

13. As set forth more fully in Municipal Respondents' Mem. of Law (Dkt. No. 102) Point I, Section C, Petitioners' second claim—alleging that DCP's method for publishing precertification notice to the public was insufficient—has no merit.

14. During the February 4, 2021 hearing, the Court indicated its intent to dismiss Petitioners' second claim unless Petitioners could provide further support for their argument that DCP's

publication of the precertification notice was insufficient and that they have standing to assert this claim. Specifically, the Court directed Petitioners' counsel as follows:

> Mr. Zakai, unless you can confirm to me the . . . second portion of your argument about precertification, that the little link that was place (sic) on the City Planning Commission website violates the law and that you have standing as petitioners, you know, members of the community, not of CB6 or CB2 to complain about it, I will go ahead and find this precertification business is fine.

Ex. B, Transcript of Feb. 4, 2021 Hearing at 69–70:25-7.

15. Petitioners have not provided further support for their second claim, and therefore Petitioners' second claim must be dismissed in accordance with this Court's direction on February 4, 2021.

16. Moreover, the Court has acknowledged that by continuing to seek mandamus to compel DCP to publish the precertification notice in the manner they prefer, Petitioners elevate "form over substance because the main purpose of the petition is to provide community access" and the public already has access to the entire ULURP Application. *See* Ex. B, Transcript of Feb. 4, 2021 Hearing at 68:23-25. Given that DCP published the entire ULURP Application on its website for public review after this Court partially lifted the temporary restraining order that had been enjoining DCP from taking such action,[2] Petitioners' second claim must be dismissed.

[2] By Order dated January 29, 2021 (Dkt. No. 100), the Court partially lifted the Temporary Restraining Order issued January 15, 2021 against Respondents to allow DCP to release the ULURP application for the Gowanus Neighborhood Plan to the public.

Petitioners' fifth and sixth claims—that Municipal Respondents' alleged failure to comply with ULURP Rules violates Constitutional Free Speech and Due Process—lack merit and must be dismissed.

17. Petitioners' fifth claim—arguing that Municipal Respondents' alleged failure to comply with the notice and hearing requirements of ULURP violates Petitioners' Due Process rights under the Fourteenth Amendment of U.S. Constitution—must be dismissed because it relies on their other meritless claims. As discussed, the disputed hearing requirements were suspended by the Governor's Order, N.Y. Exec. Order No. 202.1, and confirmed by the Mayor's Order, Ex. A, Mayoral Order 188, and the Court has already ruled that the City provided sufficient notice. *See supra* ¶¶ 3–10, 11–18.

18. Petitioners' sixth claim, arguing that Municipal Respondents' alleged failure to comply with ULURP Rules by utilizing remote hearings violates Petitioners' Free Speech rights under the First Amendment of the U.S. Constitution, *see* Verified Petition ¶ 246, must likewise be dismissed. Like Petitioners' fifth claim, this claim is premised solely upon an alleged violation of in-person requirements for hearings and meetings which were suspended by the Governor's Order, N.Y. Exec. Order No. 202.1, and confirmed by the Mayor's Order, Ex. A, Mayoral Order 188. *See supra* ¶¶ 3–10 . Therefore this claim must be dismissed.[3]

[3] And regardless, as set forth in Municipal Respondents' prior submissions to the Court, neither of Petitioners' Constitutional claims has any merit. *See* Municipal Respondents' Mem. of Law (Dkt. No. 68), Point III; *see also* Letter from Christopher Gene King to the Court, dated February 12, 2021 at 8–9 (responding to the Court's questions regarding Petitioners' First Amendment argument).

At a minimum, this Court should deny Petitioners' request for preliminary injunction forthwith and lift the Temporary Restraining Order.

19. As we have explained in our prior submissions to the Court, *see generally* Municipal Respondents' Mem. of Law (Dkt. No. 102) Point IV, Petitioners have failed to meet their high burden to demonstrate that they are entitled to the severe remedy of preliminary injunctive relief. *See Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 862 (1990) (setting forth the standard for preliminary injunctive relief, which requires Petitioners to demonstrate a likelihood of success on the merits, that they will suffer irreparable injury if the relief is not granted, and that the balance of the equities favor granting the preliminary injunctive relief).

20. For the reasons detailed above, and those set forth in the Municipal Respondents' prior submissions to the Court, Petitioners have not demonstrated a likelihood of success on the merits. *Aetna Ins. Co.*, 75 N.Y.2d at 862. As the Court has indicated, Municipal Respondents complied with the ULURP Rules regarding precertification notice and publication thereof, *see supra* ¶¶ 11–16. And Petitioners' remaining claims challenging the lawfulness of the remote ULURP hearings likewise have no merit as they are premised solely upon alleged violations of in-person requirements for hearings and meetings which were suspended by the Governor's Order, N.Y. Exec. Order No. 202.1, and confirmed by the Mayor's Order, Ex. A, Mayoral Order 188.

21. Petitioners likewise fail to demonstrate that they will suffer irreparable harm if Respondents are permitted to move forward with public review of the Gowanus Neighborhood Plan ULURP Application. Attempting to satisfy this requirement for preliminary injunctive relief, Petitioners argue that they will be harmed if public review of the ULURP Application commences because they fear they will not be able to adequately advocate for their position without in-person hearings. Municipal Respondents' Mem. of Law (Dkt. No. 102) Point IV, Section B. This argument is *speculative* at best, and therefore is insufficient to demonstrate the requisite irreparable

harm. *See Rowland v. Dushin*, 82 A.D.3d 738, 739 (2d Dep't 2011); *Family-Friendly Media, Inc. v. Recorder Television Network,* 74 A.D.2d 738, 739 (2d Dep't 2011); *see also Hell's Kitchen Neighborhood Ass'n v. N.Y. City Dep't of City Planning*, 6 Misc. 3d 1031(A) (Sup. Ct. New York County 2004) (finding that the "holding of a public hearing will not impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process that inflicts an actual injury" such that the holding of a public hearing "does not constitute an actual, concrete injury") (internal quotations and citations omitted). Moreover Petitioners allegations have no basis in fact, given the robust and extensive remote hearing procedures established by the City Planning Commission and the affected community boards allowing for public participation in the URLURP process.

22. Given that Petitioners' claims have no merit and the lack of irreparable injury to Petitioners, there is no basis to continue a stay of the ULURP review of the Gowanus Neighborhood Plan. ULURP review of the Gowanus Neighborhood Plan has now been stayed for two months. The relief Petitioners seek—to continue to enjoin public review of the ULURP Application—*certainly* has seriously harmed and continues to harm Municipal Respondents, as well as the myriad community members and stakeholders who wish to have the opportunity to participate and be heard on the ULURP Application. *See* Municipal Respondents' Mem. of Law (Dkt. No. 102) Point IV, Section C. Petitioners ask the Court to stifle public discourse by depriving Petitioners' fellow community members the opportunity to be heard on this long anticipated proposal intended to spur creation of much-needed jobs, housing, open space, and community amenities. *See* Affidavit of Jonathan Keller ("Keller Aff."), dated January 25, 2021 ¶¶ 4, 14. Numerous community members with disparate opinions on the land use proposal have expressed their desire for the injunction to be lifted and for public review of the ULURP Application to go

forward. *See* Keller Aff. ¶ 14. Moreover, continued delay of public review of the ULURP Application also impedes the orderly administration of City government, causing delays and uncertainty with cascading consequence well beyond the Gowanus neighborhood. *See* Amron Aff. ¶¶ 25–26.

23. In light of the important public interests detailed here and set forth more fully in Municipal Respondents' prior submissions, and Petitioners failure to establish "any imminent and nonspeculative harm," *Rowland*, 82 A.D.3d at 739, the balance of the equities plainly tip in favor of denying preliminary injunctive relief. *Seitzman v. Hudson River Associates*, 126 A.D.2d 211, 214 (1st Dep't. 1987) ("[W]hen the court balances the equities in deciding upon injunctive relief, it must consider the 'enormous public interests involved") (internal quotations and citations omitted).

Conclusion

24. Given the continuing harm a preliminary injunction will cause the City, as well as to myriad important public interests including delay of public review of land use proposals and the public benefits such proposals could spur, we respectfully request that the Court immediately lift the Temporary Restraining Order issued January 15, 2021 and deny Petitioners' motion for a preliminary injunction.

25. As Mayoral Executive Order 188 resolves any possible basis for Petitioners' claims regarding remote hearings, and as the Court has already indicated that the Petitioners' remaining claims regarding ULURP precertification notice have no merit, we respectfully request that the Court dismiss the Petition.

Dated: March 17, 2021
New York, New York

JAMES E. JOHNSON
Corporation Counsel of the City of New York
Attorney for Municipal Respondents,
the City of New York and the New York City
Economic Development Corporation
New York City Law Department
100 Church Street Rm. 6-132
New York, New York 10007
(212) 356-2311

BY: RACHEL RAMIREZ-GUEST
Assistant Corporation Counsel
Environmental Law Division
rguest@law.nyc.gov