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August 18, 2017

Via Email

Hon. Antoinette Gluszak Reed
Legislative Counsel
Orange County Legislature
15 Matthews Street, suite 203
Goshen, New York 10924

Re: Petition to Form the Town of North Monroe

Dear Ms. Reed:

On behalf of the agents for the town formation petitioners, please accept this letter for consideration by the County Legislature in support of the Town Law Article 5 petition for the division of the Town of Monroe to form the Town of Palm Tree. It comes in response to certain claims made by others during the public hearings that your action is both subject to SEQRA and that the Legislature is compelled to issue a positive declaration and complete an Environmental Impact Statement before it determines whether the petition for the formation of the Town of Palm Tree is adequate to present the proposition Town of Monroe electors in November. Such comments are lacking in foundation and are clearly an inappropriate attempt to use the SEQRA process as a delay tactic or worse, as a litigation threat to influence the outcome of your review.

Specifically, this letter comes in response to a letter by Attorney Golden (dated August 11, 2017), purportedly writing on behalf of an unspecified local municipal group opposing the Kiryas Joel annexation. The failure to identify any specific municipality is curious, since members of the group of municipalities that

have sued the Village over its annexation include the County, as well as the Villages of Harriman and Monroe, each of whom appeared separately at the hearing in support of the petition, and not one of them raised the need to delay the Legislature's vote in order to complete an EIS.

As you are aware, it has been the expressed position of the Village of Kiryas Joel that granting the Article 5 Petition allowing the electorate to vote on town formation is not an action subject to review under SEQRA. The agents for the petitioners concur in this position. The formation of a new town is no different than the statutory process for establishing a Village under Village Law, an action that is not subject to review under SEQRA. Just as with a Town Board's role in review of a Village Law Article 2 petition for the establishment of a village, the County Legislature's role here in review of a Town Law Article 5 petition for the establishment of a new town is to ensure that the petition is adequate and complete in order to allow the electors of the Town to decide the substantive issue of whether they desire a division of the Town and creation of a new town.

Specifically, the County's review of an Article 5 petition is not an "action" under SEQRA because it does not meet the definitional criteria set forth in the SEQRA regulations. SEQRA actions are projects or physical activities, such as construction or other activities, that may affect the environment by changing the use, appearance or condition of any natural resource or structure, that:

(i) are directly undertaken by an agency; or
(ii) involve funding by an agency; or
(iii) require one or more new or modified approvals from an agency or agencies.

Granting the petition and providing for the submission of a proposition to the electors is not a "project or physical activity." Likewise, it does not require the County to "directly undertake" or "fund" the proposed town formation; nor does it require the County to approve the formation of the town, but only to conduct a hearing and determine to submit the petition to the electors of the Town of Monroe. The County's determination does not entitle or otherwise authorize the formation of the town, except to the extent that it permits the electors to vote on the issue. Thus, the County's determination to grant the petition is not an "action" under SEQRA.

New York courts have consistently held that Town Board review of a petition to establish a village does not trigger review pursuant to SEQRA. For example, in the case of *O'Keeffe v. Bonelli*[1], the Orange County Supreme Court held that:

> *Where, as here, the proposed incorporation merely creates a separate government for some of the residents of Blooming Grove, but does not itself result in any construction or the commencement of any new projects within the boundaries of the new village, compliance with SEQRA is not required.*

A similar ruling was handed down by the Appellate Division, Third Department, in *Defreestville Area Neighborhood Ass'n, Inc. v. Tazbir*[2], also definitively concluding that SEQRA is not applicable to a village incorporation process. **In fact, in the recent formations of both the Village of South Blooming Grove and the Village of Woodbury, neither village formation was preceded by any SEQRA review at all, much less by an EIS.** It is our understanding that Attorney Golden represents the Planning Board for the Village of Woodbury, so it is assumed he is intimately familiar with that Village's formation.

The same rationale dispelling the applicability of SEQRA to village formation is clearly applicable to the formation of a town; the comparison of a village and town formation is much more rational than comparison of town formation to a municipal annexation, as has been done by others. For example, SEQRA expressly lists annexation of over 100 contiguous acres as a SEQRA Type I action. No such reference to Article 5 town formations exists anywhere in SEQRA.

Moreover, in the 2004 case of *Watervliet v. Town of Colonie*[3], identified in Attorney Golden's letter, the Court of Appeals specifically addressed SEQRA compliance for annexation actions only; it did not address the applicability of SEQRA to town or village formations. Moreover, while the *Watervliet* case held that SEQRA was specifically applicable to annexation proceedings, the Court also found that the extent of the SEQRA review must be reflective of the breadth of the action and, in that case (as here), where there is no development project or rezoning

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[1] 170 Misc.2d 218 (Orange County, 1996).
[2] 23 A.D.3d 70 (3d Dept 2005).
[3] *City Council of Watervliet v Town Board of the Town of Colonie*, 3 NY3d 508 (2004).

application presented with the petition before the municipality, a negative declaration was an appropriate course to follow.[4]

Here, while reserving the position that SEQRA is not applicable at all, in an effort to promote a peaceful resolution of this issue the Village and the agents for the petitioners have not objected to the County moving forward with the preparation of an EAF under SEQRA by the County Planning Department. In 2015, the County consigned a comprehensive planning report by CGR that assessed potential issues related to the expansion of the Village (including both environmental and fiscal issues). As a result, the County is now in possession of more than sufficient information and data to consider potential impacts from such expansion through the formation of a new town, especially where there are no development projects proposed or even an implementing government before it. This information is likewise more than adequate to support issuance of a negative declaration under SEQRA.

Accordingly, the formation of a new town does not involve an "action," as defined by SEQRA, and the County Legislature could well proceed with its obligations under Town Law Article 5 without SEQRA review. Nevertheless, now that a SEQRA review has been commenced through completion of a full EAF, no basis exists for causing delay by requiring an EIS.

Thank you for your consideration.

Respectfully submitted,

Michael G. Sterthous

[4] See also, *Cross Westchester Development Corp. v Town Board of the Town of Greenburgh*, 141 AD2d 796 (2d Dept 1988)(The town board could not require a DEIS "based on a speculative possibility of use of the property.")