

2 STATE OF NEW YORK : COUNTY OF ERIE
3 SUPREME COURT

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5 In the Matter of the Application of,
6 KATHLEEN MECCA, ANTHONY F. MECCA,
7 STEPHEN L. GREENE, JAMES R. GLOSE,
8 ELIZABETH A. MARTINA,
9 WILLIAM MARK WESTERHOLT,
10 PETER J. CERTO, JOANNE CERTO,
11 MELISA HOLDEN and ROBERT HOLDEN,

12 PETITIONERS/PLAINTIFFS,
13 INDEX #I2014-000160

14 For a Judgment pursuant to CPLR Art. 78 SFL 123-b

15 -against-

16 MOTION

17 EMPIRE STATE DEVELOPMENT, a/k/a
18 NEW YORK STATE URBAN DEVELOPMENT CORPORATION,
19 KENNETH ADAMS, in His capacity as President & CEO
20 of EMPIRE STATE DEVELOPMENT, NYS DEPARTMENT OF
21 TRANSPORTATION, JOAN McDONALD, in Her capacity as
22 Commissioner of the NYS Department of Transportation,
23 and CITY OF BUFFALO, NEW YORK,

24 RESPONDENTS/DEFENDANTS,

25 -----
26 92 Franklin Street
27 Buffalo, New York 14202
28 October 2, 2013.

29 HELD BEFORE: HONORABLE JOHN F. O'DONNELL,
30 SUPREME COURT JUSTICE.

31 APPEARANCES: ARTHUR J. GIACOLONE, ESQ.,
32 Appearing for the Plaintiffs.

33 JANE CAMERON, ESQ.,
34 TIMOTHY HOFFMAN, ESQ.,
35 ASSISTANT CORPORATION COUNSEL,
36 Appearing for the Respondents.

37 DAVID LEE, ESQ.,
38 Appearing for the City of Buffalo.

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STEPHEN GAWLIK, ESQ.,
Appearing for Empire State Development.

LISA G. PAZDERSKI,
Supreme Court Reporter.

2 THE COURT: Mr. Giacalone, is that the
3 correct way to say it?

4 MR. GIACALONE: My family says Giacalone, but
5 there's many ways to say it.

6 THE COURT: Mr. Giacalone, let me ask you a
7 question: Isn't this whole project or the number
8 of projects funded by the federal government?
9 Isn't it all federal money that is coming through
10 here?

11 MR. GIACALONE: The Empire State Development
12 project is not federal money at all as far as I
13 know related to the Episcopalian Church Home. The
14 States's papers say that some of their funding for
15 the Gateway Connection is federal and some is
16 state. I don't know the distribution between the
17 two.

18 THE COURT: Nor do I, that's why I'm asking
19 if it is federal money. Isn't the federal
20 government a necessary party?

21 MR. GIACALONE: Well, as I attempted to
22 explain -- as I reread it late last night, as I
23 attempted to explain, the petitioners are not
24 challenging the decisions made by the Federal
25 Highway Authority, they are only challenging the

2 State D.O.T.'s obligation under SEQRA to do a full
3 cumulative impact study on all projects that are
4 part of a larger plan. That requirement is
5 specifically spelled out in the SEQRA regulations,
6 but there's -- I can find no similar requirement
7 under the Federal NEPA, the Federal Environmental
8 Review Project. And the document that was
9 prepared as the joint record on decision was meant
10 to comply with each -- both NEPA and SEQRA. We
11 are not challenging the Federal Highway
12 Administration's decisions and determinations at
13 all.

14 The -- one of the affidavits that was
15 submitted on behalf of D.O.T. had attached to it,
16 I believe it was a February -- excuse me, a
17 September 24th, 2014 letter from the highway
18 administration that in no way suggests that they
19 view themselves as a necessary party, and just
20 said: We wish you luck in defending this
21 proceeding.

22 We don't believe that the federal agency has
23 to be part of this project. The criteria in CPLR
24 1001(b) would need to be addressed in a much
25 fuller extent than is allowed on the motion to

2 dismiss that we have right now.

3 And the -- under the standard of review
4 that's been in place for many, many years for an
5 Article 78 pre-answer motion to dismiss, our facts
6 have to be treated as true, and we get the benefit
7 of the doubt of any of the inferences.

8 So, it appears from Petitioner's perspective
9 that that issue -- that there's not enough on the
10 record to allow respondents' motion to succeed at
11 this point, but we also believe, again, that the
12 Federal Highway Administration is not implicated
13 in the SEQRA determinations and the SEQRA
14 obligations that we are challenging.

15 THE COURT: Okay. That's really --

16 MR. GIACALONE: Is that the only --

17 THE COURT: -- the only question I had at
18 this point. Mr. Lee?

19 MR. LEE: Yes, Your Honor. The allegations
20 in the petition as against -- Your Honor, do you
21 want me to address specifically your question on
22 whether the federal government is a necessary
23 party?

24 THE COURT: You could address that. And then
25 you could tell me why you should be excused, I

2 would suppose.

3 MR. LEE: I would like to get to maybe how --
4 why the City should be excused. The allegations
5 against the City of Buffalo are fairly limited,
6 especially now that they have been flushed out in
7 the reply papers of Mr. Giacalone.

8 The main allegations in the petition as
9 against the City of Buffalo is that the City of
10 Buffalo somehow transferred property to the state,
11 and I think that petitioners are now conceding
12 that that never happened. This property was taken
13 by the state pursuant to the Eminent Domain Law.
14 And that happened, Your Honor, when the state
15 filed its acquisition maps in the Erie County
16 Clerk's Office. There's no discretion on the part
17 of the City of Buffalo here at all, Your Honor.
18 Pursuant to the Eminent Domain Law, when the state
19 filed its acquisition maps in the clerk's office
20 on July 17th, which is almost two weeks before the
21 common council meeting that is the subject of this
22 proceeding also, that's when the state acquired
23 that property.

24 So, Your Honor, on that point which I think
25 is the main allegation against the city, there's

2 simply no merit to it.

3 And the other two ancillary allegations,
4 perhaps, against the City of Buffalo are that the
5 City of Buffalo somehow created a city debt when
6 it approved the Betterment Project agreement. But
7 in actuality, Your Honor, that allegation, first
8 of all, is never mentioned in the petition, at
9 least not specifically. That appears for the
10 first time in petitioners' reply papers. And even
11 assuming for the sake of argument that allegation
12 is properly before The Court, the street lighting
13 part of the Betterment Project Agreement was
14 actually approved by a prior bond resolution. So,
15 if you take that part out, the street lighting
16 part of the Betterment Project Agreement and you
17 simply look at: Let's take the money that the
18 city received from the states's taking that was
19 approved with the agreements for advanced payment,
20 and then you subtract the amount that the city is
21 paying out pursuant to the Betterment Agreement
22 for the improvement of the Porter Avenue bridge,
23 then actually, it is not a city debt at all. The
24 city is actually receiving a profit. And this is
25 all one common council proceeding, Your Honor.

2 This is all one item.

3 So, in other words, if you take all of the
4 money that the city received from the takings, and
5 then you subtract from that the amount that the
6 City of Buffalo is paying out for the Porter
7 Avenue Bridge Project, it actually yields a profit
8 to the City of Buffalo.

9 And Your Honor, with respect to petitioners'
10 last allegations regarding the open meetings law,
11 I would simply state that all of this information
12 regarding this approval by the common council was
13 actually made available to the public on July
14 21st. And that's not even disputed, that's an
15 allegation in the petition. So, we have all of
16 this information that the council considered when
17 approving the Betterment Project Agreement, and
18 when approving the agreement for advanced payment,
19 all of this was already on file with the council
20 and was made available to the public a week in
21 advance on or about July 21st of this year.

22 And I think with that, Your Honor, I've
23 addressed all of the allegations in the petition.
24 Unless Your Honor has any questions, I would be
25 more than happy to address them.

2 THE COURT: No. Well, what about the
3 question -- if you want to address it, I don't
4 care whether you do or not -- whether the federal
5 government is a necessary party?

6 MR. LEE: Yeah, Your Honor, I think you are
7 right. If there is federal money involved, and it
8 appears that there is -- ultimately, I mean, the
9 broader point might be that any determination by
10 Your Honor in this proceeding/action would, could
11 potentially impact the federal government.

12 THE COURT: Doesn't that make them a
13 necessary party?

14 MR. GIACALONE: Well, the question is -- part
15 of it is how speculative is the suggestion that
16 they are impacted financially. We don't know.
17 And again, anything above and beyond our petition
18 is not appropriate at this stage in this
19 proceeding. The courts have made it clear that
20 there are voluminous affidavits; all of the
21 documentation is not under consideration on a
22 pre-answer motion to dismiss which is precisely
23 what we have here.

24 And the -- under CPLR 1001(b) there are five
25 specific criteria that The Court is obliged to

2 look at. And our position is it is impossible to
3 look at that without having -- if not a hearing, a
4 chance to specifically address those criteria, and
5 we believe this isn't the appropriate forum.

6 Again, the Federal Highway Administration,
7 their decision is not being impacted. The -- it
8 is -- their decision not being challenged. We are
9 challenging the D.O.T.'s inadequate SEQRA review.
10 But we see no harm to the Federal Highway
11 Administration if this matter is defended as they
12 applauded in their September -- I think it was the
13 24th letter by the State Attorney General's Office
14 without them being directly involved.

15 And again, if they, if that claim against
16 them somehow -- if The Court were to agree that
17 the Federal Highway Administration is a necessary
18 party, that doesn't touch -- that addresses that
19 one issue against the State D.O.T. but not the
20 other issues that we are raising in the lawsuit.

21 I was a little surprised that the state was
22 acting as if the entire lawsuit should be
23 dismissed, even though they also said if you have
24 a whole bunch of -- an amalgam of separate
25 allegations, which I guess means there's different

2 kinds of projects and different kinds of things
3 happening here, why the whole thing would be
4 tossed out when This Court certainly has the
5 authority to sever any claim that it thinks
6 there's an omitted party on and allowing the rest
7 of lawsuit to go forward.

8 But, again, we believe that with the standard
9 for review on a pre-answer motion to dismiss, that
10 the requirements of 1001(b), the five criteria The
11 Court is obliged to look at, those criteria are
12 not before The Court. The facts are not before
13 The Court. And they need to be considered as The
14 Court decides, within its discretion, whether to
15 allow the cause of action to go forward with or
16 without -- even if you concluded they are a
17 necessary party, This Court has the discretion
18 under 1001(b) to say that we can go forward with
19 this claim. And we don't see how that is possible
20 to do at this stage in the proceeding.

21 THE COURT: Okay. Mr. Hoffman, is it?

22 MR. HOFFMAN: May I be heard on these two
23 points briefly?

24 THE COURT: Certainly, yes.

25 MR. HOFFMAN: Thank you. Judge, on the two

2 points that have come up, the first one you raised
3 about necessary party, and then Mr. Giacalone's
4 statements about stating a claim and what does or
5 doesn't have to be considered by The Court, we
6 move to dismiss on necessary party state
7 respondents -- and by the way, if it is okay with
8 The Court, I'm mostly going to address the D.O.T.
9 project and Ms. Cameron would like to talk about
10 the Episcopal Home Project. But on the necessary
11 party piece, the standard under CPLR 1001(a) is
12 whether a party who is not in the case might be
13 inequitably affected.

14 As we pointed out in our papers, this is a
15 project that was studied jointly by the federal
16 and state government. It is funded jointly by the
17 federal and state governments, and we submitted to
18 The Court a case from the Court of Appeals called
19 Swazy, which says that: When a party is necessary
20 under 1001(a), and when the absent party is
21 immune, sovereign immunity -- in that case it was
22 a foreign country -- here we have the United
23 States -- immune from the state court; then The
24 Court in that case pretty much cut to the chase on
25 1001(b) and found the immunity factor to be a

2 dominant factor and dismissed the case for
3 necessary party grounds.

4 Now, this relates to something petitioners
5 have said on reply about what they are and aren't
6 challenging, and it goes to how the federal
7 government is sort of inextricably part of this
8 \$56 million highway project.

9 Mr. Giacalone says the petitioners, they want
10 a supplemental Environmental Impact Statement to
11 address a larger plan, and I'm prepared to explain
12 in detail why there is no such larger plan for any
13 practical purpose. But he says that they are not
14 challenging the record of decision of the D.O.T.
15 itself, they are just challenging D.O.T.'s
16 approval of it.

17 Well, respectfully, that is a distinction
18 without a difference here. The D.O.T. explained
19 in the record decision which petitioners have
20 largely left out of their pleadings to the thing
21 they are challenging -- this record of decision,
22 this animal that is their final action, that is
23 under SEQRA regulation, that is the D.O.T.'s
24 legally required decision document. They don't
25 just approve it, they make that decision. And

2 here that decision was made jointly with the
3 federal government, the Federal Highway
4 Administration. You cannot get to requiring the
5 kind of additional studies that petitioners have
6 asked for on reply without invalidating that joint
7 decision. And to invalidate it not only hurts the
8 public because, as I'll explain later perhaps, you
9 know, this is a project that takes
10 interstate-bound traffic off of local roads, takes
11 it out of a park, a historic park, and it has no
12 negative environmental impacts.

13 To stop that project not only hurts the
14 public and the state, but it also may, under the
15 standard of CPLR 1001, it might well inequitably
16 affect the federal government. Why? Because they
17 may have to pay for new studies. They have
18 already paid for many, many studies. And as we
19 have tried to touch upon in our papers, you know,
20 we are on the eve of construction here. And if
21 this project was stopped, there are any number of
22 financial implications of that. And the federal
23 government would, you know, would share in that
24 pain.

25 The other thing I wanted to touch on at this

2 moment was the thing that came up about
3 Mr. Giacalone's assertion that whatever he --
4 whatever his clients have represented in their
5 pleadings has to be construed as true for this
6 motion to dismiss. We believe that's wrong.
7 There's a case -- there's a lot of cases, but the
8 latest case is from the Fourth Department in 2011
9 and it is called -- and we have supplied this and
10 a couple other cases that we didn't get a chance
11 to put in our papers to The Court already, but the
12 case is the Matter of Niagara County versus Power
13 Authority, Fourth Department 2011. And I'll
14 paraphrase: We agree with respondents that the
15 court below erred in denying the motion to dismiss
16 the Article 78 petition for failure to state a
17 cause of action. It is well settled that bare
18 legal conclusions and factual claims that are
19 flatly contradicted by the evidence are not
20 presumed to be true on a motion to dismiss for
21 failure to state a cause of action. We have made
22 that motion.

23 When the moving party offers evidentiary
24 material -- which we have done -- The Court is
25 required to determine whether the proponent of the

2 pleading -- petitioners here -- have a cause of
3 action, not whether they have just stated one.

4 So, both for stating a cause of action and
5 injunction purposes, the petitioners have to
6 present evidence they have a cause of action to
7 survive a motion to dismiss. And it is our
8 position they have not done that here. They have
9 to show they have a clear right to relief that is
10 plain from the undisputed facts, a meritorious
11 claim that they are likely to prevail on. They
12 haven't done that, either. Respectfully, we don't
13 even believe that's a close question here. They
14 have to demonstrate that the equities favor them,
15 which they don't for either of these public works
16 projects that are before you, nor it is our
17 position they do not demonstrate any irreparable
18 harm from this Gateway project, this highway
19 project. The preliminary injunction is a drastic
20 remedy. And here it would not be equitable to
21 grant that kind of extraordinary relief under
22 these facts.

23 Now, again, I got up because I wanted to
24 address your questions about necessary party and
25 what I think is the appropriate inquiry on these

2 motions. I can go on about why the things that
3 petitioners seek to review in this new study don't
4 exist to be reviewed, and I can talk about the
5 Gateway project. I'm just not sure how you want
6 to proceed.

7 THE COURT: You indicated that your
8 co-counsel wish to be heard, so I'm glad to hear
9 from her first.

10 MR. HOFFMAN: Okay. Thank you.

11 THE COURT: Mr. Gawlik is in the back there
12 hiding. I don't know what he's doing, whether he
13 wants to be heard or not. He put in papers. Yes,
14 ma'am?

15 MS. CAMERON: To the extent that we are
16 talking about assertions made in the petition that
17 are unsupported, and in fact, are flatly
18 contradicted both on a common sense level and in
19 terms of what has been presented by respondent,
20 all of those issues are doubly true when it comes
21 to planned abatement and remediation of the
22 Episcopal Church Home. There is no negative
23 declaration set forth in the petition. There is
24 no supporting final environmental assessment form.
25 There is no evidence whatsoever of the strong

2 support of -- Empire State Development had in
3 making its determination of a negative
4 declaration. How can you possibly rule on those
5 things without knowing what it is, without knowing
6 whether they took the hard look, whether they made
7 a reasoned elaboration of their determination, and
8 whether they identified the necessary issues. It
9 is just not there. And I mean, you could argue to
10 the contrary. You would find -- there's nothing
11 in the record that supports it. When you look at
12 our record, it shows that there was clearly a good
13 environmental review.

14 In terms of the necessary party issue, to the
15 extent -- and I think it is a very large extent --
16 that the petition rests on the idea that
17 cumulative impacts weren't studied, and through a
18 broader plan made by elected officials or
19 spokespeople or reporters, that there is some
20 correlation between the two projects; then to the
21 extent that the federal government funded this
22 project, which under their theory of the case
23 includes the Episcopal Church Home, the entire
24 matter requires dismissal. What more would you
25 like to know about, Judge?

2 THE COURT: I think I may know more than what
3 I care to know about a lot of things, but I think
4 that will do for now.

5 Mr. Giacalone, why do we have to assume that
6 everything you say in the petition -- petitioners
7 say is true, and without -- apparently what
8 you are suggesting is without considering at least
9 some of the evidence presented by the respondents?

10 MR. GIACALONE: Well, I guess the simplest
11 answer is because that is what the appellate
12 courts of the state have said for decades and that
13 is the standard. See, the respondents had a
14 choice when they responded to our petition: They
15 could answer the petition admitting or denying the
16 facts and do what CPLR requires, which is provide
17 to The Court the entire record.

18 When Ms. Cameron says that there's nothing in
19 the papers, and The Court -- excuse me, nothing in
20 our pleadings that attaches the negative
21 declaration, that's true. It is their
22 responsibility to do that. So, they had the
23 option of either answering and providing The Court
24 the entire record, and then in their answer, have
25 their affirmative defenses, or make a motion to

2 dismiss that is in effect a motion, a demure
3 motion, in which they are saying -- when they do
4 that, the courts have said repeatedly that when
5 they make their pre-answer motion to dismiss, that
6 they are assuming the accuracy, the truthfulness
7 of the facts in our pleadings.

8 So, the entire record is not in our pleadings
9 because it is their responsibility to provide it.
10 I think The Court -- I think I can suggest The
11 Court would say that we certainly did attempt to
12 be thorough in our petition, and we have attached
13 many affidavits, but the responsibility of the
14 respondents is to gather and certify and provide
15 records to The Court. That's not our
16 responsibility, that is their responsibility. And
17 that's why the courts have said: If you are going
18 to make a motion to dismiss ahead of time, it has
19 to be on objections of law, and that means that it
20 has to be treated as a demurrer, and the
21 petitioners' allegations are treated as true, and
22 the petitioner gets the benefit of the doubt.
23 So -- and again that's been the standard.

24 Now, it is -- curiously, my first contact
25 from the Attorney General's Office, Your Honor,

2 was on Sunday evening, I believe. I received an
3 e-mail from Ms. Cameron wanting to know if I
4 agreed that today's proceeding was going to be
5 addressing the preliminary injunction, and any
6 motion to dismiss that they filed. And did I
7 agree -- and then after the decisions from The
8 Court on that, they would have a right to answer.
9 And my response was: Just one little tweak, Jane.
10 You are acting as if the option of answering our
11 petition isn't available to you. And so, only if
12 there's a motion to dismiss that falls within the
13 appropriate standards. Now, should there be a
14 motion to dismiss now? I mean, they have delayed,
15 they have delayed providing The Court with the
16 answer that one would need. And I said it to be
17 partially amusing, but we have in this situation,
18 we do have he who whose name must not be named.
19 And we do have she whose name -- she who must not
20 be named when a huge part of our argument in our
21 petition is that there is a larger plan. That
22 Governor Cuomo made it clear in his press releases
23 in August of 2012, that he made it clear in his
24 Peace Bridge understanding that was issued by him
25 in June or July of 2013, that that is a larger

2 plan. That he himself called -- in the Peace
3 Bridge Understanding, he called it a roadmap for
4 the Peace Bridge Plaza expansion. We have that.
5 They didn't even mention and discuss any of that
6 in their papers. And --

7 THE COURT: With respect to the Governor, can
8 you believe everything, first of all, that you
9 read in the newspaper? And secondly, do you
10 believe all politicians' promises or assurances?
11 Didn't this whole thing start under his father or
12 before that?

13 MR. GIACALONE: Well, in response to that,
14 this is the -- in some ways, Your Honor, this is
15 the absurdity of their argument.

16 THE COURT: I don't mean to interrupt you. I
17 do mean to interrupt you because I have a
18 question.

19 MR. GIACALONE: Okay. Go ahead, I'm sorry.

20 THE COURT: Hasn't the state or some
21 subsidiary thereof done an environmental quality
22 review with regard to the Episcopal Church Home?

23 MR. GIACALONE: They issued a negative
24 declaration in which they did not take a hard look
25 at the noise issue, the view issue, the air

2 quality issue. And it is interesting they now
3 provide The Court with affidavits saying: Oh, we
4 thought about all of this stuff. We addressed all
5 of this stuff, with the exception that the
6 standards in the regulation for SEQRA, their
7 negative declaration needs to provide the
8 reference to all supporting documentation. That's
9 the language from the regulations. They need to
10 provide -- and none of it is there. They didn't
11 explain how they went from: We admit that this,
12 these six buildings, a hundred ninety thousand
13 square feet, some of the -- the closest buildings
14 to the residents is four stories high. We admit
15 it creates a noise barrier from the Peace Bridge
16 activities, and a visual barrier from the Peace
17 Bridge activities. But then: Voila, we conclude
18 knocking these buildings down and putting up a
19 berm with a couple of trees is not going to have a
20 significant impact on the residents who are 50
21 feet away from this. So, that's all they have in
22 a negative declaration regarding noise, regarding
23 visual. And the law and the regulations in the
24 court decisions say you need a reasoned
25 elaboration and you need to be providing

2 references to supporting documentation. Their
3 negative doc doesn't do that. That in and of
4 itself is a major deficiency that warrants setting
5 aside. But what the Empire State Development also
6 didn't do is look at the longterm and cumulative
7 impact of whatever development is going to be
8 happening on that parcel. What the state paid
9 \$4.7 million for a parcel that they themselves
10 appraised at \$1.7 million and the governor comes
11 to town and says: This is the final piece that we
12 need in our Peace Bridge expansion project,
13 singular, project, the public, my clients, the
14 public generally, and this Court, I believe, have
15 the right to say: There is a plan.

16 What I would love just for a moment to say is
17 here is the absurdity of suggesting there is no
18 plan: We have the State D.O.T. involved in a
19 major project. We have the Empire State
20 Development involved in a project. We have the
21 city involved in the Niagara Street Gateway
22 Connection. We have the Peace Bridge Authority
23 itself involved in a number of on-going activities
24 right now, all of which are for the ultimate goal
25 of increasing the efficiency of the -- of travel

2 to and from the plaza. And they are claiming that
3 there is no larger plan, that there is no somehow
4 guiding light for all of that, that -- I can tell
5 you want to ask me something.

6 THE COURT: Let's go back to the city.

7 MR. GIACALONE: Okay.

8 THE COURT: Why shouldn't they be out?

9 MR. GIACALONE: Because what Mr. Lee is
10 saying reinforces the problems that we have had --
11 we, the public, and my clients have had throughout
12 the city's activities in furthering the Gateway
13 Connection Project. As the lengthy transcript at
14 paragraph 50 of our verified complaint indicates,
15 the official who is named, coincidentally, the New
16 York State Program Manager for the Peace Bridge,
17 the Maria Lehman, they created a new position to
18 manage, on behalf of New York State, the various
19 projects and activities. She talks -- she who
20 again, who must not be named and wasn't referred
21 to in any way in the responding papers -- she
22 talks about their plans to make sure that the
23 public is uninformed until the last possible
24 moment, and that anyone in the City of Buffalo who
25 might try to put some pebbles in the way of

2 bulldozers would be circumvented. And it is
3 there. They have not in any way refuted it. It
4 is there and verified. This Court must assume
5 that it is true, that's what was said. And the
6 whole plan was to somehow finalize the Gateway
7 Connection contracts between the Peace Bridge --
8 between the D.O.T. and the city without the public
9 knowing.

10 As I tried to explain in my reply
11 affirmation -- and I've been reading these
12 documents unfortunately for 38 years now -- as a
13 lawyer, I could not tell for certain what was
14 approved on July 29th. The cover motion paper
15 that was filed by the Commissioner of Public
16 Works, Mr. Stefniak, refers to the -- asking the
17 common council to give authority to the mayor and
18 to him, the commissioner of public works to
19 finalize the pending -- which means to me it
20 hasn't been finalized -- the pending acquisition
21 of city -- of easements right and fee interest,
22 ownership interest in city land in the vicinity of
23 the Peace Bridge in furtherance of the Gateway
24 project. That's what that document says. I'm
25 thinking: Well, it is not artfully written, but

2 apparently, that document conveyed the property.
3 If it didn't convey the property, it did what we
4 say and Mr. Lee is incorrect when he says the
5 Betterment Project is not alleged and discussed in
6 our papers because it is. The -- both the
7 Betterment Project Agreement and the, excuse me --
8 project agreement and the agreements for advanced
9 payments were part of finalizing the city's
10 authority and approval and consent to allow the
11 state to go forward. But we couldn't tell it
12 happened.

13 Here we have -- on April 25th, we have the
14 program manager from New York State's Peace Bridge
15 Program, we have her saying: We are going to
16 wait. No, Mr. Masiello, former Mayor of the City
17 of Buffalo, member of the PBA board, we are not
18 going to talk about this publicly until day 121,
19 the day after the statute of limitations expires,
20 but we are also going to do our best to circumvent
21 and not have people know about it.

22 According to these papers, the actual
23 acquisition by the state was accomplished on July
24 14th. What a coincidence that it was July 17th
25 that Mr. Stepniak filed a late filing to begin

2 with, called a late filing, with the common
3 council to try to get it on July 22nd. It didn't
4 happen on July 22nd because at least one council
5 member objected.

6 As Mr. Rivera, Council Member Rivera's
7 affidavit says that is attached to one of these
8 papers of the state because it was objected to, it
9 was never discussed and it was never filed and
10 made part of the official record. And it was not
11 made part of the official record until July 29th
12 when all of a sudden -- if this thing wasn't
13 important to do -- all of a sudden the council
14 members, excluding Mr. Golumbek, approved having a
15 special meeting suddenly on July 29th waiving 24
16 hour notice. How about that? Not even having 24
17 hour notice, and they then went and approved
18 whatever this puff thing was. But whatever it
19 was -- and as we say in there, I actually say in
20 there: Upon information and belief, I'm not sure
21 what is happening, but I think they conveyed
22 property. Whatever it was, it was approved in
23 furtherance of the Gateway Connection Project, and
24 that is what we are challenging. And whether it
25 was conveyance or whether it was dotting the Is

2 and crossing the Ts to finalize the payment on
3 that conveyance, that's what it was. And that's
4 why for the city to think somehow we are out of
5 this because we couldn't tell in good faith what
6 exactly happened on July 29th, I think is not a
7 basis to dismiss our petition against them.

8 THE COURT: Mr. Hoffman, go ahead.

9 MR. HOFFMAN: Briefly, Your Honor, on the --
10 on these various statements and memos and things
11 like that, petitioners are asking The Court to
12 invalidate and stop two important expensive public
13 works projects including the Gateway project,
14 which was, we know, a massive federal state
15 environmental effort for failure to study plans
16 and projects that simply don't exist to be
17 reviewed in any real practical sense. They rely
18 on two-year old press releases from the governor.
19 They refer to his desires to make things happen
20 where he wants public policy to go, what he said
21 in his state of the state address and other
22 speeches. But, Your Honor, the governor does not
23 develop or execute specific project plans, state
24 agencies do. That is why under the law, the acts
25 of the governor are exempt from SEQRA.

2 We supplied The Court a case Matter of West
3 Village where the appellate division says
4 invalidating that exemption: Virtually any
5 conceivable acts of the governor would have to be
6 executed by a state agency and only then fall
7 within SEQRA.

8 And the Court of Appeals said in another
9 case: We have supplied to The Court called
10 Programming and Systems that until a specific
11 project plan for development is actually
12 formulated and proposed, environmental review is
13 simply not required.

14 Now, there's a case we supplied The Court
15 from Livingston County to supreme court that I
16 think explains in common sense language that
17 holding by the Court of Appeals, and I just quote
18 it here: The common sense reason for this is that
19 without a specific plan to assess, environmental
20 review information will necessarily be so general
21 and vague as to be essentially worthless for
22 planning purposes. To require environmental
23 review under such circumstances would obviously
24 prove to be an exercise in wasteful futility.

25 Now, Mr. Giacalone also referenced an

2 unsigned three-page memorandum of understanding
3 between Canadian and New York executives where
4 they describe projects they would like to see
5 happen; which, by the way, they acknowledge that
6 if any of those things were to be progressed, they
7 would require environmental review. Obviously on
8 its face that document, that unsigned three-page
9 memo is an aspirational, unenforceable thing. It
10 would require federal approval from both the
11 Canadian and United States Federal Governments.
12 States can't make binding agreements with foreign
13 countries. And not to mention whatever potential
14 projects they are talking about in there, there
15 would have been a myriad of local approvals that
16 would have to proceed to any practical work.

17 So in response to these two-year old press
18 releases and unsigned, unenforceable memos, the
19 state has produced for you sworn affidavits with
20 extensive documentation that reflect the reality
21 here: The former Peace Bridge expansion project
22 was formally abandoned in the federal register
23 over two and-a-half years ago by every agency
24 involved. There are no such current plans or
25 projects. Simply stated, none of the things that

2 petitioners reference place in front of any agency
3 the specifics that would be necessary to undergo
4 environmental review.

5 Now, with regard to the Episcopal home, I
6 turn to --

7 THE COURT: I have another question.

8 MR. HOFFMAN: Go ahead.

9 THE COURT: Based on what you said, if you
10 piecemeal these things, do you avoid the argument
11 that this is part of a larger project, a planned
12 project? You can do it piecemeal and therefore,
13 you don't have to follow the rules over here? Is
14 that sort of what you are saying? I know you are
15 not saying to follow rules, but --

16 MR. HOFFMAN: Your words, not mine.

17 THE COURT: Right, exactly.

18 MR. HOFFMAN: The Gateway project, which is
19 the project that is being challenged here, has
20 been studied including all of the -- the
21 allegations, the sole allegation in the petition
22 is that a proper cumulative impacts analysis was
23 not done. If you look at the affidavit of Daniel
24 Hit, which is the thickest affidavit that we
25 supply, Your Honor, he works for the D.O.T., many

2 attachments. He explains in great detail all of
3 the things that were studied, everyone that was
4 involved; and there is an extensive cumulative
5 impacts analysis there. Every past, present,
6 proposed and reasonably foreseeable action that
7 could take place in the Gateway project area was
8 examined, and their potential affects were
9 analyzed. You are simply not required to analyze
10 things that don't exist. The agencies went out of
11 their way to identify city plans, park plans, what
12 might happen with the Episcopal Home given the bad
13 conditions of the property there, the redecking of
14 the Peace Bridge, the studies where they are
15 trying to put the customs on the Canadian side,
16 all of that is mentioned and analyzed in the
17 document that we have put before you.

18 After that analysis, the conclusion is that
19 they don't have anything to do with this project.
20 This project is discrete. It does a few simple
21 but needed things: It gets interstate bound -- it
22 gets traffic that wants to get on the 190 or
23 traffic coming from the 190, makes it so it
24 doesn't have to go on local Buffalo streets and
25 through a local Buffalo park, that's it.

2 And you know, you can say there's a grand
3 plan and maybe in somebody's mind there is, but
4 the way the environmental laws work, and I think
5 the import of what the courts have said, there's
6 simply not the kind of thing that is -- that could
7 be studied by an agency. So, it is our position
8 that the state agencies have done everything they
9 could do and more here, if I've answered your
10 question.

11 THE COURT: Yes. I think you've answered it.
12 Ms. Cameron?

13 MS. CAMERON: One of the linchpins in
14 determining whether cumulative impacts are studied
15 or what might be required in terms of a broader
16 plain is the independent utility of the project.
17 And as my colleague, Mr. Hoffman, just stated, the
18 Gateway project does nothing more than make sure
19 interstate travelers, international travelers
20 don't -- aren't required and don't clutter the
21 streets of the west side of Buffalo with their
22 traffic and their trucks.

23 In fact, in terms of environmental impact, it
24 is a benefit to the west side of Buffalo because
25 it takes all of that traffic off Busti Avenue, off

2 Columbus Parkway and makes sure it travels
3 straight through. Additionally, the studies that
4 the D.O.T. has determined that are included in
5 Appendix B of its final environmental impact
6 statement clearly note that there will be no
7 increased traffic as a result of this project.
8 This project -- that project is just about getting
9 people from the 190 onto the thruway without
10 having to go through local streets. It is a
11 broadly accepted principle of what is to be done
12 in terms of the development of highway projects.
13 But more of the point, so much more important and
14 so much clearer is the independent utility, which
15 is the word used by the courts of the Episcopal
16 Home Project. All those people want to do is
17 abate asbestos, remediate the property and
18 demolish it because it continues to get broken
19 into because there's no real way to secure it
20 because when they purchased it, it was in extreme
21 disrepair. They boarded it up, they closed the
22 windows, they locked it up. As recently as last
23 night there was a break-in. If you come with
24 crowbars, there's not a whole lot to do. The
25 neighbors don't like it. We have three affidavits

2 from neighbors begging The Court to proceed with
3 the project.

4 The truth is, the petitioners don't like it.
5 They have changed their position, but if you look
6 at the affidavit from the city building inspector,
7 the lead Petitioner, Kathleen Mecca, has called
8 and has written and e-mailed and approached them
9 repeatedly about the condition of the Episcopal
10 Church Home.

11 If you -- if The Court were to enjoin that
12 project, it would be a first time for the record
13 book as far as I can see from Lexis of a court
14 requiring an agency not to abate a nuisance,
15 right? Courts require nuisances to be abated. In
16 this case, the Episcopal or the EDC would be
17 required not to do what was necessary to make this
18 clear nuisance, this clear safety hazard safe.

19 The initial stages of the project are nothing
20 more than the abatement for asbestos and the
21 treatment of other environmental hazards within
22 the property to prepare it for demolition. The
23 initial funding is only for a utility shed and one
24 building that isn't adjacent to the rest of the
25 property. They are entitled to do what they need

2 to do with that property. Whether it is part of a
3 broader plan, there has to be a plan to be
4 studied. For instance, as it currently stands,
5 Busti Avenue is owned by the City of Buffalo. The
6 City of Buffalo is not always cooperative and
7 might not be expected to be cooperative in terms
8 of taking away their land. That piece is not in
9 place. You cannot get the Episcopal Home without
10 Busti Avenue. That's not there.

11 And on the necessary party question, I would
12 note that there's a recent case brought by the
13 Buffalo -- I might not have the plaintiff's name
14 right, but Buffalo Preservationists in regard of
15 the demolition of certain homes owned by the Peace
16 Bridge Authority. That was determined to be
17 proper. It was originally brought in front of
18 Judge Glowonia but was removed to federal court
19 because all of these issues are implicated. If it
20 is a grand plan -- and I'm not saying -- I'm sure
21 Andrew Cuomo, Governor of the State of New York,
22 has an interest in progressing this project. As
23 Mr. Hoffman pointed out, he's not subject to
24 SEQRA. He can say any number of things. The
25 things that put restraints on government are the

2 rules of administrative law and the rules of
3 environmental review.

4 And in this case, I must remember to say
5 this, there was full compliance in the negative
6 declaration. What Mr. Giacalone is saying is
7 absolutely not true. If you look at the negative
8 declaration, it refers to a full environmental
9 assessment form which is documented and was
10 included with the negative declaration. They
11 studied 14 different areas. They did extensive
12 noise studies. They did studies with living
13 community impacts. They looked at -- I mean
14 seriously, what we are talking about is you are
15 going to take a nuisance property that is getting
16 broken into and is infested with toxins and we are
17 to take seriously a claim that it is going make a
18 visual problem to remove it and keep the one nice
19 building, the chapel, in a pristine state. You're
20 going to say that that somehow impacts the air,
21 which, by the way, is not alleged. Petitioners
22 float and roll with what it is they are alleging.
23 They are -- in terms of the Episcopal Church Home,
24 they say noise wasn't studied; completely not
25 true. Visual impacts were not studied; that is

2 completely not true. Community -- consistency
3 with community value or something of the like were
4 not studied; that is not true. Why would it be
5 outside of the community's value to want to get
6 rid of this eyesore, this nuisance, this thing
7 that has been the subject of a housing court
8 action, repeated visits by Inspector Muscarella,
9 repeated calls by Kathleen Mecca. I mean, there's
10 a point where you have to ground your petition in
11 reality and it is just not there.

12 In terms of not responding to the allegations
13 in the petition, it is because they are
14 unsupported because it doesn't matter what the
15 governor says or appointees say about these
16 projects. They were fully studied. They were
17 both fully studied. They have independent
18 utility, and there's not a basis to stop them from
19 going forward. And in both cases, there's
20 significant injury, but especially the Episcopal
21 Church Home. They will lose their contract with
22 their contractor on October 9th, just a few days
23 now. That's why Mr. Hoffman and I, frankly, have
24 been working day and night to put this record
25 together. It is not a full record. We would

2 require a verified record of decision in order to
3 fully answer. This is the tip of the iceberg in
4 terms of what was done in relation to these cases.
5 What would we study? Is Busti Avenue in or is
6 Busti Avenue out? Is the proposal to have U.S.
7 Customs be on the Canadian side? Is that in play
8 or isn't it? Who is involved in these studies,
9 the federal authorities? Maybe we should be in
10 federal court. It is not there. Government
11 functions through its agencies and through its
12 public service corporations. That's what it is.
13 Those entities did what was required. Am I not
14 answering some question?

15 THE COURT: No. I've got your position.

16 MS. CAMERON: I've broken the podium.

17 THE COURT: I hope the cast wasn't the cause
18 of that.

19 MS. CAMERON: Don't ask that question.

20 THE COURT: Mr. Lee?

21 MR. LEE: Very briefly here.

22 THE COURT: Go ahead, Mr. Lee.

23 MR. LEE: Very briefly. If the Court was
24 inclined to dismiss this proceeding for failure to
25 state a necessary party -- in other words, for

2 failure to name the federal government as a party,
3 it is the city's position the city should still be
4 dismissed and we should no longer be a part of
5 this.

6 Petitioners continue to say that the city's
7 approval was somehow needed for this project. It
8 was just said during oral argument when it is
9 clear what the Eminent Domain Procedure Law says,
10 it says that the state takes property by filing
11 acquisition maps and that's what happened here.
12 The common council approval wasn't required.
13 Common council approved -- there was no discretion
14 even allowed. So, we have to get by that point.

15 With respect to petitioners' final
16 allegations against the city regarding this
17 alleged secrecy, it is alleged in paragraph 56 of
18 the petition, Your Honor, that the packet was
19 provided to the common council as well as to the
20 public on the City of Buffalo's website. This is
21 a week before the common council meeting on July
22 29th. The city shouldn't be a part of this, Your
23 Honor, and we ask it be dismissed as against the
24 city.

25 THE COURT: I think they are suggesting the

2 city is a coconspirator, but that's -- Mr. Gawlik,
3 is there anything you would like to say or would
4 you like to rest on your papers?

5 MR. GAWLIK: I would just say, Your Honor,
6 that we went above and beyond in the environmental
7 review. The Episcopal Church Home is riddled with
8 asbestos. You can't even go in without
9 appropriate hazmat suits because for the last
10 seven years or so before we acquired it, it has
11 been riddled with vandalism and everything was
12 stripped out. And there's asbestos and other
13 hazardous materials all over with the exception,
14 Your Honor, of the chapels. The vandals, we have
15 found, are God-fearing. And when you walk into
16 the chapel, that has been very well maintained or
17 at least not vandalized as the rest of the
18 building is.

19 THE COURT: Mr. Giacalone?

20 MR. GIACALONE: May I respond?

21 THE COURT: We will let you finish up.

22 MR. GIACALONE: A whole bunch --

23 THE COURT: With respect to anything you
24 would like to, I'm glad to hear from you.

25 MR. GIACALONE: Thank you, Your Honor. I'm

2 going to start with the references to Petitioner
3 Kathleen Mecca. Kathleen Mecca complained in the
4 past. And interestingly, the complaints that were
5 provided in the papers ended at July 2012 --
6 excuse me --

7 MS. CAMERON: '13.

8 MR. GIACALONE: July 2013 when Empire State
9 Development became owner. But Kathleen Mecca was
10 complaining about the failure to appropriately
11 secure the site to preserve the historic building,
12 Thorton Hall. The gates weren't locked. There
13 were things that could have been done, easily
14 done, that hadn't been done. And that's
15 consistent with what we are saying in our lawsuit,
16 that the changes that are going to happen there
17 are going to adversely impact the historic
18 resources on that site.

19 The -- as Petitioner Steven Green says in his
20 reply affidavit, Empire State Development, who
21 says they are in such a hurry now to preserve this
22 site and do something with this site, they have
23 owned it for 15 months. They have never bothered
24 putting up a fence and preventing people from
25 getting into the entire north and west sides of

2 the site. Nothing. The photographs show it. I
3 took them last week. They have been allowing
4 access to large portions of that site without any
5 restriction including the Thorton Hall, the
6 historic resource. And so, the -- to suggest now
7 they have to move before they do the full study
8 is, I think, disingenuous of them. The -- I
9 challenge Jane Cameron to find in a negative
10 declaration what is required by the regulations,
11 which is a list of supporting documentation
12 relating to their noise conclusions and their
13 visual conclusions. It is not there. They
14 created it in their current set of papers. It is
15 not in the negative declaration, and that's where
16 it has to be. The concept that somehow the
17 governor's vision, the state governor, somebody
18 who likes to get his way, the concept that his
19 vision for the Peace Bridge Plaza doesn't dictate
20 what the state D.O.T. and the State -- Empire
21 State Development does and doesn't create a
22 roadmap, to me, begs the question. We are
23 supposed to believe that despite the fact that
24 there are all these projects happening in and
25 around the plaza, that there's no one overlooking

2 it and deciding whether the pieces fit.

3 The ramp -- the Gateway project is creating
4 connections directly to the plaza. The Empire
5 State Development is 50 feet away from the plaza
6 right now. And their own resolution -- and this
7 goes to the suggestion that all we have is two
8 August 12th press releases that support what we
9 are alleging. We also have on top of that the
10 fact that the May 25th, 2012 resolution of the
11 Peace Bridge Authority -- and all of this is
12 extensively set forth in our pleadings with copies
13 of the papers. The May 25th, 2012 resolution from
14 the Peace Bridge Authority talked in terms of
15 potential plaza projects including -- and that was
16 their term -- including, quote, the redesign and
17 relocation of the existing duty-free store to a
18 larger, more functional area on the property
19 currently occupied by the vacant Episcopal Church
20 Home, close quotes. That's the Peace Bridge
21 itself in May of 2012.

22 In the joint record of decision finding
23 statement that D.O.T. signed with the feds, they
24 had a topic called, quote, other projects
25 affecting the U.S. Plaza. Projects that are

2 currently funded are about to be funded and are
3 associated with the plaza include -- and they list
4 about eight projects including the Episcopal
5 Church Home.

6 The progress report also referred to, quoted,
7 and made part of our record, the project report
8 that was filed by the general manager of the Peace
9 Bridge Authority on July 25th, 2013, excuse me, in
10 which, quote, he provided a status of the various
11 authority and related projects, close quote,
12 include under the subheading, quote, State of New
13 York Projects Impacting the PBA, Peace Bridge
14 Authority, included both the Episcopal Church Home
15 and the Gateway Connections. They are all
16 connected.

17 And on April 25th, 2014, that same meeting
18 when all of the -- let sleeping dogs lie -- we are
19 not going to let the public know what is
20 happening, et cetera, et cetera, was going on,
21 they, the Peace Bridge Authority, passed a
22 resolution in which they said, advised, quote:
23 Advised Empire State Development that it has no
24 objections to the demolition of the Episcopal
25 Church Home structures, close quote. Why are they

2 even bothering to pass a resolution saying they
3 are not objecting to this next step if there isn't
4 a web and a connection between all of these things
5 that they are denying for the exact same reason?
6 In the year 2000, Justice Eugene Fahey said these,
7 the roadways and the ramps and the connecting
8 things in the plaza are all interrelated and these
9 agencies are involved in strategies to avoid the
10 environmental review required under the law. The
11 same thing is happening now. Now, here's my
12 guess: Someone had to have the courage to say to
13 the governor after his August 2012 press releases:
14 Mr. Governor, you keep on talking about this big
15 plan for the plaza, but we have to act as if
16 there's no plan or else we have to do the longterm
17 cumulative impact study that no one has been
18 willing to do, including prior to 2000 when Judge
19 Fahey rendered his decision. It is the same sort
20 of games to get around actually having to do
21 something.

22 So, when you have -- when you have the
23 Gateway project that, number 1, is called Gateway
24 Connections Improvement Project to the U.S. Peace
25 Bridge Plaza; no connection with the Peace Bridge.

2 No 2, has as a primary objective to provide
3 direct access from the U.S. Peace Bridge project
4 to the northbound I-90, close quote. Their words.
5 Their primary objective.

6 Now, when their location of the ramps
7 directly connects to the Peace Bridge Plaza, when
8 they say in their papers that they need to have
9 new signage, D.O.T. signage on the Peace Bridge
10 Plaza itself; when they needed to get permission
11 according to their papers from the Peace Bridge to
12 convey a piece of Peace Bridge property to allow
13 them to go forward with their project; when you
14 have all of those things happening, to suggest
15 that there isn't a larger plan that someone hasn't
16 coordinated that somehow means that the whole
17 process is arbitrary, and that's the ludicrousness of
18 what has happened because they try so hard to say
19 separate purpose, separate need, independent this,
20 separate that, when in effect, there has to be a
21 larger plan and it was set forth by Governor
22 Cuomo, and it was set forth in the Peace Bridge
23 Understanding, which by the way, is referenced in
24 the D.O.T. federal highway documentation. They
25 expressly reference it as a plan, the Peace Bridge

2 Understanding is referenced in there and discussed
3 as a plan that has public support and approval.

4 So, all of these things, they have done a
5 great job keeping it all up in the air, but to
6 suggest that there's no larger plan when there's
7 all of these pieces that have oozed out here and
8 there, and when everything is interconnected and
9 it would be totally irrational not to have a
10 connection here and there we believe is wrong.

11 Let me -- the one thing I've never addressed
12 is the whole issue of whether or not there's a
13 likelihood of success and whether or not the
14 equities balance in our way. If The Court would
15 allow me?

16 THE COURT: Sure. Could I ask one more
17 question, and I apologize for not asking it
18 before, I just didn't think of it. Why isn't the
19 Peace Bridge Authority a necessary party?

20 MR. GIACALONE: Because everyone claims that
21 they are not part of this.

22 MS. CAMERON: That hasn't stopped you before.

23 THE COURT: Well --

24 MR. GIACALONE: I don't understand this
25 comment.

2 THE COURT: Excuse me, excuse me. There's
3 been a lot of talk about the Peace Bridge
4 Authority and their secret meetings and their
5 sneaky this and that and all of that, whatever.
6 Whether it is true or not I take no position, but
7 why aren't they a necessary party? Aren't they
8 the raison d'etre of this whole thing? Isn't this
9 the grand plan to have the gateway, the Peace
10 Bridge to the -- hopefully the new one at some
11 point or something like that?

12 MR. GIACALONE: The grand plan is Governor
13 Cuomo getting what he wants from everyone: The
14 state agencies, the City and the Peace Bridge. It
15 is his plan. We never suggested it was the Peace
16 Bridge. It is his plan to have all of these
17 things occur. Now, if the Peace Bridge believes
18 they are a necessary party -- and it is
19 interesting that was not raised by respondents --
20 if they somehow believe that they want to be part
21 of this, they could have joined. They didn't.
22 They actually got an affidavit from the general
23 manager --

24 THE COURT: Right.

25 MR. GIACALONE: -- denying that there's a

2 larger plan. Despite what happened on April 25th
3 and despite everything else, there's no larger
4 plan. If they want to join this party, it is fine
5 with us. We don't believe -- well, let me be more
6 specific --

7 THE COURT: You didn't invite them.

8 MR. GIACALONE: Well, let me be more
9 specific. We are not challenging any decision
10 that they made. In an Article 78, you need to be
11 challenging the determination of somebody. They
12 didn't make a determination. So, that's why
13 there's nothing for us to challenge in this
14 proceeding.

15 But as far as the criteria for a preliminary
16 injunction, we believe -- well, a couple of
17 things: Although they cited the case that said
18 that mere failure to publish the -- publish your
19 negative declaration for a type one action with
20 the DEC's ENV, Environmental News Bulletin is not
21 in and of itself a sufficient grounds to overturn
22 something into SEQRA. I don't remember the facts
23 of that particular case, but we have -- here's our
24 facts: We have groups purposely trying not to
25 inform the public. And if we hadn't started the

2 lawsuit, that notice wouldn't have been published
3 at all because they sent it in after we started
4 the lawsuit. The bottom line is they waited and
5 their notice -- that's what he handed up to The
6 Court prior to the proceedings today -- their
7 notice was made on October 1st, 2014, 93 days
8 after the negative declaration was issued on June
9 30th, 2014. It wouldn't have been. The ENB is
10 the only way people like myself have any access to
11 information to know what was happening with these
12 documentations, and yet they waited 93 days in the
13 midst of all of these things about let's keep
14 sleeping doings lie, et cetera, et cetera. Given
15 the context of that, that failure is something
16 significant. But more importantly, it is, as I
17 mentioned previously, the fact that their negative
18 declaration grants you -- it is long and it
19 addressed a bunch of topics. You can't take a
20 topic of noise, admit what you are going to do is
21 going to be removing a significant barrier, and
22 then not explain your conclusion, not have a list
23 of references explaining how you reach that
24 conclusion when you say we are going to knock
25 these buildings down and put up a berm with a

2 couple of trees and that is going to solve the
3 problem of the residents on Columbus Parkway who
4 now don't see the Peace Bridge who are going to
5 have it right there 400 feet away; and they are
6 also going to have all of the activities that are
7 going on at the base of the Peace Bridge for all
8 of these projects that are happening. It is going
9 to open them up to all of that, either for noise
10 or for visual. They do not provide a list of
11 their references documentation supporting the
12 conclusions. That is a violation of CPLR. That's
13 a failure to have the hard look that is required
14 under SEQRA.

15 Now we have talked about the, excuse me, the
16 cumulative impacts and the fact that there needs
17 to be -- there has to be some kind of larger plan
18 when none of this makes any sense. The fact of
19 the matter is that the Peace Bridge itself has
20 talked about using that property for an expanded
21 duty-free store. That would bring all of the
22 trucks and residential -- excuse me, personal
23 vehicles to that site in the midst of this
24 neighborhood. Somebody realized we have to stop
25 talking about that, so now they don't have a plan.

2 The governor thinks they have a plan because the
3 governor said this was the last integral piece
4 needed to expand the plaza. So we believe we are
5 going to succeed on that. We also believe
6 similarly for D.O.T. they didn't do the cumulative
7 impact, they did a cumulative impact analysis, but
8 they eliminated a variety of projects including
9 the Episcopal Church Home saying that -- saying
10 that that was outside their study area and had no
11 specific plans. So they didn't look at the
12 impact. But if you are going to be shifting
13 traffic onto that site, there needs to be an
14 analysis of that. And SEQRA expressly has -- and
15 I referred to this in my reply affirmation -- they
16 have the concept of a generic environmental impact
17 statement that takes a general plan and that leaks
18 addresses what could be happening based on those
19 plans. And so the -- you could not need the
20 specificity. We cite a case in our papers that
21 expressly says: You don't have to have a concrete
22 plan to have it be part of a larger plan that
23 needs to be assessed when another action is being
24 approved or environment study being done. But
25 also, we think it is important to note that the

2 city entity with the authority to rule on whether
3 or not the proposed Gateway Connection is going to
4 have a negative impact on the historic resources
5 of Front Park and the esthetic resources of Front
6 Park on September 24, 2014 denied that certificate
7 of appropriateness. And that's the second
8 document that we provided to The Court in which
9 the state employee, the program manager -- excuse
10 me, the project manager, Craig Mozrall,
11 M-O-Z-R-A-L-L, says, quote: It is my
12 understanding that the Historic Preservation Board
13 must review this proposal and make a ruling that
14 the proposed actions will not have a negative
15 impact on Front Park, close quote. That happened
16 on June 12th.

17 From the records that we provided, apparently
18 on June 26, the preservation board said: We need
19 more information. Please provide us with A, B, C.
20 Empire State Development decided -- excuse me,
21 D.O.T. decided not to go back. And this was
22 denied. So they don't have the approval that they
23 themselves said we have to have to proceed with
24 this project because of the potential harm to
25 the -- from the perspective of the City of

2 Buffalo, the potential harm to this historic site,
3 Front Park, blocking the views to the water, the
4 things that they are doing to make elevated ramps
5 and barrier walls and everything is going to
6 impact the esthetics in the historic significance
7 of Front Park. So for those reasons, we do
8 believe we have the likelihood of success.

9 As far as irreparable harm, the removal of
10 those noise and visual barriers is not reparable.
11 It is irreparable unless they are going to be
12 rebuilding those structures. There isn't going to
13 be a similar barrier that's going to be in place
14 until they build a large duty-free store there.
15 If that's their plan, that should be part of the
16 analysis.

17 The -- the papers that were provided by the
18 state suggest that by removing the abatement, by
19 removing the asbestos and abating the interior of
20 Thorton Hall, one of the two buildings that they
21 agreed and they say in their documents has
22 historic significance, that the abatement process
23 itself may make it impossible to attempt to
24 restore and preserve that balance. So going
25 forward, even with the asbestos removal is

2 irreversible much less taking that building down
3 which is part of their plans, they have even
4 segmented how much they are going to demolish and
5 do. They keep on breaking everything into little
6 pieces. I think it was an excellent question that
7 you asked, Your Honor, I think to Mr. Hoffman:
8 You mean it is okay to keep dividing things up
9 into small pieces and saying each piece isn't
10 going to have a significant impact? That's is
11 exactly what segmentation is. That's exactly what
12 SEQRA prohibits, and that's what has been
13 happening with this larger plan for the Peace
14 Bridge Plaza.

15 The balancing of the equities. When you
16 balance the impact, the permanent impact to the
17 character of that neighborhood, to the noise
18 impacts, the visual impacts, the health impacts,
19 we don't have the ability to do the studies, but
20 as our papers show, the -- I believe it is the
21 second last exhibit in a verified petition is the
22 DEC's monitoring equipment that they put up a
23 hundred feet away from this Episcopal Church Home
24 to address the concerns about air quality. And
25 they put it there because they -- because that's

2 where the highest concentration, particulates of
3 carbon, were found in their previous study. And
4 they know that there's dramatic concerns in the
5 neighborhood about air quality. And so if you
6 take down this large structure, if it is providing
7 noise and visual barriers, it is most likely
8 stopping some of that, some of the fumes and some
9 of the particulates also. We don't know. That
10 hasn't been studied. And we need to know that.

11 So the DEC, as we say in our papers, in
12 August started a one-year study for air quality
13 putting that monitor right there on that corner
14 within just several hundred feet of all of my
15 clients, and so that's important. To allow
16 everything to happen and then find out about the
17 air quality is exactly what SEQRA is trying to not
18 have. The idea is to have the information you
19 need to make an informed decision before you
20 approve a project, before you go ahead with the
21 project.

22 The Empire State Development's own project
23 manual as far as balancing equities here says that
24 project delays are not a compensable damage claim
25 by the contractor. We don't know what the

2 contractor plans to do. It is speculative that
3 the contractor would walk away if there's a delay.
4 There's no proof of that, and delays are not
5 compensable under their own project manual and
6 that's, that segment is attached. I believe it
7 was Exhibit G to the verified complaint. D.O.T.
8 can't proceed right now without the certificate of
9 appropriateness, and they don't have it.

10 So right now, having a preliminary injunction
11 is not something that -- we are not going to be
12 impacting the real world and the legal world right
13 now as far as the approvals that they need.

14 The affidavit of, I believe, it was Mr. Howe,
15 the D.O.T. contract manager, the potential
16 financial damages are all speculative. He says
17 that maybe the contractor will walk away from
18 this. Well, the contractor provided an affidavit
19 saying how desperately he wants this project.
20 They say that their authority to award a, quote,
21 best value, close quote, contract may end because
22 it is allowed under the Infrastructure Investment
23 Act that may not be extended when it expires on
24 December 9th. Well, it may or may not. Sounds
25 awfully speculative to me. But again, they

2 haven't provided anything tangible. We believe
3 that the equities are in favor of the residents
4 who are living there and are concerned about what
5 is going to happen and most concerned about no one
6 is putting all of these pieces together. All of
7 these projects were meant to increase the
8 efficiency of how that whole plaza works with the
9 ultimate goal of being able to handle more
10 traffic, more trucks, more pedestrians, not fewer.
11 No one is looking at that to see how all of these
12 things work together, and that's what we believe
13 has to be done.

14 One last thing, Your Honor, regarding what
15 the city is saying. Again, we are challenging
16 whatever approval happened on the -- on July 29th
17 by the common council, they didn't say this is
18 just being done for philosophical purposes, they
19 approved their resolution to have an impact. It
20 allowed the furtherance of the Gateway Connection
21 project when they agreed to the amount to be paid
22 by the State D.O.T. to them. That was a T that
23 had to be crossed. And if, if The Court thinks
24 that our pleadings don't make that crystal clear
25 that we are challenging the decision that furthers

2 the Gateway Connection and therefore impacts
3 things, we ask The Court not to dismiss our claim
4 against them, but to allow us to amend. We
5 have -- I could amend, I could have brought in an
6 amended petition today. We have the right to
7 amend under the Article 78 within 20 days of their
8 answering without The Court's permission.

9 So, their resolve all of the time is: Get
10 this out of the court completely. My clients have
11 rights. We ask that if The Court thinks that
12 things are not sufficient, that we just be allowed
13 to amend, and then we'll straighten out what
14 exactly is or isn't a new challenge. So, based on
15 than that, thank you for your patience. I really
16 appreciate it. I'll sit down.

17 THE COURT: Sure. I thought he was going to
18 have the last word, but I guess you might since
19 you are standing.

20 MR. HOFFMAN: A couple of very quick points:
21 In terms of what has or hasn't been studied, I
22 would simply refer The Court to the review
23 documents we have provided. In particular,
24 referencing something Mr. Giacalone said the
25 D.O.T. and the federal government engaged in a

2 process under section 106 of the National Historic
3 Preservation Act about the park. The City of
4 Buffalo consulted on that. That's reflected in
5 the documents. It is our position that D.O.T.
6 satisfied whatever requirements of applicable law
7 are vis-a-vis the city in that process.

8 Second, the kind of materials again that
9 Mr. Giacalone is relying on, they don't have
10 evidentiary value. The Fourth Department case of
11 Foreman versus SUNY Trustees that we provided to
12 you basically says: These kinds of things have no
13 evidentiary value.

14 Third, Justice Fahey's April 2000 decision
15 about the Peace Bridge, sadly I was there, I would
16 simply point out that the essence of that case
17 was, that, you know, you can't build a new bridge,
18 new international bridge and a new plaza without
19 an environmental impact statement, and you have to
20 study them together. Here, there's no project for
21 a bridge and there's no project for a plaza. And
22 moreover, you got for the discrete project
23 involved, the highway project, a full
24 environmental review that took over a year to do,
25 soup to nuts; couldn't have studied anything else.

2 I have one more point. What was it? Oh,
3 yes. It is our position that you shouldn't have
4 to get to the issue of an undertaking or set a
5 date for us to answer because we think the
6 preliminary injunction motion should be denied and
7 that the claims should be dismissed. We reserve
8 our rights to address those matters. We would ask
9 The Court with respect to, you know, we need to
10 know about the injunction ruling sooner rather
11 than later because we'll have a lot more to say
12 about that. But I thank you for your patience.

13 THE COURT: Ms. Cameron, you apparently have
14 something you would like to say also.

15 MS. MADEY: Thank you, Judge.
16 Mr. Giacalone's assertions about the nature of the
17 negative declaration, I don't quite know how to
18 respond to it. The negative declaration itself
19 references the full environmental assessment form
20 that is attached to the document. That is what
21 people do. It is the ordinary procedure, that
22 full environmental assessment form assesses
23 numerous areas, I'm sure The Court including air,
24 noise, visual impact and quality of life in the
25 neighborhood. The agency is allowed to make

2 determinations in that regard: The amount of
3 study, the extent of the study, according to
4 Achpod V. Koch one of the leading cases is left to
5 the discretion of the agency. There are -- the
6 question really comes -- I don't know -- I just
7 don't know how we can study a plan, Judge.

8 In terms of the balancing of the equities, it
9 is very clear that the equities lie in favor of
10 the residents who would like to see this public
11 nuisance removed. I'll leave it at that.

12 THE COURT: Thank you.

13 MS. CAMERON: In terms of irreparable harm,
14 Mr. Giacalone parses out that issue in an odd way.
15 The point is right now we are in a period that
16 will end by October 9th, at which point there will
17 be no bind upon the contractor who may be watching
18 the T.V. in terms of this event, and the EDC will
19 be placed in a bind, and the neighbors will be
20 placed in a bind.

21 In terms of -- there's been a reframing of
22 the historic preservation issues. We have a
23 letter of resolution with SHIPO, the agency that
24 makes such determinations regarding matters such
25 as this, SHIPO agreed that Thorton Hall sadly

2 requires demolition because of the rampant
3 asbestos, decay, disrepair, roof, water damage;
4 there's a whole litany. I don't mean to, you
5 know, take too much of The Court's time, but there
6 are -- there were mitigations prepared in
7 relations to it: How it would be memorialized,
8 how it would be studied, and the chapel will be
9 maintained. That's full compliance with SEQRA.
10 It is full compliance with the Cathedral of St.
11 John, the Divine case versus Dormitory Authority
12 which we have supplied to The Court.

13 There's nothing in the petition that
14 describes air impact in relation to the Episcopal
15 Church Home. Now it is here. Now it has suddenly
16 arrived that somehow the demolition of this
17 nuisance structure is going to relate to air
18 impacts in the neighborhood. Again, even in terms
19 of D.O.T. which would make a certain amount of
20 sense, there's no increased traffic. And the
21 traffic that exists is pushed up the road. They
22 need to meet all of those standards.

23 The extraordinary remedy, I won't belabor
24 that upon The Court. There is nothing in the
25 record that would suggest anything other than the

2 required environmental reviews were made. There's
3 no basis of newspapers articles, Governor Andrew
4 Cuomo's wishes, that can transform this case into
5 one where further studies would be required.
6 There will be studies required if and when there's
7 an expansion of the plaza or there's an expansion
8 of the Peace Bridge. Nobody argues that point,
9 and nobody argues that politicians have ambitions.
10 It is not really the issue here. We cannot study
11 Governor Andrew Cuomo's ambitions.

12 THE COURT: Thank you. Mr. Lee, is there
13 anything else you would like to say?

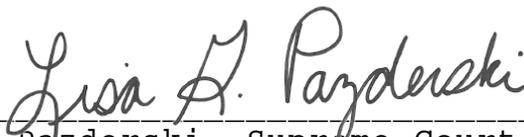
14 MR. LEE: One thing, Your Honor, very
15 quickly: There's no need for the petitioner to
16 amend his petition as against the city. The city
17 is not claiming that petitioners are not
18 challenging the agreement for advanced payment,
19 that's certainly in their petition. Our position
20 is that it has no merit. Again, this proceeding
21 against the city is not very complicated even
22 though petitioners are trying to make it, perhaps,
23 look that way. The state took the city's property
24 when they filed acquisition maps. And pursuant to
25 the Eminent Domain Procedure Law, the state has to

2 offer the city its highest appraised value of the
3 reasonable compensation for that property. The
4 highest appraised value, and that's what happened
5 here. So, they submitted that offer to the city
6 and all that the common council did, Your Honor,
7 was approve that offer while reserving its right
8 to claim further compensation or greater
9 compensation in the future. What is arbitrary and
10 capricious about that? Nothing.

11 THE COURT: Thank you all. I'll get you a
12 decision as quickly as I can. Thank you.

13 * * * * *

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15
16 Certified to be a true and accurate transcript
17 of the minutes and/or testimony taken herein
18 transcribed into English text through Computer
19 Assisted Transcription.

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22 Lisa G. Pazderski, Supreme Court Reporter
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