

STATE OF NEW YORK  
SUPREME COURT: COUNTY OF ERIE

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In the Matter of the Application of

MARK GOLDMAN,  
SCOT D. FISHER,  
BRUCE L. FISHER,  
SUSAN M. DAVIS,  
STEPHEN C. HALPERN, and  
ELIZABETH P. STANTON,

Petitioners/Plaintiffs

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

- against -

BASS PRO OUTDOOR WORLD, L.L.C.,  
ERIE CANAL HARBOR DEVELOPMENT  
CORPORATION,  
RICHARD M. KESSEL, as Chief Executive Officer of the  
Power Authority of the State of New York,  
JORDAN LEVY, as Chairman of the Erie Canal Harbor  
Development Corporation,  
DENNIS M. MULLEN, as Chairman and Chief Executive  
Officer of the Empire State Development Corporation,  
NEW YORK STATE ECONOMIC DEVELOPMENT  
POWER ALLOCATION BOARD,  
NEW YORK STATE URBAN DEVELOPMENT  
CORPORATION, d/b/a Empire State Development Corporation,  
POWER AUTHORITY OF THE STATE OF NEW YORK,  
KENNETH SCHOETZ, as Chairman of the New York State  
Economic Development Power Allocation Board, and  
STATE OF NEW YORK,

Respondents/Defendants

BUFFALO MUNICIPAL HOUSING AUTHORITY,  
BUFFALO SEWER AUTHORITY,  
CITY OF BUFFALO, NEW YORK,  
COUNTY OF ERIE, NEW YORK, and  
NEW YORK STATE THRUWAY AUTHORITY,  
Additional Respondents/Defendants.

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**VERIFIED PETITION/  
COMPLAINT**

Index No. I-2010-7723  
Date Filed: 07-26-10

Assigned to:  
Hon. Frederick J. Marshall

Petitioners/plaintiffs (hereinafter, "petitioners") MARK GOLDMAN, SCOT D. FISHER, BRUCE L. FISHER, SUSAN M. DAVIS, STEPHEN C. HALPERN, and ELIZABETH P. STANTON, by their attorney, Arthur J. Giacalone, Esq., for their verified petition and complaint (hereinafter, "petition") against the respondents/defendants (hereinafter, "respondents") respectfully allege and state:

### **INTRODUCTION**

1. Petitioners bring this combined CPLR Article 78 proceeding and State Finance Law Section 123-b citizen taxpayer's action (hereinafter, "proceeding") pursuant to the laws of the State of New York, including, without limitation, the New York State Constitution, Article VII, Section 8(1) [the "no gift or loan clause"]; New York State Economic Development Law, Section 188 (concerning the approval of "Industrial Incentive Awards"); common law principles regarding conflicts of interest and the appearance of impropriety; and, the State Environmental Quality Review Act [SEQRA] and the regulations promulgated thereunder at 6 NYCRR Part 617.

2. This proceeding is brought to challenge actions taken, or about to be taken, by various governmental entities and officials in furtherance of the Canal Side Land Use Improvement Project ["Canal Side project"], which is located in the City of Buffalo, County of Erie, State of New York, and sponsored by respondent Erie Canal Harbor Development Corporation, including, without limitation, the following actions and decisions:

A. The February 2, 2010 decision by respondent New York State Economic Development Power Allocation Board authorizing respondent Power Authority of the State of New York to utilize net revenues from the Niagara Power Project for an

expedited funding package to respondent Erie Canal Harbor Development Corporation, and approving an Industrial Incentive Award to help fund the aforementioned Canal Side project.

B. The March 26, 2010 decision of respondent New York State Urban Development Corporation, d/b/a Empire State Development Corporation, affirming the “General Project Plan” for the Canal Side project, a plan which includes, among other things, an estimated budget of \$294,829,687, a list of designated “funding uses,” including \$35,000,000 for the “Bass Pro Store” (including the store’s core, shell and fixtures), and a \$4,000,000 “Anchor Tenant Allowance” for an incentive to attract a second anchor tenant to the Project Area, and a list of “anticipated funding sources,” including \$105,000,000 from respondent Power Authority of the State of New York, \$21,000,000 from respondent New York State, and \$5,000,000 from respondent New York State Urban Development Corporation, d/b/a Empire State Development Corporation.

C. The decision by respondent Power Authority of the State of New York to enter into an agreement with respondent Erie Canal Harbor Development Corporation, on or about July 13, 2010, to provide \$105,000,000 in funding for the Canal Side project, including the aforementioned Industrial Incentive Award approved by respondent New York State Economic Development Power Allocation Board, a portion of which, upon information and belief, will be utilized in conjunction with the construction of the “Bass Pro Store” or related improvements, and/or other unspecified private uses.

D. Decision(s) by respondent New York State to provide a total of \$21,000,000 in funding to the Canal Side project, a portion of which, upon information and belief, will

be utilized in conjunction with the construction of the “Bass Pro Store” or related improvements, and/or other unspecified private uses.

E. Decision(s) by respondent New York State Urban Development Corporation, d/b/a Empire State Development Corporation, to provide \$5,000,000 in funding to the Canal Side project, a portion of which, upon information and belief, will be utilized in conjunction with the construction of the “Bass Pro Store” or related improvements, and/or other unspecified private uses.

### **PARTIES**

3A. Petitioner Mark Goldman is a “citizen taxpayer,” as that term is defined at Section 123-a of the State Finance Law, who resides at 398 Jersey Street in the City of Buffalo, County of Erie, State of New York, and pays state income and sales tax.

3B. Petitioner Scot D. Fisher is a “citizen taxpayer,” as that term is defined at Section 123-a of the State Finance Law, who resides at 467 Linwood Avenue in the City of Buffalo, County of Erie, State of New York, and pays state income and sales tax.

3C. Petitioner Bruce L. Fisher is a “citizen taxpayer,” as that term is defined at Section 123-a of the State Finance Law, who resides at 420 Linwood Avenue in the City of Buffalo, County of Erie, State of New York, and pays state income and sales tax.

3D. Petitioner Susan M. Davis is a “citizen taxpayer,” as that term is defined at Section 123-a of the State Finance Law, who resides at 58 Granger Place in the City of Buffalo, County of Erie, State of New York, and pays state income and sales tax.

3E. Petitioner Stephen C. Halpern is a “citizen taxpayer,” as that term is defined at Section 123-a of the State Finance Law, who resides at 20 Argyle Park in the City of Buffalo, County of Erie, State of New York, and pays state income and sales tax.

3F. Petitioner Elizabeth P. Stanton is a “citizen taxpayer,” as that term is defined at Section 123-a of the State Finance Law, who resides at 20 Argyle Park in the City of Buffalo, County of Erie, State of New York, and pays state income and sales tax.

4A. Respondent Bass Pro Outdoor World, L.L.C. [“Bass Pro”] is a foreign limited liability company with an office for conducting business in Springfield, Missouri; respondent Bass Pro is included as a named respondent in this proceeding pursuant to Section 123-b(2) of the State Finance Law as a recipient or intended recipient of an allegedly illegal or unconstitutional disbursement of state funds or state property, and as a “necessary party” pursuant to CPLR Section 1001.

4B. Respondent Erie Canal Harbor Development Corporation [“ECHDC”] is a public benefit corporation and a subsidiary agency of Empire State Development Corporation, with an office for the conducting of business in Buffalo, New York; respondent ECHDC is the project sponsor of the Canal Side project.

4C. Respondent Richard M. Kessel is the Chief Executive Officer of respondent Power Authority of the State of New York, with an office for the conducting of business at 123 Main Street, White Plains, New York.

4D. Respondent Jordan Levy is the Chairman of the ECHDC, with an office for the conducting of business in Buffalo, New York.

4E. Respondent Dennis M. Mullen is the Chairman and Chief Executive Officer of the Empire State Development Corporation, with an office for the conducting of business in Albany, New York.

4F. Respondent New York State Economic Development Power Allocation Board [“EDPAB”] is a board created by the State of New York, with the powers and duties set forth in the State’s Economic Development Law, including, without limitation, the power to review and approve economic development plans submitted by respondent NYPA for the use of “Industrial Incentive Awards” for economic development, with an office for the conducting of business at 123 Main Street, White Plains, New York.

4G. Respondent New York State Urban Development Corporation, d/b/a Empire State Development Corporation, [“ESD”] is a corporate governmental agency of the State of New York, constituting a political subdivision and public benefit corporation, with an office for the conducting of business at 95 Perry Street, Buffalo, New York; respondent ESD is the parent corporation of respondent ECHDC, and served as SEQRA “lead agency” for the Canal Side project.

4H. Respondent Power Authority of the State of New York [“NYPA”] is a corporate municipal instrumentality, a body corporate and politic, and a political subdivision of the State of New York, with an office for the conducting of business at 123 Main Street, White Plains, New York.

4I. Respondent Kenneth Schoetz is Chairman of respondent EDPAB, with an office for the conducting of business in White Plains and/or Buffalo, New York; according to public records, said respondent held the position of “Senior Vice President – Regional Offices” for respondent ESD at the time respondent EDPAB approved an Industrial Incentive Award for the Canal Side project, and previously served as acting upstate Chief Executive Officer and Upstate Chief Operating Officer for respondent ESD.

4J. Respondent State of New York (“State”) is one of the fifty sovereign states of

the United States of America, operating under the Constitution of the State of New York, with an office for the conducting of business in the capital city of the State of New York, Albany. New York; a portion of the Canal Side project area is, or previously had been, owned by respondent State through the New York State Department of Transportation.

5A. Respondent Buffalo Municipal Housing Authority [“Housing Authority”] is a body corporate and politic, with an office for the conducting of business in Buffalo, New York; a portion of the Canal Side project area is, or previously had been, owned by respondent Housing Authority.

5B. Respondent Buffalo Sewer Authority [“Sewer Authority”], a board created by the New York State Legislature, is a body corporate and politic constituting a public benefit corporation, with an office for the conducting of business in Buffalo, New York; a portion of the Canal Side project area is, or previously had been, owned by respondent Sewer Authority.

5C. Respondent City of Buffalo, New York [“City”] is a municipal corporation located in the County of Erie, State of New York, with an office for the conducting of business in Buffalo, New York; respondent City is participating in the development and implementation of the Canal Side project, and owns a portion of the Canal Side project area.

5D. Respondent County of Erie [“County”] is a municipal corporation comprising the inhabitants within its boundaries, with an office for the conducting of business in Buffalo, New York; respondent County is participating in the development and implementation of the Canal Side project.

5E. Respondent New York State Thruway Authority [“Thruway Authority”], a board created by the New York State Legislature, is a body corporate and politic constituting a public corporation, with an office for the conducting of business in Albany, New York; a portion of the Canal Side project area is, or previously had been, owned by respondent Thruway Authority.

**FOR PETITIONERS' FIRST CLAIM –  
VIOLATION OF NYS CONSTITUTION’S “NO GIFT OR LOAN CLAUSE”**

6. Petitioners repeat and reallege each and every allegation contained in paragraphs 1 through 5E of this petition, with the same force and effect as if set forth here at length.

7. As referenced in the following excerpt from the “General Project Plan” for the Canal Side project, affirmed on March 26, 2010 by respondent ESD, respondents ECHDC, ESD, State, NYPA and EDPAB envision the Canal Side project being “anchored” by a “Bass Pro Outdoor World Store”:

...

*The Project will consist of over 1 million square feet of commercial (retail, lodging, and office), cultural, and residential space along the Buffalo waterfront that will be designed to emphasize downtown Buffalo’s connection to the Lake Erie waterfront through the construction of a network of interpretive water elements evoking the character and vibrancy of the historic canals that once crossed the area, including segments of the Erie Canal, the Commercial Slip, and the Prime Slip. **Anchored by a Bass Pro Outdoor World Store, a destination retailer**, the Project will provide various year-round offerings and experiences, including restaurants, entertainment venues, retail outlets, cultural attractions, vast public spaces, and increased access to the Buffalo River, appealing to a wide demographic of visitors and residents. [Emphasis added.]*

...

8. In an attempt to lure respondent Bass Pro to become a major element of the Canal Side project, respondents ECHDC, ESD, State, and NYPA have offered the so-



called “destination retailer” massive subsidies and incentives, including, without limitation:

A. The dedication of thirty-five million dollars (\$35,000,000) of funds to construct the “core, shell, and fixtures” of the “Bass Pro Store,” with respondent Bass Pro merely responsible for the store’s “equipment and furnishings.”

B. Location of the Bass Pro Store above a three-level, 530-plus space parking garage, which will also provide respondent Bass Pro with space for boat service and equipment storage, and provision nearby of “RV parking” for use by Bass Pro customers.

C. The provision of thirty (30) controlled-access boat slips on the Buffalo River, “secured and segregated from the public transient boat slips to the north,” to allow the private retailer to utilize the waterfront for boat sales and demonstrations.

D. A lease agreement leasing to Bass Pro the above-described premises (for an initial term of 20 years with six 5-year renewal option) requiring respondent Bass Pro “to pay rent of \$1 per year plus a common area maintenance charge of \$600,000 per year.”

E. Exemption of the Bass Pro premises from real estate taxes.

[Attached hereto as **Exhibit A** is a copy of respondent ESD’s “General Project Plan.”

The description of the Canal Side project quoted in the preceding paragraph can be found on p. 1 of the General Project Plan; details of the Bass Pro store on p. 9; a table of “Funding Uses” for the Canal Side project on p. 12; a table of “Funding Sources” on p. 13; a description of the proposed Bass Pro lease on p. 14.]

9. In addition to the above-described incentives and subsidies being offered to respondent Bass Pro, the Canal Side project budget included in respondent ESD’s General Project Plan includes a four million dollar “Anchor Tenant Allowance” to be

utilized by respondents as “an incentive to attract a second anchor tenant to the Project Area.”

10. Upon information and belief, all, or a substantial portion of, the funds utilized and/or to be utilized for the above-described incentives and subsidies for the purpose of attracting respondent Bass Pro, as the primary anchor tenant, and an additional private enterprise as the “second anchor tenant,” constitute State money.

11. With the exception of certain enumerated purposes not relevant to this proceeding, Article VII, Section 8(1) of the Constitution of the State of New York prohibits the gift or loan of State money or credit “to or in aid of any private corporation or association, or private undertaking”:

*Constitution of the State of New York  
Article VII State Finances*

...  
*§8(1). The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking; nor shall the credit of the state be given or loaned to or in aid of any individual, or public or private corporation or association, or private undertaking, but the foregoing provisions shall not apply to any fund or property now held or which may hereafter be held by the state for educational, mental health or mental retardation purposes.*

...  
12. The rationale for the inclusion of the above-quoted provision in New York’s Constitution was recently explained in a June 24, 2010 Memorandum issued by the Appellate Division, Third Department in Bordeleau v. State of New York, AD3d , NYS2d , 2010 NY Slip Op 05649, 2010 N.Y. App. Div. LEXIS 5434 (06/24/2010):

*... [T]he NY Constitution prohibits gifts or loans of state funds to private entities. Article VII, § 8 (1) provides that “[t]he money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking.” This provision was added in 1846 “in reaction to the [Legislature’s]*

*prior practices of subsidizing private railroad and canal companies through long-term State debt obligations, which the State ultimately was forced to pay when many of those private enterprises failed during the depression of 1837-1842. Thus, subsidization by gifts of public funds to private undertakings, or by pledging public credit on their behalf, was banned, irrespective of how beneficent or desirable to the public the subsidized activity might seem to be" (Matter of Schulz v State of New York, 86 NY2d 225, 233-234 [1995] [citations omitted], cert denied 516 US 944 [1995]; see People v Ohrenstein, 77 NY2d 38, 50-51 [1990]; Wein v State of New York, 39 NY2d 136, 142-143 [1976]).*

13. The Third Department's decision in Bordeleau rejects two arguments asserted by the respondents therein (which included respondent ESD), first, that passing state funds through the hands of a state department or a public benefit corporation ("PBC") avoids the prohibition expressed in Article VII, Section 8(1), and, second, that proof of a public purpose for the funds renders the appropriations proper:

*... [W]e cannot accept defendants' premise that passing state funds through the hands of the Department or a PBC before distribution to private entities will avoid the constitutional proscription. Giving the funds to private entities by channeling them through authorized public entities will not shield these appropriations from challenge, for the State may not do "indirectly that which cannot be done directly" (Wein v State of New York, 39 NY2d at 145, quoting People ex rel. Burby v Howland, 155 NY 270, 280 [1898]; accord Schulz v State of New York, 84 NY2d at 241). An analogous circumvention was rejected by the Court of Appeals when it stated: "If the gift of the bonds of the state to a railroad corporation would be such a gift — and it undoubtedly would be — then so would be an issue of bonds by the state with the express condition that their proceeds should be given to the same corporation. The evasion of the constitutional prohibition would be palpable and it could not and should not be permitted" (People v Westchester County Natl. Bank of Peekskill, N.Y., 231 NY 465, 476 [1921]).*

*Nor can we accept defendants' argument that proof of a public purpose for the funds that were disbursed by the intermediaries here establishes the legitimacy of the appropriations. The Court of Appeals has made clear that the existence of a public purpose for an appropriation that aids a private undertaking is not the test of whether it is lawful. "However important, however useful the objects designed by the legislature, they may not be accomplished by a gift or a loan of credit to an individual or to a corporation. It will not do to say that the character of the act is to be judged by its main object — that because the purpose is public, the means adopted cannot be called a gift or a loan. To do so would be*

*to make meaningless the provision adopted by the [constitutional] convention of 1846. Gifts of credit to railroads served an important public purpose. That purpose was distinctly before the legislatures that made them. Yet they were still gifts and so were prohibited" (id. at 475).*

14. The above-described incentives and subsidies approved by respondents ECHDC, ESD, State, NYPA and/or EDPAB for respondent Bass Pro, and for the unidentified "second anchor tenant," jointly and separately constitute a gift or loan of State money or credit "to or in aid of [a] private corporation or association, or private undertaking," and are violative of Article VII, Section 8(1) of New York's Constitution. NYS Constitution, Art. VI, § 8(1); Bordelaeau, *supra*.

**PETITIONERS' SECOND CLAIM – RESPONDENT EDPAB & UDC'S VIOLATION OF EDL §188 INDUSTRIAL INCENTIVE AWARD CRITERIA**

15. Petitioners repeat and reallege each and every allegation contained in paragraphs 1 through 14 of this petition, with the same force and effect as if set forth here at length.

16. Section 182 of the State's Economic Development Law addresses the creation of respondent EDPAB, and provides that there shall be a four-member board, that three members constitute a quorum, and "that no actions may be taken except upon the affirmative vote of at least three members."

17. Section 183 of the State's Economic Development Law lists the powers and duties of respondent EDPAB, including, in pertinent part: "to evaluate applications for allocations of economic development power and to make recommendations with respect to such proposed allocations," and "to evaluate economic development plans for the use of industrial incentive awards specifically provided for in this section." EDL §183(b) & (c).

18. Section 188 of the State’s Economic Development Law is entitled “industrial incentive awards,” and provides the following:

*Economic Development Law*

*Section 188 Industrial incentive awards*

*§ 188. Industrial incentive awards. The power authority of the state of New York shall submit to the board its economic development plan for the use of industrial incentive awards for economic development purposes. The board shall review the proposed plan and shall approve such plan, in whole or in part, upon its determination that such plan and its implementation is consistent with the criteria and requirements provided for in sections one hundred eighty-four and one hundred eighty-five of this article and such other criteria as the board may, by rule and regulation, provide with respect to the plan and industrial incentive awards.*

19. Pursuant to EDL Section 188, respondent NYPA is obligated to submit any proposed “economic development plan for the use of industrial incentive awards for economic development purposes” to respondent EDPAB for its review and approval; respondent EDPAB may approve the plan only if “its implementation is consistent with the criteria and requirements provided for” in EDL Section 184 (entitled “Criteria for eligibility for economic development power”) and EDL Section 185 (entitled “Revitalization programs”), and “such other criteria as the board may, by rule and regulation, provide with respect to the plan and industrial incentive awards.”

20. Upon information and belief, respondent EDPAB has not provided, by rule or regulation, any additional criteria with respect to proposals for “industrial incentive awards,” and, therefore, any proposal submitted to respondent EDPAB by respondent NYPA may not be approved unless its implementation would be consistent with the criteria and requirements provided in EDL Sections 184 and 185.

21. The Minutes of a Special Meeting conducted by respondent EDPAB on

February 2, 2010 show that said respondent reviewed and approved that date, by a three to zero vote, respondent NYPA's request for an expedited funding package to respondent ECHDC to support the Canal Side project, and authorized an Industrial Incentive Award ["IIA"] to respondent ECHDC in the amount of \$3.7 million per year for 20 years (2010 - 2029) in support of the Canal Side Development Project "for the sole purpose of enabling the Erie Canal Harbor Development Corporation to secure the necessary funding for the Canal Side Development Project." [A copy of respondent EDPAB's 2/2/10 meeting minutes is attached hereto as **Exhibit B**]

22. As shown by the criteria and requirements listed at EDL Section 184, and underscored at Section 370.1(c) of respondent EDPAB's regulations (found at 21 NYCRR Section 370.1), the benefits of respondent NYPA's economic development power is not intended for use by a business facility that is "primarily used in making retail sales of goods or services to customers who personally visit such facilities to obtain such goods or services," such as the Canal Side project's proposed anchor tenant, the Bass Pro store. [Emphasis added.]

23. Furthermore, as reflected in the introductory sentence of EDL Section 185, an economic development plan for a revitalization program is intended to benefit "a business in serious, long-term distress that is not primarily caused by normal, short-term changes in the business cycle," not a proposed development such as the Canal Side project, or a business entity such as respondent Bass Pro.

24. Implementation of the Canal Side project plan would not be consistent with the criteria and requirements provided in either EDL Section 184 or Section 185, and, therefore, the action taken by respondent EDPAB on February 2, 2010 violates the

mandates of Section 188 of the Economic Development Law.

25. By approving respondent NYPA's request for an expedited funding package to respondent ECHDC to support the Canal Side project, and authorizing an Industrial Incentive Award ["IIA"] to respondent ECHDC on February 2, 2010, respondent EDPAB failed to perform a duty enjoined upon it by law, proceeded without or in excess of its jurisdiction, and acted in a fashion that is contrary to law, arbitrary and capricious, and/or an abuse of discretion.

26. By entering into an agreement with respondent ECHDC, on or about July 13, 2010, to provide \$105,000,000 in funding for the Canal Side project, which includes the aforementioned Industrial Incentive Award unlawfully approved by respondent EDPAB on February 2, 2010, respondent NYPA has failed to perform a duty enjoined upon it by law, proceeded without or in excess of its jurisdiction, and acted in a fashion that is contrary to law, arbitrary and capricious, and/or an abuse of discretion.

27. Petitioner has no adequate remedy at law.

**FOR PETITIONERS' THIRD CLAIM – REGARDING  
CONFLICT OF INTEREST OF RESPONDENT EDPAB'S CHAIRMAN**

28. Petitioners repeat and reallege each and every allegation contained in paragraphs 1 through 27 of this petition, with the same force and effect as if set forth here at length.

29. Respondent Kenneth Schoetz, Chairman of respondent EDPAB, participated in the board's February 2, 2010 special meeting, and voted affirmatively to approve the resolution adopted that day in furtherance of respondent ECHDC's Canal Side project, despite the fact that respondent Schoetz simultaneously held the position of "Senior Vice

President – Regional Offices” for respondent ESD, and had previously served as acting upstate Chief Executive Officer and Upstate Chief Operating Officer for respondent ESD.

30. The fact that respondent Schoetz’s employer, respondent ESD, served as the SEQRA lead agency for the proposed Canal Side project, and is the parent corporation of the project sponsor, respondent ECHDC, creates an impermissible conflict of interest and/or appearance of impropriety.

31. Only three of the four members of respondent EDPAB participated in the February 2, 2010 special meeting, and, therefore, had respondent Schoetz not voted for the resolution, the three affirmative votes required to take an action pursuant to EDL Section 182 would have been lacking.

32. Common law in the State of New York holds that it is critical that the public be assured that their officials are free to exercise their best judgment without any hint or suggestion of self-interest or partiality, especially if a matter under consideration is controversial, such as the proposed Canal Side project; anything less undermines the people's confidence in the legitimacy of the proceedings and the integrity of the governmental agency. [See, generally, e.g., Zagoreos v. Conklin, 109 AD2d 281, 491 NYS2d 358 (AD2 1985); Byer v. Town of Poestenkill, 232 AD2d 851, 648 NYS2d 768 (AD3 1996).]

33. By participating in the discussion of, and voting on, the proposed resolution on February 2, 2010, respondent Schoetz acted in violation of common law conflict-of-interest principles, and created, at a minimum, the appearance of impropriety.



34. As a result of the above actions on February 2, 2010, respondent EDPAB's approval of the Canal Side project resolution is invalid and should be set aside and nullified.

35. For the above reasons, respondent EDPAB has failed to perform a duty enjoined upon it by law, breached its fiduciary responsibility to the residents of the State of New York, proceeded without or in excess of its jurisdiction, and/or made a determination in violation of lawful procedure, affected by an error of law, and/or in an arbitrary and capricious manner.

36. Petitioners have no adequate remedy at law.

**PETITIONERS' FOURTH CLAIM – RESPONDENT EDPAB'S FAILURE TO PROVIDE A MEANINGFUL WRITTEN DETERMINATION**

37. Petitioners repeat and reallege each and every allegation contained in paragraphs 1 through 36 of this petition, with the same force and effect as if set forth here at length.

38. Respondent EDPAB is obligated by its own regulations to provide a meaningful written explanation for its determinations, including findings, conclusions and the reasons for its decision:

*Section 370.8. Determinations of the board.*

*Upon approval or denial of any application for economic development power, the board will issue in writing a statement of its findings and conclusions with respect to such application and the reasons for its approval or denial.*

[21 NYCRR § 370.8]

39. The resolution adopted by respondent EDPAB on February 2, 2010 [attached hereto as **Exhibit B**] is so conclusory in nature and devoid of substance that it violates the

letter and spirit of the above-quoted regulation, and leaves the Court without a rational basis for determining whether the requirements of EDL Section 188 have been met.

40. By providing a deficient written determination, respondent EDPAB has failed to perform a duty enjoined upon it by law, proceeded without or in excess of its jurisdiction, and acted in a fashion that is contrary to law, arbitrary and capricious, and/or an abuse of discretion.

41. Petitioner has no adequate remedy at law.

**FOR PETITIONERS' FIFTH CLAIM– RESPONDENT EDPAB’S  
VIOLATION OF SEQRA**

42. Petitioners repeat and reallege each and every allegation contained in paragraphs 1 through 41 of this petition, with the same force and effect as if set forth here at length.

43. Pursuant to the regulations promulgated by the State Commissioner of Environmental Conservation, "No agency involved in an action may undertake, fund or approve the action until it has complied with the provisions of SEQR." [6 NYCRR 617.3(a)]

44. Pursuant to Section 617.11 of the SEQRA regulation, found at 6 NYCRR 617.11, respondent EDPAB, as an “involved agency,” was not allowed to make a final decision to approve or fund a project until the lead agency, respondent ESD, issued its SEQRA findings statement, and without first issuing its own findings statement:

***§617.11 Decision-making and findings requirements***

*(a) Prior to the lead agency's decision on an action that has been the subject of a final EIS, it shall afford agencies and the public a reasonable time period (not less than 10 calendar days) in which to consider the final EIS before issuing its written findings statement. If a project modification or change of circumstance related to the project requires a lead or involved agency to substantively modify*

*its decision, findings may be amended and filed in accordance with subdivision 617.12(b) of this Part.*

*(b) In the case of an action involving an applicant, the lead agency's filing of a written findings statement and decision on whether or not to fund or approve an action must be made within 30 calendar days after the filing of the final EIS.*

*(c) No involved agency may make a final decision to undertake, fund, approve or disapprove an action that has been the subject of a final EIS, until the time period provided in subdivision 617.11(a) of this section has passed and the agency has made a written findings statement. Findings and a decision may be made simultaneously.*

...

[6 NYCRR 617.11(a)-(c)]

45. The March 26, 2010 minutes of respondent ESD's Board of Directors indicate that respondent ESD did not issue its SEQRA findings statement until March 26, 2010. [A copy of respondent ESD's 3/26/10 minutes is attached hereto as **Exhibit C**],

46. By voting to approve funding for the Canal Side project on February 2, 2010, prior to the lead agency's issuance of its SEQRA findings statement, and without first issuing its own findings statement, respondent EDPAB violated the procedural requirements of SEQRA.

47. State and local agencies, including respondent EDPAB, are obliged to strictly comply with the prescribed procedures in SEQRA. [See, for example, NYC Coalition to End Lead Poisoning v. Vallone, 100 NY2d 337, 350, 763 NYS2d 530, 537 (7/1/2003) (the substance of SEQRA cannot be achieved without its procedures, and departures from SEQRA's procedural mechanisms thwart the purposes of the statute; strict compliance with SEQRA guarantees that environmental concerns are confronted and resolved prior to agency action); Citizens Against Retail Sprawl v. Giza, 280 AD2d 234, 237, 722 NYS2d 645, 649 (4th Dept. 2001); King v. Saratoga County Board of Supervisors, 89 NY2d 341, 347-348, 653 NYS2d 233, 235-236 (1996); Taxpayers Opposed to Floodmart,

Ltd. v. City of Hornell IDA, 212 AD2d 958, 624 NYS2d 689 (4th Dept. 1995) (“literal rather than substantial compliance with SEQRA is required”); Golten Marine Co., Inc. v. NYSDEC, 193 AD2d 742, 598 NYS2d 59 (3d Dept. 1993) (“Literal compliance with both the letter and spirit of SEQRA is required and substantial compliance will not suffice”.)]

48. As New York State's highest court held more than two decades ago, an agency's action is void and unauthorized if it has not met its obligations under SEQRA:

...  
*... We [the NY Court of Appeals] have insisted... that the statutory environmental review requirements of SEQRA must be met and have held that if they are not the governmental action is void and, in real sense, unauthorized.*

E.F.S. Ventures Corp. v. Foster, 71 NY2d 359, 526 NYS2d 56, 62 (1988).

49. By approving funding for the Canal Side project without waiting for the lead agency's issuance of a findings statement, and without first issuing its own findings statement, respondent EDPAB failed to perform a duty enjoined upon it by law, proceeded without or in excess of its jurisdiction, and acted in a fashion that is contrary to law, arbitrary and capricious, and/or an abuse of discretion.

50. Pursuant to EDL § 188, respondent EDPAB's lawful approval of the Canal Side project's economic development plan and industrial incentive award was a condition precedent to respondent NYPA's entry into a funding agreement with respondent ECHDC.

51. By entering into an agreement with respondent ECHDC, on or about July 13, 2010, to provide \$105,000,000 in funding for the Canal Side project, including the aforementioned Industrial Incentive Award unlawfully approved by respondent EDPAB

on February 2, 2010, respondent NYPA has failed to perform a duty enjoined upon it by law, proceeded without or in excess of its jurisdiction, and acted in a fashion that is contrary to law, arbitrary and capricious, and/or an abuse of discretion.

52. Petitioner has no adequate remedy at law.

#### **REGARDING PETITIONERS' REQUEST FOR PRELIMINARY RELIEF**

53. Petitioners repeat and reallege each and every allegation contained in paragraphs 1 through 52 of this petition, with the same force and effect as if set forth here at length.

54. Petitioners seek a preliminary injunction from the Court to maintain the status quo during the pendency of this proceeding by preliminarily enjoining respondents ECHDC, ESD, NYPA, and/or the State of New York, from expending, appropriating, disbursing, or otherwise transferring any funds which, directly or indirectly, further the development of the proposed Bass Pro store, and/or otherwise constitute a subsidy or monetary incentive to a private corporation, association or undertaking, in furtherance of the Canal Side project.

55. Upon information and belief, any expenditure of funds during the pendency of this proceeding, which have been wrongfully or illegally appropriated or disbursed in furtherance of the Canal Side project, would irreparably harm petitioners, the taxpayers of the State of New York, and the environment because such expenditure would reduce the amount of funds available in the future for the cleaning and restoration of the Buffalo River and Outer Harbor, and/or the proper development of the Erie Canal Harbor and Buffalo waterfront.

56. Failure to grant the requested preliminary injunction would tend to render the judgment ineffectual.

57. For the reasons stated in paragraphs 1 through 52 of this pleading, petitioners believe that they have established the likelihood of success.

58. Upon information and belief, the potential harm to petitioners, the taxpayers of the State of New York, and the environment if a preliminary injunction is not granted clearly exceeds any potential harm to respondents of granting the preliminary relief requested.

**WHEREFORE**, petitioners demand judgment against respondents as follows:

A. Preliminarily enjoining, during the pendency of this proceeding, respondents Erie Canal Harbor Development Corporation, New York State Urban Development Corporation, d/b/a Empire State Development Corporation, Power Authority of the State of New York, and/or the State of New York, its officers, employees, agents, boards, authorities, corporate governmental agencies, corporate municipal instrumentalities, and/or public benefit corporations, from expending, appropriating, disbursing, or otherwise transferring any funds which, directly or indirectly, further the development of the proposed Bass Pro store, and/or otherwise constitute a subsidy or monetary incentive to a private corporation, association or undertaking, in furtherance of the Canal Side project.

B. Declaring that the incentives and subsidies approved by respondents Erie Canal Harbor Development Corporation, New York State Urban Development Corporation, d/b/a Empire State Development Corporation, Power Authority of the State

of New York, New York State Economic Development Power Allocation Board, and/or the State of New York, for respondent Bass Pro Outdoor World, L.L.C., the so-called “Bass Pro Store” at the Canal Side project, and/or for the unidentified “second anchor tenant” at the Canal Side project, constitute an unconstitutional gift or loan of State money or credit “to or in aid of [a] private corporation or association, or private undertaking,” and are void as violative of Article VII, Section 8(1) of New York’s Constitution.

C. Annuling and setting aside the February 2, 2010 decision by respondent New York State Economic Development Power Allocation Board that authorized respondent Power Authority of the State of New York to utilize net revenues from the Niagara Power Project for an expedited funding package to respondent Erie Canal Harbor Development Corporation, and approved an Industrial Incentive Award to help fund the Canal Side project.

D. Annuling and setting aside the March 26, 2010 decision of respondent New York State Urban Development Corporation, d/b/a Empire State Development Corporation, affirming the “General Project Plan” for the Canal Side project.

E. Annuling and setting aside both the decision by respondent Power Authority of the State of New York to enter into an agreement with respondent Erie Canal Harbor Development Corporation, and the agreement itself, entered into on or about July 13, 2010, to provide \$105,000,000 in funding for the Canal Side project.

F. Annuling and setting aside each and every decision by or on behalf of respondent State of New York, and/or any of its officers, employees, agents, boards, authorities, corporate governmental agencies, corporate municipal instrumentalities,

and/or public benefit corporations, including, without limitation, respondent New York State Urban Development Corporation, d/b/a Empire State Development Corporation, to expend, appropriate, disburse, or otherwise transfer any funds in furtherance of the development of the proposed Bass Pro store, and/or any other private undertaking, as part of the Canal Side project.

G. Permanently enjoining respondents Erie Canal Harbor Development Corporation, New York State Urban Development Corporation, d/b/a Empire State Development Corporation, Power Authority of the State of New York, and the State of New York, its officers, employees, agents, boards, authorities, corporate governmental agencies, corporate municipal instrumentalities, and/or public benefit corporations, from expending, appropriating, disbursing, or otherwise transferring any funds which, directly or indirectly, further the development of the proposed Bass Pro store, and/or otherwise constitute a subsidy or monetary incentive to a private corporation, association or undertaking, in furtherance of the Canal Side project.

H. Granting such other and further relief, as to the Court may seem just and proper, together with the costs and disbursements of this proceeding, including attorney fees in accordance to State Finance Law § 123-g.

Dated: July 24, 2010  
East Aurora, New York

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ARTHUR J. GIACALONE  
Attorney for Petitioners/Plaintiffs  
140 Knox Road  
P.O. Box 63  
East Aurora, New York 14052  
(716) 687-1902



**VERIFICATION**

STATE OF NEW YORK)

SS.:

COUNTY OF ERIE)

MARK GOLDMAN, being duly sworn, deposes and says: he is one of the petitioners/plaintiffs in the within proceeding/action, and that the petitioners/plaintiffs are united in interest; that he has read the foregoing petition/complaint and knows the content thereof; that the same is true to his own knowledge, except as to matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

/s/ \_\_\_\_\_  
MARK GOLDMAN

Sworn to before me this  
24th day of July 2010.

\_\_\_\_\_  
ARTHUR J. GIACALONE  
Notary Public, State of New York  
Qualified in Erie County  
My commission expires 5/31/2011