

STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

In the Matter of the Application of
MARGARET WOOSTER,
CLAYTON S. "JAY" BURNEY, JR.,
LYNDA K. STEPHENS, and
JAMES E. CARR,
Petitioners

**VERIFIED
AMENDED PETITION**

Index No. I-2016-0096

Date Petition Filed: 6/28/16

For a Judgment pursuant to CPLR Art. 78 & § 3001
- against -

Assigned to:
Hon. Donna M. Siwek, JSC

QUEEN CITY LANDING, LLC,
CITY OF BUFFALO PLANNING BOARD, and
CITY OF BUFFALO COMMON COUNCIL,
Respondents.

Petitioners Margaret Wooster, Clayton S. "Jay" Burney, Jr., Lynda K. Stephens, and James E. Carr, by their attorney, Arthur J. Giacalone, for their verified amended petition in this CPLR Article 78 proceeding against the respondents, respectfully allege and state:

INTRODUCTION

1. Commencing in mid-March 2016, respondent Queen City Landing, LLC, has engaged in a concerted effort to fast-track the approval process for a 23-story, 370,000-square-foot mixed-use development project proposed for construction on the City of Buffalo's Outer Harbor, attempting to circumvent laws and policies meant to ensure thoughtful and appropriate planning decisions and preserve our environment. Said respondent's actions, assisted by the staff of the City of Buffalo's planning office and respondent City of Buffalo Planning Board, bring to mind the cautionary words in *Sutton*

Area Community v. Board of Estimates of the City of New York, 165 AD2d 456, 462, 568 NYS2d 35, 39 (2d Dept. 1991), revd. on other grounds 78 NY2d 945, 573 NYS2d 638 (1991), where the Second Department urged "judicial vigilance" in circumstances where "sophisticated developers and compliant officials" maneuver through and around environmental and land use laws.

2. This CPLR Article 78 proceeding is brought to challenge and set aside the following determinations and actions in furtherance of respondent Queen City Landing, LLC's proposed mixed-use facility at 975-1005 Fuhrmann Boulevard in the City of Buffalo, County of Erie, State of New York [hereinafter, "Queen City Landing project"]:

A. The May 31, 2016 issuance by respondent City of Buffalo Planning Board of a Determination of Significance/Negative Declaration, pursuant to the State Environmental Quality Review Act and the regulations promulgated thereunder at 6 NYCRR Part 617 ["SEQRA"], for the proposed Queen City Landing project.

B. The May 31, 2016 approval by respondent City of Buffalo Planning Board of the design and site plan for the Queen City Landing project.

C. The May 31, 2016 approval by respondent City of Buffalo Planning Board of respondent Queen City Landing, LLC's application to subdivide 975-1005 Fuhrmann Blvd. in the City of Buffalo, New York.

D. The May 31, 2016 approval by respondent City of Buffalo Planning Board of respondent Queen City Landing, LLC's application for a demolition permit for 975-1005 Fuhrmann Blvd. in the City of Buffalo, New York.

E. The June 21, 2016 grant by respondent City of Buffalo Common Council of a restricted use permit for the Queen City Landing project.

PARTIES

3(A). Petitioner Margaret Wooster is a resident of the City of Buffalo, County of Erie, and State of New York, and, as addressed in detail below, uses and has an appreciation for Buffalo's Outer Harbor and its natural resources more than most other members of the public.

3(B). Petitioner Clayton S. "Jay" Burney, Jr., (hereinafter, "Jay Burney") is a resident of the City of Buffalo, County of Erie, and State of New York, and, as addressed in detail below, uses and has an appreciation for Buffalo's Outer Harbor and its natural resources more than most other members of the public.

3(C). Petitioner Lynda K. Stephens is a resident of the City of Buffalo, County of Erie, and State of New York, and, as addressed in detail below, uses and has an appreciation for Buffalo's Outer Harbor and its natural resources more than most other members of the public.

3(D). Petitioner James E. Carr is a resident of the City of Buffalo, County of Erie, and State of New York, and, as addressed in detail below, uses and has an appreciation for Buffalo's Outer Harbor and its natural resources more than most other members of the public.

4(A). Upon information and belief, respondent Queen City Landing, LLC, is a domestic limited liability company, the owner of property in the City of Buffalo commonly known as 975-1005 Fuhrmann Boulevard, and the sponsor of the Queen City Landing project, with an office for the conducting of business at 3275 N. Benzing Road, Orchard Park, New York 14127.

4(B). Respondent Planning Board of the City of Buffalo ("City Planning Board") is the planning board of the City of Buffalo, County of Erie, State of New York, possessing the powers and duties of a city planning board pursuant to the laws of the State of New York, and having an office for the conducting of business in the County of Erie at City Hall, 65 Niagara Square, Buffalo, New York 14202.

4(C). Respondent Common Council of the City of Buffalo ("Common Council") is the legislative body of the City of Buffalo, County of Erie, State of New York, possessing the powers and duties of a common council pursuant to the laws of the State of New York, and having an office for the conducting of business in the County of Erie at City Hall, 65 Niagara Square, Buffalo, New York 14202.

FACTUAL BACKGROUND & LEGAL CONTEXT

- Buffalo's Outer Harbor and the Subject Parcel -

5. The portion of the City of Buffalo's Lake Erie shoreline extending northerly from the city's border with Lackawanna to the U.S. Coast Guard Marina is known as the "Outer Harbor."

6. Located within the confines of the Outer Harbor are public parks, marinas and walkways, including, from south to north, Tiftt Street Pier, Gallagher Beach, Buffalo Harbor State Park, the Small Boat Harbor, the Greenway Nature Trail (also known as the "Greenbelt"), the Seaway Pier, and Wilkeson Pointe, and State-designated significant fish and wildlife habitats, including the Small Boat Harbor and Times Beach Nature Preserve ("Times Beach").

7. The "subject parcel" – that is, two adjoining parcels of land commonly known as 975 Fuhrmann Boulevard (S.B.L. 132.06-1-1.1) and 1005 Fuhrmann Boulevard

(S.B.L. 132.06-1-1.2) – is situated within the Outer Harbor immediately north of the Small Boat Harbor and a short distance south of the Greenway Nature Trail, Wilkeson Point and Times Beach.

8. The subject parcel forms a peninsula, approximately 20 acres in area, extending in a west-southwesterly direction into Lake Erie, is surrounded by water on the south, west, and northwest, and abuts a public bike path and Fuhrmann Boulevard along its eastern boundary.

9. The subject parcel, which is situated in a 100-year coastal floodplain, is located in close proximity to two significant bird habitats (Tifft Nature Preserve and Times Beach Nature Preserve), fish spawning areas at the Small Boat Harbor and in the waters of Lake Erie to its west and northwest, and to a number of areas to its west and south referred to in the City of Buffalo’s Local Waterfront Revitalization Program [“LWRP”] as “fishing hot spots.” [Attached hereto as **Exhibit A** are two maps, each of which is a detail from a LWRP map depicting the Outer Harbor’s “natural resources” and “recreation and open space,” respectively.]

10. The northeast portion of the subject parcels abuts a parcel of land approximately 50 acres in area commonly known as the “Port Terminal Complex” or “Ford Terminal Complex,” having a street address of 901 Fuhrmann Boulevard, which includes two large, currently-vacant industrial buildings referred to as “Terminal A” and “Terminal B.”

11. The primary structure at the subject parcel at 975-1005 Fuhrmann Blvd. is a six-story industrial building which, according to City of Buffalo’s “Property Information”

records, was constructed in 1927 and has a gross floor area of approximately 272,000 square feet.

12. The primary structure at 975-1005 Fuhrmann Blvd. is known throughout Western New York as the “Freezer Queen building,” and, upon information and belief, has been vacant since approximately July 2006.

13. According to the City of Buffalo’s “Property Information” records, the subject parcel is owned by respondent Queen City Landing, LLC, and was purchased for \$3,000,000 pursuant to a foreclosure deed on or about November 28, 2007.

14. According to records available on-line from the New York State Department of State’s Division of Corporations, respondent Queen City Landing, LLC, is a domestic limited liability company based in Erie County and formed on November 2, 2007.

15. Upon information and belief, Gerald A. Buchheit, Jr., is a principal of Queen City Landing, LLC.

16. According to New York State’s Cultural Information System (CRIS) and the Buffalo Harbor Brownfield Opportunity Area Nomination Document, the Freezer Queen building and, upon information and belief, the Port Terminal Complex are eligible for listing on both the National and State Registers of Historic Places.

17. Upon information and belief, respondent Queen City Landing, LLC, has taken no visible steps to maintain or preserve the former Freezer Queen building during the eight-and-half-years that it has owned the subject parcel, failing to replace or board up broken windows, paint the exterior of the building, or otherwise attempt to prevent deterioration.

- Respondent Queen City Landing's 2008 Proposal -

18. Upon information and belief, respondent Queen City Landing, LLC, announced in or around March 2008 its plans to convert the Freezer Queen building into approximately 130 upscale condominium units, adding two floors to the existing structure; in furtherance of such plans, respondent Queen City Landing, LLC, petitioned the City of Buffalo to rezone the subject parcel from "M3" Heavy Industrial to "CM" General Commercial District, and applied to respondent City Planning Board for design and site plan approval of the proposed project.

19. According to City of Buffalo records, on June 24, 2008, respondent Common Council passed a resolution to approve the rezoning of the subject parcel from M3 to CM, but expressly provided that the rezoning would not take effect until the following conditions were met:

...
... That this rezoning shall not be effective unless and until a certified copy [of the resolution] has been filed by the petitioner in the offices of the Erie County Clerk's Office and proof of such filing is submitted to the City Clerk's Office. That this rezoning shall not be effective unless and until such conditions as are set by the City Planning Board are met.
...

[Attached hereto as **Exhibit B** is a copy of May 17, 2016 certification by the City Clerk setting forth the text of the aforementioned June 24, 2008 resolution.]

20. Upon information and belief, respondent Queen City Landing, LLC, "the petitioner" referred to in the aforementioned June 24, 2008 rezoning resolution, failed to file a certified copy of said resolution in the offices of the Erie County Clerk, and abandoned the project which had been the basis for the request to rezone 975-1005 Fuhrmann Blvd. from "M3" to "CM."

- Respondent Queen City Landing's 2015 Proposal -

21. Upon information and belief, in or around July 2015, respondent Queen City Landing, LLC's principal, Gerald A. Buchheit, Jr., announced new plans to retrofit the existing Freezer Queen building at the subject parcel to create 120 one- and two-bedroom apartments priced at \$2,000 per month, with a restaurant, bar and fitness center on the main floor, and the addition of a penthouse atop the existing structure with a resident club house and roof-top terrace, as well as covered ground-level parking; future phases would include residential buildings and possibly a hotel on the 20-acre site. [Attached hereto as **Exhibit C** is a sheet with two illustrations prepared on behalf of respondent Queen City Landing, LLC, at the top of the page a rendering of respondent Queen City Landing, LLC's 2008 proposal, and at the bottom a rendering of the 2015 proposal.]

22. Upon information and belief, in furtherance of the plan announced in July 2015, respondent Queen City Landing, LLC, sought design and site plan review from respondent City Planning Board "for the conversion of the 'Freezer Queen' building into 120 market-rate apartments and a restaurant and fitness center," and a rezoning of 975-1005 Fuhrmann Blvd. from "M3" to "CM" from respondent Common Council. [Attached hereto as **Exhibit D** is a copy of respondent City Planning Board's October 19, 2015 regular meeting agenda reflecting respondent Queen City Landing, LLC's applications.]

23. Upon information and belief, on November 2, 2015, respondent Queen City Landing, LLC's obtained design and site plan approval from respondent City Planning Board.

24. Upon information and belief, respondent Queen City Landing, LLC, chose

not to proceed with its request to rezone the subject parcel from “M3” to “CM,” and, instead, abandoned its plans for 975-1005 Fuhrmann Blvd. which had been the basis for the November 2, 2015 approval granted by respondent City Planning Board.

- Buffalo Local Waterfront Revitalization Program [LWRP] -

25. Upon information and belief, on or about February 2, 2016, respondent Common Council unanimously adopted the City of Buffalo *Local Waterfront Revitalization Program* [LWRP], a 177-page document that sets “general goals for the city’s waterfront as a whole and specific goals for portions of the waterfront that have notable characteristics.”

26. The subject parcels lies within Buffalo’s Waterfront Revitalization Area [BRWA].

27. Buffalo’s LWRP sets forth goals and policies of pertinence to the Outer Harbor and respondent Queen City Landing’s proposed project for 975-1005 Fuhrmann Blvd., including, without limitation, the following:

A. The LWRP contains a detailed development concept and rendering for the former Freezer Queen site, showing re-use of the existing Freezer Queen building with a penthouse, and expressly envisions a “*build out*” at the Freezer Queen site that includes “*Building Reuse*,” not the demolition of the existing structure. [LWRP, p. “25”]

[Attached hereto as **Exhibit E** is a copy of the LWRP’s detailed concept rendering for the former Freezer Queen site, found at LWRP, p. “37”.]

B. The LWRP requires that SEQRA, site plan and consistency reviews for proposed projects within Buffalo’s waterfront revitalization area [Buffalo WRA] consider “potential adverse impacts or interference with the continued operation of existing water-

dependent uses.” [LWRP, p. “5”]

C. The LWRP includes the following policy: “Protect, enhance and restore structures, districts, areas or sites that are of significance in the history, architecture, archeology or culture of the state, its communities or the nation,” and requires, “in addition to compliance with historic preservation laws,” consideration of impacts on “Waterfront industrial heritage resources.” Both the existing structure at the Freezer Queen site, and the adjacent Ford Terminal Complex (also known as Terminals “A” and “B”) are among the sites listed in the LWRP as possessing “waterfront heritage resources” reflecting the industrial history of the Outer Harbor. [LWRP, pp. “8” and “9”]

D. A LWRP policy requires decision-makers to “protect, restore or enhance natural and manmade resources ... which contribute to the overall scenic quality of the coastal areas.” In furtherance of the policy, SEQRA, site plan and consistency review of proposed actions within the BWRA are to consider protection and enhancement of unique waterfront landscapes such as marinas (described as “the heart of the community’s engagement with its water”), piers, wharfs and mooring areas, Great Lakes Seaway Trail Scenic Byway, and the Niagara River Globally Significant Important Bird Area. [LWRP, pp “9”, “158-159”] Furthermore, as set forth in the LWRP’s Buffalo Waterfront Assessment Form (BAAF), when determining whether a proposed project will hinder the LWRP policy objective of preventing impairment of the scenic quality of a waterfront resource, an agency must consider whether the development includes “the addition of structures which because of siting or scale will reduce identified views or which because of scale, form or materials will diminish the scenic quality of an identified resource.”

E. The LWRP seeks to protect, preserve and improve publicly owned areas identified as habitats of state and local significance, as well as the Niagara River Globally Significant Important Bird Area (GSIBA), and characterizes Buffalo’s waterfront revitalization area as “*an informal regional wildlife preserve*” where the Lake Erie-Niagara River food web must be protected and rebuilt. [LWRP, pp. “11”, “12”.] Included within the Outer Harbor area are three State-designated “Significant Coastal Fish and Wildlife Habitats”: Times Beach Nature Preserve (described as “a critical geographical feature for bird migration north in the spring and south in the fall”), the Small Boat Harbor (characterized as “the only sizable shallow water embayment on Lake Erie in Erie County” possessing “valuable food resources for many species of waterfowl and other migratory birds”), and Tiff Nature Preserve (described as “the largest contiguous fish and wildlife habitat area within the City of Buffalo” where “birds of 264 species and subspecies have been recorded”). [LWRP, pp. “111”, “113” – “114”]

F. Buffalo’s LWRP expressly calls for the protection and enhancement of the Niagara River GSIBA, and asks that any review of a proposed project consider two critical factors:

- (a) “Protection and enhancement of bird habitat areas;” and
- (b) “Avoidance of disruption to bird migration to the maximum extent practicable.” [LWRP, p. “12”]

- Buffalo Coastal Special Review District -

28. The subject parcel is located within the City’s “Buffalo Coastal Special Review District,” found at Section 511-67 of the City’s Zoning Ordinance; as a result,

any project proposed for 975-1005 Fuhrmann Blvd. may not proceed unless it obtains a “restricted use permit” from respondent Common Council.

29. The intent of the Buffalo Coastal Special Review District is set forth at Section 511-67(A)(2) of the City Code as follows:

*City of Buffalo Code, Chapter 511 Zoning
Section 511-67 Buffalo Coastal Special Review District*

...

A.(2). Legislative intent.

*(a) The Common Council finds that the stability, economic viability and future prosperity of the **Buffalo coastal area is being threatened by inconsistent development** and by uses not related to the coastal area.*

*(b) The Common Council further finds that **inadequately controlled development may jeopardize a balance of residential, commercial, port-related industrial and public access uses** and thus adversely affect the welfare and economic well-being of the City and its residents.*

(c) The Common Council therefore finds that future development shall be controlled by the creation of a special zoning district. [Emphasis added.]

30. The Buffalo Coastal Special Review District expressly empowers respondent Common Council to determine the appropriate height of any structure built within said district when determining whether to grant or deny the restricted use permit:

*City of Buffalo Code, Chapter 511 Zoning
Section 511-67 Buffalo Coastal Special Review District*

...

A.(4) Restricted use permit. Any person seeking to establish or extend a use restricted by this section shall file an application for a restricted use permit as approved by § 511-55 of this chapter. The City Planning Board, in its report of recommendations to the Common Council, shall describe considerations involving air and water quality, coastal management, flood hazards and environmental impact of the proposed uses. In making its recommendation, the City Planning Board shall also coordinate referrals to other affected governmental agencies and report to the Common Council on such coordination.

A.(5) Height restrictions. Any application under Subsection A(4) above shall include maximum heights involved in any use seeking to be established or extended under this subdivision. Such maximum height shall be subject to the approval of the Common Council and, once approved, shall not be exceeded.

31. Pursuant to Buffalo’s City Code, a proposed project or action that is located on a site wholly or partially within a coastal zone or a 100-year floodplain, such as the subject parcel, is deemed a “Type 1” action for purpose of review under the State Environmental Review Act [SEQRA], and, therefore, “carries with it a presumption that it is likely to have a significant adverse impact on the environment” and may require an Environmental Impact Statement [“EIS”]. [Buffalo City Code, Section 168-4(A) & 168-4(B)(9)]

- Respondent Queen City Landing’s 2016 Proposal –

32. Upon information and belief, on or about March 14, 2016, an application was submitted on behalf of respondent Queen City Landing, LLC, to respondent City Planning Board requesting design and site plan approval for a proposed development at 975-1005 Fuhrmann Blvd., as well as a request to subdivide the 20-acre parcel into two lots.

33. The March 14, 2106 proposed project involved demolition of the existing former Freezer Queen building, and development of a mixed-use facility including a 23-story apartment tower, 324-feet in height, with approximately 200 units, two restaurants, a fitness center, surface parking for visitors, and a three-story, 95,000-square-foot parking ramp situated at the east (upland) portion of the subject parcel (hereinafter, the “March 2016 project” or “23-story tower project”). [Attached hereto as **Exhibit F** two renderings prepared on behalf of respondent Queen City Landing, LLC, depicting the March 2016 project.]

34. The “Site Plan” submitted to respondent City Planning Board on March 14, 2106 shows the location of a “Future 10-Story Building With Structured Parking” at the

west end of the 20-acre parcel. [Attached hereto as **Exhibit G** is the portion of the March 2016 project's site plan referencing a "Future 10-Story Building With Structured Parking".]

35. Upon information and belief, at the time the March 2016 project's application was filed with the City of Buffalo, respondent Queen City Landing, Inc.'s principal, Gerald A. Buchheit, Jr., was quoted in the local media as hoping to start the construction process by June 2016.

36. Upon information and belief, at the time the March 2016 project application was submitted to respondent City Planning Board, the City of Buffalo's official zoning map, as well as the "Existing Zoning" map included in the October 2015 draft of the City's proposed new zoning and development ordinance (known as the Green Code"), showed the subject parcel as zoned "M3," a zoning classification which does not allow construction of new residential units.

37. Upon receipt of the application for the 23-story tower project, respondent City Planning Board promptly scheduled a public hearing for April 4, 2016.

38. Respondent City Planning Board scheduled the public hearing despite the existence of a variety of substantial deficiencies in respondent Queen City Landing, LLC's application, including, without limitation, the following:

A. Rather than identifying the zoning for the subject parcel as "M3," the transmittal correspondence filed on behalf of respondent Queen City Landing, LLC, stated: "[T]he site may have been rezoned previously and we are trying to verify if it was completed. In the interim, we will assume that the Site is or will be zoned CM."

B. Although the proposed 23-story tower project is a “Type 1” action under SEQRA, and the SEQRA regulations mandate that a Full Environmental Assessment Form [“FEAF”] – approximately 13 pages in length - must be used to determine the significance of a Type 1 action, [see 6 NYCRR 617.6(a)(2)], respondent Queen City Landing, LLC, submitted a three-page Short Environmental Assessment Form [“SEAF”].

C. Respondent Queen City Landing, LLC’s application failed to acknowledge that the subject parcel is located within the Buffalo Coastal Special Review District, and did not apply for a restricted use permit from respondent Common Council.

39. Upon information and belief, petitioners’ counsel, Arthur J. Giacalone, Esq., brought the above-noted deficiencies to the attention of respondent City Planning Board during the April 4, 2016 public hearing, and, among other issues, advised said respondent that the applicant’s SEAF failed to address the impacts related to the proposed “Future 10-Story Building With Structured Parking.”

40. Upon information and belief, on or about April 4, 2016, respondent Queen City Landing, LLC, withdrew its SEAF and filed an FEAF concerning the 23-story project, and submitted a request for a restricted use permit from respondent Common Council; the subsequent site plans submitted to respondents City Planning Board and Common Council eliminated all references to the “Future 10-Story Building With Structured Parking.”

41. Petitioners’ counsel also advised respondents City Planning Board and Common Council that, as a result of the Common Council authority to approve or deny a restricted use permit for the proposed 23-story tower project, respondent Common Council, and not respondent City Planning Board, was the “involved agency principally

responsible for ... approving” the proposed action under SEQRA, and, therefore, was the proper “lead agency” to determine whether or not an Environmental Impact Statement was required for the project.

42. The April 6, 2016 edition of the “Environmental Notice Bulletin” – known as the “ENB” and published by the New York State Department of Environmental Conservation (“DEC”) – included a public notice that the DEC had received a “Brownfield Cleanup Program” application from Queen City Landing, LLC, for the Queen City Landing site at 975-1005 Fuhrmann Blvd. in the City of Buffalo.

43. The aforementioned April 6, 2016 ENB public notice contained, in pertinent part, the following “Site Description”:

Site Description

Location: The proposed BCP Site is located in the City of Buffalo on Fuhrmann Boulevard, just north of the Port of Buffalo Small Boat Harbor and Tiff Nature Preserve. The entrance to the parcel is just north of the intersection of Fuhrmann Boulevard and Ohio Street. Site Features: The proposed BCP Site is improved with a large manufacturing building, a small office building, two connected parking lots, and a former water treatment facility. The proposed BCP Site fronts to Fuhrmann Boulevard. The majority of the remainder of the site is surrounded by Lake Erie (Buffalo Outer Harbor). As noted above, the tax parcel will be subdivided so that the western boundary of the BCP Site will be land; not the Buffalo Outer Harbor. ... The surrounding parcels are zoned for heavy and general industrial and commercial uses. Surrounding parcels are a mix of industrial, commercial, and park and recreation land uses. Past Use of the Site: The Phase I ESA indicated that the BCP Site was occupied by a portion of a shipping terminal and then a food manufacturing facility since 1927. Freezer Queen owned the property for food manufacturing from 1958 to 2004. Olsen Marine used the property for boat repair and storage until September 2015. Contamination at the site appears to be from the use of various sources of urban fill to create land for the original shipping terminal facility and from the presence and use of petroleum products related to the use of machinery and rail service. Site Geology and Hydrogeology: The Queen City Landing Site contains

urban fill across the site with observed thickness ranging up to twenty feet. Water was observed in site investigations to be approximately 7 to 12 feet below grade. The groundwater flows towards Lake Erie.

44. Upon information and belief, on or about April 22, 2016, the City Clerk of the City of Buffalo, Gerald A. Chwalinski, in an apparent effort to advance respondent Queen City Landing, LLC's proposed project, filed documents in the Erie County Clerk's Office regarding the June 24, 2008 resolution of respondent Common Council approving the rezoning of 975-1005 Fuhrman Blvd. from "M3" to "CM" if certain conditions are met, taking such action despite the following facts:

(a) the conditions set forth in the June 24, 2008 had not been met;

(b) respondent Queen City Landing, LLC, had abandoned its 2008 proposed project upon which said rezoning petition had been predicated;

(c) respondent Queen City Landing, LLC, had petitioned to rezone 975-1005 Fuhrmann Blvd. from "M3" to "CM" a second time in 2015, but abandoned both its rezoning request in its 2015 proposed project; and

(d) the City of Buffalo's official zoning map, as well as the "Existing Zoning" map included in the October 2015 draft of the City's proposed new zoning and development ordinance (known as the Green Code"), showed the subject parcel as zoned "M3."

45. Upon information and belief, on or about April 27, 2016, Nadine Marrero, the City of Buffalo's Director of Planning, sent a "Notice of Intent Establishment of SEQRA Lead Agency" ["Notice of Intent"], along with respondent Queen City Landing, LLC's FEAF, to a number of agencies, including, without limitation, respondent Common

Council and the NYS Department of Environmental Conservation [DEC], expressing respondent City Planning Board's willingness to act as SEQRA "lead agency" for the 23-story tower project.

46. Upon information and belief, the aforementioned "Notice of Intent" and accompanying FEAF were not sent to the City of Buffalo Environmental Management Commission ["BEMC"].

47. Upon information and belief, none of the agencies to whom the aforementioned Notice of Intent was sent objected to respondent City Planning Board serving as SEQRA lead agency for the 23-story tower project, and, as a result, such agencies are precluded from later requiring preparation of an Environmental Impact Statement (EIS) for the project. [6 NYCRR 617.6(b)(3)(iii)].

48. On May 17, 2016, the Legislation Committee of respondent Common Council conducted a public hearing regarding respondent Queen City Landing, LLC's request for a restricted use permit for the 23-story tower project, at which time the petitioners herein, as well as their counsel, testified and expressed their objections to the proposed project, including, without limitation, concerns related to the significant adverse environmental impacts, inappropriateness of the scale of the tower, the process being used by respondents in reviewing the proposed project, and the need under SEQRA to issue a Positive Declaration and require preparation of an EIS.

49. Upon information and belief, during respondent City Planning Board's May 31, 2016 regular meeting, Director of Planning Nadine Marrero, who is not a member of said respondent board, presented to respondent City Planning Board a 13-page SEQRA

“Determination of Significance” [“Negative Declaration”] which stated, among other things, the following:

The Planning Board has determined that the proposal by Queen City Landing, LLC (the “Applicant”) to redevelop ~ 8 acre portion of the existing property comprised of 975 and 1005 Fuhrmann Blvd. (the “Site”) as described herein, will not have any significant adverse impact on the environment; that a Negative Declaration pursuant to SEQRA should be issued; and that no Environmental Impact Statement need be prepared.

The City’s Director of Planning did not simultaneously or otherwise provide the members of respondent City Planning Board for their consideration a proposed “Determination of Significance” issuing a “Positive Declaration” and requiring respondent Queen City Landing, LLC, to prepare a draft Environmental Impact Statement.

50. Upon information and belief, a majority of respondent City Planning Board had not directed Director of Planning Marrero and/or her staff to prepare the Negative Declaration, and had not instructed her and/or her staff as to the contents of the Negative Declaration.

51. Upon information and belief, a majority of respondent City Planning Board had not read or even seen the Negative Declaration prior to the May 31, 2016 meeting.

52. Upon information and belief, by a 5 to 1 vote, respondent City Planning Board approved the aforementioned Negative Declaration at the May 31, 2016 meeting, and the 13-page document was approved without one word being changed.

53. Upon information and belief, a majority of respondent City Planning Board had not read the entirety of the Negative Declaration’s nine pages of text (the remainder consisting of a list of supporting documentation, and interested and involved agencies to be sent a copy of the document) prior to approval of the Determination of Significance/ Negative Declaration.

54. Upon information and belief, the aforementioned Negative Declaration, although “approved” by respondent City Planning Board on May 31, 2016, was not signed by the Chair of respondent City Planning Board, James Morrell, the authorized representative of said board, until June 13, 2016. [Attached hereto as **Exhibit H** is a copy of the aforementioned signed Negative Declaration.]

55. Upon information and belief, immediately following the 5 to 1 vote approving the Negative Declaration for the 23-story tower project, respondent City Planning Board, by an identical 5 to 1 vote, approved respondent Queen City Landing, LLC’s design and site plan without any conditions, request for subdivision of the subject parcel, and application for a demolition permit.

56. At its June 21, 2016 regular meeting, respondent Common Council, by a 6 to 3 vote, granted a restricted use permit for the 23-story tower project, without imposing any conditions.

**REGARDING PETITIONERS’ FIRST CLAIM
– against respondents City Planning Board and Common Council –
SEQRA VIOLATION: IMPROPER “LEAD AGENCY”**

57. Petitioners repeat and re-allege each and every allegation contained in paragraphs 1 through 56 of this petition, with the same force and effect as if set forth here at length.

58. Through its enactment of the State Environmental Quality Review Act (SEQRA), found at Environmental Conservation Law, Article 8, Section 8-0101 et seq., the State Legislature has made protection of the environment one of New York’s “foremost policy concerns” and an “affirmative obligation” of every governmental agency, (see, for example, E.F.S. Ventures Corp. v. Foster, 71 NY2d 359, 526 NYS2d

56, 62 (1988)).

59. State and local agencies, including respondents Common Council and City Planning Board, are obliged to comply with both “the letter and spirit of the SEQRA review process,” by performing the following tasks:

- (a) identifying the relevant areas of environmental concern;
- (b) taking a "*hard look*" at them; and
- (c) making a "*reasoned elaboration*" of the basis for its determination whether the proposed action “may include the potential for at least one significant adverse environmental impact.” [See, for example, NYC Coalition to End Lead Poisoning v. Vallone, 100 NY2d 337, 347-348, 763 NYS2d 530, 537 (2003); LaDelfa v. Village of Mt. Morris, 213 Ad2d 1024, 625 NYS2d 117, 119 (4th Dept. 1995); also see 6 NYCRR 617.7(a) & (b).]

60. New York's highest court has long held that an agency's action is void and unauthorized if it has not met its obligations under SEQRA:

...

... We 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).

61. Respondents Common Council and City Planning Board are obligated 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”).

62. Pursuant to SEQRA, "*No agency involved in an action may undertake, fund or approve the action until it has complied with the provisions of SEQRA*", and "[a] project sponsor may not commence any physical alteration related to an action until the provisions of SEQR have been complied with." [6 NYCRR 617.3(a); Town of Dickinson v. County of Broome, 183 AD2d 1013, 1015, 583 NYS2d 637, 638 (3rd Dept. 1992).]

63. A state or local agency that has jurisdiction to fund, approve or directly undertake an action is called an “*involved agency*.” [6 NYCRR Section 617.2(s)] In contrast, an “interested agency” means an agency that lacks jurisdiction to fund, approve or directly undertake an action but wishes to participate in the review process because of its specific expertise or concern about the proposed action. [6 NYCRR 617.2(t)]

64. A “*lead agency*” is defined as “an involved agency principally responsible for undertaking, funding or approving an action, and therefore responsible for determining whether an environmental impact statement is required in connection with the action, and for the preparation and filing of the statement if one is required.” [6 NYCRR Section 617.2(u)] [Emphasis added.]

65. The Queen City Landing project is an “action” under SEQRA, and the “involved agencies” with the authority to “approve” the action include respondent Common Council, in light of its authority to grant or deny respondent Queen City

Landing, LLC's application for a "restricted use permit," and respondent City Planning Board, in light of its authority to approve the project's site plan and to grant the request to subdivide the subject parcel into two lots.

66. Additionally, in light of respondent Queen City Landing's application to the DEC for assistance through the Brownfield Cleanup Program, the DEC is an "involved agency" due to its decision whether or not to provide financial support for the Queen City Landing project. [See SEQRA's definition for "funding" at 6 NYCRR 617.2(q).]

67. For the following reasons, it was a violation of SEQRA for respondent Common Council not to have functioned as "lead agency" and perform the crucial task of determining whether an environmental impact statement was required regarding the proposed Queen City Landing project:

A. As the only City of Buffalo agency authorized to approve the restricted use permit, without which respondent Queen City Landing, LLC's project could not proceed, respondent Common Council was the agency "principally responsible" for approving the action. [City of Buffalo Code, Section 511-67(A)(4)]

B. Pursuant to the Buffalo Coastal Special Review District, Section 511-67(A)(5), respondent Common Council had final word on the most significant and controversial aspect of the proposed action, the height of the proposed tower:

*A.(5) **Height restrictions.** Any application under Subsection A(4) above shall include maximum heights involved in any use seeking to be established or extended under this subdivision. Such maximum height shall be subject to the approval of the Common Council and, **once approved, shall not be exceeded.*** [Emphasis added.]

C. Although Buffalo's "Environmental Review Ordinance" – which is found at Chapter 168 of the City Code, and supplements the regulations found at 6 NYCRR Part

617 – provides that respondent City Planning Board shall automatically be lead agency for site plan review and subdivision developments [City Code, Section 168-7(A)(1)(a, b)], it establishes respondent Common Council as the automatically-designated lead agency for “Actions undertaken wholly or partially within, or contiguous to, Coastal Special Review Districts (as per Chapter 511 of the Code of the City).” [City Code, Section 168-7(A)(2)(d)]

[Attached hereto as **Exhibit I** is an April 18, 2016 letter submitted to respondent City Planning Board by petitioners’ counsel herein, Arthur J. Giacalone, advising said respondent, at page 3, that respondent Common Council was the proper lead agency if either a rezoning or a restricted use permit is required for the Queen City Landing project.]

68. The general authority granted by respondent Common Council to respondent City Planning Board “to review and approve, approve with modifications or disapprove design and site plans throughout the City” for all new construction in excess of \$100,000 in value, does not constitute the most direct authority to approve the proposed 23-story tower project, and, therefore, respondent City Planning Board is not the involved agency principally responsible for approving the proposed action. [6 NYCRR 617.2(u)]

69. Also, respondent City Planning Board’s authority to decide whether or not to divide respondent Queen City Landing, LLC’s 20-acre parcel into two lots does not constitute the most direct authority to approve the proposed 23-story tower project.

70. Furthermore, and significantly, while respondent Common Council possesses the ultimate authority to determine the maximum height of the proposed tower, respondent City Planning Board is without authority under Buffalo’s zoning ordinance to

demand a reduction in height lower than the maximum height allowed within the applicable zoning district:

**City of Buffalo Zoning Ordinance
Article XXVIII, Citywide Design and Site Plan**

...

Section 511-146. Specific standards and consideration.

Design standards for new construction and rehabilitation.

A. Building-to-site-relationship.

...

(3) Without restricting the height regulations of this chapter, new buildings and site accouterments should be compatible with adjoining buildings

...

71. In the words of the Hon. John P. Lane, Justice of the Supreme Court, Erie County, *“The Common Council abrogated its procedural and substantive responsibilities under SEQRA by allowing the Planning Board to assume the pivotal role of lead agency.”* See Price v. Common Council of City of Buffalo, 3 Misc.2d 625, 632, 773 NYS2d 224 (Sup. Ct., Erie Co. 2004) (J. Lane) (Buffalo Common Council’s approval of helipad project, and the site plan approval, negative declaration and determination of nonsignificance by City of Buffalo Planning Board were arbitrary and capricious, irrational and contrary to law where Common Council abrogated its responsibilities under SEQRA and allowed the Planning Board to assume the role of lead agency.).

72. As a result of respondent City Planning Board serving as SEQRA lead agency, respondent City Planning Board, by issuing a Negative Declaration that fails to comply with the requirements of SEQRA and the regulations promulgated thereunder, and by granting design and site plan approval and subdividing the subject parcel, and respondent Common Council, by approving the restricted use permit for the 23-story tower project, have failed to perform a duty enjoined upon them by law, proceeded

without or in excess of their jurisdiction, and rendered determinations that are contrary to law, arbitrary and capricious, and/or an abuse of discretion.

73. Petitioners have no adequate remedy at law.

**REGARDING PETITIONERS' SECOND CLAIM IN THE ALTERNATIVE
– against respondent City Planning Board –
SEQRA VIOLATION: IMPROPER DELEGATION OF RESPONSIBILITY**

74. Petitioners repeat and re-allege each and every allegation contained in paragraphs 1 through 73 of this petition, with the same force and effect as if set forth here at length.

75. If the Court were to decide that it was proper under SEQRA for respondent City Planning Board to serve as lead agency for the Queen City Landing project, petitioners further contend that said respondent violated the requirements of SEQRA by improperly delegating its responsibility as lead agency.

76. A lead agency under SEQRA may not delegate its responsibilities, including its obligation to make a determination of significance, to any other agency or official, but it must exercise its own judgment on whether or not a proposed action may have a significant adverse impact on the environment. [See, *e.g.*, Coca-Cola Bottling Co. of New York, 72 NY2d 674, 682-683, 536 NYS2d 33, 37 (1988) (a governmental entity responsible for deciding to proceed with a project impermissibly delegates its SEQRA responsibilities when it insulates itself from consideration of environmental factors); Penfield Panorama Area Community, Inc. v. Town of Penfield Planning Board, 253 AD2d 342, 350, 688 NYS2d 848, 853-854 (4th Dept. 1999) ("A lead agency under SEQRA may not delegate its responsibilities to another agency."); Ecumenical Task Force of Niagara Frontier v. Love Canal Area Revitalization Agency, 179 AD2d 261, 583

NYS2d 859, 864 (4th Dept. 1992) (a lead agency may not delegate its authority under SEQRA and abandon its role as ultimate decision-maker on matters of environmental significance).]

77. As explained by the Appellate Division, Fourth Department, in Penfield Panorama, *supra*:

A lead agency under SEQRA may not delegate its responsibilities to any other agency (citation omitted). Although a lead agency without environmental expertise to evaluate a project may rely on outside sources and the advice of others in performing its function (citations omitted), it must exercise its critical judgment on all of the issues presented ... (citations omitted).

78. As addressed in greater detail above at paragraphs 49 through 54, upon information and belief, on May 31, 2016, a majority of respondent City Planning Board rubber-stamped a Determination of Significance/Negative Declaration that was prepared by the Director of Planning for the City of Buffalo, and/or her staff, without said Director or her staff receiving prior instructions regarding the contents of said document from a majority of respondent City Planning Board, and which was handed to members of respondent City Planning Board for their initial review minutes before the Negative Declaration was approved by a 5 to 1 vote.

79. Respondent City Planning Board's surrender to the Director of Planning of its responsibilities regarding the content and critical judgments included in the Negative Declaration was not its only improper delegation of its duties under SEQRA.

80. The Negative Declaration adopted on May 31, 2016 (attached hereto as **Exhibit H**) references the prior industrial activities on the subject parcel, and the presence of toxic materials:

... The Applicant has applied for inclusion in the New York State Brownfield Cleanup Program to facilitate the removal and/or remediation of existing

contaminants at this Site. Due to the use of industrial fill, much of the site has elevated levels of heavy metals. There are areas of petroleum contamination related to past fuel storage on-site.

[Negative Declaration, p. 7, “Impacts on Human Health”].

81. Nonetheless, rather than exercising its own judgment in determining whether the particular circumstances adversely impact the environment, respondent City Planning Board insulated itself from addressing the issue of pervasive contaminants at 975-1005 Fuhrmann Blvd. by deferring responsibility to the DEC through the State agency’s supervision of the Brownfield Cleanup Program:

Impacts on Land

The Project will alter approximately 8 acres of a 20 acre parcel. The Site has been disturbed since approximately 1927 and has been used for industrial purposes. Furthermore, the Site was man-made from fill deposited there at the time the building was constructed. To the extent there is any impacts, they are related to the Applicant’s proposed environmental remediation as part of the New York State Brownfield Cleanup Program (“BCP”). The cleanup will be done under the supervision of the New York State Department of Environmental Conservation (“NYSDEC”) and the Applicant will properly manage soil removal, remediation and disposal. Given that the Applicant will be remediating a contaminated site and conducted with NYSDEC oversight, the impacts on land will be minimal and could be characterized as beneficial.

...

[Negative Declaration, p. 3, “Impacts on Land”].

82. Respondent City Planning Board’s approach to assessing potential adverse impacts to land and human health caused by contaminants in the soil, deferring to the DEC and its Brownfield Cleanup Program, constitutes an improper delegation of responsibilities under SEQRA:

A lead agency improperly defers its duties when it abdicates its SEQRA responsibilities to another agency or insulates itself from environmental decision-making (*citations omitted*). While a lead agency is encouraged to consider the opinions of experts and other agencies, it must exercise its own judgment in

determining whether a particular circumstance adversely impacts the environment.

Riverkeeper, Inc. v. Planning Bd. of Town of Southeast, 9 NY3d 219, 851 NYS2d at 234 (2007); also see, Bronx Committee for Toxic Free Schools v. NYC School Construction Authority, 86 AD3d 401 (AD1 2011) (“[project sponsor’s] participation in the BCP did not exempt the project’s environmental impacts from SEQRA scrutiny”); Penfield Panorama, supra; Phelps v. Town Board of Town of Alabama, 174 Misc.2d 889, 667 NYS2d 187 (Sup. Ct., Genesee Co. 1997) (J. Kevin M. Dillon) (fact that approvals are necessary from other agencies before commencement of the proposed action does not relieve the lead agency of its obligations to comply with SEQRA).

83. As a result of respondent City Planning Board’s improper delegation of its responsibilities under SEQRA, it has failed to perform a duty enjoined upon it by law, proceeded without or in excess of its jurisdiction, and rendered determinations that are contrary to law, arbitrary and capricious, and/or an abuse of discretion.

84. Petitioners have no adequate remedy at law.

**REGARDING PETITIONERS’ THIRD CLAIM
– against respondent City Planning Board –
SEQRA VIOLATION: FAILURE TO TAKE A “HARD LOOK”**

85. Petitioners repeat and re-allege each and every allegation contained in paragraphs 1 through 84 of this petition, with the same force and effect as if set forth here at length.

86. Petitioners contend that respondent City Planning Board violated the requirements of SEQRA by failing to take the requisite “hard look” at multiple areas of environmental concern, and, therefore, that its May 31, 2016 Determination of

Significance/Negative Declaration, and all subsequent approvals by said respondent and respondent Common Council in furtherance of the 23-story tower project, are void and must be annulled.

- Failure to take a hard look at impacts on migratory birds/wildlife –

87. Respondent City Planning Board was informed by a number of witnesses at its April 18, 2016 public hearing of the potential adverse impacts the proposed 23-story, 324-foot tower would have on migratory birds and other wildlife in the vicinity of the subject parcel due to its proximity to wildlife habits such as the Tiff Nature Preserve, Times Beach Nature Preserve and the Small Boat Harbor, and its location at the gateway to the Niagara River Corridor Globally Significant Important Bird Area.

88. Petitioner Jay Burney’s extemporaneous remarks and written statement at the April 18, 2016 public hearing [a copy of which is attached hereto as **Exhibit J(1)**] provided a detailed explanation of the importance ecologically of Buffalo’s Outer Harbor to the avian population, and the reasons the location and design of the proposed 23-story tower posed a significant threat to the Outer Harbor’s resident and migratory bird population, including, for example, the following excerpted comments:

...

Last Year National Audubon issued a report “A Storm Gathers for North American Birds” in which it declared that 314 species of the 588 species that they studied are going to find themselves in dire straits by 2080. ... Many of these birds are familiar to us in Western New York, Buffalo, and along our shorelines. These include Baltimore Orioles, Osprey, Wood Thrush, Ruffed Grouse, Loons, and a wide array of shorebirds that are or have been relatively common along our Outer Harbor shoreline. Many species of birds that depend on our local habitats are at great risk.

Over 300 species of birds are found here. Our region, our coastlines, and our Outer Harbor are profoundly important, if fragmented, bird habitat. Some birds live here year round, some migrate through here, and some migrate to here.

In the winter we see great numbers and species of far northern birds such as waterfowl including ducks, geese, and swans that come to the Niagara River and our Outer Harbor for the winter. Many years and through time, these waters are often the first open waters that border the cold north. The birds that nest and breed in the arctic, winter right here.

...

In the spring and early summer we see incredible migrations of hawks and raptors including Bald Eagles, and songbirds including the brilliant hemisphere traveling warblers. We have some of the most amazing warbler migration of anywhere on earth. Some of these birds winter in the Amazon, and breed here or in the northern woodlands. In the fall we have a world-class migration of gulls.

...

Our area is considered a part of both the Atlantic and Mississippi flyways. These are vast corridors that birds travel in during migration. The Atlantic Flyway is primarily coastal, and the Mississippi Flyway more or less follows the central valley from the north to the Gulf of Mexico. Here, in Buffalo, and right on our Outer Harbor, at the confluence of Lake Erie, and the Niagara River, these flyways combine. Birds use our outer harbor, and our shorelines. They depend upon it.

...

The Niagara River Corridor Globally Significant Important Bird Area starts at the Outer Harbor and goes all the way to Lewiston. It was one of the first internationally developed IBA's, in that the US organizations and agencies teamed up with Canadian counterparts.

...

The first is location *The Outer Harbor is a bad location to build structures that interfere with birds.*

... Given the incredible value and fragility of the location, losing the Outer Harbor of Buffalo to inappropriate development may start a wound that will bleed out. We need to protect the Outer Harbor as open space and habitat. The planning community has to find some way to understand that.

The second is design *One of the biggest threats to birds happens to be buildings. Glass surfaces in particular, have a major impact on bird/building collisions... Lights are another major factor in bird building collision. Lights confuse migrating birds, including the millions of warblers that migrate through our area and along our coastlines at night. The spring warbler migration for 2016 is just starting now.*

Fog and low cloud cover are especially dangerous for birds as they try to navigate around buildings at night, which is when most birds migrate.

...

89. The SEQRA regulations promulgated by the State DEC list “substantial

interference with the movement of any resident or migratory fish or wildlife species; impacts on significant habitat area; ... or other significant adverse impacts to natural resources” as “indicators” of significant adverse impacts on the environment. [6 NYCRR 617.7(c)(1)(ii)]

90. On June 17, 2016, the Appellate Division, Fourth Department, in Mtr. Of Wellsville Citizens for Responsible Dev., Inc. v. Wal-Mart Stores, Inc., ___ AD3d ___, 2016 N.Y. App. Div. LEXIS 4693; 2016 NY Slip Op 04847 (AD4 2016), held that a town board’s failure to take a hard look at a proposed project’s impact on wildlife (more specifically, birds at a nearby habitat) rendered its negative declaration arbitrary and capricious, and annulment of the negative declaration was required. Also see, Kittredge v. Planning Bd. of Town of Liberty, 57 AD3d 1336, 1337-38 (AD3 2008) (“[the lead agency’s] failure to properly identify the impact of the proposed development on wildlife or to take the requisite hard look at such impact is contrary to the mandates of SEQRA.”).

91. Despite the substantial information provided to respondent City Planning Board during the public hearing process, and the prominent role of wildlife and natural habitat areas in the SEQRA environmental review process, respondent City Planning Board failed to take the requisite “hard look” at this area of environmental concern, choosing instead to rely on a flawed two-and-a-half page “analysis” submitted by the project sponsor concerning the issue of migratory birds.

92. Attached hereto as **Exhibit J(2)** is a copy of the “Migration Bird Assessment & Consultation,” prepared by DIELUX, LLC on behalf of respondent Queen City Landing, LLC, that is referred to in the May 31, 2016 Negative Declaration as “an analysis” of potential impacts on migratory birds.

93. The DIEHLUX, LLC “migratory bird assessment” does two basic things:

(a) It lists a variety of building design “best practices” that the developer might “potentially incorporate” into the design of the building to lessen the likelihood of migratory bird impacts.

(b) It provides the following statement apparently meant to suggest that a 23-story tower would have less of an adverse impact on bird populations than a residence or low-rise building:

“... DIEHLUX, LLC cannot rule out that transient migratory birds may occasionally be impacted by this structure during peak migration periods. However, according to recent studies such as Bird-building Collisions in the United States by S.R. Loss, the majority of bird/glass collisions occur at low-rise (1-3 story) buildings (56%) and urban/rural residences (44%). Less than 1% were noted at high rises.”

94. Respondent City Planning Board did not ask for, and the sponsor of the proposed project did not submit, any information or analysis prior to the May 31, 2016 issuance of the Negative Declaration and approval of the project concerning the following topics relevant to assessing the potential adverse impacts of 23-story, 274,000-square-foot glass and metal tower on the migratory bird populations that traverse the Buffalo waterfront:

(a) The flight paths and quantity of migrating birds in the vicinity of the subject parcel.

(b) The seasonal patterns of the migrations, and the extent to which the bird populations are moving during the day or at night.

(c) The extent, if any, the existing six-story, unlit Freezer Queen building has been an obstruction to migrating birds.

(d) A comparison between deaths, if any, occurring at the existing Freezer Queens facility and the likely change in numbers if the proposed 324-foot tower were built, as well as an estimate of how many migrating birds would be killed by the proposed tower, with and without the proposed “mitigation measures.” [Compare O’Donnell v. Town Bd. of Town of Amherst, 656 NYS2d 100 (Sup. Ct., Erie Co. 1997) (J. Barbara Howe) (Court nullifies negative declaration for deer bait-and-shoot program concluding that town could not rationally determine whether impact on deer population would be significant without knowing how many deer would be killed under the program.)]

95. Additionally, the Planning Board failed to ask for clarification or further details concerning the one-sentence reference in the DIEHLUX, LLC correspondence to the study prepared by S.R. Loss, “*Bird-building Collisions in the United States.*”

96. A review of the entire article written by Scott R. Loss (who, upon information and belief, is employed by the Migratory Bird Center, Smithsonian Conservation Biology Institute, National Zoological Park, Washington, D.C.) reveals the following poignant facts:

A. The report estimates that between 365 and 988 million birds are killed annually by building collisions in the United State, making building collision mortality one of the top sources of direct anthropogenic mortality of birds in the U.S.

B. The report’s mortality estimates may be conservative because data from buildings that cause exceptionally high annual rates of collision were removed from the analysis before extending average rates to the scale of the entire U.S. Hundreds to greater than one thousand birds per year have been found at intensively monitored buildings in or near areas with a high concentration of birds during migration.

C. Mortality rates have been found to increase with the percentage and surface area of buildings covered by glass, and with the amount of light emitted from windows

D. High-rises cause the lowest total number of bird deaths for one simple reason: there are relatively few buildings taller than eleven (11) stories in height when compared to the number of detached residences and mid-rise buildings. Despite causing the lowest total mortality, high-rises had the highest median annual mortality rate.

E. Nearly all high-risk species for low-rise and high-rise buildings are migratory. Compared with resident species, migratory species traverse longer distances, use a greater diversity of habitat types, and encounter more building types and total buildings during the annual cycle. Additionally, migratory species are attracted to large lighted buildings during their nocturnal migration; this attraction causes a large amount of mortality at low-rises and high-rises as birds either immediately collide with lighted buildings or become entrapped before later dying of collision or exhaustion.

97. Although the May 31, 2016 Negative Declaration states that, “One of the areas the Planning Board examined most closely were the potential impacts to migratory birds,” there is, in fact, “no record evidence of any meaningful investigation into this area of environmental concern,” (see Kittredge, *supra*, 57 AD3d at 1338), merely respondent City Planning Board’s reliance on the DIEHLUX, LLC “analysis” and on mitigation measures which fail to consider the beneficial impact of lowering the height of the 23-story building. This falls far short of the “hard look” mandated by SEQRA.

98. By failing to issue a Positive Declaration and require respondent Queen City Landing to prepare a draft EIS addressing the proposed action’s probable adverse impacts on migratory birds and wildlife, respondent City Planning Board has violated the well-established principle that the requirement to issue a Positive Declaration and require preparation of a draft EIS is triggered by "*a relatively low threshold*", that is, a draft EIS is needed *if the action may have a significant effect* on any one or more aspects of the environment. [See Chemical Specialties Manufacturers Assoc. v. Jorling, 85 NY2d 382, 626 NYS2d 1, 9 (1995); also see, *e.g.*, Munash v. Town Board of Town of East Hampton, 297 AD2d 345, 748 NYS2d 160 (2d Dept. 2002) ("Since SEQRA mandates the

preparation of an EIS when the proposed action may include the potential for at least one significant environmental effect, 'there is a relatively low threshold for the preparation of an EIS'"); Miller v. City of Lockport, 210 AD2d 955 (AD4 1994) (Fourth Department annuls negative declaration where "the relatively low threshold for preparing an EIS on a Type I action is not met").]

- Failure to take a hard look at impacts on important historic & aesthetic resources-

99. The legislative purpose expressed in the SEQRA statute is expansive: "*to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources.*" ECL §§ 8-0101, 8-0103[6].

100. Accordingly, SEQRA defines "environment" broadly to go beyond physical conditions to include socio-economic concerns, and, expressly, "resources of historic or aesthetic significance" and "existing community or neighborhood character":

"Environment" means the physical conditions that will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, *resources of agricultural, archaeological, historic or aesthetic significance*, existing patterns of population concentration, distribution or growth, *existing community or neighborhood character*, and human health. [Emphasis added.]

6 NYCRR 6 17.2(1); also see, *e.g.*, Chinese Staff and Workers Assoc. v. City of New York, 68 NY2d 359, 365-366, 509 NYS2d 499, 503 (1986) ("It is clear from the express terms of the statute and the regulations that environment is broadly defined.").

101. New York's courts have long recognized the obligation of a lead agency to consider the proposed action's potential impacts on historic and aesthetic resources. See, *e.g.*, WEOK Broadcasting Corp. v. Planning Bd. of Town of Lloyd, 79 NY2d 373, 583 NYS2d 170 (1992) (NYCA acknowledges that aesthetic impact considerations are "a

proper area of concern" and "may constitute an important factor in SEQRA review"); Home Depot, USA, Inc. v. Town of Mount Pleasant, 293 AD2d 677, 741 NYS2d 274 (AD2 2002) (site plan approval properly denied where the "record indicates that the project would bring about 'a noticeable change in the visual character' of the area"); Exxon Corp. v. Gallelli, 192 AD2d 706, 597 NYS2d 139 (AD2 1993) (a planning board is authorized to deny application for site plan approval on aesthetic grounds where supported by substantial evidence); East Coast Development Co. v. Kay, 174 Misc.2d 430, 667 NYS2d 182 (Sup. Ct., Tompkins Co. 1996) ("By its enactment of SEQRA, the Legislature implicitly declared that aesthetic preservation is a matter of public concern no less than physical threats to the environment.").

102. The SEQRA regulations promulgated by the State Department of Environmental Conservation list "the impairment of the character or quality of important historical ... or aesthetic resources" as "indicators" of significant adverse impacts on the environment. [6 NYCRR 617.7(c)(1)(v)]

103. To assist a lead agency in determining whether a proposed action is likely to have a significant adverse impact on aesthetic resources, the Full Environmental Assessment Form ["FEAF"] obligates a project sponsor to answer the following question: *"Is the project site within five miles of any officially designated and publicly accessible federal, state, or local scenic or aesthetic resource?"*

104. Respondent Common Council's Local Waterfront Revitalization Program [LWRP], adopted on February 2, 2016, includes the former Freezer Queen parcel and adjoining "Ford Terminal Complex" as sites containing "waterfront heritage resources,"

[LWRP, p. “8”] and expressly identifies three important categories of scenic resources on Buffalo’s Outer Harbor that are to be protected and enhanced:

A. Unique waterfront landscapes such as marinas, piers, wharfs and mooring areas. [LWRP, p. “9”] The waterfront landscapes identified in Buffalo’s LWRP include the following Outer Harbor resources: Wilkeson Pointe, the NYPA Outer Harbor Marina, the Small Boat Harbor (with its 1,042 boat slips), and Gallagher Beach. [LWRP, pp. “134” and “135”] In the words of the LWRP: “*Buffalo’s marinas are the heart of the community’s engagement with its water.*” [LWRP, p. “158”]

B. The Buffalo portion of the Great Lakes Seaway Trail National Scenic Byway. [LWRP, p. “9”] The LWRP describes the Great Lakes Seaway Trail as follows: “... [A] 518 mile National Scenic Byway that follows the shores of Lake Erie, the Niagara River, Lake Ontario, and the St. Lawrence River. Within the City of Buffalo, the Great Lakes Seaway Trail follows Niagara Street south to Niagara Square, then south on Delaware Avenue to Route 5 and south to the City line.” [LWRP, p. “158”]

C Waterfront sunsets. As noted in the LWRP: “*Located at the eastern end of Lake Erie, Buffalo is the only Great Lakes city to enjoy a view of the sun setting over water.*” [LWRP, p. “158”]

105. Despite the abundance of scenic resources open to the public that are located within the Outer Harbor, respondent Queen City Landing, LLC’s FEAF identifies only one “scenic or aesthetic resource” within 5 miles of the subject parcel, the Great Lakes Seaway Scenic Byway.

106. As correctly noted at page 3 of respondent City Planning Board’s Negative Declaration, “The surrounding area is currently dominated by recreational areas.”

107. The following scenic resources used and enjoyed by the public are situated within 0.1 to 1.8 miles of the subject parcel:

Approximate Distance from 975-1005 Fuhrmann Blvd. to Outer Harbor public spaces:

To the South:

- Small Boat Harbor: 0.1 mile
- Buffalo Harbor State Park: 0.5 miles
- Gallagher Beach/Pier: 0.8 miles
- Tifft Street Pier: 1.0 miles

To the North:

- Greenway Nature Trail (“Greenbelt”): 0.5 miles
- Seaway Pier: 1.2 miles
- Wilkeson Pointe: 1.4 miles
- Times Beach Nature Preserve: 1.5 miles
- U.S. Coast Guard marina: 1.8 miles

108. In light of the plan to demolish the former Freezer Queen building and build a 234-foot tall glass and steel structure, starkly different in scale and character to the nearby natural and man-made environment (which includes public parks, marinas, nature preserves, and bike/pedestrian paths), respondent City Planning Board was asked by the public during the public hearings on the proposed Queen City Landing project to issue a Positive Declaration and require the project sponsor to prepare a draft EIS to address the potential adverse impacts on historic and visual resources.

109. Nonetheless, despite its acknowledgement that the Outer Harbor is dominated by recreation areas, and its recognition that the proposed 23-story tower is a “visually significant deviation” from what currently exists, respondent City Planning Board concluded that the Project will not have any significant adverse impacts on aesthetic resources, providing the following explanation in its May 31, 2016 Negative Declaration:

Impacts on Aesthetic Resources

Without question the proposed Project is a visually significant deviation from the existing structures in the area. The existing Freezer [Queen] Building is 6-stories tall and the proposed tower will be 23 [stories]. The height of the structure (324') will be second only to the existing wind farm to the south and on a par with other taller buildings in the urban core. As a result, the proposed building will be a significant visual change from the existing structures.

While the building is located adjacent to Lake Erie, a visual and recreational resource for the area, it is not anticipated to negatively impacts [sic] views despite the degree of change from existing conditions. The proposed structure is a stand-alone building and given the vast stretches of open, publically-owned [sic] lands adjacent to it, the overall viewshed will not be significantly impacted. Therefore, the Planning Board has determined that the Project will not have any significant adverse impacts on aesthetic resources.

110. Upon information and belief, in reaching its determination regarding impacts on historic and aesthetic resources:

A. Respondent City Planning Board failed to take a hard look at the former Freezer Queen building's association with Buffalo's once thriving shipping, warehousing and storage industry, as part of the industrial Outer Harbor, and as a significant contributor to the national industry of frozen Foods, and, as a locally significant example of early-twentieth century commercial architecture.

B. Respondent City Planning Board failed to take basic steps traditionally used by lead agencies when conducting a meaningful investigation to determine the potential impacts of a proposed project on aesthetic and scenic resources, including, without limitation:

(i) Verifying the applicant's inventory of aesthetic resources within the 23-story tower's viewshed, that is the geographic area from which the proposed action may be seen.

(ii) Requesting that the applicant provide a tangible visual assessment, such as graphic viewshed and line-of-sight analysis, or more sophisticated visual simulations and digital viewshed analysis.

(iii) Requesting that the applicant provide a tangible visual assessment depicting the extent to which adverse impacts might be mitigated or eliminated by reducing the size and scale of the proposed structure.

(iv) Utilization of the tools provided by the State DEC to assist lead agencies, such as the SEQRA Visual EAF Addendum, and the manual, “*Assessing and Mitigating Visual Impacts.*”

111. The above-quoted statement in respondent City Planning Board’s Negative Declaration regarding impacts on aesthetic resources not only demonstrates the lead agency’s failure to take a “hard look,” it also, by virtue of its conclusory and illogical nature, violates said respondent’s obligation to provide a “reasoned elaboration” for its determination of non-significance. [See NYC Coalition, *supra*; LaDelfa, *supra*; Tonery v. Planning Board of Town of Hamlin, 256 AD2d 1097, 1098 (AD4 1998) (“Conclusory statements, unsupported by empirical or experimental data, scientific authorities or any explanatory information will not suffice as a reasoned elaboration for its determination of environmental significance or nonsignificance.”).]

- Failure to take a hard look at conflicts with community plans and character –

112. The SEQRA regulations promulgated by the State Department of Environmental Conservation list “the creation of a material conflict with a community’s current plans or goals as officially approved or adopted” as an “indicator” of significant adverse impacts on the environment. [6 NYCRR 617.7(c)(1)(iv)]

113. Respondent City Planning Board’s assessment of this “indicator” of significant adverse impacts fails the “hard look” standard in several important ways, including, without limitation, the following:

(a) The significance of the policies and goals set forth in the City’s LWRP, set forth in detail above paragraphs 25 – 27, is misleadingly downplayed in the May 31, 2016 Negative Declaration by treating the LWRP, adopted by respondent Common Council on February 2, 2016, as an unfinished product.

(b) Respondent City Planning Board fails to acknowledge the fact that the “structural and environmental conditions” being used to justify respondent Queen City Landing, LLC’s abandonment of its November 2015 plans to re-use the existing six-story Freezer Queen building, were almost certainly in existence in late 2015 when the project sponsor obtained design and site plan approval for the seven-story building and when the current draft of the proposed Green Code was presented to the public.

(c) Suggesting that a 23-story development consisting of a mix of residential, commercial and recreational uses is not in significant conflict with a community vision for a six- or seven-story mixed use facility is equivalent to saying that a big-box discount retail store with a large supermarket is consistent with a community plan that envisions a small-scale neighborhood grocery store at the same location.

(d) Respondent City Planning Board disregards the fact that the LWRP, and the proposed Green Code, anticipated “limited private development.” What has changed in the interim is not the anticipated amount of private development, but the size and scale of the project sponsor’s proposal.

(e) Failure to address in any meaningful fashion, if at all, the conflict between the proposed Queen City Landing project and the following policies adopted by respondent Common Council when it adopted the LWRP in February 2016:

(i) The LWRP policy to “protect, enhance and restore structures, districts, areas or sites that are of significance in the history, architecture, archeology or culture of the state, its communities or the nation,” such as the existing structure at the Freezer Queen site. Respondent City Planning Board’s assertion, at page 5 of the Negative Declaration, that, “the Outer Harbor area did not contribute significantly to the industrial development in the City of Buffalo,” is patently false, and belied by the LWRP’s recognition of the significance to Buffalo’s “Industrial Heritage” of the “Industrial Heritage Trail” which is located in close proximity to the subject parcel and “tells the story of the Grain Elevators and manufacturing along the Buffalo River and Outer Harbor.” [LWRP, p. 157] It is also belied by the conclusions reached in a “Resource Evaluation” report issued by the New York State Department of Parks, Recreation and Historic Preservation (PR&HP) on June 17, 2016 (a copy of which is attached hereto as **Exhibit O**), which expressly concludes that the Freezer Queen building at 975 Fuhrmann Blvd. in Buffalo is eligible for listing in the State and National Registers of Historic Places, and explains in detail the reasons for that conclusion.

(ii) The LWRP policy requiring decision-makers to “protect, restore or enhance natural and manmade resources ... which contribute to the overall scenic quality of the coastal areas,” requiring SEQRA and site plan reviews to consider protection and enhancement of unique waterfront landscapes such as marinas (described as “the heart of the community’s engagement with its water”), piers, wharfs and mooring areas, Great Lakes Seaway Trail Scenic Byway, and the Niagara River Globally Significant Important Bird Area. [LWRP, pp “9”, “158-159”]

(iii) The LWRP policy that seeks to protect, preserve and improve publicly owned areas identified as habitats of state and local significance, as well as the Niagara River Globally Significant Important Bird Area (GSIBA), and characterizes Buffalo’s waterfront revitalization area as “*an informal regional wildlife preserve*” where the Lake Erie-Niagara River food web must be protected and rebuilt. [LWRP, pp. “11”, “12”.]

(iv) The LWRP policy that expressly calls for “protection and enhancement of bird habitat areas,” and “avoidance of disruption to bird migration to the maximum extent practicable.” [LWRP, p. “12”]

(v) The LWRP policies to “protect, maintain and increase the levels and types of access to public water-related recreation resources and facilities,” and to give priority “along the coast” to “water dependent and enhanced recreation” over “non-water-related uses.” [LWRP, p. “13”] These LWRP goals are inconsistent with and will be jeopardized by the inherent conflict between the heavy volume of traffic that would be generated by

the proposed 23-story tower project and would cross the public bicycle/pedestrian path adjacent to the front of the Queen City Landing development, and the safety and convenience of individuals, families and groups on bicycle or foot seeking to enjoy the unique waterfront experience.

- Failure to take a “hard look” at impacts on traffic levels -

114. The SEQRA regulations promulgated by the State Department of Environmental Conservation list “a substantial adverse change in existing ... traffic levels” as an “indicator” of significant adverse impacts on the environment. [6 NYCRR 617.7(c)(1)(i)] [See Coppola v. Good Samaritan Hospital Medical Center, 309 AD2d 862 (AD2 2003) (appellate court rules that the impact of a project on traffic is an area of relevant environmental concern, and annuls a site plan and building permit annulled where the negative declaration failed to take a hard look at the traffic issue).]

115. Respondent Queen City Landing, LLC’s FEAF answers “Yes” to the question, “Will the proposed action result in a substantial increase in traffic above present levels or generate substantial new demand for transportation facilities or services,” and indicates that peak traffic is expected in morning and evening.

116. The traffic analysis submitted on behalf of Queen City Landing to the City Planning Board estimates that the 197 apartments and two restaurants proposed by the developer would generate 217 vehicles entering or exiting the site during the AM peak hour, 228 vehicles entering or exiting the site during the PM peak hour, and a total of 2,687 vehicles entering or exiting the property on the typical weekday.

117. The above-noted trip generation figures provided by the project sponsor’s

traffic expert equate to the following number of vehicles entering or exiting the site, and, thereby, crossing the public bike path:

- (a) one vehicle every 16.6 seconds during the morning peak hour;
- (b) one vehicle every 15.8 seconds during the afternoon peak hour; and,
- (c) on average, one vehicle every 32 seconds, twenty-four hours a day.

118. The “Impacts on Traffic” analysis contained in respondent City Planning Board’s Negative Declaration fails to focus on the “setting” of the proposed development and its entrance/exit driveway, as required by 6 NYCRR 617.7(c)(3)(i).

119. The mammoth Queen City Landing project is proposed for an Outer Harbor site located between nature-enhanced areas such as the Greenway Nature Trail, Wilkeson Point, and Times Beach to the north, and the Small Boat Harbor and Gallagher Beach to the south.

120. The Queen City Landing project’s entrance/exit driveway will be generating vehicular traffic – at intervals of every 16 second during morning and afternoon peak hours – that will cross a steadily-used public bike/pedestrian path before it reaches Fuhrmann Boulevard or Route 5. [Attached hereto as **Exhibit K** is a portion of the project sponsor’s site plan showing the project’s entrance/exit driveway and its passage over the “Existing Bike Path.”]

121. By disregarding the setting of the project’s driveway, and giving no consideration to impact of the substantially increased traffic levels on a public bike path in an area “currently dominated by recreational uses,” respondent City Planning Board has failed to take the requisite “hard look” at the proposed action’s impacts on traffic levels and traffic safety.

- Failure to take a hard look at impacts on water quality, floodplain –

122. The SEQRA regulations promulgated by the State Department of Environmental Conservation list “a substantial adverse change in existing ... ground or surface water quality” and “a substantial increase in potential for erosion, flooding, leaching or drainage problems” as “indicators” of significant adverse impacts on the environment. [6 NYCRR 617.7(c)(1)(i) &(ii)]

123. Not surprisingly, New York’s appellate courts have concluded that a direct impact on one’s drinking water supply is a concern that is plainly within the zone of interest that SEQRA is designed to protect. [See, e.g., Many v. Village of Sharon Springs Board of Trustees, 218 AD2d 845, 629 NYS2d 868 (AD3 1995).] A municipality’s negative declaration that fails to take a hard look at the proposed project’s impact on surface water will be annulled as violative of SEQRA’s mandates. [E.g., Wellsville Citizens, supra.]

124. Similarly, where a planning board fails to take hard look at surface water drainage and runoff issues before issuing a negative declaration approving a project, the negative declaration and project approval will be set aside. [See, e.g., Carpenter v. City of Ithaca Planning Board, 190 AD2d 934, 593 NYS2d 582 (3d Dept. 1993).]

125. Given the pervasive soil contamination at the subject parcel, its location in a floodplain, the fact that groundwater flows towards Lake Erie (see paragraph 43 above), and the admissions in respondent Queen City Landing, LLC’s FEAF that 100% of the site is poorly drained, that the site contains wetlands or other waterbodies, and that Lake Erie is listed in the most recent compilation of NYS water quality-impaired waterbodies,

the analysis of “Impacts on Surface Water” and “Impacts on Flooding” found at pages 3 and 4 of the Negative Declaration does not constitute the requisite “hard look.”

126. It is not appropriate for respondent City Planning Board to circumvent review of surface water, drainage, and erosion concerns by stating that “the Project will utilize appropriate erosion and sediment control practices and will comply with all applicable New York State Pollution Discharge Elimination System requirements,” or that “the stormwater management system will comply with NYSDEC guidelines to minimize pollutant loading to Lake Erie,” or that “the Project will utilize stormwater management resources to comply with the standards set forth in the Buffalo Sewer Authority’s Stormwater Management Plan.”

127. By taking this approach, respondent City Planning Board, as lead agency, has violated SEQRA by failing to exercise its own judgment in determining whether a particular circumstance adversely impacts the environment. [See Riverkeeper, *supra*; Bronx Committee, *supra*; Penfield Panorama, *supra*.]

128. Also, respondent City Planning Board has failed to take a “hard look” at flooding potential when, without any engineering data or analysis, it concludes that raising the site approximately 2 feet to prevent flooding and on-site ponding will eliminate the potential of adverse impacts from flooding.

129. As a result of respondent City Planning Board’s failure to take a hard look at multiple areas of environmental concern, it has failed to perform a duty enjoined upon it by law, proceeded without or in excess of its jurisdiction, and rendered determinations that are contrary to law, arbitrary and capricious, and/or an abuse of discretion.

130. Petitioners have no adequate remedy at law.

REGARDING PETITIONERS' FOURTH CLAIM
– against respondent City Planning Board –
VIOLATION OF THE LETTER AND/OR SPIRIT OF SEQRA &
BUFFALO CITY CODE REGARDING BEMC'S INVOLVEMENT

131. Petitioners repeat and re-allege each and every allegation contained in paragraphs 1 through 130 of the Verified Petition, with the same force and effect as if set forth here at length.

132. According to the City of Buffalo's official website, the City of Buffalo Environmental Management Commission ("BEMC") was established to advise the city government on present and proposed methods and plans for the preservation, protection, enhancement and management of the environment and to encourage actions to improve environmental quality among public and private agencies and organizations within the City of Buffalo. BEMC members are required to have environmental-oriented training or background in public service, and must be committed to the preservation and enhancement of environmental quality.

133. Buffalo's City Code, at Section 168-8, expressly provides for the involvement of the BEMC into the notification and review procedures of SEQRA "Type 1" actions, such as the 23-story tower project:

§ 168-8. Notice to the Buffalo Environmental Management Commission (EMC).

A. Whenever a full environmental assessment form is required, the designated lead agency shall promptly notify the EMC; notification shall include submission of a completed Part I EAF.

B. The EMC shall be incorporated into all SEQRA notification and review procedures as set forth in 6 NYCRR 617.12.

134. Upon information and belief, although the BEMC was aware of the submission of a proposal by respondent Queen City Landing, LLC, to respondent City

Planning Board, and representatives of the project sponsor appeared before the BEMC on April 20, 2016, the BEMC lacked adequate information from respondent Queen City Landing, LLC, regarding the proposed 23-story tower project, prior to respondent City Planning Board's unanticipated and surprising issuance of a Negative Declaration on May 31, 2016, to submit to respondent City Planning Board a report or recommendations regarding the SEQRA review of the action.

135. Upon information and belief, and as is reflected in the BEMC draft Minutes for its April, May and June 2016 meetings attached hereto as **Exhibit P**, the BEMC's review of the proposed 23-story tower project consisted of the following:

A. The appearance of representatives of respondent Queen City Landing, LLC, at the BEMC's April 20, 2016 meeting, at which time the BEMC determined that it needed "additional information" from the project sponsor.

B. When the requisite additional information was not received, a decision by the BEMC Chair at the BEMC's May 18, 2016 meeting "to invite representative to present additional information on the former Freezer Queen project to the next [June 15, 2016] BEMC meeting."

C. As stated in the draft June 15, 2016 BEMC minutes:

M. Romanowski [respondent Queen City Landing, LLC's counsel] provided additional information regarding the Queen City Landing project. There was a general discussion about demolition debris, bird impacts, site contamination, building height and the on-site parking structure.

[BEMC Member] Grieco questioned why the project was given a negative declaration by the Planning Board when it appeared as if a positive declaration appeared more appropriate. He indicated that the BEMC should have been more informed on the SEQRA issues with the project and was concerned about BEMC involvement in the process with the Planning Board. He expected to see a more extensive alternative analysis for the project.

There was a general discussion regarding communication with the Planning Board and the gradual transition to incorporate zoning and planning reflected in the Green Code.

[BEMC Chair] Gardella indicated that communications with the Planning Board seemed to have lessened during the past several months and that he would contact the Executive Director of Strategic Planning to why the BEMC has been bypassed on some significant and sensitive issues. He was concerned that the SEQRA process was not being followed.

...

136. Upon information and belief, the Notice of Intent issued on or about April 27, 2016 by Nadine Marrero, the City of Buffalo’s Director of Planning, was sent to eight “involved agencies” and eight “interested agencies,” but not to the BEMC. [Attached hereto as **Exhibit L** is a copy of the April 27, 2016 Notice of Intent, with mailing list.]

137. The failure to meaningfully incorporate the BEMC into the SEQRA review process for the 23-story tower project should be treated as evidence of the lack of a hard look by respondent City Planning Board – especially in light of the mandatory wording of Section 168-8, and the complex and controversial nature of the project. [See Riverkeeper, *supra*, 9 NY3d 219, 851 NYS2d at 235 (although a lead agency is not required under SEQRA to solicit comments before determining whether an SEIS is needed, the failure to do so “may at times evidence the lack of a ‘hard look’”).]

138. As a result of respondent City Planning Board’s failure to meaningfully incorporate the BEMC into the SEQRA review process for the 23-story project, it has failed to perform a duty enjoined upon it by law, proceeded without or in excess of its jurisdiction, and rendered determinations that are contrary to law, arbitrary and capricious, and/or an abuse of discretion.

139. Petitioners have no adequate remedy at law.

**REGARDING PETITIONERS' FIFTH CLAIM
– against respondents City Planning Board & Queen City Landing, LLC –
VIOLATION OF GCL §§ 27-A(7) & 33(8)(a)'s
PERFORMANCE BOND REQUIREMENT**

140. Petitioners repeat and re-allege each and every allegation contained in paragraphs 1 through 139 of this petition, with the same force and effect as if set forth here at length.

141. Pursuant to General City Law § 27-A, respondent City Planning Board was obliged to require, and respondent Queen City Landing, LLC, was obliged to provide, a performance bond or other security sufficient to cover the full cost of the required infrastructure and improvements for the subject project *prior to* respondent City Planning Board's May 31, 2016 approval of the site plan, in light of the fact that such infrastructure and improvements were not installed at the time of said approval:

General City Law Section 27-A

...

7. Performance bond or other security. As an alternative to the installation of required infrastructure and improvements, prior to approval by the authorized board, a performance bond or other security sufficient to cover the full cost of the same, as estimated by the authorized board or a city department designated by the authorized board to make such estimate, where such departmental estimate is deemed acceptable by the authorized board, shall be furnished to the city by the owner. Such security shall be provided to the city pursuant to the provisions of subdivision eight of section two hundred thirty-three of this article. [Emphasis added.]

142. Pursuant to General City Law § 33(8)(a), respondent City Planning Board was obliged to require, and respondent Queen City Landing, LLC, was obliged to provide, a performance bond or other security sufficient to cover the full cost of the required infrastructure and improvements for the subject project *prior to* respondent City Planning Board's May 31, 2016 approval of applicant's subdivision request, in light of

the fact that such infrastructure and improvements were not installed at the time of said approval:

General City Law Section 33(8)(a)

...
8. Performance bond or other security. (a) Furnishing of performance bond or other security. As an alternative to the installation of required infrastructure and improvements, as above provided, prior to planning board approval, a performance bond or other security sufficient to cover the full cost of the same, as estimated by the planning board or a city department designated by the planning board to make such estimate, where such departmental estimate is deemed acceptable by the authorized board, shall be furnished to the city by the owner. [Emphasis added.]

143. Respondent City Planning Board may not waive the requirement that a bond be posted. [See Friends of the Pine Bush v. Planning Bd. of City of Albany, 86 AD2d 246, 248-249, 450 NYS2d 966, 968 (AD3 1982), *affirmed for reasons stated in opinion below* 59 NY2d 849 (“The only construction that can be given to the statutory language of section 33 of the General Law is that the owner of the land shall install the improvements, or alternatively, post a bond to cover the costs thereof.”); also see, Christie v. Phoenicia Water District, 194 AD2d 912, 598 NYS2d 840, 841 (AD3 1993) (“Improvements deemed necessary by the town may be waived (Town Law § 277[1]; however, once a town determines that a particular improvement is necessary, it may not waive the requirement that the owner either install the improvement or post the bond.)

144. The remedy for violation of these statutory provisions is nullification of the approval, not a return of the matter to respondent City Planning Board for compliance. [See Save the Pine Bush v. Planning Board of City of Albany, 96 AD2d 986, 988, 466 NYS2d 828, 832 (AD3 1983).]

145. As a result of respondent City Planning Board's failure to require respondent Queen City Landing, LLC, to furnish a performance bond or other security prior to the May 31, 2016 approvals of the proposed project's site plan and subdivision application, it has failed to perform a duty enjoined upon it by law, proceeded without or in excess of its jurisdiction, and rendered determinations that are contrary to law, arbitrary and capricious, and/or an abuse of discretion.

146. Petitioners have no adequate remedy at law.

**REGARDING PETITIONERS' SIXTH CLAIM
– against respondent City Planning Board –
ARBITRARY & CAPRICIOUS TREATMENT OF SUBJECT PARCEL
AS ZONED "CM"**

147. Petitioners repeat and re-allege each and every allegation contained in paragraphs 1 through 146 of this petition, with the same force and effect as if set forth here at length.

148. As is addressed in greater detail at paragraphs 14 through 24 above, respondent Queen City Landing, LLC, failed to comply with the conditions in respondent Common Council's June 24, 2008 resolution conditionally rezoning 975-1005 Fuhrmann Blvd. from "M3" to "CM," and abandoned its 2008 proposed project; in 2015, respondent Queen City Landing, LLC, petitioned a second time to rezone 975-1005 Fuhrmann Blvd. from "M3" to "CM," but subsequently abandoned both its rezoning request and the 2015 proposed project.

149. At the time respondent Queen City Landing, LLC, submitted its application to respondent City Planning Board for approvals related to the 23-story tower project, the City of Buffalo's official zoning map, as well as the "Existing Zoning" map included in

the October 2015 draft of the City’s proposed new zoning and development ordinance (known as the ”Green Code”), showed the subject parcel as zoned “M3.”

150. Respondent City Planning Board’s decision to treat the subject parcel as being zoned CM disregards the facts, and, therefore, is arbitrary and capricious and should be annulled. [See generally, County of Monroe v. Kaladjian, 83 NY2d 185, 189, 608 NYS2d 942, 944 (1994) *quoting* Pell v. Board of Education, 34 NY2d 222, 231, 356 NYS2d 833, 839 (1974) (a resolution adopted "without regard to the facts" is arbitrary and capricious).]

151. Pursuant to Section 511-52 of the City of Buffalo’s zoning ordinance, residential units are not allowed in an M3 zone.

152. In light of the foregoing, respondent City Planning Board’s approval of respondent Queen City Landing, LLC’s site for a project including approximately 199 residential units is a determination that is contrary to law, arbitrary and capricious.

153. Petitioners have no adequate remedy at law.

**REGARDING PETITIONERS’ SEVENTH CLAIM
– against respondent Common Council –
ARBITRARY & CAPRICIOUS ISSUANCE OF RESTRICTED USE PERMIT**

154. Petitioners repeat and re-allege each and every allegation contained in paragraphs 1 through 153 of this petition, with the same force and effect as if set forth here at length.

155. As addressed in greater detail above, the purpose of respondent Common Council’s enactment of the Buffalo Coastal Special Review District was to protect

Buffalo’s coastal area from the threats presented by inconsistent development, uses not related to the coastal area, and inadequately controlled development that may jeopardize a balance of residential, commercial, port-related industrial and public access uses. [See City Code, Section 511-67(A)(2).]

156. The 23-story tower project proposed by respondent Queen City Landing, LLC, embodies the threats the Buffalo Coastal Review District was intended to remedy: development inconsistent with both the character of the existing Outer Harbor community and official plans for the area, uses not dependent upon location directly on the coast, and inadequately controlled development.

157. Respondent Common Council’s decision to issue a restricted use permit for the 23-story tower project disregards the facts, and, therefore, is arbitrary and capricious and should be annulled, in light of the stark contrast between the proposed project and the existing natural and manmade resources throughout the Outer Harbor, and the significant inconsistencies between the project and the policies and goals expressed in the LWRP.

158. An example of respondent Common Council’s disturbing disregard for the facts is its failure to address the issues that were raised by petitioner Margaret Wooster at the June 6, 2016 public hearing conducted by said respondent’s Legislation Committee.

159. The following excerpt from petitioner Wooster’s June 6, 2016 testimony highlights the concerns ignored by respondent Common Council:

...
[The Outer Harbor] is ... our buffer from lake effect wind, snow and flooding... In light of increasingly extreme local storms, the LWRP calls for the City to “examine precipitation records, historic high water data, insurance claims, local rainfall changes, existing flood and ice management structures, bridge operations, . . . snow melt, high Lake Erie winds, Lake Erie seiche and historic tsunamis to maximize the accuracy of flood data and risk maps.” (LWRP Section III, p. 56)

This has not been done. Yet anyone who has been stuck in the Outer Harbor during a winter storm knows just how risky a place it can be.

My UB graduate planning students conducted a “vulnerability analysis” this spring, based on the Outer Harbor’s sensitivity and level of exposure... During extreme weather events where evacuation may be necessary, the Skyway cannot be relied upon as an evacuation route. Residents would need to walk 40 minutes through a heavy industrialized area to reach the nearest refuge...

Exposure is also high. A 2014 State Department of Homeland Security and Emergency Services report shows Erie County has high exposure to significant wind and winter weather events due to its proximity to Lake Erie. The Outer Harbor is one of the most exposed locations to prevailing weather in Erie County.

A high-rise residential tower on the Outer Harbor would require significant public costs to address these vulnerability issues...

[Attached hereto as **Exhibit M** is a copy of petitioner Wooster’s June 6, 2016 statement.]

160. In light of the foregoing, respondent Common Council’s issuance of a restricted use permit for the 23-story tower project constitutes a determination that is arbitrary and capricious, and/or an abuse of discretion.

161. Petitioners have no adequate remedy at law.

PETITIONERS’ STANDING

162. Petitioners repeat and re-allege each and every allegation contained in paragraphs 1 through 161 of this petition, with the same force and effect as if set forth here at length.

163. The New York Court of Appeals has long recognized a two-prong test for an individual who wishes to establish standing to challenge governmental action regarding land use, zoning and SEQRA issues: that the injury of which he or she complains falls within the “zone of interests” or concerns sought to be promoted or protected, and that he

or she would suffer direct harm, injury that is in some way different from the public at large. See, for example, Society of Plastics Industry, Inc. v. County of Suffolk, 77 NY2d 761, 773, 570 NYS2d 778 (1991); Mobil Oil Corporation v. Syracuse IDA, 76 NY2d 428, 443, 559 NYS2d 947, 950 (1990).

164. Although New York's courts have applied the legal principle that a presumption of standing exists in land use and environmental cases for a property owner or resident who is either adjacent to or in close proximity of a challenged project, see *e.g.*, Society of Plastics, *supra*, 77 NY2d at 779; LaDelfa v. Village of Mt. Morris, 213 AD2d 1024, 1025, 625 NYS2d 117, 118 (AD4 1995); Michalak v. ZBA of Town of Pomfret, 286 AD2d 906, 731 NYS2d 129 (AD4 2001), such ownership or residency is not a prerequisite to standing.

165. Rejecting the argument that “environmental harm can be alleged only by those who own or inhabit property adjacent to, or across the street from, a project site,” our State’s highest court articulated the principle in 2009 that people who allege “repeated, not rare or isolated use” of a natural resource “for recreation and to study and enjoy the unique habitat” have standing to allege environmental harm in SEQRA cases:

We hold that a person who can prove that he or she uses and enjoys a natural resource more than most other members of the public has standing under the State Environmental Quality Review Act (SEQRA) to challenge government actions that threaten that resource...

Here, petitioners allege that they "use the Pine Bush for recreation and to study and enjoy the unique habitat found there." It is clear in context that they allege repeated, not rare or isolated use. This meets the Society of Plastics test by showing that the threatened harm of which petitioners complain will affect them differently from "the public at large." ... The City asks us to adopt a rule that environmental harm can be alleged only by those who own or inhabit property adjacent to, or across the street from, a project site; that rule would be arbitrary, and would mean in many cases that there would be no plaintiff with standing to sue, while there might be many who suffered real injury.

Save The Pine Bush. v. Common Council of the City of Albany, 13 NY3d 297, 301, 305 (2009); also see, Clean Water Advocates of New York v. NYS Dept. of Environmental Conservation, 103 AD3d 1006, 1008-1009 (AD3 2013) (Citing Save the Pine Bush, the Third Dept. states, “It is now settled that standing to assert a claim based upon an impact upon a natural or cultural resource requir[es] a demonstration that a[n individual's] use of a resource is more than that of the general public.”).

166. The “zone of interests” of SEQRA and the zoning and planning laws of New York State and the City of Buffalo include the protection of the environmental, aesthetic, and historic resources that petitioners contend will be harmed if the determinations they challenge in this proceeding are not nullified.

167. New York’s courts have long acknowledged SEQRA’s broad “zone of interest,” and, as the case law and regulatory provisions cited above demonstrate, SEQRA’s zone of interests includes, without limitation, impact on wildlife, aesthetic impacts, existing community or neighborhood character, traffic levels, impact on drinking water and surface water, and drainage and stormwater runoff.

168. Standing in zoning cases is also a broad concept because zoning seeks to protect the welfare of the entire community "by making a balanced and effective use of the available land and providing for the public need for varying types of uses and structures." [See, e.g., East Thirteenth St. Community Assoc. v. NYS Urban Development Corp., 84 NY2d 287, 296, 617 NYS2d 706, 709 [1994]]. Without limitation, the purposes sought to be promoted by the City of Buffalo’s land use and zoning laws include:

(a) *Public health and safety.* See, e.g., Manupella v. Troy City ZBA, 272 AD2d 761, 707 NYS2d 707 (AD3 2000) (issues of a neighborhood's safety and welfare fall within the zone of interests which the zoning ordinances were designed to protect).

(b) *Preservation of the character of a neighborhood.* See, e.g., McGrath v. Town Board of Town of North Greenbush, 254 AD2d 614, 616, 678 NYS2d 834, 836 (AD3 1998) (the allegation that a petitioner will suffer harm from "degradation in the character of the neighborhood" is a concern that falls within the zone of interest protected by zoning laws).

(c) *Harmonizing various land uses within a community.* See, e.g., St. Onge v. Donovan, 71 NY2d 507, 527 NYS2d 721 (1988) ("Conditions imposed to protect the surrounding area from a particular land use are consistent with the purposes of zoning, which seeks to harmonize the various land uses within a community.").

(d) *Noise and traffic levels.* See, e.g., McGrath v. Town Board of Town of North Greenbush, 254 AD2d 614, 678 NYS2d 834 (AD3 1998) ("increased noise" and "increased vehicle and truck traffic" are concerns within the zone of interest protected by the Town's zoning laws); Overhill Building Company v. Delany, 28 NY2d 449, 322 NYS2d 696 (1971) (public safety in the form of alleviated traffic congestion is a "legitimate purpose for a zoning ordinance").

169. As is described below in greater detail, each petitioner alleges that she or he would suffer direct harm that is different from the injury to the public at large if respondent Queen City Landing, LLC, is allowed to demolish the existing Freezer Queen facility and construct the Queen City Landing Project, without first being required to prepare a Draft Environmental Impact Statement [DEIS] pursuant to SEQRA, and that

such harm falls within the “zones of interests” promoted or protected by SEQRA and New York State and the City of Buffalo’s zoning laws and land use policies.

170. Regarding petitioner Margaret Wooster’s claim that she has standing herein:

A. Petitioner Margaret Wooster is an adjunct professor of urban planning and ecology at SUNY Buffalo, and possesses a master’s degree in Urban Planning.

B. She is a founding member of Friends of the Buffalo River, and formerly served as Executive Director of Great Lakes United, as well as Senior Planner with Buffalo Niagara Riverkeeper.

C. Margaret Wooster is also the author of “*Living Waters: Restoring the Rivers of the Lower Great Lakes*,” and recently has contributed three op-ed pieces published in the *Buffalo News* addressing her concerns related to development of the City of Buffalo’s Outer Harbor.

D. Given the Outer Harbor’s position as an integral part of the Buffalo River watershed, protection, preservation and enhancement of the Outer Harbor’s ecology, and of the health and viability of its natural habitats, have been areas of special concern and study for petitioner Wooster since the Friends of the Buffalo River was formed in 1990.

E. In light of her decades of study, advocacy, writing and teaching related to the Buffalo River, Lake Erie and Buffalo’s Outer Harbor, the failure of respondent Planning Board to require preparation of a Draft Environmental Impact Statement [DEIS] to provide a comprehensive assessment of potential adverse impacts of the proposed action on the coastal ecosystem, as well as a meaningful analysis of mitigation measures and alternatives to the proposed 23-story project, petitioner Wooster will suffer direct harm

that is different in kind and degree from the public at large if the relief requested in this petition is not granted.

171. Regarding petitioner Jay Burney's claim that he has standing herein:

A. Petitioner Jay Burney has been engaged with Buffalo's Outer Harbor for almost 40 years. He is a writer, videographer, photographer, journalist, educator, and community leader working on environmental and social justice issues with a focus on Buffalo's Outer Harbor and shorelines.

B. During the past four decades, petitioner Burney has participated in numerous meetings, charrettes, workshops, and public planning sessions and meetings regarding the Outer Harbor.

C. He has worked with New York State, Erie County, and the City of Buffalo, as well as numerous community organizations regarding the Outer Harbor, and has worked with schools including Buffalo Public Schools, SUNY Buffalo, SUNY Buffalo State, Cornell, Brock University, Canisius College, and Daemen College on projects and presentations about the Buffalo Outer Harbor.

D. In 2012, the City of Buffalo and the Erie Canal Harbor Development Cooperation recognized Jay Burney as a formal stakeholder in the Brownfield Remediation program for the Outer Harbor.

E. He is the long time Chair of the Friends of Times Beach Nature Preserve which was created in 2008, and which succeeded the Times Beach Oversight Committee which he also chaired since its inception in 1989. Established in 2008, The Friends of Times Beach Nature Preserve advocates for the protection and conservation of the Times Beach Nature Preserve ("Times Beach"), Buffalo's Outer Harbor and adjacent

shorelines. This includes a focus on avian conservation, pollinator conservation, and native ecosystems.

F. Times Beach is a 55-acre, city-owned and county managed nature preserve designated by the State of New York as a “significant coastal fish and wildlife habitat,” is located one mile across the Buffalo River from Canalside, and is a significant public resource for ecological protection and conservation, education, and wildlife observation. Times Beach has public walkways and overlooks, and has recently been undergoing a multi-million dollar restoration effort financed by federal, state and local funds. The Friends of Times Beach Nature Preserve is a recognized partner in that project.

G. Due to its location on the eastern end of Lake Erie, Times Beach is a critical geographical site for bird habitat including year round migration and seasonal breeding.

H. Petitioner Burney visits the Outer Harbor and Times Beach almost every day, year round. He has led tours of Time Beach, and given lectures and presentations regarding the Outer Harbor in an effort to develop and promote a wider awareness of the region’s biodiversity and sustainability.

I. Petitioner Burney was also the Chair of the Niagara River Globally Significant Important Bird Area Coalition, a group of international, state, federal, county and municipal agencies, universities, and environmental conservation organizations that helped to establish the Niagara River Corridor Globally Significant Important Bird Area, from 1996 until 2004, when the official designation was declared.

J. In light of his decades of study and advocacy relating to the Outer Harbor and Times Beach, the failure of respondent Planning Board to require preparation of a Draft Environmental Impact Statement [DEIS] to provide a comprehensive assessment of

potential adverse impacts of the proposed action on the coastal ecosystem, as well as a meaningful analysis of mitigation measures and alternatives to the proposed 23-story project, petitioner Burney will suffer direct harm that is different in kind and degree from the public at large if the relief requested in this petition is not granted.

172. Regarding petitioner Lynda K. Stephens' claim that she has standing herein:

A. Petitioner Lynda K. Stephens, a retired grants consultant and former elementary school teacher, is actively involved with the Waterfront Committee of the League of Women Voters of Buffalo Niagara (LWVBN). LWVBN is a nonpartisan volunteer organization that encourages an informed electorate and advocates for civic improvement.

B. For the past several years, LWVBN has included as one of its primary goals a commitment to advocate on behalf of Buffalo's waterfront:

Local Program Focus No. 6: Support of plans for the waterfronts of Erie County (along Lake Erie and the Niagara and the Buffalo Rivers) that provide and ensure:

- a. Year-round public access to the waterfront;*
- b. A coherent regional planning process arrived at and adopted with adequate public participation;*
- c. Only such commercial development as makes appropriate use of a waterfront location;*
- d. Documentation and preservation of the area's significant industrial, commercial and social history;*
- e. Development of services and facilities necessary for a variety of recreational activities; and*
- f. Protection and enhancement of the natural environment at the water's edge.*

C. Petitioner Stephens, in furtherance of the LWVBN's waterfront initiative, has advocated for meaningful public participation in the planning process for Buffalo's Outer Harbor, and for the preservation of public lands along Buffalo's waterfront. She has

appeared at public hearings regarding respondent Queen City Landing, LLC's plans for the 20-acre subject parcel, expressing orally and in writing concerns held by the LWVBN and herself personally that, among other things, the proposed 23-story development diminishes the public's use and enjoyment of nearby public lands, fails to protect and preserve the natural environment in an ecologically sensitive and significant area, risks contamination of the public's drinking water by disturbing the contaminant-filled soils on site, and disregards the historical significance of the existing former-Freezer Queen building.

D. Lynda Stephens frequently visits the Outer Harbor for meetings, rallies, and to patronize the restaurant adjacent to the small boat harbor, and additionally walks the paths at Times Beach, Wilkeson Point, etc.

E. In light of her years of advocacy on behalf of, and frequent use and enjoyment of, the Outer Harbor, the failure of respondent Planning Board to require preparation of a DEIS to provide a comprehensive assessment of potential adverse impacts of the proposed project on the public's access to and safe and enjoyable utilization of nearby marinas, parks, walkways, bike paths, and nature preserves, and on the potential risks to the quality of drinking water, as well as a meaningful analysis of mitigation measures and alternatives to the proposed 23-story project, petitioner Stephens will suffer direct harm that is different in kind and degree from the public at large if the relief requested in this petition is not granted.

173. Regarding petitioner James. E. Carr's claim that he has standing herein:

A. Petitioner James E. Carr is a retired urban planner. From 1969 to 1975, he was employed as a planner with the Erie-Niagara Regional Planning Board where he

prepared two studies related to Buffalo's waterfront, "The Buffalo River - Buffalo Creek Recreation and Open Space Preservation Plan" and "The Urban River."

B. Petitioner Carr was appointed Executive Director of the City of Buffalo/Erie County Urban Waterfront Advisory Committee when it was established in 1975, and held that position for approximately five years. The committee labored to make the Riverwalk a reality, and sponsored two conferences to support public participation in determining future uses of the waterfront.

C. During that time period and continuing to the present, Mr. Carr has actively supported the creation of a joint Canadian/American Niagara River International Gateway Recreation Area which would have the Buffalo waterfront as its southern anchor.

D. As Chair of the Niagara Group Sierra Club, and subsequent Chair of the Atlantic Chapter of the Sierra Club, Mr. Carr actively encouraged and promoted public use of Buffalo's river and lakefront areas.

E. Since 2012, Petitioner Carr has served and continues to serve as Treasurer of the Board of Directors of the "21st Century Park on the Outer Harbor" organization.

F. He visits Buffalo's Inner Harbor and Outer Harbor on a daily to weekly basis, attending events such as those held at Silo City and Canalside, and frequently bicycles on the Outer Harbor public bike paths.

G. In light of his decades of study and advocacy relating to the public's access to and enjoyment of the Outer Harbor and Buffalo River area, the failure of respondent Planning Board to require preparation of a DEIS to provide a comprehensive assessment of potential adverse impacts of the proposed project on the public's access to and safe

and enjoyable utilization of nearby marinas, parks, walkways, bike paths, and nature preserves, and potential for the future expansion and enhancement of such facilities, as well as a meaningful analysis of mitigation measures and alternatives to the proposed 23-story project, petitioner Carr will suffer direct harm that is different in kind and degree from the public at large if the relief requested in this petition is not granted.

REGARDING PRELIMINARY RELIEF

174. Petitioners repeat and re-allege each and every allegation contained in paragraphs 1 through 173 of this petition, with the same force and effect as if set forth here at length.

175. Petitioners seek preliminary relief from the Court, in the form of both a temporary restraining order and a preliminary injunction, to maintain the status quo during the pendency of this proceeding.

176. Based on the following facts, it appears that respondent Queen City Landing LLC, intends to start construction-related activity at the subject parcel “immediately”:

(a) On Monday, June 20, 2015, the day before respondent Common Council was scheduled to vote to approve or deny a restricted use permit, the last discretionary approval required from the City of Buffalo for the project to proceed, WGRZ TV’s Scott Levin reported the following:

The Buffalo Common Council will vote Tuesday whether to approve the Freezer Queen project on Buffalo’s Outer Harbor.

...
[Gerry Buchheit’s] spokesperson, Phil Pantano, says work will begin as soon as next week if the Council approves the project on Tuesday.
“If approval is granted tomorrow, work will get started right away on abatement, demolition, and construction right after...”

(b) On Tuesday, June 21, 2016, WGRZ TV's report regarding the Council's approval of the "Freezer Queen Project" ended with the following statement: "Developer Gerry Buchheit says the construction work will start immediately and should be finished by the end of next year."

(c) A notice is taped to the buildings at the subject parcel, 975 Fuhrmann Blvd., indicating that Lion Construction Supply & Services, LLC, the holder of a NYS Asbestos Handling License, will start asbestos removal activity on July 7, 2016. Attached hereto as **Exhibit N** are two sheets showing the aforementioned Lion Construction notice.]

177. As is alleged above at paragraph 16, according to New York State's Cultural Information System (CRIS) and the Buffalo Harbor Brownfield Opportunity Area Nomination Document, the Freezer Queen building is eligible for listing on both the National and State Registers of Historic Places.

178. The Local Waterfront Revitalization Program [LWRP], adopted by respondent Common Council on February 2, 2016, includes a policy to "protect, enhance and restore structures, districts, areas or sites that are of significance in the history, architecture, archeology or culture of the state, its communities or the nation," and references the existing Freezer Queen building as such a structure because of its role as part of Buffalo's industrial heritage.

179. Furthermore, pursuant to Section 617.3(a) of the SEQRA regulation, "A project sponsor may not commence any physical alteration related to an action until the provisions of SEQR have been complied with." [6 NYCRR 617.3(a)] The SEQRA regulations, at 6 NYCRR § 617.2(ab), define "physical alteration" to include, but not be limited to, vegetation removal, demolition, stockpiling materials, grading and other forms

of earthwork, excavation or trenching, and construction of buildings, structures or facilities.

180. In light of the historical significance of the former Freezer Queen building, and SEQRA's prohibition against "physical alteration" at the project's site until the requirements of SEQRA have been complied with, commencement of the demolition process and construction-related activity during the pendency of this proceeding, and prior to full compliance with the requirements of SEQRA and the applicable zoning and planning laws, will produce severe injury to petitioners' environmental interests.

181. Upon information and belief, unless a temporary restraining order is granted pending a hearing for a preliminary injunction, petitioners may suffer immediate and irreparable injury.

182. The appellate courts of this State have repeatedly recognized that, "within the purview of CPLR article 63, an 'irreparable injury' is one which may not be compensated by an award of money damages." See, Lawrence H. Morse, Inc. v. Anson, 185 AD2d 505 (AD3 1992); Fischer v. Deitsch, 168 AD2d 599 (AD2 1990).

183. Failure to preserve one of the few remaining pieces of Buffalo's industrial heritage during the pendency of this proceeding would create a loss to petitioners, as well as the entire Buffalo area, that could not be compensated by either the award of money damages, or the construction of a replacement structure.

184. Upon information and belief, if the requested preliminary relief is not granted, and respondent Queen City Landing, LLC, proceeds with its plans to demolish the former Freezer Queen building during the pendency of this proceeding, such actions

will tend to render judgment herein ineffectual, and will result in irreparable injury to petitioners.

185. For the reasons stated above, it is clear that respondents City Planning Board and Common Council have failed to strictly comply with the procedural and substantive requirements of SEQRA, and Buffalo's City Code, as well as the General City Law, and, therefore, that petitioners have established the likelihood of success.

186. Upon information and belief, the potential harm to petitioners, the Buffalo community, and to the environment if the requested preliminary relief is not granted clearly exceeds any potential harm to respondents of granting the temporary restraining order and preliminary injunction.

WHEREFORE, petitioners demand judgment against respondents as follows:

A. Preliminarily enjoining, during the pendency of this proceeding, respondent Queen City Landing, LLC, its employees, contractors, agents and assigns, from commencing and/or continuing:

(i) the demolition and/or physical alteration of the former Freezer Queen warehouse or any other structure located on the premises of 975-1005 Fuhrmann Blvd. in the City of Buffalo, New York, or any portion of such structures, including, without limitation, asbestos abatement and removal; and

(ii) the "physical alteration", as that term is defined at 6 NYCRR 617.2(ab), of 975-1005 Fuhrmann Blvd., Buffalo, New York, in furtherance of respondent Queen City Landing, LLC's Queen City Landing project, including, without limitation, vegetation

removal, demolition, stockpiling materials, grading and other forms of earthwork, dumping, filling or depositing, discharges to air or water, excavation or trenching, application of pesticides, herbicides, or other chemicals, application of sewage sludge, dredging, flooding, draining or dewatering, paving, construction of buildings, structures or facilities, and extraction, injection or recharge of resources below ground.

B. Annuling and setting aside the Determination of Significance/Negative Declaration for the proposed Queen City Landing project adopted on May 31, 2016 by respondent City of Buffalo Planning Board.

C. Annuling and setting aside the May 31, 2016 approval by respondent City of Buffalo Planning Board of the design and site plan for the Queen City Landing project.

D. Annuling and setting aside the May 31, 2016 approval by respondent City of Buffalo Planning Board of respondent Queen City Landing, LLC's application to subdivide 975-1005 Fuhrmann Blvd. in the City of Buffalo, New York.

E. Annuling and setting aside the May 31, 2016 approval by respondent City of Buffalo Planning Board of respondent Queen City Landing, LLC's application for a demolition permit for 975-1005 Fuhrmann Blvd. in the City of Buffalo, New York.

F. Annuling and setting aside the June 21, 2016 grant by respondent City of Buffalo Common Council of a restricted use permit for the Queen City Landing project at 975-1005 Fuhrmann Blvd. in the City of Buffalo, New York.

G. Granting such other and further relief as to the Court may seem just and proper, together with the costs and disbursements of this proceeding.

Dated: July 10, 2016
Buffalo, New York

ARTHUR J. GIACALONE
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VERIFICATION

STATE OF NEW YORK)

SS.:

COUNTY OF ERIE)

MARGARET WOOSTER, being duly sworn, deposes and says: she is one of the petitioners in the within proceeding, and that all of the petitioners are united in interest; that she has read the foregoing amended petition and knows the content thereof; that the same is true to her own knowledge, except as to matters therein stated to be alleged upon information and belief, and as to those matters she believes it to be true.

MARGARET WOOSTER

Sworn to before me this
_____ day of July 2016.

ARTHUR J. GIACALONE
Notary Public, State of New York
Qualified in Erie County
My commission expires 5/31/17