SUPREME COURT STATE OF NEW YORK
APPELLATE DIVISION: FOURTH DEPARTMENT

DOCKET NOS. CA 16-02043 & CA 16-02077

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

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

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

SUPPORTING AFFIRMATION

"Wooster Proceeding"
Erie Co. Index No. I-2016-0096

In the Matter of the Application of
BUFFALO NIAGARA RIVERKEEPER, INC.
Petitioner-Appellant

For a Judgment pursuant to CPLR Art. 78
-against-

CITY OF BUFFALO, and
QUEEN CITY LANDING, LLC,
Respondents-Respondents.

"**Riverkeeper Proceeding"**
Erie Co. Index No. 807004/2016

ARTHUR J. GIACALONE, an attorney duly admitted to practice in the State of New York, subscribes and affirms the following to be true under the penalty of perjury:

1. I am the attorney for petitioners-appellants Margaret Wooster, Clayton S. "Jay" Burney, Jr., Lynda K. Stephens and James E. Carr in the above-captioned "Wooster Proceeding" (referred to collectively herein as "Wooster appellants" or "appellants"), and, as such, am fully familiar with the facts and circumstances herein.

2. This affirmation is submitted in support of the Wooster appellants' motion to reargue that portion of the May 5, 2017 Memorandum and Order of this Court [hereinafter, "May 5, 2017 Order"] affirming the dismissal on the merits of appellants' Verified Amended Petition. Appellants are not asking to reargue that portion of this Court's May 5, 2017 Order affirming the denial of respondents' motion to dismiss the pleadings for lack of standing.

Regarding "Necessary Papers"

3. Pursuant to 22 NYCRR 1000.13(a)(5), accompanying this affirmation as **Exhibit A** is a copy of the aforementioned May 5, 2017 Order of this Court.

4. Pursuant to 22 NYCRR 1000.13(a)(5), accompanying this affirmation as **Exhibit B** are the following necessary papers: (a) pertaining to both the Wooster Proceeding and Riverkeeper Proceeding: the joint Order & Judgment (one document) granted by the Hon. Donna M. Siwek, JSC, September 30, 2016, entered in the office of the Erie County Clerk October 11, 2016, and the September 14, 2016 Memorandum Decision; (b) pertaining to the Wooster Proceeding: a copy of the Notice of Appeal with proof of service and filing on October 31, 2016; (c) pertaining to the Riverkeeper Proceeding: a copy of the Notice of Appeal with proof of electronic filing on October 26, 2016; (d) a copy of the following prior orders of this Court: (i) April 4, 2017 Order denying without prejudice respondent Queen City Landing, LLC's motion to strike; (ii) March 1, 2017 Order denying respondent Queen City Landing, LLC's motion for permission to have two attorneys present oral argument; (iii) January 5, 2017 Scheduling Order; and, (iv) November 30, 2016 Order consolidating appeals, expediting appeals, and denying appellants' motion seeking preliminary relief.

Points Wooster Appellants allege have been overlooked or misapprehended

- <u>Purported "conformance" with USFWS "best practice" measures</u> -

5. The May 5, 2017 Order concludes that respondent Planning Board complied with the requirements of SEQRA and took the requisite "hard look" at the potential impacts on migratory birds of a 23-story, glass-and-steel tower "*especially in light of the project's conformance with accepted governmental guidelines to mitigate bird impacts*." Appellants respectfully allege that the Court overlooked or misapprehended the following facts in reaching its assessment that the proposed tower project conforms with the pertinent mitigation measures:

A. The project sponsor's wildlife consultant, DIEHLUX, LLC, did not assert that respondent Queen City Landing's proposed project would meet all of the pertinent best practice management measures recommended by the U.S. Fish & Wildlife Service [USFWS]. The consultant's report, found at R1642-1644], indicates that QCL would "*potentially* incorporate [USFWS] mitigation design practices" [emphasis added], and provides a list of eight (8) measures that "summarizes *QCL's efforts* to incorporate these recommended best practices to minimize adverse impacts to migratory birds in the area." [R1643] [Emphasis added.]

B. Respondent Planning Board does not claim that the proposed project is in full conformance with the USFWS guidelines. Its May 31, 2016 Negative Declaration merely states: "The proposed design of the building incorporates *many* of the mitigation measures suggested in the USFWS guidance document." [R1386 (emphasis added)]

C. Neither respondent Planning Board, the lead agency, nor respondent Queen City Landing, the project sponsor, identified the USFWS "best practices" measures that are *not* incorporated into the design of the 23-story, glass-and-steel tower, or evaluated the adverse impacts of omitting such mitigation measures from the project's design. [Note: Renderings of

the proposed tower are found, e.g., at R144, 1342.] Review of the "Certified Record of Proceedings" filed by the City Respondents pertaining to the proceedings conducted before respondent Planning Board - found at R1093 through 1399 – confirms that the actual USFWS document, "Reducing Bird Collisions with Buildings and Building Glass Best Practices" ["USFWS Guidance Document"] was *not* part of the "Information Considered" by respondent Planning Board when it issued the May 31, 2016 Negative Declaration and approved, without any conditions, the project's design and site plan. [Note: The USFWS Guidance Document was provided to the court below by QCL's counsel. See R451-468.]

D. The following "best practices" mitigation measures are recommended by the USFWS in its guidance document, but are <u>not</u> one of the best practices measures "potentially" incorporated into the design of the 23-story, glass-and-steel tower:

> (i) "Glass Design/Pattern. Avoid over-use of glass: keep the percentage of total glass below American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) standard of 40% of surface area." [R465]
>
> (ii) "Lighting Design: Install motion sensors on all lights (both interior and exterior) that activate only when people are present. … This is especially important during the bird migration periods (early April through late May and mid-August through early November), and periods of inclement weather. [R459]
>
> (iii) "Lighting Operation: Ensure that any lights that are not motion-activated are turned off at night; especially architectural lighting, *upper story interior lighting*; and lobby or atrium lighting." [R459] [Emphasis added.] [Note: The DIEHLUX report refers only to "turn[ing] off all non-essential *exterior* lighting," omitting reference to "upper story interior lighting." R1643.]

6. The significance of the omitted "best practices" measures for avoiding bird collisions into buildings cannot be overstated given the project's location in close proximity to two state-designated bird habitats, [R135], and the failure of the project sponsor and lead agency to attempt to quantify potential deaths to migratory birds, or to estimate the lesser impacts associated with either a shorter building or non-glass-and-steel tower. [R1642-1644, 1386]

- <u>Overlooking DEC's instructions that the lead agency is to complete FEAF Part 2</u> -

7. In reaching its conclusion that respondent Planning Board did not abdicate its responsibilities as lead agency, the Court apparently overlooked or misapprehended: (a) the DEC's instructions that Part 2 of the FEAF must be completed by the lead agency (whether or not members of the lead agency have environmental expertise); and, (b) the lead agency's failure to discuss or analyze either the FEAF Part 2 or the Negative Declaration before approving them. Additionally, the May 5, 2017 Order appears to assume that the planning department staff possessed substantive expertise not established in the record.

8. Part 2 of the FEAF, consisting of ten pages and 18 sets of questions, is the primary tool created by the State Department of Environmental Conservation (DEC) to ensure that a lead agency does not insulate itself from direct consideration of potential adverse environmental impacts, and considers environmental ramifications of a proposed action to the fullest extent possible. [R1373-1382] The first sentence of the "FEAF, Part 2" states unequivocally and in bold print: "**Part 2 is to be completed by the lead agency.**" [R1373] [Emphasis in the original.] The importance of this procedural requirement is underscored by the language used in the SEQR Handbook when explaining the function of the FEAF in the environmental review process:

> - Part 2 of the full EAF helps to identify the major categories of impacts and identifies the magnitude of each impact. **The lead agency <u>must</u> complete its own analysis and is responsible for all decisions made during preparation of Part 2…** [Emphasis added.] [R739]

9. Significantly, the instructions for FEAF Part 2 acknowledge that lead agency members are not likely to be environmental professionals. For that reason, the questions in Part 2 of the FEAF have been specifically "designed to walk a reviewer through the assessment process":

> **…** We recognize that the lead agency's reviewer(s) will not necessarily be environmental professionals. So, **the questions are designed to walk a reviewer through the assessment process** by providing a series of questions that can be answered using the information found in Part 1… When Part 2 is completed, the lead agency will have identified relevant environmental areas that may be impacted by the proposed activity. [Emphasis added.] [R1373]

10. Therefore, it is the lead agency's duty to answer the 18 sets of questions and complete Part 2 of the FEAF, and it does not matter whether the lead agency's members possess environmental expertise. Contrary to the DEC's instructions, it was Director of Environmental Affairs, Jason Paananen, and not the lead agency members, who completed FEAF Part 2. [R548-550] Not only did respondent Planning Board not "walk through" and "complete" Part 2 of the FEAF, the transcript of the Planning Board's May 31, 2016 meeting shows that the Planning Board members did not mention the FEAF Part 2 document by name, did not review or answer the ten pages of questions in Part 2 of the FEAF, and did not change even one response in FEAF, Part 2, although the document had <u>not</u> been provided to the Planning Board prior to May 31, 2016 meeting. [R1794-1812, 550]

11. Furthermore, the Record on Appeal is devoid of any evidence establishing that members of the strategic planning department staff have any special expertise – beyond that of the Planning Board members – in assessing visual and aesthetic impacts, impacts on existing community character, or the impacts of tall buildings on migrating birds. These are not aspects of the environment requiring highly technical training and expertise. Additionally, Mr. Paananen, the person principally responsible for completing FEAF Part 2, had just recently joined the planning department staff when he performed these tasks on the days immediately preceding the May 31, 2016 Planning Board meeting where the FEAF Part 2 and Negative Declaration were rubberstamped by the lead agency, respondent Planning Board. [R550]

- <u>Overlooking/Misapprehending planning department's role as de facto lead agency</u> -

12. Appellants respectfully allege that the Court, in reaching its conclusion that respondent Planning Board did not abdicate its responsibilities as lead agency, overlooks or misapprehends the admission in respondent City of Buffalo's verified answer, at paragraph 32 [re Am. Petition, para. 49-51, 53 at R195-196] and at paragraph 41 [re Am. Petition, para. 78 at R204], that the planning department staff is <u>never</u> directed by the Planning Board to prepare a Determination of Significance, but prepares them "*in the regular course of their duties*":

> … Admits that Director of Planning Nadine Marrero presented a 13-page SEQRA Determination of Significance for review by Planning Board members, as presentation of prepared Determinations of Significance are a part of her duties. As such, neither Director Marrero nor staff are ever "directed" to prepare a Declaration as these documents are prepared through coordination of City staff in the regular course of their duties in all proposed projects before the Planning Board. [R349-351]

13. The above-quoted admission coincides with the duties described by Director of Environmental Affairs Paananen in the affidavit he submitted to the IAS court:

> …
> 6. My duties include the review of submitted Part I Environmental Assessment Forms ("EAF"s), <u>preparation of Part 2 and 3 EAFs, preparation of determinations of significance</u> and preparation of negative, conditioned negative and positive declarations.
> …
> 15. Based on the information and analysis of these moderate environmental impacts and the overall scope of the Project, <u>a negative declaration was prepared for the Planning Board's consideration</u>…
> …
> *38. … From the review of [12 enumerated] environmental topics in the Part 2 FEAF and the completion of the Part 3 FEAF, <u>the staff from the Office of Strategic Planning determined that the proposed project would not have any adverse environmental impacts and therefore a negative declaration was prepared for consideration by the Planning Board</u>.* [Italics in original.]

[R511, 513, 522] [Underlining added]

14. The Determination of Significance – that is, the decision whether to issue a "positive declaration" requiring preparation of an environmental impact statement [EIS], or a "negative

declaration" ending the SEQRA review without an EIS – is the primary duty of a lead agency. [6 NYCRR 617.7(a)] As stated in the definition of "lead agency" in the SEQRA regulations, "'Lead agency' means an involved agency principally responsible for … approving an action, and therefore responsible for determining whether an environment impact statement is required in connection with the action…" [6 NYCRR 617.2(u)]

15. It is true that we are not dealing here with the precise situation our state's highest court faced in Coca-Cola Bottling Co. v. Board of Estimate, 72 N.Y.2d 674 (1988), where the City of New York's "Mayoral Executive Order No. 91" designated two agencies – the City Department of Environmental Protection (DEP) and Department of City Planning – "as permanent 'lead agencies' responsible for implementation of SEQRA." In that situation, the Court of Appeals held that, by allowing one of the two "permanent lead agencies" – the DEP – to "make the initial determination of the significance of the environmental effect of a project," rather than the City's Board of Estimates – the agency principally responsible for approving the project - Executive Order No. 91 transgressed SEQRA's policy and language, and unlawfully "altered or diminished" the lead agency's responsibility. Id.

16. Nonetheless, although the City of Buffalo has not *officially* designated the planning department staff as "lead agency," an analogous defect in process has been created. The City Respondents' verified answer and Paananen affidavit establish that the planning department staff functions as *de facto lead agency* by making the initial determination of significance, and preparing the negative declaration, without obtaining direction from the Planning Board. As the transcript of the 05/31/16 meeting shows, the Planning Board rubberstamped the Negative Declaration, without changing a word or discussing its contents. [R1794-1812] Clearly, the planning department's role has unlawfully diminished the lead agency's responsibility. *Id.*

- Overlooking absence of objective measurements/reasoned elaboration for visual impacts -

17. Appellants respectfully allege that the Court, in concluding that respondent Planning Board took the requisite hard look at potential impacts aesthetic resources and community character, overlooks or misapprehends the Planning Board's failure: (a) to require submission by the project sponsor of any of the objective measurements recommended by the DEC for assessing visual impacts (such as line-of-sight and viewshed analyses, and visual simulations); and, (b) to provide a "reasoned elaboration" for the conclusion that "a stand-alone building" in a vast stretch of open, public lands would not have a significant visual impact. [R1386, 1389].

18. The determination of non-significance was reached despite the Negative Declaration's own characterization of the 23-story, glass-and-steel structure as a "stark contrast' to the existing manmade and natural resources nearby [R1389], and admission by the developer's counsel that the proposed tower is "certainly different and distinct from anything else on the water's edge" [R1800].

19. Respondent Planning Board (or, more accurately, the City's planning staff) stood the objective approach to assessing a proposed project's visual impacts on its head when giving the following justification for the determination that the 23-story tower would not have "any significant impacts on aesthetic resources":

> … 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. [R1386]

20. Initially, it must be noted that the Negative Declaration's conclusion that "the overall viewshed will not be significantly impacted" [R1386] fails to identify the 23-story tower's "viewshed" – the geographic area from which the proposed project may be seen. [R756]

Moreover, this conclusory statement was reached without the benefit of the objective assessments and customary tools used recommended by the State DEC. These tools include graphic viewshed and line-of-sight analysis, and, for a project as substantial as the subject proposal, more sophisticated visual simulations and digital viewshed analysis. [SEQR Handbook, R742-743; also see the DEC's policy statement, "*Assessing and Mitigating Visual Impacts*," R747-461.]

21. Submission to the Planning Board of artist renderings of the various views of the proposed tower [see, e.g., R144, 1342] – without objectively measuring its visibility from aesthetically-significant places - falls far short of the detailed, thoughtful analysis called for by the DEC when assessing visual and aesthetic impacts. [R749-752] Neither the lead agency, nor the public, was provided with accurate and objective "visual assessments" showing the 23-story tower's visibility from the multitude of aesthetically-sensitive locations within the tower's viewshed [e.g., visibility of the tower from the boats in the adjacent Small Boat Harbor and nearby marinas; bicyclists on the adjoining public bike path; walkers on the nearby pubic paths; visitors to the Tifft and Times Beach nature preserve; kayakers in the waters of the Outer Harbor; etc.] [R751] Nor was any effort made to quantify the number of people who would view the tower from the various public parks, paths, marinas, and nature preserves. [R742]

22. Therefore, respondent Planning Board has not met its obligations under SEQRA.

WHEREFORE, the Wooster appellants respectfully ask this Court to grant their motion to reargue, and to enter an order providing the relief requested in their Notice of Motion.

Dated: Buffalo, New York
May 30, 2017

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Arthur J. Giacalone