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STATEMENT OF QUESTIONS INVOLVED

1. Have the Petitioners-Appellants established standing in the underlying proceedings? Answer of the Court below: Yes.

2. Did the SEQRA lead agency improperly delegate its responsibilities and insulate itself from the required review of potential adverse environmental impacts when it allowed the city's planning office staff to perform the task of completing "Part 2 – Identification of Potential Project Impacts" of the SEQRA Full Environmental Assessment Form? Answer of the Court below: No.

3. Did the SEQRA lead agency improperly delegate its responsibilities and insulate itself from the making the most critical of SEQRA determinations – whether or not to require the project sponsor to prepare a DEIS - when it allowed the city's planning office staff to prepare the determination of significance/negative declaration without first obtaining directions from the lead agency itself concerning the need for a DEIS? Answer of the Court below: No.

4. Did the SEQRA lead agency violate its duty under SEQRA to assess the proposed action's potential for adverse impacts related to the subject parcel's pervasive soil contamination, potential leaching of PCBs and other industrial contaminants into the underlying soil and nearby waters of Lake Erie, and stormwater and sediment control, by deferring responsibility for such review to the State Department of Environmental Conservation and the Buffalo Sewer Authority?
Answer of the Court below: No.

5. Did the State Environmental Quality Review Act (SEQRA) lead agency, the City Planning Board, improperly disregard SEQRA's relatively-low threshold for requiring a Draft Environmental Impact Statement (DEIS), and fail to take the requisite "hard look" at potential areas of adverse environmental impacts, when it issued a SEQRA determination of significance/negative declaration? Answer of the Court below: No.

6. Did respondents City Planning Board and Common Council violate the requirements of SEQRA by allowing the City Planning Board to serve as SEQRA lead agency where the Common Council had primary responsibility for determining whether the proposed action would proceed pursuant

to its authority to grant or deny a restricted use permit for the project, and to ultimately determine the height of the building? Answer of the Court below: No.

7. Was the eight-year delay in the rezoning applicant's compliance with the condition imposed in a 2008 rezoning resolution – during which time the rezoning applicant twice abandoned both the rezoning request and proposed projects for the site – so unreasonable as to render arbitrary and capricious the city's reliance on the 2008 rezoning? Answer of the Court below: No.

8. Did respondent Common Council act in an arbitrary and capricious fashion in granting the proposed project a restricted use permit when it disregarded the purpose of the Buffalo Coastal Special Review District and the Outer Harbor's extreme weather? Answer of the Court below: No.

9. Did respondent City Planning Board violate the requirements of Section 27-a(7) of New York State's General City Law when it approved the proposed project without requiring the subject parcel's owner to furnish to the city a performance bond or other security sufficient to cover the full cost of installation of required infrastructures and improvements? Answer of the Court below: No.

10. Are the City Respondents barred by the pre-emption doctrine from disregarding the performance bond requirement found at Section 27-a(7) of New York State's General City Law? Answer of the Court below: No (by implication).

STATEMENT OF THE NATURE OF THE CASE

[Citations preceded by the letter "R" refer to page numbers in the Consolidated Record on Appeal

This appeal consolidates two related CPLR Article 78 proceedings commenced two days apart in Supreme Court, Erie County: (a) the "*Wooster Proceeding*," commenced on June 28, 2016 by Arthur J. Giacalone, Esq., on behalf of four City of Buffalo residents, petitioners-appellants Margaret Wooster, Clayton S. "Jay" Burney, Lynda K. Stephens, and James E. Carr; and, (b) the "*Riverkeeper Proceeding*," commenced on June 30, 2016 by Richard J. Lippes, Esq., on behalf of Buffalo Niagara Riverkeeper, Inc., a not-for-profit corporation. The "Wooster Proceeding" and "Riverkeeper Proceeding" are referred to by this Court as "*Appeal No. 1*," and Appeal No. 1 has been assigned Docket No. CA 16-02043. The "Wooster Proceeding" and "Riverkeeper Proceeding" both seek injunctive relief and nullification of the State Environmental Quality Review Act (SEQRA) Determination of Significance/Negative Declaration approved by respondent City of Buffalo Planning Board, and zoning and planning-related approvals by the City Planning Board and City of Buffalo Common Council in furtherance of respondent Queen City Landing, LLC's proposed 23-story mixed-use project on the City of Buffalo's Outer Harbor.

The Wooster Proceeding and Riverkeeper Proceeding were joined, but not consolidated, below. Both appeals in Appeal No. 1 are taken from Justice Siwek's "Order & Judgment" [one document], entered October 11, 2016, which denied respondents' motions to dismiss for lack of standing, and dismissed both proceedings. Respondent Queen City Landing, LLC, has cross-appealed.

Appeal No. 1 has been consolidated with "*Appeal No. 2*," which was taken by the "Wooster Petitioners" from Justice Siwek's "Order & Judgment" entered November 9, 2016. The November 9, 2016 Order & Judgment dismissed a cause of action, regarding the obligation to require a performance bond prior to approving a site plan, raised in the Wooster Proceeding, but not resolved in the October 11, 2016 Order & Judgment. Appeal No. 2 has been assigned *Docket No. CA 16-02077*. By Order entered November 30, 2016, this Court ordered the above-described consolidations, denied appellants' request for a preliminary injunction, and granted respondents request for an expedited appeal, by adding the appeals to this Court's term commencing April 3, 2017, if the appeals are perfected on or before January 4, 2017.

STATEMENT OF THE FACTS

- Buffalo's Outer Harbor and the Subject Parcel -

The subject parcel – described in greater detail below – is located within the City of Buffalo's "Outer Harbor," a portion of the city's Lake Erie shoreline which extends northerly for approximately 2.8 miles from Buffalo's border with Lackawanna to the U.S. Coast Guard Marina. Within the confines of the Outer Harbor are public parks, marinas and walkways, including, from south to north, Tifft Street Pier, Gallagher Beach, Buffalo Harbor State Park, the Small Boat Harbor, the Greenway Nature Trail (also known as the "Greenbelt"), the Seaway Pier, Wilkeson Pointe, and Times Beach Nature Preserve ("Times Beach"). [R32, 134, 216]

Three areas within the Outer Harbor have been designated by the New York State Department of State ("DOS") as "Significant Coastal Fish and Wildlife Habitats":

1. The Small Boat Harbor. This 165-acre fish and wildlife habitat is immediately adjacent to the south property line of the subject parcel, and is described by the DOS as follows:

> …
> The Small Boat Harbor is the only sizable shallow water embayment on Lake Erie in Erie County. Despite human disturbances, it is one of the most important fish and wildlife habitat areas in the Buffalo metropolitan region, because it provides substantial protection from wave action for fish, wildlife, and aquatic vegetation. Consequently, the harbor supports a highly productive and diverse littoral community, with concentrations of many fish and wildlife species occurring in the area.
>
> … Submerged, rooted macrophytes and their associated invertebrates and fish provide valuable food resources for many species of waterfowl and other migratory birds. The Small Boat Harbor attracts concentrations of these birds during spring and fall migrations (March-April and September-November, respectively), with some remaining until the harbor freezes over in early to mid-winter… [R789-792, 680-681]

2. Tifft Farm Nature Preserve. This 264-acre nature preserve and environmental education center, located across Fuhrmann Boulevard about a quarter-mile southeast of the subject parcel, is jointly operated by the City of Buffalo and Buffalo Museum of Science. According to the DOS:

> …
> Tifft Nature Preserve is the largest contiguous fish and wildlife habitat area within the City of Buffalo. Of special importance is the relatively undisturbed wetland area, which is the largest of its kind along the Lake Erie coastline. The site is inhabited by

> a diversity of fish and wildlife species that is unusual in this coastal region, especially within this urban area. A full complement of wetland species occurs in and around the marshes at Tifft Farm: … many species of waterfowl, shorebirds, herons, osprey (T) [threatened], and passerine birds use the area as a stopover during spring and fall Migrations…
>
> …
>
> Despite its current status as a nature preserve and environmental education center, Tifft Farm's fish and wildlife habitats remain vulnerable to a number of potential impacts. Surrounding land uses may be the most important factor affecting the wildlife resources of this area. Encroachment of human disturbance, including industrial, commercial, or residential development could have significant impacts on species using the area… [R797-800, 681]

3. Times Beach Nature Preserve (f/k/a Times Beach Diked Disposal Area). This 55-acre city-owned and county-managed nature preserve lies along the Lake Erie shoreline approximately 1.5 miles north of the subject parcel. [R216] The DOS provides the following description of this significant habitat area:

> …
>
> [Times Beach] is one of the few sizeable wetlands areas along the New York shoreline of Lake Erie. Although the area is man-made, and only recently created, it has become an important fish and wildlife habitat. The variety of ecological communities at Times Beach attracts a diversity of species that is unusual in this coastal region, especially within the Buffalo metropolitan area. The site lies in an important flyway for migratory birds, a key factor enhancing its potential for wildlife. Its location at the eastern end of Lake Erie, and dike-protected water area, make it a focal point for water-oriented birds moving eastward along the north and south shores of the lake.
>
> …
>
> Times Beach is a valuable refuge and feeding area for gulls, terns, shorebirds, dabbling and diving waterfowl, marsh birds, and passerines, especially during the spring and fall migrations… Since 1972, over 220 species of birds have been observed in the area… These include some extreme rarities for the region… [R793-796, 678]

The City of Buffalo's Draft Local Waterfront Revitalization Program ("LWRP") - which was accepted "as complete and ready for public review" by respondent Common Council on February 2, 2016 [R861] - sets general goals for the city's waterfront as a whole and specific goals for portions of the waterfront that have notable characteristics. [R561-737] The LWRP characterizes Buffalo's waterfront area, including the entire Outer Harbor, as "*an informal regional wildlife preserve,*" and seeks as a primary goal to protect, preserve and improve publicly owned areas identified as habitats of state and local significance, including Times Beach, Small Boat Harbor, Tifft Nature Preserve, and the Niagara

River Globally Significant Important Bird Area (GSIBA). [R574-575, 678-683, 34] Another critical goal of the Buffalo LWRP is to "protect, restore or enhance natural and manmade resources … which contribute to the overall scenic quality of the coastal areas." [R572] Those resources include "unique waterfront landscapes" such as marinas (described in the LWRP as "the heart of the community's engagement with its water"), piers, wharfs and mooring areas, waterfront sunsets, the Niagara GSIBA, and the Buffalo portion of the Great Lakes Seaway Trail Scenic Byway (which includes an elevated portion of Route 5 as it passes in close proximity of the subject parcel). [R134, 712, 725, 215]

The GSIBA – one of only 72 sites worldwide to receive the designation by National Audubon – "annually supports one of the world's most spectacular concentrations of gulls," and hosts "a remarkable diversity of waterfowl" and "an exceptional diversity of migratory songbirds during spring and fall migrations." [R682-683] According to the LWRP, "Many of the migrating species find habitat and refuge at the various open areas and nature preserves that exist in the vicinity of the [Niagara] river, including Times Beach Preserve and Tifft Nature Preserve (which is also designated by the Audubon Society as an IBA)." [R683] Policies set forth in the LWRP expressly call for the protection and enhancement of the Niagara River GSIBA, and require that the review of any proposed project within the BWRA 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." [R575]

The "subject parcel" – which consists of two adjoining parcels of land commonly known as 975 Fuhrmann Boulevard and 1005 Fuhrmann Boulevard – is situated within the Outer Harbor immediately north of the Small Boat Harbor, across Fuhrmann Blvd. to the northwest of Tifft Nature Preserve, and a short distance south of the Greenway Nature Trail, Wilkeson Point and Times Beach. [R32, 135, 216] Approximately 4.6 acres of the subject parcel's 20 acres are underwater. [R2105, 822, 525] The land portion of the subject parcel is situated in a 100-year coastal floodplain, and forms a peninsula extending in a west-southwesterly direction into Lake Erie, surrounded by water on the south, west, and northwest. [R182] The peninsula was manmade from various sources of urban fill – at depths of up to twenty feet - for the site's original use as a shipping terminal. It is a designated "brownfield cleanup" site due to

contamination from the urban fill used to create it, and from the presence and utilization of petroleum products related to the use of machinery and rail service at the site. [R193-194, 762-764, 2106] Concern exists - as expressed by respondent Queen City Landing, LLC's engineering consultant - that petroleum and polychlorinated biphenyls (PCBs) used in below grade pits and sumps may have seeped through cracks in the concrete and were released into the underlying soils. [R2128]

The subject parcel abuts fish spawning areas at the Small Boat Harbor and in the waters of Lake Erie to its west and northwest, including habitat for the New York State threatened lake sturgeon and muskellunge. It is also adjacent to areas to its west and south referred to in the LWRP as "fishing hot spots." [R134, 135, 682, 525-526] Two New York State threatened bird species, peregrine falcon and the common tern, have nesting sites along the Outer Harbor a short distance from the subject parcel. [R135, 679, 682]

The eastern boundary of the subject parcel abuts a public bike path and Fuhrmann Boulevard. [R166] The northeast portion of the subject parcel is adjacent to 901 Fuhrmann Boulevard, a parcel of land approximately 50 acres in area commonly known as the "Port Terminal Complex" or "Ford Terminal Complex," which includes two large, currently-vacant industrial buildings referred to as "Terminal A" and "Terminal B." [R68, 2168]

The primary structure at the subject parcel at 975-1005 Fuhrmann Blvd. at the time the underlying proceedings were commenced, known throughout Western New York as the "Freezer Queen building," was a vacant six-story, 272,000-square-foot industrial building. [R2094, 69] The Freezer Queen building was constructed in 1927, and, despite appellants' efforts to obtain preliminary relief from this Court, was substantially demolished during November 2016. As confirmed in a written "Resource Evaluation" report issued by the New York State Office of Parks, Recreation & Historic Preservation (SHPO) in June 2016, the structure was eligible for listing on both the State and National Registers of Historic Places due to "its 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 its representation of "a locally significant example of early-twentieth century commercial architecture." [R318-319]

The subject parcel is located within the councilmanic district of South District Councilmember Christopher P. Scanlon. [R988] It is also situated within the City's "Buffalo Coastal Special Review District," ["Buffalo Coastal District"] the provisions of which are found at Section 511-67 of the City's Zoning Ordinance. [R188-189, 992] Projects proposed within the Buffalo Coastal District may not proceed without first obtaining a "restricted use permit" from respondent Common Council. The stated intent of the Buffalo Coastal District is to control future development so that the stability, economic viability and future prosperity of the Buffalo coastal area is not threatened by "inconsistent development" or uses not related to the coastal area, and to assure that a balance of residential, commercial, port-related industrial and public access uses is not jeopardized by "inadequately controlled development." [R189] The Buffalo Coastal District expressly empowers respondent Common Council to determine the appropriate height of any structure built within the district when determining whether to grant or deny the restricted use permit. [R189]

Pursuant to Buffalo's City Code, a proposed project or action that is located on a site wholly or partially within a coastal zone, such as the Buffalo Coastal District, 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]. [R190] Respondent Common Council is listed 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)." [R200-201]

- Respondent Queen City Landing's 2008 and 2015 Proposals -

The subject parcel is owned by respondent Queen City Landing, LLC, a domestic limited liability company based in Erie County and formed on November 2, 2007, and was purchased for $3,000,000 pursuant to a foreclosure deed on or about November 28, 2007. Gerald A. Buchheit, Jr., is a manager of Queen City Landing, LLC. [R32, 183]

Respondent Queen City Landing, LLC, announced in or around March 2008 its plans to convert the Freezer Queen building into an eight- or nine-story upscale condominium development. ["Queen City Landing's 2008 plan"] [R184, 138 (top rendering)] 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. [R831] 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. [Emphasis added.]*
> …

[R935-936] Respondent Queen City Landing, LLC, "the petitioner" referred to in the above-quoted June 24, 2008 rezoning resolution, abandoned the project which had been the basis for the request to rezone 975-1005 Fuhrmann Blvd. from "M3" to "CM," and failed to take the requisite step to effectuate the rezoning change, the filing of a certified copy of the resolution in the offices of the Erie County Clerk. [R33, 184, 994-995]

In the summer of 2015, Mr. Buchheit announced Queen City Landing, LLC's a new plan to retrofit the Freezer Queen building to create 120 one- and two-bedroom apartments, 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. [R33, 185-186, 138 (bottom rendering)] In furtherance of the plan announced in July 2015, Queen City Landing, LLC, sought design and site plan review from the City Planning Board "for the conversion of the 'Freezer Queen' building into 120 market-rate apartments and a restaurant and fitness center," and once again petitioned to respondent Common Council to rezone 975-1005 Fuhrmann Blvd. from "M3" to "CM. [R33, 139-141] On November 2, 2015, Queen City Landing, LLC obtained design and site plan approval from respondent City Planning Board. However, for a second time, Queen City Landing, LLC abandoned its plans for 975-1005 Fuhrmann Blvd., despite

having received City Planning Board approval, and chose not to proceed with its request to rezone the subject parcel from "M3" to "CM." [R33, 185]

- Respondent Queen City Landing's 2016 Proposal/Multiple Applications –

Four months after respondent City Planning Board approved the design and site application for Queen City Landing's 2015 plan, the developer hastily filed, and then thrice refiled or supplemented, its application for the subject project, that is, its plans to demolish the former Freezer Queen building and construct a 23-story, 324-foot tower on the eastern portion of the subject parcel. [R2043-2069] The building's height has been accurately described by QCL's counsel as "certainly different and distinct from anything else on the water's edge." [R1800] Although Queen City Landing, LLC's intentions were to fast-track the City of Buffalo's approval process – expressing a desire to begin demolition activity by June 2016 [R2077] - submission of incomplete and inaccurate applications resulted in delays, multiple public hearings before the City Planning Board, and the filing of three SEQRA Environmental Assessment Forms ["EAFs"]:

(1) The March 14, 2016 Application. On March 14, 2106, a "site plan review application" was submitted to respondent City Planning Board by Trautman Associates, an architectural and engineering firm. In contrast to Queen City Landing's 2008 and 2015 proposals, the proposed project involved demolition of the 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 parking ramp situated at the east (upland) portion of the subject parcel (hereinafter, the "subject project" or "23-story tower project"). [R2043-2069; 144] The "Site Plan" submitted to respondent City Planning Board on March 14, 2106 also showed the location of a "Future 10-Story Building With Structured Parking" at the west end of the 20-acre parcel. [R2054, 145]

Upon receipt of the application for the 23-story tower project, the City of Buffalo's planning office staff – embracing the project sponsor's desire for a fast-track application process - immediately scheduled a public hearing for April 4, 2016 before the City Planning Board. [R989, 1682-1683] The

formal review process was initiated despite the existence of a variety of significant deficiencies in respondent Queen City Landing, LLC's application, including, without limitation, the following:

A. Although the proposed action is a "Type 1" action under SEQRA due to its location in a 100-year floodplain and within the Buffalo Coastal District, Queen City Landing, LLC's agent submitted a Short Environmental Assessment Form ["Short EAF"], a three-page form, as the first step in complying with SEQRA. [R2046-2048] The SEQRA regulations mandate the filing of a Full Environmental Assessment Form ["Full EAF"] for "Type 1" actions. The Full EAF is a comprehensive form consisting of Part 1, prepared by the project sponsor, and Part 2 and Part 3, which are the responsibility of the lead agency. [R882-894, 1373-1382]

B. Respondent Queen City Landing, LLC's application failed to acknowledge that the subject parcel is located within the Buffalo Coastal District, and, for that reason, would require respondent Common Council to determine whether to approve or a deny restricted use permit for the project. [R192, 2043]

C. At the time the March 14, 2016 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." [R35, 231-232] Buffalo's zoning ordinance does not allow construction of new residential units in an "M3" zoning district. [R232] 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." [R044]

The above-described deficiencies were brought to the attention of City officials, including Councilmember Scanlon, on March 25 and 28, 2016 by the Wooster Petitioners' counsel, Arthur J. Giacalone, Esq., who requested that the April 4, 2016 public hearing before the City Planning Board be canceled. [R984-987, 1097-1101] Nonetheless, the public hearing was held. [R1695] Mr. Giacalone advised respondent City Planning Board during the April 4, 2016 public hearing of the deficiencies in the

project sponsor's application, and of his opinion that the Common Council, and not the Planning Board, should serve as SEQRA "lead agency," and that a Draft Environmental Impact Statement [Draft EIS] was required under SEQRA. [R2129-2132] Respondent City Planning Board closed the public hearing, and indicated that it would seek legal advice from the City's Corporation Council's office on several of the issues raised by Mr. Giacalone. [R994-998] ***Note: Respondent City Planning Board did not provide the IAS court with the transcript of its April 4, 2016 or May 16, 2016 public hearings concerning Queen City Landing, LLC's application. The only "record" of those proceedings contained in the Record on Appeal are in the form of respondent Planning Board's 4/04/16 and 5/16/16 agendas.*** [R 37, 1695-1697] ***The Record on Appeal does, however, include the transcripts of the April 18 and May 31, 2016 Planning Board proceedings.*** [R1698-1772, 1794-1812]

2. April 4, 2014 application. By letter dated April 4, 2016, respondent Queen City Landing, LLC's legal counsel filed a "Letter of Intent" with respondent City Planning Board seeking three approvals from the Planning Board: design and site plan approval, preliminary subdivision approval, and a demolition permit for its mixed-use residential and commercial building. The correspondence was accompanied by exhibits and materials "intended to completely supplant those previously provided to the Planning Department." [R2069-2122] Included in the April 4, 2016 application submissions was a Full EAF, dated March 30, 2016. [R2103-2117] Without explanation, the site plan filed with respondent Queen City Landing, LLC's second application removed the prior reference to a "Future 10-Story Building With Structured Parking" at the west end of the subject parcel. [R2091]

As with the March 14, 2016 application, the April 4, 2016 submissions did not apply for, or make reference to, the subject parcel's location in the Buffalo Coastal Special Review District, and the need for a restricted use permit from respondent Common Council. [R2071] The Full EAF failed to include respondent Common Council when listing "Government Approvals." [R2104] It was not until the second proceeding before respondent Planning Board on April 18, 2016 – characterized by the Planning Board chair as "our, I guess, continued public hearing" – that Queen City Landing, LLC's counsel conceded that the site is "in the city's coastal special review district," and that a restricted use permit from

the Common Council was a prerequisite. [R1701] In light of the City Planning Board's duty under Section 511-67(A)(4) of the Buffalo Code both to provide the Common Council with its recommendations concerning a restricted use permit application, and to "coordinate referrals to other governmental agencies" regarding the application, the project sponsor's counsel also advised the Planning Board that "before the Common Council can act on that application, it will come before this Board for their review." [R1701]

3. April 15, 2014 application. By letter dated April 15, 2016, respondent Queen City Landing, LLC's legal counsel filed a "Letter of Intent" with respondents Common Council and City Planning Board seeking a restricted use permit from the Common Council for the proposed redevelopment of 975 and 1005 Fuhrmann Blvd. [R862] Among the exhibits and material accompanying the April 15, 2016 correspondence was an "updated" Full EAF, dated April 7, 2016. [R882-896] The public hearing regarding Queen City Landing, LLC's restricted use permit application was conducted on May 17, 2016 by respondent Common Council's Legislation Committee, the day after respondent City Planning Board conducted its third public hearing concerning the 23-story tower project. [R1861-1898]

4. May 26, 2016 Post-hearings submission. On May 26, 2016, ten days after the closing of respondent the Planning Board's public hearing, and five days prior to said respondent's issuance of its SEQRA Negative Declaration and approval of the subject project's site plan application, Queen City Landing, LLC's manager, Mr. Buchheit, submitted a correspondence to the Chair of respondent Planning Board. [R2124] Accompanying Queen City Landing's letter were "materials from its architectural and engineering teams" which included information - unknown to the Appellants or the public generally - regarding the potential seepage of PCBs and petroleum products into the soils underlying the Freezer Queen structure. [R2128]

SEQRA Environmental Review Process/Project Approvals

Respondent City Planning Board was the officially designated "lead agency" for purposes of the SEQRA environmental review of the Queen City Landing project. [R1205] However, the Record on

Appeal unequivocally establishes that it was, in fact, personnel in two administrative offices at Buffalo's City Hall that performed two critical SEQRA functions: the identification of relevant environmental areas that may be adversely impacted by the proposed project through completion of "Part 2" of the Full EAF ["FEAF Part 2"]; and, preparation of the Determination of Significance/ Negative Declaration [hereinafter, "Negative Declaration"] which concluded that the project sponsor would not be required to prepare a Draft Environmental Impact Statement [DEIS"].

An affidavit submitted by the Director of Environmental Affairs for the City of Buffalo, Jason Paananen, confirms the extent to which the City's administrative staff went well beyond mere "assistance" and sharing of expertise with the City Planning Board in performing SEQRA-mandated functions. [R510-522] Mr. Paananen describes his role in the SEQRA review process as follows:

> …
>
> 6. My duties include the review of submitted Part I Environmental Assessment Forms ("EAF"s), preparation of Part 2 and 3 EAFs, preparation of determinations of significance and preparation of negative, conditioned negative and positive declarations.
>
> …
>
> 12. As Director of Environmental Affairs, I assisted in the environmental review of the proposed Project and preparation of the Part 2 FEAF for the project located at 975 Fuhrmann and 1005 Fuhrmann.
>
> …
>
> 14. I was directly involved in reviewing the Applicant's FEAF. Once potential environmental issues associated with the proposed project were considered, with information from the Part 1 FEAF and supporting documents used in the completion of the Part 2 FEAF, it was determined that while some environmental impacts were moderate in scale and context, they would not have an adverse environmental impact on the environment.
>
> 15. Based on the information and analysis of these moderate environmental impacts and the overall scope of the Project, a negative declaration was prepared for the Planning Board's consideration…
>
> …
>
> *38. … From the review of [12 enumerated] environmental topics in the Part 2 FEAF and the completion of the Part 3 FEAF, 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.* [Italics in original.]
>
> …

[R511-513, 522

The task of reviewing, answering, and completing the ten pages of questions in the Queen City Landing FEAF Part 2 [R1373-1382] was performed by the City's planning staff, not the members of

respondent City Planning Board, despite the following instructions – prepared by the State's Department of Environmental Conservation (DEC) – in the FEAF Part 2's introductory paragraph:

> **Part 2 is to be completed by the lead agency.** Part 2 is designed to help the lead agency inventory all potential resources that could be affected by a proposed project or action. 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. To further assist the lead agency in completing Part 2, the form identifies the most relevant questions in Part 1 that will provide the information needed to answer the Part 2 question. When Part 2 is completed, the lead agency will have identified relevant environmental areas that may be impacted by the proposed activity. [Emphasis in the original.]

[R1373] The completed FEAF Part 2, dated May 31, 2016, was presented to respondent Planning Board at its May 31, 2016 meeting. The transcript of that meeting shows that the Planning Board members did not mention FEAF Part 2 during the proceedings, or discuss or answer any of the 18 sets of questions set forth in that document. [R1794-1812]

The Paananen affidavit also shows that the City's planning staff, and not respondent Planning Board, made the decision that the proposed 23-story tower project would not have a significant adverse impact on any aspect of the environment, and proceeded to prepare the 13-page Negative Declaration to present to the Planning Board during its May 31, 2016. This most critical of all SEQRA-related determinations was written by the City's planning staff without first obtaining directions from the actual lead agency, respondent City Planning Board. [R513, 522] The process described by the City's Director of Environmental Affairs is consistent with the assertions made by the City Respondents at paragraphs 32 and 41 of their Verified Answer, that is, that the City's Director of Planning, Nadine Marrero, and the planning office staff, never receive direction from the actual lead agency prior to drafting a SEQRA Determination of Significance:

> … 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, 350-351] Furthermore, the transcript of respondent Planning Board's May 31, 2016 meeting shows that the City Planning Board members did not mention the "Determination of Significance" or "Negative Declaration" by name, or alter one word in the 12-page document that had been prepared by the administrative staff, and presented to the "lead agency" for the first time at the May 31, 2016 meeting. [R1794-1812]

The SEQRA determination of non-significance was rubberstamped by the lead agency, without modification, near the conclusion of respondent City Planning Board's May 31, 2016 meeting, despite the presence of illogical conclusions, disregard of important facts, conclusory assertions, and inappropriate deferral of environmental review responsibilities to other agencies. [R1805-1810] The following is a summary of several such flaws:

(a) Despite acknowledging that the Outer Harbor is dominated by recreation areas and natural resources, and its recognition that the proposed 23-story, 324-foot-tall tower is a "visually significant deviation" from what currently exists, the Negative Declaration concludes that the Queen City Landing project will not have significant adverse impacts on either aesthetic resources or existing community character due to its status as a "stand-alone building":

> 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. [R1386]
>
> Consistency with Community Plans and Character
>
> …
>
> Ultimately, the issue of height is one of contrast. The proposed height is in stark contrast to what exists there today and what planners may have thought might occur on the Site. However, this is balanced against the limited private development that will be allowed on the Outer Harbor and the overall consistency of the Project with community plans and character. Therefore, taking the

> Project as a whole, the Planning Board has determined that the Project is consistent with community plans and will not have a significant adverse impact upon community character. [R1389]

(b) The Negative Declaration concludes that the proposed 23-story, glass-and-metal tower would have no significant adverse impacts on migratory birds despite the proximity of the subject parcel to three State-designated significant fish and wildlife habitats and the nesting sites of two threatened bird species, the significant role that Tifft Nature Preserve and Times Beach play in providing habitat and refuge for many species of migratory birds annually traversing the Niagara River Globally Significant International Bird Area, [R134, 678-683] and the LWRP policies calling for protection and enhancement of bird habitat areas, and avoidance of disruption to bird migration "to the maximum extent practicable." [R575] The determination of non-significance relied on a flawed two-and-a-half page "analysis" submitted by the project sponsor's ecologist, which failed to estimate the quantity of migratory birds that might be killed or disturbed by the proposed project. [R163-165]

(c) Despite the fact that the Small Boat Harbor – a State-designated significant fish and wildlife habitat – forms the southern boundary of the subject parcel, and the proximity of the project site to spawning areas of the Lake Sturgeon (a New York State threatened species), and to areas identified in the LWRP as "fishing hot spots," [R135, 682, 525-526] the Negative Declaration makes no mention of any kind to fish or other aquatic species. Moreover, the determination of non-significance rejects the possibility of significant adverse impacts to all non-bird species - plant or animal - with one conclusory sentence: "No other potentially significant impacts to plants or animals were identified." [R960]

(d) Although the Negative Declaration acknowledges that the subject parcel has been contaminated by industrial fill, heavy metals and petroleum contaminants, and the project sponsor's engineering consultant has expressed concern that petroleum and polychlorinated biphenyls (PCBs) used in below grade pits and sumps may have been released into the underlying soils, [R959, 963, 2128] respondent City Planning Board has insulated itself from addressing the issue of pervasive contaminants at 975-1005 Fuhrmann Blvd. by deferring responsibility for assessing adverse impacts on land and human

health 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. [R959]
>
> …
>
> Impacts on Human Health
>
> The Project as a whole will provide positive potential impacts on human health. 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.
>
> Because the Applicant is proposing to remediate the environmental conditions and that remediation will be subject to significant NYSDEC oversight, the remedial efforts will improve and therefore reduce adverse impacts on human health. [R963]

(e) Similarly, despite the subject parcel's location in a floodplain, the acknowledged pervasiveness of soil contamination, and the FEAF's recognition that 100% of the site is poorly drained and that groundwater flows towards Lake Erie [R32, 1289], respondent City Planning Board has insulated itself from addressing the project's potential adverse impacts on surface water, drainage, erosion and flooding, by deferring responsibility for assessing adverse impacts to other agencies:

> Impacts on Surface Water
>
> During construction, the Project will utilize appropriate erosion and sediment control practices and will comply with all applicable New York State Pollutant Discharge Elimination System requirements.
>
> … [T]he stormwater management system will comply with the NYSDEC guidelines to minimize pollutant loading to Lake Erie.
>
> The Project will utilize stormwater management measures to comply with the standards set forth in the Buffalo Sewer Authority Stormwater Management Plan…
>
> As a result of the Project's design and stormwater management measures, it will not result in any significant adverse impacts on surface water or groundwater quality or quantity. [R959]

Impacts on Flooding

> The Site is located within a 100- and 500-year floodplain. The Applicant will be raising the Site approximately 2' to prevent flooding and on-site ponding. Given that the Site is an isthmus and located at the water's edge, raising the Site 2' will not have significant impacts on flooding in the area as any displaced water will immediately return to Lake Erie. As a result, the Planning Board does not anticipate significant adverse impacts from flooding as a result of the Project. [R960]

(f) It is impossible for a motor vehicle to enter or exit the subject parcel without traveling across the pre-existing public bike path/pedestrian walkway. [R166] Nonetheless, neither the traffic analysis by the project sponsor, [R1303-1305] nor the Negative Declaration prepared by the City's planning office staff, addresses the impact of the proposed mixed-use project on the adjacent public bike path or pedestrians utilizing nearby walkways, parks and natural resources. [R961] The significance of this omission is underscored by the conclusion in the project's traffic analysis that the proposed 197 apartments and two restaurants 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. These trip generation figures equate to one vehicle crossing the public bike path/walkway every 16.6 seconds during the morning peak hour, every 15.8 seconds during the afternoon peak hour, and, on average, every 32 seconds, each hour of the day. [R222-223]

Respondent City Planning Board approved the Queen City Landing's design and site plan application at the conclusion of its May 31, 2016 meeting. No conditions of any kind were placed on the site plan approved for the 23-story tower project. [R38] Additionally, respondent Queen City Landing, LLC, was not required to furnish a performance bond, despite the fact that the site plan approved by the City Planning Board requires installation of the following infrastructure and features: a "public bike path," two stormwater management areas, a paved parking lot with 80 spaces, site lighting, light bollards, and a paved access and egress drive. [R822, 2168]

On June 21, 2016, respondent City Common Council granted, without any conditions, a restricted use permit for respondent Queen City Landing, LLC's proposed mixed-use facility. [R38, 978] In doing

so, the Common Council disregarded the extent to which the 23-story tower project embodies the threats the Buffalo Coastal Special 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. [R189] Respondent Common Council also failed to consider the issues that were raised by petitioner Margaret Wooster at the June 6, 2016 public hearing conducted by said respondent's Legislation Committee, included the following:

> …
> [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…

[R171]

ARGUMENT

POINT 1: THE IAS COURT CORRECTLY DETERMINED THAT THE INDIVIDUAL "WOOSTER PETITIONERS" AND BUFFALO NIAGARA RIVERKEEPER HAVE ESTABLISHED STANDING IN ACCORDANCE WITH THE PRINCIPLES ESPOUSED BY THE NEW YORY COURT OF APPEALS.

The court below correctly concluded that the four individual "Wooster Petitioners" and Buffalo Niagara Riverkeeper, Inc., met their burden to establish standing in the underlying proceedings.

A. The "Wooster Petitioners" and standing.

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 by the statutory provisions under which the agency has acted, 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 (1991); Mobil Oil Corporation v. Syracuse IDA, 76 NY2d 428, 443 (1990). Although New York's appellate courts, including this honorable Court, 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 (AD4 1995); Michalak v. ZBA of Town of Pomfret, 286 AD2d 906 (AD4 2001), recent rulings by our State's highest court have made it clear that such ownership or residency is not a prerequisite for standing.

The New York Court of Appeals, expressly 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," held in Save The Pine Bush v. Common Council of the City of Albany, 13 NY3d 297 (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, *supra* 13 NY3d at 301, 305. This principle was reiterated in Sierra Club v. Village of Painted Post, 26 NY3d 301, 310 (2015) ("…[T]his Court held (in *Save The Pine Bush*) that petitioners, who alleged 'repeated, not rare or isolated use' of the Pine Bush recreation area, had demonstrated standing "by showing that the threatened harm of which petitioners complain will affect them differently from 'the public at large'."); 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."). Additionally, the recent Sierra Club decision concludes that, "[t]he number of people who are affected by the challenged action is not dispositive of standing," and that the fact "[t]hat more than one person may be harmed does not defeat standing." Sierra Club, *supra* 26 NY3d at 310-311.

The following excerpts from affidavits of each of the Wooster Petitioners show how they repeatedly use the natural and cultural resources in the vicinity of the proposed 23-story tower project to a greater extent than the general public, meeting their burden of demonstrating how the threatened harms of which they complain will affect them differently than the public at large:

From the Opposing Affidavit of petitioner-appellant Margaret Wooster:

> …
>
> 3. I am an adjunct professor of urban planning and ecology at SUNY Buffalo, and I possess a master's degree in Urban Planning. I am a founding member of Friends of the Buffalo River, and formerly served as Executive Director of Great Lakes United, as well as Senior Environmental Planner with Buffalo Niagara Riverkeeper.
>
> 4. I am also the author of "*Living Waters: Restoring the Rivers of the Lower Great Lakes*," and recently have contributed three op-ed pieces published in the *Buffalo News*

addressing my concerns related to development of the City of Buffalo's Outer Harbor. Over the years I have written many letters to decision-makers including the Buffalo Common Council about the need to protect the ecological and recreational values of the Outer Harbor.

…

11. There is an extremely high likelihood that the project sponsor's plan to place or construct 300 [feet of] boat slips in Lake Erie at or near sites of high toxicity will adversely impact the Small Boat Harbor's significant habitat by disturbing contaminant-laden sediments, causing me, in light of my decades of effort and advocacy on behalf of the Buffalo River watershed area, to suffer direct harm that is different in kind and degree from the public at large. After all, the public generally has not devoted most of their professional lives to restoring the ecological health of The Buffalo River watershed and Outer Harbor.

…

[R783-788]

From the Opposing Affidavit of petitioner-appellant Jay Burney:

…

3. I have been engaged with Buffalo's Outer Harbor for almost 40 years, as 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.

…

14. More specifically, the public generally has not devoted a huge percentage of their lives fighting to protect and enhance the Outer Harbor's biodiversity and sustainability. Unlike the vast majority of Western New Yorkers who may have not even visited the Outer Harbor, or who think of its coastline as a place to party or occasionally rent a kayak, I care passionately about its ecological features.

…

24. Unlike the public generally, if the tower is built, I will be compelled to spend valuable time, energy, and resources studying and documenting the almost-certain disruption to bird migration resulting from placement of a 324-foot structure in the middle of an important flyway - time, energy, and resources that could be put to much more constructive endeavors to protect and enhance Buffalo's fragile coastline.

…

[R765-774]

From the Opposing Affidavit of petitioner-appellant James E. Carr:

…

3. I am a retired urban planner. From 1969 to 1975, I was employed as a planner with the Erie-Niagara Regional Planning Board where I prepared two studies related to Buffalo's waterfront, "The Buffalo River - Buffalo Creek Recreation and Open Space Preservation Plan" and "The Urban River."

4. I 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.

5. During that time period and continuing to the present, I have 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.

…

10. It is my professional judgment and personal belief that construction of the 23-story, 324-foot tower, and the resulting lights, noise (vehicular and human), and traffic (crossing the public bike and pedestrian path), will significantly reduce the attractiveness of the Outer Harbor area as a place to recreate, walk, bicycle, experience nature, and study the nearby significant fish and wildlife habitats. In so doing, it will adversely affect the results that I have helped to attain through study and advocacy to increase, protect and enhance the public's access to and enjoyment of the Outer Harbor and Buffalo River area. The general public will not suffer this type of injury.

…

[R807-811]

From the Opposing Affidavit of petitioner-appellant Lynda K. Stephens:

…

4. I enjoy visiting Buffalo's Outer Harbor once or twice per week, weather permitting. I seek waterside serenity. For me the Outer Harbor provides a unique opportunity to enjoy an expansive natural environment next to Lake Erie. It is about seven miles from home and it's free. Being close to the water is very calming. When I am alone, for safety reasons I spend more time at the southern end of the harbor away from isolated areas.

5. The thought of a 23-story apartment tower, three-story parking ramp, and the increased traffic imposed onto this setting tells me I will be deprived of a favorite serene place. How can I possibly feel in tune with Outer Harbor nature and low key Small Boat Harbor activities while facing a mega-tower with all its trappings? I simply will not have a comparable serene experience at the Outer Harbor.

…

7. The disruption of Outer Harbor serenity will be heightened during demolition and construction of the Queen City Landing project. How can I enjoy refreshments outside at Charlie's Boatyard Restaurant – only about a tenth of a mile away - while the old Freezer Queen building is being demolished and construction activities take place for an estimated eighteen months? There will almost certainly be dust – of unknown content - leaving the property (whether or not water suppression techniques are used) during demolition and, especially, during the on-site crushing of the concrete "debris" from the huge former warehouse facility. Noise from the earth moving equipment, heavy trucks and cranes will frequently fill the air, and I cannot even imagine the sounds that will result from the concrete-crushing process. I cannot visit the vicinity of the Small Boat Harbor under those circumstances. Since I am often by myself at the Outer Harbor, Charlie's and the state park are my most frequent haunts. The QCL project takes that away.

[R803-806]

The concerns raised in the Wooster Proceeding easily fall within the broad "zone of interests" of SEQRA and state and local zoning and planning laws. The purpose of SEQRA is broad, "to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources", ECL §§ 8-0101, 8-0103[6], and the statute reflects the New York Legislature's recognition "that environmental concerns should take their proper place alongside economic interests in the land use

decision-making processes of State and local agencies". See, King v. Saratoga County Bd. of Supervisors, 89 NY2d 341, 347 (1996); also see Coca-Cola Bottling Co. v. Board of Estimate, 72 N.Y.2d 674, 679 (1988) ("SEQRA's fundamental policy is to inject environmental considerations directly into governmental decision making."). The breadth of SEQRA's zone of interests is reflected in its broad definition of "environment":

> "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.

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 (1986) ("It is clear from the express terms of the statute and the regulations that environment is broadly defined."); Town of Henrietta v. NYSDEC, 76 AD2d 215, 222, (AD4 1980) ("SEQRA … defines 'environment' very broadly").

Likewise, the "zone of interests" in zoning cases is 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 East Thirteenth St. Community Assoc. v. NYS Urban Development Corp., 84 NY2d 287, 296 (1994). The purposes sought to be promoted by zoning laws include, for example: *public health and safety* - e.*g.*, Manupella v. Troy City ZBA, 272 AD2d 761 (AD3. 2000); *preservation of the character of a neighborhood* - e.*g.*, McGrath v. Town Board of Town of North Greenbush, 254 AD2d 614, 616 (AD3 1998); *harmonizing various land uses within a community* - e.*g.*, St. Onge v. Donovan, 71 NY2d 507 (1988); *alleviating traffic congestion* - e.*g.*, Overhill Building Company v. Delany, 28 NY2d 449 (1971); and, *increased noise* McGrath, *supra* 254 AD2d at 616.

In light of the above facts and legal principles, the IAS court's ruling that the Wooster Petitioners have demonstrated standing should be affirmed. By doing so this Court would be furthering two related

standing principles embraced by New York's appellate courts: First, "standing principles, which are in the end matters of policy, should not be heavy-handed; in zoning litigation in particular, it is desirable that land use disputes be resolved on their own merits rather than by preclusive, restrictive standing rules." Sun-Brite Car Wash, Inc. v. Board of Zoning Appeals, 69 NY2d 406, 413 (1987); Ecumenical Task Force v. Love Canal ARA, 179 AD2d 261 (AD4 1992) ("it is desirable that environmental disputes be resolved on their merits rather than by preclusive, restrictive standing rules"). And, second, standing rules "should not be so restrictive as to avoid judicial review," Sierra Club, *supra* 26 NY3d at 311, and, therefore, courts should avoid circumstances where denial of standing would "erect an impenetrable barrier to any judicial scrutiny." See, e.g., Boryszewski v. Brydges, 37 NY2d 361, 364 (1975); Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 NY2d 801, 814 (2003).

B. "Riverkeeper" and standing.

The New York Court of Appeals has understood for more than forty years the constructive role an appropriate representative organization or association can play in a zoning, environmental or land use case. Allowing standing to an organization can help alleviate the "economic disparity" between a developer or speculator desiring relaxation or circumvention of environmental and zoning restrictions (and, who has "little to lose and much to gain if he can prevail"), and individual residents who may not have the financial resources to effectively oppose the proposed project (and, even if successful, will not be able to recoup their expenditures). See, e.g., Douglaston Civic Association, Inc. v. Galvin, 36 NY2d 1, 6-7 (1974). An organization or association dedicated to environmental preservation, such as petitioner-appellant Riverkeeper, seeking to represent the interests of the environment and persons threatened with environmental harm must meet three requirements to establish standing: (1) it must show that one or more of its members would have standing to sue as individuals; (2) it must demonstrate that the interests it asserts in the action are germane to its purposes so as to satisfy the court that it is an appropriate representative of those interests; and (3) it must be evident that neither the asserted claim nor the appropriate relief requires participation of the individual members. Society of Plastics, *supra* 77 NY2d at

775-776; also see Committee to Preserve Brighton Beach v. Council of City of New York, 214 AD2d 335 (AD1 1995) (an organization's standing "dovetails" with that of its individual members).

The IAS court was convinced by affidavits submitted by four of Riverkeeper's members that he or she would be injured in their use and enjoyment of a natural resource, the Outer Harbor, and that the requirements for organizational standing had been met:

(a) Doug Hopkins. Mr. Hopkins, a member of the Board of Directors of Buffalo Niagara Riverkeeper, indicates in his affidavit that, among other things, as a history and geography teacher he co-leads student field trips to the Buffalo waterfront, including an annual canoe trip on the Buffalo River and Buffalo Harbor. He also is a sailor who sails on the inner and outer harbors within Lake Erie in the vicinity of Buffalo. He indicates that he anchors in the calm waters of the Outer Harbor and enjoys the views of the Buffalo Waterfront that are possible from the water of the Outer Harbor. Finally, he indicates that construction of a tall building, as currently proposed, on the Outer Harbor "would likely have significant impact on my boating experience in the waters of the Outer Harbor." [R537-539]

(b) Jeffrey Liebel. Mr. Liebel's affidavit indicates that he is a member of Buffalo Niagara Riverkeeper, and that he teaches canoeing and kayaking. He conducts portions of his courses over the years at Gallagher Beach and paddles the Outer Harbor area in proximity of the current Freezer Queen Building. He further indicates that water quality is an important issue given that portions of their training courses require participants and himself to be in the water in order to practice self- and assisted-rescue techniques. Mr. Liebel is planning to expand instructions to include standup paddle boarding which has an even higher risk of falling into the water. He indicates that he is concerned that the water quality of the area could be adversely affected by the project in such a way that it could put the health and safety of himself and his class participants in jeopardy. He concludes his affidavit with the following assertion:

> 8. We actively promote paddling as a healthy activity and a way to experience the natural resources of the Western New York area. There is a resurgence of use by the public of our waterways and that is directly related to access and improving water quality as well as providing a different view of the natural world. The visual aspects of a 23 story building on the waterfront is counter to the intimate way that one can 'experience nature' through recreation with a canoe, kayak or paddleboard and would diminish the vistas that one gets while sitting low in the water.

[R534-536]

(c) Lynda Schneekloth. Ms. Schneekloth, also a member of Buffalo Niagara Riverkeeper's Board of Directors, indicates in her affidavit that she has been involved in local conversations about the Outer Harbor for nearly a quarter-century through professional pursuits and volunteerism. She currently serves as the Advocacy Chair of the Western New York Environmental Alliance, and, as such, is responsible for the group's Outer Harbor campaign. She visits the Outer Harbor quite often for recreation, walking her dog along the path at least a couple of times a week, and regularly taking her grandchildren to play in the playground at Outer Harbor State Park. She also kayaks Gallagher Beach and in the Outer Harbor area, enjoying the view of the green spaces from the water. She indicates that, "development of the site would lessen my appreciation of the viewshed provided by the greenspace and trees against the lake." Further, that: "The proposed development and related increase in traffic would cause me to go to the Outer Harbor and Outer Harbor State Park less. I would be less likely to, and could potentially stop completely, my use of a space I really enjoy and use multiple times a week." [R532-533]

(d) Jill Jedlicka. The affidavit of Ms. Jedlicka, the Executive Director of Buffalo Niagara Riverkeeper, provides a detailed list of the organization's programs and projects concerning the Buffalo area watershed, including the Niagara and Buffalo Rivers and the Lake Erie shore at the Outer Harbor. Her affidavit also references Riverkeeper's involvement with the Erie Canal Harbor Development Corporation's process of developing a master plan for the Outer Harbor, including waterfront revitalization and habitat restoration, as well as its participation in the City of Buffalo's multi-year process of drafting a new zoning ordinance ("Green Code") and Local Waterfront Revitalization Plan. The activities described in Executive Director Jedlicka's affidavit demonstrate that the interests Riverkeeper asserts in the underlying proceedings and this appeal are germane to its purposes, and that the organization has the expertise and interests making it an appropriate representative of those interests. [R540-544; also see affidavit of Riverkeeper's Deputy Executive Director Kerrie Gallo at R524-529]

For the reasons stated above and in appellants' respective pleadings, this Court is respectfully asked to affirm the lower court's ruling that the four individual "Wooster Petitioners" and Buffalo

Niagara Riverkeeper, Inc., have established standing. Also, for the sake of argument, if the Court were to conclude the none of the four Wooster Petitioners or Riverkeeper meets the requirements for standing set forth in Save The Pine Bush, appellants respectfully request that the Court allow standing pursuant to the common-law standing doctrine reflected in Boryszewski, *supra*, 37 NY2d at 364, and Saratoga County, *supra*, 100 NY2d at 814. As set forth in their respective affidavits, each of the Wooster Petitioners meets the requirements for common-law standing. Furthermore, the legal issues asserted in this appeal – in particular, appellants' insistence that respondents Planning Board and Common Council fully comply with the letter and spirit of SEQRA – are of great significance to the public given the important role the ecological health of the Lake Erie shoreline, including the Outer Harbor, play in the health, wellbeing and quality of life of City of Buffalo residents.

POINT 2: RESPONDENT PLANNING BOARD IMPROPERLY INSULATED ITSELF FROM MEANINGFUL REVIEW OF POTENTIAL ENVIRONMENTAL IMPACTS BY ALLOWING THE CITY'S PLANNING STAFF TO PERFORM BOTH THE TASK OF COMPLETING "PART 2" OF THE SEQRA FULL ENVIRONMENTAL ASSESSMENT FORM, AND THE TASK OF PREPARING A DETERMINATION OF SIGNIFICANCE/ NEGATIVE DECLARATION WITHOUT FIRST OBTAINING DIRECTIONS FROM THE PLANNING BOARD REGARDING THE NEED FOR A DEIS.

Injecting environmental considerations directly into the governmental decision-making process is SEQRA's "fundamental" or "core" policy. See, e.g., Coca-Cola, *supra* 72 NY2d at 681-682. This policy is "not mere exhortation": "… The statute and implementing regulations make elaborate provision for requiring consideration of environmental effects of governmental decisions by the decision maker, primarily through the 'lead agency' concept." *Id.* To effectuate this core policy, SEQRA has created "an elaborate procedural framework" requiring lead agencies to consider the environmental ramifications of their actions to "the fullest extent possible":

> More than 20 years ago the Legislature enacted SEQRA, and by so doing formally recognized that environmental concerns should take their proper place alongside economic interests in the land use decision-making processes of State and local agencies (see, ECL 8-0103[7]; 6 NYCRR 617.1[d]). To insure that this laudable goal would be accomplished, the Legislature created **an elaborate procedural framework** requiring parties to consider the environmental ramifications of their actions "[a]s early as possible" (ECL 8-0109[4]) and to "the fullest extent possible" (ECL 8-0103[6]). The **mandate that agencies implement SEQRA's procedural mechanisms to the "fullest extent possible"** reflects the Legislature's view that **the**

> **substance of SEQRA cannot be achieved without its procedure**, and that departures from SEQRA's procedural mechanisms thwart the purposes of the statute. Thus it is clear that **strict, not substantial, compliance is required**… Anything less than strict compliance, moreover, offers an incentive to cut corners and then cure defects only after protracted litigation, all at the ultimate expense of the environment. [Emphasis added.]

King, *supra* 89 NY2d at 347-348; also see, NYC Coalition to End Lead Poisoning v. Vallone, 100 NY2d 337, 350 (2003).

The New York Court of Appeals has held that this fundamental SEQRA policy – injecting consideration of the environmental effects of governmental decisions directly into the policy-making decisions of governmental entities - is violated where "the governmental entity responsible for the final policy decision to proceed with a project [is] insulated from consideration of environmental factors." Coca-Cola, *supra*. The lead agency's responsibility for determining the significance or non-significance of a proposed action must not be "altered or diminished" by the environmental review process utilized by a municipality. *Id.* This Court has expressed a similar sentiment in Ecumenical Task Force of Niagara Frontier v. Love Canal Area Revitalization Agency, 179 AD2d 261, 268 (AD4 1992) (while a lead agency is encouraged to consult those agencies that are more expert in a particular area, it may not delegate its authority under SEQRA and abandon its role as ultimate decision-maker on matters of environmental significance), and Penfield Panorama Area Community, Inc. v. Town of Penfield Planning Board, 253 AD2d 342, 350 (AD4 1999) (a lead agency under SEQRA "must exercise its critical judgment on all issues presented in the DEIS", and, therefore, may not delegate its responsibilities to another agency).

SEQRA allows – even encourages – a lead agency to draw on the expertise of others as it performs its duties. Ecumenical Task Force, *supra* 179 AD2d at 268. It would be proper, for example, for a lead agency to retain a planning consultant to provide recommendations and assist in preparing SEQRA's Full Environmental Assessment Form [FEAF], if the lead agency then carefully reviews the FEAF, reaches its own conclusions on the questions raised in Part 2 of the FEAF, and, ultimately, issues a Negative Declaration detailing *its* analysis of each area of potential environmental concern. E.g.,

Mombaccus Excavating v. Town of Rochester, 89 AD2d 1209 (AD3 2011). But that is not what occurred here.

Appellants contend that the environmental review process utilized by the City of Buffalo went beyond permissible consultation between City planning office staff and the lead agency, and constituted improper insulation of the designated lead agency – respondent City Planning Board – from its most critical task, determining whether the proposed 23-story tower was likely to have a significant adverse environmental impact on one or more aspects of the environment. More specifically, contrary to the legal principles expressed in Coca-Cola and its progeny, respondent Planning Board's responsibility for determining whether to issue a "Positive Declaration" and require the project sponsor to prepare a Draft Environmental Impact Statement [DEIS], or a "Negative Declaration" and end the SEQRA environmental review process, was impermissibly "altered or diminished" by the processes used to complete Part 2 of the Full Environmental Assessment Form [FEAF], and prepare the Determination of Significance/ Negative Declaration.

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] 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:

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

[R739]

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] Therefore, it does not matter whether the lead agency's members possess environmental expertise. It is the lead agency's duty to answer the 18 sets of questions and complete Part 2 of the FEAF.

Appellants contend that the Memorandum Decision below understates the responsibilities assumed by City staff members when characterizing their actions as merely "play[ing] a role in collecting, organizing and preparing Part 2 of the FEAF and the Determination of Significance, Negative Declaration." [R45] The Affidavit of Jason Paananen ("Paananen Affidavit") reveals the extent to which the involvement of the City's planning staff extended well beyond merely synthesizing the information obtained by the lead agency:

> Paananen Affidavit
>
> …
>
> 6. My duties include the review of submitted Part I Environmental Assessment Forms ("EAF"s), preparation of Part 2 and 3 EAFs, preparation of determinations of significance and preparation of negative, conditioned negative and positive declarations.
>
> …
>
> 14. I was directly involved in reviewing the Applicant's FEAF. Once potential environmental issues associated with the proposed project were considered, with information from the Part 1 FEAF and supporting documents used in the completion of the Part 2 FEAF, it was determined that while some environmental impacts were moderate in scale and context, they would not have an adverse environmental impact on the environment.
>
> 15. Based on the information and analysis of these moderate environmental impacts and the overall scope of the Project, a negative declaration was prepared for the Planning Board's consideration…
>
> …
>
> *38. … From the review of [12 enumerated] environmental topics in the Part 2 FEAF and the completion of the Part 3 FEAF, 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.* [Italics in original.]
>
> …

[R510-522] It is obvious from these quotes that it was Mr. Paananen, with input from other members of the City's planning staff, who prepared and completed Part 2 of the FEAF – not the lead agency, the Planning Board members.

Mr. Paananen's affidavit also shows that it was not only the FEAF Part 2 that was prepared by the City's planning staff, and not by respondent Planning Board. The staff also made the initial decision that the proposed 23-story tower project would not be adversely impact the environment – the most critical of all SEQRA-related determinations – and prepared the 12-page Negative Declaration [found at R1383-1394] to present to the Planning Board at its May 31, 2016 meeting. [R513] The Planning Board, abandoning its duties under SEQRA, did little more than rubberstamp the planning staff's determination.

The "Factual Background" portion of the IAS court's Memorandum Decision includes the following statement:

> …
> On May 31, 2016, Director of Planning, Marrero presented to the Planning Board a 13-page SEQRA "Determination of Significance" or "Negative Declaration" (R. 121-133). Petitioners allege that a majority of the Planning Board did not direct Marrero or her staff to prepare the Negative Declaration nor dictate the contents thereof.
> …

[R37-38] This statement overlooks, not only the process described by Mr. Paananen (in which the planning staff did the environmental analysis mandated by SEQRA for the Queen City Landing project without first obtaining instructions from the Planning Board), but also the admission in the City Respondents' Verified Answer, at paragraphs 32 and 41, that the planning office staff <u>never</u> awaits "direction" from the Planning Board prior to preparing a project's Determination of Significance:

> … 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]

It is unclear whether the process reflected in Mr. Paananen's Affidavit, and broadened in the City's Verified Answer to cover all SEQRA cases requiring a Determination of Significance, is conducted

pursuant to provisions in the City Code, or has merely developed through practice. Either way, to paraphrase the Coca-Cola opinion, its operation transgresses SEQRA's spirit, as well as its form, and violates a fundamental policy of SEQRA by insulating the lead agency from consideration of environmental factors. Coca-Cola, *supra*; Ecumenical Task Force, *supra*; Penfield Panorama, *supra*.

The Memorandum Decision below concludes its analysis concerning respondent Planning Board's "Reliance on City Departments" with the following statement: "

> … Ultimately, we find that the record supports that the Planning Board reached its own conclusions and exercised its own judgment in rendering their decision with respect to the Negative Declaration.

[R45] Appellants respectfully contend that the IAS court's conclusion is unsupported in the record:

(a) 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 not been provided to the Planning Board prior to May 31, 2016 meeting. [R1794-1812]

(b) The transcript of the May 31, 2016 meeting shows that the Planning Board failed to change one word in the twelve-page Negative Declaration, did not mention the "Determination of Significance" or "Negative Declaration" by name during the May 31, 2016 meeting, and did not discuss the specific findings and conclusions in the Negative Declaration, despite the fact that the lengthy document, prepared by the planning staff without first obtaining the direction of the Planning Board, was presented to the "lead agency" for the first time at the May 31, 2016 meeting. [R1794-1812]

(c) No member of respondent Planning Board submitted an affidavit to the IAS court to counter appellants' contentions regarding the process used in completing the FEAF, Part 2, and the Negative Declaration.

As a result of the above, respondent City Planning Board, willfully or otherwise, was impermissibly insulated from conducting the analysis of the proposed 23-story tower's environmental impacts in the manner envisioned by the SEQRA statute and implementing regulation. Coca-Cola, *supra*; Ecumenical Task Force, *supra*; Penfield Panorama, *supra*; *SEQR Handbook*, 3d Ed., p. 75 [R739]

Accordingly, respondent Planning Board's Negative Declaration and design and site approval, and respondent Common Council's restricted use permit, should be annulled. King, *supra*, 89 NY2d at 348; E.F.S. Ventures Corp. v. Foster, 71 NY2d 359, 371 (if the environmental review requirements of SEQRA are not met, "the governmental action is void and, in a real sense, unauthorized").

POINT 3: RESPONDENT PLANNING BOARD VIOLATED ITS DUTY UNDER SEQRA TO ASSESS THE ACTION'S POTENTIAL FOR ADVERSE IMPACTS RELATED TO THE SUBJECT PARCEL'S PERVASIVE SOIL CONTAMINATION, POTENTIAL LEACHING OF PCBs AND OTHER INDUSTRIAL CONTAMINANTS INTO THE UNDERLYING SOILS AND NEARBY WATERS OF LAKE ERIE, AND STORMWATER AND SEDIMENT CONTROL, BY DEFERRING RESPONSIBILITY FOR SUCH REVIEW TO NEW YORK'S DEPARTMENT OF ENVIRONMENTAL CONSERVATION AND THE BUFFALO SEWER AUTHORITY.

This Court held, in its 1999 ruling in Penfield Panorama, *supra*, that the Town of Penfield Planning Board violated the requirements of SEQRA when it "improperly deferred resolution of the hazardous waste remediation issue" when approving a cluster subdivision project. Rather than taking the requisite "hard look" at the contamination on site, the lead agency "conditioned its approval" on the developer's agreement "to get approval of a site remediation plan from the NYSDEC and [Monroe County Department of Health]." As this Court explained:

> … A lead agency under SEQRA may not delegate its responsibilities to any other agency. 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, it must exercise its critical judgment on all of the issues presented in the DEIS. Thus, by deferring resolution of the hazardous waste remediation issue, the Planning Board failed to take the requisite hard look at an area of environmental concern. [Internal citations omitted.]

Id; 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 [Brownfield Cleanup Program] did not exempt the project's environmental impacts from SEQRA scrutiny"); Ecumenical Task Force, *supra* ("a lead agency may not delegate consideration of an issue relevant to the preparation of an EIS to another agency in such a way that it abandons its role as ultimate decisionmaker on matters of environmental significance").

As detailed in the statement of facts *supra*, the Negative Declaration issued by respondent Planning Board acknowledges that the subject parcel has been contaminated by industrial fill, heavy metals and petroleum contaminants. Additionally, the project sponsor's engineering consultant has expressed concern that petroleum and polychlorinated biphenyls (PCBs) used in below grade pits and sumps may have been released into the underlying soils. [R2128] Despite these obvious areas of environmental concern, and in stark contrast to its responsibility under SEQRA to "exercise its critical judgment on all of the issues" disclosed during the environmental review process, Penfield Panorama, *supra*, the City Planning Board insulated itself from addressing the issue of pervasive contaminants at 975-1005 Fuhrmann Blvd. by deferring responsibility for assessing adverse impacts on land and human health to the State DEC through the State agency's supervision of the Brownfield Cleanup Program. [See R1385, 1389] Applying the holding and rationale expressed in Penfield Panorama, respondent Planning Board's May 31, 2016 Negative Declaration, and the approvals that followed, must be invalidated.

Similarly, despite the subject parcel's location in a floodplain, the acknowledged pervasiveness of soil contamination, and the FEAF's recognition that 100% of the site is poorly drained and that groundwater flows towards Lake Erie, respondent City Planning Board has impermissibly insulated itself from addressing the project's potential adverse impacts on surface water, drainage, erosion and flooding. [See R1385] Each of these concerns implicates the site itself and the adjacent waters of Lake Erie. [R135] Rather than making an independent judgment regarding potential adverse impacts, the Planning Board has failed to meet its obligations under SEQRA by deferring responsibility for assessing adverse impacts to the State DEC and the agencies involved in the SPDES and stormwater management permitting processes. As a result, the Negative Declaration must be annulled. See Penfield Panorama, *supra*; Ecumenical Task Force, *supra*; Coca-Cola, *supra*; *cf* Riverkeeper v. Planning Bd., 9 NY3d 219 (2007) (NY Ct. of Appeals distinguishes *Penfield Panorama* where the SEQRA lead agency considered the environmental issues requiring permits and made an independent judgment that they would not create significant environmental impact.).

POINT 4: BY ISSUING A NEGATIVE DECLARATION FOR THE PROPOSED CONSTRUCTION OF A 23-STORY MIXED-USE PROJECT ON BUFFALO'S OUTER HARBOR, RESPONDENT PLANNING BOARD HAS DISREGARDED SEQRA'S "RELATIVELY LOW THESHOLD" FOR REQUIRING A DRAFT ENVIRONMENTAL IMPACT STATEMENT (DEIS) FOR "TYPE I" ACTIONS, AND HAS FAILED TO TAKE THE REQUISITE "HARD LOOK" AT THE POTENTIAL ADVERSE IMPACTS ON NUMEROUS ASPECTS OF THE ENVIRONMENT, INCLUDING, WITHOUT LIMITATION, AESTHETIC AND VISUAL RESOURCES, EXISTING COMMUNITY CHARACTER, MIGRATORY BIRDS, AND AQUATIC RESOURCES.

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 v. Foster, 71 NY2d 359 (1988). State and local agencies, including respondents Common Council and City Planning Board, are obliged to strictly comply with the prescribed procedures in SEQRA. See, NYC Coalition to End Lead Poisoning v. Vallone 100 NY2d 337, 350 (2003); Citizens Against Retail Sprawl v. Giza, 280 AD2d 234, 23 (AD4 2001). To satisfy "the letter and spirit of the SEQRA review process," a lead agency must perform the following tasks: (a) identify the relevant areas of environmental concern; (b) take a "*hard look*" at them; and (c) make 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, *supra*, 100 NY2d at 347-348; LaDelfa v. Village of Mt. Morris, 213 AD2d 1024 (AD4 1995); also see 6 NYCRR 617.7(a) & (b).

As this Court observed more than two decades ago, the heart of SEQRA is the environmental impact statement (EIS):

> … [A]n EIS is at the heart of SEQRA and is specifically designed to ensure that environmental issues are injected directly and openly into government decision making (see, Akpan v. Koch, 75 N.Y.2d 561, 570, 555 N.Y.S.2d 16, 554 N.E.2d 53; Matter of Coca-Cola Bottling Co. of N.Y. v. Board of Estimate of City of N.Y., 72 N.Y.2d 674, 679, 536 N.Y.S.2d 33, 532 N.E.2d 1261). The preparation of an EIS guarantees compliance with the requirements that a lead agency undertake a full review of the adverse environmental effects of a project, consider alternatives to the project, including "no action", and consider mitigation measures (ECL 8-0109[2]; 6 NYCRR 617.14[f]; Matter of Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 416, 503 N.Y.S.2d 298, 494 N.E.2d 429; Matter of Shawangunk Mountain Envtl. Assn. v. Planning Bd. of Town of Gardiner, supra).

Miller v. City of Lockport, 210 AD2d 955, 620 NYS2d 680, 682-683 (1994). The Miller decision also affirmed the principle that, "In Type I actions there is a relatively low threshold for requiring an EIS and one should be prepared when there is a potentially significant adverse effect on the environment." *Id*; also see, Matter of Jackson v. NYS Urban Dev. Corp., 67 NY2d 400, 415 (1986).

The critical role of the EIS in the environmental review process, and the significance of public access to the information, was explained by the Appellate Division, Third Department in Shawangunk Mountain Envtl. Assn. v. Planning Bd. of Town of Gardiner, 157 AD273, 275-276 (AD3 1990):

> … The EIS process is especially designed to insure the injection of full, open and deliberative consideration of environmental issues into governmental decision making. The EIS process guarantees comprehensive review of a project's adverse environmental effects, consideration of less intrusive alternatives to the proposed action, including "no-action", and consideration of mitigation measures. To assure accountability of the lead agency and avoidance of any oversight in that agency's assessments, the regulatory scheme requires public access to the information by making the draft and final EIS available with sufficient lead time to afford interested persons an opportunity to study the project, its environmental effects and proposed mitigating measures, and then comment thereon. Additional safeguards are found in the substantive requirements that the lead agency must act and choose among alternatives so as to minimize adverse environmental consequences, consistent with other social, economic and policy considerations, and must then make appropriate written findings to that effect. [Internal citations omitted.]

Id; also see Miller, *supra* (failure to prepare an EIS when the relatively low threshold has been met will "lessen the public access to the process and permit governmental approval of [a] massive project without consideration of less intrusive alternatives, including no action").

By failing to issue a Positive Declaration and require respondent Queen City Landing to prepare a draft EIS addressing the proposed action's potential adverse impacts on numerous areas of environmental concern – the most obvious of which are detailed below - respondent Planning Board has violated SEQRA by disregarding the "*relatively low threshold*" for requiring an EIS, and, in doing so, has deprived the public (and, Buffalo's Outer Harbor) of "full, open and deliberative consideration of environmental issues." Shawangunk, *supra*; Miller, *supra*.

A. Adverse impacts on aesthetic/visual resources and existing community character.

Respondent Planning Board's Negative Declaration expresses the conclusion that a stand-alone, 23-story, 324-foot multi-use tower will not have a significant adverse impact on either the Outer Harbor's aesthetic resources [R1386], or the existing community character [R1389]. These determinations of non-significance were 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]. In choosing to end the SEQRA review process prior to preparation of a Draft EIS, the Planning Board has violated a lead agency's obligation to take a "hard look" at each relevant area of environmental concern, has disregarded the aforementioned *relatively low threshold* for triggering the EIS process, *id*, and has rendered meaningless the acknowledgment by our State's highest court that aesthetic impact considerations are "a proper area of concern" and "may constitute an important factor in SEQRA review." WEOK Broadcasting Corp. v. Planning Bd. of Town of Lloyd, 79 NY2d 373, 381, 385 (1992)

The stark contrast between the proposed 23-story glass-and-steel tower [R144] and the inviting public paths, marinas, parks, beaches, and nature preserves within its sizeable viewshed [R134-135], is undeniable. The "unique waterfront landscapes" experienced along the Outer Harbor are so essential to the well-being of Buffalonians that the City's Draft Local Waterfront Revitalization Program ("LWRP") includes as a critical goal: "Protect, restore or enhance natural and manmade resources … which contribute to the overall scenic quality of the coastal areas." [R572] A lead agency may possess considerable discretion in deciding which areas of potential environmental concern may have a significant impact, but it does not have the authority to disregard an obvious problem. As this Court expressed in a landmark SEQRA decision: "*Like the proverbial ostrich, respondents have incredibly put out of sight and mind a clear environmental problem*." H.O.M.E.S. v. NYS Urban Development Corp., 69 AD2d 222, 418 NYS2d 827, 831 (AD4 1979) (Emphasis added).

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] This unsupported (and, unsupportable) conclusion was reached without the benefit of the objective assessments and customary tools used by the State DEC and local agencies striving to meaningfully assess a proposed structure's visual impacts. These tools often include graphic viewshed and line-of-sight analysis, or, for a project as expensive 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.] By virtue of this conclusory and illogical explanation, respondent Planning Board not only failed to take the requisite "hard look" at likely impacts on aesthetic resources and existing community character, it has violated its obligation to provide a "reasoned elaboration" for its determination of non-significance. See, 6 NYCRR 617.7(b)(4); also see, e.g., 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.").

B. Adverse impacts on migratory birds. Not surprisingly, protection of wildlife and natural habitat areas plays a prominent role in the SEQRA environmental review process. The SEQRA regulations 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). New

York's appellate courts, including this Court, have set aside a lead agency's Negative Declaration where impacts on nearby wildlife have not been given the requisite hard look. For example, in Mtr. Of Wellsville Citizens for Responsible Dev., Inc. v. Wal-Mart Stores, Inc., 140 AD3d 1767 (AD4 2016), a town board's failure to take a hard look at a proposed project's impact on birds at a nearby habitat led this Court to declare the lead agency's negative declaration arbitrary and capricious. Likewise, in Kittredge v. Planning Bd. of Town of Liberty, 57 AD3d 1336, 1337-38 (AD3 2008), the Third Department concluded that "[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."

The public strenuously warned respondent City Planning Board, at its April 18, 2016 public hearing, of the potential adverse impacts the proposed 23-story, glass-and-steel tower would have on migratory birds and other wildlife in the vicinity of the subject parcel due to its proximity to three state-designated significant fish and wildlife habitats - the adjacent Small Boat Harbor, and nearby Tifft and Times Beach Nature Preserves – as well as its location at the gateway to the Niagara River Corridor Globally Significant Important Bird Area ("GSIBA"). [R1178-1187; 789-800] The lead agency was also advised of the statement in the City's LWRP that, "Many of the migrating species [that use the GSIBA] find habitat and refuge at the various open areas and nature preserves that exist in the vicinity of the [Niagara] river, including Times Beach Preserve and Tifft Nature Preserve." [R682-683] Additionally, the Planning Board was informed of the policies set forth in the LWRP that expressly call for "protection and enhancement of bird habitat areas," and "avoidance of disruption to bird migration to the maximum extent practicable" [R575], as well as the presence of nesting sites of two New York State threatened bird species, peregrine falcon and the common tern, along the Outer Harbor a short distance from the subject parcel. [R135, 679, 682]

Nonetheless, respondent Planning Board failed to take the requisite "hard look" at this vital concern. Rather, it chose to rely on a flawed two-and-a-half page "analysis" submitted by the project sponsor's consulting firm, DIEHLUX, LLC, concerning the issue of migratory birds. The "analysis" does

little more than list U.S. Fish & Wildlife Services [USF&WS] "best practices" measures respondent QCL was considering for its development. [R1296-1298] [Note: The August 11, 2016 affidavit and accompanying exhibits submitted to the IAS court by DIEHLUX's president, found at R443-468, were not provided to the lead agency prior to issuance of its May 31, 2016 Negative Declaration.]

Respondent Planning Board did not ask for, and the sponsor of the proposed project did not submit, any meaningful information, data, or analysis to address the following topics relevant to assessing the potential adverse impacts on the migratory bird populations that traverse the Buffalo waterfront of a 23-story, 274,000-square-foot glass and metal tower: (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. (e) An estimate of how many migrating birds would be killed by the proposed tower, with and without the proposed "mitigation measures." (f) Identification of the "best practices" for avoiding bird-building collisions not incorporated into the developer's plans for the 23-story tower, and an explanation why they are being excluded. (g) The impact of the project sponsor's failure to comply with the following USF&WS "best practice": "*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; 769-771]

The failure to seek such information, and, therefore, to meaningfully assess the quantity of birds that might be killed or otherwise adversely impacted by the proposed project, violates SEQRA's "hard look" standard. See, O'Donnell v. Town Bd. of Town of Amherst, 656 NYS2d 100, 104-105 (Sup. Ct., Erie Co. 1997) (J. Barbara Howe) (a lead agency cannot rationally determine whether a town's deer bait-and-shoot program might have a significant impact on its deer population without knowing how many deer would be killed under the program). Furthermore, 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 Planning Board has violated the aforementioned 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. Miller, *supra*.

C. <u>Adverse impacts on aquatic resources/fish and wildlife habitats</u>. One of the procedures established in the SEQRA regulations to ensure that a lead agency takes a "hard look" at the impacts "that may be reasonably expected to result from the proposed action" is the requirement that the lead agency review the Environmental Assessment Form [EAF] to identify relevant areas of environmental concerns, and compare reasonably likely impacts against a list of "indicators of significant adverse impacts on the environment." 6 NYCRR 617.7(b)&(c). Included in the DEC's list of "indicators of significant adverse impacts" are the following criteria:

> … substantial interference with the movement of any resident or migratory fish or wildlife species; impacts on a significant habitat area; substantial adverse impacts on a threatened or endangered species of animal or plant, or the habitat of such a species; or other significant adverse impacts to natural resources;

6 NYCRR 617.7(c)(1)(ii). Despite the breadth of natural resources identified in the above provision – ranging from resident or migratory fish or wildlife, animal or plant species, and significant habitat areas – the Planning Board's Negative Declaration, under the heading "Impacts on Plants and Animals," only discusses the proposed project's impacts on migratory birds. Following a two-paragraph dismissal of any significant adverse impacts on migratory birds, the Negative Declaration addresses the entire remainder of the animal and plant kingdoms in eleven words: "*No other potentially significant impacts to plants or animals are anticipated*." [R1386] No mention is made of significant habitat areas, threatened or endangered species of plant or animals, or other natural resources.

The failure of the Negative Declaration to identify any potential environmental impacts on aquatic resources and fish, or on fish wildlife habitats, is stunning given the subject parcel's location immediately to the north of the Small Boat Harbor, a state-designated significant fish and wildlife habitat. [R789-792] Notably, the Small Boat Harbor's waters include spawning areas of lake sturgeon [R530], a

State threatened species, as well as many other species of fish and other aquatic animals and plants. [R135, 680-681] Concerns regarding potential impacts on spawning areas and lake sturgeon in the Small Boat Harbor were raised to the Planning Board at its May 16, 2016 public hearing, two weeks prior to issuance of the Negative Declaration. [R1032] Had respondent Planning Board met its "affirmative obligation" as SEQRA lead agency, E.F.S. Ventures, *supra,* it would have actively explored potential adverse effects to aquatic resources, and would have issued a Positive Declaration and required the project sponsor to address reasonably expected adverse impacts to aquatic resources (such as those discussed in the affidavit of Riverkeeper's Deputy Executive Director, Kerrie Gallo, at R524-529).

Respondent Planning Board's failure to identify, much less analyze, the proposed project's potential adverse impacts on nearby aquatic resources, fish, and wildlife habitats, violates a lead agency's "hard look" mandate, and invalidates its Negative Declaration, and the approvals rendered by both City Respondents. Miller, *supra*; Wellsville Citizens, *supra*; Kittrege, *supra*; 6 NYCRR 617.7(b)&(c).

D. Adverse impacts on traffic levels/historic resources. A similar unwillingness to take the requisite "hard look" occurred with other areas of environmental concern, such as: (i) increased traffic levels – where neither the Negative Declaration [R1387], nor the traffic analysis relied upon by the lead agency [R1303-1305], mentioned the impact of the projected significant increase in traffic levels on the public parks, marinas, and, most directly, the adjoining public bike and pedestrian path [R166, 222-223]; and, (ii) historic resources – where respondent Planning Board embraced the applicant's self-serving comments concerning the historic significance of the former Freezer Queen building, and failed to conduct an independent investigation to determine the reasons why the structure was recognized as eligible for listing on the State and National Register of Historic Places. [R1387, 1397] Had the lead agency complied with its affirmative obligation to assess the potential adverse impacts significance of the historic resource, it would have learned from the New York State Office of Historic Preservation the compelling reasons the building was eligible for such listing [R259-260], and, perhaps, this important piece of Buffalo's industrial past would not have been demolished.

Respondent Planning Board's pervasive failure to take the "hard look" mandated by SEQRA, and to respect the "relatively low threshold" for requiring a DEIS, renders its determinations unlawful and unauthorized. Miller, *supra*; Wellsville Citizens, *supra*; H.O.M.E.S., *supra*; 6 NYCRR 617.7(b)&(c).

POINT 5: THE CITY RESPONDENTS VIOLATED SEQRA BY ALLOWING THE CITY PLANNING BOARD, RATHER THAN THE COMMON COUNCIL, TO SERVE AS LEAD AGENCY WHERE THE COMMON COUNCIL HAD PRIMARY RESPONSIBILITY FOR DETERMINING WHETHER THE PROPOSED PROJECT WOULD BE ALLOWED TO PROCEED, AND POSSESSED THE ULTIMATE AUTHORITY TO DETERMINE THE BUILDING'S HEIGHT.

The SEQRA regulations, found at 6 NYCRR Part 617, define three types of state and local agencies for purposes of the SEQRA environmental review process. An 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)] 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.]

The Queen City Landing project is an "action" under SEQRA, and the "involved agencies" with the authority to "approve" some aspect of 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. 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).]

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 with the direct authority to approve or deny the proposed project – as a result of its sole power to issue or deny the restricted use permit required to proceed in the Coastal Review District - respondent Common Council was the agency "principally responsible" for approving the action. [City of Buffalo Code, Section 511-67(A)(4)] Neither the general authority possessed by the City Planning Board to review and approve, approve with modifications or disapprove the Queen City Landing project's design and site plan, nor respondent Planning Board's authority to decide whether or not to divide the project sponsor's 20-acre parcel into two lots, provides the Planning Board with direct authority to approve or deny the use being proposed for the subject parcel, a 23-story, mixed-use facility. That power resides with the Common Council alone.

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.]

In sharp contrast, respondent City Planning Board lacked the 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

…

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 simultaneously 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)]

Several years ago, the Hon. John P. Lane, J.S.C., in Price v. Common Council of City of Buffalo, 3 Misc.2d 625 (Sup. Ct., Erie Co. 2004) (J. Lane), was faced with an analogous situation regarding the appropriateness of the City of Buffalo's Planning Board, rather than its Common Council, serving as SEQRA lead agency. In both the instant appeal and in Price, the Common Council alone possessed the authority to approve or deny the specific use. In Price, in order to operate a privately owned helipad within the City of Buffalo, the operator was required to obtain authorization from the Common Council. Similarly, in this proceeding, in order to construct and operate the proposed mixed-use facility within the Buffalo Special Coastal Review District, the developer must obtain a Restricted Use Permit from respondent Common Council. In both Price and the instant proceeding, the City Planning Board played an administrative role, and lacked the authority to determine whether or not the proposed use itself would be allowed: in Price, the Planning Board's role was to review the helipad's design and site plan atop an existing building; in the instant matter, its role was to review the project's design and site plan, and decide whether to subdivide the 20-acre parcel into two lots.

Justice Lane determined that the Common Council was "the agency that is principally responsible for approving the action," and that the City respondents' contention that the Planning Board had the most direct authority to approve the permit for the helipad was mistaken: "Only the Common Council had that power." Price, *supra* 3 Misc.2d at 629-630. Accordingly, the court held that, "*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, 3 Misc.2d at 632. [Emphasis added.] The language utilized by Justice Lane in Price to describe the Common Council and its role – the agency *principally responsible* for approving the action; the agency with *final approval authority*; the agency with *the most direct authority* to approve the permit; the governmental *entity responsible for the final policy decision* - applies equally to the Common Council's authority and role in deciding the fate of the 23-story tower project.

The IAS court in the instant proceeding correctly indicates that the facts in Price are distinguishable; [R44] appellants respectfully contend, however, that the distinctions are not controlling. The Planning Board's design and site plan review in Price – for a rooftop helipad located above an existing hospital building – was certainly less involved than the design and site plan application submitted by respondent Queen City Landing. And the helipad location did not require a division of an existing parcel into two lots. Nonetheless, those factual differences pale when considered alongside the fundamental similarities between these two cases: in both matters, the Common Council alone possessed the "final" and "most direct" authority to approve or deny the proposed use, and was the governmental entity responsible for "the final policy decision." *Id*. Given these facts, it is difficult, at best, to describe respondent Planning Board herein as the "involved agency principally responsible for …approving" the action. 6 NYCRR 617.2(u).

Without discussion, the Memorandum Decision below concludes its analysis of appellants' lead agency claim with a citation to this Court's decision in Matter of Citizens Against Sprawl-Mart v. City of Niagara Falls, 35 AD3d 1190 (AD4 2006) [R44] The Sprawl-Mart decision holds that "it was proper for the Planning Board to be designated as the lead agency for purposes of SEQRA review of the specific impacts of the project as well as the more general impacts of the zoning amendments under consideration by the City Council." The facts are not detailed sufficiently in the Sprawl-Mart memorandum to determine the extent to which the facts are similar to, or distinguishable from, the instant appeal. The decision does, however, contain the following statement: "Indeed, under the circumstances of this case, the City Council would have engaged in improper segmentation if it had conducted its own review of the

environmental impacts of the proposed zoning amendments." *Id.* The issue of segmentation is not pertinent here. The Buffalo Common Council was in a position to address the full range of activities or steps involved in the proposed Queen City Landing project. 6 NYCRR 617.3(g).

For the reasons stated above, SEQRA was violated when respondent Common Council failed to assume the role of lead agency regarding the proposed Queen City Landing project. 6 NYCRR 617.2(u). As a result, appellants respectfully ask this Court to annul the challenged determinations.

POINT 6: THE EIGHT-YEAR DELAY BETWEEN THE 2008 CONDITIONAL REZONING OF THE SUBJECT PARCEL FROM "M3" (INDUSTRIAL) TO "CM" (COMMERCIAL) AND COMPLIANCE WITH THE CONDITION BY RESPONDENT QUEEN CITY LANDING, LLC – DURING WHICH PERIOD THE REZONING APPLICANT TWICE ABANDONED ITS PROPOSED PROJECTS AND THE REQUESTED REZONING – IS UNREASONABLE AND RENDERS THE CITY RESPONDENTS' TREATMENT OF THE SUBJECT PARCEL AS ZONED CM ARBITRARY AND CAPRICIOUS.

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The City of Buffalo "*Local Law No. 1 of the Year 2016*" on file at the New York Department of State's database of local laws was not enacted by respondent Common Council in 2016, or even in 2015. [R911, 908] It was eight years earlier, on *June 24, 2008*, that the resolution conditionally rezoning the subject parcel – 975 and 1005 Fuhrmann Blvd. - from "M3" (Heavy Industrial) to "CM" (General Commercial) was passed by the City of Buffalo's legislative body. [R934-936]

2008 is the year that respondent Queen City Landing, LLC, announced its first plans for the site of the former Freezer Queen building, which included renovation of the vacant industrial building and conversion into an 8- or 9-story upscale condominium development. [R138 – top rendering] In furtherance of its plans, respondent Queen City Landing, LLC, petitioned the City of Buffalo for design and site plan approval of the proposed project, and to rezone the subject parcel from "M3" to "CM." [R831] Pursuant to Section 511-52 of the City of Buffalo's zoning ordinance, residential units are not allowed in an M3 zone.

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 two 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.*
> …

[R935-936] No reason was given for the requirement that "the petitioner" - Queen City Landing, LLC – file the resolution in the county clerk's office. The current City of Buffalo Corporation Counsel, Timothy A. Ball, Esq., serving in the capacity of Assistant Corporation Counsel in June 2008, had approved the form of the enacted resolution. [R936] Although the Wooster Petitioners' counsel apprised Mr. Ball of the misstatements and confusion over the zoning status of the subject parcel following the filing in March 2016 of Queen City Landing's proposal to demolish the existing Freezer Queen building and build a 23-story tower, [R1019, 994] Buffalo's Corporation Counsel did not provide the IAS court with an explanation for the Common Council's decision to include the condition as a prerequisite for effectuating the zoning amendment.

It took respondent Queen City Landing nearly eight years – from June 2008 to April 22, 2016 - to comply with the condition that a certified copy of the rezoning resolution be filed in the Erie County Clerk's Office and proof of such filing submitted to the City's Clerk Office. [R922-928] While the June 2008 rezoning resolution approved by respondent Common Council had not provided a time period within which the condition had to be met, appellants contend that the opportunity to meet the condition and effectuate the resolution was not without limitation. After all, circumstances and community plans change with the passage of time. This Court is urged to embrace the legal principle expressed in 2007 by the Appellate Division, Second Department in a matter involving a conditional zoning variance: "[I]t is a well-recognized principle of law that where no time for action is specified, the law will imply reasonable time." Gjerlow v. Graap, 43 AD2d 1165 (2nd Dept. 2007).

Respondent Queen City Landing's eight-year delay in effectuating the rezoning of the property from M3 to CG was anything but reasonable given its acts and omissions during the interim:

A. Queen City Landing abandoned both its 2008 proposed residential project which was the basis for the rezoning request, and the requisite rezoning request. [R33, 994-1007]

B. In 2015, Queen City Landing submitted a second development project for the subject parcel, seeking design and site plan review from the City Planning Board "for the conversion of the 'Freezer Queen' building into 120 market-rate apartments and a restaurant and fitness center," and once again petitioned to respondent Common Council to rezone 975-1005 Fuhrmann Blvd. from "M3" to "CM. [R139-141] Despite respondent Planning Board's approval of QCL's design and site plan application on November 2, 2015 [R1690-1693], Queen City Landing, LLC subsequently abandoned both its rezoning request and the 2015 proposed project, filing its March 2016 application to demolish the Freezer Queen building and construct a 23-story tower.

C. Queen City Landing, LLC, as alleged by its manager, Gerald A. Buchheit, Jr., "invested time and money" in hopes of using the Former Freezer Queen site as a "computer server center," a use not permitted in a City of Buffalo CM district:

> QCL then invested time and money exploring the marketing of the Property as a computer server center. QCL principals attended industry conferences in Dallas, Texas to make contacts and understand that industry. QCL was not successful, primarily because the electrical load infrastructure required was not readily available at the Property.

[R474]

In light of these facts, appellants ask this Court to render a determination which finds that the eight-year delay in meeting the 2008 condition was unreasonable, and nullifies the two "zoning" decisions – site plan approval and granting of the restricted use permit – which depended on the subject parcel being zoned CM. Gjerlow, *supra*.

POINT 7: RESPONDENT COMMON COUNCIL ACTED IN AN ARBITRARY AND CAPRICIOUS FASHION WHEN IT APPROVED A RESTRICTED USE PERMIT FOR THE PROPOSED QUEEN CITY LANDING PROJECT WHILE DISREGARDING THE PURPOSE OF THE BUFFALO COASTAL SPECIAL REVIEW DISTRICT AND THE OUTER HARBOR'S EXTREME WEATHER.

New York's highest court has long characterized a determination made by a government entity without regards to the facts as arbitrary and capricious. See, e.g., Pell v. Board of Education, 34 NY2d 222, 231 (1974) (a resolution adopted "without regard to the facts" is arbitrary and capricious); County of Monroe v. Kaladjian, 83 NY2d 185, 189 (1994). Respondent Common Council's decision to issue a restricted use permit for the 23-story tower project, an approval necessitated by the subject parcel's location in the Buffalo Coastal Special Review District, disregards the facts in two significant ways:

(a) The purpose of the Buffalo Coastal District. Respondent Common Council enacted the Buffalo Coastal District 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).] The 23-story tower project proposed by respondent Queen City Landing, LLC, embodies the threats the Buffalo Coastal District was intended to remedy: development inconsistent with both the character of the existing Outer Harbor community [R134, 135] and official plans for the area [R1014-1015, 588, 143], uses not dependent upon location directly on the coast, and inadequately controlled development.

(b) The Outer Harbor's vulnerability to extreme weather events. On February 2, 2016, respondent Common Council adopted a resolution accepting "as complete and ready for public review" the City of Buffalo's Draft Local Waterfront Revitalization Program ("LWRP"). [R861] Recognizing the vulnerability of Buffalo's low-lying coastal areas, such as the Outer Harbor, to extreme weather and flooding events, the LWRP proposes a plan, sponsored by the City, which would, among other tasks:

> Examine precipitation records, historic high water data, insurance claims, local rainfall changes, existing flood and ice management structures, bridge and lock operations, dredging, the City's stormwater management program, snow melt, high Lake Erie winds, Lake Erie seiche and historic tsunamis to maximize the accuracy of flood data and risk maps for the City of Buffalo to the maximum extent practicable.

[R619, 161] On June 6, 2016, petitioner Margaret Wooster, describing the Outer Harbor as "our buffer from lake effect wind, snow and flooding," brought to respondent Common Council's attention the LWRP's plan, and a recent analysis conducted by her SUNY at Buffalo graduate planning students concerning the Outer Harbor's vulnerability to extreme weather events. [R171]. Two weeks later, on June 21, 2016, paying no heed to the LWRP's call for examination of existing flood and ice management structures, and data on snow melt, Lake Erie winds, etc. (all topics omitted from respondent Planning Board's environmental review process for the Queen City Landing project), the Common Council approved, without any conditions, the restricted use permit for the 23-story tower project. [R978]

By disregarding the stark contrast between the proposed project and both 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, and by ignoring the serious issues relating to the Outer Harbor's vulnerability to extreme weather events, respondent Common Counsel has functioned in an arbitrary and capricious fashion. For that reason, appellants ask this Court to annul the restricted use permit. Pell, *supra*; County of Monroe, *supra*.

POINT 8: SITE PLAN APPROVAL FOR THE QUEEN CITY LANDING PROJECT, WHICH INCLUDES AN EXTENSION OF THE PUBLIC BIKE PATH TO ALLOW PUBLIC ACCESS TO THE WATERFRONT AND OTHER ESSENTIAL INFRASTRUCTURE, MUST BE ANNULLED AS A RESULT OF RESPONDENT PLANNING BOARD'S FAILURE TO REQUIRE A PERFORMANCE BOND FROM RESPONDENT QUEEN CITY LANDING.

Pursuant to Section 511-138 of the City of Buffalo zoning ordinance, all new construction in excess of $100,000 in value or 50,000 square feet in area is subject to "design and site plan review" as provided at Article XXVIII ("Citywide Design and Site Plan) of Chapter 511 of the City Code. For that reason, respondent Queen City Landing, LLC (QCL) was required to apply to the City of Buffalo for design and site plan review. As reflected in the pertinent provisions of Article XXVIII, the City of Buffalo's zoning ordinance requires an applicant to include, among others, the following elements and information in its proposed site plan: means of access, pedestrian sensitivity, environmental matters and such other elements which may be related to the health, safety and general welfare of the community,

proposed ingress and egress to the site, and location of all existing and proposed surface and subsurface drainage facilities. The proposed site plan approved on May 31, 2016 includes, among other infrastructure and improvements, a "Public Bike Path," two areas denoted "Stormwater Management Area (Typ)," a paved parking lot with 80 spaces, site lighting, light bollards, and a paved access and egress drive. Petitioners-Appellants contend that it was unlawful for respondent Planning Board to have approved respondent QCL's proposed site plan without first requiring respondent QCL to furnish a performance bond or other appropriate security, as required by GCL 27-a(7), to cover the full cost of installation of infrastructure and improvements, including, at a minimum, the public bike path extension, sanitary sewer and storm drainage facilities, paved access and egress drive, paved parking lot, site lighting, and light bollards.

Respondent QCL initially argued below (and, the City respondents concurred without elaboration) that petitioners' contention that a performance bond (or other suitable security) was required under GCL 27-a(7) lacks merit because, "*The Project does not include any public places or improvements to be dedicated to the City of Buffalo or intended for the use of the public at large – the entirety of this Project is and will remain private*." This arguments fails on the facts and the law:

A. Purported lack of public spaces or improvements. One cannot easily overstate the disingenuous nature of respondents' assertion that the Queen City Landing project does not include any public places or improvements intended for the use of the public at large. Whether or not there is land that will be dedicated to the City of Buffalo, we were repeatedly reminded throughout the proceedings below that the project includes an extension of the public bike path and public access to the waterfront. For example: (i) The Queen City Landing site plan proclaims in all-caps: "PUBLIC BIKE PATH." R2168] (ii) Respondent Planning Board's purported May 31, 2016 Resolution expressly states that the application for site plan review includes "an extension of the public bike path providing public waterfront access." [R1368] (iii) In describing the project, the Negative Declaration approved by respondent Planning Board references "an extension of the public bike path providing public waterfront access." [R1383] (iv) QCL's manager, Gerald Buchheit, refers at least three times in his sworn affidavit to the

extension of the public bike path and new public access to the waterfront in his affidavit. [[R474, 476] (v) Councilmember Christopher P. Scanlon lists "an extension of the public bike path providing public waterfront access" as one of the ways the proposed project "will contribute to the City's well-being and economic vitality."

B. Misplaced reliance on the phrase "public places" in GCL 33(2)(c). Respondent QCL relies on the phrase "all streets and other public places shown on such plats be suitably graded and paved" in arguing that performance bonds are required only for "public places." Such reliance is misplaced. When one carefully reads Section 33(2)(c) in its entirety, it is clear that the term "public places" does not apply to the remainder of the subparagraph. As the following text of Section 33(2)(c) shows, the phrase "all streets and other public places shown on such plats be suitably graded and paved" is separated from the rest of the listed items by a semicolon:

> 2. Additional requirements. The planning board shall also require that:
>
> …
>
> (c) all streets and other public places shown on such plats be suitably graded and paved; street signs, sidewalks, street lighting standards, curbs, gutters, street trees, water mains, fire alarm signal devices (including necessary ducts and cables or other connecting facilities), sanitary sewers and storm drains be installed all in accordance with standards, specifications and procedures acceptable to the appropriate city departments except as hereinafter provided, or alternatively that a performance bond or other security be furnished to the city as hereinafter provided.

GCL 33(2)(c). While all streets and public places shown on a plat are to be "suitably graded and paved," the remaining items listed at Section 33(2)(c) – including, for example, sidewalks, sanitary sewers and storm drains – are to be "installed all in accordance with standards, specifications and procedures acceptable to the appropriate city departments…" Therefore, Section 33(2)(c) contains two different lists with two distinct instructions, without the use of the word "public" restricting the elements included in the second list.

(c) Misplaced reliance on the definition for "public improvement" in GCL 20-e(2)(b)

Respondent QCL's sleight-of-hand below, misleadingly quoting a portion of GCL Section 20-e(2)(b), cannot withstand even the most superficial scrutiny. The following assertion was found at page 54 of QCL's August 12, 2016 Memorandum of Law, immediately after recitation of GCL Section 33(2):

…

> The statute clearly specifies that performance bonds are required only for "public places." General City Law § 20-e[2][b] provides further clarity, defining a 'public improvement' as "public structures and facilities intended for the use of state or municipal employees and the public at large." NY Gen. City § 20-e (2)(b). Such bond requirements are primarily for roads to be dedicated to the municipality along with other public infrastructure such as sanitary sewer lines and drainage facilities…

Respondent QCL's argument is flawed in several ways: (i) Without explanation or justification, it attempts to equate GCL 33(2)(c)'s use of the term "public places" with GCL 20-e(2)'s definition for the term "public improvement." (ii) It fails to inform the Court that Section 20-e(2) expressly states that its definitions are "For purposes of this section," that is, GCL Section 20-e. And, (iii) most disturbingly, respondent QCL chose to cherry-pick the phrase, "public structures and facilities intended for the use of state or municipal employees and the public at large," and omits the specific inclusion in the definition of elements such as a recreation area, pedestrian or vehicular accessways, and a pedestrian walkway.

(d) Unsupported contention that private land is exempt from the performance bond requirement.

Respondent QCL appears to argue below that infrastructure and improvements on private land are somehow exempt from the performance bond requirement. Such an interpretation ignores the fact that most site plan reviews – which, by definition, consider "the proposed use of *a single parcel of land*" – involve private land, not public property or public right-of-ways. A ruling that declares GCL 27(a)(7)'s performance bond requirement inapplicable to infrastructure and other improvements on private land would contradict the legislative intent to ensure that the burden of financing required improvements is placed on the developer and not the municipality or entire improvement district, and would destroy Section 27(a)(7)'s "statutory expression of the public will to control development of property." See Friends of the Pine Bush v. Planning Bd. of City of Albany, 86 AD2d 246, 248-249 (AD3 1982) (3rd Dept., construing similar language in GCL § 33, holds that allowing a city planning board to waive

posting of performance bond would be tantamount to destroying "the statutory expression of the public will to control development"), *affirmed for reasons stated in opinion below* 59 NY2d 849. Likewise, in Christie v. Phoenicia Water District, 194 AD2d 912, 598 NYS2d 840, 841 (AD3 1993), the Third Department, construing a similarly worded provision of NY's Town Law, Section 277, states: "The legislative intent of placing the burden of financing such improvements on the subdivision owner or developer, rather than on the entire district or municipality, is manifest." *Id.*

Furthermore, it is not only site plan reviews that often involve infrastructure and other improvements solely on private property. There are many subdivisions where the entire development is private, and the applicant proposes a development where residents are serviced by private streets, sidewalks, curbs, gutters, sanitary sewers, storm drains, etc. Nothing in the language in either GCL Section 27-a, or Section 33, suggests that such site plans and subdivision plats are exempt from the performance bond requirements simply because private property is involved.

Although improvements deemed unnecessary by a municipality may be waived, a city planning board may not waive the requirement that the owner post the performance bond if the required improvements are not installed prior to site plan or subdivision approval. See Christie, *supra* ("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."); Friends of Pine Bush, *supra*, 86 AD2d 248-249 ("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.").

Appellants ask this Court to embrace the principle espoused by the Appellate Division, Third Department, in Save the Pine Bush v. Planning Board of City of Albany, 96 AD2d 986, 988 (AD3 1983), holding that the remedy for violation of General City Law's performance bond requirement is nullification of the approval, not a return of the matter to respondent City Planning Board for compliance:

> ... Respondents, however, argue that the remedy [for violation of GCL's performance bond requirement] is simply to remit the matter to respondent Planning Board for compliance, rather than to nullify the plat approval. Section 33 of the General City Law provides for prospective compliance, using language such as "[b]efore the approval by the planning board," "[i]n approving such plats," and "[i]n making such determination". The decision of this court also stated that: * * * section 33 of the General City Law requires that owners install improvements or post a performance bond sufficient to cover the full cost thereof prior to approval of a subdivision by the City of Albany Planning Board (Matter of Friends of Pine Bush v. Planning Bd. of City of Albany, supra, p. 250, 450 N.Y.S.2d 966; emphasis added). Consequently, Special Term acted properly in determining that the approval should be nullified on this ground.

Id.

In addition to their "no public space or improvements" argument, respondents insist that General City Law § 27-a(7)'s performance bond requirement does not apply to the site plan review process provided in Buffalo's "Citywide Design and Site Plan" provisions – found at Section 511-138 et seq. of the City Code. Those provisions – in contrast to Buffalo's subdivision regulations – fail to make reference to the requirement of a performance bond or other security where required infrastructure and improvements have not been installed prior to site plan approval. Respondents' argument disregards the "pre-emption doctrine," described recently by the New York Court of Appeals as follows:

> *...[A]s a political subdivision of the State, a [municipality] may not enact ordinances that conflict with the State Constitution or any general law (see Municipal Home Rule Law § 10 [1] [i], [ii]). Under the preemption doctrine, a local law promulgated under a municipality's home rule authority must yield to an inconsistent state law as a consequence of "the untrammeled primacy of the Legislature to act with respect to matters of State concern…"*

Wallach v. Town of Dryden, 23 NY3d 728, 992 NYS2d 710, 717 (2014); also see, Belle v. Town Board of Town of Onondaga, 61 AD2d 352 (AD4 1978) ("A 'pre-emption doctrine' has evolved which precludes local legislation in subject areas marked by a pervasive scheme of state legislation.").

Although local municipalities – cities, town and villages – possess certain "supersession authority" to amend or supersede a general law pursuant to Section 10 of the Municipal Home Rule Law [MHRL Section 10(1)(ii)(d)(3)], "Local lawmaking power under the supersession authority is of course in all instances subject to the State's transcendent interest where the Legislature has manifested such interest

by expressly prohibiting a local law (Municipal Home Rule Law § 10 [1][ii][d][3]), or where a local law is otherwise preempted by State law (Albany Area Bldrs. Assn. v. Town of Guilderland, 74 N.Y.2d 372, 547 N.Y.S.2d 627, 546 N.E.2d 920 [decided today])." Kahmi v. Town of Yorktown, 74 NY2d 423 (1989). As explained in 2003 by our State's highest court, preemptions may be express or implied:

> *...The Legislature may expressly state its intent to preempt, or that intent may be implied from the nature of the subject matter being regulated as well as the scope and purpose of the state legislative scheme, including the need for statewide uniformity in a particular area. A comprehensive and detailed statutory scheme may be evidence of the Legislature's intent to preempt (see Albany Area Bldrs. Assn., 74 NY2d at 377)...*

Cohen v. Board of Appeals, 100 NY2d 395, 400 (2003).

The site plan review process established by the State Legislature at Section 27-a of the General City Law – and the parallel and virtually identical provisions at Town Law Section 274-a and Village Law Section 7-725-a – do not expressly state the Legislature's intent to preempt. Nonetheless, as New York's Court of Appeals recognized in Riegert Apartments Corp. v. Planning Board, 57 NY2d 206, 455 NYS2d 558 (1982) - when construing the parallel provisions at Town Law Section 274-a – the comprehensive site plan review process reflects "*the legislative intent of providing a State-wide uniform scheme.*" Riegert, *supra*, 57 NY2d 206, 455 NYS2d at 562. [Emphasis added.] As a result of the "State-wide uniform scheme" for reviewing site plan applications found at General City Law Section 27-a, the performance bond requirement found at subsection (7) of that provision is controlling over the City of Buffalo's site plan regulations. Consequently, to paraphrase the Court of Appeals' holding in Riegert, "at least to the extent Buffalo's Citywide Design & Site Plan regulations conflict with GCL Section 27-a(7), the City Respondents' site plan regulations should be deemed negated by the legislation enacting GCL Section 27-a." *Id*.

Even if petitioners were to presume, for the sake of argument, that the State Legislature has not expressed an intent to "cover the field" when enacting GCL 27-a, and that a City can amend or supersede such provisions by eliminating the performance bond requirement for site plan approvals, the City Respondents' elimination of the performance bond requirement for site plans must still be invalidated. The City of Buffalo's authority to amend or supersede can be exercised only upon substantial adherence

to the procedures set forth in Municipal Home Rule Law Section 22(1). That provision requires a municipality invoking its supersession authority to state its intention with definiteness and explicitness. Neither Buffalo's "Citywide Design & Site Plan" regulations, nor, upon information and belief, the local law enacting them, expressly amend or supersede GCL 27-a(7), nor do they contain a declaration of intent to do so. Therefore, the elimination of GCL 27-a(7)'s performance bond requirement is invalid. See Kahmi, *supra*, 74 NY2d at 434-435.

Contrary to the argument in respondent QCL's contention below that GCL 27-a(7) "requires the municipality to define what needs to be bonded," the pertinent statutory provision does not expressly state such a requirement. Furthermore, if a plain reading of the statute could be interpreted to place such an obligation on a city planning board, respondent City Planning Board's failure to perform such duties would provide yet another basis for invalidating the May 31, 2016 site plan approval. Furthermore, respondent QCL is not in a position to claim that it is just an innocent party who should not be subjected to the performance bond requirement in GCL 27-a(7) in light of the absence of such a requirement in the City of Buffalo's code. As this Court has expressed, "The law is clear that those who deal with the government are expected to know the law, and cannot rely on the conduct of government agents contrary to law" as a basis for claiming that it is being unfairly treated. See, generally, Board of Trustees of Village of Sackets Harbor v. Sackets Harbor Leasing Co., 26 AD3d 769, 771 (AD4 2006).

For the above reasons, appellants respectfully ask this Court to hold that respondent City Planning Board has violated the performance bond requirement mandated by GCL 27-a(7), and to embrace the ruling of the Third Department in Save the Pine Bush v. Planning Board of City of Albany, 96 AD2d 986, 988 (AD3 1983), that the remedy for violation of General City Law's performance bond requirement is nullification of the approval, not a return of the matter to respondent City Planning Board.

CONCLUSION

For the reasons stated above, petitioners-appellants respectfully ask this Court: (A) In "Appeal No. 1", to reverse so much of the October 11, 2016 "Order & Judgment" of the Hon. Donna M. Siwek, J.S.C., which dismissed and denied the Wooster Verified Amended Petition and the Riverkeeper Verified Petition; to affirm so much of the October 11, 2016 "Order & Judgment" of the Hon. Donna M. Siwek, J.S.C., which denied respondents' motions to dismiss the Wooster Verified Amended Petition and Riverkeeper Verified Petition for lack of standing; to deny, in their entirety, respondent Queen City Landing, LLC's cross-appeals seeking to dismiss the Wooster Verified Amended Petition and the Riverkeeper Verified Petition for lack of standing; to grant an order annulling respondent City of Buffalo Planning Board's May 31, 2016 Determination of Significance/Negative Declaration, respondent City of Buffalo Planning Board's May 31, 2016 design and site plan approval, and respondent City of Buffalo Common Council's June 21, 2016 approval of a restricted use permit, regarding respondent Queen City Landing, LLC's proposed project at 975-1005 Fuhrmann Blvd. in the City of Buffalo; and, such other and further relief as to this Court seems proper, including the costs and disbursements of "Appeal No. 1"; and, (B) In "Appeal No. 2," to reverse so much of the November 9, 2016 "Order & Judgment" of the Hon. Donna M. Siwek, J.S.C., which dismissed and denied the Wooster Verified Amended Petition's "FIFTH CLAIM" alleging violation of General City Law Section 27-a(7); to grant an order annulling respondent City of Buffalo Planning Board's May 31, 2016 design and site plan approval regarding respondent Queen City Landing, LLC's proposed project at 975-1005 Fuhrmann Blvd. in the City of Buffalo; and, such other and further relief as to this Court seems proper, including the costs and disbursements of "Appeal No. 2."

DATED: January 3, 2017
Buffalo, New York

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