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July 1, 2017

Hon. Catherine Nugent-Panepinto
Justice of the Supreme Court
92 Franklin St., Part 2, 3rd Floor
Buffalo, NY 14202

**Re: Wooster et al. v. Queen City Landing, LLC et al.
Index No. I-2017-000008 (Sup. Ct., Erie Co.) (J. Nugent-Panepinto)**

Dear Justice Nugent-Panepinto:

I apologize for having to write to the Court on this matter.

Petitioners are concerned that the elapse of nearly a half-year from petitioners' commencement of the above-referenced CPLR Article 78 proceeding may render the relief requested in the original Verified Petition (filed January 17, 2017) and the subsequent Verified Supplement to Verified Petition (submitted to the Court on April 7, 2017) ineffectual if the merits of the claims asserted in petitioners' pleadings are not promptly resolved.

It has come to petitioners' attention – by way of a June 29, 2017 article in the *Buffalo News* under the headline, “*State fines Queen City Landing \$50,000 over fallen concrete*” – that respondent Queen City Landing, LLC, entered into a Consent Order with the New York State Department of Environmental Conservation [DEC] on May 3, 2017. The Consent Order and its \$50,000 fine addresses not only the “fallen concrete” referenced in the *Buffalo News* headline, but also a health and environmental issue central to petitioners' proceeding: the composition of the large mounds of demolition debris stockpiled on the Queen City Landing site. [Enclosed for the convenience of the Court is a copy of the Consent Order.]

As alleged at paragraph “30” of the Verified Petition, petitioners contend that respondent QCL failed to provide, and respondent City of Buffalo Planning Board failed to demand, information or data regarding the demolition debris. More specifically, in pertinent part, paragraph “30” states:

...

30. Contrary to the purposes expressed at Sections 421-2 and 421-7 of the City of Buffalo City Code, respondent Planning Board has acted in an arbitrary and capricious manner by relying upon inadequate, incomplete, outdated, and/or misleading information submitted on behalf of the subdivider, respondent Queen City Landing, LLC, in reaching its decision to approve respondent QCL's preliminary subdivision plat, including, without limitation, the following:

...

B. *Respondent QCL failed to provide respondent Planning Board with any meaningful information or data related to the mounds of demolition debris on the western lot at the time the preliminary plat was approved, and respondent Planning Board failed to ask the subdivider to provide information to answer pertinent questions, such as:*

(i) What is the composition of the material stored in piles on the western lot? (ii) Do the piles contain any contaminated and/or toxic material? (iii) What steps have been taken to prevent dispersion of airborne particles? (iv) What steps have been taken to prevent any of the demolition debris from leaching into the soil beneath it and/or the adjacent waters of Lake Erie? (v) Is QCL in compliance with the provisions found at Section 103-38(E) of the City Code regarding “Removal of debris”? (vi) When will the demolition debris be removed from the western lot? (vii) Does use of the western lot for storage of the demolition debris comply with the permitted uses in a CM (General Commercial District) zone as set forth at City Code Section 511-40. [Emphasis added.]

The enclosed Consent Order reflects the following facts:

(1) QCL has known since a September 11, 2015 “Lead Based Paint Inspection Report” that that the former Freezer Queen building’s components (concrete, plaster, brick) consistently tested positive for lead. [Consent Order, § 21]

(2) A year later, QCL sent a September 21, 2016 letter to DEC seeking permission to crush the concrete on-site and beneficially reuse the materials on-site. [Consent Order, § 23] In response, the DEC requested additional sampling to address concerns about lead-based paint. [Consent Order, § 27] QCL’s contractor conducted additional sampling on September 29, 2016, but delayed providing the results to the DEC until on or about January 17, 2017. [Consent Order, § 36] These samples of the loose paint confirmed “the presence of lead and mercury at elevated levels.” [Consent Order, § 2]

In between the September 29, 2016 sampling event and QCL’s January 17, 2017 submission to the DEC of the sampling results confirming the presence of elevated levels of lead and mercury, the following events took place:

(a) demolition of the former Freezer Queen building was commenced;

(b) the Hon. Erin M. Peradotto, Associate Justice of the Appellate Division, Fourth Department, signed a November 3, 2016 Order to Show Cause in which petitioners’ request for a Temporary Restraining Order restraining continued demolition of the Freezer Queen building was denied;

(c) demolition of the former Freezer Queen building was completed;

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(d) the concrete remnants from the demolished building was crushed on-site, “potentially comingling” the lead-based paint with the construction and demolition debris; [Consent Order, § 30, 36];

(e) the December 19, 2016 public hearing at respondent Planning Board was conducted at which petitioners’ counsel raised concerns, *inter alia*, about the mounds of demolition debris;

(f) respondent Planning Board granted its December 19, 2016 approval of QCL’s preliminary plat plan; and

(g) respondent Planning Board granted its January 3, 2017 approval of QCL’s amended site plan for the Queen City Landing project.

In addition to a copy of the Consent Order, enclosed with this correspondent is a photograph that I took this date reflecting the continued presence at the QCL site of large mounds of demolition debris in close proximity to the waters of Lake Erie and the Small Boat marina.

Petitioners are presently awaiting a decision from this Court in response to the respondents’ respective motions to dismiss, and respectfully request a determination on the pending motions at the Court’s earliest convenience. Petitioners additionally request that the Court, as part of its order determining the motions, instruct respondents to serve and file their respective answers to petitioners’ pleadings (including, respondent Planning Board’s certified record) in an expeditious manner. Once the answers are served and filed, petitioners will promptly serve their reply (if necessary), and oral argument on the merits of the claims and defenses may proceed.

Thank you for your kind consideration of this correspondence.

Respectfully yours,

Arthur J. Giacalone
Enc.

Cc: Elizabeth A. Kraengel, Esq. (Enc.)
Jessica M. Lazarin, Esq. (Enc.)