STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

In the Matter of the Application of

THOMAS KREHBIEL, Individually and as Trustee of Krehbiel Living Trust, and CARMEN SIMON-COLEMAN,
Petitioners

For a Judgment pursuant to CPLR Article 78

- against -

WESTERN NEW YORK MARITIME CHARTER SCHOOL, and CITY OF BUFFALO COMMON COUNCIL,
Respondents.

AFFIRMATION IN FURTHER SUPPORT OF MOTION TO SUPPLEMENT PETITION & IN OPPOSITION TO MOTIONS TO DISMISS

Index No. I-2018000062

Assigned to:
Hon. _____

ORAL ARGUMENT REQUESTED

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

1. I am attorney for petitioners Thomas Krehbiel and Carmen Simon-Coleman, am fully familiar with the facts and circumstances of this matter, and, unless otherwise noted, I have personal knowledge of the facts asserted in this affirmation. This affirmation is provided in further support of petitioners' motion to supplement the Verified Petition, and in opposition to respondents' motions to dismiss the Verified Petition as moot.

Overview

2. Respondents seem to believe that they have the unilateral authority to control and restrict petitioners' constitutional and statutory right to petition the Court for redress simply because they find the litigation "burdensome." For example:

(a) Working in concert, they have taken steps in hopes of rendering the pending proceeding "moot" by rescinding the June 12, 2018 special use permit – despite the fact that respondent Western New York Maritime Charter School ("Maritime") has every intention to proceed with its plans to construct their proposed three-story high school building and 24,000-square-foot athletic facility, and respondent City of Buffalo Common Council ("Common Council") has refused to acknowledge any legal deficiencies in the decision-making process that led to the June 12, 2018 grant of Maritime's special use permit application. The pretense for the October 2, 2018 rescission vote – to allow Maritime an opportunity to conduct an archeological study – has no basis in law or logic. The existence of the special use permit did not in any way prevent respondent charter school from hiring archeological consultants to perform the desired investigation on its property at 102 Buffum Street. And, as will be addressed below in greater detail, the assertion by respondents' respective counsel that the desire to perform an archeological assessment of the subject parcel stems from receipt of "new" information and requests for such review is belied by the record.

(b) Respondents now seek to prevent this Court from addressing in the most efficient manner – that is, as part of the instant proceeding - the petitioners' claims that the Common Council lacked the authority to rescind the special use permit, and, in the alternative, failed to follow the proper procedures in granting Maritime's request for rescission. The Common Council's attorney goes so far as to argue that the Common Council's "legislative action" is "not subject to judicial control." [If such a principle did exist, it would bar any litigation to challenge legislative acts such as the enactment of a zoning ordinance, the rezoning of a parcel of land, etc.] Were the Court to agree with petitioners' contention that the Common Council lacks

authority to rescind, and/or utilized the wrong procedures, the special use permit would remain in place, and there would be no basis for respondents to seek dismissal on mootness grounds.

IN FURTHER RESPONSE TO RESPONDENTS' MOTIONS TO DISMISS

3. There are several significant issues that respondents' counsel cannot hide under a sheaf of affirmations and spurious legal contentions.

(a) Rescission of the special use permit was not needed in order for Maritime to conduct an archeological study.

4. Respondent Maritime did not need to obtain a rescission of the special use permit granted in June 2018 by respondent Council in order to lawfully conduct an archeological study – or assess any other environmental impact – on the property it owns at 102 Buffum Street. No legal obstacle prevented such activity. Although petitioners have repeatedly raised this point, neither Maritime, nor the Common Council, has addressed it, or provided the Court with a rational reason to explain the need for Maritime's extraordinary request for, and the Common Council's resolution approving, the October 2, 2018 rescission. The purported need for rescission appears to be little more than a sham, a manufactured excuse so that respondents could attempt to rid themselves of embarrassing litigation by arguing that the pending proceeding is moot.

(b) The purported "new" or "additional" information was available to respondents at the time the special use permit was granted.

5. Respondents may have received correspondence requesting an archeological survey of the subject parcel subsequent to the June 12, 2018 vote to approve the special use permit. But the information respondents misleadingly characterize as "new" or "additional," and purport to be the basis for the October 2, 2018 rescission, was, in fact, not new. As alleged at paragraph "74" of the Verified Petition:

74. Respondent Common Council's Negative Declaration acknowledges that "the proposed action is located within an area designated as sensitive for archeological sites on the NYSHPO [New York State Historic Preservation Office] archaeological site inventory."

Moreover, and as set forth at paragraph "42" of the Verified Petition, Allan Jamieson, a Native American, descendant of Mary Jemison, and the Executive Director of an indigenous arts and cultural non-profit organization known as Neto Hatinakwe Onkwehowe ("Neto"), testified at the June 5, 2018 public hearing conducted by respondent Common Council's Legislation Committee. Following a warm greeting at the public hearing by the Chairman of the Legislation Committee, Fillmore District Councilmember David A. Franczyk, Mr. Jamieson advised the Common Council and Maritime's representative, David P. Comerford, of the following:

- He had conducted extensive research into the history of the nearby Seneca Indian Park and surrounding lands, which showed that Mary Jemison may have been originally buried on land behind the school building at 102 Buffum Street.

- His research also established that the existing school building at 102 Buffum Street is the site of the first Seneca Mission House (school) on the Buffalo Creek Reservation.

- The Buffum Street land is one of the last historic sites in Buffalo for the Seneca Nation.

- A complete archeological survey should be conducted prior to approving the project.

6. Respondents chose to disregard both the State's designation of the site as archeologically sensitive, and the information presented and recommendation made by Mr. Jamieson on June 5, 2018, prior to approval of the special use permit. They now are attempting to artificially manufacture justification for the claim of mootness in order to rid themselves of what they characterize as "burdensome litigation."

(c) The Common Council's Oct. 2, 2018 resolution rescinds the special use permit, but not the SEQRA Negative Declaration.

7. The "resolved" portion of the Common Council's October 2, 2018 resolution makes it

irrefutably clear that only its special use permit for Maritime's expansion plans has been rescinded:

> …
> *Resolved that The City of Buffalo Common Council-*
>
> 1) Rescinds the Special Use Permit for 102 Buffum Street (Council Item #18-1021) concerning expansion of the already existing School; and
> 2) Directs City Clerk to provide notice of this action to the Mayor, City Planning Board and the Law Department.

[See Exhibit "1" attached to Supplemental Affirmation of Jessica M. Lazarin, Esq.]

8. Significantly, respondent Common Council has <u>not</u> rescinded the SEQRA Determination of Non-Significance/Negative Declaration for the expansion project which was also approved by the Common Council – in a separate vote – on June 12, 2018, and which is separately challenged by petitioners' in their Verified Petition. [See Verified Petition, paragraph "1(A)," and "Second Claim" at paragraphs "55" through "115".]

9. Although respondents' counsel assert that "the decision to rescind Maritime's Special Use Permit further renders moot the Common Council's previously adopted Determination of Non-Significance/Negative Declaration" [see, e.g., Supplemental Affirmation of Jessica M. Lazarin, Esq., paragraph "11"], no legal support is provided for this contention. Moreover, the September 19, 2018 letter requesting rescission expressly states that, "*Maritime still intends to undertake the Project*" – that is, plans to proceed with the proposed expansion and construction of a high school building and athletic facility at 102 Buffum Street.

10. Pursuant to SEQRA, it is this expansion project which constitutes the "action" triggering respondent Common Council's obligation under SEQRA to issue a Determination of Significance:

> "Actions" include projects or physical activities, such as construction or other activities that may affect the environment by changing the use, appearance or condition of any natural resource or structure that … (iii) require one or more new or modified approvals from an agency or agencies.

[6 NYCRR Sections 617.2(b)(1)(iii); 617.7(a)] As Ms. Lazarin's aforementioned Supplemental Affirmation acknowledges, unless substantive changes are proposed in the future plans for the project – a supposition which is speculative, at best – the June 12, 2018 Negative Declaration remains the pertinent SEQRA document and determination. In Ms. Lazarin's words, "… Rescission or amendment would depend on whether there are proposed changes for the Project…" [Lazarin 11/01/18 Affirmation, paragraph 12]

(d) The Common Council's Oct. 2, 2018 resolution reinforces an actual controversy regarding a lead agency's duties when assessing potential environmental impacts at a site designated by SHPO as archeologically sensitive.

11. Maritime's counsel contends that the Common Council's October 2. 2018 resolution rescinding the special use permit "effectively eliminates an actual controversy presented by the Notice of Petition and Petition." [See, Martorana 11/13/18 affirmation, paragraph 5.] Petitioners strongly disagree.

12. The Common Council's October 2, 2018 resolution states that respondent charter school requested rescission of the special use permit "so that Maritime can pursue an archeological examination in accordance with the NY State Historic Preservation Office (SHPO)." [See 10/02/18 resolution, 4th "Whereas clause."] As alleged by Maritime's counsel, Maritime "is now engaged in an archeological examination of the Property." [Martorana 11/13/18 affirmation, paragraph 7] Nonetheless, respondent Common Council – the SEQRA "lead agency" mandated by state law to comply with the requirements of the environmental review process – unequivocally proclaims in its October 2, 2018 resolution's fifth "Whereas

clause" that it has no obligation "to take advice from or consult with" SHPO "in any way":

…

Whereas *As a municipal entity, the Common Council is not required to take advice from or consult with New York State Historic Preservation Office (SHPO) in any way; however these letters share recommendations that are new to Council;*

…

13. This proclamation – in addition to underscoring the illogic of the rescission process in which respondents have engaged - intensifies the dispute between petitioners and respondents as to a lead agency's responsibilities when assessing potential adverse environmental impacts on property designated by SHPO as sensitive for archeological sites. The above-quoted whereas clause expresses a position that is in direct conflict with the following allegations and contentions in the Verified Petition:

Failure to Identify Environmental Concerns and/or Take a "Hard Look"
A. Regarding Impacts on Historic and Archeological Resources

…

74. Respondent Common Council's Negative Declaration acknowledges that "the proposed action is located within an area designated as sensitive for archeological sites on the NYSHPO [New York State Historic Preservation Office] archaeological site inventory."

75. Upon information and belief, despite the provisions in the SEQRA regulations requiring a lead agency "to make every reasonable effort to involve … other agencies and the public in the SEQR process" [6 NYCRR 617.3(d)], and encouraging agencies "to seek the advice and assistance of other agencies … on SEQR matters, including … recommendations on the significance or non-significance of actions" [6 NYCRR 617.14(c), respondent Common Council did not attempt to involve SHPO in the SEQR process, or seek SHPO's advice and assistance prior to adopting its Negative Declaration for the proposed charter school expansion project on June 12, 2018.

76. Rather than take affirmative steps to prevent adverse impacts to archeological resources, respondent Common Council issued its Negative Declaration with the following "reason" for not requiring the preparation of an Environmental Impact Statement to assess the potential adverse impacts on archeological resources:

Impacts on Historic and Archeological Resources

The site does not contain any landmarked buildings or structures. There are no known or identified significant cultural resources on site or adjacent to the property. Although the proposed action is located within an area designated as sensitive for archeological sites on the NYSHPO [New York State Historic Preservation Office] archeological site inventory, the site was previously developed. No adverse environmental impacts are anticipated.

…

14. In light of the Common Council's unequivocal assertion in the resolution's fifth whereas clause, the dispute between the parties regarding the Common Council's obligation as SEQRA lead agency to seek SHPO's advice and assistance is very much alive and in need of resolution.

(e) By its emphasis on only one aspect of the environment – archeological resources - the Common Council's Oct. 2, 2018 resolution fails to eliminate the actual controversies presented in the Verified Petition regarding impacts on land, existing neighborhood character, traffic, drainage, etc.

15. One might get the misimpression from respondents' papers that the only SEQRA-related issues asserted in the Verified Petition pertain to respondents' disregard of potential impacts to archeological resources. Neither Maritime, nor the Common Council, has acknowledged any specific violations of SEQRA (or, pertinent zoning provisions), or expressed any plans to address specific areas of environmental concern beyond archeological resources. In fact, the Verified Petition challenges the adequacy of respondent Common Council's assessment of multiple areas of environmental concerns, including, without limitation, impacts on land, existing neighborhood character, traffic, drainage, and construction-related impacts. [Verified Petition, paragraphs "82" to "115".]

16. The conflict between respondents' view of what constitutes a "hard look" at areas of environmental concerns, and the environmental assessment petitioners claim is mandated by SEQRA, remains an actual controversy.

17. In light of the foregoing, the claims raised in the Verified Petition have not been rendered moot, and petitioners respectfully ask the Court to deny in their entirety respondents' motions to dismiss the Verified Petition as moot, and to order such other and further relief as to the Court appears just and proper.

IN RESPONSE TO RESPONDENTS' OPPOSITION TO PETITIONERS' MOTION TO SUPPLEMENT PETITION

(a) Applicable standard when considering petitioners' motion to supplement petition.

18. Petitioners seek to supplement their July 11, 2018 Verified Petition to set forth subsequent transactions, that is, the events relating to respondent Common Council's October 2, 2018 rescission of the special use permit it had granted to Maritime on June 12, 2018. CPLR Rule 3025(b) provides that leave to amend or supplement a pleading "shall be freely given," and the Fourth Department's decision in DeForte v. Allstate Insurance Co., 66 AD2d 1028, 411 NYS2d 726 (4th Dept. 1978), explains both the purpose of the rule and the limits on the IAS court's role when reviewing a motion to amend or supplement a pleading:

> …
> A party may move at any time to amend or supplement a pleading and "leave shall be freely given" (CPLR 3025(b)). The purpose of CPLR 3025(b) is to ensure full litigation of a controversy and this section is construed to permit pleadings to be amended or supplemented, absent real prejudice or surprise and upon such terms as may be just under the circumstances [cites omitted]… Upon consideration of the motion, Special Term should not examine the merits or legal sufficiency of the proposed amended or supplemental pleadings unless the proposed pleading is clearly and patently insufficient on its face [cite omitted].
> …

Id, also see, e.g., Newton v. Aqua Flo Co., 106 AD2d 919, 483 NYS2d 133 (4th Dept.1984) ("Upon consideration of the motion, Special Term should not examine the merits or legal sufficiency of the proposed amendment unless the proposed pleading is clearly and patently insufficient on its face…"); Stengel v. Clarence Materials Corp., 144 AD2d 917, 918, 534

NYS2d 28, 29 (4th Dept. 1988) ("[A]bsent a showing of prejudice or surprise resulting directly from the delay it is an abuse of discretion as a matter of law to deny the motion to amend."); D'Onofrio v. St. Joseph's Hospital Health Center, 101 AD2d 686, 476 NYS2d 33 (4th Dept. 1984) ("It is well settled that it is an abuse of discretion as a matter of law to deny the motion in the absence of 'prejudice or surprise resulting directly from the delay.'").

19. Respondents' contentions, that the claims asserted in the proposed Supplemental Petition (attached as "Exhibit 1" to the Notice of Motion to Supplement Petition) are "palpably insufficient as a matter of law" or "totally devoid of merit," raise issues that go well beyond the face of the proposed pleading. Moreover, they are are based on mischaracterizations and misinterpretations of the legal principles and case law relied upon by respondents, on misleading legal and factual conclusions, and/or on arguments that condemn-without-analysis the legal principles and precedent asserted in the proposed Supplemental Petition.

20. In raising their various issues, respondents are asking this Court to exceed the limited role the Fourth Department has identified as proper for Special Term when considering a motion to supplement a pleading: Special Term should not examine the merits or legal sufficiency of the proposed supplement unless the proposed pleading is *clearly and patently insufficient on its face*. DeForte, *supra*; Newton, *supra*. In other words, the question that an IAS court should be asking is: Do the claims asserted in the proposed supplemental pleading allege one or more cognizable claims? See, Agway v. Williams, 185 AD2d 636 (4th Dept. 1992) (Fourth Dept., reversing the lower court, grants motion for leave to amend a pleading where the "allegation is sufficient to state a cognizable defense or claim").

21. An objective review of the proposed Supplemental Petition, which sets forth in detail the factual and legal bases for the three new legal claims, discloses the fallacy of any assertion that petitioners have failed to allege cognizable claims against respondents.

(b) Respondents' failure to allege real prejudice, delay, or surprise.

22. As the Fourth Department decisions discussed above make clear, CPLR 3025(b) is to be construed to allow a pleading to be supplemented "absent real prejudice or surprise" – that is, prejudice or surprise resulting directly from the moving party's delay in bringing the motion. DeForte, *supra*; Newton, *supra*; Stengel, *supra*.

23. It cannot be reasonably argued that petitioners unfairly delayed the filing of this motion, which was brought within 30 days of respondent Common Council's vote to rescind the special use permit. Furthermore, respondents have not alleged, much less proven, that they have or will suffer "real prejudice" as a result of a purported delay. The closest respondent Maritime comes to alleging any harm if the motion is granted is Mr. Martorana's unsupported assertion that allowing petitioners to supplement their pleading "would lead to needless, time-consuming litigation, and an unnecessary waste of judicial resources." [See Martorana 11/13/18 affirmation, paragraph 13.] This contention overlooks the fact that petitioners have the option to assert their new legal claims in a separate legal proceeding that would almost certainly lead to a greater expenditure of time, money, and judicial resources.

(c) Assuming, arguendo, that the Court is not convinced that "Petitioners' Third Claim" is sufficient on its face, a closer review of the merits demonstrates a cognizable claim that respondent Common Council lacked authority to the rescind the special use permit.

24. Counsel for respondent Common Council appears to be arguing that the Common Council's rescission of Maritime's special use permit "by approved resolution" constitutes

"legislative action" and, therefore, is somehow beyond judicial scrutiny. [See Ms. Lazarin's 11/13/2018 Affirmation In Opposition, paragraphs 10-12.] This argument is without merit:

(a) Pursuant to the City of Buffalo Charter, Article 3 (Common Council), Section 3-7(c), "*The common council shall have the power: … (c) to adopt resolutions and rules and regulations in the exercise of its functions, powers and duties*." City Charter, Section 3-7(c). The plain language of this provision, as well as common sense, leads to the conclusion that respondent Common Council may only adopt resolutions to further its legitimate functions, powers and duties, and lacks authority to adopt resolutions that go beyond such functions, powers and duties. Id. In other words, Buffalo's Common Council cannot extend its legitimate powers simply by dressing-up a decision in the trappings of "a resolution." Not surprisingly, the October 2, 2018 "resolution" adopted by the Common Council makes no reference to the source of its authority to either entertain Maritime's request to rescind the special use permit, or to grant the request. As is addressed below in this affirmation, respondent Common Council lacks such authority.

(b) Both the Appellate Division, Fourth Department, in Mobil Oil Corp. v. City of Syracuse, 52 AD2d 731, 381 NYS2d 924, 925 (4th Dept. 1976), and the New York Court of Appeals in Lemir Realty Corp. v. Larkin, 11 NY2d 20, 226 NYS2d 374 (1962), have concluded that a determination by a municipality's legislative body regarding a special use permit is, as expressed by the Fourth Department, "an administrative rather than a legislative function." Mobil Oil, *supra*. In the words of our State's highest court, "… [S]pecial exceptions, grants or denials, even though by a legislative body, were for court purposes administrative with the result that they are subject to review 'as to reasonableness' in an article 78 proceeding". Lemir, *supra*, 11 NY2d at 24, *quoting* Larkin Co. v. Schwab, 242 NY 330, 336 (1926). Respondents have not explained how an administrative power can be converted to a legislative power simply by

characterizing a decision as "a resolution." Additionally, even if one assumes, *arguendo*, that respondent Common Council's June 12, 2018 approval of Maritime's special use permit application constituted a legislative act, the doctrine of legislative equivalency would apply, and, for that reason, the special use permit could only be rescinded or modified by a process equal to the procedures used to approve it. [See, generally, Brunswick Smart Growth v. Town Board of Town of Brunswick, 51 AD3d 1119 (3d Dept. 2008) (doctrine of legislative equivalency dictates that existing legislation be repealed or modified only by a legislative act equal to the procedure used to enact it).]

(c) If one assumes for sake of argument that respondent Common Council's October 2, 2018 resolution constituted legislative action, the courts of this state, contrary to respondent Common Council's argument, have long exercised jurisdiction over challenges to a municipal body's legislative actions, including, without limitation, the enactment of zoning ordinances, and approvals and denials of zoning amendments. Where the challenge is to the content or substance of a legislative decision to amend a zoning ordinance or rezone a parcel of land, whether by a Town Board, Village Board or City Common Council, CPLR Section 213(1)'s six-year statute of limitations has been applied. See, *e.g.*, Almor Associates v. Town of Skaneateles, 213 AD2d 863 (4th Dept. 1996); Williamsville Southeast Homeowners Association, Inc., 77 AD2d 812 (4th Dept. 1980); Schiener v. Town of Sardinia, 48 AD3d 1253 (4th Dept. 2008).

(d) Again, if one assumes for sake of argument that respondent Common Council's October 2, 2018 resolution constituted legislative action, and respondents were to argue that the proper vehicle for challenging the rescission of the special use permit is a declaratory judgment action, petitioners' use of an Article 78 proceeding to raise their claims would not be a fatal mistake. The New York Court of Appeals acknowledged nearly four decades ago that courts

have universally corrected this procedural glitch by exercising the powers of conversion found at CPLR 103(c):

> … In most cases the application of the principle [that an Article 78 proceeding is not the proper vehicle to challenge legislative action] has been of no practical significance inasmuch as the courts, in reliance on CPLR 103 (subd. (c)) have promptly remedied any procedural infirmity by converting the article 78 proceeding to a declaratory judgment action or other appropriate proceeding and thereupon marched on to the merits. [Cites omitted.] …No case has been found in which the court failed to come to the rescue by exercising its CPLR 103 (subd. (c)) powers of conversion where it was possible to do so.

Press v. County of Monroe, 50 NY2d 695, 702, 431 NYS2d 394, 397 (1980); also see, *e.g.*, Friends Of The Pine Bush v. Planning Bd. of City of Albany, 59 NY2d 849, 465 NYS2d 924 (1983) (proper exercise of discretion to convert a moot Art. 78 to an action for declaratory judgment); Town of Fishkill v. Royal Dutchess Properties, Inc., 231 AD2d 511, 648 NYS2d 107 (2d Dept. 1996) ("It is a proper exercise of discretion for the Supreme Court to convert a declaratory judgment action to a proceeding pursuant to CPLR article 78 rather than dismiss the case outright [cites omitted].").

25. Respondent Maritime's counsel argues – relying primarily on the flawed Second Department decision in Belclaire Holding Corp. v. Klingher, 28 AD2d 689 (1967) – that the Common Council, as the City of Buffalo's legislative body, possesses broad "plenary powers" which "*undoubtedly* includes the power to revisit and rescind previous approvals, unless that authority is expressly limited by the zoning ordinance." [Emphasis added.] [Maritime's Memorandum of Law, pp. 4,5] Reliance on the Belclaire decision is misplaced for a number of salient reasons:

(a) As is discussed above, the Fourth Department and the New York Court of Appeals have concluded that a determination by a municipality's legislative body regarding a special use permit is "an administrative rather than a legislative function." Mobil Oil, *supra*; Lemir, *supra*.

The conclusion expressed in Belclaire, that "where, as here, the legislative body retains to itself the power to grant variances or special permits, such power is plenary in nature," is based on the Second Department's mischaracterization of such determinations as "a legislative act." Its conclusion contradicts the rule expressed in Mobil Oil and Lemir, and, therefore, must be rejected by this Court.

(b) The Belclaire decision misconstrues the holding of our State's highest court in Lemir when it cites to Lemir for the proposition that the legislative body, exercising its plenary power to grant special permits, "may review its previous decisions and change its views." Belclaire, *supra*, 280 NYS2d at 944. A careful reading of the decision in Lemir shows that its statement that a legislative body "may change its view" is not referring to the situation we have in the instant proceeding, where a legislative body approves an applicant's special use permit, and subsequently rescinds that same applicant's permit. To the contrary, the Lemir court's ruling addresses a claim that a town board acted unreasonably in denying petitioner a special permit when it had previously granted such permits to similarly-situated applicants. As explained by the New York Court of Appeals:

…

> The mere fact that consents were granted to owners of premises somewhat similarly situated does not in itself show that consent was arbitrarily refused to this applicant… Unlimited discretion in an administrative board by ordinance is not narrowed through its exercise… The council may refuse to duplicate previous error; it may change its views as to what is for the best interests of the city; it may give weight to slight differences which are not discernible. [Citation omitted.]

Lemir, *supra*, 11 NY2d at 24-25. The Lemir court is merely expressing the principle that a legislative body's grant of a special use permit to a prior applicant does not bar it from denying a special use permit to a subsequent applicant "somewhat similarly situated."

- Rescind vs. Revoke -

26. Respondent Maritime's counsel cites to Ninnie v. Gould, 178 AD2d 832, 833-834 (3d Dept. 1991), to support its contention that, "a legislative body's plenary authority undoubtedly includes the power to revisit and rescind previous approvals, unless that authority is expressly limited by the zoning ordinance." Ironically - given opposing counsel's unexplained insistence that there is a meaningful distinction between "revocation" and "rescission" – the Ninnie case involves, not the authority to "rescind" a previously approved special use permit, but "the power to **revoke** a previously granted extension" of a special use permit. *Id*. [Emphasis added.]

27. Petitioners contend that, for purposes of this proceeding, there is no meaningful distinction between "rescission" and "revocation" of a special use permit. While neither term is defined in the UDO/Green Code, the dictionary definition of "revoke" is "to annul by recalling or taking back: rescind." [See, *Merriam Webster's Collegiate Dictionary*, 10th Edition.] Similarly, www.bing.com provides the following definition for "rescission": "the revocation, cancellation, or repeal of a law, order, or agreement."

28. From petitioners' perspective, more significant than whether the Ninnie court was addressing the revocation or rescission of a prior approval is the fact that Ninnie relies on the flawed reasoning in Belclaire as precedent for its conclusion that a city council's authority under its zoning ordinance "includes the power to revoke a previously granted extension, unless that authority is expressly limited by the zoning ordinance." Ninnie, *supra*, 178 AD2d at 833-834.

29. As noted at paragraph 149(b) of the proposed Supplemental Petition, Buffalo's UDO/Green Code contains a provision for the "Revocation" of a special use permit by the

Common Council, found at Section 11.3.3(1). The provision provides two grounds for revocation, and mandates a public hearing with notice:

> **11.3.3 Special Use Permit**
>
> **…**
>
> **I. Revocation.**
>
> *1. The Common Council may revoke a special use permit after finding that any one of the following has occurred.*
>
> *(a) The licenses or permits required for the operation or maintenance of the use are terminated.*
>
> *(b) Any of the provisions of this Ordinance or any of the conditions and restrictions of the special use permitted are violated.*
>
> *2. The Common Council must hold a public hearing to confirm the revocation of the special permit. Notice for the public hearing is required in accordance with Section 11.2.2, as required for the original approval. The applicant and property owner must be notified of the public hearing. Following the public hearing, the Common Council will make its decision.*

30. Whether cancellation of a previously granted special use permit is called revocation – the term used in the City of Buffalo's UDO/Green Code – or rescission, or nullification, the authority of the body with the administrative power to determine whether to grant or deny a special use permit to cancel, revoke, rescind, or nullify the permit "is limited by the express language of the [zoning] ordinance." See Tohr Industries Corp. v. Zoning Bd. of Appeals of City of Long Beach, 74 NY2d 575, 578 (1989) (NYCA holds that a ZBA's authority to revoke a previously granted variance may not be implied from the general grant of power in General City Law, but is limited by the express language of the city's zoning code).

31. In the instant proceeding, respondent Common Council's power to cancel, revoke, rescind, or nullify Maritime's special use permit is limited to the "revocation" authority found at

Section 11.3.3(1) of the UDO/Green Code. Tohr, *supra*. To hold otherwise would create a situation rife with the potential for abuse and favoritism.

32. Furthermore, the principle expressed by our State's highest court in Tohr is consistent with the allegations asserted at paragraphs 140 through 144 of the proposed Supplemental Petition regarding respondent Common Council's lack of authority to grant Maritime's request to rescind the June 12, 2018 special use permit.

33. With the exception of a vague reference to "the Petitioners' assertions, and use of inapposite authorities," found at paragraph "9" of Mr. Martorana's November 13, 2018 affirmation, respondents have refrained from any analysis of the position presented at paragraphs 140 - 144 of the proposed Supplemental Petition, to wit:

…

> *140. The New York Court of Appeals has long-held that cities and other municipal authorities have no inherent power to enact or enforce zoning or land use regulations, and that they exercise such authority solely by legislative grant and in the absence of legislative delegation of power their actions are ultra vires and void. See, Kahmi v. Planning Board of Town of Yorktown, 59 NY2d 385, 465 NYS2d 865, 866 (1983) ("Towns and other municipal authorities have no inherent power to enact or enforce zoning or land use regulations. They exercise such authority solely by legislative grant and in the absence of legislative delegation of power their actions are ultra vires and void."); Reigert Apartments Corp. v. Planning Bd. of Town of Clarkstown, 57 NY2d 206, 455 NYS2d 558, 559-560 (1982).*
>
> *141. A careful and thorough review of the pertinent provisions of the State's General City Law, as well as the City of Buffalo Uniform Development Ordinance/Green Code, shows that respondent Common Council has not been granted the authority to rescind its June 12, 2018 approval of the Special Use Permit, to wit: Neither Section 27-b ("Approval of special use permits") of the State's General City Law, nor Section 11.3.3 ("Special Use Permit") of the Green Code, provides respondent Common Council with the authority to reconsider a prior approval or denial of a special use permit.*
>
> *142. In sharp contrast, Section 81-a(12) of the General City Law, and Section 11.3.5(G) of the City's Green Code – entitled "Rehearing" – expressly empower a Zoning Board of Appeals "to review" a prior decision, and, after notice and a public hearing, "reverse, modify or annul" its earlier determination.*

143. As a matter of statutory construction, the failure of the State Legislature to include a matter within a particular statute is an indication that its exclusion was intended, and any effort by a court to supply the omitted matter "would amount to judicial legislation." See, generally, Pajak v. Pajak*, 56 NY2d 394, 397 (1982);* People v. Price*, 224 AD2d 1014 (AD4 1996).*

144. These principles of statutory construction are particularly pertinent where, as here, the State Legislature has chosen to include a provision applicable to one category of zoning decision-making (that is, variances granted by a zoning board of appeals), and has not included it for another category of zoning decisions (special use permits). Reigert*, supra; also see,* Nyack Hospital v. Village of Nyack Planning Bd.*, 231 AD2d 617 (AD2 1996) (the failure of the State Legislature to include an approval-by-default provision in the site plan statutes, although the default provision is included in the statutory provisions governing subdivision approval, "is a strong indication that such exclusion was intended").*

…

34. Respondents' references to a legislative body's "plenary powers," and the claim that labeling the Common Council's October 2, 2018 rescission vote a "resolution" magically insulates the determination from judicial scrutiny, do nothing to detract from the binding nature of the legal principles asserted by our State's highest court in the above-cited cases.

35. In light of the above, petitioners respectfully ask this Court to grant their motion to supplement the Verified Petition herein with the proposed "Third Claim" that respondent Common Council lacked the authority to rescind Maritime's special use permit.

(d) Assuming, arguendo, that the Court is not convinced that "Petitioners' Fourth Claim" (asserted in the alternative) is sufficient on its face, a closer review of the merits demonstrates a cognizable claim that respondent Common Council failed to follow proper procedures in rescinding Maritime's special use permit.

36. Petitioners' proposed "Fourth Claim", found at paragraphs 147 through 152 of the proposed Supplemental Petition, alleges that, if we assume *arguendo* that respondent Common Council possessed the authority to rescind the special use permit, the Common Council was obligated to hold a public hearing, following proper public notice, on the proposed rescission of the special use permit.

37. The Fourth Claim is based on two arguments:

(a) Akin to the doctrine of legislative equivalence (see paragraph 24(a) *supra*), a determination to rescind or otherwise cancel a previously granted special use permit should follow procedures equivalent to the initial process utilized when deciding whether to approve or deny the special use permit application. Given the fact that the public was involved, through the public hearing process, when the initial determination to approve the permit was made, due process and the concept of fairness dictate that a public hearing be conducted by respondent Common Council – after proper notice - prior to a decision to rescind a special use permit. [See UDO Section 11.3.3(D).]

(b) Given the similarity between rescission" and "revocation," and UDO's requirement – at Section 11.3.3(I) – that a public hearing be conducted prior to revocation of a special use permit, due process and the concept of fairness dictate that a public hearing be conducted by respondent Common Council , after proper notice, prior to a decision to rescind a special use permit. [See UDO Section 11.3.3(I).]

38. In light of the above, petitioners respectfully ask this Court to grant their motion to supplement the Verified Petition herein with the proposed "Fourth Claim" that respondent Common Council was obligated to hold a public hearing, following proper public notice prior to rendering a decision whether or not to rescind Maritime's special use permit.

(e) Assuming, arguendo, that the Court is not convinced that "Petitioners' Fifth Claim" (asserted in the alternative) is sufficient on its face, a closer review of the merits will demonstrate a cognizable claim that respondent Maritime's Middle School is obligated to obtain a special use permit under the City's UDO/Green Code.

The timeliness of Petitioners' Fifth Claim/Pansa v. Damiano (NYCA (1964)

39. No reason existed for petitioners, as residents and property owners on Buffum Street, to question Maritime's receipt of all permits and approvals required by either the City of Buffalo or the State of New York when it began operating its middle school in September 2017.

40. And, it was petitioners understanding and belief that the special use permit granted on June 12, 2018 by respondent Common Council to respondent Maritime covered all school-related activities at 102 Buffum Street, that is, the middle school classes operating in the existing structure at the subject parcel, and the proposed high school building and athletic facility.

41. Additionally, it was petitioners' understanding and belief that, from the June 12, 2018 issuance of the special use permit to the effective date of the Common Council's resolution rescinding the June 6, 2018 special use permit, Maritime's middle school was operating pursuant to the special use permit challenged in petitioner's Verified Petition.

42. Furthermore, petitioners were unaware of respondent City of Buffalo's official position that Maritime's middle school "does not need a Special Use Permit to continue its operation and is not affected by [the October 2, 2018] Resolution" until they were advised by their legal counsel that respondent Common Council's October 2, 2018 resolution expressed that position in one of its several "Whereas clauses."

43. Petitioners were also unaware of any specific determination by Buffalo's Commissioner of Permit & Inspection Services whether or not respondent Maritime was required to obtain a special use permit to operate its middle school in the existing building at 102 Buffum Street until being advised by their legal counsel of reference to such purported determination in the November 13, 2018 "Affirmation in Opposition" of Jessica M. Lazarin, Esq., and the

November 13, 2018 Affidavit of Louis Petrucci (who is identified as Assistant Director in the City's Department of Permit & Inspection Services).

44. On or about October 22, 2018, on behalf of petitioners, I searched the documentation filed by respondent Maritime at the website of the New York State Department of Education to determine whether said respondent had filed a Certificate of Occupancy for the 2017 – 2018 academic year. State regulations require the filing of such documentation by a duly operating charter school. No Certificate of Occupancy was filed by Maritime for the 2017 – 2018 academic year, although a Certificate of Occupancy, dated July 10, 2018, was filed and available at the Department of Education's website. I concluded, due to the absence of an earlier Certificate of Occupancy at the State's website, that no Certificate of Occupancy had been issued for the Buffum Street site prior to July 10, 2018.

45. Nothing in either the July 10, 2018 or September 8, 2017 Certificates of Occupancy accompanying Mr. Petrucci's affidavit informs the public whether or not respondent Maritime was required by the City of Buffalo to obtain a special use permit in order to lawfully operate its middle school at 102 Buffum Street.

46. Petitioners have been informed by their legal counsel that Section 11.3.11 of the City's UDO/Green Code provides, in pertinent part: "An application for an administrative appeal must be filed … with the Zoning Administrator … within 60 days of filing the requirement, decision, interpretation, or determination being appealed." UDO, Section 11.3.12(D).

47. Petitioners contend that the 60 day period for filing such an administrative appeal has not expired, and that it would be fair and proper for the Court to treat either November 13, 2018 or November 1, 2018 as the start of the 60-day period:

(a) November 13, 2018. On the evening of November 13, 2018, petitioners' legal counsel received the aforementioned November 13, 2018 affirmation of Ms. Lazarin and affidavit of Mr. Petrucci, which advised petitioners of the purported determination by the Commissioner of Permits & Inspection Services (the brother of respondent Maritime's Director of Administration, David Comerford) that Maritime was not required to obtain a special use permit prior to commencing operation of its middle school at 102 Buffum Street.

(b) November 1, 2018. On November 1, 2018, petitioners' legal counsel received a copy of respondent Common Council's October 2, 2018 resolution, attached as an exhibit to the November 1, 2018 "Supplemental Affirmation of Jessica M. Lazarin, Esq." As noted above, said resolution states that Maritime's middle school "does not need a Special Use Permit to continue its operation and is not affected by [the October 2, 2018] Resolution."

48. The time period for taking an appeal is still running, therefore, whether the 60-day period is treated as starting on November 13, 2018, or November 1, 2018, or even October 9, 2018 (the date the Mayor approved the October 2, 2018 resolution, and, therefore, pursuant to Section 3-19 of the City Charter, the date the rescission resolution was deemed adopted),.

49. Furthermore, respondents cannot objectively accuse petitioners of unreasonably delaying assertion of their claim that Maritime's middle school operation requires a special use permit, or that the concept of laches is applicable:

(a) The issue that a special use permit was needed to operate the middle school was not ripe between June 12, 2018 and October 9, 2018, while the June 12, 2018 special use permit was in effect.

(b) Petitioner's legal counsel was not allowed to speak or submit his written comments at the Common Council's October 2, 2018 regular meeting, and, therefore, was prevented from publicly raising the issue. And,

(c) Petitioners' motion for leave to serve their supplemental petition was filed and served within approximately 24 days of the date the rescission took effect.

50. Petitioners base their interpretation of the correct date for determining compliance with the UDO's 60-day period for filing an administrative appeal on the reasoning and holding of the New York Court of Appeals in Pansa v. Damiano, 14 NY2d 356 (1964). The Pansa case involves a challenge to the issuance of a building permit by a neighboring property owner, and a zoning ordinance with a requirement that an appeal be taken to the Zoning Board of Appeals "within thirty (30) days of the date of the decision." Our State's highest court viewed the 30-day period as fair and sensible as applied to an applicant denied a permit, but concludes: "But one who demands revocation of a permit issued to another is in no position to appeal or at least should not be required to appeal until his demand for revocation has been rejected with some formality and finality." Here is a fuller statement of the NYCA's reasoning:

...

> *The whole of the position of the city officials as to the timeliness issue is that the zoning ordinance at the point where it calls for an appeal to be taken 'within thirty (30) days of the date of the decision' means within 30 days from the issuance of the permit. Such a construction or application might in some fact situations be permissible but on these facts it is unreasonable and undesirable. Strictly applied, it might prevent any appeal at all since the neighbors might not learn till long afterward of the issuance of a building permit. As applied to an applicant denied a permit the proposed construction might [14 N.Y.2d 360] be fair and sensible. But one who demands revocation of a permit issued to another is in no position to appeal or at least should not be required to take his appeal until his demand for revocation has been rejected with some formality and finality. It is the duty of the courts to construe statutes reasonably and so as not to deprive citizens of important rights. In performance of that duty we read section 3 of article XIII of the zoning ordinance as meaning that the prescribed 30 days does not being to run against one who seeks revocation of a permit until his objections have been overruled in a 'decision' of which he has had notice…* [Emphasis added.]

Pansa, *supra*, 14 NY2d at 359-360; also see, Farina v. ZBA of City of New Rochelle, 294 AD2d 499 (2d Dept. 2002) ("It is settled law, however, that where a party seeks revocation of a building permit issued to another, the prescriptive period should be computed from the date such party received notice that his objections to the permit had been overruled."]

51. Petitioners are in a position comparable to the neighbor who lacks first-hand knowledge of the decision of the permitting official to issue a building permit, and "might not learn till long afterward of the issuance of a building permit." Pansa, *supra*. Actually, petitioners' position is even more precarious. In Pansa, commencement of construction activity provided tangible notice to a neighbor that a building permit had been issued. Here, in contrast, there was no visible clue at the 102 Buffum Street site that a special use permit had not been issued prior to commencement of middle school operations. Furthermore, unlike the need to obtain a building permit, which is a matter of common knowledge among city residents, the obligation to obtain a special use permit in order to operate a school in petitioners' zoning district is not a matter of common knowledge or everyday conversation. The topic of the need to obtain a special use permit was not on either petitioner's mind until each received notice of the June 5, 2018 public hearing before respondent Common Council to address Maritime's special use permit application.

52. Petitioners are more than willing to file an administrative appeal pursuant to UDO Section 11.3.12, but believe that this case falls within an important exception to the need for administrative exhaustion: the futility of such appeal. [See, e.g., Watergate II Apartments v. Buffalo Sewer Authority, 46 NY2d 52, 412 NYS2d 821, 824 (1978) (the exhaustion rule need not be followed "when resort to an administrative remedy would be futile"). Here, given the position expressed in the November 13, 2018 affidavit provided by the Assistant Director of

Permits & Inspection Services, in respondent Common Council's October 2, 2018 resolution, and in Ms. Lazarin's November 13, 2018 affirmation, it is difficult to view the filing of an administrative appeal as anything other than futile.

53. For the sake of judicial economy, petitioners propose that the parties and the Court treat petitioners' filing of its November 2, 2018 Notice of Motion to Supplement Petition, and its proposed "Fifth Claim," as petitioners' official demand that the City require respondent Maritime to obtain a special use permit for operation of the middle school, and Mr. Petrucci's affidavit as the Commissioner of Permits & Inspection Services official rejection of that demand. We could then be in a position – if the Court grants the pending request for permission to serve the Supplemental Petition – to expeditiously address the merits of petitioners' "Fifth Claim."

The merits of Petitioners' "Fifth Claim"

54. Regarding the merits of petitioners' claim that respondent Maritime must obtain a special use permit pursuant to the City's UDO/Green Code, petitioners respectfully direct the Court's attention to paragraph 156(a)-(i) of the proposed Supplemental Petition. Petitioners also wish to underscore a fact totally ignored by Mr. Petrucci, Ms. Lazarin, and respondents: As alleged at paragraph 156 of the proposed Supplemental Petition, the existing building at the subject parcel had not been used for years prior to commencement of Maritime's middle school:

- On the April 3, 2017 effective date of the UDO/Green Code, and, upon information and belief, for several continuous years prior to that date, the building at 102 Buffum Street in which respondent Maritime's Middle School currently operates was vacant, unoccupied, and not being used as a school.

- Upon information and belief, respondent Maritime purchased 102 Buffum Street on June 16, 2017, at which time the building was vacant, unoccupied, and not being used as a school.

Additionally, as alleged at paragraph 45 of the Verified Petition, South District Councilmember Christopher Scanlon, when expressing the reasons he supported issuance of the special use permit immediately following the June 5, 2018 public hearing, stated that the former School No. 70 building on Buffum Street had been vacant for a number of years, and, if it continued, would have fallen into a state of disrepair.

55. Discontinuance of use of the former School No. 70 building for a number of years is of significant relevance. Pursuant to Section 12.1(E) of the UDO/Green Code:

> **12.1 NONCONFORMITIES**
>
> **…**
>
> **12.1.2 Nonconforming Uses**
>
> …
>
> **E. Discontinuance.** Whenever the active and continuous operation of any nonconforming use, in whole or in part, has been discontinued for one year, it constitutes an abandonment of the nonconforming use or part of that use, regardless of any intent to resume operation. The discontinued use may not be re-established.

56. Lastly, regarding the pre-emption issue raised in Mr. Martorana' November 13, 2018 affirmation (but, not in respondent Maritime's Memorandum of Law), Maritime's counsel is incorrect when he states that "Maritime is exempt from compliance with the UDO." [Martorana 11/13/18 affirmation, p. 7] In a leading case on this topic, Cornell University v. Bagnardi, 68 NY2d 583 (1986), our State's highest court reiterated the court's prior holdings which rejected any conclusive presumption of a church or school's entitlement to an exemption from zoning ordinances, or that a religious or educational use automatically outweighs its ill effects. Cornell, *supra*, 68 NY2d at 594-595. To the contrary, "The presumed beneficial effect may be rebutted

with evidence of a significant impact on traffic congestion, property values, municipal services, and the like." Id. And, the New York Court of Appeals expressly acknowledges the propriety of a municipality's use of a special use permit process when assessing a school or church's over-all impact on the public's welfare:

…

> … A special permit may be required and reasonable conditions directly related to the public's health, safety and welfare may be imposed to the same extent that they may be imposed on noneducational applicants.

Cornell, *supra*, 68 NY2d at 596.

57. In light of the above, it is petitioners respectfully ask this Court to grant their motion to supplement the Verified Petition herein with the proposed "Fifth Claim" concerning the Maritime middle school's obligation to obtain a special use permit.

58. In summary, to ensure full and fair litigation of the dispute between the parties, petitioners respectfully ask the Court to: (a) deny in their entirety respondents' motions to dismiss the Verified Petition; (b) grant petitioners' motion to serve the proposed Supplemental Petition; and, (c) grant such other relief as to the court appears just and proper.

Dated: November 19, 2018
Buffalo, New York

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