

STATE OF NEW YORK  
SUPREME COURT: COUNTY OF ERIE

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In the Matter of the Application of

Elverna D. Gidney, and  
Lorna Peterson,

Petitioners,

For a Judgment under CPLR Article 78

- against -

ZONING BOARD OF APPEALS OF THE CITY  
OF BUFFALO,  
PLANNING BOARD OF THE CITY OF BUFFALO,  
SYMPHONY PROPERTY MANAGEMENT LLC, and  
MICHIGAN-REDEV LLC,

Respondents.

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**VERIFIED PETITION**

Index No.

Date Filed:

Assigned to:

Petitioners, Elverna D. Gidney and Lorna Peterson, by their attorney, Arthur J. Giacalone, for their verified petition against respondents herein, respectfully allege and state:

**INTRODUCTION**

1. This CPLR Article 78 proceeding involves a 133-unit, market-rate apartment complex, known as “The Lawrence” (hereinafter, “The Lawrence”), proposed for construction in the City of Buffalo on the east side of Michigan Avenue, to the east of the Buffalo Niagara Medical Campus, and on the west side of Maple Street, in a traditional, small-scale, predominantly low-income and African American neighborhood (consisting of 34 city blocks) known as the “Fruit Belt,” and, more specifically, seeks judgment nullifying the following determinations adopted in furtherance of The Lawrence project:

A. The February 19, 2020 adoption by respondent Zoning Board of Appeals of

the City of Buffalo (hereinafter, at times referred to as, “ZBA”) of a Determination of Non-Significance/Negative Declaration for The Lawrence project, pursuant to the State Environmental Quality Review Act and the regulations promulgated thereunder at 6 NYCRR Part 617 [“SEQRA”] (hereinafter, “ZBA Negative Declaration”).

B. The June 17, 2020 adoption by respondent Zoning Board of Appeals of the City of Buffalo of a Determination of Non-Significance/Amended Negative Declaration for The Lawrence project, pursuant to SEQRA (hereinafter, “ZBA Amended Negative Declaration”).

C. The June 17, 2020 approval by respondent Zoning Board of Appeals of the City of Buffalo of seven (7) categories of area variances, constituting thirteen (13) separate variances, from the dimensional requirements of the City of Buffalo’s existing zoning laws, for The Lawrence project - as requested by co-applicants respondent Symphony Property Management LLC and respondent Michigan-Redev LLC - including: in excess of residential density (one variance from N-2R zone requirement); in excess of lot width (one variance from N-2R zone requirement, one variance from N-2E zone requirement); in excess of building coverage (one variance from N-2R zone requirement, one variance from N-2E zone requirement); in excess of impervious coverage (one variance from N-2R zone requirement, one variance from N-2E zone requirement); deficiency in side yards (total) (one variance from N-2R zone requirement); deficiency in rear yard setback (one variance from N-2R zone requirement, one variance from N-2E zone requirement); and, in excess of permitted height (one variance from N-2R zone’s maximum-height-in-feet requirement, one variance from N-2E zone’s maximum-height-in-feet requirement, one variance from N-2E zone’s maximum-height-in-stories

requirement).

D. The June 29, 2020 adoption by respondent Planning Board of the City of Buffalo (hereinafter, at times referred to as, “Planning Board”) of a Determination of Non-Significance/Negative Declaration for The Lawrence project, pursuant to SEQRA (hereinafter, “Planning Board Negative Declaration”).

E. The June 29, 2020 approval by respondent Planning Board of the major site plan application for The Lawrence project.

### **PARTIES**

2(A). Petitioner Elverna D. Gidney (“Gidney”), who turns 70 on July 14, 2020, resides in the City of Buffalo’s Fruit Belt neighborhood at 274 Mulberry Street, real property which her family has owned, along with an adjoining lot at 299 Maple Street, for nearly 60 years; as a result of the location of these two parcels in close proximity to the proposed site of The Lawrence, petitioner Gidney will be harmed in a manner different in kind and degree from the public generally, and such harm falls within the zone of interests or concerns of both the City of Buffalo’s zoning laws and SEQRA.

2(B). Petitioner Lorna Peterson, PhD (“Peterson”), is a retired university professor who has, for the past 29 years, resided in and owned real property in the City of Buffalo, County of Erie and State of New York; as a result of her years of studying the history, architecture, culture, and character of the Fruit Belt neighborhood and its residents, and her use of the knowledge she has acquired to advocate for the protection and preservation of that neighborhood’s character, architecture and cultural resources, petitioner Peterson will be harmed in a manner different in kind and degree from the public generally, and such harm falls within the zone of interests or concerns of both the

City of Buffalo’s zoning laws and SEQRA.

3(A). Respondent Zoning Board of Appeals of the City of Buffalo is the zoning board of appeals of the City of Buffalo, County of Erie, State of New York, possessing the powers and duties of a city zoning board of appeals pursuant to the laws of the State of New York, and having an office for the conducting of business in the County of Erie at City Hall, 65 Niagara Square, Buffalo, New York 14202.

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

3(C). According to information obtained from the New York State Department of State, Division of Corporations, respondent Symphony Property Management LLC (hereinafter, at times referred to as “Symphony”), is a domestic limited liability company, having an office for the conducting of business in the County of Erie, State of New York.

3(D). According to information obtained from the New York State Department of State, Division of Corporations, respondent Michigan-Redev LLC (hereinafter, at times referred to as “Michigan-Redev”), is a domestic limited liability company, having an office for the conducting of business in the County of Erie, State of New York.

## **LEGAL FRAMEWORK**

### **A. Zoning Laws**

4. A city’s power to enact zoning laws is derived from subsections (24) and (25) of Section 20 of the General City Law (“GCL”) of the State of New York, which

conclude with the following proviso: "... Such regulations shall be designed to promote the public health, safety and general welfare and shall be made with reasonable consideration, among other things, to the character of the district, its peculiar suitability for particular uses, the conservation of property values and the direction of building development, *in accord with a well-considered plan.*" [Emphasis added.]

5. On December 27, 2016, pursuant to GCL 20(24&(25), the City of Buffalo Common Council adopted the current City of Buffalo zoning ordinance - referred to officially as the "Unified Development Ordinance" ("UDO") and informally as the "Green Code" [hereinafter, at times referred to as, "UDO" or "UDO/Green Code"] – which expresses its "purpose" as follows:

UDO Section 1.1.2 Purpose

This ordinance is adopted in accordance with a comprehensive plan to promote the interest and welfare of the people through standards that address the orderly and compatible use of land, the relationship between building facades and the public realm, the form and mass of buildings in relation to one another, and the scale and type of blocks, thoroughfares, and open space.

6. At the time the 2015 draft of the UDO/Green Code was presented for public review, the City of Buffalo's Office of Strategic Planning (hereinafter, at times referred to as "OSP") provided the following description of the role of zoning and the proposed UDO:

*Zoning is designed to protect a community by outlining what can and can't be built on a given piece of land. It sets standards to ensure that adjacent buildings complement rather than conflict with each other. And it determines whether homes, schools, and stores are clustered together or set far apart.*

*The UDO is the city's first comprehensive zoning rewrite since 1953 and codifies the land use policies of the Comprehensive Plan and Buffalo Green Code planning documents. It will combine land use, subdivision, and public realm (e.g.; streets, parks, and sidewalks) standards into a single, user-friendly document.*

*The UDO implements the community's vision for the development of the city. Responding to considerable input from residents and business owners, it will*

be a “form-based code,” emphasizing neighborhood character, as its organizing principle. This approach was chosen because of its unique capacity to help realize the community’s vision for walkable, transit-supportive neighborhoods. It will be a more accessible document, with illustrations, tables, and plain English text, making the ordinance easier to understand and apply. [Emphasis added.]

7. The UDO/Green Code places the six (6) lots included in the proposed site of The Lawrence which front on Michigan Avenue, which are directly across the street from the Buffalo Niagara Medical Campus, in the “N-2E Mixed-Use Edge” zoning district, and provides the following description of the purpose of the N-2E zone:

UDO 3.1.5(A) N-2E Mixed-Use Edge

Purpose. The N-2E zone addresses transitional areas, typically at the edge of more intense mixed-use centers, in Buffalo’s most compact neighborhoods. These areas are defined by a mix of homes and stores.

8. The UDO/Green Code places the nine (9) lots included in the proposed site of The Lawrence which front on Maple Street, as well as the houses directly across Maple Street and adjoining streets within the Fruit Belt neighborhood, in the “N-2R Residential” zoning district, and provides the following description of the purpose of the N-2R zone:

UDO 3.1.6(A) N-2R Residential

Purpose. The N-2R zone addresses residential areas adjoining more intensive mixed-use centers, generally defined by compact residential blocks, which occasionally include small mixed-use buildings.

9. Pursuant to the UDO/Green Code, neighborhood zones such as N-2E and N-2R have specified “building types” or building forms permitted within the zone.

10. Both N-2E and N-2R zones permit a multi-story building type known as “Stacked Units,” which can facilitate a variety of uses, including residential units.

11. Reflecting the distinctive purposes for N-2E and N-2R zones, the UDO establishes lot dimension, building setbacks, density and height requirements that are different for the N-2E and N-2R districts, including, for example, the following:

<u>Requirement</u>	<u>N-2E zone</u>	<u>N-2R zone</u>
Maximum lot width	120'	60' interior lot/100' corner lot
Minimum total side yards	Not Applicable	20% of lot width
Maximum Density	Not Applicable	1 unit/1,250 sq. ft. of lot area
Maximum Building Height	3 stories, 44'	3 stories, 40'

12. The dimensional requirements of the UDO's N-2R district reflect its intent: the reinforcement of a medium-density residential district comprised of moderate size residential buildings (a maximum of 3-stories high), on moderate size lots (no wider than 60'), and separated by side yards (at least 3-feet wide), with the moderate "Residential density" maximum of one unit for each 1,250 square feet of lot area.

13. As the UDO, the City of Buffalo zoning ordinance in effect prior to the enactment of the Green Code/UDO, known as Chapter 511 of the City Code, placed the six lots included in the proposed site of "The Lawrence" fronting on Michigan Avenue in a less-restrictive zoning district than the nine lots fronting on Maple Street:

(a) The nine lots on Maple Street, as well as the houses directly across Maple Street and adjoining streets in the Fruit Belt neighborhood, were in the "R2 Dwelling District," which required a minimum lot area of 2,000 square feet per dwelling unit, restricted building heights to a maximum 3 stories or 40 feet, and required a minimum width for each side yard (for any building other than a one- or two-family dwelling) of 2 ½ feet per story of building height, but not less than five feet in any case.

(b) The six lots on Michigan Avenue were in the "R3 Dwelling District," which required a minimum lot area of 1,250 square feet per dwelling unit (in contrast to the

2,000 square feet per unit minimum in the R2 zone), and, as in the R2 district, restricted building heights to a maximum 3 stories or 40 feet, and required a minimum width for each side yard (for any building other than a one- or two-family dwelling) of 2 ½ feet per story of building height, but not less than five feet.

14. As required under New York State’s zoning laws, the UDO provides a City of Buffalo property owner with a “narrowly circumscribed” mechanism, known as a zoning variance, to seek relief from specific requirements set forth in the ordinance:

UDO Section 11.3.5 Zoning Variance

A. Description. A zoning variance allows a *narrowly circumscribed* means by which relief may be granted from *unforeseen* applications of this Ordinance that create practical difficulties or particular hardships. [Emphasis added.] There are two types of zoning variance:

1. Use variance. A use variance is the authorization by the Zoning Board of Appeals for the use of land for a purpose that is otherwise not allowed or is prohibited by the applicable zoning regulations.
2. Area variance. An area variance is the authorization by the Zoning Board of Appeals for the use of land in a manner that is not allowed by the dimensional or physical requirements of the applicable zoning regulations.

15. The potential for abuse of the power to grant zoning variances was acknowledged more than 90 years ago by the then-Chief Judge of the New York Court of Appeals, Benjamin N. Cardozo: “*There has been confided to the Board a delicate jurisdiction and one easily abused.*” [People of the State of NY ex rel. Fordham Manor Reformed Church v. Walsh, 244 NY 280, 290 (1927).] [Emphasis added.]

16. Zoning boards of appeal have long been advised by New York’s appellate courts that where “the grant of a variance is destructive of the purposes to be achieved by the ordinance, there is a clear invasion of the legislative process,” and that they must “make certain that the effect of a variance would not introduce such an incongruity into



the ordinance that the zoning pattern would be seriously disarranged,” [Van Deusen v. Jackson, 35 AD2d 58, 60-61 (AD2 1970); Held v. Giuliano, 46 AD2d 558, 559 (AD3 1975).]

17. New York’s appellate courts have also insisted that zoning decisions must reflect the communities “well-considered plan” or “comprehensive plan,” ensuring that local authorities “act for the benefit of the community as a whole following a calm and deliberate consideration of the alternatives, and not because of the whims of either an articulate minority or even majority of the community.” Udell v. Haas, 21 NY2d 463, 469 (1968) (“[T]he comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use. It is the insurance that the public welfare is being served and that zoning does not become nothing more than just a Gallup poll.”)

18. In the early 1990s, New York’s legislature codified the standards for granting variances, requiring “the Zoning Board to engage in a balancing test, weighing ‘the benefit to the applicant’ against ‘the detriment to the health, safety and welfare of the neighborhood or community’ if the area variance is granted.” [Sasso v. Osgood, 86 NY2d 374, 384 (1995); also see, Coco v. City of Rochester ZBA, 236 AD2d 826 (AD4 1997).]

19. The state-mandated “balancing test” for granting an area variance (the type of variances involved in this proceeding) is set forth at GCL Section 81-b(4)(b) for city zoning boards (and, Town Law Section 267-b for towns), and has been incorporated, virtually verbatim, into the UDO/Green Code at UDO Section 11.3.5(E)(2):

UDO Section 11.3.5 Zoning Variance

E. Approval Standards

...

2. Area Variance.

a. In making its determination, the Zoning Board of Appeals must make written findings of fact that take into consideration the benefit to the applicant if the variance is granted as weighed against the detriment to the health, safety and welfare by the approval of the variance. In making this determination the Zoning Board of Appeals must also consider:

i. Whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance.

ii. Whether the benefit sought by the applicant can be achieved by some method feasible for the applicant to pursue, other than an area variance.

iii. Whether the requested area variance is substantial.

iv. Whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or zone.

v. Whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.

b. The Zoning Board of Appeals, in the granting of area variances, must grant the minimum variance that it shall deem necessary and adequate and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community.

20. Citing the language which is included at UDO Section 11.3.5(E)(2)(b), our State's highest court expressed the principle that, "[T]he [Zoning] Board is entrusted with safeguarding the character of the neighborhood in accordance with the zoning laws."

[See, Pecoraro v. ZBA of Town of Hempstead, 2 NY3d 608, 615 (2004).]

21. Opinions rendered by New York's highest court have consistently embraced lot size, lot width, density, and the scale and style of nearby homes as relevant factors when considering a proposed project's impacts on a neighborhood's character. [See, e.g., Pecoraro, *supra*, 2 NY3d at 614-615; Ifrac v. Utschig, 98 NY2d 304, 308 (2002).]

22. Although two terms used in the area variance “balancing test,” whether the requested variance is “substantial,” and whether “the alleged difficulty was self-created,” are not defined in either the state statutes or the UDO, the New York Court of Appeals has provided guidance:

A. In Ifrac, *supra*, a leading area variance case involving a request for lot size and lot width variances, our state’s highest court holds that, “The area variances – of at least 60% - are undisputably substantial,” *id*, 98 NY2d at 309, and, in Pecoraro, the Court of Appeals holds that it was not an abuse of discretion for the zoning board of appeals to determine that deficiencies of 33.3% and 27.3% in lot area and frontage width, respectively, were substantial and weighed against granting it. *Id*, 2 NY3d at 614.

B. A difficulty is "self-created" for variance purposes where the owner was aware, or should have been aware, of the zoning restrictions from which he/she/it seeks relief at the time the property was acquired. [Ifrac, *supra*, 98 NY2d at 309; also see, Stamm v. Board of Zoning Appeals of Town of Greece, 283 AD2d 995 (AD4 2001); Carrier v. Town of Palmyra Zoning Board of Appeals, 30 AD3d 1036 (AD4 2006).

23. The New York Court of Appeals has succinctly expressed the general standard of review when a ZBA’s variance determination is challenged:

...Courts may set aside a zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure (*citations omitted*). A determination of a zoning board should be sustained on judicial review if it has a rational basis and is supported by substantial evidence... (*citations omitted*).

Pecoraro, *supra*, 2 NY3d at 613; Ifrac, *supra*, 98 NY2d at 309; also see, Fox v. Town of Geneva ZBA, 176 AD3d 1576, 1579 (AD4 2019) (4<sup>th</sup> Dept. reverses IAS court judgment confirming ZBA decision that “lacks a rational basis and is not supported by substantial

evidence”); Mengisopolous v. Bd. of Zoning Appeals, 168 AD3d 943, 945 (AD2 2019) (“although the Board engaged in the required balancing test,” 2<sup>nd</sup> Dept. annuls the variance determination where the ZBA “failed to meaningfully consider the relevant statutory factors”).

24. Pursuant to the City of Buffalo’s UDO/Green Code, new construction of a principal building of at least 5,000 square feet in gross floor area (other than a one- or two-family dwelling), must undergo “major site plan review” by the city’s Planning Board, which is described as follows:

UDO Section 11.3.7 Major Site Plan Review.

A. Description. Major site plan review allows for discretionary review of the site configuration and architectural design of projects which, due to their magnitude, are more likely to have significant impacts on their surroundings.

25. Following a public hearing, the Planning Board has 62 days to approve, approve with modifications, or disapprove the site plan review application, applying the following approval standards as set forth at UDO Section 11.3.7(G):

UDO Section 11.3.7(G). Approval Standards.

The City Planning Board must make written findings of fact on the following criteria:

1. The project complies with all applicable standards of this Ordinance.
2. The project is consistent with the spirit and intent of the Comprehensive Plan.
3. The project will be sited and designed so as to be harmonious with the surrounding area and not interfere with the development, use, and enjoyment of adjacent property.
4. The project will promote building design that responds to the surrounding neighborhood and demonstrates respect for surrounding historic resources, while allowing for a diversity of architectural styles and original and distinctive design approaches.

5. The project will ensure safe and efficient access for all site users, including pedestrians, cyclists, transit passengers, the mobility impaired, and motor vehicles, as applicable.
6. The project will be located, designed, and/ or managed to meet its anticipated travel demand, and will include reasonable efforts to minimize single-occupancy vehicle trips, reduce vehicle miles travelled, and promote transportation alternatives. If required by this Ordinance, a Transportation Demand Management (TDM) plan must be approved by the City Planning Board as evidence of the project meeting this criterion.
7. The project will provide for the adequate protection of significant natural, cultural, heritage, and scenic assets on or near the site.
8. The project contributes to existing pedestrian-oriented rights-of-way in relation to the public realm and streetscape.
9. The project will utilize plant materials that are capable of withstanding the climatic conditions of Buffalo and the microclimate of the site, and will be planted so as to maximize prospects for healthy growth.
10. The Project builds in fair housing, inclusionary, and equal opportunity initiatives of the City of Buffalo to promote access to community assets such as quality education, employment and transportation for all, without consideration of race, gender, religion, age, sexual orientation, national origin or ethnic background.
11. The project will make for the most efficient use of land and municipal services, utilities, and infrastructure.
12. The project is sufficiently served by or provides services, utilities, and infrastructure as required by the Buffalo Sewer Authority, Buffalo Water Board, Commissioner of Public Works, Parks, and Streets, and Fire Department.

### **B. State Environmental Quality Review Act (SEQRA)**

26. 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, E.F.S. Ventures Corp. v. Foster, 71 NY2d 359, 526 NYS2d 56, 62 (1988).]

27. When a SEQRA lead agency, such as respondent ZBA or Planning Board, is in the process of approving or denying an “action,” such as variances or site plan review for an apartment building, the agency is obliged to comply with both “the letter and spirit of the SEQRA review process,” by performing the following tasks:

(a) identifying the relevant areas of environmental concern;

(b) taking a "hard look" at them; and

(c) making a "reasoned elaboration" of the basis for its determination whether the proposed action “may include the potential for at least one significant adverse environmental impact.” [See, for example, NYC Coalition to End Lead Poisoning v. Vallone, 100 NY2d 337, 347-348 (2003); LaDelfa v. Village of Mt. Morris, 213 AD2d 1024 (AD4 1995); also see 6 NYCRR 617.7(a) & (b).]

28. Pursuant to SEQRA, "No agency involved in an action may undertake, fund or approve the action until it has complied with the provisions of SEQRA", and "[a] project sponsor may not commence any physical alteration related to an action until the provisions of SEQR have been complied with." [6 NYCRR 617.3(a); Town of Dickinson v. County of Broome, 183 AD2d 1013, 1015 (AD3 1992).]

29. Lead agencies, such as respondents ZBA and City Planning Board, are obligated to strictly comply with the prescribed procedures in SEQRA. [See, for example, NYC Coalition to End Lead Poisoning v. Vallone, 100 NY2d 337, 350 (2003) (the substance of SEQRA cannot be achieved without its procedures, and departures from SEQRA's procedural mechanisms thwart the purposes of the statute; strict compliance with SEQRA guarantees that environmental concerns are confronted and resolved prior to agency action); Citizens Against Retail Sprawl v. Giza, 280 AD2d 234, 237 (AD4

2001); Taxpayers Opposed to Floodmart, Ltd. v. City of Hornell IDA, 212 AD2d 958 (AD4 1995) (“literal rather than substantial compliance with SEQRA is required”).

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

31. Accordingly, SEQRA and its regulations define “environment” broadly to go beyond physical conditions to include socio-economic concerns, such as population patterns and existing neighborhood character:

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

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.").

32. The SEQRA regulations promulgated by the State Department of Environmental Conservation list “the impairment of the character or quality of important historical, archeological, architectural, or aesthetic resources or of existing community or neighborhood character” as an “indicator” of significant adverse impacts on the environment. [6 NYCRR 617.7(c)(1)(v)]

33. The SEQRA regulations promulgated by the State Department of Environmental Conservation also list “the creation of a material conflict with a

community's current plans or goals as officially approved or adopted" as an "indicator" of significant adverse impacts on the environment. [6 NYCRR 617.7(c)(1)(iv)]

34. The New York Court of Appeals has held that "the impact that a project may have on population patterns or existing community character, with or without a separate impact on the physical environment, is a relevant concern in an environmental analysis since the statute includes these concerns as elements of the environment." Chinese Staff, *supra*, 68 NY2d at 366.

35. The SEQRA process requires a lead agency to make a "determination of significance" and issue either a "Positive Declaration" or "Negative Declaration" for the action under consideration.

36. A "Positive declaration" is a written statement prepared by the lead agency indicating that implementation of the action as proposed *may* have a significant adverse impact on the environment and that an environmental impact statement (EIS) will be required." 6 NYCRR 617.2(ac). [Emphasis added.]

37. A "Negative declaration" is a written statement prepared by the lead agency indicating that implementation of the action as proposed will not have any significant environment impacts," 6 NYCRR 617.2(y), and, for that reason, an EIS will not be required.

38. There is "a relatively low threshold" for issuing a Positive Declaration and requiring preparation of an EIS: if the action *may* have a significant effect on any one or more aspects of the environment. See 6 NYCRR 617.7(a); Chemical Specialties Manufacturers Assoc. v. Jorling, 85 NY2d 382, 626 NYS2d 1, 9 (1995); Munash v. Town Board of Town of East Hampton, 297 AD2d 345 (AD2 2002) ("Since SEQRA mandates



the preparation of an EIS when the proposed action may include the potential for at least one significant environmental effect, 'there is a relatively low threshold for the preparation of an EIS' (.).

39. The EIS has been described by New York State's appellate courts as "the heart of SEQRA," (see, e.g., Jackson v. NYS Urban Dev. Corp., 67 NY2d 400, 503 NYS2d 298, 304 (1986)), provides "a means for agencies, project sponsors and the public to systematically consider adverse impacts, alternatives and mitigation," 6 NYCRR 617.2(n), and, in the words of the Appellate Division, Fourth Department, "is specifically designed to ensure that environmental issues are injected directly and openly into government decision making." Miller v. City of Lockport, 210 AD2d 955, 957 (AD4 1994).

### **PERTINENT FACTS**

#### **A. Acquisition of Property by Michigan-Redev/"By right" development at site**

40. The site for the proposed apartment complex known as The Lawrence is comprised of an assemblage of fifteen parcels of land in the City of Buffalo, six on the east side of Michigan Avenue, and nine on the west side off Maple Street, more specifically: 983, 985, 989, 993, 995 and 997 Michigan Avenue, and 228, 230, 232, 234, 240, 242, 244, 248 and 250 Maple Street [hereinafter, referred to collectively as "The Lawrence site"].

41. The Lawrence site is located to the east and across Michigan Avenue from an area of the City of Buffalo referred to as the Buffalo Niagara Medical Campus.

42. According to area variance and major site plan applications submitted to respondents ZBA and/or Planning Board on behalf of co-applicants and respondents

Symphony Property Management LLC and Michigan-Redev LLC (hereinafter, at time referred to collectively as “The Lawrence respondents”), the total lot area of The Lawrence site’s 15-parcel assemblage is 44,150 square feet, or approximately 1.013 acres of land, with the six Michigan Avenue parcels totaling approximately 18,150 square feet of lot area with a total lot width of 181.5 feet, and the nine Maple Street parcels totaling 26,000 square feet of lot area with a total lot width of 260 feet.

43. Upon information and belief, based on Property Information available on-line at the City of Buffalo’s website, on June 17, 2020, the date that respondent ZBA approved multiple area variances for the proposed The Lawrence apartment project, respondent Michigan-Redev LLC was the record owner of 14 of the 15 parcels comprising The Lawrence site, and the City of Buffalo was the owner of record of the fifteenth parcel, 244 Maple Street.

44. According to information obtained on-line from the New York State Department of State, Division of Corporations, respondent Michigan-Redev LLC, a domestic limited liability company, was formed on December 22, 2016.

45. According to public records, on December 23, 2016, respondent Michigan-Redev paid \$1.75 million to Michigan Maple LLC for fourteen properties on Michigan Avenue and Maple Street, eleven of which, 983, 985, 989, 993, and 997 Michigan Avenue, and 228, 230, 232, 234, 248 and 250 Maple Street, are now part of The Lawrence site.

46. Regarding the four parcels comprising a portion of The Lawrence site which were not purchased on December 23, 20216 by respondent Michigan-Redev, according to public records:

(a) 995 Michigan Avenue was purchased by respondent Michigan-Redev from Robert L. Allen on February 13, 2017 for \$275,000; said parcel includes a two-family dwelling, constructed in 1875, which respondents Symphony and Michigan-Redev intend to demolish in furtherance of The Lawrence project.

(b) 242 Maple Street, a vacant lot, and 240 Maple Street and were purchased by respondent Michigan-Redev from Roswell Park Cancer Institute on March 14, 2017 for \$108,000; 240 Maple Street includes a one-family dwelling, constructed in 1995, which respondents Symphony and Michigan-Redev intend to demolish in furtherance of The Lawrence project.

(c) 244 Maple Street, a vacant lot, continues to be owned by the City of Buffalo.

47. The City of Buffalo's legislative body, its Common Council, after years of hearings, revisions and debate, approved the City's first new zoning ordinance since the early 1950s, the UDO/Green Code, on December 27, 2016, four days after respondent Michigan-Redev's purchase of eleven of the fifteen parcels of land which now comprise The Lawrence site; the legislative approval of the UDO/Green Code, which had been preceded by the preparation of a Draft and Final Environmental Impact Statement, occurred approximately 48 days prior to respondent Michigan-Redev's purchase of 995 Michigan Avenue, and approximately 77 days prior to respondent Michigan-Redev's purchase of 240 and 242 Maple Street from Roswell Park Cancer Institute.

48. According to the dimensional requirements set forth in the zoning ordinance in effect *prior to* the City of Buffalo's enactment of the UDO/Green Code, The Lawrence respondents would have been permitted "by right" – that is, in compliance with the zoning ordinance, and without the need to obtain a variance, special use permit, or zoning

amendment – to construct a maximum of 27 dwelling units within The Lawrence site’s 44,150-square-foot lot area: 14 units within the six parcels and 18,150 square feet of lot area on Michigan Avenue which were zoned R3, and 13 units within the nine parcels and 26,000 square feet of lot area on Maple Street which were zoned R2.

49. As a result of the “residential density” restriction in the UDO’s N-2R district, which limits new construction to one residential unit per 1,250 square feet of lot area, The Lawrence respondents may “by right” – that is, in compliance with the zoning ordinance, and without the need to obtain a variance, special use permit, or zoning amendment – construct a maximum of approximately 21 (to be precise, 20.8) dwelling units within The Lawrence site’s nine parcels and 26,000 square feet of lot area on Maple Street presently zoned N-2R.

50. The UDO/Green Code does not expressly contain a maximum density or dwelling unit per lot square footage restriction for the N-2E zone; however, taking into consideration the limitations created by the N-2E’s 3-story maximum height, 120-foot lot-width maximum, and the seventy percent (70%) maximum building coverage, petitioners estimate that The Lawrence respondents may construct “by right” a maximum of approximately 36 residential units in the portion of The Lawrence site presently zoned N-2E.

51. In summary, respondents Symphony and Michigan-Redev could have constructed “by right” a total of approximately 27 residential units on The Lawrence site’s 15 parcels under the pre-UDO/Green Code zoning ordinance (14 units on the 6 Michigan Avenue parcels zoned R3, and 13 units on the 9 Maple Street parcels zoned R2), and now, under the UDO/Green Code, could construct “by right” an estimated 57

residential units (an estimated 36 units on the 6 Michigan Avenue parcels zoned N-2E, and 21 units on the 9 Maple Street parcels zoned N-2R).

52. Upon information and belief, respondent Michigan-Redev did not condition the purchase of any of the 15 parcels comprising The Lawrence site on obtaining the variances The Lawrence respondents subsequently sought from respondent ZBA, despite the limitations on the number of residential units that could be constructed by right under the pre-UDO zoning ordinance and the UDO/Green Code.

53. Application of the UDO/Green Code to The Lawrence site does not deprive The Lawrence respondents of the reasonable use and enjoyment of the fifteen parcels, or deprive the property owner of any use of the property to which it is reasonably adapted.

54. As an example, upon information and belief, The Lawrence respondents could, by right, construct the following development at The Lawrence site in accordance with the UDO/Green Code:

(a) On the nine Maple Street parcels with a total lot width of 260', four 4-unit buildings, each of a 53'-wide lot, and a fifth 5-unit building on a 48'-wide lot, for a total of 21 units.

(b) On the six Michigan Avenue parcels with a total lot width of 181.5', one 24-unit building on a 120'-wide lot, and a 12-unit building on a 61.5'-wide lot, for a total of 36 units.

### **B. Variance Application Process**

55. On or about August 30, 2019, respondent Symphony submitted an application to respondents ZBA and Planning Board to develop 131 units of "market rate apartments" at The Lawrence site (the "initial proposal"), with a 181.5-foot lot width on

Michigan Avenue, a 260-foot lot width on Maple Street, with a building coverage of 92% of the site, impervious coverage of 85% of the site, a building 5-stories in height on both Michigan Avenue and Maple Street, and total side yards on Maple Street of six feet, requiring variances from the following standards established by the UDO/Green Code:

(a) N-2R's residential density requirement of no more than one unit per 1,250 square feet of lot area;

(b) N-2R's 60' maximum lot width requirement;

(c) N-2E's 120' maximum lot width requirement;

(d) N-2R's minimum total side yards requirement of 20% of the lot width;

(e) N-2E's 3 stories maximum building height requirement;

(f) N-2R's 3 stories maximum building height requirement;

(g) N-2R's 40' maximum building height requirement;

(h) N-2R's 70% maximum building coverage requirement;

(i) N-2E's 70% maximum building coverage requirement;

(j) N-2R's 80% maximum impervious coverage requirement;

(k) N-2E's 80% maximum impervious coverage requirement;

(l) N-2R's minimum rear yard requirement of 15% of lot depth; and,

(m) N-2E's minimum rear yard requirement of 15% of lot depth.

56. Following expressions of strong public opposition, at a September 18, 2019 public hearing, to the initial proposal's density, character, scale, building height and coverage, lot width, and deficient side yards (among other concerns), The Lawrence respondents made two subsequent attempts to present what they assert are significant changes to the proposed apartment complex in an effort, purportedly, address the public's

concerns.

57. The “second proposal” for The Lawrence project, which decreased the number of units by a mere two (from 131 to 129), and reduced the building’s height from five to four stories by proposing to place the facility’s 78-space parking structure partially below grade, was met once again with strong opposition by the public at the ZBA’s January 15, 2020 meeting.

58. The third iteration of The Lawrence project was submitted to respondent ZBA on or about March 5, 2020 (the “third proposal”), and constitutes the current version and the one acted upon by respondent ZBA on June 17, 2020 and respondent Planning Board on June 29, 2020.

59. The third proposal has the same building footprint and lot dimensions as the original proposal and the second proposal, that is, a 181.5-foot lot width on Michigan Avenue, a 260-foot lot width on Maple Street, building coverage of 92% of the site, impervious coverage of 85% of the site, and, total side yards on Maple Street of only six feet; it also retains the 4-story height on Maple Street proposed in the second proposal.

60. The third proposal is different dimensionally from the second proposal in the following ways: it *increases* the number of total units from 129 to 133 (two higher than the original proposal in August 2019); lowers the building height on Maple Street from 5 stories to 4 stories; reduces the number of residential units on Maple Street from 76 to 68 units (or, from one unit per 342 square feet of lot area, to one unit per 382 square feet of lot area); and, to compensate for the modest Maple Street reduction, adds 12 units to the Michigan Avenue portion of the project.

61. The third proposal for The Lawrence project continued The Lawrence

respondents' request for thirteen (13) area variances from the requirements of the UDO/Green Code.

62. Petitioners find the following variances requested by The Lawrence respondents to be the most detrimental to the health, safety and welfare of the surrounding neighborhood, the mostly likely to produce an undesirable change in the character of Maple Street and the Fruit Belt neighborhood and a detriment to nearby properties, and the most likely to have an adverse effect or impact on the physical or environmental conditions in the neighborhood:

(a) A variance reducing N-2R's residential density requirement of no more than one unit per 1,250 square feet of lot area, which limits the Maple Street parcels to 21 units, to one unit per 382 square feet of lot area, which equates to 68 units on Maple Street, and constitutes a 223% variance.

(b) A variance increasing N-2R's maximum lot width restriction of 60 feet on Maple Street to a 260 foot lot width, constituting a 333% variance.

(c) A variance increasing N-2E's maximum lot width restriction of 120 feet on Michigan Avenue to a 181.5-foot lot width, constituting a 51% variance.

(d) A variance reducing N-2R's minimum total side yards requirement of 20% of the 260-foot lot width, which equates to 52 feet, to 6 feet or 2.3% of the lot width, constituting an 884% variance.

(e) A variance increasing N-2E's 3 stories maximum building height limitation to 5 stories, constituting a 66.67% variance.

(f) A variance increasing N-2R's 3 stories maximum building height requirement to 4 stories, constituting a 33.33% variance.



(g) A variance increasing N-2R's 70% maximum building coverage restriction to 92% building coverage, a 31.4% variance.

63. As a result of The Lawrence respondents' submission of three versions of project, respondent Zoning Board of Appeals has conducted three public hearings concerning the area variances requested for The Lawrence project, in-person hearings on September 18, 2019 and January 15, 2020, and, as a result of the Covid-19 pandemic, a virtual public hearing on June 17, 2020.

64. During the public hearings, members of the public were advised by the ZBA chairman that they were limited to three minutes each to testify and provide evidence in opposition to the numerous variances.

65. During the public hearings, members of the public provided comments and evidence in opposition to the requested variances, including, among other things, the following concerns:

(a) The UDO/Green Code expressly restricts the role of variances as follows: "A zoning variance allows a *narrowly circumscribed means* by which relief may be granted from *unforeseen applications of this Ordinance* that create practical difficulties or particular hardships." [UDO, 11.3.5(A)] [Emphasis added.]

(b) The intent of the N-2R district is clearly manifest in its dimensional requirements. The N-2R zone envisions a residential district comprised of moderate size residential buildings (a maximum of 3-stories high), on moderate size lots (no wider than 60'), and separated by side yards (at least 3-feet wide), with the moderate "residential density" maximum of one unit for each 1,250 square feet of lot area.

(c) It does not matter how many times the applicant revises its plans to,

purportedly, satisfy the neighborhood residents. The original proposal was so massively out of scale and character with the Maple Street side of the project that the repeated tweaking of the façade still leaves a proposed development grossly out of compliance with the standards in an N-2R zone and incompatible with the existing neighborhood character, scale and density.

(d) The ZBA has the duty to protect and implement, not supplant, the UDO’s intent, and, as expressed by our state’s highest court in Pecoraro v. ZBA of Town of Hempstead, is statutorily “entrusted with safeguarding the character of the neighborhood in accordance with the zoning laws.”

(e) There is a stark contrast between what The Lawrence respondents propose to construct on its nine assembled lots on Maple Street, and both the average dimensions of the nine closest houses to The Lawrence site - 241, 235, 231, 227, 221, 217, 215 and 188 Maple Street, and 172 Carlton Street - and what is allowed “by right” pursuant to N-2R requirements on the area variance applicant’s 26,000-square-foot parcel, as reflected in the following table:

**9 Closest Homes Proposed on Maple N-2R By Right**

<b>Number of Units:</b>	17 existing units	68 units proposed	21 units max.
<b>Number of stories:</b>	1.91-story (ave.)	4-story proposed	3-story max.
<b>Lot width:</b>	45.7’ ave./85’ max.	260’ proposed	4 x 60’-wide lots
<b>Gross Fl. Area:</b>	2,271 sf (ave.)	90,000 sf (est.)	4 x 12,600 sf bldgs.
	[20,442 sf (total)]	[90,000 sf (total)]	[50,400 sf total]
<b>Density:</b>	1 unit/2,345 sf	1 unit/382 sf	1 unit/1,250 sf max.

(f) To demonstrate the stark contrast between The Lawrence respondents’ proposed apartment project, and the existing character, lot size, density, scale and style of nearby homes in the Fruit Belt neighborhood, on June 15, 2020, petitioners’ counsel,

Arthur J. Giacalone, emailed to two officials in the City of Buffalo's Office of Strategic Planning, John Fell and Nadine Marrero, six photographs depicting the nine closest residences to The Lawrence site - 241, 235, 231, 227, 221, 217, 215 and 188 Maple Street, and 172 Carlton Street - for submission to the ZBA as part of the June 17, 2020 virtual public hearing record.

(g) New York's highest court, in *Ifrac v. Utschig* -a leading area variance case involving lot size and width - holds that, "The area variances – of at least 60% - are undisputably substantial." Accordingly, the applicant requested five "undisputably substantial" variances for The Lawrence project:

- 884% variance from N-2R's minimum side yard requirement (6' rather than 52').
- 333% variance from N-2R's maximum lot width (260' rather than 60').
- 223% variance from N-2R's maximum density allowed (68 units/acre rather than 21).
- 67% variance from N-2R's minimum rear setback requirement (5' rather than 15').
- 67% variance from N-2E's maximum stories (5 stories rather than 3).

(h) The applicant admits in its area variance application that its difficulty – the need for a specific density in order to make what it considers an acceptable profit – is self-created.

(i) The potential for a significant adverse change to the existing neighborhood character, the potential displacement of current residents and property owners as a result of the potential gentrifying impacts of this market-rate development, and the creation of a material conflict with Buffalo's zoning ordinance and comprehensive plan, trigger, individually and jointly, the need for a Positive Declaration and preparation of a Draft EIS.

(j) The public notices for the public hearing were deficient, failing to fairly apprise the public of the location of the project, or of the quantity and substantiality of the

variances required for this project. Neither the mailed notice sent to property owners in close proximity to The Lawrence site (including petitioner Gidney), nor the notice published in the Buffalo News, mentions Maple Street. The mailed notice lists the “Project Location” as “983 Michigan Avenue,” and the published notice states, “Erect building at 983 Michigan (N-2E/N2R).”

(k) The “market rate” rentals for the proposed 133 units, and the predominance of efficiency and one-bedroom units, will make the proposed apartment facility inaccessible to many of the existing residents of the Fruit Belt neighborhood.

(l) Minor tweaks to the massing of the Maple Street façade – such as the two 25-foot wide by 20-foot deep recessed patios – are a far cry from the UDO’s definition of “yard,” which requires open space extending to the parcel’s rear yard line, and do little, if anything, to meaningfully mitigate the 46-foot deficiency in total side yards.

(m) The proposed design changes to the Maple Street façade, and the developer’s intention “to create a façade along Maple which *mimics* separate buildings,” fail to tangibly mitigate the adverse impacts to the neighborhood’s traditional residential character, scale, and density. The UDO does not seek to “mimic” smaller buildings and lot sizes in the N-2R zone. The UDO’s intent is to limit construction to moderate scale structures on lots of moderate width, and to prohibit construction of a large, out-of-scale building on a large, out-of-scale lot.

(n) The potential detriment to the Fruit Belt neighborhood far exceeds the benefit to the applicant, that is, a desire to make a profit after overpaying for 15 parcels, given the adverse impacts the variances would have on the character of the neighborhood, its incompatible density, scale, and architectural style, the substantiality of its numerous

variances, and the self-created nature of the applicant's purported economic difficulty.

66. Upon information and belief, the staff of the City of Buffalo's Office of Strategic Planning, as is customary, submitted to respondent ZBA, prior to the aforementioned June 17, 2020 public hearing, a written report analyzing The Lawrence project's pending area variance application (hereinafter, "ZBA Staff Report").

67. The following excerpts from the aforementioned ZBA Staff Report acknowledge, in response to the question whether an undesirable change will be produced in the character of the neighborhood, or a detriment to nearby properties will be created by the granting of the area variance, the likelihood that many of the requested variances on Maple Street would individually result in an adverse impact on the neighborhood's character, and create a detriment to nearby properties:

(a) In excess of residential density. ... The proposal includes 68 units on the Maple St. portion of the site, which is more than the approximately 21 units that would be permitted. Though there are several buildings of significant size in the nearby medical campus, the development of an apartment building with a significant number of units would alter the character along the traditionally small-scale residential block of Maple St. Therefore, the requested variance may produce an undesirable change in neighborhood character and a detriment to nearby properties.

(b) In excess of lot width. The proposed lot width along Michigan is 181.5 feet and along Maple is 260 feet, with maximum lot widths of 120 feet and 60 feet, respectively. ... [T]he proposed lot width along Maple St., across from traditional residential development, may produce an undesirable change in neighborhood character and a detriment to nearby properties since it would permit a building of significant width, which would be out of scale with the existing small-scale residential context. However, it is noted that the proposal changes the massing along Maple St. with the intention of reducing the impact of the size/width of the building.

(c) & (d) In excess of building and impervious coverage. The proposed building coverage is 92% and impervious coverage is 85%, higher than the maximum building coverage of 70% and maximum impervious coverage of 80%, ... [They] may impact the neighborhood character along the [sic] Maple St., where the intensity of development is much lower. Therefore, the proposed variances may

produce an undesirable change in neighborhood character and a detriment to nearby properties.

...

(g) In excess of permitted height. ... Though the building height along Maple St. is only one story (four feet) over the height limit, due to the small-scale residential context along Maple, the proposed variance may contribute to an undesirable change in neighborhood character and a detriment to nearby properties.

68. The aforementioned ZBA Staff Report, referencing the existing small-scaled residential development on Maple Street, also acknowledges that each of the following requested variances “may be considered a substantial variance”:

- the requested increase in N-2R’s residential density requirement from approximately 21 units to 68 units (“over three times the approximately 21 units permitted”);
- the requested increase in N-2R’s maximum lot width from 60’ to 260’ (“which would be out of scale with the existing small-scale residential context”);
- the requested increase in maximum building coverage from 70% to 92%;
- the requested increase in maximum impervious coverage from 80% to 85%;
- the requested decrease in N-2R’s minimum total side yards requirement from 52’ to 6’ (“[s]ince Maple is a residential street with lower development intensity”); and,
- the increase in N-2R’s maximum building height from 3 stories and 40’ to 4 stories and 44’ (“due to the small-scale residential context along Maple”).

69. Additionally, the aforementioned ZBA Staff Report advises respondent ZBA that each one of the variances requested by The Lawrence respondents “may be considered self-created.”

70. Upon information and belief, in addition to providing respondent ZBA members the aforementioned ZBA Staff Report, the staff of the Office of Strategic

Planning also prepared and provided respondent ZBA with a proposed SEQRA Notice of Determination “Non Significance – Amended Negative Declaration” (hereinafter, “Draft ZBA Amended Negative Declaration”).

71. Despite the analysis in the ZBA Staff Report which concludes that the vast majority of the requested variances on Maple Street “may produce an undesirable change in neighborhood character and a detriment to nearby properties” due to “the small-scale residential context along Maple St.,” and which characterizes virtually all of the variances in the N-2R zone as “substantial,” the Draft ZBA Amended Negative Declaration makes the following illogical and insufficiently supported assertions:

(a) Regarding existing neighborhood character. According to the Amended Negative Declaration, the proposed action “is overall consistent with the existing community and neighborhood character,” and the proposed use “is generally consistent with the pattern of development in the project area.”

(b) Regarding conflict with community plans or goals. Although conceding that “the requested variances and proposed design are inconsistent with community plans, including the zoning code,” the Amended Negative Declaration concludes, “This is however a minor adverse environmental impact and not a significant adverse environmental impact.”

72. Following the close of respondent ZBA’s June 17, 2020 public hearing on The Lawrence variance application, members of respondent ZBA approved the aforementioned Draft ZBA Amended Negative Declaration, thereby ending the ZBA’s SEQRA environmental review process for The Lawrence project.

73. Upon information and belief, despite the fact that the 5-page Draft ZBA

Amended Negative Declaration had been prepared by the OSP staff, and not by the ZBA members, the Amended Negative Declaration was approved without any requested changes by respondent ZBA.

74. Following the close of respondent ZBA’s June 17, 2020 public hearing on The Lawrence variance application, respondent ZBA, by a vote of 4 ayes (by Chair James A. Lewis, Thomas Dearing, Janice McKinnie, and 1 nay (by Bernice Radle), approved each and every variance requested by The Lawrence respondents, without limiting the size of any of the variances, or imposing any conditions to its approval in order to preserve and protect the character of the neighborhood and the health, safety and welfare of the community.

75. Upon information and belief, and as reported in the June 23, 2020 print version of *The Buffalo News*, under the headline, “*Fruit Belt group’s support pushes Lawrence project to next stage*,” the chairman of the ZBA so enthusiastically stated, “I can’t believe we had this many people that were in favor of it, especially the Fruit Belt coalition,” that in the words of the *Buffalo News* article:

”  
City Planning Director Nadine Marrero cautioned board members not to be swayed by public opinion – which is not a factor the board may consider – but to focus on balancing the benefit to the applicant against the impacts on the health, safety and welfare of the community.

...

76. Upon information and belief, on June 17, 2020, at the time respondent ZBA voted to approve the requested variances, it did not have before it the “written findings of fact” mandated by UDO/Green Code Section 11.3.5(E)(2)(a); furthermore, to the extent such written findings of fact now exist, such findings were prepared, subsequent to the ZBA’s June 17, 2020 vote, by a member or members of the Office of Strategic



Planning's staff, and not by respondent ZBA.

### **C. Major site plan review process**

77. As a result of The Lawrence respondents' submission of three versions of the project, respondent Planning Board has conducted three public hearings concerning the project's major site plan application: in-person hearings on October 21, 2019 and January 27, 2020, and, as a result of the Covid-19 pandemic, a virtual public hearing on June 29, 2020.

78. During respondent Planning Board's January 27, 2020 hearing on The Lawrence site plan application, the board's Vice Chair, Cynthia Schwartz, told the applicant's counsel and her fellow Planning Board members that she was "concerned about" the Maple street portion of the project, and expressed the following "generic statement":

We understand the Green Code is not the tablet from the mount, but I am concerned when things come to us needing 8, 9, 10 major variances, not just 2 or 3 minor variances.

79. The Planning Board chairman advised members of the public at each public hearing that they were limited to three minutes each to testify and provide evidence in opposition to the site plan application.

80. Members of the public submitted written comments to the OSP staff for entry into the record at the June 29, 2020 public hearing, and spoke during the virtual hearing, raising a variety of issues in opposition to the proposed major site plan, including, among others, the following:

A. Three minutes is an inadequate amount of time to fairly address the issues raised by the major site plan review application for The Lawrence.

B. Respondent Planning Board is obligated to base its decision regarding the proposed site plan on the “Approval Standards” found at UDO Section 11.3.7(G), and is not compelled by law to accept the dimensions and deviations from the UDO reflected in the ZBA variances granted June 17, 2020 if such variances are inconsistent with Section 11.3.7(G)’s approval standards.

C. The project is not consistent with all applicable standards of the UDO/Green Code, as required by the UDO’s first approval standard:

(1) The Lawrence site plan is substantially inconsistent with the requirements and intent of the N-2R district, that is, construction of a moderate size residential building (a maximum of 3-stories high), on a moderate size lot (no wider than 60’), and separated by side yards (at least 3-feet wide), with a moderate “Residential density” maximum of one unit for each 1,250 square feet of lot area.

(2) The ZBA’s approval of five “undisputably substantial” variances, along with several other significant deviations from the UDO’s dimensional restrictions, is not only inconsistent with N-2R, it amounts, in effect, to a rewriting of the UDO requirements and an unlawful intrusion into the Common Council’s legislative authority.

D. The N-2R zoning district standards require the actual construction of moderate-scaled buildings on moderately-wide lots, not merely an attempt, in the words of The Lawrence respondents’ attorney, to “mimic” separate buildings, or “mimic” the side yard requirements.

E. The inclusion of two recesses or patios, approximately 25 feet wide and 20 feet deep, in the Maple Street façade of an apartment building that is approximately 250

feet wide and 80 feet deep, is a far cry from the UDO's requirement of "side yards," which are defined in the UDO/Green Code as open and unobstructed spaces extending from the front yard line to the rear yard line.

F. The Lawrence project, as represented in its proposed site plan, not only more than triples the UDO's maximum density on Maple Street, it extends more than four times the permissible lot width, and it provides less than 12% of the mandated side yard total.

G. The project is not consistent with the spirit and intent of the Comprehensive Plan, as required by the UDO's second approval standard:

(1) The UDO/Green Code, which went into effect in 2017, is the codification of the City's comprehensive plan, and the comprehensive plan's primary implementation tool.

(2) The 2006 document, "The Queen City in the 21<sup>st</sup> Century," the City's "comprehensive plan," not only states that it is intended to be "a general guide" and "adaptable," it acknowledges that the implementation of the comprehensive plan will require completion of a number of more specific and detailed plans, including "a revised Zoning Ordinance."

(3) The UDO's "purpose" clause expressly states that it is "adopted in accordance with a comprehensive plan..."

(4) An on-line statement by Buffalo's Office of Strategic Planning, issued at the time the October 2015 draft of the UDO/Green Code was made public, specifically states that the UDO "codifies the land use policies of the Comprehensive Plan" and "implements the community's vision for the

development of the city.”

(5) The Lawrence site plan cannot, logically, be substantially inconsistent with the UDO/Green Code standards for the N-2R zone, and, simultaneously be consistent with the spirit and intent of the Comprehensive Plan.

H. The proposed apartment building’s site plan contradicts the decision of Buffalo’s Common Council to limit the “transition” area between the medical campus and Fruit Belt’s residential street to the narrow N-2E zoning district on the east side of Michigan Avenue. Had the City’s legislative body wished to extend the “transition” from the high-density, commercial medical campus beyond Michigan Avenue and onto Maple Street, it could have and would have taken that step, and the Planning Board lacks the authority to permit such an encroachment.

I. The Lawrence project is neither “sited and designed so as to be harmonious with the surrounding area,” nor representative of a “building design that responds to the surrounding neighborhood,” and, as a result, conflicts with the UDO’s third and fourth approval standards:

(1) The data available at the City’s on-line Property Information website demonstrate numerically, and the photographs of the nine closest residences to the Lawrence site, taken by petitioners’ counsel and submitted prior to the June 29, 2020 virtual public hearing for submission to respondent ZBA, show visually, the marked disharmony between The Lawrence project and the residential block upon which the majority of the proposed apartment complex would be located, that is, the N-2R zoned, small-scale, low-density Maple Street residential neighborhood.

(2) There are nine (9) existing residences on or adjoining Maple Street, starting directly across the street from The Lawrence site, and progressing south to the corner of Maple and Carlton Street. The nine existing houses contain a total of 17 residential units, compared to the 68 units proposed for the nine parcels assembled by the applicant on Maple Street.

(3) The average height of the 9 existing houses is 1.91 stories, with none of the houses exceeding two-stories. The applicant plans a 4-story structure.

(4) The average lot width of the nine existing houses is 45.7 feet (with none wider than 85'). The Lawrence would extend over a 260-foot lot.

(5) The nine existing houses have an average gross floor area (GFA) of 2,271 square feet. The proposed Maple Street portion of The Lawrence would contain an estimated 90,000 square feet GFA.

(6) The nine existing houses have a combined density of 1 unit per 2,345 square feet of lot area. The applicant plans to construct 1 unit per 382 square feet of lot area.

J. Given the likelihood that the proposed action's construction and operation would have a significant adverse impact on the existing neighborhood character, and would create a material conflict with the Comprehensive Plan and UDO/Green Code, respondent Planning Board must issue a Positive Declaration, and require The Lawrence respondents to prepare a Draft Environmental Impact Statement.

81. The public notices for the Planning Board's public hearings for The Lawrence project were deficient, failing to fairly apprise the public of the location of the project. Neither the mailed notice sent to property owners in close proximity to The

Lawrence site (including petitioner Gidney), nor the notice published in the Buffalo News, mentions Maple Street, but only references 983 Michigan Avenue and construction of a multifamily residential structure.

82. Upon information and belief, the staff of the City of Buffalo’s Office of Strategic Planning, as is customary, submitted to respondent Planning Board, prior to the aforementioned June 29, 2020 public hearing, a written report analyzing The Lawrence project’s pending major site plan review application (hereinafter, “Planning Board Staff Report”).

83. The aforementioned Planning Board Staff Report, while purportedly assessing the compliance of The Lawrence project with the UDO/Green Code’s approval standards, contains equivocations, contradictions, and misleading assertions, as demonstrated by the following partial list of examples:

A. Concerning compliance with the standards of the UDO. The report states: “The project *seems* to comply with the applicable standards of the UDO... However, it is noted that seven [categories] of variances were required and granted by the Zoning Board of Appeals at the June 17, 2020 ZBA meeting.” [Emphasis added.] By definition, a project that requires a total of 13 [not merely seven, as claimed] variances, including more than a half-dozen major deviations from the UDO, reflects a drastic departure from, not compliance with, applicable UDO standards.

B. Concerning consistency with the spirit and intent of the comprehensive plan. Without acknowledging the UDO’s role as the primary tool for incorporating and implementing the city’s comprehensive plan’s goals, the report misleadingly cherry-picks one section from the comprehensive plan’s 134-page document when claiming the

project's consistency with the comprehensive plan: "The project ... is consistent with Buffalo's Comprehensive Plan, specifically with respect to Sec. 2.4.5, Rebuilding Neighborhoods, by working to link housing development with economic development." Even if one were to assume, for the sake of argument, that The Lawrence project is consistent with Section 2.4.5, the project's dramatic departure from the UDO requirements in an N-2R zone undermines any claim of consistency with the spirit and intent of the comprehensive plan.

C. Concerning harmony with surrounding area, responsiveness to surrounding neighborhood. The following assertions in the report reflect the failure of the applicant to adequately respond to the character of the Fruit Belt's traditional, small-scale residential neighborhood on Maple Street and beyond:

(1) "The siting along Michigan Avenue seems appropriate due to the large-scale buildings of the medical campus. However, the siting along Maple Street is not as consistent due to the smaller scale residential fabric across the street."

(2) "Though the proposed building height of five-stories along Michigan Avenue seems to fit in with the scale of the medical campus (opposite the site), the four-story (44-foot) portion along Maple St. may be out of context with the character of the residential neighborhood."

(3) "The project includes a design that somewhat responds to the surrounding neighborhood in terms of material... The applicant attempts to better relate the building to the surrounding architecture by using the material changes to break up the façade."

(4) "Though the size and style of the proposed building are inconsistent with buildings in the Fruit Belt neighborhood, the recent modification to include two

(approximately 25-foot by 20-foot) recesses along Maple St. will help break up the width of the building and are intended to mimic the massing of multiple smaller residential developments.”

D. Concerning whether the project is located and designed to meet its anticipated travel demand. The report describes the parking spaces that will be part of the project, but concedes that, “The proposal may increase the demand for nearby on-street parking, particularly to accommodate visitors.”

E. Concerning fair housing, inclusionary, and equal opportunity initiatives. The report merely states, “The applicant is required to comply with all fair housing, anti-discrimination and equal opportunity laws at the federal, state and local levels.” It does not address the fact that, with the exception of references during the June 29, 2020 virtual public hearing by The Lawrence respondents’ counsel to recent inquiries by the applicant into the availability of financial assistance if affordable units were built into the project, The Lawrence has consistently been touted by the developer as a “market rate” apartment development focused on providing housing for medical campus employees, not housing meant to attract low-income tenants from the predominantly African American Fruit Belt neighborhood.

84. In addition to providing respondent Planning Board members the aforementioned Planning Board Staff Report, the staff of the Office of Strategic Planning also prepared and provided respondent Planning Board with a five-page proposed SEQRA Notice of Determination “Non Significance – Negative Declaration” (hereinafter, “Draft Planning Board Negative Declaration”).

85. Despite a statement in the Draft Planning Board Negative Declaration that



“multiple area variances” and certain aspects of the project design “were not in compliance with applicable zoning standards in the Unified Development Ordinance,” and the repeated references in the Planning Board Staff Report to the inconsistencies between the proposed project’s size, scale and design, and the smaller-scale residential fabric and character of Maple Street, the Draft Planning Board Negative Declaration concludes that the proposed action “would not have any significant adverse environmental impacts,” and that a Draft Environmental Impact Statement would not be required.

86. The Draft Planning Board Negative Declaration does not include a description of the small-scale and low-density character and nature of the Maple Street neighborhood, and fails to acknowledge the conflict and inconsistencies between The Lawrence project and the Maple Street neighborhood which were referenced multiple times in the Planning Board Staff Report.

87. The Draft Planning Board Negative Declaration relies on the reduction in the number of residential units on Maple Street from 76 to 68 units to support its conclusions that the project would not result in a significant adverse impact on existing neighborhood character, and would not create a material conflict with the city’s current plans or goals, but fails to acknowledge that the proposed 68 units is still 326% larger than the 20.8-unit maximum called for by the UDO/Green Code.

88. The Draft Planning Board Negative Declaration relies on the existence of a skilled nursing facility to the north of the proposed site (and, to the north of High Street) known as “HighPointe on Michigan,” to support its conclusion that the project would not result in a significant adverse impact on existing neighborhood character, and would not

create a material conflict with the city's current plans or goals, but fails to provide the following facts:

A. HighPointe was constructed, according to the City of Buffalo's Property Information, in 2012, several years prior to the adoption of the UDO/Green Code, and represents a building size and scale the Common Council chose not to allow in Maple Street's N-2R zoning district.

B. The UDO/Green Code places the site of the HighPointe facility in the D-M Medical Campus zone, not in N-2R.

C. While HighPointe may reach four-stories in height, the portion of its 4-story façade that is built within several feet of Maple Street's public sidewalk is approximately 90 feet in length, in sharp contrast to the 250-foot length of The Lawrence's four-story façade proposed for construction several feet from Maple Street's sidewalk.

89. Immediately following the close of respondent Planning Board's virtual June 29, 2020 public hearing on The Lawrence site plan application, members of respondent Planning Board approved the aforementioned Negative Declaration, ending the Planning Board's SEQRA environmental review process for The Lawrence project, without any discussion of the document's content, and without any changes to the draft which had been prepared by the Office of Strategic Planning's staff.

90. Following the close of respondent Planning Board's June 29, 2020 public hearing on The Lawrence variance application, respondent Planning Board approved the requested site plan without any modifications or conditions, by a vote of 4 ayes (by Chair James Morrell, Vice Chair Cynthia Schwartz, Martha Lamparelli, and Michael Rembis), 1 nay (by Andrew Malcom), and 1 abstention (by Horace Gioia, who, upon information

and belief, is a partner in the law firm representing The Lawrence respondents).

91. As reported in the June 30, 2020 print version of *The Buffalo News*, under the headline, “*Neighbor’s support cited by Planning Board as it Oks Fruit Belt Housing*,” Planning Board Vice Chair, Cynthia Schwartz, abandoned the concerns she had raised at the January 27, 2020 public hearing regarding Maple Street and the multitude of variances required for the project, and expressed the following sentiment: “From what we’re seeing and hearing, there’s strong support, and I am willing to listen to those residents.”

92. The motion to approve the site plan for The Lawrence project was made by Planning Board member Martha Lamparelli, who, in making the motion, expressly referred to Cynthia Schwartz’s comment regarding the strong support for the project from residents, and enthusiastically embraced what she referred to as “quite overwhelming support by those who would be affected the most;” at no time did ZBA member Lamparelli make reference to the UDO’s approval standards for a major site plan review.

93. Upon information and belief, on June 29, 2020, at the time respondent Planning Board voted to approve the requested site plan, said board did not have before it the “written findings of fact” on the criteria listed in the UDO’s approval standards mandated by UDO/Green Code Section 11.3.7(G); furthermore, to the extent such written findings of fact now exist, such findings were prepared, subsequent to the Planning Board’s June 29, 2020 vote, by a member or members of the Office of Strategic Planning’s staff, and not by respondent Planning Board.

**REGARDING PETITIONERS' FIRST CLAIM -  
Respondent ZBA has disregarded the “narrowly circumscribed” role of variances,  
and has encroached upon the legislative powers of Buffalo’s Common Council**

94. Petitioners repeat and reallege each and every allegation contained in paragraphs 1 through 93 of this petition, with the same force and effect as if set forth here at length.

95. By granting The Lawrence respondents seven categories of area variances (totaling thirteen separate variances) from the requirements of the City of Buffalo’s UDO/Green Code, many of which are substantial in nature, respondent ZBA has exceeded its authority under Section 11.3.5(A) of the Unified Development Ordinance to utilize the variance process as a “narrowly circumscribed means by which relief may be granted from unforeseen applications of [the UDO] that create practical difficulties or particular hardships.” [UDO Section 11.3.5(A).]

96. By granting The Lawrence respondents seven categories of area variances (totaling thirteen separate variances) from the requirements of the City of Buffalo’s UDO/Green Code, many of which are substantial in nature, respondent ZBA has used the variance process to destroy the purposes the UDO/Green Code intended to achieve: (a) when it created the N-2E (Mixed-Use Edge) zone to “address( ) transitional areas, typically at the edge of more intense mixed-use centers, in Buffalo’s most compact neighborhoods”; (b) placed the six parcels owned by respondent Michigan-Redev on the east side of Michigan Avenue in the N-2E zone; (c) created the N-2R (Residential) zone to “address( ) residential areas adjoining more intensive mixed-use centers, generally defined by compact residential blocks, which occasionally include small mixed-use buildings”; and (d) placed the nine parcels owned by respondent Michigan-Redev on the

west side of Maple Street in the N-2R zone. [UDO §§ 3.1.5(a), 3.1.6(A); UDO's zoning map.]

97. By allowing a building of the size, scale, density, and design of The Lawrence to encroach upon Maple Street and the traditional, small-scale, moderately dense Fruit Belt neighborhood, respondent ZBA has introduced such an incongruity into the UDO/Green Code that the thirteen variances granted to The Lawrence respondents will seriously disarrange the UDO's zoning pattern, to the detriment of both the adjoining residential neighborhood and the integrity of the zoning process. [Van Deusen, *supra*; Held, *supra*.]

98. By wielding an axe to the requirements and intent of the UDO, rather than applying a scalpel in a narrowly circumscribed fashion, respondent ZBA has abused its jurisdiction and unlawfully invaded the legislative process and the legislative authority of the City of Buffalo Common Council.

99. In light of the above, respondent Zoning Board of Appeals of the City of Buffalo has proceeded in excess of its jurisdiction, has made a determination affected by an error of law, and/or has acted in an arbitrary and capricious manner or in abuse of its discretion.

100. Petitioners have no adequate remedy at law.

**REGARDING PETITIONERS' SECOND CLAIM -  
Respondent ZBA has improperly treated the zoning variance process as a Gallop  
poll, allowing public opinion to determine its decision to grant the variances**

101. Petitioners repeat and reallege each and every allegation contained in paragraphs 1 through 100 of this petition, with the same force and effect as if set forth here at length.

102. Respondent ZBA’s decision to grant The Lawrence respondents seven categories of area variances (totaling thirteen separate variances) was not based on a meaningful consideration of the criteria statutorily mandated in the area variance “balancing test” for each of the requested variances, or on the intent of the City’s comprehensive plan as codified in the UDO/Green Code, but as a response to the generalized expressions of support by neighborhood residents and a group called the “Fruit Belt Coalition.”

103. As described by veteran business reporter Jonathan D. Epstein, in his June 23, 2020 *Buffalo News* article, headlined, “*Fruit Belt group’s support pushes Lawrence project to next stage,*” the Chair of respondent ZBA, Rev. James Lewis, was so impressed by the number of people who signed a petition or called in to the June 17, 2020 virtual public hearing expressing support for The Lawrence project, that the head of the City’s planning department felt it necessary to warn the ZBA members that they could not properly base their decision on generalized public sentiment:

City Planning Director Nadine Marrero cautioned board members not to be swayed by public opinion – which is not a factor the board may consider – but to focus on balancing the benefit to the applicant against the impacts on the health, safety and welfare of the community.

[See paragraph “75” *supra*.]

104. Upon information and belief, the purported neighbors expressing their support for the project did not provide respondent ZBA with substantive evidence regarding the specific criteria set forth in the UDO’s “balancing test,” such as the substantiality of the requested variances, impact on the neighborhood’s existing character, or the self-created nature of the applicant’s hardship or difficulties.

105. Establishment of the standards set forth in the N-2E and N-2R zones, and

enactment of the UDO, following years of study, review, and public debate, reflect the Common Council's deliberate consideration of the alternatives for what is now the proposed site for The Lawrence, and what the City's legislative body determined would best benefit the community as a whole, and such determination may not be set aside by respondent ZBA "because of the whims of either an articulate minority or even majority of the community." [Udell v. Haas, 21 NY2d 463, 469 (1968).]

106. Given the absence of support in the record for respondent ZBA's determination, the grant of each and every variance requested by the applicant was impermissibly based on what respondent ZBA perceived as generalized community support for the project, converting the area variance process into "nothing more than just a Gallop poll." [Id; also see, Young Development, Inc. v. Town of West Seneca, 91 AD3d 1350 (AD4 2012).]

107. In light of the above, respondent Zoning Board of Appeals of the City of Buffalo has proceeded in excess of its jurisdiction, has made a determination affected by an error of law, and/or has acted in an arbitrary and capricious manner or in abuse of its discretion.

108. Petitioners have no adequate remedy at law.

**REGARDING PETITIONERS' THIRD CLAIM -  
Respondent ZBA failed to properly conduct the "balancing test" mandated  
for area variance applications**

109. Petitioners repeat and reallege each and every allegation contained in paragraphs 1 through 108 of this petition, with the same force and effect as if set forth here at length.

110. Respondent ZBA has not met its obligation to engage in the state-mandated “balancing test” for each area variance required for the proposed project, as set forth at GCL Section 81-b(4)(b) and Section 11.3.5(E)(2) of the UDO, weighing the benefit to the applicant against the detriment to the neighborhood or community, and meaningfully considering the relevant statutory factors. [See, Sasso v. Osgood, 86 NY2d 374, 382-383 (1995); Coco v. City of Rochester ZBA, 236 AD2d 826 (AD4 1997)]; Mengisopolous v. Bd. of Zoning Appeals, 168 AD3d 943, 945 (AD2 2019).

111. The only rational conclusion respondent ZBA could make if it meaningfully and objectively considers the balancing test criteria is that the detriment to the neighborhood vastly outweighs the applicant’s desire to increase its profits.

112. Applying the standard used by our state’s highest court, in Ifrah, supra, at least five of the variances are “indisputably substantial”: (a) 884% variance from N-2R’s minimum side yard requirement (6’ rather than 52’); (b) 333% variance from N-2R’s maximum lot width (260’ rather than 60’); (c) 223% variance from N-2R’s maximum density allowed (68 units/acre rather than 21); (d) 67% variance from N-2R’s minimum rear setback requirement (5’ rather than 15’); and (e) 67% variance from N-2E’s maximum stories (5 stories rather than 3).

113. The applicant admits in its area variance application that its difficulty – the need for a specific density, that is, a large number of units, in order to make what it considers an acceptable profit – is self-created.

114. As addressed above at paragraph “22(B)”, a difficulty is "self-created" for variance purposes where the owner was aware, or should have been aware, of the zoning restrictions from which he/she/it seeks relief at the time the property was acquired.



115. Not only did respondent Michigan-Redev continue purchasing parcels included in its 15-parcel assemblage subsequent to the Common Council's adoption of the UDO/Green Code, the UDO allows The Lawrence respondents to construct "by right" a greater number of units at the project's site than under the preceding zoning code, an estimated 57 units under the UDO compared with an estimated 27 units under its predecessor. [See paragraphs "49" through "52" above.]

116. Despite a pro-development philosophy at the City's Office of Strategic Planning, its Staff Report to respondent ZBA acknowledges the potential that, due to "the small-scale residential context along Maple St.," many of the requested variances on Maple Street - including in excess of residential density, in excess of lot width, in excess of building coverage, in excess of impervious coverage, and in excess of permitted height - would individually result in an adverse impact on the neighborhood's character, and would create a detriment to nearby properties. [See paragraph "68" above.]

117. The ZBA Staff Report analysis is consistent with opinions rendered by New York's highest court which have consistently embraced lot size, lot width, density, and the scale and style of nearby homes as relevant factors when considering a proposed project's impacts on a neighborhood's character. [See, e.g., Pecoraro, *supra*, 2 NY3d at 614-615; Ifrah v. Utschig, 98 NY2d 304, 308 (2002).]

118. Given the large number and substantiality of required variances, and the proposed project's stark contrast with the UDO's vision for the N-2R zone, The Lawrence respondents should have, but did not, pursue the only feasible method through which it might accomplish its goal of greater profitability: seeking a rezoning of its Maple Street parcels from the Common Council.

119 As addressed in greater detail at paragraphs “54” and “55” above, The Lawrence respondents are not deprived by the UDO of the reasonable use and enjoyment of the fifteen parcels, and could, by right, construct four 4-unit buildings and a five-unit building, with a total of 21 units, on its Maple Street lots, and one 24-unit building and one 12-unit building on its Michigan Avenue parcels.

120. In light of its failure to properly and meaningfully engage in the mandated area variance “balancing test,” and the absence of substantial evidence in the record to support its approval of the variance application, respondent Zoning Board of Appeals of the City of Buffalo has made a determination affected by an error of law, and/or has acted in an arbitrary and capricious manner or in abuse of its discretion.

121. Petitioners have no adequate remedy at law.

**REGARDING PETITIONERS’ FOURTH CLAIM -  
Respondent ZBA failed to make the written findings of fact required by UDO  
Section 11.3.5(E)(2)(a) prior to its approval of the requested variances.**

122. Petitioners repeat and reallege each and every allegation contained in paragraphs 1 through 121 of this petition, with the same force and effect as if set forth here at length.

123. On June 17, 2020, at the time respondent ZBA voted to approve the requested variances, it had not made, and did not have before it, the “written findings of fact” mandated by UDO/Green Code Section 11.3.5(E)(2)(a).

124. The written findings requirement is a measure intended to ensure that, prior to rendering its determination on the requested variances, respondent ZBA has engaged in a meaningful review of the applicable criteria.

125. Upon information and belief, to the extent such written findings of fact now

exist, such findings were prepared, subsequent to the ZBA's June 17, 2020 vote, not by respondent ZBA, but by the Office of Strategic Planning's staff.

126. In light of the above, respondent Zoning Board of Appeals of the City of Buffalo has made a determination made in violation of lawful procedure, affected by an error of law, and/or has acted in an arbitrary and capricious manner or in abuse of its discretion.

127. Petitioners have no adequate remedy at law.

**REGARDING PETITIONERS' FIFTH CLAIM -  
Respondent ZBA failed to take a "hard look" at potential areas of environmental concern, and disregarded SEQRA's low threshold for requiring a Draft EIS**

128. Petitioners repeat and reallege each and every allegation contained in paragraphs 1 through 127 of this petition, with the same force and effect as if set forth here at length.

129. The primary responsibility of a SEQRA lead agency, such as respondent ZBA, is to issue a Determination of Significance, determining whether or not a proposed action "may include the potential for at least one significant adverse environmental impact," and if such potential exists, issuing a Positive Declaration and requiring the preparation of a Draft Environmental Impact Statement [DEIS]." 6 NYCRR 617.7(a).

130. When determining whether the proposed action – here, the construction and operation of The Lawrence project – "may" have a significant adverse impact on the environment, the lead agency must compare "the impacts that may be reasonably expected to result from the proposed action" against a list of "criteria for determining significance" listed in the SEQRA regulations, which include, of particular importance to

this proceeding, the following criteria “considered indicators of significant adverse impacts on the environment”:

(a) “the creation of a material conflict with a community’s current plans or goals as officially approved or adopted”; [6 NYCRR 617.7(c)(1)(iv)] and,

(b) the impairment of the character or quality of existing community or neighborhood character.” [6 NYCRR 617.7(c)(1)(v)]

131. Despite the analysis in the ZBA Staff Report which concludes that the vast majority of the requested variances on Maple Street “may produce an undesirable change in neighborhood character and a detriment to nearby properties” due to “the small-scale residential context along Maple St.,” and an acknowledgement in the Draft Amended Negative Declaration that “the requested area variances and certain aspects of project design are not in compliance with applicable zoning standards and the Unified Development Ordinance,” respondent ZBA failed to require preparation of a DEIS, and, instead, issued an Amended Negative Declaration, ending its environmental review of The Lawrence project.

132. By issuing its Amended Negative Declaration on June 17, 2020, respondent ZBA has disregarded its obligation to take a “hard look” at potential areas of environmental concern, and SEQRA’s relatively “low threshold” for requiring a project sponsor to prepare a DEIS. [See paragraph “38” above.]

133. To paraphrase the Appellate Division, Fourth Department, in its pivotal environmental review case, [H.O.M.E.S. vs. NYSUDC, 69 AD2d 222, 418 NYS2d 827, 831 (AD4 1979)]: Like the proverbial ostrich, respondent ZBA has incredibly put out of sight and mind the clear contrast between the scale, height, density and style of The

Lawrence proposal, and both the requirements of the N-2R zone, and the small-scale, moderate density, traditional residential character that exists along Maple Street and throughout the broader Fruit Belt neighborhood.

134. In light of the above, respondent Zoning Board of Appeals of the City of Buffalo has rendered a determination made in violation of lawful procedure, affected by an error of law, and/or has acted in an arbitrary and capricious manner or in abuse of its discretion.

135. Petitioners have no adequate remedy at law.

**REGARDING PETITIONERS' SIXTH CLAIM -  
Respondent Planning Board has improperly treated the site plan review process as a  
Gallop poll, allowing public opinion to determine its decision**

136. Petitioners repeat and reallege each and every allegation contained in paragraphs 1 through 135 of this petition, with the same force and effect as if set forth here at length.

137. Respondent Planning Board's decision to approve the major site plan application for The Lawrence project was not based on a meaningful consideration of the "Approval Standards" mandated by UDO Section 11.3.7(G), but as a response to the generalized expressions of support by neighborhood residents and a group called the "Fruit Belt Coalition."

138. As Jonathan D. Epstein, a veteran business reporter, wrote in his June 30, 2020 *Buffalo News* article, under the headline, "*Neighbor's support cited by Planning Board as it Oks Fruit Belt Housing*":

A controversial project to construct a 133-unit apartment building on the edge of the Fruit Belt neighborhood overcame its final hurdle Monday, as the Buffalo Planning Board cited support from Maple Street neighbors in granting final approval despite resistance from Green Code advocates.

139. Mr. Epstein's report also accurately quotes Planning Board Vice Chair, Cynthia Schwartz, who expressed the following sentiment during the June 29, 2020 virtual board meeting: "From what we're seeing and hearing, there's strong support, and I am willing to listen to those residents."

140. The critical role played by the voices and signatures of neighbors was underscored when Planning Board member Martha Lamparelli, while making the motion to approve the site plan for The Lawrence project, expressly referred to Cynthia Schwartz's comment regarding the strong support for the project from residents, and then enthusiastically embraced the "quite overwhelming support by those who would be affected the most."

141. At no time did ZBA member Lamparelli make reference to the UDO's approval standards for a major site plan review in making her approval motion for the site plan, paralleling the absence of substantive evidence concerning the UDO's site plan criteria in the comments made in support of the apartment project by those who purportedly "would be affected the most."

142. Enactment of the UDO/Green Code, following years of study, review, and public debate, with specific standards for the N-2E and N-2R zones, and a listing of major site plan approval standards that must be considered by respondent Planning Board, reflects the Common Council's deliberate consideration of the alternatives for what is now the proposed site for The Lawrence, and the type of development the City's legislative body determined would best benefit the community as a whole.

143. The Common Council's legislative enactment may not be set aside by respondent Planning Board "because of the whims of either an articulate minority or even

majority of the community.“ [Udell v. Haas, 21 NY2d 463, 469 (1968).]

144. Given the absence of substantial evidence in the record for respondent Planning Board’s determination, the approval of The Lawrence project’s site plan, without modifications or conditions, was impermissibly based on what respondent Planning Board perceived as generalized community support for the project, converting the major site plan review process into “nothing more than just a Gallop poll.” [Id; also see, Young Development, Inc. v. Town of West Seneca, 91 AD3d 1350 (AD4 2012).]

145. In light of the above, respondent Planning Board of the City of Buffalo has proceeded in excess of its jurisdiction, has made a determination affected by an error of law, and/or has acted in an arbitrary and capricious manner or in abuse of its discretion.

146. Petitioners have no adequate remedy at law.

**REGARDING PETITIONERS’ SEVENTH CLAIM -  
Respondent Planning Board failed to properly consider the UDO’s “Approval  
Standards” when approving The Lawrence major site plan**

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

148. Respondent Planning Board has not met its obligation to base its decision whether to approve or disapprove The Lawrence major site plan application on a meaningful and objective consideration of the UDO’s “Approval Standards.” [UDO, Section 11.3.7(G)]

149. As addressed in greater detail above at paragraph “80,” opponents to The Lawrence project, including the petitioners (who were characterized in Mr. Epstein’s article as “Green Code advocates”), provided written and oral testimony concerning the

failure of the proposed apartment's site plan to meet the approval standards required by the UDO/Green Code, including, without limitation, the following:

A. The Lawrence site plan is not consistent with all applicable standards of the UDO/Green Code, as required by the first approval standard, and, in particular, the requirements and intent of the N-2R district, which call for the construction of a moderate size residential building, on a moderate size lot, and separated by side yards, with a moderate "Residential density" maximum; the June 17, 2020 ZBA approval of five "undisputably substantial" variances, along with several other significant deviations from the UDO's dimensional restrictions, demonstrates the site plan's marked inconsistency with the UDO's standards.

B. The N-2R zoning district standards require the actual construction of moderate-scaled buildings on moderately-wide lots, not merely an attempt to "mimic" separate buildings, or "mimic" the side yard requirements.

C. The inclusion of two recesses or patios, approximately 25 feet wide and 20 feet deep, in the Maple Street façade of an apartment building that is approximately 250 feet wide and 80 feet deep, is a wholly inadequate substitution for the construction of 4 or 5 separate, moderate-size buildings, separated by actual side yards with unobstructed open space extending from the front yard line to the rear yard line, as required by the UDO.

D. The Lawrence project, as represented in its proposed site plan, not only more than triples the UDO's maximum density on Maple Street, it extends more than four times the permissible lot width, and it provides less than 12% of the mandated side yard total.



E. The project is not consistent with the spirit and intent of the Comprehensive Plan, as required by the UDO's second approval standard: The UDO/Green Code is the codification of the City's comprehensive plan, and the comprehensive plan's primary implementation tool, and, therefore, it is irrational to conclude that a site plan substantially inconsistent with the UDO/Green Code standards for the N-2R zone is consistent with the spirit and intent of the Comprehensive Plan.

F. The proposed apartment building's site plan contradicts the decision of Buffalo's Common Council to limit the "transition" area between the medical campus and Fruit Belt's residential street to the narrow N-2E zoning district on the east side of Michigan Avenue.

G. As demonstrated by the City's Property Information data and photographs of the nine closest residences to The Lawrence site, submitted by way of email for the Planning Board's record by petitioners' counsel prior to the June 29, 2020 virtual public hearing, The Lawrence project is neither "sited and designed so as to be harmonious with the surrounding area," nor representative of a "building design that responds to the surrounding neighborhood," and, as a result, conflicts with the UDO's third and fourth approval standards. [See paragraph "80(I)" above.]

150. The only rational conclusion respondent Planning Board could make if it meaningfully and objectively applies the UDO's "Approval Standards" is that The Lawrence site plan is substantially inconsistent with the applicable criteria.

151. In light of its failure to properly and meaningfully apply the applicable "Approval Standards," and the absence of substantial evidence to support its determination, respondent Planning Board of the City of Buffalo has made a

determination affected by an error of law, and/or has acted in an arbitrary and capricious manner or in abuse of its discretion.

152. Petitioners have no adequate remedy at law.

**REGARDING PETITIONERS' EIGHTH CLAIM -  
Respondent Planning Board failed to make the written findings of fact required by  
UDO Section 11.3.7(G) prior to its approval of the requested variances.**

153. Petitioners repeat and reallege each and every allegation contained in paragraphs 1 through 152 of this petition, with the same force and effect as if set forth here at length.

154. On June 29, 2020, at the time respondent Zoning Board voted to approve The Lawrence site plan application, it had not made, and did not have before it, the “written findings of fact” mandated by UDO/Green Code Section 11.3.7(G).

155. The written findings requirement is a measure intended to ensure that, prior to rendering its determination on a major site plan application, respondent Planning Board has engaged in a meaningful review of the applicable approval standards.

156. Upon information and belief, to the extent such written findings of fact now exist, such findings were prepared, subsequent to the Planning Board’s June 29, 2020 vote, not by respondent Planning Board, but by the Office of Strategic Planning’s staff.

157. In light of the above, respondent Zoning Board of Appeals of the City of Buffalo has made a determination made in violation of lawful procedure, affected by an error of law, and/or has acted in an arbitrary and capricious manner or in abuse of its discretion.

158. Petitioners have no adequate remedy at law.

**REGARDING PETITIONERS' NINFTH CLAIM -  
Respondent Planning Board failed to take a "hard look" at potential areas of  
environmental concern, and disregarded SEQRA's low threshold for requiring a  
DEIS**

159. Petitioners repeat and reallege each and every allegation contained in paragraphs 1 through 158 of this petition, with the same force and effect as if set forth here at length.

160. As addressed above at Petitioners' Fifth Claim, the primary responsibility of a SEQRA lead agency, such as respondent Planning Board, is to issue a Determination of Significance, determining whether or not a proposed action "may include the potential for at least one significant adverse environmental impact," and if such potential exists, issuing a Positive Declaration and requiring the preparation of a Draft Environmental Impact Statement [DEIS]." 6 NYCRR 617.7(a).

161. When determining whether the proposed action – here, the construction and operation of The Lawrence project – "may" have a significant adverse impact on the environment, the lead agency must compare "the impacts that may be reasonably expected to result from the proposed action" against a list of "criteria for determining significance" listed in the SEQRA regulations, which include, of particular importance to this proceeding, the following criteria "considered indicators of significant adverse impacts on the environment":

(a) "the creation of a material conflict with a community's current plans or goals as officially approved or adopted"; [6 NYCRR 617.7(c)(1)(iv)] and,

(b) the impairment of the character or quality of existing community or neighborhood character." [6 NYCRR 617.7(c)(1)(v)]

162. Despite a statement in the Draft Planning Board Negative Declaration that “multiple area variances” and certain aspects of the project design “were not in compliance with applicable zoning standards in the Unified Development Ordinance,” and repeated references in the Planning Board Staff Report to the inconsistencies between the proposed project’s size, scale and design, and the smaller-scale residential fabric and character of Maple Street, respondent Planning Board failed to require preparation of a DEIS, and, instead, issued a Negative Declaration, ending its environmental review of The Lawrence project.

163. By issuing its Negative Declaration on June 29, 2020, respondent Planning Board has disregarded its obligation to take a “hard look” at potential areas of environmental concern, and SEQRA’s relatively “low threshold” for requiring a project sponsor to prepare a DEIS.

164. Like the proverbial ostrich (as well as, respondent ZBA), respondent Planning Board has incredibly put out of sight and mind the clear contrast between the scale, height, density and style of The Lawrence proposal, and both the requirements of the N-2R zone, and the small-scale, moderate density, traditional residential character that exists along Maple Street and throughout the broader Fruit Belt neighborhood. [See, H.O.M.E.S. vs. NYSUDC, 69 AD2d 222, 418 NYS2d 827, 831 (AD4 1979).]

165. In light of the above, respondent Planning Board of the City of Buffalo has rendered a determination made in violation of lawful procedure, affected by an error of law, and/or has acted in an arbitrary and capricious manner or in abuse of its discretion.

166. Petitioners have no adequate remedy at law.

## PETITIONERS' STANDING.

167. Petitioners repeat and re-allege each and every allegation contained in paragraphs 1 through 166 of this petition, with the same force and effect as if set forth here at length.

168. The New York Court of Appeals has long recognized a two-prong test for an individual who wishes to establish standing to challenge governmental action regarding land use, zoning and SEQRA issues: that the injury of which he or she complains falls within the “zone of interests” or concerns sought to be promoted or protected, and that he or she would suffer direct harm, injury that is in some way different from the public at large. See, e.g., 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).

169. New York’s courts have long embraced the legal principle that a presumption of standing exists in land use and zoning cases for a property owner or resident, such as petitioner Gidney, who lives 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).

170. Petitioner Elverna D. Gidney has resided for the past decade at 274 Mulberry Street in Buffalo’s Fruit Belt neighborhood, real property which her family has owned for nearly 60 years. The two-family house at 274 Mulberry Street, built in 1880, is a traditional Fruit Belt residence, two-stories in height with a peaked roof, contains around 2,900 square feet of living space, and sits on a 35’ wide by 100’ long lot. The rear yard of 274 Mulberry Street adjoins 299 Maple Street, which also has been owned by

petitioner Gidney's family for nearly six decades. Petitioner Gidney parks her automobile in the garage at 299 Maple Street, which she must access from Maple Street.

171. The properties at 299 Maple Street and 274 Mulberry Street are located about a block north of the nine Maple Street lots included in The Lawrence site, that is, 250 through 228 Maple Street. Due to the close proximity of 299 Maple Street and 274 Mulberry Street to The Lawrence site, petitioner Gidney received in the mail, for both parcels, written notices of the hearings before respondents ZBA and Planning Board which are the subject of this proceeding. New York's highest court holds that the receipt of such notice gives rise to a presumption of standing in a zoning case: "The fact that a person received, or would be entitled to receive, mandatory notice of an administrative hearing because it owns property adjacent to or very close to the property in issue gives rise to a presumption of standing in a zoning case." See, Sun-Brite Car Wash, Inc vs. Board of Zoning Appeals, 69 NY2d 406, 413-414 (1987).

172. Due to the proximity of both 299 Maple Street and 274 Mulberry Street to The Lawrence site, if The Lawrence project is allowed to proceed, petitioner Gidney will be harmed in a manner different in kind and degree from the public generally in a variety of ways, including, without limitation, the following:

(a) Due to the close proximity of 299 Maple Street and 274 Mulberry Street to The Lawrence site, petitioner Gidney already has an unobstructed view of the one-family, 2-story, 1,400-square-foot house located at 240 Maple Street (which The Lawrence respondents intend to demolish); if The Lawrence project is constructed, each time she leaves her residence by automobile, and when she is in her backyard, petitioner Gidney would be subjected to the sight of the proposed 4-story, 250-foot long building proposed

by The Lawrence respondents, a size and scale that she finds aesthetically offensive due to its stark contrast with traditional Fruit Belt residences.

(b) Petitioner Gidney frequently travels to and from her residence by way of the portion of Maple Street where The Lawrence site is located, and the operation of the proposed 133-unit apartment building would increase traffic and decrease safety for her and other neighborhood residents.

(c) During the 14-month construction period estimated in the applicant's Full Environmental Assessment Form, petitioner Gidney would be subjected to the noise and traffic caused by the numerous construction vehicles traveling to and from the site, and, given the proximity of the planned building to the narrow Maple Street right-of-way, one can reasonably anticipate that automobile and pedestrian traffic on that block of Maple Street will be subjected to detours, delays, and a variety of obstructions.

(d) Due to the location of 299 Maple Street and 274 Mulberry Street directly across Maple Street from the HighPointe skilled nursing facility, petitioner Gidney has personally experienced the adverse impacts on the existing character of her neighborhood and the peaceful enjoyment of her home resulting from both the construction and operation of an over-sized, non-residential facility in her traditional neighborhood, and her quality of life and the character of her neighborhood will be further degraded by the construction and operation of a second large, inappropriate building in close proximity to her residence.

173. The "zone of interests" of SEQRA and the zoning laws of New York State and the City of Buffalo include the protection of neighborhood character, noise and traffic levels, environmental resources, aesthetics, and historic and architectural resources

that petitioners contend will be harmed if the determinations they challenge in this proceeding are not nullified.

174. New York's courts have long acknowledged SEQRA's broad "zone of interest," and, as the case law and regulatory provisions cited above demonstrate, SEQRA's zone of interests includes the impact that a project may have on population patterns or existing neighborhood or community character, with or without a separate impact on the physical environment. See Chinese Staff, *supra*, 68 NY2d at 366. Also, New York's courts have long recognized the obligation of a lead agency to consider the proposed action's potential impacts on historic and aesthetic resources. See, e.g., WEOK Broadcasting Corp. v. Planning Bd. of Town of Lloyd, 79 NY2d 373 (1992) (NYCA acknowledges that aesthetic impact considerations are "a proper area of concern" and "may constitute an important factor in SEQRA review"); Home Depot, USA, Inc. v. Town of Mount Pleasant, 293 AD2d 677 (AD2 2002) (site plan approval properly denied where the "record indicates that the project would bring about 'a noticeable change in the visual character' of the area").

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



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

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

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

(d) *Noise and traffic levels.* See, e.g., McGrath v. Town Board of Town of North Greenbush, 254 AD2d 614 (AD3 1998) ("increased noise" and "increased vehicle and truck traffic" are concerns within the zone of interest protected by the Town's zoning laws).

176. In light of the above, petitioner Gidney meets the two-prong test for standing to assert the claims set forth in this proceeding.

177. Although petitioner Lorna Peterson does not reside in or own property in close proximity to The Lawrence site, she too can demonstrate that she will suffer harm that falls within SEQRA's "zone of interest," that is different from that incurred by the public at large, thanks to the holdings and reasoning in two opinions by our state's highest court: Save The Pine Bush v. Common Council of the City of Albany, 13 NY3d 297, 301, 305 (2009), and Chinese Staff and Workers Assoc. v. City of NY, 68 NY2d

359, 366 (1986).

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

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

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

Save The Pine Bush v. Common Council of the City of Albany, 13 NY3d 297, 301, 305 (2009); also see, Wooster v. Queen City Landing, LLC, 150 AD3d 1689 (AD4 2017) (4<sup>th</sup> Dept., citing Save The Pine Bush, *supra*, holds that petitioners who establish that they engage in “repeated, not rare or isolated use” of Buffalo’s Outer Harbor “for recreation, study and enjoyment,” showed that the threatened environmental and ecological harm to that area “will affect them differently from the public at large,” and have standing.).

179. As is addressed above, the New York Court of Appeals held in Chinese Staff, *supra*, 68 NY2d at 366, that the broad definition of “environment” in SEQRA “expressly includes as physical conditions such considerations as ‘existing patterns of population concentration, distribution, or growth, and existing community or

neighborhood character.” For that reason, “the impact that a project may have on population patterns or existing neighborhood or community character, with or without a separate impact on the physical environment, is a relevant concern in an environmental analysis since the statute includes these concerns as elements of the environment.” *Id.* Reinforcing the Chinese Staff’s reasoning is the fact that the SEQRA regulations list “the impairment of the character or quality of important historical, archeological, architectural, or aesthetic resources or of existing community or neighborhood character” as an “indicator” of significant adverse impacts on the environment. [6 NYCRR 617.7(c)(1)(v)]

180. Given the equal status under SEQRA of physical conditions, such as land, water, flora and fauna, and existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character, petitioners Peterson’s “repeated, not rare or isolated use” of the Fruit Belt’s existing community and neighborhood character, and population patterns and demographics, for study and enjoyment (which will be discussed below), are appropriate activities to establish standing in this proceeding. Chinese Staff, *supra*; Save The Pine Bush, *supra*.

181. Petitioner Peterson retired in 2015 from her position in the Department of Library and Information Studies at the Graduate School of Education at the University at Buffalo. She holds a BA in History and English, MS in Library Science, and a PhD in Higher Education.

182. Since shortly before her retirement, petitioner Peterson has repeatedly and tirelessly used her knowledge and skills in research and writing to study the character, history, architecture, and demographics of the Fruit Belt neighborhood in order to

advocate for neighborhood preservation, and address issues of population patterns and gentrification in the Fruit Belt.

183. Here are but a handful of petitioner Peterson’s “repeated, not rare or isolated” activities in furtherance of her efforts to learn about and preserve the Fruit Belt’s unique history and character:

- 2014: Petitioner Peterson assisted in organizing a Fruit Belt community meeting to discuss the proposed UDO/Green Code and its potential impacts on the Fruit Belt’s existing character and demographics.

- 2015 and 2016: Petitioner Peterson submitted to the National Historic Trust information regarding the Fruit Belt, requesting that it be listed as one of eleven “Endangered Places.”

- 2016: Petitioner Peterson wrote and submitted a grant to Preservation League of NYS, and received a \$7,000 grant to fund a cultural resource survey of the Fruit Belt.

- 2016: Petitioner Peterson organized and funded a lecture on the “Social costs of gentrification in the Fruit Belt,” given by Dr. Stacey Sutton of the University of Illinois – Chicago.

- 2017: Petitioner Peterson revised and resubmitted the 2014 High Street Historic District application for local landmark designation (a property located several hundred feet from The Lawrence site), which the Common Council approved May 16, 2017.

- 2017: Petitioner Peterson continued work on the Preservation League of NYS cultural resource survey, conducting research, and editing drafts of the survey.

- 2017: Petitioner Peterson took action to help prevent demolition of 238 Carlton Street in the Fruit Belt, stopping demolition, and assisting in the successful efforts to have

the building designated by the City of Buffalo as a local landmark.

- 2018: Petitioner Peterson oversaw the completion of the Preservation League of NYS cultural resource survey, applied for and obtained a grant to create a brochure summarizing the cultural resource survey, and took steps to widely distribute the completed brochure.

- 2019: Petitioner Peterson purchased the aforementioned 238 Carlton to save it from demolition, and then donated the structure to the African Heritage Food Co-op, through its 501c3 arm, to help serve and preserve the Fruit Belt neighborhood.

184. In light of her years of study, research, advocacy and writing related to the Fruit Belt's historic, architectural, and cultural resources, its existing neighborhood character, and its population patterns, petitioner Peterson will suffer direct harm that is different in kind and degree from the public at large if the relief requested in this petition - to annul the refusal of respondents ZBA and Planning Board to require preparation of a Draft Environmental Impact Statement to properly assess the proposed action's potential adverse impacts on the existing character of the Fruit Belt neighborhood, and to set aside said respondents' determinations in furtherance of The Lawrence project - is not granted.

### **REGARDING PRELIMINARY RELIEF**

185. Petitioners repeat and re-allege each and every allegation contained in paragraphs 1 through 184 of this petition, with the same force and effect as if set forth here at length.

186. Petitioners do not presently have knowledge of when The Lawrence respondents intend to move forward to demolish the two houses currently standing at The

Lawrence site, and, at the time this petition is being prepared, have not seen any evidence of site preparation or other activity suggesting that such action is imminent.

187. Therefore, petitioners believe that it would be premature at this time to request preliminary relief to maintain the status quo during the pendency of this proceeding.

188. Petitioners respectfully reserve the right to promptly file an application for a temporary restraining order and/or preliminary injunction to maintain the status quo when and if it appears that The Lawrence respondents are ready to proceed with demolition, site preparation, and/or other action to commence construction of The Lawrence project.

189. Although petitioners are not seeking preliminary relief at this time, it is important to place The Lawrence respondents on notice that, pursuant to 6 NYCRR 617.3(a) of the SEQRA regulations, "A project sponsor may not commence any physical alteration related to an action until the provisions of SEQR have been complied with."

190. The SEQRA regulations, at 6 NYCRR § 617.2(ab), define "physical alteration" to include, but not be limited to, vegetation removal, demolition, stockpiling materials, grading and other forms of earthwork, excavation or trenching, and construction of buildings, structures or facilities.

191. Until the requirements of SEQRA are fully complied with, and it is petitioners assertion that they have not been, it would be improper for The Lawrence respondents to engage in any "physical alteration" of the subject parcel.

WHEREFORE, petitioners demand judgment against respondents as follows:

A. Annuling and setting aside the February 19, 2020 adoption by respondent Zoning Board of Appeals of the City of Buffalo of a Determination of Non-Significance/Negative Declaration for The Lawrence project.

B. Annuling and setting aside the June 17, 2020 adoption by respondent Zoning Board of Appeals of the City of Buffalo of a Determination of Non-Significance/ Amended Negative Declaration for The Lawrence project

C. Annuling and setting aside the June 17, 2020 approval by respondent Zoning Board of Appeals of the City of Buffalo of seven (7) categories of area variances, constituting thirteen (13) separate variances, from the dimensional requirements of the City of Buffalo's existing zoning laws, for The Lawrence project.

D. Annuling and setting aside the June 29, 2020 adoption by respondent Planning Board of the City of Buffalo of a Determination of Non-Significance/Negative Declaration for The Lawrence project.

E. Annuling and setting aside the June 29, 2020 approval by respondent Planning Board of the major site plan application for The Lawrence project.

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

Dated: July 6, 2020  
Buffalo, New York

/s/ Arthur J. Giacalone  
ARTHUR J. GIACALONE  
Attorney for Petitioners  
17 Oschawa Avenue  
Buffalo, New York 14210  
(716) 436-2646

**VERIFICATION**

STATE OF NEW YORK)

SS.:

COUNTY OF ERIE)

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

/s/ Lorna Peterson  
LORNA PETERSON

Sworn to before me this  
6<sup>th</sup> day of July 2020.

/s/ Arthur J. Giacalone  
ARTHUR J. GIACALONE  
Notary Public, State of New York  
Qualified in Erie County  
My commission expires 5/31/23