

STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

In the Matter of the Application of

ARTHUR J. GIACALONE,
Petitioner

For a Judgment pursuant to CPLR Article 78

- against -

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

VERIFIED PETITION

Index No. I-2018000058
Filed: 06/20/2018

Assigned to:

Hon. Timothy J. Walker

Petitioner Arthur J. Giacalone, for his verified petition in this CPLR Article 78 proceeding against the respondents, respectfully alleges and states:

INTRODUCTION

1. This CPLR Article 78 proceeding is brought to challenge and set aside the following determinations and actions in furtherance of respondent Western New York Maritime Charter School's proposed project to add to an existing 2-story, 42,681-square-foot middle school facility at 102 Buffum Street in the City of Buffalo, County of Erie, a 3-story, 64,913-square-foot high school building, and 24,050-square-foot athletic facility with three full-size basketball courts [hereinafter, "charter school expansion project"]:

A. The May 21, 2018 adoption by respondent City of Buffalo Planning Board of a Determination of Non-Significance/Negative Declaration [hereinafter, "Negative Declaration"], pursuant to the State Environmental Quality Review Act and the regulations promulgated thereunder at 6 NYCRR Part 617 ["SEQRA"], for the proposed

charter school expansion project.

B. The May 21, 2018 approval with conditions by respondent City of Buffalo Planning Board of the site plan for the charter school expansion project.

C. The June 12, 2018 adoption by respondent City of Buffalo Common Council of a Determination of Non-Significance/Negative Declaration, pursuant to SEQRA, for the proposed charter school expansion project.

D. The June 12, 2018 approval by respondent City of Buffalo Common Council of a Special Use Permit for the charter school expansion project.

PARTIES

2. Petitioner Arthur J. Giacalone owns and resides in the City of Buffalo, County of Erie, at 17 Oschawa Avenue, real property located less than 800 feet from the site of the proposed charter school expansion project, and is impacted by the challenged approvals to an extent and in ways different from the public generally.

3. Upon information and belief, respondent Western New York Maritime Charter School (hereinafter, "Charter School") is a public school chartered by the New York State Board of Regents, currently operating its High School in the City of Buffalo at 266 Genesee Street, and its Middle School in the City of Buffalo at 102 Buffum Street, with an office for the conducting of business at 266 Genesee Street, Buffalo, New York 14204.

4. Respondent Planning Board of the City of Buffalo (hereinafter, "Planning Board") 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.

5. Respondent Common Council of the City of Buffalo (hereinafter, "Common Council") is the legislative body of the City of Buffalo, County of Erie, State of New York, possessing the powers and duties of a common council 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.

FACTUAL BACKGROUND

6. According to the City of Buffalo's on-line "Property Information," 102 Buffum Street [hereinafter, at times, "subject parcel"] was purchased in June 2017 by respondent Charter School from the City of Buffalo for \$1,001,600.00.

7. According to the City of Buffalo's on-line "Property Information," the subject parcel contains one structure, a two-story building, built in 1915 and renovated in 1990, consisting of 42,681 square feet of gross floor area and a basement.

8. The subject parcel is located three blocks east of Seneca Street on Buffum Street, a narrow residential street with a paved width of approximately twenty (20) feet.

9. At the time respondent Charter School purchased the subject parcel, the existing building, formerly known as "Public School No. 70," was vacant.

10. Respondent commenced operating its Middle School at the subject parcel in September 2017, and, upon information and belief, currently has approximately 81 students and 24 faculty members utilizing the subject parcel.

11. Petitioner does not oppose the operation of respondent Charter School's Middle School at the 102 Buffum Street site, an activity seemingly consistent in scale and

intensity with the prior operations of former Public School No. 70. [Note: It is not clear whether respondent Charter School obtained the Special Use Permit required under the City of Buffalo's zoning law prior to commencing operations of its Middle School at the subject parcel. Petitioner is not raising that legal issue as part of this proceeding.]

12. Respondent Charter School's Middle School is surrounded on the south, east and west by one-story and two-story residences, nearly all of which are one- and two-family homes, and on the north by an undeveloped field which borders on the rear yards of one- and two-family residences on Zittel Avenue.

13. According to the City of Buffalo's on-line "Property Information," the residences located immediately east of the Middle School pre-date the 1915 construction of former School No. 70, while the homes across the street from the project site on Buffum Street, and on Indian Orchard Place and Silverdale Place (one-block long, dead-end streets) were built prior to or during the 1920s.

14. Each of the respondents has acknowledged that 102 Buffum Street is located in an archeologically sensitive area, as designated by the New York State Historic Preservation Office, respondent Charter School in its SEQRA Short Environmental Assessment Form ["SEAF"], and respondent Planning Board and Common Council in their respective Negative Declarations.

15. The subject parcel is situated approximately 200 feet to the northwest of a 1.61-acre City of Buffalo park, called "Seneca Indian Park" (also known as "The Old Indian Cemetery"), which is identified in the City's "Property Information" as 129 Buffum Street.

16. Upon information and belief, the Seneca Indian Park constitutes a portion of a larger area where indigenous people lived until about 1842, and where an early missionary church, Mission House (school) and burial grounds were located.

17. A bronze plaque mounted to a boulder within Seneca Indian Park states, in part, the following:

In this vicinity from 1780 to 1842 dwelt the larger portion of the Seneca Nation of the Iroquois League. In this enclosure were buried Red Jacket, Mary Jemison the White Woman of the Genesee and many of the noted chiefs and leaders of the nation whose remains have been removed and reburied elsewhere...

18. According to City of Buffalo records, on October 18, 2016, the date respondent Common Council approved the sale of 102 Buffum Street (former School No. 70) and vacant land to the rear of 102 Buffum Street, the intended plans for the subject parcel, as expressed by the entity requesting the sale, Ellicott Development Company, made no mention of the construction of a High School building:

...
*The Developer intends to renovate the property and lease to an existing charter school. The short term renovations are estimated at \$390,000 and **long term renovations include a new building including a gym (45,000 sq. ft.) and an athletic field** with project costs estimates at \$9,750,000.00... [Emphasis added.]*

19. On May 1, 2018, William Paladino, as CEO of Ellicott Development Company, submitted a cover letter and packet of material to the City of Buffalo on behalf of its “client” – respondent Charter School.

20. Mr. Paladino’s May 1, 2018 cover letter replaced the plan expressed to the City by Ellicott Development Company in October 2016 - to construct “a new building including a gym (45,000 sq. ft.) and an athletic field” – with the following proposal:

We propose to construct a new 3-story classroom building and athletic facility addition to the existing school. The 3-story classroom building will be approximately 64,913 square feet and will be used by Maritime Charter High school students and faculty. The addition will house a mixture of classrooms, lecture halls, offices, etc. The athletic facility will be approximately 24,050 square feet and will have 3 full size basketball courts. The new building and athletic facility will be internally connected to the existing 2-story school.

21. The plans submitted by Ellicott Development on May 1, 2018, in addition to proposing the addition of a High School classroom building and an athletic facility, includes the construction of an additional 57 parking spacing on land that currently consists of a grassy lawn with approximately 8 to 10 mature trees [hereinafter, “May 2018 plan”]. [Attached hereto as **Exhibit A** are photographs taken by petitioner accurately depicting the grassy lawn and trees respondent Charter School intends to remove and replace with a parking lot.]

22. The following table contrasts the scale of development and intensity of use currently found at the subject parcel with the proposed May 2018 plan:

| | <u>CURRENT STATUS</u> | <u>MAY 2018 PLAN</u> |
|--|------------------------------|--|
| Number of buildings | 1 | 3 |
| Gross Floor Area (to nearest 1,000 sq. ft.) | 43,000 sq. ft. | 43,000 sq. ft. (existing bldg.) 65,000 sq. ft. (new classroom bldg.) 24,000 sq. ft. (new athletic facility) <u>Grand Total: 132,000 sq. ft.</u> |
| Max. No. of Stories | 2-stories | 3-stories (new classroom bldg.) |
| Parking spaces | Unknown | Additional 57 spaces |
| No. of students | 81 | 450 |
| No. of faculty | 24 | 75 |

23. The proposed May 2018 plan, if constructed, would represent an increase in gross floor area at the subject parcel of greater than three hundred percent (300%).

24. The proposed May 2018 plan, if implemented, would represent a 555% increase in students (from 81 to 450), and a 312% increase in faculty (from 24 to 75), at the 102 Buffum Street site.

25. The subject parcel is situated in the City's South Council District, which is represented by Councilmember Christopher P. Scanlon.

26. Upon information and belief, it is the custom among respondent Common Council's nine members to defer to the wishes of the Councilmember whose district encompasses the site of a proposed project when voting to approval or disapprove a project.

27. According to the records available online at the New York State Board of Elections website, on at least seventeen (17) occasions between August 2012 and February 2016, political contributions were made to "*Friends of Christopher P. Scanlon*" by entities with the same address as the corporate headquarters of Ellicott Development Company (that is, 295 Main Street, Suite 210, Buffalo, New York), and/or by the company's current CEO, William A. Paladino.

28. Documents and videotapes available online from the City of Buffalo website show that it took respondent Charter School only 42 days – from May 1, 2018 to June 12, 2018 - to obtain the discretionary zoning approvals it needed from both respondent Planning Board (site plan approval) and respondent Common Council (special use permit), as well as to have both municipal respondents issue a "Negative Declaration"

ending environmental review under SEQRA without preparation of an Environmental Impact Statement [EIS]:

A. May 1, 2018 – Ellicott Development Company CEO William A. Paladino submits a site plan application packet to respondent Planning Board on behalf of respondent Charter School, requesting that respondent Planning Board review the proposed project at its May 21, 2018 meeting.

B. May 7, 2018 – Ellicott Development Company CEO William A. Paladino submits a special use application to respondent Common Council.

C. May 10, 2018 - the Office of City Clerk issues a “Notice of Complete Application” to respondent Charter School’s David Comerford advising the applicant that respondent Planning Board would consider the special use application at its June 4, 2018 meeting, and that a public hearing for the 102 Buffum Street project would be held in the Common Council Chamber on June 5, 2018.

D. May 21, 2018 - respondent Planning Board conducts a public hearing on the site plan review application, adopts a Negative Declaration ending its environmental review under SEQRA, and approves the site plan with the following conditions:

- * Lighting must meet dark sky standards. * All mature trees must be saved where possible. * Façade plans as approved will be reverse – primarily grey with blue accents.
- * Light standards not to exceed 14 ft.

E. May 29, 2018 - respondent Common Council refers the special use permit application to its Legislation Committee.

F. May 30, 2018 - respondent Common Council’s Chief of Staff, Malcolm Ertha, signs a SEQRA Determination of Significance with attached Negative Declaration

concerning the special use permit application, and submits the same to respondent Common Council for review.

G. June 4, 2018 – respondent Planning Board recommends to respondent Common Council that it approve the proposed special use permit; upon information and belief, the recommendation was not accompanied at that time by written findings of fact.

H. June 5, 2018 – a public hearing on respondent Charter School’s special use permit application is held by respondent Common Council’s Legislation Committee, during which Councilmember Scanlon states that he is in favor of the project; the Legislation Committee refers the matter back to the Common Council “without recommendation;” upon information and belief, respondent Common Council had not received written findings of fact from respondent Planning Board at the time of the public hearing.

I. June 12, 2018 – respondent Common Council, without any discussion, approves, in approximately nine (9) seconds, Negative Declarations for eight (8) projects, including respondent Charter School’s 102 Buffum Street project; also, respondent Common Council, without any discussion, approves, in approximately seven (7) seconds, respondent Charter School’s special use permit request.

**REGARDING PETITIONERS’ FIRST CLAIM
– against respondents Planning Board and Charter School –
VIOLATION OF GREEN CODE’S “POSTED NOTICE” REQUIREMENTS**

29. Petitioner repeats and re-alleges each and every allegation contained in paragraphs 1 through 28 of this petition, with the same force and effect as if set forth here at length.

30. The City of Buffalo’s zoning and development law is officially titled the Unified Development Ordinance, and is unofficially known as the “Green Code” [hereinafter, “Green Code”].

31. The Green Code states that respondent Planning Board must conduct a “major site plan review” of projects “which, due to their magnitude, are more likely to have significant impacts on their surroundings.” [Green Code, Section 11.3.7(A)]

32. Respondent Planning Board correctly determined that the proposed charter school expansion project required “major site plan review” due to the fact that it exceeds the following thresholds set forth in the Green Code for major site plan review: new construction of a principal building, or expansion of an existing principal building, of at least 5,000 square feet in gross floor area; new construction of a principal building of the civic type building in a neighborhood zone; and, new construction or reconstruction of a parking lot of at least 50 spaces. [Green Code, Section 11.3.7(C)]

33. The Green Code states that “the City Planning Board must hold a public hearing on the proposed major site plan,” and that, “notice of the public hearing is required in accordance with Section 11.2.2.” [Green Code, Section 11.3.7(F)(2)]

34. Upon information and belief, respondent Planning Board conducted a public hearing on the charter school expansion site plan on May 21, 2018.

35. Petitioner had no prior notice or knowledge of the aforementioned May 21, 2018 public hearing, and, therefore, was unable to attend that proceeding and present testimony and evidence in opposition to the proposed charter school expansion.

36. Pursuant to Section 11.2.2 of the Green Code, only property owners within 400 feet of the property line of the subject property are sent a “Mailed Notice” of a

scheduled public hearing, and, for that reason, petitioner, whose property is approximately 780 feet from 102 Buffum Street, was not sent a mailed notice of the May 21, 2018 public hearing.

37. To ensure that individuals, such as petitioner, who do not receive a mailed notice, but who may be interested in a zoning matter, have notice in a timely manner of a pending zoning application, the Green Code, at Section 11.2.2(C), places an obligation on the applicant to provide “Posted Notice.”

38. In pertinent part, Section 11.2.2.(C) of the Green Code states the following:

Section 11.2.2 Notice

...

C. Posted Notice

1. *The applicant is responsible for posted notice. Signs for posting must be a minimum of 12 square feet in area and should be clearly visible from and, where possible, within 10 feet of the principal thoroughfare.*
2. *When posted notice is required, it must be posted on the property at least ten days prior to the public hearing and removed upon the closing of the public hearing...*
3. The posted notice must include:
 - a. A description of the application type and brief summary of the approval sought.
 - b. A phone number to call and email address to contact the City for information.
 - c. If additional information is available online, the appropriate website address.

...

F. Notice Defects. *Minor defects in notice do not impair the notice or invalidate proceedings if a bona fide attempt has been made to comply with applicable notice requirements.*

[Emphasis added.]

39. Petitioner walks, bicycles and/or drives on Buffum Street and passes the subject parcel one or more times a day virtually every day of the year, attracted by the beauty and serenity of the Seneca Indian Park, the aesthetics of the mature trees and masonry building at 102 Buffum Street, and the relative quiet and lack of vehicular traffic on this predominantly residential street.

40. Had respondent Charter School, as applicant for both the major site plan application before respondent Planning Board, and Special Use Permit application before respondent Common Council, complied with the letter and spirit of the Green Code's "Posted Notice" provisions, petitioner would have seen the notice, been aware of the proceedings before respondent Planning Board, attended the May 21, 2018 public hearing, testified, and submitted evidence against both the issuance of a Negative Declaration and approval of the proposed site plan.

41. Despite a grassy front lawn, approximately 48 feet in depth, running the entire length of the Middle School building, respondent Charter School failed to post the required sign so that it would be "clearly visible from" and "within 10 feet" of Buffum Street, the principal thoroughfare.

42. Respondent Charter School placed its sign in a location that was not clearly visible from Buffum Street (or, the public sidewalk adjacent to the subject parcel), but, instead, in a classroom window more than 50 feet from Buffum Street, where the notice was further obscured by the glare and light reflecting off the school's "Rescue Window." [Attached hereto as **Exhibit B** are photographs taken by petitioner accurately depicting the "posted notice" as seen from Buffum Street through petitioner's car window, from the sidewalk approximately 48' from the sign, and at close range.]

43. The defects in respondent Charter School’s posted notice are major, not minor, in character and impact, and, upon information and belief, respondent Charter School failed to make a bona fide attempt to comply with the above-quoted notice requirements.

44. As a result of respondent Charter School’s failure to comply with the Green Code’s “Posted Notice” requirements, petitioner has been deprived of his right, under the City of Buffalo Code and the zoning laws of the State of New York, to participate in respondent Planning Board’s May 21, 2018 public hearing on respondent Charter School’s major site plan application, and, therefore, respondent Planning Board, by issuing a Negative Declaration and approving respondent Charter School’s site plan application on May 21, 2018, has rendered determinations that are contrary to law, arbitrary and capricious, and/or an abuse of discretion, and such determinations should be invalidated.

45. Petitioner has no adequate remedy at law.

**REGARDING PETITIONERS’ SECOND CLAIM
– against respondents Planning Board –
ABSENCE OF NECESSARY INFORMATION**

46. Petitioner repeats and re-alleges each and every allegation contained in paragraphs 1 through 45 of this petition, with the same force and effect as if set forth here at length.

47. The major site plan review process places upon respondent Planning Board an obligation to review “the site configuration and architectural design of projects which, due to their magnitude, are more likely to have significant impacts on their surroundings.” [Green Code, Section 11.3.7(A)]

48. To enable respondent Planning to effectively conduct a major site plan review, the Green Code identifies at Section 11.3.7(D) the information the applicant must include in its submittal to respondent Planning Board, including, in pertinent part, the following:

Section 11.3.7 Major Site Plan Review

...
D. Submittals. Major site plan applications must include *a site plan, drawn to a scale of at least one inch equals 30 feet ... that contains, the information listed below.* The Zoning Administrator may waive submittal requirements for site plans where such information is not necessary to determine the nature of the development or where the development meets relevant approval criteria.

...
9. Context of development within 100 feet of the site, including *location and scale of principal buildings, and site ingress and egress points.*

12. Existing and proposed improvements on the site, including ... *landscape, established trees (six inch DBH or more) [diameter at breast height], ... parking and loading facilities ...*

13. Detailed architectural drawings, drawn to a scale of one inch equals four feet, including proposed building materials

...
[Emphasis added.]

49. The site plan review application submitted by respondent Charter School and reviewed by respondent Planning Board violates the requirements of Section 11.3.7(D) in a number of significant ways, including, without limitation, the following:

A. The site plan was not drawn to a scale of “*at least one inch equals 30 feet,*” but to a scale of *one inch equals 40 feet*, making it extremely difficult, if not impossible, for the detailed information printed on the site plan to be deciphered by petitioner, and, upon information and belief, by members of respondent Planning Board.

B. The site plan fails to provide a critical piece of information concerning the “context of development within 100 feet of the site” (in other words, the fabric of the

surrounding residential neighborhood) by *omitting the location and scale of the principal buildings, that is, the residences, across the street from the existing school* on either Buffum Street or Silverdale Place.

C. The site plan fails to depict the “*established trees (six inch DBH or more)*” on site, and, upon information and belief, also does not show existing parking and loading facilities.

D. Rather than provide “detailed architectural drawings, drawn to a scale of one inch equals four feet, the elevations submitted by respondent Charter School are drawn to a scale of 1/16” = 1.0’ which translates to one inch equals sixteen (16) feet.

50. Due to the nature of the surrounding neighborhood, and the magnitude of the proposed charter school expansion project, the above-described violations of Section 11.3.7(D) of the Green Code prevented a full and reasonable review and consideration of respondent Charter School’s site plan by either respondent Planning Board or the public.

51. Due to the nature of the surrounding neighborhood, and the magnitude of the proposed charter school expansion project, the above-described violations of Section 11.3.7(D) of the Green Code prevented a rational determination, by either respondent Planning Board or the public, of the proposed project’s consistency with the “Approval Standards” at Section 11.3.7(G) of the Green Code, which, without limitation, include the following criteria:

Section 11.3.7 Major Site Plan Review

...
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.

...

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.

7. The project will provide for the adequate protection of significant natural, cultural, heritage, and scenic assets on or near the site

...

52. Upon information and belief, the classroom building approved by respondent Planning Board does not comply with the maximum building height standard of the Green Code for a civic building in an N-3R zone, which, pursuant to Section 3.2.4(E), is 3 stories, 40', but has a total height of 45'6" when the vertical distance is measured from the average ground level to the peak of the building's flat roof. [See Green Code Section 2.3.4(A)(1).]

53. As a result of respondent Charter School's failure to provide the information required by Section 11.3.7(D) of the Green Code, and/or respondent Planning Board's failure to require submission of the omitted information or other information deemed necessary for proper consideration of the application, respondent Planning Board's approval of respondent Charter School's site plan was contrary to law, arbitrary and capricious, and/or an abuse of discretion, and such determination should be invalidated.

54. Petitioner has no adequate remedy at law.

REGARDING PETITIONERS' THIRD CLAIM
– against respondents Planning Board –
FAILURE TO MAKE WRITTEN FINDINGS OF FACT

55. Petitioner repeats and re-alleges each and every allegation contained in paragraphs 1 through 54 of this petition, with the same force and effect as if set forth here at length.

56. Pursuant to Section 11.3.7(F), Procedure, of the Green Code, respondent Planning Board must approve, approve with modification, or disapprove the application for a proposed major site plan “within 62 days of the public hearing.” [Green Code, Section 11.3.7(F)(3)]

57. The introductory sentence of subsection “G” of Green Code Section 11.3.7, Approval Standards, states that, “The City Planning Board must make written findings of fact on the following criteria...”, and then lists twelve (12) criteria pertinent to an applicant’s request for the approval of a major site plan.

58. Upon information and belief, on May 21, 2018, after closing the public hearing, respondent Planning Board “approved with conditions” respondent Charter School’s site plan without first having made written findings of fact in support of its determination.

59. In the alternative, if, at the time respondent Planning Board voted to approve with conditions the site plan for the charter school expansion, it had before it a set of written findings regarding respondent Charter School’s proposed site plan, said written findings were the work-product, not of respondent Planning Board, but of staff members in the City of Buffalo’s planning department.

60. As a result of respondent Planning Board's approval with conditions of respondent Charter School's site plan without first having made written findings of fact in support of its determination, respondent Planning Board's approval of respondent Charter School's site plan was contrary to law, arbitrary and capricious, and/or an abuse of discretion, and such determination should be invalidated.

61. Furthermore, by approving with conditions respondent Charter School's site plan without first having made written findings of fact in support of its determination, respondent Planning Board has made it extremely difficult, if not impossible, for this Court to determine whether or not the May 21, 2018 approval is arbitrary, capricious, or an abuse of discretion.

62. Petitioner has no adequate remedy at law.

**REGARDING PETITIONERS' FOURTH CLAIM
– against respondent Common Council –
ARBITRARY & CAPRICIOUS GRANT OF SPECIAL USE PERMIT**

63. Petitioner repeats and re-alleges each and every allegation contained in paragraphs 1 through 62 of this petition, with the same force and effect as if set forth here at length.

64. Pursuant to the Green Code, the subject parcel at 102 Buffum Street, and the adjoining properties on Buffum Street, Silverdale Place, Indian Orchard Place and Galloway Street, are zoned "*N-3R Residential*."

65. The Green Code identifies the following purpose for the N-3R zone:

Section 3.1.9 N-3R RESIDENTIAL

A. Purpose.

The N-3R zone addresses residential areas adjoining the centers of Buffalo’s streetcar neighborhoods, generally defined by *moderately compact residential blocks, which occasionally include small mixed use buildings.*

...

[Emphasis added.]

66. Pursuant to the Green Code, single-unit, double-unit, and multiple-unit dwellings, as well as group homes, are allowed as of right in the N-3R zone. [Green Code TABLE 6A PRINCIPAL USES.]

67. Pursuant to the Green Code, primary and secondary schools are considered civic uses, and are not allowed as of right in an N-3R zone, but require a Special Use Permit granted by respondent Common Council. [Green Code TABLE 6A PRINCIPAL USES.]

68. The City of Buffalo’s Green Code describes a “special use permit” as follows:

Section 11.3.3 Special Use Permit

A. Description. A special use permit allows certain *uses that have increased potential for incompatibility* in a zone to be *carefully reviewed* to determine, *against fixed standards*, whether their establishment on any given site should be allowed. These uses may or may not be appropriate in a particular location depending on *a weighing, in each case, of the public need and benefit against the local impact and effect.*

...

[Emphasis added.]

69. Once a property owner initiates a request for a special use permit, “The Common Council, after receiving a recommendation from the City Planning Board, must take action” on the request. [Green Code Section 11.3.3(B)&(C)]

70. Following a determination by the City Clerk that a special use permit application is complete, respondent Planning Board has 30 days to “review the application and make a recommendation to approve, approve with modifications, or disapprove the application, and forward the recommendation to the Common Council.” [Green Code Section 11.3.3(D)(1)&(2)]

71. As alleged above, a special use application was filed on behalf of respondent Charter School on May 7, 2018, and the City Clerk issued a “Notice of Complete Application” on May 10, 2018.

72. The Green Code provides that respondent Common Council must hold a public hearing on the proposed special use permit, with notice of the public hearing as required in accordance with Section 11.2.2, “within 62 days of the determination of completeness,” and must approve, approve with modifications, or disapprove the application “within 62 days of the closing of the public hearing.”

73. The “fixed standards” referenced in the Green Code’s description of a special use permit that must be considered by respondents Common Council and Planning Board when reviewing a proposed special use permit are set forth at Section 11.3.3(E) of the Green Code as follows:

Section 11.3.3 Special Use Permit

...

E. Approval Standards. The City Planning Board must make written findings of fact on, and the Common Council decision must consider, the following criteria:

1. The proposed use is *consistent with the spirit and intent of this Ordinance* and the Comprehensive Plan.
2. The proposed use will be established, maintained, and *operated so as not to endanger the public health, safety, or welfare.*

3. The proposed use will be established, maintained, and operated so as to be *harmonious with the surrounding area* and will *not impede the development, use, and enjoyment of adjacent property in any foreseeable manner*.

4. The proposed use will be of a character that *does not produce noise, odors, glare, and/or vibration that adversely affects the surrounding area*.

5. The proposed use will not place an excessive burden on public improvements, facilities, services, or utilities.

6. The proposed use *will not result in the destruction, loss, or damage of any feature determined to be of significant natural, scenic, or historic importance*.

[Emphasis added.]

74. On or about May 28, 2018, petitioner learned of the scheduled June 5, 2018 public hearing to be held by the Common Council Legislation Committee when he stopped while bicycling down Buffum Street to talk with a neighbor who expressed concern over a public hearing notice she had received from the City Clerk's office regarding a "Special Use Permit for a School" at 102 Buffum Street.

75. The public hearing notice advised the recipient that, "Additional information is available online at city-buffalo.com/meetings."

76. Petitioner promptly reviewed online documents relating to both the prior public hearing conducted on May 21, 2018 by respondent Planning Board, and the hearing scheduled for June 5, 2018 before the Legislation Committee, and found it extremely difficult, if not impossible, to read various drawings, including, without limitation, respondent Charter School's proposed site plan and "Preliminary" topographic survey.

77. The topographic survey was of particular interest to petitioner because it depicted the topography and details of the undeveloped portions of the 6.8-acre subject

parcel, as well as a large, circular object on 102 Buffum Street's grassy, treed east lawn (the proposed location for a new parking lot).

78. Wishing to review a full-scale version of the aforementioned site plan and topographic survey, petitioner visited the office of the City's planning department at City Hall on May 30, 2018, and was assisted by the Director of Environmental Affairs, Jason Paananen.

79. Although Mr. Paananen was extremely cooperative, he was unable to locate the topographic survey, and directed petitioner to the Office of the City Clerk, where the staff there was also unable to locate either the topographic survey or a large-scale version of the proposed site plan.

80. On the morning of Monday, June 4, 2018, petitioner sent an email to the address listed on the aforementioned public hearing notice – councilstaff@city-buffalo.com – and asked if he could present photographs contained on a USB drive to the Council Members and public at the public hearing scheduled for June 5, 2018 before the Legislation Committee.

81. Not having received a reply to his June 4, 2018 email message, petitioner made a telephone call on the morning of June 5, 2018, and spoke with respondent Common Council's Public Information Officer, Clayton B. Hoyt, who advised petitioner that it would not be possible to electronically exhibit photographs at the 2:00 PM public hearing, and instructed petitioner to hand-deliver the photographs, and written comments, to Councilmember Christopher Scanlon at Council Chambers at the 2:00 PM proceedings.

82. Petitioner followed the instructions of the Common Council's Public Information Officer, and delivered to Mr. Scanlon an original and nine copies of petitioner's written comments regarding the proposed special use permit for the 102 Buffum Street site, as well as thirty-two (32) 8.5" by 11" color photographs of the project site and adjoining neighborhood, shortly before 2:00 PM, requesting that the letter and photographs be made part of the official record of the proceedings.

83. The Chairman of respondent Common Council's Legislation Committee, Fillmore District Councilmember David A. Franczyk, opened the June 5, 2018 public hearing regarding 102 Buffum Street at approximately 2:12 PM, and David Comerford, who identified himself as a Vice President of respondent Charter School, gave a very brief, general presentation in support of the application.

84. Two members of the public testified at the public hearing prior to petitioner:

A. Thomas Krehbiel. Mr. Krehbiel identified himself as a long-time owner and resident of 136 Buffum Street, expressed his strong opposition to the addition of a high school at 102 Buffum Street, and emphasized that the former School No. 70 building was built as a neighborhood elementary school, that Buffum Street area is a neighborhood, that the proposed three-story high school building is very much out-of-character with the surrounding neighborhood, and that Buffum Street is not a major thoroughfare where high schools belong.

B. Allan Jamieson. Mr. Jamieson identified himself as a Native American and descendant of Mary Jemison, stated that he has conducted extensive research into the history of the nearby Seneca Indian Park and surrounding lands, which showed that Mary Jemison may have been originally buried on land behind the school building at 102

Buffum Street, and that the existing school building is the site of the first Seneca mission house, characterized the Buffum Street land as one of the last historic sites in Buffalo for the Seneca Nation, and requested that a complete archeological survey – going over the site with a fine-tooth comb – be conducted prior to approving the project.

85. Upon information and belief, Mr. Jamieson is the Executive Director of the only indigenous arts and cultural non-profit organization in Western New York, Neto Hatinakwe Onkwehowe (known as “Neto”), which means “Here Lives the People” in the Cayuga language.

86. Petitioner spoke for approximately eight (8) minutes at the June 5, 2018 public hearing, advising the Chair that he had provided Councilmember Scanlon with an original and copies of written comments and, in addition, 32 photographs, and raising the following issues (but, due to time constraints, not all the issues addressed in his written comments): the inadequacy of the information submitted on behalf of respondent Charter School in support of the special use permit; the consistency of the existing school building, and Middle School operations, with the scale and character of the surrounding neighborhood; the proposed charter school expansion’s drastic change in scale of development and intensity of use, including increase from 1 to 3 primary buildings, greater than 300% increase in gross floor area, increase in maximum height from 2 to 3 stories, 555% increase in the number of students, and 312% increase in the number of faculty; respondent Charter School’s significantly defective posted notice; the inability to read the proposed site plan; the site plan’s failure to show the residences across the street from the proposed project, and the mature trees on-site; Buffum Street’s extremely narrow, 20-foot wide pavement width; the difficulty of school buses to safely pass each

other to and from the Buffum Street site; and, the need for the issuance of a Positive Declaration under SEQRA. [Attached hereto as **Exhibit C** is a copy of petitioner's June 5, 2018 written comments to respondent Common Council in opposition to the special use permit request at 102 Buffum.]

87. Upon information and belief, other than the Chairman, Councilmember Scanlon was the only member of respondent Common Council to speak during the June 5, 2018 public hearing regarding the 102 Buffum Street special use permit.

88. Near the close of the June 5, 2018 public hearing, Councilmember Scanlon stated on the record, "*I can tell you at face value I'm in favor of this project,*" after quickly making the following points:

- The former School No. 70 building on Buffum had been vacant for a number of years, and, had it continued, would have fallen eventually into a state of disrepair.

- We have an entity, a school, with a wonderful reputation which is bringing life back to the school building.

- Use of the building is injecting the South Buffalo community with "a couple hundred bodies" each and every day.

- They [respondent Charter School] are investing between \$10 and \$15 million which will further revitalize the Seneca Street corridor.

89. Councilmember Scanlon's comments on June 5, 2018 failed to acknowledge or address any of the issues raised by petitioner, Mr. Jamieson, or Mr. Krehbiel, during the public hearing.

90. Councilmember Scanlon's comments during the June 5, 2018 public hearing failed to mention any of the six "Approval Standards" respondent Common Council must

consider under the Green Code when deciding to approve or disapprove a special use permit. [Green Code Section 11.3.3(E)]

91. Councilmember Scanlon’s comments during the June 5, 2018 public hearing failed to demonstrate a “careful[] review against fixed standards,” or, a “weighing ... of the public need and benefit against the local impact and effect” of a proposed use deemed to have “increased potential for incompatibility” in the N-3R zone, as mandated under the Green Code’s special use permit process. [Green Code Section 11.3.3(A)]

92. Upon information and belief, following the close of the June 5, 2018 public hearing, the members of respondent Common Council did not have an opportunity to publicly and officially consider respondent Charter School’s special use permit application until the Common Council’s June 12, 2018 Regular Meeting.

93. Petitioner did not attend the Common Council’s June 12, 2018 Regular Meeting, however, his review of the videotape of the public meeting – available online through the City of Buffalo’s website – discloses the following:

A. At the June 12, 2018 meeting, without any discussion and in approximately nine (9) seconds, respondent Common Council approved a motion to adopt “Items 52 through 59” in the “Miscellaneous” portion of the agenda – consisting of eight (8) SEQRA Negative Declarations, including the Negative Declaration for 102 Buffum. [See “MediaTraq Webcast” for Common Council’s June 12, 2018 regular meeting, from approximately 20:00 through 20:09.]

B. At the June 12, 2018 meeting, without any discussion and in approximately seven (7) seconds, respondent Common Council approved a motion to approve “Item 13” in the “Legislation” portion of the agenda – “D. Comerford, Agent, Special Use Permit –

102 Buffum for a School in a N-3R Zone (South).” [See “MediaTraq Webcast” for Common Council’s June 12, 2018 regular meeting, from 22:19 through 22:26.]

94. Upon information and belief, respondent Planning Board had not provided, and respondent Common Council had not yet received, the Planning Board’s written findings of fact regarding the proposed special use permit for 102 Buffum Street, at the time respondent Common Council approved the special use permit to allow a Middle School and High School at 102 Buffum Street.

95. As a result of respondent Common Council’s approval of respondent Charter School’s special use permit on June 12, 2018, without first having conducted the requisite careful review, and without weighing public need and benefit against local impact and effect, and without awaiting receipt of respondent Planning Board’s written findings, and/or without consideration of the Green Code’s “fixed” approval standards, respondent Common Council has acted contrary to law, in an arbitrary and capricious manner, and/or has abused its discretion, and such determination should be invalidated.

96. Petitioner has no adequate remedy at law.

**REGARDING PETITIONERS’ FIFTH CLAIM
– against respondent Common Council –
VIOLATION OF PETITIONER’S RIGHT TO BE HEARD**

97. Petitioner repeats and re-alleges each and every allegation contained in paragraphs 1 through 96 of this petition, with the same force and effect as if set forth here at length.

98. The requirement, found at both Section 11.3.3(D)(3) of the Green Code, and Section 27-b(6) of the State of New York’s General City Law, that a decision whether to grant or deny a special use permit be preceded by a public hearing, is substantially

diminished if written comments and/or evidence – such as photographs – submitted by a member of the public are not made part of the public record, and are not made available to the members of the body possessing the authority to render the determination, prior to the vote on the pending application.

99. On June 16, 2018, petitioner carefully reviewed on-line the “proceedings” – that is, the official record of the documents before the pertinent body - for both the aforementioned June 5, 2018 Legislation Committee meeting, and respondent Common Council’s June 12, 2018 Regular Meeting, and was unable to find, in either proceedings, petitioners’ June 5, 2018 written comments (attached hereto as Exhibit C), or the 32 color photographs of the subject parcel and surrounding neighborhood delivered to Councilmember Scanlon prior to the June 5, 2018 public hearing on the 102 Buffum Street special use permit.

100. Petitioner’s right to be heard at the June 5, 2018 was substantially diminished if, as it appears, either his written comments and/or the photographs he provided in a timely fashion to Councilmember Scanlon were not made part of the public record, and/or were not made available to the other members of respondent Common Council prior to the June 12, 2018 vote to approve the special use permit.

101. As a result, respondent Common Council’s approval of respondent Charter School’s special use permit on June 12, 2018 constitutes an act contrary to law, arbitrary and capricious, and/or an abuse of discretion, and such determination should be invalidated, and a new public hearing conducted.

102. Petitioner has no adequate remedy at law.

REGARDING PETITIONERS' SIXTH CLAIM
– against respondents Planning Board and Common Council –
SEQRA VIOLATIONS

103. Petitioner repeats and re-alleges each and every allegation contained in paragraphs 1 through 102 of this petition, with the same force and effect as if set forth here at length.

104. 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," [see, e.g., E.F.S. Ventures Corp. v. Foster, 71 NY2d 359, 526 NYS2d 56, 62 (1988)], and has placed an "affirmative obligation" on state and local agencies "to consider environmental effects." [See, e.g., Jackson v. NYSUDC, 67 NY2d 400, 503 NYS2d 298, 309 (1986).

105. State and local agencies are 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," and, therefore, require preparation of an Environmental Impact Statement [EIS]. [See, for example, NYC Coalition to End Lead Poisoning v. Vallone, 100 NY2d 337, 347-348, 763 NYS2d 530, 537 (2003); LaDelfa v. Village of Mt. Morris, 213 AD2d 1024, 625 NYS2d 117, 119 (4th Dept. 1995); also see 6 NYCRR 617.7(a) & (b).]

106. New York's highest court has long held that an agency's action is void and unauthorized if it has not met its obligations under SEQRA:

...
...We have insisted... that the statutory environmental review requirements of SEQRA must be met and have held that if they are not the governmental action is void and, in real sense, unauthorized.

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

107. SEQRA defines “environment” broadly to include, “as physical conditions of the environment,” such considerations as “resources of archeological, historic or aesthetic significance” and “existing community or 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); see, e.g., Chinese Staff and Workers Assoc. v. City of New York, 68 NY2d 359, 365-366, 509 NYS2d 499, 503 (1986) (“It is clear from the express terms of the statute and the regulations that environment is broadly defined.”).

108. Our state’s highest court has expressly ruled that the impact a project may have on existing community or neighborhood character is a relevant concern, and must be considered by a lead agency when determining whether to require preparation of an EIS, “regardless of whether there is an impact on the physical environment.” Chinese Staff, *supra*, 509 NYS2d at 503.

109. Respondent Charter School’s Buffum expansion project at 102 Buffum Street is an “action” under SEQRA, that is, a project or physical activities that may affect the environment by changing the use, appearance or condition of any natural resource or

structure, that requires one or more new or modified approvals from an agency or agencies. [6 NYCRR Section 617.2(b)]

110. A state or local agency that has jurisdiction to fund, approve or directly undertake an action is called an “*involved agency*.” [6 NYCRR Section 617.2(s)]

111. Pursuant to SEQRA, respondent Common Council, in light of its authority to grant or deny respondent Charter School’s expansion project, and respondent Planning Board, in light of its authority to approve or deny the project’s site plan, are “involved agencies” with the authority to “approve” the proposed action.

112. As involved agencies, respondents Common Council and 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, 763 NYS2d 530, 537 (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, 722 NYS2d 645, 649 (4th Dept. 2001); King v. Saratoga County Board of Supervisors, 89 NY2d 341, 347-348, 653 NYS2d 233, 235-236 (1996); Taxpayers Opposed to Floodmart, Ltd. v. City of Hornell IDA, 212 AD2d 958, 624 NYS2d 689 (4th Dept. 1995) (“literal rather than substantial compliance with SEQRA is required”).

113. Furthermore, under 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 SEQRA have been complied with." [6 NYCRR 617.3(a); Town of Dickinson v. County of Broome, 183 AD2d 1013, 1015, 583 NYS2d 637, 638 (3rd Dept. 1992).]

114. At the time respondent Planning Board received respondent Charter School's proposed action, it elected to conduct what the SEQRA regulations refer to as an "uncoordinated review" of the charter school expansion project - rather than performing a so-called "coordinated review" with respondent Common Council – thereby placing an obligation on both involved agencies to *identify* the relevant areas of environmental concern, to take a "*hard look*" at them; and to make a "*reasoned elaboration*" of the basis for its determination whether the proposed action "may include the potential for at least one significant adverse environmental impact," and, therefore, require preparation of an Environmental Impact Statement. [6 NYCRR 617.6(b)(3)&(4); 617.7]

115. As a review of their respective Determinations of Non-Significance/Negative Declarations demonstrates, respondent Planning Board and respondent Common Council has each failed to meet its obligations under SEQRA, rendering their respective Negative Declarations and their substantive approvals of respondent Charter School's action void and unauthorized. E.F.S. Ventures, *supra*, 526 NYS2d at 62. [Attached hereto as **Exhibit D** is respondent Planning Board's Negative Declaration, dated and adopted on May 21, 2018; attached hereto as **Exhibit E** is respondent Common Council's Negative Declaration, dated May 30, 2018 and adopted June 12, 2018.]

- Regarding Impacts on Historic and Archeological Resources –

116. The SEQR regulations expressly identify “the impairment of the character or quality of important historical, [and] archeological ... resources” as one of the listed “*indicators of significant adverse impacts on the environment.*” [See 6 NYCRR Section 617.7(c)(1)(v); see Jackson v. NYSUDC, 67 NY2d 400, 503 NYS2d 298, 309 (1986) (“DEC regulations [list] ‘the impairment of the character of quality of important * * * archaeological * * * resources’ as a criterion considered an indicator of significant effect on the environment, triggering preparation of an EIS [citations omitted].”)]

117. Although both attached Negative Declarations acknowledge that “the proposed action is located within an area designated as sensitive for archeological sites on the NYSHPO [New York State Historic Preservation Office] archaeological site inventory,” neither respondent Planning Board, nor Common Council, honored “the affirmative obligation of [an] agency to consider environmental effects.” See Jackson, *supra*.

118. Despite the provision in the SEQRA regulations requiring a lead agency “to make every reasonable effort to involve ... other agencies and the public in the SEQR process” [6 NYCRR 617.3(d)], the following email message, forwarded to me on June 18, 2018 by Jay Toth, the Seneca Nation’s Tribal Archaeologist, and written on June 18, 2018 by Nancy Herter, Ph.D., Archaeology Unit Program Coordinator with the New York State Historic Preservation Office [SHPO], clearly states that SHPO has not been contacted by the City of Buffalo about the 102 Buffum Street project:

From: Herter, Nancy (PARKS) [mailto:Nancy.Herter@parks.ny.gov]
Sent: Monday, June 18, 2018 12:14 PM
To: Jay Toth <jay.toth@sni.org>

Cc: Todd Gates <todd.gates@sni.org>; Cindy Nephew <cindy.nephew@sni.org>
Subject: RE: Fwd: FW: Buffum Street Bedlam

Jay,

The SHPO has not been contacted about this project but we can write a letter to the City of Buffalo stating our concerns and providing recommendations for a Phase IA archaeological survey. I would also explain when Section 106 of the National Historic Preservation Act and Section 14.09 of the State Historic Preservation Act apply and indicate that Indian Nation consultation is necessary.

Nancy

Nancy Herter, Ph.D.

Archaeology Unit Program Coordinator

New York State Parks, Recreation & Historic Preservation

PO Box 189, Peebles Island, Waterford, New York 12188-0189

(518) 268-2179 | nancy.herter@parks.ny.gov

www.nysparks.com

119. As the above quoted email states, SHPO has concerns regarding the proposed Buffum Street project, and recommends that a “Phase 1A archaeological survey” be conducted. [A copy of the June 18, 2018 SHPO email message is attached hereto as **Exhibit F**, along with Dr. Herter’s follow-up letter to respondent Common Council on June 19, 2018.]

120. Rather than take any affirmative steps to prevent adverse impacts to archeological resources, the City of Buffalo respondents issued their respective Negative Declarations with virtually identical “reasoning” for not requiring the preparation of an Environmental Impact Statement to assess the potential adverse impacts on archeological resources:

Impacts on Historic and Archeological Resources

...

The project will not impact the character and quality of an archeological resource. There are no known and/or identified significant cultural resources on site or adjacent to the property. Although the proposed action is located within an area designated as sensitive for archeological sites on the NYSHPO [New York State Historic Preservation Office] archeological site inventory, the site was previously developed. No significant adverse environmental impacts are anticipated.

[See Planning Board's Negative Declaration, attached hereto as Exhibit D.]

121. Neither the Planning Board, nor the Common Council, addresses the bases and nature of the "archeological sensitivity," that is, the location of ancient indigenous villages and burial grounds in the vicinity of the subject parcel, including the existence, within a couple hundred feet of the project site, of the Seneca Indian Park, a site deemed sacred by the Senecas and historically used as a burial ground by the Seneca Nation and others.

122. Furthermore, as described in a June 18, 2018 letter written by Raymond C. Vaughan, Ph.D., P.G., and attached hereto as **Exhibit G**, an 1856 map of Buffalo (from www.wnyheritage.org) appears to show that the historically-significant Seneca Mission House was located at the [south]eastern edge of the 102 Buffum Street site, and that at least part of the footprint of the Mission House extended to the relatively undisturbed grassy lawn at the southeastern edge of the subject parcel (where respondent Charter School intends to excavate the lawn and mature trees and construct a parking lot).

123. In the light of the above, respondents Planning Board and Common Council have failed to take the requisite "*hard look*" at potential adverse impacts to important historic and archeological impacts, and to make a "*reasoned elaboration*" of the basis for their determinations not to require preparation of an Environmental Impact Statement addressing, at a minimum, this sensitive and critical aspect of the environment.

124. Additionally, by failing to issue a Positive Declaration and require respondent Charter School to prepare a draft EIS assessing the proposed action's potential adverse impacts on historic and archeological resources, respondents Planning Board and Common Council have violated the well-established principle that the requirement to issue a Positive Declaration and require preparation of a draft EIS is triggered by "*a relatively low threshold*", that is, a draft EIS is needed *if the action may have a significant effect* on any one or more aspects of the environment. [See Chemical Specialties Manufacturers Assoc. v. Jorling, 85 NY2d 382, 626 NYS2d 1, 9 (1995); also see, *e.g.*, Munash v. Town Board of Town of East Hampton, 297 AD2d 345, 748 NYS2d 160 (2d Dept. 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.'").]

125. Although both City of Buffalo respondents have failed to comply with SEQRA, it is the Common Council's failure to take a "hard look" at potential harm to historic and archeological resources, despite the poignant pleas at the June 5, 2018 public hearing from Allan Jamieson, the Executive Director of Neto, that is most disturbing and violative of the letter and spirit of New York's environmental review law.

- Regarding Impacts on Land –

126. The SEQR regulations also expressly identify "*a substantial change in the intensity of use of land*" as one of the listed "*indicators of significant adverse impacts on the environment.*" [See 6 NYCRR Section 617.7(c)(1)(viii).]

127. Neither Negative Declaration issued by the City of Buffalo respondents addresses the contrast between the current scale of development and intensity of use at

the subject parcel, and respondent Charter School's proposed May 2018 plan, as set forth in detail above at paragraphs 22 through 24.

128. The Common Council's Negative Declaration provides a conclusory statement, unsupported by empirical data or explanatory information, in support of its determination that the proposed charter school expansion will not adversely impact the land, merely repeating the language from the SEQRA regulations identifying the criteria for determining significance:

Impacts on Land

The project will not create a substantial change in the use, or intensity of use, of land, including agricultural, open space, or recreational resources, or in its capacity to support existing uses.

[See Common Council's Negative Declaration, attached hereto as Exhibit E.]

129. New York State's appellate courts have consistently held, as the Fourth Department did in Tonery v. Planning Board of Town of Hamlin, 256 AD2d 1097, 1098 (AD4 1998), that, "Conclusory statements, unsupported by empirical or experimental data, scientific authorities or any explanatory information will not suffice as a reasoned elaboration for its determination of environmental significance or nonsignificance." Id.

130. Respondent Planning Board's Negative Declaration, while not merely parroting the regulatory language, also fails to acknowledge the fact that the charter school expansion project would triple the number of buildings on site, increase gross floor area from approximately 43,000 sq. ft. to approximately 132,000 sq. ft. (an increase of greater than 300%), increase the maximum number of stories on site from 2 to 3, add an additional 57 parking spaces (replacing a grassy lawn and mature trees with a paved

parking lot), increase the number of students at 102 Buffum Street from 81 to 450 (an increase of greater than 550%), and triple the number of faculty on site from 24 to 75:

Impacts on Land

The construction of the new building [sic] and site improvements will not have any significant adverse environmental impacts on land as the site was partial [sic] developed (paved areas) and underutilized green space (lawn area).

[See Planning Board's Negative Declaration, attached hereto as Exhibit D.]

131. Respondent Planning Board has not only disregarded the stark contrast between the intensity of the current use of 102 Buffum Street and the proposed charter school expansion, it has failed to acknowledge that the two new buildings will encroach substantially on land that has not been previously developed or paved, and that the transition from so-called "underutilized green space (lawn area)" to a paved parking lot is a substantial change in the use and intensity of use of the grassy lawn.

132. By rendering their respective determinations regarding impacts on land "without regard to the facts," respondents Planning Board and Common Council have acted in an arbitrary and capricious manner [see, e.g., Pell v. Board of Education, 34 NY2d 222, 231 (1974) (a resolution adopted "without regard to the facts" is arbitrary and capricious), County of Monroe v. Kaladjian, 83 NY2d 185, 189 (1994)], and have failed to meet their obligations under SEQRA.

- Regarding Impacts on Existing Neighborhood Character –

133. The SEQRA regulations list "the impairment of ... existing community or neighborhood character" as an "indicator" of significant adverse impacts on the environment. [6 NYCRR 617.7(c)(1)(v)]

134. Respondent Common Council has ignored “neighborhood character” in its Negative Declaration – choosing to only reference “the existing community” – a dubious tactic, especially in the context of a request for a special use permit for a high school in a neighborhood that is zoned N-3R.

135. After all, it was in early 2017 that the same nine Common Council members, when enacting the Green Code, placed the neighborhood surrounding 102 Buffum Street in the “N-3R Residential” zone, described N-3R zones as “moderately compact residential blocks, which occasionally include small mixed use buildings,” concluded that the operation of a school in an N-3R zone “had increased potential for incompatibility,” and, as a result, required such a use to be “carefully reviewed” pursuant to the special use permit process. [Green Code, Sections 3.1.9(A), 11.3.3(A)]

136. Given this legislative context, respondent Common Council’s strikingly meager and conclusory statement, “*The project will not impair the character or quality of the existing community,*” is clearly deficient and violative of SEQRA (see Tonery, *supra*), but fittingly emblematic of the perfunctory and disrespectful approach Buffalo’s legislative body exhibited toward the SEQRA process on June 12, 2018 when it simultaneously adopted, without discussion and in nine seconds, Negative Declarations for eight different projects. [See Paragraph 92(A) above.]

137. Respondent Planning Board’s take on impacts to existing neighborhood character is not much better than the Common Council’s:

Consistency with Community Plans and Character

The project is consistent with the community’s current plans and goals, including institutional uses in the project area, and is overall consistent with the existing community and neighborhood. No significant adverse environmental impacts are anticipated.

138. Contrary to its obligations under SEQRA, the Planning Board’s explanation for not requiring preparation of a Draft EIS to address potential adverse impacts on the existing neighborhood’s character is conclusory, unsupported by either data or explanatory information, inaccurately suggests that there are “institutional uses” nearby, and disregards the drastic contrast between the scale and intensity of use of the existing Middle School (which has been an integral part of the neighborhood’s character since 1915), and the proposed expansion plan. [See Tonery, *supra*.]

- Regarding Impacts on Traffic -

139. The SEQRA regulations identify “a substantial adverse change in existing ... traffic levels” as an “indicator” of significant adverse impacts on the environment. [6 NYCRR 617.7(c)(1)(i)]; also see Coppola v. Good Samaritan Hospital Medical Center, 309 AD2d 862 (AD2 2003).]

140. Neither of the attached Negative Declarations provides any empirical data to support the assertion that the proposed action – which will attract 525 people to Buffum street on a daily basis – will not have a substantial adverse impact on existing traffic levels.

141. Neither of the attached Negative Declarations provides an estimate of existing traffic levels on Buffum Street, or the estimated increase in traffic levels as a result of the charter school expansion project, and, upon information, respondent Charter School did not provide the City of Buffalo respondents with data on the existing traffic levels, making a meaningful assessment of the substantiality of the increase impossible.

142. Although not referenced in the Negative Declarations, the application packet submitted by the project sponsor to respondent Planning Bard as part of the site plan

review includes a so-called “Transportation Demand Management Plan” [“transportation plan”].

143. The transportation plan, following a convoluted analysis, estimates that the proposed middle school/high school would generate 104 “vehicle trips” [not including yellow bus traffic] during the school’s “AM Peak Hour,” and 86 “vehicle trips” [not including yellow bus traffic] during the school’s “PM Peak Hour.”

144. According to respondent Charter School’s transportation plan, “The school utilizes 20 yellow school buses.”

145. The projected 104 vehicle trips [not including yellow bus traffic] during the expanded school’s AM peak hour (presumably, between 7 AM and 8 AM) translates to approximately one vehicle arriving at the project site every 35 seconds [not including yellow bus traffic].

146. The projected 86 vehicle trips [not including yellow bus traffic] during the expanded school’s PM peak hour (presumably, between 3 PM and 4 PM) translates to approximately one vehicle trip departing the project site every 42 seconds [not including yellow bus traffic].

147. The statement in respondent Planning Board’s Negative Declaration that, “The project is located in a developed urban area and road capacity is adequate to accommodate any increase generated by the project,” disregards the reality on Buffum Street, as described in petitioner’s June 5, 2018 letter to respondent Common Council:

... 102 Buffum is located three blocks from Seneca, in the heart of a residential neighborhood, where the principal public street is only 20 feet wide, cars purposely park over the curb because of the narrowness of the thoroughfare, and two of the adjacent streets (Indian Orchard and Silverdale) are one-block long dead ends. As the accompanying photos show, school buses – with only 81 students attending the school – already have a difficult time maneuvering around

each other on Buffum Street. Traveling becomes difficult and even treacherous during the winter months on this typical South Buffalo tertiary street...

[See Petitioner's June 5, 2018 written comments, p. 5, attached hereto as Exhibit C.]

[Attached hereto as **Exhibit H** are photographs taken by petitioner accurately depicting the traffic situation on Buffum Street on Monday, June 4, 2018, at approximately 7:20 AM.]

148. Given the narrow width of Buffum Street, and the congestion already observed by petitioner, and experienced by Buffum Street residents, resulting from the existing traffic [including the yellow buses utilized by the Middle School], the estimate that the charter school expansion project would generate one vehicle every 35 seconds during the morning peak hour, and one vehicle every 42 seconds during the afternoon peak hour, constitutes a substantial adverse change in traffic levels, requiring preparation of a draft EIS assessing potential traffic impacts.

- Regarding Attracting a Large Number of People to a Place -

149. Another "indicator" of significant adverse impacts on the environment recognized in the SEQRA regulations is "the encouraging or attracting of a large number of people to a place or places for more than a few days, compared to the number of people who would come to such place absent the action." [6 NYCRR 617.7(c)(1)(ix)]

150. Under the heading, "Additional Considerations," respondent Planning Board's Negative Declaration merely echoes the regulatory language: "The project will not the encourage or attract a large number of people to a place or places for more than a few days, compared to the number of people who would come to such place absent the action."

151. This conclusory, unsupported assertion fails to reference the number of people who would be spending school days at 102 Buffum Street, or attempt to explain how attracting 525 people (students and faculty), plus parents, delivery persons, etc., to a residential neighborhood predominated by one- and two-family homes, would not adversely impact the quality of life, peaceful enjoyment, noise level, sense of privacy, etc., of the nearby residents.

152. Respondent Common Council's Negative Declaration fails to even mention this "indicator of significant adverse impacts."

- Regarding Changes to Two or More Elements of the Environment –

153. Another "indicator" of significant adverse impacts on the environment recognized in the SEQRA regulations is "changes to two or more elements of the environment, no one of which has a significant impact on the environment, but when considered together result in a substantial adverse impact on the environment." [6 NYCRR 617.7(c)(1)(xi)]

154. As with the "attracting large numbers of people" criteria, respondent Planning Board's Negative Declaration addresses this "indicator" under the heading, "Additional Considerations," and merely echoes the regulatory language.

155. Once again, respondent Common Council's Negative Declaration fails to even mention this "indicator of significant adverse impacts."

156. If one assumes, for the sake of argument, that, when considered separately, the proposed project would not likely result in a significant adverse impact on existing neighborhood character, land, traffic, noise, air quality, aesthetics, or traffic, petitioner contends that, when considered together, the adverse impacts on existing neighborhood

character, land, traffic noise, air quality, aesthetics, and traffic would result in a substantial adverse impact on the environment given the proximity of the surrounding residences to the charter school expansion site, the predominantly residential nature of the neighborhood, the narrow width of Buffum Street, and the 103-year-period during which the former School No. 70 building functioned simply as an elementary school.

- Regarding Construction-related Impacts -

157. Respondent Charter School's major site plan application estimates that construction of the proposed project would take four months.

158. Upon information and belief, construction-related activities would include, but may not be limited to, the transporting of large construction vehicles to the site; the transporting of large amounts of construction materials to the site; stockpiling of large amounts of construction materials at the site; vegetation removal, including the removal of numerous mature trees; excavation and/or trenching; grading and other earthwork; construction of two substantial buildings; paving; and, the daily attraction of a substantial number of workers, and their personal vehicles, to the vicinity of the site.

159. Given the proximity of the surrounding residences to the charter school expansion site, the residential nature of the neighborhood, and the narrow width of Buffum Street, construction-related traffic, noise, dust, etc., would have a profoundly adverse impact on the quality of life of the surrounding residents during the duration of construction, .

160. Contrary to the requirements of SEQRA, neither respondent Planning Board, nor respondent Common Council, addressed the likely impacts of construction-related activities in their respective Negative Declarations.

161. As a result of respondent Planning Board's failure to comply with the letter and spirit of SEQRA and its regulations prior to approving with conditions respondent Charter School's site plan, it has failed to perform a duty enjoined upon it by law, proceeded without or in excess of its jurisdiction, and rendered determinations that are contrary to law, arbitrary and capricious, and/or an abuse of discretion, and its May 21, 2018 Negative Declaration and site plan determination should be invalidated.

162. As a result of respondent Common Council's failure to comply with the letter and spirit of SEQRA and its regulations prior to approving respondent Charter School's special use permit, it has failed to perform a duty enjoined upon it by law, proceeded without or in excess of its jurisdiction, and rendered determinations that are contrary to law, arbitrary and capricious, and/or an abuse of discretion, and its June 12, 2018 Negative Declaration and special use plan determination should be invalidated.

163. Petitioner has no adequate remedy at law.

PETITIONER'S STANDING

164. Petitioners repeat and re-allege each and every allegation contained in paragraphs 1 through 163 of this petition, with the same force and effect as if set forth here at length.

165. New York courts have long held that standing, especially in zoning matters, should be liberally construed so that land disputes are resolved on their merits. See, e.g., Sun-Brite Car Wash, Inc. v. Board of Zoning and Appeals of Town of North Hempstead, 69 NY2d 406, 413, 515 NYS2d 418, 421 (1987); Parisella v. Town of Fishkill, 209 AD2d 850, 619 NYS2d 169 (3d Dept. 1994) (standing should be liberally construed so that land disputes are settled on their own merits, and allegations contained in a petition are

deemed to be true); Massiello v. Town Board of Town of Lake George, 257 AD2d 962, 963, 684 NYS2d 330, 331 (3d Dept. 1999).

166. The New York Court of Appeals has established 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, 570 NYS2d 778 (1991); Mobil Oil Corporation v. Syracuse IDA, 76 NY2d 428, 443, 559 NYS2d 947, 950 (1990).

167. New York’s courts apply the legal principle that a presumption of standing exists in land use and environmental cases for a property owner or resident whose property is in close proximity to the subject property. See e.g., Society of Plastics, supra, 77 NY2d at 779; LaDelfa v. Village of Mt. Morris, 213 AD2d 1024, 1025, 625 NYS2d 117, 118 (AD4 1995); Williamsville/Southeast Area HOA v Town of Amherst, 110 AD2d 1074, 488 NYS2d 931 (4th Dept. 1985) (owner of property about 1,500 feet from rezoned site has standing to pursue SEQRA and zoning claims); Manupella v. Troy City ZBA, 272 AD2d 761, 707 NYS2d 707 (3d Dept. 2000) (petitioner residing 714 feet from site resides sufficiently close to subject parcel to have standing in zoning dispute).

168. The proximity alone permits an inference that the challenger possesses an interest different from other members of the community. See Gernatt Asphalt Products, Inc. v. Town of Sardinia, 87 NY2d 668, 642 NYS2d 164 (1996); Manupella, supra (“If petitioners can show that their premises are located in close proximity to the subject

property, then actual injury is not required for it is presumed that they will suffer an adverse impact different in nature or degree than the public at large.").

169. Petitioner's residence at 17 Oschawa Avenue is located in close proximity to the subject parcel, that is, less than 800 feet from 102 Buffum Street, and, therefore, a presumption exists that he will be adversely affected by the proposed charter school expansion project.

170. Additionally, as alleged above, petitioner walks, bicycles and/or drives on Buffum Street and passes the subject parcel one or more times a day virtually every day of the year, attracted by the beauty and serenity of the Seneca Indian Park, the aesthetics of the mature trees and masonry building at 102 Buffum Street, and the relative quiet and lack of vehicular traffic on this predominantly residential street, and, therefore, he will be injured by the proposal to the proposed action in a manner that is different in kind and degree from that of the public at large.

171. The "zone of interests" of the zoning and planning laws of New York State and the City of Buffalo and SEQRA include the protection of the character of a neighborhood, and the environmental, aesthetic, historic and archeological resources that petitioner contends will be harmed if the determinations he challenges in this proceeding are not nullified.

REGARDING PRELIMINARY RELIEF

172. Petitioners repeat and re-allege each and every allegation contained in paragraphs 1 through 171 of this petition, with the same force and effect as if set forth here at length.

173. Petitioner seeks preliminary relief from the Court, in the form of both a temporary restraining order and a preliminary injunction, to maintain the status quo during the pendency of this proceeding.

174. Upon information and belief, respondent Charter School intends to start construction-related activity at the subject parcel immediately following the end of the academic year on or about June 22, 2018.

175. As is alleged in greater detail at paragraphs 116 through 125 above, the subject parcel is located in an area designated by the New York State Historic Preservation Office as archeologically sensitive, and, furthermore, that SHPO's Archaeology Unit Program Coordinator, Nancy Herter, Ph.D., has expressed in an email dated June 18, 2018 (attached hereto as Exhibit F) that SHPO has concerns regarding the proposed project, and recommends that a "Phase 1A archeological survey" be conducted.

176. Additionally, pursuant to Section 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." [6 NYCRR 617.3(a)]

177. 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.

178. In light of the potential adverse impacts on archeological resources, and SEQRA's prohibition against "physical alteration" at the project's site until the requirements of SEQRA have been complied with, commencement of construction-related activity during the pendency of this proceeding, and prior to full compliance with

the requirements of SEQRA and the applicable zoning and planning laws, will produce severe injury to petitioner's zoning and environmental interests.

179. Upon information and belief, unless a temporary restraining order is granted pending a hearing for a preliminary injunction, petitioner may suffer immediate and irreparable injury.

180. Upon information and belief, if the requested preliminary relief is not granted, and respondent Charter School proceeds with excavation and construction-related activities during the pendency of this proceeding, such actions will tend to render judgment herein ineffectual, and will result in irreparable injury to petitioner.

181. For the reasons stated above, it is clear that respondents Planning Board and Common Council have failed to strictly comply with the procedural and substantive requirements of SEQRA, and Buffalo's Green Code, and, therefore, that petitioner has established the likelihood of success.

182. Upon information and belief, the potential harm to petitioner, the residents living in close proximity to 102 Buffum Street, and to the environment (and, in particular, archeological resources) if the requested preliminary relief is not granted, exceeds any potential harm to respondents of granting the temporary restraining order and preliminary injunction.

WHEREFORE, petitioner demands judgment against respondents as follows:

A. Preliminarily enjoining, during the pendency of this proceeding, respondent Western New York Maritime Charter School, its employees, contractors, agents and assigns, from commencing and/or continuing:

(i) construction-related activities at the subject parcel, situated at 102 Buffum Street, Buffalo, New York; and

(ii) the "physical alteration", as that term is defined at 6 NYCRR 617.2(ab), of real property in the City of Buffalo, New York commonly known as 102 Buffum Street, in furtherance of respondent Western New York Maritime Charter School's charter school expansion project, including, without limitation, vegetation removal, demolition, stockpiling materials, grading and other forms of earthwork, dumping, filling or depositing, discharges to air or water, excavation or trenching, application of pesticides, herbicides, or other chemicals, application of sewage sludge, dredging, flooding, draining or dewatering, paving, construction of buildings, structures or facilities, and extraction, injection or recharge of resources below ground.

B. Annuling and setting aside the Determination of Non-Significance/Negative Declaration for the proposed charter school expansion project at 102 Buffum Street, adopted on May 21, 2018 by respondent City of Buffalo Planning Board.

C. Annuling and setting aside the May 21, 2018 approval with conditions by respondent City of Buffalo Planning Board of the site plan for the proposed charter school expansion project at 102 Buffum Street.

D. Annuling and setting aside the Determination of Non-Significance/Negative Declaration for the proposed charter school expansion project at 102 Buffum Street,

adopted on June 12, 2018 by respondent City of Buffalo Common Council.

E. Annuling and setting aside the June 12, 2018 grant by respondent City of Buffalo Common Council of a special use permit for the proposed charter school expansion project at 102 Buffum Street.

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: June 19, 2018
Buffalo, New York

/s/ Arthur J. Giacalone
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VERIFICATION

STATE OF NEW YORK)

SS.:

COUNTY OF ERIE)

ARTHUR J. GIACALONE, being duly sworn, deposes and says: he is the petitioner in the within proceeding; that he has read the foregoing petition and knows the content thereof; that the same is true to his own knowledge, except as to matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

/s/ Arthur J. Giacalone
ARTHUR J. GIACALONE

Sworn to before me this
19th day of June, 2018l.

/s/ Joshua Pulvino

Notary Public, State of New York
Qualified in Erie County
My commission expires 06/19/2021