

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

In the Matter of the Application of the LEAGUE OF WOMEN VOTERS OF BUFFALO/NIAGARA, INC.; THE 21ST CENTURY PARK IN THE OUTER HARBOR, INC.; and THE WESTERN NEW YORK ENVIRONMENTAL ALLIANCE, Inc.

Index No. _____

VERIFIED PETITION

Petitioners,

For a Judgment Pursuant to CPLR Article 78

-vs-

THE ERIE CANAL HARBOR DEVELOPMENT CORPORATION; THE CITY OF BUFFALO; and THE CITY OF BUFFALO COMMON COUNCIL,

Respondents.

Petitioners, by their attorneys, LIPPES & LIPPES, Richard J. Lippes, of counsel, respectfully allege as follows:

I. INTRODUCTION

1. Petitioners are commencing this Special Proceeding challenging the “General Project Plan Buffalo Outer Harbor Civic and Land Use Improvement Project” (hereinafter cited as “The Project”) which was adopted by Erie Canal Harbor Development Corporation (hereinafter cited as “ECHDC”) on November 8, 2020, and affirmed on February 8, 2021, and a Negative Declaration was issued by ECHDC which was published on February 24, 2021, as violative of New York

State Environmental Quality Review Act, Environmental Conservation Law Article 8-0101, et. seq. [hereinafter cited as “SEQRA”]; and the regulations promulgated thereto. This Special Proceeding also challenges the City of Buffalo’s determination that the proposed action of building an amphitheater, and holding concerts and events is consistent with the City of Buffalo’s Local Waterfront Revitalization Program (hereinafter cited as “LWRP”), as well as violative of the City of Buffalo’s zoning ordinance (hereinafter cited as “Green Code”).

II. PARTIES

2. THE LEAGUE OF WOMEN VOTERS OF BUFFALO/NIAGARA, INC., is a New York State not-for-profit corporation incorporated on November 22, 2002 and located at 1272 Delaware Avenue, City of Buffalo, County of Erie. The League of Women Voters of Buffalo/Niagara, Inc. is a good government organization that encourages participation in the political process, works to increase understanding of major public policy issues, and influences public policy through education and advocacy. They have members that regularly use the section of the Outer Harbor where the project is intended to be built and the concerts and events to occur including the passive uses of this Outer Harbor land for walking, jogging, bicycling, and sitting on the park benches to view Lake Erie and the watercraft used on the lake. Their members are concerned that the tranquil

nature of the project site will be significantly and adversely affected by the construction of the amphitheater and holding of concerts and events on what is now considered passive parkland. Their members are also concerned about the effects of significant noise, lighting, and pollutant runoff into the lake on the flora and fauna that use the site as well as the surrounding areas and the disturbance to the aquatic ecology of the lake nearby the shoreline.

3. THE 21ST CENTURY PARK IN THE OUTER HARBOR, INC., is a New York State not-for-profit corporation incorporated on February 28, 2013. It was formed to protect and preserved the over 130 acres of the Lake Erie Waterfront Land for public use by creating a park for the benefit of the people of Western New York. They have been working to establish the Outer Harbor and the site at issue as a dedicated public park. The 21st Century Park in the Outer Harbor, Inc. has many members that regularly use the site at issue, including walking, jogging, bicycling, and sitting on the park benches to view Lake Erie and the watercraft that uses the lake. Their members are concerned that the tranquil nature of the project site will be significantly and adversely affected by the construction of the amphitheater and holding of concerts and events on what is now considered passive parkland. Their members are also concerned about the effects of significant noise, lighting, and pollutant runoff into the lake on the flora

and fauna that use the site as well as the surrounding areas and the disturbance to the aquatic ecology of the lake nearby the shoreline.

4. WESTERN NEW YORK ENVIRONMENTAL ALLIANCE is a New York State not-for-profit corporation. The Alliance's members through their respective organizations, regularly use the site at issue, including walking, jogging, bicycling, and sitting on the park benches to view Lake Erie and the watercraft that uses the lake. Their members are concerned that the tranquil nature of the project site will be significantly and adversely affected by the construction of the amphitheater and holding of concerts and events on what is now considered passive parkland. Their members are also concerned about the effects of significant noise, lighting, pollutant runoff into the lake on the flora and fauna that use the site as well as the surrounding areas and the disturbance to the aquatic ecology of the lake nearby the shoreline.

5. The ERIE CANAL HARBOR DEVELOPMENT CORPORATION located at 95 Perry Street, in the City of Buffalo and State of New York, is a state agency which is a subsidiary of the New York State Urban Development Corporation d/b/a Empire State Development. They are the owners at the site at issue, and are the lead agency responsible for compliance with the laws of the State of New York. As such, they are made a Respondent in the instant proceeding.

6. The CITY OF BUFFALO is a municipal corporation with its government agencies located on Niagara Square in the City of Buffalo and State of New York. The CITY OF BUFFALO COMMON COUNCIL is responsible for granting a Special Use Permit to ECHDC concerning the proposed project, as well as assuring consistency with the City of Buffalo's LWRP. As such, they are made Respondents in the instant proceeding.

III. FACTS

7. ECHDC intends to create various amenities and an amphitheater for holding concerts and events for upwards of 8,000 people and 2,000 to 4,000 automobiles, since the concerts and events that are proposed to be held in the amphitheater will have no individual seating, but rather, will admit individuals in their automobiles to the events and concerts like in a drive-in movie theater. The amphitheater will be built on what ECHDC calls the Lakeside Complex, which in 2019 was designated as a 41-acre sub-area of the Outer Harbor and was dedicated as the Lakeside Complex, including an extension of the multiuse trail system as well as a new bike park and off-road trails, a 50-space paved parking lot, 3.5-acre of lawn which they call an event lawn, and large areas of regenerative landscape.

8. The Lakeside Complex also includes what is called Terminal B, upon which sits a nearly 100,000 sq. ft. steel frame and concrete block building

surrounding by approximately 12 acres of asphalt paving, and the Lakeside Complex on three sides and Lake Erie to the west.

9. It is the intention of ECHDC to rehabilitate the existing 100,000 ft. building which is now vacant, and to create a new 30,000 sq. ft. amphitheater facility to support the concerts and other outdoor events, which will be built on the southern end of the existing Terminal B slab. The amphitheater will include a 9,000 sq. ft. permanent stage/storage/green room facility on the eastern edge of Terminal B with a public elevated walkway along the western edge. The Lakeside Complex is located within the City of Buffalo Outer Harbor, a portion of the City's Lake Erie shoreline which extends northerly for approximately 2.8 miles from Buffalo's border with Lackawanna to the U.S. Coast Guard Marina. Within the confines of the Outer Harbor are public parks, marinas and walkways, including, from south to north, Tiff Street Pier, Gallagher Beach, Buffalo Harbor State Park, the Small Boat Harbor, the Greenway Nature Trail (also known as the "Greenbelt"), the Seaway Pier, Wilkeson Pointe, and Times Beach Nature Preserve.

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

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

“The Small Boat Harbor is the only sizable shallow water embayment on Lake Erie in Erie County. Despite human disturbances, it is one of the most important fish and wildlife habitat areas in the Buffalo metropolitan region, because it provides substantial protection from wave action for fish, wildlife, and aquatic vegetation. Consequently, the harbor supports a highly productive and a diverse littoral community, with concentrations of many fish and wildlife species occurring in the area.

...fish provide valuable food resources for many species of waterfowl and other migratory birds. The Small Boat Harbor attracts concentrations of these birds during springs and fall migrations (March-April and September-November, respectively), with some remaining until the harbor freezes over in early to mid-winter...” [See Department of State Significant Habitat Narrative for the Small Boat Harbor, October 15, 1987.]

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

“Tifft Nature Preserve is the largest contiguous fish and wildlife habitat area within the City of Buffalo. Of special importance is the relatively undisturbed wetland area, which is the largest of its kind along the Lake Erie coastline. The site is inhabited by a diversity of fish and wildlife species that is unusual in this coastal region, especially within this urban area. A full complement of

wetland species occurs in and around the marshes at Tiff Farm: ... many species of waterfowl, shorebirds, herons, osprey (T) [threatened], and passerine birds use the area as a stopover during spring and fall Migrations...

...

Despite its current status as a nature preserve and environmental education center, Tiff Farm's fish and wildlife habitats remain vulnerable to a number of potential impacts. Surrounding land uses may be the most important factor affecting the wildlife resources of this area. Encroachment of human disturbance, including industrial, commercial, or residential development could have significant impacts on species using the area..." [See Supra for the Tiff Farm Nature Preserve]

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

"[Times Beach] is one of the few sizeable wetlands areas along the New York shoreline of Lake Erie. Although the areas in man-made, and only recently created, it has become an important fish and wildlife habitat. The variety of ecological communities at Times Beach attracts a diversity of species that is unusual in this coastal region, especially within the Buffalo metropolitan area. The site lies in an important flyway for migratory birds, a key factor enhancing its potential for wildlife. Its location at the eastern end of Lake Erie, and dike-protected water area, make it a focal point for water-oriented birds moving eastward along the north and south shores of the lake.

...

Times Beach is a valuable refuge and feeding area for gulls, terns, shorebirds, dabbling and diving waterfowl,

marsh birds, and passerines, especially during the spring and fall migration... Since 1972, over 220 species of birds have been observed in the area... These include some extreme rarities for the region...” [See, Supra for the Times Beach Diked Disposal Site]

11. The City of Buffalo’s Local Waterfront Revitalization Program, lists general goals for the City’s waterfront as a whole and specific goals for portions of the waterfront that have notable characteristics. [See Buffalo Local Waterfront Revitalization Plan] The LWRP characterizes Buffalo’s waterfront area, including the entire Outer Harbor, as “*an informal regional wildlife preserve,*” and seeks as a primary goal to protect, preserve and improve publicly owned areas identified as habitats of state and local significance, including Times Beach, Small Boat Harbor, Tiffit Nature Preserve, and the Niagara River Globally Significant Important Bird Area [See LWRP at IIa(7 c)].

12. Another critical goal of the Buffalo LWRP is to “protect, restore or enhance natural and manmade resources ... which contribute to the overall scenic quality of the coastal area.” [See LWRP, Section II (5b)] Those resources include “unique waterfront landscapes” such as marinas, piers, wharfs and mooring areas, waterfront sunsets, the Niagara River Globally Significant Important Bird Area, and the Buffalo portion of the Great Lakes Seaway Trail Scenic Byway [See ID.].

13. The Niagara River Globally Significant Important Bird Area is one of only 72 sites worldwide to receive the designation by National Audubon –

“annually supports one of the world’s most spectacular concentrations of gulls,” and hosts “a remarkable diversity of waterfowl” and “an exceptional diversity of migratory songbirds during spring and fall migrations.” [See LWRP at Section II (3)] According to the LWRP, “Many of the migrating species find habitat and refuge at the various open areas and nature preserves that exists in the vicinity of the [Niagara] river, including Times Beach Preserve and Tiff Nature Preserve (which is also designated by the Audubon Society as an IBA).” [See ID.]

14. Policies set forth in the LWRP expressly call for the protection and enhancement of the Niagara River Globally Significant Important Bird Area, and require that the review of any proposed project within the Buffalo Waterfront Review Area consider two critical factors: (a) “Protection and enhancement of bird habitat areas:” and (b) “Avoidance of disruption to bird migration to the maximum extent practicable.” [See LWRP at Section II (7K)].

15. The subject parcel abuts fish spawning areas at the Small Boat Harbor and in the waters of Lake Erie to its west and northwest, including habitat for the New York State threatened lake sturgeon and muskellunge. Two New York State threatened bird species, the peregrine falcon and the common tern, have nesting sites along the Outer Harbor a short distance from the subject parcel.

16. In spite of the extensive and important wildlife recognized by these multiple sources, the ECHDC has determined that the proposed project will have

no significant adverse environmental effects on avian, aquatic, or other wildlife species. Indeed, in their environmental assessment, in describing the wildlife on the project site they identify the predominant wildlife species that occupy or use the project site as shorebirds and small mammals. While ECHDC in their Full Environmental Assessment Form Addendum recognizes the importance of the bird flyway and the surrounding wildlife habitat areas, incredibly, ECHDC indicates that “Overall, the proposed action is expected to positively impact plant and animal species within the project site.” Full Environmental Assessment Form Addendum at 2.7.2.

17. Moreover, while ECHDC recognizes that construction of some project components such as the work at Terminal B “may cause temporary impact to wildlife associated with construction noise and general disturbance of normal conditions,” it does not discuss or otherwise recognize that the noise from rock concerts and other events throughout the spring, summer and fall months, during the important migratory bird seasons will also create significant noise not only at the project site but at the surrounding important and significant areas previously mentioned. By only considering potential adverse effects up to the project site boundaries, and ignoring the effects that the significant noise, lighting, runoff from automobile exhaust into the Lake Erie spawning areas from lake sturgeon, would have, certainly may cause significant adverse environmental effects.

18. Also, in spite of the fact that the amphitheater will bring 8,000 people and somewhere between 2,000 and 4,000 automobiles to the project site when concert or other events are being held, the ECHDC has ignored the noise that would be created at various rock concerts and other events. In fact, in § 2.15.2 of the Full Environmental Assessment Form Addendum, it is indicated that “The project would not result in any significant adverse impacts regarding noise, light, odors, or glare, such as that associated with landfills, selected agricultural uses, or heavy manufacturing facilities.” While merely mentioning that noise will occur, particularly during construction, the ECHDC simply ignores noise as a significant adverse polluting factor that will significantly affect the patterns of bird migration and other wildlife habitats of the surrounding area. While ECHDC recognizes the fact that the project site has been used as passive park-like activities for decades, ECHDC does not analyze or otherwise consider the loss of the important passive nature of the project site contiguous to Lake Erie and the Lake Erie shoreline.

19. The public has used the site at issue, along with other Outer Harbor areas, as passive parkland. In recognition of this fact, various government entities have placed park benches on the site, in order for park users to passively view Lake Erie and watercraft using the lake, and the beautiful Lake Erie sunsets.

20. Moreover, walkways have been placed on the project site so that people can use the walkways for walking their dogs, walking, jogging and bicycling which occur regularly during the spring, summer and fall months.

21. While the project site has never been designated as public parkland, the repeated and regular passive use of the project site for decades, and the fact that the project site has been used in the same manner as the recently dedicated New York State Harbor Park, indicates that the project site is in fact a *de facto* park or implied park.

22. As such, the proposed amphitheater, concert use, and rehabilitation and use of the large building on Terminal B, in fact constitutes alienation of parkland which requires New York State Legislative approval.

23. The responsibilities of an agency pursuant to SEQRA are specified in the regulations promulgated pursuant to SEQRA. and are contained at 6 N.Y.C.R.R. § 617.

24. According to the regulations promulgated pursuant to SEQRA:

The basic purpose of SEQRA is to incorporate the consideration of environmental factors into the existing planning, review and decision-making processes of state, regional and local government agencies at the earliest possible time. To accomplish this goal, SEQRA requires that all agencies determine whether the actions they directly undertake, fund or approve may have a significant impact on the environment, and, if it is determined that the action may have a significant adverse impact, prepare or request an environmental impact statement.

6 NYCRR § 617.1(c).

25. Further, the regulations indicate that:

In adopting SEQR, it was the Legislature's intention that all agencies conduct their affairs with an awareness that they are stewards of the air, water, land and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations.

6 NYCRR § 617.1(b)

26. The regulations contained at 6 NYCRR § 617.7 indicate that an EIS must be prepared if the proposed action "may include the potential for at least significant adverse environmental impact." 6 NYCRR § 617.7(a)(1) (emphasis added).

27. Conversely, to determine that an EIS will not be required for an action, "the lead agency must determine either that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant." 6 NYCRR § 61.7.7(aX2).

28. For all of the foregoing reasons, SEQRA has been violated and the site plan approval must be voided.

**IV. FOR A FIRST CAUSE OF ACTION:
VIOLATION OF THE NEW YORK STATE QUALITY REVIEW ACT**

29. The allegations contained in paragraph "1" through "28" inclusive are hereby realleged as more fully set forth herein.

30. The responsibilities of an agency pursuant to SEQRA are specified in the regulations promulgated pursuant to SEQRA, and are contained at 6 N.Y.C.R.R. § 617.

31. Prior to approving the proposed project, ECHDC, as the lead agency for SEQRA compliance was required to apply a “hard look standard” in fulfilling its SEQRA responsibilities, which require an agency to:

- (1) Identify all areas of environmental concerns; and
- (2) Take a hard look with the environmental issues identified; and
- (3) Provide a reasoned elaboration for the decisions that are made, including whether or not to do an environmental impact statement.”

6 N.Y.C.R.R. 617.7 (B)

32. By not considering the significant adverse effects of the project on the wildlife nearby the project site, or the effects of the project site on the important bird flyway that occurs over the site, or the effects on the Lake Erie ecology due to runoff from the 2,000-4,000 vehicles that will come to concerts or other events, ECHDC has failed to comply with the hard look standard.

33. Moreover, the supposed reasoned elaboration supporting ECHDC’s Negative Declaration is woefully inadequate and conclusory, and does not provide any analysis concerning why the noise, light, or contaminant runoff into Lake Erie may not create significant adverse environmental effects and therefore fails the reasoned elaboration requirement for a Negative Declaration.

V. **FOR A SECOND CAUSE OF ACTION:
ALIENATION OF PARKLAND**

34. The allegations contained in paragraph “1” through “33” inclusive are hereby realleged as more fully set forth herein.

35. As previously indicated, the passive use of the project site as parkland for decades requires that the project site be considered a *de facto* or implied park.

36. As such, the parkland cannot be alienated for non-park uses without the specific approval of the New York State Legislature.

37. Since no request has been made to the New York State Legislature to approve the non-park uses of the amphitheater, its related concerts and events, as well as the new rehabilitation of the 100,000 sq. ft building in Terminal B, the Public Trust Doctrine has been violated and the project cannot go forward until such time as the non-park uses are approved by the New York State Legislature.

VI. **FOR A THIRD CAUSE OF ACTION:
VIOLATION OF SECTION 239-M OF NEW YORK STATE
GENERAL MUNICIPAL LAW**

38. The allegations contained in paragraph “1” through “37” inclusive are hereby realleged as more fully set forth herein.

39. Site plan approval by the City of Buffalo requires a reference to the Erie County Planning Board prior to its consideration to approve or not approve the grant of a Special Use Permit for the proposed project, if the site of the

proposed project is within 500 feet of the boundary of any existing or proposed county or state park or any other recreational area.

40. The site of the proposed project is contiguous to the New York State Buffalo Harbor Park, and as such, the referral required by § 239-m is required.

41. No referral has been made to the Erie County Planning Department which is a jurisdictional requirement.

42. Therefore, the City of Buffalo is in violation of § 239-m of the General Municipal Law and any approval that may be made by the City Common Council must be voided until the General Municipal Law is complied with.

VII. FOR A FOURTH CAUSE OF ACTION:
CITY OF BUFFALO VIOLATION OF ITS LOCAL WATERFRONT
REVITALIZATION PROGRAM

43. The allegations contained in paragraph “1” through “42” inclusive are hereby realleged as more fully set forth herein.

44. As previously indicated, the proposed project is inconsistent with many of the requirements of the local Waterfront Revitalization Program. As such, approval of the project by the City of Buffalo violates the consistently review requirements of the LWRP.

**VIII. FOR A FIFTH CAUSE OF ACTION:
VIOLATION OF THE CITY OF BUFFALO'S ZONING ORDINANCE**

45. The allegations contained in paragraph "1" through "44" inclusive are hereby realleged as more fully set forth herein.

46. The City of Buffalo's zoning requirements contains approval standards for the City of Buffalo's Common Council decision on whether or not to grant a Special Use Permit.

47. Those approval standards, located at the City of Buffalo Zoning Ordinance 496-11.3.4 indicate:

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

...

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 affect the surrounding area.

...

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."

48. As previously indicated, the proposed amphitheater allowing for concerts and other events will certainly create significant noise, the amphitheater is not “harmonious with the surrounding area, and will in fact impede “the enjoyment of adjacent property in any foreseeable manner”, and finally, the proposed project will in fact damage significant natural and scenic areas and amenities such as the loss of the passive nature of the project site and the *de facto* park.

49. Since the City of Buffalo Planning Board did not make written findings concerning these approval standards, and Common Council has not considered these approval standards, the City of Buffalo Zoning Ordinance has been violated.

WHEREFORE, due to the violation of the various laws and ordinances indicated in this Petition, the approval by ECHDC to issue a Negative Declaration and not prepare an Environmental Impact Statement, and any decision of the City of Buffalo by not recognizing the inconsistency of the proposed project to its Local Waterfront Revitalization Plan, by not making a reference to the Erie County Planning Board, and by not properly considering the approval standards required by its Zoning Ordinance, any construction at the project site to advance the Project must be enjoined, and the approvals given for the project to go forward, must be voided until all laws of the State of New York and Ordinances of the City of Buffalo are complied with.

DATED: Buffalo, New York
June 23, 2021

LIPPES & LIPPES



By:

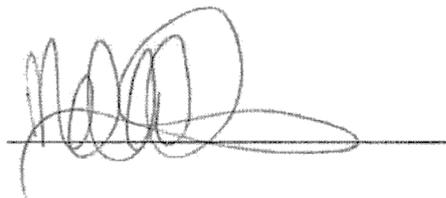
RICHARD J. LIPPES, ESQ., Of Counsel
1109 Delaware Avenue
Buffalo, New York 14209
Telephone: (716) 884-4800
Email: rlippes@lippeslaw.com
Attorneys for Petitioners

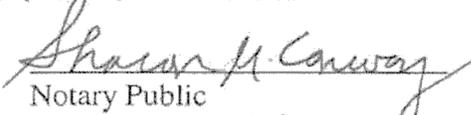
VERIFICATION

STATE OF NEW YORK)
COUNTY OF ERIE) SS.:
CITY OF BUFFALO)

Melissa D. Wischerath, being duly sworn, deposes and says that she is the President of **THE 21ST CENTURY PARK IN THE OUTER HARBOR, INC.**, the corporation named in the within entitled action; that she has read the foregoing **VERIFIED PETITION** and knows the contents thereof; and that the same is true to her own knowledge, except as to the matters therein stated to be alleged upon information and belief, as to those matters she believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by Petitioners is because the said Petitioners is a corporation and the grounds of deponent's belief as to all matters in the said **VERIFIED PETITION** not stated upon her own knowledge, are investigations which deponent has caused to be made concerning the subject matter of this **VERIFIED PETITION** and information acquired by deponent in the course of her duties as an officer of said corporation and from the books and papers of said corporation.



Sworn to before me this
23rd day of June, 2021.

Notary Public

SHARON M. CONWAY
Notary Public, State of New York
Qualified in Erie County
My Commission Expires June 30, 2023