Christopher Scanlon  
Buffalo Common Council Legislative Committee Chair  
1401 City Hall, Buffalo NY 14202

**VIA EMAIL.**

June 14, 2016

Dear Chairman Scanlon,

Buffalo Niagara Riverkeeper writes to request that the Common Council deny the Restricted Use Permit application for the proposed Freezer Queen development site on the Outer Harbor located in the Buffalo Coastal Special Review District for two reasons:

1. The environmental review of this project was inappropriate, incomplete and does not meet the mandates of SEQRA. The project should not move forward without the proper study of all potential environmental impacts.

2. The scale and scope of the proposed development is out of character with the intent provided in both the current and proposed zoning codes, and is the complete antithesis to the City of Buffalo’s own vision and strategy for redevelopment at this site.

We reaffirm our long standing position that we are amenable to development at this site, but that any development on the Outer Harbor occurs at a reasonable and appropriate scale and supports and benefits ecological and community revitalization. The pending decision by the Common Council on the Restricted Use Permit will define the future of the Outer Harbor for generations. This project cannot move forward without the Council’s affirmative vote and therefore, the Council’s decision becomes the “final approval” of the project.

As the facts below will show, the Negative Declaration of findings was improperly issued. As such, we urge the Council to request that the Planning Board rescind their issuance of negative declaration and to undergo a full Environmental Impact Statement (EIS) in order to come into full compliance under the law.

The procedure undertaken by the Planning Board as well as the analysis provided to the Planning Board by the project proponent was woefully inadequate given the magnitude and precedential value of this project. The Planning Board did not consider the impact on water quality nor aquatic habitat in their decision making process. The project proponent’s own Negative Declaration states that the project will cause an increase in untreated surface runoff directly into protected coastal habitat. **“Given that the site is an isthmus and located on the water’s edge, raising the site 2’ will not have significant impacts on flooding in the area as any displaced water will immediately return to Lake Erie.”**
For the following reasons we encourage the Common Council to deny the Restricted Use Permit:

I. The Project Is a Type 1 Action Carrying the Presumption of Requiring an Environmental Impact Statement

This project is a Type I action pursuant to SEQRA and, therefore, carries a presumption that an environmental impact statement or EIS must be prepared. The SEQRA regulations include a list of specific activities that are considered Type I actions. The purpose of the Type 1 action list is to identify actions that may have a significant adverse impact on the environment and that are more likely to require the preparation of an EIS.

The applicant is seeking site plan approval from the Planning Board and a building permit. Based on Applicant’s proposed plans for the Site which is located in a floodplain and calls for various improvements including new paved parking and internal circulation road and the issuance of a building permit, the Project is a Type I action which requires site plan review. All the factors outlined in the site plan weigh in favor of undertaking an EIS. The information provided to the Planning Board by the project proponent was not sufficient to adequately ascertain the totality of potential environmental impacts and therefore, the Planning Board should have found a positive declaration and required an EIS. Failure to do so is arbitrary and capricious.

II. The Negative Declaration Was Improperly Issued and Must Be Rescinded

The SEQRA regulations provide that a Type I action carries the presumption that it is likely to have a significant adverse environmental impact. It is well settled that SEQRA mandates the preparation of an EIS when a proposed project “may include the potential for at least one significant environmental effect.” The operative word “may” sets a low threshold for preparing an EIS. Moreover, SEQRA is meant to ensure that agency decision makers focus attention on any environmental impact to the maximum extent practicable (emphasis added).

Further, SEQRA states that a SEQRA decision must be rescinded when new information is discovered or changes in circumstances related to the project arise; that were not previously considered and the lead agency determines that a significant adverse environmental impact may result. Here, the proposed action is a Type I due to its location in a floodplain and close proximity to significant Coastal Habitat. Yet, these environmental factors did not trigger an EIS and furthermore, were not even considered in the Applicant’s documents or the Negative Declaration. While the Planning Board is the Lead Agency and ultimately the body that must rescind their decision, the reasons the Negative Declaration must be rescinded are vital for the Common Council to discuss.

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3 6 NYCRR 617.4[a][1].
5 Id. citing Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d 400, 414-415; see, Matter of West Branch Conservation Assn. v Planning Bd. of Town of Clarkstown
6 6 NYCRR §617.7(f)(1)(ii)-(iii)
before voting to approve the project. The project cannot go forward without Common Council approval of the height variance.

Numerous potential environmental impacts were not considered. Specifically, the Negative Declaration clearly states that the property is bordered on two sides by the Small Boat Harbor and Lake Erie. Further, the FEAF Findings in p.3.D.1(b.a) note that approximately 4.5 acres of the 20 acre parcel are underwater. Yet, the FEAF does not include any study of impacts on aquatic species. It includes only study of avian species for impact and states, “No other potentially significant impacts to plants or animals were identified.” This exceptionally narrow view not only excludes terrestrial species but also does not consider the affects upon the sensitive ecology of the Outer Harbor, a body listed as NYSDOS Significant Coastal Habitat or the risks to a New York State threatened species, lake sturgeon, known to be present in the Small Boat Harbor.

The Small Boat Harbor is listed by NYSDOS as a significant Coastal Fish and Wildlife Habitat. This designation is part of the framework for New York State Consistency Review which means that, generally, New York State agencies use the information provided for each designated habitat, such as here, the Small Boat Harbor, in the State and federal consistency review process. This applies here because the Restricted Use Permit is subject to consistency review.

In addition, communities that prepare Local Waterfront Revitalization Programs (LWRP) are required to protect designated significant habitats and are encouraged to use local land use controls for habitat protection. According to the NYSDOS Coastal Fish and Wildlife Habitat Rating Form for the Small Boat Harbor, “a habitat impairment test must be met for any activity that is subject to consistency review under federal and state laws (such as here, a restricted use permit in a coastal zone), or under applicable local laws contained in an approved Local Waterfront Revitalization Program. This habitat protection policy applies whether the proposed action occurs within or outside the designated area. Furthermore, NYSDOS definition of habitat destruction includes physical alteration, pollution or disturbance of a designated area or through indirect effects of these actions. This list includes changes in substrate, hydrology or increases in runoff or pollutants.

The two foot increase in elevation of the parcel proposed by developers which, as stated, will result in direct runoff into Lake Erie is in direct conflict with NYSDOS requirements. The Small Boat Harbor is bordered on one side by gravel-cobble beach. Gravel-cobble substrate in shallow water is prime Lake Sturgeon breeding habitat. NYSDOS further states that, “any permanent alteration or loss of productive littoral areas would reduce the value of the Small Boat Harbor as fish and wildlife habitat.” Not only could the proposed development cause additional runoff of pollutants into the water, but it could also negatively impair the threatened Lake Sturgeon habitat. See map attached as Exhibit I showing the Lake Sturgeon habitat and environmental use considerations.

Failure to consider a sufficiently broad list of wildlife species on a development of this scale in a Significant Coastal Habitat that includes threatened species is a total misapplication of the SEQRA process. The proposed project absolutely necessitates and
deserves a full EIS. Since the planning Board did not consider potential impacts on coastal habitat and water quality, they must rescind their decision and undergo a full EIS.\textsuperscript{7}

Moreover, the Negative Declaration suggests that any impact to the land will be discovered and addressed under the New York State Brownfield Cleanup Program (BCP). The BCP should not be used as to supplant SEQRA duties.

\textbf{III. The Common Council should deny the Restricted Use Permit Because the Proposed Construction is Inconsistent with Stated Intent of the Zoning Code}

While the City of Buffalo’s revamped Unified Development Ordinance (UDO) “Green Code” is currently in the final stages of development, and not yet codified into law, the Common Council, in accepting the Local Waterfront Revitalization Plan (LWRP) on February 2, 2016, the first step to adoption, has defined the scope and intent of Outer Harbor development in whole, and in particular, at this very site.\textsuperscript{8} Contrary to the developer’s \textit{assertion}, the plans laid out in the LWRP clearly show that this development is not consistent with community plans and character. The SEQRA, site plan, and consistency review of actions in the Waterfront Revitalization Area (WRA), the area defined in the LWRP, should examine: (a) protection of the local habitat sites, including breeding grounds, identified in this LWRP Inventory and (b) protection and management of native stocks and the restoration of sustainable populations of indigenous fish living in Lake Erie, Niagara River, Buffalo River and Scajaquada Creek systems, as discussed in the inventory.\textsuperscript{9} Furthermore, the LWRP states, “significant coastal fish and wildlife habitats, will be protected, preserved, and where practical, restored so as to maintain their viability as habitats.” Consistency review of actions within the Buffalo WRA shall consider the Times Beach, North Buffalo Harbor, Small Boat Harbor and Tifft Nature Preserve state designated Significant Coastal Fish and Wildlife Habitats, as described in Inventory Section II C1 and on Map 100.

Under Sections 511-67 and 511-55 of the current zoning code, the Common Council has the statutory authority to deny the Restricted Use Permit on the grounds that it is incompatible with the intent of the special zoning district. \textit{The stated intent of the Buffalo Coastal Special Review District is as follows,} “(a)…the stability, economic viability and future prosperity of the Buffalo coastal area is being threatened by inconsistent development and by uses not related to the coastal area. (b) The Common Council further finds that inadequately controlled development may jeopardize a balance of residential, commercial, port-related industrial and public access uses and thus adversely affect the welfare and economic well-being of the City and its residents.\textsuperscript{10}

Moreover, “The Council has determined that, within the area defined by the Buffalo Coastal Special Review District, there is a need to maintain, for the public good, sound development consistent with this major resource and a concurrent need to maintain the

\textsuperscript{7} Id.
\textsuperscript{8} See Generally, LWRP pages 8, 19, 25, 37
\textsuperscript{9} LWRP as adopted, Section IIC4 and Section IID, respectively
\textsuperscript{10} BUFFALO CITY CODE Art. XVI §511-67
natural scenic quality of the entire waterfront, along with a potential for public access, while allowing for proper development therein. 11

The scale and scope of the proposed development is clearly incompatible with the intent of the accepted LWRP and the current zoning code. Neither the current zoning, nor the proposed zoning allow by-right a development of this form and magnitude.

Furthermore, the proposed development is not consistent with zoning and planning on waterfront parcels nor was it inclusive enough of the breadth of potential impacts to coastal habitat and aquatic species or the adverse effects of untreated urban runoff directly into Lake Erie.

For these reasons, the Common Council should deny the Restricted Use Permit and encourage the Planning Board to rescind their Negative Declaration and undergo a full Environmental Impact Analysis.

Sincerely,

Richard Lippes, Esq.
General Counsel, Buffalo Niagara Riverkeeper

cc: Jill Jedlicka, Executive Director, Buffalo Niagara Riverkeeper
City of Buffalo Planning Board
Buffalo Common Council

MV:JB:jj:kg
Exhibit 1
Queen City Landing Ecological Context

Development Site

FEMA Flood Zone
- 100-Yr Floodplain
- 500-Yr Floodplain

Source: Esri, DigitalGlobe, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AEX, Getmapping, Aerogrid, IGN, IGP, swisstopo, and the GIS User Community