

January, 13, 2020

Dear City of Buffalo Planning Board Members,

Buffalo Niagara Waterkeeper issues these comments in opposition to the request that the proposed Queen City Landing project be considered a Planned Unit Development (PUD) Project as it goes against the letter and intent of the City of Buffalo Unified Development Ordinance (“UDO” or “Green Code”), and additionally, the Planning Board should not accept the environmental review forms as drafted because these are incomplete.

For the reasons stated herein, this project does not meet the requirements under 11.3.8 to be considered a PUD. Moreover, the project does not require a PUD to meet any project objective other than to simply avoid the height requirement of the N1-S zone. Even if Common Council decided that the project could qualify as a PUD, the Common Council as a matter of law cannot grant the height waiver as it is not a height waiver but a building “type” waiver masked as a height waiver.

For over 30 years, Buffalo Niagara Waterkeeper has been the region’s guardian of Western New York’s fresh water, including the Buffalo River, Niagara River, our two Great Lakes and thousands of tributaries. We offer these comments that are informed by decades of knowledge and experience related to environmental rules, policies and the science of our regional water resources. As a local non-profit, Waterkeeper’s mission is four-fold: we PROTECT the water, we RESTORE both the waterways and the surrounding ecosystems, we CONNECT people to their waterways, and we INSPIRE both economic activity along the waterways and community engagement. Waterkeeper has also served as the Buffalo River Remedial Advisory Committee Coordinator since 2002.

1. The Project Does Not Qualify as a Planned Unit Development

The Applicant’s December 4, 2019 letter seeks approval to designate the entire 20-acre lot a Planned Unit Development (“PUD”) under UDO Section 11.3.8. In, order to accomplish this, the Applicant seeks certain waivers from the Common Council. **The PUD must adhere to the underlying zoning code (the Green Code)**, unless it can be waived by the Common Council. Specifically, this site is zoned N1-S. Under the N1-S zone, a “tower” is not a permitted use. The Applicant is trying to bypass the zoning requirement by their attempt to re-brand the building as a “loft” rather than a “tower” and requesting a waiver of the height requirements. As

explained below, the Applicant is really asking for a waiver of building “type” not “height” and as the Planning Board and Council should know, building **type** cannot be waived.¹

While the UDO is silent on the exact height requirement of a “Loft Building” (“loft”), it does state that a loft is intended to be: a “multi-story, typically large footprint often naturally lit with tall ceilings and expansive windows.”² At face value, this definition could appear to apply. However, upon closer inspection and comparison to the definition of “tower” it is clear that multi-story does not presume to mean “20 stories, plus a penthouse”. Conversely, a “tower” is defined as “a stacked unit or commercial block building of substantial height typically designed with upper story setbacks... a tower contributes to the skyline of the downtown.”³ An examination of the rendering of the Queen City Landing tower clearly shows two sets of setbacks as the floors get higher.

Regarding substantial height, by way of comparison, the Seneca One Tower is 38 stories. City Hall is 32 Stories. This new building is 20 stories, *plus*, a penthouse. It is easy to see that a building roughly 2/3 the size of city hall or almost half the size of the Seneca One Tower should be considered “of substantial height” and “would contribute to the skyline of the city” as the skyline is clearly visible lakeside. The 2016 application referred to the project as a “tower.” Since, then the project design has decreased by 48 feet. This difference of 3 stories or 48 feet does not morph what would be one of the city’s largest buildings into a “loft.” Since this building a is clearly a tower disguised as a loft, what the Applicant is really asking for a waiver of building “type” not “height.”

A. The Project Does Not Meet the Review Criteria Required for a PUD

Second, under Section 11.3.8.H, in order to approve a PUD, the Planning Board must make written findings of fact and the Common Council must take into account a set of criteria. The Applicant outlines these criteria with responses on page 9 of the application or planning Board packet page 116. Regarding Criteria 1 and 2, Applicant states on page 15 of their letter, (Planning Board Packet page 122), that (1) the project meets and spirit and intent of the Comprehensive Plan and (2) it is exactly the kind of development that the UDO was designed to encourage.

While the Comprehensive Plan does suggest redevelopment of brownfields in certain zones, it also provides for adherence to the Local Waterfront Revitalization Plan (LWRP). The LWRP provides for the local application of federal Coastal Zone Management policies under State supervision. The first of the Coastal zone policies is:

¹ UDO Section 11.3.8.E

² UDO Section 3.2.8

³ UDO Section 3.2.12

Foster a pattern of development in the coastal area that enhances community character, preserves open space, makes efficient use of infrastructure, makes beneficial use of coastal location, and minimizes adverse effects of development.

This project is the antithesis of this policy. This proposed project is not in line with the community character of the Outer Harbor. After decades of development and public consultation, the City of Buffalo adopted a holistic vision for the Outer Harbor providing for public access to the city's waterfront in support of public trust.⁴

At page 11 of Applicant's letter, Applicant states, "The requested waivers will maximize the waterfront experience for the visitor/tenant." The Applicant's own words demonstrate that the waiver required to build at a certain height is not for the good of the general public, but intended for its tenant only. . The documents provided also lack a "line of site" analysis so the scale of the adverse impact from this development on the viewshed is unknown.

If the UDO was intended to encourage this kind of development, then the City would not have explicitly restricted building height at the Outer Harbor to six stories within the Green Code, nor provided for the vast array of ecological considerations in the LWRP.

B. The Project Does Not Provide the Public Benefit Required for a PUD

In addition to the above, the project does not *provide for* any of the public benefits listed under UDO 11.3.8.H.6. Examples of public benefits include:

- (a) Affordable housing units – NOT included in project
- (b) Below market commercial incubator space – NOT included in project
- (c) Green building systems and sustainable landscapes- landscape will be addressed below and applicant has clearly stated that future development is feasible
- (d) Adaptive reuse of heritage buildings – heritage building has been removed
- (e) Reserved or dedicated open space – some lawn space available which is stated may be subject to future development. Specifically, "Any future redevelopment of the remaining approximately 12 acres of the site will be designed and progressed based on market demand..."⁵ That is NOT reserved or dedicated open space.
- (f) Accessible buildings – NOT included in design plan
- (g) Transportation amenities that involve sites users to walk, bike, and take transit- Criteria met in part by way of limited closed loop bike trail available on the property around the building.
- (h) Use of renewable energy resources – NOT included in project

⁴⁴ LWRP Sec. 11 – LWRP Policies, at page 3

⁵⁵ Excerpted Phillips Lytle letter to Common Council, page 15.

- (i) Water conservation and reuse- NOT included in project, will generate increased volumes of untreated run-off directly into Lake Erie
- (j) Brownfield redevelopment- As applicant notes, brownfield clean-up is COMPLETE. Applicant cannot now claim that a PUD is needed to “provide for” a brownfield clean-up when the clean-up is complete. The plain language of this section does not apply retroactively. The Brownfield Clean-up happened before a PUD was a consideration of the project.
- (k) Enhancement of physical and visual access to the waterfront- the project blocks visual access to the waterfront, much more than the previous building. There are no line of sight depictions provided for in the renderings. It is also unclear whether there will be restricted times upon which the public will be able to access the property.
- (l) Restoration of natural features such as wildlife habitats, native vegetation, shoreline buffers, floodplains and wetlands - site plan includes non-native species and a further hardened shoreline in a flood prone area. There is no additional habitat created and limited, if any, flood mitigation plantings or inclusion in the landscape plan. There has been no analysis on the ecological impact of the shoreline or nearshore waters and aquatic habitat related to the proposed shoreline construction.

The project does not meet the public benefit criteria exemplified in the UDO as indicative of necessitating a PUD.

2. This Project Should be Considered a New Project and Subject to New Review

The Applicant is simultaneously requesting major site plan review and consideration of the project as a Planned Unit Development Project and asking to reuse the environmental review from a three-year old previous design. Following the Applicant’s own logic and this PUD request to the Planning Board and Common Council, this project should be considered a new project and therefore, be subject to a full review including a new SEQR analysis.

The UDO foresaw projects that would straddle the new and old code and accounted for this in Section, 1.3.3.B, which states, **“if an applicant fails to act before any approval expires....the provisions of this ordinance govern and the previous approval is revoked.”** In this case, the UDO was made effective April 3rd 2017, and site plan approval was granted to QCL January 3rd 2017. The Project was first approved under the previous zoning code. Applying the old code, the applicant needed to obtain both a building permit and begin construction within one year of site plan approval. Applicant did not, so site plan approval would have been revoked under Section 511.151 of the prior zoning code.

As a new project, for which approval has expired, it should be subject to a new review including an environmental review under SEQR. However, the Applicant claims the 2016 Negative Declaration should stand. As this project must now be reviewed under the new UDO including the Local waterfront Revitalization Plan, the Planning Board is required to issue written consistency review of the Buffalo Coastal Assessment Form. **The Planning Board should not find this project consistent with the policy as the form is missing information and it does not adequately address the flooding issues on the site.**

A. Coastal Resiliency and Stormwater are Not Adequately Addressed

Applicant claims there has been a decrease in impervious surface, increase in green space and increase in stormwater management. Although there are numerical differences, the percentages are insignificant.

Feature	2016 Site Plan	2019 Site Plan	Difference
Impervious Surface	3.90 acres	3.85 acres	- 0.05 acres
Total Greenspace	3.82 acres	3.85 acres	+0.03 acres

Despite the known risk of flooding due to regular and naturally occurring lake seiche events, made worse by current lake conditions and more frequent high lake levels, the Applicant answered the following policy objectives by stating, "...the post development conditions will result in a decrease of impervious surface. In addition, a bioretention based planter system will be utilized in measure to filter runoff prior to discharge." Questions Presented, but not answered:

- 9A. Minimize damage from flooding by protecting natural protective features
- 9B. Minimize property damage and risk to humans from flooding and erosion, including, (a) preserve publicly held waterfront open space, (b) require new development to be set back from high water mark, (c) require the maintenance of vegetated riparian buffer (d) required on-site storm water management (f) Meet FEMA Flood insurance requirements, and (g) contribute to regional flood prevention efforts
- 9C. ...use non-structural measures to minimize damage to natural resources
- 9D. Activities in development will not result in increase in erosion
- 9E. Construction or reconstruction of erosion of protection structures will be undertaken only if they have a reasonable probability of controlling erosion for at least thirty years.

A reference to a bioretention planter, noting a less than one acre change in impervious surface and noting that the site is brownfield redevelopment does not adequately address the questions.⁶

The site is in both the 100-year and 500-year flood plain. As the lake levels continue to fluctuate unpredictably, and storm events continue to intensify, lakeshore sites need to be

⁶ See LWRP policy form Questions 9A-E

designed with climate resiliency principles and be able to accommodate the power of changing Lake Erie weather. This site has added impervious surface along the water's edge. Presumably under the guise of a shore public walkway, the site design has added a concrete sidewalk and terrace area in addition to two existing concrete sea walls with no explanation of how the additional surface will protect against lake seiches or flooding.

While Waterkeeper is glad to see a bioretention based planter system included, analysis of the proposed design appears that the estimated 35,000 square foot roof will be collected into a single drain which will lead into what appears to be a 2,000 square foot bioretention planter. Moreover, the planting plan suggests that the planter will be a depression filled with wetland seed mix. There is no explanation of how this single planter will mitigate flooding, no less capture run-off.

Furthermore, with regard to stormwater, there are unanswered questions about the quality of the water that will now run directly into the lake untreated. The surface lot has grown from 355 spaces to 572 spaces. The surface lot on the design⁷ is over 3 acres of impervious surface. This will result in rain water, snow melt, road salt, automobile fluids, petroleum byproducts, potentially polycyclic aromatic hydrocarbons PAHs (a known carcinogen in parking lot asphalt), trash, cigarette butts, and single-use plastic waste, flowing directly into the nearshore area of the lake, untreated. Based on the currently proposed design, the stormwater planter does not filter the parking lot run-off. Immediately in front of the parking lot is a lawn area that could act as a catchment area for the untreated parking lot run-off, however, any environmental benefit of that grassy area has been limited by the bifurcation of that area with an impervious bike path.

The Coastal Assessment Form ("CAF") and Full Environmental Assessment Form ("FEAF") have similar inconsistencies and mistakes. At a minimum, these forms need to be corrected and resubmitted before they can be considered as appropriate reviews. **For example, questions 1 (a) and (b) on the CAF: the site is located immediately adjacent to NYSDOS Significant Coastal Habitat, but the Applicant checked, "no".**

On the FEAF, Applicant answers question n. in the affirmative, noting the project site does contain a designated significant coastal habitat, "small Boat harbor- shallow water embayment." **Similarly, CAF question 3(h) Applicant answered "no" when asked when the site is in a designated flood or erosion hazard area but the site is within the 100 and 500 year floodplains.**

Similarly, question 4(a)(6-7), asking if the site is in an area prone to flooding, applicant answered, "no" but the site is in the floodplain. This answer is absurd, as evidenced by the three recent flooding events between October-November 2019, that resulted in significant lake seiches that overtopped the banks of the QCL site. (Photo attached at Attachment 1). Finally, in CAF

⁷ See C-100

question 3(j), applicant states, “yes” to whether there will be construction or reconstruction of erosion protective structures but in the LWRP policy consistency review form, question 9e only sites back to question 9a which states that there will be a decrease in impervious surface and the inclusion of storm water planter.

None of this adequately addresses the potential for erosion or inundation of lake water during storm and seiche events.

3. Conclusion

Buffalo Niagara Waterkeeper maintains its original public position that this site could be developed sustainably in some limited form, and there are opportunities to provide a beautiful, ecologically sensitive, multi-use space which simultaneously provides public access, climate resiliency and protection of Lake Erie and the nearshore area. The site could also serve the community well by simply being maintained as a natural regeneration area and buffer to the City of Buffalo in the face of a changing climate. The proposed QCL tower plan is in stark contrast to the City’s efforts to establish a UDO and the intent of the LWRP, and should not go forward as designed.

Furthermore, the Planning Board should not make a recommendation on the Full Environmental Assessment Form or the Coastal Assessment Form without first seeking additional information from the Applicant and seeking clarifications on the environmental and ecological aspects of the design.

Lastly, the Planning Board should not recommend this project be considered a Planned Unit Development Project. This designation is an obvious attempt to circumvent the zoning requirements, the public benefit, veil what is actually an attempt to get the Comment Council to take an action that they cannot under the express terms of the UDO.

Respectfully Submitted,

Buffalo Niagara Waterkeeper

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Attachment 1

Queen City Landing site, Fall 2019 post-storm viewed from Outer Harbor State Park



PC: <http://www.ourouterharbor.org/>