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Members of the Albany City Common Council
City Hall
Albany, NY

Re: Tharaldson's Hotel Project

Dear Council Members;

I understand that new letters have been sent to the Common Council by the developer and the Department of Environmental Conservation, (DEC) concerning the above project, but that these letters have not been placed in the Final Supplemental Environmental Impact Statement (FSEIS), nor will the public have an opportunity to comment on them. Nor apparently will there be any disclosure of the private negotiations that occurred between the DEC and the developer about this project, or an opportunity for the public to comment on whatever "mitigation" is proposed. On behalf of Save The Pine Bush, we object to this procedure, and to making any decision as to whether to approve the above project, without input or transparency to the public, in clear violation of the State Environmental Quality Review Act (SEQRA).

Since this proceeding appears to have lost all transparency or opportunity for the public to be heard, I would like to make some comments on the environmental impacts of the above project. For snakes to survive in this region, including the Hognose Snake and the Worm Snake, it is necessary for the snakes to go into hibernation during the winter in a den below the frost level where they will not freeze. (Properly referred to as a "hibernaculum") Prolonged freezing will kill snakes. All hibernating snakes, including Worm Snakes and Hognose Snakes, tend to leave their hibernaculum in the spring, migrate out into their home territory, and then return in the autumn to the same hibernaculum which they left in the spring. These snakes tend to be quite territorial and refuse to move far from their natural winter hibernaculum. When snakes are removed from the area around their natural wintering area, they tend to return, and if they are prevented from returning, they experience a high mortality rate.

The fact that Worm Snakes have been repeatedly found on or near the Hotel site, and that they have been documented here for over 21 years, indicates that they must have one or more hibernacula in the immediate area. Relocating the Worm Snakes from the Hotel site, (as proposed by the developer), and bulldozing or otherwise destroying their hibernaculum in the course of construction would devastate the Worm Snake population since the Snakes would normally try to return and on returning would find their hibernaculum destroyed.

A very similar situation occurred in State of NY v. Sour Mountain Realty, 703 NYS2d 854 (Sup. Ct. Dutchess Co. 1999); aff'd 714 NYS2d 78 (AD 2nd Dept. 2000). In that case, experts on snake biology testified that the Eastern timber rattlesnake hibernated in common hibernaculum during the winter, and in the spring there was an "out-migration" from the hibernaculum in all directions for up to two miles. In the fall there was an "in-migration, back to the same home hibernaculum for the winter from which they had left in the spring. The Court found that the defendant's attempts to prevent the snakes from coming onto their property by erecting a snake proof fence would block or hinder the snakes' out-migration and would result in a "taking" of the snake population.

In the present case, any proposal to remove the Worm Snakes from the Hotel site would be potentially far more devastating to the Worm Snakes since their hibernaculum has never been identified. If the hibernaculum is located on the site of the hotel, then removing the snakes when they emerge in the spring and destroying the hibernaculum during construction would create high snake mortality when they return in the fall and find their hibernaculum destroyed. Creating new hibernaculum for the snakes is ineffective because the snakes have an instinct to return to their old hibernaculum and may not be willing to accept new sites.

In addition it should be noted that Worm Snakes spend much of their time underground and are often very difficult to find. It is unrealistic to suppose that a significant number of Worm Snakes can be located when they emerge from their hibernaculum in the spring and removed to some other area. Many Worm Snakes will be missed in the "roundup", and may well be killed during construction. Thus if the Common Council approves this project as presented, it will indicate that the Common Council is prepared to accept the extirpation of the Worm Snake from the Pine Bush. In this context I do not believe there has been any public discussion of a plan for how the snakes will be treated during construction. Handling and relocating snakes requires a permit from the DEC. Relocating snakes generally causes large mortality of the snakes because of their instinct to return to their hibernaculum. The public is entitled to be heard on the plans for this critical aspect of the project and there is no information about this in the FSEIS.

According to the DEC letters, this is the only colony of Worm Snakes to have been found in this area or apparently in Upstate New York for many years. (The last Worm Snake, found in 1987, was from the same area, and thus it was apparently from the same hibernaculum). It would be irresponsible to destroy this unique, and long existing colony of Worm Snakes under any circumstance, but especially since the colony is located on the edge of the Albany Pine Bush Preserve – a preserve that was created deliberately to protect all of the rare species of the Pine Bush including the Worm Snake. Does it make any sense to create the Albany Pine Bush Preserve to protect rare animals such as Worm Snakes, and then when the only upstate colony of Worm Snakes is discovered in the Pine Bush to approve a development project that potentially will destroy the snakes? Obviously not.

Worm Snakes are an attractive animal, harmless to humans, but beneficial to their ecosystem. Because they spend so much of their time underground they are hard to study and so little is known about them. Here is a golden opportunity presented to the Albany Community. Study the Worm Snakes. The Albany Pine Bush Preserve Commission (APBPC) is right next door. Snakes are in decline all over the country and their role in maintaining the balance in nature is badly misunderstood. The APBPC should use this colony of Worm Snakes to help scientists and the public understand reptiles and their role in the environment. Worm Snakes are classified as a species of Special Concern meaning that they are at risk of becoming “threatened”, or “endangered”, but in the present context, where they are the only colony existing anywhere in the Upstate area, and are apparently a feature of the Pine Bush ecology, their status takes on a much greater significance. (Because information about the Worm Snakes has been hidden from the public in the SEQRA proceeding, and because there has been no opportunity for public comments on this aspect of the project, the Common Council has not had any opportunity to consider the unique opportunity that will be lost if the hotel project goes forward and the Worm Snake is extirpated from the Pine Bush). In this context it should be noted that the Common Council has apparently not heard from the APBPC on its plans for the Worm Snake.

It should be noted that the DEC has not established any legal limit on the number of snakes generally that can be taken or killed. Thus any “taking” of an Eastern Hognose Snake or a Worm Snake would require a “Taking” permit from the DEC, notwithstanding that the Eastern Hognose Snake and the Worm Snake are only listed as a species of Special Concern. The DEC has recommended that the New York State Conservation Law be amended to include the Eastern Hognose Snake, and the Worm Snake as protected species. The DEC under its Comprehensive Wildlife Conservation Strategy (CWCS), has listed the Eastern Hognose Snake and the Worm Snake as “species of greatest conservation need”. It is inconceivable to me that the Common Council would permit the destruction of the only known colony of Worm Snakes in the Pine Bush when the Pine Bush Preserve was created precisely to protect such rare species of the Pine Bush.

I have been watching the Common Council’s attempts to act as lead agency in the above matter for some time now and I feel it is time to respectfully object to the way the proceedings have been handled, and to the violations of the letter and spirit of the State Environmental Quality Review Act, (SEQRA), which have occurred.

The only public hearing on the SDEIS was held on August 4, 2008, one week before the DEC sent out notification (on August 13, 2008) that it had found a Worm Snake and a Hognose Snake on or near the Hotel site. As a result, the August 4 public hearing had nothing to do with the discovery of these reptiles of special concern on the hotel site, and the public has never had an opportunity to comment on the full extent of factual information concerning these reptiles of special concern.

On November 17, 2008, I was present in the Council Chambers when a resolution was introduced to find that the Supplemental Environmental Impact Statement (SEIS) in the above matter was complete and should be made final. At that time, a letter from the Albany Pine Bush Preserve Commission (APBPC) to the Council was referred to, which stated that neither the APBPC nor the DEC had been notified about the proceeding, or given time to comment. The letter requested the Council to delay making the SEIS final until the APBPC and the DEC had an opportunity to study and comment on the SEIS. (In fact the only reason the APBPC was able to send the letter was because it was notified of the proceeding a day earlier by Save The Pine Bush; the Council had apparently failed in its duty to coordinate with these interested agencies.) I spoke against closing the SEIS until the APBPC and the DEC could comment on the recent discoveries. Notwithstanding these requests, the Council, by a vote of 10-5, determined that the SEIS was complete and should be made final without hearing from the APBPC or the DEC.

The whole purpose of SEQRA is to create a process to ensure that before a lead agency, such as the Common Council, makes a decision that may affect the environment, it has before it all of the information that it needs to take a "hard look" at the environmental issues that have been identified. Obviously the Council cannot take a "hard look" at the environmental issues if it has essentially only the developer's application before it. In a coordinated review with other interested agencies, such as the present SEQRA review, the lead agency must coordinate with the interested agencies and obtain their comments before it can take a "hard look" at the issues. By declaring the SEIS to be complete and final before it had received the comments and analysis of the public, the DEC and APBPC, the Council violated its duty under SEQRA. By not notifying the APBPC and the DEC of the proceedings, or agreeing to wait until the agencies had time to review the Developers application and comment on it, the Council violated its duty to coordinate with interested agencies.

After the November 17th vote, the handling of the above matter became even more confused and one-sided. A Finding Statement was prepared which presented a distorted view of the issues, based only on the FSEIS which, of course, did not contain new facts or analysis by the DEC. The Council was asked to approve this Finding Statement as the Council's "hard look" at the issues. The Council had no basis to take a "hard look" at the issues at that point since it had not heard from the DEC or other interested agencies or indeed the public on the full record. Then the DEC wrote a letter to the Council dated November 25, 2008, complaining that it had not been notified of the proceeding, adding new facts not previously disclosed about the Worm Snake, and requesting more time to study the matter. The matter was apparently referred back to committee where the developer negotiated in private with the DEC, apparently on the proposed mitigation, without any opportunity for the public to comment.

One of the main purposes of SEQRA was to create a transparent procedure in which the public could participate, and in which the decisions of a lead agency would be recorded in findings based on a public record. The SEIS has now been made final and so the new information from the DEC, and the mitigation discussions are not included in the FSEIS. The public has been deprived of an opportunity to comment on the DEC's new facts,

proposed mitigation and analysis, and is not able to observe how the decisions of the lead agency have been arrived at. The process is no longer public or transparent.

We most respectfully object to the Common Council's vote to accept the FSEIS as final without notifying the DEC and APBPC and other interested agencies about the vote, and without coordinating with these agencies to obtain their input.

We respectfully object that new factual information brought forward by the DEC after FSEIS was closed is not included in the FSEIS and was not subject to public comment.

We respectfully object that the public was never given a public hearing on the FSEIS that included an opportunity to comment on the discovery of the Worm Snake and Hognose Snake. In particular the public was never given an opportunity to comment on the significance of the Worm Snake colony being the only known representative of its species in Upstate New York, living next to a Preserve that was created for its protection, where the Worm Snake could be studied and used as a means of educating the public on the role of reptiles in the ecosystem.

We respectfully object to the Common Council approving a Finding Statement that is based on an incomplete FSEIS that does not contain the new facts, comments or analysis of the interested agencies, especially when both interested agencies requested an opportunity to comment.

We object to any procedure in which the draft Finding Statement is not disclosed to the interested agencies (DEC, APBPC and/or USFWS) and the public before the Council adopts it, so that if there are disagreements between the interested agencies, the public and the developer as to the proposed Findings Statement, the disagreements can be identified, and the Council can take a hard look at the issues and make its own decision as to what Findings it wants to make. This is the role of the lead agency and it may not legally be delegated to anyone. (Remember that the paid "experts" of the developer have a remarkable inability to find species that might present a problem for their clients. They presented a report that the Hotel site was an inappropriate habitat for Karner Blue butterflies, until their findings were contradicted by USFWS after the FEIS was completed. These same experts insisted that while they were doing their butterfly studies, they did not see any other rare or endangered species on the site, until the Court told them to take another look. After these experts did a detailed study of the area they confidently reported that there were no rare species on or near the site, including particularly the Hognose Snake, the Worm Snake, or the Spadefoot Toad. Then the DEC went to the site and actually found examples of these very species on or near the site. Now the developer's experts have decided that these examples of rare species are just transients in the wrong habitat, notwithstanding the DEC's opinion that the worm snakes have probably been there for at least the last 21 years and probably longer. Surely before the Council approves a Finding Statement it should make sure that the public, the DEC and the APBPC have seen the Finding Statement and have had an opportunity to comment on its accuracy.

We respectfully object to having the developer and the DEC or the APBPC negotiate in private with the Developer as to whether the project should be allowed and what mitigation would be appropriate when such private negotiations are contrary to the spirit and law of SEQRA. So far no mitigation plan has been publicly proposed and the public has not had any opportunity to comment on it.

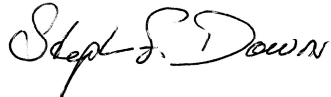
Finally we respectfully object to the Council refusing to take a “hard look” at the issues presented here and essentially delegating their duty to the developer and the DEC. The developer here is facing serious difficulties with its application because it chose to build in the Pine Bush. The Pine Bush is a very rare and unusual habitat, and so it is no surprise that there are a number of rare and endangered species that live there. That is the risk of building in the Pine Bush. Rather than penalize the rare species in the Pine Bush by moving them from their increasingly restricted habitat, (and in the case of the Worm Snakes, from their home territory for over 21 years), the Council should take a “hard look” at whether this project should be permitted at all. It is not just about getting the procedure correct or the mitigation adequate. It is really about taking a “hard look” at this project and the enormous environmental consequences of the developer’s decision to build in an area full of rare species, and coming to a reasoned decision. There is a golden opportunity to protect and study the only known Upstate colony of Worm Snakes next to a preserve that was created in part for them. The Common Council by law must consider this opportunity but only after it has before it all of the information, including especially information from the interested agencies such as the DEC and APBPC, that it need to make a fully reasoned decision. Right now the Council does not have such a record before it and so it cannot legally take a “hard look” at the issues or prepare a Finding Statement.

Under the circumstance, we respectfully request that the Common Council rescind its premature vote to make the SEIS final. We request that the entire matter be referred back to committee where the comments and analysis of the DEC and APBPC can be considered and the public can be heard on the full record. When it is determined that the record (not the developer’s application but the full record) is complete and final, we request that any proposed Findings Statement (which represents the Council’s “hard look” at the issues), be submitted to the DEC, the APBPC, other interested agencies and the public for their comments before they are submitted to the Council for adoption. If there are any disagreements between these other entities and the developer, we request that these differences be identified to the Council so that the Council can take the legally required “hard look” at them and come to a reasoned decision. The present practice of rubber stamping a Finding Statement based on an incomplete and one sided record, and waiting to see if the DEC or other agency objects, is legally insufficient, and causes environmental groups to lose faith in the environmental decisions of the City of Albany.

We think the Common Council has talented and dedicated members who can do better with environmental decisions if given a fair procedure and a complete record before them. We are as frustrated as you are by the present system that generates one sided decisions in favor of the developer which must be then challenged or corrected in private negotiations with the DEC or other agencies, or by litigation. We want to help you make

prompt and intelligent environmental decisions that can be respected by everyone - developer and environmentalist alike. The present system is not working and it is time to change it.

Yours very truly,



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