

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

**SAVE THE PINE BUSH Inc.; LYNNE JACKSON;
REZSIN ADAMS; JOHN WOLCOTT; LUCY CLARK;
SANDRA CAMP; DAVE CAMP; LARRY LESSNER;
RUSSELL ZIEMBA; and ANNE SOMBOR**

Petitioners;

For a judgment pursuant to Article 78 of the CPLR

-Against -

AFFIDAVIT

**THE COMMON COUNCIL OF THE CITY OF ALBANY;
and THARALDSON DEVELOPMENT CO.,**

Index No.

Respondents.

State of New York

SS:

County of Albany

LYNNE JACKSON, being duly sworn deposes and says:

1. I am a petitioner in the above entitle action and live at 223 South Swan Street, Albany, N.Y..
2. This is an action pursuant to Article 78 of the CPLR, which seeks to vacate and annul a determination of the City of Albany Common Council, pursuant to the State Environmental Quality Review Act, (Article 8 of the New York State Environmental Conservation Law, and 6 NYCRR Part 617, hereinafter "SEQRA"), that a parcel of land in the Albany Pine Bush should be rezoned to permit the construction of a 124 unit hotel. The Final Environmental Impact Statement (hereinafter FEIS) adopted and filed by the lead agency, Common Council, pursuant to SEQRA, was arbitrary and capricious, unsubstantiated by the evidence, in excess of jurisdiction, incomplete, in violation of SEQRA, illogical and erroneous, and failed to adequately consider the effect of the proposed hotel on rare and endangered species of plants and animals that live on or near the parcel of land.

3. I am a founder and secretary of Save The Pine Bush Inc., a not-for profit corporation organized under the laws of New York, with a business address at 33 Central Ave, Albany New York. For the last 28 years Save The Pine Bush has been the preeminent force in protecting the Albany Pine Bush, the habitat of the endangered Karner Blue Butterfly and other threatened and endangered species. The organization has brought numerous law suits on behalf of the Pine Bush and the endangered species found there, and won a number of key decisions in the Court of Appeals and in the lower courts which lead to the creation of the Albany Pine Bush Commission and the Albany Pine Bush Preserve. In Save The Pine Bush v. City of Albany, 70 NY2d 193,201 (1987), the Court of Appeals expressly upheld the standing of Save The Pine Bush Inc. to assert claim similar to those in the instant proceeding, and the organization has never been denied standing in any of the many law suits it has brought.

4. Petitioners Rezsín Adams, who lives at 112 Chestnut Street, Albany is President of Save the Pine Bush; John Wolcott, who lives at 344 Sheridan Avenue, Albany is Vice-President, Lucy Clark who lives with Anne Sombor, at 2348 Cayuna Road, Niskayuna, is Treasurer, and Russell Ziemba, who lives at 1813 Highland Ave. Troy, N.Y. is a member of the Board of Directors. Petitioners Sandra Camp and Dave Camp, who live at 13 Gipp Road, Albany, NY and Larry Lessner, who lives at 26 Wilan Lane, Albany, NY are members of Save The Pine Bush, and live near the site of the proposed hotel.

5. All of the Petitioners have been very active in the SEQRA process involving the proposed hotel, and all of the Petitioners recreate in the Pine Bush and are active in their use, study and enjoyment of this unique area. All of the Petitioners own their own homes at the addresses listed above.

6. On or about September 10, 2003, Tharaldson Development Co. with an office and principal place of business at 1202 Westrac Drive, Fargo, North Dakota, 58103, applied to the City of Albany for a zoning change on a plot of land at 124-128R Washington Avenue Extension, in order to construct a 124 unit Hotel (hereinafter “the Hotel project”).

7. The Common Council of the City of Albany (hereinafter “Common Council”) was designated as the lead agency to conduct a review of the Hotel project pursuant to SEQRA. Between September 10, 2003 and December 19, 2005, the Common Council through its committees and agents, including the Department of Development and Planning (hereinafter DDP) conducted a review of the Hotel project application, pursuant to SEQRA, for a zoning change for the Hotel project site from R-1B (Single Family Medium Density Residential Zoning District), to C-2 (Highway Commercial Zoning District).

8. During the course of the SEQRA review, experts from the Albany Pine Bush Preserve Commission, and from the endangered species units of the New York State Department of Environmental Conservation (hereinafter “NYSDEC”), and the United States Fish and Wildlife Service (hereinafter “USFWS”), provided the Common Council with information and advice about the rare and endangered species living in the land adjacent to the Hotel project site.¹ These scientists have had more than fifteen years of intense study and experience managing the recovery plan of the Karner Blue Butterfly in the Pine Bush and in other areas around the country, (hereinafter referred to as the “neutral experts”). They have published extensively on the subject and their expertise in the field of Karner Blue butterfly recovery is well recognized.

9. The Common Council also received information from Dr. Richard Futyma, a botanist hired by the Applicant (Tharaldson) as an expert to provide an opinion on the environmental affects of the Hotel project. According to his resume, Dr. Futyma holds no academic position, has not published any independent scientific articles on the Karner Blue butterfly or endangered animal species, and has not undertaken any formal educational courses or training with respect to the Karner Blue butterfly, or the recovery of endangered species.

10. On December 19, 2005, the Common Council filed a Final Environmental Impact Statement, (FEIS) with Findings which concluded that the construction of the Hotel

¹ . The Albany Pine Bush Preserve Commission, which was established in 1988 to create and manage the Albany Pine Bush Preserve, jointly oversees the Karner Blue Butterfly Recovery Plan and other related plans, with scientists at NYSDEC and USFWS.

project would not involve unreasonable environmental risks or damage. A copy of the Findings is attached as Exhibit 1. The Findings relied almost exclusively on the opinion of the applicant Tharaldson's expert, Dr. Richard Futyma, and disregarded the opinions of the neutral experts from various State and Federal agencies who are responsible for preserving the endangered Karner Blue butterfly, and who disagreed with Dr. Futyma's conclusions and with the logic, methods and observations by which he reached his conclusions.

11. As an example of this disagreement, on December 19, 2005, Neil Gifford, Conservation Director of the Pine Bush Preserve Commission wrote to the DDP to object to the adoption of the FEIS. A copy of this letter is attached as Exhibit 2. The letter stated in part as follows:

“[T]he conclusions deducted in the DEIS, FEIS and Findings Statement do not appear to be supported by the factual and scientific information contained within the FEIS, the Final Recovery Plan for the Karner blue butterfly, or information provided by state and federal wildlife agencies and the [Pine Bush Preserve] Commission....”

After listing a long summary of the expertise of the neutral experts with respect to Karner Blue butterflies, and the numerous errors and omissions by Dr. Futyma which were adopted in the FEIS, the letter concludes:

“In closing the Commission would not recommend that the City of Albany accept the Findings Statement as complete and accurate, and remains concerned that the conclusions contained in the Findings Statement regarding likely adverse impacts to the Karner blue butterfly appear unsubstantiated and contradictory to the on-site information presented, as well as information provided by state and federal wildlife agencies, and that FEIS and Findings Statement analysis of potential impacts is therefore inconclusive and/or inaccurate.”

12. Mr. Gifford also made a statement to the Planning, Economic Development and Land Use Committee of the Albany Common Council on October 27, 2005, a copy of

which is attached as Exhibit 3, in which he summarized some of the concerns of the neutral experts about the FEIS and the lack of scientific study or expertise on which its conclusions were based.

13. On December 15, 2005, Mr. Gifford also made a direct statement to the Common Council itself, a copy of which is attached as Exhibit 4, in which he further summarizes the concerns of the neutral experts about the FEIS and the lack of scientific study or expertise on which its conclusions were based. In this statement Mr. Gifford summarizes issues that were never resolved in the FEIS, issues in which Dr. Futyma's conclusions disagree with those of the neutral experts, issues as to Dr. Futyma's competence and knowledge of Karner Blue butterfly biology, and issues about the conclusions reached in the FEIS.

BACKGROUND

14. The Pine Bush Preserve Commission was created by the New York State Legislature in 1988 after a series of law suits by Save the Pine Bush resulted in court decisions that required the City to set aside a significant portion of land in the Albany Pine Bush for the protection of rare and engendered species that live there, including the Karner Blue butterfly. The Commission was charged with creating and managing this preserve known as the Pine Bush Preserve. Subsequent court and administrative decisions held that the Pine Bush Preserve must include more than 2000 acres of land suitable for the preservation of the Karner Blue butterfly, and that the land must be configured in such a way as to permit periodic burnings of a portion of the preserve, to regenerate the native Pine Bush habitat. At present the Pine Bush Preserve has about 1,850 "fire manageable" acres. (See Exhibit 1, p.17-18). The eventual size and configuration of the Pine Bush Preserve have still to be decided. (See Exhibit 1, p.11(D), p.27(h) and p.33(H)(1)). Pursuant to court and administrative decisions, until such a preserve suitable for the preservation of the Karner Blue butterfly is established, development of the Albany Pine Bush must be curtailed on land that could contribute to the Preserve or to the welfare of the Karner Blue butterfly. (See, Save the Pine Bush, Inc

v. Common Council of the City of Albany, 188 AD2d 969,591 NYS2d 897 (3rd Dept. 1992)).

15. The Pine Bush Preserve at present has only three very small isolated populations of Karner Blue butterflies within the Preserve. The largest population of Karner Blue butterflies south of the Thruway lies outside the Pine Bush Preserve at the end of a long cul-de-sac next to Crossgates Mall in an area known as Butterfly Hill. The state-listed threatened Frosted Elfin butterfly also inhabits the area around Butterfly Hill. The area of Butterfly Hill including a corridor to the Pine Bush Preserve is call the Butterfly Management Area and is jointly administered by NYSDEC and by the Pine Bush Preserve Commission. Butterfly Hill lies adjacent to the Hotel project site, less than 100 meters from the proposed Hotel. A map showing the entire Pine Bush preserve is attached as Exhibit 5, and a map showing the Butterfly Management area with the Hotel project site on one side is attached as Exhibit 6.

16. In 1998, the population of Karner Blue butterflies on Butterfly Hill dropped dramatically from 157 observed to only 37. Since 1998, the population has not recovered and has fluctuated between a low of 5 individual butterflies observed and a high of 30. A copy of a census of the Karner Blue butterfly population on Butterfly Hill (Crossgates Hill) by the Albany Pine Bush Preserve Commission is attached as Exhibit 7. 1998 was the same year that Crossgates Mall expanded its theater up to the edge of Butterfly Hill, and it was also the year that Crossgates illegally cleared and bulldozed a portion of the adjacent Hotel project site for a parking lot as described more fully below. Similar drops in population of other Karner Blue butterflies were observed in other locations in 1998, but the populations in these other locations rebounded in succeeding years, whereas the population at Butterfly Hill has not rebounded significantly and remains dangerously low.

17. The short term goal of the Pine Bush Preserve Commission, the NYSDEC, and the USFWS is to strengthen the population of Karner Blue butterflies on Butterfly Hill and help the Karner Blue to recover from the steep declines in its population which it has suffered since 1998.

18. The long term goals of the Pine Bush Preserve Commission, the NYSDEC and the USFWS is help the Karner Blue butterfly spread its habitat west toward and into the Pine Bush Preserve over 1000 meters away, by establishing islands or stepping stones of habitat along the way which the butterflies in succeeding generations can inhabit. Since the Karner Blue butterflies spread in general only about 200 meters in each generation, this “migration” or spread of the Karner Blue butterfly from the Butterfly Hill management area to the Pine Bush Preserve, will take a number of years at best to achieve. Until that happens the preservation and strengthening of the population on Butterfly Hill is crucial to the butterfly’s survival, because if any further drop in population occurs and the colony dwindles away, the last best chance to introduce a significant number of Karner Blue butterflies into the Pine Bush Preserve will have been irretrievably lost. The Preserve, that was designed to protect the Karner Blue butterfly, may be left without any Karner Blue butterflies in it.

19. Preserving the Hotel project site from development is essential for the short term goal of strengthening the Karner Blue population on Butterfly Hill by providing a buffer from the encroaching development projects, and a habitat for a larger butterfly community. This would be especially so if the Hotel project site were restored to its original pine bush ecology. The property would also contribute to the long term goal of providing a buffer to development that may injure the butterflies.

20. None of the experts who study the Karner Blue butterfly know why the butterfly populations on Butterfly Hill crashed in 1998, the year the Crossgates expanded its theater, and also cleared and bulldozed the Hotel project site. Karner Blue populations did poorly in other locations in that year as well, and so some experts have speculated that poor weather or some other more general condition, contributed to the decline in populations. On the other hand, the other populations have recovered from the drop in 1998, whereas the population on Butterfly Hill has not recovered and remains dangerously low. This has lead some experts to speculate that increased pollution, loss of habitat, pressure of development, increased heat or light or changed wind patterns or other factors associated with development have affected the population on Butterfly Hill. But the truth is that nobody knows for sure why the Karner Blue population on Butterfly

Hill is struggling. **What is known is that if the population on Butterfly Hill drops to zero, the extensive efforts to create a Preserve, and a corridor to lead the butterflies from Butterfly Hill to the Preserve, will have been in vain, and the chances of the species surviving will be significantly lower. This is the crucial point that the Common Council seems to have missed.**

21. It is illogical and foolish to imperil all the hard work that went into creating the Pine Bush Preserve on the mere speculation that weather, not development, lead to the decline in population, and that the butterflies on Butterfly Hill will not be effected by the Hotel project, because the blue lupines, which Karner Blues need to propagate, were not found on the site. This is the logic that was adopted by the Common Council, and it completely ignores the advice of the neutral experts and the danger that the decline in population was caused by the pressure of development and habitat loss.

22. The Common Council should have considered protecting the Hotel project site from development by a conservation easement, or outright purchase, or at the least deferring development of the site until such time as the Karner Blue butterfly population had recovered and had started spreading westward down the corridor that is being prepared for it. The Common Council also should have made a plan for protecting and strengthening the Karner Blue butterfly population on Butterfly Hill until such time as the butterflies were able to spread west and enter the Preserve prepared for them. Clearly one aspect of such a plan, if it had been considered, would have been to defer any development of the Hotel project site until the butterflies had spread west into the Preserve.

THE PETITION

23. **With respect to the first cause of action**, on or about April 18, 2005 the United States Fish and Wildlife Service (hereinafter USFWS), in connection with the SEQRA review of the Hotel project, wrote a letter to the DDP, a copy of which is attached as Exhibit 8, to request that it be allowed to examine the Hotel project site to determine if

the Hotel project would result in a “taking” of the endangered Karner Blue butterfly in violation of federal Endangered Species Act. The letter stated in part as follows:

As mentioned in our August 2004 letter the ESA [Endangered Species Act](Section 9) prohibits “take” of Federally-listed animals without appropriate authorization.

To determine whether take of Karner blue butterflies is likely to occur, the Service first needs to determine whether Karner blue butterflies are present at a given site.

The proposed project area is approximately 100 meters from wild blue lupine patches that are known to be occupied by the Karner Blue butterfly. Therefore the proposed project area may be considered occupied by Karner blue butterflies if there is suitable habitat present; **we conclude that Karner blue butterflies are likely to use the proposed project area.** If agreed to by the applicant, we would like to visit the site to examine potential nectar resources both within the existing NYSDEC management area and within the proposed project area. We would also like to visit the site to determine whether any barriers exist between the management area and the proposed project area. **After our site visit, or after additional information is provided by the applicant we will provide our determination of whether we consider the site occupied by Karner Blue butterflies.** If the proposed project area is not considered occupied (not likely to be used by Karner Blue butterflies), we would not anticipate direct impacts to the species. However, we will still need to fully analyze the potential indirect effects of the proposed project on Karner blue butterflies within the NYSDEC management areas. **We request that the City withhold any final approval for the proposed project until our concerns are resolved regarding the potential for adverse impacts to the Karner Blue butterfly.** (emphasis added)

24. On or about December 19, 2005 the Pine Bush Preserve Commission wrote to the DDP to object to the proposed adoption of the FEIS without permitting the USFWS to conduct an inspection and analysis of the site. A copy of the letter was previously attached as Exhibit 2. The letter states in part as follows:

‘The Commission’s recommendation, therefore, remains to be that the Council suspend consideration of, or reject the resolution to adopt the Findings Statement as complete and accurate, until such time as the United States Department of the Interior Fish and Wildlife Service’s request to complete an on-site analysis is responded to, honored and concluded. In its April 2005 letter to the City, the Service specifically recommended that the City of Albany require additional coordination among the applicant, the NYSDEC, and appropriate consulting firms, involved Federal agencies (if any) and the Service regarding the proposed project prior to issuance of any City approvals. **The Commission understands that no such requirement or request was made of the applicant, and that the City as Lead Agency has not responded to the Service’s request to visit the project site.**’ (Emphasis added)

25. On or about December 19, 2005, the Common Council filed a Final Environmental Impact Statement (FEIS) finding that no “taking” of Karner Blue butterflies would result from the Hotel project, notwithstanding that USFWS had not conducted a site visit, and had not issued any determination as to the “taking” of Karner Blue butterflies. (See, Finding II(2)(F)(4) of the FEIS Findings, Exhibit 1, p. 30)

26. USFWS is the sole agency which can make a determination as to whether a taking of a federally listed endangered species will result from an action or project, pursuant to 16 USC 1531 et seq. The Common Council had no jurisdiction to make a determination as to a “taking” of a federally listed endangered species, and on this ground alone the FEIS must be vacated as incomplete and inaccurate.

27. Moreover, any determination which the USFWS will now make on the “taking” issue will not be included in the FEIS. The public will not have an opportunity to see the

information, and the Common Council will not have an opportunity to take a “hard look” at the information prior to reaching its conclusions. As set forth more fully in the attached memorandum of law, deferring environmental decisions to an agency after the FEIS has been filed, is contrary to SEQRA and should result in the incomplete FEIS being annulled. Penfield v. Planning Board, 253 AD2d 342; 688 NYS2d 848 (4th Dept. 1999)

28. **With respect to the second cause of action**, one of the most important issues which the Common Council had to evaluate in the Hotel project FEIS was the impact that the hotel would have on the population of Karner Blue Butterflies at Butterfly Hill less than 100 meters away. On April 26, 2005 the Albany Pine Bush Preserve Commission wrote to the DDP to object to the lack of evaluation in the DEIS about the impact that the Hotel project would have on the butterfly population at Butterfly Hill. A copy of this letter is attached as Exhibit 9. The letter stated in part as follows:

The DEIS [Draft Environmental Impact Statement] fails to evaluate if the site is within currently occupied Karner blue butterfly habitat, but also if the project will have any short and/or long-term impacts on the size of the Crossgates sub-population, its current and long-term viability (i.e. the ability of the sub-population to persist over time), and the Commission’s ability to meet state and federal goals to recover the butterfly.”

29. Notwithstanding this and other objections by the neutral experts, the FEIS contains virtually no findings or analysis of the impacts that the hotel will have on the Karner Blue population on Butterfly Hill. Those findings that do refer to a possible impact – Finding II(2)(E)(1)(d) p.23; Finding II(2)(E)(2)(e)and (f) p.25, and Finding IV(2) p. 42 - are incomplete, illogical, vague and conclusory.

30. Finding II(2)(E)(1)(d)(Exhibit 1, p.23) illogically finds that because a decline in the Karner Blue population on Butterfly Hill after 1998 can not be proved to be related to the expansion of a movie theater at Crossgates in 1998, the construction of a Hotel at the present project site will not have any impact on the population on Butterfly Hill. The

illogic of the proposition is obvious. Even if the expansion of the movie theater in 1998 cannot be proved to have been the sole cause of the decline, it is certainly possible that it contributed to the decline and to the inability of the population to rebound after the decline, and therefore the new Hotel project may well contribute to a new decline in the now very fragile population. The Findings are silent on this obvious point that requires analysis.

31. Finding II(2)(E)(2)(e) and (f) (Exhibit 1, p.25) incorrectly finds that the Hotel project site is “physically remote from” and “a considerable distance from” the Butterfly Management Area including Butterfly Hill, and thus will not be effected by the Hotel project, notwithstanding that the Hotel project site is so close to Butterfly Hill – less than 100 meters away – that the USFWS considers the Hotel project site “actually occupied” by Karner Blue butterflies. (See Exhibit 2). The Finding also claims that studies prepared by the developer’s expert, Dr. Richard Futyma, “concluded that no portion of the butterfly Management Area will be disturbed or otherwise affected as a result of the Project”. However, this finding does not indicate what potential harmful effects were studied, what standards, criteria and methodology were used, and what specific conclusions were drawn by Dr. Futyma, nor does it analyze the numerous discrepancies between Dr. Futyma’s conclusions and those of the neutral experts. It is simply vague conclusions without any supporting scientific studies or information.

32. Finding IV(2)(Exhibit 1, p. 42) finds that the Hotel project will cause “noise, dust, and other particles to discharge”, but makes no attempt to determine how much discharge or what effect this will have on the butterflies less than 100 meters away, and concludes without foundation that the “impacts will not be significant”.

33. These three specific findings, and other more general findings scattered throughout the FEIS Findings Statement, make vague conclusions about the lack of harm to Karner Blue butterflies based on Dr. Futyma’s erroneous assumption that because he did not find any blue lupines on the Hotel site, the property is unsuitable for Karner Blue butterflies. (See for example, Finding II(2)(A)(4)(Exhibit 1, p.9); Finding II(2)(B)(16)(Exhibit 1, p.11), and (Finding II(2)(E)(1)(f)(Exhibit 1 p.24). Nowhere does

the FEIS take a hard look at the environmental impacts that the Hotel project is likely to generate and how these impacts are likely to be experienced by the Karner Blue butterflies on nearby Butterfly Hill. Nor does the FEIS analyze the discrepancies between the opinions of the neutral experts and Dr. Futyma's unscientific mantra that no blue lupines mean that no butterflies will be present to be harmed.

34. The neutral experts, by contrast, agree that the Hotel project site should be considered presently occupied by the Karner Blue butterfly; that the butterfly probably forages on various plants and flowers on the site, even if blue lupines are not present; that forest and shaded areas do not preclude use by Karner Blue butterflies as Dr. Futyma assumed, and that the land, if restored to its former condition, would provide valuable support for the Karner Blue butterfly population on Butterfly Hill. (See Exhibit 2, p. 3-4). The neutral experts also agree that Dr. Futyma apparently lacks understanding of Karner Blue butterflies needs and habits, and that an inspection of the site by a neutral agency such as USFWS is needed, but that permission for such a visit has not be given by the applicant. (See Exhibits 2, 3 and 4).

35. It was especially improper for the Common Council to give excessive and at times conclusive weight to the reports of Dr. Futyma, because the applicant refused to give the neutral experts permission to visit the Hotel site to prepare their own reports, and so the applicant was able to block a full, fair and impartial evaluation of the Hotel Site. Instead of forcing the applicant to permit a full fair and impartial evaluation by the neutral experts, the Common Council rewarded the applicant's intransigence by adopting Dr. Futyma's reports as conclusive, and stated in the FEIS (Finding II(2)(F)(4), Exhibit 1 p.31)), that "if a site visit is deemed necessary, the Applicant will be required to cooperate in such efforts as required by law" knowing that the results of such a site visit would not be included in the FEIS.

36. In addition the City of Albany is under a court order to plan for the recovery of the Karner Blue butterfly by establishing a Preserve of at least 2000 fire manageable acres. See, Save The Pine Bush v. City of Albany, 70 NY2d 193, 518 NYS2d 943 (1987); Save The Pine Bush v. Common Council of the City of New York, 188 AD2d

969; 591 NYS2d 897 (3rd Dept. 1992). In accordance with these court decisions, and with the federal and state butterfly recovery plans, the City is required to plan for the development of an adequate Preserve, and it also must plan for a corridor to lead the Karner Blue butterflies into the Preserve, but the City has completely failed to make any plan for keeping the Karner Blue butterflies on Butterfly Hill alive until such time as they can spread down the corridor and into the Preserve. The FEIS refused to examine this critical question or make any plan for keeping the butterflies alive. Obviously there is a significant possibility that further development, like that occurring in 1998 when the population crashed, could extirpate the Butterfly population before it could spread. The failure of the City to consider this possibility or plan for it is simply irresponsible.

37. The failure of the FEIS to provide any discussion or analysis of the crucial issue of the effect of the Hotel project on the Butterfly Hill area, and the failure to consider any opinion except that of Dr. Futyma, and the failure to make any plan for keeping the Karner Blue butterflies on Butterfly Hill alive until they can spread into the Preserve, renders the FEIS inherently incomplete and deficient.

38. **With respect to the third cause of action**, on or about April 18, 2005 the USFWS wrote to the DDP to object in part to the failure of the DEIS to list all of the state and federally endangered and threatened species that may be affected by the Hotel project and to analyze the threat to each. A copy of this letter was previously attached as Exhibit 8. The letter stated in part as follows:

In our August 2004 letter, we suggested that the applicant coordinate with the NYSDEC and New York Natural Heritage Program (NYNHP) to determine whether any other State-listed species, beside the Karner Blue butterfly, may occur in the vicinity of the proposed project. The draft EIS does not refer to any correspondence with either the NYSDEC or NYNHP regarding such coordination. **We are aware that the State-listed threatened frosted elfin (*Callophrys irus*) occurs on the NYSDEC management area adjacent to the proposed project area** and continue to recommend that the applicant coordinate with the NYSDEC and NYNHP to determine whether any other State-listed species or species of

concern may occur within the vicinity of the proposed project area and whether those species have the potential to be impacted by the proposed project. (Emphasis added)

39. On or about September 7, 2004, NYSDEC wrote to DDP by letter, a copy of which is attached as Exhibit 10, to request that the EIS include an evaluation of how the Hotel project will impact all the rare and unusual species known to inhabit the pine bush including, in addition to the Karner Blue butterfly, the Frosted Elfin butterfly, the Hognosed Snake, the Worm Snake, and the Eastern Spadefoot Toad.

The letter states in part as follows:

While it is important and indeed essential that this project include a detailed evaluation of potential site use by Karner blue butterflies and the potential impacts of the project on this species, it is also important to note that the Karner blue butterfly is one species in a rare habitat that is known to support numerous rare or unusual species. The biological evaluation should encompass these other rare species as well. **These include, but may not be limited to: Hognosed Snake (Special Concern), Worm Snake (Special Concern), Eastern Spadefoot Toad (Special Concern), and Frosted Elfin (Threatened).** (Emphasis added)

40. On April 26, 2005, The Pine Bush Preserve Commission wrote a letter to the to the DDP, a copy of which was previously attached as Exhibit 9, to request a full evaluation of all the rare species in the area of the Hotel project, and stated in part:

“...the Albany Pine Bush represents one of the best remaining world wide examples of an inland pitch pine – scrub oak barrens and is home to 19 rare plant and animal species including the NYS and federally endangered Karner Blue butterfly, the NYS threatened Frosted elfin butterfly, **and is the only known location in New York state for the state-endangered Adder’s Mouth Orchid (Malaxis bayardii)**”(Emphasis added)

41. Notwithstanding these letters, and other similar requests by neutral experts, the Findings, (Exhibit 1), do not mention the Frosted Elfin butterfly, the Hognosed Snake,

the Worm Snake, the Eastern Spadefoot Toad or the Adder's Mouth Orchid at all, or contain any analysis as to the impact of the Hotel project on these rare or state-threatened species, known to inhabit the Pine Bush, or in the case of the Frosted Elfin known to be living in the management area adjacent to the Hotel project area. The Findings do not even state whether there are any other rare or endangered species living in the area or make any analysis as to whether such species might be impacted by the Hotel project.

42. Finding II(2)(B)(11), (Exhibit 1,p.10), the only Finding to discuss the issue, states: "The Site does not contain ecologically significant vegetation, habitat or wildlife". This finding carefully avoided stating whether any ecologically significant vegetation, habitat or wildlife, other than the Karner Blue butterfly, were found **near** the site that might be impacted by the construction of the Hotel, notwithstanding that USFWS had already indicated that the Frosted Elfin butterfly is located near the Hotel project site. Moreover, the neutral experts disagreed with even this limited and misleading Finding. For example, on page 2 of Exhibit 2, the Pine Bush Preserve Commission wrote to the DDP on December 19, 2005 to note how erroneous the Finding was. The letter stated in part as follows:

Subsection 11 states that "The Site does not contain ecologically significant vegetation habitat or wildlife. This conclusion is also not supported and contradicted by on site botanical information provided by the applicant in the FEIS, and information provided state and federal wildlife agencies and the Commission. Information provided by the applicant indicates that the site contains remnant pitch pine scrub oak barrens, specifically a fire-suppressed pine barrens variant commonly referred to as pitch pine scrub oak forest, as well as pine barrens grassy openings and successional old field. On a scale of significance from 1-5, inland pitch pine scrub oak barrens currently hold a global rank of 2 and a state rank of 1, and are known to support a variety of habitats for ecologically significant wildlife. The Commission agrees with state and federal wildlife agencies conclusions that the project site is currently used by the Karner blue butterfly. Further, the extensive list of plants provided in the FEIS by the applicant, includes many native species indicative to

inland pitch pine scrub oak barrens including, native grasses and many flowering plants that are know to be utilized by foraging adult Karner blue butterflies.

43. As a result of failing to list or consider in any way, other threatened or endangered species including the Frosted Elfin butterfly, the FEIS is fatally incomplete and deficient and must be vacated and annulled.

44. **With respect to the fourth cause of action**, on July 6, 1994, Pyramid Corporation, owners of Crossgates Mall, in connection with an expansion of Crossgates mall into an area immediately adjacent to Butterfly Hill, obtained a SPDES Permit from the NYSDEC (Permit # 4-0130-00007/00002). A letter from NYSDEC, dated January 14, 2004, is attached as Exhibit 11, and describes several conditions attached to this permit which were intended to protect the Karner Blue butterfly and other endangered species from future development around Butterfly Hill. The letter describes two of these important conditions in part as follows:

7c. Prior to any further physical alteration of permittee owned or controlled lands adjacent to the Karner Blue Hill Preserve [Butterfly Hill] beyond that authorized under this permit, the permittee shall provide proposed development plans and narratives to the Department for prior review and if necessary approval. In the event there is no specific Department Permit or approval required, then the Department may still attach conditions to any such proposed projects. Such conditions shall be binding on the permittee and are limited to those conditions necessary to ensure there are not significant adverse impacts upon the Karner Blue Hill Preserve.

7d. At least 60 days in advance of any transfer or sale of the preserve property, any easement, other property right or lease, the permittee is required to apply for Department approval to transfer this permit. The conditions in this permit are binding upon the permittee unless the Department makes a special determination to either modify or delete the conditions contained herein. The permittee is required to maintain the

Preserve under single ownership and provide a copy of this permit in its entirety to any prospective owner or lessee.

45. On information and belief, in 1998 Pyramid Crossgates Co., the then owner of the Hotel project site, cleared and bulldozed a significant portion of the property, covered it with gravel and constructed a parking lot for Crossgates Mall, notwithstanding that the owner did not apply for or obtain approval to do so as required by condition 7c of the SPDES permit, and Article IV of Chapter 375 of the City Code. At some time after 1998, Pyramid Crossgates Co. sold the Hotel project site to the Tharaldson Development Co. without obtaining permission of NYSDEC as required by condition 7d of the NYSDEC SPDES Permit.

46. On January 14, 2004, NYSDEC wrote to Daniel Hershberg, the applicant's engineer in the SEQRA review of the Hotel project, and noted that the two conditions in the SPDES Permit applied to the Hotel project site. A copy of the letter was previously attached as Exhibit 11. The NYSDEC letter states:

“This permit applies to the Crossgates Mall, Karner Blue Hill Preserve, and adjacent properties owned in whole or part or under control of in whole or part by the permittee. The permittee in this case refers to Pyramid Crossgates Company as well as its successors and assigns as well as any person or corporation having an interest in the property....**Therefore it is a requirement of the permit that we be involved in the review and approval of this project and that change in ownership of this property which appears to contain a portion of the Karner Blue Hill Preserve could be a violation of permit condition 7d.**”

47. Finding I(4)(Exhibit 1, p.6), of the FEIS stated in part: “None of the lands proposed for development were demonstrated to be ‘permittee-owned or controlled lands adjacent to the Karner Blue Hill Preserve...Therefore, the requirements of the SPDES Permit are not applicable to the Project Site.” This Finding, however, is contradicted by Finding II(2)(B)(15)(Exhibit 1, p.11), which states, “The Site is located north of, **except the most southwestern corner of the Site is partially contiguous to, lands considered**

part of the Albany Pine Bush Preserve.” A map, accompanying the FEIS, a copy of which is attached as Exhibit 12, makes clear that the Hotel project site is adjacent to the Karner Blue Hill Preserve at the southwestern corner. The parcel of land that borders the Preserve, 126 Washington Ave, covers about half the Hotel project site including about half of the land that was illegally cleared. Thus there can be no doubt that this parcel is adjacent to the Preserve as found in Finding II(2)(B)(15), that the parcel is thus covered by the SPDES Permit. Finding I(4) is simply wrong.

48. The map also indicates that Hershberg and Hershberg, the consulting Engineers for the applicant apparently utilized a very strained reading of the SPDES Permit word “adjacent”. When the Karner Blue Hill Preserve was created in 1994 the Preserve did not occupy the entire parcel of land on which it was located. Rather, a sliver of land around Butterfly Hill was left after the Preserve was created on the lot owned by Crossgates. Hershberg apparently read the word “adjacent” to include only this sliver of remaining land, and not the other parcels of land owned by Crossgates at that time that were adjacent to the parcel of land on which the Preserve was created. The map thus shows the other parcels of land which now comprise the Hotel project site as separated from the Preserve lands by a narrow sliver of land representing the portion of the plot owned by Crossgates that was not included in the Preserve. This is clearly a misreading of the SPDES Permit. The term “adjacent” in the Permit was not used in the sense of a metes and bounds description of the property involved, but was rather used in a broad sense to include lands “owned or controlled” by Crossgates bordering on the land where the Preserve was located and **which might be developed in the future**. Clearly the “sliver” of land could not have been separately developed. The use of the term “owned or controlled” suggests a broader description of the lands than just the sliver of the lot owned by Crossgates which was not included in the Preserve. To limit the SPDES Permit to this sliver of land would give the SPDES Permit conditions virtually no meaning.

49. Moreover, the map included in the FEIS, clearly shows that the gravel area laid down by Crossgates while constructing its parking lot infringes deeply onto the sliver of land that even Hershberg and Hershberg would concede is “adjacent” to the Preserve

land. Thus there is no doubt that the SPDES permit would apply to the illegal clearing of the land, and the development of the Hotel project site.

50. But in any event it is up to NYSDEC to decide the meaning and effect of its SPDES permits, and the NYSDEC found in its January 14, 2004 letter quoted above that the Hotel project site is indeed “adjacent” and subject to the SPDES permit.

The Common Council does not have jurisdiction to substitute its judgment for that of the NYSDEC as to the scope, meaning, and effect of NYSDEC SPDES Permit 4-0130-00007/00002. This is especially so since the NYSDEC, in 1994, required the conditions in the SPDES Permit in order to protect Butterfly Hill from further encroachment of development. Finding II(2)(B)(5) (Exhibit 1, p.10), recognizes NYSDEC as “the agency responsible in New York for statewide management of the Karner blue butterfly”, yet at the same time the Common Council substituted its judgment for that of the NYSDEC as to whether the conditions in the SPDES Permit apply to the Hotel project site, and thereby foreclosed the very review that the NYSDEC is required by the permit to make – that of determining what if any adverse impacts from the Hotel project will be suffered by the butterflies on Butterfly Hill. The FEIS is thus fatally incomplete in that the Common Council impermissibly substituted its judgment for that of NYSDEC as to whether conditions of SPDES Permit 4-0130-00007/00002-0 apply and were violated, and in addition made erroneous decisions on this issue.

51. With respect to the fifth cause of action, on November 10, 2003 the Pine Bush Preserve Commission wrote to the DDP to request that the Common Council consider the issue of whether the clearing and bulldozing of the Hotel project site violated the City Code, and whether, as a result, it should be restored to its former condition. A copy of this letter is attached as Exhibit 13. The letter stated in part as follows:

It is our understanding that [the Hotel project site] was initially cleared and used as a “snow-storage area” by Pyramid Crossgates without proper approvals or consideration of environmental factors....[I]f the removal of approximately 2.5 acres of Pine Bush habitat and construction of a

“parking and snow storage area”, by Pyramid Crossgates, occurred without the necessary permits, that the habitat removal should be mitigated by restoring some or all of the area to Pine Bush and Karner blue butterfly habitat. To the best of our knowledge the site remains vacant, and there has not been any effort to restore the area illegally cleared. The Commission would therefore, likely recommend to the City of Albany and the Town of Guilderland that the applicant address this issue and explain what has and will be done with regard to the previous illegal site use. It would appear pre-mature for the City to consider the requested Zoning change without first addressing if this earlier issue has been resolved with all of the interested parties.

52. Article VI, Sections 375-33(A) of the Albany City Code require that a site plan review and approval be given for “all new commercial, industrial and institutional development”. Section 375-35(D)(2) requires that site plan review and approval be given for “Proposed development”, including: “**The location and design of all uses not requiring structures such as off-street parking, loading and storage areas**”. Clearly then, Crossgates was required to get site plan approval before building a parking lot and storage area on the Hotel project site on or about 1998.

53. Finding I(3), Exhibit 1, p. 5-6 illogically determined that because no enforcement proceeding was ever commenced for the improper clearing, “no violation of law occurred.” The finding notes that the EIS “investigated whether this action (the clearing and bulldozing) violated any laws and/or resulted in state or local enforcements proceedings, and that requests were made to the City of Albany Bureau of Buildings and Codes to provide any record of any enforcement proceedings regarding this matter and none were found.” The FEIS fails to indicate that the “investigation” ever requested or obtained records to indicate whether site plan approval was given for the parking lot.

54. I requested the City of Albany Bureau of Buildings and Codes through the Freedom of Information Law (FOIL) any records which would indicate that site plan approval was requested or given for the parking lot. I have been told by the Bureau that

no such application was ever made. Thus in constructing the parking lot and storage area without site plan approval, Pyramid Crossgates was clearly in violation of the Albany City Code even if no enforcement action was ever commenced.

55. As a result of the above, the Common Council's "investigation" and its Finding in the FEIS that no violations of law occurred, are fatally incomplete and erroneous and should be vacated.

56. **With respect to the sixth cause of action**, on September 7, 2004, the Pine Bush Preserve Commission, in commenting on the DEIS, stated that the Common Council should use an appropriate ecological baseline when describing existing conditions, that considered the land before it was illegally cleared. A copy of this letter is attached as Exhibit 14. The letter stated in part as follows:

Resolution of the illegally constructed parking area remains outstanding. The DEIS must therefore use the pre-parking area environmental condition of the site as the appropriate ecological baseline when describing existing conditions and evaluating potential ecological impacts....[and must] [i]dentify all measures to avoid minimize and mitigate impacts from the proposed project, **including the complete restoration of the area containing the illegally constructed parking area.**" (emphasis added)

57. On May 19, 2005, the NYSDEC wrote a letter to the DDP, a copy of which is attached as Exhibit 15, to raise the same issue:

"Further, the DEIS does not present any discussion of the history of alteration of this site. Through review of aerial photographs and other sources, it is possible to perform a general habitat assessment of this site, and to reach some conclusions as to its former habitat suitability...In summary, the DEIS is inadequate as it fails to properly evaluate habitat conditions prior to unauthorized site disturbances as well as existing habitat conditions.

58. Notwithstanding these letters and other similar letters from other neutral experts, the Common Council did not make any Findings as to the condition of the land prior to its unauthorized clearing and bulldozing, nor did it make any Finding as to what the land would contribute to the ecology of the area if it was restored to its former condition. Instead the Findings considered only the condition of the Hotel project site after it had been cleared and bulldozed, as expressed in the reports of the Applicant's expert Dr. Richard Futyma.

59. The Applicant's expert, Dr. Richard Futyma, based his conclusions on the condition of the site after it had been cleared and bulldozed, and gave no consideration as to how the land would contribute to the survival of the Karner Blue butterfly, the Frosted Elfin butterfly and other rare and endangered Pine Bush species if it was restored to its former condition. The Common Council gave Dr. Futyma's opinions conclusive weight and excluded consideration of the opinions of other experts who disagreed with Dr. Futyma.

60. By ignoring the condition of the Hotel site before it was cleared and bulldozed, Dr. Futyma was able to state that no blue lupines were found on the property and so the property was not suitable for a breeding population of Karner Blue butterflies. Repeatedly the Findings, citing Dr. Futyma, relied on this opinion to find that development of the property would not harm the Karner Blue butterfly population, and failed to consider the opinion of neutral experts that Karner Blue butterflies use other flowers for nectar and that the property, if restored to its original condition, might well contribute to the survival of the Karner Blue butterfly.

61. By the failing to consider the potential use of the property if it was restored to its original condition, the FEIS is fatally incomplete and should be vacated.

62. **With respect to the seventh cause of action**, on or about May 19, 2005, the NYSDEC wrote a letter to the DDP, previously attached as Exhibit 15, objecting that the DEIS for the Hotel project, "contain very little in the way of alternative analysis".

63. On September 7, 2004 the Pine Bush Preserve Commission, commenting on the DEIS, stated in a letter, previously attached as Exhibit 14, that the Common Council needed to, “Identify all development alternatives and associated environmental impacts **including** reduced footprint and **no-build alternatives**.”

64. Notwithstanding these and other requests for alternative analysis, the FEIS failed to consider or take a hard look at any significant alternatives to the construction of the Hotel project or to any modified or scaled down version of the Hotel project. In particular, the FEIS failed to consider whether the land should have been purchased outright for the Butterfly Management area, or whether a conservation easement should have been applied to the property, or whether the Hotel project should have been delayed to determine whether the Karner Blue butterfly population on Butterfly Hill was able to regain strength and spread down the corridor and into the Pine Bush Preserve as proposed by the federal and state recovery plan.

65. Finding III(B), (Exhibit 1, p.42) duly recited that the DEIS and FEIS contained an appropriate analysis of possible reasonable alternatives to the project, including a “No-action alternative” and a “Dedication to the preserve” alternative, but in fact no such analysis is made. The No-action alternative is dismissed because “[it] will result in a lost opportunity to achieve public benefits in the form of increased jobs and first class hotel accommodations.”. The “Dedication to the preserve” option is not even mentioned. The “dedication” option is so completely ignored that the FEIS does not even distinguish between dedication to the Pine Bush Preserve and dedication to the Butterfly Management Area – a critical distinction because the Pine Bush Preserve is some distance away from the Hotel site, whereas the Hotel project site is adjacent to the Butterfly Management Area and forms a critical support area for Butterfly Hill. Nor did the FEIS consider a conservation easement, or a delay of development until the Butterfly population had strengthened and the butterflies has spread down the corridor toward the Preserve. The lack of any meaningful discussion or analysis of options and alternatives renders the FEIS incomplete and deficient.

66. **With respect to the eighth cause of action**, the FEIS fails to list projects which may have a cumulative impact on the butterfly population or to analyze them in any meaningful way. In Finding II(2)(F)(8)(Exhibit 1, p.32) of the FEIS the Common Council identified as a potential “cumulative impact”, whether “the City may seek permission to expand the landfill” at the Rapp Road facility immediately across the Thruway from the Hotel project site. The Common Council stated in this Finding: “However, to date no application [for an expanded landfill] has been filed so any analysis would be pure speculation at this time”. The Common Council made no assessment as to whether the expanded landfill would impact the adequacy of the preserve, or harm the butterflies.

67. The FEIS relating to the Hotel project was filed on or about December 19, 2005.

68. By at least November 16, 2005, over a month before the FEIS was filed, the City of Albany had filed an application to expand the landfill, and filed a Full Environmental Assessment Form, a copy of which is attached as Exhibit 16.

69. Finding II(2)(F)(8) of the FEIS relating to the Hotel project is obviously untrue and incomplete since the City of Albany filed an application to expand the landfill over a month before the FEIS was filed. As a result the FEIS must be vacated for failure to consider a cumulative impact which the Council itself identified. (See, Penfield Panorama Area Comm. Inc. v. Town of Penfield, 253 DA2d 342, 688 NYS2d 848 (4th Dept. 1999), in which the Court held that a lead agency may not identify a serious environmental issue, and then refuse to consider it.). Moreover, the Council failed to reach any conclusion about whether the goal of a 2000 acre fire manageable preserve had been obtained, and in Finding II(H)(1)(Exhibit 1, p.33) simply acknowledged the differences of opinion on this subject. The Common Council was required to make a determination as to the adequacy of the Preserve, pursuant to Court order in Save The Pine Bush v. Common Council of the City of Albany, 188 AD2d 969, 591 NYS2d 897 (3rd Dept. 1992). The failure of the Common Council to make such a determination renders the FEIS incomplete.

70. **With respect to the ninth cause of action**, the land that the City of Albany applied to use to extend the landfill is identified in its EAF (Exhibit 16), as “lands currently known as the Fox Run Mobile Home Park”. The 60 acre Fox Run Mobile Home Park was purchased by the City in 2000 in order to fulfill a condition, required by NYSDEC in connection with the expansion of the landfill in 2000, that the City of Albany purchase the 60 acre Fox Run property **for dedication to the Pine Bush Preserve**. Since the purchase of Fox Run in 2000, the City has claimed that the Fox Run property was dedicated to the Preserve, and has included the 60 acre property as being part of the Pine Bush Preserve whenever it had to calculate whether sufficient land had been acquired to achieve a viable 2000 fire manageable acre Preserve for the Karner Blue butterfly².

71. In the present case, Section D of the FEIS reviews at length a number of “contradictory” reports and information concerning whether the minimum burnable acreage had been achieved for the preserve. Finding II(2)(D)(7)(b) of the FEIS found that at present the Pine Bush Preserve had over 2,735 acres of which approximately 1,850 acres were fire manageable. Finding II(F)(1)(Exhibit 1, p.33) of the FEIS concludes:

“As discussed above, certain documentation contained in the record clearly supports a determination that a 2,000 acre fire manageable Preserve has been obtained. However, the Common Council recognizes that other entities, including the Commission, have expressed disagreement with this conclusion.”

Yet all of these calculations as to whether 2000 fire manageable acres have been achieved included Fox Run as being part of the Preserve,³ while at the same time the City was seeking to use the same land for a landfill expansion. **The City of Albany**

² The City of Albany is presently under Court order to plan for an adequate Preserve of at least 2000 fire manageable acres for the protection of the Karner Blue butterfly. Save The Pine Bush v. Common Council, 188 AD2d 969, 591 NYS2d 897 (3rd Dept. 1992). In Save The Pine Bush v. City of Albany, 141AD2d 949, 53 NYS2d 295 (3rd Dept. 1988) court stated:

“The Planning board’s approval of site plans violated SEQRA given the failure to take a hard look at the cumulative environmental impact of the projects on minimum preserve acreage necessary to ensure survival of area ecology and Karner Blue butterflies”.

³ Fox Run is included in the 2002 Management Plan for the Preserve which is discussed at length in the FEIS

knowingly counted the same land twice. The misrepresentation is obvious because the City of Albany cannot simultaneously use Fox Run for both the Preserve and for the Landfill.

72. The City apparently tried to cover up this misrepresentation by adopting the fiction that while it was considering the size of the Preserve in connection with the Hotel project, it was unaware of its own application to expand the landfill which had been filed over a month earlier⁴. Clearly this is disingenuous, and it infected all of the Findings with respect to whether an adequate Preserve had been established.

73. In January 2006, following the commencement of a lawsuit by Save The Pine Bush against the City of Albany for its plan to expand the landfill, the City of Albany agreed to withdraw the landfill application, but the Mayor announced that he would seek to have another 10 acres of land previously dedicated to the Pine Bush Preserve, withdrawn and converted into a landfill. See Exhibit 17, which is a newspaper account of the Mayor's announcement that the City would remove another 10 acres of land previously dedicated to the Preserve for an expansion of the landfill.

74. Since the City of Albany claims the right to withdraw land previously dedicated to the Preserve whenever it feels like it, all of the prior calculations as to the adequacy of the Preserve are false and a misrepresentation. In numerous prior cases, involving the adequacy of the land set aside for the Preserve, the City has represented to the public in the FEIS, and to the Courts, that it had protected sufficient lands to achieve its goal of a Preserve. Based on these representations the Courts have allowed development to proceed in the Pine Bush. If it now turns out that the City can withdraw protected land from the Preserve and use it for its own purposes, the prior representations as to the adequacy of the Preserve were false and the City has repeatedly perpetrated a fraud on

⁴ The claim that no application was filed was apparently made to take advantage of the holding in Strathmore Hills Civic Ass'n v. Town of Huntington, 146 AD2d 783, 537 NYS2d 264 (2nd Dept. 1989) that under "cumulative impacts" the lead agency was required to consider only projects where rezoning applications are actually pending. Commentary by Philip Weinberg to Section 8-0109 of McKinney's Environmental Conservation Law refers to this holding as "an unduly restrictive result" and states that the test should be "whether rezoning application by adjacent owners are reasonably predictable". Here, of course, the application was already pending, and so there was no excuse for the City to fail to consider it.

the courts. The lands were to be held in trust for the Preserve, not used as a bank account to be drawn on whenever the City had a construction project that would not fit elsewhere.

75. Finding II(D)(3)(c) of the FEIS (Exhibit 1, p 14), notes that a 1994 report by Environmental Design and Research (hereinafter the EDR report) concluded that a 2000 acre Preserve had been achieved, based on the City of Albany's representation that it had protected certain land for the Preserve. The Finding notes that this report, "served as the basis for subsequent [court] decisions permitting development to proceed in the Albany Pine Bush", and then in subparagraphs (d), (e), (f), and (g), the FEIS Findings Exhibit 1, p.15 list various court decisions that approved development in the Pine Bush based on the City of Albany's representation that sufficient land had been protected by the City to ensure a 2000 acre preserve. Those cases cited in the FEIS include, In the Matter of Save The Pine Bush, Inc. v. City of Albany Planning Board, slip op. (Alb. Co. Sup. Ct. 1994); Save The Pine Bush v. City of Albany, 281, AD2d 832 (3rd Dept. 2001); Save The Pine Bush v. Planning Board of the City of Albany, 298 AD2d 806 (3rd Dept. 2002); Save The Pine Bush Inc. v. Town of Guilderland Planning Board, 217 AD2d 767 (3rd Dept. 1995); Save The Pine Bush v. Town of Guilderland Zoning Board of Appeals, 220 AD2d 90 (3rd Dept. 1996); Save The Pine Bush v. Pyramid Crossgates Company, Index No. 6355-96 (Sup. Ct. Albany Co. 1997). Yet if the City of Albany is permitted to withdraw land previously placed in the Preserve, the City has misrepresented to the courts in all of the above cases the amount of land actually preserved, and the court decisions were based on these misrepresentations.

76. Given the level of misrepresentation and disingenuousness exhibited by the City of Albany on the lands it has allegedly "protected" for the Preserve, the FEIS should not only be vacated as incomplete, but the City of Albany should be enjoined from approving further development in the Pine Bush until such time as it can adopt a plan, approved by the Court, for ensuring that lands dedicated to the Pine Bush Preserve and counted toward the goal of 2000 fire manageable acres, in fact remain in the Preserve and are not removed by the City for its own purposes.

Summary

77. The Common Council rushed to complete the FEIS in this case before the end of 2005, based solely on the opinion of the applicants’ expert”, while disregarding the opinions of neutral experts who disagreed with applicant’s expert on basic issues concerning the preservation of the Karner Blue butterfly and other threatened species such as the Frosted Elfin butterfly. In the course of its rush to judgment, the Common Council made decision about the “taking” of endangered species that only the USFWS can make, and made decisions about the scope of the SPDES Permit that only the NYSDEC could make. The Common Council knew that the USFWS had requested an opportunity to examine the site, but the Common Council refused to delay the FEIS for even so reasonable a request that would have allowed the neutral experts the same access to the site that was given to the applicant’s “expert”. The Common Council thus tilted the playing field in favor of the applicant. When the City of Albany filled an application to extend the neighboring landfill, the Common Council refused to delay the filing of the FEIS and falsely claimed that the application had not been filed so that consideration of the cumulative effect of an expanded landfill on the Karner Blue butterfly could be disregarded as “speculative”. Moreover, the City counted the 60 acre Fox Run twice – once in reaching its conclusions about the adequacy of the Preserve, and again when it wanted to use the same land for a landfill. The City now claims the right to withdraw lands previously dedicated to the preserve, which contradicts the City’s claim, made in numerous prior cases, that it has under court order protected sufficient land in the Pine Bush to permit development to proceed there. This claim is shown to be false by the City’s declared intention to remove the protection from land previously dedicated to the Preserve; it amounts to misrepresentation and a fraud on the court.

78. The FEIS does not represent objective science or even an impartial look at the facts – rather it is a compilation of arguments to approve a construction project before the end of the year regardless of what damage it may do to the environment and the Karner Blue butterfly. Ironically, if the Common Council is wrong and the Karner Blue butterfly population is so effected by the construction of the Hotel that it dies out, the City of Albany will have lost its last best chance to populate the Pine Bush Preserve with the

butterfly that it was designed to save. **The Preserve's 2000 fire manageable acres of land designed protect the Karner Blue butterfly may end up without any butterflies in it.** The FEIS is so arbitrary and capricious, unsubstantiated by the evidence, in excess of jurisdiction, incomplete, erroneous, illogical and lacking in analysis or alternatives that it should be rejected completely by this court.

WHEREFORE, Petitioner requests that the court enter an order and judgment:

- 1) Imposing a Preliminary Injunction to prevent any steps being taken to develop the Hotel project site pending a determination of this application; and
- 2) Vacating the Final Environmental Impact Statement for the Hotel project as arbitrary and capricious, incomplete, erroneous and deficient; and
- 3) Enjoining the City from approving further development in the Pine Bush until it has provided for a system satisfactory to the Court of ensuring that land dedicated to the Pine Bush Preserve cannot be later withdraw and used for other purposes, and
- 4) For such other a further relief as to this court seems just and proper.

Lynne Jackson

Sworn to before me

This day of

Notary Public