

Exhibit 1

Common Council Member Fox offered the following:

Resolution Number 78.121.05R

RESOLUTION OF THE COMMON COUNCIL ACCEPTING THE SEQRA FINDINGS STATEMENT REGARDING THE PROPOSED RESIDENCE INN AT 124-128R WASHINGTON AVENUE EXTENSION IN THE CITY OF ALBANY

WHEREAS, R.I. Heritage of Albany, LLC c/o the Tharaldson Development Company (“Tharaldson”) is the owner of 124-128R Washington Avenue Extension in the City of Albany; and

WHEREAS, Tharaldson filed an application with the City of Albany Common Council to change the zoning classification of 124-128R Washington Avenue Extension on or about September 10, 2003, which was introduced by Ordinance 35.101.03 on October 6, 2003; and

WHEREAS, the City of Albany Common Council is the lead agency regarding the proposed project; and

WHEREAS, the proposed action includes rezoning and all other applicable municipal permits and approvals, including but not limited to, site plan approval by the City of Albany Planning Board and an area variance by the City of Albany Board of Zoning Appeals, to allow the construction and operation of a 124-unit Residence Inn hotel facility, and associated improvements, ancillary parking, site infrastructure and a portion of the parcel available for commitment to mitigation to NYSDEC on ±3.6 acres of land on the south of Washington Avenue Extension, north of the Town of Guilderland municipal border, in the City of Albany, New York; and

WHEREAS, on or about September 10, 2003, Tharaldson Development Company, filed an application for rezoning with the City of Albany Common Council (“Common Council”) together with a legal description of the area to be rezoned, Long Environmental Assessment Form, site plan and other relevant information; and

WHEREAS, Tharaldson proposes to construct and operate a 124-unit Residence Inn facility, and associated improvements (the “Project”) on ±3.6 acres of land (originally 3.72 acres) on the south of Washington Avenue Extension, north of the Town of Guilderland municipal boundary line, in the City of Albany, New York (the “Site”); and

WHEREAS, the Site is proposed to be rezoned from the R-1B Single Family Medium-Density Residential Zoning District to C-2 Highway Commercial Zoning District; and

WHEREAS, the Site is situated along Washington Avenue Extension, a major New York State east-west highway; in between Crossgates Mall; a regional shopping center to the south, Crossgates Commons, another regional shopping center to the north, and the commercial offices of Time Warner Cable and its ancillary satellite telecommunications facilities to the west; and

WHEREAS, the Common Council has determined to act as lead agency for the Project pursuant to Article 8 of the Environmental Conservation Law and 6 NYCRR Part 617 (“SEQRA”), and coordinated review of the Project as SEQRA lead agency with the other involved agencies for this action determined to constitute a Type I action; and

WHEREAS, on February 19, 2004, as SEQRA lead agency, the Common Council determined that the Project may have a significant effect on the environment, requiring the preparation of a Draft Environmental Impact Statement (“DEIS”) and, thereafter, published notice of its positive declaration in the Environmental News Bulletin; and

WHEREAS, the Common Council determined to conduct scoping for the Project and consistent with the requirements of SEQRA, conducted a public hearing on August 26, 2004 to consider the Draft Scoping Checklist and members of the public and involved and interested agencies were provided an opportunity to comment; and

WHEREAS, the Common Council initiated a public comment period on the Draft Scope which ended on September 7, 2004; and

WHEREAS, written comments were received and considered by the Common Council on the Draft Scoping Checklist which was thereafter modified to reflect substantive comments received thereon, and a Final Scoping Checklist was prepared in accordance with the requirements of 6 NYCRR 617.8 and by resolution was accepted as complete on September 20, 2004; and

WHEREAS, the DEIS was prepared pursuant to the Final Scoping Checklist and the requirements of 6 NYCRR § 617.9(b); and

WHEREAS, on or about December, 2004 through March 25, 2005, the Common Council received and reviewed the DEIS; and

WHEREAS, on March 21, 2005, the Common Council based upon its own independent examination and consideration of the DEIS and consultation with its staff, found and determined that the DEIS was satisfactory with respect to its scope, content, adequacy and consistency with the content of the Final Scope for purposes of commencing public review; and

WHEREAS, the Common Council published Notice of Completion of the DEIS in the Environmental Notice Bulletin pursuant to 6 NYCRR § 617.12(b); and

WHEREAS, on April 18, 2005, the Common Council conducted a combined public hearing to consider the DEIS and rezoning application/petition as required by SEQRA and Albany City Code (Zoning Ordinance) at which all members of the public desiring to be heard were given an opportunity to submit oral and written comments on the Project, including but not limited to, the DEIS and rezoning application; and

WHEREAS, on April 21, 2005, the Albany County Planning Board conducted a meeting

and issued a recommendation on the Project which stated “Modify local approval to include: 1) Review by the Albany Pine Bush Commission; and 2) Notification to the Town of Guilderland”; and

WHEREAS, the Albany Pine Bush Preserve Commission has participated in the review of the Project, offering written comments and providing oral comments at public hearings and meetings; and

WHEREAS, the Town of Guilderland has received notification of the Project ; and

WHEREAS, in accordance with SEQRA, the public comment period on the DEIS closed on May 19, 2005; and

WHEREAS, the Common Council caused to be prepared a Final Environmental Impact Statement (the “FEIS”) with respect to the Project, which included responses to all substantive comments received on the DEIS for the Project; and

WHEREAS, certain information and analysis regarding issues examined in the DEIS were amplified and further discussed in the FEIS as a result of comments received from the public and the involved/interested agencies. This material is consistent with information regarding such issues contained in the DEIS. It amplified and augmented information previously considered by the Common Council and contained in the DEIS and did not identify any newly discovered information about significant adverse environmental affects which were not previously addressed. Therefore, the FEIS identifies and examines all relevant potential environmental impacts which have been identified in connection with the Project; and

WHEREAS, on October 27, 2005, the Zoning Committee of the Common Council conducted a meeting to consider and analyze the FEIS and allow for public input and comment regarding same; and

WHEREAS, on November 17, 2005 the Zoning Committee of the Common Council conducted a second meeting to consider the FEIS and adopted a resolution that recommended the FEIS be adopted as complete with respect to scope, content and adequacy for purposes of SEQRA; and

WHEREAS, on November 21, 2005, after considering the FEIS, including the recommendation of the Zoning Committee, the Common Council adopted a Resolution in which it determined that the Final EIS was complete with respect to scope, content and adequacy for purposes of SEQRA, published notice of same in the Environmental Notice Bulletin, and filed and distributed copies of same as required by 6 NYCRR § 617.12(b); and

WHEREAS, the Final EIS adequately and thoroughly examines and evaluates the relevant identified environmental impacts, including but not limited to secondary and cumulative impacts, reasonably expected to occur as a result of the Project, taking into consideration social, economic and other essential considerations; and

WHEREAS, the Common Council, based upon its own independent examination and consideration of the FEIS and consultation with its staff and legal consultants, found that the FEIS is satisfactory with respect to its scope, content and adequacy; and

WHEREAS, on December 15, 2005, in an effort to provide the maximum amount of continued public participation and consideration, the Zoning Committee conducted a meeting and invited additional public comments on the draft SEQRA Findings Statement; and

WHEREAS, after due deliberation, the Zoning Committee passed a resolution to recommend adoption of the SEQRA Findings Statement and to rezone the Site from R-1B to C-2 to the Common Council; and

WHEREAS, over ten (10) days have passed since the FEIS was adopted by the Common Council pursuant to 6 NYCRR §617(11)(a); and

WHEREAS, this findings statement has been prepared in accordance with Section 617.11 of the SEQRA implementing regulations (6 NYCRR Part 617); and

WHEREAS, the Common Council has given consideration to the relevant environmental impacts, facts and conclusions disclosed in the Final Environmental Impact Statement, which incorporates by reference the Draft Environmental Impact Statement, and other relevant material and weighed and balanced relevant environmental impacts with social, economic and other considerations and determines and certifies that all of the procedural and other requirements of Part 617 have been met, that consistent with social, economic and other essential considerations from among the reasonable alternatives thereto, the action to be approved and carried out is one which minimizes or avoids adverse environmental effects to the maximum extent practicable, and that consistent with social, economic and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided by incorporating as conditions to the decision those mitigative measures which were identified as practicable; and

WHEREAS, the Project, among other things, includes:

- Making land available for commitment to mitigation to NYSDEC to be added to an established Corridor Area associated with the Karner Blue butterfly fully discussed in the EIS's;
- Utilizing native species with the landscaping plan;
- Contribute funding for the potential purchase of other lands identified as higher protection priority; and
- Providing a fire hydrant to assist in fire management activities.

WHEREAS, the Final EIS adequately and thoroughly examines and evaluates the relevant identified environmental and other impacts, including secondary and cumulative impacts, reasonably expected to occur as a result of the Project; and

WHEREAS, consistent with its obligations pursuant to SEQRA, the Common Council has undertaken its own independent and careful consideration of the Project, including identified relevant environmental impacts; and

WHEREAS, at each stage of the SEQRA proceedings, the Common Council has encouraged comment from interested and involved agencies and the public, and has provided sufficient time for preparation and consideration of and comment on the Draft EIS, the Final EIS and this Findings Statement as required under SEQRA in order to develop a full and complete understanding of the Project, together with the revisions thereto. As a result, the Common Council finds that on balance, after due consideration of all relevant documentation and comments, it has more than adequate information from which to evaluate all of the relevant benefits and potential environmental and other impacts likely to occur as results of the Project with the revisions thereto; and

WHEREAS, in addition to the facts and conclusions contained in the Final EIS, the following enumerated facts and conclusions, derived from the Final EIS and other relevant information, set forth the social, economic and other relevant factors and standards considered by the Common Council, which formed the basis for its decision.

NOW, THEREFORE, BE IT RESOLVED AS FOLLOWS:

I. BACKGROUND

1. Tharaldson is one of the nation’s largest independent developers of hotel/motel properties. Hotels operated by Tharaldson include:

- Residence Inn by Marriott;
- Courtyard by Marriott;
- Springhill Suites by Marriott;
- Towne Place Suites by Marriott;
- Fairfield Inn by Marriott;
- Hampton Inn by Hilton;
- Homewood Suites by Hilton;
- Country Inn and Suites;
- Holiday Inn Express;
- Comfort Inn;
- Comfort Inn and Suites.

2. The Site was purchased by a subsidiary of Tharaldson, which, as detailed in the FEIS and discussed at the public hearing, was an “arms-length” real estate transaction, an issue not germane to the rezoning request. Nevertheless, proof was presented in the environmental impact statements that the transaction was an “arms length” transaction.

3. According to public comments, a portion of the Site was cleared approximately *seven (7) years ago* and gravel material was placed on the property. The DEIS

and FEIS document this issue and provides a delineation of the limits of such gravel area in relation to the Site. See, FEIS Appendix C. Based on the map, no land was cleared and no gravel was placed within the existing management area. The EIS's investigated whether this action violated any laws and/or resulted in state or local enforcement proceedings and determined that no proceedings were commenced by the City or NYSDEC. Requests were made by representatives of the Applicant and Planning staff to the City of Albany Bureau of Buildings and Codes to provide any record of any enforcement proceeding regarding this matter and none were found. The DEIS and FEIS demonstrates that no violations of law occurred.

4. The Applicant owns no portion of the Karner Blue Hill Preserve which was established pursuant to NYSDEC SPDES Permit 4-0130-00007/00002-0. No rezoning of such lands are proposed and no development is proposed on such lands. None of the lands proposed for development were demonstrated to be "permittee-owned or controlled lands adjacent to the Karner Blue Hill Preserve". The Karner Blue Hill Preserve is owned by a third party and managed by NYSDEC and is located south of the proposed parcels to be rezoned owned by Tharaldson. The butterfly area is surrounded by an opaque fence visible from public vantage points. Therefore, the requirements of the SPDES Permit are not applicable to the Project Site. Nevertheless, to ensure a thorough and comprehensive review by the permitting authority, the Common Council has sought the advice and involvement of the New York State Department of Environmental Conservation from the inception of this Project.
5. Access to the Site will be provided from the South Frontage Road which will be extended to the main access driveway to the Site and appropriately designed and improved in accordance with applicable law to ensure adequate sight distances as noted in the Traffic Impact Study.
6. Potable water is available via an existing City of Albany water transmission main located along the South Frontage Road to the Northwest of the Site. The 8" main will be extended along the South Frontage Road to the Site.
7. Stormwater will be detained on-site and re-charged to groundwater pursuant to a Stormwater Pollution Prevention Plan in accordance with the requirements of NYSDEC. See FEIS, Appendix M.
8. Telephone, electricity and natural gas are available by connection to or extension of existing facilities.
9. Fire and police protection services are provided by the existing nearby local departments.
10. The areas of potential environmental concern identified by the Common Council included, among other things, terrestrial and aquatic ecology (the Albany Pine

Bush Preserve), traffic and other areas of potential environmental concern discussed in the EIS's which included air quality resources, geology, water resources and drainage, land use and zoning, community services, visual, noise and cultural resources.

11. Notwithstanding the fact that the Site was not identified for inclusion in the Preserve (as confirmed by the Conservation Director of the Commission throughout the review process), potential beneficial impacts identified in connection with the Project included impacts on current efforts to protect the Albany Pine Bush Preserve by incorporation of appropriate mitigation measures discussed herein.
12. In addition, potential benefits include generation of additional employment opportunities, fulfilling an identified need for hotel accommodations in this area and the identification of potential traffic improvements if deemed necessary in the future and creation of additional jobs and tax revenues (property, sales and hotel).
13. Based on substantive comments which have been received regarding the Albany Pine Bush Preserve, the established Corridor Area, as delineated in the FEIS, Appendix F, and potential impacts of the Project on the Butterfly Hill at Crossgates, was the subject of much public scrutiny and extensive analysis. The eastern portion of the Corridor Area (from the Crossgates Hill area to Rapp Road) was established over approximately 11 years ago in connection with an expansion plan at Crossgates Mall. It is depicted in the 2002 Management Plan. See Management Plan, Figure 10; see also discussion in the Federal Recovery Plan. More recently land has been made available for management intended to link the Karner Blue butterflies at the Butterfly Hill at Crossgates with the Pine Bush Preserve on lands west of Rapp Road which is designed to increase contiguity. The established Corridor Area, explicitly sanctioned by NYSDEC, is designed to function in accordance with the goals and objectives set forth in the Implementation Guidelines and 2002 Management Plan (defined below).
14. Although the Project is outside the area known as the Pine Bush Site Plan Review District (See, Zoning Ordinance §375-36), those regulations were considered by the Applicant in the design of the Project.

II. POTENTIAL PROJECT IMPACTS

1. LAND USE AND ZONING.

- A. The ± 3.60 acre Site is currently vacant land which is zoned R-1B. The Project is consistent and compatible with the general character of other land uses in the vicinity along Washington Avenue Extension, such as the ±20 acre commercial development, Crossgates Commons and ± 160 acre Crossgates Mall and the active offices of Time Warner Cable. Its other "neighbors" include a truck/bus repair center to the north, a number of

nursing homes and assisted living facilities. The Site is located adjacent to Washington Avenue Extension which is a major east-west highway with desirable access to Interstate 90, the NYS Thruway and the Adirondack Northway making it an ideal location for the proposed hotel use. As stated in the Final EIS:

Here the Project Site is situated on a heavily traveled New York State highway located between two regional shopping centers – Crossgates Mall and Crossgates Commons. Immediately to the west are the offices of Time Warner Cable. These commercial uses which surround the Site make it inconceivable that the Site should remain residentially zoned... Consequently, it is plain that rezoning allows the use of the Site to be consistent with the highly commercial nature of the area.

- B. Development of the Project is consistent with Albany's long-range planning strategy. *Albany Ahead: An Historic City's Bright Future* (February, 1985) and *Partnership to Progress: Realizing Albany's Future* (January 1989), both prepared by the Mayor's Strategic Planning Committee, increase employment and tax base in the City.
- C. Rezoning for the Project is consistent with and presents no conflict with the zoning and land use plans for this area or in the City of Albany and will serve the general welfare of the community at large.

2. ALBANY PINE BUSH PRESERVE.

A. INTRODUCTION.

1. The Common Council, in making these findings, has carefully considered all relevant information pertaining to the establishment and management of the Albany Pine Bush Preserve, including, but not limited to, various court decisions, the 1993 Management Plan, the listing of the Karner Blue Butterfly as an endangered species under the Federal Endangered Species Act, the 1996 Implementation Guidelines, a Report on the Minimum Area Requirements for Long-Term Conservation of the Albany Pine Bush and Karner Blue Butterfly: An Assessment, a report on the Ecological Significance of the Pine East Office Park site prepared by Environmental Design and Research (the "EDR Report"), the Updated Maps and Acreage Study-Albany Pine Bush Preserve prepared by Hershberg and Hershberg (the "Updated Preserve Acreage Study"), the 2001 draft Management Plan ("2001 draft Management Plan"), the 2002 Management Plan ("2002 Management Plan"), Analysis of Potential Habitat for Karner Blue Butterflies and Ecological Assessment at the Proposed Hotel Site, Washington Avenue Extension, City of Albany, New York (Draft EIS), Supplemental Report for Proposed Residence Inn, 124-128R Washington Avenue Extension, Albany, New York (Final EIS), prior ecological reports concerning the Butterfly Hill site

and the Site, the Federal Recovery Plan, the Population Monitoring Study – 2004, comments submitted on behalf of the Albany Pine Bush Preserve Commission, New York State Department of Environmental Conservation and the United States Environmental Protection Agency, Fish and Wildlife Service, and other information including material presented by the members of the public and organizations and the personal knowledge of members of the Common Council.

2. The Albany Pine Bush Preserve is generally considered and referred to as those lands that are dedicated for management by the Commission as part of the Albany Pine Bush Preserve (the "Preserve"). Pursuant to the Albany Pine Bush Preserve: Protection and Project Review Implementation Guidelines and Final Environmental Impact Statement ("Implementation Guidelines"), the Preserve includes parcels owned by various public agencies, municipalities and the Nature Conservancy and other lands which are available for management.

3. The Site is located on the southeastern periphery of what is generally referred to as the "Albany Pine Bush Study Area". The Albany Pine Bush is generally referred to in the Implementation Guidelines as an area of approximately 12,000 acres as identified as the Study Area in the 1993 Management Plan and Final Environmental Impact Statement for the Albany Pine Bush Preserve ("Management Plan"). The Study Area remained unchanged in the 2002 Management Plan.

4. Appendix II of the DEIS is a report from an expert who evaluated the Project Site in light of all the existing Management Plans and protection data. The report found that the Site did "not constitute a significant resource for the Karner blue butterfly either as a location for breeding or for the feeding of adults. There is no habitat (i.e. patches of lupine) which is essential for the propagation of the Karner blue butterfly species and no evidence that the butterflies utilize the [Site]."

B. THE SITE

1. The Site is not part of the Albany Pine Bush Preserve. The Site has not been targeted for acquisition into the Preserve.

2. Ecological reports performed in 2000 and 2004, confirmed that no Karner Blue Butterflies or any other State of Federal threatened or endangered species, are located on the Site or likely to use the Site. The Management Plan, Implementation Guidelines and 2002 Management Plan likewise conclude no Karner Blue Butterflies exist on the Site.

3. No suitable habitat for the Karner blue butterfly exists on the Site.

4. An existing natural forested barrier between the Project Site and the Butterfly Hill inhibits the ability for northward migration to the Site.

5. In any event, pursuant to the management objectives the westward migration along the NIMO right-of-way, through the Daughters of Sarah conservation easement and across the lands to the rear of the Avila House should be encouraged since all management plans, *approved by New York State Department of Environmental Conservation the agency responsible in New York for statewide management of the Karner blue butterfly*, are designed to promote this westward migration, and not northward to the Site, Washington Avenue Extension and shopping center.
6. The Project Site was not identified in the 1996 Implementation Guidelines as necessary as providing any ecological functions or essential to butterfly recovery or viability.
7. The Project Site was not identified in the 1996 Implementation Guidelines as necessary to achieve the minimum acreage to achieve an ecologically viable Preserve, assuming such a Preserve has not been achieved.
8. The Project Site was not identified in the 2002 Management Plan as necessary as providing any ecological functions or essential to butterfly recovery or viability.
9. The Project Site was not identified in the 2002 Management Plan as necessary to achieve the minimum acreage to achieve an ecologically viable Preserve, assuming such a Preserve has not been achieved.
10. The Site is bounded on the north by South Frontage Road and Washington Avenue Extension; commercial development on the north and northeast (Crossgates Commons and H.L. Gage), west (offices of Time Warner Cable) and south and east by Crossgates Mall. South is land owned by a private property owner and the Butterfly Hill at Crossgates.
11. The Site does not contain ecologically significant vegetation, habitat or wildlife.
12. There are no wetlands on the Site.
13. There is no dispute that a portion of the Site is undeveloped and, consists of a closed canopy forest along its southern border that has established itself on the Site and adjoining parcel, but the species are invasive to the Pine Bush ecology - including white pine, maple, black oak, pitch pine, gray birch, black cherry, cottonwood and trembling aspen. It has been well documented that forested areas containing invasive species, and overstory inhibits sun light from passing to the ground, thereby creating inhospitable conditions for native Pine Bush species, including blue lupine, the primary food source for the Karner Blue butterfly.

14. The northern portion of the Site, as noted above, has been cleared and a gravel area created outside the boundary of the Management Area.

15. 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. The Project preserves land adjacent to this area for commitment to dedication to the NYSDEC.

16. Adverse impacts to the butterflies and habitat on the Butterfly Hill are not anticipated or have been mitigated by the proposed mitigation measures.

C. THE BUTTERFLY HILL AT CROSSGATES

1. As indicated above, the Project Site does not contain any endangered, rare or threatened species. However, a population of Karner Blue Butterfly is known to be located within the Management Area southwest of the Project Site in the Town of Guilderland. Karner Blue Butterfly colonies are concentrated in a \pm 1 acre area within the Management Area and located generally on the west side of the crest of the hill. At its closest point, the Project building will be approximately 480 feet away from the existing Karner Blue Butterfly colonies on the hill and approximately 320 feet away from the existing perimeter fence which has been constructed to delineate the perimeter vegetated buffer of the Management Area.

2. The Management Area represents a 5 acre area surrounded by an opaque white fence which supports a \pm 1 acre area in which Karner Blue Butterfly colonies are located. The Management Area is monitored and maintained on a routine basis by qualified representatives of the NYSDEC and the Commission.

3. Areas to the north of the Management Area on the Site do not possess suitable habitat. Therefore, Karner Blue Butterflies are generally not attracted to areas of the Site north of the Management Area. Maintaining existing vegetation on the southern portion of the Site as buffered, forested area, and construction of the Project building, will facilitate the Commission's stated goal of the channeling of Karner Blue Butterflies to the west along the established Migration Corridor. This will have a beneficial effect on the effort of NYSDEC and the Commission to encourage the Karner Blue Butterfly migration to the west in the direction of existing suitable butterfly habitat on lands already within the Preserve.

D. MINIMUM ACREAGE/CONFIGURATION OF THE PRESERVE

Contradictory information has been provided regarding the minimum acreage, taking into account configuration and edge effects, currently available for management as part of the Preserve, and needed to establish an ecologically viable Pine Bush ecosystem.

1. Givnish Report

- (a) Dr. Thomas Givnish, Dr. Eric Menges and Dr. Dale Schweitzer ("Givnish"), in a scientific analysis completed in 1988, entitled "Minimum Area Requirements for Long Term Conservation of the Albany Pine Bush and Karner Blue Butterfly: An Assessment" (see Draft EIS, Appendix VIII) ("Givnish Report"), concluded that an ecologically viable Pine Bush ecosystem can be achieved through establishment of a $\pm 2,000$ acre Preserve which generally corresponds to the primary and secondary preserve boundaries established by the 1985 NYS Natural Heritage Program. Appropriate and active management of such preserve area would be required. (See DEIS Appendix VIII)
- (b) The Givnish Report stated that the 2000 acre figure was not a hard and fast number. "It must be emphasized that identifying roughly 2,000 acres as the minimum area required to sustain the Albany Pine Bush indefinitely does not imply that 1,800 acres (or 1,975 acres) would not suffice..." Givnish at p. 11.
- (c) The Givnish Report identified a five-lobed configuration for the Preserve which is intended to "insure that fire can be used to help sustain the Karner Blue Butterfly regionally without extirpating it in a single fire-sweeping through the entire Reserve." (Givnish, p. 15).
- (d) It appears that the roughly $\pm 2,000$ acre preserve envisioned by Givnish focuses on establishment of pitch pine scrub oak habitat together with all existing representative natural communities which make up the ecosystem such as water bodies, vernal ponds and ravines/forests. It states "The primary and secondary take lines enclose a five-lobed area of approximately 1,860 acres, both in and outside the City of Albany...Reschke (1988) estimates that roughly 1,500 acres of this area consists of pitch pine-scrub oak barrens in various stages of succession. The remainder includes almost all of the remaining pine barrens vernal pools...and a portion of a well-developed ravine system along Kaikout Kill." Givnish recommended, among other things, use of land use practices to encourage use of native species in all landscaping and limiting proportion of lots that can be paved, built upon or covered in grass. "The aim of such action, of course, is to increase the ability of the Karner blue butterfly to disperse between appropriate sites for reproduction and to found new populations, thereby enhancing its probability of long-term survival in the Albany Pine Bush." Givnish at p. 59.
- (e) The 2002 Management Plan describes this report as the "seminal study". See 2002 Management Plan, P.8.

2. The 1993 Management Plan

- (a) The 1993 Management Plan concluded that, as of the date of its adoption in May 26, 1993, approximately 1,924 acres, which were acquired by various agencies, organizations and municipalities were included in the Preserve.
- (b) The 1993 Management Plan recognized the Givnish Report findings that “the minimum area required for the long-term conservation of the Albany Pine Bush ecosystem and the Karner blue butterfly is approximately 2,000 acres.” This figure approximates the area included within the primary and secondary “preserve” boundaries as defined by the N.H.P. in 1985. The 1993 Management Plan concluded the Commission is now close to achieving its initial goal of a $\pm 2,000$ acre Preserve, “however, additional lands were recommended for acquisition to expand the opportunities the Preserve would have to offer.” 1993 Management Plan at p. 27. The 1993 Management Plan also established a comprehensive plan for the active management of the Preserve, including fire management.
- (c) The 1993 Management Plan recommended the establishment of three levels of protection in the Albany Pine Bush and specifies additional lands as high priority sites for acquisition. Approximately 337 acres of such high priority sites (or 56% of the primary protection area) were identified and targeted for acquisition and incorporation into the Preserve. The Site was not included in this category. Since that time, numerous significant additional parcels have been acquired.
- (d) More than 300 of the 337 acres identified for acquisition in the primary protection area are located at least three (3) miles from the Site.
- (e) According to the 1993 Management Plan, the Site is classified as a secondary protection area. This classification includes both developed and undeveloped lands which are adjacent to the Preserve or the primary protection area and may have an influence on natural resource protection and management activities.
- (f) The primary protection area is defined in the Management Plan as areas that contain ecologically significant features, and which are recommended for acquisition. The secondary protection area is the residual category established pursuant to the Management Plan that includes land in the general area not otherwise classified as being

of importance, and “includes undeveloped and developed lands.” The designation of land as secondary protection area “does not represent the compulsory incorporation of land into the Preserve.” These boundaries may raise questions regarding the reasons for the Site’s inclusion in the secondary protection area, because of the potential for significant resources. (Management Plan, p.66) The Management Plan goes on to provide that “Protection Area Boundaries do not carry with [them] an environmental ‘cloud or stigma’”. These boundaries “...simply identify areas where cooperative programs to protect and manage significant Pine Bush resources may be appropriate.” The boundaries proposed in the Management Plan have no regulatory status. They are designated as planning tools that outline areas where significant resources are known to occur and where certain types of resource protection and management activities may be appropriate.

3. Environmental Design and Research (“EDR”) Report

- (a) In 1994, after adoption of the 1993 Management Plan, EDR (the same environmental consultant that prepared the 1993 Management Plan for the Commission and subsequently updated the Implementation Guidelines on behalf of the Commission) completed an analysis of the Preserve, including configuration, on behalf of a private landowner (“EDR Report”) (See, Draft EIS, Appendix VII).
- (b) The EDR Report concluded that the Preserve, at that time, consisted of ±2,146 protected acres (Note: The Hershberg analysis updated this figure based on additional lands acquired or available for management to be ±2,530 acres.) [See DEIS Appendix IX] and that although protection/acquisition (and subsequent management) of priority sites identified in the Management Plan would further enhance the viability of the Pine Bush ecosystem, implementation of an aggressive management program and timely initiation of this work appears to be one of the most significant issues relative to the viability of this ecosystem and especially the Karner blue butterfly.
- (c) EDR concluded a ±2,000 acre Preserve as configured and accounting for edge effects had been achieved. (See, DEIS, Appendix VII, p. 21). That analysis was not refuted at that time and served as the basis for subsequent decisions permitting development to proceed in the Albany Pine Bush.
- (d) Based, in part, on EDR’s conclusions regarding the Preserve, the City of Albany Planning Board previously granted site plan approval to a project within the Pine Bush that was subject to

litigation and resulted in a decision by the New York State Supreme Court, Albany County. In the Matter of Save the Pine Bush, Inc. v. City of Albany Planning Board, slip op. (Alb. Co. Sup. Ct. 1994), Connor, J., the Court stated, “documents reviewed by the Planning Board were sufficient for the Board to determine that **the 2,000 acres threshold for the Preserve has been achieved...**” (Emphasis added)

- (e) Based in part on the EDR Report, the Common Council approved a rezoning for an office project at 300 Washington Avenue Extension and the Planning Board issued site plan approval. The approval resulted in a lawsuit which denied the litigant’s attempt to annul the decisions of the City. See, Save the Pine Bush v. City of Albany, 281 A.D.2d 832 (3rd Dept. 2001).
- (f) A senior housing project was also reviewed and approved by the Planning Board in part based on the EDR Report. This project preserved ±11 acre of land to assist in the creation of a corridor area west of Rapp Road envisioned by the Commission. See, Save the Pine Bush v. Planning Board of the City of Albany, 298 A.D.2d 806 (3rd Dept. 2002).
- (g) Similarly, other municipalities have approved development in the Pine Bush subsequent to the EDR Report. In Save the Pine Bush, Inc. v. Town of Guilderland Planning Board, 217 A.D.2d 767 (3rd Dept. 1995), in denying the Petitioners relief, the Court noted that the Planning Board was “well aware that additional acreage was required in order to attain the 2,000 manageable acres targeted by the Commission, and there was certainly record support for the Planning Board’s findings regarding the number of acres then included and available for inclusion in the Preserve.” See also, Save the Pine Bush v. Town of Guilderland Zoning Board of Appeals, 220 A.D.2d 90 (3rd Dept. 1996); Save the Pine Bush v. Pyramid Crossgates Company, Index No. 6355-96 (Sup. Ct. Albany Co. 1997), Teresi, J.

4. Hershberg and Hershberg Update

- (a) Since the preparation of the EDR Report, additional information became available about properties which had or will be acquired for addition to the Preserve.
- (b) The Updated Preserve Acreage Study, prepared by the engineering firm of Hershberg and Hershberg, utilized information contained in the Implementation Guidelines and other relevant documents, including the EDR Report, relevant surveys, and deeds to compute

the current number of total Preserve acres and the fire manageable acres within the Preserve, including lands available for management. The Updated Preserve Acreage Study was prepared and incorporated into the Draft EIS and was further examined in the Final EIS to further address and examine issues analyzed in the Draft EIS in direct response to public comments. Based on the additional acquisitions, the Updated Preserve Acreage Study tends to support the existence of a 2,000± acre minimum preserve.

- (c) According to the Updated Preserve Acreage Study, as of 1998, a total of 2,530.43 lands were available for management or protection within the Preserve and approximately 2,061.43 fire manageable acres are within the Preserve or otherwise protected/managed. Since then, additional significant subsequent acquisitions have occurred; including, but not limited to:
- ±44 acre parcel commonly known as the Mrozak parcel;
 - ±115 acres that were acquired by the New York State Department of Environmental Conservation for the Preserve commonly known as the Fenney and Ford parcel;
 - ±47 acres preserved at Nos. 400 & 495 Rapp Road which had been planned for an office project to be known as Drumlin Fields; and
 - additional acreage made available in connection with rezoning approvals by the City of Albany Common Council at 300 and 365 Washington Avenue Extension (Laberge Site) (±3 acres and ±1.5 acres, respectively).
 - ±10.8 acres preserved at the Avila project site (referenced above) and ±9.0 acres and the Daughters of Sarah site, assisting in the creation of a corridor area and adjoining management areas on lands west of Rapp Road and adjacent to the existing Preserve.

5. The Commissioner of the Department of Conservation

- (a) The establishment of a 2,000± acre minimum preserve is also supported by professionals with special training with the Karner Blue butterfly and has been upheld by the Commissioner of the New York State Department of Environmental Conservation who stated:

Although prior litigation established the need to thoroughly address the minimum acreage needed to maintain the Pine Bush habitat, the City has provided just such assessment... There has been no showing that would cast doubt upon the study's conclusions and hence no substantive and significant issue exists.

(see - Interim Decision of the Commissioner in the matter of the application for the proposed twenty-five (25) acre expansion of the Rapp Road Landfill, DEC No. 4-0101-171/10).

6. Implementation Guidelines

- (a) Subsequent to the 1993 Management Plan and EDR report, the Commission adopted the Implementation Guidelines in 1996, as a supplement to the Management Plan. The Implementation Guidelines conclude that additional lands are necessary to be acquired to support the Commission's "vision" for the Pine Bush Preserve.
- (b) Based on recommendations for the protection of linkages, buffers, and historic and significant environmental resources, and other public uses, the Commission recommends that additional acreage be acquired to support its "vision" for a minimum preserve. The Implementation Guidelines conclude the variety of functions the Preserve performs, and the need to accommodate, for instance, public use, require that the issue of Preserve area look beyond the ecological minimum recommended by Givnish.
- (c) More recently, the Commission asserted in connection with a prior project that 3,950 acres of land of which 2,390 fire manageable acres would establish its "vision" for the Preserve. According to a comment letter from the Commission, approximately 2,750 acres of land, of which 1,850 fire manageable acres, have been incorporated into the Preserve or otherwise available for management. (See, Commission letter dated July 18, 2001, Final EIS, Appendix G).
- (d) According to these updated acreage figures from the Commission, to account for recent acquisitions, a minimum of 150 acres of existing or potentially restorable pitch pine scrub oak that can be managed by fire are recommended for protection in order to reach the 2,000 fire manageable acres goal of the Commission.

7. 2002 Management Plan

- (a) The 2002 Management Plan states that it "updates and consolidates the original [1993] Management Plan and the [Implementation Guidelines] and updates the original Fire Management Plan for the Preserve."¹

¹2002 Management Plan at p. 4

- (b) Regarding the minimum acreage and configuration the 2002 Management Plan notes that since 1996 an additional ±450 acres have been incorporated into the Preserve, bringing the total size to over 2,735 acres, of which, approximately 1,850 acres are considered fire manageable.²
- (c) The 2002 Management Plan re-evaluated and modified the scores and ranking criteria established in the Implementation Guidelines, however, it did not result in many changes to the proposed protection priorities. Based on such re-evaluation, an additional 705 acres were identified for full protection beyond what was recommended in the Implementation Guidelines.³ The new target is stated to be 4,610 acres which includes the Preserve areas and full protection parcels.
- (d) The 2002 Management Plan recognizes that “the recommendation for protection of additional acreage (beyond what was recommended in the 1996 Guidelines) reflects the Commission’s experience that these recommendations may not be fully realized, since they are strictly advisory in nature. **Only by recommending more than the minimum can the Preserve vision, as expressed in this plan, be reached.**” (emphasis is added).⁴ Therefore, the Commission’s Vision Plan represents more acreage for the Preserve than required for the total minimum acreage.
- (e) According to recent newspaper accounts, the Commission has been able to protect approximately 250 additional acres to bring the total preserved acreage to over 3,000 acres.
- (f) This is the Commission’s most current management plan for establishing protection priority of identified parcels, including acquisition, and contains an updated fire management component.
- (g) No protection status was recommended for the Site in the 2002 Management Plan to achieve the Commission’s vision for a minimum Preserve.

8. The Federal Karner Blue Butterfly Recovery Plan (2003)

²2002 Management Plan at p. vi, 3, 71

³2002 Management Plan at p. 57

⁴2002 Management Plan at p. 66

- (a) The objective of the federal Karner Blue Butterfly Recovery Plan (“Recovery Plan”) is restoration of viable metapopulations of Karner blue butterflies across the species extant range to allow it to be reclassified from endangered to threatened.
- (b) In order to accomplish the objective, the Recovery Plan proposes a national plan for a minimum of 27 metapopulations [19 viable metapopulations (supporting 3,000 butterflies each) and eight large viable metapopulations (supporting 6,000 butterflies each)] are established within 13 recovery units across the butterfly’s range and are being managed consistent with the identified recovery objectives.
- (c) The Recovery Plan contains information concerning the distribution of the Karner Blue butterflies in several states.
- (d) The Recovery Plan notes that “The subpopulation at the Crossgates Mall (including both the Hill and powerline section) continues to be intensively managed through removal of competing and invasive vegetation and planting of desirable species.”
- (e) It was suggested that the Site may constitute “occupied habitat”. The USFWS letter dated April 18, 2005, states that there is no definition in the Endangered Species Act or implementing regulations, however the letter indicated that the federal Recovery Plan provides guidance to make such a determination. Next, the USFWS stated “Our current definition of “occupied” habitat includes: all suitable habitat within 200m of a lupine patch occupied by Karner blue butterflies, plus additional suitable habitat deemed likely to be occupied based on dispersal capability of the Karner blue butterfly population.”
- (f) Dr. Futyma examined this issue and found that: “Such evidence that the proposed project will not interfere with the butterflies includes the fact that the Site does not contain any rare ecological community types, endangered/threatened wildlife species or other significant ecological features. Specifically, there is no evidence breeding habitat of Karner blue butterflies (i.e., lupine plants) found on the Site, and no evidence that the butterflies feed on any other nectar-producing plants on the Site.” See DEIS, Appendix II.
- (g) Dr. Futyma continued, specifically addressing “occupied habitat” and found: When mapping the extent of habitats occupied by butterflies like the Karner blue, it has been the practice of the NYSDEC Endangered Species Unit to consider the “occupied habitat” in a particular location to consist of the places where the

species is known to be found, as well as habitats within several hundred feet that are considered to be suitable, even though the species has not been found there. **It does not appear that this definition of occupied habitat has its source in New York state’s endangered species regulations or in the federal Karner Blue Butterfly Recovery Plan. It is clear that the project site does not meet the definition of “suitable habitat” in the Karner Blue Butterfly Recovery Plan because it does not possess larval resources, i.e., the wild lupine plants on which the larvae feed.** My own studies in 2004 included visits to the project site on four days when the second brood of Karner blues was in flight. On each of those days, I observed Karner blue adults flying near the lupine patches within the nearby Niagara Mohawk powerline right-of-way to the south of the site. However, my search of the project site on those four days, which constituted a total of more than eight hours of observation, did not reveal any Karner blue butterflies. This is consistent with my prior observations of this site in 2000. Therefore, there is no evidence that the Karner blue butterflies actually make use of the project site. (Emphasis added). See FEIS, Appendix D.

- (h) The Recovery Plan does not contain a definition for “occupied habitat”, however, although there is a definition of “suitable habitat”, as noted by Dr. Futyma, the Site does not fall under this definition.
- (i) Therefore, based on the available information, the Common Council concludes that the Site does not appear to constitute “occupied habitat.” Even assuming the Site constituted “occupied habitat”, the management objectives for this area for the past 12 years entails encouragement of westward migration, not north to the Site where further northward or westward migration is not likely given existing conditions (Washington Avenue Extension, the NYS Thruway and regional shopping center [to the north], and office complex and residential facilities [to the west]).

9. Karner Blue Butterfly, Population Monitoring Results – 2004

- (a) In a joint collaboration report “Karner Blue Butterfly, Population Monitoring Results – 2004”, the Commission and NYSDEC utilize the findings of the federal Recovery Plan and 2002 Management Plan to strategically maximize subpopulation size and connectivity to nearby subpopulations while minimizing dispersal to developed areas to ensure “that sufficient individuals disperse to restoration sites to the west. Such dispersal is essential to creating and

maintaining viable Kbb metapopulations requisite for down listing and/or delisting the species.” (Emphasis added.)

- (b) The 2002 Management Plan was drafted after consideration of the draft federal Recovery Plan which indicated that habitat (lupine) patches which are within 200 meters of each other may encourage butterfly movement.
- (c) The 2004 Population Monitoring Report indicates that preservation techniques used to establish appropriate habitat along the NIMO right-of-way produced favorable results for population numbers in this location. Generally, the NIMO right-of-way area, together with the Butterfly Hill were determined by NYSDEC to be “sufficiently configured to achieve the goal of providing linkage for the butterfly, from the mall at least as far as Rapp Road ... It is west of Rapp Road where the linkage is bottlenecked and has yet to be fully achieved ... ” Appendix 3 of the Implementation Guidelines at page 15.
- (d) The Population Monitoring Report states (see Appendix B of this FEIS):

To enhance KBB dispersal and colonization of the Federal KBB Recovery Plan adopted a strategy of maximizing sub-population size and connectivity between subpopulations. The most appropriate management for this site [the Butterfly Hill at Crossgates] and its KBB population is, therefore, rapid and extensive habitat expansion to the north and west, and maintaining or erecting significant barriers to dispersal adjacent to surrounding developed area. Expansion into the adjacent [NIMO powerline right-of-way] and associated open space can increase habitat and effectively expand the size of suitable habitat for this subpopulation, consistent with these management guidelines described in the Federal Recovery Plan for the KBB (USFWS 2003) and Fuller (in prep). Given the Site’s poor landscape context, and that generally few KBB appear to disperse farther than 200 meters (KBB are known, however, to disperse more than 2 kilometers in appropriately connected habitat, USFWS 2003), maximizing sub-population size and connectivity to nearby subpopulations, while minimizing dispersal to developed areas is the most effective method of ensuring that sufficient individuals disperse to restoration sites to the west. Such dispersal

is essential to creating and maintaining viable KBB metapopulations requisite for down listing and/or delisting the species.

- (e) Consequently, the Commission has indicated that the goals and objectives of the 2002 Management Plan and federal Recovery Plan will be met by introducing appropriate habitat into the NIMO powerline right-of-way both north and west of the Crossgates Hill to encourage westward migration. Development of the Site will not adversely impact this goal, nor has the ability of the Commission to obtain a 2,000 acre Preserve been compromised, assuming it not already been achieved. In fact, since 2002 when habitat expansion work was initiated, the numbers of observed butterflies has actually increased along the Corridor Area. The 2004 peak number of Kbb's observed was the highest number observed since monitoring began in 1994. However, the recently released population sampling numbers of Karner Blue Butterflies at the Butterfly Hill and NIMO PROW during 2005 nearly doubled this former peak with 114 Kbb observed during the second brood on July 5, 2005. This number is not intended to be the actual total population of Kbb's in the NIMO PROW but is a population count based on a carefully laid out walking transect of the NIMO PROW which can be used to compare the growth of the Kbb population.

E. THE PROJECT IS CONSISTENT WITH THE GOALS AND OBJECTIVES OF THE MANAGEMENT PLAN, THE IMPLEMENTATION GUIDELINES, 2002 MANAGEMENT PLAN AND RECOVERY PLAN.

1. The DEIS and FEIS

- (a) The EIS's evaluated the potential adverse impacts of the Project on endangered species such as the Karner blue butterfly. An expert report contained in the DEIS states that "the [Project] is compatible with the goal of maintaining a corridor that encourages westward migration of Karner Blue butterflies." (DEIS Appendix II). This expert report also evaluated the 2002 Management Plan and found that "the [Project] will not interfere with meeting the goals and objectives of the 2002 Management Plan."
- (b) The DEIS also confirmed that the Project is consistent with the ability of the Commission to create "habitat patches" between subpopulations which are goals set forth in the Federal Recovery Plan and the 2002 Management Plan. The expert report states:

The Project will not detract from the Commission's goal in the establishment of such habitat patches. In fact ... the prior Planning Board approvals have established a framework for

the Commission to achieve this goal. Also, another action that has been undertaken to meet this objective is the creation of new Karner blue butterfly habitat in the NIMO powerline right-of-way between the Site and Crossgates Hill. This work began in 2002 and has continued in 2004, with scraping of soil to remove undesirable plants in preparation for planting of lupines and other plants that can provide nectar to the adult butterflies. (See DEIS Appendix II)

- (c) Dr. Futyma added in the FEIS that:

Moreover, based on the management objectives of the Commission and NYSDEC for this area, the goal is to encourage migration to the west, not north. As noted in my previous report: NYSDEC determined that it was not necessary to include the project site in the management area for linkage/corridor purposes except for a portion of its extreme southwestern corner. In fact, the proposed development is compatible with the goal of maintaining a corridor that encourages westward migration of Karner blue butterflies.” (See, FEIS, Appendix D)

- (d) It was suggested that the construction of a building in the vicinity of the Butterfly Hill might negatively impact the population at Butterfly Hill because a negative impact on population was purportedly associated with construction of a prior theater expansion project at Crossgates Mall. The butterfly population at Butterfly Hill was evaluated by Dr. Futyma. Dr. Futyma offered his opinion that:

Since 1998, the populations at Crossgates Hill have fluctuated but are mostly stable, although low. The largest daily count of individual Karner blue butterflies since 1997 was in 2004, with 30 individuals observed on June 2nd, the first day of observation of the spring brood. The 2004 peak number of butterflies observed in the NIMO powerline right-of-way observed (58) is the “highest number observed since monitoring was initiated in 1994.”

It has been suggested that the expansion of a movie theatre in the part of Crossgates Mall adjacent to Crossgates Hill may have contributed to the drop in the numbers of Karner blue butterflies between 1997 and 1998. However, the sudden decline in butterfly population counts in this period is a phenomenon observed at a number of Karner blue butterfly sites in the Albany-Saratoga region, and not just at

Crossgates Hill and the NIMO right-of-way (Kathleen O'Brien of NYSDEC, personal communication). Therefore, the cause of the decline lies in a factor with more widespread effects than the construction of a building. The most likely reason is a string of years in which the weather has been unfavorable to the survival of Karner blue butterflies.

- (e) In addition to the finding that the Project will not adversely affect the Butterfly Management Area, the DEIS and FEIS demonstrate the Project Site has no suitable Pine Bush habitat and would not be considered a viable candidate for inclusion into the Preserve.
- (f) Therefore, the DEIS and FEIS and other information, including expert reports and analysis, conclude the Project Site does not support valuable or suitable Pine Bush habitat and will not adversely impact the butterflies at Crossgates Hill.
- (g) The Common Council also notes that several plans have been adopted over the years concerning acquisition and management of lands to be incorporated and managed as part of a viable Pine Bush Preserve. These plans are incorporated into the DEIS and FEIS and thoroughly addressed.
- (h) The Common Council has considered the Project and Site in relation to all the Management Plans and has determined that that Project will not negatively impact or impede those efforts to create and maintain a viable Preserve Area.

2. The Management Plan

- (a) Based on Map 15 in the Management Plan, the Site is classified as a Secondary Protection area. The Management Plan states:

Areas adjacent to the southern section of the Preserve. These sites could provide . . . a potential migration / dispersal corridor between the southeast section and Crossgates Hill (a site separated from the Preserve, but included in the primary protection area because it supports a significant population of Karner Blue Butterflies). Management Plan, p. 30.

- (b) The Management Plan, therefore, suggests that a dispersal corridor be created between "Crossgates Hill" and the existing Preserve. The Management Plan does not specifically identify the Site, or

any other site, as providing the identified corridor. However, the corridor is intended to promote westward migration. The Project, which incorporates an area to be made available for commitment to mitigation to NYSDEC, meets this objective.

- (c) The Management Plan objective to establish the dispersal corridor has also been advanced by decisions of the City of Albany Planning Board which requires that the Daughters of Sarah offer a dispersal corridor totaling ± 9.0 acres for dedication to the Preserve through a conservation easement and the expansion of the Teresian House by the Roman Catholic Diocese of Albany [Avila project] to continue the Corridor Area to the west totaling ± 20.0 additional acres for the corridor. See FEIS, Appendix F.
- (d) Pursuant to the Management Plan, portions of the Project are located in the secondary protection area. However, based on the Management Plan criteria and the record before the Common Council, the portions of the Project Site proposed to be developed do not contain any significant characteristics making it necessary for incorporation into the overall Pine Bush management effort. Expert reports have concluded that the Project will not adversely impact the existing Management Area (which has been designated in the Management Plan as primary protection area because of its ecological importance to the Pine Bush), nor does the Project contain valuable Pine Bush habitat, which would make it a viable candidate for incorporation into the Preserve. The Conservation Director for the Commission also provided testimony to this effect.
- (e) The Project is physically remote from the existing Primary Pine Bush Preserve and the Butterfly Management Area. The Project entails construction of a building and parking areas, all of which is located a considerable distance from the butterfly management area. Nonetheless, studies were conducted by leading experts which concluded that no portion of the butterfly Management Area will be disturbed or otherwise adversely affected as a result of the Project.
- (f) These studies prepared by Richard P. Futyma, Ph.D. of the LA Group. P.C., which are set forth in the FEIS and DEIS, determined there will be no adverse impacts on the Management Area resulting from, among other things, temperature or wind direction and the Project was consistent with the goals sought to be achieved in the Management Plan. Dr. Futyma has a Ph.D. in botany and has extensive experience studying the Karner Blue Butterfly and its habitat, including Karner Blue Butterfly, wild lupine and flowering plant populations within the Management Area.

3. The Implementation Guidelines

- (a) According to the Implementation Guidelines, the recommendations contained therein “will guide the Commission, its members and remaining agencies in their protection and project review process” Implementation Guidelines, page 21. The Implementation Guidelines, though not binding on non-Preserve property, provide guidance to municipalities on projects that may impact the Preserve. See New York Farm Bureau, Inc. v. Albany Pine Bush Preserve Commission, (Harris J., presiding) (Index No. 4406-96 Alb. Co. Sup. Ct. 1997). In reviewing the Project, the Common Council has carefully considered the recommendations set forth in the Implementation Guidelines and of the Commission.
- (b) While the Implementation Guidelines classify lands as necessary for the Preserve warranting full protection, partial protection or open space status, the Implementation Guidelines assigned no ecological significance to the Site.
- (c) The Implementation Guidelines were prepared by the Commission to supplement the Management Plan as a result of the settlement of a lawsuit. The Implementation Guidelines state that they supersede the Management Plan with respect to project review guidelines and processes where inconsistent. The Implementation Guidelines also established a priority for acquisition and protection of lands not currently protected or located within the Preserve.

Although priorities have been established, areas can only be protected as financial resources and willing sellers permit. The Implementation Guidelines do not provide a strict order for protection, but serve to guide protection efforts, as areas are protected and developed, protection priorities will be updated and re-evaluated. The ongoing changes in the protection of the Pine Bush area necessitates that the list be dynamic . . .”

- (d) The Project will further the goals and objectives of both the Management Plan and the Implementation Guidelines through the incorporation of site planning measures to be required by the Common Council to assure development of the Project is compatible with the Preserve character and other management activities established in the Management Plan and Implementation Guidelines. Planning measures include, but are not limited to, incorporation of a land area located along the southwestern portion of the Site to be available for commitment to mitigation to

NYSDEC and landscaping with native species. See, Section V for additional measures.

- (e) As noted in the ecological assessment by Dr. Futyma, he notes that: “a strip of wooded vegetation will be preserved in the southwestern part of the project site. This area, along with woods on the adjacent parcel to the south, will act as a buffer between the project and the Karner blue butterfly management area in the Niagara Mohawk right-of-way. It will act as a wind-break that will help protect the butterfly management area from changes in wind patterns and temperatures that might result from the project. It will also continue to serve as a migration barrier that will discourage Karner blue butterflies from traveling into the project area.”
- (f) Assuming the preservation goal has not been reached, the Project has been designed to incorporate measures to be consistent with goals and objectives set forth in the Implementation Guidelines. Even though the Site does not add any lands identified by the Commission in the Implementation Guidelines or 2002 Management Plan which may add to the total fire manageable acres included in or targeted for acquisition. As noted, in response to Comment 44 in the Implementation Guidelines, NYSDEC determined the existing corridor was sufficient to link Crossgates Hill to the west. Dr. Futyma in his report agreed with this assessment. See, DEIS, Appendix II.
- (g) The subject Site Plan ensures the continued existence of an appropriate corridor consistent with goals and objectives of the Implementation Guidelines, when considered cumulatively together with the land identified for the existing Corridor Area for preservation/management purposes.
- (h) Therefore, development of the Project on the Site is consistent with the Implementation Guidelines and will not affect the establishment of a 2,000± acre fire manageable Preserve, assuming such has yet to be attained, even if other properties with greater priorities are developed in the future.
- (i) The Site is entirely outside of the land areas identified by the Commission as necessary for Preserve purposes. Therefore, development of the Project consistent with the Implementation Guidelines will not negatively affect the overall configuration of the Pine Bush Preserve. The Project will not “cut off” any other existing or potential Preserve lands from each other, but, rather, will help facilitate connectivity. Furthermore, no individual or entity has identified how the Pine Bush configuration would be

adversely affected if the Property was partially developed consistent with the Implementation Guidelines.

- (j) Despite the obvious scrutiny of the Site at that time, the 1996 Implementation Guidelines did not classify the Site as necessary for the Preserve. In fact, NYSDEC confirmed the established corridor was sufficient without inclusion of the Site. This assessment was later confirmed in the 2002 Management Plan which reclassified numerous parcels from partial protection to full protection. Consistent with the recommendations in the 1996 Implementation Guidelines, the 2002 Management Plan did not classify the Site for any ecological function.
- (k) Response 44 in the Implementation Guidelines concludes that the Corridor Area from the Butterfly Hill to Rapp Road is sufficient for migratory purposes. It states:

The existing linkage from Crossgates to Rapp Road, while it could benefit from improvements, **is considered adequate.**

During the permitting process for Crossgates Mall expansion phase III, agreement was reached between the Department of Environmental Conservation (NYSDEC) and Pyramid Corporation regarding the configuration and extent of an expanded Karner blue butterfly Management Area on Crossgates property. As a condition of the DEC permit necessary for the expansion, the management area was expanded from the Hill that supports Karner Blue butterflies, to include a corridor along the entire power line all the way to Rapp Road. In addition, an area north of the power line, varying in width from 50 feet to 150 feet was also included in the management area, as was a similar area 160 feet in width south of the power line. Thus the minimum width of the management area is over 300 feet, while for the most part is over 400 feet wide. DEC's Bureau of Wildlife feels that this expanded management area is sufficiently configured to achieve the goal of providing linkage for the butterfly, from the Mall at least as far west as Rapp Road where the linkage is bottle necked and has yet to be fully achieved. (Emphasis added)

- (l) Therefore, NYSDEC determined that the existing corridor area is sufficient for linkage/corridor purposes without the inclusion of all or any part of the Site.

4. Prior Commission Letters and Comments

- (a) The Commission reviewed and considered a prior Project at the

location of the Site and had no objection to the development proposal. Pursuant to a previous written comment letter dated June 6, 2000 on the prior project, the Commission stated:

(i) “In closing, if the rezone and development proceeds consistent with the recommendations made by the Commission, *we would not object*. Thank you.” (Emphasis added)

(ii) At the public hearing regarding the prior project, the former Executive Director reiterated: “Overall the applicant has addressed the issues with regard to the Pine Bush... we do not have any objections from the Pine Bush Commission.”

(b) In addition, the Conservation Director of the Commission at the public hearing for the subject Project confirmed that the Site had little, if any, impact on the Commission’s ability to create a contiguous Preserve or effect its ability to establish a minimum Preserve area. The Conservation Director stated that the Commission generally agrees with the Applicant's conclusion that while the property could certainly benefit the creation of a Preserve, “*it is not necessarily essential to that purpose.*” Public hearing comment of Neil Gifford, p. 54 and 57. (Emphasis added) This was reiterated before the Common Council before the Council on November 21 in connection with the acceptance of the FEIS as complete.

5. 2002 Management Plan

(a) Consistent with the 1996 Implementation Guidelines, the 2002 Management Plan continues the classification and identification of parcels as important for acquisition into the Preserve - full protection, partial protection or open space. The 2002 Management Plan does not classify the Site into any of these categories. Although the 2002 Management Plan reclassified 705 acres of land for full protection, the classification of the Site remained unchanged.

(b) The 2002 Management Plan identifies a goal for Karner blue butterfly management to create suitable dispersal areas between occupied subpopulations by expanding habitat outward from existing subpopulations and create “stepping stones” of suitable habitat between subpopulations. Criteria for dispersal areas are provided with the recognition that “most dispersal areas will require considerable restoration/modification to create or expand

suitable habitat for Karner blue dispersal (Gifford, 1999).”⁵
“Creating linkages and infilling decreases Preserve fragmentation.”⁶

- (c) As noted in the Population Monitoring Report – 2004, the Commission has begun undertaking this activity in an effort to encourage westward migration.
- (d) As noted above, the Site will have no adverse impact of the creation of “stepping stones” intended for the promotion of westward migration.

F. “TAKING” UNDER STATE OR FEDERAL LAW

1. It was suggested that “taking” under the state or federal Endangered Species Act should be investigated.
2. Dr. Futyma examined the issue in the DEIS and FEIS and determined that no state or federal permit is implicated or required because the Site is not utilized by a State or Federal endangered or threatened species, the Site does not contain any rare ecological community types, suitable habitat or other significant ecological features and there is no breeding habitat of Karner blue butterflies on the Site. No existing migratory pattern for the Karner blue butterfly would be disrupted as a result of the Project. Based on several inspections of the Site, there is no evidence of Karner blue butterflies or lupine plants on the Site.
3. As noted above, the Commission, through its Conservation Director, testified before the Council, among other things, that the Site was not essential for incorporation into the Preserve, however it was suggested that the United States Fish and Wildlife Service should be allowed to examine the Site.
4. In response to the comments of the USFWS, the Applicant provided detailed analysis and expert opinion contained in the FEIS. The expert report concluded that no taking would occur as a result of the Project taking into account, among other things, the Federal Recovery Plan and application of the terms “occupied habitat”, “critical habitat” and “suitable habitat” to the Site. The Common Council determines that responses were comprehensive and responsive in nature to satisfy the inquiry of the USFWS. The Common Council notes that SEQRA does not change, or otherwise diminish, the jurisdiction of other agencies and the USFWS may exercise its authority in its discretion. All agencies and the public have been provided extended opportunities to provide any relevant information and comments to the Common Council regarding the Project. As

⁵2002 Draft Management Plan at p. 43

⁶2002 Draft Management Plan at p. 24

noted above, on balance, the Common Council determines that it has received sufficient information to develop a complete understanding of all the potential adverse environmental impacts of the Project including issues and concerns expressed by the involved and interested and the public. Nevertheless, in response to the USFWS concerns the Applicant provided additional information directly addressing the issues raised. Although the information provided in the FEIS comprehensively addresses the substantive concerns of the USFWS, if a site visit is deemed necessary, or other obligations are imposed by other involved agencies, the Applicant will be required to cooperate in such efforts as required by law.

G. CUMULATIVE IMPACTS

1. In Save the Pine Bush, Inc. v. Common Council of the City of Albany, 188 AD2d 969 (3rd Dept. 1992), the Appellate Division faulted a decision by the Common Council to rezone property in the City of Albany and held:

the probability likelihood or expectation of acquiring the necessary acreage is not addressed in the environmental impact statement (which cover the reasons the properties are not necessarily suitable for acquisition into the preserve), nor in the SEQRA Findings Statement (which restate the same findings).

The determinations lack a reasoned elaboration concerning the manner in which the necessary 2,000 acres would be acquired in the absence of the subject parcels, which was an environmental concern that had to be addressed as it was essential to perpetuate the Pine Bush ecology and the Karner Blue Butterfly...

2. Subsequent to this decision, the Commission adopted the Management Plan (in 1993) and Implementation Guidelines (in 1996) and 2002 Management Plan, which provide such an assessment, and EDR concluded (in 1994) that an ecologically viable preserve had been achieved. EDR found that "...it appears a preserve well in excess of 2,000 acres has been achieved and that "edge effects" would not reduce the fire-manageable area of the existing preserve "below the range of minimum area considered acceptable to Givnish, et al (i.e. 1,800 acres)..." Draft EIS, Tab G, EDR Report at pps. 13 and 16-19.

3. In the absence of the Site and incorporation of the identified mitigation measures, there will be no significant adverse impact with proposed development of the Site on the probability, likelihood or expectation of acquiring the acreage needed to establish the Preserve. Nevertheless, a portion of the Site will be made available to the NYSDEC for commitment to the Preserve Adoption and implementation of the Management Plan and Implementation Guidelines are plans adopted by the Commission which are intended to further insure that the minimum preserve will be acquired and/or managed.

4. The Common Council has thoroughly considered and evaluated the secondary and cumulative impacts of the Project and other pending, proposed, or conceptual projects to achieve the minimum acreage required to achieve an ecologically viable Preserve, to the extent it has not been achieved, and considered the goals and objectives of the 1993 Management Plan, the Implementation Guidelines, 2002 Management Plan and federal Recovery Plan and assessed the impact of the Project on efforts to achieve those goals and objectives would not be compromised as a result of the Project.

5. Taking into consideration the Project, a Corridor Area has been identified and substantially created through the efforts of the City and Planning Board consistent with the objectives of the Implementation Guidelines and 2002 Management Plan. NYSDEC has determined the Corridor Area at least east of Rapp Road to be sufficient for migratory purposes and an expert report concurs in NYSDEC's assessment.

6. Other identified projects within the City of Albany, Village of Colonie and the Towns of Guilderland and Colonie will not impact the ability of the Property to provide its identified ecological functions.

7. The Village of Colonie considered an expansion of a trailer park at one time and elimination of the at-grade crossing of the railroad tracks along Rapp Road. However, no plans have been prepared identifying the location of the proposed crossing.

8. It was reported that the City may seek permission to expand the landfill. However, to date no application has been filed so any analysis would be pure speculation at this time. Even assuming such permission was ultimately obtained, it was reported that the City will pledge to acquire comparable additional lands to dedicate to the Preserve. In any event, any expansion of the landfill will undergo its own detailed environmental review process. Even assuming an application is made and eventually approved, it will have no impact on the ability of the Site to provide the ecological benefits contained in the mitigation measures below. The landfill is situated northwest from the Site across Washington Avenue Extension and the New York State Thruway making it remote from the Site. In fact, the 2002 Management Plan draws a distinction between management objectives for butterfly populations and the Preserve located north and south of the NYS Thruway. See 2002 Management Plan, Table 7, P 36. It states the management objectives to be: "Maintain two separate populations with at least 3,000 adult butterflies in each: one north of the NYS Thruway (I90) and a second south of the Thruway."

9. The Common Council is also considering rezoning of a property at the Daughters of Sarah facility to C-PB Commercial Pine Bush. The Commission testified in support of the rezoning request on November 21, 2005 and noted it

may issue additional comments during site plan review for a potential project at this site. This site is remote from the hotel Site located on the north side of the existing buildings away from the Site and the established corridor area. Between the Site and Daughters of Sarah rezoning site are several developments including the Time Warner Cable office building, residential group housing facility, Rapp Road and the existing Daughters of Sarah development. Development of the Daughters of Sarah site would not change the management objective to encourage westward migration through the rear of the Daughters of Sarah property along the established corridor area.

10. None of these projects when considered with the Project will impact the ability of the Site to continue to provide its environmental benefits and functions, identified in the mitigation measures, since neither the Implementation Guidelines nor 2002 Management Plan classified the Site for acquisition into the Preserve or for any other ecological function. The Draft and Final EIS's evaluated the cumulative impact of these projects together and concluded that the goal of a linkage corridor, and increased connectivity, as defined in the Implementation Guidelines, 2002 Management Plan and federal Recovery Plan, would be achieved. It is not expected that protection priority for the Site would change as a result of these projects or any combination thereof.

11. It should be noted the relatively recent rezoning of 300 and 365 Washington Avenue Extension provided that additional acres would be dedicated to the Preserve. In addition, the 400-495 Rapp Road re-zoning proposal in the City of Albany, although approved, was the subject of a land swap and has become a part of the Preserve. The 2002 Management Plan recognized that this addition "has strengthened the connection between the main body of the Preserve and the Rensselaer Lake area."⁷

H. CONCLUSION

1. 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. Notwithstanding this discrepancy, as discussed herein, the Common Council has determined that development of the Project on the Site is consistent with the Management Plan and the Implementation Guidelines and will not affect the achievement of a 2,000 acre fire manageable Preserve, assuming one has not already been achieved, nor will the Project adversely affect the configuration of the Pine Push Preserve.

2. Additionally, assuming that a 2,000± acre fire manageable Preserve has not been assembled, the Implementation Guidelines create a plan to acquire

⁷2002 Management Plan at p. 24

and/or protect additional lands based upon the presence of appropriate pine bush habitat/ecology at specific sites analyzed for protection and/or management as part of the Preserve. Development of the Project, with the mitigation measures incorporated, is consistent with such plan.

3. Based upon the above, the development of the Project is consistent with the Management Plan and the Implementation Guidelines, especially since the Implementation Guidelines expressly contemplate development on a portion of the Site and with certain mitigation measures which have been proposed as part of the Site, including but not limited to, proposing making additional land available for commitment to the Preserve. Furthermore, the measures incorporated into the Project will serve to protect additional land and provide enhanced ecological features for the Preserve. Development of the Site with the Project will not have any adverse effect on the achievement of a 2,000± acre fire manageable Preserve, assuming additional acres are required, nor will the Project adversely affect the ultimate configuration of the Pine Bush Preserve. In fact, the configuration will be enhanced by appropriate addition of the Corridor Area which promotes connectivity to the west. Moreover, if the Project was not undertaken, then the Site would continue to be overtaken with invasive species and potentially frustrate the Commission's goal of connectivity and linkage. Therefore, the Project will not have any significant adverse effects on the Preserve, rather the effects are considered to be positive.

As more fully elaborated in this Findings Statement, the Common Council finds that, after consideration and weighing of the competing viewpoints and conclusions as to what potential adverse environmental impacts will occur, if any, as a result of the Project, and balancing those viewpoints and conclusions against the efforts to minimize and/or avoid such potential impacts through adoption of the mitigation measures set forth herein, and the undisputed social, economic and other benefits resulting from the Project, the Project avoids or minimizes identified potential adverse impacts relating to the Preserve and the Albany Pine Bush to the maximum extent practicable.

4. The 2002 Management Plan provides a budget through fiscal year 2006. It states that, "to date, over \$25 million has been invested in the Albany Pine Bush."⁸ The Commission receives funding from a variety of sources to assist it in reaching its vision for the Pine Bush. The NYS Legislature continues to provide funding as well as the City of Albany through landfill tipping fees and other Commission members and public and private entities. Continued funding is necessary, "[h]owever, there is a strong tradition of shared funding of land and protection, and many millions of dollars have been invested in the Albany Pine Bush to date. With the needed additional investment, the Preserve can be completed."⁹

⁸2002 Management Plan at p. 77

⁹2002 Management Plan at p. 79

3. OPEN SPACE/LANDSCAPING.

- A The Project will include a number of measures to integrate the Site Plan with the existing landscape. These measures include:
- i) Provide a 0.25 acre area available for commitment to protection of the corridor.
 - ii) Utilization of native Pine Bush species into the landscaping design.
 - iii) Maintain $\pm 34.1\%$ of the developed area as open space/landscaped area utilizing a combination of and native species and traditional species for landscaping and solely native species within the developed portion of the Site adjoining the Preserve and corridor area.

4. PUBLIC BENEFITS/ECONOMIC IMPACTS.

- A. The Common Council recognizes the need of the City to increase commercial base to create construction and operational jobs and stimulate the economy.
- B. Upon development of the Project, additional demands upon police and fire services is a possibility, but not expected to be significant.
- C. Development of the Project will generate both part time and full time construction jobs and permanent jobs with a significant monthly payroll. Permanent job positions will also be created once the Project is completed and operational. Approximately 15 part time and full time jobs are expected to be created by the Project. The Common Council recognizes that the developer, as any other developer of property, may utilize §485-b of the Real Property Tax law which will allow the phasing in of property taxes over a period of time.
- D. Necessary traffic improvements to be constructed in connection with the Project will be completed at no cost to the City.
- E. The Preserve will also receive benefits in the form of mitigation fees.
- F. On balance, the Project will have significant positive economic impacts for the City and its residents. There is an obvious public benefit to be achieved through construction of necessary hotel facilities, increased employment, usage of the City's infrastructure investment, completion of improvements to mitigate traffic impacts and contribution of monies toward the preservation and management of the Albany Pine Bush Preserve. The Project contributes substantially to such public benefits.

5. UTILITIES.

- A. Adequate telephone, telecommunications services, electric, natural gas, water and sewer capacity, service and infrastructure exists to accommodate the Project. Adequate facilities for generation, transmission and distribution of electrical energy are available from Niagara Mohawk Power Corporation.
- B. Adequate water supply exists in the City of Albany under control of the Albany Water Board to supply the Project. Recent improvements to the distribution system insure that an adequate supply can be transmitted to the Site.
- C. Adequate sanitary sewer transmission capacity exists in the sanitary sewer adjoining the Project. Sewage is transmitted to the Albany County North Wastewater Treatment Plant. The Albany Water Board currently utilizes only a portion of its permitted capacity and the Project can be accommodated with minimal impact upon these excess permitted levels.

6. GEOLOGY.

- A. The geology of the Site is dominated by unconsolidated deposits of glacial origin above a bedrock of shale. The soils consist primarily of uniform fine sands with a trace of silt. This surface layer is underlain with layers of with medium dense silt and silty clay with a trace of sand below.
- B. The Project will not have a significant adverse impact on the geology of the area.

7. WATER RESOURCES.

- A. The groundwater in the area consists of bedrock aquifer and two possible unconsolidated aquifers: Buried Ice-Contact Sand and Gravel Aquifer (deep aquifer); and Pine Bush Aquifer (shallow aquifer). The Buried Ice-Contact and Gravel Aquifer, if it exists beneath the Property does not receive significant recharge from the Site. The Pine Bush Aquifer receives recharge entirely from precipitation and snow melt.
- B. The Project will not adversely affect either groundwater or surface water in the area. Additionally, the Project may utilize porous asphalt pavement to allow ground water recharge. Surface water from the Site will be recharged to the Pine Bush Aquifer (shallow aquifer). The Pine Bush Aquifer surfaces to both the Kaikout Kill and to Rensselaer Lake. The natural filtration which takes place through the sand layers will prevent any adverse impact from occurring to this stream course or waterbody. See FEIS, Appendix M.

8. AIR RESOURCES.

- A. Air quality can be affected by traffic congestion. However, the proposed traffic improvements will maintain or improve the level of service at area intersections.

- B. The City of Albany is located within an attainment area under the National Air Quality standards.
- C. A traffic engineer examined potential air quality impact as a result of the Project and determined that no significant adverse impacts are expected as a result of the Project and air quality standards will continue to be met.
- D. Occasional incursions beyond recommended ozone levels currently occur in the City of Albany but will not be impacted by the Project.

9. WETLANDS.

There are no designated New York State Freshwater Wetlands or federally designated wetlands on the Site.

10. AGRICULTURAL RESOURCES.

There are no agricultural resources currently in use for agricultural purposes on the Site. Therefore, the Project will not have an impact on agricultural resources.

11. EDUCATIONAL FACILITIES.

The Site is located in the City of Albany School District. The Project, designed and intended for temporary residents and will not create additional demands on the City of Albany School District.

12. POLICE PROTECTION.

The Property currently receives police protection from the City of Albany Police Department. Police protection is adequate to serve the current needs of the City of Albany and to accommodate the Project.

13. FIRE PROTECTION.

The Property is serviced by the City of Albany Fire Department. Fire protection is adequate to serve the current needs of the City of Albany and to accommodate the Project.

14. HEALTH CARE FACILITIES.

Emergency health care facilities are available within and as part of the Project. A trauma center is available within eight miles of the Site, while other outpatient clinics are also available. These facilities are more than adequate to serve the current needs of the City of Albany and to accommodate the Project.

15. SOCIAL SERVICES.

Albany County Department of Social Services is the principal conveyor of social services to the City of Albany. In addition, there are several other agencies that exist in the community to meet its current needs. The Project is not expected to generate any additional demands on Social Services

16. RECREATIONAL FACILITIES.

A variety of parks, playgrounds and recreational facilities are available near the Project Site. Given the anticipated patrons of the hotel facility, it is not expected that additional recreational facilities will be required as a result of the Project. The Project will not have any significant negative impact on these facilities or their availability.

17. DEMOGRAPHY.

The population of the County of Albany showed an increase of 0.5% between the years 1990 and 2000. The population of the City of Albany declined slightly. Since the Project will constitute temporary housing facilities, the Project will not have a significant impact on the current population or the projected growth for the City of Albany. However, under US Census procedures, certain occupants of the Project may be counted as residents of the City of Albany.

18. STORMWATER MANAGEMENT.

The Project will not have a significant adverse impact upon the quality of the surrounding surface waters or upon groundwater. Stormwater will be collected from the site, including the parking lot and roof and will discharge to the groundwater utilizing a ground water recharge system (infiltration system) or porous pavement. NYSDEC Stormwater Management Design Manual shall be used to size and construct these facilities and the entire WQv will be exfiltrated to the ground water through the base of these infiltration practices. No floatable or settleable solids will be recharged to the groundwater.

Potential levels of chemical transmission will be very low due to the use of the minimum of 3 foot separation between the bottom of the infiltration basin and the high groundwater table. See FEIS, Appendix M.

A comment suggested that a principal aquifer may be impacted by the Project. This issue was addressed in the FEIS:

Principal aquifers are productive formations not intensively used at present for municipal water supply. Eighteen primary water supply aquifers underlie about 4% of upstate New York. A primary aquifer is an

underground soil or rock formation that yields enough water to be used as a major municipal water supply. NYSDEC also designates certain aquifers as “sole source aquifers”. The Pine Bush Aquifer is not a “sole-source aquifer” and is not a “primary aquifer”. Protection of all aquifers from hazardous waste is required under Environmental Protection Agency and NYS DEC standards. Compliance with NYSDEC Stormwater Manangement Design Manual provides adequate protection from storm water runoff including those potentially containing hydrocarbons, floatables or chemicals.

Therefore, there may be special rules that apply, for instance, to the storage of hazardous materials or siting a landfill over a principal aquifer, however no such requirements are applicable to the instant application.

Even if such special rules applied to the Site, the Site will only create ±2.3 acres of additional impervious area. On balance, considering benefits of the Project, in the form of jobs creation, increased tax revenues, the hundreds of acres of developed land in the area, the addition of ±2.3 acres impervious area is considered to be *de minimus* and minor in nature and impacts small.

19. CULTURAL IMPACTS.

There are no known historical sites or artifacts on the Site. The Implementation Guidelines verify that no cultural resources exist on the Site. No comments were received from the public expressing concern regarding cultural resources. It is not anticipated that the Project will have a significant negative impact on archeological resources.

20. TRAFFIC/TRANSPORTATION

- A. Based on the traffic analyses prepared for the Project and all available traffic-related information in the record, the Common Council based on its independent review of the information in the record and the review and comments of NYSDOT, makes the following determinations.
- B. Transportation Concepts, LLP prepared a Traffic Impact Study dated December 28, 2004 (“TIS”) which provided a cumulative analysis of the potential impacts of the Project on potentially affected intersections.
- C. The Common Council has considered the TIS, and Letter Report dated June 28, 2005, for the Project and the potential impact that the Project may have on the transportation in the area. The traffic improvements proposed in the Traffic Impact Study mitigate potential traffic impacts to the maximum extent practicable.

- D. The TIS includes projected traffic volumes anticipated for the Project, further projections anticipating potential future growth in the area and an assumed growth rate.
- E. The TIS also utilized the most current information available, including actual traffic counts in October, 2003 and historical report from the Capital District Transportation Committee from 1998 – 2001. These traffic counts were used to determine both the morning and afternoon "peak hours" of traffic and current levels of service of the traffic in the area.
- F. The use of peak hour traffic insures that the traffic projected to be generated by the Project is combined with all other potential projects to determine levels of service during the "peak hour" traffic time periods. During all other time periods, traffic conditions are expected to be better than those described in the TIS's "peak hour" scenario.
- G. Accordingly, the TIS provides a conservative, worst case scenario of potential future traffic flows with and without the Project.
- H. The TIS was provided to NYSDOT. In a letter dated September 17, 2004, NYSDOT suggested that a Highway Work Permit may be necessary for work conducted in the State right-of-way.
- I. It is not anticipated that the Project will have an adverse traffic impact.
- J. The Site will be situated on the South Frontage Road which will be extended and terminate approximately 90 feet to the east of eastern Site driveway. Approximately 300 feet to the east is a single lane entrance/exit (right-in and right-out) to Crossgates Mall from Washington Avenue Extension. North is the Washington Avenue Extension. The NIMO right-of-way and Butterfly Hill are situated between the Site and Crossgates Mall to the south. Time Warner Cable and its satellite facilities abut the Site to the West.
- K. The Commission maintains "approximately 20 miles of marked trails located throughout the Preserve..." 2002 Management Plan, p 21. One of the Program Goals is to provide appropriate recreational uses and segregate incompatible uses and restrict particularly damaging uses from those areas of the Preserve that are most sensitive, which includes removal of inappropriate trails from ecologically sensitive areas. 2002 Management Plan, p. 26. Given the existing surrounding uses, inclusion of a trail at this location to the south would be inappropriate.
- L. According to Figure 10 of the 2002 Management Plan, there are no public trails in the vicinity of the Site. The nearest trail is located to the west of the Teresian House. 6 NYCRR §648.1 (as printed in the 2002 Management Plan as Appendix H) addresses trails in the Pine Bush and provides: "It is unlawful for any person to: (b) Ride or walk a bicycle... except on officially established and officially

marked trails; (c) Walk on or otherwise use an unmarked path, including firebreaks for any purposes without a valid permit.” In its numerous comments during the SEQRA process, the Commission did not indicate that a trail would be appropriate for this area.

- M. Given the location of the Butterfly Hill and Corridor Area to the south of the Site, the provision of trails for pedestrian and bicycle recreational activities should be discouraged.
- N. Moreover, the intent of the Applicant and Project is to serve business travelers arriving from the Albany International Airport and other area business travelers who are unlikely to utilize or require bicycle facilities.
- O. Nevertheless, several public comments suggested the need for bicycle accommodations. Although pedestrian and bicycle facilities are not likely to be necessary for customers of the hotel, the Common Council determines that a bicycle rack should be provided on-site for customers of the Project, in a location to be determined to be appropriate during the site plan review process by the Planning Board.

21. VISUAL RESOURCES.

- A. The Site provides little visual resource for the general public when viewed from Washington Avenue Extension and the South Frontage Road.
- B. The Site will remain $\pm 34.1\%$ green/open space upon completion of the Project. The area is intensely commercial in nature and a three story hotel building, which will require a variance from the Zoning Board of Appeal, is not expected to create negative visual impacts, especially given the visual renderings in the record.
- C. The Project is not expected to have an adverse impact on visual resources.

22. NOISE.

- A. Due to the Site location and type of use, noise impacts are expected to be insignificant.
- B. Construction related noise is considered a temporary impact.
- C. During the operational phase, no Project generated noise source will be above the existing background noise at the Site.
- D. Taking into account the above-referenced measures, surrounding noise levels will not be noticeably increased. Existing prevailing noise from vehicular traffic on Washington Avenue Extension will continue to dominate.

III. ALTERNATIVES

- A. The DEIS and FEIS contain an appropriate analysis of possible reasonable alternatives to the Project, taking into consideration the objectives and capabilities of the Applicant. Identified reasonable alternatives have been examined at a level of detail sufficient to allow a comparative assessment of their impacts.
- B. The Common Council has identified and examined reasonable alternatives to the Project. Alternatives analyzed include:
 - 1. No-action; and
 - 2. Alternative use in conformance with existing zoning
 - 3. Alternative use of the Site for an 87 unit hotel
 - 4. Dedication to the Preserve
 - 5. Alternative locations for the project
- C. The no-action alternative, while it will preserve the status quo, will result in a lost opportunity to achieve public benefits in the form of increased jobs and first class hotel accommodations. Moreover, the benefit of additional land being made available for commitment to NYSDEC will not occur.
- D. Alternative residential development will create greater demands for City-provided services than the Project, such as roads, trash collection, and schools. Such residential development would likely preclude any benefits to the Albany Pine Bush Preserve, such as creation, in the southwestern portion of the Site of a Corridor Area. See, DEIS, Appendix XI.

Based on the potential adverse environmental effects described above, the residential alternative analyzed does not represent the preferred alternative, especially when compared to the Project.
- E. None of the Alternatives represent reasonable alternatives taking into account the objectives of the Applicant.

IV. UNAVOIDABLE ADVERSE ENVIRONMENTAL IMPACTS

Potential unavoidable adverse environmental impacts, which may result as a consequence of the Project, have been identified as follows:

- 1. The development of the hotel is not anticipated to generate a substantial amount of additional traffic. By implementing the identified traffic improvements, such potential impacts will be mitigated to the maximum extent practicable.
- 2. During construction the Project will cause noise, dust and other particles to discharge. These impacts will not be significant and will be temporary in nature.

3. If development of the Project is considered to be not fully consistent with the Implementation Guidelines and 2002 Management Plan, despite the fact that the Site was not identified as ecologically significant for inclusion in the Preserve, management objectives are not compromised by the measures incorporated into the Project including, but not limited to, committing 0.25 acres to the NYSDEC, utilization of native species in the landscaping plan, installation of a fire hydrant to assist the Commission in its fire management activities are significant benefits. The Project has been designed to be consistent with the Implementation Guidelines and 2002 Management Plan.

The potential unavoidable impacts identified above consist primarily of activities which are local and insignificant in nature, and to a larger extent can and have been mitigated.

V. MITIGATING MEASURES

Approval of the Project in accordance with the measures herein described will not result in significant adverse environmental impacts. In order to minimize or avoid identified adverse environmental effects, the following practicable mitigative measures, or other measures providing the same or similar mitigative effect, are incorporated as conditions to the Common Council's findings regarding the Project:

A. PINE BUSH

1. Make available the 0.25 acre area identified on the site plans for commitment for preservation to New York State Department of Environmental Conservation.
3. Permit the Commission, or its designee, access to the 0.25 acre area to allow the Commission, or its designee, to perform maintenance activities, if they so choose.
4. No future development shall be allowed in the area to be made available for commitment to NYSDEC.
6. Landscaping within the development envelope shall contain a combination of native Pine Bush species and other appropriate landscaping plants and shrubbery.
7. A fire hydrant shall be installed for the potential use by the Commission or its designee to assist in fire management activities.
8. Notwithstanding that the Site is not within the boundaries of the Pine Bush Overlay District, Site lighting shall conform to these requirements. Sodium vapor lighting shall be utilized for exterior lighting purposes and conform with glare requirements of Section 375-126 of the Zoning

Ordinance.

9. Donate to the Commission surplus sand from the Site after construction is completed, if any.
10. Contribute funding as set forth in the DEIS to the Commission.
11. The Applicant will cooperate with the efforts of the USFWS and other involved agencies, to the fullest extent required by law.

C. UTILITIES

1. The stormwater management plan, including appropriate erosion and sedimentation control, must be implemented as set forth in the DEIS and FEIS to minimize potential impact on the Pine Bush Aquifer.
2. Water extensions and water and sewer connections shall be made at no cost to the City.

D. TRAFFIC

1. Necessary traffic improvements identified in the TIS for the Project shall be implemented.
2. A bicycle rack shall be provided on the Project Site for the use of Residence Inn customers or staff.

E. MISCELLANEOUS

1. To the extent practicable, limit site construction work hours to minimize the potential noise impact.
2. The Applicant shall apply for and obtain a variance regarding the height of the building from the Zoning Board of Appeals.
3. The Applicant shall apply for and obtain site plan approval from the Planning Board.

VI. CONCLUSION

In conclusion, the Common Council hereby finds that it has given adequate consideration to the Draft and Final EIS, including, but not limited to relevant environmental impacts, the facts and conclusions disclosed in the Final EIS, and other documents relevant to the proposed action. The Common Council has weighed and balanced relevant environmental impacts with social, economic and other considerations.

The Common Council finds further and certifies that:

- (1) The requirements of SEQRA have been met;
- (2) Consistent with social, economic and other essential considerations from among the reasonable alternatives thereto, the Project is one which on balance minimizes, or avoids adverse environmental effects to the maximum extent practicable and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable;

This statement shall be filed in accordance with Section 617.12 of the SEQRA implementing regulations.

Exhibit 2



COMMISSION MEMBERS,

December 19, 2005

Steven G. Schassler
Regional Director
NYS Department of
Environmental
Conservation

Bernadette Castro
Commissioner
NYS Office of Parks,
Recreation and
Historic Preservation

Andy Beers
Deputy Director
The Nature Conservancy of
New York State

Jerry Jennings
Mayor
City of Albany

Mary E. Brizzell
Supervisor
Town of Colonie

Ken Runion
Supervisor
Town of Guilderland

Michael G. Breslin
County Executive
County of Albany

Harvey Jay Alexander, Ph.D.
Citizen Representative

Margaret M. Stewart, Ph.D.
Citizen Representative

Aaron Mair
Citizen Representative

Corporate Liaison
John Brust

EXECUTIVE DIRECTOR
Christopher A. Hawver

Mr. Richard Nicholson
Historic Preservation Planner
City of Albany, Department of Development and Planning
21 Lodge Street
Albany, NY 12207

RE: 124-128R Washington Avenue Extension Draft Environmental Impact Statement
Proposed 124-unit Residence Inn

Dear Mr. Nicholson,

Thank you for forwarding the revised Findings Statement for the above referenced project. The staff and Technical Committee of the Albany Pine Bush Preserve Commission have reviewed the Findings Statement provided. Since 1991, the Albany Pine Bush Preserve Commission (APBPC) has served as an advisor to municipal boards, departments and agencies within the Albany Pine Bush Study Area, assisting with the analysis of natural resource information and the potential for adverse impacts of proposed development projects on the globally rare aquatic and terrestrial ecology of the Albany Pine Bush, and providing recommendations on how these impacts might best be avoided, minimized and mitigated to achieve a balance between economic development and Pine Bush conservation. In that role the APBPC has provided its professional assistance to the City regarding this project on five separate occasions during the State Environmental Quality Review (SEQR) process.

The Commission's analysis of the documentation provided to substantiate a conclusion that this project is not likely to result in potentially significant adverse impacts to the Karner Blue butterfly remains unchanged; the 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 Commission.

The comments and opinions provided by the applicant's representative throughout the SEQR process have intimated that the Commission's analysis on the Draft scope, DEIS, FEIS and Findings Statement represent conjecture by the Commission, who opposes this project. Please note that in the analysis and advisory services provided to the City regarding the EIS and Findings Statement, the Commission has only provided the City with pertinent and factual information and analysis, essential to identifying and evaluating the potential and likely adverse impacts of the proposed project.

Given that it is the cumulative effect of individual private and public actions that determine the degree to which a successful balance is reached in providing economic

vitality and natural resource conservation to communities in the Pine Bush Study Area, it is important to understand the relative level of expertise provided by the Commission in its advisory role in Project Review, as outlined in the 2002 Management Plan and Final Environmental Impact Statement for the Albany Pine Bush Preserve, adopted by the Commission.

Commission consultations provided in this and any proposed project, are based on 14 years of field experience managing, what is widely known to be one of the best remaining global examples of an inland pitch pine scrub oak barrens, of which there are fewer than twenty known examples. By all accounts the extent, condition and contiguity of the Albany Pine Bush have been significantly reduced, and this has resulted in the elimination and scarcity of native plant and animal species. It is therefore particularly important that the Commission work with its members and partners to understand and apply the best available conservation science to the creation and management of a viable preserve, to the recovery and management of the endangered Karner blue butterfly, and to the conservation of more than a dozen other rare plant and animal species.

The Commission has worked with public and private partners to recover the endangered Karner blue butterfly in the Albany Pine Bush. To date the Commission has managed more than 1,000 acres within the Preserve, including treating 865 acres with prescribed fire, removing 96 acres of invasive plants, restoring 37 acres of old agricultural fields, and planting through hundreds of acres of pitch pine scrub oak barrens with locally derived native plants. Not only have these efforts proven successful in restoring a paved parking lot, old fields and former invasive species sites to Karner blue butterfly habitat, but the Commission's successful methods are also being utilized beyond the Pine Bush to improve Karner-blue butterfly habitat restoration and recovery.

Additionally Commission staff routinely work with public and private institutions and agencies to conduct research on a wide variety of Pine Barrens conservation topics ranging from mammals to soil chemistry. The Commission has been an active member of State and Federal Karner blue butterfly recovery teams and working groups since 1991, and frequently participates in professional workshops, conferences and symposia regarding the ecology and management of the Karner blue butterfly. In particular for the last two years Commission science staff have been working with scientists from The Nature Conservancy, the US Fish and Wildlife Service, and NYS Department of environmental Conservation in the development of methods to quantitatively measure the relative suitability of Karner blue butterfly habitat; to date we have analyzed more than 20 individual habitat patches throughout the Glacial Lake Albany Karner blue butterfly Recovery Unit in New York State. Additionally, APBPC currently participates in a national effort of the federal Karner blue butterfly recovery team to develop monitoring standards for measuring Karner blue butterfly population dynamics and habitat features essential to understanding progress in Kbb recovery, as outlined in the USFWS' Final Recovery Plan for the species.

It is with this first hand knowledge and experience in conservation science that the Commission provides its expertise and recommendations to Commission members. The Commission reiterates its earlier concerns that in its analysis of on-site information, information provided by state and federal wildlife agencies and its own experience with Karner blue butterfly ecology and management, that interpretations and conclusions in the FEIS and Findings Statement cannot appear to be supported and in several instances appear directly contradictory to the factual information provided in the Draft and Final Environmental Impact Statements and Findings Statement.

Specifically, within Findings Statement section II.2.B. regarding potential project impacts to the Site, subsections 2, 3, 4, 11, 13 and 16 appear factually in error based on the information provided by the US Fish and Wildlife Service, NYSDEC, and the Commission.

- Subsection 2 "...confirmed that no Karner Blue Butterflies or any other State of Federal threatened or endangered species are located on the Site or likely to use the Site. The Management Plan, Implementation Guidelines and 2002 Management Plan likewise conclude no Karner Blue Butterflies exist on the Site. On site information provided in the FEIS, and information provided by state and federal wildlife agencies and the Commission, clearly indicate that the project site is well within the currently accepted standard used to identify the boundaries of occupied Karner blue butterfly habitat. Additionally in April 18, 2005 and May 19, 2005 correspondences from the Service and NYSDEC they consider the project site to be used by the Karner blue butterfly and that the site must be considered as part of the butterfly habitat.
- Subsection 3 states that "No suitable habitat for the Karner blue butterfly exists on the Site." As stated above (Subsection 2), this conclusion cannot be supported by the on site information provided in the FEIS and state and federal wildlife agencies and the Commission.
- Subsection 4 states that "An existing natural forested barrier between the Project Site and the Butterfly Hill inhibits the ability for northward migration to the Site". Based on the conditions of this wooded strip of land, this conclusion cannot be supported with information provided in the FEIS and scientific evidence previously provided to the City by the Commission in its October 27, 2005 comments to the Planning, Economic Development and Land Use Committee of the City of Albany Common Council.
- 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 by 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 known to be utilized by foraging adult Karner blue butterflies.

- Subsection 13 states that, "... a portion of the Site is undeveloped and, consists of a closed canopy...but the species are invasive to the Pine Bush ecology - including white pine, maple, black oak, pitch pine, gray birch, black cherry, cottonwood and trembling aspen." All of these species are native to inland Pine Barrens.
- Subsection 16 states that: "Adverse impacts to the butterflies and habitat on the Butterfly Hill are not anticipated or have been mitigated by the proposed mitigation

measures". This assertion is also not supported with information provided by state and federal wildlife agencies and the Commission.

Additionally, subsection II.2.D.8 e. through i. attempt to support a conclusion that the site does not appear to constitute occupied Karner blue butterfly habitat. These statements are not supported by information provided by state and federal wildlife agencies and the Commission. In particular, information provided in the USFWS April 18 letter, the May 2005 NYSDEC letter, and the 2004 Karner blue butterfly-monitoring report provided by the Commission, appears to directly contradict these statements. Utilizing the on-site information provided in the FEIS and the accepted standard for defining the boundaries of Karner blue butterfly habitat, both agencies concluded that "...Karner blue butterflies are likely to use the proposed project area" (USFWS April 18, 2005 letter) and that the project area "must be considered as part of the butterfly habitat" (NYSDEC May 19, 2005 letter).

Also, Subsection II.2.E.4 concludes that "no taking would occur as a result of the Project." As the Service and the Commission have indicated previously, only the US Fish and Wildlife Service can make such determinations, and that such a determination is critical to evaluating the likelihood of adverse impacts on the Karner blue butterfly.

Lastly, it is essential to successfully balancing development and conservation in the Albany Pine Bush that any analysis of potentially significant adverse environmental impacts be based on the best available conservation science, be supported by the facts on the ground and information provided by state and federal environmental regulatory agencies. The Commission's enabling legislation, ECL Article 46-0111.3, mandates that "not less than every five years the Commission shall review the management plan, ... and propose amendments to the management plan as they are deemed to be necessary and appropriate." The 2002 Management Plan and FEIS adopted by the Commission, therefore, updates and supercedes all earlier management plans for the Preserve. The Commission is, therefore, concerned that the DEIS, FEIS and Findings Statement relies on out-of-date and obsolete reports and that are not germane to the Final EIS and Findings Statement to support its conclusions. Several of these reports are more than a decade old including:

- the 24 year-old, 1981 Management Plan for the Conservation of the Crossgates Karner blue butterfly Habitat;
- the 12 year-old, 1993 Management Plan and FEIS for the Albany Pine Bush Preserve;
- the 11 year-old, 1994 report by Environmental Design and Research, P.C. entitled "Report on the Ecological Significance of the Pine East Office Park Site";
- the 9 year-old, 1996 Albany Pine Bush Preserve Protection and Project Review Implementation Guidelines and FEIS; and
- the Hershberg and Hershberg analysis of Preserve acreage.

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 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, any 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

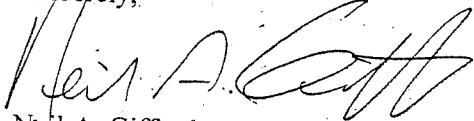
the applicant, and that the City as Lead Agency has not responded to the Service's request to visit the project site.

The Commission appreciates the City of Albany's demonstrated commitment to supporting the work of the Commission and in working with us to accurately identify, avoid, minimize and mitigate potentially adverse impacts of economic development on the globally rare ecology of the Albany Pine Bush.

These comments represent likely Commission reactions to the adoption of the Findings Statement for the proposed Zoning Change and Concept Approval of a 124 Unit Residence Inn based on a review of project by the Albany Pine Bush Preserve Commission Technical Committee and staff.

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. Additionally the Commission is particularly concerned that the US Fish and Wildlife Service has apparently not received a response from the City to its request to visit the site, or to its recommendation that the City require additional coordination between the applicant and interested and involved agencies prior to issuing necessary approvals, so that the Service can make determinations regarding the prohibited "Taking" of a federally endangered species. Thank you for considering the Commission's analysis and recommendations. If you have any questions of comments regarding this matter, please do not hesitate to contact me.

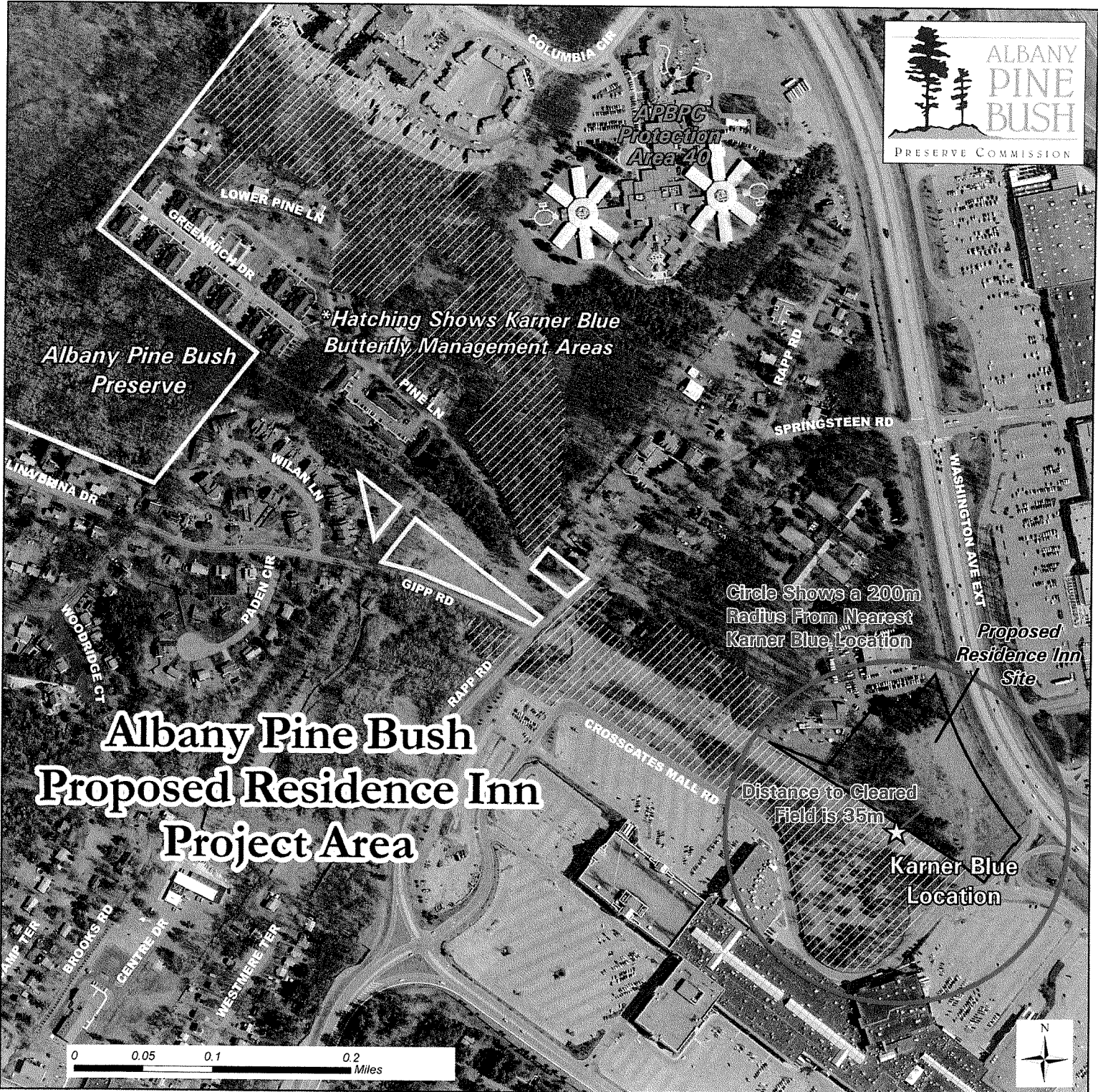
Sincerely,



Neil A. Gifford,
Conservation Director

Enclosures: December 15, APBPC Common Council Committee meeting comments.

Cc: Albany Pine Bush Preserve Commission Technical Committee
Mr. Steven Schassler, Esq., APBPC Chair, NYSDEC Reg. 4 Director
Mr. Christopher A. Hawver, APBPC Executive Director
Ms. Lori Harris, Commissioner, Dept of Development and Planning
Mr. Kenneth Runion, Supervisor, Town of Guilderland
Mr. David Stillwell, Field Supervisor, USFWS
Ms. Robyn Niver, Biologist, USFWS
Mr. Peter Nye, NYSDEC - Endangered Species Unit



**Hatching Shows Karner Blue Butterfly Management Areas*

Circle Shows a 200m Radius From Nearest Karner Blue Location

Proposed Residence Inn Site

Distance to Cleared Field is 35m

Karner Blue Location

Albany Pine Bush Proposed Residence Inn Project Area



Exhibit 3

PLANNING, ECONOMIC DEVELOPMENT AND LAND USE COMMITTEE
OF
CITY OF ALBANY COMMON COUNCIL
October 27, 2005 @ 5:00, City Hall

Albany Pine Bush Preserve Commission Comments
Presented by
Neil A. Gifford, Conservation Director

Commission Staff have reviewed the FEIS and can only suggest that the Committee recommend that the Full Common Council reject any resolution that would consider the FEIS as complete.

This primarily results from the FEIS not at all addressing the substantial comments presented to the City, as Lead Agency, during the Public Comment Period by the USFWS.

Specifically I am referring to the April 18, 2005 DEIS comment letter provided by the Field Supervisor of the NYS USFWS office in Cortland, NY to Richard Nicholson of the City of Albany Department of Development & Planning. The Commission's copy of this letter was received via regular mail on April 21, 2005, well before the April 29 close of the public comment period.

The comments provided in the Service's letter are sufficiently substantive, that the Commission can only recommend that the City would be ill advised to proceed further in considering this application, until such time as a more thorough coordination can be established with the USFWS, consistent with their April 18 letter.

April 18, USFWS letter stated:

- While the DEIS, did address some of their substantive comments provided in their August 2005 comment letter on the Scoping Checklist,

"... we have some remaining concerns and offer the following comments for your consideration."

- **Federally Listed Species:**
"...it appears that the analysis of potential impacts to the Kbb does not address potential impacts to the known butterfly population within the NYSDEC management Area adjacent to the project area."
- **ESA Take Prohibitions**
ESA prohibits take of federally listed species without proper authorization. Take is defined under the ESA, and includes in part, to "harass, harm, wound, or kill" a federally listed species. The definition of harm has been further defined to include significant habitat modification or degradation that results in death or injury to listed

species by significantly impairing behavioral patterns such as breeding, feeding or sheltering.”

FURTHER,

“To determine whether take of Karner blue butterflies is likely to occur, the **Service** first needs to determine whether Kbb are present at a given site. The ESA and its implementation guidelines DO NOT include a definition of occupied habitat and do not specify requirements to determine presence of individual species. However the KBB recovery Plan does provide information to assist Service biologists with such determinations for the Kbb.

“OUR CURRENT DEFINITION OF OCCUPIED HABITAT INCLUDES: ALL SUITABLE HABITAT WITH 200 METERS OF A LUPINE PATCH OCCUPIED BY KARNER BLUE BUTTERFLIES,

PLUS ADDITIONAL SUITABLE HABITAT DEEMED LIKEY TO BE OCCUPIED BASED ON THE DISPERSAL CAPABILITY OF THE KARNER BLUE BUTTERFLY POPULATION.”

“THE PROPOSED PROJECT AREA IS APPROXIMATELY 100 METERS FROM WILD BLUE LUPINE PATCHES THAT ARE KNOWN TO BE OCCUPIED BY THE Kbb. THEREFORE, THE PROPOSED PROJECT AREA MAY BE CONSIDERED OCCUPIED BY Kbb IF THERE IS SUITABLE HABITAT PRESENT; WE CONCLUDE THAT KARNER BLUE BUTTERFLIES ARE LIKELY TO USE THE PROPOSED PROJECT AREA.”

Note that NYSDEC drew the same conclusion in their May 19, 2005 DEIS comment letter.

April 18 FWS Letter goes on to say that they would like to visit the area to determine the extent of barriers to dispersal and that after such a visit they would make a determination as to whether the USFWS would consider the site occupied.

PLEASE NOTE THAT CLOSER INSPECTION BY THE COMMISSION REVEALED THAT ACTUAL DISTANCE FROM THE CLEARED PORTIONS OF THE PROJECT AREA TO OCCUPIED LUPINE PATCHES IS LESS THAT 40 METERS. (1/5 THE REQUIRED DISTANCE”) Moreover, the supplemental site analysis and plant list provided in FEIS further clarifies that the site is likely to be used by Kbb's.

The FEIS states that “Even if the site is counted within a certain arbitrary distance from the Butterfly Hill site, this should not be the sole indication or benchmark as to whether a particular location is an occupied habitat”. Indeed it is not, but rather one part of defining occupied habitat by FWS standards. As

previously stated (above), it is the dispersal dynamics of the species, the distance and the habitat of a particular site that is used to make such determinations according to the FWS.

The FWS letter went on to say

“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.”

IN OTHER WORDS, in accordance with the Endangered Species Act THE SERVICE NEEDS TO ISSUE A BIOLOGICAL OPINION REGARDING IMPACTS FROM THIS PROJECT ON THE KBB, as described in their August 2004 letter regarding FWS authorization of Taking under Section 7 of ESA.

APRIL 18 FWS LETTER: “WE REQUEST THAT THE CITY WITHHOLD ANY FINAL APPROVALS FOR THE PROPOSED PROJECT UNTIL OUR CONCERNS ARE RESOLVED REGARDING THE POTENTIAL FOR ADVERSE IMPACTS TO THE KARNER BLUE BUTTERFLY.”

The USFWS letter only substantiates the Commission’s and DEC’s view that project site is likely occupied by the Karner blue butterfly, and therefore would likely result in direct and indirect impacts to the species, and that a complete analysis of these impacts is needed in the EIS, and in direct consult with USFWS. Such a coordinated analysis is lacking.

Further, the USFWS letter of April 18 raises serious doubts about the conclusions established in the DEIS and now the FEIS.

Mainly the FEIS assertion that there will be no direct or indirect impacts on the Kbb and that no “Taking” will occur.

FEIS States: “DEIS provided background information on all of those substantive and prominent issues that were raised during scoping.” “An expert report provides details establishing that the project will have no significant adverse impact on the Kbb.”

1ST: The Commission’s understanding from the FWS, is that only the FWS, not the applicant or the City, or even the DEC, can determine if a Taking is likely to occur under the federal Endangered Species Act.

2nd: The supplemental plant list and site description provided in the FEIS only seem to further support the Commission’s opinion that the site does contain remnant pitch pine scrub oak barrens (contrary to FEIS a rare habitat) and is likely occupied Kbb habitat, and may therefore, have both direct and indirect impacts on both the butterfly sub-population occurring there, and the ability to

recover the species. These conclusions are highly consistent with the opinions provided by NYSDEC and the USFWS.

Further, the applicant states that the Commission asserted that the project area "...had little, if any ecological value." Not only did we not say any such thing, but based on the information available in the FEIS, reiterate our earlier statement that the project site "could benefit the creation of a viable Preserve."

Clearly the DEIS and FEIS also did not fully evaluate all of the available information regarding Kbb ecology. As one example the FEIS states that the remaining forested strip between the DEC management Area and the occupied lupine would serve as a sufficient barrier, preventing butterflies from using the project site. If the applicant's hired consultants had adequately consulted with the USFWS (as requested twice by the Service), or evaluated the abundant information cited in the Final Recovery Plan for the Species they would find up-to-date research that clearly demonstrates that this is not the case.

For example, In 2005, researchers from Michigan, Dunn and Shelagowski, found the following. Using mark-recapture methods, they document 65 cases of between patch dispersal of Karner blue butterflies among isolated sub-populations within a matrix of closed canopy oak and mature red pine plantation. Few corridors were located within the experimental system and most of the edges of patches were "hard" (forest). Fifty eight of 65 dispersal flights among subpopulations were greater than 200 m with mean dispersal of males being 440 m and female 518 m.

Clearly, based on the best available information, the forested strip referenced in the FEIS, being less than 40 meters wide, and with occupied lupine at its southern edge, is not likely to serve as a barrier to Karner blue butterflies, and significantly strengthens the case that the open field on the project site is indeed likely occupied Karner blue butterfly habitat.

[Reference provided:

Dunn, J.P., Ph.D. and B Shelagowski. 2005. Inter and intra - patch migration by the Karner blue butterfly and an evaluation of lupine habitat and butterfly populations within the Muskegon Recovery Unit (USFWS), Muskegon and Oceana Co's MI, 2004. 2004 Report - USFWS Federal Fish and Wildlife Permit -TE081995-0.]

This is only one example of the applicant's lack of including available information in the EIS and why a more thorough coordination between the Lead Agency and the USFWS is needed to fully and accurately evaluate potentially significant environmental impacts. Impacts that would be likely to result in the "Taking" of a federally and state endangered species.

When considered cumulatively, the comments provided by nationally recognized Kbb experts, including experts from the APBPC, TNC, DEC and the FWS appear to significantly contradict the applicant's hired consultant. Someone who may be a respected "Vegetation Ecologist" as described in his report, but who is not a Kbb expert, a lepidopterist, or even a wildlife biologist.

In conclusion, the Commission cannot consider the FEIS complete, as the report needs substantially more information and significant revision to adequately address the substantive comments received on the DEIS. Based on the Commission's extensive experience in monitoring and managing for the recovery of the Karner blue butterfly, we do not believe that either the DEIS and the FEIS adequately address the substantive comments provided, and further that the responses provided in FEIS are often in error, based on out-of-date scientific knowledge and/ or misrepresentative of the available information. For example, FEIS cited the 1988 Malcolm Pirnie report understandings of Kbb dispersal dynamics, when abundant and more current information is not only readily available, but also cited in the Final Recovery Plan for the Kbb, including extensive information in Appendix G of that Plan. Further Dr. Futyma concludes that there is a lack of scientific research on the biotic and physical factors that affect Karner blue butterflies, but does not take advantage of the extensive literature cited section of the Final Recovery Plan or the internet.

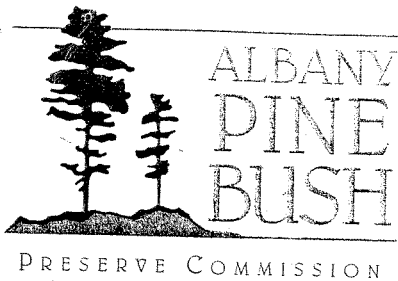
In particular, given the gravity of the FWS's concerns expressed in their April 18 letter, the Commission is concerned that the comments contained in the letter were excluded from consideration in the FEIS. APBPC therefore respectfully suggests that any contemplation of recommending that the full Council accept the FEIS as complete, is ill advised given the lack of complete information. And that it would likely be in the best interests of the City, as Lead Agency, to coordinate further with the FWS as requested in their April 18, 2005 letter and address their concerns more thoroughly.

Thank You.

Respectfully submitted:

October 27, 2005

Neil A. Gifford
Conservation Director, APBPC



COMMISSION MEMBERS

Steven G. Schassler
Regional Director
NYS Department of
Environmental
Conservation

Bernadette Castro
Commissioner
NYS Office of Parks,
Recreation and
Historic Preservation

Andy Beers
Deputy Director
The Nature Conservancy of
New York State

Jerry Jennings
Mayor
City of Albany

Mary E. Brizzell
Supervisor
Town of Colonie

Ken Runion
Supervisor
Town of Guilderland

Michael G. Breslin
County Executive
County of Albany

Harvey Jay Alexander, Ph.D.
Citizen Representative

Margaret M. Stewart, Ph.D.
Citizen Representative

Aaron Mair
Citizen Representative

Corporate Liaison
John Brust

EXECUTIVE DIRECTOR
Christopher A. Hawver

City of Albany Common Council
Planning, Economic Development and Land Use Committee
December 15, 2005

Findings Statement for the
Proposed Residence Inn @ 124-128R Washington Avenue Extension

Albany Pine Bush Preserve Commission Comments
Presented by: Neil A. Gifford, APBPC Conservation Director

Thank you for the opportunity to comment this evening regarding the Common Council's consideration of a resolution to adopt the Findings Statement associated with the construction of a 124 unit Residence Inn.

The Technical Committee of the Albany Pine Bush Preserve Commission and Commission staff have reviewed the Findings Statement provided by the Development and Planning Department staff.

The Commission, in its advisory role to the City as a municipal Commission member has provided comment regarding potentially significant adverse environmental impacts associated with the proposed project throughout the State Environmental Quality Review (SEQRA) process, including but not limited to comment on the Draft Scope, the Draft EIS, and the Final EIS.

The Commission's opinion of the analysis of potentially significant adverse environmental impacts has not changed, the environmental impact analysis and conclusions provide in the DEIS, the FEIS and now the Findings Statement appears inadequate, misrepresentative and in error based on:

1. comments provided to the City by the United States Department of the Interior Fish and Wildlife Service (the Service);
2. comments provided by the New York State Department of Environmental Conservation, (NYSDEC);
3. the Commission's 14 years of experience and expertise in Pine Barrens conservation and Karner blue butterfly recovery and management;
4. and comments provided by the public at large.

Specifically, the analysis and conclusions provided in Statement of Findings for this project regarding potentially significant adverse impacts to the State and Federally endangered Karner blue butterfly appear in error and raise concerns about the integrity of this project's environmental review within the SEQRA process in the City

of Albany. In so far as the analysis and conclusions summarized in the FEIS and Findings Statement, prepared by the Thaldson Development Corporation's environmental consultant,

1. contradict the professional opinions provided to the City by the Service, the NYSDEC and the Commission, and
2. provide the necessary foundation upon which to issue approvals for the permanent development of the project site,

the Commission is concerned that in adopting the Findings Statement as complete and accurate the Common Council may be facilitating violations of federal Endangered Species Law and New York State Environmental Conservation Law.

Additional consultation with the USFWS is clearly warranted to evaluate potentially significant adverse environmental impacts and has been specifically requested by the Service.

Throughout the SEQRA process for this project, the Commission has provided significant comment on two points that remain to be inadequately and or incorrectly addressed in the FEIS and Findings Statement.

1. The City should address the irreplaceable loss of remnant inland pitch pine scrub oak barrens and construction of a 1-acre gravel parking lot without the appropriate Site Plan review by the City of Albany Department of Development and Planning. This is of particular interest, given that the Commission was approached on December 1, 2005 and stop work orders were issued by the City's Building and Codes Enforcement staff for clearing work associated with habitat restoration efforts that were believed to be in violation of Article IV of Chapter 375 of the City Code.
2. On-site US Fish and Wildlife Service analysis regarding impacts to the Karner blue butterfly are needed to accurately evaluate potentially significant adverse environmental impacts prior to issuing approvals for this project. In letters to the City of Albany, both the Service and the NYSDEC have clearly stated that they consider the Karner blue butterfly to be currently using the project site. As outlined in the Service's April 2005 letter, development of a site without USFWS permits authorizing the Taking of a federally listed endangered species is prohibited.

The Findings Statement indicates that "the action to be approved and carried out...is one that minimizes or avoids adverse environmental effects." And further states that "the FEIS adequately and thoroughly examines and evaluates the relevant identified environmental and other impacts including secondary and cumulative impacts."

These statements are in conflict with written comments submitted by two regulatory agencies, i.e. the USFWS and NYSDEC. Specifically, within Findings Statement section II.2.B. regarding potential project impacts to the Site, subsections 2, 3, 4, 11, 13 and 16 appear factually in error based on the comments provided by the Service, NYSDEC, and the Commission. (*Commission responses provided in **bold** text below.*)

- Subsection 2 "...confirmed that no Karner Blue Butterflies or any other State of Federal threatened or endangered species are located on the Site or likely to use the Site. The Management Plan, Implementation Guidelines and 2002 Management Plan likewise conclude no Karner Blue Butterflies exist on the Site. **Not supported and contradictory to the information provided by state and federal wildlife agencies and the Commission.**
- Subsection 3 states that "No suitable habitat for the Karner blue butterfly exists on the Site." **Not supported and contradictory to the information provided by state and federal wildlife agencies and the Commission.**
- Subsection 4 states that "An existing natural forested barrier between the Project Site and the Butterfly Hill inhibits the ability for northward migration to the Site". **Not consistent and contradictory to peer reviewed scientific evidence previously provided to the City by the Commission.**
- Subsection 11 states that "The Site does not contain ecologically significant vegetation, habitat or wildlife." **Not supported by on site botanical information provided by the applicant, and information provided by state and federal wildlife agencies and the Commission. In particular, information provided in the FEIS 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, with 1 being the most significant, 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 consider the project site 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, pitch pine, scrub oak, native grasses and many flowering plants that are known to be utilized by foraging adult Karner blue butterflies.

- Subsection 13 states that, "... a portion of the Site is undeveloped and, consists of a closed canopy...but the species are invasive to the Pine Bush ecology - including white pine, maple, black oak, pitch pine, gray birch, black cherry, cottonwood and trembling aspen. **All of these species are native to inland Pine Barrens. The conclusion that these species are invasive to the pine bush raises concerns about the consultant's understanding of basic inland Pine Barrens ecology.**
- Subsection 16 states that: "Adverse impacts to the butterflies and habitat on the Butterfly Hill are not anticipated or have been mitigated by the

proposed mitigation measures". **Not supported with information provided by the applicant, state and federal wildlife agencies and the Commission. In particular no impacts to the butterfly were identified raising questions about how they can subsequently mitigated?**

Additionally, subsection II.2.D.8 e. through i. attempt to support a conclusion that site does not appear to constitute occupied Karner blue butterfly habitat. **These statements are not supported and contradictory to information provided by state and federal wildlife agencies and the Commission. In particular, information provided in the USFWS April 18 letter and in the 2004 Karner blue butterfly monitoring report provided by the Commission, appears to directly contradict these statements.**

Lastly, Subsection II.2.E.4 concludes that "no taking would occur as a result of the Project." **As the Commission has stated previously, only the US Fish and Wildlife Service can make such determinations.**

Regarding this last point, please refer to the attached map provided for project context.

Finally, proposed mitigation in the FEIS and Findings Statement for adverse environmental impacts appears 1) premature based on assertions by the appropriate state and federal regulatory agencies that the site is considered to be currently used by endangered species, 2) inadequate, based on FEIS and Findings Statement assertions that the site is not used by endangered species, and 3) inappropriate because only the US Fish and Wildlife Service can determine whether a proposed project will result in the Taking of endangered species.

The Commission reiterates its concern that in adopting the submitted Findings Statement as complete and accurate, the Common Council may be facilitating violations of federal Endangered Species Law and New York State Environmental Conservation Law. Considering all of this, the Commission can only suggest that as a municipal member of the Albany Pine Bush Preserve Commission, that the City of Albany Common Council suspend consideration of the resolution to adopt the Findings Statement or reject the Findings Statement completely, until such time as the United States Department of Interior Fish and Wildlife Service and the NY State Department of Environmental Conservation have concluded their evaluation of the site, as requested by the Service.

"In adopting SEQR, it was the legislature's intention that all agencies conduct their affairs with an awareness that they are stewards of the air, water, land, and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations." (6 NYCRR Part 617.1)

Thank you.

Respectfully Submitted,
Albany Pine Bush Preserve Commission



Exhibit 5

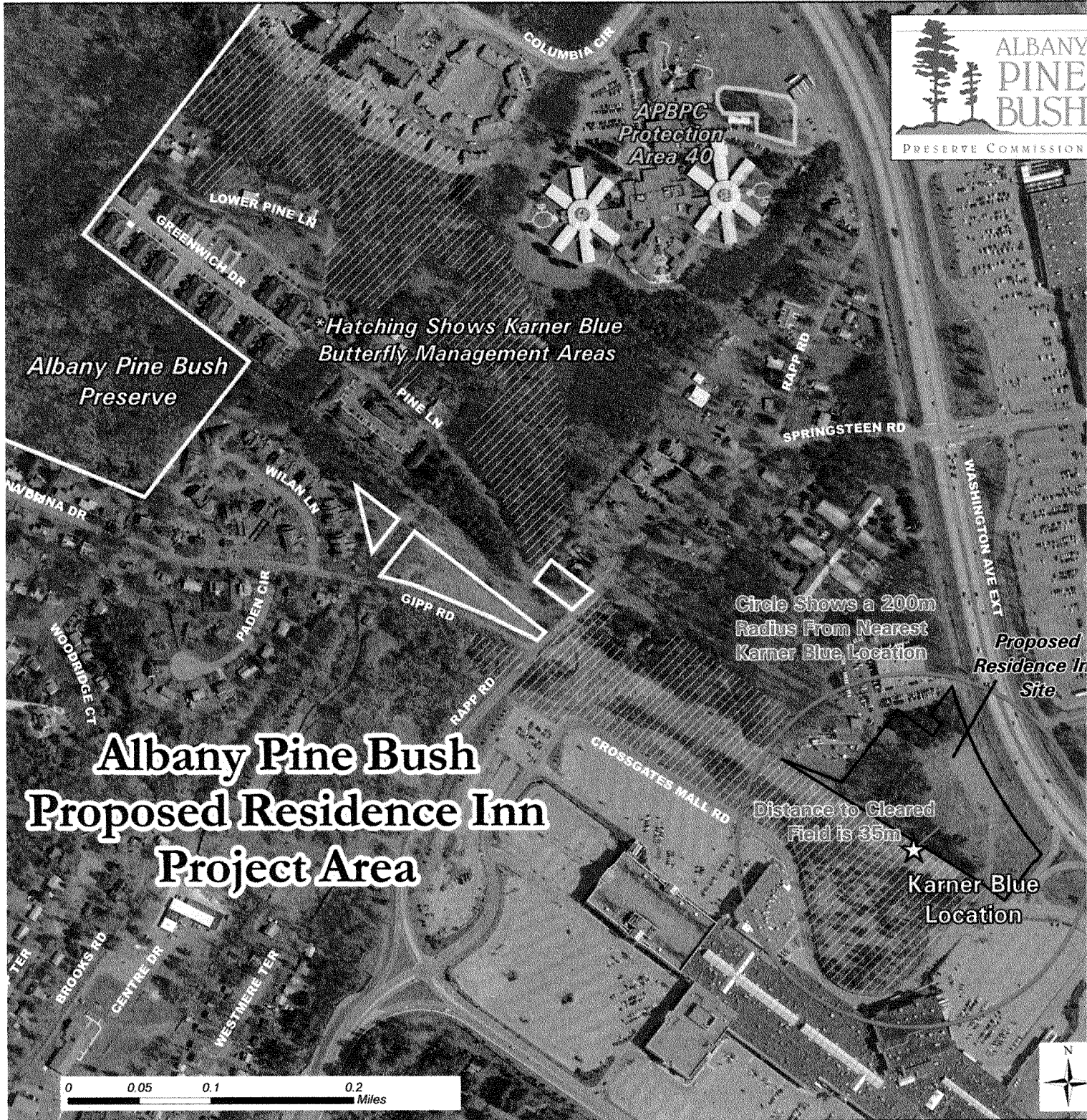
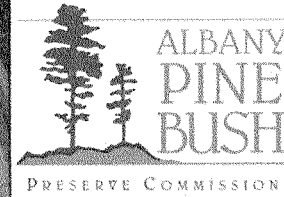
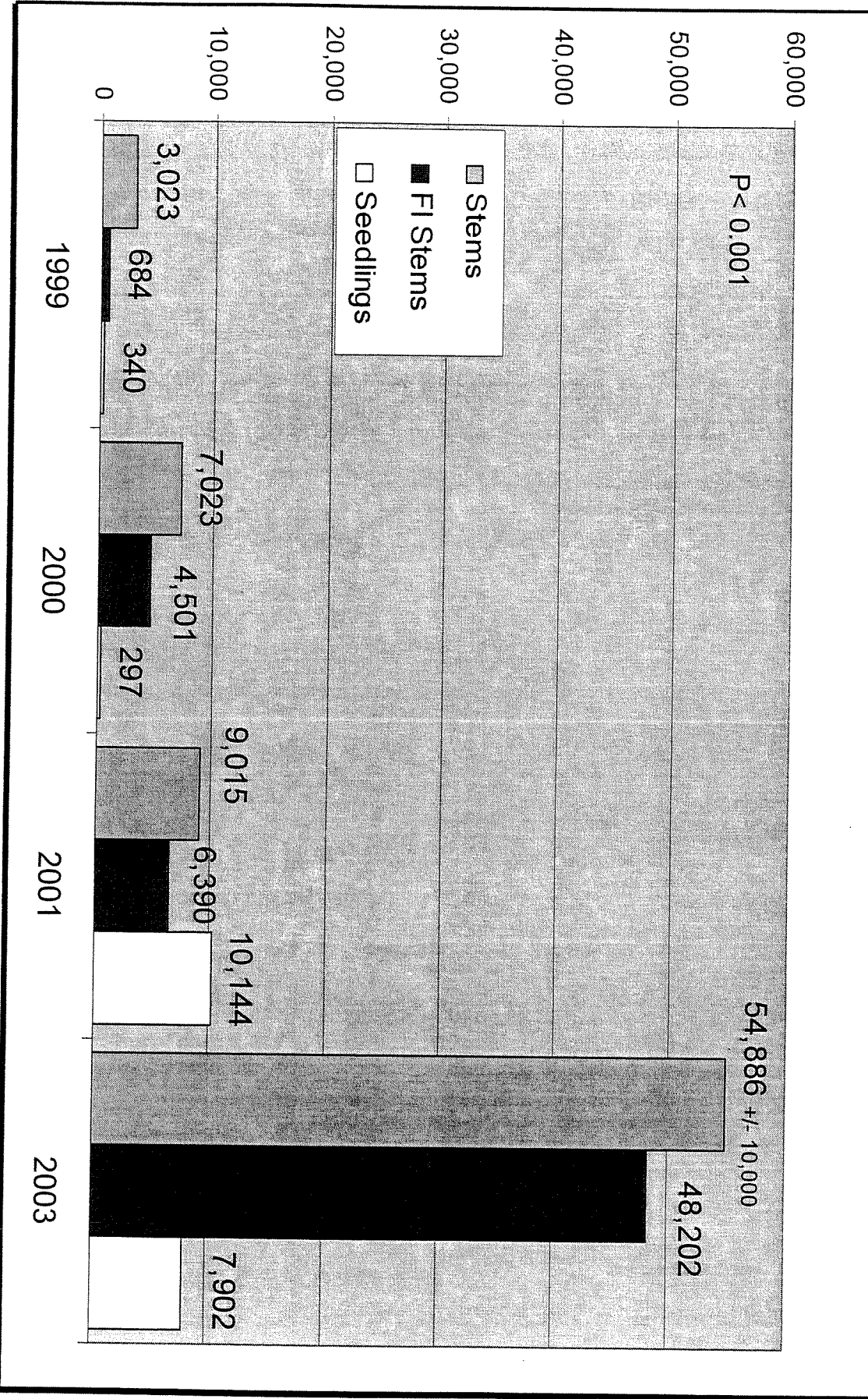
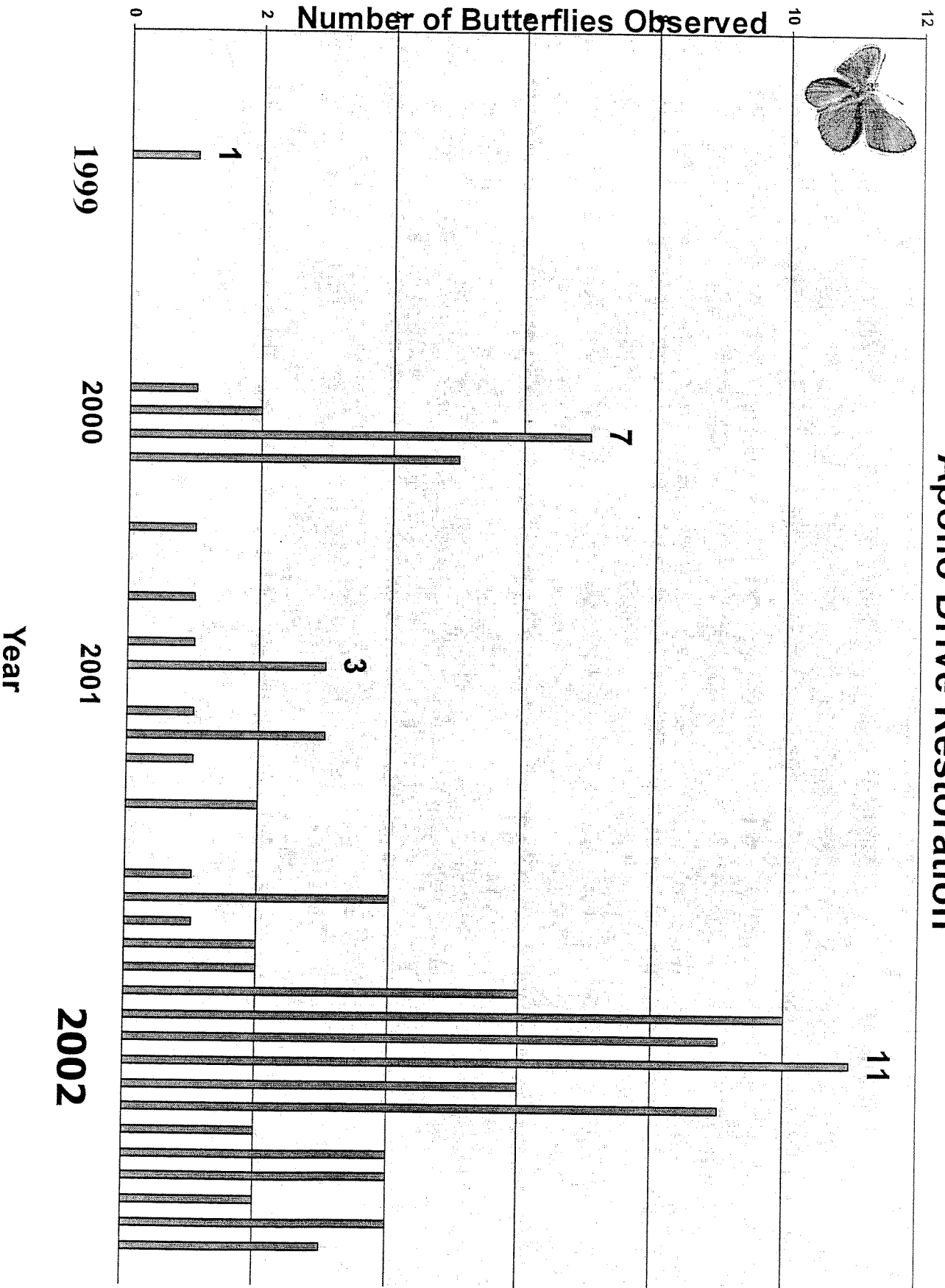
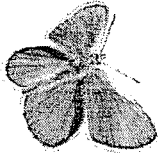


Exhibit 7

Lupine (*Lupinus perennis*) population at a Karner blue butterfly (*Lycbaeides melissa samuelis*) habitat restoration site in the Albany Pine Bush Preserve, NY



Apollo Drive Restoration

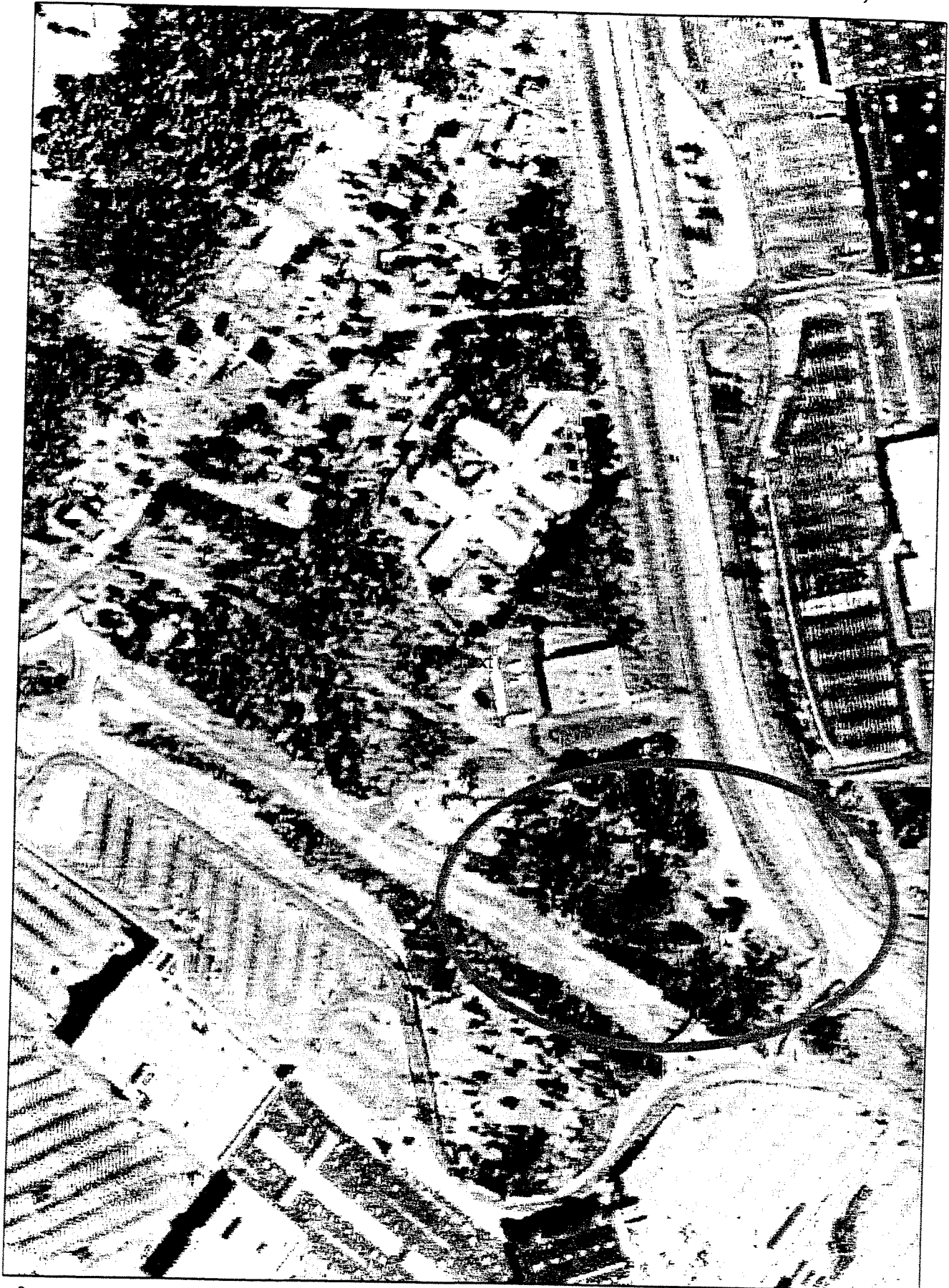


Rezone Area After Clearing (2003)



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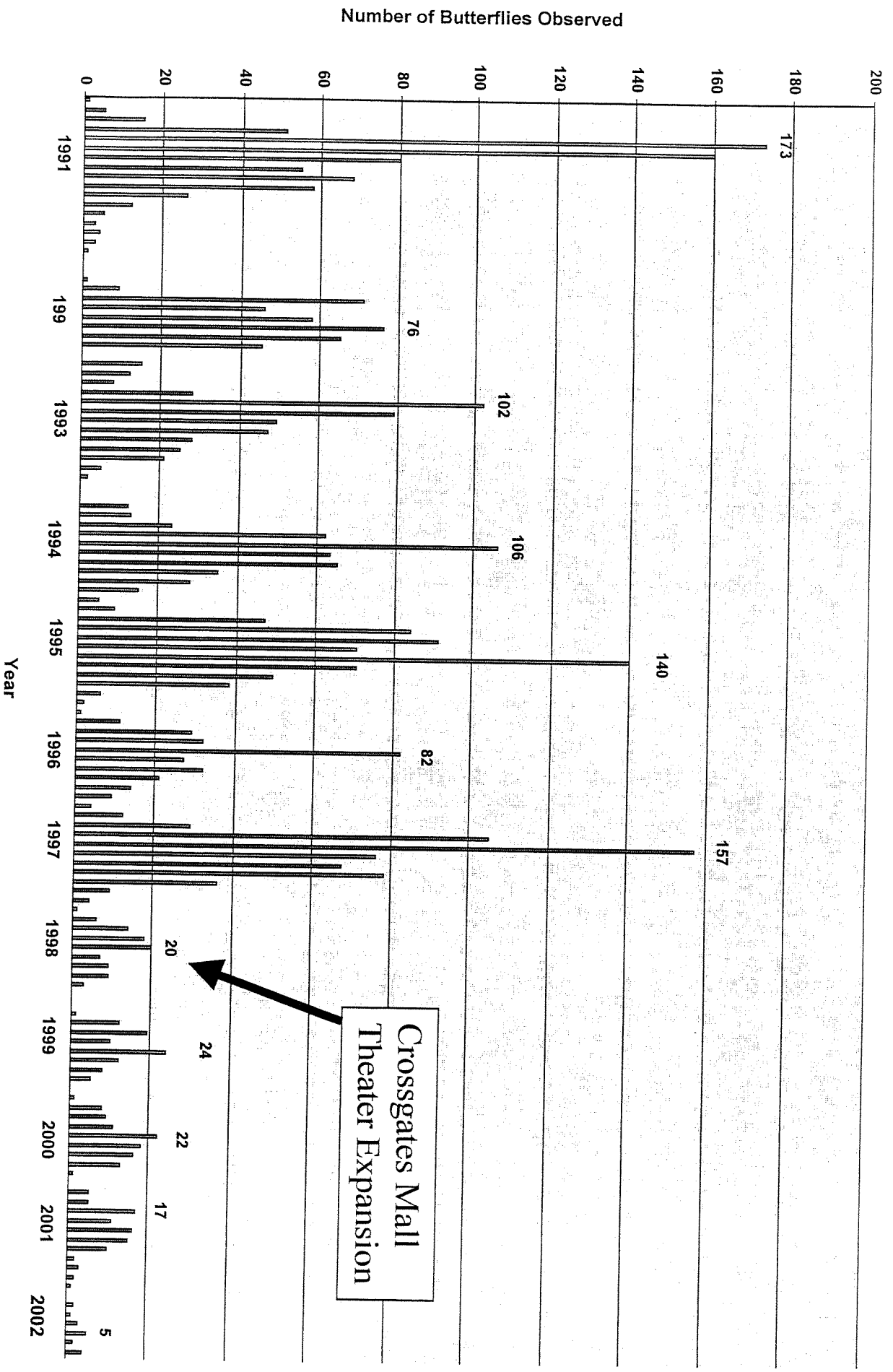
Rezone Area Before Clearing (ca 1990)



0 90 180 360 Meters

Crossgates Hill

Second Brood Census (1991-2002)



Crossgates Mall
Theater Expansion

Exhibit 8



United States Department of the Interior

FISH AND WILDLIFE SERVICE

3817 Luker Road
Cortland, NY 13045



April 18, 2005

APR 21 2005

APR 21 2005

Mr. Richard Nicholson
Historic Preservation Planner
City of Albany Department of Development and Planning
21 Lodge Street
Albany, NY 12207

Dear Mr. Nicholson:

This letter is in regards to the Tharaldson Development Company's request for zoning change at the site of a proposed Residence Inn Hotel at 124-128R Washington Avenue Extension in the City of Albany, Albany County, New York. The following comments are provided as technical assistance pursuant to the Endangered Species Act of 1973 (ESA) (87 Stat. 884, as amended; 16 U.S.C. 1531 et seq.). This does not preclude additional U.S. Fish and Wildlife Service (Service) comments under other legislation.

Project History

The Service received the August 16, 2004, Draft Scoping Checklist for the Draft Environmental Impact Statement for the Application of Tharaldson Development Company for Rezoning Approval (Draft EIS) on August 20, 2004. We provided comments on the Draft Scoping Checklist in our August 30, 2004, letter to you. We then received your March 28, 2005, letter which included the Notice of Completion of Draft EIS and Notice of SEQR and Rezoning Public Hearing, the October 4, 2004, Final Scoping Checklist, and the March 21, 2005, Draft EIS for the proposed project. We appreciate the City of Albany's coordination with the Service on this proposed project. It appears that some of our recommendations were included in the Final Scoping Checklist and Draft EIS. However, we have some remaining concerns and offer the following comments for your consideration.

Federally-listed Species

As stated in our August 2004 letter, the only known Federally-listed species to occur in the vicinity of the proposed project area is the Federally- and State-listed endangered Karner blue butterfly (*Lycaeides melissa samuelis*). We have reviewed the Draft EIS and understand that the applicant has concluded that adverse impacts to the Karner blue butterfly from the proposed project are unlikely. The applicant has further concluded that the proposed project may benefit the species by providing an additional 0.25-acre easement area for management along the Niagara Mohawk powerline right-of-way which is part of an existing New York State Department of Environmental Conservation (NYSDEC) Karner blue butterfly management area.



It appears that the analysis of potential impacts to the Karner blue butterfly focuses on the proposed project location and does not address potential impacts to the known Karner blue butterfly population within the NYSDEC management areas adjacent to the proposed project area. Based on his December 8, 2004, letter to Mr. Daniel R. Hershberg, we understand that Dr. Richard Futyma of the LA Group, visited the proposed project area five times in 2004 with an average observation period of approximately 2.1 hours/visit (total of approximately 10.5 hours of observation at the site). We further understand that Dr. Futyma did not observe any wild blue lupine (*Lupinus perennis*) or Karner blue butterflies within the proposed project area during those visits. Dr. Futyma also visited the proposed project area in May of 2000 (timing and extent of surveys are unknown) and did not observe any wild blue lupine. While wild blue lupine is a required habitat component for breeding habitat of the Karner blue butterfly, the proposed project area may provide nectar resources for nearby Karner blue butterflies. Dr. Futyma's December 2004 letter states that, "...much of the project site is open and was covered with flowering herbaceous plants."

ESA Take Prohibitions

As mentioned in our August 2004 letter the ESA (Section 9) prohibits "take" of Federally-listed animals without appropriate authorization. Take is defined under the ESA, and includes in part, to "harass, harm, wound, or kill" a Federally-listed species. The definition of harm has been further defined to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering. Take not authorized in a management agreement with the NYSDEC in compliance with their agency's ESA Section 10 Federal recovery permit or Section 6 Co-operative Agreement, would not be allowed under the ESA without the appropriate additional permits from the Service. The State of New York also has an Endangered Species Act which similarly prohibits the taking of a State-listed species.

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 ESA and its implementing regulations do not include a definition for "occupied habitat" and do not specify requirements to determine presence of individual species. The variety of species listed under the ESA precludes such broad definitions. However, the Karner Blue Butterfly Recovery Plan (Service 2003) does provide information to assist Service biologists with such determinations for the Karner blue butterfly.

Our current definition of "occupied" habitat includes:

- all suitable habitat¹ within 200m of a lupine patch occupied by Karner blue butterflies,
- plus additional suitable habitat² deemed likely to be occupied based on the dispersal capability of the Karner blue butterfly population.

This definition may be revised as additional information regarding the use of habitats by Karner blue butterflies becomes available.

¹ Suitable habitat includes lupine patches as well as open areas supporting adult and larval resources accessible by the Karner blue butterfly.

² Factors to consider when determining the extent of occupied habitat include the source population size of Karner blue butterflies, the presence of dispersal corridors or barriers, and habitat quality of the surrounding landscape. The extent of occupied habitat will be made on a case by case basis.

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 approvals for the proposed project until our concerns are resolved regarding the potential for adverse impacts to the Karner blue butterfly.

Except for the Karner blue butterfly, and occasional transient individuals, no other Federally-listed or proposed endangered or threatened species under our jurisdiction are known to exist within the vicinity of the proposed project area. In addition, no habitat in the project area is currently designated or proposed "critical habitat" in accordance with provisions of the ESA. Should project plans change, or if additional information on listed or proposed species or critical habitat becomes available, this determination may be reconsidered. The most recent compilation of Federally-listed and proposed endangered and threatened species in New York* is available for your information. If the proposed project is not completed within one year from the date of this letter, we recommend that the project proponent us to ensure that the listed species presence/absence information for the proposed project is current.

Relationship of the Proposed Project to Existing Permits

In our August 2004 letter, we recommended that the applicant should explain the relationship of this project to the existing NYSDEC Permit 4-0130-0007/00002. In addition, the NYSDEC submitted a letter to Mr. Daniel Hershberg of Hershberg & Hershberg on January 14, 2004, regarding the potential application of two Special Conditions in that permit to the proposed project. We request that this issue be resolved prior to any approvals for zoning changes.

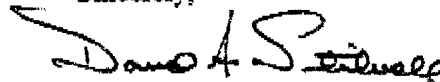
Other Resources of Interest

Part V (p. 5) of the Final Scoping Checklist states that, "the existing environmental setting of the Project shall include the following... Terrestrial and Aquatic Ecology. This section will include a description of the existing vegetation, wildlife, water resources and rare, threatened and endangered species present at the Site...." 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, besides the Karner blue butterfly, may occur in the vicinity of the proposed project. The Draft EIS does not refer to any correspondence with the 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. In addition, the Draft EIS does not appear to

fully evaluate the terrestrial and aquatic ecology of the proposed project area. Section II.F.4. of the Draft EIS includes information on the following subjects: a) Pine Bush and Evaluation of the Site (pp. 20-38); b) Pine Bush Preserve (pp. 38-51); c) Potential for increase in exposure to tick-borne diseases (p. 52); and d) Potential for increase in exposure to mosquito-borne disease (p. 52). The Pine Bush and Evaluation of the Site section primarily provides background information on previous documents related to the Pine Bush, rather than an assessment of what has been observed at the proposed project site. An ecological assessment of the site was conducted by Dr. Futyma, however, it appears that this assessment was focused on the potential presence of habitat for the Karner blue butterfly. While Dr. Futyma discusses his lack of observing Karner blue butterflies or wild blue lupine within the proposed project area, there is no description of what was found at the proposed project site (e.g., vegetation, wildlife, ecological communities) in Dr. Futyma's December 8, 2004, letter to Mr. Daniel R. Hershberg. In addition, his December 2004 letter states that, "I confined my efforts to the open, non-forested part of the site, where the vegetation is dominated by herbaceous plants." We recommend that a full ecological evaluation of the proposed project area take place. If this has already been conducted, the information should be made available to the public for review prior to any approvals regarding the proposed project.

In summary, we continue to have concerns about potential impacts to the Karner blue butterfly and there appear to be other outstanding issues that need to be addressed by the applicant. Therefore, we recommend that the City of Albany require additional coordination among the applicant, the NYSDEC, any appropriate consulting firms, involved Federal agencies (if any), and the Service regarding the proposed project prior to issuance of any City approvals. Thank you for your time. If you require additional information please contact Robyn Niver at (607) 753-9334.

Sincerely,



David A. Stilwell
Field Supervisor

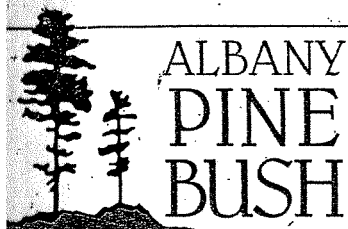
*Additional information referred to above may be found on our website at:
<http://nyfo.fws.gov/es/esdesc.htm>

Literature Cited:

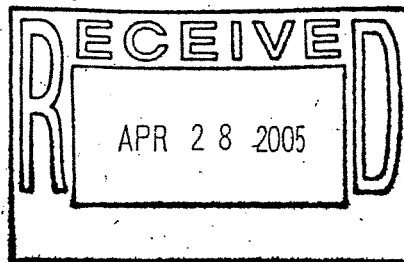
U.S. Fish and Wildlife Service. 2003. Final Recovery Plan for the Karner Blue Butterfly (*Lycaeides melissa samuelis*). U.S. Fish and Wildlife Service, Fort Snelling, Minnesota. 273 pp.

cc: APBPC, Latham, NY (Attn: N. Gifford)
NYSDEC, Albany, NY (Endangered Species Unit; Attn: P. Nye/K. O'Brien)
NYSDEC, Schenectady, NY (Attn: N. Heaslip)

Exhibit 9



RESERVE COMMISSION



COMMISSION MEMBERS

Steven G. Schassler
Regional Director
State Department of
Environmental
Conservation

Madette Castro
Commissioner
State Office of Parks,
Recreation and
Historic Preservation

Andy Beers
Deputy Director
State Nature Conservancy of
New York State

Barry Jennings
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Town of Colonie

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County Executive
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Gregory Jay Alexander, Ph.D.
Election Representative

Margaret M. Stewart, Ph.D.
Election Representative

John Mair
Election Representative

Corporate Liaison
Town of Brust

EXECUTIVE DIRECTOR
Christopher A. Hawver

April 26, 2005

Mr. Richard Nicholson
Historic Preservation Planner
City of Albany, Department of Development and Planning
21 Lodge Street
Albany, NY 12207

RE: 124-128R Washington Avenue Extension Draft Environmental Impact
Statement
Proposed 124-unit Residence Inn

Dear Mr. Nicholson:

Thank you for providing the Albany Pine Bush Preserve Commission with the opportunity to comment on the Draft Environmental Impact Statement (DEIS) for the above referenced project. The Commission appreciates the long-standing cooperative support of the City of Albany in balancing economic development with the conservation of the globally-rare ecology of the Albany Pine Bush. In particular the Common Council's efforts at the Avila and Daughter's of Sarah sites as well as the City's purchase of several parcels to mitigate the P-4 landfill expansion have enhanced Preserve continuity.

Located within New York State's capital city, 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*). The New York state legislature created the Albany Pine Bush Preserve and the Albany Pine Bush Preserve Commission to ensure the creation and management of a viable pitch pine scrub oak barrens. However, only through the proactive actions of Commission members can we reach this goal.

Commission staff and the Commission's Technical Committee have reviewed the DEIS and provide the following comments:

I. Property ownership and City of Albany and NYSDEC Permit Violations

The Commission's earlier comments recommended that prior to considering this proposal the City address the apparent illegal construction of a gravel parking lot at the project's location, including the likely violation of New York State Department of Environmental Conservation Permits as indicated in the Department's January 14, 2004 letter to the project consultant (*attached*). In response to the Commission's comments the DEIS section 2.b.1. states that Thaldson Development Company is the "Contract Vendee" for these properties, which were "cleared by prior owner"...and that a search by Building and Codes of the City of Albany revealed that there have been no notices of violations issued to the prior property owner in connection with the clearing and construction. Since the applicant is willing to evaluate prior violations, it would seem appropriate that the DEIS also evaluate if any application for necessary permits were filed or if necessary permits were issued by the City.

The DEIS clearly indicates that the property has been sold. The NYSDEC January 14, 2004 letter indicates that transferring the property to another entity without notifying the NYSDEC would be a violation of the agency's permits. Inquiries reveal that the NYSDEC has no record of any transfer of these properties. However, if the property was not transferred or transferred to a related entity, the clearing, construction and use of the parking lot also likely constitutes several violations. In addition to complete evaluation by the Department of potential NYSDEC permit violations, the Commission requests that the City evaluate if permits were requested and/or issued for the construction of the parking lot.

II. Appropriate environmental baseline and accurate description of the site in determining impacts.

The Commission previously submitted aerial photographs to the City of Albany Zoning Committee of this site before and after the illegal clearing and construction of the parking lot. These photographs clearly indicate that the site was mostly forested with some open areas and likely capable of supporting habitat for a variety of rare and common plant and animal species including the Karner blue butterfly. In addition, while the DEIS describes the site as a currently vacant property with a portion of the site reportedly cleared by the prior owner, it fails to accurately describe that a portion of the site remains forested and will need to be cleared (based on plats provided in DEIS). The Commission previously commented that the DEIS needs to evaluate potential impacts on all rare species known to the area, including the New York State Threatened Frosted elfin butterfly. The DEIS failed to identify plant and animal species found throughout the site, or that the site contains a portion of a remnant sand dune. The DEIS also fails to note the impacts associated with the additional clearing that will be necessary to complete the project as proposed.

The DEIS should evaluate the potential impacts of the original clearing and parking lot construction, specifically the impact of removing a significant buffer between the occupied Karner blue butterfly habitat and Washington Avenue Extension.

III. Inconclusive and inaccurate evaluation of direct, indirect and cumulative impacts to the ecology, viability and recovery of the Karner blue butterfly.

Several Commission comments previously submitted to the City for inclusion in the DEIS-outlined a number of specific potential impacts to the Karner blue butterfly sub-population, commonly referred to as the Crossgates sub-population, that needed to be evaluated in the DEIS. The DEIS 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.

Specifically, the Commission's November 10, 2003 letter to Zoning Committee Chairman Dan Herring outlined a number of these specific issues, including ecological context that was completely absent from the DEIS's evaluation of potential impacts to the Karner blue butterfly that are pertinent to understanding if this project will have significantly negative environmental impacts. These issues include:

- the recovery of a viable Karner blue butterfly meta-population is essential to the state and federal recovery of the species;
- as described in the federal Final Recovery Plan for the Karner blue butterfly (U.S. Fish & Wildlife Service, 2003), the New York State Glacial Lake Albany Recovery Unit (which includes the Albany Pine Bush Recovery Unit) is one of only six in the country to still have naturally occurring Karner blue butterfly populations, with New York the only state east of the Great Lakes;
- the Crossgates sub-population is one of only three sub-populations remaining in the New York State Albany Pine Bush Recovery Unit;
- the Crossgates sub-population is the only Karner blue butterfly sub-population south of the New York State Thruway; and
- based on the Final Recovery Plan for the species, none of these sub-populations can currently be considered viable.

While the Commission has made considerable progress in understanding how to create and restore Karner blue butterfly habitat on nearly 30 acres, hundreds of acres of viable habitat are needed to achieve an overall viable status for the species in the Pine Bush and the state. According to the Final Recovery Plan for the species, maintaining and expanding remaining sub-populations is the first step in recovering the species.

The Commission has provided the applicant with abundant information to assist in evaluating potential impacts from this project on the Karner blue butterfly. In addition to the November 2003 letter, the Commission provided letters of comment to the City regarding issues surrounding this site in September 2004, and August 1999. In addition to the information provided in these letters, through the Freedom of Information Law (FOIL), the applicant requested, and was provided with a copy of the 36 page Karner blue butterfly (*Lycaeides Melissa samuelis*) population monitoring results – 2004: Albany Pine Bush Recovery Unit, Albany, NY (APBPC and NYSDEC 2004). The

2004 report evaluates and summarizes 13 years of Karner blue butterfly information specific to the Albany Pine Bush Recovery Unit. The Commission has also provided specific additional informational resources to assist the applicant in identifying and evaluating potential negative impacts of this project on the viability of this sub-population and the ability of the Commission and the NYSDEC to recover the species in the Albany Pine Bush. While some of these earlier correspondences were cited, the DEIS's utilization of this information is inadequate to both identify potential impacts and to determine if such potential impacts will be significant. Given the information provided and the significance of the site to State and Federal Recovery of the species, the Commission would expect an exhaustive review of Karner blue butterfly conservation and recovery as was provided in the DEIS to conclude that the project will not have a significant negative impact on the Commission's ability to create a viable Albany Pine Bush Preserve.

An August 30, 2004 letter to the City of Albany Department of Development and Planning from the United States Fish and Wildlife Service identified that the DEIS "will need to fully evaluate all effects of their proposed action. This should include an analysis of the relationship of the proposed action to other nearby Karner blue butterfly sites and an evaluation of potential effects to Karner blue butterflies at those sites from the proposed action." It appears that the USFWS is asking the applicant to evaluate how this project might effect the ability to recover the species. It is the Commission's current understanding that any action that would put the species at further risk of extinction in the Pine Bush would ultimately result in risking range wide species extinction, since throughout the species range none of the butterfly populations currently meet the recovery criteria described in the Final Recovery Plan for the species.

The DEIS needs to identify and evaluate the potential impacts of this project on the components of viability discussed in Final Recovery Plan for the Karner blue butterfly and on the Commission's recovery strategy described in the 2002 Management Plan and Final Environmental Impact Statement for the Albany Pine Bush Preserve. Specifically, the DEIS should refer to the Final Recovery Plan discussion of Karner blue butterfly Life History and Ecology, Dispersal, Habitat, Threats to Survival, Conservation Measures, Recovery Strategy and step-down outline, including Appendices C, E, G and H. Years of expert opinion and scientific literature are referenced within this plan.

Further, related to determining the relative significance of potential impacts on the Karner blue butterfly the DEIS was found to provide:

A. Inconclusive determination of Kbb presence on site:

The typical Karner blue butterfly will move up to 200 meters from its natal lupine patch to forage, seek shelter and search for mates (USFWS 2003). This site is well within 100 meters of occupied lupine patches and as described by the applicant's botanical consultant as containing grasses and wildflowers consistent with Karner blue butterfly foraging habitat. Based on eight years of Commission participation on the federal Karner blue butterfly recovery team and New York State Karner blue butterfly working group, the Commission understands that the project site is likely

well within the currently accepted standard used to identify the boundaries of occupied Karner blue butterfly habitat.

Based on an evaluation of the DEIS discussion of Karner blue butterfly presence and a close evaluation of the consultant's assessment, DEIS Appendix II, it appears that the consultant did not completely or appropriately evaluate the project site's contribution and significance as Karner blue butterfly habitat.

For example, the consultant indicated in his letter that no Karner blue butterflies were observed. He further stated that in his opinion that "....it is also reasonable to expect that I would have seen at least a few on the site if it were of any significance as a nectar source for the adult butterflies". Karner blue butterfly research in New York and throughout the range of the species indicates that it is indeed very reasonable to expect that he would not have seen butterflies at this site, given the extremely small source sub-population, and that not finding butterflies within the span of a couple of visits can be rather common. In fact, multiple sites in Saratoga and Albany Counties have had butterflies in one year, not in others, and subsequently found again in later years. This is why the New York State standard is that a site is considered occupied for 5 years, once butterflies have been observed. This provides sufficient opportunity to definitively determine if a site is or is not occupied. This practice is employed within occupied habitat throughout the butterfly's range in New York, including sites in the Albany Pine Bush.

The consultant also states that the absence of lupine on the site indicates that it does not serve as a Karner blue butterfly breeding habitat, and that the absence of suitable breeding habitat serves as an appropriate indicator that Karner blue butterflies are not likely to be found at a given location. The consultant fails to mention that the site is less than 100 meters from known occupied Karner blue butterfly and Frosted Elfin habitat. In fact, part of the site's illegal clearing extends into the NYSDEC Karner blue butterfly management area. Despite being provided with, and having cited within the DEIS, both the 2004 Albany Pine Bush Karner blue butterfly monitoring report and the Final Recovery Plan for the Karner blue butterfly, the information summarized in the DEIS does not represent a full understanding of Karner blue butterfly habitat nor a knowledge of Karner blue butterfly viability and recovery issues.

B. Incomplete evaluation of potential impacts to Kbb Viability and Recovery

i) Sub-population size

"The probability that a subpopulation will be extirpated is related to the size of the subpopulation (larger subpopulations are less likely to be extirpated than smaller subpopulations), and the temporal variation in subpopulation size (more variable subpopulations are more likely to be extirpated) (USFWS 2003: Appendix G).

Data provided to the applicant in the Karner blue butterfly (*Lycaeides Melissa samuelis*) population monitoring results – 2004: Albany Pine Bush Recovery Unit.

Albany, NY (APBPC and NYSDEC 2004) clearly demonstrate that the Crossgates sub-population is extremely small and highly variable.

Sub-population size is critical not only to a viable sub-population, but also to the ability to recover the species here. In particular, the removal of significant forested areas between the Crossgates sub-population and Washington Avenue extension, effectively eliminates a buffer and potential barrier that previously would have served to limit the dispersal of butterflies to inhospitable habitat along Washington Avenue Extension. Previous clearing of the site in the late 1990's, coupled with atypical weather and adjacent development may have expedited the dramatic decline of Karner blue butterfly observed at the Crossgates sub-population, and given its complete isolation from all other occupied sites may have contributed to the extremely sluggish recovery of this sub-population compared to the recovery of many other sites throughout the Glacial Lake Albany Recovery Unit. Additional clearing and construction of the project site could further jeopardize the viability of this sub-population and, as one of only three remaining Karner blue butterfly sub-populations in the Albany Pine Bush Recovery Unit, jeopardize our ability to recover the species here by not only limiting the number of individuals within the sub-population, but facilitating their dispersal to inhospitable area, effectively reducing the number of butterflies dispersing to protected lands west of the site.

ii) Potential impacts on dispersal and sub-population connectivity

"In many ecosystems that support the Karner blue, most dispersing females may never locate suitable habitat with host plants upon which to lay eggs. Many simply leave their natal habitat and move into hostile adjacent habitats, never locating even nearby sites of suitable habitat. USFWS 2003: Appendix G.)"

The Crossgates sub-population is currently surrounded by the illegal parking lot to the Northeast, Crossgates Mall parking lots to the Southeast, and Crossgates Mall and additional parking lots to the Southwest. While the DEIS attempted to describe that a sufficient land-base to provide the butterfly with a dispersal corridor exists within the NYSDEC management area, it failed to fully evaluate known dispersal dynamics for the species described in the Final Recovery Plan for the Karner Blue butterfly. Most importantly, unlike vertebrate non-flying wildlife, the butterflies appear to disperse randomly in all directions. This presents a particular challenge to the recovery of the Karner blue in the Pine Bush because it means a significantly smaller number of the relatively few butterflies that disperse beyond 200 meters from their natal lupine patch are likely to reach protected lands to the West. Logic dictates that the sub-population size for this site, therefore, needs to be several times larger than a comparable sub-population located within contiguous habitat, to ensure that enough butterflies actually reach protected lands of the Albany Pine Bush Preserve.

The 2002 Management Plan and Final Environmental Impact Statement for the Albany Pine Bush Preserve describes that a given sub-population needs to be connected to two other sub-populations to ensure the ability of butterflies to re-

colonize a given sub-population following natural or unnatural events, such as a single wildfire, that could eliminate a whole sub-population. This is particularly problematic at this site as its population is small and isolated from all other Karner blue butterfly sub-populations. Based on the recovery of other butterfly sub-populations throughout New York State, this isolation may likely be contributing to the Crossgates sub-population's slow and sluggish recovery following the abrupt decline observed in 1998.

IV. "Take": Only the NYSDEC-Endangered Species Unit and the USFWS can determine if the project is likely to result in the "taking" of the threatened and endangered species per state and federal endangered species laws, either directly through harm to an individual, or indirectly through actions that would jeopardize the survival of the species. The Commission understands that because none of the range-wide Karner blue butterfly metapopulations have been documented to be viable, actions that would jeopardize the survival of any individual site may be considered to effectively jeopardize the survival of the species as whole. However, only the NYSDEC-Endangered Species Unit and the USFWS can make this determination within their respective jurisdictions. The NYSDEC should also make a "taking" determination on the State-Threatened Frosted Elfin butterfly.

V. Mitigation.

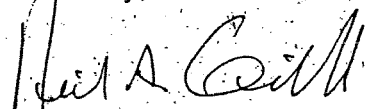
Due to the number of outstanding issues described above, a full and accurate assessment of impacts is needed to facilitate the identification and discussion of appropriate mitigation. However, any discussion of monetary mitigation should be based on an assessment of the fair market value of comparable properties and as has been used previously, represent a two-to-one acreage replacement.

In summary, the Commission review of the Draft Environmental Impact Statement indicates that the DEIS is not complete. The Commission has concerns how this project may impact the viability of the Crossgates Karner blue butterfly sub-population and our ability to recover the species here consistent with state and federal guidelines. This is particularly important given the current extinction risk faced by the species in New York and the Northeast. The information presented within the DEIS pertaining to potentially significant adverse environmental impacts on the viability and recovery of the Karner blue butterfly appears insufficient to conclude that no such impacts exist. The Commission therefore recommends that the City not take any action on the current proposal until a thorough evaluation of these issues is complete in concurrence with the US Fish and Wildlife Service and the NYS Department of Environmental Conservation - Endangered Species Unit. In light of the probability that outstanding endangered species issues exist and that only the USFWS can address these issues, it also appears requisite that the City consult with the USFWS to take a hard look at these issues prior to a review of a Final Environmental Impact Statement and prior to consideration of approvals for the rezoning and construction of the project.

The Commission in partnership with the State of New York and the City of Albany has worked hard to balance economic development with Pine Bush conservation. This has included protecting a number of parcels to improve the continuity of the Preserve. Working with private, state and federal partners the Commission has also significantly advanced state and federal understanding of Karner blue butterfly viability and recovery. The Commission suggests that it is appropriate, therefore, to take a very hard look at the potentially significant adverse environmental impacts of this project so that actions are not taken that could jeopardize these cooperative conservation successes, jeopardizing the viability of the Crossgates sub-population and ultimately our ability to recover the species in the Albany Pine Bush and in New York State.

In closing, I believe that the Commission would not support the requested zoning change and development concept as proposed without a more complete evaluation of the project's potential short- and long-term, direct and indirect cumulative impacts on rare and listed plant and animal species, including the Karner blue butterfly and Frosted elfin butterfly, through either a re-draft of the DEIS or through the preparation of a Supplemental Environmental Impact Statement. Thank you for your consideration of these comments and suggestions.

Sincerely,

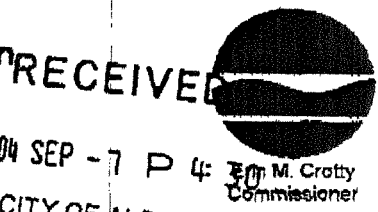


Neil A. Gifford
Conservation Director

Encl: August 5, 1999 APBPC letter
November 10, 2003 APBPC letter
September 7, 2004 APBPC letter
January 14, 2004 NYSDEC letter

Cc: Albany Pine Bush Preserve Commission Technical Committee
Mr. Steven Schassler, Esq., APBPC Chair, NYSDEC Reg. 4 Director
Mr. Christopher A. Hawyer, APBPC Executive Director
Ms. Lori Harris, Commissioner, Dept of Development and Planning
Mr. Kenneth Runion, Supervisor, Town of Guilderland
Mr. David Stillwell, Field Supervisor, USFWS
Mr. Peter Nye, NYSDEC – Endangered Species Unit

New York State Department of Environmental Conservation
Division of Fish, Wildlife and Marine Resources, Region 4
50 North Westcott Road, Schenectady, New York 12306-2014
Phone: (518) 357-2067 • FAX: (518) 357-2460
Email: keparker@gw.dec.state.ny.us Website: www.dec.state.ny.us



CITY OF ALBANY
Development & Planning

Post-It® Fax Note	7671	Date	9/7/04	Pages	2
To	Rebecca Brownell	From	Karl Parker		
Co./Dept.	Dev + Planning	Co.	NYS DEC		
Phone #		Phone #	557-2070		
Fax #	434-9846	Fax #			

Richard Nicholson
Department of Development & Planning
21 Lodge St.
Albany, NY 12207

Re: Tharaldson Development Co., Residence Inn, Draft Scoping Checklist

Dear Mr. Nicholson:

Please accept the following brief comments in regard to the referenced matter:

- 1) The Department of Environmental Conservation is certainly an interested agency in this project, and may prove to be an involved agency pursuant to ECL Article 11-0535 *Endangered and Threatened Species*. A copy of the Final Scope should be provided to: Regional Permit Administrator, NYSDEC Region 4, 1150 North Westcott Rd., Schenectady, NY 12306.
- 2) Under the evaluation of Terrestrial and Aquatic Ecology in the Existing Environmental Setting Section, evaluation should also be made of the site as it existed prior to unauthorized clearing and grading. Such evaluation may be made through evaluation of aerial photographs, other similar records, and evaluation of adjoining areas on and adjacent to the property that were not disturbed.
- 3) 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).
- 4) Finally, it is important that biological evaluations and surveys of the site be conducted by qualified biologists at an appropriate time of the year to find the species in question.

Please contact me if you have any questions.

Sincerely,



Karl Parker
Senior Wildlife Biologist
Region 4

cc: B. Clarke, NYSDEC, Environmental Permits

New York State Department of Environmental Conservation

Division of Environmental Permits, Region 4

1150 North Westcott Road, Schenectady, New York 12306-2014

Phone: (518) 357-2069 • FAX: (518) 357-2460

Website: www.dec.state.ny.us



JAN 11 2004
JAN 20 2004
January 14, 2004

Daniel Hershberg, P. E.
Hershberg & Hershberg
40 Colvin Ave
Albany, NY 12206

RE: Proposed Residence Inn
NOS's 124, 126, 126R & 128 Washington
Ave Extension
Your Project # 2002-0240
City of Albany, Albany County

Dear Mr. Hershberg:

We have reviewed the information that you forwarded to us on December 30, 2003 for the above referenced project. Thank-you. Although we also need to review a complete set of development plans for the entire site, clearly showing the property lines, we were able to gather enough information off the location map and Project Site Map Figure 1B of the Traffic Impact Study to raise some preliminary concerns.

The information provided leads us to believe that two of the Special Conditions in our DEC Permit 4-0130-00007/00002, issued 7/6/94 will apply to this proposal. 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.

Special Condition # 7c states that: prior to any further physical alterations of permittee owned or controlled lands adjacent to the Karner Blue Hill Preserve 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 no significant adverse impacts upon the Karner Blue Hill Preserve.

Special Condition 7d states that: 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.

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.

Please provide a project narrative and a full set of design and development plans clearly showing the entire property lines and the Karner Blue Hill Preserve boundary lines so that we can evaluate the proposal, determine our permit jurisdiction and concerns, and work to resolve issues related to the permit conditions and potential impacts to the Albany Pine Bush and Karner Blue Hill Preserve

If you have any questions please feel free to contact me at 518-357-2459 or at the address above.

Sincerely,



Wendy DuBois
Division of Environmental Permits

AlbCo#9/Residence Inn/wjd

enc: pmt

cc: K. Parker

S. Schassler, Regional Director

Pyramid Crossgates Inc

Mayor, City of Albany

R. Nicholson/ D. Herring, Planning, City of Albany w enc

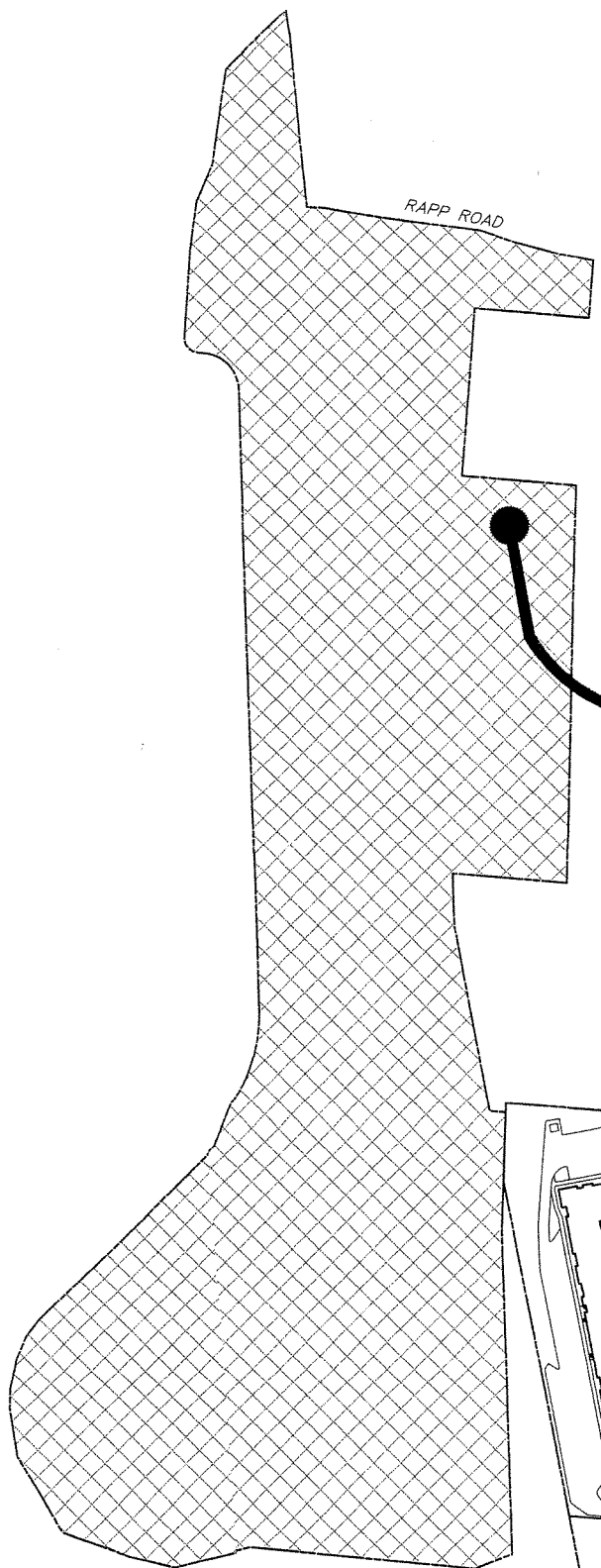
J. Weston, Planning, Town of Guilderland w enc

S. Holmes, Tharaldson Development Co w enc

K. O'Brien, Wildlife CO

N. Gifford, APBPC

file



RAPP ROAD

**KARNER BLUE
HILL PRESERVE**

SITE



November 10, 2003

COMMISSION MEMBERS

Steven G. Schassler
Regional Director
NYS Department of
Environmental
Conservation

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Commissioner
NYS Office of Parks,
Recreation and
Historic Preservation

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Aaron Mair
Citizen Representative

Corporate Liaison
John Brust

EXECUTIVE DIRECTOR
Christopher A. Hawver

Mr. Dan Herring, Chairman
City of Albany – Zoning Committee
Department of Development and Planning
Albany City Hall
Albany, NY 12207

RE: 124-128 Washington Avenue Extension
Zoning Change request and 124 Unit Residence Inn Concept application

Dear Mr. Herring,

The Albany Pine Bush Preserve Commission recently received a carbon copy of the Zoning Change Request and Concept Proposal for the above referenced project. The Albany Pine Bush Preserve Commission appreciates the opportunity to work with the City of Albany and the applicant to balance appropriate development with the successful conservation of the Albany Pine Bush. Commission Staff and the Commission's Technical Committee have reviewed the application.

The Albany Pine Bush represents one of the best remaining examples of an inland pitch pine – scrub oak barrens and is home to numerous rare, threatened, and endangered species of plants and animals (APBPC, 2002). The New York State Legislature created the Albany Pine Bush Preserve and the Albany Pine Bush Preserve Commission (APBPC) to protect and manage a viable pitch pine scrub oak barrens (ECL Article 46). The requested Zoning Change and Development Concept for a 124-Unit Residence Inn is proposed for a site in the Albany Pine Bush that contains fire-suppressed pitch pine scrub oak barrens and is immediately adjacent to one of the largest remaining populations of the Karner blue butterfly (Kbb) (Gifford et. al. in prep.); a species listed as endangered by the U.S. Fish and Wildlife Service (USFWS) (Federal Register 57(240): 59236-59244) and the State of New York.

The Albany Pine Bush Preserve Commission (APBPC) would likely have several concerns and recommendations about the potential short and long term impacts associated with the requested Zoning change and Development Concept, as proposed, including:

1. Address unresolved land use issues: The proposed project represents a complete build out for an area on which the Commission has commented previously. It is our understanding that a large portion of the area proposed for re-zoning and subsequent development of a 124 unit Residence Inn was initially

cleared and used as a "snow-storage area" by Pyramid Crossgates without proper approvals or consideration of environmental factors. In separate 1999 Commission correspondence to the City of Albany and the Town of Guilderland, APBPC conveyed that if 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.

2. Assess Environmental Impacts: prepare Supplemental Environmental Impact Statement (SEIS): The irreversible loss of existing and restorable Pine Bush and Karner blue habitat immediately adjacent to the Crossgates Hill and Crossgates Powerline-right-of-way (Crossgates) Karner blue sub-population, suggests that a hard look at the proposed request needs to be taken. Consistent with the 2002 Management Plan and FEIS adopted by the Commission, and 6NYCRR Part 617.9(a)(7) and 617.7(c)(iv), it would appear appropriate for the City to request that the applicant prepare a SEIS. A SEIS to the 2002 Management Plan and FEIS for the Albany Pine Bush Preserve would provide the applicant and the City with the ability to specifically evaluate the impacts of the proposed development on the Commission's ability to create and manage a viable Preserve and recover the Karner blue butterfly, consistent with the 2002 Management Plan, the Commission's enabling legislation, (Environmental Conservation Law Article 46) and the recently adopted USFWS Final Recovery Plan for the Karner blue butterfly. It should be noted that because the area is significantly contiguous with lands managed by New York State as open space and endangered species habitat it could be appropriate to prepare a Full Environmental Impact Statement, consistent with 6NYCRR Part 617.4(b)(10). It is understood that the SEQRA threshold for a Type 1 Action is 25% of the "normal" 10-acre threshold, for such projects.

A supplemental EIS should evaluate:

- A) Potential Direct Impacts on the Crossgates Hill Kbb sub-population
- i) Potential harm to Karner blue butterflies and other state listed species. The applicant indicated on the SEQRA Full Environmental Assessment Form submitted, that the site does not contain any species listed as threatened or endangered. Given the close proximity (<50 meters) to known occupied habitat, Karner blue butterflies and Frosted Elfin butterflies (NYS threatened) may currently occupy the site and be utilizing nectar sources located there. A SEIS should include appropriate surveys (timing and frequency) of the site for both species.
 - ii) Potential for irreversible loss of 3.72 acres of existing and potential pitch pine scrub oak barrens and Karner blue butterfly habitat. Earlier APBPC comments highlighted the need to restore the area illegally cleared to native vegetation. This is also consistent with the recovery strategy adopted by the USFWS in the Final Recovery Plan for the Karner blue butterfly; to maintain and expand existing sub-populations (USFWS 2003). Commission research

and management has shown that more heavily developed similar sites can indeed be restored to Kbb habitat (Gifford 2003).

iii) Potential impacts on Karner blue butterfly population size and long-term viability Abnormal changes in predation, wind, temperature, lighting, and available ground water are discussed as threats to Kbb survival in the federal Karner blue butterfly Recovery Plan (USFWS 2003). Specifically, these changes may reduce a site's short term and long-term ability to support a viable Kbb sub-population. The Commission noted concerns regarding these potential effects to the Crossgates Kbb sub-population when the Crossgates Mall Theater expansion project was initially proposed. The numbers of Kbb observed at the Crossgates sub-population have declined considerably since the completion of the Theater project, despite habitat improvements to the Crossgates Hill Kbb habitat (Gifford et. al., 2003). Kbb populations naturally fluctuate over time in response to a variety of environmental conditions, increasing the need to expand and link isolated sites to other occupied habitat and adequately buffer occupied Kbb sites from non-compatible surrounding land uses (USFWS 2003). SEIS should, therefore, investigate potential impacts that this proposal may have on predation, lighting, wind patterns, temperature fluctuations, and changes in depth to groundwater at the adjacent Crossgates Kbb sub-population.

iv) Potential for inappropriate use by Inn guests: SEIS should evaluate the potential impact of Inn residents on the adjacent Kbb habitat.

B Potential impacts on the Commission's ability to successfully recover the Karner blue butterfly consistent with the Final Recovery Plan for the Karner Blue butterfly (USFWS 2003), the Draft NYS Karner blue butterfly recovery plan (NYSDEC in prep.), and the 2002 Management Plan and Final Environmental Impact Statement for the Albany Pine Bush Preserve (APBPC 2002).

i) Sub-population size: Successful recovery of the Karner blue butterfly in the Albany Pine Bush Recovery Unit will depend on the ability to expand and link existing sub-populations (APBPC 2002; USFWS 2003). Currently in the Albany Pine Bush Preserve there are only four existing sub-populations. The Crossgates sub-population is the eastern most site, is isolated from all other Kbb sub-populations, and the only large site south of the NYS Thruway. The 2002 Management Plan and FEIS described the need to restore two viable meta-populations in the Pine Bush Recovery Unit, one north and one south of the Thruway. As one of the few last remaining occupied sites in the Pine Bush, the Crossgates sub-population is therefore critical to the successful recovery of the Karner blue butterfly in the Albany Pine Bush Kbb Recovery Unit. It should also be noted that full recovery in each federal Kbb Recovery Unit is essential to both State and National Kbb recovery efforts (USFWS, 2002; NYSDEC, in prep.).

Federal and State Kbb Recovery strategies highlight the need to first expand the habitat and Karner blue population size at existing occupied Kbb sites and second to create/maintain suitable dispersal areas to link existing occupied sites (USFWS 2003). The Commission is currently working to restore suitable habitat throughout the Pine Bush Preserve, and these efforts

are proving extremely successful (Gifford, 2003). To fulfill federal and state recovery goals, however, the Commission and NYSDEC need to first maximize Kbb habitat and Kbb population size at occupied sites to increase the probability for successful dispersal to restoration sites within the Preserve. Potential negative impacts to the Crossgates Kbb sub-population will likely have serious negative effects on our ability to recover the species in the Albany Pine Bush. SEIS for this project should therefore evaluate how the proposed project may affect the Commission's ability to meet state and federal Kbb recovery goals and the recovery and management goals adopted by the Commission in the 2002 Management Plan and FEIS (APBPC, 2002).

ii) Kbb Dispersal and Connectivity: A SEIS should evaluate potential changes in traffic volume and timing on Rapp road as a result of this project and the potential negative impacts increased traffic may have on the Commission's and NYSDEC's ability to successfully facilitate Kbb dispersal across Rapp Road. The City of Albany has helped protect considerable acreage on the West Side of Rapp Road that will provide a linkage between the NYSDEC Kbb management area (Crossgates Hill and Crossgates PROW) and Preserve lands to the west. Successful dispersal to these lands and the adjacent Blueberry Hill section of the Preserve, however, is highly contingent upon the butterfly's ability to cross Rapp Road. Recent studies of Kbb movement and dispersal patterns along Albany County Route 155 illustrate that traffic volume plays a significant role in impeding Kbb dispersal across roads (Fuller, Ph.D. Thesis in prep.). When combined with potential direct impacts to the Crossgates sub-population, the impact of increased traffic on Rapp Road may be significant and further reduce the Commission's ability to successfully link the Crossgates Kbb sub-population with Preserve lands.

C) Identify reasonable development alternatives. A SEIS should evaluate all reasonable alternatives for the site, including a no-build alternative.

D) Identify appropriate mitigation measures. A SEIS should identify and evaluate all appropriate mitigation measures for the site, including the complete restoration of the area illegally cleared.

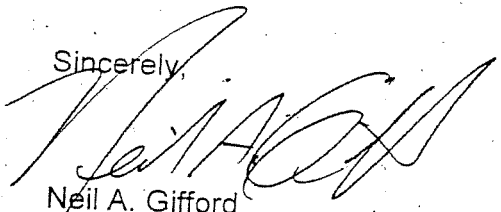
3. Expand Coordinated Review of Zoning request and Concept proposal: The Commission would likely recommend that the City expand the Coordinated Review of the request for Zoning change and Concept proposal to other interested and involved agencies for comment, including; the Town of Guilderland, Albany County, the New York State Department of Environmental Conservation – Endangered Species Unit, and the United States Fish and Wildlife Service – NYS Field Office.

Upon careful review by Commission staff and the Commission's Technical Committee, it would appear that the proposed Zoning change and conceptual proposal for a 124-Room Residence Inn may have the potential to have significant direct and long-term negative effects on the Karner blue butterfly in the Albany Pine Bush. The Commission applauds the City of Albany's long-standing support for creating and managing a viable Preserve and for its efforts to recover the Karner blue butterfly in the Albany Pine Bush; including support for protecting approximately 19 acres of habitat in Full Protection Area 29 (Daughters of Sarah & Teresian House). The Commission looks forward to the continued commitment of the City to protect and recover this endangered species in this critical habitat area.

These comments represent likely Commission reactions to the proposed Zoning change and Concept proposal submitted to the Commission for review, and are my speculation of the opinion of the Commission.

In closing, I believe the Commission would not support the requested Zoning change and development concept as proposed, due to the potential for serious short and long-term negative effects on the endangered Karner blue butterfly and on the creation and management of a viable Pine Bush Preserve. The Commission would likely recommend a thorough review of potentially unresolved illegal site clearing and site use, expanding the review of this project to other interested/involved agencies, and preparing a Supplemental Environmental Impact Statement to thoroughly evaluate the scope of potential negative impacts on the recovery of the federally and state endangered Karner blue butterfly and on the management of a viable Pine Bush Preserve. Thank you for your consideration of these comments and suggestions. If you have any questions or comments regarding this matter, please do not hesitate to contact me.

Sincerely,



Neil A. Gifford
Conservation Director
Albany Pine Bush Preserve Commission

- cc: Albany Pine Bush Preserve Commission Technical Committee
- Mr. Steven Schassler, Esq., APBPC Chair – NYSDEC Region 4 Director
- Mr. Christopher A. Hawver, APBPC Executive Director
- Ms. Lori Harris, Commissioner, Department of Development and Planning
- Mr. David Casciotti, Director, Department of Development and Planning
- Ms. Jan Weston, Director of Planning, Town of Guilderland
- Ms. Robyn Niver, Endangered Species Biologist, USFWS – NYS Field Office
- Ms. Kathy O'Brien, Endangered Species Biologist, NYSDEC – Endangered Species Unit
- Mr. Andrew Labruzzo, Planner, Albany County
- Mr. Daniel R. Hershberg, Hershberg & Hershberg.

Literature Cited:

Albany Pine Bush Preserve Commission (APBPC). 2002. Management Plan and Final Environmental Impact Statement for the Albany Pine Bush Preserve. Albany, NY. 135 pp.

Fuller, S. In Prep. Allee Effects in a Fragmented Karner Blue Butterfly Population. SUNY College of Environmental Science and Forestry, Department of Environmental and Forest Biology. Syracuse, NY. *Ph.D. Thesis in prep.*

- Gifford, N. 2003. Karner blue butterfly, (*Lycaeides melissa samuelis*) Population and Habitat restoration Monitoring Results: Implications for successful recovery in the Albany Pine Bush Preserve, NY. 59th Annual Northeast Fish and Wildlife Conference, Newport, RI.
- Gifford, N., K. Breisch, and NYS Department of Environmental Conservation, In Prep. Albany Pine Bush Karner blue butterfly (*Lycaeides melissa samuelis*) population monitoring results, 1991 – 2003. Albany, NY.
- New York State Department of Environmental Conservation. In Prep. Draft NYS Recovery Plan for the Karner Blue Butterfly (*Lycaeides melissa samuelis*). Albany, NY.
- U.S. Fish and Wildlife Service. 2003. Final Recovery Plan for the Karner Blue Butterfly (*Lycaeides melissa samuelis*). U.S. Fish and Wildlife Service, Fort Snelling, MN. 273 pp.
- U.S. Fish and Wildlife Service. 1992. Endangered and threatened wildlife and plants; determination of endangered status for the Karner blue butterfly. Final Rule. Federal Register 57(240): 59236-59244.



COMMISSION MEMBERS

Steven C. Schassler
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NYS Office of Parks,
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The Nature Conservancy of
New York State

Jerry Jennings
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City of Albany

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Town of Colonie

K...son
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Citizen Representative

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Corporate Liaison
John Brust

EXECUTIVE DIRECTOR
Christopher A. Hawver

September 7, 2004

Mr. Richard Nicholson
Historic Preservation Planner
City of Albany, Department of Development and Planning
21 Lodge Street
Albany, NY 12207

RE: 124-128R Washington Avenue Extension
Proposed 124-unit Residence Inn

Dear Mr. Nicholson:

Thank you for providing the Albany Pine Bush Preserve Commission with the opportunity to comment on the draft SEQRA scoping document for the above referenced project. The Commission appreciates the long-standing cooperative support of the City of Albany in balancing economic development with the conservation of the globally-rare ecology of the Albany Pine Bush. Commission staff and the Commission's Technical Committee have reviewed the draft scope and provide the following comments.

• Interested Agencies

The list of interested agencies should include the United States Fish and Wildlife Service (USFWS), NYS Department of Environmental Conservation - Endangered Species Unit (NYSDEC-ESU), Town of Guilderland Planning Board, and the Albany Pine Bush Preserve Commission.

• Terrestrial and Aquatic Ecology

The Albany Pine Bush Preserve Commission (APBPC) provided our initial comments on this project in a November 10, 2003 letter to City of Albany Zoning Committee Chair, Mr. Dan Herring. That letter (attached) outlines specific information for inclusion in the scoping document that is requisite to completing a Draft Environmental Impact Statement (DEIS). Given the proposed project is located within the Pine Bush Study Area (APBPC 2002) and adjacent/within Karner blue butterfly habitat, it is imperative that the DEIS accurately identify and evaluate the potential direct, indirect, short and long-term cumulative impacts of the above referenced project.

o Use appropriate ecological baseline when describing "existing conditions":

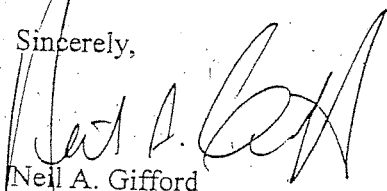
Resolution of the illegally constructed parking area remains outstanding. The DEIS must therefore use the pre-parking area environmental

condition of the site as the appropriate ecological baseline when describing existing conditions and evaluating potential ecological impacts.

- Identify and evaluate direct impacts on ALL rare and listed plant and animal species including but not limited to the Karner blue butterfly (Kbb). DEIS should include an evaluation of:
 - "Taking" of Karner blue butterflies and other state listed species.
 - Irreversible loss of 3.72 acres of existing and potential pitch pine scrub oak barrens and Kbb habitat.
 - Impacts on Kbb and Frosted Elfin butterfly population sizes and viability.
 - Impacts to other listed species in the Albany Pine Bush Study Area.
 - Impacts of guests on adjacent habitat and rare species.
- Identify and evaluate impacts on the ability to successfully recover the Karner blue butterfly, in New York State and in the United States, as prescribed in the Final Recovery Plan for the Karner blue butterfly (USFWS 2003), the Draft NYS Karner blue butterfly recovery plan (NYSDEC in prep), and the 2002 Management Plan and Final Environmental Impact Statement for the Albany Pine Bush Preserve (APBPC 2002). Specifically, the DEIS should include an evaluation of the project's impacts on
 - Glacial Lake Albany Metapopulation size.
 - Sub-population size.
 - Karner blue butterfly dispersal and subpopulation connectivity.
- Identify and evaluate impacts on the Commission's ability to create and manage a viable Preserve.
- Identify all development alternatives and associated environmental impacts including reduced footprint and no-build alternatives.
- Identify 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.

In closing, I believe that the Commission would not support the requested Zoning change and development concept as proposed without a complete evaluation of the project's potential short- and long-term, direct and indirect cumulative impacts on rare and listed plant and animal species, including the Karner blue butterfly and frosted elfin butterfly, and on the Commission's ability to create and manage a viable Preserve. Thank you for consideration of these comments and suggestions. If you have any questions or comments regarding this matter, please do not hesitate to contact me.

Sincerely,


Neil A. Gifford
Conservation Director

Encl: November 10, 2003 APBPC comment letter regarding 124-128 Wash. Ave. Ext.

124-128R Wash. Ave. Ext.

Cc: Albany Pine Bush Preserve Commission Technical Committee
Mr. Steven Schassler, Esq., APBPC Chair, NYSDEC Reg. 4 Director
Mr. Christopher A. Hawver, APBPC Executive Director
Ms. Lori Harris, Commissioner, Dept of Development and Planning
Ms. Jan Weston, Dir. Of Planning, Town of Guilderland
Mr. David Stillwell, Field Supervisor, USFWS
Mr. Peter Nye, NYSDEC – Endangered Species Unit

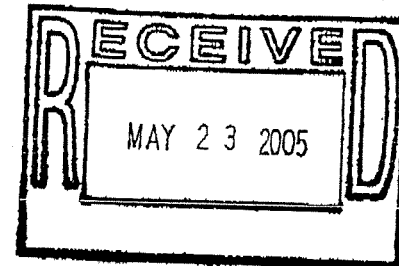
New York State Department
Division of Environmental Per
1150 North Westcott Road, Schene
Phone: (518) 357-2069 • FAX: (511
Website: www.dec.state.ny.us

Post-It® Fax Note	7671	Date	# of pages 3
To	Richard Nicholson	From	Andy Marcucci
Co./Dept.		Co.	
Phone #		Phone #	
Fax #	434-9846	Fax #	



Denise M. Sheehan
Acting
Commissioner

May 19, 2005



Richard Nicholson
Historic Preservation Planner
City of Albany
Department of Development and Planning
21 Lodge Street
Albany, NY 12207

RE: Tharaldson Development Company
DEIS for Residence Inn Hotel DEIS
City of Albany, Albany County

Dear Mr. Nicholson:

Thank you for the opportunity to review the above referenced Draft Environmental Impact Statement (DEIS). The following are the department's comments on the proposal.

- 1) It is not clear from the document what property is the subject of this project. The DEIS identifies four tax parcels, but does not present a map showing these parcels. It is fairly clear that the project is occurring on only the portion of the properties within the City of Albany, but what is not clear is whether a subdivision is being proposed, or whether the project parcel is actually larger than what is shown on the site plan. The DEIS should clearly present what parcels are involved, and not involved, and how the project will or will not alter current properties.
- 2) It is also not clear who the owner of the project parcel is. Tharaldson is identified as the "contract vendee" (page 4). On the page there appears the statement that the site was "cleared by the prior owner," suggesting that properties have changed hands. If that is the case, the DEC has not been notified of such an ownership change, which should have occurred pursuant to the conditions of the Crossgates permit issued by this department. Finally, the site plan identifies some lands as "portion of parcel available for commitment to mitigation by Tharaldson to NYSDEC," while other portions, which presumably are part of the same parcel of property are identified as "lands outside control of Tharaldson recommended for mitigation by NYSDEC." Again, the DEIS must clearly present who owns what properties now, and who will own those properties if the project is approved.

- 00/20 0 13:20 NO.941 05/04
- 3) The proposed planting list (page 8) is somewhat lacking with respect to trees. Gray birch is a very short-lived tree and we would much prefer that the planting list be expanded to include pitch pine.
 - 4) One mitigation measure we would propose is the extension of the water line or hydrant to the edge of the Butterfly Management Area along the powerline. (See page 9)
 - 5) A 50' wide buffer area for Karner blue butterflies along the powerline was provided for in the Crossgates 1994 permit and it was anticipated that this buffer would be expanded when the subject property was developed. The 0.25 acre area that is proposed to be added is very inadequate given the size of the project proposed. Without proper maps and identification of property lines and ownership, it is difficult to properly evaluate this issue.
 - 6) It is not clear to whom the \$55,800 in mitigation fees would go, but it is assumed that they would go to the City of Albany. This should be clarified in the document.
 - 7) Given the close proximity of the project site to a known site utilized by Karner blue butterflies, and its location within the normal flight distance of butterflies, the site itself must be considered as part of the butterfly habitat. Because there is a wooded area separating the Management Area from the open portion of the project site, and because there is no evidence of lupine which would support eggs, larvae or caterpillars, we think that it can be fairly said that Karner blue butterflies are probably no more than transient and occasional visitors as adults to the project site. The DEIS does not present or discuss these issues. 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. Richard Futyma's report does not include a plant list, or any discussion on the suitability of the site for nectaring adult butterflies - other than to say he found no lupine. The issue of the site being part of the butterfly's current occupied habitat, according to current definitions, has not been adequately discussed in the DEIS or addressed in regard to the project design.
 - 8) The DEIS contains very little in the way of an alternative analysis. The alternative of a 100-unit or 75-unit Inn with an expanded buffer to the Karner blue butterfly Management Area is not presented at all and should be included in the document.
 - 9) The DEIS failed to adequately address issues related to the site's proximity to endangered (Karner blue) and threatened (frosted elfin) butterflies, and its potential use by transient butterflies, as well as its value as a buffer to the existing Management Area.



In summary, the DEIS is inadequate as it fails to properly evaluate habitat conditions prior to unauthorized site disturbance as well as existing habitat conditions. It also does not present sufficient basic project information. Further, the set-aside area in an undetailed form of 0.25 acres on the project site is unsatisfactory and the DEIS must include more details and discussion about it.

Thank you again for this opportunity to provide you with our comments on the DEIS and feel free to contact me if you have any questions pertaining to these comments.

Sincerely,



Angelo Marcuccio
Environmental Analyst

cc: Karl Parker, Region 4, Wildlife

617.20
Appendix A
State Environmental Quality Review
FULL ENVIRONMENTAL ASSESSMENT FORM

PURPOSE: The full EAF is designed to help applicants and agencies determine, in an orderly manner, whether a project or action may be significant. The question of whether an action may be significant is not always easy to answer. Frequently, there are aspects of a project that are subjective or unmeasurable. It is also understood that those who determine significance may have little or no formal knowledge of the environment or may not be technically expert in environmental analysis. In addition, many who have knowledge in one particular area may not be aware of the broader concerns affecting the question of significance. The full EAF is intended to provide a method whereby applicants and agencies can be assured that the determination process has been orderly, comprehensive in nature, yet flexible enough to allow introduction of information to fit a project or action.

FULL EAF COMPONENTS: The full EAF is comprised of three parts:

- Part 1:** Provides objective data and information about a given project and its site. By identifying basic project data, it assists a reviewer in the analysis that takes place in Part 2 and 3.
- Part 2:** Focuses on identifying the range of possible impacts that may occur from a project or action. It provides guidance as to whether an impact is likely to be considered small to moderate or whether it is a potentially-large impact. The form also identified whether an impact can be mitigated or reduced.
- Part 3:** If any impact in Part 2 is identified as potentially-large, than Part 3 is used to evaluate whether or not the impact is actually important.

DETERMINATION OF SIGNIFICANCE - Type 1 and Unlisted Actions

Identify the Portions of EAF completed for this project: Part 1 Part 2 Part 3

Upon review of the information recorded on this EAF (Parts 1, 2 and 3 if appropriate), and any other supporting information, and considering both the magnitude and importance of each impact, it is reasonably determined by the lead agency that:

- A. The project will not result in any large and important impact(s) and, therefore, is one which will not have a significant impact on the environment, therefore, a **negative declaration will be prepared.**
- B. Although the project could have a significant effect on the environment, there will not be a significant effect for this Unlisted Action because the mitigation measures described in PART 3 have been required, therefore, a **CONDITIONED negative declaration will be prepared.***
- C. The project may result in one or more large and important impacts that may have a significant impact on the environment, therefore, a **positive declaration will be prepared.**

*A Conditioned Negative Declaration is only valid for Unlisted actions.

Rapp Road Landfill Expansion

NAME OF ACTION

NYSDEC

NAME OF LEAD AGENCY

William Clarke

PRINT OR TYPE NAME OF RESPONSIBLE OFFICER IN LEAD AGENCY

Permit Administrator

TITLE OF RESPONSIBLE OFFICER

SIGNATURE OF RESPONSIBLE OFFICER IN LEAD AGENCY

SIGNATURE OF PREPARED (IF DIFFERENT FROM RESPONSIBLE OFFICER)

October 26, 2005

Date

PART 1 - PROJECT INFORMATION
PREPARED BY PROJECT SPONSOR

Notice: This document is designed to assist in determining whether the action proposed may have a significant effect on the environment. Please complete the entire form, Parts A through E. Answers to these questions will be considered as part of the application for approval and may be subject to further verification and public review. Provide any additional information you believe will be needed to complete Parts 2 and 3.

It is expected that completion of the full EAF will be dependent on information currently available and will not involve new studies, research or investigation. If information requiring such additional work is unavailable, so indicate and specify each instance.

NAME OF ACTION: Rapp Road Landfill Expansion			
LOCATION OF ACTION: Rapp Road Landfill, City of Albany, Albany County (include street address, municipality and County)			
NAME OF APPLICANT/SPONSOR: City of Albany Department of General Services		BUSINESS TELEPHONE	
Mr. Willard A. Bruce, Commissioner			
One Connor Boulevard	Albany	NY	12204
STREET ADDRESS	CITY/PO	STATE	ZIP
NAME OF OWNER (IF DIFFERENT):			
		BUSINESS TELEPHONE	
STREET ADDRESS	CITY/PO	STATE	ZIP
DESCRIPTION OF ACTION: Construction of an approximately 24 acre landfill expansion of the existing Rapp Road Landfill onto lands currently know as the Fox Run Mobile Home Park.			

Please complete each question - Indicate N.A. if not applicable.

A. SITE DESCRIPTION

Physical setting of overall project, both developed and undeveloped areas.

1. Present land use: Urban Industrial Commercial Residential(suburban) Rural (non-farm)
 Forest Agriculture Other Landfill

2. Total acreage of project area: 24+/- acres.

<u>APPROXIMATE ACREAGE</u>	<u>PRESENTLY</u>	<u>AFTER COMPLETION</u>
Meadow or Brushland (Non-agricultural)	6 ___ acres	0 ___ acres
Forested	___ acres	0 ___ acres
Agricultural (includes orchards, cropland, pasture, etc.)	___ acres	___ acres
Wetland (Freshwater or tidal as per Articles 24,25 of ECL)	4 ___ acres	0 ___ acres
Water Surface Area	___ acres	___ acres
Unvegetated (Rock, earth or fill)	___ acres	20 ___ acres
Roads, buildings and other paved surfaces	6 ___ acres	0 ___ acres
Other (Indicate type) Mobile Home Park/Veg. area	8 ___ acres	4 ___ acres

3. What is predominant soil type(s) on project site? Colonie Loamy Fine Sand
- a. Soil drainage:
- well drained 70% of site
- Moderately well drained 30% of site
- Poorly drained ___ % of site
- b. If any agricultural land is involved, how many acres of soil are classified within soil group 1 through 4 of the NYS Land Classification System? ___ Acres (See 1 NYCRR 370):
4. Are there bedrock outcroppings on project site? Yes No.
- a. What is depth to bedrock? 125+ (in feet):

- 5. Approximate percentage of proposed project site with slopes?
 0-10% 90 % 10-15% 10 % 15% or greater _____ %.
- 6. Is project substantially contiguous to, or contain a building, site, or district, listed on the State or the National Registers of Historic Places? Yes No
- 7. Is project substantially contiguous to, to a site listed on the Register of National Natural Landmarks?
 Yes No
- 8. What is the depth of the water table: 10 (in feet)
- 9. Is the site located over a primary, principal, or sole source aquifer? Yes No.
- 10. Do hunting, fishing or shall fishing opportunities presently exist in the project area? Yes No.
- 11. Does project site contain any species of plant or animal life that is identified as threatened or endangered?
 Yes No. According to: Clough Harbour & Associates LLP.
Identify each species:
- 12. Are there any unique or unusual land forms on the project site? (i.e., cliffs, dunes, other geological formations)? Yes No.
Describe:
- 13. Is the project site presently used by the community or neighborhood as an open space or recreation area?
 Yes No.
If yes, explain:
- 14. Does the present site include scenic views known to be important to the community? Yes No.
- 15. Streams within or contiguous to project area? Intermittent Stream.
- 16. Lakes, ponds, wetland areas within or contiguous to project area?

Name: <u>Un-named Wetlands</u>	Size (in acres) <u>4</u>
Name: _____	Size (in acres) _____
Name: _____	Size (in acres) _____
- 17. Is the site served by existing public utilities? Yes No.
a. If yes, does sufficient capacity exist to allow connection: Yes No.
b. If yes, will improvements be necessary to allow connection: Yes No.
- 18. Is the site located in an agricultural district certified pursuant to Agriculture and Markets Law, Article 25-AA, Section 303 and 304? Yes No.
- 19. Is the site located in or substantially contiguous to a Critical Environmental Area designated pursuant to Article 8 of the ECL, and 6 NYCRR 617? Yes No.
- 20. Has the site ever been used for the disposal of solid or hazardous wastes? Yes No.

B. PROJECT DESCRIPTION

- 1. Physical dimensions and scale of project (fill in dimensions as appropriate).
 - a. Total contiguous acreage owned or controlled by project sponsor 155+/- acres.
 - b. Project acreage to be developed: 12 acres initially; 24 acres ultimately.
 - c. Project acreage to remain undeveloped 16 acres.
 - d. Length of project, in miles: N/A (if appropriate).
 - e. If the project is an expansion, indicate percent of expansion proposed N/A %
 - f. Number of off-street parking spaces existing N/A; proposed _____.
 - g. Maximum vehicular trips generated per hour N/A (upon completion of project).
 - h. If residential, number and type of housing units:

	One family	Two family	Multiple family	Condominium
Initially				
Ultimately				

- i. Dimensions (in feet) of largest proposed structure N/A height; N/A width; N/A length.
- j. Linear feet of frontage along a public thoroughfare project will occupy is? N/A Ft.
- 2. How much natural material (i.e., rock, earth, etc.) will be removed from the site? 0 Tons/cubic yards.
- 3. Will disturbed areas be reclaimed: Yes No N/A
 - a. If yes, for what intended purpose is the site being reclaimed? Wildlife Habitat
 - b. Will topsoil be stockpiled for reclamation? Yes No
 - c. Will upper subsoil be stockpiled for reclamation? Yes No
- 4. How many acres of vegetation (trees, shrubs, ground covers) will be removed from site? 24 acres.
- 5. Will any mature forest (over 100 years old) or other locally-important vegetation be removed by this project? Yes No
- 6. If single phase project: Anticipated period of construction N/A months, (including demolition).
- 7. If multi-phased:
 - a. Total number of phases anticipated 2 (number).
 - b. Anticipated date of commencement phase I April month 2008 year, (including demolition).
 - c. Approximate completion date of final phase Nov. month 2013 year.
 - d. Is phase I functionally dependent on subsequent phases? Yes No
- 8. Will blasting occur during construction? Yes No
- 9. Number of jobs generated: during construction? 20 +/-; after project is complete? 0
- 10. Number of job eliminated by this project? 0
- 11. Will project require relocation of any projects or facilities: Yes No
If yes, explain Existing residents will be relocated
- 12. Is surface liquid waste disposal involved? Yes No
 - a. If yes, indicate type of waste (sewage, industrial, etc.) and amount _____
 - b. Name of water body into which effluent will be discharged _____
- 13. Is subsurface liquid waste disposal involved? Yes No Type: _____
- 14. Will surface area of an existing water body increase or decrease by proposal? Yes No
Explain: _____
- 15. Is project, or any portion of project, located in a 100 year flood plain? Yes No
- 16. Will the project generate solid waste? Yes No
 - a. If yes, what is the amount per month? _____ Tons.
 - b. If yes, will an existing solid waste facility be used? Yes No
 - c. If yes, give name _____; location _____
 - d. Will any wastes not go into a sewage disposal system or into a sanitary landfill? Yes No
 - e. If yes, explain: _____
- 17. Will the project involve the disposal of solid waste: Yes No.
 - a. If yes, what is the anticipated rate of disposal: 21,000 tons/month.
 - b. If yes, what is the anticipated site life: 7 years.
- 18. Will project use herbicides or pesticides? Yes No.
- 19. Will project routinely produce odors (more than one hour per day)? Yes No
(with proposed active gas collection system)
- 20. Will project produce operating noise exceeding the local ambient noise levels? Yes No
- 21. Will project result in an increase in energy use? Yes No
If yes, indicate type(s) _____
- 22. If water supply is from wells, indicate pumping capacity _____ gallons/minute
- 23. Total anticipated water usage per day 1000 +/- gallons/day.
- 24. Does project involve Local, State or Federal funding? Yes No
If yes, explain City of Albany.

25. Approvals Required:

	Yes	No	Type	Submission Date
City, Town, Village Board	<input type="checkbox"/>	<input type="checkbox"/>		
City, Town, Village Plng. Board	<input type="checkbox"/>	<input type="checkbox"/>		
City, Town, Zoning Board	<input type="checkbox"/>	<input type="checkbox"/>		
City, County Health Department	<input type="checkbox"/>	<input type="checkbox"/>		
Other Local Agencies	<input type="checkbox"/>	<input type="checkbox"/>		
Other Regional Agencies	<input type="checkbox"/>	<input type="checkbox"/>		
State Agencies	<input checked="" type="checkbox"/>	<input type="checkbox"/>	NYSDEC Part 360 Modification	
Federal Agencies	<input type="checkbox"/>	<input type="checkbox"/>		

C. ZONING and PLANNING INFORMATION

1. Does proposed action involve a planning or zoning decision? Yes No

If yes, indicate decision required:

<input type="checkbox"/> zoning amendment	<input type="checkbox"/> zoning variance	<input type="checkbox"/> special use permit	<input type="checkbox"/> subdivision	<input type="checkbox"/> site plan
<input type="checkbox"/> new/revision of master plan	<input type="checkbox"/> resource management plan	<input type="checkbox"/> Other.		

2. What is the zoning classification(s) of the site? N/A

3. What is the maximum potential development of the site if developed as permitted by the present zoning? N/A

4. What is the proposed zoning of the site? N/A

5. What is the maximum potential development of the site if developed as permitted by the proposed zoning? N/A

6. Is the proposed action consistent with the recommended uses in adopted local land use plans? Yes No

7. What are the predominant land use(s) and zoning classifications within a ¼ mile radius of proposed action?
Land Use: Industrial & Landfill Zoning: N/A

8. Is the proposed action compatible with adjoining/surrounding land uses within a ¼ mile? Yes No

9. If the proposed action is the subdivision of land, how many lots are proposed? N/A

a. What is the minimum lot size proposed? _____

10. Will proposed action require any authorization(s) for the formation of sewer or water districts? Yes No

11. Will the proposed action create a demand for any community provided serviced (recreation, education, police, fire protection)? Yes No

a. If yes, is existing capacity sufficient to handle projected demand? Yes No

12. Will the proposed action result in the generation of traffic significantly above present levels? Yes No

a. If yes, is the existing road network adequate to handle the additional traffic? Yes No

D. INFORMATIONAL DETAILS

Attach any additional information as may be needed to clarify your project. If there are, or may be, any adverse impacts associated with your proposal, please discuss such impacts and measures which you propose to mitigate or avoid them.

E. VERIFICATION

I certify that the information provided above is true to the best of my knowledge.

Applicant/Sponsor Name: Willard A. Bruce

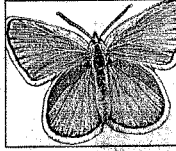
Date: 11/16/05

Signature: Willard A. Bruce

Title: Commissioner

If the action is in the Coastal Area, and you are a state agency, complete the Coastal Assessment Form before proceeding with this assessment.

CAPITAL REGION



Albany targets barrens again

Jennings says 10 acres dedicated to Pine Bush are needed for landfill

By **BRIAN NEARING**
Staff writer

ALBANY — The city wants to expand its rapidly filling dump onto 10 acres it had already dedicated to the Pine Bush Preserve.

"We hope that people would be reasonable and know what we are up against," Mayor Jerry Jennings told the Times Union editorial board on Wednesday. "I know some people are going to fight us on this."

During his State of the City address last week, Jennings said the city wants to expand the Rapp Road facility near Thruway Exit 24 into 10 city-owned acres. A decade ago, Albany dedicated that land as forever-wild to the preserve, which includes about 3,000 acres in Albany, Colonie and Guilderland.

It would be the first time that the city has sought to remove land from the preserve since its creation by the state in 1988.

"Taking land from the preserve for a dump sets a terrible precedent," Save the Pine Bush Secretary Lynne Jackson said Wednesday. "Who is to say that in another five years, another 10 acres won't be needed, and then another and another?"

The Pine Bush is one of the largest of about 20 inland pine barrens worldwide. It was formed toward the end of the last Ice Age 15,000 years ago when a large glacial lake stretched from present day Glens Falls to Newburgh.

The lake drained and left behind the sandy soils that now support the scrub pines of the rare ecosystem. Less than a fifth of the original Pine Bush survives, with the remaining area divided by highways, shopping malls and industrial parks.

Jennings is turning to the 10-acre patch of preserve land because the Rapp Road dump will be full in four years, long before a proposed new city-owned regional dump in Coeymans could be opened. But that plan is facing delays linked to wetlands on the 363-acre parcel as well as legal challenges by local opponents.

Chris Hawver, executive director of the Pine Bush Preserve Commission, said, "This is a precedent that we don't want to see happen," he said. "The city needs to look at other alternatives."

Jennings said the city could give the commission money to buy other land in the Pine Bush to offset the 10 acres that could be lost.

Last week the city dropped its
Please see **PRESERVE B6** ▶

PRESERVE: Advocates oppose landfill growth

▼ CONTINUED FROM B1

plan to expand the dump into 20 acres at the Fox Run Estates trailer park after Save the Pine Bush sued because the city had promised in 2000 to donate the land to the preserve.

The city earns about \$13 million a year — a tenth of its annual budget — by taking trash from private haulers and the communities in the ANSWERS consortium that includes Cohoes, Rensselaer, Watervliet, Berne, Bethlehem, Guilderland, Knox, New Scotland, Rensselaerville, Westerlo, Green Island and Altamont.

Albany cannot afford to slow down the flow of trash, which would extend the life of the dump, Jennings said. "It is a

“Taking land from the preserve for a dump sets a terrible precedent.”

LYNNE JACKSON
Save the Pine Bush

financial situation for us,” he said.

When the city expanded the landfill in 2000, it was projected to last for 15 years. However, because the city is taking in nearly as much trash as allowed under its state permit, the expansion will be filled by 2010.

Without a place to put its garbage, the city would be forced to pay to haul it away, Jennings

said. That expense, coupled with the revenue loss, could force massive property tax increases and city worker layoffs, he warned.

Removing land from the preserve — a process called alienation — requires state legislative approval. Assemblyman Jack McEnaney said Jennings has approached him about sponsoring such a bill.

“This is a battle that has to be fought in the Common Council,” said McEnaney, an Albany Democrat. “This is a local matter and will require a home-rule message from the council.”

There appeared to be some division on the 15-member council over the idea of sacrificing Pine Bush Preserve acres.

“There seems to be an air of

inevitability about this,” said Common Council President Shawn Morris. “This is the largest opportunity available to the city at this time.”

However, she added, the dump squeeze “opens the door for the big discussion of the future of the landfill and the city’s dependency on revenue from the landfill.”

Council member Dominick Calsolaro said Jennings must work with the council to find a solution to the garbage issues and questioned whether the preserve should be reduced. “We need a better dialogue on this,” Calsolaro said.

► *Brian Nearing can be reached at 454-5094 or by e-mail at bnearing@timesunion.com.*

