

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the matter of the Application of

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

Petitioners;

**AMENDED
VERIFIED
PETITION**

- Against -

Index No.

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

Respondents.

PETITIONERS, for their complaint against the respondents, make the following allegations:

1. This is an action pursuant to Article 78 of the CPLR, seeking to vacate and annul a determination of the City of Albany Common Council, pursuant to the State Environmental Quality Review Act, Article 8 of the New York State Environmental Conservation Law, and 6 NYCRR Part 617, (hereinafter SEQRA), that a parcel of land should be rezoned to permit the construction of a 124 unit hotel. The Final Environmental Impact Statement (hereinafter FEIS) adopted and filed by the Common Council, pursuant to SEQRA, was arbitrary and capricious, in excess of jurisdiction, unsubstantiated by the evidence, incomplete, in violation of SEQRA, illogical and erroneous and failed to adequately consider the effect of the proposed hotel on rare and endangered species of plants and animals that live on or near the parcel of land, including the Karner Blue butterfly, a federally-listed endangered species, and the Frosted Elfin butterfly a state listed threatened species.

THE PARTIES

2. Save The Pine Bush is a not-for-profit organization, organized under the laws of the State of New York in 1978, with a place of business at 33 Central Ave., Albany, N.Y., which advocates for protecting the Albany Pine Bush and the rare and endangered plants and animals that live there. The organization has brought numerous law suits on behalf of the Pine Bush and the endangered species found there, and won a number of key decisions in the Court of Appeals and in the lower courts which lead to the creation of the Albany Pine Bush Commission and the Albany Pine Bush Preserve. The Court of Appeals in Save The Pine Bush v. City of Albany, 70 NY2d 193, 201 (1987), expressly upheld the standing of Save The Pine Bush to bring claims similar to those advocated here, and the organization has never been denied standing in any of the many cases brought by it.

3 Petitioners Rezsín Adams, who lives at 112 Chestnut Street, Albany, N.Y., is President of Save The Pine Bush; John Wolcott, who lives at 344 Sheridan Ave, Albany, N.Y., is Vice President; Lynne Jackson, who lives at 223 South Swan Street, Albany, N.Y., is Secretary; Lucy Clark who lives with Anne Sombor, at 2348 Cayuna Road, Niskayuna, is Treasurer; and Russell Ziemba, who lives at 1813 Highland Ave. Troy, N.Y., is a member of the Board of Directors. Sandra Camp and Dave Camp who live at 13 Gipp Road, Albany, N.Y. and Larry Lessner, who lives at 26 Wilan Lane, Albany, N.Y are members of Save The Pine Bush, who live near the site of the hotel project. All of the Petitioners, use the Pine Bush for recreation and to study and enjoy the unique habitat found there. All of the Petitioners have made extraordinary efforts over the years to protect the Pine Bush by speaking out at hearings, reviewing documents and development plans, organizing fund raisers to fund law suits and in many other ways advocating on behalf of the Pine Bush. All of the Petitioners own their own homes at the addresses described above.

4. All of the petitioners will suffer injury to and loss of their use and enjoyment of the natural resources of the Pine Bush as a result of the violations of SEQRA alleged herein which will cause injury to or extirpation of the Karner Blue Butterfly and other rare and endangered species inhabiting the Pine Bush.

5. Petitioners Sandra Camp, David Camp and Larry Lessner will, in addition to the losses specified in paragraph 4 above, suffer injury as residential owners of property as a result of respondent Common Council's improperly changing the residential zoning of a neighboring plot of land to permit a commercial hotel to be built, thereby unreasonably subjecting them to additional commercial pollution, traffic congestion, and change in the character of the neighborhood that is incompatible with the protected nature of the Pine Bush and with the residential zoning of their residences.

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

7. The Common Council of the City of Albany (hereinafter "Common Council") is a branch of the government of the City of Albany designated as the lead agency to conduct a review of the Hotel project pursuant to SEQRA.

PRIOR PROCEEDINGS

8. The Albany Pine Bush Commission was established by the State of New York Legislature in 1988 to create and manage the Albany Pine Bush Preserve and to jointly oversee the Karner Blue Butterfly Recovery Plan and other related studies and plans together with the endangered species units of the New York State Department of Environmental Conservation (hereinafter "NYSDEC"), and the United States Fish and Wildlife Service (hereinafter "USFWS"). The scientists at the Albany Pine Bush Commission and at NYSDEC and USFWS have had more than 15 years of study and experience managing the recovery plan of the Karner Blue Butterfly in the Pine Bush and in other areas around the country, (hereinafter referred to as the "neutral experts"). They have published extensively on the subject and their expertise in the field of Karner Blue butterfly recovery is well recognized.

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

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

11. On December 19, 2005, the Common Council filed a Final Environmental Impact Statement, (FEIS) with Findings which concluded that the construction of the Hotel project would not involve unreasonable environmental risks or damage. The Findings relied almost exclusively on the opinion of Dr. Futyma, and disregarded the opinions of the neutral experts who disagreed with Dr. Futymas conclusions and with the logic, methods and observations by which he reached his conclusions.

12. On December 19, 2005 the Pine Bush Commission wrote to the DDP to object to the adoption of the FEIS. The letter stated in part as follows:

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

[After listing a long summary of the expertise of the neutral experts with respect to Karner Blue butterflies, and the numerous errors and omissions in the FEIS, the letter concludes]:

“In closing the Commission would not recommend that the City of Albany accept the Findings Statement as complete and accurate, and remains

concerned that the conclusions contained in the Findings Statement regarding likely adverse impacts to the Karner blue butterfly appear unsubstantiated and contradictory to the on-site information presented, as well as information provided by state and federal wildlife agencies, and that FEIS and Findings Statement analysis of potential impacts is therefore inconclusive and/or inaccurate.”

BACKGROUND

13. As a result of a series of law suits by Save the Pine Bush, various court decisions require the City of Albany to set aside a significant portion of land in the Albany Pine Bush as a preserve for the protection of rare and engendered species that live there, including the Karner Blue butterfly. By Court order, the Pine Bush Preserve must include more than 2000 acres of land suitable for the preservation of the Karner Blue butterfly, and that the land must be configured in such a way as to permit periodic burnings of a portion of the preserve, to regenerate the native Pine Bush habitat. Save The Pine Bush v. Common Council, 188 AD2d 969; 591 NYS2d 897 (3rd Dept. 1992)

14. The eventual size of the Pine Bush Preserve, and its configuration have still to be decided. Pursuant to court and administrative decisions, until such a preserve suitable for the preservation of the Karner Blue butterfly is establish, development of the Albany Pine Bush must be curtailed on land that can contribute to the Preserve or to the welfare of the Karner Blue butterfly.

15. At present the Pine Bush Preserve has about 1,850 “fire manageable” acres.

16. The Pine Bush Preserve at present has only three very small isolated populations of Karner Blue butterflies within the Preserve. The largest population of Karner Blue butterflies south of the Thruway lies outside the Pine Bush Preserve at the end of a long cul-de-sac next to Crossgates Mall in an area known as Butterfly Hill. The area of Butterfly Hill including a

corridor to the Pine Bush Preserve is call the Butterfly Management area and is jointly administered by NYSDEC and by the Pine Bush Commission.

17. Butterfly Hill is less than 200 meters from the proposed Hotel project site.
18. The state-listed threatened Frosted Elfin butterfly inhabits the area around Butterfly Hill.
19. Other rare species that inhabit the Pine Bush include the Hognosed Snake, the Worm Snake, the Eastern Spadefoot Toad, and the Adder's Mouth Orchid.
20. The short term goal of the Pine Bush Commission, the NYSDEC, and the USFWS is to strengthen the population of Karner Blue butterflies on Butterfly Hill and help the Karner Blue butterfly to recover from the steep declines in its population which it has suffered since 1998.
21. The long term goals of the Pine Bush Commission, the NYSDEC and the USFWS is help the Karner Blue butterfly spread its habitat west toward and into the Pine Bush Preserve some 1000 meters away, by establishing islands or stepping stones of habitat along the way which the butterflies in succeeding generations can inhabit. Since the Karner Blue butterflies spread in general only about 200 meters in each generation, this "migration" of the Karner Blue butterfly from the Butterfly Hill management area to the Pine Bush Preserve, will take a number of years.
22. Preserving the Hotel project site from development is essential for the short term goal of strengthening the Karner Blue population on Butterfly Hill by providing a buffer from the encroaching development projects, and a habitat for a larger butterfly community. This would be especially so if the Hotel project site were restored to its original Pine Bush ecology. The property would also contribute to the long term goal of providing a buffer to development that may injure the butterflies.

AS AND FOR A FIRST CAUSE OF ACTION

23. On or about April 18, 2005 the United States Fish and Wildlife Service (hereinafter USFWS), in connection with the SEQRA review of the Hotel project, wrote to the DDP, and stated that the USFWS had concluded that Karner Blue butterflies were likely to use the Hotel project site, and that the USFWS needed to visit the site to determine if the site was occupied by the Karner Blue butterfly, and if the development of the site would result in a “taking” of a federally-listed endangered species under the Endangered Species Act. The letter also stated:

We request that the City withhold any final approval for the proposed project until our concerns are resolved regarding the potential for adverse impacts to the Karner Blue butterfly. (emphasis added)

24. The Common Council never granted the USFWS an opportunity to visit the Hotel project site, or required the applicant to do so, prior to filing the FEIS.

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

26. USFWS is the sole agency which can make a determination as to whether a taking of a federally listed endangered species will result from an action or project, pursuant to 16 USC 1531 et seq.

27. The Common Council had no jurisdiction to make a determination as to a taking of a federally listed endangered species.

28. The Common Council also stated in Finding II(2)(E)(4) that “the USFWS may exercise its authority in its discretion”, and that “if a site visit is deemed necessary, the Applicant will be required to cooperate in such efforts as required by law”.

29. This finding had the effect of delegating the final decision on the “taking” issue to the USFWS and deferring the USFWS’s decision until after the FEIS was filed. As a result, the information and decisions of USFWS would not in the public record (FEIS) and the Common Council would not have an opportunity to take a “hard look” at the USFWS’ determination, as required by SEQRA (6 NYCRR 617.9), and to consider in light of the USFWS determination what environmental impacts the project would generated or what alternatives should be examined, or what mitigation measures should be undertaken or whether the project should proceed at all.

30. As a result of the above, the Common Council’s FEIS findings concerning the “taking” of the Karner Blue butterflies in connection with the Hotel project violated SEQRA, and are in excess of jurisdiction, arbitrary and capricious, unsubstantiated by the evidence, and incomplete, and must therefore be annulled.

AS AND FOR A SECOND CAUSE OF ACTION

31. Petitioners repeat and reallege paragraphs 1 through 30.

32. One of the most important issues which the Common Council had to evaluate in the Hotel project FEIS was the impact that the hotel would have on the population of Karner Blue Butterflies at Butterfly Hill less than 100 meters away.

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

34. Finding II(2)(D)(1)(d) illogically finds that because a decline in the Karner Blue population on Butterfly Hill in 1998 may not be related to the expansion of a movie theater at Crossgates, the construction of a Hotel at the present project site will not have any impact on the population on Butterfly Hill. The illogic of the proposition is obvious. In fact, the

expansion of the movie theater may well have contributed to the decline of the population, and the construction of the Hotel may also further weaken an already fragile population.

35. Finding II(2)(D)(2)(e) and (f) incorrectly finds that the Hotel project site is “physically remote from” and “a considerable distance from” the Butterfly Management Area including Butterfly Hill, and thus will not be effected by the Hotel project, notwithstanding that the Hotel project site is so close to Butterfly Hill – less than 100 meters away – that the USFWS considers the Hotel project site “actually occupied” by Karner Blue butterflies.

36. The same Finding also claims that studies prepared by the developer’s expert, Dr. Richard Futyma, “concluded that no portion of the butterfly Management Area will be disturbed or otherwise affected as a result of the Project”. However this finding does not indicate what potential harmful effects were studied, what standards, criteria and methodology were used, what specific conclusions were drawn by Dr. Futyma, and does not analyze the discrepancies between Dr. Futyma’s conclusions and those of the neutral experts.

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

38. Other findings make vague conclusions without analysis and without taking a hard look at the impacts from the Hotel project that may be experienced by the Karner Blue butterflies, based on Dr. Futyma’s erroneous claim that since there are no blue lupines on the Hotel site property, the land is unattractive to Karner Blue butterflies and developing the property will not cause the butterflies any harm. The neutral experts agreed that Karner Blue butterflies may forage on flowers at the Hotel project site even if blue lupines are not present, and that if the land was restored to its original condition before the illegal clearing and bulldozing, it could well support breeding populations of Karner Blue butterflies.

39. It was especially improper for the Common Council to give excessive and at times conclusive weight to the reports of Dr. Futyma, because the applicant refused to give the neutral experts permission to visit the Hotel site to prepare their own reports, and so the applicant was able to block a full, fair and impartial evaluation of the Hotel Site. Instead of forcing the applicant to permit a full fair and impartial evaluation by the neutral experts, the Common Council rewarded the applicant's intransigence by adopting Dr. Futyma's reports as conclusive, and stated in the FEIS (Finding II(2)(E)(4), p.30)), "if a site visit is deemed necessary, the Applicant will be required to cooperate in such efforts as required by law" knowing that the results of such a site visit would not be included in the FEIS.

40. As a result of the above, the FEIS violated SEQRA, is arbitrary and capricious, incomplete and unsubstantiated by the evidence as to the impact of the Hotel on the butterfly population at Butterfly Hill.

AS AND FOR A THIRD CAUSE OF ACTION

41. Petitioners repeat and reallege paragraphs 1 through 40.

42. On or about April 18, 2005 the USFWS wrote to the DDP and stated that the State-listed threatened Frosted Elfin butterfly occurs on NYSDEC management area adjacent to the Hotel project site, and requested that the Common Council coordinate with the NYSDEC and the NYS Natural Heritage Program to determine what impact the Hotel project will have on the Frosted Elfin butterfly, what, if any, other threatened or endangered species living were living in the area, and what impact the Hotel project would have on them.

43. On April 26, 2005 the Pine Bush Commission wrote to the DDP and stated that the Albany Pine Bush is the home to 19 rare plant and Animal Species including the Karner Blue butterfly, the Frosted Elfin butterfly and the endangered Adder's Mouth Orchid.

44. On or about September 7, 2004, NYSDEC wrote to the DDP to note that the Pine Bush was home to a number of rare and endangered species including the endangered Karner

Blue butterfly, the threatened Frosted Elfin butterfly, the Hognosed Snake (Special Concern), the Worm Snake (Special Concern), and the Eastern Spadefoot Toad (Special Concern), and requested that the biological evaluation include these species as well.

45. Notwithstanding these letters, and other similar requests by neutral experts, the Findings do not mention the Frosted Elfin butterfly, the Adder's Mouth Orchid, the Hognosed Snake, the Worm Snake, or the Eastern Spadefoot Toad, or contain any analysis as to the impact of the Hotel project on rare species known to be living in the management area near to the Hotel project area.

46. The Findings do not make any reference or analysis as to whether there are any other federally or state listed threatened or endangered species that might be impacted by the Hotel project. Finding II(2)(B)(11), the only finding to discuss the issue stated: "The Site does not contain ecologically significant vegetation, habitat or wildlife", and carefully avoided stating whether any rare or endangered species, other than the Karner Blue butterfly, were found near the site that might be impacted by the construction of the Hotel.

47. The Findings also failed to state that much of the site had been illegally bulldozed seven years earlier and made into a parking lot, and that the neutral experts disagreed with the finding that the site does not contain ecologically significant vegetation, habitat or wildlife.

48. As a result of these omissions, the FEIS violated SEQRA, is arbitrary and capricious, incomplete, and unsubstantiated by the evidence as to whether the Frosted elfin butterfly or any other listed species would be threatened by the Hotel project.

AS AND FOR A FOURTH CAUSE OF ACTION

49. Petitioners repeat and reallege paragraphs 1 through 48.

50. On July 6, 1994, Pyramid Corporation, owners of Crossgates Mall, in connection with an expansion of Crossgates mall into an area near Butterfly Hill, obtained a SPDES Permit

from the NYSDEC (Permit # 4-0130-00007/00002) which was conditioned in part by requiring that before Pyramid Crossgates altered any more of its land “adjacent to” Butterfly Hill, it must provide plans to and obtain approval from NYSDEC (Condition 7c) and that it must provide notice to NYSDEC 60 days in advance of any transfer of the preserve property (Condition 7d).

51. In 1998 Pyramid Crossgates Co., the then owner of the Hotel project site, cleared a significant portion of the property, covered it with gravel and constructed a parking lot for Crossgates Mall, notwithstanding that the owner did not notify and obtain the approval of NYSDEC pursuant to condition 7c of the SPDES permit, and did not obtain site plan approval from the City pursuant to Article IV Chapter 375-35(D)(2) of the Albany City Code.

52. At some time after 1998, Pyramid Crossgates Co. sold the Hotel project site to the Tharaldson Development Co. without obtaining permission of NYSDEC pursuant to condition 7d of the NYSDEC SPDES Permit.

53. On January 14, 2004, NYSDEC wrote to Daniel Hershberg, the applicant’s engineer and stated that the two conditions in the SPDES Permit applied to the Hotel project site. The NYSDEC letter states:

“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.”

54. Notwithstanding this clear statement by NYSDEC that SPDES permit 4-0130-00007/00002-0 applied to the Hotel project site, the FEIS (Finding I(4) erroneously found that “None of the lands proposed for development were demonstrated to be ‘permittee-owned or controlled lands adjacent to the Karner Blue Hill Preserve...Therefore, the requirements of the SPDES Permit are not applicable to the Project Site.”

55. There is no basis in the FEIS to support Finding I(4) and it is clearly wrong and without foundation. The Hotel project site is adjacent to the Karner Blue Hill Preserve (Butterfly Hill).

56. Finding I(4) is contradicted by Finding II(2)(B)(15), which states: “The Site is located north of, except the most southwestern corner of the Site is partially contiguous to, lands considered part of the Albany Pine Bush Preserve.” A map accompanying the FEIS indicates that the southwestern corner of the Hotel project site is adjacent to the Karner Blue Hill Preserve (Butterfly Hill). As a result, the SPDES Permit would apply to the Hotel project site.

57. The Common Council does not have jurisdiction to substitute its judgment for that of the NYSDEC as to the scope, meaning, and effect of NYSDEC SPDES Permit 4-0130-00007/00002.

58. By rejecting the decision of the NYSDEC, the Common Council failed to take a “hard look” at the environmental impacts that the NYSDEC was raising.

59. The Common Council impermissibly substituted its judgment and jurisdiction for that of NYSDEC as to whether conditions of SPDES Permit 4-0130-00007/00002-0 were applicable to the Hotel project site, and its Finding that the permit was not applicable was in violation of SEQRA, and was arbitrary and capricious, unsubstantiated by the evidence, incomplete, erroneous, illogical, and contradicted by Finding II(2)(b)(15).

AS AND FOR A FIFTH CAUSE OF ACTION

60. Petitioners repeat and reallege paragraphs 1 through 59.

61. On November 10, 2003 the Pine Bush Commission wrote to the DDP and stated its concern that the Hotel project site had been illegally cleared by the owner, Pyramid Crossgates, in violation of various local ordinances, and requested that consideration be given to restoring the property to “Pine Bush and Karner blue butterfly habitat”.

62. Notwithstanding this and other requests by the neutral experts for a rational determination as to whether the Hotel project site was illegally cleared in violation of local ordinances, the FEIS (Finding I(3)) illogically found that because no enforcement proceeding was ever commenced for the improper clearing, “no violation of law occurred.” The finding notes that the EIS “investigated whether this action (the clearing and bulldozing) violated any laws and/or resulted in state or local enforcements proceedings, and that requests were made to the City of Albany Bureau of Buildings and Codes to provide any record of any enforcement proceedings regarding this matter and none were found.”

63. The FEIS fails to indicate that the “investigation” ever requested or obtained records to indicate whether permits were applied for or given for the land clearing that was undertaken by Pyramid Crossgates in order to make the clearing lawful.

64. Article VI Section 375-33(A) of the Albany City Code requires a site plan review for “All new commercial, industrial, and institutional development”, and Section 375-35(D)(2) requires site plan approval for “Proposed Development” that includes “The location and design or all uses not requiring structures such as off-street parking, loading and storage areas.”

65. No site plan approval was ever given for the parking lot and storage area constructed on the Hotel project site.

66. The clearing of the Hotel project site without obtaining the site plan approval required by law, and by the NYSDEC SPDES Permit was unauthorized and in violation of the law.

67. As a result of the above, the Common Council’s “investigation” and its Finding in the FEIS that no violations of law occurred, are, arbitrary and capricious, in excess of its jurisdiction, unsubstantiated by the evidence, incomplete, in violation of SEQRA, erroneous and illogical, and should be vacated.

AS AND FOR A SIXTH CAUSE OF ACTION

68. Petitioners repeat and reallege paragraphs 1 through 67.

69. On September 7, 2004, the Pine Bush Commission requested that the Common Council use the condition of the parking lot before it was illegally cleared and bulldozed, as the ecological baseline when describing existing conditions on the Hotel project site. The Common Council would then have to consider how to minimize and mitigate impacts to the property “including the complete restoration of the area containing the illegally constructed parking area.”: The NYSDEC made a similar request on May 19, 2005.

70. Notwithstanding these letters and other similar letters from other neutral experts, the Common Council did not make any Findings as to the condition of the land prior to its unauthorized clearing and bulldozing, and what the land would contribute to the ecology of the area if it was restored to its former condition. Instead the Findings considered only the condition of the Hotel project site after it had been cleared and bulldozed, as expressed in the reports of the Applicant’s expert Dr. Richard Futyma.

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

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

if restored to its original condition, might well contribute to the survival of the Karner Blue butterfly.

73. By the failing to consider the potential use of the property if it was restored to its original condition, the FEIS is arbitrary and capricious, unsubstantiated by the evidence, in violation of SEQRA, and incomplete, and should be vacated.

AS AND FOR A SEVENTH CAUSE OF ACTION

74. Petitioners repeat and reallege paragraph 1 through 73.

75. On or about May 19, 2005, the NYSDEC wrote to the DDP that the DEIS for the Hotel project, “contain very little in the way of 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”.

76. On September 7, 2004 the Pine Bush Commission, commenting on the DEIS, stated that the Common Council needed to, “Identify all development alternatives and associated environmental impacts including reduced footprint **and no-build alternatives.**”

77. Notwithstanding these and other requests for alternative analysis, the FEIS Findings failed to consider or take a hard look at any significant alternatives to the construction of the Hotel project or to any modified or scaled down version of the Hotel project. In particular, the FEIS Findings failed to consider whether the most appropriate use for the land would have been to restore the property to its former condition of Pine Bush barrens planted with Blue Lupines and other native plants, and allowed to develop, strengthen and supplement the population of Karner Blue butterflies and Frosted Elfin butterflies on Butterfly Hill.

78. The Findings present a Section entitled “Alternatives” (Section III) which claims that the City as lead agency analyzed alternatives including “No-action” and “Dedication to the Preserve”. The No-action alternative is dismissed in Finding III(C) because it “will result in a lost opportunity to achieve public benefits in the form of increased jobs and first class hotel

accommodations”. No further mention is made of the “Dedication to the Preserve” alternative, nor does that Findings even state whether the dedication would be to the Pine Bush Preserve, some distance away from the Hotel site, or to the Butterfly Management Area (Karner Blue Hill Preserve/Butterfly Hill) which adjoins the Hotel site.

79. The Findings do not discuss or analyze as an alternative whether the Hotel project site should be purchased for the Butterfly Management Area to strengthen the Karner Blue population on Butterfly Hill, or whether the City should impose a conservation easement on the site, or delay the Hotel project until such time as the Karner Blue butterflies has recovered sufficiently to spread down the corridor being prepared for them and into the Preserve according to the Butterfly Recovery Plan.

80. As a result of the above, the FEIS violates SEQRA, is arbitrary and capricious and incomplete and should be vacated.

AS AND FOR A EIGHTH CAUSE OF ACTION

81. Petitioners repeat and reallege paragraphs 1 through 80.

82. As a result of a series of court cases, including Save The Pine Bush Inc. v. Common Council of the City of Albany, 188 AD2d 969, 591 NYS2d 897 (3rd Dept. 1992), the City of Albany is under court order to provide a Pine Bush Preserve of at least 2000 fire manageable acres, before development on potential preserve land will be allowed, and the City must consider the cumulative impact of other development projects on potential preserve land which the City’s might need to complete the Preserve.

83. The FEIS fails to list all of the various projects which may have a cumulative impact on the City’s ability to complete the Preserve, or to analyze these projects in any meaningful way.

84. In Finding II(2)(F)(8) of the FEIS the Common Council considered, under the topic “cumulative impacts”, whether “the City may seek permission to expand the landfill” at the

Rapp Road facility immediately across the Thruway from the Hotel project site. The Common Council stated in this Finding: “However, to date no application [for an expanded landfill] has been filed so any analysis would be pure speculation at this time”, and the Common Council made no assessment as to whether the expanded landfill might impact the completion of the Preserve or otherwise injure the Karner Blue butterflies.

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

86. On November 16, 2005, the City of Albany filed an application to expand the landfill.

87. Finding II(2)(F)(8) of the FEIS, which refused to consider the landfill expansion as “speculative”, is obviously incomplete and a misrepresentation since the City of Albany filed an application to expand the landfill weeks before the FEIS was filed.

88. As indicated by Finding II(F)(1) of the FEIS, the Common Council failed to make a determination as to whether the goal of a 2000 acre fire manageable preserve had been achieved, notwithstanding that the holding in Save The Pine Bush v. Common Council of the City of Albany, 188 AD2d 969, 591 NYS2d 897 (3rd Dept. 1992), required that such a determination be made.

89. As a result of the above, the FEIS violated SEQRA, is arbitrary and capricious, unsubstantiated by the evidence, and incomplete, and it must be vacated.

AS AND FOR A NINTH CAUSE OF ACTION

90. Petitioners repeat and reallege paragraphs 1 through 89.

91. In numerous previous cases challenging the development of land in the Pine Bush, the City has represented to the public and to the courts that it has protected, or is about to protect, sufficient land in the Pine Bush, so that a 2000 fire manageable acre Preserve has been, or is about to be, achieved. Courts have relied on such representations to dismiss challenges to the adequacy of the Preserve lands so far protected.

92. In the present case, Section D of the FEIS reviews a number of “contrary” reports and information concerning whether the minimum fire manageable acreage had been achieved for the Preserve. Finding II(2)(D)(7)(b) of the FEIS found that at present the Pine Bush Preserve had over 2,735 acres of which approximately 1,850 acres were fire manageable. Finding II(F)(1) of the FEIS concludes : “As discussed above, certain documentation contained in the record clearly supports a determination that a 2,000 acre fire manageable Preserve has been obtained. However, the Common Council recognizes that other entities, including the Commission, have expressed disagreement with this conclusion.”

93. The 2002 Management Plan for the Pine Bush Preserve includes the 60 acre Fox Run Mobile Park as land dedicated to the Pine Bush Preserve by the City of Albany.

94. The Common Council included the 2002 Management Plan and hence Fox Run Mobile Park in its calculations as to whether a 2000 acre fire manageable preserved had been achieved in connection with the Hotel project.

95. On or about November 16, 2005, the City of Albany filed an EAF form, in connection with its proposed expansion of the Rapp Road land fill, which identified the property involved as “Construction of an approximately 24 acre landfill expansion of the existing Rapp Road Landfill onto lands currently known as the Fox Run Mobile Home Park.”

96. The City’s landfill application was submitted over a month before the City of Albany, as lead agency, concluded in the FEIS for the Hotel project site that the City had achieved the minimum acreage necessary to satisfy the court ordered requirement of a 2000 fire manageable acre preserve, which included the Fox Run property.

97. The City of Albany may not take inconsistent positions on the Fox Run land, and find that the land is both part of the Pine Bush Preserve, and at the same time land available for an extension of the land fill.

98. In January 2006, the City of Albany agreed to withdraw its application to use the Fox Run property for the landfill expansion, but asserted that it would use another parcel of land, previously dedicated to the Pine Bush Preserve for the landfill expansion.

99. The City of Albany asserts the position that it may withdraw land dedicated to the Preserve to use for the landfill or other needs whenever such needs arise.

100. It would be false and a misrepresentation for the City to represent that it had achieved or was close to achieving the goal of a 2000 fire manageable acre Preserve, when the City at the same time reserved the right to withdraw some or all of this land for its own purposes.

101. In numerous prior cases, including those cases set forth in Findings II(D)(3)(c),(d),(e),(f),and (g) of the FEIS, Courts have permitted development to proceed in the Pine Bush, based on the City's representation that certain lands were dedicated to the Pine Bush Preserve sufficient to form an adequately sized preserve.

102. If the City were permitted to withdraw such land previously dedicated to the Preserve and use it for its own purposes, the court decisions in the above cases would be based on a misrepresentation to the courts.

For the above reasons, the FEIS in the present case violates SEQRA, is arbitrary and capricious, unsubstantiated by the evidence, incomplete and a misrepresentation, and it should be annulled. The City of Albany should be enjoined from approving any more development in the Pine Bush until the City adopts a plan, approved by the courts ensuring that land dedicated to the Pine Bush Preserve will not be withdrawn and used for other purposes of the City.

WHEREFORE, Plaintiffs request that the court enter and order and judgment:

- 1) Vacating the Final Environmental Impact Statement for the Hotel project as arbitrary and capricious, incomplete, erroneous and deficient, and
- 2) Granting a Preliminary Injunction against further construction of the Hotel project during the pendency of this action, and
- 3) Enjoining the City from approving any further development projects in the Pine Bush until the City adopts a plan, approved by the courts ensuring that land dedicated to the

Pine Bush Preserve will not be withdrawn and used for other purposes of the City,
and

4) For such other a further relief as to this court seems just and proper.

Dated: Albany N.Y.

May 5, 2006

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