

**CITIZENS FOR SAINT PATRICK'S
5 Ball Place
Watervliet, NY 12189**

August 23, 2012

To the Watervliet City Council:

The following written comments are provided to the City Council in response to the Nigro Supplemental Project Report submitted earlier this month. These comments are in addition to other written comments and letters and testimony to the Council from the Citizens for Saint Patrick's.

The City Council Has Failed to Comply with the State Environmental Quality Review Act:

The City Council has failed to discharge its initial duty under the State Environmental Quality Review Act. The City Council has not yet (after four months of process) made a determination of significance on the Nigro proposal as required under 6 NYCRR 617.7. This determination of significance is required to be made by the lead agency (which the City Council has declared itself) within twenty calendar days of its receipt of an EAF and application or within twenty calendar days of its establishment as lead agency, whichever comes last. By either standard the time for the City Council to make a determination of significance passed months ago. All City Council actions on the Nigro project since that time are in violation of the State Environmental Quality Review Act. [NYS DEC SEQR Handbook, section B(10) How much time does the lead agency have to make a determination of significance?]

None of the mandated public assessment of Parts Two and Three of the Long Form Environmental Assessment Form presented by the Nigro organization has been performed. At least, if any such review has been performed, it has not been made available to the public through repeated FOIL requests.

A determination of significance is the most critical step in the SEQR process. This is the step in which the lead agency must decide whether or not a proposed Type I or Unlisted action is likely to have a significant adverse impact upon the environment. If the lead agency finds one or more significant adverse environmental impacts, it must prepare a positive declaration identifying the significant adverse impact(s) and requiring the preparation of an Environmental Impact Statement (EIS). If the lead agency finds that the action will have no significant adverse impacts on the environment, no EIS is necessary and the lead agency must prepare a negative declaration.

There are serious consequences for municipal failure to comply with the State Environmental Quality Review Act. See, for example, *Yellow Lantern Kampground v. Town of Cortlandville*, 279 AD2d 6 (3rd Dept. 2000). In that case the Supreme Court, Appellate Division, Third Department annulled a municipal board's rezoning action because the Town Board had failed to complete Part 3 of the environmental assessment form (EAF) although in completing the form the board had classified certain impacts as potentially large. The EAF specifically directs the lead agency to complete Part 3 of the EAF if any impact is classified as potentially large in Part 2 of the EAF. Further, the failure to complete Part 3 of the EAF was not excused under the authority to modify the EAF. Although a lead agency may modify the EAF to better serve its implementation of SEQR provided the modified form is as comprehensive as

the model form [6 NYCRR 617.2(m)], there was no evidence in the record to show that the Town Board had done so.

Wrapping the City Council's process to date in the authority of the City Charter will not excuse failure to comply with SEQR. In a very early case, *Rye Town/King Civic Assn. v. Town of Rye* 2 AD2d 474 (2nd Dept. 1981), the Town's informal review of environmental impacts, not conducted according to SEQR's procedures was found to be inadequate. Strict (or "literal") compliance with the procedures was held to be required to ensure that the mandates of the law were met.

Delaying the City Council's SEQR determination to require redesign of the project, balancing perceived social and economic benefits against environmental and social harm cannot justify a negative declaration. Says The SEQR Handbook, "The determination of significance is a threshold determination which should not balance benefits against harm, but rather should consider whether a proposal has any probable significant adverse impacts. Such balancing may only be done in Findings following an EIS." [The SEQR Handbook, Section B(6)]

The Court of Appeals found thirty years ago that the remedy for an agency's failure to comply with SEQR was to nullify the action taken or approved by that agency. *Tri-County Taxpayers v. Town Board* 55 NY2d 41 (1982). The DEC SEQR Handbook states that in most cases, the matter is sent back to the agency for it to make a determination of significance; in a few cases, courts have ordered that EISs be prepared.

This proposal is not consistent with City's Comprehensive Plan:

In March 2012 the City Council adopted the City's first comprehensive plan. Consistent with that comprehensive plan, the City's Planning Board, as an overall statement issued on June 6, 2012, urged the City Council to consider "whether the proposed project and a zoning change of the parcel from R-3 to B-1 is an appropriate use and benefit for the neighborhood and the entirety of the City of Watervliet."

While the Nigro proponents identified and quoted with approval Action Item 8.3 of the adopted Comprehensive Plan, they did not make any reference to other sections of the Comprehensive Plan, all of which call for preservation and improvement of residential neighborhoods in the City. Nowhere in the Comprehensive Plan as adopted is there any contemplation of large scale big box development in residential neighborhoods, even in the existing B-1 zoning district.

Goal 2.1 of the Comprehensive Plan calls for housing rehabilitation. Destruction of the houses along 23rd Street does not support this goal. Comprehensive Plan Goal 2.3 is to continue home ownership and maximize the rate of homeownership. The developers contemplate removing twelve residential units from the City's housing stock.

This proposal clearly violates Comprehensive Plan Goal 6 to preserve and promote Watervliet's community character and the City's rich cultural and historic resources. In specific, the Nigro proposal violates Action Item 6.1 setting the goal to redevelop vacant buildings that have significant cultural or

historic significance to the city. The NYS Historic Preservation Officer has identified the Saint Patrick's site as eligible for the national and state registers of historic preservation.

The proposed destruction of this property is in contravention of the City's established comprehensive plan hierarchy of protection for its historic building resources. That hierarchy is:
Redevelop vacant structures and get them back on the tax roles
Adaptation of the exteriors of existing vacant buildings to appropriate new uses that respect
The existing built fabric of the structures and the City's built environment generally
Sensitive modification of existing buildings to accommodate new uses that are needed in Watervliet.

In aid of that hierarchy, Comprehensive Plan Action Item 6.2 calls upon the City to identify historic resources in the City for possible inclusion in local and/or state and federal historic districts. That action item has already been met through the efforts of the Citizens for Saint Patrick's. The New York State Historic Preservation Office has identified the Saint Patrick's property as a "highly intact urban church complex" with a church edifice that represents "an outstanding example of later 19th Century Gothic Revival ecclesiastical architecture in the Capital District". [NYS SHPO Determination of Eligibility, April 19, 2012]

The project proponents did not undertake the analysis required by the City Council.

For example, under the topic "Land Use", the City Council directed the Nigro proponents to "evaluate and compare the merits of the proposed development versus the merits of development" of "small scale urban infill consisting of commercial shops along 19th Street and residential uses along 5th Avenue, 6th Avenue and 23rd Street".

The tax value of the property bordered by 19th Street to the south, 6th Avenue to the west, 23rd Street to the north and 5th Avenue to the east, as reported on the 2012 Final Assessment Role is \$2,600,700.00. See Table A appended. This Final Assessment assigns a taxable value of \$1,700,000.00 to the Saint Patrick's property, a far cry from the "current tax exempt status" assumed by the Nigro report. [Page 6, first part paragraph] There is no analysis of the tax yield from the existing formerly tax exempt property, if placed upon the tax rolls. The initial and supplemental reports make no account of the tax value to the City of the existing row of buildings on the south side of 23rd Street.

The developer's alternatives analysis [page 6, paragraph 3] does not explain why the costs of asbestos removal should be included as part of the demolition costs for a contemplated alternative smaller scale future for the property, since the State of New York has already required the property owner to remediate the asbestos in the buildings on the Saint Patrick's property. Certainly there can be no credible suggestion that the premises will require asbestos remediation twice.

There is no meaningful support in the supplemental report for the inflated number of \$380,000 for construction of a single family home, since half of the residential properties in the Saint Patrick's neighborhood are two family residences.

Only a resolutely suburban developer could characterize the beautiful row houses in the 500 block on the south side of 23rd Street as “obsolete residential structures”. Nor does the developer explain why it would be desirable to eliminate the residential structures on 23rd Street, if a mixed use alternative was pursued. The alternatives analysis the City Council requested does not call for replacement of the buildings on 23rd Street, merely keeping buildings on that street residential.

In terms of the streetscape along the north side of 19th Street, it is interesting that the initial site plan contemplated a “proposed retail commercial use” in the part of the revised site plan that is now identified as not possible to build due to the presence of the Gas House Creek storm sewer. Which is it? Did the project sponsors not make a proper disclosure of site conditions in the initial proposal, or are they exaggerating in the Supplemental Project Report to make the alternative development scenario required by the City Council seem less appealing? If the center portion of the 19th Street frontage is not suitable for infill retail development, how does that affect the supposed valuation of the initial proposal?

The valuation of the site in the alternatives analysis did not include any realistic tax value from the proposed commercial development along 19th Street. The City Council wanted this. All the developers say is “Economic impacts of the infill retail commercial development are obviously positive when compared to the current no-economic impact as an unused former church frontage.” [Supplemental Project Report, page 5]

Nor does the alternatives analysis identify any employment, sales tax contribution, or other benefit from the commercial property that could be constructed along 19th Street in the alternative required by the City Council.

The Supplemental Project Report says that “the property value impact [of something not identified] is the same when the current application for infill retail development is compared to the identical development suggested in the City Council comment.” But there is no explanation of that property value impact.

The proposed lots in the developer’s alternative are significantly larger than the existing lot configuration in the neighborhood. For example, along 23rd Street where there are presently 6 buildings and an empty parcel that is 84 feet along 23rd Street, the site plan [Supplemental Project Report Exhibit 4] contemplates only 6 lots. Clearly additional yield consistent with the existing development and the present R-3 zoning could be obtained, thereby increasing the development and tax yield from the property for the alternative analysis.

The developer’s Supplemental Project Report says “The economic impacts of residential infill uses fall well short of those associated with the proposed project” but does not explain the dimensions of that differing economic impact. Nor does the developer’s analysis offset the allegedly greater economic impacts against the unavoidable adverse impacts of a suburban style big box that requires demolition of National Register eligible properties upon the surrounding residential neighborhood.

Applicant Presented an Inadequate Visual Impact Assessment.

Anyone familiar with the views of Saint Patrick's in the various locations in the region will be stunned at the warped manner in which the project proponents have purported to assess the loss of Saint Patrick's as a visual resource. There is a detailed and by this time well-established protocol for assessing visual impact which the developer's consultants do not appear to have considered.

The DEC guidance policy "Assessing and Mitigating Visual Impacts" (pdf, 302 kb) was developed to provide direction to Department staff for evaluating visual and aesthetic impacts generated from proposed facilities. The policy and guidance defines what visual and aesthetic impacts are; describes when a visual assessment is necessary; provides guidelines on how to review a visual impact assessment; differentiates State from local concerns; and defines avoidance, mitigation and offset measures that eliminate, reduce, or compensate for negative visual effects.

The cornerstone of the DEC guidance document is its inventory of aesthetic resources of statewide or national significance. The scenic and aesthetic resources identified in the guidance have all been protected by law or regulation, and are therefore special places that the public has deemed worthy of protection due to the inherent aesthetic value associated with the resource. For example, one category is parks, which have been established by government to protect unique resources, and are accessible for use and appreciation by the public.

The DEC guidance defines State regulatory concerns, and separates them from local concerns. However, the DEC guidance may be used as a model by municipalities. Once local authorities have officially identified locally important visual resources, the guidance may be used to assist a lead agency in systematically evaluating potential visual and aesthetic impacts from a proposed development. The DEC and other professional guidance is readily available.

The Saint Patrick's Site is aesthetically significant for a variety of reasons. It is a property on or eligible for inclusion in the National and State Register of Historic Places [16 U.S.C. § 470a et seq., Parks, Recreation and Historic Preservation Law Section 14.07]. Even without the National and State Register eligibility, Saint Patrick's is an aesthetic resource of state significance because it is within the boundaries of New York State's first Urban Cultural Park, the RiversPark Urban Cultural Park [Parks, Recreation and Historic Preservation Law Section 35.15]. In addition, the visibility of Saint Patrick's from the Hudson River, which has been designated an "American Heritage River" by a Presidential Order under [PL 91-190] requires assessment.

Adverse visual impact is an appropriate reason to deny an application to destroy or damage a visual resource. In *Lane Construction Corp. v. Cahill*, 270 AD2d 609 (3d Dept. 2000), Appellate Division Third Department upheld the DEC Commissioner's determination to deny permits on the ground, among others, "that the project's impacts on the historical and scenic character of the community cannot be sufficiently mitigated." *Id.* at 610. The subject mine would have reduced the elevation of a prominent topographic feature to the community of East Nassau, known as Snake Mountain, by approximately 270 feet. In denying permits, the Commissioner had particularly relied on the Administrative Law Judge's conclusion that there was no way to mitigate the long term impact of removal of this prominent topographic feature on the community of East Nassau.

Supplemental Report Fails to Address Destruction of Historic Property.

The Supplemental Report's section on Historical Context fails to discuss the loss of a property determined to be eligible for listing on the National and State registers of historic property.

As has been stated previously, the Saint Patrick's property has been identified by New York's State Historic Preservation Officer as eligible for inclusion on the National and State Registers of Historic Places. That the present property owner does not wish to see the property so listed is irrelevant for purposes of the duty of the City Council, as lead agency, to fully and honestly assess the adverse impact of the loss of that property (and the adjacent historic residential buildings along 23rd Street) upon the City. This is particularly incumbent upon the City in light of the provisions in the Comprehensive Plan referenced above which mandate special consideration of historic resources in the City.

No Credible Negative Declaration Can Be Issued for the Nigro Proposal.

There is no possibility that an appropriate negative declaration can be issued for this project.

A negative declaration or "neg dec" is a determination by the lead agency that an action will not result in a significant adverse environmental impact and consequently no EIS will be prepared. In order for a lead agency to issue a negative declaration, it must be able to demonstrate that the action will not have a significant adverse environmental impact. In making decisions on significance, the lead agency must take a hard look at all relevant impacts of the whole action, not just those within its immediate jurisdiction, and document its reasoning in writing.

A negative declaration cannot balance whether the beneficial aspects of a proposed action will outweigh its adverse impacts. Rather, the determination of significance for an action must consider whether the proposal has any probable significant adverse environmental impacts. Even the Nigro proponents of this rezoning have acknowledged there are various significant adverse environmental impacts of their project, not the least of which is destruction of a major historic property determined by the State Historic Preservation Office to be eligible for listing on the National and State Registers of Historic Places.

Nor can the Nigro proposal be a conditioned negative declaration.

A conditioned negative declaration (CND) is a form of negative declaration which may be used for Unlisted actions only, and only in limited circumstances. Use of a CND can be appropriate when a lead agency concludes that a proposed action may have a potentially significant adverse impact on the environment, but the impact can be eliminated or adequately mitigated by conditions imposed by the lead agency, without the need for additional environmental studies. Use of the CND acknowledges that without imposition of conditions by the lead agency, the action may have potentially significant impacts. In situations where those impacts are readily mitigated or avoided, use of the CND allows an agency to issue an approval with enforceable conditions. When a lead agency uses the CND process it must consider the whole action and all relevant impacts in identifying appropriate conditions.

The CND must meet the conditions of legal sufficiency in the same fashion as other determinations of significance. A CND must show, in written form, under 6 NYCRR 617.6(g)(2) that the whole action was considered and that all relevant areas of environmental concern were identified and thoroughly analyzed. A reasoned elaboration must be given as to why any areas of concern would not constitute significant adverse environmental impacts. The lead agency must document its conclusion that any potential impacts are not significant, or that any potentially significant impacts would be adequately mitigated through either the standards within the jurisdictions of the lead and other involved agencies, or through the special conditions of the CND.

In addition, there are specific procedural requirements a lead agency must be able to meet to use a CND. A CND may only be used for Unlisted actions that are initiated by applicants and that require agency approval or a decision to provide funding. Issuance of a CND must be based on coordinated review (see 617.6(b)(3)), thereby providing opportunity for full consideration of the concerns of other involved agencies. This coordinated review must be for the entire project, not a segmented element of it. Unless the City Council reverses course at this point and includes the City of Watervliet Zoning Board of Appeal and its mandated use variance for any business activity within 200 feet of any residential district under the provisions of City of Watervliet Zoning Code §272-22, this project could not be considered for a CND.

The conditions appropriate for use in a CND are those outside the normal jurisdiction of the agency. A condition that requires analysis of the results of a future study is inappropriate. Such information must be available prior to determining significance. There is no suggestion that a city council does not have a full array of powers associated with a site specific rezoning. Therefore, it is difficult to envision a condition for the conditioned negative declaration that might be outside the normal jurisdiction of the City Council.

But the condition that prohibits use of the CND for the Nigro project is the requirement in 6 NYCRR 617.7(d)(1)(iii) that the SEQR conditions imposed [see 617.3(b) and 617.7(d)(1)(iii)] have eliminated or reduced the identified potentially significant adverse impact(s) to a non-significant level. Using the criteria in the SEQR regulations, there is no credible argument that can be made that destruction of a property determined eligible for the National and State Registers of Historic Places can be mitigated so as to be “nonsignificant”.

What the City Council Can Do:

The only legally acceptable actions by the City Council at this point are:

1. Make a decision to deny the Nigro application. This decision does not require any additional environmental review. Legislative bodies have the authority to refuse to entertain (not to consider) certain applications including petitions to change the zoning classification of a parcel. If the legislative body chooses not to entertain the petition they do not have to complete SEQR in making that decision. This decision not to undertake a discretionary act has been placed on the Type II list (see 6 NYCRR Section 617.5). [The SEQR Handbook, Third Edition, 2010, page 15]

2. Issue a positive declaration of environmental significance and require an environmental impact statement.

Any other action of the City Council is in clear violation of the State Environmental Quality Review Act, its regulations, and the 30+ years of case law developed on this statute.

Respectfully submitted,

Citizens for Saint Patrick's

TABLE A:
EXISTING TAX VALUATION
CITY OF WATERVLIET
2012 FINAL ASSESSMENT ROLL

Tax value to be eliminated:		2011		2012
510 23 rd Street	Mielewski Family Trust	\$75,000	two family	\$185,000
512 23 rd Street	Walter J. Schlegel	\$75,000	two family	\$185,000
514 23 rd Street	Jennifer A. Ashline	\$70,000	two family	\$150,000
516 23 rd Street	Todd Senecal	\$81,100	two family	\$150,000
518 23 rd Street	Tim Hunziker	\$81,100	two family	\$118,000
520 23 rd Street	Kimberly Kachougian	\$81,100	two family	<u>\$156,700</u>
				\$944,700.00
 Valuation of St. Patrick's with existing structures:				
32.50-3-24	St. Patrick's Athletic Field	\$43,700	athletic field	\$55,000
32.58-4-1	St. Patrick's 2.9 acres	exempt	supermarket	<u>\$1,700,000</u>
Tax value to be lost				\$2,699,700.00