

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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In the Matter of the Application of

RIVERKEEPER, INC., THE CARY INSTITUTE OF
ECOSYSTEM STUDIES, INC., JOHN MYLOD, ANTHONY
OLHEISER, EILEEN HAYDEN and HOLLY WAHLBERG,

Petitioners,

for a judgment pursuant to Article 78 and
Section 3001 of the Civil Practice Law and Rules,

-against-

The CITY OF POUGHKEEPSIE, a municipal corporation,
the COMMON COUNCIL OF THE CITY OF POUGHKEEPSIE,
JOHN TKAZYIK, in his capacity as Mayor of the City of
Poughkeepsie, and SEAWAY NAVIGATION AND TOURS,
LTD., a domestic corporation,

Respondents.
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Index No. 2011-5238

**Notice of Verified
Petition**

Oral Argument
Requested

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PLEASE TAKE NOTICE that, upon the annexed petition, verified on the 29th day of June, 2011, together with all of the exhibits annexed thereto, an application will be made to the Supreme Court of the State of New York, County of Dutchess, at the Courthouse located at 10 Market Street, Poughkeepsie, New York, on the 17th day of August, 2011, at 9:30 a.m., or as soon thereafter as counsel can be heard, for a judgment pursuant to Article 78 and Section 3001 of the New York Civil Practice Law and Rules ("CPLR"), granting the relief sought by the petition, awarding petitioners their costs and disbursements, and providing such other and further relief as the Court may deem just and proper under the circumstances.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR § 7804(c), respondents are required to serve verified answers and supporting affidavits, if any, upon Petitioner at least five days prior to the above-referenced return date.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR §§ 7804(b) and 506(b), Dutchess County is designated as the venue of this proceeding, it being the county where the material events complained of in the Verified Petition have occurred.

ATTORNEYS FOR PETITIONERS



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Jasmine Hosein, Legal Intern
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Dated: June 29, 2011
White Plains, New York

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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In the Matter of the Application of

RIVERKEEPER, INC., THE CARY INSTITUTE OF
ECOSYSTEM STUDIES, INC., JOHN MYLOD, ANTHONY
OLHEISER, EILEEN HAYDEN and HOLLY WAHLBERG,

Petitioners,

for a judgment pursuant to Article 78 and
Section 3001 of the Civil Practice Law and Rules,

Index No. 2011-4208

-against-

**Verified Petition
and Complaint**

The CITY OF POUGHKEEPSIE, a municipal corporation,
the COMMON COUNCIL OF THE CITY OF POUGHKEEPSIE,
JOHN TKAZYIK, in his capacity as Mayor of the City of
Poughkeepsie, and SEAWAY NAVIGATION AND TOURS,
LTD., a domestic corporation,

Oral Argument
Requested

Respondents.
-----X

Petitioners, by their attorneys, Pace Environmental Litigation Clinic, Inc., respectfully
allege as follows:

NATURE OF THE PROCEEDING

1. This is a proceeding for a judgment pursuant to Article 78 of the New York Civil
Practice Law and Rules (“CPLR”), as well as an action for a declaratory judgment
pursuant to CPLR § 3001, and for injunctive relief pursuant to CPLR § 6301.¹

Petitioners challenge determinations of respondents City of Poughkeepsie (“City”), the
Common Council of the City of Poughkeepsie (“Common Council”) and Mayor John

¹ This practice of combining Article 78 claims with plenary claims in a “hybrid” pleading is
recognized by New York courts at all levels, including the Court of Appeals, and CPLR § 3017(b).

Tkazyik (collectively, the “Municipal Respondents”), as set forth in Common Council Resolution No. R-11-33, which was approved by the Common Council on April 23, 2011, and approved by Mayor Tkazyik on April 26, 2011 (“2011 Resolution”). A true and correct copy of the 2011 Resolution (provided by the City to Petitioners in response to a Freedom of Information Law request) is attached as Exhibit 1 to this Petition.

2. The 2011 Resolution authorized Mayor Tkazyik to enter into a license agreement with Respondent Seaway Navigation and Tours, LTD. (“Seaway”), whereby Seaway would be licensed by the City to use certain docking and bulkhead facilities located within Victor C. Waryas Memorial Park (“Waryas Park”) for purposes of running a for-profit tour boat operation on the Hudson River. As dedicated municipal parkland owned by the City, Waryas Park and its dock are required to be held in trust by the City for use by the public.
3. Upon information and belief, the license agreement authorized by the 2011 Resolution was executed by Mayor Tkazyik and Seaway on May 2, 2011 (“2011 License Agreement”). A true and correct copy of the 2011 License Agreement (provided by the City to Petitioners in response to a Freedom of Information Law request) is attached as Exhibit 2 to this Petition.
4. The 2011 License Agreement purports to authorize Seaway to utilize the only public floating dock within the City (the “Waryas Park public dock”) as the home port for Seaway’s tour boat, the “Mystère,” for a period of ten years. In consideration for the right to utilize the Waryas Park public dock as the Mystère’s home port, Seaway

agreed to pay the City an annual fee of \$2,500 in monthly installments of \$233.24 per month. *See* Exhibit 2, ¶ 6.

5. Upon information and belief, the *Mystère* is approximately 60 feet in length (not counting her mooring lines) and the Waryas Park public dock is approximately 70 feet in length. Thus, virtually the entire Waryas Park public dock is blocked from use by the public whenever the *Mystère* is moored. *See* recent photos of the *Mystère* moored at the Waryas Park public dock attached as Exhibit 3 to this Petition.
6. For decades, the Waryas Park public dock has been utilized by countless area residents, local businesses and educational and research institutions to access the navigable waters of the Hudson River for recreational, commercial, educational, and scientific research purposes. The Waryas Park public dock has also been heavily utilized by area residents for landside recreational purposes such as fishing from the dock, sightseeing and socializing. This dock has historically provided these area residents, businesses and institutions with free and convenient access to the Hudson River. These important public uses have now been eliminated and/or severely restricted as a result of the virtually exclusive use of the Waryas Park public dock by Seaway whenever the *Mystère* is moored, which, upon information and belief, averages approximately 20 hours per day.
7. As detailed herein, the 2011 Resolution, the 2011 License Agreement, and Seaway's resulting virtually exclusive use of the Waryas Park public dock since approximately April 27, 2011, violate New York law as follows: (a) the Municipal Respondents have violated the State Environmental Quality Review Act, Article 8 of the New York

Environmental Conservation Law (“ECL”), and its implementing regulations at 6 NYCRR Part 617, (collectively, “SEQRA”), insofar as they erroneously, arbitrarily and capriciously determined that their 2011 Resolution to enter into the 2011 License Agreement constituted a “Type II” action, which resulted in the City undertaking no environmental review whatsoever with respect to the determination to license the use of the Waryas Park public dock to Seaway; (b) the Municipal Respondents have violated the common law public trust doctrine insofar as they have alienated dedicated municipal parkland without express state legislative approval; (c) the Municipal Respondents have violated the common law public trust doctrine insofar as the 2011 Resolution and the 2011 License Agreement unlawfully diverted property held by the City for public use to a private, commercial use; and (d) the Municipal Respondents erred as a matter of law, acted arbitrarily and capriciously, abused their discretion and violated lawful procedure when they approved the 2011 Resolution and entered into the 2011 License Agreement without first complying with the requirements of the City of Poughkeepsie Waterfront Consistency Review Law set forth at Chapter 18 1/2 of the Code of Ordinances, City of Poughkeepsie.

8. Petitioners respectfully request that the Court: (a) declare that the Municipal Respondents violated SEQRA when they determined that approval of the 2011 Resolution authorizing the 2011 License Agreement with Seaway was a “Type II” action not subject to further environmental review; (b) declare that the 2011 Resolution, and the resulting 2011 License Agreement, by which the Municipal Respondents purported to authorize the virtually exclusive use of the Waryas Park

public dock by Seaway, and excluded countless other members of the public from using and enjoying this established public resource, constitutes an alienation of parkland in violation of the common law public trust doctrine; (c) declare that the 2011 Resolution, and the resulting 2011 License Agreement, by which the Municipal Respondents purported to authorize the virtually exclusive use of the Waryas Park public dock by Seaway, and excluded countless other members of the public from using and enjoying this established public resource, unlawfully diverted property held by the City for public use to a private, commercial use in violation of the common law public trust doctrine; (d) annul and vacate the 2011 Resolution and the 2011 License Agreement; (e) enjoin Seaway to immediately relocate the Mystère from the Waryas Park public dock and to immediately cease commercial operation of the Mystère from the Waryas Park public dock; (f) enjoin the Municipal Respondents from granting any new licenses, leases or other approvals to Seaway or any other tour boat operator that authorize the use of the Waryas Park public dock to the exclusion of the public, absent (i) proper review being conducted under SEQRA; (ii) direct and explicit approval from the State Legislature for the operation of a for-profit tour boat from the Waryas Park public dock; and (iii) proper review being conducted by the City's Waterfront Advisory Committee pursuant to the City's Waterfront Consistency Review Law; (g) grant Petitioners their costs and disbursements of this proceeding; and (h) grant such other and further relief as the Court deems just and proper under the circumstances.

THE PARTIES

Petitioners

9. Petitioner Riverkeeper, Inc. (“Riverkeeper”) is a 501(c)(3) not-for-profit corporation with its offices located at 20 Secor Road, Ossining, New York 10562. Riverkeeper is a member-supported watchdog organization with approximately 4,000 active members, many of whom reside in the Hudson Valley, including within the City of Poughkeepsie. Riverkeeper is dedicated to defending the Hudson River and its tributaries and protecting the drinking water supply of nine million New York City and Hudson Valley residents. For more than 44 years Riverkeeper has stopped polluters, championed public access to the river, influenced land use decisions, and restored habitat, benefiting the natural and human communities of the Hudson River and its watershed. Having frequently utilized the Waryas Park public dock in the past to moor its patrol boat, the R. Ian Fletcher, for public outreach and other purposes, Riverkeeper brings this proceeding on its own behalf, as well as on behalf of its members who have used, and who intend to continue to use, the dock. After learning of the City’s 2010 license agreement with Seaway, and that the City was considering amending the agreement to attempt to cure legal defects in that agreement, on April 4, 2011, counsel for Riverkeeper wrote to Mayor Tkazyik and the members of the Common Council to raise concerns about violations of SEQRA and the public trust doctrine and to “respectfully request[] that the City cease and desist from any further action concerning this plan, and that the City take no further actions to deprive the public of its right of access to the Hudson River and its right to recreate on public

parkland, until such time that the City and Riverkeeper meet to discuss the City's intentions and attempt to resolve any potential disputes without the need for litigation." A true and correct copy of Riverkeeper's April 4, 2011 letter to the City is attached as Exhibit 4 to this Petition. Notwithstanding the concerns raised by Riverkeeper and other concerned members of the public, the Municipal Respondents approved the 2011 Resolution and entered into the 2011 License Agreement with Seaway approximately one month later.

10. Petitioner Cary Institute for Ecosystem Studies, Inc. ("Cary Institute") is a 501(c)(3) not-for-profit corporation focused on environmental research and education, with its offices located at 2801 Sharon Turnpike (Route 44), Millbrook, New York 12545. For more than twenty-five years, Cary Institute scientists have been investigating the complex interactions that govern the natural world. Their objective findings lead to more effective policy decisions and increased environmental literacy. Focal areas include air and water pollution, climate change, invasive species, and the ecological dimensions of infectious disease. Cary institute has been using the Waryas Park public dock for over 20 years for purposes of boarding and loading its boat with researchers and scientific equipment. After learning of the City's 2010 license agreement with Seaway, on March 29, 2011, Stuart Findlay, Ph.D., a Senior Scientist at Cary Institute, wrote to Mayor Tkazyik to "strongly encourage [him] to reconsider th[e] agreement so that science may continue, safety is not compromised and the people of NY can enjoy their natural resources." Dr. Findlay further suggested in his letter that the City "hold a public hearing on this matter to gather information from all

users of this public facility.” A true and correct copy of Dr. Findlay’s March 29, 2011 letter to Mayor Tkazyik is attached as Exhibit 5 to this Petition. Notwithstanding the concerns raised by Dr. Findlay on behalf of Cary Institute, the Municipal Respondents approved the 2011 Resolution and entered into the 2011 License Agreement with Seaway approximately one month later.

11. Petitioner John Mylod is an individual who resides in Poughkeepsie, and has been a supporting member of Riverkeeper going all the way back to the 1980s. For approximately 35 years, Mr. Mylod has been a commercial fisherman on the Hudson, fishing primarily for shad, river herring and blue crab. Mr. Mylod also frequently uses and enjoys the Hudson River for recreational activities and aesthetic enjoyment. For over 25 years, Mr. Mylod has also been a member of the New York State Department of Environmental Conservation’s (“DEC”) Hudson River Estuary Management Advisory Committee, and has actively participated in helping to develop a long-term management plan for the estuary. For decades, Mr. Mylod has frequently used Waryas Park, including its public dock, in his commercial and recreational endeavors. Mr. Mylod has also repeatedly visited Waryas Park since the arrival of the *Mystère* in late-April 2011, and has personally observed that the *Mystère*’s presence blocks virtually the entire dock from any reasonable use by the public. Mr. Mylod has also observed that the presence of the *Mystère* at the public dock creates unsafe conditions for boaters and other members of the public who may attempt to use the few remaining feet of dock space for boating or other activities. Mr. Mylod has also observed members of the public who have attempted to utilize the Waryas Park public

dock, and the nearby boat ramp, ultimately decide that attempting to do so was unsafe in the presence of the *Mystère*, and abandon their efforts to access, use and enjoy the Hudson River. Mr. Mylod is very concerned that the public's right and ability to use the Waryas Park public dock was sacrificed by the Municipal Respondents: (1) without any genuine effort having been made by the Municipal Respondents to notify the public of the City's intent to license the use of the dock to a private, for-profit enterprise or to receive feedback about the proposal from the public (such as might be obtained at a public hearing); (2) with no environmental review whatsoever; and (3) without any waterfront consistency review by the City's Waterfront Advisory Committee.

12. Petitioner Eileen Hayden is an individual who resides at 10 Gaskin Road, Poughkeepsie, New York. Ms. Hayden is the former Director of the Dutchess County Historical Society and has personally used and enjoyed the Waryas Park public dock for approximately 20 years for personal, recreational, and aesthetic enjoyment. Ms. Hayden frequents the park as part of an exercise regime that involves walking the waterfront and stopping on the dock to enjoy watching the boats come in and out. Ms. Hayden is also part of a group that engages in exercise on the waterfront. She enjoys watching the boats and jet skis during this time and believes the river is "as exciting a place as you can be." Since the arrival of the *Mystère*, Ms. Hayden has observed members of the public attempting ingress and egress from the dock for recreational boating, which they could not accomplish. Ms. Hayden is very concerned that the public has lost access to the water, which was a struggle to obtain after the industry in

the area moved. Ms. Hayden is directly affected by this as her personal and aesthetic enjoyment includes observing the public's activities on the water. Ms. Hayden is also concerned that many of the low income people who have historically utilized the dock would not be able to afford tickets on the *Mystère*, leaving them without access to the river.

13. Petitioner Anthony Olheiser is an individual who resides at 16-2A Holmes Street, Poughkeepsie, New York 12601. Mr. Olheiser owns a 15-foot boat that he uses recreationally on the Hudson River. Prior to the *Mystère's* arrival at the Waryas Park public dock, Mr. Olheiser regularly used the dock as part of his normal practice of launching his boat into the Hudson River. He would moor his boat to the dock after his initial launch from the neighboring boat ramp, which enabled him to park his truck and trailer and then return to his boat before heading out on to the river. He would again tie up at the public dock upon his return to shore so that he could drive his truck and trailer down to the river to load his boat back on to the trailer. Mr. Olheiser has visited Waryas Park since the arrival of the *Mystère*, and has been unable to tie up at the dock due to the presence of the *Mystère*. He is very concerned about his own and other boaters' ability to safely launch their craft without reliable access to the Waryas Park public dock.

14. Petitioner Holly Wahlberg is an individual who resides at 35 Garfield Place, Poughkeepsie, New York. Ms. Wahlberg has been a resident of Poughkeepsie for 15 years. Ms. Wahlberg walks her dog around the city and to Waryas Park regularly. Ms. Wahlberg and her dog stop for extended periods of time to enjoy watching the

boats launch from the Waryas Park public dock and to enjoy the views from the dock. Ms. Wahlberg has frequented the dock since the arrival of the *Mystère* in late-April 2011, and is upset that her own and the public's ability to use the dock has effectively been eliminated by the *Mystère*'s presence.

Respondents

15. Respondent City of Poughkeepsie is a municipal corporation within the State of New York.
16. Respondent Common Council of the City of Poughkeepsie is the primary legislative body of the City of Poughkeepsie.
17. Respondent John Tkazyik is the Mayor of the City of Poughkeepsie.
18. Respondent Seaway Navigation and Tours, LTD., is, upon information and belief, a for-profit, domestic business corporation. According to the New York State Department of State's records (last reviewed June 28, 2011), Seaway's principal executive office is located at 9350 Dingle Hole Road, Phoenix, New York 13135. Upon information and belief, in connection with its operation of the *Mystère*, Seaway has been doing business under the name "Empire Cruise Lines." *See, e.g.,* <http://www.empirecruiselines.com/about/> (noting that the *Mystère* "still sails under Seaway Navigation and Tours, Ltd colors but given the importance of the region we now travel in, we established Empire Cruise Lines.") (last reviewed June 28, 2011). According to the New York State Department of State's records (last reviewed June 28, 2011), "Empire Cruise Lines, Inc." is an inactive corporation that was dissolved "by Proclamation/Annulment of Authority" on Septemeber 24, 1997.

FACTUAL BACKGROUND

19. Waryas Park is, upon information and belief, dedicated municipal parkland, located downtown in the City of Poughkeepsie, to the north of the Mid-Hudson Bridge, and to the south of the Walkway Across the Hudson. *See* Google satellite image attached as Exhibit 6 to this Petition. The park is uniquely located on the Hudson River and, upon information and belief, contains approximately nine acres of dedicated parkland and open space. Upon information and belief, Waryas Park was dedicated by the City in or around 1976. *See* photo of Waryas Park dedication plaque attached as Exhibit 7 to this Petition. All of the real property upon which Waryas Park is located is, upon information and belief, owned by the City.²
20. Located within Waryas Park is the Waryas Park public dock, which, upon information and belief, has for decades been utilized by the public to directly access the navigable waters of the Hudson River on boats or other floating craft for various recreational, commercial, educational and scientific research purposes.
21. In addition to accessing the navigable waters of the Hudson River on boats or other floating craft, upon information and belief, countless members of the public have

² Petitioners note that on April 25, 2011, they transmitted to the City a Freedom of Information Law request seeking, *inter alia*, “[a]ll records relating to how, and/or the process by which, any portion of Waryas Park was dedicated as, or otherwise became, municipal parkland, including, but not limited to: a. All records concerning the deed(s) for any transfer of ownership of real property to the City . . . c. All records concerning park record maps or related documents” A true and correct copy of Petitioners’ FOIL request is attached as Exhibit 8 to this Petition. While the City has provided certain documents in response to other categories of records requested in Petitioners’ April 25, 2011 FOIL request letter, it has not yet provided any records responsive to the above category, or other categories of records requested. The City has informed Petitioners that it is still in the process of searching for records responsive to these requests. Petitioners reserve the right to amend their Petition to assert additional causes of action relating to any violations by the Municipal Respondents of the Freedom of Information Law, and/or to submit additional documentation relating to Waryas Park’s status as municipal parkland, if and when such records are received from the City.

regularly used the Waryas Park public dock for other recreational purposes such as fishing from the dock, sightseeing and socializing.

22. Upon information and belief, Seaway operated the *Mystère* on the Erie Canal for approximately three years prior to moving her to Poughkeepsie.
23. Upon information and belief, in 2010, the Municipal Respondents and Seaway conducted negotiations concerning the possible relocation of the home port for Seaway's tour boat, the *Mystère*, to the Waryas Park public dock.
24. On or about November 1, 2010, the Common Council approved Resolution No. R-10-109 ("2010 Resolution"), which purported to authorize Mayor Tkazyik to enter into a license agreement with Seaway expressly allowing the *exclusive use* of the Waryas Park public dock by Seaway for a 10-year period. Upon information and belief, Mayor Tkazyik approved the 2010 Resolution on or about November 2, 2010. A true and correct copy of the 2010 Resolution (provided by the City to Petitioners in response to a Freedom of Information Law request) is attached as Exhibit 9 to this Petition.
25. Upon information and belief, the license agreement purportedly authorized by the 2010 Resolution was executed by Mayor Tkazyik and Seaway on or about November 15, 2010 ("2010 License Agreement"). A true and correct copy of the 2010 License Agreement (provided by the City to Petitioners in response to a Freedom of Information Law request) is attached as Exhibit 10 to this Petition. In consideration for the right to exclusively use the Waryas Park public dock, Seaway agreed to pay the

City an annual fee of \$2,500, in monthly installments of \$233.24 per month. *See* Exhibit 10, ¶ 6.

26. As noted above, the 2010 License Agreement explicitly provides that Seaway's use of the Waryas Park public dock would be *exclusive*. *See* Exhibit 10, ¶¶ 1, 10. Also notable, "Exhibit A" to the 2010 License Agreement, which purports to show the "docking and bulkhead facilities owned or under the control of CITY along or in the Hudson River at property owned by CITY," Exhibit 10, ¶ 1, purported to give Seaway exclusive use of not only the Waryas Park public dock itself, but also of a significant length of Waryas Park's Hudson River bulkhead and shoreline and a large area of the surface of the river itself abutting Waryas Park. *See* Exhibit 10 hereto at Ex. A.
27. On or about March 9, 2011, the New York State Office of Parks, Recreation and Historic Preservation ("OPRHP") transmitted a letter to Mayor Tkazyik, in which OPRHP raised numerous concerns about the facial illegality of the 2010 License Agreement. A true and correct copy of this letter (provided by the City to Petitioners in response to a Freedom of Information Law request) is attached as Exhibit 11 to this Petition.
28. Upon information and belief, after discussions between representatives of the Municipal Respondents and OPRHP, on or about April 6, 2011, the City transmitted a written response to OPRHP's March 9, 2011 letter, requesting that OPRHP review a new draft amended license agreement proposed by the Municipal Respondents. A true and correct copy of the City's April 6, 2011 transmittal to OPRHP (provided by the

City to Petitioners in response to a Freedom of Information Law request) is attached as Exhibit 12 to this Petition.

29. The City's April 6, 2011 letter to OPRHP contained misrepresentations and/or misleading assertions that were clearly designed to convince OPRHP that the Municipal Respondents' proposal to license the *Mystère* to use the Waryas Park public dock as its home port was not problematic from a public trust standpoint. For example, the City's letter stated that the new proposed license agreement "allows a private tour company to dock at *a portion of* the public dock" (emphasis added), but failed to reveal that the purported "portion" of the public dock that is blocked by the *Mystère* whenever she is moored is at least 90 percent of the safely useable dock space (60 foot boat, plus mooring lines, at an approximately 70 foot dock). *See Exhibits 3, 15.* The City's letter to OPRHP also stated that the amended license agreement proposed by the City "allows access to the public," but failed to state that such "access" is virtually meaningless in light of the *Mystère*'s size relative to the size of the dock and that the location of the so-called allowance of access to the public is at the very end of the dock (perpendicular to the river channel) where tidal flow and insufficient space often render it unsafe to attempt to moor most boats.
30. Despite (or perhaps as a result of) the above-referenced misrepresentations and/or misleading statements by the City in the April 6, 2011 letter to OPRHP, on April 19, 2011, OPRHP responded to the City's April 6, 2011 letter, and transmitted a new "redlined" version of the proposed amended license agreement that OPRHP said it believed would render the draft agreement a "true license agreement." A true and

correct copy of OPRHP's April 19, 2011 letter to the City (provided by the City to Petitioners in response to a Freedom of Information Law request) is attached as Exhibit 13 to this Petition.

31. Although OPRHP apparently, and erroneously, believed that its proposed edits to the amended license agreement transmitted to the City on April 19, 2011, might serve to cure or sanitize the amended license agreement legally, OPRHP still recognized that the practical effect of the agreement could be to deprive the public of its right and ability to use and enjoy the Waryas Park public dock. OPRHP went so far as to "emphasize" in its letter to the City that "OPRHP and many other state and local government agencies have long pursued policies to *advance the goal of enhancing public access to the Hudson River, including the provision of publicly accessible docking facilities.*" OPRHP's letter went on to "strongly encourage the City to administer the agreement in a fashion that continues to provide *some level of public access* to the boating dock in Waryas Park." *See* Exhibit 13, p. 2 (emphasis added).
32. Having received OPRHP's redlined edits and tacit "sign-off" (albeit with apparent reservations) to the then-draft amended license agreement, the Municipal Respondents moved with obvious and deliberate speed to approve a new resolution and execute the amended license agreement. Despite growing concern among Poughkeepsie residents and organizations like Riverkeeper (which has historically championed public access to the Hudson) and Cary Institute (which has long been involved in the collection of vital scientific data and regularly used the Waryas Park public dock in furtherance of its research) about the public's tragic loss of the use of the Waryas Park public dock

(*see* Exhibits 4 and 5, respectively), the Common Council promptly scheduled a special meeting to vote on whether to go forward with the amended license agreement. Upon information and belief, this special meeting was held on the morning of April 23, 2011, which was not just a Saturday morning, but the Saturday morning of Easter weekend. Upon information and belief, only a few members of the public were present at this meeting. While the Municipal Respondents apparently post video recordings of their legislative meetings on the internet, no such recording was made available to the public for the April 23, 2011 meeting. *See* <http://www.totalwebcasting.com/view/?id=cop#> (last reviewed June 28, 2011). The 2011 Resolution passed by a vote of 6-2, and was approved by Mayor Tkazyik on April 26, 2011. *See* Exhibit 1.

33. Upon information and belief, Seaway's tour boat, the *Mystère*, arrived and moored at the Waryas Park public dock on or about April 27, 2011. On May 2, 2011, the 2011 License Agreement was executed by Mayor Tkazyik and Seaway. *See* Exhibit 2. Upon information and belief, the *Mystère* has made the Waryas Park public dock her home port since her arrival in Poughkeepsie.
34. The practical effect on public access of the *Mystère* making the Waryas Park public dock her new home has been precisely what petitioners had feared. The *Mystère*'s actual use of the dock is virtually exclusive, regardless of the technical amendments reflected in the 2011 License Agreement. As noted previously, the *Mystère* takes up the vast majority of the dock whenever she is moored. When her mooring lines are accounted for, all that is left of the dock for the public to use for any purpose is a few

feet of dock on the southern end perpendicular to the river channel. *See* Exhibits 3, 15. This dock space is insufficient for many Hudson River boats to even attempt to moor in the presence of the *Mystère*. Even with boats for which this space could theoretically be sufficient, few if any responsible operators would attempt docking at this location because of unreasonable risk of damage to the operator's boat, the *Mystère*, or both.

FIRST CAUSE OF ACTION

(PURSUANT TO CPLR ARTICLE 78 AS AGAINST THE MUNICIPAL RESPONDENTS)

The Municipal Respondents erred as a matter of law, acted arbitrarily and capriciously, abused their discretion, and violated lawful procedure, when they determined under the provisions of SEQRA that the 2011 license agreement with Seaway was a “Type II” action, and accordingly failed to conduct environmental review.

35. Petitioners repeat and reallege the allegations set forth in Paragraphs 1 through 34 of this Petition as if fully stated herein.

36. The law is well settled that judicial review of a SEQRA determination is limited to determining “whether the challenged determination was affected by an error of law or was arbitrary and capricious, an abuse of discretion, or was the product of a violation of lawful procedure.” *East End Prop. Co. No. 1, LLC v. Kessel*, 46 AD3d 817, 851 [2d Dept. 2007]; *Matter of Vil. of Tarrytown v. Planning Bd. of Vil. of Sleepy Hollow*, 292 AD2d 617, 619 [2d Dept. 2002]. “An agency determination should be annulled if it is arbitrary, capricious or unsupported by the evidence.” *Matter of Trump on the Ocean, LLC v. Cortes–Vasquez*, 76 AD3d 1080, 1083 [2d Dept. 2010], quoting *Matter of Riverkeeper, Inc. v. Planning Bd. of Town of Southeast*, 9 NY3d 219, 232, [2007].

A determination is arbitrary if it is made without sound basis in reason and without regard to the facts. *See Merrick Auto Serv., Inc. v. Grannis*, 86 AD3d 895, 919 [2d Dept. 2011].

37. Under SEQRA, no agency may undertake, fund, or approve an action until the agency has complied with SEQRA's provisions. 6 NYCRR § 617.3(a). In particular, SEQRA requires that all agencies determine whether their actions may have a significant impact on the environment, and, if so, that they analyze the project to evaluate the extent of its impacts, as well as mitigation measures and project alternatives. 6 NYCRR § 617.1(c).
38. SEQRA sets forth detailed procedures for an agency to use in making initial determinations as to the degree of scrutiny that the action must receive in the course of SEQRA review, and whether an Environmental Assessment Form (“EAF”) and/or an Environmental Impact Statement (“EIS”) must be prepared. 6 NYCRR § 617.6. Agencies must begin by determining whether the subject action is a “Type I action,” a “Type II action,” or an “Unlisted action,” by applying the thresholds and other criteria set forth in 6 NYCRR §§ 617.4, 617.5 and 617.6. If an action is a Type II action, the agency has no further responsibilities under SEQRA. 6 NYCRR § 617.6(a)(1)(i). Otherwise, using an EAF, and applying the significance criteria at 6 NYCRR § 617.7(c), the agency must “thoroughly analyze the identified relevant areas of environmental concern” to determine if the Type I or Unlisted action may have one or more significant adverse impacts on the environment. 6 NYCRR § 617.7. The determination of significance must be set forth in writing, contain a reasoned

elaboration, reference any supporting documentation, and if the action “may include the potential for at least one significant adverse environmental impact,” an EIS must be prepared. 6 NYCRR §§ 617.7(a)(1) & (b)(4). A “Type I action carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS.” 6 NYCRR § 617.4(a)(1).

39. Upon information and belief, the Municipal Respondents did not prepare either an EAF or an EAS in connection with the 2011 Resolution or the 2011 License Agreement. Instead, the sum total of the Municipal Respondents’ purported efforts to comply with SEQRA appears to be a single “whereas” clause set forth in the preamble to the 2011 Resolution stating that the “Common Council . . . has determined that [the 2011 Resolution] constitutes a Type II action as defined by [SEQRA] and 6 NYCRR Part 617 . . .” *See* Exhibit 1, p. 1.
40. The actions that are designated as “Type II” (and thus require no additional environmental review) in the DEC’s regulations are set forth with specificity at 6 NYCRR § 617.5(c). If an action is not found on this “Type II” list, it must either be classified as “Type I” (if it is found on the specific list set forth at 6 NYCRR § 617.4(b)) or “unlisted.”
41. The Municipal Respondents’ approval of the 2011 Resolution, which authorized Mayor Tkazyik to enter into the 2011 License Agreement with Seaway, is not even arguably one of the actions contained on the “Type II” list set forth at 6 NYCRR § 617.5(c).

42. The single SEQRA “finding” set forth in the 2011 Resolution fails to even specify which action(s) on the “Type II” list the Municipal Respondents relied upon in making that finding. *See* Exhibit 1, p. 1.
43. The only indication of which Petitioners are aware concerning the Municipal Respondents’ basis for concluding that that 2011 Resolution and 2011 License Agreement constituted a “Type II” action is contained in a November 15, 2010 email that the City provided to petitioners in response to a Freedom of Information Law request. In that email, which responded to concerns raised by Mr. John Mylod (one of the Petitioners herein) with members of the City’s Waterfront Advisory Committee, the City’s Corporation Counsel indicated that he was “pretty much satisfied that the action of licensing the tour boat to dock at the existing dock is a Type II action under SEQRA, and therefore not a covered action under the definition of action in Chapter 18 1/2.”³ A true and correct copy of the Corporation Counsel’s November 15, 2010 email (provided by the City to Petitioners in response to a Freedom of Information Law request) is attached as Exhibit 14 to this Petition.
44. The Corporation Counsel pointed to 6 NYCRR § 617.5(c)(26), which reads “license, lease and permit *renewals*, or transfers of ownership thereof, where there will be no *material change in permit conditions or the scope of permitted activities.*” *See* Exhibit 14, p. 1 (emphasis added).

³ “Chapter 18 1/2” apparently refers to the City of Poughkeepsie Waterfront Consistency Review Law set forth at Chapter 18 1/2 of the Code of Ordinances, City of Poughkeepsie. Petitioners assert an independent cause of action herein concerning the Municipal Respondents’ violations of the Waterfront Consistency Review Law. *See* Petitioners’ 4th Cause of Action, *infra* ¶¶ 80-97.

45. Petitioners reiterate that the Municipal Respondents failed to specify in their SEQRA finding which action(s) on the “Type II” list the Municipal Respondents actually relied upon in making that finding. *See* Exhibit 1, p. 1. In any event, any finding by the Municipal Respondents that the 2011 Resolution and the 2011 License Agreement qualify as a “license, lease or permit renewal” would be facially erroneous based upon the plain language of the regulation. The 2011 Resolution, which authorized the City to enter into the 2011 License Agreement, simply did not “renew” any license, lease or permit. There was no factual or legal basis for the City to conclude that the 2011 Resolution or the 2011 License Agreement met any reasonable definition of a “renewal” of a license “where there will be no material change in permit conditions or the scope of permitted activities,” such as might satisfy 6 NYCRR § 617.5(c)(26).
46. “Strict, not substantial, compliance” with SEQRA is required by the statute . . . Anything less than strict compliance [] offers an incentive to cut corners and then cure defects only after protracted litigation, all at the ultimate expense of the environment.” *King v. Saratoga County Bd. Of Supervisors*, 89 NY2d 341, 348 [1996]; *Long Island Contractors' Ass'n v. Town of Riverhead*, 17 AD3d 590, 593 [2d Dep’t 2005]. Thus, once a violation of SEQRA has been established, the proper remedy is to annul whatever agency determinations may have been made in absence of full compliance with SEQRA. *See Chinese Staff & Workers Ass’n v. City of New York*, 68 NY2d 359, 369 [1986].
47. The Municipal Respondents’ erroneous finding that the 2011 Resolution authorizing the 2011 License Agreement was a “Type II” action clearly violated the requirements

of SEQRA, and the 2011 Resolution and 2011 License Agreement must be annulled and declared invalid on these grounds.

48. It is also noteworthy that had the Municipal Respondents conducted a legitimate environmental review in an EAF and/or EAS, as required by SEQRA, they would certainly have had their attention drawn to the full panoply of impacts resulting from the 2011 License Agreement with Seaway that needed to be analyzed. Obvious environmental impacts that should have been considered during the environmental review by the Municipal Respondents under SEQRA's "hard look" standard include impacts relating to Seaway's interference with appropriate and pre-existing park uses of the dock, such as (a) the general loss of recreational opportunity by the public; (b) visits from historic vessels; (c) visits from vessels associated with festivals such as the Clearwater Pumpkin Festival; (d) the use of the dock for staging, conducting and viewing boat races; and (e) the use of the dock for casual swimming.
49. Additional potential impacts that should have been reviewed and analyzed by the Municipal Respondents include impacts relating to (a) parking; (b) traffic; (c) visual impacts (including the loss of the view from the dock); (d) waste disposal; (e) noise; and (f) litter.
50. Another essential category of potential impacts that should have been analyzed by the Municipal Respondents relates to impacts upon the public health and safety. Public safety is considered an environmental impact that must be reviewed pursuant to SEQRA. *See, e.g., Scenic Hudson, Inc. v. Town of Fishkill Town Board*, 258 AD2d 654, 657 [2d Dept. 1999] (discussing, inter alia, potential environmental impacts,

including impacts on “public health and safety”); *Price v. Common Council of City of Buffalo*, 3 Misc3d 625, 629-33 [Sup. Ct. Erie Co. 2004] (holding that Common Council did not take “hard look” at public safety issues as required by SEQRA).

51. Upon information and belief, a Poughkeepsie resident drowned in the Hudson River on June 12, 2011, when his boat sunk near the Waryas Park public dock. Upon information and belief, the Dutchess County Sheriff’s Department had great difficulty accessing the dock during the recovery operation as a result of the presence of the *Mystère*. With only a few feet of dock space with which to work, the Sheriff’s patrol boats were forced to dock off the stern of the *Mystère* which, upon information and belief, made the transfer of the drowning victim from the patrol boat to the Waryas Park public dock difficult. *See* copies of select photographs of the above-referenced recovery operation attached as Exhibit 15 to this Petition.⁴

52. Because no SEQRA impacts analysis was ever performed by the Municipal Respondents in connection with the 2011 Resolution and 2011 License Agreement, it is unknown whether, and to what extent, the *Mystère*’s presence might have the potential to hamper future rescue and/or recovery operations by public safety personnel on the Hudson River. It is also presently unknown whether, and to what extent, the *Mystère*’s presence might create a hazard to boaters who may run into trouble in the river and not have the ability to quickly tie up at the Waryas Park public dock.

⁴ These photographs were downloaded from a web site with the following unified record locator: <http://jasonbrodbeck.com/jb/drowning-victim-recovery>.

53. Each of the Petitioners herein has standing to sue to enforce the Municipal Respondents' obligations under SEQRA. "A person who can prove that he or she uses and enjoys a natural resource more than most other members of the public has standing under . . . [SEQRA] to challenge government actions that threaten that resource." *Save the Pine Bush, Inc. v. Common Council of the City of Albany*, 13 NY3d 297, 301 [2009]. Each of the organizational and individual Petitioners herein has used the Waryas Park and its public dock for various recreational, commercial, educational and scientific research purposes in the past, and each of them intends to continue to use the dock for such purposes in the future. *See* ¶¶ 9-14, *supra*. In addition, certain of Riverkeeper's members have used Waryas Park and its public dock for various recreational, commercial, educational and scientific research purposes in the past, and each of them intends to continue to use the dock for such purposes in the future. *See, e.g.*, ¶¶ 9, 11, *supra*. As such, each of the Petitioners easily meets the standing requirements established by the Court of Appeals.

54. Based upon all of the above, the Municipal Respondents erred as a matter of law, acted arbitrarily and capriciously, abused their discretion and violated lawful procedure, when they determined under the provisions of SEQRA and its implementing regulations that approval of the 2011 Resolution authorizing the 2011 license agreement with Seaway was a "Type II" action not subject to environmental review.

SECOND CAUSE OF ACTION

**(FOR A DECLARATORY JUDGMENT AND
INJUNCTION AS AGAINST ALL RESPONDENTS)**

**Violation of the common law public trust doctrine:
Alienation of dedicated parkland without state legislative approval.**

55. Petitioners repeat and reallege the allegations set forth in Paragraphs 1 through 54 of this Petition as if fully stated herein.
56. Under New York common law, the Public Trust Doctrine prohibits the alienation of dedicated municipal parkland absent specific authorization of the New York State Legislature.
57. Absent such state legislative approval, diverting dedicated municipal parkland to a non-park purpose or non-park use, in whole or part, temporarily or permanently, even for another public purpose or use, constitutes an unlawful alienation.
58. Absent state legislative approval, releasing control of dedicated parkland to private for-profit interests constitutes an unlawful alienation of that parkland.
59. Absent state legislative approval, failure to preserve pre-existing, high-value, public uses of dedicated municipal parkland, such as the historic use of that parkland for public access to the navigable waters of the Hudson River, constitutes an unlawful alienation of that parkland.
60. The 2011 Resolution, and the resulting 2011 License Agreement, through which the Municipal Respondents purported to authorize the virtually exclusive use of the Waryas Park public dock by Seaway, excluding countless other public users of the

resource, constitute an alienation of parkland requiring the approval of the state legislature.

61. Upon information and belief, the state legislature has not been asked to approve, and has not approved, the 2011 Resolution and/or the resulting 2011 License Agreement, which authorize the virtually exclusive use of the Waryas Park public dock by Seaway.
62. The 2011 Resolution, and the resulting 2011 License Agreement, are therefore unlawful and in violation of the common law public trust doctrine.
63. Petitioners are injured and damaged by such illegal acts in that the public nature of Waryas Park and its public dock have been significantly and adversely affected, altered and transformed; because they have lost access they previously had and would otherwise have to Waryas Park and its public dock for public purposes; and because the encroachment of private, commercial uses into Waryas Park has adversely affected, and will continue to adversely affect, their use and enjoyment of Waryas Park.
64. Petitioners have no adequate remedy at law.
65. Petitioners are entitled to a judgment declaring that the 2011 Resolution, and the resulting 2011 License Agreement, which authorize the virtually exclusive use of the Waryas Park public dock by Seaway without approval of the state legislature, constitute an unlawful alienation of parkland.

66. All of the Respondents should be enjoined and ordered to immediately cease all commercial operations at the Waryas Park public dock unless and until the 2011 Resolution and the 2011 License Agreement are approved by the State Legislature.

THIRD CAUSE OF ACTION

(FOR A DECLARATORY JUDGMENT AND INJUNCTION AS AGAINST ALL RESPONDENTS)

Violation of the common law public trust doctrine: The 2011 Resolution and 2011 License Agreement unlawfully divert property held by the City for public use to a private commercial use.

67. Petitioners repeat and reallege the allegations set forth in Paragraphs 1 through 66 of this Petition as if fully stated herein.

68. “A municipality may hold property either in its corporate capacity as an ordinary proprietor or solely for the public use. Whether it can devote any part of its property even temporarily to a private use depends entirely upon the capacity in which it holds title.” *People ex rel. Swan v Doxsee*, 136 AD 400, 403 [2d Dept. 1903]. In this regard, the United States Supreme Court has stated: “In its streets, wharves, cemeteries, hospitals, court houses, and other public buildings, the [municipal] corporation has no proprietary rights distinct from the trust for the public. It holds them for public use, and to no other use can they be appropriated without special legislative sanction.” *Meriwether v. Garrett*, 102 US 472, 513 [1880]; *Cotrone v. City of New York*, 38 Misc2d 580 [Sup. Ct. Kings Co. 1962]; *accord American Dock Co. v. City of New York*, 174 Misc 183, 21 N.Y.S.2d 943, 957 [Sup. Ct. N.Y. Co. 1940], *aff’d*, 261 AD 1063, *aff’d*, 286 N.Y. 658 [1941].

69. “It has long been the rule that a municipality, without specific legislative sanction, may not permit property acquired or held by it for public use to be wholly or partly diverted to a possession or use exclusively private.” *Matter of Lake George Steamboat Co. v Blais*, 30 NY2d 48, 51 [1972].
70. Just as in *Lake George Steamboat Co.*, the 2011 Resolution and the 2011 License Agreement have demonstrably diverted a dock held by the City for public use to a private commercial use. Countless members of the public who have historically utilized the Waryas Park public dock are now unable to do so as a result of the almost constant presence of a for-profit enterprise operating from the public dock.
71. The fact that the 2011 License Agreement is titled a license agreement is not dispositive of whether the Waryas Park public dock has been “wholly or partly diverted to a possession exclusively private.” Far more relevant than the name of the document are the practical effects Seaway’s use of the dock has on the ability of the public to use and enjoy it. The name the parties give to an instrument “is not conclusive, for the court must look at the nature of the right, rather than to the name that the parties gave it, in order to learn its true character.” *Greenwood L. & P. J. R. Co. v. New York & G. L. R. Co.*, 134 NY 435, 439 [1892]; *see also Williams v. Hylan*, 126 Misc 807, 809-10 [Sup. Ct. N.Y. Co. 1926].
72. As alleged *supra*, upon information and belief, the *Mystère* is approximately 60 feet in length (not counting her mooring lines) and the Waryas Park public dock is approximately 70 feet in length. Thus, virtually the entire Waryas Park public dock is blocked from use by the public whenever the *Mystère* is moored. *See Exhibits 3, 15.*

Thus, regardless of whether the agreement between the Municipal Respondents and Seaway is titled a “license” or a “lease,” the *de facto* result of the Mystère’s presence is that the public is excluded and Seaway has virtually exclusive use of the dock.

73. The fact that the 2010 License Agreement explicitly provided that Seaway’s use of the Waryas Park public dock would be exclusive demonstrates the Municipal Respondents’ and Seaway’s original intent to provide Seaway with exclusive use of the dock. *See* Exhibit 10, ¶¶ 1, 10.
74. Upon information and belief, the state legislature has not been asked to approve, and has not approved, the 2011 Resolution and/or the resulting 2011 License Agreement, which authorize the virtually exclusive use of the Waryas Park public dock by Seaway.
75. The 2011 Resolution, and the resulting 2011 License Agreement, are therefore unlawful and violate of the common law public trust doctrine.
76. Petitioners are injured and damaged by such illegal acts in that the public nature of Waryas Park and its public dock have been significantly and adversely affected, altered and transformed; because they have lost access they previously had and would otherwise have to Waryas Park and its public dock for public purposes; and because the encroachment of private, commercial uses into Waryas Park has adversely affected, and will continue to adversely affect, their use and enjoyment of Waryas Park.
77. Petitioners have no adequate remedy at law.

78. Petitioners are entitled to a judgment declaring that the 2011 Resolution, and the resulting 2011 License Agreement, which authorize the virtually exclusive use of the Waryas Park public dock by Seaway without approval of the state legislature, constitute an unlawful alienation of parkland.

79. All of the Respondents should be enjoined and ordered to immediately cease all operations at the Waryas Park public dock unless and until 2011 Resolution and the 2011 License Agreement are approved by the State Legislature.

FOURTH CAUSE OF ACTION

(PURSUANT TO CPLR ARTICLE 78 AS AGAINST THE MUNICIPAL RESPONDENTS)

The Municipal Respondents erred as a matter of law, acted arbitrarily and capriciously, abused their discretion and violated lawful procedure when they approved the 2011 Resolution, and entered into the 2011 License Agreement, without first complying with the requirements of the City of Poughkeepsie Waterfront Consistency Review Law.

80. Petitioners repeat and reallege the allegations set forth in Paragraphs 1 through 79 of this Petition as if fully stated herein.

81. The City of Poughkeepsie Waterfront Consistency Review Law (“WCR Law”), set forth at Chapter 18 1/2 of the Code of Ordinances, City of Poughkeepsie (“City Code”), states that it is “intended to provide a framework for agencies of the City of Poughkeepsie to consider the policies and purposes contained in the Local Waterfront Revitalization Program (LWRP) when reviewing applications for actions or direct agency actions located in the coastal area; and to assure that such actions and direct actions are consistent with the said policies and purposes.” City Code § 18 1/2-2(b).

82. The WCR Law further states that “it is the purpose of this chapter to . . . permit[] the beneficial use of coastal resources while ***preventing . . . diminution of open space areas or public access to the waterfront . . .***” *Id.* § 18 1/2-2 (emphasis added).
83. Under the WCR Law, “[a]ll boards, departments, offices, other bodies or officers of the City of Poughkeepsie are responsible for the implementation of the LWRP within the bounds of their jurisdiction and must comply with this chapter, to the extent applicable, prior to carrying out, approving or funding any action.” *Id.* § 18 1/2-3.
84. The WCR Law explicitly requires that “[w]henever a proposed action is located in the Local Waterfront Area, an agency ***shall, prior to approving, funding or undertaking the action, make a determination that it is consistent with the LWRP policies set forth in Subsection (g) herein. No action in the Local Waterfront Area shall be approved, funded or undertaken without such a determination.***” *Id.* § 18 1/2-7(a) (emphasis added).
85. “Whenever an agency receives an application for approval or funding of an action or as early as possible in the agency’s formulation of a direct action to be located in the Local Waterfront Area, the applicant, or in the case of a direct action, the agency, ***shall prepare*** a coastal assessment (CA) to assist with the consistency review.” *Id.* § 18 1/2-7(b) (emphasis added).
86. “***Prior to making its determination of environmental significance under SEQRA, the agency shall solicit and consider the recommendation of the Waterfront Advisory Committee with reference to the consistency of the proposed action*** by referring a copy of the completed application, CA, environmental assessment form

(EAF) and all other relevant information to the Committee within 10 days of its receipt.” *Id.* § 18 1/2-7(c) (emphasis added).

87. “After referral from an agency, the Committee shall consider whether the proposed action is consistent with the LWRP policies set forth in Subsection (g) herein to the maximum extent practicable. The Committee shall require the applicant to submit all completed applications, CA's, EAF's and any other information deemed to be necessary to its consistency recommendations.” *Id.* § 18 1/2-7(d).

88. The term “agency” is broadly defined by the WCR Law as “[a]ny board, agency, department, office, other body or officer of the City of Poughkeepsie.” *Id.* § 18 1/2-4.

89. The Municipal Respondents are clearly encompassed within the WCR Law’s definition of “agency,” and are thus bound by the requirements of the WCR Law.

90. The term “actions” is broadly defined by the WCR Law as “[e]ither Type I or unlisted actions as defined in the S.E.Q.R.A. regulations (6 N.Y.C.R.R. Part 617) which are undertaken by an agency and which include:

(a) Projects or physical activities, such as construction or other activities that may affect the environment by changing the use, appearance or condition of any natural resource or structure, that:

(1) Are directly undertaken by an agency; or

(2) Involve funding by an agency; or

(3) Require one or more new or modified approvals from an agency or agencies.

(b) Agency planning and policy making activities that may affect the environment and commit the agency to a course of future decisions.

(c) Adoption of agency rules, regulations and procedures, including local laws, codes, ordinances, executive orders and resolutions that may affect the environment.

(d) Any combinations of the above.”

Id. § 18 1/2-4.

91. The actions of the Municipal Respondents challenged by Petitioners herein, *i.e.*, the approval of the 2011 Resolution, and the execution of the 2011 License Agreement by Mayor Tkazyik and Seaway, are clearly encompassed within the WCR Law's definition of "actions," and, as such, the Municipal Respondents were obligated to comply with the requirements of the WCR Law.
92. As set forth *supra* (Petitioners' First Cause of Action, ¶¶ 35-54, *supra*), the Municipal Respondents erroneously found that their approval of the 2011 Resolution and the execution of the 2011 License Agreement were "Type II" Actions requiring no further environmental review. Upon information and belief, the Municipal Respondents erroneously relied upon this incorrect SEQRA finding to excuse the 2011 Resolution and the 2011 License Agreement from coastal consistency review by the Waterfront Advisory Council pursuant to the WCR Law. *See* Exhibit 14, p. 1.
93. The 2011 Resolution, and the resulting 2011 License Agreement are unlawful as a result of the Municipal Respondents' blatant violations of the WCR Law.
94. Petitioners are injured and damaged by such illegal act in that the public nature of Waryas Park and its public dock have been significantly and adversely affected, altered and transformed, because they have lost access they previously had and would otherwise have to Waryas Park and its public dock for public recreational purposes, and because the encroachment of private, commercial uses into the public municipal park has adversely affected, and will continue to adversely affect, their use and enjoyment of the Park.

95. Petitioners have no adequate remedy at law.
96. Petitioners are entitled to a judgment declaring that the 2011 Resolution and the resulting 2011 License Agreement are unlawful as a result of the Municipal Respondents' blatant violations of the WCR Law.
97. All of the Respondents should be enjoined and ordered to immediately cease all commercial operations at the Waryas Park public dock unless and until the Municipal Respondents comply with the clear requirements of the WCR Law.

CONCLUSION

WHEREFORE, Petitioners respectfully pray that this Court render a judgment and order containing the following relief:

- a) Declaring that the Municipal Respondents violated SEQRA when they determined that approval of the 2011 Resolution authorizing the 2011 License Agreement with Seaway was a "Type II" action not subject to further environmental review.
- b) Declaring that the 2011 Resolution, and the resulting 2011 License Agreement, by which the Municipal Respondents purported to authorize the virtually exclusive use of the Waryas Park public dock by Seaway, and excluded countless other members of the public from using and enjoying this public resource, constitutes an alienation of parkland in violation of the common law public trust doctrine.
- c) Declaring that the 2011 Resolution, and the resulting 2011 License Agreement, by which the Municipal Respondents purported to authorize the virtually exclusive use of the Waryas Park public dock by Seaway, and excluded countless other members of the

public from using and enjoying this public resource, unlawfully diverted property held by the City for public use to a private commercial use in violation of the common law public trust doctrine.

- d) Annulling and vacating the 2011 Resolution and the 2011 License Agreement as a result of (1) Municipal Respondents' failure to conduct environmental review in violation of SEQRA; (2) Municipal Respondents' violations of the public trust doctrine; (3) Municipal Respondents' failure to obtain approval for the alienation and diversion from the State Legislature; and (4) Municipal Respondents' failure to refer the proposal to the Waterfront Advisory Committee for waterfront consistency review as required by the City's own WCR Law.
- e) Enjoining Seaway to immediately relocate the Mystère from the Waryas Park public dock and to immediately cease commercial operation of the Mystère from the Waryas Park public dock.
- f) Enjoining the Municipal Respondents from granting any new licenses, leases or other approvals to Seaway or any other tour boat operator that authorize the use of the Waryas Park public dock, absent (1) proper review being conducted under SEQRA; (2) direct and explicit approval from the State Legislature for the operation of a for-profit tour boat from the Waryas Park public dock; and (3) proper review being conducted by the City's Waterfront Advisory Committee pursuant to the WCR Law.
- g) Granting Petitioners their costs and disbursements of this proceeding; and

h) Granting such other and further relief as the Court deems just and proper under the circumstances.

ATTORNEYS FOR PETITIONERS

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Dated: June 29, 2011
White Plains, New York

VERIFICATION

STATE OF NEW YORK)
 : ss.
COUNTY OF WESTCHESTER)

Daniel E. Estrin, being duly sworn, deposes and says:

1. I have read the foregoing petition, and can state that its contents are based upon my knowledge, except as to matters alleged upon information and belief, which matters I believe to be true based on my review of pertinent documents and conversations with persons with personal knowledge.

2. I am an attorney for the petitioners in this proceeding. I am not a petitioner in this proceeding. I am signing this verification pursuant to Rule 3020(d)(3) of the New York Civil Practice Law and Rules because petitioners with personal knowledge of the allegations set forth in the petition are located in a different county from that of my office.

/s/ Daniel E. Estrin
Daniel E. Estrin

Sworn before me this
29th day of June, 2011

/s/ Notary Public
Notary Public