

**City of Newburgh -- Waterfront Development**  
**Update: August 2007**

On April 10, 2006 the City Council unanimously selected [Leyland Alliance](#) of Tuxedo, NY (with [Duany Plater-Zybert Architects](#)) as "master developer" for 30 plus acres of City-owned properties on and near the waterfront. In September 2006, the City of Newburgh entered into an Exclusivity Agreement with Leyland to conduct a Planning Charrette for the Project, and prepare a preliminary Concept Plan so as to officially commence the public review process for the Project under the State Environmental Review Act ("SEQRA") and its governing regulations. The Charrette was conducted in February 2007, and a Final Charrette Report was issued by Leyland in May 2007. The next step is the execution by the parties of a Development Agreement, and commencement of the SEQRA process.

**Development Agreement**

The Development Agreement would establish the general obligations and responsibilities of the parties for advancing the Project, including, relevant business terms and public review procedures. Although the parties are obligated to work in good faith to fulfill the terms of the Agreement, the ultimate Plan, and many of its final economics, is subject to the completion of SEQRA and other public review processes, a review and analysis by the City of detailed economic pro-forma for the Project, and the execution of a final Land Disposition Agreement:

A summary of the general terms of the draft Development Agreement are, as follows:

- Concept Plan: The Concept Plan is a synthesis of the Charrette process. It will become Exhibit "A" to the Development Agreement, as well as the basis for the public review. Most, if not all, aspects of the Concept Plan will evolve during the review process based upon public comment and the very extensive environmental impact analyses to be performed during SEQRA, site plan review and other governmental and public reviews. Importantly, the Concept Plan is the starting point. Approval of the Concept Plan in the Development Agreement would not constitute a final approval of the Plan or Project by the City.

- Project Description: The Concept Plan defines – again, not approves -- the Project. Currently, the Plan consists of approximately thirty (38) acres, 1170 residential units (10% Work Force/5% on-site-5% off-site), up to 105,000 square feet of dedicated retail space, 35,000 of neighborhood retail, 50,000 square feet of flex retail associated with Live-Work units, 150 hotel rooms and banquet facilities, 2180 structured parking spaces, 100,000 square feet of office and approximately 4.5 acres of public open space and parks. The final Project Description will be determined upon the completion of SEQRA, site plan review and other governmental reviews. Construction phasing will be evaluated during the SEQRA process, and reflected in a final Land Disposition Agreement. The Project also contemplates proposed rezoning changes both to the Project Site, as well as possible additional zoning overlays along the waterfront to promote new, organic development consistent with the goals of the Project. Other related actions will include, among others, a revised Local Waterfront Revitalization Program and Harbor Management Plan.

- Land Assemblage: The draft Agreement sets forth the purchase prices for the City-owned parcels based upon the City and Leyland Appraisal Reports, and subsequent negotiations. The Base Purchase Prices may be subject to price offsets for remediation (the sites were appraised as clean), possible extraordinary construction costs (such as the removal of atypical amounts of subsurface debris on the Site) and certain Infrastructure Costs to be determined. The latter items would be further negotiated upon review of the Project's financials and further environmental review. The City would consider the use of eminent domain, as a last resort, to acquire certain limited private properties recently added to the Project. A key element of the Project is the connection of the City's waterfront to the downtown. The Project includes a "green," which provides the connection from Broadway to the waterfront. The "green" would cover, and could only be built, upon certain underground parking structures. The "green," as well as certain adjoining parcels, are privately owned, and would serve an important public purpose. The City Council, therefore, if Leyland is unable to acquire these parcels consensually from the owner, would, as a last resort, exercise its eminent domain powers to acquire these properties for just compensation. The draft Agreement establishes a detailed procedure for the use of eminent domain so as to be revenue neutral to the City. The City has already had discussions with the potentially affected landowner.

- Acquisition Costs: The draft Agreement sets forth the purchase prices for the City-owned parcels based upon the City and Leyland Appraisal Reports and subsequent negotiations. The Base Purchase Price for the former Consolidated Iron property is \$1,933,000. For the balance of the parcels it is \$2,061,800. These Base Purchase Prices may be subject to price

offsets for remediation (the sites were appraised as clean), possible extraordinary construction costs and certain Public Infrastructure Costs to be determined. The latter items would be further negotiated upon review of the Project's financials and further environmental review.

- Community Benefits Agreement: The Agreement calls for the creation of a Community Development Program and commits that the City and Leyland shall negotiate a local hiring and local vendor program during the SEQRA process.
- Allocation of Infrastructure and Public Amenity Costs: Under the draft Development Agreement, Leyland would be responsible for costs relating to Project Infrastructure such as internal roads, sanitary hookups, private residential parking facilities, etc., provided, that the City would explore using Municipal Financing mechanisms to assist Leyland such as tax incremental financing, bonding, etc. For Public Infrastructure, any Municipal Funding must not decrease the amount of revenue to be received by the City's general treasury. The City would be responsible for Public Infrastructure, including, but not limited to, relocation and upgrading of the sewer trunk line, and any public parking facilities, provided, the City would seek non-City Public Funding in the first instance for such needs. "Shared Infrastructure" includes those improvements, which benefit the City/public and private Project residents and commercial tenants – e.g., public open space, public recreational areas, parks, the bulkhead and shared parking facilities. The parties will explore various funding options for these improvements, including, but not limited to, a combination of one or more of the following: private financing alone, non-City Public Funding, Municipal Financing or City funding. The final determination as to allocation of Shared Improvement costs shall be determined based upon the City's receipt and review from Leyland of detailed financial pro-formas for the Project, as well as other information that will be generated during the environmental review process.
- Environmental: Under the draft Agreement, Leyland would be responsible for environmental remediation of Project parcels included (except the Consolidated Site), and could apply for entry into the New York State Brownfield Program. Leyland would be entitled to an off-set to the Purchase Price equal to the remediation costs it occurs and other extraordinary construction costs it may incur due to any contamination on the Site, assuming Brownfield credits or other governmental programs are not available, such amount not to exceed the total Base Purchase Price. Leyland shall not be liable for any environmental cleanup costs for the Consolidated Site until such time as the Consolidated Site is deemed remediated and delisted by the EPA. Environmental costs will not include normal construction costs such as due diligence investigation, site preparation, or removal of underground tanks versus cleanup of any soil contaminated by such tanks. Any dispute as to what constitutes remediation costs will be subject to arbitration. The City would be indemnified by Leyland for any actions or damages arising from or related to Leyland's entry onto the properties for environmental testing or other similar purposes, environmental costs or damages post-Closing on all the non-Consolidated properties, and any contamination caused by or exacerbated by Leyland.
- City or Developer Default: Each party would have certain rights in the event of a default by the other party. With respect to the City, it would have a responsibility under the Agreement to process Leyland's application and to act in good faith regarding its obligations thereunder, including, but not limited to, not to unilaterally pull the plug on the Project due to, for example, changes in Administration or City priorities. On the other hand, subject to the public review process and based upon substantial evidence and/or real empirical data regarding potential impacts, the proposed Project may be approved in whole, modified, or reduced in scope. In the event of a City default, the City would become liable to pay Leyland its costs and expenses in connection with the Agreement and SEQRA review up to \$500,000.00. Leyland will have spent significant amounts of money on this Project based upon its reliance of the City's good faith in the process. The amount is meant to act as a meaningful deterrent to the City acting in bad faith. In an action for specific performance, the prevailing party would be paid its attorney fees.
- Developer Performance Guidelines and Default: The draft Agreement provides for specific performance timelines for Leyland, as default provisions, to ensure ongoing progress on the Project, and to prevent any "warehousing" of the properties. In the event of a Leyland default, Leyland would have no rights against the City, must reimburse the City for all its expenses, and would lose its exclusivity for the Project and Project sites. Certain termination provisions include a mediation, and binding arbitration clause.
- Developer Escrow Account: The draft Agreement provides that Leyland must indemnify and pay all the City's outside consultant expenses for all phases of the Project, including, SEQRA review, any litigation, environmental and financial consultants, etc. There would be a boilerplate Escrow Agreement establishing a fixed level of payment to the Escrow fund by Leyland, a procedure for processing City invoices and a method for Leyland replenishing the Escrow fund. The Developer Escrow would start with a \$50,000.00 deposit upon the execution of the Agreement, and must be replenished to \$50,000.00 once it falls below \$25,000.00.

- No Assignment: The draft Agreement contains a “No Assignment or Transfer” provision, prohibiting Leyland from transferring control of the Project without the City’s consent not to be unreasonably withheld, unless it transfers the Project to an Affiliate. Leyland must continue to own 25% of the interest in the Affiliate, as well as the Leyland principals must continue to control the daily management of the Project.

### **Designation of Lead Agency and Upcoming Timetable**

After the City and Leyland execute the Development Agreement, Leyland would prepare and submit applications to the City Council for the Project, including, but not limited to, a potential rezoning and other formal applications and petitions to implement the Project. Leyland would also submit an Environmental Assessment Form commencing the Project’s environmental review under the State Environmental Quality Review Act (“SEQRA”).

The City would then designate a Lead Agency under SEQRA. Due to the various actions involved in the Project, including, land disposition and zoning changes, the City intends that the City Council act as Lead Agency, however, two (2) members of the Planning Board, one member of the Zoning Board of Appeals and one representative of the Waterfront Advisory Committee, to be chosen by those bodies, shall be designated to sit with the Council to, among other things, share their expertise, as well as to act as a liaison to their respective Boards, who will be “involved agencies” under SEQRA’s coordinated review procedures.

### **SEQRA Environmental Review**

The City will likely issue a Positive Declaration, requiring the preparation of an Environmental Impact Statement (“EIS”), and full environmental review under SEQRA.

The following provides a brief description of the SEQRA and other regulatory processes applicable to the review of the proposed Project.

- Designation of Lead Agency & Determination of Significance – The selection of a Lead Agency must be accomplished within 30 days of the submission of an Environmental Assessment Form. Current intentions are for the City to assume Lead Agency status. The City would circulate a letter declaring its intent to assume Lead Agency status to other potentially involved agencies, which have “jurisdiction by law to fund, approve or directly undertake an action” related to the subject action. 6 NYCRR § 617.2(s). Following this notification, the City would be in a position to formally designate itself Lead Agency, and to issue a Positive Declaration, which would trigger the preparation of an environmental impact statement (“EIS”).
- Scoping – The scoping session is intended to focus the EIS on the potentially significant adverse environmental impacts, and eliminate consideration of irrelevant or insignificant impacts. Leyland Alliance will be responsible for submitting a draft Scoping Document to the City. The draft Scoping Document will be circulated to all involved agencies, and after providing a public comment period, the Lead Agency must provide a final written Scoping Document to Leyland within 60 days of its receipt of the draft Scoping Document. See 6 NYCRR § 617.8(f).
- Draft EIS Submission & Review – Upon receipt of a final Scoping Document, Leyland’s professional consultants will prepare a Draft EIS. Upon receipt of a DEIS, the Lead Agency has 45 days to determine whether it is adequate and complete for the purposes of public review. See 6 NYCRR § 617.9(a)(2). Once the DEIS is determined to be complete, the Lead Agency would issue a Notice of Completion of the DEIS.
- The filing of the Notice of Completion of the DEIS starts the public comment period, which must be a minimum of 30 days. See 6 NYCRR § 617.9(a)(4). For expediency sake, a Notice of Public Hearing should accompany the Notice of Completion. Given the size and nature of the Project, as well as the anticipated public attention, we recommend extending the comment period beyond the minimum 30 days.

- Final EIS Submission & Review – The FEIS should be prepared within 45 days after the close of the public hearing. See 6 NYCRR § 617.9(a)(5). The Lead Agency must prepare, file and publish a Notice of Completion of the FEIS. The City may hold another 10-30 day public comment period on the FEIS. See 6 NYCRR § 617.11(a).
- Findings Statement – Within 30 days after the filing of the FEIS, the Lead Agency and each involved agency must prepare their Findings Statement, certifying that the SEQRA requirements have been met, and determining whether the proposed Project is approvable. See 6 NYCRR § 617.11(b). The Findings Statement and the final determination may be made simultaneously.
- Final Approval – Once the Findings are adopted, the SEQRA process is completed. At that point, the Lead Agency is authorized to proceed to final substantive approval(s) for the Project.

### **Governmental Permits / Approvals**

Following the adoption of the Findings Statements, which marks the end of the SEQRA process, Leyland Alliance would submit applications for all other necessary governmental permits and/or approvals. Some of these applications may have been submitted simultaneous with the SEQRA review. The compilation of a comprehensive list of such permits and/or approvals is difficult at this stage since the specific proposed action has yet to be determined. Nevertheless, the following permits/approvals would likely be required from the following agencies:

- City Council (Zoning, Master Plan and/or LWRP Amendment and Land Disposition<sup>1</sup>; Waterfront Consistency Review)
- City Planning Board (Subdivision, Site Plan Approval & Waterfront Consistency Review)
- City Manager (Wastewater Discharge Permit)
- City Code Compliance Officer (Street Opening and Excavation)
- City Superintendent of Water Department (Water Take Permit)
- Waterfront Advisory Committee (Recommendation regarding Waterfront Consistency Review)
- Orange County Planning Department (Referral pursuant to General Municipal Law)
- Orange County Department of Health (Domestic Water Distribution Approval)
- Architectural Review Commission (Viewshed & Historic District Overlay review)

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<sup>1</sup> Article 42 of the New York State Executive Law and its implementing regulations govern the amending of the City’s Local Waterfront Revitalization Program. “Major amendments to any approved LGWRP, such as a substantial alteration in the coastal area boundary, or of applicable coastal policies, shall be reviewed in the same manner as any original LGWRP.” 19 NYCRR § 601.4(c)(1). This process involves the circulation of a completed LGWRP application to all State agencies with programs affecting the coastal area, adjacent localities, the county and the regional planning board for a 60-day review and comment period. 19 NYCRR § 601.4(a) & (b).

Alternatively, “Minor amendments to any approved LGWRP, such as updates which reflect changing characteristics of the community, incorporation into the LGWRP of policies contained in the State Coastal Management Program, or adoption of local laws or ordinances which further implement the LGWRP, shall be subject to a 21-day period for review and comment by all parties before the secretary may render a decision on the approvability of the amendment.” 19 NYCRR § 601.4(c)(2). It is unclear at this stage whether the proposed Project will warrant a major or a minor amendment, if any.

- NYS Department of Environmental Conservation (Stormwater SPDES, Water Taking Permit, Water Quality Certification, Protection of Waters Permit)
- NYS Department of State Approval of LWRP Amendment<sup>2</sup>
- US Army Corps of Engineers (Nationwide (and maybe certain Individual) Permits for dredging, shoreline activity, and/or wetland)
- US EPA (Consolidated Iron Site Remediation – Consent Decree and/or No Further Action Letter)

Once again, these timeframes are for illustrative purposes only. SEQRA and the other timeframes can vary depending upon a variety of factors, including, quality of submissions, technical review and response turn-around times, unanticipated legal and other issues, state adjudicatory hearings, etc.

**Proposed Chronology**

The following is a preliminary proposed chronology:

September 2006	City & Leyland Alliance Execute Exclusivity & Planning Agreement
October 2006	Leyland Alliance & City Contract with Charrette Planner (DPZ)
Oct. 2006 – Jan. 2007	Leyland Alliance Performs Due Diligence & Prepares for Charrette  Preparation of Appraisals to Determine Fair Market Value of Properties, Environmental Testing, Feasibility Analyses
February 7, 2007	Charrette Planning Process Complete
April 10, 2007	Final Charrette Report
June 2007	Execution of Development & Land Disposition Agreement
July 2007	Submission of Applications for Zoning, LWRP and/or Master Plan Amendments  City Designation of Intent to Assume Lead Agency Status for Coordinated Review
July 2007	Declaration of Lead Agency & Adoption of Positive Declaration  Referrals of Zoning Amendments to Planning Board, Waterfront Advisory Committee, Architectural Review Commission and County Planning Department (GML Review) <ul style="list-style-type: none"> <li>● Reports required within 30 days</li> </ul>

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<sup>2</sup> Within 10 days of receiving any application affecting the City’s waterfront property, a City agency must prepare a Coastal Assessment Form, and refer it to the Waterfront Advisory Committee (“WAC”), which is authorized to review and make recommendations regarding the consistency of proposed actions with the LWRP standards and conditions. See City Code § 296-5(C). The WAC must render its written recommendation within 30 days of the referral, unless extended by mutual consent. See id. § 296-5(E). Within 30 days of its receipt of the WAC’s written recommendation, the agency must issue its consistency determination.

July –August 2007	Applicant Submission of Draft Scoping Document Under SEQRA Referral of Draft Scoping Document to Involved Agencies
August - September 2007	Scoping Sessions
September 2007	Acceptance of Final Scoping Document
September – Dec. 2007	Preparation of DEIS
December 2007	Submit Preliminary DEIS
January 2008	Notice of Completion of DEIS
February 2008	Joint Public Hearings on DEIS, Zoning, LWRP and/or Master Plan Amendments
February 2008	Continuation of Joint Public Hearing & Closure of Public Hearing
March – April 2008	Prepare & Submit Draft FEIS
May 2008	Notice of Completion of FEIS & Public Hearing on FEIS (optional)
July 2008	Adoption of SEQRA Findings Statements
August 2008	Adoption of Zoning, LWRP and/or Master Plan Amendments  Amend Land Disposition Agreement
September – October 2008	NYS Department of State Review and Referral of Proposed LWRP Amendment Other Agencies With Waterfront Jurisdiction  Conveyance of Land (?)
Sept. 2008 – February 2009	Submission & Review of Applications for Governmental Permits /Approvals <ul style="list-style-type: none"> <li>○ City Planning Board Site Plan Approval &amp; Possible Subdivision <ul style="list-style-type: none"> <li>● Review of Preliminary Plat &amp; Technical Issues</li> <li>● Referrals <ul style="list-style-type: none"> <li>▪ County Planning Department</li> <li>▪ WAC (30-day Consistency Review)</li> <li>▪ ARC (Viewshed &amp; Historic Overlay review and approval)</li> </ul> </li> <li>● Public Hearing (max. 120 days)</li> <li>● Preliminary Plat Approval (w/in 62 days of close of public hearing)</li> <li>● Final Plat Submission, Review &amp; Public Hearing</li> <li>● Final Approval</li> </ul> </li> <li>○ NYS Department of Environmental Conservation</li> <li>○ NYS Department of Health</li> </ul>

- Orange County Department of Health (Realty Subdivision)
- US Army Corps of Engineers (Nationwide Permits for dredging, shoreline activity and/or wetland)
- US EPA (Consent Decree or Site Deletion from NPL)

February 2009

Final Approvals From Involved Agencies