

**February 22, 2021**  
**Allegany County Industrial Development Agency**  
**Eminent Domain Procedure Law Article 2 Public Hearing**  
**Acquisition of Property located at Old State Road, Trianna Road in the Town of Amity and County Route 20 in the Town of Angelica, Allegany County (tax parcel ID #s 158.-1-2.1, 158.-1-31 and 145.-1-51)**

**Statement of Mark R McNamara on behalf of  
Charlie Bares and Marshacres LLC**

My name is Mark McNamara. I am an attorney with the law firm of Barclay Damon LLP. We are counsel to Charlie Bares and Marshacres LLC, Mr. Bares is its Managing Member, the owner of the real property located at Old State Road, Trianna Road and County Route 20 in the Town of Amity (tax parcel ID #s 158.-1-2.1, 158.-1-31) and in the Town of Angelica, Allegany County and (SBL #145.-1-51) (collectively “**Marshacres Property**”) some or all of which is at issue in this Eminent Domain Procedure Law (“**EDPL**”) Article 2 public hearing. I say “some or all of which appears to be at issue” because it is unclear from the project documents and the notice for this hearing as to how much of the Marshacres Property the Allegany County Industrial Development Agency (“**Agency**”) has targeted for acquisition.

The subject of today’s hearing, as stated in the Agency’s published notice (the “**Notice**”), is its consideration of the proposed Great Lakes Cheese Manufacturing Plant Project which will be an industrial cheese manufacturing and packaging facility of 480,000 SF and a 50,000 SF waste water treatment plant (“**Project**”). According to the Notice, the proposed Project includes:

(A)(1) the acquisition of an interest in certain parcels of property located in Allegany County, New York (collectively, the “**Land**”):

No.	Address	Tax Map Number
1.	Old State Road, Town of Amity	158.-1-2.1 (264.5 ac)
2.	Trianna Road, Town of Amity	158.-1-31 (10.8 ac)
3.	County Road 20, Town of Angelica	145.-1-51 (45.8 ac)

An industrial development agency's power to seize the private real property over that owner's strenuous objection is as extraordinary as it is brutal. Accordingly, the law imposes a variety of very specific constitutional and statutory limitations and requirements on the exercise of this power. Marshacres LLC and Charlie Bares object to the proposed taking of its property by the Agency as violating, and as detailed below,

- i) the 5<sup>th</sup> and 14<sup>th</sup> amendments to the United States Constitution,
- (ii) Article 1, sections 6 and 7 of the New York State Constitution,
- (iii) the EDPL,
- (iv) General Municipal Law,
- (v) the State Environmental Quality Review Act ("SEQRA"), and
- Each of the Comprehensive Plans of the towns of Amity and Angelica.

The irony here is that, in addition to being unsupported by law, the Agency's proposed taking is at odds with its own mission statement goals, its decades long policy of promoting agricultural development and agri-tourism, and each of the Comprehensive Plans of the Towns of Amity and Angelica while at the same time harming the Town of Cuba.

To state the obvious, while there are constitutional and statutory limitations on the Agency's exercise of its powers, there is no practical nor legal limitation on Great Lakes Cheese simply negotiating and purchasing whatever property it concludes is best for the development of its facilities. According to Forbes magazine, as of November 2020 Great Lakes Cheese had annual revenues of \$3.3 billion, over 3000 employees, and is the 139<sup>th</sup> largest private company in the United States. Surely this great company can afford to negotiate with a private land owner to purchase the property it needs for a \$500 million project without relying on a governmental agency to forcibly take that property. The Agency stepping in to do so at the behest of Great Lakes Cheese is at odds with the notion of public purpose, let alone basic fairness.

## **I. Background**

### **a. The Property**

The property identified in the Agency's Notice of this hearing are 3 parcels of exceptional agricultural land which total approximately 320 acres and are an integral part of one of the largest dairy farm operations in New York State and the largest in this area. Marshacres LLC and Mallards Dairy manage a herd of 3000 cows, over 6000 acres, produce 200,000 pounds of milk per day and employ 40 people. A dairy farm operation of this size requires substantial land for agricultural production and recycling the nutrients produced by the Mallards Dairy herd and to satisfy the New York Agricultural and Markets regulatory and permitting requirements. Charlie Bares and his partner have farmed the Marshacres Property for over 25 years and the loss

of this acreage to the Agency and Great Lakes Cheese will have a direct and substantial negative impact on Mallards Dairy operations. As Dan Spitzer noted earlier in his presentation, this is prime farmland which is exactly how it is being used by my clients. This is the opposite of “blighted.”

## **II. The Agency’s Method of Conducting the February 22, 2021 Hearing violates EDPL 201.**

EDPL 201 requires that, prior to acquisition, the condemnor, shall conduct a public hearing at a location reasonably proximate to the property which may be acquired for such project. According to its Notice, the Agency has determined to hold its EDPL Article 2 public hearing by telephone conference call on the basis of Executive Orders 202.1, 202.10, and 202.15 banning large gatherings due to the pandemic. A telephone conference call for an unlimited number of people is in no way a substitute for the statutory requirement of a public hearing as provided by EDPL Article 2. This was made clear by the quality of and complaints with respect to the Agency’s February 9, 2021 General Municipal Law (“GML”) “financial assistance” public hearing. The Governor’s issuance of these executive orders does not excuse the strict requirements of the EDPL. This is particularly so when other alternatives via video platforms were readily available and that GML § 857 specifically requires “The agency shall, to the extent practicable, stream all open meetings and public hearings on its website in real-time” and post video recordings of all meetings and public hearings on its website. The Agency failed to comply with GML § 857 by not streaming the public hearing on February 9, 2021. In this era of the Zoom, WebEx and Microsoft Teams platforms it is no defense to rely on the “to the extent practicable” excuse.

Even if, for the purposes of argument, the Governor’s suspension of an EDPL Article 2 public hearing is legally valid, the Agency’s reliance on the Executive Order it cites is unsupported because, at best, it is unclear whether by their own terms they have expired. In addition, the Agency’s reliance on Executive Order 202.10 is misplaced since it does not even apply to statutorily required public hearings. Rather it states, “Non-essential gatherings of individuals of any size for any reason (e.g. parties, celebrations or other social events) are canceled or postponed at this time.” Clearly this hearing does not qualify as a party, celebration or social event of any type.

Finally, the Agency has insisted on going forward with this hearing by telephone conference call despite the public’s objections to the quality of the February 9, 2021 conference call public hearing contemporaneous with the hearing and in writing afterwards. The Agency’s justification that “the public hearing notice was already published and therefore cannot be altered,” as Dr. Clark stated in his February 17, 2021 letter response to Jenny Bilotta, is simply wrong. A public hearing notice can always be republished for a rescheduled date particularly, as explained below, when the Agency’s notice is already defective.

### **III. The Agency Failed to Comply with the EDPL Article 2 Public Hearing Notice Requirements for Both the Public and the Property Owner**

EDPL 202 provides specific and stringent notice requirements to both the public at large and the owner of the property whose acquisition the condemnor is purportedly considering. In this case, the Agency failed both substantively and procedurally with respect to the public and the property owner.

Pursuant to EDPL § 202, the Condemnor was required to give notice to the public of the purpose, time and location of this hearing setting forth the proposed location and any alternate locations of the project at least 10 but no more than 30 days before the hearing. Such notice must be published in at least 5 successive issues of an official daily newspaper if one is designated in the locality where the project will be located and in at least 5 successive issues of a daily newspaper of general circulation in the locality. If the only newspaper available in the locality is a weekly publication then the notice must be published in that newspaper in at least 2 successive issues. The Agency did neither. The only notice of today's public hearing was the single publication by the Agency in the February 10 – 16, 2021 edition of the *Cuba Patriot and Free Press* which is a weekly newspaper. Despite the clear statutory requirements of EDPL 202, the Agency failed to publish notice of this EDPL Article 2 public hearing in at least two successive issues of the weekly newspaper, let alone 5 successive issues of a newspaper of general circulation. Accordingly, the Agency failed to meet the minimum statutory requirements set forth in EDPL § 202. The notice for this public hearing is fatally deficient and defective.

With respect to the Property owner, EDPL 202 (C) requires the condemnor provide notice of the “purpose, time, date and location” of the EDPL Article 2 public hearing to the record owner of the property either by personal service or certified mail, return receipt requested. The Agency did neither. The Agency's notice letter was on the letterhead of its counsel, Hodgson Russ LLP. The letter heading indicated it was sent “Via Certified Mail (Return Receipt Requested)” to Marshacres LLC. It was not. Instead, the Agency's February 8, 2021 notice letter was placed in the Marshacres LLC mailbox at 7017 Fadale Road, Ellicottville, New York. Marshacres never signed for the letter as required with certified mail.

While this is a technicality, the EDPL is all about precision and scrupulous compliance with the technical requirements of the law because of what is at stake. The government exercising its very serious power to seize the private property from this unwilling seller.

### **IV. The Agency's EDPL 202 Public Hearing Notice is Substantively Defective**

The Notice for this public hearing is fatally deficient in terms of the interests the Agency is proposing to acquire by eminent domain and the purported public purpose for its acquisition. EDPL 202 (A) provides the condemnor must give notice of the purpose, time and location of its

hearing setting forth the proposed location of the public project including any proposed alternate locations. The Agency's Notice of this hearing states it is considering the "acquisition of an interest in certain parcels of property" which it then lists as the 3 parcels making up the Marshacres Property. The clear reading of this language is the Agency is considering the acquisition of all 320 acres of the Marshacres Property. The Project Application (II.B) and its attached Short Environmental Assessment Form (Part I) identify "All or some" of the 3 tax map parcels as the project location/project address. The Full Environmental Assessment Form (Part I.A) submitted by the Agency with its Notice of Intent to Act as Lead Agency states the Project will be located "on a 100+ acre parcel in the towns of Amity and Angelica." Contrary to the Notice for today's hearing, the Agency's Notice of its February 9, 2021 Public Hearing on Proposed Project and Financial Assistance states the Project will include "the acquisition of an interest in the portion of several parcels of land totaling 210 acres" which it identifies as the 3 parcels making up the Marshacres Property.

While EDPL 202 does not require the condemnor to provide every detail of its intended project, the property owner, in particular, and the public, in general, are legally entitled to some specificity as to the location and amount of the property the condemnor intends to acquire for the project. The 5<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution provide that no person shall be deprived of their property without due process. Article 1, sec. 6 of the New York Constitution provides the same. Due process in the context of an EDPL 203 public hearing fundamentally includes notice of the nature of the taking. The contradictions between the Agency's various official notices and project documents are such that it's Notice is substantively and fatally defective.

#### **V. There is No Public Use, Benefit or Purpose for the Proposed Taking**

The thrust of the Agency's stated public purpose for this Project is economic development and maintaining jobs with respect to the Allegany County dairy industry. Harming the largest dairy producer in this area to effect that supposed public purpose is more than ironic. It defeats the Agency's purported economic development public purpose for the Project itself. The dairy and agricultural operations of Mallards Dairy and Marshacres are spread over 6000 acres, manage 3000 cows, employ 40 people, and produce over 200,000 pounds of milk per day. The Marshacres Property targeted by the Agency is by its nature and size critical to Mallards Dairy's continued operations. Qualitatively there is no better agricultural land in Allegany County. The quality of its soil and its level topography make it ideal for growing crops and recycling the nutrients produced by the Mallards Dairy herd and essential to its continued compliance with the New York Agricultural and Markets regulatory and permitting requirements for a dairy operation of this size. The Agency's proposed acquisition of some or all of the Property will harm my client's dairy business and, in turn, Allegany County's dairy industry which is the exact opposite of an economic development based public use, benefit or purpose.

This reality is highlighted by the fact this Project, as described later in my presentation, is at odds with each of the Comprehensive Plans developed and adopted by the Towns of Amity and Angelica where the proposed Project is to be located. It is also at odds with the Agency's own Mission Statement whose stated Goals are "Manage growth and development; Conserve rural and scenic areas, and protect agricultural resources." The acquisition of prime and essential agricultural land from the largest dairy producer in the area does violence to those goals and undermines any claim of public purpose.

As detailed in the February 9, 2021 letter to the Agency from Jenny Bilotta, Great Lakes Cheese already owns substantial land in the Town of Cuba providing a variety of alternatives to develop a new facility. Dr. Clark's February 17, 2021 letter sets forth the Agency's response to Ms. Bilotta, the public at large and, apparently, my client the Property owner to "Please keep in mind only GLC makes the final determination of final site selection." Respectfully, the Agency should keep in mind that only it can forcibly take property for the Project and the constitutional and statutory requirements behind the exercise of that power should make considerations of the existing acreage in Cuba and the impacts on that community relevant to its determination of public purpose. It is no answer to say the Agency must follow the dictates of a private company in exercising its power of eminent domain which is the case here.

Again, as noted earlier, there is no practical nor legal limitation on Great Lakes Cheese simply negotiating and purchasing whatever property it concludes is best for the development of its current and future facilities. And again, Great Lakes Cheese is one of the great private companies in this country with annual revenues of \$3.3 billion, over 3000 employees, and is the 139<sup>th</sup> largest private company in the United States. It can afford to, and should, negotiate with a private land owner to purchase the property it needs for a \$500 million project without relying on a governmental agency to forcibly take that property. The Agency stepping in to do so at the behest of Great Lakes Cheese is at odds with the notion of public purpose, let alone basic fairness.

In its response to Ms. Bilotta's letter, the Agency states the proposed PILOT agreement will "have no immediate impact on taxes or tax payers" because the Agency is exempting a company from future taxes on a facility that has not yet been built. This statement that a PILOT Agreement on a \$500 million Project facility which provides a \$170 million real property tax abatement over a 20 year period, including a 100% abatement of property taxes for the first 15 years, is at least nonsensical, perhaps disingenuous and, in any event, wrong. The Agency's position ignores both the impact of the dramatic drop in taxes resulting from the closing of the existing Great Lakes Cheese facility in Cuba and the future demands on municipal services and infrastructure resulting from the proposed facility.

Finally, while New York law recognizes the exercise of the power of eminent domain where there is an incidental private benefit to a company so long as there is a dominant public use, benefit or purpose, such is not the case here. Here the private benefit is dominant and any public benefit incidental.

In short, the Agency has failed to identify any public purpose to support the exercise of its power of eminent domain in acquiring the Marshacres Property for the Project and such acquisition by eminent domain should not be allowed.

**VI. The proposed Project conflicts with the objectives and goals of Each of the Comprehensive Plans of the Towns of Amity and Angelica.**

The Town of Amity's Comprehensive Plan was drafted with the intent of protecting the agricultural property located throughout the Town. As required by the NY State Farmland Protection Act, Allegany County offers Agricultural Districts as an opt-in program to landowners. There are up to 87 parcels of these Districts within the Town's boundaries. This program offers protection to agricultural lands against unwanted development of farmlands. Amity's comprehensive plan is based on the goal of keeping the agricultural lands in use while allowing for development in the area of the Town near the intersection of NY State Route 19 and I-86. Specifically, the plan states at page 18:

The area near the intersection of NY State Route 19 and I-86 is presently in agricultural use; yet most people understand that this location is likely to be the next area of growth in the County. The remainder of the lands that border the Genesee River / NY State Route 19 corridor should be carefully planned to allow a mixed use of mostly agriculture with a narrow corridor for development directly along NY State Route 19. No other large tracts should be taken out of farm use for development.

The Marshacres Property the Agency now seeks to acquire for industrial development and the subject of this hearing is mostly located between Old State Road, County Road 20 and the Genesee River in exactly the area which the Amity Comprehensive Plan provides should continue to be mostly agricultural. It is an understatement to say that a 480,000 SF manufacturing facility with a 50,000 SF water treatment plant is inconsistent with the goals and specific provisions of the Amity Comprehensive Plan. The Marshacres Property is located in "the remainder of the lands that border the Genesee River/NY State Route 19" which should remain agricultural. In short, locating this Project on the Marshacres Property contradicts the Town's goals and objectives and the specific provisions of its Comprehensive Plan.

Similar to Amity, the Town of Angelica's Comprehensive Plan is targeted at protecting and promoting agriculture lands. Specifically, at page IV-4 the plan states that a key Town goal is to:

Promote agriculture as a desirable use of land, and protect farmland by recognizing the unique role that agriculture can play in supporting economic prosperity and protecting and preserving Angelica's rural heritage.

The strategies in support of this goal and its supporting objectives as detailed in the Angelica Comprehensive Plan at page IV-4 are to consider land use regulations "that protect and promote farming," research the feasibility of a conservation easement program to provide tax relief to large landowners and farms, and support local farmers and encourage agri-tourism by establishing a Farmers' Market.

There is no reference whatsoever to promoting or even considering large scale industrial development as a goal or objective in the Town of Angelica. To do so would be directly at odds with the rest of its Comprehensive Plan. The proposed Project is directly in conflict with the goals contained in Angelica's Comprehensive plan in that it would destroy farmland rather than protecting it and promoting agricultural land use.

The Agency's exercise of its power of eminent domain in furtherance of a Project which violates the Comprehensive Plans of the 2 towns in which the Project is proposed to be located is unlawful.

## **VII. Excess Taking**

It is a well-established principle that a condemnor has no right to condemn real property interests in excess of what is needed for the public purposes of its proposed project. The Agency seeks to acquire substantially more property than what is needed for the Project.

As noted earlier, the Notice of this EDPL 202 hearing states the Agency is considering the "acquisition of an interest in certain parcels of property" which it then lists as the 3 parcels making up the Marshacres Property. The clear reading of this language is the Agency is considering the acquisition of all 320 acres of the Property. The Project Application (II.B) and its attached Short Environmental Assessment Form (Part I) identify "All or some" of the 3 tax map parcels as the project location/project address. The Full Environmental Assessment Form (Part I.A) submitted by the Agency with its Notice of Intent to Act as Lead Agency states the Project will be located "on a 100+ acre parcel in the towns of Amity and Angelica." Contrary to the Notice for today's hearing, the Agency's Notice of its February 9, 2021 Public Hearing on Proposed Project and Financial Assistance states the Project will include "the acquisition of an interest in the portion of several parcels of land totaling 210 acres" which it identifies as the 3 parcels making up the Marshacres Property.

Despite this confusion, no matter what it is, it is too much. The Project is described as a 480,000 SF manufacturing plant and 50,000 SF waste water treatment plant. These building improvements cover approximately 12 acres. Even with the additional land necessary for an industrial operation and general utility of such a large facility, the confused area being targeted for acquisition is in excess of what is necessary to accomplish the purported public purposes claimed by the Agency based on the size, scale, and needs of the Project. As such the proposed acquisition would be an unconstitutional excess taking.

### **VIII. Just Compensation**

Pursuant to the United States and New York Constitutions and the EDPL, the Agency is required to pay just compensation for any property interests it acquires with respect to the Project. The determination of just compensation is ultimately a judicial function independent of what the condemnor's opinion as to the amount of damages caused by its taking. Most critically, "just compensation" has been interpreted by New York courts to mean "sure and certain" compensation. That is, a mechanism is in place to guarantee there is a source of funds from which to pay the ultimate judicially determined just compensation damages.

Here there is no such mechanism to guarantee payment of just compensation. There is no evidence the Agency will be able to provide a "sure and certain" source of compensation and, in fact, the evidence is to the contrary. The Agency, unlike a municipality or the State, has no power to tax. It's only revenue source is project fees and there are a limited number of projects listed on its website. Its financial statements are identified on its website but the links to the statements do not work.

With respect to the Project at issue here, Great Lakes Cheese is the project applicant but no preferred developer agreement has been disclosed and, in any event, the property owner can legally look only to the Agency for just compensation. In short, there is no evidence the Agency has the financial resources to satisfy its obligation to pay just compensation for its acquisition of the Marshacres Property and the damages to the remainder and no other mechanism is in place to guarantee payment. This, by definition, is not "sure and certain" compensation. Accordingly, the proposed taking of the Property for the Project is in violation of the 5<sup>th</sup> and 14<sup>th</sup> amendments of the United States Constitution, Article 1, section 7 of the New York State Constitution, and EDPL Articles 1, 3, 4 and 5.

### **IX. The Agency Violated GML § 859-a By Failing to Provide the Required Notice of its February 9, 2021 "Financial Assistance" Public Hearing**

GML § 859-a requires the Agency give at least 10 days published notice of the any public hearing held pursuant to GML § 859. The Agency published its notice of the February 9, 2021

public hearing in the *Cuba Patriot and Free Press* in the February 3 – 9, 2021 edition of this weekly publication well short of the 10 day requirement. The IDA has thus failed in its minimum requirements of notice under GML § 859-a (3).

**X. State Environmental Quality Review Act**

Charlie Bares and Marshacres reserve their rights to challenge the Agency’s SEQRA review. To date the Agency has stated its environmental review of the Project is ongoing and incomplete. The Agency has classified the Project as a Type I action and submitted a Full Environmental Assessment Form with its Notice of Intent to Act as Lead Agency. According to the Agency’s Environmental Assessment Form the Project includes a 50,000 SF waste water treatment plant, the creation of stormwater and waste water retention ponds holding 7.3 million gallons with a surface area of 2.5 acres, the disturbance of 80 acres of land along the Genesee River, disturbance of wetlands, the generation of 706,000 gallons of liquid waste per day and 27,000 tons of methane per year, and result in a substantial increase of traffic with 200 semi trailers and 15 delivery trucks per day. The Project will clearly result in a number of significant adverse environmental impacts and require the preparation of an Environmental Impact Statement. Once the Agency has completed its environmental review, Mr. Bares and Marshacres will comment as appropriate.

**CONCLUSION**

The Agency’s proposed acquisition by eminent domain of real property interests in any or all of the Marshacres Property for purposes of the proposed Great Lakes Cheese Manufacturing Plant Project violates (i) the 5<sup>th</sup> and 14<sup>th</sup> amendments of the United States Constitution, (ii) Article 1, sections 6 and 7 of the New York State Constitution, (iii) New York’s EDPL, (iv) the GML (v) the State Environmental Quality Review Act and (vi) the Comprehensive Plans of the Towns of Amity and Angelica. Respectfully, the Agency should not attempt to exercise its power of eminent domain for this Project.