STATE OF NEW YORK
ADIRONDACK PARK AGENCY

IN THE MATTER OF THE APPLICATION
TO CONSTRUCT THE ADIRONDACK CLUB
AND RESORT BY:

APA Project No. 2005-100

PRESERVE ASSOCIATES, LLC,

APPLICANT.

REPLY

BRIEF AND CLOSING STATEMENT

OF PROTECT THE ADIRONDACKS! INC.

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INTRODUCTION

In this Reply Brief and Closing Statement Protect the Adirondacks! Inc. ("Protect") will respond to the two pro-project briefs that have been filed, those of the applicant ("ACR Brief") and of the Adirondack Park Agency hearing staff ("Staff Brief").

The ACR Brief utterly fails to show how the applicant has met its burden of proof on any of the relevant issues. The Staff Brief recognizes many of the defects in the applicant's proof, but then glosses over them, or attempts to paper them over with ineffective permit conditions. Neither brief demonstrates that the applicant has met its legal burden of proof.[1] Neither one provides a legal basis for approving the application. Because the applicant failed, for each and every Hearing Issue, to produce competent evidence at the hearing to prove the allegations of the application, the application must be denied. Protect Brief, pp. 5-8.

The ACR Brief (pp. 4-18) begins with a 15 page "Prologue"[2] that consists entirely of quotes from various public comment letters and resolutions, all of which were submitted before any actual, competent evidence was admitted into the hearing record. Given the lack of evidence supporting the application, it is fitting that this compilation is the core of the Applicant's final argument. Public comment letters are not evidence. They are not facts. They are merely opinions and arguments. 9 NYCRR § 580.15(e). They are not part of a proper legal basis for the Agency's decision on this matter. Id. See also WEOK Broadcasting Corp. v. Planning Bd. of Town of Lloyd, 165 A.D.2d 578, 582 (1991).

This reliance by the applicant on non-evidence is symbolic of its entire case. The applicant completely failed to make its case during the hearing. Having failed to do so, it has now resorted to legally irrelevant appeals to emotion, conflated with conjecture and speculation, extracted from the public comments (ACR Brief, pp. 4-18), rather than relying on the law and the cold, hard facts that came out in the adjudicatory hearing record.

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[1] See Post-Hearing Brief and Closing Statement of Protect the Adirondacks! Inc. dated September 23, 2011 ("Protect Brief"), pp. 5-8.

[2] Prologue: "the preface or introduction to a literary work". http://www.merriam-webster.com/dictionary/prologue .

However, the role of the Agency's members in this case is to apply the law. Contrary to the not too subtle message of ACR's "Prologue":

- It is not the role of the Agency members to create jobs.
- It is not the role of the Agency members to stimulate the real estate market.
- It is not the role of the Agency members to do what they think will be popular with people in or out of the Park.
- It is not the role of the Agency members to be influenced by local politicians.
- It is not the role of the Agency members to vote based on personal or political appeals.
- And, it is not the role of the Agency members to vote in response to emotional appeals.

Instead, it is the role of the Agency members to examine the evidence and follow the law. When the Agency does not follow the law, that leads to unfortunate results. See Lewis Family Farm v. New York State Adirondack Park Agency, 64 A.D.3d 1009 (3d Dept. 2009); Adirondack Mountain Club & Protect the Adirondacks! v. Adirondack Park Agency and Department of Environmental Conservation, ___ M.3d ___, ___ N.Y.S.2d ___, 2011 WL 3613315 (Albany Co. 2011). Such decisions ultimately contribute to a loss of credibility for the Agency and the State of New York that is far greater than any potential benefit that may be extracted from a politically popular, yet legally erroneous, decision.

Therefore, Protect urges the Agency members to ignore the applicant's "Prologue" and to follow the requirements of the APA Act. Doing so will lead inevitably to a vote for the denial of the ACR application.

ISSUES #5 & #6

The Project Will Create Undue Adverse Fiscal Impacts

The applicant failed to prove that the project would not create undue adverse fiscal impacts on local governments. Nothing in the ACR Brief or the Staff Brief changes that. The record shows that the project will not succeed financially, and that the applicant's projected tax windfalls for local governments are based on guesswork and inflated numbers, and will not occur. This was shown clearly, objectively, and rationally, based on research, analysis and hard numbers, in the prefiled testimony of Protect's witness David Norden and the exhibits attached thereto (Ex. 209 to Ex. 221). This testimony is the single most important document in the entire hearing record on Issues #5 and #6. This testimony was bolstered by Mr. Norden's live testimony on June 7 and 8, 2011 (Tr. 3223-3334, 3350-3404) and related exhibits (Ex. 222 to Ex. 225).

A. The Agency May Not Balance the Project's Alleged Benefits Against Its Adverse Impacts on the Resources of the Park

The APA Staff has argued that APA Act § 809(10)(e) "requires a balancing of the adverse resource impacts of the project with its potential benefits." Staff Brief, p. 4; see also Staff Brief, pp. 5, 100, 121-122. Similarly, the applicant argued that the socioeconomic benefits of the project outweigh its impacts to the site's natural resources. ACR Brief, p. 49. The ACR Brief (pp. 134-137) uses a lot of space discussing the project's alleged potential economic benefits, such as job creation, spending by guests and residents, and the like. The applicant also attacked Adirondack Wild's witness Dr. Michael Klemens for not balancing the project's alleged socioeconomic benefits against its impacts to wildlife habitat. ACR Brief, p. 120.

The Staff's and applicant's readings of the APA Act are wrong, as a matter of law. These parties have fallen victim to the fallacy that the Agency must take into account the economic benefits of a project and weigh them against its adverse environmental impacts.

As was established in the Protect Brief at page 4, the Agency may not weigh and balance the alleged economic and commercial benefits of the ACR project against its obvious

adverse environmental impacts.[3] By law, the Agency may not consider those benefits in its decision-making process as something that might counteract or outweigh the adverse impacts of the project. Id. The benefits may only be considered in assessing the project's burdens on the public. Id.

The Hearing Issues posed by the Agency in its February 15, 2007 Hearing Order (Ex. 56) show that the Agency intended to limit the assessment of the project's alleged benefits to their relationship to fiscal and governmental impacts:

> Issue #6. Section 805(4) requires the consideration of the burden on and benefits to the public. What are the positive and negative impacts of the project (including fiscal impacts) to the governmental units? ... Ex. 56, p. 8.

Consistent with the APA Act, the Agency did not intend that the parties should attempt to balance the project's benefits against its adverse impacts on natural resources. Likewise, the Agency may not do so when it makes its decision on this project.

A section by section review of the entire APA Act shows that the court in the previous lawsuit against this project was quite clearly correct when it held that the APA has an "environmental mandate" and may not balance economic factors against environmental factors. Association for the Protection of the Adirondacks, Inc. v. Town Board of Town of Tupper Lake, 64 A.D.3d 825 (3d Dept. 2009). As noted by the court in that case, the primacy of environmental protection under the APA Act, and the lack of authority to balance economic benefits against damage to the environment, stands in contrast to SEQRA, where that type of balancing approach is allowed, and indeed is even mandated. Id. See also Protect Brief, pp. 2-4.

Section 801 of the Act contains its "Statement of Legislative Findings and Purposes." The purposes of the Act are described as follows:

> The basic purpose of this article is to insure optimum overall conservation, protection, preservation, development and use of the unique scenic, aesthetic, wildlife, recreational, open space, historic, ecological and natural resources of the Adirondack park.

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[3] See Protect Brief Points 1, 3, 4, 7, 8, 9, and 11; Points 1, 3, 4, 7, 8, and 9, infra.

> A further purpose of this article is to focus the responsibility for developing long-range park policy in a forum reflecting statewide concern. ...

Nowhere in § 801 is it stated that a purpose or intent of the Act is to promote economic development. Nor does § 801 state that the Agency may use the alleged benefits of a project to offset its environmental impacts when deciding whether or not to issue a permit.

Instead, § 801 makes it clear that, to the extent that economic considerations are to be taken into account by the Agency, this is to be done at the planning stage, and not on a project-by-project basis:

> The Adirondack park land use and development plan set forth in this article recognizes the complementary needs of all the people of the state for the preservation of the park's resources and open space character and of the park's permanent, seasonal and transient populations for growth and service areas, employment, and a strong economic base, as well. In support of the essential interdependence of these needs, the plan represents a sensibly balanced apportionment of land to each. Adoption of the land use and development plan and authorization for its administration and enforcement will complement and assist in the administration of the Adirondack park master plan for management of state land. Together, they are essential to the achievement of the policies and purposes of this article and will benefit all of the people of the state. (emphasis added)

Indeed, economic growth was seen by the Legislature as a threat to the Park, not a benefit:

> Growing population, advancing technology and an expanding economy are focusing ever-increasing pressures on these priceless resources. APA Act § 801.

It is noteworthy that when the Act was first adopted, former § 801 stated that:

> The basic purpose of this article is to insure optimum overall conservation, protection, preservation, development and use of the unique scenic, historic, ecological and natural resources of the Adirondack park.

When the Act was comprehensively amended in 1973 to adopt the land use plan, the words "aesthetic, wildlife, recreational, open space" were added to these purposes. Laws of New York, 1973, Chapter 348, § 1; see current APA Act § 801. Thus, promoting economic growth was not among the statutory purposes for which the APA Act was adopted, nor did the Legislature see fit to change that when it made substantial amendments to the Act in 1973. Instead, these subjects were discussed in a separate paragraph of § 801, which was also added in 1973, as quoted above. As discussed above, that paragraph shows that "growth and service areas, employment, and a strong economic base" were addressed in the planning stage.

Section 805 of the Act, as originally adopted in 1971, required the Agency to prepare a land use and development plan and to submit it to the Governor and the Legislature for their approval. Former § 805(1). Former § 805(3) required that these recommendations must include recommendations:

> to implement the objectives of the plan to insure the optimum conservation, protection, preservation, development and use, of the unique scenic, historic, ecological and natural resources of the Adirondack park.

The statutory purposes of the required plan did not include economic development or enhancing municipal revenues. There was no mention of balancing environmental factors against economic benefits.

Thereafter, in 1973, such a plan was submitted by APA and approved by the Legislature and the Governor, and the APA Act was amended accordingly. When that document was submitted to the Governor, the APA's report to the Governor[4] stated (p. 1):

> The Land Use and Development Plan is the product of extensive and detailed studies, analyses and evaluations of the physical and biological resources and characteristics of the Adirondack Park, and their capability to withstand development, and of the existing land uses and public facilities of the Park and the public benefits to be derived from the unique natural resources and the scenic, historic,

[4] "Adirondack Park Land Use and Development Plan and Recommendations for Implementation", Adirondack Park Agency, March 6, 1973. A copy of the pertinent part of that report is attached hereto as Attachment A.

> recreational, open space and other qualities of the Park. **The need to preserve these resources and qualities was balanced with the equally important needs of the park's permanent, seasonal and transient populations for growth and service areas, employment, and a strong economic base.** (emphasis added)

Thus, the balancing of economic and environmental factors has already occurred at the planning stage, and is not intended to occur on a project-by-project basis. Consistent with the statutory requirements of the 1971 Act, the plan, as set forth in the current § 805, did not include any balancing of environmental factors against economic benefits in the review and approval of particular projects.

Sections 805(1) and 805(2) of the Act now govern the adoption and amendment of the Act's Land Use and Development Plan ("Plan") and the Land Use and Development Plan Map ("Map"). These sections furthur demonstrate that any balancing between environmental and economic factors was intended to occur in the adoption of the original Map under these sections and in the Map amendment process.

Going forward from the 1973 amendments that adopted the Plan, § 805(c)(3) requires that economic factors be considered in the review of any amendments to the Map. It requires "a current and comprehensive inventory and analysis of the natural resource, open space, public, economic and other land use factors ..." (emphasis added) when APA reviews potential Map amendments at the request of a local government. Similarly, § 805(c)(5) requires that the Agency take "into account such existing natural resource, open space, public, economic and other land use factors" (emphasis added) when reviewing all proposed amendments to the Map.

By contrast, as discussed below, in applying the Plan and the Map to particular projects, APA has no authority to consider such economic factors. Such factors must be considered at the planning and map amendment stages, not at the project review stage.

Section 805(3) of the Act establishes the "character descriptions and purposes" and the "policies and objectives" that are to be supported in the various land use areas created by the Act. Once land is classified on the Map, its intended purposes are defined for the various land use area types in § 805(3)(c) to

§ 805(3)(h). For instance, for Hamlet areas, their purposes include that they:

> will serve as the service and growth centers in the park. They are intended to accommodate a large portion of the necessary and natural expansion of the park's housing, commercial and industrial activities. In these areas, a wide variety of housing, commercial, recreational, social and professional needs of the park's permanent, seasonal and transient populations will be met.

APA Act § 805(3)(c)(2). All types of land uses are considered to be compatible uses in Hamlet areas. APA Act § 805(3)(c)(3). Hamlets are clearly intended to be the locus of economic development in the Park.

By contrast, in Resource Management ("RM") areas, the purposes for which economic factors are considered to be important are limited to forest, agricultural and recreational resources, and

> to prevent strip development along major travel corridors in order to enhance the aesthetic and economic benefits derived from a park atmosphere along these corridors.

APA Act §§ 805(3)(g)(1) & (3)(g)(2). Under the Plan, RM lands are not intended to be used to promote any other types of economic development.

Instead, the characteristics and purposes of RM lands:

> are those lands where the need to protect, manage and enhance forest, agricultural, recreational and open space resources is of paramount importance because of overriding natural resource and public considerations.

APA Act § 805(3)(g)(1).

> The basic purposes and objectives of resource management areas are to protect the delicate physical and biological resources, ... preserve the open spaces that are essential and basic to the unique character of the park.

APA Act § 805(3)(g)(2).

The compatible uses in RM areas are almost entirely limited to uses which promote forestry, agriculture and recreation. APA

Act §§ 805(3)(g)(4). Although residential housing is permitted by § 805(3)(g)(2) under very limited circumstances, the stated purpose of allowing it is not tied to economic benefits in any way. APA Act §§ 805(3)(g)(2).

This comparison shows that the Plan and Map set aside some areas for commerce and the promotion of economic growth, and other areas for natural resource-based industries and protection of the environment. Thus, under the APA Act, economic factors were addressed at the planning stage and may not be taken into account in the review of individual projects.

Section 805(4) of the Act sets forth the development considerations that the Agency must take into account when reviewing projects. It does not permit the consideration of economic benefits in reviewing potential adverse impacts to the Park's resources. The Development Considerations ("DC") listed at § 805(4) do not include economic, commercial or other such benefits, and they provide no basis for the consideration of such factors in the review of projects, except for the very limited purpose of offsetting the fiscal and public service burdens on the public resulting from the project. APA Act § 805(4). This section states in its entirety:

> 4. **Development considerations.** The following are those factors which relate to potential for adverse impact upon the park's natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources and which shall be considered, as provided in this article, before any significant new land use or development or subdivision of land is undertaken in the park. Any burden on the public in providing facilities and services made necessary by such land use and development or subdivision of land shall also be taken into account, as well as any commercial, industrial, residential, recreational or other benefits which might be derived therefrom ... . (emphasis added)

The first sentence of § 805(4) refers to the:

> factors which relate to potential for adverse impact upon the park's natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources ... .

These "factors", which are the listed DCs, all relate to the natural, historic and recreational resources of the Park. None

of these factors relate to economic or commercial issues. The first sentence then requires that the DCs:

> shall be considered, as provided in this article, before any significant new land use or development or subdivision of land is undertaken in the park.

The second sentence of § 805(4) states that:

> Any burden on the public in providing facilities and services made necessary by such land use and development or subdivision of land shall also be taken into account, as well as any commercial, industrial, residential, recreational or other benefits which might be derived therefrom... .

The commercial and other such benefits of a project are discussed only in the context of the "burden on the public" and not in the context of the "park's natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources". APA Act § 805(4).

The dichotomy between the first sentence of this section, and the second sentence, shows that economic and commercial issues are considered to be entirely separate from natural, historic and recreational issues, so that the potential benefits of a project are only to be considered as an offset to the project's potential burdens on the public. There is no basis in § 805(4) for the Agency to consider these benefits as an offset to the impacts on the natural, historic and recreational DCs.

This dichotomy is furthur evidenced by the listing of the DCs in § 805(4). Almost all of the DCs relate to natural, historic and recreational factors. The only exception is:

> d. Governmental considerations.
>
> (1) Governmental service and finance factors
>
> (a) Ability of government to provide facilities and services.
>
> (b) Municipal, school or special district taxes or special district user charges.

§ 805(4)(d). This DC requires the Agency to look at a project's financial burden on the community. Pursuant to § 805(4), the Agency should consider how this burden might be offset by the project's benefits. However, a project's benefits are not a DC in and of themselves.

Therefore, with the exception of burdens on the public, all of the DCs relate to natural, historic and recreational resources and not to financial or economic factors, and project benefits are only a consideration in relation to this single issue. A project's benefits may not be assessed for the purpose of offsetting adverse impacts related tp any of the other DCs.

Section 809(10)(e) of the Act requires that an application shall be denied if the project will have an undue adverse impact on the resources of the Park. That section states, in its entirety:

> e. The project would not have an undue adverse impact upon the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the park or upon the ability of the public to provide supporting facilities and services made necessary by the project, taking into account the commercial, industrial, residential, recreational or other benefits that might be derived from the project. In making this determination, as to the impact of the project upon such resources of the park, the agency shall consider those factors contained in the development considerations of the plan which are pertinent to the project under review.

Section 809(10)(e) begins with the required finding that:

> The project would not have an undue adverse impact upon the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the park....

Then, following the conjunction "or," § 809(10)(e) states:

> ... or upon the ability of the public to provide supporting facilities and services made necessary by the project, taking into account the commercial, industrial, residential, recreational or other benefits that might be derived from the project.

Thus, the construction of § 809(10)(e) clearly distinguishes between adverse impacts on the natural, historic and recreational resources of the Park on the one hand, and the burdens on the public on the other. The discussion of economic and other benefits occurs only in the context of the burdens on the public, and not in the context of the adverse resource impacts.

When discussing the DCs, both § 805(4) and § 809(10)(e) differentiate between the natural, historic and recreational resources of the Park, and the burdens that the project will impose on the public. Both then, in the context of those public burdens, allow the Agency to take into account the alleged benefits of a project. However, neither section allows those benefits to be considered in the context of the adverse impacts on the natural, historic and recreational resources of the Park.

The final sentence of § 809(10(e) requires that the Agency must consider the DCs:

> In making this determination, as to the impact of the project upon such resources of the park, the agency shall consider those factors contained in the development considerations of the plan which are pertinent to the project under review.

As shown by the discussion of § 805(4) above, project benefits are not a DC, and may only be considered as an offset to public burdens. Thus, the language of § 809(10(e)[5] on this subject supports the language of § 805(4).

Sections 814 and 815 of the Act, by comparison, show that if the Legislature had intended for the Agency to balance economic factors as part of the review of projects, it could have, and would have, done so. For instance, in the review of projects under the Interim Development Controls that were in effect prior to 1973 pursuant to APA Act § 815,[6] the Agency was directed to consider "the commercial, industrial, residential or other benefits of the project." APA Act § 815(8).[7]

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[5] APA Act § 807(f) (local government review of Class B Projects under approved local land use plans) and § 809(9) (APA review of Class A Projects in towns with approved local land use plans) contain similar language and similarly limit the consideration of economic factors in the project review process.

[6] Originally § 806, renumbered in 1973.

[7] Likewise, Section 814(2)(b) provides that in reviewing projects proposed by State agencies, the APA:

> may review the project to determine whether it: ...
>
> b. may have an undue adverse impact upon the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the park,

Thus, when the Legislature wanted the Agency to consider such potential benefits, it directed the Agency to do so, such as in § 814(2)(b) and § 815(8), and in the context of offsetting financial burdens on the public under § 805(4)(d) and § 809(10)(e). When it did not want them to be considered, it did not direct the Agency to do so.

The APA Act is clear and consistent. The alleged potential economic and financial benefits of the ACR project may not be considered by the Agency in determining whether or not to approve the project, and they may not be balanced against the project's adverse environmental impacts. These issues were already taken into account in the planning stages when the APA Plan and Map were adopted pursuant to § 805(1) and § 805(2). Therefore, the APA Staff Brief (p. 4) is incorrect.

As shown by the Protect Brief at Points 1, 3, 4, 7, 8, 9 and 11, and by the briefs of Dr. Phyllis Thompson, Adirondack Wild, The Adirondack Council, Dennis and Brenda Zicha, Kevin and Lyndon Jones, Carol Richer, Birchery Camp, and Little Simon Properties, LLC, the project will have undue adverse impacts on the resources of the Park. The alleged economic benefits of the project can not be used to offset these impacts. Therefore, the application must be denied pursuant to APA Act § 809(10)(e).

B. The Agency Must Consider the ACR Project's Lack of Viability

As discussed at page 11 of the Protect Brief, the project's financial viability is relevant to the question of the project's adverse fiscal impacts under Hearing Issue #6. This question relates to APA Act § 805(4), DC (d)(1),[8] and § 809(10)(e)

> taking into account the economic and social benefits to be derived from such project. In making such determination, the agency shall apply the development considerations.

Thus, for State projects, the consideration of "economic and social benefits" is not limited by the wording of § 814(2)(b) to "the ability of the public to provide supporting facilities and services made necessary by the project," as it is for APA review of private projects under § 809(10)(e).

[8] "d. Governmental considerations.
(1) Governmental service and finance factors

regarding adverse fiscal impacts, so the Agency must address this issue. The Staff Brief (p. 5) argues that the viability of the project is not directly relevant to the Agency's decision. It also argues (p. 101) that permit conditions can not ensure the viability of the project.

However, APA Act § 809(13)(b) states that the Agency "shall have authority":

> b. To impose reasonable conditions and requirements to ensure that ... the project sponsor furnish appropriate guarantees of completion or <u>otherwise demonstrate financial capacity to complete the project or any material part thereof</u> ... . (emphasis added)

In furtherance of this duty, the Agency's regulations allow it to require that applicants provide information on the project sponsor's financial capacity. 9 NYCRR § 572.4(c)(5).

Contrary to the Staff's position (Staff Brief, p. 5), the financial viability of the project is indeed relevant to the decision that the Agency must make in this case. Addressing it is not optional. It is a requirement of the Act.

C. <u>The Project is Not Financially Viable</u>

As set forth at Protect Brief Point 5/6, the applicant failed to meet its burden to prove that the project is financially viable, and the evidence shows overwhelmingly that it will not be. The Staff Brief concedes this:

- "the Project Sponsor's projections regarding sales and pricing are not reliable...". (p. 49)
- "Project failure or shortfall would occur because of a decline in revenue to the project due to slowed or halted sales of residential units." (footnote omitted)(p. 51)
- "Cross-examination of the Project Sponsor's experts revealed that the project application does not provide a reliable basis for projecting either the number of residential units

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> (a) Ability of government to provide facilities and services.
> (b) Municipal, school or special district taxes or special district user charges."

APA Act § 805(4)(d)(1).

to be sold or the likely sales prices of those units." (footnotes omitted)(p. 51)

- "Direct examination of the expert for Protect the Adirondacks! Inc. [David Norden] underscored this deficiency...". (footnote omitted)(p. 51)

- "the record does not provide reliable support for the Project Sponsor's positive fiscal impact projections." (footnote omitted)(p. 56)

- "However, extensive testimony was offered at the hearing that raised legitimate questions about the overall viability of the proposed project, about the proposed sales and price of residential units, and about whether the local economic benefits would actually occur." (footnotes omitted)(pp. 100-101)

- "Conditions in the Draft Order can not ensure the viability of the proposed project ...". (p. 101)

However, the ACR Brief (pp. 140, 155-160) attempts to gloss over this glaring deficiency in its case by largely ignoring it, attempting to co-opt the testimony of Protect's witness David Norden to support its case, and by arguing, in effect, that the market is so unpredictable, why bother to try to think ahead.

The ACR Brief did nothing to prove the viability of the project. The only testimony that it cites so as to arguably support the viability of the project is that of ACR's witness Terry Elsemore. ACR Brief, pp. 139-141. However, that testimony was merely conclusory conjecture and consisted solely of his opinions, without any analysis. Mr. Elsemore admitted that he did not do any market studies or other such analysis. Tr. 2370.

Indeed, the ACR Brief (p. 157) admits that Mr. Elsemore is just a real estate salesman, while Mr. Norden examined "market trends, economic factors and data collected from a wide range of projects generally within the region or on a national level...".

When a consultant's conclusion is supported by nothing more than his own opinion and is not supported by credible evidence, then that conclusion must be discounted by the decision-making agency. Meyer v. Board of Trustees, 90 N.Y.2d 139, 146-147 (1997); T-Mobile Northeast v. Village of East Hills, ___ F. Supp. ___, 2011 WL 1102759 *9 (E.D.N.Y. 2011). Therefore, Mr. Elsemore's testimony was not credible and does not support the application.

It is noteworthy that Mr. Elsemore only stated that the project could succeed if the properties were competitively priced. ACR Brief, p. 140. However, he did not claim that they were competitively priced. The record shows that they actually are not. Norden PFT, pp. 16, 32-34, 48, 50-53; Ex. 220-221; Tr. 3276. The most that he said was that the properties could be competitive if the market recovers (ACR Brief, p. 140), but neither he, nor anyone else, testified that the market had indeed recovered, or was likely to do so any time soon. He admitted that "many [buyers] are sidelined waiting for the economy to improve." ACR Brief, p. 141. Further, buyers' expectations and preferences have changed and ACR's plans do not fit those changed preferences. Norden PFT, pp. 43-44. Therefore, the project is not competitively priced, and it will fail.

The ACR Brief admits (p. 155) that the testimony of Protect's expert David Norden was "objective and credible". What that brief failed to note was that Mr. Norden's testimony makes it clear that the project will fail. Norden PFT, generally; Ex. 212 to 224; Tr. 3324, 3329. In effect, this is a concession by the applicant that the project is not going to succeed.

Mr. Norden's conclusion is supported by the applicant's own witness. Mr. Elsemore testified that the applicant's 2006 market study was overly optimistic as to both sales volume and sales prices, with prices overestimated by about 10% to 30%. Tr. 2404-2408. However, the applicant's latest sales and pricing predictions are even rosier than they were in 2006. See Protect Brief, pp. 13-16. Therefore, the applicant's own witness proved that Mr. Norden was correct.

Lacking any basis for attacking Mr. Norden, the ACR Brief tried to co-opt his testimony by cherry-picking parts of it that are seemingly favorable.[9] For instance, both he and Mr. Elsemore agreed that it is hard to predict the market more than 5 years out. ACR Brief, pp. 155-156. However, that does not change Mr. Norden's conclusion that the project is not marketable either now, or at any time, ever. Norden PFT, pp. 16-17, 34, 37. As he concludes:

> Overall, I find the lack of current market data and the superficial nature of the available market data to be particularly troubling with respect to the risk profile of this project. The market findings are relatively

[9] This is reminiscent of the application's cherry-picking part of Mr. Norden's nationwide research and using it out of context to support the faulty assumptions behind the project. Norden PFT, pp. 38-40.

> vague and offer virtually no benchmark data. **As a result, it appears that the developer's expectation of success is largely based on real estate sales projections that are out of line with what might be reasonably expected in the current market environment or, given the parameters of the project, in any market environment.** While there are clearly aspects of this project that I find appealing, the real estate sales projections are out of line with the reality of the project's location, the project's lack of market visibility and, most importantly, the high level of competition it will face from larger resorts with better access to the New York and other metropolitan markets.

Norden PFT, p. 56:5-20 (emphasis added).

And, while he did testify that he is not personally opposed to the project and that there are some positive aspects in the application materials (ACR Brief, pp. 156-157), that only supports his credibility and adds strength to his immediately preceding statement that:

> the ACR project would be placed in a category that has a much lower probability of success than most competitor resorts.
>
> My conclusion from this 3-point process is that it is highly improbable that the project will be able to achieve the sales pace and sales volume as planned and projected.

(Norden PFT, p. 17:4-9), and his later conclusion that the project "suffer[s] from all of [the] problems" characteristic of "projects that will have the most difficulty" succeeding. Norden PFT, p. 40:6, p. 40:2-3. He also concluded that:

> I believe that the market is very limited today for this type of product offering and as such the project carries relatively high risk profile. Even in the best markets, prices are depressed, new product is not being built, and re-sales are on the rise. Product is starting to move, but primarily at the best properties in the best locations (known as "A" properties) that have discounted price significantly. ...
>
> This project does not possess the primary characteristics of resorts most likely to succeed as we come out of the recession. There is no "name-

recognition," limited existing amenity base, no existing infrastructure, and no current client base upon which to draw buyers.

Norden PFT, p. 37:8-21. The ACR Brief (p. 155) also claims that his work is subjective. This is contradicted by the statement just 3 lines before that, that he was objective. Moreover, his analysis of the project is actually very objective and quantitative. Norden PFT, pp. 15-17, 27-29, 33-34, 52: Ex. 210-224.

The single area where the ACR Brief (p. 158) tries to attack Mr. Norden is on his knowledge of the interior finishes of the buildings, landscaping and the like. There is nothing that shows why this is relevant. And, while such things might affect sales prices marginally, they can not account for the gross disparities and exaggerations in predicted pricing contained in the application materials. See Protect Brief, Points 5/6.A & B.

As stated in the Staff Brief (p. 49): "the Project Sponsor's projections regarding sales and pricing are not reliable," and (pp. 100-101) "extensive testimony was offered at the hearing that raised legitimate questions about the overall viability of the proposed project, about the proposed sales and price of residential units, and about whether the local economic benefits would actually occur." Therefore, the applicant did not meet its burden of proof (Protect Brief, pp. 5-8) to show that the project is viable, and the application must be denied.

D. The Project Would Put Local Governments at a Significant Financial Risk

Issues #5 and #6 both require examination of the project's fiscal risks for local governments. As discussed at Point 5/6.A above, this is the one area where the APA Act allows the project's alleged benefits to be balanced against its impacts. However, as proven at Protect Brief Point 5/6 and at Point 5/6.C above, these claimed benefits are fictional, in large part because the project is doomed to failure.

1. There Will Be Uncompensated Fiscal Impacts to Local Governments

The applicant has argued that the municipal revenues from the project will greatly outweigh its costs, and provide a net benefit to the community. It also argues that, in the event that the project fails, its phasing plan and other features would

prevent financial harm to the local governments. See ACR Brief, pp. 137-139. This claim is incorrect.

For instance, in order to redevelop the ski area, and to sell any housing west of the Read Family property (a/k/a "Read Road"), the new sewage treatment plant will have to be built. Once it is built, it will need a certain volume of customers and sewage in order to operate and to pay for its operation. However, if, as is likely, real estate sales are only about 1/8 of the predicted volume,[10] there will not be enough customers to support it. In that event, the Town of Tupper Lake will have to take over operation of the plant. As stated in the Staff Brief:

> A default by the transportation corporation after the system is constructed could place the municipalities in the position of having to operate and maintain the wastewater treatment system. Staff Brief, p. 52.

This same problem is likely to occur for other parts of the infrastructure:

> APA hearing staff believe that some costs, particularly for operation and maintenance of public infrastructure associated with the project, may fall back to the municipalities if the project fails or does not keep paced [sic] with the projected sales and/or revenues. Staff Brief, p. 52.

Thus, the Staff is in agreement with Protect's expert witness Shanna Ratner that, despite the applicant's promises, there is a risk of the local governments having to pick up the tab for the costs of maintaining the infrastructure.

The Staff also agrees with Protect and its expert witnesses that:

> the record does not provide reliable support for the Project Sponsor's positive fiscal impact projections. This deficiency makes it difficult to assess the extent to which, or at what pace, the affected municipalities might benefit from the proposed project. ...
>
> the positive or negative fiscal impacts to the municipalities will depend upon actual residential

[10] See testimony of David Norden at Norden PFT, pp. 50-51; Tr. 324, 3329; Protect Brief, pp. 19-26; Attachment A to Protect Brief (graphs).

> sales and actual sale prices.[11] Further, according to [Protect expert] Ms. Ratner, the Project Sponsor has not fully considered the potential costs to the municipalities in its analysis. Staff Brief, p. 56. (footnotes omitted)

In other words, the Staff and Protect agree that the record shows that the applicant has failed to meet its burden of proving that the project will not adversely impact the finances of the affected local governments, and the application must be denied. See Protect Brief, Point 5/6.F.[12]

2. Shanna Ratner's Economics Testimony for Protect Was Credible

The ACR Brief (pp. 141-142) attacks Protect's expert economist Shanna Ratner, arguing, oddly, that her only goal was to discredit the project. This criticism does not go to the merits of her work, for which there is no valid rebuttal.

The ACR Brief (p. 142) criticizes her testimony because she had never done any work in Tupper Lake. There is no explanation as to why this might matter, and none of the applicant's witnesses did any prior work in the Town either. In fact, she has done a considerable amount of consulting work throughout the Adirondacks, for over 25 years, for mainstream entities such as the Adirondack North Country Association and the Plattsburgh North Country Chamber of Commerce. Ratner PFT, p. 1:17-18; Tr. 2091-2092; Exhibit 192. She has also previously spent time in Tupper Lake in connection with her work. Ratner PFT, p. 1:19-2:3; Exhibit 192.

She was also criticized (p. 142) for not having read the APA's guidance document "Development in the Adirondack Park" (the "DAP"). However, that document is not relevant to her testimony. Her role was not to give legal conclusions about whether or not the project complies with the APA Act, the DAP or the DCs, to look at the quality of the applicant's economic analysis. See generally Ratner PFT.

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[11] As proven at Protect Brief Points 5/6.A & B, both the applicant's sales and price projections are grossly inflated. See also Staff Brief, pp. 49, 51-52.

[12] The Brief of nearby property owner and party as-of-right, Kevin Jones, does an excellent job of summarizing the testimony on these questions, and the Agency members are urged to read it carefully.

The fact that she did not do her own or projections (ACR Brief, pp. 142-143) is not relevant either. The burden of proof is on the applicant. It is not up to the opposition, such as Protect, to prove that the project does not comply with the APA Act. It is up to the applicant to prove that it does. Protect Brief, pp. 5-8.

Ms. Ratner testified that she had not read the Village's planning study by Camoin Associates (ACR Brief, p. 143), but that document is not in the record, so what it may or may not say is irrelevant. The ACR Brief (pp. 143-146) goes on and on about other documents that she did not read, and people she did not talk to.

What the ACR Brief does not do is show how any of these things are the least bit relevant. Nor, with the exception of one disputed issue regarding sewer lines, does the ACR brief point out any alleged discrepancies or errors in her testimony, or provide any rebuttal to her conclusions.

In other words, the applicant was unable to assail the merits of Ms. Ratner's work, so it resorted to innuendo, irrelevancies and *ad hominem* character attacks. As discussed above, the Staff found her to be credible and the Staff Brief relies heavily on her testimony. Thus, the applicant's attempts to discredit her testimony should be ignored.

3. The Projected Tax Revenues Are Grossly Inflated And ACR's Phasing Plan Will Not Prevent Adverse Fiscal Impacts

The ACR Brief claims (pp. 137-139) that even if the project grinds to a halt (as it inevitably will), no matter when that occurs, the municipal revenues will still be positive. This would happen only if the applicant's revenue projections turn out to be reliable. As set forth above, despite its generally pro-project stance, the Hearing Staff does not believe that these projections are credible.

During the hearing, Protect showed that the applicant's projections for real estate sales and the resulting tax revenues were grossly inflated:

- The projected sales volume of $38 million per year were extremely unlikely to occur; $5 million per year (87% less) is much more likely (Norden PFT, pp. 50-51; Tr. 3253-3261, 3323-3324; Ex. 218, 219; Protect Brief, pp. 18-19, 22-23; Protect Brief, Attachment A (Norden graphs));

- Tax revenues were overstated because the calculations failed to take into account the State equalization rate of 70%, and instead, properties were valued at 100% of the projected sales prices (Tr. 2623-2643), so that revenues were overestimated by 30%;
- Tax revenues were overstated by about 50% because estimated sales prices were grossly inflated (Protect Brief, pp. 13-15);
- Sale price estimates did not take into account the real estate market crash that occurred from 2006 to 2011 (Norden PFT, pp. 32-33; Tr. 3238-3241); the applicant's own witness, Mr. Elsemore admitted that prices had dropped by about 10% to 30% from the market's peak in 2006 (Tr. 2407, 2409-2410);
- Math errors in the application materials overstated sales projections by $11.5 million, about 2% of the total (Tr. 2537-2542; Protect Brief, p. 15);
- The applicant's estimated prices for the Great Camp lots are about 230%-500% higher than actual market values for similar lots in the Adirondacks and about 600%-4,000% too high compared to similar lots in Franklin County (Tr. 3288-3300, Ex. 223, 224); and
- The applicant's estimated prices for the ski-in/ski-out residences are inflated because many of these homes are not true ski-in/ski-out properties (Tr. 3271-3273, 3278-3286).

When all of these factors are combined, the municipal revenues from the project will be only a small fraction of the potential revenues claimed in the application. Thus, the claimed net positive revenues set forth in the application have not been proven by the applicant. Likewise, the alleged net revenue in the applicant's "development phase cessation" or "project pause or stop" scenario (ACR Brief, pp. 137-139) are totally baseless. Regardless of the phasing plan or any other precautions, the revenues will not be available to support whatever infrastructure is built.

As stated in the Staff Brief (p. 56) "the record does not provide reliable support for the Project Sponsor's positive fiscal impact projections." Thus, the applicant has failed to prove that there will not be undue adverse fiscal impacts on local governments, as required by DC (d)(1), and the application must be denied.

E. ACR Is Likely to Just Sell the 8 Larger Great Camp Lots and Then Cut and Run

The project as a whole is not financially viable, and the applicant does not have the financial ability to actually build it. See Protect Brief Point 5/6. It is likely that if the

Agency approves the application, ACR is likely to sell off as many lots as it can, as quickly and easily as it can, and then disappear. The project appears to be designed to facilitate just such an exit plan.

As shown by the Staff Brief (p. 52), the applicant has so far failed to enter into any binding agreements for cost-sharing with the local governments. As shown by the Staff Brief (pp. 5-6, 60-62), the applicant's commitment to keeping the ski area open is shaky, at best. See also Protect Brief, pp. 38-39. Major funding for the ski area is likely to be delayed. Staff Brief, p. 60.[13] The applicant did not propose to build the sewer district pump station for the Lake Simond View subdivision during Phase I. Point 4, infra. As set forth at Point 1.B below, the after-the-fact critical wildlife habitat surveys proposed by the Staff will not be required until after many of the Great Camps are sold.

It is telling that the first 68 units that the applicant intends to sell are not required to be part of the homeowners association. ACR Brief p. 33. Thus, they can be sold without having to pay an assessment to support the ski area, and without the applicant having to go to the expense of setting up the association. All of those first units will be either on the Village sewer system or on-site septic systems, so that the applicant can sell them without having to construct the private sewage treatment plant. The application presents detailed phasing plans (Ex. 85, pp. 29-33), but then the applicant backs away from them by saying that its plans have "fluidity". ACR Brief, p. 161.

Thus, it appears that the following scenario is likely to occur if the Agency issues a permit for the project:

- Upon approval of the permit and any other permits required for the 8 larger Great Camp lots located east of the Read Family property (a/k/a Read Road), those lots will be platted.

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[13] "However, it is clear from the record that the Project Sponsor will only follow through on the renovation of the Ski Area if the project's residential development succeeds. ... Thus, the primary assumption underlying the proposed renovation of the Ski Area, and the timing for that renovation, is that residential development will occur at the pace and for the prices projected by the Project Sponsor." Staff Brief, p. 60 (footnotes omitted). As proven by Protect Brief, Point 5/6, the pace of sales and the prices projected by the applicant are fictional. Therefore, it is highly unlikely that the ski area renovations will occur.

- The dirt and gravel roads for those lots will be graded, without IDA funding.
- The 8 lots will be sold, at prices well below those projected by the applicant. See Protect Brief, Point 5/6.A.
- Several thousand acres of timber land will go out of production. See Point 1.F, infra; Protect Brief, Point 1.A.4.
- Hunting and other recreational opportunities on those lands, enjoyed by local residents for decades, will be lost.
- Thousands of acres of wildlife habitat will be irreparably fragmented. See Protect Brief, Point 1.A.1.
- The proceeds of those 8 lot sales will be used to pay OWD for its land, and to pay off back taxes, consultants and other debts of the developers. See Protect Brief, p. 45; Protect Brief Appendix A, Appeal #1 (pp. 112-113).
- County of Franklin Industrial Development Agency funding for the remaining infrastructure will not be approved by that agency. See Protect Brief, Point 5/6.C.
- The project amenities such as the ski area improvements and marina will not be built, due to a lack of funding.
- The developer will concede the inevitable, and abandon the remainder of the project.

In the end, the Park will suffer undue adverse impacts to its natural resources, and the Town of Tupper Lake will receive none of the promised benefits.

F. Issues ##5/6 Conclusion

The project is not viable, and the applicant has not proven that it will create positive tax revenues and avoid adverse fiscal impacts. Lacking any hard data or any other evidence to support its claims for real estate sales and pricing, and the resultant property tax revenues, the applicant is asking the Agency to approve a project that is supported only by the theory that "if you build it, [they] will come".[14] As Mr. Norden testified, the "build it and they will come ... notion ... is gone." Tr. 3314.

Moreover, the project is not proposed for a cornfield in Iowa.[15] It is proposed for the Adirondack Park, where it must comply with the APA Act.

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[14] AFI's 100 Years... 100 Movie Quotes, http://en.wikipedia.org/wiki/AFI's_100_Years...100_Movie_Quotes

[15] Field of Dreams, http://www.imdb.com/title/tt0097351/

More importantly, the APA Act does not allow the decision-makers in this case to balance the alleged financial benefits against the project's adverse impacts on the natural resources of the Park. Doing that in this case would not only be contrary to the law, it would set a terrible precedent, such that the Agency would have to approve any project that came along, so long as the developer promised to create positive tax impacts and a few jobs. That is not permitted by either the letter or the intent of the APA Act, so the application must be denied.

Issue #1

The Project Does Not Comply With the APA Act

As was stated in the Protect Brief (p. 6), the "application must be denied because the applicant failed to satisfy its 'burden of demonstrating that the project will be in compliance with applicable statutory and regulatory requirements'. 9 NYCRR § 580.14 (b)(6)(i)." Nothing in the ACR Brief establishes that the applicant met this burden of proof on Issue #1.

Despite multiple opportunities to do so, the applicant failed to collect the necessary information on wildlife habitat or to assess the potential adverse impacts of habitat fragmentation. In addition, the project design for the Great Camp lots does not provide "small clusters" and the larger Great Camp lots do not comply with the APA Act. The project will also have an undue adverse impact on the forestry resources of the Park.

As the Staff Brief (p. 25) points out, the project will adversely impact wildlife and its habitat. The applicant failed to meets its burden of proving that these impacts would not be undue. For all of these reasons, the application must be denied.

A. The Project Will Have Undue Adverse Impacts on Wildlife and Wildlife Habitat

As the Staff Brief (p. 24) points out, the applicant could have and should have done more to identify wildlife species and assess habitat impacts, and that these impacts were "only cursorily assessed" by the applicant. With regard to amphibian habitat,[16] the Staff Brief (p. 26) concedes that:

due to the lack of information in the record it is impossible to make complete conclusions about

[16] The record contains a great deal of discussion about amphibian habitat. This occurred because Adirondack Wild's expert ecologist is a specialist in amphibians. Tr. 105; Ex. 167. Because he testified about these species, that became a focus of discussion. However, that does not mean that other types of wildlife should be ignored. Instead, the same lack of data on amphibians that plagues the record also affects the record regarding other types of animals, such as birds and mammals. See e.g. Thompson PFT regarding birds; Spada testimony at Tr. 3050-3053.

protection of this specific habitat in RM. (footnote omitted)(emphasis added)

The Staff Brief (p. 113) states that "not enough was done to identify biological resources or to assess the impacts of the proposed project on those resources." These admissions alone are enough to mandate that the application must be denied. See Point 8, infra.

The Staff's concessions about wildlife impacts only refer to Resource Management ("RM") lands. However, the Agency must look at the entire project, not just the RM lands. These impacts to wildlife will occur in all land use areas, not just in RM.

The applicant claims that only a tiny percentage of the property will be developed. For instance, ACR Brief page 87 states that 99.99% of the Great Camp lots will be preserved. However, this ignores the fact that much larger areas of habitat will be adversely affected. Each house and road will affect a zone of habitat much wider than the actual footprint that is developed. Tr. 1065-1068; Glennon/Kretser PFT, pp. 13-14, 21-22, 43-44, 60-61; Tr. 4264, 4368, 4435-4436. See Exhibit 170 - Staff map of Ecological Impact Zones. As shown by Exhibit 170, a very high percentage of the property will be impacted.

The ACR Brief (p. 86) claims the applicant's consultant "took particular care" in preserving open space. However, as demonstrated by the following briefs, the unrebutted testimony of opposing experts, including Agency Staff, proved that the project will have an undue adverse impact on wildlife resources and wildlife habitat:

- Protect, pages 49-58;
- Adirondack Wild, pages 6-23;
- The Adirondack Council, pages 14-32
- Phyllis B. Thompson, PhD, pages 9-15;
- Dennis and Brenda Zicha, pp. 3-14; and
- Birchery Camp (B.G. Read), pp. 2-3

In contrast, the applicant presented no new testimony on this issue. Its witnesses did not rebut the testimony of Drs. Klemens, Glennon and Kretser. The applicant's prefiled and live testimony did nothing to prove the allegations of the written application materials, as required by the APA regulations. 9 NYCRR § 580.11(b), § 580.14(b)(3), § 580.14(b)(6)(i).

The applicant's witnesses were not scientists and, at most, they presented only speculation, conclusions and guesswork, which is not sufficient evidence to meet the applicant's burden of proof. Meyer, supra; T-Mobile, supra. This does not even come

close to meeting the applicant's burden of proof. 9 NYCRR § 580.11(b), § 580.14(b)(3), § 580.14(b)(6)(i).

The applicant relies upon a statement by Staff witness Daniel Spada regarding the benefits of protecting remaining RM lands as undeveloped, and of certain proposed permit conditions. ACR Brief, p. 99. However, unlike most of this testimony, that particular testimony is pure opinion, and appears to have no foundation in the actual evidence, or in his prior testimony. Thus, it may not be credited. Meyer, supra; T-Mobile, supra.

Rather than trying to convince the Agency that there will not be undue adverse impacts to wildlife and wildlife habitat, the ACR Brief (pp. 93, et seq.) expends several pages making excuses for the applicant's utter failure to properly assess these issues or present any competent evidence or testimony. However, as explained by Staff witness Mark Sengenberger, even at the time when the Staff declared the application to be complete, it still knew that the wildlife assessments were deficient, but it believed that this problem would be addressed in the hearing record. Tr. 1644-1649.

The Staff made this clear to the applicant too. Mr. Sengenberger testified that the Staff had extensive discussions with the applicant as to what was needed, and that despite an initial lack of understanding, by the end of the process, this had been adequately explained. However, despite the 4+ year window of opportunity between the declaration of completeness and the hearing, the applicant never tried to remedy this glaring deficiency. See also Ex. 129, p. 5. After discussing the information provided by intervenor parties, Mr. Sengenberger stated "[t]he project sponsor had an opportunity to provide additional materials in that regard. They did not." Therefore, the applicant's excuses are just that, excuses. They are not grounds for the Agency to ignore the law and approve a project that will have undue adverse impacts on wildlife and its habitat.

Regardless of whether or not the APA Staff fully explained to the applicant what it wanted to see in the application, the applicant has the burden of proof and did not meet that burden. Protect Brief, pp. 5-8. The record shows that its consultants know how to do real wildlife surveys when they want to. Protect Brief, pp. 51-53. They just chose not to do that in this case.

B. After-the-Fact Wildlife Assessments Will Not Prevent Undue Adverse Impacts to Wildlife Habitat

The Staff Brief (pp. 26-27) proposes to paper over these glaring deficiencies in the application and in the applicant's

proof at the hearing by adding permit conditions that would require after-the-fact surveys. As set forth at Point 8 below, this approach would violate the APA Act because the Agency members will not have this highly relevant and material evidence before them at the time when they will vote on the application.

There is no testimony in the record to support the idea that after-the-fact wildlife assessments will prevent undue adverse impacts on wildlife or other natural resources. Thus, there is no legal basis for the Agency to conclude that such measures would support a finding of no undue adverse impact under § 809(10)(e).

Also, the proposed future wildlife assessments are glaringly deficient. The Staff Brief (p. 27, 113) proposes that such studies be carried out with regard to the "West Face Expansion" subdivision, which is not scheduled to be built for about 13 years. However, as shown by the Staff's own testimony (Tr. 4035-4053) and its Exhibit 244, **the vast majority of the project will be built within the 750 foot wide "critical terrestrial habitat zone"** identified by the Staff on Exhibit 244. A copy of Exhibit 244 is annexed hereto as Attachment B. These developments and their proposed year of development (Ex. 85, pp. 29-33, Table II-12) include:

Development or Facility	**Phase and Year Commenced**
Bypass Road and Lake Simond Road Extension (parts)	Phase I, Year 1
Larger Great Camps (1)[17]	Phase I, Year 1
Eastern Smaller Great Camps (10)	Phase I, Year 1
Lake Simond View	Phase I, Year 1
Base Lodge, other commercial facilities	Phase I, Year 3
West Slopeside (50%)	Phase II, Year 4
Sugarloaf East	Phase II, Year 4
Ski Area East Satellite Parking	Phase II, Year 5
Tupper Lake View South (50%)	Phase II, Year 6

[17] Ex. 244 does not show all of the larger Great Camp lots, so there could be more of them in the critical terrestrial habitat area.

Western Smaller Great Camps (7)	Phase II, Year 6
Equestrian Center	Phase II, Year 7
Ski Area West Satellite Parking	Phase II, Year 8
Tupper Lake View North	Phase III, Year 9
Cranberry Village	Phase III, Year 9
Hotel	Phase III, Year 9
East Village	Phase III, Year 10

Thus, unless such a study is carried out for the entire project, before the first shovelful of dirt is turned, it will not protect this critical habitat on most of the site. However, the proposed permit conditions do not require this. Protecting only habitat around the Westface Expansion subdivision will not satisfy the legal requirements of the APA Act.

The Staff's proposed condition #90 would require that the study be done by 2013. There are two full construction seasons between the time that the Agency will vote on this application and December 31, 2013. However, there is no proposed condition that would prohibit construction before the study is done. As shown by the table above, according to the applicant's phasing plan, many of the Great Camps would be sold within that timeframe, the Lake Simond View subdivision would be constructed, and many miles of roads would be built. Therefore, proposed conditions #89 and #90 will not avoid or mitigate this adverse impact.

Also, the most that the applicant would be required to do in response to the study results would be to "propose non-material adjustments to project component configuration". Staff Brief, p. 27; Draft Condition #89. This is next to worthless and does not comply with the APA Act. If the survey were to find that an undue adverse impact would occur, which could only be avoided with a "material" change, such as the relocation or elimination of major project components, the proposed condition would not allow the Agency to require that the impact be avoided. Thus, this condition would lock the Agency into allowing an undue adverse impact to proceed and it would be powerless to prevent it. This is an obvious conflict with APA Act § 809(10)(e).

Drs. Glennon and Kretser testified, without being rebutted, that the project would have undue adverse impacts on wildlife and habitat. Tr. 11, 16, 22, 46, 47, 63, 68, 71. Given that almost the entire project will be built in the critical amphibian habitat, it is almost certain that a major redesign will be

needed to avoid undue adverse impacts. This can not be accomplished with an after-the-fact survey and "non-material adjustments".

The proposed after-the-fact surveys are also unfair to the other parties. The proposed permit conditions do not give them the opportunity to review and comment on the hearing results. If, as should have been done, the surveys had been done before the hearing, the parties could have cross-examined the witnesses who prepared them, and provided responsive testimony. Allowing this work to be done after the fact, and for it to be judged only by the Agency Staff, outside of the public eye, will only serve to reward the applicant for its refusal to do the proper studies beforehand.

The Staff has proposed to rely on after-the-fact surveys, despite repeated testimony by Dr. Klemens that this would not adequately avoid these impacts. Tr. 1069-1072, 1091-1092, 1144-1146, 1188-1189, 3141-3142, 3177, 3219.

Despite its best efforts to paper over the lack of proper wildlife surveys, the Staff could not find a way to move the project forward which would be effective to avoid undue adverse impacts to the resources of the Park. This actually proves that the Agency has no choice but to deny the application. If and when the applicant performs adequate surveys, and redesigns the project, then it can reapply for a permit.

C. The Smaller Great Camp Lots Are Not in Small Clusters as Required by the APA Act

Residential development is only allowed on RM lands if it is "on substantial acreages or in small clusters ...". APA Act § 805(3)(g). The applicant did not prove that the 28 smaller Great Camp lots in RM,[18] which average about 27.2 acres each, were in "small clusters". The Agency Staff agrees with Protect that they are not in small clusters. Therefore, the application must be denied.

The applicant argues (ACR Brief, p. 105) that these lots are "approximately one half the prescribed density of 42.7 acres per principal building" for Resource Management lands. This appears to be its only theory as to how 27.2 acre lots are in "small clusters". This theory is blatantly wrong, for many reasons.

[18] There are also 3 of these smaller Great Camp lots in Moderate Intensity. Ex. 81, p. 30.

First, the applicant's math is fuzzy. One half equals 50%. 27.2 is not one half of 42.7 acres. It is 63.7%, which is almost two-thirds. Merely being less than the lot size required to meet the density under the Overall Intensity Guidelines is not "small".[19] A 27+ acre lot is a very large house lot, by any standard.

Second, § 805(3)(g) does not merely require that the lots be small. "Small" is an adjective, which modifies "cluster" in § 805(3)(g). Thus, the clusters have to be small, not just the lots. There are 14 such lots in RM east of the ski area, totaling about 371 acres. Ex. 81, p. 30. There are 14 in RM west of the ski area, also totaling about 371 acres.[20] Ex. 81, p. 30. Again, clusters of 371 acres are not "small"[21] clusters by any standard.[22]

The APA Staff agrees with Protect that these lots are not small clusters: "the other Great Camp Lots do not comprise 'substantial acreage', nor in staff's opinion are they "in small clusters'." Staff Brief, p. 114 (emphasis added).

This finding is consistent with the Staff's hearing testimony:

> Good design collapses and overlaps the zones of impact from the development activities to minimize negative effects. The proposed project does not overlap impact zones to the greatest extent practicable. **The twenty-seven small Great Camp Lots in Resource Management are not clustered as tightly as possible nor are their zones of impact overlapped to the greatest extent possible. One alternative would be to eliminate the eight large Great Camp Lots east of Simon Pond, and reduce the size and spatial spread of the smaller**

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[19] "Small" is defined as "having comparatively little size or slight dimensions", "little or close to zero in an objectively measurable aspect (as quantity)", and "made up of few or little units". www.merriam-webster.com/dictionary.

[20] The actual average appears to be about 26.5 acres, rather than the 27.2 claimed by the applicant.

[21] Id.

[22] See September 23, 2011 Closing Statement of Adirondack Wild at pages 5 and 38-44 (discussing clustering, as applied in prior APA decisions).

> **western and eastern Great Camp Lots in Resource Management. It's possible under such a scenario that the eight large Great Camp Lots eliminated from east of Simon Pond could be relocated closer to the small eastern and western Great Camp Lots and closer to the ski resort.** This would reduce road mileage and infrastructure costs, minimize loss of open space, minimize habitat fragmentation, and allow for continued effective sustainable forest management east of Simon Pond. This alternative scenario, although suggested by Agency staff, was never proposed by the Project Sponsor nor was it evaluated to the same level as the existing proposal, i.e. soil suitability for onsite wastewater treatment, development suitable slopes, etc.

Daniel M. Spada, PFT #1, pp. 8:16-9:15 (emphasis added).

As discussed at Protect Brief pages 63-65, an alternative smaller cluster of 28 lots on 2 to 5 acres each would be feasible, and would occupy only 56 to 140 acres. A cluster in this size range is much closer to being a "small cluster" than one of 762 acres. This alternative would also be consistent with the Agency's past practice, as described in the September 23, 2011 Closing Statement of Adirondack Wild at pages 5 and 38-44. It is also consistent with the applicant's marketing goals. See e-mail from Michael Foxman, September 10, 2005, at Protect Brief Appendix D, Attachment C, p. 1. See also Ex. 132, p. 2, APA staff memo regarding market demand for 2 to 5 acre lots.

The ACR Brief (pp. 103, *et seq*.) makes various arguments about whether or not the 28 smaller Great Camp lots will have adverse impacts, etc. These arguments are irrelevant. Even if these lots had absolutely no adverse impact on the resources of the Park and fully complied with the DCs and with § 809(10)(e), they must still be in small clusters in order to comply with the Act.

The ACR Brief (pp. 103-104) also argues, based on Mr. Sengenberger's testimony, that the requirements for small clusters and substantial acreages are only considerations or conceptual objectives, rather than mandates. The statue is clear, and this claim is wrong. APA Act § 805(3)(g) states, in pertinent part:

> Finally, resource management areas will allow for residential development on substantial acreages or in small clusters on carefully selected and well designed sites.

There is nothing optional about this language. It is not just conceptual guidance. It is a mandate. The Agency can not read discretion into its statute where none exists. See Adirondack Mountain Club & Protect the Adirondacks! v. Adirondack Park Agency and Department of Environmental Conservation, ___ M.3d ___, ___ N.Y.S.2d ___, 2011 WL 3613315 (Albany Co. 2011).

Because the 28 lots occupying 762 acres are not "in small clusters", the application does not comply with APA Act § 805(3)(g), §809(10(a) and § 809(10)(b). Therefore, as a matter of law, the application must be denied.

D. The Larger Great Camp Lots Are Not on Substantial Acreages

The applicant claims that its larger Great Camp lots are on "substantial acreages" because they are larger than the 42.7 acre average lot size required on RM lands. ACR Brief, p. 101. This claim is wrong. See Protect Brief, pp. 61-62. In the context of the concept of Great Camps, and on large parcels such as the one in question, lots of 100 to a few hundred acres are not "substantial". In this context, parcels of thousands of acres would be substantial. See Memo from George Outcalt, Jr. (APA) to Mark E. Sengenberger, January 3, 2005 (Ex. 130, p. 2).

Also, as stated by Mr. Sengenberger, in RM areas, "[r]esidential development on substantial acreages may be appropriate where ... forest management and open space resources are otherwise protected or enhanced." Ex. 129, p. 6. As shown at Point 1.F below, the project does not meet this criterion for protection or enhancement of forest management.

Because the 8 larger Great Camp lots are not on "substantial acreages", the application does not comply with APA Act § 805(3)(g), §809(10(a) and § 809(10)(b). Therefore, as a matter of law, the application must be denied.

E. Most of the Great Camp Lots Are Not On Carefully and Well-Designed Sites

Pursuant to APA Act § 805(3)(g), in addition to residences being mandated to be located on substantial acreages or small clusters, they must also be on "carefully and well-designed sites". The Agency Staff testified at the hearing that most of these sites do not comply with the Agency's regulations and/or do not have an approved water supply or septic system plan. These problems are summarized at Staff Brief pages 30 to 33.

It appears that 26 out of 36 Great Camp lots on RM lands suffer from these problems. The Staff Brief (p. 34) proposes that these problems can be solved with various permit conditions. However, there is no evidence in the record that these problems can be solved. Therefore, the applicant has failed to meet its burden of proof[23] on this issue. The application does not comply with APA Act § 805(3)(g), §809(10(a) and § 809(10)(b), and it must be denied. See Friedman v. APA, 165 A.D.2d 33 (3d Dept. 1991)(upholding partial denial of subdivision application due to potential problems with wastewater disposal systems).

F. The Hypothetical Timber Management Plan Will Not Prevent the Loss of Thousands of Acres of Working Forest

As set forth at Protect Brief p. 56, the project will take thousands of acres of working forest out of production. The applicant claims that it will prepare a forestry management plan for the 8 large Great Camp lots. ACR Brief p. 39. However, this does not magically make the project compliant with the APA Act. In the opinion of APA's Mark Sengenberger, it is important to determine whether the applicant or prospective landowners intend to manage the lands for forestry, agricultural or recreational purposes. Ex. 129, p. 3. The record shows that this is uncertain, at best.

First, there is currently no such plan. Unless and until it is produced, there is no way to know if it will actually be workable. Producing it after permit issuance will not give the hearing parties or the Agency a chance to examine it and see whether or not it satisfies the applicant's burden of proof.

Even if such a plan is produced, it will not necessarily result in the land staying in timber production, nor will it be as effective as management of the entire 4,000+ acres as a single unit. As stated in the ACR Brief (p. 39), each property owner would select its own management goal, and one objective of the plans may include "long-term preservation with a goal of 'old growth'". This would take the land out of timber production.

APA Staff testified as follows on this subject:

Q. Is commercial timber harvesting occurring on the property and will forest management activities be continued after the development is commenced?

[23] Protect Brief, pp. 5-8.

A. My understanding is that the traditional timber harvesting operations of the current landowner (Oval Wood Dish) are continuing on the property for the present, but all timber harvesting will cease when the Project Sponsor takes title to the land and the proposed project commences. The Project Sponsor has indicated that this will result in the maturation of forest on all of the undeveloped parcels. Individual landowners will have the option to conduct forest management operations on their property.

From a forest management point of view it would be more efficient and silviculturally desirable to manage one larger parcel of forest land as a unit rather than implement management piecemeal among eight different smaller ownerships with possibly differing and conflicting management goals.

Daniel M. Spada, PFT #1, p. 2:1-18 (emphasis in answer added). The Staff Brief (p. 23) concludes that the applicant's plan "will not achieve the same level of forestry benefits as would continuation of historic forestry practices on the project site." The most that can be said for it is that it "has the potential to provide some forestry management benefits." Staff Brief, p. 24.

Therefore, the project will have an adverse impact on forestry resources. The applicant presented no competent testimony to the contrary, and so it failed to meet its burden of proof. Thus, the project will have undue adverse impacts on forest resources, and will not be compatible with the description and purposes, policies and objectives of Resource Management lands. Pursuant to APA Act § 809(10)(a), § 809(10)(b) and § 809(10)(e), the application must be denied.

G. The Applicant's Case is Not Supported by the Record

Many of the applicant's other claims in its brief have no support in the record.

The ACR Brief (p. 21) relies upon the so-called "conceptual "blessing'" that the application received in 2005. Conceptual review is just that, conceptual, and is completely irrelevant at this point. See statement of APA Staff attorney Paul Van Cott at Tr. 3360.

The ACR Brief (p. 46) claims that the project is better for the land than its current uses. There is no support for this claim in the record, and the expert witnesses for the APA Staff,

the Adirondack Council and Adirondack Wild all testified to the contrary. Their testimony is nicely summarized at page 12 of Dr. Phyllis Thompson's brief. The Staff Brief (pp. 24-25) points out that the project will have greater impacts on wildlife and on the fragmentation of its habitat than the prior logging operations.

The ACR Brief (pp. 21- 22) claims that the project can only succeed if its phasing plan is approved almost exactly as proposed. However, as usual, the applicant provided no proof to back this up. Mr. Sengenberger testified that the Staff was never provided with anything more than unsubstantiated claims on this issue. Tr. 1629.

H. Issue #1 Conclusion

The applicant never did the necessary biological assessment work to make a complete hearing record or to prove that the project would not have an undue adverse impact on the natural resources of the Park. Both legally, and scientifically, this work can not be done after-the-fact pursuant to permit conditions. The proposed residential use in Resource Management does not comply with the letter of the law, and with the OIGs for Resource Management lands. As a matter of law, the application must be denied.

ISSUES # 3 & # 9

The Project Will Have Undue Adverse
Stormwater, Soils, and Visual Impacts

The applicant argues (ACR Brief, pp. 76-79) that Protect and other parties somehow had a burden to cross-examine witnesses or offer evidence or consultant testimony on Issues 3 and 9. That argument is wrong - it is solely the applicant's duty to prove its case. Protect Brief, pp. 5-8. Moreover, even though no experts testified for Protect on Issues 3 and 9, the applicant's consultants' testimony may be rejected because it was not supported by credible evidence. Meyer v. Board of Trustees, 90 N.Y.2d 139, 146-147 (1997).

As for the impacts from the upper elevation developments, the project will have an undue adverse impact on: (1) the topography, vegetation and soils on the upper portions of the proposed West Slopeside and Westface developments; (2) the stormwater run-off, erosion and slippage caused by the project will have an undue adverse impact on the water, land and wildlife resources of the proposed upper portions of the West Slopeside, and the Westface developments; and (3) the visual impacts will have an undue adverse impact on the aesthetic resources of the Park. The extensive clearing and blasting required for the project would take place on areas with shallow depth to bedrock and steep slopes negatively affecting the topography, vegetation and soils and making constructing and implementing the necessary stormwater management, erosion and sedimentation practices extremely difficult. Additionally, because of high visibility of the project from off-site locations during the day and night, the visual impacts would have an undue adverse impact on the aesthetic resources of the Park.

With respect to the base lodge subcatchment area, the ACR Brief (p. 77) states that "[a]s currently proposed, there is no development in the contributing drainage area uphill of the base lodge from this project." This misleading statement ignores the fact that the base lodge subcatchment area includes precisely the areas where development would occur - West Slopeside, East Village, Cranberry Village and Sugarloaf East. LaLonde PFT #3, p. 1. Additionally, while the ACR Brief (p. 77) innocuously notes that the applicant will be "keeping the existing culverts in place and maintaining the integrity of the existing draining channels," this is not sufficient to ensure that the stormwater can be adequately managed once construction of the project begins and stormwater flows and rates are inevitably affected. This is especially pertinent since future impacts from stormwater in the base lodge subcatchment area will be compounded when the

additional volume of snowmelt from the "higher daily snowmaking . . . rates" becomes a factor in the spring. Staff Brief, p. 70.

For these reasons, the application must be denied. See Protect Brief, Points 3 and 9

ISSUE # 4

Sewer District #27 Should Not Be Permitted

While it may be mechanically feasible to connect the proposed Sewer District # 27 to Sewer District # 23 via a pump station and associated components, the proposed Sewer District is not practical and should be denied. The minimal benefits (i.e., reduced odor problems) that might accrue to the Town are clearly outweighed by the potential adverse impacts to the environment and the Town from the release of untreated sewage effluent and from potential long-term staffing, equipment, maintenance and utility expenses related to the proposed Sewer District.

It is also interesting to note that the applicant did not address in the ACR Brief the glaring discrepancy that the sewage pump station was not listed in the components for Phase I of the project, even though the lots to be attached to the proposed Sewer District are included in Phase I of the project. As Agency Staff already identified, any potential benefits from the proposed Sewer District # 27 would not be "realized until the proposed sewage pump station has been installed." LaLonde PFT #4, p. 11. It is apparent that the applicant has no concrete intentions of building this pump station. Therefore, as alluded to in the Staff Brief (p. 44) this portion of the application must be denied.

Issue #7

The Valet Boat Launch Service Would Be an Illegal Commercial Use of the State Boat Launch

The ACR Brief (pp. 49-52) and the Staff Brief (pp. 63-66) have both completely ignored the incontrovertible evidence that the applicant's proposed valet boat launch service will overwhelm the capacity of the Boat Launch. This, alone, is grounds to deny the application pursuant to the APA Act, regardless of whether or not the valet service will be a "commercial" service. See Protect Brief, Point 7.A, pp. 84-89.

Both of the pro-project parties claim that if there is ever a problem with the capacity of the Boat Launch, it would be expanded. ACR Brief, p. 50; Staff Brief, p. 65. However, this is sheer speculation (Protect Brief, pp. 87-88), and is not competent evidence on which the Agency can base its decision. See Meyer v. Board of Trustees, 90 N.Y.2d 139, 146-147 (1997); T-Mobile Northeast v. Village of East Hills, ___ F. Supp. ___, 2011 WL 1102759 *9 (E.D.N.Y. 2011).

As proven by Point 7.B of the Protect Brief, the valet service would also be an illegal commercial or business use of the State Boat Launch, which is located on Forest Preserve lands. However, the briefs of the pro-project parties both claim that no commercial activity will occur at the Boat Launch. ACR Brief, p. 50; Staff Brief, p. 64. This claim is both irrelevant and false. See Protect Brief, pp. 92-93.

Among the several rules governing the use of the Boat Launch, 6 NYCRR § 190.24(d) prohibits any person from conducting a "business" at a state boat launch. See Protect Brief, p. 91. The launching of the boats from the ACR resort and marina will be part of the resort's business. The resort will not offer this service as a public benefit or a charitable endeavor. It will be a "business." This is prohibited at the state-owned Boat Launch.

In addition, as set forth in the Protect Brief (pp. 89-90), the operation of the valet service would violate Article 14, § 1 of the Constitution. Under Article 14, it does not matter whether or not the operation will be "commercial" or a "business." The fact that the ACR resort would usurp the entire capacity of this Forest Preserve facility would violate Article 14.

Other applicable laws and regulations prohibit "commercial" use of the Boat Launch. See Protect Brief, Point 7.B. Even if no money changes hands at the Boat Launch, the activity will be inherently commercial. The valet service will not be cost-free.

It will be expensive to operate. Tr. 206-212; Protect Brief, p. 88. It will be operated by the resort's staff (Tr. 206-212), who will have to be paid by the resort. The resort will not be a charity or a municipal government. It will be a commercial business.

The resort's marina is apparently not a suitable location for a boat launch for the resort's customers. Ex. 82, Att. 17; ACR Brief, p. 51; Parker PFT #7, pp. 4-5; Franke PFT #7, p. 7; Staff Brief, p. 65. However, the applicant has estimated that an average of 47 boat-owning resort customers will want to launch them on busy days in the boating season. Tr. 195-196; Protect Brief, p. 85. In order to meet this customer demand of the resort's guests, and lacking a suitable location for its own boat launch, the applicant has decided to usurp the public Boat Launch with its valet service.

In effect, ACR has moved one part of its private commercial marina operation to a public facility. The marina is clearly a commercial operation. It will include dock rental, boat rental, a fly-fishing school, retail shops and gasoline sales. Staff Brief, pp. 92-93. All that it lacks is a boat launch. So, it will use the State's Boat Launch instead.

The valet service will be an integral part of the marina facility's services for resort guests. The customers will be taken to the marina. Tr. 207, 215. There, they will board their boats that the valet service staff have launched at the Boat Launch and driven to the marina. Tr. 203, 207. Upon their return from a day of boating, they will disembark at the marina. Tr. 203. Their boats will then be taken away by the staff to be removed from the water at the Boat Launch. The customers will be returned by that same valet service to their homes. Tr. 207, 215.

All of this will be one integrated commercial service, which proposes to heavily use the public Boat Launch, in violation of the law. See Protect Brief pp. 89-93.

ISSUE # 8

Cranberry Pond Should Not Be Used for Snowmaking

Due to the acknowledged potential adverse impacts to Cranberry Pond as a result of the withdrawal of water for snowmaking purposes, the application must be denied. APA Staff concedes that "[w]ater withdrawals for snowmaking purposes have the potential to impact wetland values and functions," but that the impacts "to fish, wildlife and other biota within Cranberry Pond and to the value and benefits of existing wetlands associated with the pond [have] not been assessed." Staff Brief, p. 70. The applicant has not met its burden of proving that these demonstrated impacts will not be "undue adverse impacts" to the resources of the Park, as required by APA Act § 809(10)(e).

Since the Agency has no data regarding what those potential impacts will be, the Agency has no basis in the record to "find that the project would not have an undue adverse impact upon the natural, scenic, ecological or wildlife resources of the Adirondack Park." Green Island Assoc. v. APA, 178 A.D.2d 860, 862 (1991). At this point, any decision by the Agency to permit ACR's proposal to use Cranberry Pond for withdrawal of snowmaking water would not be supported by substantial evidence. See APA Act § 809(10); Otto v. New York State Adirondack Park Agency, 252 A.D.2d 898, 899 (1998).

If the application is approved and Cranberry Pond is used for snowmaking, while monitoring occurs, there could be several years of damage done to the resources of the Park while this is going on. For instance, based on the testimony of Dr. Michael Klemens, the Pond, and its adjoining wetlands and vernal pools, are critical amphibian breeding habitat. Tr. 1082-1083, 1088-1090, 1130. That damage may be irreparable, yet there is currently no data in the record as to what it will be. Doing the research after the fact will be too little, too late.

Moreover, Agency Staff's suggestion that the applicant could be allowed to use Cranberry Pond for snowmaking water temporarily while requiring "monitoring . . . to assess resource impacts" does nothing to actually address the "additional impacts to wetlands, fish, wildlife and other biota" that will result from the "further reduction in the volume of Cranberry Pond." Staff Brief, pp. 70-72. See Segal v. Town of Thompson, 182 A.D.2d 1043, 1045-1046 (1992). Further, the scheme to temporarily permit the use of Cranberry Pond for snowmaking purposes is inappropriate as it undermines the long-term viability of the ski area, given that Agency Staff "do not believe that Cranberry Pond is a reliable long-term source of snow-making water for the

project." Staff Brief, p. 71. See generally Segal v. Town of Thompson, 182 A.D.2d at 1046.

The record shows that there is the potential for undue adverse impacts, the applicant failed to meet its burden of proof, there is an alternate source of snowmaking water (Tupper Lake) (Staff Brief, pp. 68-71), and the ski area needs a reliable long-term source of water. Therefore, with respect to the use of Cranberry Pond for snowmaking water, the application must be denied.

Issue # 12

The Applicant's PBOs May Not Be Transferred Across Intervening Ownerships

The pro-project briefs both argue that principal building opportunities may be transferred across intervening lands owned by a separate party. ACR Brief, App. III, p. 4; Staff Brief, pp. 115-119. Both of these parties are wrong, as a matter of law. The ACR Brief (App. III, p. 4) seems to suggest that even if ACR is incorrect, it should not have to comply with the statute in order to uphold the "mission of the APA." The Agency Staff rests its incorrect conclusion on a strained interpretation of the statute and a recent amendment of an incidentally related Agency regulation. Staff Brief, pp. 117-118.

The ACR Brief (App. III, p. 2) frames the issue as whether § 809(10)(c) should be interpreted differently if the road crossing the land is "public" or "private." Indeed, no distinction is made in 809(10)(c) between "public" and "private" roads. However, that is not the issue. The issue at hand is whether "dividing lines" means property boundary lines between different owners, or internal divisions of a property that do not denote property boundary lines. As discussed below, the latter is the proper interpretation of the statutory language.

A. A Normal Reading of the Statutory Language Shows that Intervening Land Ownerships Cannot Be Ignored

The APA Act requires allows adjoining lots in the same ownership to be considered to be a single lot. APA Act § 809(10)(c); APA § 811(1)(a). In determining compliance with the overall intensity guidelines ("OIGs"), APA Act § 809(10)(c) allows a landowner to "include all adjacent land . . . irrespective of such dividing lines as lot lines, roads, rights of way, or streams" (emphasis added). APA Act § 811(1)(a) provides, in the so-called "merger provision" of the Act's shoreline restrictions, that all adjoining lots "in the same ownership may be treated together as one lot" (emphasis added).

The proper meaning of the applicable statutes can be ascertained by examining the "statutory language and intent" without the need for "specialized knowledge." KSLM-Columbus Apartments, Inc. v. New York State Div. of Hous. & Cmty. Renewal, 6 A.D.3d 28, 36 (2004) aff'd as modified, 5 N.Y.3d 303 (2005).

The Applicant argues that all roads bisecting the property can be ignored because the Legislature did not qualify the word "road" as meaning public or private. However, the word "road,"

as well as the terms "lot lines," "rights of way," and "streams" are all qualified by the term "dividing lines," which should be given effect and meaning within the statute. See McKinney's Statutes § 254; Lewis Family Farm, Inc. v. New York State Adirondack Park Agency, 64 A.D.3d 1009, 1014 (2009); Adirondack Mountain Club & Protect the Adirondacks! v. Adirondack Park Agency and Department of Environmental Conservation, ___ M.3d ___, ___ N.Y.S.2d ___, 2011 WL 3613315 (Albany Co. 2011). Since the term "dividing lines" is not defined, the meaning must be gleaned from the statute as a whole. See id; McKinney's Statutes § 239(a).

Taken in context with the rest of APA Act § 809(10)(c) and with APA Act § 811(1)(a), which describes "lots in the same ownership" (emphasis added), "lot lines, roads, rights of way, or streams" (§ 809(10)(c)) are examples of internal divisions of a single property that is under the same ownership. It would be difficult to argue that streams are anything more than internal divisions of property. Additionally, using the common meaning of these terms, lands owned in fee title by separate owners are separated by a boundary line, not a dividing line, regardless of whether the intervening land is vacant or contains a road. See McKinney's Statutes § 232. Therefore, lands owned by separate owners cannot be combined or crossed for the purposes of applying the OIGs. Nor can separately owned private lands be crossed when shifting PBOs around on a property owner's various lots.

The facts of the present case show the absurdity of the ACR/Staff position. The Read Family property is 50 feet wide, and contains a road. The Nature Conservancy Property, on the other hand, is 400 feet wide, and contains a road, but it is labeled as a "driveway" on the applicant's new map "MP-3" that is attached to its brief. The Paul Smith's property is 100 feet wide, but does not appear to contain a road. See Protect Brief, pp. 106-107. Under the ACR/Staff interpretation, PBOs could be transferred across the Nature Conservancy property, even though its road only occupies about 5% of its width, but not across the Paul Smith's property, which is only 1/4 as wide, because it does not have a road on it.

Also, in reviewing the ACR project, the Agency staff's reliance on this new interpretation would allow land "ownerships separated from each other by an intervening road or right-of-way owned in fee [to be] deemed" a single lot in contravention of the plain meaning of the language of the APA Act. N.Y. Register December 31, 2008, p. 3 (emphasis added). Agency staff cannot "deem" separate lots, including the lots of the ACR property, to be a single piece of property, when in reality they are divided by intervening land ownerships. This would facilitate circumvention of the overall intensity guidelines and would be

"out of harmony" with the statutory language. KSLM-Columbus Apartments, supra, at 39. As Justice Muller held regarding the Agency's amendment to 9 NYCRR § 573.4, lots separated by intervening owners can not be "adjoining lots" for the purposes of APA Act § 811(1)(a) and thus can not "be treated together as one lot." New York Blue Line Council, Inc. v. Adirondack Park Agency, Supreme Court, Warren County, Nov. 19, 2009, slip op., p. 18, n. 5. See also APA Act § 811(1)(a).[24]

The Applicant attempts to argue that the Legislature intended for "adjacent," but separate, properties to be considered to be a single lot so as long as the properties are "nearby." ACR Brief, App. III, p. 3. This is an improper and strained reading of the statute. The terms "adjacent" and "contiguous" are used differently in APA Act § 809(10)(c) to differentiate between different circumstances. "Adjacent" is used to refer to a situation where lands under the same ownership are separated merely by "dividing lines," while "contiguous" is used to refer to a situation where lands are under different ownerships. APA Act § 809(10)(c). Additionally, as discussed above, a strip of land owned in fee by a third party is not a mere "dividing line" and can not be aggregated with the land of a separate landowner unless the two landowners are "acting, in concert in submitting a project." APA Act § 809(10)(c).

B. The Regulation Change Relied Upon by ACR and the APA Staff Does Not Apply to the Overall Intensity Guidelines

Prior to 2009, the Agency's implementing regulations stated that the "sale of a landowner's entire ownership on one side of a public road, railroad, right-of-way owned in fee, or other intervening fee ownership, will not be considered a subdivision." 9 NYCRR former § 573.4(b). This became known as the "natural subdivision rule." According to the Agency, this rule was repealed in 2009 to "clarif[y] that ownerships separated from each other by an intervening road or right-of-way owned in fee are deemed adjacent." N.Y. Register, December 31, 2008, p. 3.

[24] APA Staff suggests that the "recent relevant changes made to the Agency's regulations" were affirmed by the Appellate Division. Staff Brief, p. 116. However, this statement is misleading because the Appellate Division reversed Justice Muller's decision on purely procedural grounds and did not make any findings with respect to the merits of the Agency's regulatory changes. See New York Blue Line Council, Inc. v. Adirondack Park Agency, 86 A.D.3d 756 (2011).

The Agency explained that this deletion "allows the Agency to properly apply the overall intensity guidelines" and prevent the creation of previously separate "lawful lots." Id. It furthur explained that the intent of this change was to prevent the creation of undersized lots that did not comply with the OIGs and were not buildable lots. Id., at 3.

However, the amended 9 NYCRR § 573.4 does not apply to the current issue, and it never did. It applies to the determination of jurisdiction over subdivisions. It is found in Part 573 of the Agency's regulations, entitled "Jurisdiction of Projects Pursuant to the Adirondack Park Agency Act". Section 573.4 is entitled "Subdivisions". Thus, it does not apply herein because ACR is not proposing to divide its property by using the Read Family property, the Nature Conservancy property or the Paul Smith's property, as boundary lines.

On the other hand, the application of the overall intensity guidelines pursuant to § 809(10)(c) of the Act is governed by 9 NYCRR § 574.7, entitled "Application of the Overall Intensity Guidelines". Nothing in that regulation says that intervening ownerships can be ignored when applying the overall intensity guidelines.

The two sections are entirely consistent with each other. Roads and other intervening ownerships are discounted for determining whether or not a permit is needed to sell off a portion of an owner's land. However, under APA Act § 809(10)(c), PBOs can not be transferred across an intervening ownership, and certainly not without the consent of the other landowner.

The fact that the two rules are consistent with each other is also supported by the definition of "subdivision" at APA Act § 802(63). That definition states that "any division of land into two or more lots, parcels or sites, whether adjoining or not" is a subdivision. Thus, the old § 573.4 was not consistent with the statute. The fact that it was repealed only brought the regulations into conformity with the statute.

On the other hand, calculating the amount of PBOs on a site is an entirely different proposition, under an entirely different section of the APA Act. As set forth at Point 12.A above, the only rational interpretation of § 809(10)(c) is that ACR's PBOs can not be transferred across the 3 intervening properties.

C. Point 12 Conclusion

Here, it is undisputed that the intervening properties are owned by third parties. ACR Brief, App. III, p. 3; Protect Brief, pp. 106-107. Therefore, the roads through the ACR property are not simply internal dividing lines, but are property boundary lines. As a result, the private land containing the roads cannot be aggregated with the Applicant's land unless the separate landowners are "acting in concert," which they are not. APA Act § 809(10)(c). Nor can the applicant's PBOs be transferred across entirely separate ownerships. Therefore, as shown by Protect Brief Point 12, the project does not comply with the OIGs and the application must be denied.

CONCLUSION

The application does not comply with the APA Act. As a matter of law, it must be denied.

/S/ *John W. Caffry*

Dated: October 24, 2011

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Appendix A

Clarifications of and Corrections to
Protect's Brief of September 23, 2011

1. At pages 49 and 55, the Protect Brief states that Dr. Klemens found 14 species of amphibians on or near the project site. The correct number is that 11 species were found in one day of field work. Supplemental Prefiled Testimony of Michael W. Klemens, PhD; dated 4/27/11; admitted 6/7/11, Tr. 3137, Attachment A.

2. At pages 34 and 38, the Protect Brief states that the Empire Zone program has been terminated. The citations for this change in the law are:

- General Municipal Law § 969;
- www.budget.ny.gov/pubs/archive/fy0910archive/0910archive.html;
- www.gjdc.org/biz/pdf/Empire%20Zone%20Program%20Sunset%20FAQ%20gjdc.pdf

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