

STATE OF NEW YORK
SUPREME COURT

ALBANY COUNTY

PARTIAL COPY OF

In the Matter of the Application of

AMENDED PETITION

PROTECT THE ADIRONDACKS! INC., SIERRA
CLUB, PHYLLIS THOMPSON, ROBERT HARRISON,
and LESLIE HARRISON,

INDEX NO. 1682-12

Petitioners,

DATE OF FILING:

for a Judgment Pursuant to
CPLR Article 78

March 20, 2012

-against-

ADIRONDACK PARK AGENCY, NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
PRESERVE ASSOCIATES, LLC, BIG TUPPER, LLC,
TUPPER LAKE BOAT CLUB, LLC, OVAL WOOD DISH
LIQUIDATING TRUST and NANCY HULL GODSHALL,
as Trustee of OVAL WOOD DISH LIQUIDATING
TRUST,

Respondents.

Petitioners, Protect the Adirondacks! Inc., Sierra Club,
Phyllis Thompson, Robert Harrison, and Leslie Harrison
("Petitioners"), for their verified amended petition herein, by
their attorneys, Caffry & Flower, allege as follows:

SUMMARY OF THE PROCEEDING

1. This CPLR Article 78 proceeding seeks to annul the
January 20, 2012 decision by respondent Adirondack Park Agency
("APA") which approved a permit application by Preserve

Pages 2 through 144 not included.

**AS AND FOR A THIRTIETH SEPARATE
AND DISTINCT CAUSE OF ACTION**

643. Each and every allegation set forth above is hereby repeated and realleged.

644. The Order and Permits [R. 1-276.]¹ should be annulled because the Order [R. 1] attempts to define the Project being "in existence" for purposes of the Project obtaining vested rights and avoiding permit expiration, or the Applicant avoiding having to apply for renewal of the Order and Permits, as being the conveyance of a single lot in the Project. This violates both APA Act § 809(c) and 9 NYCRR § 572.20. In addition, APA did not follow the proper procedure in extending the period to achieve "in existence" status from 2 years to 10 years, and did not include mandatory language in the Order and Permits, in violation of APA Act § 809(c) and 9 NYCRR § 572.20.

Legal Background

645. APA Act § 809(c) provides that:

c. If a project for which a permit has been granted, or a certificate issued, is not in existence within two years after the recording of such permit or certificate, unless the terms of the permit provides for a longer period of time, the project may not thereafter be undertaken or continued unless an application for a new permit therefor has been applied for and granted in the same manner and subject to all conditions governing the application for and granting of a permit as provided in this section. In determining whether to provide a longer period of time

¹ References to the record served herein by APA and DEC are abbreviated as "R. ____."

by when the project must be in existence, the agency shall give due consideration to the potential of the land related to the project to remain suitable for the use allowed by the permit and to the economic considerations attending the project.

646. APA Act § 802(25) provides that:

25. "In existence" means (a) with respect to any land use or development, including any structure, that such use or development has been substantially commenced or completed, and (b) with respect to any subdivision or portion of a subdivision, that such subdivision or portion has been substantially commenced and that substantial expenditures have been made for structures or improvements directly related thereto.

647. The APA's regulations at 9 NYCRR § 572.20 provide, in pertinent part, that:

§ 572.20 Renewal of permits.

(a) A permit for a project which is not in existence within the period specified in the permit shall expire and be void at the end of such specified period unless renewed by the agency pursuant to section 809(8)(b) of the Adirondack Park Agency Act and this section.

(b) A request for permit renewal shall be made prior to expiration of the permit. Any request thereafter shall be treated as an application for a new permit.

...

(d)(1) For the purpose of determining if a project (except a subdivision) was in existence within the period stipulated in the permit the agency will consider, among other factors occurring within the period, the nature, extent and cost of structures and improvements completed or commenced and necessary to the new land use and development authorized by the permit.

(2) For the purpose of determining if a subdivision (or portion thereof) was in existence within the period stipulated in the permit, the agency will consider, among other factors occurring within the period:

(i) the location and number of lots sold relative to the total number of lots in the subdivision,

(ii) the location, nature, extent and cost of necessary structures and improvements completed or commenced relative to all other necessary structures and improvements related to the subdivision; and

(iii) demonstrated efforts to sell lots.

(3) Every project permit issued or renewed by the agency shall recite the provisions of paragraph (1) or (2) of this subdivision, as applicable.

648. The effect of the statute and regulations is that unless a project is "in existence" within 2 years (or a longer period if provided for in the permit), a permit automatically expires and becomes void, and the applicant must begin the application process anew. APA Act § 809(c); 9 NYCRR § 572.20(a) & (b). The regulations allow this time period to be extended upon a timely application for renewal of the permit, if certain conditions are met. 9 NYCRR § 572.20.

649. Further, a project can only be deemed to be "in existence" if it has been "substantially commenced or completed", or if the project is a subdivision, if it has been "substantially commenced and ... substantial expenditures have been made for structures or improvements directly related thereto." APA Act § 802(25). The regulations provide further standards for determining whether or not a project is "in existence", and its approval has expired, or is in need of renewal. 9 NYCRR § 572.20(d).

650. Finally, 9 NYCRR § 572.20(d)(3) requires that all APA permits which are issued, or renewed, shall recite the provisions of 9 NYCRR § 572.20(d)(1) and (2).

APA Improperly Extended the Deadline
for the Project to be "In Existence"

651. The Order [R. 1-39] which approved the Project was issued in violation of APA Act § 809(c) and 9 NYCRR § 572.20.

652. The Order stated that:

This project may not be undertaken or continued unless the project authorized herein is in existence within 10 years from the date of issuance of Agency Order 2005-100. The Agency will consider this project in existence when the first lot authorized herein has been conveyed. R. 1.

653. The Order gives the Applicants 10 years in which to get the Project "in existence", rather than the usual 2 year period provided for in APA Act § 809(c). R. 1.

654. Section APA Act § 809(c) does permit APA to allow a longer period than 2 years, but only if it "... shall give due consideration to the potential of the land related to the project to remain suitable for the use allowed by the permit and to the economic considerations attending the project."

655. However, APA did not give "due consideration" to this requirement of § 809(c). In fact, "the potential of the land related to the project to remain suitable for the use allowed by the permit and to the economic considerations attending the

project" (§ 809(c)) were not even discussed by the APA Members when they approved the extension from 2 years to 10 years. R. 2118-21532, 21658.

656. Therefore, APA's action in granting the Applicant 10 years to get the Project "in existence" [R.1] violated APA Act § 809(c).

657. The Order states that APA "will consider this project in existence when the first lot authorized herein has been conveyed." R. 1.

658. This provision is directly contrary to APA Act § 802(25), which provides that:

In existence" means (a) with respect to any land use or development, including any structure, that such use or development has been substantially commenced or completed, and (b) with respect to any subdivision or portion of a subdivision, that such subdivision or portion has been substantially commenced and that substantial expenditures have been made for structures or improvements directly related thereto.

659. Conveying a single lot does not require either that the "development has been substantially commenced or completed", or that "such subdivision ... has been substantially commenced and that substantial expenditures have been made for structures or improvements directly related thereto", as required by § 802(25).

660. 9 NYCRR § 572.20(d) further defines these requirements, and provides a list of factors to be considered by APA in deciding whether or not they have been met and a project

is "in existence" at the time that a permit renewal is applied for.

661. These considerations include "the nature, extent and cost of structures and improvements completed or commenced and necessary to the new land use and development" (9 NYCRR § 572.20(d)(1)), and "(i) the location and number of lots sold relative to the total number of lots in the subdivision, (ii) the location, nature, extent and cost of necessary structures and improvements completed or commenced relative to all other necessary structures and improvements related to the subdivision; and (iii) demonstrated efforts to sell lots." 9 NYCRR § 572.20(d)(2).

662. Conveying a single lot does not require selling any lots, and certainly not a substantial number thereof, does not require commencing or completing any roads, structures or other improvements, and does not even require any efforts to sell lots.

663. Indeed, one of the approved lots is an "access lot" to be conveyed to Thomas Lawson, one of the principals in the Applicant. R. 6; ¶ 285, supra. Another is a lot that is intended to be donated to a local museum. R. 6. Other lots are likely to be conveyed to the various subsidiary limited liability companies owned by the Applicant. R. 27-28.

664. Thus, if and when any of the 14 individual permits for the Project is issued, the entire Project could obtain vested

rights merely by the Applicant making an internal transfer to convey a single lot. R. 1. This is entirely contrary to the law at APA Act § 809(c) and 9 NYCRR § 572.20.

665. The effect of the Order [R. 1] as defining "in existence" as being "when the first lot authorized herein has been conveyed" is to allow the Applicant to short-circuit the mandates of the APA Act and regulations and avoid having the approval expire, or having to apply for a permit renewal, pursuant to APA Act § 809(c) and 9 NYCRR § 572.20.

666. APA can not, in a project permit, allow an applicant to avoid the permit renewal process. Nor can it determine, ahead of time, whether the Project is "in existence". This can only be determined by going through the renewal process pursuant to 9 NYCRR § 572.20, and considering all of the requirements set forth in APA Act § 809(c) and 9 NYCRR § 572.20.

667. Therefore, APA's action in attempting to redefine "in existence" for the benefit of the Applicant violated APA Act § 809(c) and 9 NYCRR § 572.20.

668. APA's decision to allow the conveyance of a single lot to make the Project be "in existence" was not a subject of the adjudicatory hearing, and this idea was not raised by any party prior to the close of the record. This idea first arose in December 2011 or January 2012, apparently at the suggestion of the APA Executive Staff.

669. The Hearing Staff's "Revised Draft Order", which was attached to its Reply Brief dated October 24, 2011, proposed (at pp. 56-57) that "... the Project shall be in existence when Phase I of the Project as described herein has been completed, or as hereafter amended, and a quantitative biological survey and habitat impact analysis has been completed...".

670. At that time, Phase I included a substantial part of the Project, including, but not limited to, the construction of many of the roads and utilities, the wastewater treatment plant, the ski area base lodge, a new ski lift, and the sale of up to 77 home lots. Revised Draft Order, October 24, 2011, pp. 16-18.

671. Thus, Petitioners had no reason to object to this proposal as not conforming to the statute and regulations defining "in existence". The APA's final ruling on this question, which was significantly different, came only after the close of the record, when Petitioners and the other hearing parties had no opportunity to comment on it.

APA Did Not Include Required
Language in the Order and Permits

672. The Order and Permits do not "recite the provisions of paragraph (1) or (2) of this subdivision [§ 572.20(d)], as applicable", as mandated by 9 NYCRR § 572.20(d)(3). R. 1-276.

673. Therefore, APA did not follow its own regulations in preparing and approving the Order and Permits.

674. Therefore, for all 3 of the foregoing reasons, APA's decision to approve the Order and Permits was made in violation of lawful procedure, affected by error of law, and arbitrary and capricious, and should be annulled.

WHEREFORE, it is requested that judgment be granted:

(A) Annulling the Project Findings and Order, No. 2005-100, and the 14 individual permits for the Project.

(B) Awarding Petitioners the costs and disbursements of this proceeding;

(C) Against respondents APA and DEC only, awarding Petitioners their legal fees and other expenses pursuant to the New York State Equal Access to Justice Act, CPLR Article 86; and

(D) Granting such other and further relief as may be deemed just and proper by the Court.

Dated: June 18, 2012

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